ANDREAS KALYVAS

Democracy and the Politics of the Extraordinary

Max Weber, Carl Schmitt, and Hannah Arendt

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Although the modern age is often described as the age of democratic revolutions, the subject of popular foundings has not captured the imagination of contemporary political thought. Most of the time, democratic theory and political science treat as the object of their inquiry normal politics, institutionalized power, and consolidated democracies. The aim of Andreas Kalyvas's study is to show why it is important for democratic theorists to rethink the question of democracy's beginnings. Is there a founding unique to democracies? Can a democracy be democratically established? What are the implications of expanding democratic politics in light of the question of whether and how to address democracy's beginnings? Kalyvas addresses these questions and scrutinizes the possibility of democratic beginnings in terms of the category of the extraordinary, as he reconstructs it from the writings of Max Weber, Carl Schmitt, and Hannah Arendt and their views on the creation of new political, symbolic, and constitutional orders.

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I am autonomous only if I am the origin of what will be and I know myself as such.

<div align="right">Cornelius Castoriadis</div>

Democracy is, according to its ideal, a fatherless society.

<div align="right">Hans Kelsen</div>

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Abbreviations

OR   Hannah Arendt, *On Revolution*, New York: Penguin Books, 1990

OT   Hannah Arendt, *The Origins of Totalitarianism*, New York: Harvest Book, 1979

PB   Carl Schmitt, *Positionen und Begriffe im Kampf mit Weimar-Genf-Versailles, 1923–1939*, Berlin: Duncker und Humblot, 1988

PESC   Max Weber, *The Protestant Ethic and the Spirit of Capitalism*, trans. Talcott Parsons, London: Routledge, 1992

PT   Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab, Cambridge, Mass.: MIT Press, 1988

PW   Max Weber, *Weber: Political Writings*, ed. Peter Lassman and Ronald Speirs, Cambridge: Cambridge University Press, 1994

RCPF   Carl Schmitt, *Roman Catholicism and Political Form*, trans. Gary L. Ulmen, Westport, Conn.: Greenwood Press, 1996

SR   Max Weber, *The Sociology of Religion*, Boston: Beacon Press, 1993

UDA   Carl Schmitt, *Über die drei Arten des rechtswissenschaftlichen Denkens*, Berlin: Duncker und Humblot, 1993

V   Carl Schmitt, *Verfassungslehre*, Berlin: Duncker und Humblot, 1989

Introduction

The Extraordinary and Political Theory

Although the modern age is often described as the age of democratic revolutions, the subject of popular foundings has not captured the imagination of modern political thought.[1] Early democratic theory, marked by the historical experience of the ancient Greek *polis* and enraptured by the Roman republican legacy, at least since the time of Niccolò Machiavelli and Jean-Jacques Rousseau, has elided the theme of collective foundings and democratic higher lawmaking. By confining the question of new beginnings to the instituting acts of mythical lawgivers and heroic founders, usually located outside the *demos*, democratic theory did not systematically address political and legal foundings on its own terms.[2]

Classical liberalism, meanwhile, has been inclined to emphasize juridical continuity, legality, and gradual political changes. Even in its social contract versions, with the prominent exception of John Locke, liberalism's focus has been more on a fictional natural state and the counterfactual notion of an original contract among equal and free persons and less on actual political ruptures, legal innovations, and new institutional beginnings.[3] In fact, the idea of a social contract was predominantly used to explain political obligation, to justify obedience, to describe the consensual basis of authority, and, in a few cases, to legitimate resistance, rather than to account for those historical moments of genuine rupture and transformation. At a later

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[1] R. R. Palmer, *The Age of the Democratic Revolution*, 2 vols., Princeton: Princeton University Press, 1959–1964; Claude Lefort, *L'invention démocratique*, Paris: Fayard, 1981.

[2] Bonnie Honig, *Democracy and the Foreigner*, Princeton: Princeton University Press, 2003, pp. 15–40.

[3] John Locke, *Two Treatises of Government*, ed. Peter Laslett, Cambridge: Cambridge University Press, 1991, book II:13, pp. 366–374.

stage, classical Marxism attempted to fill this gap by invoking the imminent possibility of a proletarian revolution, but its historical determinism and economic materialism has led Marxism to pay more attention to long-term social and economic mutations than to political, legal, institutional, and cultural changes, which were perceived as mere epiphenomenal effects of deeper structural developments unfolding in the realm of the material production of society.[4] Political ruptures were approached from the vantage point of social revolutions and reduced to a mirroring of objective economic forces.[5]

This lack of reflection on new popular beginnings has impoverished the understanding of democracy, legitimacy, and freedom in modern politics. Against this background, the aim of the present study is to show why it is important for democratic theory to revisit the issue of foundings and to investigate their implications for rethinking vexing topics – the relationship between legitimacy and legality, sovereignty and representation, power and law, freedom and authority – which are at the center of debates in contemporary political theory. My point of departure is to rephrase the question of new radical beginnings in terms of the category of the extraordinary, as it appears in the writings of Max Weber, Carl Schmitt, and Hannah Arendt, and to elucidate its complex and tension-ridden relation to ordinary politics.

Of course, there are all kinds of extraordinary politics that lead to radical transformations, many of them with clear antidemocratic attributes. Undoubtedly, the concept of the extraordinary is not a new one. It has been associated in the past, rather inadequately, in the Jacobin-Leninist tradition of revolutionary vanguards and through the lens of the standard dichotomy of revolution and reform.[6] In this context, modern revolutions were seen, one way or another, as extraordinary manifestations of the revolutionary consciousness of modernity and of its attempt to break explicitly from the past, to liberate itself from the weight of tradition, and to eradicate all forms of domination and inequality.[7] However, this conceptualization of

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[4] For a classical statement, see Karl Marx, preface to *A Contribution to the Critique of Political Economy*, ed. Maurice Dobb and trans. S. W. Ryazanskaya, New York: International Publishers, 1989, pp. 19–22.

[5] Karl Marx and Frederich Engels, "Manifesto of the Communist Party," in *The Marx-Engels Reader*, ed. Robert C. Tucker, New York and London: W. W. Norton, 1978, pp. 469–500; Frederich Engels, preface to the third edition of Marx's "The Eighteenth Brumaire of Louis Bonaparte," in Karl Marx and Frederich Engels, *Selected Works in One Volume*, London: Lawrence & Wishart, 1970, p. 95.

[6] Rosa Luxemburg, *Reform or Revolution*, London and Chicago: Bookmarks, 1989.

[7] For the concept of revolution in relation to novelty and creativity, see Hans Joas, *The Creativity of Action*, Chicago: University of Chicago Press, 1996, pp. 105–116.

the extraordinary seems to have lost its appeal and to have reached its limits – for two main reasons, I think.

First, the classical model of revolution has been linked to the specter of dictatorship and totalitarianism and/or to the equally unpromising (from the point of view of democracy) experience of restoration and counterrevolution.[8] Modern revolutions have sought to break with the past but at the cost of extreme violence, rampant rightlessness, and continuous arbitrariness. They seem destined not only to proceed in dictatorial and undemocratic ways but also to conclude in new forms of domination, stuck in a perpetual state of exception.[9] Hence, it follows the all-too-usual conflation of the extraordinary and the exception, that is, of foundings and emergencies. Or, modern revolutions are regarded as failures to institute a stable and enduring legal and political order, allowing the return of the old state of affairs.[10] In addition, revolutions have often been associated with the apocalyptic myth of an absolute liberation, a progressive and chiliastic philosophy of history, and the millenarian utopia of total emancipation, in which the newly founded political society would transcend David Hume's two circumstances of justice, dispensing with the need of a stable legal framework and a system of rights for the adjudication of differences and conflicts.[11] In that sense, the traditional formulation of the politics of the extraordinary hinted at the eventual elimination of all politics and at the eschatological realization of a transparent, rational, and pacified society in complete harmony with itself.[12] If, in the first case, extraordinary revolutionary transformations turned into nondemocratic power struggles among competing elites operating in a legal vacuum where the factual will of the strongest group could prevail over its enemies, then, in the second, revolutions were idealized and mystified as an absolute leap from the realm of necessity to that of total freedom, failing to account for normal, everyday politics.

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[8] Claude Lefort, "La question de la Révolution," in *L' invention démocratique*, pp. 185–192.

[9] Bruce Ackerman, *The Future of Liberal Revolution*, New Haven: Yale University Press, 1992, p. 5.

[10] Jean Cohen and Andrew Arato, *Civil Society and Political Theory*, Cambridge, Mass.: MIT Press, 1992, p. 493; Jürgen Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg, Cambridge, Mass.: MIT Press, 1996, pp. 467–472.

[11] Ernesto Laclau, *Emancipation(s)*, London and New York: Verso, 1996, pp. 2–19. On the two "circumstances" or "facts" of justice, see David Hume, *A Treatise of Human Nature*, ed. Ernest C. Mossner, London and New York: Penguin Books, 1984, pp. 536–552.

[12] Roberto Unger, *Social Theory: Its Situation and Its Task*, Cambridge: Cambridge University Press, 1987, pp. 163–164.

Because of this undemocratic and illiberal formulation, the issue of the extraordinary disappeared from democratic theory. However, 1989 changed that. Since then, there have been, from the European Union and Central and Eastern Europe to Russia, from South Africa to Venezuela and Bolivia, and from Afghanistan and Iraq to Nepal, multiple and proliferating attempts to found new regimes, to make new constitutions, and to initiate important political, social, and institutional changes. Attention of democratic theorists has shifted from normal politics and ordinary lawmaking to extraordinary politics, higher lawmaking, and, in some cases, popular movements struggling to alter the cultural and legal self-understanding of their political communities.

My project is to provide a theoretical framework for reconceptualizing the extraordinary by avoiding the problems and limitations associated with the old formulation of revolution and by relating it explicitly to democratic politics. My goal, therefore, is to appropriate the notion of the extraordinary for a normative democratic theory with a radical intent. Focusing on the extraordinary, I argue, expands the scope of the democratic experience by including the beginnings of a popular regime as a meaningful and necessary topic of empirical investigation and axiological reflection. What does it mean to say that a democratic state has to be democratically founded or that it has to start democratically? Is there a distinct democratic founding unique to democracies? Do the identities of the framers and the constituent actors matter? Are founding acts undertaken and carried out by a military coup d'état, a foreign conqueror, a theocratic priestly elite, an elective president, a representative assembly, a small group of constitutional lawyers, or an active community really different? Does the absence or presence of popular participation in the establishment of a democratic regime truly matter? Likewise, is it important whether the institution of democracy unfolds in secrecy or through an open, public, and inclusive process, through elite negotiation or broad popular debate and mobilization?

To be sure, I am not alone in recognizing the return of the extraordinary and in attempting to recover it for democratic theory. Some constitutional scholars have already attempted to do that. Bruce Ackerman, Ulrich Preuss, Frank Michelman, Sanford Levinson, and Akhil Reed Amar, among others, have begun to rethink the return of the extraordinary in the form of constitutional revolutions.[13] For the most part, however, the extraordinary has been

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[13] Bruce Ackerman, *We the People: Foundations*, Cambridge, Mass.: Harvard University Press, 1991; Bruce Ackerman, "Neo-Federalism," in *Constitutionalism and Democracy*, ed. Jon Elster and Rune Slagstad, Cambridge: Cambridge University Press, 1988, pp. 122–123;

approached from an unduly legalistic perspective – not surprisingly, because most of these thinkers are jurists. They always reason from the standpoint of law. By this I mean that they have focused exclusively on changes taking place in the legal framework and in the basic procedural rules of regimes. Thus, they have occluded the other dimensions of the extraordinary, namely those unfolding at the realm of the symbolic, like the transformation of shared meanings, the radical reorientation of collective and individual values, and the construction of new political identities. On the other hand, efforts to avoid such narrow jurisprudential approaches have ended up in exactly the opposite position: disassociating the extraordinary from any reference to rules, procedures, or norms. Here, I am referring chiefly to Jacques Derrida's strong and unattainable distinction between law and justice, to Antonio Negri's excessive reconceptualization of the constituent power as a glorification of a permanent revolution in constant opposition to constitutionalism, to Sheldon Wolin's exaltation of an agonistic *demos* and a "transgressive" democracy, and even to Roberto Unger's communitarian eradication of legal formalism from extraordinary politics.[14]

Bruce Ackerman, *We the People: Transformations*, Cambridge, Mass.: Harvard University Press, 1998; Bruce Ackerman, "Higher Lawmaking," in *Responding to Imperfection: The Theory and Practice of Constitutional Amendment*, ed. Sanford Levinson, Princeton: Princeton University Press, 1995, pp. 63–88; Ulrich Preuss, *Constitutional Revolution: The Link between Constitutionalism and Progress*, trans. Deborah Lucas Schneider, Atlantic Highlands, N.J.: Humanities Press, 1995; Sanford Levinson, "How Many Times Has the United States Constitution Been Amended? (A) <26; (B) 26; (C) 27; (D) >27: Accounting for Constitutional Change," in Levinson, *Responding to Imperfection*, pp. 13–36; Akhil Reed Amar, "Popular Sovereignty and Constitutional Amendment," in Levinson, *Responding to Imperfection*, pp. 89–116; Frank Michelman, "Law's Republic," *Yale Law Journal*, 97 (1988), pp. 1493–1537; Frank Michelman, "Always under the Law?" *Constitutional Commentary*, 12:2 (1995), pp. 227–247; Frank Michelman, "How Can the People Ever Make the Laws? A Critique of Deliberative Democracy," in *Deliberative Democracy*, ed. James Bohman and William Rehg, Cambridge, Mass.: MIT Press, 1996, pp. 145–172; Frank Michelman, "Can Constitutional Democrats Be Legal Positivists? Or Why Constitutionalism," *Constellations*, 2:3 (1996), pp. 293–308; Frank Michelman, "Constitutional Authorship," in *Constitutionalism: Philosophical Foundations*, ed. Larry Alexander, Cambridge: Cambridge University Press, 1998, pp. 64–98.

[14] Roberto Unger, *Law in Modern Society: Toward a Criticism of Social Theory*, New York: Free Press, 1976, pp. 192–242; Jacques Derrida, "Force of Law: The 'Mystical Foundations of Authority,'" in *Deconstruction and the Possibility of Justice*, ed. David Gray Carlson, Drucilla Cornell, and Michel Rosenfeld, New York: Routledge, 1992, pp. 3–67; Antonio Negri, *Insurgencies: Constituent Power and the Modern State*, trans. Maurizia Boscagli, Minneapolis: Minnesota University Press, 1999; Sheldon Wolin, *The Presence of the Past: Essays on the State and the Constitution*, Baltimore: John Hopkins University Press, 1989; Sheldon Wolin, "Norm and Form: The Constitutionalizing of Democracy," in *Athenian Political Thought and the Reconstruction of American Democracy*, ed. J. Peter Euben, John R. Wallach, and Josiah Ober, Ithaca: Cornell University Press, 1994, pp. 29–58; Sheldon

Therefore, while there is no doubt that the politics of the extraordinary has been revived, it has not been sufficiently and persuasively theorized. But despite their manifest limitations, these attempts have succeeded in showing that the extraordinary should neither be ignored nor conceptualized as a total revolutionary break. Rather, it needs to be considerably reformulated so as to avoid both the dangers of dictatorship and the arbitrariness related to the absolute ruptures that encompass the risk of unrestrained power and the unrealistic utopian expectations of an ethical society, free from the artificiality and alienating effects of institutional mediations and legal, formal mechanisms of will formation and decision making. Against the background of these two attempts to rethink the extraordinary and its relationship to democracy and legitimacy, I propose an alternative path.

Answering the question of what is the difference between normal and extraordinary politics offers a first step toward such a theorization. Traditionally, normal politics is monopolized by political elites, entrenched interest groups, bureaucratic parties, rigid institutionalized procedures, the principle of representation, and parliamentary-electoral processes. It is also characterized by political fragmentation and low popular participation in the process of deliberation about common affairs and decision making. Normal politics seems to boil down to relations of bargaining and negotiation among organized interests and state officials. In ordinary times, in short, politics as usual fits a utilitarian and statist model that is characterized by civic privatism, depoliticization, and passivity and carried out by political elites, professional bureaucrats, and social technicians.

By contrast, democratic extraordinary politics might be tentatively and provisionally construed as involving high levels of collective mobilization; extensive popular support for some fundamental changes; the emergence of irregular and informal public spaces; and the formation of extra-institutional and antistatist movements that directly challenge the established balance of forces, the prevailing politicosocial status quo, the state legality, and the dominant value system. During these extraordinary moments, the slumbering popular sovereign wakes up to reaffirm its supreme power of self-determination and self-government and to substantially rearrange or alter the fundamental norms, values, and institutions that regulate ordinary

Wolin, "Fugitive Democracy," in *Democracy and Difference: Contesting the Boundaries of the Political*, ed. Seyla Benhabib, Princeton: Princeton University Press, 1996, pp. 31–45; Sheldon Wolin, "Transgression, Equality, and Voice," in *Demokratia: A Conversation on Democracies Ancient and Modern*, ed. Josiah Ober and Charles Hedrick, Princeton: Princeton University Press, 1996, pp. 63–90.

legislation and institutionalized politics. In extraordinary moments, politics opens up to make room for conscious popular participation and extra-institutional, spontaneous collective intervention. The means and scope of political action undergo considerable changes. For instance, formal, procedural rules that regulate normal, institutionalized politics are supplemented by or subordinated to informal, extraconstitutional forms of participation that strive to narrow the distance between rulers and ruled, active and passive citizens, representatives and represented. Extraordinary politics aims either at core constitutional matters or at central social imaginary significations, cultural meanings, and economic issues, with the goal of transforming the basic structures of society and resignifying social reality. To put it in more general terms, the democratic politics of the extraordinary refers to those infrequent and unusual moments when the citizenry, overflowing the formal borders of institutionalized politics, reflectively aims at the modification of the central political, symbolic, and constitutional principles and at the redefinition of the content and ends of a community.

But why should we be interested in these moments? What is the empirical, theoretical, and normative significance of founding moments, institutional breaks, and extraordinary politics? Is it not more meaningful and rewarding to study solely the effects and consequences, say, of a newly drafted constitution rather than delving into the labyrinthine, obscure, and sometimes apocryphal questions of democratic origins and popular foundings?[15] Why, for instance, should we be troubled by the fact that, in certain instances, fundamental political principles and higher legal norms are not democratically produced but are instead the outcome of normal politics and incremental reforms coming from above and realized by ordinary lawmaking if, at the same time, they have unambiguous democratic consequences? Why do radical political changes need to be associated with ruptures, disruptions, and discontinuity? Why is the requirement of popular participation in those extraordinary moments a virtue rather than a vice? And, finally, is there any logical, causal relationship between democratic origins and democratic outcomes?[16]

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[15] Andrew Arato correctly distinguishes between result-oriented and principle-oriented approaches to constitutional making. Although liberalism often adopts the first approach, the second has come closer to the democratic value of self-determination. Andrew Arato, *Civil Society, Constitution, and Legitimacy*, Lanham, Md.: Rowman & Littlefield, 2000, pp. 247–248.

[16] This question was raised by Hans Kelsen, *General Theory of Law and State*, trans. Anders Wedberg, Cambridge, Mass.: Harvard University Press, 1945, p. 117.

This study seeks to answer these questions. My argument is twofold. The significance of extraordinary politics, I argue, is due to two key factors. First, it answers to the need for democratic legitimacy and allows rethinking ways of rectifying the problem of the legitimation deficit that unavoidably plagues the normal politics of any constitutional, representative democracy. Democratic extraordinary politics generates the appropriate resources that could guarantee the authority and stability of a political order, which is so necessary during subsequent normal times. Second, it reintroduces the normative ideals of political freedom and collective autonomy at the center of democratic theory. Extraordinary politics might be seen, in Cornelius Castoriadis's pertinent terms, as the explicit and lucid self-institution of society, whereby the citizens are jointly called to be the authors of their destiny and to decide about the central rules and higher normative significations that will shape and determine their political and social life.[17] The politics of democratic foundings illustrates the democratic origins of the basic structures of society, whereby its fundamental regulative principles, institutions, and common values are conceived as the purposeful product of a collective practice based on conscious political will formation.

The task, therefore, is to rethink the extraordinary dimension of politics from the perspective of democratic theory. I turn to the writings of three political thinkers who despite all their differences, have attempted, in their own singular way, to rethink the category of the extraordinary beyond the reform-revolution dichotomy. Undoubtedly, many questions and reservations can be raised about bringing together three authors who wrote nothing or little about each other. What might be the intellectual affinities among Weber, Schmitt, and Arendt? Is it possible to find a common ground for comparing three thinkers with contrasting biographies, political values, and philosophical commitments? How can we legitimately put under the same roof Weber, who, despite all his pessimism (or maybe because of it) came to expound a disillusioned version of liberal, presidential constitutionalism; Schmitt, a member of the National Socialist Party and the notorious "crown jurist" of the Third Reich; and Arendt, whose neo-republicanism put her at a distance from both of them with regard to many issues, as, for

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[17] Cornelius Castoriadis, *The Imaginary Institution of Society*, trans. Kathleen Blamey, Cambridge: Polity Press, 1987, pp. 369–374; Cornelius Castoriadis, *Philosophy, Politics, Autonomy: Essays in Political Philosophy*, ed. David Ames Curtis, Oxford: Oxford University Press, 1991, p. 72; Cornelius Castoriadis, "Radical Imagination and the Social Instituting Imaginary," in *The Castoriadis Reader*, ed. David Ames Curtis, Oxford: Blackwell Publishers, 1997, pp. 319–337.

example, by underscoring the political centrality of relations of persuasion, deliberation, and opinions and by endorsing the controversial institution of popular councils?

Even if we leave aside their divergent political beliefs, are we not still running the risk of underplaying another significant difference – that of their worldviews? Weber's reflections on the political leader, his radical pluralism, his reduction of politics to legitimate domination and violence, and his anxiety about the survival of individual freedom in modern Occidental societies hardly resonate with the tone and content of the other two thinkers' writings. Schmitt, after all, was a conservative, authoritarian statist, fascinated by the reactionary political tradition of Joseph de Maistre and Donoso Cortès, deeply concerned with matters of authority and unity, who at one time professed the need for an active political role on the part of the Catholic Church against the rampant materialism of Marxism and the individualism of liberalism and who flirted unabashedly with Italian Fascism. Meanwhile, Arendt was revolted by the reduction of political power to force and violence, the conflation of the political with sovereignty and the will, and the dictatorial implications of a centralized nation-state. Most importantly, she questioned the instituted relations of political inequality and subordination by vehemently repudiating the distinction between rulers and ruled, which Weber and Schmitt accepted as an inexorable fact of modern political reality. Lastly, how can we neglect the fact that, whereas Weber sanctioned the great charismatic leader and Schmitt spoke of an abstract popular sovereign will, Arendt put the stress on the perfomativity of speech and deed situated within self-organized public spheres?

Perhaps because of the many obvious and substantial differences among the three authors, there has been no systematic comparison of their thoughts. Yet, despite their differences, certain interesting similarities among them cannot be totally overlooked. For example, they were all Germans marked by the decisive experience of the Weimar Republic. They shared the awareness that the political is a quasi-independent field of unpredictability and indeterminacy. Furthermore, they were equally concerned with the rise of the modern administrative, bureaucratic state. One can also find an analogous interest in the concrete situation and the conjunctural, a penetrating critical attitude toward parliamentary representation, and a common "agonistic" view of politics as the arena of conflict and antagonism. More significantly, the work of Weber, Schmitt, and Arendt is characterized by a steady and continuous effort to salvage the concept of the political from the oblivion to which orthodox Marxism and economic and moral liberalism had relegated it. All three thinkers strove to reestablish its pivotal position as a distinct

realm of human experience and as an independent domain of investigation with its own internal principles.

Given these similarities, it should not come as a surprise that they all recognized that modernity brought, along with enlightenment, reason, and science, the collapse of ultimate foundations – a collapse that makes politics in a secular, postmetaphysical age look tragically groundless and uncertain. Further, from a broader historical point of view, notwithstanding the different intellectual and cultural contexts in which they worked, they were all actively involved in the political events of their days facing the same historical predicaments of a rapidly changing European society: the crisis of classical, nineteenth-century liberalism; the gradual inclusion of the laboring masses into politics; the solidification of the Soviet Union; and the ascent of a new form of social, interventionist state. Nor should it be forgotten that they confronted similar theoretical questions regarding the tense and intricate relationship between will and reason, the ethical and the political, continuity and disruption, means and ends, freedom and authority.

It is, however, their thoughts on foundations and on the creation of new political, symbolic, and constitutional orders that I discuss. I argue that Weber's theory of *charisma*, Schmitt's conception of the *constituent power*, and Arendt's notion of *new beginnings* represent three distinct variations on a single theme – namely, the extraordinary dimension of the political as the originary, instituting moment of society. Weber, Schmitt, and Arendt focused on the modern sources, conditions, content, and scope of this originating event. Weber located it in the revolutionary nature of charisma, Schmitt in the constituent power of the sovereign popular will, and Arendt in the instituting potentialities of deed and speech. It is also true, however, that this common exploration pulled them in different directions and disciplines. Weber's sociology borrowed a theological concept to look afresh at the historical and political experience of prophetic religious movements, the politics of inspiring founders, and the powers of enthralling visionaries. By contrast, Schmitt, in an unusually sober, plain, and legalistic style, introduced to German jurisprudence the rebellious and insurgent force of the constituent power, which had been formerly discovered in the midst of the English civil war and during the heydays of the American War of Independence and the revolutionary deliberations that shook the French National Constituent Assembly. On the other hand, Arendt plunged into the history of political philosophy, traveling back to the ancients, Greeks and Romans alike, to recover the extraordinary potentialities of action, which, under the ascendancy of the "social," had begun to resemble those rare precious pearls

lying silently at the dark bottom of the ocean. But then, much like Schmitt, she tried to find traces of them in the historical events that marked the political character of the Western world: the founding of a new republic and the birth of a new regime out of the violent collapse of the monarchical edifice. Despite their different paths, all three thinkers explored the perplexing relationship between radical founding acts and politics as usual in a secular age, when, with the entrance of the masses into the public sphere, references to ultimate foundations of authority and to an extrasocial source of power had begun to appear more dubious than ever.

Weber's definition of charisma as an extraordinary force of symbolic change and an institutional-legal creation able to break with the limitations and constraints of traditionalism, formal legal-rational authority, and bureaucratic rule; Schmitt's appropriation of Emmanuel Sieyès's notion of the constituent power of the people as the only democratically legitimate force for establishing new constitutions; and Arendt's exceptional understanding of action as a singular event that initiates something new by subverting the ordinary, repetitive structures of everyday life, all revolve around a similar issue: the extraordinary transformation of the instituted reality and the genuine self-constitution of a new order.

At this point, a clarification is warranted regarding my reading of the three thinkers. I am not engaging in a systematic presentation or a comprehensive interpretation of their political theory. My approach is highly selective and reconstructive.[18] I focus on those aspects of their writings that pertain to the issue of the extraordinary, its relationship to democratic politics, and its survival within a stable constitutional order. Further, it is unquestionable that these authors were not particularly sympathetic toward liberal democracy. Equally important, none of them were completely successful in solving the problems associated with the extraordinary. Nevertheless, a comparative, eclectic critical engagement with their writings and theories is extremely useful for two main reasons. First, in the work of these three key twentieth-century thinkers, the extraordinary emerges with great clarity and insight, even if their answers were not always convincing. Second, it is possible to use parts and pieces of their work to develop a coherent *three-track* notion

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[18] This is not an exegetical study. In the context and limits of the present discussion, I am not interested in providing an overall interpretation of the works of the authors whom I am examining. The reader will not find here a new explication. Arguments and concepts that are not directly related to this issue are deliberately ignored. This is not because they are considered to be inferior or secondary vis-à-vis the extraordinary, but because they do not bear on the purposes of the present study.

of democracy, which not only could significantly benefit democratic theory but could also testify to the continuing relevance of the extraordinary for current, ongoing debates in political theory. In other words, I hope to show that a democratic theory of the extraordinary can provide a fruitful starting point for rethinking anew the complex and tension-ridden relationships between democracy and law, popular sovereignty and representation, power and constitutionalism, democratic legitimacy and liberal legality.

Particularly with respect to the second reason, a theory of the extraordinary, I argue, points to a new understanding of democracy and advances a *three-level* model of democratic politics. Such a model depends on the particular location and role of the extraordinary with respect to the formal, legal system and institutionalized political powers. Extraordinary politics can be prior to and below instituted politics, within it, and on its fringes. Each location, in turn, corresponds to a distinctive moment of democratic politics. The first refers to the extraordinary, instituting moment of democratic founding, the creation of new symbolic meanings, popular insurgencies, and original constitutional making – what Jon Elster has called "la politique politisante."[19] It describes the moment of democratic new beginnings and points to the normative content of political self-determination and collective self-legislation. This is the moment of legitimacy (Weber and Schmitt) and political freedom (Arendt). The second moment, "la politique politisée," refers to procedural, everyday institutionalized politics or normal lawmaking that tends to protect, consolidate, and reproduce the instituted reality of a self-organized *demos*, this time, however, integrated into a self-sustained political system and mediated by constitutional principles, legal norms, and organized state power.[20] This is the moment of legality (Weber), representation (Schmitt), and augmentation (Arendt). Finally, the third relation denotes the politics of spontaneous and unpredictable forms of popular mobilization and informal participatory agitations, unfolding at the edges of ordinary politics, side by side with the established democratic legal order, that move "between the boundaries of insurrection and institutionalized political activity."[21] From Weber's theory of noninstitutionalized charismatic movements to Schmitt's underdeveloped insights on popular assemblies to Arendt's fragmentary reflections of civil disobedience and voluntary

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[19] Jon Elster, *Ulysses and the Sirens: Studies in Rationality and Irrationality*, Cambridge and Paris: Cambridge University Press and Éditions de la maison des sciences de l'homme, 1979, p. 93.

[20] Elster, *Ulysses and the Sirens*, p. 93.

[21] Here, I use Cohen and Arato's salient terminology. Cohen and Arato, *Civil Society and Political Theory*, p. 566.

associations, I approach the third moment of the extraordinary from the perspective of more contemporary theories of new social movements, irregular extraparliamentary mobilization from below, strategies of popular resistance and disruption, and self-organized insurgent publics.[22] These theories gesture toward publics able to move alongside normal politics, dwelling tensely at the margins of the institutionalized order, aiming, through the creation of venues for more direct and conflictual collective participation, at the preservation of effective and immediate forms of action in the process of normal decision making. Here, my analysis is inspired by Ingeborg Maus's formulation of "noninstitutionalized popular sovereignty," which I retranslate as quasi- or semi-extraordinary politics.[23]

Taken together, all three dimensions or levels illuminate the complex anatomy of democracy and popular sovereignty. My aim is to distinguish analytically these three dimensions of the democratic experience, to disassociate them from Weber's, Schmitt's, and Arendt's explicit political motivations and objectives, from their relatively obsolete intellectual contexts, and from their particular philosophical assumptions, in order to properly reconfigure them within a different theoretical framework. Such a reconstruction might demonstrate that a theory of democratic extraordinary politics is useful for illustrating that democracy and constitutionalism do not have to be viewed as two antagonistic poles and that liberalism is mistaken when it claims today the legacy of constitutionalism solely for itself, defined exclusively as limited government by law. Furthermore, a systematic theory of the extraordinary could also indicate ways of reconceptualizing radical democracy without falling into the trap of a one-dimensional model that reduces popular sovereignty to a constant mobilization and permanent participation, making it virtually unrealistic under modern conditions. Direct democracy is not the only available version of radical democracy. Nor does democracy need to be simply reduced to electoral procedures and majority rule. There are other alternatives that need to be investigated. Finally, such a theory might prove helpful in providing space for rethinking the sites, role, and scope of various insurgent movements so as to expand the realm of democratic interventions

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[22] For the concept of "new associations and new publics," see Cohen and Arato, *Civil Society and Political Theory*, pp. 421–563. For the idea of "strong publics," see Nancy Fraser, "Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy," in *Habermas and the Public Sphere*, ed. Craig Calhoun, Cambridge, Mass.: MIT Press, 1992, p. 134.

[23] Ingeborg Maus, *Zur Aufklärung der Demorkratietheorie. Rechts- und Demokratietheoretische Uberlegungen im Anschluss an Kant,* Frankfurt am Main: Suhrkamp, 1992, p. 203.

during normal politics vis-à-vis the institutionalized order, the bureaucratic state, vertical structures of power relations, political inequalities, and the system of party politics.

The discussion that follows is divided into three thematic parts. In Part I, I turn to Weber's concept of charismatic legitimacy. But instead of focusing on charisma as it is defined in his methodological and sociological writings, I examine it as it appears, though in an elusive and vague manner, in his comparative-historical studies on the prophetic, monotheistic world religions. In these studies, charisma emerges as a struggle among religious charismatic movements over the symbolic institution of society. Subsequently, I examine how Weber's sociological critique of constitutionalism and his pessimistic and restrictive understanding of formal legal-rational domination undercut his insights on extraordinary charismatic politics, preventing him from turning charisma into the direction of popular political foundings. His inability to find a proper balance between the first and second moment, that is, between an ephemeral charisma remaining always in a *status nascendi* and the iron cage of juridical formalism, bureaucratic reason, and abstract legality, accounts for his failure to reconcile extraordinary and normal politics.

In Part II, I focus on Schmitt's theory of the constituent will of the sovereign people, as it is illustrated in his constitutional texts. I trace his formulation of sovereignty back, not to his much-discussed definition based on the exception, but to his model of genuine constitutional making. Schmitt's approach was directed partly against Weber's failure to propose a systematic and convincing theory of democratic legitimacy and partly against the dilemmas and limitations of Hans Kelsen's pure theory of law. My aim is also to show how the relation between the extraordinary and the instituted procedural reality reformulates the problem of the institutionalization and consolidation of the substantive content of democracy and thus the possibility itself of a democratic constitution. Here, I rely upon and further develop Schmitt's attempt to extricate constitutionalism from the liberal tradition in order to take it in a more democratic direction. Against Weber's overly binary approach, which culminates in an unattractive theory of the charismatic Caesarist president, Schmitt explored alternative paths. But although he struggled to blend the democratic principle of identity with that of political representation within a substantive constitution, he too failed by ominously concluding, much like Weber, with a presidential solution and by endorsing an omnipotent personalistic executive power with a plenitude of

dictatorial powers, thus substituting the extraordinary with the exception, foundings with emergencies.

Finally, in Part III, I submit Schmitt's theory of popular constituent politics to Arendt's criticisms of the French Revolution that aimed at decentering and dedramatizing the constituent power and at disentangling it from what she perceived were the dangers associated with a voluntaristic formulation of constituent sovereignty, absolute legal breaks, and the plebiscitarian appeal to a homogeneous popular will located in a normless, shapeless state of nature. Contrary to Schmitt's oscillations, Arendt opted for a lasting federal republican constitution of councils that could allow for the continuing practices of political participation, regulated contests, and public deliberation in the process of normal politics. Arendt's version of a constitutionalized extraordinary politics, however, is not without its own important difficulties and aporias, although it approximates democratic values and institutions more than the other two approaches. Much like Schmitt, but from the opposite side, Arendt stumbled on the problem of political representation. Her determination to dispense with sovereignty, her strong ontological definition of action, and her exclusive reliance on opinion turned representation into an almost useless concept, blurring the distinction between the extraordinary and the normal and challenging her otherwise intriguing and promising version of ordinary republican politics.

PART I

CHARISMATIC POLITICS AND THE SYMBOLIC FOUNDATIONS OF POWER

Max Weber

From this one can deduce the importance of the "cultural aspect," even in practical (collective) activity. An historical act can only be performed by "collective man," and this presupposes the attainment of a "cultural-social" unity through which a multiplicity of dispersed wills, with heterogeneous aims, are welded together with a single aim, on the basis of an equal and common conception of the world, both general and particular, operating in transitory bursts (in emotional ways) or permanently (where the intellectual base is so well rooted, assimilated, and experienced that it becomes passion).

Antonio Gramsci[1]

The institution of society is in each case the institution of a magma of social imaginary significations, which we can and must call a *world* of significations. For it is one and the same thing to say that society institutes the world in each case as its world or its world as the world, and to say that it institutes a world of significations that is its own, that it institutes itself in instituting the world of significations that is its own, in correlation to which alone, a world can and does exist for it. . . . Society brings into being a world of significations and itself exists in reference to such a world.

Cornelius Castoriadis[2]

Max Weber concluded his famous study on the origins of capitalism with a significant political prognosis about the future course of Western civilization. Modern societies, he wrote, are confronted with three historical possibilities: they will either "live in this cage" (i.e., of modern rationalism), "entirely new prophets will arise," or "there will be a great

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[1] Antonio Gramsci, *Selections from the Prison Notebooks*, ed. Quintin Hoare and Geoffrey Nowell Smith, New York: International Publishers, 1995, p. 349.
[2] Castoriadis, *The Imaginary Institution of Society*, p. 359.

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rebirth of old ideas and ideals."[3] For Weber, which of these three paths would be taken was a matter of political struggle, decision, and contingent social-historical factors. As such, neither structural economic imperatives nor objective historical laws nor a blind faith in scientific reason and universal morality would ever relieve modern individuals from their responsibility to decide about the political form of their collective existence. In his very last political writings and after many intellectual experiments and theoretical modifications, he favored the second path (combined with the first), that of plebiscitarian-leader constitutional democracy.[4] In the end, he placed his bet on the extraordinary powers of the charismatic politician to break through the dangers and limitations plaguing disenchanted mass-democratic societies.[5]

Most commentators consider Weber to have been an exponent of plebiscitarianism and of a strong executive power.[6] And this he doubtless was. Hence, the main focus of most of the studies of his political thought has been primarily on the heroic, creative, and exceptional powers of the charismatic leader.[7] But while these studies recognize the instituting powers of charisma, they usually conclude with a dismissive assessment that depicts it as no more than a "Dionysian force" or "a celebration of irrationalism."[8] Additionally, by emphasizing the vitalistic and emotional nature of charismatic

[3] Weber, *PESC*, p. 182. Each of these three possibilities corresponds to Weber's three types of legitimate authority: legal-rational, charismatic, and traditional.

[4] Karl Löwith in his brilliant, still unsurpassed comparative discussion of Marx and Weber has argued, wrongly I think, that the latter, while concerned with the alienating effects of modern, bureaucratized societies abstained, contrary to the former, from providing a political solution to the problem of bureaucratization. Thus, "where Marx offered a therapy," Löwith maintains, "Weber offered only a diagnosis." Karl Löwith, *Max Weber and Karl Marx*, ed. Tom Botomore and William Outhwaite, London: George Allen and Unwin, 1982, p. 22.

[5] Weber, *ES*, pp. 245, 266–271. Also, see Max Weber, "The President of the Reich" and "The Profession and Vocation of Politics," *PW*.

[6] Wolfgang J. Mommsen, *Max Weber and German Politics, 1890–1920*, Chicago: University of Chicago Press, 1984, pp. 409–414; Wolfgang J. Mommsen, *The Age of Bureaucracy: Perspectives on the Political Sociology of Max Weber*, New York: Harper Torchbooks, 1974, pp. 72–94.

[7] Joseph Bensman and Michael Givant, "Charisma and Modernity: The Use and Abuse of a Concept," *Social Research*, 42:4 (1975), p. 600; Alkis Kontos, "The World Disenchanted, and the Return of Gods and Demons," in *The Barbarism of Reason: Max Weber and the Twilight of Enlightenment*, ed. Asher Horowitz and Terry Maley, Toronto: University of Toronto Press, 1994, pp. 238–239; Gilbert G. Germain, "The Revenge of the Sacred: Technology and Reenchantment," in Horowitz and Maley, *The Barbarism of Reason*, pp. 259–261.

[8] Luciano Cavalli, "Charisma and Twentieth-Century Politics," in *Max Weber: Rationality and Modernity*, ed. Sam Whimster and Scott Lash, London: Allen and Unwin, 1987, p. 319. Cavalli developed this approach in his *Il capo carismatico: per una sociologia weberiana*

leadership, embodied in the institutional form of constitutional Caesarism, these readings highlight the discretionary and arbitrary powers with which Weber sought to endow the plebiscitarian president, especially during political crises and emergency situations.[9] Weber's significant role in the drafting of the Weimar Constitution and his successful efforts to include the exceptional powers of the president in Articles 41 and 48 reinforce this interpretation.[10]

Because of such an exclusive stress on Caesarism, most accounts of Weber's theory of charisma as plebiscitarian leadership provide an inconclusive view of this form of insurgent politics that cannot be fully captured by the exceptional traits of a democratically elected president who lives *for* politics, however unrivaled these might be.[11] Contrary to these prevailing

[9] Weber, "The President of the Reich," p. 307. For instance, Weber's notion of charisma is said to have "prepared the way to an authoritarian and dictatorial leadership state positively by advocating, generally, irrational 'charismatic' leadership and 'rule of a leader with a machine'" and to have been used for "exalting the irrational aspects of life." Karl Löwith, *Mass und Wert,* III, 1939, p. 171, quoted by Mommsen, *Max Weber*, p. 410; Julien Freund, *The Sociology of Max Weber*, New York: Pantheon Books, 1968, p. 233.

[10] Mommsen, *Max Weber*, pp. 332–389. Even without these excessive references to irrationality and discretionary powers, the main characteristic of these readings is the description of charisma as simply another (personalistic) type of political domination. Julian Freund has characterized Weber's *Economy and Society* as "a sociology of domination." Freund, *The Sociology of Max Weber*, p. 218. It has almost become a conventional truism to declare that for Weber, "the charismatic process is…the natural development of the vertical relationship between charismatic leader and followers." Cavalli, "Charisma and Twentieth-Century Politics," p. 318.

[11] For one thing, what seems to be ignored in these readings is that contrary to both legal-rational and traditional forms of legitimacy, which are based on a strictly vertical and repressive understanding of political power, charisma, according to Weber, sometimes "may be subject to an anti-authoritarian interpretation." Weber occasionally used the term "charismatic community." As N. S. Eisenstadt has correctly pointed out, "Throughout his discussion of charisma Weber emphasizes not so much the charismatic leader, but the charismatic group or band." This reformulation underscores the proximity of charisma to direct democratic rule, group solidarity, substantive equality, and the lack of unequal relations of subordination among the members of a charismatic community, where "the group has a right to enact, recognize, or appeal laws according to its own free will, both in general and for an individual case." Weber, *ES*, pp. 266, 243–244, 1119–1120; "Religious Rejections of the World and Their Directions," in *From Max Weber: Essays in Sociology*, ed. H. H. Gerth and C. Wright Mills, New York: Routledge, 1991, pp. 328–330; N. S. Eisenstadt, introduction to *Max Weber on Charisma and Institutional Building*, ed. N. S. Eisenstadt, Chicago: University of Chicago Press, 1968, p. xx. Guenther Roth has been one of the first Weber scholars to pay attention to the notion of "the charismatic community of ideological virtuosi." Guenther Roth, "Charisma and the Counterculture," in Guenther Roth and Wolfgang Schluchter, *Max Weber's Vision of History: Ethics and Methods*, Berkeley: University of California Press, 1979, pp. 128, 130–132, 138. Also see, Schluchter's discussion of "charismatic communitalization" and "charismatic congrega-

views, I want to argue that the major accounts of Weber's theory of charisma as a theory of plebiscitarian leadership miss a crucial dimension – indeed, for my purposes, one of the most interesting dimensions – of his theory. For one thing, they overlook the various formulations of charisma.[12] I argue that there are two versions of charismatic politics in Weber's theory: a collective and an individualistic. Unless the former is adequately analyzed, one will miss the forms of instituting power that his theory of charisma sought to address and will lose sight of what is most useful in his theory of charisma for a democratic theory of the extraordinary.

In fact, Weber's treatment of charisma underwent considerable change.[13] In the pre-1913 section of *Economy and Society*, charisma appears mainly as a collective, impersonal form of rebellious hegemonic politics, which, located chronologically and conceptually before traditional and rational-legal domination, was conceived by Weber as the only source of any legitimation discourse. In this version, charismatic movements are the only political forces that can generate new discourses of justification against the established order, cultivate the belief in the legitimate exercise of political power, and produce a sense of duty and obligation toward a newly instituted authority.[14] With this version, charisma comes extremely close to depicting the originary and radical founding of a novel structure of legitimacy. As Talcott Parsons correctly but hastily observed, "Legitimacy is thus the *institutional* application or embodiment of charisma."[15] In a similar vein, but again

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tion," in Wolfgang Schluchter, *Rationalism, Religion, and Domination: A Weberian Perspective*, Berkeley: University of California Press, 1988, pp. 213–230.

[12] Weber borrowed the concept of charisma from the legal scholar and historian Rudolf Sohm. Despite some very important similarities, Weber detheologized and historicized Sohm's concept of charisma and also distinguished among many different forms of charisma, including charisma of office, lineage charisma, charisma of reason, and hereditary charisma. Rudolf Sohm, *Outlines of Church History* [1887], trans. M. Sinclair, Boston: Beacon Press, 1958, p. 35.

[13] Mommsen, *The Age of Bureaucracy*, pp. 15–21; Stephen L. Esquith, "Politics and Values in Marx and Weber," in *A Weber-Marx Dialogue*, ed. Robert J. Antonio and Ronald M. Glassman, Lawrence: University Press of Kansas, 1985, p. 309; Joas, *The Creativity of Action*, pp. 46–47.

[14] In this earlier version, charisma turns into a metapolitics that seeks to capture the cultural, symbolic, and axiological preconditions that make politics as usual possible in the first place. For the concept of metapolitics as the possibility of rupture with the instituted reality and as what makes it possible, see Alain Badiou, *Abrégé de métapolitique*, Paris: Éditions du Seuil, 1998.

[15] Talcott Parsons, *The Structure of Social Action*, Vol. 2, New York: Free Press, 1968, p. 669. Also, see Edward A. Shils, "Charisma, Order, and Status," *American Sociological Review*, 34:2 (1973), p. 204.

without further explication, Donald McIntosh has argued that charisma "is the legitimating principle behind any authority."[16] After 1913, however, Weber focused almost exclusively on the personal attributes of charismatic leaders: their bearing on authority and domination; their institutional place in liberal constitutional democracies; their relationship to party machines; and their potential powers to counterbalance anonymous bureaucratic rule, abstract legal formalism, divided and weak parliaments, instrumental rationality, and the utilitarian and factional politics of interests.[17]

While this second version of charisma has been exhaustively treated, the first remains relatively ignored by the main studies of his political thought.[18] Of course, Weber himself is responsible for this relative neglect of the collective version of charisma by explicitly endorsing the individualistic one during the last years of his life. In that sense, any attempt to recover the former requires one to argue with Weber against Weber and in many cases even to go beyond his own intentions and formulations. This is what I attempt to do in the next three chapters by engaging in a selective and reconstructive reading. My aim is neither to rescue Weber from his own flaws and contradictions nor to claim that the reader will find here the definitive interpretation of his theory of charisma. Rather, I am interested in retrieving some important aspects included in his first, underdeveloped version of (collective) charisma and to examine whether and how they can contribute to a better understanding of extraordinary politics.

Thus, although it is true that Weber emphasized the creative action of heroic leaders, blended together charisma and domination, professed a rather rigorous methodological individualism, and explicitly framed his theory of plebiscitarian leadership in a mass democracy as well as his analytical views on charisma in personalistic terms, there are strong indications, particularly in his studies on the sociology of religion, of a substantially different approach to charisma.[19] Surprisingly enough, not only individuals but also collective subjects in the form of religious movements and substan-

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[16] David McIntosh, "Weber and Freud: On the Nature and Source of Authority," *American Sociological Review*, 35 (1970), p. 909; Stephen P. Turner and Regis A. Factor, *Max Weber: The Lawyer as Social Thinker*, London: Routledge, 1994, p. 118.

[17] Mommsen, *Max Weber*, pp. 390–414; David Beetham, *Max Weber and the Theory of Modern Politics*, Cambridge: Polity Press, 1985, pp. 215–249.

[18] I have in mind Peter Breiner's study of Weber's political thought. Breiner's keen attempt to examine the democratic aspects of Weber ignores charisma. Peter Breiner, *Max Weber and Democratic Politics*, Ithaca: Cornell University Press, 1996.

[19] Weber, *ES*, pp. 14, 18.

tive communities of solidarity populate his historical narrative of prophetic, emissary world religions. This collective model belies his assumptions about methodological individualism and goes beyond mere instrumental rationality and the paradigm of domination and rulership. For this reason, I want to reach into Weber's sociology of religion to recover the collective model of charismatic politics in order to relate it to extraordinary foundings.

Although this attempt to examine the earlier version of charisma that Weber abandoned in his more mature works is not the first,[20] those scholars who have been attuned to this version have unfortunately stopped short of establishing its links with his theory of politics, and even less with democracy.[21] And even though many important aspects of charisma that are omitted by the plebiscitarian model are now recognized and studied in their own right, they are scarcely read in relation to modern politics, thus failing to challenge the conventional depiction of Weber's political thought as a sheer vindication of *Führerdemokratie* that confined charisma to the strictly heroic and voluntaristic qualities of the plebiscitarian president. Despite some interesting interpretative studies on the concept of charisma as it appears in his sociology of world religions, questions about how it might be deployed to better grasp and reassess Weber's political project; what distinguishes it from the later, more visible version of charismatic domination; or what constitutes its present political, even democratic relevance are seldom raised.

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[20] Reinhard Bendix's discussion of Weber's sociology of religion remains one of the best examinations of its political insights contained in his comparative-historical sociology of world religions. Bendix, however, does not establish the connection between this version of charismatic politics and Weber's political writings. For example, ancient religions and charisma are discussed in different chapters as if they constitute two different, independent themes. Reinhard Bendix, *Max Weber: An Intellectual Biography*, Berkeley: University of California Press, 1977, pp. 257–281; Guenther Roth undertook a more promising attempt to link charismatic movements and modern social movements. Notwithstanding its merits, this approach confines exclusively charisma to the charisma of reason. Hence, it reproduces the same limitations that one can find in Weber's writings. Roth, "Charisma and the Counterculture," pp. 119–143.

[21] For example, Wolfgang Schluchter, *Religion und Lebensführung*, 2 Vols., Frankfurt am Main: Suhrkamp, 1988; *Max Webers Studie über das antike Judentum: Interpretation und Kritik*, ed. Wolfgang Schluchter, Frankfurt am Main: Suhrkamp, 1981; *Max Webers Studie über Konfuzianismus und Taoismus: Interpretation und Kritik*, ed. Wolfgang Schluchter Frankfurt am Main: Suhrkamp, 1983; *Max Webers Sicht des okzidentalen Christentums: Interpretation und Kritik*, ed. Wolfgang Schluchter, Frankfurt am Main: Suhrkamp, 1988; *Max Weber and Islam*, ed. Toby E. Huff and Wolfgang Schluchter, New Brunswick: Transaction, 1999; Alastair Hamilton, "Max Weber's *Protestant Ethic and the Spirit of Capitalism*," in *The Cambridge Companion to Weber*, ed. Stephen P. Turner, Cambridge: Cambridge University Press, 2000, pp. 151–171; John Love, "Max Weber's Orient," in Turner, *The Cambridge Companion to Weber*, pp. 172–199; John Love, "Max Weber's *Ancient Judaism*," in Turner, *The Cambridge Companion to Weber*, pp. 200–222.

As a consequence, we are confronted with the following discomfiting situation: either the political pertinence of charisma is recognized but only in the malign form of a popularly elected head of the executive with discretionary powers and thus dismissed as potentially dictatorial and populist;[22] or it is reinterpreted as an expansive collective movement that struggles to radically reinstitute the social, only to be relegated to an irrevocably lost premodern, religious enchanted universe with no significance for modern secular democratic politics. As Karl Loewenstein once emblematically put it, charisma "in politics is a phenomenon of the pre-Cartesian world."[23]

In what follows, I attempt to overcome this bifurcated approach to Weber's concept of charisma in order to recover the first, collective version of charisma, interpreted here as charismatic (extraordinary) politics.[24] This

[22] Rune Slagstad, "Liberal Constitutionalism and Its Critics: Carl Schmitt and Max Weber," in Elster and Slagstad, *Constitutionalism and Democracy*, pp. 122–123; Sven Eliaeson, "Max Weber and Plebiscitary Democracy," in *Max Weber: Democracy and Modernization*, ed. Ralph Schroeder, New York: St. Martin's Press, 1998, pp. 47–60; Sven Eliaeson, "Constitutional Caesarism: Weber's Politics in Their German Context," in Turner, *The Cambridge Companion to Weber*, pp. 131–150.

[23] Karl Loewenstein, *Max Weber's Political Ideas in the Perspective of Our Time*, Amherst: University of Massachusetts Press, 1966, p. 86. As it has been characteristically claimed, "the concept of charismatic leadership as developed by Weber is of little use to the analysis of modern political and social movements. . . . The Weberian concept was originally applied to highly personal social movements that were not only personal but were revolutionary and irrational. The modern world, at least at the political level, is based upon political machinery that is geared to mass-scale operation." Bensman and Givant, "Charisma and Modernity," p. 610. Also, see McIntosh, "Weber and Freud: On the Nature and Source of Authority," p. 902; Wolfgang Schluchter, *The Rise of Western Rationalism: Max Weber's Developmental History*, Berkeley: University of California Press, 1981, p. 124; Schluchter, *Rationalism, Religion, and Domination*, pp. 392–432.

[24] This bifurcated approach to Weber's concept of charisma reflects a deeper methodological split within Weber scholarship that divides among his purely political writings, his sociological theory, and his comparative-historical investigations on world religions. See Beetham, *Max Weber*, pp. 30–31, 245, 264; Loewenstein, *Max Weber's Political Ideas in the Perspective of Our Times*, pp. 4–7; Guenther Roth, "Political Critiques," in *Scholarship and Partisanship: Essays on Max Weber*, ed. Reinhard Bendix and Guenther Roth, Berkeley: University of California Press, 1971, pp. 55–57, 66, 67–69. For attempts to argue against splitting Weber's writings, see Mommsen, *The Age of Bureaucracy*, p. 80; Wolfgang J. Mommsen, "Max Weber's Political Sociology and His Philosophy of World History," in *Max Weber*, ed. Dennis Wrong, Upper Saddle River, N.J.: Prentice-Hall, 1970, p. 193; Wolfgang J. Mommsen, "The Antinomic Structure of Max Weber's Political Thought," in *The Political and Social Thought of Max Weber*, Chicago: University of Chicago Press, 1989, pp. 24–44; Schluchter, *The Rise of Western Rationalism*, pp. 10, 12, 24, 25–81; Schluchter, *Rationalism, Religion, and Domination*, pp. xiv, 37–38, 44, 46, 81–82, 90, 204, 303, 315, 348–349, 362, 414, 423, 432, 569; Schluchter, *Paradoxes of Modernity: Culture and Conduct in the Theory of Max Weber*, Stanford: Stanford University Press, 1966, pp. 109, 111–112, 185, 190–204, 305.

version appears better than anywhere else in Weber's comparative-historical treatment of world religions that departs from the strict constraints of a rigorous, formal, and abstract sociological-scientific enterprise. This departure reflects a subtle move away from the paradigm of domination defined in terms of a hierarchical and vertical relationship between command and obedience, rulers and ruled, toward the model of an insurgent collective hegemonic struggle for the radical (re)institution of society. Charismatic politics, as Weber sometimes alluded to it, is a collective revolutionary force "of expansive political movements" striving for the "monopoly of the spiritual leadership of the community," as part of a broader political struggle "for the control of the community."[25] This is a hegemonic struggle that aims at the symbolic foundations of political power. Charismatic movements strive for the dissemination of a new set of values and meanings able to transcend sectarian differences, ideological plurality, and social fragmentation in the name of a new unitary worldview that could not only generate novel axiological criteria for discriminating between legitimate and illegitimate principles of political organization but that could also bring, by motivating and stirring political action, profound institutional changes in the matrix of power. Following Pierre Bourdieu, I call this struggle symbolic because it seeks to influence the perception of reality and "to produce and impose the legitimate vision of the world."[26]

Unfortunately, Weber did not develop this version of extraordinary politics. But the fact that he did not propose a systematic and comprehensive theory of charismatic politics is not a reason for not elaborating upon the rich conceptual apparatus he advanced through the years. Such a rethinking requires relativizing and contextualizing his understanding of plebiscitarian-leader democracy – the one he regarded as the most suitable for the modern age – as just one particular historical and institutional version of charisma of the much broader phenomenon of charismatic politics.[27] Putting aside this particularly unattractive version, I concentrate exclusively on reconstructing charismatic politics from a plurality of scattered textual references. As I argue, located in the indefinable region between material and ideational interests, social structures and symbolic meanings, the concept of charismatic politics not only sheds light over the obscure sources

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[25] Weber, *ES*, p. 252; Weber, *SR*, pp. 68, 130.

[26] Pierre Bourdieu, *In other Words: Essays towards a Reflexive Sociology*, trans. Matthew Adamson, Stanford: Stanford University Press, 1990, p. 133.

[27] Max Weber, "The Social Psychology of the World Religions," in Gerth and Mills, *From Max Weber*, p. 300.

of radical historical change but also advances our understanding of how changes in the underlying motivational and symbolic underpinnings of political authority might initiate genuine political, legal, and institutional transformations.

What interests me here, therefore, is neither to present a critical review of the enormous body of secondary works on charisma nor to introduce another analytical interpretation of this sociological ideal type of legitimate domination. Instead, I use *The Sociology of Religion* as my main guide, which I reinterpret as a "sociology of charismatic politics."[28] Accordingly, I take it to be not only a historical account or a theoretical hypothesis about the autonomous development of ideas and religious representations and their constitutive influence on personal conduct, ethical attitudes toward the world, and economic practices.[29] It is equally important for explaining the political origins of certain systems of belief, worldviews, and ethical attitudes that prepare diverse groups with heterogeneous interests, value orientations, and social positions to participate in the institution of a new form of authority as the only legitimate and valid one – that is, as the only exercised de jure and not simply de facto.[30] In this study as well as in his other essays on world religions, one can find an intriguing genealogical inquiry that seeks to clarify the historical and political preconditions that are necessary for the emergence of a new discourse of legitimacy. These preconditions revolve around the symbolic struggle for the transformation of the social world through the development and dissemination of a new representation of reality capable of revolutionizing existing mentalities, of constituting new collective subjectivities, and of obtaining the support of the greatest possible number of individuals and groups for the radical institution of a new legal and political order.

In these texts, instead of taking factual, empirical reality (material or ideational) as the inaugural moment of his analysis and then proceeding to demonstrate the way it conditions and determines the exercise of power,

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[28] Here I depart from both Löwith's and Mommsen's approaches. The first has called the sociology of religion a "sociology of rationalism," while the second described it "a substantive outline of universal history." Löwith, *Max Weber and Karl Marx*, p. 41; Mommsen, *The Age of Bureaucracy*, p. 13. I am rather in agreement with Reinhard Bendix who has argued that the sociology of religion should be viewed "as a study in the sociology of innovation." Bendix, *Max Weber*, p. 265.

[29] This is Friedreich H. Tenbruck's interpretation that identifies as Weber's central theme the discovery of the independent dynamics of the evolution of worldviews. Friedreich H. Tenbruck, "The Problem of Thematic Unity in the Works of Max Weber," *British Journal of Sociology*, 31 (1980), pp. 313–351.

[30] Weber, *ES*, pp. 945–948.

Weber performs a genealogical analysis that situates legal, cultural, and institutional phenomena that we tend to take more or less as given, natural, and fixed within a broader field of contingent struggles, stressing thereby their artificial, historical, and constructed character.[31] As Reinhard Bendix has correctly pointed out, "Weber was not content to see any accepted belief or convention as something given; he sought to demonstrate that the dominant beliefs and institutions of today are the relics of past struggles among 'suffering, striving, doing' men."[32] Indeed, in his comparative-historical investigation of world religions, Weber focuses less on the purely religious realm and its intrinsic transmutations and more on the profane political circumstances, power relations, and historical forms of collective mobilization lurking behind or below the apparently immaterial war among various religious worldviews and gods.

In the case of legitimate authority, this approach can yield some valuable insights. Rather than simply taking for granted beliefs in the legitimacy of authority, by historicizing and politicizing them, Weber was able to investigate the gradual and conflictual emergence of such beliefs. As is well known, he argued that political domination could seldom be exercised as naked physical force.[33] Instead, to be effective and stable, it must, first, be transmuted into a symbolic form and thus be endowed with a legitimation that it would not otherwise have.[34] Second, it has to be supported by a new institutional and legal organization of the social order. What is less commented on, however, is his attempt to elucidate the multiple political relations, conflicts, and practices that make possible this transmutation. His charismatic politics highlights the fact that the exercise of power always presupposes certain forms of substantive meanings and ethical values. It rests on a foundation of shared maxims and social imaginary significations.[35] The symbolic struggles among antagonistic charismatic movements aim precisely at producing competing discourses and beliefs for justifying the founding of new structures of authority and of new political and social thought.[36]

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[31] Schluchter, *Rationalism, Religion, and Domination*, pp. 165, 168. For the concept of field, see Pierre Bourdieu, "Some Properties of Fields," in *Sociology in Question*, trans. Richard Nice, London: Sage Publications, 1993, pp. 72–77.

[32] Bendix, *Max Weber*, pp. 265–266. For a similar point, see Maurice Merleau-Ponty, *Adventures of the Dialectic*, trans. Joseph Bien, Evanston: Northwestern University Press, 1973, p. 22.

[33] Weber, *ES*, pp. 31–32.

[34] Weber, *ES*, pp. 945–946.

[35] Weber, *ES*, pp. 953–954.

[36] Turner and Factor, *Max Weber: The Lawyer as Social Thinker,* p. 102.

What makes these movements charismatic, therefore, is not that they strive for material resources, the acquisition of political power, or the satisfaction of economic interests. Nor are they charismatic solely because of the extraordinary and supernatural powers of their charismatic leaders. What makes them charismatic is that they struggle for the control of the symbolic foundations of political authority through the formation and reformation of those axiological and mental structures that determine whether and when power is exercised "rightly" or "wrongly" within a bounded historical and territorial community. If the first case were true, these movements would not be charismatic but quite ordinary, engaged in everyday, normal politics that neither question nor threaten the instituted society but instead accept it and reproduce it. In the second instance, however, their extraordinary character is due to the fact that they aim at radically altering the inherited reality. But they do so not only by changing the institutional and legal configuration of political power. Their politics goes much deeper: it aims at the formation of new subjectivities and the symbolic foundation of power itself.

Charismatic movements are extraordinary because they challenge the existing widespread beliefs and meanings that sustain the legitimacy of a political and juridical order. They seek first to disrupt and subvert the motivational and normative grounds of an established institutional and legal structure before replacing it with a new one. They seek to bring about a symbolic revolution in convictions (*Gesinnungsrevolutionen*) before undertaking a political revolution at the level of institutions and laws.[37] As Weber claimed, "charisma transforms all values and breaks all traditional and rational norms. . . . [C]harisma in its most potent forms, disrupts rational rule as well as tradition altogether and overturns all notions of sanctity. . . . In this purely empirical and value-free sense charisma is indeed the specifically revolutionary force of history."[38] What he did not clarify, however, is how charisma is able to accomplish all that. Nor did he say much about the specific operations of the instituting potentialities of charismatic intervention.[39] Nevertheless, the model of charismatic politics, developed

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[37] For the concept of "symbolic revolutions," see Pierre Bourdieu, "Monopolisation politique et révolutions symboliques," in *Propos sur le champ politique*, Lyon: Presses Universitaires de Lyon, 2000, pp. 99–108.

[38] Weber, *ES*, pp. 1115, 1117. In this context, charismatic politics could be interpreted as a sacrilegious and blasphemous force that defies the symbolic and normative foundations of the instituted orthodox reality.

[39] According to Joas, this failure reflects a deeper problem in Weber's sociology, namely the lack of a systematic theory of creative action. Joas, *The Creativity of Action*, pp. 48–49.

on the basis of Weber's insights, can shed some light on these questions and help retrieve the first, earlier, collective version of charisma.

1

Revisiting Weber's Concept of the Political

One cannot fail to notice the sharpness of Weber's formal and realist definition of the political. Anticipating Schmitt's and Arendt's conceptual distinctions, Weber argued that the political delineates an independent sphere of human activity and institutional order sharply distinguished from the economic, the moral, the religious, and the aesthetic. Contrary to Schmitt and Arendt, however, he equated the state with the political in a way that the former successfully occupies the entire terrain of the latter.[1] From a wide range of conflicts, Weber singled out as having a clear political character only those aiming at the seizure of the legitimate means of violence, that is, the state.[2] Politics is repeatedly described as a struggle among competing collective entities (mainly political mass parties) over the acquisition of the state apparatus as the best way to influence the distribution of power and thus to secure and advance their material and ideal interests.[3] And although he closely followed the German tradition of general constitutional law doctrines that equated the political to the state, he radicalized this approach by famously redefining the latter as the monopoly over the legitimate means of violence.[4] This coercive capacity belongs to the bureaucratic machine

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[1] Weber, *ES*, p. 55.

[2] Weber, "The Profession and Vocation of Politics," *PW*, p. 316.

[3] Weber, "The Profession and Vocation of Politics," pp. 311, 316; Weber, *ES*, pp. 54–55; Weber, *SR*, p. 235. For this conventional view of Weber's notion of politics, see Robert J. Antonio, "Values, History, and Science: The Metatheoretic Foundations of the Weber-Marx Dialogue," in *A Weber-Marx Dialogue*, ed. Robert J. Antonio and Ronald M. Glassman, Lawrence: University Press of Kansas, 1985, pp. 24–25.

[4] Weber, "Religious Rejections of the World and Their Directions," p. 334; Weber, *ES*, pp. 901–902, 908; Weber, "The Profession and Vocation of Politics," pp. 310–311. Turner and Factor have traced this line of legal analysis from Rudolf von Ihering to Weber. Turner and Factor, *Max Weber: The Lawyer as Social Thinker*, pp. 103–104.

of the state that, regulated by a formal system of impersonal and general legal rules, can better and more efficiently than other institutional devices administer large territories.[5] Politics is oriented toward the acquisition of the "power pragma" and materialized in the superior organizational instance of the state.[6]

The implications of this shifting of perspective from the substantive content and ends of the political to its mere use of physical coercion are not difficult to see. The state, Weber emphatically insisted, is simply a "political apparatus of force... the apparatus of domination," devoid of any normative or substantive content.[7] There are neither specific values nor intrinsic ends that the state has to realize nor ethical concerns unique to its nature.[8] The modern state is a mere technical tool, a neutral instrument of governance for the realization of any political and ideological end.[9] In itself it carries or represents no specific aims or goals and has no inherent or substantive value and thus it "is easily made to work for anybody who knows how to gain control over it."[10] As a consequence, "violence is the means specific to the state... [and] the relation between the state and violence is a particularly intimate one." If violence were to disappear, "then the concept of the 'state' would have disappeared" too.[11] By inserting violence at the very center of his understanding of the political and reducing the latter to a centralized bureaucratic machine of state domination, a coercive and disciplinary apparatus capable of issuing binding sanction-bearing injunctions, Weber proposed an extremely formal, functionalist, realist, and statist version of an instrumental-purposive theory of politics.[12]

As early as the 1950s Wilhelm Hennis pointed out that Weber's purely technocratic conception of the state omitted a vital aspect – namely, a substantive notion of politics without which no sort of public order can develop.[13] In the same vein, Jürgen Habermas has criticized Weber for

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[5] Weber, "The Meaning of 'Ethical Neutrality' in Sociology and Economics," *MSS*, p. 46; Weber, *ES*, pp. 970–971.

[6] Max Weber, "Between Two Laws," *PW*, p. 78.

[7] Weber, *SR*, p. 227.

[8] Weber, "The Profession and Vocation of Politics," p. 310.

[9] Weber, *ES*, p. 55; Weber, "The Meaning of 'Ethical Neutrality' in Sociology and Economics," p. 47.

[10] Weber, *ES*, p. 988.

[11] Weber, "The Profession and Vocation of Politics," p. 310.

[12] Weber, "Religious Rejections of the World and Their Directions," pp. 333–334.

[13] Wilhelm Hennis, "Zum Problem der deutschen Staatsanschauung," *Vierteljahreshefte Zeitgeschichte*, 7 (1959), pp. 1–23. In his more recent writings, Hennis has abandoned this conventional critique of Weber to argue instead that Weber should be read in the company

emptying politics of moral and ethical considerations and for reducing the political to an institutionalized repressive apparatus, thereby "strip[ping] state authority of its aura of kinship with reason and religion," creating a huge normative void at the center of his political theory.[14] Following and enriching the realist and descriptive tradition of modern Western political thought, Weber seems to have accepted the consequences of "the inescapable pragmatism of all action" and, more significantly, "the complete elimination of ethics from political reasoning."[15] By distancing himself from what is considered to be the alternative trend best represented by Aristotle and Hegel, by instrumentalizing the state, and by conceptualizing politics in terms of an inexorable struggle for the seizure of or at least for the influence over the coercive state machine, Weber advanced two bold and controversial claims.

On the one hand, politics, in the form of an endless struggle for power, comes dangerously close to the model of sheer power politics (*Machtpolitik*). In the domestic arena this model is translated into a particular understanding of public order and social integration based on a repressive understanding of power, according to which power is the ability to carry one's will, by different means (whatever these may be), independent of the conduct or resistance of others. Weber portrays political actors, individual and collective alike, as power seekers, orbiting around the state, itself the supreme power machine, with the aspiration to conquer it in order to secure and advance their interests. Social order and political stability are secured with the victory of one of the parties or of an alliance of parties over their competitors, mediated, regulated, and supported by the use (or the threat of use) of state coercion and sanctified by the legal system. In the likely case that there is no group powerful enough to impose its will, pragmatic negotiations and prudential compromises will ensure, at least for a while, stability and continuity.[16] Social and political integration are based on a modus vivendi. In some of Weber's writings, the political world emerges as suffused by ineradicable violence, asymmetrical relations of power, and ceaseless strategies of domination, where "force and the threat of force unavoidably breed

of Plato, Aristotle, and Rousseau. Wilhelm Hennis, *Max Weber: Essays in Reconstruction*, trans. Keith Tribe, London: Allen and Unwin, 1988, p. 125.

[14] Jürgen Habermas, "The Horrors of Autonomy: Carl Schmitt in English," in *The New Conservatism: Cultural Criticism and the Historians' Debate*, ed. Shierry Weber Nicholsen, Cambridge: Mass.: MIT Press, 1992, p. 134. Axel Honneth has also criticized Weber's theory of social conflict for "exclud[ing] every aspect of moral motivation from his conceptual definition of 'struggle.'" Axel Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts*, Cambridge: Polity Press, 1995, p. 161.

[15] Weber, "Religious Rejections of the World and Their Directions," p. 334.

[16] Weber, "Suffrage and Democracy in Germany," *PW*, pp. 128–129.

more force. . . . The very success of force, or the threat of force, depends ultimately upon power relations and not on ethical 'right.'"[17] The moment of a definitive political victory never comes. Any gain is provisional and unstable, open to new waves of contestation. Politics is the continuation of war, and "'peace' is nothing more than a change in the form of the conflict or in the antagonists or in the objects of the conflict."[18]

Habermas, once more, has paid particular attention to the equation of political action with instrumental rationality in Weber's theory of politics. Weber, Habermas argues, has identified "societal rationalization with expansion of the instrumental and strategic rationality of action contexts" and understood politics as a subsystem of purposive-rational action in which Occidental rationalism develops at the social level.[19] Habermas's point is well taken as long as Weber himself associated, in his earlier political essays, *Realpolitik* with the ethic of responsibility, that is, with the actors' careful calculation of the appropriate means and of their consequences for attaining the ultimate goal of seizing state power.[20]

On the other hand, to strengthen his claim that all politics is essentially a struggle for (state) power, Weber introduced a naturalistic interpretation of politics, strongly influenced by a particular variant of Nietzschean social Darwinism.[21] The search for power and the desire to realize one's will against resistance or obstacles corresponds to an immutable, transhistorical drive for survival and selection that is "among the most fundamental and universal components of the actual course of interpersonal behavior," inscribed in the very matrix of human psychology.[22] He argued that individuals, groups, communities, and nations alike – driven by a "will to power," by a primordial "desire," entangled in a "unavoidable 'dynamic of power,'" and propelled by "the fervor of this emotional influence" – strive to expand their zone of influence and to secure their survival.[23] To satisfy this existential, archaic impulse, actors seek to control any oppositional otherness, to

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[17] Weber, "Religious Rejections of the World and Their Directions," p. 334.
[18] Weber, "The Meaning of 'Ethical Neutrality' in Sociology and Economics," p. 27.
[19] Jürgen Habermas, *The Theory of Communicative Action: I. Reason and the Rationalization of Society*, trans. Thomas McCarthy, Boston: Beacon Press, 1984, p. 144.
[20] Weber, "The Meaning of 'Ethical Neutrality' in Sociology and Economics," pp. 16, 23–24.
[21] Max Weber, "Parliament and Government in Germany," *PW*, p. 219; Max Weber "The Nation State and Economic Policy," *PW*, pp. 2, 10, 14, 16–17. Raymond Aron has paid particular attention to the Darwinian motif in Weber's political writings. Raymond Aron, "Max Weber and Power-Politics," in *Max Weber and Sociology Today*, ed. Otto Stammer, Oxford: Basic Blackwell, 1971, p. 92.
[22] Weber, *SR*, p. 236.
[23] Weber, *ES*, pp. 911, 921.

crush potential and actual roots of resistance, and to assimilate differences within a broader unitary political organization.[24]

It is not my intention to underplay the significance of these aspects of Weber's understanding of political reality. Nor do I aspire to elude their normative deficit and their negative impact on democratic theory. Compared to the normative tradition of political thought, these arguments do indeed seem to fall into a realist and descriptive strand of political sociology. This construction ends up reducing the political to a hierarchical relation of domination and turning politics into an instrumental struggle over the realization of one's interests. There is an element of truth in the characterization of Weber as the "Machiavelli of the steel age," who with his "focus on the monopoly of physical force and its identification of rationality with effective control . . . presents the Hegelian idea of the state 'in ruins' or dissolved into its *disjecta membra*."[25]

Nonetheless, these interpretations are far from exhausting the complexity and richness of Weber's political thought. On the contrary, although it is true that they constitute one vital part, at the center of his texts, they do not fully capture his theory of the political. As Raymond Geuss convincingly claims, there are two notions of politics in Weber's work: a "narrower" and a "wider" one.[26] For Geuss, however, domination transverses both notions. As I argue, these two versions can be better understood if viewed from the perspective of the divide separating normal and extraordinary politics. In fact, the narrow concept describes Weber's views of ordinary (*alltäglich*) politics. I am inclined to reinterpret Weber's definition of the modern Occidental bureaucratic state and the struggle for state power as a depiction of normal politics, which refers to only one dimension of politics, that of state legality, everyday lawmaking, and the utilitarian politics of interests. For Weber, normal politics is the "art of the possible" and the average politician is a success-oriented actor who is able to chose the best means for realizing the ultimate goal of seizing, preserving, and enhancing state power by taking into account all the possible consequences of one's actions.

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[24] Weber, "The Nation State and Economic Policy," p. 16. Paradoxically, this descriptive, naturalistic interpretation of the psychological mechanism for self-preservation locates irrationality at the very center of modern rational politics.

[25] Peter Jacob Mayer, *Max Weber and German Politics: A Study in Political Sociology*, New York: Arno Press, 1979, pp. 109, 117n; Fred Dallmayr, "Max Weber and the Modern State," in Horowitz and Maley, *The Barbarism of Reason*, p. 35; Christian von Ferber, *Die Gewalt in der Politik. Auseinandersetzung mit Max Weber*, Stuttgart: Verlag W. Kohlhammer, 1970, pp. 53–76.

[26] Raymond Geuss, *History and Illusion in Politics*, Cambridge: Cambridge University Press, 2001, p. 14.

Here, instrumental political action goes hand in hand with the utilitarian ethic of consequentialism. But to focus exclusively on this version and to argue, as Christian von Ferber has, that Weber's interest lay solely in the extension of state power for itself, that his readiness to resort to violence contained a "value of its own" or a "legitimating power," and that "the right of the stronger" constituted the only valid justification of political action amounts to an insufficient reading.[27]

After all, Weber himself explicitly recognized that the state could also be "the most important form for the normative regulation of cultural life."[28] Thus, alongside his realist and repressive definition of power, he added another wider version, prompting its symbolic dimensions. The "word power," he remarked, "in the last analysis means the power to determine the character of culture."[29] Likewise, he distinguished between "domination by virtue of a constellation of interest" and "domination by virtue of authority."[30] Moreover, next to the narrow, descriptive formulation of normal politics, Weber alluded, even if in an erratic manner, to a broader and more substantive version, that of extraordinary (*ausseralltäglich* or *ausserordentlich*) politics. In this second case, politics is defined as "striving to attain the impossible."[31] In so doing, actors break "away from enslavement to the lifeless routine of everyday existence."[32] They also challenge the motivational grounds of the existing structure of political domination and seek to undermine the supporting legal and institutional order.

Therefore, whereas normal politics aims at the appropriation of a given structure of legitimate domination for the advancement of one's interests, extraordinary politics aims at the genuine creation of such a structure. Furthermore, legitimacy, for Weber, does not arise from violence. As he put it, "'legitimacy' originally had little bearing on violence – in the sense that violence was not bound by norms."[33] Politics, consequently, cannot be fully captured by instrumental rationality, violence, success-oriented action, or by the ethics of responsibility. It also falls under the rubric of value-oriented rationality and borders on the ethics of conviction.

If we reconsider Weber's concept of political domination from the standpoint of this amalgamation of politics, power, charisma, and culture, a more

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[27] Ferber, *Die Gewalt in der Politik*, pp. 53, 68, 72.
[28] Weber, "'Objectivity' in Social Science and Social Policy," *MSS*, pp. 67–68.
[29] Weber, "Between Two Laws," p. 76.
[30] Weber, *ES*, p. 943.
[31] Weber, "The Meaning of 'Ethical Neutrality' in Sociology and Economics," p. 24; Weber "The Profession and Vocation of Politics," p. 269.
[32] Weber, "The Meaning of 'Ethical Neutrality' in Sociology and Economics," p. 17.
[33] Weber, *ES*, p. 905.

complex picture emerges. Let us begin with culture. Culture, according to Weber, is a web of beliefs, substantive meanings, collective values, everyday practices, and symbolic significations that account for a society's unity and identity. This web is irreducible to physical, biological, or economic existence. Cultural significations are constitutive of the symbolic realm, because they are neither reducible to nor deducible from "real" or "objective" referents. Culture is not just a set of re-presentations of the real but the cement of social life, which holds together ideas, values, beliefs, and practices within a coherent whole and bestows a common meaning to a multitude of seemingly unrelated social practices and relations. Culture is also that which endows individuals "with the capacity and the will to take a deliberate attitude towards the world and to lend it *significance*. Whatever this significance may be, it will lead us to judge certain phenomena of human existence in its light and to respond to them as being (positively or negatively) meaningful."[34]

Seen from this point of view, the belief in the legitimacy of domination is directly extracted and conditioned by the prevailing hegemonic cultural values. Those who are able to determine the content and orientation of a cultural formation have a higher probability of influencing how people act and of determining what in a given society will be considered to be a legitimate authority.[35] "Domination," Weber famously argued, "is the probability that a command with a given specific content will be obeyed by a given group of persons."[36] Obviously, for Weber, in the case of *legitimate* domination, this probability does not rest on the fear of the use (or the threat of use) of violence, on motivations of self-interest, or on prudential and utilitarian considerations.[37] If it did, it would not be legitimate.[38] Rather, the legitimacy of a system of domination depends on the *belief* in the validity of this system.[39] Therefore, it leans on a set of cultural and ideational meanings that condition the axiological content of this belief.[40] For this reason, the concept of the state, he declared, cannot be scientifically grasped without a corresponding study of "the belief in the actual or normative validity

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[34] Weber, "'Objectivity' in Social Science and Social Policy," p. 81. For a detailed examination of Weber's concept of culture, see H. H. Bruun, *Science, Values, and Politics in Weber's Methodology*, Copenhagen: Munksgaard, 1972, pp. 121–130; Lawrence A. Scaff, *Fleeing the Iron Cage: Culture, Politics, and Modernity in the Thought of Max Weber*, Berkeley: University of California Press, 1989, pp. 73–150; Beetham, *Max Weber*, p. 125.

[35] Schluchter, *The Rise of Western Rationalism*, pp. 26–28.

[36] Weber, *ES*, p. 53.

[37] Weber, *ES*, p. 943.

[38] Weber, *ES*, pp. 31–33.

[39] Weber, *ES*, p. 946.

[40] Weber, *ES*, p. 1116.

of rules and of the authority-relationships of some human beings towards others. This belief is in part consciously, in part dimly felt, and in part passively accepted by persons."[41]

In addition to the realist definition of normal politics, this emphasis on the beliefs in the legitimacy of authority intimates toward another version of the political that unfortunately has been suppressed by Weber's own failure to spell it out in a clear, coherent way. Politics may also be a struggle among competing groups for the influence and control of culture, the radical transformation of subjective orientations, representation, and attitudes, the dissemination of a new worldview, the construction of political identities, and the generation of values and meanings upon which legitimate political authority rests.[42] Weber labeled this charismatic dimension of politics with the awkward term of *metanoia*, that is, the power of charisma to "effect a subjective or *internal* reorientation. . . . It may then result in a radical alteration of the central attitudes and directions of action with a completely new orientation of all attitudes toward the different problems of the 'world.'"[43] The belief in the legitimacy of political authority is part of these central attitudes.

This second model of the political explains why Weber ultimately attacked sheer power politics.[44] He vehemently rejected the "power politician" who "may give the impression of strength, but his actions merely lead into *emptiness* and *absurdity*. On this point the critics of 'power-politics' are quite correct . . . It stems from a most wretched and superficial lack of concern for the *meaning* of human action."[45] Interestingly, his main objection against power politics does not target its limitless and arbitrary character but its symbolic deficit and its inability to influence collective representations and to realize cultural values. Power politics, by seeking power for the sake of power, consists of a waste of power as such. The means of politics have become the goals of the politician. This overturning of the means-ends relationship involves a use of power that lacks the appropriate symbolic support and fails to influence value orientations. In that sense, it lacks a "cultural mission" and suffers from a huge legitimation

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[41] Weber, "'Objectivity' in Social Science and Social Policy," p. 99.

[42] Weber, "Science as Vocation," in Gerth and Mills, *From Max Weber*, p. 150. Also, see Turner, *Max Weber: From History to Modernity*, London: Routledge, 1992, pp. 215–216.

[43] Weber, *ES*, pp. 1117, 245; Schluchter, *The Rise of Western Rationalism*, p. 38.

[44] Weber, *ES*, pp. 925–926. For a detailed discussion of Weber's critique of power politics, see Jean-Marie Vincent, *Max Weber ou la démocratie inachevée*, Paris: Éditions du Félin, 1998, pp. 71–90.

[45] Weber, "The Profession and Vocation of Politics," p. 354.

deficit.[46] Sheer, raw power can hardly be considered meaningful insofar as it becomes quite impossible to imagine that power for the sake of power will be ever recognized as exemplary or obligatory to the citizens. By contrast, the causes promoted by the politician who lives *for* politics "is a question of faith," because "some kind of belief must always be *present*. Otherwise (and there can be no denying this) even political achievements which, outwardly, and supremely successful will be cursed with the nullity of all mortal undertakings."[47] Hence, power politics, Weber argued, impoverishes politics because it reduces it to a "convictionless cultivation of purely formal 'maintenance of the state' without *any* substantive goal."[48] In a similar vein, he understood clashes between parties to be not only conflicts about state power, economic or class interests, material advantages, self-preservation, or mere survival; they are also "conflicts about substantive goals" and interventions "in the struggle of world views and party opinions."[49] For instance, in the case of socialist movements and labor politics, Weber repudiated explanations based exclusively on material profit and economic benefits anticipating contemporary discourses on post-material values, such as recognition and identity.[50] He observed that, "one may think what one likes about strikes. They are usually a fight for interests, for wages. Yet, very often not just for wages, but also for ideal things, for honor, as the workers happen to understand it."[51] Similarly, in a letter to Robert Michels, Weber advised him to analyze

the position of Social Democracy or the socialist movement above all as a party of *culture*. The movement certainly wanted to create and *believed* it *had* created *not* only its own *social* outcomes, but also its own *cultural* content. *What* content? From which *ultimate* ethical or other standpoints? It wanted a substitute for *religion*, even to be a religion itself. In what *sense*? Is this still the case?[52]

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[46] Weber, *ES*, p. 925. Also, see Mommsen, *Max Weber*, pp. 42–43, 46.

[47] Weber, "The Profession and Vocation of Politics," p. 335.

[48] Max Weber, *Gesammelte Aufsätze zur Sociologie und Sozialpolitik*, Tübingen: J.C.B. Mohr, 1924, p. 360.

[49] Weber, "The Profession and Vocation of Politics," p. 320; Weber, "Science as a Vocation," p. 150.

[50] Schluchter, *Rationalism, Religion, and Domination*, p. 150.

[51] Weber, "Socialism," *PW*, p. 275. It is not surprising, therefore, that Weber understood socialism as a predominantly cultural movement, "a cultural community," combining a moral vision of social organization, a cultural critique of capitalist alienation, and aiming at reenchanting the modern world, rather than as a political ideology seeking to better the material and social conditions of the workers. See Scaff, *Fleeing the Iron Cage*, pp. 175–177.

[52] Weber to Michels, May 30, 1914, cited by Scaff, *Fleeing the Iron Cage*, p. 178.

This alternative, wider concept of the political can be traced to Weber's critique of certain prevailing versions of liberalism and Marxism that, despite their crucial differences, seek to assimilate the political to the economic realm.[53]

Liberalism and the Political

Weber rejected the liberal fiction of a self-sustained social order, framed according to the model of the free interplay of individual economic action and material self-interests, as a reified and hyposticized fiction that could be accepted only in the heuristic form of an economic ideal type but not as a comprehensive description of politics.[54] "As a separate structure," he wrote, "a political community can be said to exist only if, and in so far as, a community constitutes more than an 'economic group.'"[55] Interestingly, echoing Hegel, he opposed those versions of liberalism that understand politics as a magnified replica of market interactions, because they are "apolitical," "individualistic," and lacking "moral evaluations."[56] Rational profit-making activity excludes everything but prudential interactions among success-oriented individuals. These interactions can hardly account for political action. Contrary to reductionist approaches adopted by some prevailing forms of liberal theory, which tend to blur the difference between politics and economics, Weber set forth to differentiate them clearly and to argue for the "qualitative different character" of the political from the economic realm.[57]

   Whereas market economic action is oriented "to purely economic results – want satisfaction or profit-making,"[58] to "the satisfaction of a desire for 'utilities,'" or to "the control over economic resources,"[59] political action is autonomously constituted "in so far as it possesses *value systems* ordering matters other than the directly economic disposition of goods and services."[60] With this key distinction, Weber reflected on the significance of

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[53] Hennis, *Max Weber*, pp. 121–122, 195–197.

[54] Weber, "The Meaning of 'Ethical Neutrality' in Sociology and Economics," p. 44.

[55] Weber, *ES*, p. 902.

[56] Weber, "The Meaning of 'Ethical Neutrality' in Sociology and Economics," p. 44.

[57] Weber, *ES*, p. 903.

[58] Weber, *ES*, p. 340.

[59] Weber, *ES*, p. 63.

[60] Weber, *ES*, p. 902 (emphasis added). For one thing, these value systems invest the state with the right to command large numbers of individuals to sacrifice themselves when necessary and to expect that they will comply, even against their personal self-interest or material advantages. This unconditional existential power over life and death accounts, according to Weber, for the superiority of the political vis-à-vis other relationships, life orders, and spheres of social organization. Weber, *ES*, p. 903; Weber "Religious Rejections of the World and Their Directions," p. 335.

other, more substantive views of the state – for example, by suggesting an inherent "interest of maintaining certain objective cultural values which in their turn again are very differentiated and which we as a politically unified people believe we represent";[61] or by alluding to a broader concept of the public arena as "a place where struggles are waged for or against ideals in politics and social-policy."[62] He also maintained that ultimately the true objective of the state is not "the *well-being* humans will enjoy in the future but what kind of people they will *be*." Its economic and social policy, therefore, should be concerned less with "breeding well-being in people" and more "with the *quality of the human beings*."[63]

Weber sought to demonstrate that the political realm transcends purely instrumental considerations centered on the market economy as the paradigmatic form of social order to embrace value rationality and substantive meanings. Whereas the economy remains limited to the imperatives of individual instrumental rationality and egoistic utilitarian calculations that find their proper place in market exchange relations, the political entails a completely different understanding of rationality and action.[64] Economic, instrumental action lacks any inherent worth.[65] It is a too-narrow type of action.[66] Although it can speak about means, it remains silent about ends. By contrast, value-rational action, which corresponds mainly to political action, although subjective in character, has a substantive content permeated with axiological and ethical significations.[67] As David Beetham has correctly observed,

for Weber it was non-material values that were important, as opposed to "bread and butter" questions. Not that he underestimated the practical significance of the latter. But such questions should not form the ends of politics. . . . Politics for Weber was a sphere for the assertion and pursuit of non-material values. While the attainment of power and the satisfaction of material interest were necessary means for the politician, they should not form ends in themselves.[68]

Although individual behavior is heavily conditioned by prudential, utilitarian motives, it is also important to recognize that individuals are also moral and cultural beings capable of adopting an evaluative stand toward the

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[61] Weber, "'Objectivity' in Social Science and Social Policy," p. 109.
[62] Weber, "'Objectivity' in Social Science and Social Policy," p. 60.
[63] Weber, "The Nation State and Economic Policy," p. 15.
[64] Weber, *ES*, p. 946.
[65] Weber, *ES*, pp. 30, 22.
[66] Weber, *ES*, pp. 24, 25, 29, 30.
[67] Weber, *ES*, pp. 4, 14, 23, 24, 25, 26–27; Chris Thornill, *Political Theory in Modern Germany: An Introduction*, Cambridge: Polity Press, 2000, p. 4; Hennis, *Max Weber*, p. 121.
[68] Beetham, *Max Weber*, pp. 43–44.

world, others, themselves, and political authority and thus to act collectively according to certain axiological principles and substantive meanings.[69]

But where does this capacity to act according to values come from? Although Weber acknowledged that this capability is virtually universal, he understood that the way of realizing it was conditioned by the existing evaluative frameworks and worldviews accessible to actors – that is, by the types of value systems and imaginary significations that are available within a cultural formation at a specific social-historical moment. The capacity to transform oneself from an isolated economic agent into a political actor is dependent on the particular value systems that happen to prevail in a cultural universe. The political field is composed of a certain limited number of antagonistic worldviews that compete over the determination of what is politically thinkable, sayable, and, by consequence, desirable and acceptable. Therefore, for meaningful collective action to be actualized, individuals must be saturated with extra-economic significations and symbolic meanings.[70] These, for Weber, can come neither from the material sphere of economic activities nor from within purposive, formal rationality. Economic interests and egoistic calculation of utility are unable to account for concerted political action. The latter requires more than a simple reference to profits, needs, and self-preservation.[71] More often what happens in the case of individuals acting solely according to their economic self-interests is that a meaningless and "amorphous social action emerges."[72]

My reading stressing the relationship between the political and value rationality is reinforced by Weber's claim that the belief in the legitimacy of power ultimately rests on a sense of duty exhibited by the citizens toward this power.[73] What liberalism seems to miss, according to Weber, is that a legitimate political order relies on some ethical, substantive maxims that make allegiance to political authority look normatively right, such as a duty emerging out of a particular conviction that this authority is exemplary and thus obligatory and binding.[74] This is why, in this second, suppressed version, the political transcends a purely formal and instrumental definition based on the monopoly of the legitimate means of violence to include axiological considerations and substantive convictions that determine what is a legitimate use of power and what is not.[75]

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[69] Schluchter, *Paradoxes of Modernity*, pp. 246–248.
[70] Weber, *ES*, p. 946.
[71] Mommsen, *The Age of Bureaucracy*, p. 63.
[72] Weber, *ES*, p. 929; Thornill, *Political Theory in Modern Germany*, p. 31.
[73] Weber, *ES*, pp. 31, 25.
[74] Weber, *ES*, pp. 946–947, 952–954.
[75] Turner and Factor, *Max Weber: The Lawyer as Social Thinker,* p. 102.

Now, if read carefully, Weber's famous definition of the state as the monopoly of the legitimate means of physical violence consists of two distinct criteria that correspond to the two versions of the political and which divide normal from extraordinary politics. The first criterion defines the state as the monopoly of the means of physical violence. The second criterion understands the state according to the legitimate use of those means of physical violence, "regardless of personal motives or interests."[76] What is particular to the state – and to politics more broadly – is not only violence but also the subterranean meanings lurking below the use of such violence and the command-obedience relationship it sustains. If violence must be legitimate in order for the modern state to persist, then the symbolic and cognitive practices that create this legitimacy must also be of primary interest in understanding the political. Weber made an important distinction between "'legitimate' command and the norms by which it is 'legitimated.'"[77] With regard to the norms that endow a command with legitimacy, he observed that they might come from either charisma or a sacred tradition founded upon charisma. In both cases, it is charisma – directly or indirectly – that bestows an individual command with legitimacy, indicating the content and limits of its "lawfulness."[78]

In his critical engagement with market rationality, Weber suggested that whereas during normal politics actors aim at appropriating the means of violence within a given structure of legitimacy, during extraordinary politics they aim at creating the belief in this legitimacy by disseminating those norms that will justify authority. If in the first case actors compete within an established and stable framework of legitimate authority, in the second they strive to subvert the existing framework in order to institute a new one within which normal politics will take place at a subsequent temporal stage and from which it will deduce its claim to legitimate authority. Consequently, liberalism, from this perspective, seems to account only for normal politics. It is a doctrine of the ordinary.

Marxism and the Political

Weber was also critical of the orthodox Marxist approach to politics for its economic reductionism, class determinism, and excessive materialism. Political practices are neither a simple reflection of material interests nor a continuation of class conflict in the superstructural level of politics. What

[76] Weber, *ES*, p. 943.
[77] Weber, *ES*, p. 764.
[78] Weber, *ES*, p. 764.

he found lacking in the Marxist theories of his time was an understanding of the political as a sphere of human activity with its own inner logic, representations, and organizational principles that exceed the imperatives of material production, class structure, and class interests.[79] By rejecting the Marxist assumptions of economic determinism, which subordinate the political superstructure to the material infrastructure, political interests to economic interests, Weber developed an original and prescient theory of the political based on the uncoupling of political from economic power and political subjectivities from social classes.

For example, he dismissed the tendency to deduce the political identity of social actors from their "class situation."[80] The fact that individuals are structurally located within a hierarchical economic system of asymmetrical relations of power does not mean that it unilaterally determines the content and direction of their political attitudes.[81] Although he accepted that "class situation" creates occasionally a similarity of material interests among different individuals and can even lead an economic group to act as a uniform and homogeneous collective entity, he was careful not to fall into the traps of economic foundationalism and class naturalism.[82] The mere fact of class position can determine neither the agents' value attitudes toward the world nor the content of their political identities.

This uncoupling of political identities from social classes was also informed by Weber's sharp distinction between fact and value. This distinction allowed him to avoid deducing the meaning and substantive content of one's political action and views from one's structural, economic location and factual class belonging.[83] Individuals as class members cannot experience their structural positions within the social in an immediate, transparent way. The content of an actor's political choices and beliefs cannot be reduced to a class interest.[84] Against those materialist and economistic theories that profess to derive collective consciousness and political subjectivities exclusively from economic structures, Weber claimed that in no way can a class constitute a political category for the simple reason that "a class does not in itself constitute a group," and therefore "to treat 'class' conceptually

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[79] Weber, "'Objectivity' in Social Science and Social Policy," p. 68; Weber, "Socialism," pp. 295.

[80] Weber, "The Social Psychology of the World Religions," p. 301.

[81] Weber, *ES*, p. 303.

[82] Weber, *ES*, p. 302.

[83] Weber, "The Meaning of 'Ethical Neutrality' in Sociology and Economics," pp. 23, 36; Weber, "'Objectivity' in Social Science and Social Policy," pp. 51–52, 68.

[84] Weber, *ES*, p. 929.

as being equivalent to 'group' leads to distortion."[85] A class is simply a factual, descriptive economic concept defined by the relationship of an individual to the means of production and the acquisition of commodities or, at best, a helpful heuristic economic ideal type.[86] Human behavior that is solely determined by class cannot account for meaningful, consistent value-oriented collective action. And the fact that class structure determines the distribution of economic power does not mean that it can also determine the distribution of political power.[87]

Weber considered that orthodox Marxism, by defining political groups in terms of prepolitical, economic class structures, treats the political as subordinate to the economic, reducing it to a mere mirror effect. Identities are supposed to be formed in the realm of material production only to be projected subsequently in the political sphere. In that case, the political amounts to nothing more than a mere stage upon which prefabricated roles are played out. By contrast, he argued, the "degree to which 'social action' and possibly associations emerge from the mass behavior of the members of a class is linked to *general cultural conditions*, especially to those of an intellectual sort."[88] Political identities look more like cultural products and less like objective, economic givens. For this reason he distinguished between groups defined by the possibility of acting collectively in the world according to, on the one hand, some evaluative norms and cultural interpretative tools that enable actors to meaningfully orient themselves in relation to the actions of other social actors and, on the other hand, material interests based on class structure that cannot account for concerted political action.[89] Because he assumed that collective identities constitute an intricate phenomenon (influenced by such variables as race, ethnicity, and nationality), he was not willing to accept a materialistic explanation that deduces political phenomena from the deeds of preconstituted economic actors.[90] For Weber, one should distinguish between the group and the class, political identity and class situation:

That men in the same class situation regularly react in mass actions to such tangible situations as economic ones in the direction of those interests that are most adequate to their average number is an important and after all simple fact for the understanding of historical events. However, this fact must not lead to that kind of pseudo-scientific

[85] Weber, *ES*, p. 930.
[86] Weber, *ES*, p. 937.
[87] Weber, *ES*, p. 43.
[88] Weber, *ES*, p. 929.
[89] Weber, *ES*, p. 23.
[90] Weber, *ES*, pp. 385–398.

operation with the concepts of class and class interests which is so frequent these days and which has found its most classic expression in the statement of a talented author, that the individual may be in error concerning his interests but that the class is infallible about its interests.[91]

Against the Marxist inclination that assumes the dominance of pure economic interests and precludes the operation of political or other noneconomic considerations, Weber asserted that the formation of collective subjectivities is possible only with the presence of symbolic representations and general interpretative frameworks that transform economic agents into conscious political actors capable of acting in concert according to shared substantive principles and axiological norms.[92] Thus, the political is the site where political identities are forged and individuals acquire the ability to rise above narrow class interests, to adopt a wider evaluative and ethical perspective, and to act in concert.[93] Outside the political field there is always the risk that they will relapse into the immediacy and meaninglessness of an atomized, material existence and fall back into private, economic life and the quest for the satisfaction of needs and self-interests.[94] This risk corresponds to Weber's notion of depoliticization.[95]

To Marx's class essentialism, he juxtaposed an alternative model of politics, according to which individuals become part of political groups and associations by virtue of a common understanding of honor and a shared sense of dignity.[96] Both honor and dignity, however, were for Weber cultural and historical constructions rather than objective, natural psychological predispositions. Politics is a quest for dignity, an assertion of identity first and then only secondarily an attempt to conquer the state and to realize one's interests through political means. As such, it cannot be separated from the symbolic realm and from a culturally shared sense of honor. For instance, if the members of the working class are experiencing certain practices and relationship as injurious, it is because they have internalized a substantive

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[91] Weber, *ES*, p. 930. Also, see Bourdieu, *In Other Words*, p. 129.

[92] For an astute discussion of the relationship between ideas and group formation, see Stephen Kalberg, "The Role of Ideal Interests in Max Weber's Comparative Historical Sociology," in Antonio and Glassman, *A Weber-Marx Dialogue*, pp. 47–48.

[93] Beetham, *Max Weber*, p. 225; Mommsen, *The Political and Social Theory of Max Weber*, pp. 58–59.

[94] Thornill, *Political Theory in Modern Germany*, p. 43.

[95] Hennis, *Max Weber*, pp. 181–183. This crucial aspect of Weber's theory of collective identity formation is lost in Catherine Brennan's otherwise incisive discussion of Weber's critique of class essentialism. Catherine Brennan, *Max Weber on Power and Social Stratification: An Interpretation and Critique*, Aldershot: Ashgate, 1997, pp. 144–145.

[96] Weber, *ES*, p. 934.

sense of what dignity is and of what can harm it. Resistance and revolt are not natural reactions. At best, social subordination and economic exploitation can lead to distress and dissatisfaction. But in order to link this natural, instinctual feeling of frustration with a particular sense of injustice, it must first be experienced as illegitimate and unjust. It must be viewed, in other words, as undeserved, imposed by a particular institutional and political order that has been created to benefit certain social groups to the detriment of others. The shift from an amorphous, inarticulate feeling of distress to concerted political action and to strategies of resistance requires value systems that endow individuals with the ability to translate the mere fact of their social subordination into political terms as unjust and, thus, as something that needs to be remedied by human action. By breaking with the objectivist assumption that political identities are always already constituted through a structural positioning in the economic realm, Weber viewed their formation as a political project, involving contingent, conflictual, and context-specific relations that unfold in the sphere of the symbolic.

Based on Weber's critical dialogue with Marxism, the political can be redefined as the central field where collective subjectivities are constructed and actors struggle for the determination of the dominant worldview that will enable individuals to identify with larger collectivities, distinguishable from others according to their substantive values, ethos, life-styles, and enemies. This identification enables individuals to act together in conformity with certain shared principles, a mutual sense of justice, shared political objectives, and common adversaries and to struggle together for the satisfaction of their sense of dignity and honor relatively free from prudential or instrumental considerations of expediency.[97] This passage from a disordered conglomeration of competing, self-interested individuals with distinct and antagonistic economic needs to a member of a broader ethical-political community, points to the symbolic and constitutive dimension of politics.

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[97] Scaff, *Fleeing the Iron Cage*, p. 159; Thornill, *Political Theory in Modern Germany*, p. 42.

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Charismatic Politics

Weber's critique of liberalism and Marxism is informed by an ambition to salvage the political from the tight grip of economic reductionism, instrumental rationality, and the normal politics of interest and utilitarian calculations. Although he never systematically spelled out this alternative wider concept of the political, he did claim that substantive values and symbolic meanings are more constitutive to the formation of political identities and to the shaping of collective action than interests are. He also argued that these values and meanings are themselves the outcome of prior symbolic struggles among charismatic movements and institutionalized organizations for the control of culture and the creation of beliefs and convictions that will directly influence the legitimate foundations of political authority – that is, the very sources of the exercise of political power. In what follows, I focus on these prior charismatic struggles over the control of symbolic power.[1] This emphasis on charismatic politics might help revisit and further explore Weber's famous claim that although, during normal times, "material and ideal interests directly govern men's conduct," in extraordinary moments "the world images that have been created by 'ideas' have, like switchmen, determined the tracks along which action has been pushed by the dynamic of interest."[2] My aim is to uncover and reconstruct the political, conflictual processes whereby a worldview becomes institutionalized after emerging victorious from a struggle with its rivals.

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[1] For the most systematic study of symbolic power, see Pierre Bourdieu, "The Social Institution of Symbolic Power" and "Symbolic Power and the Political Field," in Pierre Bourdieu, *Language and Symbolic Power*, trans. Gino Raymond and Matthew Adamson, introd. John B. Thompson, Cambridge, Mass.: Harvard University Press, 1991, pp. 105–161, 163–251; Bourdieu, *In other Words*, pp. 122–139.

[2] Weber, "The Social Psychology of the World Religions," p. 280.

The model of charismatic politics takes us to the origins of these world-views and imaginary significations that enable a variety of separate individuals to form a shared sense of honor, life-style, and dignity; to identify themselves as members of a distinct homogeneous political group, of a common 'we'; and to recognize or reject the validity of a system of political authority.[3] Although Weber acknowledged that collective identities may emerge evolutionarily and unintentionally through common historical memories and customs, narratives about a shared origin, and linguistic affinities, he also understood that by themselves all these factors, while they can explain the formation of wider national and ethnic territorial communities, can account neither for political differentiations within a bounded nation-state nor for the source of the validity of political authority.[4]

As it has been correctly argued, for Weber, "validity is intrinsic to charismatic assertion."[5] I build on this claim by starting with Weber's attempt to bring together the inexorable fact of domination with the existential search of meaning and the quest for legitimating one's position within a system of social stratification. The ineradicability of domination reveals the failure to achieve a complete identity between rulers and ruled, the privileged and the disadvantaged. The vision of a totally reconciled society without internal hierarchical divisions is a pure fiction. Power inequalities will always persist. Individuals will always occupy different power positions in society. Even though a modern national project (however democratic it is) may integrate, homogenize, and abolish some of these differences, it can never totally equalize or overcome them.

To understand how Weber related this ineradicable fact of domination with the legitimacy of political authority, I reexamine his historical studies of the sociology of prophetic world religions and his thesis on the evolution and rationalization of monotheistic religious doctrines. It is in these writings that one can find, though in an implicit, unsystematic fashion, Weber's description of charismatic politics consisting of competing religious movements striving to control their communities by challenging the existing dominant beliefs, representations, and institutions and seeking to create a new collective will before engaging in the transformation of the structure of political power. In these studies, along with analyzing the constitutive role of religious ideas in determining the ethical conduct of human behavior and thus in affecting social and economic relations, Weber also

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[3] Weber, *ES*, p. 389.
[4] Weber, *ES*, pp. 385–398, 921–926.
[5] Turner and Factor, *Max Weber: The Lawyer as Social Thinker*, p. 110.

investigated those symbolic practices, forms of collective mobilization, and hegemonic conflicts that give rise to a particular religious worldview that conditions the subjective orientations of actors and affects the cultural foundations and institutional configuration of political power. These investigations point to an alternative formulation of what charisma is, of its scope and consequences, its instituting dimension, and of its eminently political character.

Weber's historical and comparative studies on world religions consist of two distinct approaches. The first looks at the political conditions under which a worldview is formed and established against its rivals, whereas the second examines how, afterward, once victorious, it alters the established economic, social, and legal relations and structures. While the first approach focuses on the origins of religious discourses of legitimation, the second inquires as to their effects and how they act upon large-scale social changes, institutional-legal transformations, and economic innovations. The former concentrates on the *origins* of collective beliefs, whereas the latter looks at their far-reaching *consequences*.[6]

Weber distinguished between these two approaches in the opening paragraph of his sociology of religion. "The essence of religion," he declared, "is not even our concern, as we make it our task to study the *conditions* and *effects* of a particular type of social [i.e., religious] behavior."[7] Similarly, his investigations on ancient Judaism consist of a combination of an examination of religious innovators and founders with an analysis of the political relationships, organizational processes, and conflictual practices by which their visions and aspirations became the dominant orientation of the post-exilic priestly group, of the Jewish people at large, and of a new structure of political authority.[8] Likewise, in his study of Protestant ethics, he argued that "the *origin* and *history* of such ideas is much more complex than the theorists of the superstructure suppose. The spirit of capitalism, in the sense in which we are using the term, had to fight its way to supremacy against a whole world of hostile forces."[9]

To trace this struggle for supremacy, Weber introduced three interdependent variables: the material basis of social formations, the forms of social and political organization, and the inner development of religious

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[6] If in the one instance religious representations are treated as a dependent variable that itself needs to be explained, in the second case they are considered to be an independent, explanatory variable.

[7] Weber, *SR*, p. 1 (emphasis added).

[8] Weber, *AJ*. Also, see Bendix, *Max Weber: An Intellectual Biography*, p. 265.

[9] Weber, *PESC*, p. 56 (emphasis added).

beliefs.[10] Although most commentators have focused on the first (materialism) and third (idealism) as the main explanatory variable, Weber insisted also on the second, that is, on the constitutive importance of political organization and collective mobilization.[11] Against materialist and ideational explanations, he argued, "Countless historical circumstances, which cannot be reduced to any economic law, and are not susceptible of economic explanation of any sort, especially *purely political processes*, had to concur in order that the newly created Churches should survive at all."[12] In his investigations of the religious origins of capitalism, he explicitly declared that no explanation can be conclusive and convincing if it keeps ignoring the ways in which "*religious movements* have influenced the development of material culture. Only when this has been determined with reasonable accuracy can the attempt be made to estimate to what extent the historical development of modern culture can be attributed to those religious forces and to what extent to others."[13]

Religion, Ideology, and the Symbolic

Before turning to these charismatic movements, it is important to remember that for Weber religious worldviews were not simply ideologies – in Marx's sense of the term of distorted, inverted, or false representations of social reality.[14] Nor were they simply reflections of class interests.[15] For Weber, religions were historical constructions with their own inner logic and consistency and were relatively autonomous from material interests and class

[10] Weber, *PESC*, p. 91.

[11] Schluchter, *Paradoxes of Modernity*, pp. 117, 134–135, 176–178, 198. For the "materialist" reading of Weber, see Bryan S. Turner, *Weber and Islam: A Critical Study*, London: Routledge & Kegan Paul, 1974, pp. 8–9, 20–21, 75, 172. For the "idealist" reading, see Tenbruck, "The Problem of Thematic Unity in the Works of Max Weber," pp. 326, 328–330, 336–337, 342.

[12] Weber, *PESC*, p. 91 (emphasis added).

[13] Weber, *PESC*, p. 92 (emphasis added). Weber argued that the development of religious communities and movements have determined "the practical effect of the religion" on economic, social, and political structures. Weber, *SR*, p. 65. Also, in his vitriolic attack on Rudolf Stammler, he reiterated this point by arguing that it is not enough to combine a materialistic and an idealistic explanation. It is also necessary to mediate between these two levels of analysis through a third one: political processes and political organizations. See Max Weber, *Critique of Stammler*, trans. Guy Oakes, New York: Free Press, 1977, pp. 62–70, 86.

[14] Karl Marx, *The German Ideology: Part One*, ed. C. J. Arthur, New York: International Publishers, 1991, pp. 47–52.

[15] Marx and Engels, "Manifesto of the Communist Party," pp. 487, 489, 495.

structures.[16] Thus, he sharply disagreed with the anthropological critiques of religion, initiated by Ludwig Feuerbach and further developed by Karl Marx, who emphasized its illusionary and deceptive nature. As he emphatically put it, "It is not our thesis that the specific nature of a religion is a simple 'function' of the social situation of the stratum which appears as its characteristic bearer, or that it represents the stratum's 'ideology,' or that it is a 'reflection' of a stratum's material or ideal interest-situation."[17] For Weber, religion cannot be reduced to an ideological epiphenomenon, a sheer illusion deployed by the dominant classes in their efforts to consolidate politically their objective economic interests by indoctrinating the masses with false beliefs.[18] Religious beliefs do not represent cases of false consciousness. Nor do they simply mask the naked fact of economic exploitation. These beliefs are not only relatively independent from material interests and economic imperatives; they are also constitutive of the social and political world by providing an inescapable symbolic and cognitive framework for meaningful and consistent collective action.[19] A completely transparent society free from cultural meanings, representations, and imaginary significations is a fantasy. Society can never look at itself directly without the mediation of symbolic referents.[20] The opaqueness of the social precludes a complete coincidence of society with itself and impedes the formation of social relations outside a given cultural framework of collective values and symbols.[21]

Against these criticisms of religion as ideology, Weber counterposed a sophisticated interpretation of the existential nature of religion. Religion is a particular historical system of rationalized symbolic beliefs consisting

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[16] Weber, "The Social Psychology of the World Religions," p. 291; Weber, *SR*, p. 38. I thus strongly disagree with Bryan Turner's assertion that religion was for Weber the ideology of a particular class. Bryan S. Turner, *For Weber: Essays in the Sociology of Fate*, London: Routledge & Kegan Paul, 1981, p. 159.

[17] Weber, "The Social Psychology of the World Religions," pp. 269–270.

[18] Weber, "The Social Psychology of the World Religions," pp. 260–261.

[19] Weber, "The Social Psychology of the World Religions," pp. 286–287; Weber, "Religious Rejections of the World and Their Directions," p. 358; Weber, "'Objectivity' in Social Science and Social Policy," p. 81.

[20] Schluchter, *The Rise of Western Rationalism*, p. 35.

[21] The example of legal domination helps to clarify this point. Legal domination is based on the belief in the legality of law, according to which norms, if enacted according to the proper procedural rules, are general and impartial. This is the belief that legality and the rule of law limit discretion and arbitrariness. Even in this case of legitimacy *qua* legality, however, legal-rational legitimacy is still conditional upon the belief that formal equality, impersonal rule, and abstract procedural fairness represent or embody deeper normative values. As such, this belief cannot be separated from a particular set of values and meanings from which legality obtains its legitimacy.

of a meaningful transcendental explanation of human life, accompanied by certain, very specific, ethical regulations and moral norms. It is a meaning-giving discourse that shapes the evaluative attitude and ethical orientation of its adherents.[22] More importantly, religion responds to some fundamental and genuine "religious needs" as well as to the perennial "emotional needs of the masses."[23] It enables social actors to make sense of the arbitrariness and irrationality of the world by instilling within their otherwise meaningless experiences a sense of identity, purpose, orientation, and consistency. In a revealing passage Weber argued that one important source of religious beliefs "is intellectualism" and "the metaphysical needs of the human mind as it is driven to reflect on ethical and religious questions, driven not by material need but by an inner compulsion to understand the world as a meaningful cosmos and to take up a position toward the world."[24] Here, religion is approached as a quasi-autonomous symbolic system, one among many, with an intrinsic logic and a rational ordering, that prevailed in premodern societies by occupying the entire symbolic field.[25] Thus, apart from its unique metaphysical traits, religion is simply another type – based on transcendental assumptions – of symbolic discourse that endows reality with meaning and tries to answer the enduring questions regarding the origins, causes, direction, and ends of human life.

This critique of the concept of religion as ideology also appears in Weber's rejection of Nietzsche's theory of *ressentiment*. For Nietzsche, famously, social subordination feeds the will of revenge of the subjugated classes and, quite often, takes the form of religious doctrines of guilt and punishment directed against their masters.[26] For Weber, however, religions are not the result of a slave revolt in morality. His disagreement with Nietzsche regarding resentment as the essence of religion reveals several substantial differences, which are relevant for his theory of charisma. First, contrary to Nietzsche, Weber did not think that the mere fact of subordination directly and automatically generates feelings of vengeance. There is nothing in domination itself that can account for resentment. Historical experience, according to Weber, shows that the normal state of affairs has been quite different. The disadvantaged and dispossessed masses are more prone to accept

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[22] Weber, *SR*, p. 59.

[23] Weber, "The Social Psychology of the World Religions," p. 270; Weber, *ES*, p. 1176.

[24] Weber, *SR*, p. 117.

[25] For the concept of the religious field, see Pierre Bourdieu, "Gènese et structure du champ religieux," *Revue française de sociologie*, 12:3 (1971), pp. 295–334.

[26] Friedrich Nietzsche, *On the Genealogy of Morality*, ed. Keith Ansell-Pearson, Cambridge: Cambridge University Press, 1994.

passively their subordinate position, either as a consequence of a natural and unquestionable order or as a result of some previous personal mistakes and individual choices.[27] Thus, the norm is obedience and resignation rather than the will for revenge and retribution. What Nietzsche missed is the intermediary symbolic level of worldviews, which, located between social stratification and subjective feelings, shape and dispose the behavior and views of the subordinated masses. For Weber, "'From what' and 'for what' one wished to be redeemed and, let us not forget, 'could be' redeemed, depended upon one's image of the world."[28]

Moreover, Nietzsche attributed the historical force of religion to an unholy alliance between the priests and the subjugated classes.[29] It is the priests, who in their struggle against the warrior and aristocratic ruling strata, seek to mobilize the repressed and to exploit their distress in order to seize power.[30] In Weber's account, however, religious hegemony is not exclusively based on a prudential alliance between the priests and the ruled. Nietzsche failed to distinguish between spontaneous, noninstitutionalized religious groups and institutionalized religious organizations with which the official priestly associations could claim monopoly over the realm of the sacred. Contrary to Nietzsche, Weber understood the religious sphere as a plural and contested terrain upon which a plurality of movements and organizations struggle for the control of the legitimate collective meanings.[31]

Such is the case, for example, when religious charismatic movements, which are opposed to the priests and their established hierocratic powers, undertake to challenge the prevailing values and beliefs and to subvert the dominant institutionalized religious worldview and its ethical imperatives.[32] In all of Weber's writings on religion, the priests appear as part of the *instituted* reality. They control the interpretation of holy texts, they administer religious symbols, they distribute grace, and they regulate the realm of the sacred. Because of these properties, organized religion protects the prevailing value system and substantially contributes to the reproduction of the

[27] Weber, *ES*, p. 953.
[28] Weber, "The Social Psychology of the World Religions," p. 280.
[29] Nietzsche, *On the Genealogy of Morality*, pp. 18–21; Weber, "The Social Psychology of the World Religions," pp. 270, 277. In the case of Christianity, for example, Weber claimed that, "There was no 'proletarian instincts' in the doctrine and teachings of Jesus." Similarly, he asserted that Buddhism represents an explicit religious rejection of resentment, challenging Nietzsche's theory. Weber, *SR*, p. 116.
[30] Friedrich Nietzsche, *The Anti-Christ*, trans. R. J. Hollingdale, London: Penguin Books, 1990, pp. 151–152, 180.
[31] Weber, *AJ*, pp. 282–281, 284–285.
[32] Weber, "Religious Rejections of the World and Their Directions," p. 328.

established structure of political power and social hierarchy.[33] For Weber, religious charismatic movements are rivals to the entrenched interests of the priests. It was the struggle for hegemony between charismatic religious movements and the hierarchical structure of the organized priesthood that explains the evolution and rationalization of religion and the radical alteration of historical-social formations. While the ruling bloc and its priestly protobureaucratic church organizations strive to defend its sovereign right of command, charismatic challengers seek to delegitimate the inherited world in order to establish a new structure of authority and a new claim to validity. In this battle, religious movements rely on the *instituting* power of charisma to challenge the *instituted* powers of priestly office and weaken its ethical and symbolic control over the repressed masses.[34]

Finally, in opposition to Nietzsche's depiction of the ruling class of the warriors as immune from any need to justify its privileges and superiority (because such a need would be an implicit recognition of its dependence on the subaltern classes), Weber was keen enough to observe that no dominant group could ever dispense with the necessity of converting factual to valid power.[35] This necessity does not denote a purely instrumental strategy of mystification aiming at deceiving the ruled. It indicates the rulers' inner need to justify first of all to themselves their superior position of authority in order to believe in the rightness of their privileges.[36] This need for self-justification is a concrete expression of the broader quest for meaning and consistency rather than a mere political tool of domination and repression. "The fortunate," Weber maintained, "is seldom satisfied with the fact of being fortunate. Beyond this, he needs to know that he has a *right* to his good fortune. He wants to be convinced that he 'deserves' it, and above all, that he deserves it in comparison with others."[37] What is of particular interest in the context of this discussion is that Weber, in his refutation of Nietzsche, stressed the crucial role religious representations played in traditional societies in generating and protecting the beliefs in this legitimacy. Rather than seeking salvation from suffering and oppression, the rulers "assign to religion the primary function of legitimizing their own life pattern and situation in the world."[38] But because they do not have access to the symbolic foundations of power and thus cannot produce and disseminate

[33] Weber, *SR*, pp. 27–31.
[34] Weber, *AJ*, pp. 271–276.
[35] Nietzsche, *The Anti-Christ*, p. 190; Weber, *ES*, pp. 945, 948.
[36] Weber, *ES*, p. 953.
[37] Weber, "The Social Psychology of the World Religions," p. 271.
[38] Weber, *SR*, p. 107.

this belief by themselves, they need to rely on the symbolic monopoly of the priests: "If the general term 'fortune' covers all the 'good' of honor, power, possession, and pleasure, it is the most general formula for the service of legitimation, which religion has had to accomplish for the external and the inner interests of all ruling men, the propertied, the victorious, and the healthy. In short, religion provides the theodicy of good fortune for those who are fortunate."[39]

As Bourdieu has correctly observed, for Weber, "Religion has also social functions in so far as the laity expects justification of their existence as occupants of a particular position in the social structure."[40] In a postreligious age, this search for meaning takes the specific form of the pursuit of political legitimacy. Weber advanced this argument when he discussed the problem of legitimacy in modern, secular Western societies. Legitimacy plays exactly the same role of religious justification, especially when religious symbolic significations no longer have political relevance in modern times. Despite this important difference between traditional and modern societies, Weber insisted that even today,

[f]or domination, this kind of justification of its legitimacy is much more than a matter of theoretical or philosophical speculation; it rather constitutes the basis of very real differences in the empirical structure of domination. The reason for this fact lies in the generally observable need of any power, or even of any advantage of life, to justify itself. . . . Simply observation shows that in every such situation he who is more favored feels the never ceasing need to look upon his position as in some way "legitimate," upon his advantage as "deserved," and the other's disadvantages as being brought about by the latter's "fault."[41]

Domination, Legitimacy, and Charismatic Politics

In order to address the problem of legitimation properly, one needs to shift the level of analysis from politics as usual and examine the underlying antagonisms and conflicts among a plurality of groups and organizations over the control of the symbolic and cultural power that antedate and condition the establishment of a stable legitimate order. From these extraordinary struggles, it is likely that a particular worldview will emerge that provides the symbolic and axiological foundations of a new form of political authority.

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[39] Weber, "The Social Psychology of the World Religions," p. 271.
[40] Pierre Bourdieu, "Legitimation and Structured Interests in Weber's Sociology of Religion," in Whimster and Lash, *Max Weber: Rationality and Modernity*, p. 124.
[41] Weber, *ES*, p. 953.

In what follows, I attempt to reconstruct this antecedent form of founding charismatic politics from Weber's writings on religion.

Imagine as the starting point a stable system of legitimate authority, social stratification, and economic inequality, sanctified by an institutionalized worldview and guarded by an official hierocratic association. The stability and continuity of this order depend on the enduring belief of the subordinated masses in its validity and normativity. Political domination and its supporting institutional and juridical structures must be seen as exemplary, and obedience must be experienced as obligatory and just, according to the prevailing symbolic values and substantive meanings. The sovereign power to command must be regarded as rightful and the laws recognized as binding and legitimate. The task of producing and disseminating these values and meanings falls upon priestly hierocratic organizations whose goal is to provide the established political structure of authority with the "power of legitimation" as they constitute an "incomparable means of domesticating the subjects."[42] At the same time, however, political domination, hierarchical and asymmetrical relations of power, and economic inequality are far from being eliminated. They are simply believed to be valid and just, as parts of a broader fair and equitable moral order.

But the sheer existence of subordination, according to Weber, always breeds inarticulate feelings of dissatisfaction, distress, and suffering. Although these feelings do not have to lead to resentment and hate, they contain a potential subterranean aspiration for redemption and liberation that can remain dormant as long as the instituted order continues to appear morally consistent and meaningful. No instituted order, however legitimate it may appear at one particularly historical period, can extinguish these feelings. It can only try to minimize and neutralize their consequences or to sublimate them, so that they will not influence the action and views of the repressed and will not subvert their allegiance to the existing order. The moment of total closure and perfect stability never arrives. Absolute legitimation is impossible.[43] Notwithstanding the ambition of the rulers to safeguard their supremacy, there will always be space for new contestations, struggles, and counterhegemonic forces that will try to respond to these ineradicable and unarticulated feelings of disquiet and anguish.

Especially in times of tension, such as political crisis, war, economic disruptions, and geopolitical changes, where widespread insecurity and

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[42] Weber, *ES*, p. 1176; Bourdieu, "Legitimation and Structured Interests in Weber's Sociology of Religion," p. 125.

[43] Bourdieu, "Social Space and Symbolic Power," in *In Other Words*, p. 137.

dislocation arise, these feelings will make the subjected masses more atten-
tive and prone to promises of change and emancipation and more receptive
to rival visions of the world and alternative ethical doctrines, expounded by
prophetic charismatic leaders.[44] Weber mentions sudden transformations of
the economic structure of rural economies that disrupt the lives of peasants,
pressures from foreign powers, the threatening appearance of neighboring
empires, the formation and expansion of cities and of an urban middle class,
the intestine fights within the ruling bloc, or a large-scale military failure.
Under these circumstances, the normative and symbolic foundations of polit-
ical authority can potentially be disturbed, its claim to validity weakened,
and its legitimacy undermined.[45]

It is during these exceptional moments of tension and insecurity, and
against the dominant symbolic representations, that prophets may appear
with the aspiration to assume the control of their community against the
existing power bloc. By virtue of a personal call and of some charismatic
qualities, they will proclaim a new set of values, an original ethical doctrine,
and a new substantive vision of the world, seeking to respond to the growing
fears and distress of the masses and to capitalize on their shaky but grad-
ually increasing disillusionment vis-à-vis the established authority.[46] They
will do so, however, not by preaching salvation through contemplation,
mysticism, and retreat from the world. Weber distinguished between two
forms of prophetic answer to the need of redemption: emissary and exem-
plary prophecy. The second version is apolitical because it abstains from
relating the quest of salvation to the transformation of the inherited reality,
the formation of movements, and the subversion of the established struc-
ture of domination. By contrast, emissary ethical prophecy encourages an
active inner-worldly asceticism that relates the quest for redemption to the
regulation of social conduct in the world, to collective mobilization, and
to the radical transformation of the established order, which, once seen
as a cause of suffering and distress, begins gradually to lose its aura of
legitimacy.[47] This prophetic dimension of emissary world religions fasci-
nated Weber because their promises of salvation are intimately related with
the profane sphere of human affairs.[48] And along with the existential and
profoundly humane need for meaning, he also focused on the search for

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[44] Weber, *ES*, p. 1112.
[45] Weber, *AJ*, pp. 269–270.
[46] Weber, "The Social Psychology of the World Religions," p. 273.
[47] Weber, "Religious Rejections of the World and Their Directions," p. 340.
[48] Weber, "The Social Psychology of the World Religions," p. 267.

redemption from political distress – a quest that in premodern societies was mainly provided by prophetic religious discourses.[49]

Relying on an unthematized but spreading dissatisfaction, emissary prophets seek to win followers among the laity by directly challenging the symbolic monopoly of organized hierocratic organizations. While fighting for the spiritual control of the masses, prophets know that their works and teachings cannot endure without building a relatively stable community of followers, a congregation – that is, a new collective subjectivity – to assist them in turning their personal teachings into the way of life of an expanding group, formed around a substantive, ethical value system.[50] According to Weber, the power position of ethical, emissary prophets depends on their ability to convince lay followers of the validity of their enunciations.[51] Although he saw as more frequent "the injection of a new content into social actions and rational associations as a result of individual invention and its subsequent spread through imitation and selection," he never maintained that charismatic individuals could carry this project by themselves.[52] Thus, while it is true that for Weber the emancipatory content of religion originated in the redemptive teachings of exceptional individuals, it quickly had to take the form of a charismatic movement.[53] Prophets have to rely on the devotion of their followers and sympathizers. If successful in creating a movement and a new collective subject, the prophets win permanent disciples as well as adherents who will support them occasionally.

A religious charismatic movement develops only when the prophets' personal mediation of divine grace becomes the function of a quasi-permanent charismatic community, based on an ethic of an absolute end, vertical relations of equality and reciprocity, the relative lack of firm structures of command and obedience, a substantive common cultural identity, and the suppression of internal differentiations among members.[54] This moment of charismatic politics has been described by Bourdieu as "the power of constitution," that is, the symbolic power to constitute or make groups.[55] For

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[49] Weber, "The Social Psychology of the World Religions," pp. 274, 273. Also, see Michael Walzer, "The Prophet as Social Critic," in *Interpretation and Social Criticism*, Cambridge, Mass.: Harvard University Press, 1987, pp. 67–94.

[50] Bourdieu, "Legitimation and Structured Interests in Weber's Sociology of Religion," in Whimster and Lash, *Max Weber: Rationality and Modernity*, p. 127.

[51] Weber, *SR*, p. 66.

[52] Weber, *ES*, p. 755.

[53] Weber, *SR*, pp. 60–79; Weber, *ES*, pp. 760–761, 767–770.

[54] Weber, *ES*, p. 243.

[55] Bourdieu, "Social Space and Symbolic Power," pp. 137–139; Bourdieu, "Social Space and the Genesis of 'Classes,'" in *Language and Symbolic Power*, pp. 229–251.

instance, one of the most decisive factors that has determined the impact of radical Protestantism on modern Occidental history and particularly on the rise of capitalism was, according to Weber, "the social organizational basis of Protestant sectarianism with all its ramifications," rather than the autonomous development of ideas.[56] Religious ideas and ethical norms of conduct spread only when they are supported by the politics of charismatic communities that seek to diffuse them to the entire society.

Once formed, the primary function of a charismatic movement is to disseminate a new worldview able to delegitimize the established authority by condemning its injustices and abuses according to some novel higher normative principles. Because the delegitimation of an established system of domination does not flow naturally from the fact of subordination and exploitation, charismatic movements have to generate and propagate values that will enable the suppressed classes to view this system as wrong, unethical, and unjustifiable. Thus, while the ruling class relies on the organized and routinized symbolic power of the priests to legitimize its own superiority and privileges, the masses are more inclined to be attracted by the charismatic movements and their redemptory discourses. The experience of dissatisfaction and distress emanating from the fact of social inequality and political subordination provides the foil for the rise of charismatic movements in their struggle against the established structure of authority.

The key strategy in these confrontations is to subvert solidified structures of domination by attacking their symbolic and motivational foundations and by disrupting the ethical and axiological presuppositions of their legitimation discourses in order to weaken the sources of internal obedience and tacit consent upon which the existing social order is based. This approach also highlights the fact that behind any form of legitimacy there is a substantive core of social representations, values, and ethical beliefs. In order to succeed in its delegitimating project, a charismatic movement has to launch a counterhegemonic, cultural attack against the dominant worldview. Its aim is to weaken and disqualify the validity of the instituted reality by generating a value system that, in the form of a redemptive future free from the afflictions of the present, could respond to the "problem of unjust suffering" and provide the solution "of a just compensation for the unequal distribution of individual happiness in the world."[57] The primary goal of charismatic movements is immanently political, but it is promoted via the

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[56] Weber, "The Protestant Sects and the Spirit of Capitalism," in Gerth and Mills, *From Max Weber*, p. 313.

[57] Weber, "Religious Rejections of the World and Their Directions," p. 353.

symbolic-religious field: it is to delegitimate – by exposing the normative deficit and moral arbitrariness – the symbolic, political, and legal arrangements that other movements and forces were previously able to establish. The realization of this aim can succeed through not only the emergence of a more appealing vision of an alternative organization of society but also the development and dissemination of more systematic, abstract, and rationalized doctrines and value systems that could appeal to broader popular strata and better address their existential need for meaning and redemption.

In this hegemonic struggle, charismatic movements seek to extend the scope of the influence of their doctrines in order "to resolve the conflicts between classes and to produce a new sacred law of eternal validity."[58] This step toward the genuine refoundation of the established order is crucial. Weber emphasized this hegemonic dimension of charismatic politics that neither restricts itself to winning the support of some subordinated classes nor aspires to create artificial, tactical alliances among different sectors of the population. The primary strategy of charismatic movements striving to (re)found political authority is the creation of a broader, organic collective will with a common view of the world and a common concept of the good.[59] "Charisma," Weber declared, "is not confined to membership in any particular class."[60] For this reason, he vehemently rejected those theories that view religious movements as class movements.[61] A charismatic movement, because it is not limited to a particular class but rather seeks to expand its influence over the entire social space, "cuts vertically through all strata" and aspires to regulate the practical conduct of the entire population.[62] Its ethical doctrine and worldview must be inclusive, accepted, and internalized by the greatest possible number of individuals and groups, irrespectively of their class positions, personal faith, economic interests, and previous political allegiances.

How does this hegemonic struggle take place? In answering this question, Weber brought together his model of extraordinary politics, the process of rationalization, and the evolution of social and cultural formations. In their effort to control the symbolic realm and to monopolize symbolic power, charismatic movements struggle against both competing charismatic movements and established religious organizations that control the sacred and

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[58] Weber, *SR*, p. 50.
[59] Schluchter, *Paradoxes of Modernity*, pp. 142, 226, 228–229, 231–232.
[60] Weber, *SR*, p. 101.
[61] Weber, *ES*, p. 1180; Weber, *AJ*, p. 277.
[62] Weber, *ES*, p. 1180.

administer the distribution of grace in a given system of political domination. The more this struggle intensifies, the more systematic, inclusive, rational, and abstract the rival worldviews will become in order to appeal to broader segments of society. Movements that cannot further systematize and elevate their worldviews will either wither away or be drawn into the orbit of the most powerful and successful ones to finally become part of them. In a word, a worldview becomes successful when it is capable of responding to the distress of the subaltern masses and gratifying their need of redemption by elaborating a meaningful, consistent, and more rational and coherent alternative vision of reality that could provide concrete orientation and a cogent sense in social life.[63] While aspiring to expose the normative deficit and moral arbitrariness of the existing order, charismatic movements have to rationalize and systematize their alternative views of the world to make them more appealing to the various needs of the ruled.

This gradual process of rationalization explains why religious discourses, while struggling for supremacy, had to become more abstract, rational, and universalistic in order to include as many heterogeneous individuals and groups as possible.[64] To gain the spiritual control of society, charisma moves "in the direction of a universal brotherhood, which goes beyond all the barriers of societal organizations."[65] In a similar vein, "Periods of strong prophetic or reformist religious agitation have frequently pulled the nobility in particular into the path of prophetic ethical religion, because this type of religion breaks through all classes and estates."[66] Religious worldviews must become as inclusive as possible and this requires them to broaden the scope of their emancipatory promises and to deepen the reach of their influence. Weber described this hegemonic struggle for influence and broad inclusion as a "tendency toward universalization."[67] This tendency became a central component of his thesis about the gradual rationalization of Western civilization. At times, he even hinted at what might be the most successful

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[63] Bourdieu has closely examined Weber's model of the competition for religious power, which owns its specificity "to the fact that what is at stake is the *monopoly of the legitimate exercise of the power to modify, in a deep and lasting fashion, the practice and world-view of lay people,* by imposing on and inculcating in them a particular *religious habitus.* By this I mean a lasting, generalized, and transposable disposition to act and think in conformity with the principles of a (quasi-)systematic view of the world and human existence." Bourdieu, "Legitimation and Structured Interests in Weber's Sociology of Religion," p. 126.

[64] Weber, "The Social Psychology of the World Religions," pp. 293–294.

[65] Weber, "Religious Rejections of the World and Their Directions," p. 330.

[66] Weber, *SR*, p. 86.

[67] Weber, *SR*, p. 23.

hegemonic strategy, which consists not so much in excluding one's rivals but rather in assimilating them within a new, wider symbolic master referent. In the case of pagan idolatries, he argued that the new monotheistic religions emerged not by destroying their antagonists but by devising symbolic systems capable of integrating them.[68]

From this struggle for the control of the symbolic realm, Weber elaborated a theory of historical alterity and cultural change according to which symbolic discourses and value systems evolve and develop during their mutual rivalry. In their effort to surpass each other and to win the support of the broader masses, charismatic movements elaborate more abstract and coherent worldviews. Weber formalized this dynamic in a succinct statement: "the highest ideals, which move us most forcefully, are always formed only in the struggle with other ideals which are just as sacred to others as ours are to us."[69] Because the masses are not passive and malleable enough to be lured by any kind of religious teaching, charismatic movements have to devise more rational, inclusive, and thus enticing religious worldviews. The masses have some genuine needs and their quest for liberation from the deprivations and inequalities of the instituted world is particularly strong, especially after being awakened by the charismatic prophetic movements. For this reason, charismatic movements have to constantly adapt the content of their redemptory messages to the needs and emancipatory aspirations of the multitude.[70] In addition, they have to "penetrate into social life in very different ways" and to regulate as many social relations as possible, public and private alike, according to a consistent and coherent set of ethical norms.[71]

The most crucial moment in this hegemonic struggle is the attempt to "organize practical behavior into a direction of life, regardless of the form it may assume in any individual case."[72] Charismatic movements, in their effort to break the symbolic grip the organized priesthood exercises over the masses, have to rely mostly on their charismatic power to effect the internal and ethical reorientation of their followers. Weber, time and again, discussed this unique extraordinary psychological power of *metanoia* and its "revolutionary consequences from within."[73] Charismatic politics "revolutionizes men 'from within' and shapes material and social conditions according to

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[68] Weber, *SR*, p. 39; Weber, *PESC*, p. 125; Schluchter, *Paradoxes of Modernity*, pp. 211–212.
[69] Weber, "'Objectivity' in Social Science and Social Policy," p. 57.
[70] Weber, *SR*, p. 102.
[71] Weber, *SR*, p. 209; Weber, *PESC*, p. 36.
[72] Weber, *SR*, p. 59.
[73] Weber, *SR*, p. 209.

its revolutionary will."[74] By propagating new ethical maxims, a successful charismatic movement seeks to "break[s] through the stereotypization of individual norms in order to bring about a meaningful total relationship of the pattern of life to the goal of religious salvation" that will also enable various groups and classes to identify themselves as members of a broader homogeneous ethical community and to act in concert.[75] What ultimately decides the outcome of the struggle between *instituting* movements and *instituted* organizational structures is whether a charismatic movement is successful in effecting an extensive axiological turn of the masses, reconciling religious motivations with practical life, and defining the content and orientation of ethical conduct of its members according to its worldview.[76]

At the end of this struggle for symbolic and cultural control, few possibilities remain available. Either a charismatic movement will successfully displace the previous priestly class to (re)found the symbolic sources of political authority according to their proclaimed values, or it may fail to win the recognition of the masses and thus fail to overthrow the existing configuration of power, culture, and authority, or finally it may seek a compromise. Similarly, "the priesthood might compromise with the new policy, surpass its doctrine, or conquer it, unless it were subjugated itself."[77] In either case, "the priesthood had to assume the obligation of codifying either the victorious new doctrine or the old doctrine, which had maintained itself despite an attack by the doctrine."[78] In the case where the new charismatic movement prevails, a lengthy revolutionary change follows, not only in the realm of beliefs and practices but also in the realm of legal, political, and social institutions.

In the case of law, for instance, Weber was well aware that any genuine legal innovation rests on the instituting power of charisma and presupposes the existence of a stable and inclusive worldview. Radical legal foundings depend upon previous symbolic struggles among charismatic movements and hierocratic organizations. Against a purely formal juridical approach that focuses exclusively on the internal coherence and logical consistency of the law, Weber maintained that "the really decisive element," of original law transformation "has always been *a new line of conduct* which then results either in a change of the meaning of existing rules of law or in the creation

74 Weber, *ES*, p. 1116.
75 Weber, *SR*, p. 209.
76 Weber, *PESC*, p. 97; Weber, "The Social Psychology of World Religions," p. 287.
77 Weber, *SR*, pp. 66–67.
78 Weber, *SR*, p. 67.

of new rules of law."[79] Real juridical creation leans on a web of extralegal substantive axiological meanings and imaginary significations established by the victorious charismatic movement after a protracted symbolic struggle.

Once victorious, the movement will seek to fortify its newly acquired powers by controlling the realm of the symbolic through the strict regulation of charisma and the establishment of a bureaucratic structure to monopolize the administration of the new central collective representations. During these critical moments the "political boundaries and the geographical extension of a religion tend to coincide. . . . The triumph of one's own god is the definitive confirmation of the ruler's triumph, an effective guarantee of political obedience, and a means of turning allegiance away from other rulers."[80] Charismatic religious movements gradually transform themselves into a novel institutionalized priestly association with new rituals, sacramental practices, interpretations, and hierocratic routines. "Charisma," Weber wrote, "is a phenomenon typical of prophetic movements or of *expansive political movements* in their early stages. But as soon as domination is well established, and above all as control over large masses of people exists, it gives away to the forces of everyday routine."[81]

Here it is not necessary to present the different forms and processes of the routinization of charisma and charismatic movements.[82] Suffice it to say that for Weber institutional structures represent a materialization, transmutation, and stabilization of charisma.[83] Subsequently, the newly established priestly association will be "directed against the rise of competing powers" and against future charismatic occurrences.[84] The routinization of the victorious charismatic movement becomes inimical to the unbounded and disrupting powers of the instituting charisma and its most uncompromised foe. It is ultimately "the striving for security" that turns charismatic movements from a subversive, instituting revolutionary force to a powerful organization through the regulation of the ethical behavior of the masses and the internal control of individuals.[85] At this stage, newly institutionalized churches turn against their past charismatic origins and abdicate the founding and creative powers of charismatic interventions. This development indicates that "charismatic revolutions" are over and new charismatic

[79] Weber, *ES*, p. 755.
[80] Weber, *ES*, p. 1174.
[81] Weber, *ES*, p. 252 (emphasis added).
[82] Weber, *ES*, pp. 246–254, 1121–1156.
[83] Weber, *ES*, p. 714.
[84] Weber, *ES*, p. 1165.
[85] Weber, *ES*, pp. 252, 1176.

interventions will now be regarded as hostile to the newly founded political authority.[86] "Now, if a religious community emerges in the wake of a prophesy or of a propaganda of a savior, the control of regular conduct first falls into the hands of the charismatically qualified successors, pupils, disciples of the prophet or of the savior. Later, under certain very regularly recurrent conditions, which we shall not deal with here, this task falls into the hands of a priestly, hereditary, or official hierocracy."[87]

The victorious worldview will rebuke aspiring prophets and movements as heretics and enemies of the new order.[88] Thus, the struggle between charismatic movements and priestly associations is a struggle between the *instituting* and the *preserving* dimensions of charisma, between living-active and frozen-routinized charisma, or between what Bourdieu, following Weber, describes as the conflict between "conservation strategies" and "subversion strategies," that is, between the defense of "orthodoxy" and the strategies of "heresy."[89] To prevent the emergence of other charismatic movements, the victorious religious community will transform itself into a permanent structure of domination and an ossified hierarchy and will elevate its system of beliefs into an official doctrine able to appear as natural and fixed, permeating the main social institutions, such as law, education, family, morality, art, the state, and the economy. Once the new foundations have been consolidated, this transformation signifies the closure of extraordinary politics and the beginning of normal, everyday politics.[90]

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[86] For this reason, Weber defined the hierocratic, priestly association as the "bearer and trustee of an office charisma" and the church as "the charisma of office." Weber, *ES*, pp. 1164, 1140.

[87] Weber, "Religious Rejections of the World and Their Directions," pp. 328–329.

[88] Weber, *ES*, pp. 1165.

[89] Bourdieu, "Some Properties of Fields," p. 73.

[90] Weber, *ES*, p. 1165.

3

Disavowing Charismatic Politics

More than simply the heroic, supernatural properties of its leader, what makes a movement charismatic is mainly its ability to change the value system and ethical attitudes of its followers and supporters, to delegitimate the symbolic and normative foundation of the established political authority, to generate a new legitimation discourse, and to form a new collective will. In addition, it must relate the radical transformation of the instituted political and legal order with some emancipatory promises for the alleviation of the distress and suffering that the subordinated masses have experienced in the previous system of social organization.[1]

Nowhere in his political studies, however, did Weber apply this model of charismatic politics to secular foundings. Nor did he refer to charismatic movements as modern instituting forces. And, most clearly, he abstained from systematically investigating the relationship of charismatic politics and democratic foundations, although in his later writings he did allude to certain affinities between charisma and democratic legitimacy. These omissions are puzzling. Equally surprising is the emphasis on the exceptional charismatic president and the heroic political demagogue as the only viable embodiments of charisma in liberal constitutional states. Most curiously, charisma, even in this personalistic version, is divested of its creative potentialities to be integrated into normal politics as part of the established constitutional order. The plebiscitarian Caesarist president of the Reich is neither a founder nor a legislator, but simply an institutional means for counterbalancing legal formalism, bureaucratic rule, instrumental rationality, weak parliaments, and the politics of interests. What led Weber to abandon this

[1] Vincent, *Max Weber ou la démocratie inachevée*, p. 78.

hegemonic, instituting form of politics? Why did he prefer the heroic individual instead of charismatic groups? Why is charisma treated only as an element of ordinary politics and not as an extraordinary founding force of new orders?

A first, tentative answer can be extracted from Weber's understanding of modernity. It may be that he thought that the withering away of religion in modern secular times has fatally affected the possibility of charismatic movements.[2] Religious doctrines have lost their symbolic social appeal and are thus unable to influence the beliefs, actions, and ethical orientations of individuals and groups. His famous thesis about the "disenchantment" of the Occidental world can be interpreted as the exhaustion of religious motifs and the gradual retreat of the sacred from human affairs.[3] Modernity represents the Pyrrhic triumph of the secular over the religious.[4] Weber described this historical trend as "the mutual strangeness of religion and politics."[5] The rationalization of Western culture, brought by science and modern capitalism, means, among other things, that "there are no mysterious incalculable forces that come into play" and consequently "one can in principle, master all things by calculation. This means that the world is disenchanted. One needs no longer to have recourse to magical means in order to master or implore spirits, as did the savage, for whom such mysterious powers existed. Technical means and calculations perform this service."[6] Relying on his analysis of the world-historical tendency toward disenchantment and secularization, Weber suggested that the "practical importance of such movements for the sphere of culture was greater in the past than now."[7]

To illustrate this claim, he referred to many examples of social stratification that demonstrate the weakening of religion. For one thing, the modern proletariat has become antireligious. Religious worldviews no longer satisfy its aspirations for liberation and redemption from economic exploitation and political subordination.[8] Similarly, the ruling groups are hostile to religious discourses, partially because they are aware of the potentially disruptive effects of a religious revival.[9] Finally, modern intellectuals are far

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[2] Weber, "The Protestant Sects and the Spirit of Capitalism," p. 307.

[3] Weber, *PESC*, p. 181.

[4] Weber, "The Protestant Sects and the Spirit of Capitalism," p. 311.

[5] Weber, "Religious Rejections of the World and Their Directions," p. 335.

[6] Weber, "Science as Vocation," p. 139.

[7] Weber, *SR*, p. 136.

[8] Weber, *SR*, p. 100.

[9] Weber, *SR*, pp. 136–137.

more removed from any religious interest.[10] More likely, academic prophesies "will create only fanatical sects but never a genuine community."[11] The dissipation of the belief in some external transcendental sources of authority from the secular Western imagination led Weber to define modernity as a "godless and prophetless" age and to warn his contemporaries that "the prophet for whom so many of our younger generation yearn simply does not exist."[12]

Despite this insistence on the death of religion, and independently of the historical and factual correctness of this assessment, Weber's effort to link the decline of religion and the modern obsoleteness of charisma is inconclusive and unconvincing. For one thing, Weber distinguished between "the charismatic age" and "the prophetic age," "political charisma" and "magic charisma," implying that although today prophets may no longer appear because of the withdrawal of religion, heroic leaders are still in great demand.[13] Ultimately, he opted for charisma and the charismatic leader. In his last political writings, he directly pleaded for the need of a new charismatic individual able to resist the tendency toward a soulless disciplinary society. It is more probable, therefore, that his reflections on modern secular societies point to the anachronism of collective charisma and not of charisma as such. But if this is what he meant, it is still unclear why he argued that the process of dedivinization affects only charismatic movements and not charismatic individuals.

A reason might be the evaporation of meaning brought about by the process of secularization. Besides the decline of religion, modernity is also dangerously senseless. In that case, the vanishing of meaning from modern, industrial societies could mean the weakening of the symbolic realm in favor of a constantly growing meaningless materialism and instrumental rationalism.[14] Scientific reason and economic instrumental action have led to "a loss of the soul" and to the "spiritual proletarization" of the broader masses.[15] If such is the case, it is more realistic to expect that only a few exceptionally endowed individuals would be able to generate original meanings and values rather than the many who often experience their lives as a constant struggle for material survival and who, besides a concern for "material goods"

[10] Weber, *SR*, p. 137; Weber, "Science as Vocation," p. 154.
[11] Weber, "Science as Vocation," p. 155.
[12] Weber, "Science as Vocation," p. 153.
[13] Weber, *ES*, p. 790–791, 1173; Weber, "The Profession and Vocation of Politics," p. 369; Schluchter, *Paradoxes of Modernity*, p. 215.
[14] Weber, *PESC*, pp. 181–182; Weber, *ES*, p. 989.
[15] Weber, "The Profession and Vocation of Politics," p. 351.

and their "purely mundane passions," do not seem to exhibit any need for the reenchantment of their world.[16] Symbolic power had become a scarce resource that only a few heroic and inspiring persons can generate, disseminate, and control. Indeed, in one of his bleakest descriptions of modern Western civilization, Weber argued that one of the most crucial political questions is whether a genuine political leader would ever appear to counterbalance the rise of meaninglessness.[17] Given the fact that he regarded this possibility to be rather unlikely, an irregularity rather than a norm, he may have thought that the expectation of having expansive popular movements seeking to reenchant the world and to reinstitute society on new foundations was merely a wishful yearning rather than a real prospect.

But his theory of secularization and disenchantment fails to explain fully the rejection of charismatic politics. Although Weber was inclined to understand modernity as the retreat of meaning and the religious from the profane, he also referred to the quite distinct process of value fragmentation and value pluralism in order to describe the trend toward the disenchantment of the world. One of the main differences between traditional and modern societies is that whereas the former are monotheistic, in which there is an all-encompassing reigning worldview, the latter, which are, metaphorically speaking, paganistic, witness a return of polytheism in the shape of multiple competing worldviews.[18] Modernity does not simply represent the death of God; it also signifies the rise of many rival gods.[19] "Many old gods ascend from their graves," Weber observed, and "they are disenchanted and hence take the form of impersonal forces. They strive to gain power over our lives and again they resume their eternal struggle with one another. . . . Our civilization destines us to realize more clearly these struggles again after our eyes have been blinded for a thousand years – blinded by the allegedly or presumably exclusive orientation towards the grandiose moral fervor of Christian ethics."[20]

In this version of disenchantment, the modern secular age is not equivalent to the fading of transcendental worldviews and the collapse of ethical doctrines but rather to a decentering and proliferation of symbolic referents, which cannot be exclusively monopolized by a single religious view of the world or traced back to a symbolic focal point.[21] While traditional,

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[16] Weber, *PESC*, pp. 181, 182.
[17] Weber, "Parliament and Government in Germany," p. 159.
[18] Weber, "Between Two Laws," p. 79.
[19] Weber, "The Meaning of 'Ethical Neutrality' in Sociology and Economics," pp. 17–18.
[20] Weber, "Science as a Vocation," p. 149.
[21] Weber, "Science as a Vocation," pp. 147–149.

religious societies are centripetal, modern, secular societies are instead centrifugal, that is, pluralistic. But if this is the case, there is no reason, or at least Weber does not provide a particular reason, to assume that collective movements are anachronistic and charismatic politics outdated. On the contrary, it is more reasonable to expect that from this polytheism, a plurality of groups will seek to occupy the symbolic field, given the lack of an omnipresent worldview. Value pluralism is more prone to instigate and intensify the emergence of charismatic movements, each one strongly embedded within a particular value system with its own "god" and ethical imperatives, rather than to impede it. Modernity diffuses rather than extinguishes meaning.

This observation brings me to another explanation that has attracted the attention of many Weber scholars: the problem of autonomy. Weber did not take the instituting power of charisma in a democratic direction or toward a theory of political freedom and collective self-determination, in the sense of a union of particular wills capable of issuing higher laws. He did not explore the links between charismatic powers and the self-institution of society through a theory of popular charismatic foundations.[22] To be sure, in his last sociological writings he sought to combine the antiauthoritarian dimension of charisma and democracy in the hybrid form of plebiscitarian, democratic legitimacy. This is what he called the movement of charisma in a democratic direction.[23] But this attempt to reconcile democracy and charisma falls short from providing a model of radical democratic foundings. Weber never considered the political community capable of appropriating even greater amounts of the creative power of charisma for the explicit and deliberative self-institution of society. The democratization of charisma is an unfulfilled promise in his theoretical and political propositions.[24]

Along with his concern for bureaucratic domination, Weber's fear and deprecating views of the modern masses must have played an important role. He deeply mistrusted the many too much to expect them to be the carrier of charisma and the driving force behind legal and political new beginnings. This distrust of the multitude reinforced his conviction that charisma, in order to be considered a viable possibility, must appear solely as an individual property that could be cultivated only in the agonistic

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[22] According to Weber, "the prophets were not, for their part, champions of democratic social ideals. . . . In their eyes the people need guidance, hence, everything depends on the qualities of the leaders." Weber, *AJ*, p. 278.

[23] Weber, *ES*, pp. 266–271.

[24] Vincent, *Max Weber ou la démocratie inachevée*, p. 84.

and conflictual practices of parliaments that function more as arenas (as a
palaestra in Weber's words) and as mechanisms of leader selection rather
than as typical representative bodies.[25] By unimaginatively adopting the
conventional antidemocratic critique of the masses, expounded by Gustavo
Le Bon, Gaetano Mosca, and Vilfredo Pareto, Weber identified mass society
with the rule of irrational emotions, uncontrollable impulses, and dangerous
passions. He considered participatory democracy susceptible to the "unreg-
ulated rule of the street," which can come under the control and the crafty
manipulations of demagogues.[26] Thus, the "danger which mass democracy
presents to national politics," as he bluntly put it, "consists principally in
the possibility that emotional elements will become predominant in poli-
tics. The 'mass' as such . . . 'thinks only as far as the day after tomorrow.'
As we know from experience, the mass is always exposed to momentary,
purely emotional and irrational influences." Thus, "when responsible deci-
sions are being taken, a cool and clear head . . . is all the more in command,
(1) the smaller the number of those who participate in the deliberations,
and (2) the more unambiguously responsibilities are understood by each of
the participants and by those whom they lead."[27] And yet at the same time
Weber recognized that modernity has created some conditions for a more
autonomous organization of political power: "The fate of an epoch which
has eaten of the tree of knowledge is that it must know that we cannot learn
the *meaning* of the world from the results of its analysis, be it ever so perfect;
it must rather be in a position to create meaning itself."[28]

   Precisely because modernity is characterized by the dissolution of tran-
scendental grounds and the loosening of the grip of extrasocial sources of
authority on modern politics, it opens up the possibility for more autono-
mous and conscious forms of political intervention. Weber, for instance,
recognized that, because of certain cultural and historical conditions that
have emerged in modern times, the origin of law has been relocated within
the human collectivity. Thus, alluding to the normative idea of autonomy,
he claimed that in some cases, legal rules "were valid and binding because
one had to create them for oneself by directly participating in a purposive
contract."[29] More importantly, he recognized that charisma has an imma-
nent democratic character – not only because it "is self-determined and

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[25] Weber, "Parliament and Government in Germany," pp. 173–174.
[26] Weber, "Suffrage and Democracy in Germany," p. 124.
[27] Weber, "Parliament and Government in Germany," p. 230.
[28] Weber, "'Objectivity' in the Social Science and Social Policy," p. 57.
[29] Weber, *ES*, p. 700.

sets its own limits," free from external norms, but also because charismatic movements are predominantly organized along democratic lines.[30] Puritan sects, historically one of the modern charismatic movements, illustrate this point. According to Weber, "pure sects also insist upon 'direct' democratic administration by the congregation and upon treating clerical officials as servants of the congregation. These very structural features demonstrate the elective affinity between the sect and political democracy."[31] Despite these scattered references to charisma and democracy, he remained deeply suspicious of popular charismatic foundings, and this skepticism led him to reject the democratic dimension of founding extraordinary politics in favor of plebiscitarianism and elitism.

This skepticism, I think, was informed by two key assumptions. First, the high levels of social differentiation and technical complexity have dispelled the belief in the existence of a general will and undermined the hope of approximating a fictitious public good. In a telling letter to Michels, Weber, anticipating Joseph Schumpeter's famous argument, wrote that "Such notions as the 'will of the people,' the true will of the people, ceased to exist for me years ago; they are *fictions*."[32] Against any optimistic and naive expectation cultivated by the pace of democratization in post–World War I Europe, he warned that one should not be misled by "the term 'democratization,'" because, in fact, "The *demos* itself, in the sense of a shapeless mass, never 'governs' larger associations, but rather is governed. What changes is only the way in which the executive leaders are selected and the measures of influence which the *demos*, or better, which social circles from its midst are able to exert upon the content and the direction of administrative activities by means of 'public opinion.'"[33]

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[30] Weber, *ES*, pp. 1112, 243.

[31] Weber, *ES*, p. 1208.

[32] Letter to Michels of August 4, 1908, quoted by Mommsen, *Max Weber*, p. 395; Joseph Schumpeter, *Capitalism, Socialism, and Democracy*, London: Unwin, 1987, pp. 250–283.

[33] Weber, *ES*, p. 985. Reproducing a typical argument, Weber claimed that democracy can emerge only in small, homogeneous communities, organized around shared, substantive values. This explains why he refused to see the ancient Greek *polis* as a democratic association. He provocatively argued that the Athenian *polis* was not a direct democracy but rather an early form of plebiscitarian, charismatic authority. For Weber, Pericles was a charismatic demagogue and a leader of the masses, whose role was reduced to winning acclamation. Contrary to ancient Near Eastern civilizations, the Greek *polis* did not have religious prophets but secular demagogues who made use of their charismatic powers to control the *demos*. Consequently, the type of charisma that prevailed in Greek politics was not the charisma of grace or divine gift but the "charisma of rhetoric." Weber, *ES*, pp. 983, 1129–1130; Max Weber, *The Agrarian Sociology of Ancient Civilizations*, trans. R. I. Frank, London: Verso, 1998, pp. 294, 185–188; Weber, *AJ*, p. 270. For a powerful response to Weber's

Second, but equally important, Weber refused to associate charismatic politics and genuine constitutional making and to develop the notion of charisma in the direction of the constituent power. This refusal was twofold. First, his sociological understanding of the constitution prevented him from developing a theory of constitutional politics. He did not investigate the constituent content of charisma, although he maintained that charisma is at the origins of any genuine legal innovation. The reason for this short-coming lies in Weber's reductionist and unduly sociological understanding of the constitutional document as a sheer reflection of the existing balance of social and political forces, and not as the written codification of charismatic innovations and new substantive values that embody a newly established worldview.[34] By reducing constitutionalism to a mere juridical translation of preexisting power relations, he could not view the constitution as a higher norm able to transform existing structures of social power. For Weber, the constitution was solely a means, among many others, in the fractional politics of interests. Second, his peculiar understanding of formal and general law as a juridical iron cage was too limited and negative to allow for a normative theory of democratic constitutional making.[35] In a revealing letter to his brother Alfred, he criticized Georg Jellinek's juridical approach for its narrowly legalistic and formalist content, because "As good as its intentions are, it is typical for the manner in which *legal scholars* treat *political* things. The more intelligent they are, the more they are blinded by formalism."[36] By linking charisma with deformalized law and personal, irrational decisions, Weber opened up a huge gap between formal legality and charismatic-democratic legitimacy: either the modern sovereign is charismatic and speaks only through concrete decisions and oracles or it speaks through the generality of the law but it is not charismatic anymore.

interpretation of ancient Greek politics, see M. I. Finley, *Ancient History: Evidence and Models*, New York: Penguin Books, 1985, pp. 93–103. For a rejoinder to Finley on the issue of leadership, oration, and charisma in ancient Greek politics, see Josiah Ober, *Mass and Elite in Democratic Athens: Rhetoric, Ideology, and the Power of the People*, Princeton: Princeton University Press, 1989, pp. 123–124. I thank David Ames Curtis for bringing this point to my attention.

[34] Weber, *ES*, p. 331; Martin Albrow, "Legal Positivism and Bourgeois Materialism: Max Weber's View of the Sociology of Law," *British Journal of Law and Society*, 2 (1975), pp. 14–31.

[35] S. M. Feldman, "An Interpretation of Max Weber's Theory of Law: Metaphysics, Economics, and the Iron Law of Constitutional Law," *Law and Social Inquiry*, 16 (1991), pp. 205–248.

[36] Max Weber's letter to Alfred Weber, May 22, 1907, cited in Scaff's *Fleeing the Iron Cage*, p. 155.

What he did not consider was the possibility that the charismatic sovereign might be able to adopt the grammar of formal law. Because of this dubious bifurcated approach, he was unable to reconcile charismatic foundations with a stable constitutional order. This dualist model may also explain why he sought a compromise in the form of the plebiscitarian presidency, which, while locating charisma within the constitution, fails to place it at its foundations as well. In his effort to avoid the juridification of charisma, he opted for the second-best solution: that of a frail, weakened, and unstable normalized personal charisma that he deemed better than a totally incapacitated collective charisma.[37]

With these arguments in hand, Weber abandoned the instituting, founding dimension of charismatic politics. In his last, post–World War I political essays, charisma is always already integrated and neutralized into normal politics and reduced to the plebiscitarian and demagogic powers of a democratically elected executive, capable of representing the unity of the state, above and beyond factional parties and corporatist interests. This integration becomes apparent in Weber's effort to reconcile the ethic of ultimate conviction with the ethic of responsibility in the figure of the plebiscitarian leader. But in this formulation, the president of the Reich does not have anything truly charismatic at his disposal, except perhaps the discretionary and arbitrary powers that the constitution provides him with. It seems that at the end, Weber was not only skeptical regarding the factual possibility of collective charismatic interventions, but he became increasingly critical of individual charisma as such. In his last political writings he distanced himself from the idea of a founding charismatic leader as such and rejected altogether the idea of sudden legal breaks and original foundings, opting instead for a deradicalized charisma.

For instance, in his reflections on the Russian revolution and his views on the drafting of the Weimar Constitution, there is almost nothing about charismatic ruptures. Nowhere in these writings does Weber conclusively and systematically discuss the relationship between radical changes, genuine constitutional politics, and personal charisma. In an obvious contrast to his sociology of religion and law, in which charisma (collective or individual) is directly related to moments of institutional founding and higher lawmaking, in his studies of modern politics he abstains from examining the affinity between original political transformations and charisma.

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[37] As Negri has keenly observed, Weber's sociological formalism and realism did not allow him to articulate an original phenomenology of the constituent power of charisma. Negri, *Insurgencies*, p. 8.

This de-charismatizing of charisma becomes apparent in "The Profession and Vocation of Politics," where Weber, in a very pessimistic and fatalistic tone, questions the possibility of charismatic revolutions even when initiated by a heroic, visionary leader. In this text there is a small but noteworthy theoretical modification that points to an additional, deeper reason for his abandonment of charisma: "the emotionalism of revolution is then followed by a return to traditional *everyday existence*, the hero of the faith disappears, and so, above all, does the faith itself, or it becomes (even more effectively) a part of the conventional rhetoric used by the political philistines and technicians. This development comes about particularly quickly in a war of faith, because these are usually conducted or inspired by genuine *leaders*, prophets of revolution."[38] As this passage indicates, his distancing from the earlier, collective formulation of charisma is also predicated on his distrust of the revolutionary drive of charisma itself.[39] Sadly, in his last writings, he unimaginatively reduced charisma and its transformative powers to the traditional proletarian concept of revolution.[40] And in his effort to avoid the dilemmas and limitations of the latter, he rejected altogether any instituting and founding charismatic action. By doing so, however, he missed the unique qualities of charisma he had developed in his previous works and misunderstood the political significance and radical implications of charismatic politics. At the end, he rejected both the instituting dimension of charisma and communist revolutions as two descriptions of one and the same phenomenon.

This identification of charisma and proletarian revolutions becomes more apparent in his discussion of anarchosyndicalism, which he considered to be the most revolutionary political force of his times. What makes Weber's critical comments on extraparliamentary syndicalism so interesting is that he explicitly compared it with the religious charismatic movements of the past.[41] Like them, anarchosyndicalism aims at a complete overthrow of the instituted reality; endorses the ethic of ultimate conviction; acts according to certain substantive values and a comprehensive general worldview; is organized in relation to an ethic of brotherliness; and seeks through the myth of the general strike, as in the case of George Sorel, to create a collective

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[38] Weber, "The Profession and Vocation of Politics," p. 365.

[39] For Weber's doubts regarding the modern possibility of revolutions, see *ES*, p. 989.

[40] Weber, "The Profession and Vocation of Politics," p. 357; Weber, "Socialism," pp. 296–300.

[41] Weber's letter to Michels of May 4, 1908, quoted in Mommsen's *The Political and Social Theory of Max Weber*, p. 96; Vincent, *Max Weber ou la démocratie inachevée*, pp. 91–129.

identity that will transcend material interests, narrow economic demands, and the differences that have fragmented the modern proletariat.[42]

Weber was right to recognize that more than party organizations, and in disagreement with Marxist materialism, political syndicalism was aware of the constitutive importance of the symbolic and cultural field insofar as it aimed at the formation of a new revolutionary collective subject and directly sought to transform the prevailing views, beliefs, and values that have sustained the existing system of exploitation and domination.[43] Furthermore, anarchosyndicalism historically affirmed voluntarism and the will at the detriment of historical determinism.[44] Instead of approaching history from a teleological point of view, anarchosyndicalists embraced contingency and alterity. Likewise, they were hostile to rational explanations and scientific justifications. Their discourse was imbued with symbols, myths, beliefs, and visions that sharply contrasted with modern materialism. For all these reasons, Weber saw in syndicalism a way of acting and thinking capable of reenchanting the world.[45]

Besides, what made anarchosyndicalism charismatic was not the mesmerizing and superhuman qualities of its leaders but its emancipatory impulses. These impulses not only pointed out its similarities to the religious charismatic movements of the past but also endowed it with a clearer and stronger redemptive intent than that of the plebiscitarian Caesarist president. Revolutionary syndicalism was closer to charismatic politics than plebiscitarian leaders were, in the sense that its politics relied on the ability to affect the internal axiological orientation of its followers and to mold the attitudes of its supporters – especially in Sorel's version, which "preached" the subversion of the normative and symbolic foundations of political authority and the establishment of a new order able to alleviate the suffering and distress of the subordinated masses.[46]

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[42] Weber, "Socialism," pp. 296–297.

[43] Weber, "Socialism," pp. 296–297.

[44] Weber, "The Meaning of 'Ethical Neutrality' in Sociology and Economics," p. 16.

[45] Weber, "Socialism," p. 298. Also, see Peter Lassman and Irving Velody (eds.), *Max Weber's "Science as a Vocation,"* London: Unwin Hyman, 1989, p. 30.

[46] Georges Sorel, *Reflections on Violence*, ed. Jeremy Jennings, Cambridge: Cambridge University Press, 1999. As Löwith has pointed out, the emancipatory dimension of theodicy, namely its promises of salvation, has been secularized in modern times to take the form of "anthropodicies" in the radical socialist doctrines that preach social and economic liberation from exploitation and economic subordination. Anthropodicies, like theodicies, aspire to combine an explanation of domination with a theory of human emancipation, but unlike them, they locate salvation not in a transcendental, spiritual realm but in a future social, earthly, and

But precisely because of these remarkable similarities between modern revolutionary syndicalism and the charismatic movements of the past, Weber vehemently rejected the politics of the former, thus preparing the ground for rejecting the latter as well. In other words, in his criticism of anarchosyndicalism he inserted a broader critique of the revolutionary drive of charisma as such. They are both inimical to normal politics. In the case of anarchosyndicalism, this aversion becomes obvious in the attitude of the convinced syndicalists who exhibit a strong distaste toward state power and ordinary politics. They are motivated by the utopia of a totally pacified and harmonious society beyond institutions, internal differentiations, domination, and inequality. And although they are prone to use violence for the overthrow of the existing order of things, their aim is to eliminate force from politics once and for all. Thus, while they use political means to achieve their ends, their ultimate goal is to abolish politics altogether. In other words, it seems that they aim at a total eradication of normal politics. The future society of the anarchosyndicalists is a society based on the lasting ethic of brotherliness, collective solidarity, and substantive economic and social equality, similar to the democratic organization of a charismatic group.[47] Weber even traced the historical and cultural origins of communism back to "the extraordinary foundation of charismatic belief."[48]

Furthermore, revolutionary syndicalists, much like previous charismatic movements, ignore the consequences of their actions and choices. Motivated by the ethic of ultimate convictions, they are indifferent to effects and ramifications. This indifference to the proper relationship among means, ends, and consequences makes syndicalism "quixotic," irresponsible, and impractical. The action of the revolutionary syndicalist, Weber claimed, "is socially 'useless,' i.e., it is not likely to be successful in the modification of the external class position of the proletariat, and that he even weakens this greatly by generating 'reactionary' attitudes, but still – for him – if he is really faithful to his convictions – this proves nothing to him."[49] By rejecting

secular political community beyond domination and subordination. Karl Löwith, *Meaning in History*, Chicago and London: University of Chicago Press and Phoenix Books, 1949.

[47] Weber, "Socialism," p. 296.

[48] Weber, *ES*, pp. 1119, 154. Weber failed to see anarchosyndicalism's appeal to a reconciled society for what it actually was: a tactical move of a much broader hegemonic strategy to create a political vision for a new collective subject. Weber was unwilling to recognize that the utopian aspiration of an emancipated humanity was part of a myth and constitutive of the symbolic struggle to delegitimate the instituted capitalist-liberal worldview.

[49] Weber, "The Meaning of 'Ethical Neutrality' in Sociology and Economics," p. 23.

instrumental-purposive action in the name of an absolute value-rational action, anarchosyndicalism is not only "doomed in advance to absolute failure" but is also prone to political irresponsibility.[50] By not taking into account the consequences of its choices and actions, it remains stubbornly and blindly devoted to its ultimate values and beliefs. Syndicalism was, for Weber, "either an idle whim of intellectual romantics and . . . undisciplined workers . . . or else a religion of conviction that is justified even if it never provides an ideal for the future that is 'attainable.'"[51]

By equating charismatic politics to anarchosyndicalist and proletarian models of revolution and rejecting all three, Weber was confronted with a serious dilemma. Although in his last writings he considered charisma to bear the problems and limitations of a proletarian revolutionary change, he still treated it as the only force able to face the impasses of a disenchanted, mass democracy.[52] Hence, his last appeal was to a hybrid but crippled form of a charismatic plebiscitarian leader as the only viable way of reconciling the two terms of the dilemma. Sadly, while Weber rhetorically held onto charisma, he purged it from its creative, founding powers. It is an appeal that ultimately amounts to the de-charismatization of charisma. Is the president of the Reich, as envisioned by Weber, a creative leader who can "transform all values"? Is the president "the specifically creative revolutionary force of history"?[53]

What is left of charisma in his descriptions of the "plebiscitarian dictator" is the *pathos* of distance, a sense of responsibility mixed with some broader vision of the national interest, a cultivated faculty of judgment, a dedication to one's cause, an embodiment of the unity of a fragmented people, an agonistic ardor, a mood of heroic pessimism, and a firm fist when the moment of decision comes.[54] Some may disagree with Weber about what great political virtues consist of. But this is not the issue here. The problem is that, in this last version, charisma is divested of all its extraordinary, founding character. In Weber's theory of the plebiscitarian president, little is left of charismatic extraordinariness. Taken to its ultimate conclusion, and despite his continuing invocation of charisma, Weber's doubts about

[50] Weber, "The Meaning of 'Ethical Neutrality' in Sociology and Economics," p. 24; Weber, "The Profession and Vocation of Politics," p. 360.

[51] Letter to Michels of May 12, 1909, quoted in Mommsen's *The Political and Social Theory of Max Weber*, p. 138.

[52] Weber, "The Profession and Vocation of Politics," p. 312.

[53] Weber, *ES*, pp. 1115, 1117.

[54] Weber, "The Profession and Vocation of Politics," p. 343.

the viability and desirability of its instituting powers led him to obliterate the issue of radical symbolic transformations and founding events, to cancel the distinction between extraordinary and normal politics, and to endorse a particular variant of a liberal doctrine of the ordinary.[55]

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[55] For Weber's liberalism, see David Beetham, "Max Weber and the Liberal Political Tradition"; Horowitz and Maley, *The Barbarism of Reason*, pp. 99–112.

PART II

THE EXCEPTION AND CONSTITUTIONAL POLITICS

Carl Schmitt

Though in a Constituted Commonwealth, standing upon its own Basis, and acting according to its own Nature, that is, acting for the preservation of the Community, there can be but *one Supreme Power*, which is *the Legislative*, to which all the rest are and must be subordinate, yet the Legislative being only a Fiduciary Power to act for certain ends, there remains still in *the People a Supreme Power* to remove or *alter the Legislative*, when they find the *Legislative* act contrary to the trust reposed in them. . . . And thus the *Community* perpetually *retains a Supream Power* of saving themselves from the attempts and designs of any Body, even of their Legislators. . . . And thus the *Community* may be said in this respect to be *always the Supream Power*, but not as considered under any form of Government, because this Power of the People can never take place till the Government be dissolved.

John Locke[1]

There necessarily exists, in every government, a power from which there is no appeal, and which, for that reason, may be termed supreme, absolute, and uncontrollable. . . . Perhaps some politician, who has not considered with sufficient accuracy our political systems, would answer that, in our governments, the supreme power was vested in the constitutions. . . . This opinion approaches a step nearer to the truth, but does not reach it. The truth is, that in our governments, the supreme, absolute, and uncontrollable power remains in the people. As our constitutions are superior to our legislatures, so the people are superior to our constitutions. Indeed the superiority, in this last instance, is much greater; for the people possess over our constitution, control in act, as well as right. The consequence is,

[1] Locke, *Two Treatises of Government*, book II:13, pp. 366–367. For a discussion of Locke's theory of the constituent power, see Julian Franklin's still unsurpassed study, *John Locke and the Theory of Sovereignty: Mixed Monarchy and the Right of Resistance in the Political Thought of the English Revolution*, Cambridge: Cambridge University Press, 1978.

the people may change constitutions whenever and however they please. This is a right of which no positive institution can ever deprive them.

James Wilson[2]

As of today, apart from a few isolated exceptions, Carl Schmitt's relationship to democratic theory has not been carefully explored.[3] Never considered a promising topic, it has remained marginal within a constantly expanding Schmitt scholarship. Obviously, the simple mentioning of Schmitt's name invokes strong reactions, especially when it comes to democracy, and with good reasons. His enthusiastic support of the Nazi seizure of power in 1933, his infamous justification of Hitler's crimes, and his virulent anti-Semitism are more than enough to dissuade a discussion of Schmitt's views on democracy. Hence, his notorious role as the "crown jurist" of the Third Reich constitutes a frequent interpretative entry point into his work. From there, his pre-Weimar as well as his post–World War II writings become thematically and logically implicated in his Nazism.

For this reason, it should not come as a surprise that as of today there is no systematic study of the relationship between Schmitt and democratic thought. Indeed, why search for elements of a democratic theory in the work of an author who has been regarded as a "young conservative" and "reactionary modernist"?[4] Why not instead study directly the classical democratic thinkers of modern times? Why risk falling into the trap of revisionism?

[2] Quoted in Jonathan Elliot's *Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787*, ed. James McClellan and M. E. Bradford, Cumberland, Va.: J. River Press, 1989, 2:432.

[3] Ellen Kennedy, *Constitutional Failure: Carl Schmitt in Weimar*, Durham: Duke University Press, 2004, pp. 125–128, 130–133. Chantal Mouffe represents an exception to this rule. She has devoted several articles to elucidating the relationship between Schmitt and democratic theory. Notwithstanding her outstanding achievements, Mouffe's intentions remain ambiguous: it is not clear whether she seeks to establish Schmitt's importance for contemporary democratic politics or to provide a more agonistic version of political liberalism. Chantal Mouffe, "Penser la démocratie moderne avec, et contre, Carl Schmitt," *Revue française de science politique*, 42:1 (1992); Chantal Mouffe, "Pluralism and Modern Democracy: Around Carl Schmitt," in *The Return of the Political*, London: Verso, 1993, pp. 129–130; Chantal Mouffe, "Carl Schmitt and the Paradox of Liberal Democracy," in *The Challenge of Carl Schmitt*, ed. Chantal Mouffe, London: Verso, 1999, pp. 38–53; Chantal Mouffe, *The Democratic Paradox*, London: Verso, 2000.

[4] Jürgen Habermas, introduction to *Observations on "The Spiritual Situation of the Age*," ed. Jürgen Habermas, trans. Thomas McCarthy, Cambridge, Mass.: MIT Press, 1985, p. 24; Jeffrey Herf, *Reactionary Modernism: Technology, Culture, and Politics in Weimar and the Third Reich*, Cambridge: Cambridge University Press, 1984; Jerry Z. Muller, "Carl Schmitt, Hans Freyer, and the Radical Conservative Critique of Liberal Democracy in the Weimar Republic," *History of Political Thought*, 12:4 (1991), pp. 696–715.

Why Carl Schmitt after all?[5] These are important questions and an attempt to answer them has to take into consideration the fact that even Schmitt's severest critics have acknowledged his significance and influence as one of the most important political thinkers of the twentieth century and have even sought to learn from his controversial theories of the political as it relates to sovereignty, his critique of liberalism, and his concept of the exception.

The following chapters on Schmitt share this assessment. As I argue, once one decides to go beyond his authoritarian intentions and repellent political allegiances to adopt a selective, reconstructive, and critical reading of his major political and constitutional writings, many interesting insights come to the fore, which appropriated in the right way might be used to deepen and advance our understanding of democracy. I seek to demonstrate that it is possible to distill from Schmitt's theory elements not only for the reconstruction of a substantive model of radical democracy but also for a theory of democratic constitutionalism without, however, committing to his entire project. In other words, what interests me is to distinguish what remains positive from what is problematic, even repulsive in Schmitt's theory. In order to do so, I focus mainly on his constitutional and legal writings. Other parts of his vast work are included, but I have avoided them for the most part. My aim is not to provide a new exegesis of Schmitt's oeuvre and much less to defend it against its critics. Rather, I am interested in elucidating those parts that, properly appropriated and reorganized, could advance our understanding of democratic foundings and extraordinary politics with Schmitt, then beyond Schmitt.

Such a project, however, faces a number of additional difficulties. Schmitt's stance toward democracy has often been described as either hostile or hypocritical. He is depicted as an intransigent enemy of modern democracy who feared that the entry of the propertyless masses into the political arena of the Weimar Republic not only would subvert an already weak state authority and a shaky social order but would also threaten the

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[5] Many monographs have attempted to account for this phenomenon and to explore the particular political and historical causes of Schmitt's unexpected return. Here is a small selection: Paul Piccone and Garry L. Ulmen, "Introduction to Carl Schmitt," *Telos*, 72 (1987), pp. 3–14; George Schwab, "Progress of the Schmitt Studies in the English-Speaking World," in *Complexio Oppositorum. Über Carl Schmitt*, ed. Helmut Quaritsch, Berlin: Duncker und Humblot, 1988, pp. 447–459; Ulrich Preuss, "Political Order and Democracy. Carl Schmitt and His Influence," in Mouffe, *The Challenge of Carl Schmitt*, pp. 155–179; Bernhard Schlink, "Why Carl Schmitt?" *Constellations*, 2:3 (1996), pp. 429–441; Ernst-Wolfgang Böckenforde, "Schmitt Revised," *Telos*, 109 (1996), pp. 81–87. Within the broader framework of the "Schmitt renaissance" that is under way, my analysis proposes to redirect attention from today's overinflated concern about what we need to reject in Schmitt's work to what we can take from it for advancing radical democracy's self-understanding.

political privileges, economic interests, and power position of capitalism
and the bourgeoisie.[6] Moreover, Schmitt's famous definition of democracy
as the identity between rulers and ruled and its juxtaposition to parliamen-
tarism is perceived at best as a rhetorical, opportunistic move and at worst
as a deceptive, instrumental tactic that should not be taken at face value.
Schmitt sided with democracy in a tactical alliance against his archenemies –
liberalism, pluralism, individualism, legal positivism, and the rule of law.[7]
Thus, his apparent appreciation of democracy and his professed intention
"to salvage democracy and to extricate it from liberal elements" are treated
as subordinate to his overall priority of discrediting the latter rather than
promoting the former.[8] It seems that Schmitt thought that the best and most
efficient way to fight liberalism was by using democracy rather than by
reproducing the old and quite ineffective arguments of traditional conser-
vatism and the counterrevolutionary discourse of political thought. Schmitt
reduced the normative worth of democracy, according to this interpretation,
to its strategic utility in advancing his ardent antiliberal politics.[9]

These interpretations are supported by arguments that Schmitt articu-
lated and defended in his Weimar writings, where he discussed the com-
patibility of democracy and dictatorship, provocatively asserting that in
some cases the latter can better embody the values of the former.[10] These

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[6] This interpretation is epitomized by the characterization of Schmitt as the "Lenin of the
bourgeoisie." Preuss, "Political Order and Democracy. Carl Schmitt and His Influence."
Renato Cristi has renewed this line of interpretation, making it the central hermeneutical
axis of his study of Schmitt. What Schmitt feared the most, and the main object of his
criticisms, was not liberalism but rather "the increased pace of the democratic revolution."
Instead of viewing Schmitt as an uncompromised antiliberal, Cristi treats him as a spirited
antidemocrat. Renato Cristi, *Carl Schmitt and Authoritarian Liberalism*, Cardiff: University
of Wales Press, 1998, p. 17.

[7] Stephen Holmes, "Schmitt: The Debility of Liberalism," in *The Anatomy of Anti-Liberalism*,
Cambridge, Mass.: Harvard University Press, 1993, pp. 50, 49.

[8] Carl Schmitt, "Der bürgerliche Rechstaat," in *Staat, Grossraum, Nomos. Arbeiten aus den
Jahren 1916–1969*, Berlin: Duncker und Humblot, 1995, p. 47.

[9] Despite their many and important differences, these two interpretations share a similar view
of Schmitt as an antidemocrat who proposed a permanent "discretionary emergency dicta-
torship" and "a neo-absolutist presidency." William Scheuerman, "The Unholy Alliance of
Carl Schmitt and Friedrich Hayek," *Constellations*, 4:2 (1997), p. 176; John McCormick,
"The Dilemmas of Dictatorship: Carl Schmitt and Constitutional Emergency Powers," *Cana-
dian Journal of Law and Jurisprudence*, 10:1 (1997), p. 175; Habermas, "The Horrors of
Autonomy: Carl Schmitt in English," p. 139.

[10] Schmitt, *CPD*, pp. 17, 28, 32. One has to take into consideration, however, as Norberto
Bobbio has correctly observed, that dictatorship in the past always appealed to traditional
and modern republicanism from Roman times to Machiavelli, Rousseau, and the French
revolutionaries. It is only at the beginning of the twentieth century, according to Bobbio,
and after the experiences of Stalinism and Nazism that dictatorship acquired an indisputably

readings also invoke Schmitt's flirtation with Italian Fascism, during a disturbing period of fascination with Mussolini.[11] The strongest indication of his antidemocratic tendencies, therefore, comes from his own theoretical preoccupation with issues of political stability, unity of authority, and efficient state power.[12] These are matters that cannot be said to compose the main aspirations of a normative theory of democracy, much less of a radical, participatory version.[13] Indeed, his concerns do not look like the ones of the democratic tradition, which include, instead, political autonomy, popular self-determination, and social justice. There is no doubt that Schmitt was an authoritarian statist, a populist, and an avowed elitist who sought to support the modern state to "gain particularly solid authoritarian foundations."[14] Throughout his life he remained deeply affected by issues of discipline and order, and his work is pervaded by an anxiety about the alleged inability of modern mass societies to implement and guarantee security.[15] And instead of approaching the political from below (from society) and the point of view of the self-organized popular masses, he preferred to approach it from above (from the vantage point of the state) and the perspective of the rulers. As he succinctly put it, "authority emanates from the top, trust from the bottom."[16] His famous definition of democracy as the identity "between the state and the people," which may entail the elimination of the ruler as a figure independent of the ruled and the abolition of asymmetrical structures of command and domination, appealed to Schmitt not because of its egalitarian and participatory implications but because of its ability to procure order.[17]

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negative meaning. Norberto Bobbio, *Democracy and Dictatorship: The Nature and Limits of State Power*, trans. Peter Kennealy, Minneapolis: University of Minnesota Press, 1989, pp. 159–166.

[11] Carl Schmitt, "Wesen und Werden des faschistischen Staat," *PB*, pp. 124–130. Also, see William Scheuerman, "Carl Schmitt and the Nazis," *German Politics and Society*, 23 (1991), pp. 71–79; William Scheuerman, "The Fascism of Carl Schmitt: A Reply to George Schwab," *German Politics and Society*, 29 (1993), pp. 194–211.

[12] Carl Schmitt, "Staatethik und pluralistischer Staat," *PB*, pp. 162–163; Carl Schmitt, "Die Wendung zum totalen Staat," *PB*, pp. 176, 178–179.

[13] For a discussion of the differences between liberal and radical democracy, see Carl Schmitt, "Der Begriff der modernen Demokratie in seinem Verhältnis zum Staatsbegriff," *PB*, pp. 22–28.

[14] Carl Schmitt, "Strong State and Sound Economy: An Address to Business Leaders," in Cristi, *Carl Schmitt,* p. 227.

[15] Schmitt, *RCPF*, p. 36.

[16] Schmitt, *LL*, p. 87.

[17] Schmitt, *CPD*, p. 26; Carl Schmitt, "Der Begriff der modernen Demokratie in seinem Verhältnis zum Staatsbegriff," pp. 22, 27–28.

   These aspects of Schmitt's work do raise the serious question whether the only lesson democratic theory could learn from his writings is to be suspicious and cautious with respect to thinkers and arguments that, while appropriating a democratic language, have as their aim to weaken and subvert the regime of popular self-determination. In this case, Schmitt might represent the new face of democracy's enemies who instead of directly attacking it, as the old conservatives did, opt for a more deceptive, cunning strategy of inner, indirect attrition. In a democratic age, where the idea of self-government, as he knew quite well, enjoys ideological hegemony, the challenge, to be effective, can come only from within. In this case, Schmitt's example becomes a historical warning that can no longer be neglected: it signals the appearance of new enemies that threaten modern liberal democracies.[18]

   Although there is undoubtedly some truth to these critical observations, it would be wrong, I think, to go so far as to say that Schmitt's political thought is totally opposed or irrelevant to contemporary democratic theory

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[18] Schmitt, *CPD*, pp. 23–24. It is this concern that informs William Scheuerman's admonition that "it should be clear why a consistent left-Schmittianism is incompatible with a compromised brand of social democratic politics," because whoever adopts Schmitt's critique of the liberal rule of law "clears the way not for left-wing utopia, but right-wing authoritarianism." Likewise, John McCormick has declared that "if this way of thinking does not make theoretical rigor or desirable political success, it makes for even less as a potentially viable source for democratic theory." William Scheuerman, *Between the Norm and the Exception: The Frankfurt School and the Rule of Law*, Cambridge, Mass.: MIT Press, 1994, p. 39; William Scheuerman, *Carl Schmit: The End of Law*, Lanham, Md.: Rowman & Littlefield, 1999, p. 9; John McCormick, *Carl Schmitt's Critique of Liberalism: Against Politics as Technology*, Cambridge: Cambridge University Press, 1997, p. 300. For a polemical refutation of Schmitt's appropriation by the left for a radical democratic project, see Mark Neokleous, "Friend or Enemy? Reading Schmitt Politically," *Radical Philosophy*, 79 (1996), pp. 13–23. A response to Neokleous's claims can be deduced from the prescient studies on Schmitt put forward by Italian leftist thinkers in *La Politica oltre lo Stato. Carl Schmitt*, ed. Giuseppe Duso, Venice: Arsenale Cooperativa, 1981, which gathers essays presented at the proceedings of the Schmitt conference in Padova, organized by the section of the Gramsci Institute in Venice. For a more general and historical discussion of the Italian reception of Schmitt, see Roberto Maggiori, *Liberation*, November 17, 1988; Gennaro Malgieri, "La recezione di Carl Schmitt in Italia," *Revue Europeenne des sciences sociales-Cahiers Vilfredo Pareto*, 16 (1978), pp. 181–186; Ellen Kennedy, "Carl Schmitt and the Frankfurt School," *Telos*, 73 (1987), p. 39; Martin Jay, "Reconciling the Irreconcilable? Rejoinder to Kennedy," *Telos*, 71 (1987), pp. 67–80; A. Sollner, "Beyond Carl Schmitt: Political Theory in the Frankfurt School," *Telos*, 71 (1987), pp. 81–97; Ulrich Preuss, "The Critique of German Liberalism: Reply to Kennedy," *Telos*, 71 (1987), pp. 97–110; Gopal Balakrishnan, *The Enemy: An Intellectual Portrait of Carl Schmitt*, London: Verso, 2000, pp. 260–268; Jan-Werner Müller, *A Dangerous Mind: Carl Schmitt in Post-War European Thought*, New Haven: Yale University Press, 2003, pp. 169–180; Andreas Kalyvas, "Hegemonic Sovereignty: Antonio Gramsci, Carl Schmitt, and the Constituent Prince," *Journal of Political Ideologies,* 5:3 (2000), pp. 343–376.

because his intentions were antidemocratic. Such an attitude, I believe, simplifies a highly complex and rich theoretical work. In what follows, I seek to demonstrate that another reading is possible, one that breaks away from the unfortunate classification of Schmitt's scholars into detractors and apologists, anti- and pro-Schmittians, Right and Left Schmittians. These distinctions are unhelpful as they promote an unduly polemical, rather unproductive and sterile engagement with Schmitt's work.

My reconstructive reading does not start with his much-commented-on definition of "the essence of the democratic principle" as the "identity between law and the people's will."[19] I instead begin with a peripheral and rather unnoticed chapter from his masterpiece, *Theory of the Constitution*.[20] In chapter 18, Schmitt introduces a penetrating description of the three different ways a people are related to their constitution: they are *prior to and above* the constitution, *within* the constitution, and finally *next* to the constitution.[21] The first relationship refers to the extraordinary, instituting moment of democratic founding during which the principle of identity can be approximated. Borrowing Bruce Ackerman's terminology, I refer to this moment as the democratic version of "higher lawmaking."[22] The second relationship refers to procedural, everyday institutionalized politics or "normal lawmaking," which tends to protect, consolidate, and reproduce the instituted reality of an organized *demos* integrated in a stable democratic constitutional order. This is the moment of legality and representation. Finally, the third relationship denotes the moment of spontaneous forms of popular mobilization and informal participatory intervention that exist side by side with the established political system.

My aim is to distinguish analytically these three moments of the democratic experience, to disassociate them from Schmitt's political objectives and underlying theological-philosophical assumptions, and to properly

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[19] For Schmitt, "all democratic arguments rest logically on a series of identities. In this series belong the identity of governed and governing, sovereign and subject, the identity of the subject and object of state authority, the identity of the people with their representatives in parliament, the identity of the state and the current voting population, the identity of the state and the law, and finally an identity of the quantitative (the numerical majority or unanimity) with the qualitative (the justice of the laws)." Schmitt, *CP*, p. 26.

[20] Schmitt, *V*.

[21] Schmitt, *V*, pp. 238–252. For a detailed discussion of this chapter, see Andreas Kalyvas, "Carl Schmitt and the Three Moments of Democracy," *Cardozo Law Review*, 21:5–6 (2000), pp. 1525–1565.

[22] This moment can be also described as one of constitutional politics. See Ackerman, "Neo-Federalism?" pp. 153–194; Bruce Ackerman, "Constitutional Politics/Constitutional Law," *Yale Law Journal*, 99 (1989), pp. 453–547.

reconfigure them within a different theoretical framework in which they could generate the conceptual resources for rethinking the relationship between democracy and the extraordinary. Once the three moments of democracy have been analytically distinguished, I revisit Schmitt's critical engagement with legal positivism, normativism, and constitutionalism to show that it was more complicated and multifaceted than a total, unqualified rejection. This brings me to my main task, which is to indicate how a serene reading of his constitutional writings might allow one to approach key controversial topics in contemporary democratic theory that are at the center of this study, like those concerning the legitimacy of democratic law, the relationship between substance and procedure, the instituting power of the popular sovereign will, and the instituted structures of regular political life – in a word, extraordinary and normal politics.[23]

Needless to say, as my reading unfolds, I raise some critical questions about Schmitt's theory, pointing to the limits of his approach and to the need, once I have isolated and appropriated those conceptual tools that are important for democratic theory, to go beyond his overall theoretical project. I locate these limits, first, in his misconstruction of liberalism and his incautious abandonment of speech and public deliberation, which left him with no other choice than that of a mute and thus crippled *demos*. Many of Schmitt's flaws originate from his failure to appreciate the political importance of public debate for the process of democratic will formation. His "politics of the will," even when it is read from the perspective of a popular will, is too restrictive to account for other aspects of the democratic experience. Additionally, contrary to the prevailing depictions of Schmitt as an exponent of legal indeterminacy, I trace the limitations of his understanding of democracy to his overly juridical approach.[24] By limiting the notion of sovereignty to that of the constituent power and by redefining it exclusively in terms of an extraordinary act of creating new constitutions, which is a juridical act par excellence, he undermined the conceptual resources that would have saved him from many dilemmas.[25] For example, he did not escape procedural reductionism. Strikingly as it sounds, he reproduced, like many liberals, another version, if a more sophisticated one, of constitutional fetishism that overemphasizes the juridical dimension of sovereignty, setting

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[23] Schmitt, *V*, p. 147.

[24] Nadia Urbinati, "Schmitt's Critique of Liberalism," *Cardozo Law Review*, 21:5–6 (May 2000), pp. 1646–1647.

[25] Olivier Beaud has nicely shown this juridical dimension of the concept of the constituent power in the writings of prominent legal and constitutional thinkers of the past two centuries. Olivier Beaud, *La puissance de l' état*, Paris: PUF, 1994, p. 207.

it apart from the broader symbolic, social, and economic context of modern liberal-capitalist societies.[26]

The notion of the constituent power, as radical and insurgent as it may be, cannot be equated automatically with a theory of participatory democracy. Thus, while it is crucial for a democratic theory of constitutional making, it faces certain limitations when expended to normal times. Furthermore, Schmitt's personalistic theory of representation addresses but fails to solve the problem of the survival of the extraordinary during normal politics and ultimately ends up with a justification of a strong plebiscitarian executive that informed and encouraged his ghastly support of Hitler's rule. Finally, although Schmitt's theory provides rich resources for rethinking the problem of democratic legitimacy and its place within the instituted reality, it ignores a crucial aspect of democratic politics, that of freedom. In other words, his political theory is a promising starting point for examining issues pertaining to questions of democratic legitimacy, but it is not equally helpful for addressing political autonomy.

[26] Negri, *Insurgencies*, p. 2. Also, see Franz L. Neumann, "The Concept of Political Freedom," in *The Rule of Law under Siege: Selected Essays of Franz L. Neumann and Otto Kirchheimer*, ed. William E. Scheuerman, Berkeley: University of California Press, 1996, p. 229n87.

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The Popular Constituent Sovereign and the Pure Theory of Democratic Legitimacy

Schmitt's reflections on modern mass democracy start with an examination of the political consequences following the postmedieval transition from the sovereignty of the king to the sovereignty of the people, from the unitary, physical body of the monarch to the fragmented, dispersed body of the multitude.[1] He explored the political implications of the rise of popular sovereignty and particularly the fact that "the decisionistic and personalistic element in the concept of sovereignty was lost . . . [because] the unity that a people represents does not possess this decisionistic character."[2] In other words, he not only directly addressed the problem of agency and action of a sovereign that is transformed into an impersonal, unorganized multitude. He also sought to illuminate the democratic origins of political power, to rethink the category of sovereignty in a democratic age, and to develop a systematic theory of democratic legitimacy.[3] Pasquale Pasquino has nicely captured this dimension of Schmitt's work, noting that it should also be read as an attempt to "think the democratic form of authority."[4]

Sovereignty and Dictatorship

Schmitt pursued his aim by combining Thomas Hobbes's absolutist concept of sovereignty and Emmanuel Sieyès's notion of *le pouvoir constituent*, that

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[1] Schmitt, *V*, pp. 53, 57, 63, 77–78.

[2] Schmitt, *PT*, pp. 48, 49.

[3] Schmitt, *V*, pp. 79, 87–91.

[4] Pasquale Pasquino, preface to Carl Schmitt's *Parliementarisme et démocratie*, Paris: Éditions du Seuil, 1988, pp. 14, 24n. See also Schmitt, "Der Begriff der modernen Demokratie in seinem Verhaltnis zum Staatsbegriff," p. 24.

is, the power of a political subject to create a new constitution.[5] In my effort to clarify Schmitt's understanding of extraordinary politics and to reach into his singular insights on popular sovereignty, I bracket for a moment his famous definition, in the opening sentence of *Political Theology*, according to which the "Sovereign is he who decides on the exception."[6] I believe that this aphoristic formulation can be better appraised once placed within his broader constitutional theory of the extraordinary. I find it more promising to start from his previous work on dictatorship.[7] Indeed, his reconceptualization of sovereignty as the constituent power of the people appears for the first time in a systematic form in his historically oriented discussion on dictatorship and the two different forms it might take: commissarial and sovereign.[8]

The commissarial dictator Schmitt argued, following the Roman republican tradition, is appointed by a higher political authority and has a very specific task to accomplish, namely, the elimination of enemies during a crisis that threatens the survival of a regime. In these emergency moments, the higher authority appoints the commissarial dictator to suspend, if necessary, the existing legal order, to remove the threat, and to restore the previous normal conditions.[9] The dictator has unrestrained power to achieve its designated end, and no moral or legal limits constrain his actions. The dictator can not only suspend the existing legal system in its entirety but also operate literally outside of it, in a normless vacuum. The singularity of this type of dictatorship, according to Schmitt, is found in the fact that "all is justified that appears to be necessary for a concretely gained success," that is, a return to the *status quo ante bellum*.[10]

Despite its discretionary powers, however, commissarial dictatorship remains a form of *constituted* politics, designed to protect the established constitutional order in cases of exceptional crisis and high peril. Its functions are usually carefully enumerated in the constitutional text and strictly prescribed in the institutional matrix of the regime.[11] For instance, it faces specific time and task limits, cannot legislate, and is always subordinated to

[5] Pasquale Pasquino, "Die Lehre vom 'Pouvoir Constituant' bei Emmanuel Sieyès und Carl Schmitt," in *Complexio Oppositorum. Über Carl Schmitt*, ed. Helmut Quaritsch, Berlin: Duncker und Humblot, 1988, pp. 371–385.
[6] Schmitt, *PT*, p. 5.
[7] Schmitt, *DD*.
[8] Schmitt, *DD*, p. 137.
[9] Schmitt, *DD*, p. xvi.
[10] Schmitt, *DD*, p. xviii.
[11] Schmitt, *DD*, pp. 1–2.

the higher, sovereign authority that has appointed it. It represents a strict form of delegation. It can suspend the constitution but cannot alter or replace it. Its only purpose is to end the crisis, restore the normal order, and revert to politics as usual. Schmitt's concept of commissarial dictatorship might well be described, in Clinton Rossiter's pertinent terms, as a "constitutional dictatorship."[12] It remains internal to and conditioned by the existing constitutional provisions, lacking the attributes to invest it with a sovereign mantle.

What is, one might then ask, the defining mark of sovereignty, if not its discretionary powers? Schmitt's concept of sovereign dictatorship provides the first elements of an answer. Contrary to commissarial dictatorship, sovereign dictatorship, although also a type of delegation, has a different task: to establish a new political and legal order by drafting a new constitution.[13] Sovereign dictatorship, therefore, is a "founding power" reminiscent of the classical legislator who operates outside the existing legal system and is external to the established constitution.[14] This founding act represents a rupture or a legal break that separates it from the previous system of norms.[15] Sovereign dictatorship is a form of *constituting* politics. The constituent power of the sovereign subject decides explicitly and consciously to alter the juridical form of a political association.[16] It signifies the radical beginning of a new regime that cannot be reduced or traced back to any anterior procedure, set of rights, legal structure, or fundamental laws. Here Schmitt seems to have embraced Maurice Hauriou's definition of sovereignty as "a founding legislative power."[17]

To better grasp his redefinition of sovereignty as the constituent founder, it would be useful to examine how Schmitt came to distinguish it from dictatorship. In making this distinction, he shifted from the traditional notion of sovereignty as the final and supreme authority of command to the concept of sovereignty as the creative, founding act of the constituent power. This change goes beyond the conventional idea, at least since Jean Bodin, that

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[12] Clinton L. Rossiter, *Constitutional Dictatorship in the Modern Democracies*, Westport, Conn.: Greenwood Press, 1948.

[13] Schmitt, *DD*, pp. 140–152.

[14] Schmitt, *DD*, pp. 137–138.

[15] Schmitt, *DD*, pp. 127–148.

[16] Schmitt, *DD*, pp. 139, 142. Schmitt's sovereign dictator corresponds more to the traditional republican vision of the Great Legislator than to Hobbes's powerful Leviathan, who, after all, remains dependent upon an antecedent social contract and the unalienable individual right to self-preservation.

[17] Maurice Hauriou, *Précis de droit constitutionnel* (2nd ed.), Paris: Sirey, 1929, p. 246.

the defining mark of sovereignty is predominantly its absolute powers, its arbitrary discretionary will, or even its illegal potentialities. This, I think, is the main thrust behind his distinction between dictatorship and sovereignty. On the one hand, Schmitt's concept of sovereignty designates the subject who has the power and takes the decision to create a new constitution. The sovereign is the original author of a new constitutional order.[18] As Negri, following Schmitt, defines it, the constituent power "is the source of production of constitutional norms – that is, the power to make a constitution and therefore to dictate the fundamental norms that organize the powers of the state. In other words, it is the power to establish a new juridical arrangement, to regulate juridical relationships within a new community."[19] On the other hand, however, the same political subject can also be considered to be a dictator because at the very moment of its manifestation it cannot be limited, controlled, or restricted by any preexisting system of legal norms and constitutional provisions. Therefore, while sovereignty *qua* constituent power refers to the genuine process of constitutional making, dictatorship evokes the arbitrary and discretionary attributes that often characterize this process.

In order to discern what Schmitt thought to be the real essence of sovereignty, one has to go beyond a personal, empirical will. In fact, while dictatorship represents a temporary break with the established juridical system, sovereignty refers to the lasting foundations of such a system. In the first case, the emphasis is on the moment of violation and transgression (suspension) of an established order. In the second case, it is on the moment of the original foundation and creation (establishment) of a new order. While Schmitt portrayed the nature of dictatorship as free from the prescribed legal norms, he understood the essence of sovereignty to reside in something entirely different, mainly, in its creative, instituting powers to set new systems of fundamental laws, to 'instaure' political orders, and to bring into being novel constitutions. Consequently, while dictatorship is *norm-breaking*, sovereignty is *norm-founding*. Additionally, dictatorship represents a rupture with the inherited legality, whereas sovereignty represents the genesis of a new legality. And while dictatorship is coercive and repressive, sovereignty is creative and productive. Furthermore, dictatorship

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[18] Beaud has adopted Schmitt's definition of sovereignty: "Constituent sovereignty signifies that, in contemporary states, the Sovereign is he who makes the constitution." Beaud, *La puissance de l'état*, p. 208.

[19] Negri, *Insurgencies*, p. 2.

is *illegal* whereas sovereignty is *extralegal*. Lastly, dictatorship, as an executive power, embodies a particular will; sovereignty, by contrast, expresses a general will.[20]

To be sure, this distinction has not always been very clear. The problem seems to come from Schmitt's misleading term of "sovereign dictatorship," which conflates the extraordinary with the exception. This lack of clarity partly accounts for some standard, widespread interpretations of his work, which similarly tend to equate his concepts of dictatorship and sovereignty, accusing Schmitt of embracing a permanent executive dictatorship.[21] Those commentators, who argue that he associated the sovereign with the dictator, are also inclined to emphasize the supposedly illegal and discretionary threats of sovereignty. Schmitt's sovereign is regularly portrayed as the factual force of a supreme power, usually incarnated in the figure of the president, above and outside the restraints of the legal order, who rules through decrees. Sovereignty becomes equivalent to emergency rule.[22]

Habermas has epitomized this reading by equating Schmitt's concept of sovereignty with "the facticity of a power that overcomes every other power."[23] The distinguishing trait of sovereignty that comes out of Habermas's interpretation is its voluntaristic, absolute power that defies all rules, regulations, and institutional boundaries. It is this blending of sovereignty and dictatorship that has led many critics to argue that Schmitt advocated deformalized law and legal nihilism and endorsed the fiction of an arbitrary, irrational personal decision.[24] Thus, he is often interpreted as a disillusioned

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[20] Schmitt, *DD*, p. 137. For the relationship between the constituent power and the general will, see Bernard Groethuysen, *Philosophie de la révolution française*, Paris: Gallimard, 1992, pp. 262–268.

[21] McCormick, "The Dilemmas of Dictatorship: Carl Schmitt and Constitutional Emergency Powers," pp. 217–251.

[22] Walter Benjamin, "Theses on the Philosophy of History," in *Illuminations: Essays and Reflections*, ed. Hannah Arendt, New York: Schocken Books, 1968, pp. 253–264. This interpretation of sovereignty also informs the work of Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen, Stanford: Stanford University Press, 1998; Giorgio Agamben, *State of Exception*, trans. Kevin Attell, Chicago: University of Chicago, 2005.

[23] Habermas, "The Horrors of Autonomy: Carl Schmitt in English," pp. 130–131.

[24] Scheuerman, *Carl Schmitt: The End of Law*, pp. 1–12, 175–180; Richard Wolin, "Carl Schmitt, Political Existentialism, and the Total State," *Theory and Society*, 19:4 (1990), p. 409; Stephen Holmes, "Carl Schmitt: Theorist of the Reich," *American Political Science Review*, 77:4 (1983), pp. 1066–1067; Holmes, "Schmitt: The Debility of Liberalism"; Charles Larmore, "Carl Schmitt's Critique of Liberal Democracy," in *The Morals of Modernity*, Cambridge: Cambridge University Press, 1996; Mark Lilla, "The Enemy of Liberalism," *New York Review of Books*, 44:8, May 15, 1997.

conservative, fascinated by the irrational, an existentialist of the right who glorified violence as the expression of an authentic and intense existence, and who fought, much like Weber before him, against the alienating confines of the "iron cage" of modern, technical, disenchanted liberal civilization.[25] Some have even suggested that his antiliberal and antipluralistic existentialist notion of sovereignty is inherently totalitarian and that his theory of the "total qualitative state" is a theoretically embellished anticipation of one of the most repressive and totalitarian state systems that history has known.[26]

I find these readings partial and inconclusive for a variety of reasons. For one thing, they do not distinguish between sovereignty and dictatorship, the extraordinary and the exception. What these critical studies miss is that the criterion of a discretionary, personal will is primarily the defining characteristic of dictatorship, not of sovereignty. The act of suspending the instituted order is the distinguishing mark of dictatorship. Additionally, they overlook the crucial link between sovereignty and the constituent power of the people and ignore Schmitt's explicit depiction of the constituent sovereign as a "founding power" (*die begründende Gewalt*).[27] The sovereign is the one who creates the constitution and the fundamental laws of a regime, the one who decides the juridical form and content of the political existence of a collectivity and of its higher regulative and normative principles. In a word, the sovereign is the constituent subject.[28] Actually, whenever

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[25] Richard Wolin, "Carl Schmitt, the Conservative Revolutionary Habitus and the Aesthetics of Horror," *Political Theory*, 20:3 (1992), pp. 438–444. See also, David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar*, Oxford: Clarendon Press, 1997; McCormick, *Carl Schmitt's Critique of Liberalism*. For an incisive, convincing, but rather brief response to this type of interpretations, see Paul Hirst, "Carl Schmitt: Political Decisionism and Romanticism," in *Representative Democracy and Its Limits*, Cambridge: Polity Press, 1990, pp. 128–137.

[26] Habermas, "The Horrors of Autonomy: Carl Schmitt in English," p. 139; Richard Wolin, "Carl Schmitt, Political Existentialism, and the Total State," p. 409; Scheuerman, *Carl Schmitt: The End of Law*, pp. 85–139.

[27] Schmitt, *DD*, p. 134.

[28] For a helpful historical presentation, conceptual analysis, and comparative discussion of the concept of the constituent power, see Georges Burdeau, *Traité de science politique: le statut du pouvoir dans l'état*, Vol. IV, Paris: Librairie générale de droit et de jurisprudence, 1983; Ernst Wolfgang Böckenforde, "Die verfassungsggebende Gewalt des Volkes-Ein Grenzbegriff des Verfassungsrechts," in *Staat, Verfassung, Democratie. Studien zur Verfassungstheorie und zum Verfassungsrecht*, Frankfurt-am-Main: Suhrkamp, 1991, pp. 90–114; Negri, *Insurgencies*; Claude Klein, *Théorie et pratique du pouvoir constituant*, Paris: PUF, 1996; Andreas Kalyvas, "Popular Sovereignty, the Constituent Power, and Democracy," *Constellations*, 12:2 (2005).

Schmitt addressed the moment of the sovereign decision and its relationship to the established juridical system it was to stress its disruptive, instituting, founding attributes. Even in one of his most obscure and ambivalent texts on the exception, *Political Theology*, Schmitt affirmed that, after all, "every legal order is *based* on a decision, and also the concept of the legal order, which is applied as something self-evident, contains within it the contrast of the two distinct elements of the juristic – norm and decision. Like every other order, the legal order *rests on a decision* and not on a norm."[29] Several pages later, he added that "the circumstance that requires a decision remains an independent *determining* moment."[30] Accordingly, the sovereign who takes this decision "is the highest, legally independent, *underived* power."[31]

In a subsequent treatise, he described this instituting essence of the sovereign constituent decision much more clearly. According to this definition of decisionism, "The sovereign decision is *an absolute beginning*, and *the beginning* (understood as αρχή) *is nothing else than a sovereign decision*. It springs out of a normative nothingness and from a concrete disorder."[32] In this later, more mature version of the sovereign decision, Schmitt viewed the fundamental norms and rules (and institutions) as having no other ground than the groundless instituting sovereign will. A true sovereign decision always escapes subsumption under any rules or norms because it constitutes their ultimate origin. And as their ultimate cause, it will always elude them. Hence, the instituting sovereign decision cannot be reduced or traced back to anything external or posterior to itself. It signifies a new, radical legal beginning. It is in that sense that Schmitt understood the sovereign will as originary and groundless.[33] Ernesto Laclau, following Jacques Derrida, has nicely captured this instituting capacity of the decision by observing that "the moment of the decision, the moment of madness, is this jump from the experience of undecidability to a *creative act*.... As we have said, this act cannot be explained in terms of any rational underlying mediation. This moment of decision . . . [is] something left to itself and unable to provide its grounds through any system of rules transcending itself."[34]

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[29] Schmitt, *PT*, p. 10 (emphasis added).
[30] Schmitt, *PT*, p. 30 (emphasis added).
[31] Schmitt, *PT*, p. 17 (emphasis added).
[32] Schmitt, *UDA*, pp. 21, 23–24 (emphasis added). This founding moment of the decision is discussed in Wolfgang Palaver's idiosyncratic reading of Schmitt in his "A Girardian Reading of Schmitt's Political Theology," *Telos*, 93 (1992), p. 55.
[33] Preuss, *Constitutional Revolution*, pp. 2–5.
[34] Ernesto Laclau, "Deconstruction, Pragmatism, Hegemony," in *Deconstruction and Pragmatism*, ed. Chantal Mouffe, London: Verso, 1996, pp. 54–55; Ernesto Laclau, *New Reflections on the Revolution of Our Time*, London: Verso, 1990, pp. 30, 194.

Obviously, Schmitt departs from more traditional definitions of sovereignty as an absolute instance of command or as a supreme power of domination. Instead of stressing the discretionary power of a superior, personal executive command emanating from the top, he redirects our attention to the underlying sources of the instituted reality located at the bottom. The sovereign constituent subject is not a repressive or coercive force, but rather a productive agency. Likewise, the sovereign is less an absolute commander than a legislator: the mission of the sovereign is not to command or to exercise power, but instead to invent the higher rules and to determine the fundamental laws of a political community. In Michelman's terms, the sovereign is the one who makes the laws of lawmaking.[35] Once it has carried out its task, the sovereign withdraws from the political realm, leaving politics to its elected representative(s), the newly instituted norms, and the ensuing state legality – this second moment of democracy, the moment of normal politics, which I discuss in the next chapter.

With his concept of the constituent sovereign, Schmitt sought to account for the origins of a juridical system and political order. He did not try to eliminate the norm in favor of the exception but to elucidate the conditions of its emergence and of its possibility. Similarly, he did not aspire to replace procedure with substance, legality with legitimacy, or the form with the content, as is often thought. His constitutional theory aimed at revealing the superiority of legitimacy only during extraordinary politics, that is, during those singular, extraordinary moments of genuine constitutional creation. While he established the primacy of legitimacy as the foundation of legality, he did not wish to eradicate the latter.[36]

Once this aspect of Schmitt's project is acknowledged, the ambiguity surrounding *Political Theology* is relativized. In this tiny, tense text, sovereignty refers not only to a discretionary will capable of deciding the exception but also to the origins of a new higher norm and the foundations of a novel legal system in moments of radical change. Precisely because the norm is antecedent to the decision that has brought it into being and instituted it, its origins must be located in a normless, extralegal zone. Instead of promoting an arbitrary will and of sketching "the outlines of a theoretical justification

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[35] Frank Michelman, *Brennan and Democracy*, Princeton: Princeton University Press, 1999, p. 48.

[36] Paul Piccone and Gary L. Ulmen, "Introduction to Carl Schmitt," *Telos*, 72 (1987), p. 7. Here, in fact, Schmitt simply reproduced Sieyès's argument that "the national will...needs only its own reality to be always legal, because it is the origin of all legality." Emmanuel Sieyès, *Qu'est-ce que le Tiers état?* Geneva: Librairie Droz, 1970, p. 182.

of an incipient dictator, unrestrained by the 'normativities' of liberal demo-
cratic politics,"[37] his constitutional theory relies on and further elaborates
Sieyès's famous statement that "the constituent power can do everything in
relationship to constitutional making. It is not subordinated to a previous
constitution. The nation that exercises the greatest, the most important of its
powers, must be, while carrying this function, free from all constraints, from
any form, except the one that it deems better to adopt."[38] By adopting this
position, Schmitt also came extremely close to James Madison's response to
the charges that the Philadelphia Convention acted illegally, because its res-
olutions were neither authorized by the Continental Congress nor in accord
with the Articles of the Confederation. In a tone similar to that of Schmitt,
Madison contended that the convention

must have reflected, that in all great changes of established governments, forms ought
to give way to substance; that a rigid adherence in such cases to the former, would
render nominal and nugatory the transcendent and precious right of the people to
"abolish or alter their government as to them shall seem most likely to effect their
safety and happiness" . . . it is therefore essential that such changes be instituted by
some *informal and unauthorized propositions*. . . . Had the convention . . . taken the
cold and sullen resolution of disappointing its ardent hopes, of sacrificing substance
to forms, of committing the dearest interests of their country to the uncertainties of
delay and the hazard of events . . . what judgment ought to have been pronounced
by the impartial world, by the friends of mankind, by every virtuous citizen, on the
conduct and character of this assembly?[39]

The Popular Sovereign and Democracy

It is critical to bear in mind the radical constituting dimension of sovereignty
derived from the "absolute purity" of the founding decision, when joined
with the idea of the people, provides Schmitt with the normative resources
for a robust, pure theory of democratic legitimacy.[40] By investigating the
consequences of the democratization of the constituent power, he elabo-
rated one of the most intriguing, original theories of popular sovereignty in
the twentieth century.[41] In a modern democracy, he claimed, the people are

[37] Scheuerman, *Carl Schmitt: The End of Law*, p. 73.
[38] Emmanuel Sieyès, "Reconnaissance et exposition raisonnée des droits de l'homme et du
citoyen," in *Orateurs de la Révolution française: I. Les Constituants*, ed. François Furet and
Ran Halévi, Paris: Gallimard, 1989, p. 1013.
[39] James Madison, *The Federalist: A Commentary on the Constitution of the United States*,
ed. Edward Mead Earle, New York: Modern Library, 1937, no. 40, pp. 257, 258.
[40] Schmitt, *PT*, p. 13.
[41] Schmitt, *V*, pp. 237–238.

the sole sovereign, because they are the unique holders of the constituent power, that is, the single authors of the constitution.[42] As he put it, "where the democratic idea of the *maiestas populi* rules, the validity of the constitution rests on the will of the people."[43] The constituent sovereign evokes the extraordinary moment of the concrete manifestation of collective autonomy and popular mobilization during those rare periods of political innovation and original constitutional making, when there is growing mass intervention and participation in the process of establishing a new democratic constitution.

Although Schmitt recognized that under modern conditions it is usually a sovereign dictatorship that, without any constraint or control from pre-existing instituted authorities, has to lay down the fundamental law of the land, frequently in the benign form of a constituent assembly, he nonetheless insisted that it always remains subordinated to the supreme authority of the people, the true, uncontestable sovereign, which has delegated and authorized it to act.[44] As he claimed, from "another perspective, it [i.e., sovereign dictatorship] remains a dictatorship, that is, a *mandate. It is not the sovereign*, but acts in the name and in behalf of the people, who can at any time disavow its proxy with a political action."[45] The real sovereign in a democracy can be but one, and this is the people and not the constituent assembly, which remains a form of delegated dictatorship.[46] In this division of labor between the sovereign and the dictator, the extraordinary and the exception, the people remain the sovereign, and the constituent assembly stays its inferior, delegated dictator. As Schmitt explicitly declared, sovereign dictatorship "is not the subject or holder of the constituent power, but only its delegate. . . . [Sovereign dictatorship] is the only constituted power" during a revolutionary period when the people choose to express themselves politically.[47] Because "all power resides in the *pouvoir constituent* of the people," the latter is the final and sole legitimate sovereign authority in a

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[42] Schmitt, *DD*, p. 139.

[43] Schmitt, *V*, p. 88.

[44] Schmitt, *V*, p. 26.

[45] Schmitt, *V*, p. 59–60.

[46] I disagree slightly with Arato's depiction of the sovereign constituent power as an "affective identification with leaders or elites." It seems to me that it would be more accurate to describe the revolutionary constituent assemblies as simply delegates of the people. Thus, although, according to Schmitt, the people during normal politics can identify with the plebiscitarian leader, who represents the unity of the state, they do not need to do so in extraordinary moments of constitutional politics. See Andrew Arato, "Dilemmas Arising from the Power to Create Constitutions in Eastern Europe," *Cardozo Law Review*, 14:3–4 (1993), p. 674.

[47] Schmitt, *V*, p. 59.

democracy insofar as it is the unique rightful holder of the constituent power that can legitimately create a new constitutional order.[48]

As the sovereign dictatorship is but a form of delegation, it should not be confused with the real supreme power, the popular sovereign will, which has appointed it and to which it remains subordinated.[49] There is no doubt that for Schmitt, in modern times and more particularly during the extraordinary process of constitutional making, only the people can be the sovereign. Modernity and democracy are intrinsically connected.[50] As Negri, following Schmitt, has correctly asserted, "To speak of the constituent power is to speak of democracy. In the modern age the two concepts have often been related."[51] And with a few exceptions, as Claude Klein has sharply observed, it is Schmitt who recovered the concept of constituent power from the oblivion in which liberal political and legal theory had condemned it.[52] The importance of this recovery can be better illustrated by Ernst-Wolfgang Böckenförde's claim that "the concept of the constituent power is, because of its origin as well as of its content, a democratic and revolutionary concept *that belongs solely* to the context of a democratic constitutional theory."[53]

From this analysis, a second conclusion can be drawn: sovereignty is not only defined with respect to its genuine instituting power to create a new constitution and a new system of fundamental laws but, in modern times, it is also characterized by its identification with the will of the people.[54] By fusing Bodin's and Rousseau's respective understandings of the defining marks of sovereignty, Schmitt endowed the constituent power with three classical sovereign attributes: it is one and indivisible, unrepresentable, and unalienable and untransferable. These attributes make clear that sovereign dictatorship is but a mere form of delegation, a binding mandate or commission,

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[48] Schmitt, *PT*, p. 51.

[49] Schmitt, *V*, p. 49.

[50] Schmitt, *V*, pp. 48–50.

[51] Negri, *Insurgencies*, p. 1.

[52] Klein, *Théorie et pratique du pouvoir constituant*, pp. 100–102.

[53] Ernst-Wolfgang Böckenförde, "Die Verfassungsggebende Gewalt des Volkes-Ein Grenzbegriff des Verfassungsrechts," in *Staat, Verfassung, Demokratie. Studien zur Verfassungstheorie und zum Verfassungsreght*, Frankfurt am Main: Suhrkamp, 1992, pp. 11–12 (emphasis added). Also see Carl J. Friedrich, *Constitutional Government and Democracy: Theory and Practice in Europe and America*, Boston: Ginn, 1950, p. 128; Kalyvas, "Popular Sovereignty, the Constituent Power, and Democracy."

[54] See the section entitled "The Subject of the Constituent Power," *V*, pp. 77–82; Arato, "Forms of Constitution Making and Theories of Democracy," *Cardozo Law Review*, 17:2 (1995), pp. 202–205; Cristi, *Carl Schmitt and Authoritarian Liberalism*, pp. 116–117; Balakrishnan, *The Enemy*, pp. 87–100.

subordinated to the control of the sovereign people, who remain in the last instance the true and uncontestable holder of the constituent power. This last point can help one to better understand his seminal redefinition of popular sovereignty in terms of a theory of democratic legitimacy with a critical intent: the sovereign, according to Schmitt, is the one who has the power and the authority to take a concrete, total decision on the type and form of the political existence, that is, to determine the existence of a political unity in its entirety.[55]

Given this redefinition, his approach facilitates the distinction, from a normative-democratic point of view, between legitimate and nonlegitimate constitutions, just and unjust political and legal orders. It advances a normative criterion, the constituent popular will, with which one can test and assess the legitimacy of existing constitutions and of the basic structures of society to which it gave birth. For instance, the identity of the constituent subject, the people, becomes the defining standard by which the validity of democratic constitutions and institutional arrangements should be evaluated. "Democratic theory," Schmitt powerfully argued, "knows as a legitimate constitution only the one that rests on the constituent power of the people."[56] This theory of democratic legitimacy is in accord with his definition of democracy as the regime in which "the people is the subject of the constituent power and gives to itself its own constitution."[57] In a democratic regime, therefore, the legitimacy of the fundamental norms and values rests exclusively upon the actual manifestation of the will of the popular constituent subject and the participation of the citizens in the extraordinary process of genuine constitutional making.[58]

Surprisingly enough, the image of Schmitt as an intransigent antinormativist thinker starts to shatter once his constitutional theory is taken seriously. The antinormative tonality that one senses in *The Concept of the Political* recedes before a normative theory of democracy.[59] It would be incorrect, therefore, to keep insisting on portraying his constitutional and political writings as irrational and nihilist. Not only do they not abandon normative political theory; they also help to illuminate the normative foundations

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[55] Schmitt, *V*, pp. 75–76.

[56] Schmitt, *V*, pp. 94–95.

[57] "Das Volk ist Träger der verfassunggebenden Gewalt und gibt sich selbst seine Verfassung." Schmitt, *V*, pp. 224.

[58] Schmitt, *V*, p. 87. For a discussion of Schmitt's theory of constitutionalism, see Arato, "Forms of Constitution Making and Theories of Democracy," pp. 191–231; Arato, "Dilemmas Arising from the Power to Create Constitutions in Eastern Europe," pp. 667–672.

[59] Schmitt, *CP*, pp. 52, 66–67.

of popular sovereignty and elucidate the democratic grounds of legitimate political authority.[60] Hence, I am inclined to redefine the constituent sovereign as a collective power to make new constitutional beginnings, aimed at bringing about an extraordinary change in the institutions of society.[61] Constitutional politics, correlatively, is a popular strategy of power aimed at the 'instauration' of a new order and arising from the creative and cooperative activity of the citizens, organized politically as a collective agency.

There is here a promising connection between a democratic theory of the constituent power and the traditional idea of collective self-determination and self-government. A valid democratic constitution is one that has been created by the decision of the sovereign popular subject, outside preexisting authority and legality.[62] I call Schmitt's theory of legitimacy pure because it seeks to derive the validity of a political-legal order solely from the will of the sovereign people. For Schmitt, the legitimacy of a democratic constitution depends exclusively on the act of the constituent decision of the sovereign people, and it is that political decision which endows a democracy with the necessary normative resources during ordinary times and everyday lawmaking.

Schmitt's Challenge to Kelsen's Pure Theory of Law

Contrary to the mainstream interpretations of Schmitt's political theory as normatively vacuous, I see it as consisting of normative elements that if properly reconstructed could substantially benefit radical democratic politics today. To better illustrate my point against the prevailing attitude that his concept of "sovereignty acquires a halo of surrealistic meanings through the relationship to the violent destruction of the normative as such," and to fully grasp the importance of his concept of popular sovereignty for a theory of radical democracy with a normative content, I briefly compare it with Hans Kelsen's alternative model and set it against the background of one of the many confrontations that marked the turbulent relationship between the two most prominent jurists of the Weimar period.[63] By reframing Schmitt's

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[60] Schmitt, *V*, p. 90.
[61] Schmitt, *V*, p. 36.
[62] Schmitt, *PT*, p. 51; Schmitt, *V*, p. 88.
[63] Habermas, "The Horrors of Autonomy: Carl Schmitt in English," p. 137. For a general introduction to Schmitt's critique of Kelsen's normativism, see Jean-François Kervégan, "La critique schmittienne du normativisme kelsénien," in *Le droit, le politique autour de Max Weber, Hans Kelsen, Carl Schmitt*, ed. Carlos Miguel Herrera, Paris: Éditions L'Harmattan, 1995, pp. 229–241. For a more general discussion of Schmitt and Kelsen, see *Hans Kelsen and Carl Schmitt: A Juxtaposition*, ed. Dan Diner and Michael Stolleis, Tel Aviv: Bleicher Verlag, 1999.

project as an answer to the limitations and impasses of Kelsen's science of legal positivism, this comparative exercise sheds some preliminary light on the enduring pertinence of Schmitt's theory of the extraordinary.

As I see it, Schmitt elaborated the notion of the constituent power as a solution to the unresolved problems with which Kelsen's legal positivism was confronted, namely, the origins of the validity of a legal system.[64] Thus, instead of placing Schmitt at the antipode of Kelsen, I seek to show how the former supplements and complements the latter. Such a reading distances itself from the conventional tendency of framing Schmitt's dispute with Kelsen as one between a nihilistic, irrational, and normless decisionism versus a rational normativism.[65]

In the first chapter of his theory of the constitution, but also in *Political Theology*, Schmitt criticized Kelsen's legal science for failing to account for the origins of the basic norm, the *Grundnorm* and, consequently, for obliterating the issue of democratic sovereignty.[66] Note here that in this critique Schmitt links together the two themes: the foundation of a legal order and the definition of sovereignty. The thrust of his observations is completely consistent with the main premises of his political and constitutional theory: Kelsen's inability to account for the first (i.e., the origins of a legal system) leads him logically to misinterpret and reject the second (i.e., sovereignty) and vice versa.[67]

Kelsen's project of elaborating a pure theory of law can be described as an effort to fix firmly the objective validity of a legal order independently from factual considerations, metaphysical assumptions, and subjective evaluations. On the one hand, he rejected the premises of legal realism by strictly separating "ought" from "is" and *jus* from *factum*. For Kelsen, a legal norm, as a form of "ought," needs to be clearly distinguished from a mere reflection of factual relations of power or of partial interests.[68] He asserted that the validity of a legal system should not be derived from empirical prelegal

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[64] Kervégan, "La critique schmittienne du normativisme kelsénien," p. 235.

[65] Dyzenhaus, *Legitimacy and Legality*, pp. 38–122; Scheuerman, *Carl Schmitt: The End of Law*, pp. 74–82. For the concept of legality in Kelsen, see his section entitled "Justice and Legality," in *General Theory of Law and State*, p. 14.

[66] Schmitt, *PT*, pp. 18–21.

[67] Schmitt, *PT*, p. 21; Kervégan, "La critique schmittienne du normativisme kelsénien," p. 234. For a critique of the concept of sovereignty, see Kelsen, *Introduction to the Problems of Legal Theory*, trans. Bonnie Litschewski Paulson and Stanley Paulson, Oxford: Clarendon Press, 1992, p. 124. That Schmitt intended his argument to be a response to the limitations of Kelsen's *Pure Theory of Law* is illustrated by the fact that he often introduced his theory of sovereignty at the end of his critical commentaries on Kelsen.

[68] Hans Kelsen, *Pure Theory of Law*, trans. Max Knight, Berkeley: University of California Press, 1967, pp. 6–8, 68.

origins or from "factual contingencies of motivation."[69] Validity, according to this view, was not to be reduced to, deduced from, or identified with efficacy.[70] Kelsen aspired to free legal science from factual considerations and to clean legal norms of any traces and influences of social power. On the other hand, and despite the sharp divorce of validity from efficacy, he did not reproduce a classical natural-law-theory argument.[71] On the contrary, he also sought to free legal studies from ethical considerations and to "purify" them from the intrusion of irrational and metaphysical elements and subjective, moral values.[72] Consistent with his moral relativism, and influenced by Weber's notion of the "polytheism of values," Kelsen thought that any reference to morality or political beliefs would compromise the objective and neutral scientific character of jurisprudence. By radicalizing Weber's critique of natural law, he argued for a value-free and axiologically neutral science of law.[73]

   Against these two opposing schools of legal thought – legal realism and natural-law theory – Kelsen's alternative solution was based on the premise that only law, not facts or values, could create law. What did he mean by that? How is the notion of legal validity to be accounted for? Simply put, the validity of a legal norm comes from another legal norm, antecedent and superior, rather than from some sociological or ideational extralegal sources.[74] "It is a most significant peculiarity of law," Kelsen argued, "that it regulates its own creation and application."[75] As a consequence, "an 'ought' must always be deduced from another 'ought'; it never follows from a mere 'is.'"[76] These premises allow Kelsen to defend the autonomy of the normative.[77] A coercive command yields a legal norm only if and insofar as it has been authorized by a higher norm, enacted by a competent legal authority, and produced according to prescribed juridical rules and

[69] Kelsen, *Introduction to the Problems of Legal Theory*, pp. 58, 12–13.

[70] Kelsen, *Introduction to the Problems of Legal Theory*, pp. 60–61.

[71] For a concise summary of his critique of natural law, see Kelsen, "Natural Law Doctrine and Legal Positivism," in *General Theory of Law and State*, pp. 391–446.

[72] Kelsen, *Pure Theory of Law*, p. 68.

[73] Kelsen, *Introduction to the Problems of Legal Theory*, pp. 1, 7–8, 13–14.

[74] Kelsen, *Pure Theory of Law*, pp. 19–20.

[75] Kelsen, *Pure Theory of Law*, p. 71; Kelsen, *General Theory of Law and State*, p. 124; Hans Kelsen, "Foundations of Democracy," *Ethics*, 66:1 (1955), p. 3; Hans Kelsen, "Science and Politics," in *What Is Justice? Justice, Law and Politics in the Mirror of Science*, Berkeley: University of California Press, 1957, p. 365.

[76] Kelsen, "Value Judgments in the Science of Law," in *What Is Justice? Justice, Law and Politics in the Mirror of Science*, p. 221; Kelsen, *General Theory of Law and State*, p. 399.

[77] Joseph Raz, "The Purity of the Pure Theory of Law," in *Essays on Kelsen*, ed. Richard Tur and William Twining, Oxford: Clarendon Press, 1986, pp. 79–97.

procedures. Not every coercive command or act of the will has the validity of law.[78]

Kelsen built his legal theory on the idea of a hierarchical legal structure and a strictly procedural relationship. The validity of a legal norm is inferred from a higher-order norm, whose own validity, in turn, is established by an appeal to its higher-order norm, and so on. The highest norm in the hierarchical legal system derives its own validity from a direct appeal to the constitution. The constitutional document as the supreme law of the land consists of "that positive legal norm (or set of norms) that regulates the creation of the other norms of the legal order."[79] The validity of the constitution, however, cannot be derived from any superior legal norm because it is itself the highest source from which all other lower norms are derived. If the validity of the highest legal norm, the constitution, cannot be derived from another positive norm, it can be derived only from a nonlegal norm, a nonpositive norm, the basic norm, what Kelsen in his early writings called the "origin norm," the *Ursprungsnorm*.[80] There must be one final ground, one highest norm that is the source of the validity of all derivative norms, including the constitution.[81] In the absence of such an ultimate norm, legal science would spiral into a *regressus ad infinitum*.[82] The basic norm is a *causa sui*, reminiscent of Aristotle's "unmoved mover," an authorizing norm that endows the inferior norms with the necessary validity.

Here one reaches to the core of Kelsen's positivism: the metalegal basic norm.[83] Although the basic norm is an authorizing norm that endows all inferior norms with the necessary validity, it is itself unauthorized, a "hypothetical foundation," a mental presupposition that does not describe a real, existing ground.[84] It is not a positive, human-made norm and is not

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[78] See Kelsen's renowned chapter, "The Law as a Normative Coercive Order; Legal Community and Gang of Robbers," in *Pure Theory of Law*, pp. 44–50.

[79] Kelsen, "Science and Politics," p. 364; Kelsen, *Introduction to the Problems of Legal Theory*, pp. 55–56, 63–64.

[80] Hans Kelsen, *Allgemeine Staatslehre*, Vienna: Nachdruck, 1993, pp. 99, 104, 338. For an illuminating discussion of the basic norm in Kelsen's early writings, see Stanley Paulson's "On the Early Development of the Grundnorm," in *Law, Life, and the Image of Man: Modes of Thought in Modern Legal Theory; Festschrift for Jan M. Broekman*, ed. Frank Fleerackers, Evert van Leeuwen, and Bert van Roermund, Berlin: Duncker und Humblot, 1997, pp. 217–230.

[81] Kelsen, "On the Basic Norm," *California Law Review*, 47:1 (1959), p. 109.

[82] Kelsen, *General Theory of Law and State*, p. 111.

[83] For a critical discussion of Kelsen's theory of the basic norm, see Andreas Kalyvas, "The Basic Norm and Democracy in Hans Kelsen's Legal and Political Theory," *Philosophy and Social Criticism*, 32:5 (2006), pp. 572–599.

[84] Kelsen, *General Theory of Law and State*, p. 111.

created by a legal authority.[85] As a "hypothetical foundation," its validity is assumed by the legal scholar in order to explain the normative character and unity of the entire legal system.[86] This higher hypothetical nonpositive norm is the ultimate, objective source of legal validity.

For Kelsen this higher norm is not a positive norm. It is instead a hypothetical norm, a logical assumption, the existence and validity of which we need to assume if we want to explain the normative character of the entire legal system. Unlike other legal positivists, such as Jeremy Bentham and John Austin, who deduced the validity of a legal system from the subjective and empirical will of the sovereign command, Kelsen, building on Kant's transcendental argument, asserted that the basic norm must be perceived solely as the necessary, logical condition of the possibility of legal science, the transcendental presupposition of any legal cognition. It is solely a mental construction, a product of thought. Once this premise is accepted, it is feasible to test, by tracing back to their final foundation, the authorization acts and the validity of all the derivative, inferior legal norms and to account for the normativity of laws.

In his first writings on this matter, Kelsen avoided addressing directly the question of the sources of this sovereign-less, higher basic norm from which the entire legal system derives its validity, emphasizing merely its hypothetical existence and stressing its "epistemological function."[87] Such a function could free legal science from the metaphysical and unscientific illusions of natural law, the irrationality of subjective beliefs, and the empirical and sociological reductionism of legal realism. But apart from these references to the basic norm as a presupposition, an "as if," there is nothing in his theory that could explain why and on what grounds the basic norm should be considered valid – especially when he had argued that it is not a positive norm. Whereas with the supposition of a basic norm Kelsen could account for the validity of all the derivative norms (the issue of legality), he was still confronted with the vexing issue of the origins of the validity of the basic norm itself (the issue of legitimacy). Why and how does a basic norm become valid? What differentiates it from the naked power of a human will strong enough to impose its partial interest on others in the form of a basic norm? Kelsen elided these questions by claiming that it did not matter where the

[85] Hans Kelsen, "Why Should the Law Be Obeyed?" in *What Is Justice? Justice, Law, and Politics in the Mirror of Science*, pp. 262–263.

[86] Kelsen, *Introduction to the Problems of Legal Theory*, p. 58; Kelsen, *General Theory of Law and State*, p. 116; Kelsen, *Pure Theory of Law*, p. 202.

[87] Kelsen, *Pure Theory of Law*, p. 218.

basic norm came from, why it had become the basic norm, or how it came into being. These questions are irrelevant for the validity of a legal system. They are unscientific.

For this reason, Kelsen dismissed any reference to a theory of legitimation, arguing that legitimacy discourses were ideological by nature.[88] What matters is only legality – that is, the internal congruence, logical consistency, and hierarchical relation within an abstract legal system between superior and inferior norms. He described the origins of the basic norm as an inexplicable *Mysterium* in order to characterize the creation of a new basic norm.[89] Thus, while Kelsen was able to provide a precise and conclusive theory of legality, he ignored the question of legitimacy.

At this point, one can locate the normative impact of Schmitt's crucial intervention. With a poignant comment, he observed that Kelsen's supposed derivation of the validity of the legal system from the *Grundnorm* was a "tautology of raw factuality" that undermines any distinction between validity and efficacy.[90] Here, Schmitt struck at the heart of Kelsen's attempt to derive the validity of the legal system from itself, by pointing at the normative deficit of the pure theory of law. If the validity of the basic norm cannot be established but just assumed, then neither can the validity of the secondary, derivative norms that are supposed to appeal to this higher level be established. How can the basic norm that is the source of validity of all the derivative positive norms itself be considered to be a valid norm, if its own authority is not conferred by any prior, higher norm? How can a norm that has not been posited by another positive norm be regarded as valid? How, additionally, can a nonpositive norm be regarded as the source of normativity of all positive norms? Where does its validity come from? Clearly, there is a problem of logical consistency here.[91] But this problem aside, there is still another, equally pressing difficulty with vital implications for democratic theory. Only this second problem is examined here.

If it can be demonstrated that this basic norm, the foundation of a constitutional regime, is derived from sheer factual power and pure might, Kelsen's normativist legal theory will break down like a castle made of cards. There would be no way, in this case, to distinguish between power and norm,

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[88] Kelsen, *Introduction to the Problems of Legal Theory*, pp. 18–19.

[89] Kelsen, quoted by Peter Caldwell in *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory and Practice of Weimar Constitutionalism*, Durham: Duke University Press, 1997, p. 50.

[90] Schmitt, *V*, pp. 8–9.

[91] Joseph Raz, "Kelsen's Theory of the Basic Norm," in *The Authority of Law: Essays on Law and Morality*, Oxford: Clarendon Press, 1979, pp. 122–145.

force and rules, politics and law. Validity would ultimately refer to nothing more than the efficacy of certain actors to impose a new basic norm. It would appear essentially as disguised factual power. But this is precisely the case. Kelsen reluctantly acknowledged that, when it comes to historical reality, the basic norm, though a logical presupposition, might well have emanated from the naked subjective will of an individual or a group of individuals who had the force to overthrow the previous basic norm and to impose a new one. This elaboration suggests that the basic norm might be nothing more than the expression of an arbitrary, subjective act.[92] Moreover, this act operates in a legal vacuum and by itself does not constitute a positive legal norm.[93]

Consequently, the legal system, which Kelsen sought to insulate from politics and power, is firmly rooted in a purely extralegal political act. That he chose not to examine this originating act does not mean that he was able to solve the problem of arbitrary power. All he is left with is the simple factuality of the basic norm. Although it may be argued that this approach does not differ radically from Schmitt's description of the extralegal origins of the constitution-founding moment, there is nonetheless one important difference: whereas for both thinkers this initial moment of the norm-giving act is beyond legality, for Schmitt it is not beyond legitimacy. Indeed, for Schmitt, the assessment of the legitimacy of a constitutional order is directly dependent upon the identity of the actor from which it has originated, that is, whether it emanated from the people, a particular group, or a single individual. According to this approach, questions bearing on who creates the basic norm directly determine the validity and legitimacy of the ensuing constitutional and legal system. This crucial distinction was reiterated by Carl Friedrich, who, following Schmitt, correctly observed that, "To make the constitutional decision genuine it is also necessary that it be participated in by some of those who are being governed as contrasted with those who do the governing. This differentiates such a constituent act from a *coup d'état*."[94]

This normative-critical aspect is dramatically missing from Kelsen's legal positivism. All acts of founding, precisely because they operate in a legal vacuum, remain beyond the reach and interest of the legal theorist, who can neither study nor evaluate them. These acts are irrelevant for the subsequent

[92] Kelsen, *Introduction to the Problems of Legal Theory*, pp. 57, 59.
[93] Kelsen, *Introduction to the Problems of Legal Theory*, p. 58.
[94] Friedrich, *Constitutional Government and Democracy: Theory and Practice in Europe and America*, p. 128.

legal system, whose validity should be judged only according to its prospective functioning and internal logic, after, of course, being based on an arbitrary and effective basic norm. Therefore, independently of how it came into being, any form of authority, once stabilized, obeyed by its citizens, and recognized by the international community, is a valid legal order.

But how did Kelsen reach this conclusion? Simply by ignoring the vexing issue of the sources of the basic norm and the origins of political power and by dispensing with sovereignty. As Schmitt pointed out,

[J]urists of positive law, i.e. of constituted and enacted law, have been accustomed in all times to consider only the given order and the processes that obtain within it. They have in view only the sphere of what has been established firmly, what has been constituted; in particular only the system of a specific state legality. They are content to reject as "unjuridical" the question of what processes established this order. They find it meaningful to trace all legality back to the constitution, or to the will of the state, which is conceived of as a person. However, they have an immediate answer for the further question regarding the origin of this constitution or the origin of the state; they say it is a mere fact. In times of unproblematic security this has a certain practical rationale, when one considers that modern legality, above all, is the functional mode of a state bureaucracy, which has no interest in the right of its origins, but only in the law of its own functioning. Nevertheless, the theory of constitutive processes and power manifestations that produces constitutions also involves questions of jurisprudence.[95]

This neglect of constitutional origins in Kelsen divests the concept of validity from its forms of genesis and detaches the legal order and the state from the needs and expectations of the participants.[96] What Kelsen's normative legal positivism succeeds in doing is to cut the ties between the validity of a norm and its legitimacy. By radicalizing Weber's notion of legality, Kelsen introduced a procedural argument that reduced the validity of a legal norm to mere legality, that is, to its generation from a higher, competent norm according to some prescribed rules. And although he struggled to keep the legal norm apart from political power, believing that in this manner

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[95] Carl Schmitt, *The Nomos of the Earth*, trans. Gary Ulmen, New York: Telos Press, 2003, p. 82.

[96] As early as 1926, Herman Heller had charged Kelsen with reintroducing facticity into legal theory from the back door and within the concept of the basic norm. Herman Heller, "Die Krise der Staatslehre," in *Gesammelte Schrifften*, ed. Fritz Borinski, Martin Drath, Gerhart Niemeyer, and Otto Stammer, Tübingen: J.C.B. Mohr, 1992, pp. 23–24. Two years later, Carl Schmitt repeated this criticism, by arguing that Kelsen's supposed derivation of the validity of the legal system from the *Grundnorm* was a "tautology of raw factuality." Schmitt, *V*, pp. 8–9. For an illuminating discussion of the different variations that the term "normative" takes in Kelsen theory, see Bobbio, *Essais de théorie du droit*, Paris: Bruylant L.G.D.J, 1998, pp. 185–206.

he could succeed in immunizing law from politics, he concluded with the near fusion of norm and fact, "ought" and "is," validity and efficacy.[97] This identification confirmed Kelsen's inability to discriminate between valid and nonvalid basic norms, between legitimated and nonlegitimated higher laws.[98]

There is no better place to see this problem than in his major subsequent post–World War II writings. Whereas he had previously rejected what he termed "the ideology of legitimacy" because of its tendency for subjective prescriptions and irrational value judgments that do not correspond to the objective and purely descriptive aspirations of a neutral legal science, in later treatises he moderated this extreme claim, attempting to reconsider the issue of legitimacy and to explore ways of solving the mystery of the origin of the validity of the basic norm.[99] This effort is manifested in a slight change of terminology that reflects deeper theoretical modifications. Discussing the origins of the basic norm, Kelsen now postulated the existence of a "norm-creating authority," a "constitution-establishing authority," which, while extralegal, should be still "looked upon as the highest authority."[100] On what grounds can this originary norm-creating power that creates the basic norm be considered to be the higher, legitimate authority? And by whom? Certainly not by the citizens.[101] A scientific and pure theory of law cannot link the validity of the law to any particular, contingent attitude adopted by the participants. This would amount to a regression back to subjective

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[97] Kelsen, *Introduction to the Problems of Legal Theory*, pp. 2–3, 60, 62. For a critique of Kelsen's legal positivism along these lines, see F. A. Hayek, *Law, Legislation and Liberty: A New Restatement of the Liberal Principles of Justice and Political Economy, Vol. II: The Mirage of Social Justice*, London: Routledge, 1998, pp. 49, 52.

[98] Hayek, *Law, Legislation and Liberty*, pp. 49–50, 53–54. David Dyzenhaus reiterates this critique in his *Legitimacy and Legality*, p. 155.

[99] "'Legitimacy' being an ideology in the Marxist, and thus pejorative, sense of the term rather than a scientific concept." Kelsen, *Introduction to the Problems of Legal Theory*, pp. 106, 18–19. A parallel reading of the two different versions of the *Pure Theory of Law* – the first published in 1934 and translated as *Introduction to the Problems of Legal Theory* and the second published in 1960 as an expended, altered version of the first edition, translated as *Pure Theory of Law* – shows the elimination from the text of the references to legitimation discourses as forms of political ideology and thus as unscientific in character. Additionally, Kelsen added a section, entitled "Legitimacy and Effectiveness" to address the problem of legitimate power. Kelsen, *Pure Theory of Law*, pp. 208–211. In *General Theory of Law and State*, Kelsen did not include the notion of legitimacy in the category of the ideological. He used instead the term "rational justification." Kelsen, *General Theory of Law and State*, 1999, p. 8.

[100] Kelsen, *Pure Theory of Law*, p. 199.

[101] Kelsen, *Pure Theory of Law*, p. 218.

beliefs and arbitrary value judgments. Interestingly enough, he alluded to another solution. There is an element of recognition that is indispensable for endowing the basic norm with appropriate legitimacy. This recognition is expressed by the legal scientist or from "the point of view of a science of positive law" that corresponds to a scientific and objective point of view. In other words, it seems that for Kelsen the agent that founds a new political and legal order and establishes a new basic norm must be recognized by the jurist, who sees it *sub specie aeternitatis*, as the higher authority.[102]

What did Kelsen achieve by such a move? If the authority that institutes the new basic norm is considered to be the only competent constituting authority from the impartial and informed point of view of legal science, then the ensuing basic norm appears also to be valid. Though subtle, the change in his argumentation is not inconsequential. Instead of emphasizing solely the need to presuppose the basic norm as the condition of possibility for the validity of a legal system, he now added the need to presuppose also a "constitution-creating act of the will" as the condition of possibility for the validity of the ground norm, with the conferred authority to create a constitution.[103] It is here that the jurists must assume that they either have the competence to create the basic norm or can recognize those who have it. For Kelsen, the validity of the *Grundnorm* presupposes the postulation of a constituent will, which, although it is acknowledged to be fictitious, is, nonetheless, acknowledged.[104] According to this later formulation, the answer to the question of why a basic norm is valid is that there is a (hypothetical) nonlegal or metalegal authority that created it, and which is "regarded (i.e. by the jurist or legal science) as the highest authority."[105] "The creator of the historically first constitution" is regarded by the positivistic science of law as the only legitimate authority competent to create a new basic norm.[106]

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[102] Kelsen, *What Is Justice? Justice, Law and Politics in the Mirror of Science*, p. 262. See Raz for a penetrating critique of Kelsen's reference to a hypothetical legal person in "Kelsen's Theory of the Basic Norm," pp. 141, 144–145.

[103] Hans Kelsen, *Théorie génerale des norms*, Paris: PUF, 1996, pp. 343, 344.

[104] Kelsen, *Pure Theory of Law*, pp. 202, 203–204.

[105] Kelsen, *Pure Theory of Law*, p. 203. According to Carlos Miguel Herrera, Kelsen understood sovereignty to be a hypothetical concept, too, a theoretical construction, which, like the constituent power, was a necessary logical presupposition for a juridical theory of the state. Carlos Miguel Herrera, "La souveraineté du dogme à l'hypothèse," in *Théorie juridique et politique chez Hans Kelsen*, Paris: Éditions KIMÉ, 1997, pp. 115–118.

[106] Kelsen, *Pure Theory of Law*, pp. 203–204.

Here Kelsen smuggled into his argument a principle of recognition and legitimacy in the form of a logical-transcendental presupposition that is not derived from the existing legal system but rather from the legal consciousness of the jurist. Olivier Beaud has incisively noted the possibility of analyzing "the constituent power from a Kelsian point of view. There is, in his eyes, an initial constituent act, a founding of norms that invites us to take it into consideration in legal analysis. The originating constituent power, therefore, is not completely absent from Kelsen's œuvre, even if he rejects it."[107] For the same reason, Stanley Paulson has described these late writings of Kelsen as belonging to a "voluntaristic period," one that "is marked by the complete abandonment of the conceptual neo-Kantian apparatus. From now on, the juridical norm is presented as the meaning of an act of the will.... In a word, in this late period, Kelsen joins traditional juridical positivism, in the version offered by the thinkers of the 'will,' those same thinkers he had fought against for a long time."[108]

This retrospective recognition of a constituent power becomes the only condition of possibility for the validity of the basic norm and, therefore, for the normativity of the entire legal system built upon it.[109] Thus, in an enigmatic but very suggestive passage, Kelsen seems to have adopted some of Schmitt's terminology and to have departed from his original formulation of the hypothetical ground norm:

The original constitution of a State is the work of the founders of the State. If the State is created in a democratic way, the first constitution originates in a constituent assembly, what the French call *une constituante*. Sometimes any change in the constitution is outside the competence of the regular legislative organ instituted by the constitution, and reserved for such a *constituante*, a special organ competent only for constitutional amendments. In this case it is customary to distinguish between a constituent power and a legislative power.[110]

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[107] Beaud, *La puissance de l' état*, p. 213. For a similar point, see Bobbio, *Essais de théorie du droit*, p. 236.

[108] Stanley L. Paulsen, introduction to *Théorie générale du droit et de l'État*, Paris: Bruylant L.G.D.J, 1997, p. 7.

[109] Compare this interpretation with Kelsen's enigmatic concession: "If one wishes to regard it [i.e., the basic norm] as an element of a natural-law doctrine despite its renunciation of any element of material justice, very little objection can be raised; just as little, in fact, as against calling the categories of Kant's transcendental philosophy metaphysics because they are not data of experience, but conditions of existence. What is involved is a minimum, there of metaphysics, here of natural law, without which neither a cognition of nature nor of law is possible.... Accordingly, the theory of the basic norm may be considered as a natural-law doctrine in keeping with Kant's transcendental logic." Kelsen, *General Theory of Law and State*, p. 437.

[110] Kelsen, *General Theory of Law and State*, p. 259.

Even in this case, however, Kelsen's reluctant recognition of the constituent power and its relationship to democratic theory fails to meet the challenge of Schmitt's critique. He does not go, and obviously cannot go, far enough in his search for the origins of the validity of the basic norm and of the sources of political legitimacy, given the restrictions imposed by his theoretical framework. After bringing back "the constitution-creating act," as "logically indispensable for the foundation of the objective validity of the positive legal norms," Kelsen quickly added that "it can only be the meaning of an act of thinking" and not of an actual act of the will.[111] Likewise, the authority from which the basic norm emanates is "admittedly, a fictitious authority."[112] In this case, however, one might say that a fictitious constituent will is no constituent will at all and that a hypothetical source of legitimacy is no source at all. Despite this small concession to Schmitt's criticisms, Kelsen continued to argue that the basic norm, given the fictional character of the constituent act, is derived in the final analysis from the ability of a political entity to impose it independently of the particular carrier, the substantive values it may embody, or the conditions under which this new norm was originally established. As Norberto Bobbio has rightly perceived, echoing Schmitt's critique, for Kelsen, "legitimation is purely and simply a matter of fact."[113]

When assessing the nature of a legal order, Kelsen declared that there is no difference between a democratic revolution and a reactionary coup d'état, which can both qualify as the legitimate foundations of a valid constitution, once they meet his two factual criteria – two criteria, that, needless to say, fail by themselves to generate the appropriate resources for a democratic political theory with a normative intent. According to the first criterion, a norm becomes valid when a group was successful in imposing a new basic norm. The second criterion refers to the crude fact of the people's a posteriori compliance with that norm.[114] Such compliance, however, can

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[111] Kelsen, *Pure Theory of Law*, p. 204.
[112] Kelsen, *Pure Theory of Law*, p. 256.
[113] Bobbio, *Democracy and Dictatorship*, p. 87. For a more comprehensive criticism of Kelsen, see Bobbio, *Essais de théorie du droit*, pp. 252–253; Graham Hughes, "Validity and the Basic Norm," in *Essays in Honor of Hans Kelsen*, ed. *California Law Review*, with an introduction by Albert A. Ehrenzweig, South Hackensack, N.J.: Fred B. Rothman, 1971, p. 703; Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law*, pp. 50–51.
[114] A third condition is the recognition of the new legal order by the international community. This recognition, however, endows the new regime with political but not democratic legitimacy. One may characterize this type of legitimacy as legitimacy from the outside. Kelsen, *Introduction to the Problems of Legal Theory*, p. 61.

be derived from a multiplicity of causes as, for example, force, compulsion, interest, fear, habit, or internalized coercion – causes that Kelsen does not distinguish. Ultimately, a juridical order derives its validity from the bare fact of its existence, that is, of the mere force of a group to impose it on a given population. Thus, as he acknowledged,

> it is in this context irrelevant whether or not this replacement [i.e., of a basic norm by another] is effected through a violent uprising against those individuals who so far have been the "legitimate" organs competent to create and amend the legal order. It is equally irrelevant whether the replacement is affected through a movement emanating from the mass of the people, or through action from those in government positions. From a juristic point of view, the decisive criterion of a revolution is that the order in force is overthrown and replaced by a new order in a way that the former had not itself anticipated. . . . It is just the phenomenon of revolution which clearly shows the significance of the basic norm. Suppose that a group of individuals attempt *to seize power by force* in order to remove the legitimate government in a hitherto monarchic State, and to introduce a republican form of government. If they succeed, if the old order ceases, and the new order begins to be efficacious, because the individuals whose behavior the new order regulates actually behave, by and large, in conformity with the new order, then this order is considered a valid order.[115]

Kelsen's arguments regarding the extralegal, unauthorized nature of constitutional politics strike at the core of democratic theory. Some important theoretical implications follow from the shady apparitions of the basic norm, from the absent presence of the extraordinary. These are implications that undermine the ideal and practice of democratic beginnings. Not only do they obliterate any meaningful distinction between different forms of constitutional making; they also conflate the constituting democratic moment to bare, extralegal force, equally arbitrary and unauthorized as, for instance, those acts undertaken and carried out by a foreign power, a military takeover, or by an existing branch of the government, with or without popular participation.[116] From a formal, juridical point

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[115] Kelsen, *General Theory of Law and State*, pp. 117, 118.

[116] In a mode, highly reminiscent of a realist approach, Kelsen argued that "every legal order which has the degree of effectiveness necessary to make it positive is more or less a compromise between conflicting interest-groups in their struggle for power, in their antagonistic tendencies to determine the content of the social order. This struggle for power invariably presents itself as a struggle for 'justice'; all the fighting groups use the ideology of 'natural law.' They never represent the interests that they seek to realize as mere group-interests, but as the 'true,' the 'common,' the 'general' interest. The result of this struggle determines the temporary content of the legal order." Kelsen, *General Theory of Law and State*, pp. 438–439.

of view, there is no difference between the ground norm of a democratic constitutional regime and that of other forms of government. In fact, all political regimes are founded on an identical hypothetical basic norm. As Kelsen claimed, it is "irrelevant whether the replacement [i.e., of a legal order by another legal order] is affected through a movement emanating from the mass of the people, or through action from those in government positions."[117]

Consequently, whether the foundation of a legal order is "established by a single usurper or a council, however assembled," does not affect the nature, content, validity, or identity of the ensuing legal and constitutional order.[118] A democratic state does not have to be democratically founded. So the validity of democratic law does not depend on the fundamental constitutional principles and higher legal norms being democratically produced. Kelsen believed that it didn't matter *how* or *when* a constitutional democracy is created, or by *whom*. The framers' identities and the constitutional making practice they adopt are irrelevant, as are popular attitudes or participation vis-à-vis the creation of the constitution. Likewise, it is of no concern whether the constitutional making process unfolds in secrecy or through an open, public, and inclusive process. No logical, causal relationship exists between democratic origins and democratic outcomes: "The content of a positive legal order is entirely independent from its basic norm."[119] Any political regime, be it democratic or autocratic in Kelsen's terminology, is derived from an analogous arbitrary, extralegal will, carried out by naked force, and validated by an identical hypothetical basic norm: "What is to be valid as a norm is whatever the framers of the first constitution have expressed as their will."[120]

Paradoxically enough, although Kelsen is considered to be one of the main exponents of a pure, normative theory, his legal positivism ultimately deprives him of the conceptual means that were necessary for this normative project.[121] As Schmitt acutely saw, a huge deficit of democratic legitimacy lies at the very heart of Kelsen's legal philosophy. And although many commentators on Schmitt's work have been eager to establish the case for theoretical continuities and intellectual affinities between Schmitt's Weimar

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[117] Kelsen, *General Theory of Law and State*, p. 117.
[118] Kelsen, *Introduction to the Problems of Legal Theory*, p. 57; Kelsen, *General Theory of Law and State*, p. 396.
[119] Kelsen, *Pure Theory of Law*, p. 217; Kelsen, *General Theory of Law and State*, p. 436.
[120] Kelsen, *Introduction to the Problems of Legal Theory*, p. 57.
[121] Kelsen, *General Theory of Law and State*, pp. 119–122; Schmitt, *V*, pp. 58–60, 75–99.

writings and his subsequent decision to join National Socialism in 1933, they have been reluctant to comment on the theoretical reasons that compelled Kelsen to admit that "from the point of view of the science of law, the law (*Recht*) under the Nazi-government was law (*Recht*). We may regret it but we cannot deny that it was law."[122] This statement certainly contributed to investing the Nazist regime with the aura of legality.[123] What could have been a more defeatist and fatalistic position than this one, which failed to propose critical and regulative principles that could have exposed the unjust and illegitimate nature of Nazi rule by pointing to the normative void of its supposedly legal order?[124]

By contrast, from the perspective of Schmitt's definition of sovereignty as the constituent power of the popular will, the Nazi state could never have been qualified as a new legitimate normative legal order based on an act of the people because it did not respect the five basic elements composing the model of democratic constitutional making he had developed in 1928 and which included the following procedural steps that Andrew Arato has neatly reconstructed:

1. The dissolution of all previously constituted powers;
2. A popularly elected or acclaimed assembly with a plenitude of powers;
3. A provisional government rooted entirely in this assembly;
4. A constitution offered for a national, popular referendum;
5. The dissolution of the constituent assembly upon the ratification of the constitution that establishes a duly constituted government.[125]

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[122] Kelsen, quoted by Hayek in *Law, Legislation, and Liberty*, p. 173.

[123] Michel Troper, "Y-a-t-il un État nazi?" in *Pour une théorie juridique de l'état*, Paris: PUF, 1994, pp. 177–182.

[124] Franz Neumann criticized Kelsen's pure theory of law as nihilistic and decisionistic. Franz Neumann, *Behemoth: The Structure and Practice of National-Socialism, 1933–1944*, New York: Harper Torchbooks, 1944, pp. 46–47. Also see Friedrich A. Hayek, *The Constitution of Liberty*, Chicago: University of Chicago Press, 1960, p. 238; Hayek, *Law, Legislation, and Liberty*, pp. 45, 47, 48–56; Lon L. Fuller, "Positivism and Fidelity to Law – A Reply to Professor Hart," *Harvard Law Review*, 71:4 (1958), pp. 658–661; Bobbio, *Democracy and Dictatorship*, pp. 86–88, Norberto Bobbio, "Kelsen et les sources du droit," *Archives de philosophie du droit*, 27 (1982), pp. 135–145; Bobbio, *Essais de théorie du droit*, pp. 185–283; Hughes, "Validity and the Basic Norm"; Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law*, pp. 50–51. For an informed presentation of this debate, see Stanley L. Paulson, "Lon Fuller, Gustav, Radbruch, and the 'Positivist Thesis,'" *Law and Philosophy*, 13 (1994), pp. 313–359. This criticism of Kelsen's legal positivism appears as well in Habermas's *Between Facts and Norms*, p. 87.

[125] Arato, "Forms of Constitution Making and Theories of Democracy," p. 203. On the vexing issue of Schmitt's Nazism, see George Schwab, *The Challenge of Exception: An Introduction to the Political Ideas of Carl Schmitt between 1921 and 1936*, Westport,

Actually, it is not Schmitt's political theory that suffers from a normative vacuum but rather Kelsen's formal procedural approach. By developing the idea of the sovereign popular will as the only legitimate source of a modern democratic political order, Schmitt is better positioned for renewing the normative dimension of the democratic ideal. A legal system, according to this approach, can be regarded as normatively valid, from a democratic point of view, only if the people consider it just, endorse its norms, and view it as the outcome of their free collective will – that is, as the result of extraordinary politics. From Schmitt's perspective, which is the perspective of the participant, a basic norm is valid not in the sense of a logical-transcendental presupposition but rather because it is has emanated from those directly affected by it, that is, from the constituent decision of the sovereign people. In other words, according to the democratic politics of the extraordinary, the only higher norms that can claim to be valid are those that were created by the decision of all in their capacity as participants in the popular constituent will of the sovereign people during the founding moment of a new constitutional order.

This strong emphasis on democratic legitimacy in Schmitt's theory of the extraordinary becomes more apparent in *The Crisis of Parliamentary Democracy*, where he defined democracy not merely as the identity between rulers and ruled but also, in accordance with his theory of the constituent power, as collective self-determination. For Schmitt, "It belongs to the essence of democracy that every and all *decisions* which are taken, are only *valid* for those who *themselves decide*."[126] Alone among Schmitt's commentators in the United States, Arato has designated, and rightly so, Schmitt's concept of sovereignty as "revolutionary-democratic" hinging on left-wing radicalism.[127]

Conn.: Greenwood Press, 1989; Joseph Bendersky, "Carl Schmitt in the Summer of 1932: A Reexamination," *Cahiers Vilfredo Pareto*, 16:44 (1978), pp. 39–54; Joseph Bendersky, "The Expendable *Kronjurist*: Carl Schmitt and National Socialism, 1933–1936," *Journal of Contemporary History*, 14:2 (1979); Joseph Bendersky, *Carl Schmitt: A Theorist for the Reich*, Princeton: Princeton University Press, 1983; Balakrishnan, *The Enemy*, pp. 194–200. A careful reading of Schmitt's writings endorsing the National Socialist Enabling Act of March 23, 1933, illustrates important changes in his concepts of sovereignty and representation, introduced to justify the unjustifiable. He abandoned one of his major theoretical principles by dropping the argument that the constituent sovereign power cannot be alienated or transferred. See Carl Schmitt, "Das Gesetz zur der Not von Volk und Reich," *Deutsche Juristen-Zeitung*, 38:1 (April 1933), pp. 455–458; Carl Schmitt, "Das gute Recht der deutschen Revolution," *Westdeutscher Beobacthen*, 12:108 (May 1933), pp. 1–2.
[126] Schmitt, *CPD*, p. 24 (emphasis added).
[127] Arato, "Forms of Constitution Making and Theories of Democracy," p. 202.

There is no better illustration of the radical-democratic ramifications of his theory of constitutional politics than his critical attitude toward the French Revolution. When applied to existing processes of constitutional making, his theory emerges as a powerful tool of democratic critique. Because of this normative theory of the sovereign constituent power of the people, he was able to criticize the French Revolution from a democratic position and not as one might have anticipated from a conservative, reactionary point of view. In his critical assessment, there is no trace of nostalgia toward a lost past, no sign of resentment against democratic modernity, no irrational display of virulent hostility for the revolutionary upheavals of modern politics. He rather reproached the French Revolution for stopping short of the radical possibilities to which it gave birth and for not developing further the democratic process it had initiated. For Schmitt, the French Revolution was susceptible to a shortage of democratic legitimacy that precluded it from being genuinely democratic. Two main reasons compromised the democratic character of the revolution. The first is related to the issue of the ratification by the people of the draft of the new constitution that the National Assembly had approved. Schmitt, Arato asserts, "considers it a fatal omission that, in line with Sieyès's peculiar interpretation of Rousseau, the assembly did not consider it essential to have its constitutional product ratified in popular referendum."[128] But this is not the only critique of the French Revolution. There is also a second one that I consider illuminating with respect to his effort to disentangle sovereignty from dictatorship, the extraordinary from the exception. The second problem, according to Schmitt is that the revolutionary constitution was designed and formulated by the sovereign dictatorship of the Constituent Assembly instead of being created by the sovereign, that is, by the nondictatorial constituent popular power. "In a democracy," Schmitt emphasized, "it would have been more logical to let the people decide by themselves: the constituent will of the people cannot in fact be represented without transforming democracy into an aristocracy. But in 1789 the issue was not to produce a democracy, but a liberal constitution of the bourgeois rule of law."[129]

Here Schmitt reiterated his earlier point that the popular constituent power can never be represented, as in the case of the French Constituent Assembly. It can only be delegated. In other words, Schmitt dismissed Sieyès's argument that the constituent power is always represented. For Schmitt, the sovereign constituent power can delegate its powers, but it can never be

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[128] Arato, *Civil Society, Constitution, and Legitimacy*, p. 238.
[129] Schmitt, *V*, p. 80.

represented for the simple reason that sovereignty, in the moments of its genuine manifestation, is unrepresentable. Similarly, a sovereign dictatorship, such as those of the Soviets in Russia or the Fascio in Italy, will always remain a form of dictatorship and never become a sovereign.[130] This position is in accord with his formulation of the sovereign constituent power of the people as a creative, founding power that cannot be shared, divided, or transferred to another institutional agency or procedural mechanism. It has to be exercised by the people, who are the ultimate authority in a democracy – or through their delegates, if they so choose.[131]

This formulation of popular sovereignty in terms of the constituent power of an expansive political community is a more sophisticated restatement of the old, fundamental principle of democracy as active, collective self-determination, according to which, the people are the unique and ultimate authors of their fundamental laws.[132] Legality is subsequent to and dependent on legitimacy. In the extraordinary moment of genuine constitutional creation, for Schmitt, democratic substance precedes formal legalism and abstract proceduralism. Because the law, as well as the constitution as the highest legal document, is the creation of the people, it is conditional on and subordinate to their will and vulnerable to being changed by their volitions and decisions. Indeed, the sovereign constituent people may initiate a change in the law in violation of the instituted law. The sovereign subject ignores the instituted law to make possible the "instauration" of a new one. Only in that sense can it be said that for Schmitt the sovereign is *legibus solutus*. A legitimate democratic order exists when the constituent power belongs to the entire collective body of the people and is effectively exercised by them.

Because Schmitt's theory of sovereignty refers to the genuine creation of a new legal and constitutional order by a popular founding decision, it is assumed to operate solely during a juridical and political extraordinary moment, in a "natural state" and a legal vacuum.[133] There are several reasons that explain why it cannot be constrained by an antecedent rule or

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[130] Schmitt, *V*, pp. 81–82.

[131] In fact, Schmitt's critique hints at what Elster has described as "constitutional bootstrapping," which refers to the process whereby a constituent assembly becomes autonomous from the power that had delegated it in the first place and to which it is supposed to remain subordinated. Jon Elster, "Constitutional Bootstrapping in Philadelphia and Paris," *Cardozo Law Review*, 14:3–4 (1993), p. 549.

[132] Arato has keenly observed that Schmitt's theory of the constituent power of the people "remains an idiosyncratic one in the tradition of revolutionary democratic thought." See Arato, "Forms of Constitution Making and Theories of Democracy," p. 204.

[133] Schmitt, *V*, p. 79.

norm. First, during the moment of genuine constitutional making there is not yet such a rule. If the constituent will were to be determined by the previous legal order or if it were to derive its legitimacy from a preexisting constitution, it would not be a *constituent* power but rather a *constituted* power. In this case, we would not speak of the extraordinary creation of a new constitution, a new beginning marked by the break with a previous political regime, but simply of the partial transformation or revision of an already existing one.[134] For Schmitt, as well as for Kelsen, the old legal system must be annulled or ignored if a new constitutional order is to be created.[135] "A new constitution," Schmitt declared, "is never produced according to [i.e., previous] rules that would have been considered to be superior. . . . It is unthinkable that a *new* constitution, that is, a new fundamental political decision, succumbs to an antecedent constitution, becoming dependent on it."[136] This formulation, which stresses legal discontinuity, in the form of a gap and a void, is a reminder that while the old system is abrogated, the new one is not yet in place. As Renato Cristi observes, according to Schmitt "sovereignty became visible only during exceptional circumstances, when a constitution was destroyed and another was born. In these circumstances, sovereignty showed up under the guise of constituent power."[137] During the moment of original constitutional making, there is a break, a dislocation between the two moments, which makes possible not only the reactivation of the constituent power of the people but also the generation of democratic legitimacy for the new political system. It is more accurate, therefore, to describe the constituent power of the popular will as extralegal rather than illegal, because during the moment of original constitutional creation there is no established system of laws.[138]

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[134] Schmitt, *V*, pp. 88–89.
[135] Note here the striking similarities with Kelsen. Kelsen, *Pure Theory of Law*, pp. 118–119.
[136] Schmitt, *V*, p. 88.
[137] Cristi, *Carl Schmitt and Authoritarian Liberalism*, p. 117. However, Schmitt himself has acknowledged that a total break is conceivable only when the creation of a new constitution is accompanied by a change of the subject of the constituent power, as for example from the king to the people. In all the other cases, it remains a "constitutional minimum" that indicates a form of continuity. Schmitt, *V*, p. 92. I thank Andrew Arato for bringing this point to my attention.
[138] John Rawls has adopted Ackerman's theory of constitutional politics, by acknowledging that the "constituent power of the people sets up a framework to regulate ordinary power, *and it comes into play only when the existing regime has been dissolved.*" John Rawls, "The Idea of Public Reason," in *Political Liberalism*, New York: Columbia University Press, 1993, p. 231.

There is a second explanation for what drove Schmitt to phrase sovereignty in terms of the exception. The exception, besides designating the juridical declaration of an emergency situation, is the condition of possibility of sovereignty and extraordinary politics, not its essence. It is only in the moment of an organic crisis, to use Gramsci's term, where the closure of the social explodes to bring about a displacement among its different structural levels, including the legal system, that there is the possibility for an immanent radical change in the political organization of society.[139] I take Schmitt's reference to the exception as describing also this moment of crisis, this openness and contingency that provides the available space for the reactivation of the constituent power, which up to this moment remained in a dormant and subterranean form.[140] But apart from this abstract understanding, Schmitt is not so far from a conventional sociological and historical truism, according to which, as Elster has noted, "new constitutions almost always are written in the wake of a crisis or exceptional circumstances of some sort. . . . By and large . . . the link between crisis and constitution-making is quite robust."[141]

A final reason for associating the sovereign constituent power with the exception has to do with the failure and collapse of the previous regime. Again, Elster's observation helps to clarify this point: "Almost by definition, the old regime is part of the problem that a constituent assembly is convened to solve. There would be no need to have an assembly if the regime was not flawed. But if it is flawed, why should the assembly respect its instructions?"[142] Schmitt's recourse to the exception should not be viewed as an essential and defining feature of sovereignty, as a mystification and glorification of violence and illegality, or even as an integral part of a fascist theory with totalitarian implications, but rather as the condition of possibility of extraordinary sovereign popular intervention, that is, of democratic constitutional foundings.[143]

Be that as it may, the insertion of the exception at the center of Schmitt's theory of the extraordinary has not been the only reason for attacking

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[139] Gramsci, *Selections from the Prison Notebooks*, pp. 26, 210–218, 318.

[140] This dialectic between crisis and creation has been carefully examined by Negri in *Insurgencies*, pp. 20, 319.

[141] Jon Elster, "Forces and Mechanisms in the Constitution-Making Process," *Duke Law Journal*, 45:2 (November 1995), p. 370.

[142] Elster, "Forces and Mechanisms in the Constitution-Making Process," p. 375.

[143] McCormick, *Carl Schmitt's Critique of Liberalism*, p. 314; Scheuerman, *Carl Schmitt: The End of Law*, pp. 251, 254–255.

his constitutional and legal theory. His notion of the sovereign constituent power has not escaped the negative approach that characterizes most of the recent Schmitt scholarship. Not only has it rarely been discussed in relation to a theory of democratic legitimacy, for which it was originally formulated and with respect to which it should be measured and judged, but, most provocatively, it has also been caricatured as an ethnic and racist theory.

Habermas, to take just one example, has claimed that Schmitt attributed the ability of the people to act in a coherent and consistent way to a prepolitical, ethnic homogeneity, which among other things, reflected his political preference for an ethnically homogeneous state, prone to eradicate and purge its ethnic enemies. As he puts it, "democracy must take the form of a national democracy because the 'self' of the self-determination of the people is conceived as a macrosubject capable of action and because the ethnic nation seems to be the appropriate entity to fill this conceptual gap – it is viewed as the quasi-natural substrate of the state organization."[144] For Habermas, Schmitt's theory of the popular constituent power presupposes an organic, substantive ethnic homogeneity that binds a community together and, as such, is an integral part of his "militant ethnonationalism."[145] Once this 'substantialist' interpretation of the sovereign popular subject is pronounced, without, it should be noted, any textual evidence to support it, it is but a short leap to turn it into a dangerous political category that justified the Nazi politics of mass extermination.[146]

If Habermas's critique were correct, it would seem that Schmitt reduced the political to the prepolitical, the constituent popular sovereign to some prior naturalistic ethnic or racial collective identity, and the constitution to

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[144] Habermas, *The Inclusion of the Other: Studies in Political Theory*, ed. Ciaran Cronin and Pablo De Greiff, Cambridge, Mass.: MIT Press, 1998, p. 135.

[145] Habermas, *The Inclusion of the Other*, p. 148.

[146] Scheuerman links the notion of the constituent power with Nazism by arguing that Schmitt's theory of "constitution-making rests on the preexistence of an ethnically homogeneous nation, capable of effectively distinguishing itself from other peoples and if necessary, waging war against them." Scheuerman, *Carl Schmitt: The End of Law*, pp. 70, 66. Schmitt's supposed emphasis on the ethnic substance of the constituent subject as the unspoiled *Volk* of the true German nation has been described as "constitutional foundationalism" or "communitarian existentialism." Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law*, p. 96. Ulrich Preuss has further developed this line of criticism in order to reject the concept of the constituent power, which he sees as intrinsically associated with an ethnic theory of the political community. Preuss, *Constitutional Revolution*, pp. 75–78, 95–97.

a mere reflection of a deeper set of existential, irrational values deployed against the Other, the enemy, who might endanger the ethnic unity of the people.[147] I do not think this is the case. Schmitt hardly identified the people and the constituent power with a prepolitical substance, and there is nothing in his Weimar writings to suggest that he thought that the ability of the people to act as a constituent sovereign was due to common ethnic origins.[148] On the contrary, on many different occasions he historicized and relativized any direct reference to a prepolitical essence as the intrinsic identity of the people. The political identity of the people, he wrote, "does not describe its own substance, but only the intensity of an association or dissociation of human beings whose motives can be *religious, national (in the ethnic or cultural sense), economic, or of another kind and can affect at different times different coalitions and separations.*"[149]

Because of his friend-enemy distinction, he did not essentialize or naturalize the constituent power of the sovereign people. This distinction was formulated in order to point at a relational and antiessentialist dimension of political identities.[150] For Schmitt, political conflicts constitute the central mechanism of identity formation through which a group's substantive sense of "us" is constructed by a confrontation in which each term of the relationship dialectically consolidates and enforces the identity of the other. As Chantal Mouffe has correctly argued, Schmitt's theory highlights the fact "that the creation of an identity implies the establishment of a difference, difference which is often constructed on the basis of a hierarchy.... Once we have understood that every identity is relational, and that the affirmation

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[147] Dyzenhaus, *Legality and Legitimacy*, p. 101.

[148] As Scheuerman, for instance, argues, "Although Schmitt here does leave open the possibility that homogeneity can take distinct forms, I believe that textual evidence suggests that even in the 1920s he considered national or ethnic homogeneity most likely to guarantee political unity." Scheuerman, however, does not provide such textual evidence. In fact, it seems that there is not such evidence before 1933. Schmitt's discussion in *The Crisis of Parliamentary Democracy* to which Scheuerman refers is a description of Sorel's concept of the myth. Rather than glorifying ethnic sameness, Schmitt described it as a political myth, that is, as a symbolic construction. Given this lack of textual support, it is worth asking if Schmitt was a nationalist after all. This is a hard question, open to further investigation. Independently of whether he was a nationalist or not, however, one must take into account that as a Catholic, Schmitt must have felt quite uneasy with German identity and the memory of *Kulturkampf*. Scheuerman, *Carl Schmitt: The End of Law*, p. 280. For a discussion of the relationship between Schmitt and nationalism, see Jan-Werner Müller, "Carl Schmitt – An Occasional Nationalist?" *History of European Ideas*, 23:1 (1997), pp. 19–34.

[149] Schmitt, *CP*, p. 38.

[150] Chantal Mouffe, *On the Political*, London: Routledge, 2005, pp. 14–16.

of a difference is a precondition for the existence of any identity, i.e. the perception of something 'other' which constitutes its 'exterior,' we are, I think, in a better position to understand Schmitt's point."[151] The political was not conceived by Schmitt to be a mere stage upon which the natural and organic ethnic identities of groups are played out. He did not posit ethnicity or race as the fixed essence of identity. On the contrary, political identities and shared conceptions of the "we" are constituted through struggles, antagonisms, and differential relations among groups. Moreover, for Schmitt, political identities cannot be closed, self-referential essences because the friend-enemy criterion is "not . . . an exhaustive definition or one indicative of *substantial* content."[152]

With this distinction in mind, it is clear that it would have amounted to a flagrant contradiction to claim that some subjectivities are always already preformed outside the conflictual realm of the political and that the constitutional text is simply an epiphenomenon of a deeper, more authentic ethnic identity. And, in fact, Schmitt did not succumb to this contradiction, at least not before joining Nazism in 1933. In a crystalline, central paragraph of his major constitutional treatise, he emphatically and explicitly declared that "The notion of democratic identity is a *political* notion and as all true political notions, it refers to the possibility of a *distinction*. Political democracy cannot rest on the absence of a distinction among all men, but only on the belonging to a *particular community*, and this belonging could be determined by very divergent factors – the idea of a common race, a common faith, a common destiny and tradition," and a common social class.[153] Schmitt did not assert that the constituent popular sovereign has to be a homogeneous ethnic community. What he argued for instead is that if the citizens want to play an active political role, as it is presumed in a democratic regime, they must forge a collective identity according to certain shared values, common principles, and mutual enemies that will enable them to emerge as a lucid and conscious actor with concrete projects.

Far from being a totalitarian or racial ideology, the belief that democracy requires popular unity and collective solidarity is one of the oldest maxims in political thought, as well as of the democratic, republican, and socialist traditions. Moreover, when Schmitt was examining the principle of political identity in a democracy, he was not speaking about a particular

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[151] Mouffe, *On the Political*, p. 15.
[152] Schmitt, *CP*, p. 26 (emphasis added).
[153] Schmitt, *V*, pp. 227, 233–234.

will ready to exterminate its enemies.[154] He was rather alluding to a general will and to "the essence of the democratic principle . . . namely, the assertion of an identity between the law and the people."[155] For such an identity to be possible, it is logical to expect a minimum degree of identification and unity to exist among the citizens of a political community, so that a common action, a shared public good, or a general interest can make sense.[156]

Of course, I do not intend with these arguments to disregard serious problems associated with a naive or rhetorical glorification of the constituent people. Nor do I mean to downplay the fact that Schmitt's particular version of extraordinary founding politics, despite of all its theoretical sophistication, is ensnared in a disquieting contradiction. On the one hand, he affirmed that the popular sovereign, though external and prior to the established constituted reality, is capable of lucid and self-conscious political action. Paradoxically, on the other hand, following Hobbes, he pointed at the formless, disorganized, and factional properties of a power that is an "unorganizable organizer" (*das unorganisierbar Organisierende*), and which precludes the possibility of cogent and coherent collective intervention.

Here we arrive at the center of Schmitt's limitations.[157] How can he simultaneously maintain that the constituent subject is both an active and a passive political actor? How can he assert both that "the constitution in the positive sense is born from the *pouvoir constituant*. . . . Always we find behind this constituent act a subject capable of action. . . . This constitution is a conscious choice that the political unity gives to itself and accomplishes it by itself through the carrier of the constituent power," and that "the people as carrier of the constituent power . . . is . . . not formed, not fixed" and

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[154] Scheuerman, *Carl Schmitt: The End of Law*, pp. 66–72.

[155] Schmitt, *CPD*, p. 26.

[156] Although there is no doubt that Schmitt was fervently opposed to pluralistic models of democracy, not much is said about the underlying reasons for this disagreement. Apart from some references to Schmitt's preoccupation with issues of political stability, social order, and the threat of multiple sovereignties – all of which are more or less pragmatic concerns – there has been no in-depth analysis of the normative foundations of his confrontation with pluralism. It is then worth asking on what normative grounds did Schmitt criticize pluralistic models of democracy. One major reason, among others, I think, was the problem of legitimation deficit that a pluralistic model implies, especially when applied to the founding moment of constitutional creation, because pluralism equates the process of constitutional making either with a pragmatic balance of particular interests or with an unattainable rational consensus among all involved parties in the form of a constitutional pact. Schmitt, *V*, chap. 7; Balakrishnan, *The Enemy*, pp. 159–163.

[157] Schmitt, *DD*, p. 139.

therefore not capable of collective action, which means it is unable to found consciously and lucidly a new constitution?[158] What led Schmitt to fall into such a blatant contradiction?

I venture to speculate that one main reason has to do with his sometimes peculiar and rigid understanding of liberalism. By that, I do not mean his famous and much-commented-upon relentless antiliberalism. On the contrary, I think that his failure to escape this contradiction was due to his gratuitous generosity toward liberalism. It is not so much, as Leo Strauss argued, that Schmitt remained "within the horizon of liberalism," as that his understanding of liberalism was highly idealized.[159] He incautiously donated to the liberal tradition the public practices (and values) of speech, discussion, and deliberation. In a word, he looked at liberalism through the lens of liberalism and as liberalism wants to be seen: rational, dialogical, consensual, and deliberative. And because these practices were associated with it, he could not incorporate them into his own theory. By falling under the spell of an idealized liberalism, he injured the democratic potentialities of his own theory of the extraordinary. Lacking other means to express itself, Schmitt's constituent sovereign is left with nothing more than the passive options of acclamation, noise, and shouts, becoming defenseless to pervasive forms of manipulation and demagogy.[160] Hence, he reduced the extraordinary founding decision to the prosaic act of ordinary consent. Here, Sheldon Wolin's remark is prescient: "For 'The People' to become an actor, not simply an elector, more than will was needed; a voice was also required."[161] By excluding public deliberation and civic debate from the political expression of the constituent power, Schmitt fell into this fatal contradiction.[162] He tried to solve this tension between the sovereign constituent people as a lucid collective agency and as a passive and disorganized crowd with a dubious argument about acclamation as the only form of expression of the democratic will:

The natural form of the direct manifestation of the will of a people is a shout of approbation or the denial of the assembled mass, *acclamation*. In the large modern States, acclamation, the only natural and necessary manifestation of the people, has changed form. It expresses itself as public opinion. But the people in general can only

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[158] Schmitt, *V*, pp. 21, 251, 83.
[159] Leo Strauss, "Comments on Carl Schmitt's *Der Begriff des politischen*," *CP*, p. 105.
[160] Schmitt, *V*, pp. 242–243.
[161] Wolin, "Transgression, Equality, and Voice," p. 86.
[162] Schmitt, *V*, pp. 83, 240–241, 244.

say yes or no, to approve or to refuse, and its yes or no becomes particularly simple and elementary when it entails a fundamental decision on the ensemble of its proper existence.[163]

This was Schmitt's final answer to the problem of democratic will formation. I say final, because, despite this reduction of the sovereign to sheer acclamation, he did recognize that politics also involves the public struggle "to create homogeneity and to shape the will of the people with methods uncommon in the liberal tradition of the past century."[164] Although he acknowledged that these methods had been predominantly elitist, he understood the importance of antecedent struggles for the formation of a democratic will. He admitted that "everything depends on how the will of the people is formed" to note the important role of "who has control over the means with which the will of the people is to be constructed: military and political force, propaganda, control of public opinion, through the press, party organizations, assemblies, popular education, and schools. In particular, only political power, which should come from the people's will, can form the people's will in the first place."[165]

However suggestive these references might be, they did not permit Schmitt to successfully confront this problem. His critics are correct. He was wrong. Not only did he incorrectly assume that voice, discussion, judgment, and deliberation were inherent, constitutive attributes of classical bourgeois parliamentarism, but he also failed to see that the origins of these practices were located at a much earlier historical stage, at the very origins of the democratic experience: the ancient Greek *polis*. By renouncing the political significance of speech as a means of will formation, he undermined the conceptual and normative foundations of his otherwise ingenious theory of the extraordinary politics of the popular constituent sovereign. On this point, Habermas's critique is well taken. "The medium Schmitt ridicules, that of public discussion guided by arguments," Habermas underscores, "is in fact essential to any democratic justification on political authority."[166] By leveling constituent politics to a speechless applause and by silencing the sovereign people, Schmitt undermined the very same grounds of his theory of the extraordinary. His vision of liberalism garnished and mythologized as it was, returned with a vengeance, truncating his own options: a mute

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[163] Schmitt, *V*, pp. 83–84.
[164] Schmitt, *CPD*, p. 16.
[165] Schmitt, *CPD*, pp. 27, 29.
[166] Habermas, "The Horrors of Autonomy: Carl Schmitt in English," p. 138.

constituent sovereign is hardly a democratic sovereign. It may consent but not decide. By embracing acclamation as the only possible manifestation of the sovereign will of the people, he left unfinished his theory of democratic extraordinary politics and took back from democratic theory what he had given it before.

5

Toward a Theory of Democratic Constitutionalism

"Schmitt," Stephen Holmes writes, "subscribed to the myth of a funda-
mental opposition between constitutional limitations and democratic gov-
ernment.... Schmitt's democratic mysticism, not to mention its practical
consequences, suffices to discredit this entire approach. It is meaningless
to speak about popular government apart from some sort of legal frame-
work which enables the electorate to have a coherent will."[1] According to
this line of interpretation, Schmitt sought to replace constitutionalism and
a stable legal system with an immutable, boundless sovereign constituent
power, often incarnated in a dictatorial president, ruling by arbitrary exec-
utive decrees and administrative orders.[2] Schmitt's critique of the rule of
law, the separation of powers, and of normative legal formalism, so this
argument goes, is part of a broader, more ambitious attempt to abolish
constitutionalism. Schmitt's appeal to a fictional constituent subject is seen
as a pretext for the establishment of an executive dictatorship.[3] Not only
did he abhor liberalism; he also sought to undermine and destroy the idea
of the constitution as government under law in order to replace it with a
permanent state of exception and a normless emergency.[4]

As I try to show in this chapter, these charges lose considerable force
and cannot be consistently sustained once we take into consideration two

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[1] Stephen Holmes, "Precommitment and the Paradox of Democracy," in Elster and Slagstad,
Constitutionalism and Democracy, p. 231.
[2] Scheuerman, *Carl Schmitt: The End of Law*, pp. 81, 73.
[3] McCormick, *Carl Schmitt's Critique of Liberalism*, pp. 137, 140, 145, 156; Scheuerman, *Carl
Schmitt: The End of Law*, pp. 39–84.
[4] Scheuerman, *Between the Norm and the Exception*, pp. 34–36; William Scheuerman, "Legal
Indeterminacy and the Origins of Nazi Legal Thought: The Case of Carl Schmitt," *History
of Political Thought*, 17:4 (1996), pp. 571–590; Scheuerman, "The Unholy Alliance of Carl
Schmitt and Friedrich A. Hayek," pp. 176–177.

crucial aspects of Schmitt's theory. The first is his stark, clear-cut distinction between the people in an extraconstitutional outside and the people within the constitution, or, to put it in more general terms, between the *constituent* people and the *constituted* people.[5] The second is his effort to combine the principle of identity with the principle of representation. Both aspects point to the distinction between the first and second moment of democracy, extraordinary and normal politics. Thus, Schmitt's reflections on modern constitutionalism were twofold. On the one hand, he differentiated between the first, extraordinary founding moment, where legitimacy overpowers legality, and the second moment, that of normal politics, where legality subordinates legitimacy. Peter Caldwell has captured this crucial distinction in Schmitt's political and legal theory by observing that both Schmitt and Kelsen "sought in different ways to separate the moment of sovereignty from everyday political practice," that is, the first from the second moment.[6] On the other hand, Schmitt introduced the concept of political representation in order to fill the gap created by the retreat of the popular sovereign from the political realm after it has successfully created a new higher law and the need, therefore, to render it visible during ordinary politics. The failure to understand the role that representation plays in Schmitt's constitutional theory has led to the prevailing tendency to conflate the four distinct concepts of representation, delegation, dictatorship, and sovereignty into the one and the same figure of the plebiscitarian president. My reading of Schmitt's notion of democracy's second moment takes these two aspects (normal politics and political representation) as the twin pillars upon which he built his singular theory of constitutionalism.

As I discussed in the previous chapter, democratic extraordinary politics dispenses with representation for the simple reason that, for Schmitt, the people should be physically present and publicly mobilized during the democratic creation of a new constitution, outside the mechanisms of state representation. Their originary, instituting powers can only be delegated. By contrast, normal politics requires and necessitates representation because in a constitutional order the people become absent and the sovereign invisible. They exist symbolically only through their institutional representation. It should be recalled that for Schmitt the form and type of representation are among the most essential parts of the constitution, directly derived from the founding decision of the constituent subject, who, among other things,

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[5] "Das Volk innerhalb der Verfassung in Ausübung verfassungsgesetzlich geregelter Befugnisse," Schmitt, *V*, p. 239.
[6] Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law*, p. 120.

decides how it will be represented in normal times of ordinary lawmaking. For Schmitt, constitutionalism and representation are interrelated concepts: without a constitution there is no representation, and representation is always included in the highest, essential part of the constitution.

My aim in this chapter is to show that, although it is true that some of Schmitt's arguments are open to the accusation of anticonstitutionalism, this charge, once relocated within the broader context of his theory of the extraordinary rather than of the exception, can been seen under a considerably different light. In fact, Schmitt never described his project in terms of a rejection of constitutionalism. Before his 'turn' in 1933, he never provided a theoretical or political justification of permanent dictatorship. Quite the contrary, in the introduction to his major constitutional treatise, he depicted his undertaking as a systematic reflection on the meaning and content of constitutional theory, and not, as the critics believe, as a malicious attack and subversion of the entire modern European jurisprudential tradition.[7] As he put it, his research program in constitutional theory should be understood as "the attempt to elaborate a *system*" and "to develop a theory of the constitution."[8]

Taking these statements seriously, I interpret Schmitt's project as a confrontation with one of the most vexing problems in modern democratic theory – namely, that of the self-enforcement and self-limitation of a democratic order. Further, on this reading, Schmitt's work could contribute in the direction of an alternative constitutional theory that transcends the aporias of liberalism, while providing a solid legal form for the stable interaction among state, people, sovereignty, and law within a democratic regime. I do not intend to argue that Schmitt had an answer to all the difficulties bearing on the relationship between democracy and constitutionalism. However, I do intend to demonstrate that he not only avoided the conflation between the norm and the exception but also alluded to ways, not always successful, of extirpating constitutionalism from its monopolization by liberalism in order to take it in a more democratic direction.[9]

What Is a Constitution?

Schmitt's effort to redefine the nature of constitutionalism is one of the most intriguing, original aspects of his overall theoretical project. One of the

[7] Schmitt, *V*, p. xi.

[8] "...eine Verfassungslehre in dem hier gedachten Sinne zu entwickeln," Schmitt, *V*, pp. xi, xiii.

[9] Schmitt, *CPD*, p. 24; Schmitt, *V*, p. 226.

fundamental tasks of a constitution, he declared, is neither to institutional-ize and protect prepolitical individual rights against the state and the popular will nor to establish some formal and general procedural norms that will comprise the central rules of the political game, as some classical theories of liberal constitutionalism tend to assume (although he did admit that these can be the secondary tasks of constitutionalism).[10] A constitution is not identical to a legal limitation on government. To put it slightly differently, constitutionalism for Schmitt cannot be defined solely as government limited by the rule of law, a description that he would see as the liberal version of constitutionalism. Thus, constitutionalism as limited government does not refer to some generic properties but rather to its liberal variant. This is one of the reasons why, according to Schmitt, the liberal tradition of constitu-tionalism during the eighteenth and nineteenth centuries had antidemocratic consequences.[11] As I see it, the originality of Schmitt's work can be partly traced back to his project of disentangling constitutionalism from liberalism, making it possible to rethink the idea of a democratic constitution.[12]

For Schmitt, it is not constitutionalism that is opposed to democracy but rather *liberal* constitutionalism. Note here, that this opposition between liberalism and democracy differs from the one he advanced in his earlier study on the crisis of parliamentarism. The focus is not so much on the issue of bourgeois parliamentarism and its failures and decline but on the wider problem of extraordinary power, its origins, its figuration and repre-sentation, and its institutional preservation within a legitimate democratic order.

Whereas liberalism, according to Schmitt, emerged as a theory that aimed at the fragmentation of political power and has pursued this aim by seeking to neutralize or eliminate the constituent power of the sovereign people, democracy, by contrast, came forth as a theory of (popular) power, try-ing to find a viable solution to the question of how to generate, sustain, and protect this power.[13] Instead of approaching constitutionalism from the vantage point of the question of how to shield individual rights from democratic majorities and state authority, Schmitt understood it in terms of the equally pressing question of how to shelter the constituent power of the sovereign people both from itself (its own excesses and shortsightedness) and

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[10] For a brief but informative discussion of these two aspects of liberal constitutionalism, see Jon Elster, introduction to Elster and Slagstad, *Constitutionalism and Democracy*, pp. 2–3.
[11] Schmitt, *V*, pp. 200–202.
[12] Schmitt, *V*, pp. 37–38.
[13] Schmitt, *V*, pp. 107, 200, 201.

from the contingent and precarious ordinary majorities that replace it (and represent it) during normal times. Thus, the fundamental purpose of a democratic constitution is to protect the founding decisions of the people from two potential threats: its own self and subsequent ordinary representative legislatures.

The constitution, Schmitt argued, can be defined by its intent to preserve and secure the founding decision of the sovereign people concerning the content and type of its political existence. The constitution is the institutionalization and legal codification of the constituent will and of the substantive values to which it has given birth. Any founding sovereign decision incorporates some substantive meanings and fundamental principles that account for the identity and *eidos* of a political community. For this reason, Schmitt referred to an "absolute constitution" and a "substantive democracy" as two sides of the same coin. Instead of juxtaposing constitutionalism against democracy or of placing the constitution outside the realm of the political, into a sphere of pure legality, he proposed a positive constitutional theory, emphasizing its positing and stabilizing effects on political power according to some concrete and substantial aims that a community has democratically invented for itself.[14]

A constitution, therefore, carries the fundamental, central popular decisions, which, in the case of democracy, are political and legal equality, political rights and universal suffrage, the principle of the identity between the rulers and the ruled, and a specific form with which sovereignty will be represented (parliamentary, presidential, and so forth).[15] In other words, a democratic constitution must embody democratic values and principles as well as specific and concrete institutional modalities of governing. For this reason, in his critique of liberalism, Schmitt refuted those arguments that saw the constitution either as an artificial and formal ensemble of

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[14] Paradoxically, Schmitt's notion of the positive constitution comes very close to Holmes's distinction between positive and negative constitutionalism. I say paradoxically, given Holmes's virulent attack on Schmitt. See Stephen Holmes and Cass Sunstein, "The Politics of Constitutional Revision in Eastern Europe," in *Responding to Imperfection: The Theory and Practice of Constitutional Amendment*, ed. Sanford Levinson, Princeton: Princeton University Press, 1995, pp. 302–303.

[15] Schmitt, *V*, pp. 228, 234. It should be noted that Schmitt's definition of democracy as identity is composed of two parameters. The first is the "identity principle" and refers to the direct participation of the people in the making of the laws of a democratic society. The identity principle corresponds to the tradition of direct democracy whereby the *demos* rules directly. The second parameter is the "identification principle" and refers to the internal homogeneity and cohesion of a group. Most commentators of Schmitt have focused mainly on the second principle while ignoring the first.

various abstract principles and neutral procedural rules, a fortuitous "collection of written constitutional laws," or as the outcome of a prudential social pact among different and competing interests, derived from a balance of forces and a pragmatic compromise.[16] These theories, he thought, have dangerously trivialized and debased the idea and worth of the constitution to everyday politics, equating it to an instrument for the advancement of particular interests, bureaucratic pressures, and factional goals.[17]

In opposition to these liberal formulations, Schmitt struggled to develop an alternative understanding of constitutionalism, probing its role of "concretizing" and "formalizing" the popular constituent sovereign.[18] This concretization, which implies an unavoidable degree of limitation and mediation, becomes necessary if democracy is to acquire a solid and lasting institutional basis, indispensable for its continuing survival and reproduction. The constitution, in its "absolute" form, is not a formal list of abstract principles and individual rights juxtaposed to the state and the political sphere, or a set of neutral procedures aiming at encircling and policing political power. Rather, it is a positive document that embodies the fundamental, substantive values and founding popular decisions of a political community.[19]

In that sense, a constitution aims foremost at the transformation of spontaneous and unregulated extraordinary power into a regulated and organized legal force. It turns formless sovereign power into a constituted legal authority. Schmitt realized that a democratic constituent power could be threatened in two ways. First, because it is located in an extrajuridical zone, it is extremely fragile and fluctuating and consequently evanescent and weak. In order to be maintained, it would need to find support in a stable institutional structure. Second, once constitutionalized, the constituent sovereign power becomes vulnerable to the ambitions and interests of ordinary legislation and contingent majorities seeking to appropriate and usurp the

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[16] Schmitt, *V*, pp. 16, 44, 61–75.

[17] Schmitt, *V*, p. 44.

[18] "Die weitere Ausführung und Formulierung der vom Volk in seiner Unmittelbarkeit getroffenen politischen Entscheidung bedarf irgendeiner Organisation," Schmitt, *V*, p. 84.

[19] During the German unification in 1990, the State Treaty on Monetary, Economic, and Social Union modified the Basic Law, including a change in Article 46, which now reads: "This Basic Law [which is valid for the entire German people following the achievement of the unity and freedom of Germany] shall cease to be in force on the day on which a constitution adopted by *a free decision* of the [united] German people comes into force" (emphasis added). Note also the decision of the *Bundersverfassungsgericht*: "Taken as a unit, *a constitution reflects the certain overarching principles and fundamental decisions* to which individual provisions are subordinate" (emphasis added). Schmittian resonances? See *Comparative Constitutional Law*, ed. Walter E. Murphy and Joseph Tanenhaus, New York: St. Martin's Press, 1977, p. 208.

powers of the democratic subject by imposing, for example, a type of parliamentary sovereignty. Schmitt, in his constitutional theory, tackled both threats.

This section addresses the first problem, while the second is discussed in the next. Schmitt saw the constitution as offering the only possibility for democratic sovereignty to attain a concrete and secure institutional form. The popular sovereign can survive only when it is invested with a juridical form. Through the making of a new constitution, it leaves its extralegal position for a juridical state of stability, that is, of durability. The constitution seals this passage from the extraconstitutional realm to the instituted state. It also guarantees and enforces this passage. The constituent sovereign relinquishes its omnipresence and limits its omnipotence in order to stabilize itself and to safeguard its founding decisions. Schmitt described this movement from the *constituting* to the *constituted* as a transformation of sovereignty itself: its visibility is lost. In normal times, sovereignty becomes invisible. With the creation of a stable constitution, the sovereign moves from a situation of concrete and physical public prominence to a state of invisibility. It exits the political and retreats to the social. In other words, the constitution makes the sovereign invisible; it is hidden behind procedures, rules, and legal norms (hence the need for representation). Likewise, the sovereign people also temporarily relinquish their singular constituent powers. For Schmitt believed that it is better to have a withdrawn and invisible *constituted* sovereign rather than a permanent all-powerful but self-destructive *constituent* sovereign. The people do not need to be constantly mobilized and activated. With a constitution they can rest. Against the model of an excessive politicization of society, he proposed the temporal limitation and juridical containment of the popular constituent sovereign during ordinary times.

As a result of this shift from outside to inside the constitution, the people are integrated into a secure democratic constituted order. Having created the constitution, they now become an integral part of it. They move from a position of externality to a position of immanence, from legitimacy to legality, from substance to procedures. With a democratic constitution in place, the reasons for a constantly mobilized people vanish. The constitution can permit them to dissolve and to return to their usual private and social activities. This significant change means that the people as an instituted entity are organized and shaped, and their will and preferences expressed according to and within established regulations and procedures. They are transformed into an intrinsic part of the constituted reality and subordinated to the existing legality. From being a constantly eruptive constituent subject, they become a "normalized" and institutionalized constituted sovereign. The

positive and necessary function of the constitution is to effect this transition. With the extraordinary process of constitutional making coming to a close, the sovereign power is subordinated to established laws and rules; it stops emitting constitutional norms. It becomes, in other words, a proceduralized and institutionalized represented sovereignty. The constitution puts an end to extraordinary constitutional politics.[20]

For this reason, Schmitt argued, in a constitutional regime – the second moment of democracy – the will of the people can only be expressed through the prescribed provisions and intermediate mechanisms of the instituted legal system, such as periodical elections, referenda, plebiscites, and the constitutionally regulated exercise of political rights.[21] It is restrained, filtered, and bounded by the constitution. Thus, although he initially located the popular constituent will in a state of nature, he did not imply that it had to stay there forever.[22] He was describing only the first, extraordinary founding moment of democracy. While he was captivated by the genuine capacity of the groundless creative power of the multitude, the unformed (*formlos*) form of all forms, to create order out of chaos, stability out of disorder, and normalcy out of the extraordinary, he was equally attentive to its need for self-limitation, that is, to the second, ordinary face of democratic politics.[23] What most commentators have overlooked, therefore, is another, equally important attribute of the constituent subject: its ability to subject itself to laws and authorities that it has created. Constitutionalism is a form of self-binding, wherein the constituent power in an act of abdication decides to protect itself against itself.[24] The sovereign cannot be defined solely as the one who decides about the exception. The sovereign constituent subject is also the one who "creates the normal situation" (*er schafft die normale Situation*) and implements this normalcy by binding itself to the constitutional norms and procedural institutions that it has created during extraordinary politics.[25]

Here, Schmitt was investigating the other side of the norm-exception divide, the second moment of democratic politics: the institutionalization of sovereignty and the implementation of normal, everyday politics. In the

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[20] See, for a similar argument, Sheldon Wolin, "Collective Identity and Constitutional Power," in *The Presence of the Past*, pp. 8–31.

[21] Schmitt, *V*, pp. 84–85, 239, 251.

[22] Schmitt, *V*, p. 5.

[23] Schmitt, *DD*, p. 142; Schmitt, *V*, p. 79.

[24] Schmitt could be read as anticipating Elster's and Holmes's idea of constitutionalism as precommitment. Elster, *Ulysses and the Sirens*, pp. 87–103; Holmes, "Precommitment and the Paradox of Democracy," pp. 227–228.

[25] Schmitt, "Staatsethik und pluralistischer Staat," in *Positionen und Begriffe im Kampf mit Weimar-Genf-Versailles 1923–1939*, Berlin: Duncker und Humblot, 1988, p. 155.

previous chapter I discussed the groundless origins of the ground norm, derived from the will of the constituent people. I described this moment as extraordinary politics. Now I want to stress that Schmitt was equally interested in the second dimension of democracy, namely, that "all norms presuppose in fact a normal situation. No norm can survive in the void, there is no norm in an abnormal situation."[26] I describe this moment as normal politics. As he argued, "To create tranquility, security, peace, and order and thereby establish the normal situation is the prerequisite for legal norms to be valid."[27] As these passages make clear, Schmitt was fully aware that democracy requires a stable, predictable, and secure political order, where laws will guarantee regularity and diminish indeterminacy.

Whereas the goal of extraordinary politics is to create the higher, regulative norms of society, the aim of ordinary politics is to provide the necessary institutional and juridical environment for their maintenance. For democracy to be an effective and viable regime, it has to move from the extraordinary and unstable moment of its popular founding to the most prosaic but equally essential ordinary moment of its institutionalization and normalization, that is, of its constitutionalization. One of Schmitt's main concerns was how to stabilize and institutionalize the creative form-giving constituent power of the sovereign will.[28] While it has become commonplace to make the exception the central interpretative categories of Schmitt's thought, Dyzenhaus correctly notes that,

while the vitality of the exception looms large as the theme of *Political Theology*, it is important to keep in mind that Schmitt was not arguing for the total negation of normality. Indeed, in other works of this period, he seemed to argue for the desirability of legally established normality. For he did not reject the idea of a society comprehensively governed by legal norms, *on condition that the political decision that underpins that legal order is made explicit.*[29]

The constitution is a necessary and inescapable institutional and legal device to protect the constituent power from itself, from its fragile and ephemeral nature, by assisting it in exiting the extralegal zone and entering the realm of institutionalized political life. Note here the interesting contrast with liberalism. Contrary to the liberal version of constitutionalism, Schmitt understood the democratic constitution as the embodiment or figuration of power and not simply as its limitation, as the institutionalization and

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[26] Schmitt, "Staatsethik und pluralistischer Staat," p. 155.
[27] Schmitt, *CP*, p. 46.
[28] Dyzenhaus, *Legality and Legitimacy*, pp. 66, 94.
[29] Dyzenhaus, *Legality and Legitimacy*, p. 46 (emphasis added).

normalization rather than the negation of the popular constituent will. It is an act of self-institutionalization that seeks to turn the sovereign decision into a firm, enduring norm, able to implement stability and to procure normalcy and order. Whereas for Schmitt the constitution symbolizes the transition of the people from its extraconstitutional condition to a politically organized community, for most liberal thinkers it signifies mainly a set of limitations imposed on the political (especially the state) in favor of the apolitical, that is, of a private sphere and individual liberties. The task of the democratic constitution, by contrast, is to protect the sovereign constituent power.

With this reading in mind, Schmitt's characterization of the constitution as a political, positive document and of liberalism as a nonpolitical theory can be better appreciated. It is not only that liberalism, because of its universal theory of human rights, its economism, its legalism, its tendency to moralize, and its individualism, refuses to recognize the fundamental distinction between the friend and the enemy.[30] The apolitical nature of liberalism is also derived from its fear of political power and, ultimately, its anxiety in the face of the democratic popular sovereign.[31] Liberal constitutionalism responds to the fear that democratic politics will become tyrannical and despotic, turning against dissenting minorities and individuals to violate their liberties and rights. For Schmitt, by contrast, constitutionalism answers to the anxiety that the constituent power will remain eternally omnipresent and impotent, unable to procure stability, and thus self-destructive. Because the omnipotence of the constituent power is directly related to the rarity and brevity of its activities – of its eruption as a singular event – its temporal extension would surely threaten its creative strength. Consequently, for Schmitt it might be better to have a sporadic extraordinary politics, remaining most of the time inactive and invisible, keeping all its instituting power for those historical moments of genuine constitutional transformation, than to have an expansive and tireless constituent politics dissolving within its own limitless and uncontrollable strength. This argument is nicely captured in Laclau's remark that "A power which is total is no power at all."[32] Similarly, for Schmitt, the constituent power is a scarce resource not to be wasted in a permanent politics of the extraordinary.

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[30] Schmitt, *CP*, pp. 69–73.
[31] Schmitt, "Der bürgerliche Rechstaat," pp. 45–46.
[32] Ernesto Laclau, "Identity and Hegemony: The Role of Universality in the Constitution of Political Logics," in Judith Butler, Ernesto Laclau, and Slavoj Zizek, *Contingency, Hegemony, Universality: Contemporary Dialogues on the Left*, London: Verso, 2000, p. 54.

With the distinction established between the first and the second moment of democracy, it is possible to revisit his famous critique of legality and legal formalism. Although it is true that he was not well disposed toward proceduralism and legal formalism, it is inaccurate to think that he rejected them altogether. As I explained in the previous chapter, pure legality cannot account for the democratic origins of political power, thus suffering from a large legitimation deficit.[33] The reduction of democracy to a set of neutral and empty procedures impoverishes and weakens the substantive content of democracy, corroding its normative and political foundations, and threatening its constitutional core.[34] This explains Schmitt's belief that neither procedures nor the system of legal rules should be neutral. They must, on the contrary, be inherently related to the aims and aspirations of a democratic political community. They are segments of its juridical framework, expressed in the founding constitutional decision of the popular sovereign. Here, Schmitt targets purely statist models of democracy, according to which politics is reduced to the workings of political elites, hierarchical organizations, and bureaucratic administration.

Despite the ardor of this critique, however, Schmitt did not altogether dismiss procedures. He simply rejected their appropriation by liberal discourses that aspire either to undermine the substantive moment of democratic legitimacy or to hide the objectives and partial interests of social groups under a veil of neutrality, impartiality, and legality.[35] This double defect of proceduralism was not meant to call for its total abolition. Schmitt recognized that, although in the first moment of democracy there is no place for legality, a significant degree of legal formalism is necessary and even inescapable during normal politics. He acknowledged that the founding political decision "needs a certain organization, a procedure."[36] This procedure is integrated within a stable and firm constitutional structure. This is one of the main reasons why extraordinary constituent politics yields a constitution that establishes procedural rules and formal norms in the shape of constitutional laws.[37]

One of the main effects of democratic legitimacy is to give birth to legality. For this reason, Schmitt recognized that all modern constitutions are mixed or heterogeneous constitutions, composed of both liberal elements

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[33] Schmitt, *V*, pp. 8–9; Schmitt, *LL*, p. 13.
[34] Schmitt, *LL*, pp. 29, 86.
[35] Schmitt, *LL*, pp. 22–24; Schmitt, *CP*, pp. 52, 66–67.
[36] Schmitt, *V*, p. 84.
[37] Schmitt, *V*, p. 239.

(procedural and formal) and democratic elements (substantive and political).[38] As Slavoj Žižek rightly observes, for Schmitt a decision is made "not . . . for some concrete order, but primarily . . . for the formal principle of order as such." In this case, Žižek correctly adds, Schmitt did not seek to evade formalism and legality.[39] I find it inappropriate to interpret Schmitt's position as a total repudiation of proceduralism. While his defense of a substantive democracy and a "decisionistic" constitution helps to expose the impasses of one-dimensional liberal models of legality, which have contributed to the emptying and weakening of democracy, because among other things they disavow the extraordinary, thereby neutralizing democracy's substantive political content, he did not reject the need for some formal, abstract procedures in the name of a mythical essence. He did not dismiss formalism to cheerfully embrace pure substance or absolute executive discretion. Rather than interpreting his position as an unconditional dismissal of legal formalism, I am more inclined to view it as an effort to reconcile formalism and democratic legitimacy, the second with the first moment of democracy, the extraordinary and the ordinary.

Schmitt was very clear in distinguishing between two aspects of sovereignty: "the ordinary powers of sovereignty, that is, those which are included and thus defined by a legal disposition and the extraordinary powers of sovereignty, that is, those that have as an object the immediate expression of an unlimited *plenitudo potestatis*."[40] Instead of seeking a permanent executive dictatorship, Schmitt's work points to a set of mediations between substantive and procedural democracy, the constituent and the constituted sovereign, the first (extraordinary) and the second (ordinary) moment of democracy. Only within this context, can we properly appreciate his critique of "absolute democracy," a critique I return to later.

Schmitt as a Defender of Constitutionalism

Even if Schmitt's project aimed at redefining the meaning and content of democratic constitutionalism, in a way that would stabilize and secure the

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[38] Schmitt, *V*, pp. 49, 110. Schmitt argued that any modern constitution, in its generic form, contains both a political-democratic and liberal part, the main difference being that, in the democratic constitution, substantive political equality and the identity between the ruler and the ruled is superior to the liberal part, composed of the principles of separation of powers and individual rights. Schmitt, *V*, pp. 146–147.

[39] Slavoj Žižek, *The Ticklish Subject: The Absent Center of Political Ontology*, London: Verso, 1999, p. 114; Slavoj Žižek, "Carl Schmitt in the Age of Post-Politics," in *The Challenge of Carl Schmitt*, ed. Chantal Mouffe, London: Verso, 1999, pp. 18–19.

[40] Schmitt, *DD*, pp. 190–191.

substantive decisions of the sovereign constituent will of the people, his
views on the particular measures he thought to be most advantageous for
the protection of the *constituted* order still remain to be considered. Here,
I discuss three such measures that occupy a central, though often neglected,
place in his political theory and compose his constitutional architectonics: his
distinction between the higher-substantive and the inferior-procedural part
of the constitution, his concept of political representation, and his notion of
the "ethic of the constitution."

The first measure brings me back to the second task of constitution-
alism, which I mentioned in the previous section – the protection of the
constituent decision of the people from the instituted powers and the princi-
ple of majoritarian rule. Here, Schmitt confronted purely procedural models
of democracy, which in his time took the form of majoritarian democracy,
according to which a simple and ordinary legislative majority could poten-
tially change the entire constitution through legal, constituted means.[41] In
fact, his pamphlet *Legitimacy and Legality* must be partly seen as an attack
against what Ackerman has labeled "monistic" or "leveling" democracy.[42]

To address this problem Schmitt introduced a key distinction between
"the constitution" (*Verfassung*), which corresponds to the higher and
substantive-political part of the constitution, what John Rawls has called
the "constitutional essentials" or the "essential constitution," and the "con-
stitutional laws" (*Verfassungsgesetz*), which include a set of procedural rules
and formal legal regulations.[43] In Schmitt's version of a two-track consti-
tution, the first refers to democratic legitimacy, while the second denotes
the accredited position of legal formalism within constitutionalism.[44] The
first part embodies the founding political decisions of a sovereign commu-
nity concerning the form of government, the fundamental rules that regulate
the exercise of political power and its circumscribed area of competence,
the form of political representation, and the higher principles and symbolic
values of a political association. It denotes, in other words, the core consti-
tutional identity of a democratic political order. The second part incarnates
the subsidiary rules, procedures, and mechanisms that support and formal-
ize the first, higher, substantive part. As Carl Friedrich, restating Schmitt,
said, "Some things in a constitution are 'fundamental' . . . while others are
'circumstantial.'"[45]

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[41] Schmitt, *V*, p. 152.
[42] Ackerman, "Neo-Federalism?" pp. 178–179.
[43] Schmitt, *V*, pp. 20–21. Also, see Rawls, *Political Liberalism*, pp. 227–230.
[44] For the concept of "a two-track constitution," see Ackerman, "Higher Lawmaking," p. 65.
[45] Friedrich, *Constitutional Government and Democracy*, p. 144.

Schmitt sought to shield the essential constitution from normal politics with a set of clearly defined amendment rules to protect the decision of the constituent power, not from itself this time, but from subsequent ordinary legislatures. A constitution, he ascertained, is a hierarchical ranking of constitutional values and principles, where the norm that underlies the entire constitutional structure and defines the form of state and the type of government defines the foundational constitutional core, the basic constitution.[46] Here, Schmitt was concerned with a second kind of threat, when the *constituent* people is threatened by the *constituted* society, or, to put it differently, by its future, prospective self, projected within a constitutional order, in the form of ordinary representative legislatures, bureaucratic state imperatives, and elected officials. Given that, after the extraordinary founding of a new constitution, the popular sovereign retreats from everyday politics, Schmitt became increasingly concerned about potential threats emerging from the normal assemblies that could take advantage of the sovereign's absence to change the fundamental decisions, endowing ordinary lawmaking with the aura of higher lawmaking. So, he adopted the solution of a two-level constitution, where its highest part is shielded from the decisions of ordinary, constituted powers.

Despite, however, the secondary status of the "constitutional laws" within a democratic constitutional order, which Schmitt understood as predominantly liberal and procedural in character, these still have to play an important role. He recognized that the liberal part "is so important and so characteristic to any modern constitution" that it cannot be rejected altogether.[47] Contrary to some of his critics, he unambiguously asserted that "there is no modern constitution without these two very different elements – the liberal component and the political component."[48] The crucial task is not to abolish the one in favor of the other but to see how they can be better articulated and which part has priority over the other.

A two-level constitution was important to Schmitt in order to protect the general will of the popular sovereign from the possibility of being degraded into the particular wills of ephemeral majorities (*ordentlichen Gesetzgeber*).[49] He sought to preserve a clear separation between constitutionalism

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[46] Friedrich, *Constitutional Government and Democracy*, p. 145. Here I disagree with Cristi's characterization of Schmitt's distinction between "the constitution" and "constitutional laws" as metaphysical. Renato Cristi, "The Metaphysics of Constituent Power: Schmitt and the Genesis of Chile's 1980 Constitution," *Cardozo Law Review*, 21:5–6 (2000), pp. 1749–1776.

[47] Schmitt, *V*, p. 126.

[48] Schmitt, *V*, p. 146.

[49] Schmitt, *LL*, pp. 26–27.

and politics as usual. Although he never developed a systematic theory of constitutional amendments, he did focus on the differences between formal amendment procedures for constitutional change and the total abrogation of the constitution. He argued for strict amendment rules that would prohibit the established constituted powers, such as the president, the parliament, or the judiciary, from changing the fundamental and essential core of the constitution according to momentary political interests, independently of the aspirations and participation of the sovereign people. Such a change would amount to an illegitimate abolition of the existing constitution, signifying the usurpation of extraordinary power by ordinary powers. Schmitt argued that the process for amending the constitution should be more difficult than passing ordinary legislation. In the opposite case, the constitution would increasingly resemble normal legislation and would simply embody the conflicts of everyday politics, rather than expressing the collective will of the sovereign constituent people. This would have the effect of constantly putting the fundamental laws at the mercy of quotidian political struggles and turning the constitution to another contested object of sheer power politics, elite competition, and factional wills. Schmitt's firm distinction between "the constitution" and "constitutional laws" preserves the boundaries between constitutional and ordinary laws, extraordinary and normal politics.

To be sure, amendment rules have more than one function. First, they regulate the process of lawful constitutional change according to a set of procedural means by which one can legally modify the original document. They also ascertain which parts of the constitution are open to revision by amendment and which are shielded. Moreover, they delineate the realm of extraordinary and normal politics. Consequently, they are deployed to protect the extraordinary fundamental decisions of the sovereign people, and the core constitutional identity of the political community, embodied in the higher substantive part of the constitution, against the ordinary legislatures, simple majorities, and party interests. More than anything else, however, and despite their various technical functions, he insisted that amendment rules ultimately aim at the protection of the constitution (*Schutz der Verfassung*).[50]

The real thrust of Schmitt's position is that amendment rules can be used only to modify the second, inferior part of the constitution; they cannot alter the highest part. Only the procedural, liberal part of the constitution can be modified by legal means. The highest, substantive democratic part is

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[50] Schmitt, *V*, p. 103. For a detailed discussion of Schmitt's understanding of amendment rules, see Beaud, *La puissance de l'état*, pp. 344–357.

inviolable and shielded from amendment powers. Legal provisions of constitutional change cannot and should not alter the structure of government, the regime form, or its fundamental principles.[51] For Schmitt, amendment rules are not unlimited or unbounded because they do not incarnate the constituent power.[52] There are limits to the amending powers insofar as they are constituted powers.

But does this mean that the constitutional essentials can never change? Does Schmitt suggest that a constitution is an immutable, sacred text? By no means. The fundamental core of the constitution can be altered only by a participatory sovereign popular decision but never through gradual formal procedures or by the representative(s) of the people.[53] He thus distinguished constitutional revision from constitutional annihilation, abrogation, and derogation.[54] Were the constitution to be radically modified by formal amendment processes, this would amount to an illegitimate act, created by legal but not legitimate means.[55] Pure legality when taken to its logical conclusions undermines the normative foundations of democratic legitimacy and of constitutionalism as such. Legality usurps extraordinary politics and threatens the substantive "spirit of the constitution" (*Geist der Verfassung*).[56]

In using this remarkable language, Schmitt made a strong argument in favor of constitutionalism. Moreover, he came very close to some contemporary constitutional scholars who, much like him, have argued that "[i]n our everyday discourse we distinguish amendment from fundamental changes because the word *amendment* ordinarily signifies incremental improvements or corrections of a large whole" and not the radical and complete transformation of the whole.[57] Had an entire constitution been transformed

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[51] Schmitt, *V*, pp. 102–112.

[52] For a useful discussion of the relationship between amendment rules and the constituent power, see Holmes and Sunstein, "The Politics of Constitutional Revision in Eastern Europe," p. 276; Friedrich, *Constitutional Government and Democracy*, pp. 143–144.

[53] For a parallel argument, see Amar, "Popular Sovereignty and Constitutional Amendment," p. 97.

[54] "Verfassungsänderung ist also nicht Verfassungsvernichtung; Verfassungsänderung ist nicht Verfassungsbeseitigung; Verfassungsänderung ist nicht Verfassungsdurchbrechung," Schmitt, *V*, pp. 103, 104, 106. These distinctions have been analyzed and further developed by Walter F. Murphy, "Merlin's Memory: The Past and Future Imperfect of the Once and Future Polity," in Levinson, *Responding to Imperfection*, pp. 176–177.

[55] Schmitt, *LL*, p. 13. For a similar observation, see Donald Lutz, "Toward a Theory of Constitutional Amendment," in Levinson, *Responding to Imperfection*, pp. 241, 263.

[56] Schmitt, *LL*, p. 14.

[57] For a similar argument, see Sotirios Barber, *On What the Constitution Means*, Baltimore: John Hopkins University Press, 1984, p. 43; Walter F. Murphy, "An Ordering of

gradually and legally through amendment procedures, it would have suffered from a legitimation deficit, because it would not have been established by the constituent power of the people. But in a democracy, Schmitt reminds us, "The people is the only subject of the constituent power and it is the only one who can give to itself a constitution."[58]

For instance, a change from monarchy to parliamentarism or from parliamentarism to socialism can be decided and undertaken only by the people in its higher capacity as the sovereign power during extraordinary politics. Radical constitutional changes to be legitimate must come from the active citizens themselves. This signifies an extraordinary, and quite rare, mobilization of the sovereign constituent power, which needs to ascend from the depths to which it has been subordinated by the actual constitution to the light of concrete, constitutional politics. In this case, we revert to the first, extraordinary moment of democracy, where the sovereign awakens and becomes again physically present and politically visible. It is a new constitutional beginning.[59] This emphasis on the need for strict amendment rules and the protection of the substantive part of the constitution from pure legal proceduralism reflects Schmitt's broader attempt to defend the constitution and constitutionalism more broadly. If Arato is right to argue that "Amendment rules are central to any constitutional government . . . [because] without such rules it is almost impossible to maintain the differentiation of the written constitution and ordinary laws, so important from the point of view of constitutionalism," then Schmitt can hardly be regarded as an anticonstitutional thinker who sought to replace constitutionalism with a permanent executive presidential dictatorship.[60]

Obviously, independently of the success of his effort, his observations point to a central paradox inherent in democratic politics. While the supreme moment of democracy is defined as the effective manifestation of the

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Constitutional Values," *Southern California Law Review*, 53 (1980), p. 755; Murphy, "Merlin's Memory," pp. 169, 175, 178–179.

[58] Schmitt, *V*, p. 223.

[59] Schmitt, *V*, pp. 26–27, 92.

[60] Andrew Arato, "Slouching toward Philadelphia?" *Constellations*, 3:2 (1996), pp. 237–238; Schmitt, *V*, p. 98. Schmitt understood the amendment process as a later American constitutional scholar would describe it, namely, "as the domestication of the right to revolution." To put it slightly differently, the amendment process can be seen as the domestication of the constituent sovereign people and defined as the "pouvoir constituant réformateur" rather than "the pouvoir constituant révolutionnaire." See Walter Dellinger, "The Legitimacy of Constitutional Change: Rethinking the Amending Process," *Harvard Law Review*, 97 (1983), p. 43; Geneviève Koubi and Raphaël Romi, *État, constitution, loi*, Paris: Éditions de l'Espace Européene, 1991, pp. 81–84.

constituent subject through the extraordinary creation of a new constitution, political stability demands from the sovereign people that it expresses itself only in extraordinary moments and that it refrains from exercising continuously its constituent power at close intervals. Democracy entails that the extraordinary does not become the norm, but rather remains an infrequent occurrence. To ensure that, a democratic constitution must include constitutional provisions and legal mechanisms that would make the constant reactivation of the constituent power of the people difficult. This means that for lesser and minor constitutional alterations there is no need for an awakening of the constituent power. Constant awakenings of the sovereign can endanger the entire democratic regime. To avoid this danger, some constitutional changes can be carried out through the procedural mechanisms of amendment provisions.[61] On the other hand, however, this exigency for stringent amendment provisions, while it shields the fundamental founding decisions of the constituent people from ordinary legislation and everyday power politics, it unavoidably limits the historical possibilities for original constitutional creation and for a more genuine and insurgent democratic politics. For Schmitt, democracy, in order to protect itself, needs to periodically silence the popular sovereign by making extraordinary politics difficult and sporadic.

This democratic dilemma informs Schmitt's attempt to mediate between what he called "soft" and "hard" constitutions.[62] Whereas in "soft" constitutions amendment rules are equivalent to simple parliamentary majorities, so that the constitution becomes reduced to ordinary laws and constitutional extraordinary politics to everyday normal politics, in "hard" constitutions the threshold is so high that it is almost impossible to modify the constitutional laws, and in some cases, even a simple appeal to the constituent power would appear as anticonstitutional.[63] "Hard" constitutions, in other words, prevent the people from participating in higher lawmaking and undermine the democratic principle of collective self-determination.[64] While in the first instance the constitution is relativized and debased, in the second it is

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[61] Schmitt, *V*, p. 20.
[62] The similarities with Kelsen here are striking. Kelsen made a distinction between "rigid" and "flexible" constitutions. Kelsen, *General Theory of Law and State*, pp. 259–260. Also, see Madison, *The Federalist*, no. 43, p. 278; Friedrich, *Constitutional Government and Democracy*, pp. 138–140, 149.
[63] Schmitt, *V*, pp. 16–17.
[64] Stephen M. Griffin, "Constitutionalism in the United States: From Theory to Politics," in Levinson, *Responding to Imperfection*, pp. 60–61; Lutz, "Toward a Theory of Constitutional Amendment," pp. 240, 265–267; Holmes and Sunstein, "The Politics of Constitutional Revision in Eastern Europe," p. 295.

sacralized and naturalized.[65] A "soft" constitution reduces the constituent power to parliamentary sovereignty, while a "hard" constitution elevates it to a mythically evoked but eternally slumbering sovereign. In the first case, the constitution becomes a contested field of everyday politics, whereas in the second it is taken once and for all out of the realm of politics. Schmitt sought to mediate between these two extremes by arguing that while some parts of the constitution are open to the amending processes, others are not. Those that are not should not be viewed as eternal and sacred, however. If they cannot be changed procedurally, it is because only the sovereign people can directly change them.[66]

Schmitt did not propose a particular amendment procedure for a democratic constitution. By distinguishing, however, between a primary, unchangeable, and inviolable (with respect to the constituted powers) higher part and a secondary, procedural part of the constitution that can be changed by amendment rules, he exhibited an unequivocal interest in the constitutional order and constitutional democracy. It is time now to reconsider the question of whether he aimed at the destruction of constitutionalism as such or at the relativization of the liberal version in favor of a more democratic legal order. His claim that there are some essential, substantive constitutional principles that cannot be abdicated either through a simple legislative, parliamentary process or by formal amendment procedures points to the necessity of securing the political identity and normative foundations of a democratic regime from simple, normal majorities and state interests. Even the president cannot abrogate the constitution, given that the presidency is a constituted power and not a constituent power. As he plainly put it, the substantive part of the constitution is "inviolable."[67] It can be abolished only by a new direct act of the constituent popular sovereign, that is, through an extraordinary, extraconstitutional mobilization of the *demos*. Until such a moment comes, the highest constitution remains unchangeable.[68] To put it

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[65] Ackerman, *We The People: Foundations*, pp. 279–280.

[66] Schmitt's search for a middle position is echoed by Arato's argument: "An amendment rule should be able to perform both of its functions: change and preservation. If the function of preservation predominates, so does constitutionalism at the expense of democracy. In such a case, the ability of the democratic political community to reflexively fashion its fundamental rules is put in doubt. . . . When the function of change is completely dominant, in the case of easy rules of amendment, the constitution is at the mercy of the amending power, often but not necessarily the ordinary legislature." Arato, "Slouching toward Philadelphia?" p. 238.

[67] Schmitt, *V*, p. 26.

[68] Schmitt, *V*, pp. 25–26.

bluntly, amendment procedures end where the constituent people wake up to reaffirm their genuine instituting powers.[69]

If a constitution consists of three essential elements – fundamental laws that define the regime type, governmental form, and the character of representation; rules that regulate the exercise of power within properly delineated and clearly circumscribed boundaries; and the existence of strict amendment procedures that distinguish the constitution from ordinary legislation – then we can definitely locate Schmitt within the tradition of modern European constitutionalism. "If constitutionalism," as it has been said, "rests on the idea that there must be a clear difference between ordinary legislation and the provisions of the constitution," then Schmitt can be characterized as a constitutional thinker.[70]

Along with this distinction between "the constitution" and "constitutional laws," Schmitt attempted to protect the democratic constitution from contingent power politics and group interests with a reconceptualization of the notion of political representation. A careful study of his early texts, such as *Roman Catholicism and Political Form* and *Visibility of the Church: A Scholastic Consideration*, challenges conventional depictions of Schmitt as an unconditional proponent of the principle of an absolute identity between the ruler and the ruled.[71] In these two texts, a more nuanced and complex position is revealed that later culminated in a reconstructive project aimed at the mediation between identity and representation, rather than at a categorical rejection of the latter in favor of the former.[72]

In *Roman Catholicism and Political Form*, Schmitt cast his opening argument in response to Protestantism's historical failure to solve the contradictions of the modern world. He depicted a world torn between the economic rationality of capitalism and the irrational reaction of romanticism, between abstract form and concrete content, between matter and spirit.[73] For Schmitt, this tension is inherently political as it takes the form of a profound political crisis in the modern world, a crisis of representation, which

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[69] For a similar argument, see Levinson, "How Many Times Has the United States Constitution Been Amended?" p. 21.

[70] For this definition of constitutionalism, see Griffin, "Constitutionalism in the United States: From Theory to Politics," p. 50.

[71] Both texts are included in *RCPF*.

[72] Schmitt, "Die zwei Prinzipien politischer Form (Identität und Repräsentation)," *V*, pp. 204–220.

[73] For Schmitt's critique of the failure of romanticism to propose a viable alternative to the dilemmas and antitheses of modernity, see Carl Schmitt, *Political Romanticism*, trans. Guy Oakes, Cambridge, Mass.: MIT Press, 1986.

had made "bourgeois society . . . no longer capable of representation."[74] In light of this crisis, his initial goal was to demonstrate that the Catholic Church provided the only appropriate institutional form of representation able to transcend the present political predicament. Even in his later writings, after his break with political Catholicism, he would declare that, given the crisis and undelivered promises of liberal parliamentarism, one of the fundamental tasks of political theory is to elaborate a viable notion of political representation.[75]

Although for Schmitt the underlying cause of this crisis was the socioeconomic transformation of modern Western society and, in particular, the rise of capitalism and mass democracy, he nonetheless held back from presenting a classical sociological interpretation of the underlying structural change of the public sphere, such as the one he later developed in the *Crisis of Representative Democracy*. Rather, he focused on the intellectual manifestations of these changes. Appropriating Weber's distinction between formal-purposive and substantive rationality, Schmitt correlated the corrosion of the traditional basis of representation with the hegemonic role that instrumental reason plays in modern civilization. To better grasp his argument, we need to turn our attention to his peculiar and distinctive understanding of representation, an understanding that differs radically from the literal use of the term.

Representation, according to Schmitt, is neither an act similar to that of a mirror reflection of a preexisting physical entity that is projected from one location to another nor an act of binding in which one person or group entitles another to stand or to act in one's name or social-economic interest. It cannot therefore be a relationship of strict accountability and delegation in which the represented controls and commands the representative. It is important to repeat here that delegation, for Schmitt, is not a form of representation.[76] Moreover, representation does not represent social and economic interests in the political realm. It is not a mechanical translation of these interests into political interests. Representation, for Schmitt, cannot represent particular wills.

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74 Schmitt, *RCPF*, p. 20; Balakrishnan, *The Enemy*, pp. 59–60.

75 Schmitt, *V*, p. 315. Gary Ulmen advances another interpretation: Schmitt's aim is to elaborate a Catholic alternative to Weber's thesis of the Protestant ethic and the spirit of capitalism. See Gary Ulmen, introduction to *RCPF*; Gary Ulmen, "The Sociology of the State: Carl Schmitt and Max Weber," *State, Culture, and Society*, 1 (1985), pp. 3–57.

76 According to Schmitt, if the representative (*Repräsentant*) is a mere delegate, "so its keine Repräsentation mehr vorhanden." Schmitt, *V*, p. 351.

Rather, he defined representation as "an arrangement making the invisible visible," emphasizing thereby the aspects of transformation and transubstantiation.[77] For the possibility of "visualizing" something that is by itself invisible, and here Schmitt still meant abstract values and general principles, there must be a concrete, mediating institution able to embody this immaterial entity. These values can vary from the idea of God to that of a Nation to that of the People (or, as he will argue later, to that of the constituent sovereign). It is at this point that he fuses personification with representation. This transformation can take place only insofar as the intervening institution is strictly personal, because, as he claimed, only a person can materialize and carry immaterial values, casting them in a tangible, physical form-figure. "To represent in an eminent sense can only be done by a person . . . an authoritative person," Schmitt stressed, because "personalism [is] inherent in the idea of representation."[78]

With this definition at hand, he criticized modern politics precisely for the absence of such mechanisms of political representation. The rise of economic interests, privacy, materialism, and anonymity – what Arendt later coined the "social"[79] – have destroyed traditional forms of concrete institutional bodies capable of incarnating abstract regulative ideas.[80] Likewise, the political

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[77] Schmitt, "The Visibility of the Church: A Scholastic Consideration," *RCPF*, p. 52.

[78] Schmitt, *RCPF*, pp. 21, 33; Schmitt, *V*, p. 214.

[79] Arendt, *HC*, pp. 38–50. It should be noted that behind Schmitt's and Arendt's hostility to the social lays Hegel's famous critique of civil society as the system of material, immediate needs and particular wills. G. W. F. Hegel, *Elements of the Philosophy of Right*, ed. Allen W. Wood, trans. H. B. Nisbet, Cambridge: Cambridge University Press, 1991, pp. 220–275.

[80] It is a commonplace today to define totalitarianism as the complete identification of the social and the political, the public and the private, an identification that destroys the possibilities of mediation. Schmitt clearly dismissed this trend toward such a systematic and mutual absorption, which blurs all distinctions and cancels the constitutive dimension of representation. Instead, he argued for precise analytical differentiations and the maintenance of a distance between these sets of distinctions. It is precisely in this fractured space that political representation fulfills the role of symbolically constructing and projecting the unity of society. In other words, this lacuna between the political and the social, the public and the private, is that which makes room for representation and permits society to see itself, to represent itself, as a political unity independently of existing social divisions. Schmitt's social topology, composed of three distinct and differentiated areas – the economic realm, the sphere of privacy, and the public space – can hardly place him in the company of totalitarian thinkers. In fact, he often sounded more like a traditional liberal, concerned with the growth of the welfare and interventionist state, as he advanced a strong case for keeping intact "the distinction between state administration, autonomous economic administration, and the individual domain of freedom." Schmitt, "Strong State and Sound Economy. An Address to Business Leaders," pp. 224–225, 223, 232. Chris Thornill convincingly demolishes the "Nazi" reading of Carl Schmitt. With a careful reading of Schmitt's texts written

has been reduced to mere politics, that is, to an apparatus of power used by actors in their struggle to promote their narrow, sectarian interests.[81] Having become primarily instrumental and materialistic, political relations have debased the political from an autonomous sphere into power politics, "which makes of politics a mere technique [i.e., of power] in that it isolates a single, extrinsic, factor of political life."[82]

Although Schmitt had not yet developed a fully fleshed out concept of the political, he clearly distinguished it from the social. The political is the realm of substantive ethical principles, of invisible and abstract values, that is, the realm of symbolization and representation in which society forges its own symbolic unity, transcending empirical divisions through some normative collective significations.[83] The social is the domain of the material, the visible, and the immediate, saturated by economic cleavages and conflicting interests. For Schmitt, the second realm has been analyzed and somehow endorsed by Weber. So, it is helpful to view Schmitt's critique of politics as an implicit critique of Weber's 'narrow' definition of the political as the mere struggle for state power among competing interests. Moreover, in this critique, Schmitt clearly distanced himself from what he thought was Weber's Machiavellian view of politics as power politics. For the young Schmitt, politics is a struggle among substantive values and political principles rather than about state power as such.

just before 1933, Thornill demonstrates, based on a reconstruction of Schmitt's distinction between the *qualitative* and *quantitative* state, that there were huge differences between Schmitt's political and legal theory and the politics of the NSDAP. Thornill, *Political Theory in Modern Germany*, pp. 84–90. Also, see Carl Schmitt, "Weiterentwicklung des totalen Staats in Deutschland," *PB*, pp. 210–211, 213; Balakrishnan, *The Enemy*, pp. 152, 156, 161. The thrust of Schmitt's separation of the political from the social is extremely important and should not be undervalued. First, it questions the predominant interpretations of Schmitt as a principled Nazi whose theory was intrinsically connected with National Socialism. Second, it reveals a surprising proximity between Schmitt's concept of representation and a broader political tradition that starts with Edmund Burke to culminate in Marcel Gauchet. See, Marcel Gauchet, *Les révolutions des pouvoirs. La souveraineté, le peuple et la représentation: 1789–1799*, Paris: Editions Gallimard, 1992; Marcel Gauchet, *La religion dans la démocratie. Parcours de la laïcite*, Paris: Gallimard, 1998, pp. 111–127. Also, see Pitkin's insightful discussion of Burke's theory of representation. Hanna Pitkin, *The Concept of Representation*, Berkeley: University of California Press, 1967, pp. 168–189.

[81] Schmitt, *RCPF*, p. 16.

[82] Schmitt, *RCPF*, p. 16.

[83] For Schmitt, the political denotes a type of social relationship that is separate from other relationships: it is conflictual, it demands strong decisions, it exhibits hostility toward one's opponents, and it has a distinctive public aspect solely concerned with issues related to the identity of a larger community. Among such issues Schmitt referred explicitly to justice and the public good. Schmitt, *RCPF*, pp. 17, 30, 35, 36.

In modern social formations, he declared, the invisible has been assimilated into the visible. What he meant by this enigmatic formulation is nothing more than the gradual disappearance of values and ethical principles from political discourses, practices, and relations and their replacement by material interests. Communism and socialism, as well as liberalism, are to blame. Despite all their differences, they share the same epistemological premises of economic determinism and material reductionism. They have undermined the foundations of representation. They have debased representation to a mere mechanism of transmitting partial interest and particular wills from the social to the political. In doing so, they have subverted the symbolic and autonomous dimension of politics as the terrain of the figuration of the general will. Here, in a broader sense, Schmitt anticipated the so-called end of ideology thesis, according to which political conflicts have become a mere translation of sheer economic struggles over the appropriation of material benefits and not as a contest among competing conceptions of justice and the good and alternative visions of how society should be organized.[84] By replacing normative issues with material preoccupations, liberalism and socialism have divested the political of its substantive and symbolic content. They both are doctrines of the economic and not of the political, missing the very constitutive distance that separates the invisible from the visible, the norm from the factual, a distance that permits and necessitates mediation and representation.[85] In the early work of Schmitt, only ideas and values can be politically represented and never interests, which are concerned only with things that are always already physically present and visible in the social realm and thus do not warrant representation.

Liberalism and socialism, therefore, resemble one another in many essential aspects. Much like Weber and Arendt, Schmitt argued that they subordinate the political to the social and share a similar normative vision of society as a harmonious, self-regulated, and fully transparent community, populated either by self-interested economic agents or by free and equal producers.[86] This exclusion of values and meanings, which in the past had been the main condition of real antagonisms, political cleavages, and

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[84] Schmitt, *RCPF*, p. 30. Here Schmitt is victim of a contradiction. On the one hand, he laments the desubstantialization and materialization of the political, while, on the other, he castigates the emergence of total parties based on strong ideological positions, which promote coherent worldviews, as representing a major threat to the unity of a political community.

[85] Schmitt, *RCPF*, p. 54.

[86] For such a critique of the eschatological current in the leftist tradition, see William Rasch, *Sovereignty and Its Discontents: The Primacy of Conflict and the Structure of the Political*, London: Birkbeck Law Press, 2004, p. 17.

relations of enmity, obviates the need for mediation and representation. In the liberal and socialist visions of a rational society, there is nothing to be represented; rather, there are only immediate interests to be transferred unto the political realm, where they can be balanced, negotiated, and reconciled. Everything has fallen into the profane realm of the material, the private, and the visible. The political has been replaced by the administration of things. It has been debased and instrumentalized in the form of a politics of interest, destroying any meaningful boundary between the symbolic and the real.[87]

Given his insistence on the principle of noncorrespondence between the political and the social, his attack on the two main modern institutions that replaced the old, traditional forms of representation, liberal parliamentarism and soviet councils, comes as no surprise. Although he conceded that bourgeois parliamentarism was introduced to compensate for this representational deficit in modern times, he came to believe that it ultimately failed.[88] It failed as it moved away from representing the unitary normative value of the nation – a value that was secular but still invisible, immaterial, and general – in favor of the economic interests of different political and social factions. In a talk he delivered in 1932 to the Professional Business Organization, he reiterated his critique of parliamentarism because "representatives are no longer the representatives that the constitution conceives. The representative is no longer an independent, free person, representing the common welfare over and against partisan interests."[89] This displacement led to the privatization and depoliticization of the modern bourgeois parliament. Instead of incarnating the general, public value of political unity – "an ethos of justice"[90] – it became a mechanism for the advancement and satisfaction of private interests and particular wills.[91] The public has become but a simulacrum of the private and the economic, whereby publicity is replaced by secrecy.[92]

Schmitt's views on the system of soviet councils are similarly dismissive. There are two reasons for this. First, the communist invention of the revolutionary councils and of the imperative mandate reduces representatives to mere agents and delegates of the working class. Indeed, communism radicalized the logic of traditional liberal representation and developed it to

[87] Schmitt, *RCPF*, p. 16.
[88] Schmitt, *V*, pp. 216–220, 318–319.
[89] Schmitt, "Strong State and Sound Economy. An Address to Business Leaders," pp. 220–221.
[90] Schmitt, *RCPF*, p. 31.
[91] Schmitt, *CPD*, p. 6.
[92] Schmitt, *CPD*, pp. 37–39.

its ultimate conclusions, culminating in the notion of representation as a
"transmission belt." Thus, whereas nineteenth-century liberalism allowed
for some institutional and symbolic distance between the invisible idea of
the nation and the visible interests of the bourgeoisie, which made room for
a mediation between the political and the economic, permitting a certain
degree of representation,[93] Marxism in particular has destroyed any consti-
tutive distance, advocating a total fusion between the social and the political
and consequently foreclosing any possibility of representation.[94] Second,
Schmitt understood the Soviets, as I have mentioned in Chapter 4, to repre-
sent a version of dictatorship.[95] Therefore, they remain in a permanent state
of exception unable to generate forms of political representation, which are
essential to and constitutive of normal politics. Underlying these observa-
tions lay his objection to a ceaseless constituent power and to a permanent
exception. Interestingly enough, Schmitt's critique of proletarian dictator-
ship was intended also as a critique of the failures of constitutionalization.
In his discussion of delegation, he appears as a fervent critic of a lasting
dictatorship, in accord with his rejection of the principle of delegation in
favor of representation during normal times.

    What did the early Schmitt propose in order to surmount this crisis of
representation? Instead of looking for a new institutional mechanism, he
returned to what he considered to be the sole organization that has his-
torically succeeded in embodying the power of representation, the Catholic
Church, and to the only person who successfully incarnated the invisible,
the pope.[96] However, he recognized that under modern, secular conditions
the church could not play this role by itself. What is required, therefore,
is to find new political forms. Only then could the unique inherent capac-
ities of the church for mediation and personification save the category of
representation from oblivion.[97] The church, in stark opposition to liberal-
ism and socialism, is a concrete, personified political institution capable of
making decisions, of distinguishing between friend and enemy, and, more

[93] Schmitt, *V*, pp. 265–266.
[94] Schmitt, *RCPF*, pp. 25–26, 29.
[95] Schmitt, *DD*, pp. xiii–xiv, 201–202.
[96] Schmitt, *RCPF*, pp. 19, 14. No other text can help us situate Schmitt's early thought better
    than Joseph de Maistre's work on the sovereign power of the pope. It seems to me that
    Schmitt sought to preserve the underlying animating motivations of de Maistre's description
    and vindication of the sovereign pontiff's supreme power, while rejecting its traditionalist,
    antimodernist, and theological elements. In a sense, Schmitt's early work can be located in
    his attempt to "secularize" de Maistre. Joseph de Maistre, *Du Pape*, Geneva: Librairie Droz,
    1966, pp. 45–48, 129–157, 177–188.
[97] Schmitt, *RCPF*, p. 39.

importantly, of embodying substantive reason and immaterial ideas, symbolically bridging the visible and the invisible. Located in their interstice, the church knows how to negotiate this indefinable space.

How then can we explain his sudden break with Catholicism?[98] Beyond the historical and biographical reasons that have to do with Schmitt's disagreement with Catholic political formations, there is an inherent tension located at the very heart of his argument. Unable to escape the irrevocable secularization of politics, he had to accept the state-church separation and to call for a compromise and peaceful coexistence.[99] This attempt at reconciliation, however, flies in the face of his theory of sovereignty, which he had articulated just one year before and which required a single, authoritative, sovereign instance of decision.[100] He even timidly alluded to this notion of the sovereign in this early text, stating that, "the power to decide who is sovereign will signify a new sovereignty," which means that in his theoretical system there is no room for two sovereigns.[101] Multiple sovereignty is not conceivable in his conceptual universe. Catholic representation was thus sacrificed at the altar of modern state sovereignty, creating the preconditions for presidential politics.[102] The ground had been cleared for introducing the idea of an elected president as the representative of the constituent power of the popular sovereign.[103]

Eleven years after *The Visibility of the Church*, and despite all the major changes and shifts that his work experienced, Schmitt would again assert that

to represent signifies to render visible and actual a being that is invisible through the intermediary of a being that is publicly present. The dialectic of this notion is related to the assumption that the invisible is absent although at the same time we make it present. This is not possible with any kind of being, and this presupposes a certain type of being.... What is only a private affair and serves exclusively private interests can hardly be represented ... [because] representation produces a concrete manifestation of a superior kind of being.[104]

This definition differs, however, from the earlier one in two ways. First, it is the elected executive and not the pope who carries this representative

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[98] For a more general discussion of this break, see Bendersky, *Carl Schmitt: Theorist of the Reich*, pp. 85–87.

[99] Schmitt, *RCPF*, p. 25.

[100] Schmitt, *PT*.

[101] Schmitt, *V*, pp. 211–212.

[102] Schmitt, "Staatsethik und pluralisticher Staat," *PB*, p. 156.

[103] Schmitt, *V*, p. 220.

[104] Schmitt, *V*, pp. 209–210.

role. Second, and more importantly, the representative agent does not represent higher immaterial, transcendental values but the popular sovereign, that is, its general will, which after having created a new constitution, has disappeared from the political realm, ceding its place to the juridical, constitutional machine: within a stable constitutional order, the constituent power disappears from normal politics and becomes an invisible referent. Hence, it needs to be represented and symbolically reconstructed.[105] It is here where he finds the opportunity to criticize the model of direct democracy, what he calls "absolute democracy."[106]

Contrary to what is commonly thought, Schmitt did not advocate the total realization of the principle of identity. Instead, he emphatically claimed that "in real political life there is no state that could renounce all the structural elements of the principle of identity and even less a state that could renounce all those of representation. . . . These two possibilities, identity and representation, do not exclude each other but represent only two points of orientation." He concluded with a highly suggestive statement that "there is no state without representation" and, "in the same way, there is no state deprived of the structural elements of the principle of identity."[107] Absolute democracy would mean the fusion of the ruler and the ruled, elimination of political authority, and the unmediated and uninterrupted public presence of the sovereign people. As he claimed, however, "no democratic state can renounce absolutely representation. Democracy finds here its first natural borders."[108] Direct democracy had never existed and will never exist for Schmitt. Even the ancient Greek *polis*, he claimed, had to invent some mechanisms that mitigated and compromised the principle of identity. Instead of exclusively using the method of lottery, for instance, ancient Greek democracies also made use of the method of election, an aristocratic mediating institution of leader selection.[109] Direct democracy overburdens the political with an almost limitless inflation of political activity. It also leads to an extreme and dangerous politicization of society, remaining thus in a ceaseless situation of instability. As he bluntly put it, "direct democracy

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[105] Schmitt, *V*, p. 214.
[106] Schmitt, "Grenzen der Demokratie," *V*, pp. 276–282, 204–208.
[107] Schmitt, *V*, pp. 206, 208.
[108] Schmitt, *V*, pp. 276–277.
[109] See Bernard Manin's informative study on lottery and democracy in *The Principles of Representative Government*, Cambridge: Cambridge University Press, 1997, pp. 8–132. Manin makes an exemplary use of Schmitt's insights concerning the difference between selection by lot and selection by election.

amounts to the dissolution of the political unity."[110] For Schmitt, although absolute democracy could be approximated only in these rare, extraordinary moments of genuine popular constitutional creation, it should never be generalized as a model of ordinary lawmaking.

It should be remembered that when Schmitt spoke of sovereignty he had in mind the constituent power of the people. For only during the extraordinary moment of constitutional making is the principle of identity near to being materialized. When physically present, as during founding moments, the constituent sovereign is not in need of representation. It can act either directly or indirectly, by delegating its power to a constituent assembly. When the citizens are publicly visible in the form of an acting, effective constituent power, there is no need of representation but rather a need (though not always) of delegation.[111] Building upon Rousseau's distinction between representation and the general will, Schmitt, *contra* Sieyès, maintained that democratic extraordinary politics eschews representation. Where constituent politics starts, he thought, representation ends (and vice versa).

Most of Schmitt's critics have missed this important aspect of his thought. Schmitt did not argue for the total homogeneity of the people; rather, he sought to clarify the ideal presuppositions of an absolute democracy, as "an ideal theoretical construction."[112] In real life, however, absolute homogeneity also means that a permanent elimination of the enemy "is a fiction" (*fingiert wird*).[113] As I see it, too much ink has been wasted over his alleged glorification of substance, homogeneity, and identity. What he advocated was much more prosaic and commonsensical: democracy can exist only in the movement toward the elimination of political inequalities and political conflict and the removal of the distance between the rulers and the ruled and not in the actual abolition of the latter, or in the overcoming of the internal rift separating the "us" from the "them." There will always be a gap during normal times that will cancel or at least postpone the possibility of any total realization of democracy, of any final victory of a unitary people against its enemies. Thus, the effort to try to apply the model of democratic constitutional making to everyday politics will yield not direct democracy but the dissolution of the political. It is worth repeating that, for Schmitt,

[110] Schmitt, *V*, p. 207.
[111] Schmitt, *V*, p. 205; Schmitt, *DD*, p. 125.
[112] "...als gedankliche Idealkonstruktion, nicht als geschichtliche und politische Wirklichkeit anzusehen," Schmitt, *V*, p. 215.
[113] Schmitt, *V*, p. 215.

extraordinary politics is not the model for ordinary politics. The extraordinary is not the everyday, and any attempt to turn it into that will bring its dissolution.

Democracy needs both a stable constitutional framework and a higher institutionalized representative instance. For Schmitt, once the sovereign withdraws from politics, it has to reappear in a representational form, that is, through a directly elected president. It is its invisibility during normal times that qualifies it for representation. The democratically elected president represents the invisible sovereign people, making it visible in the symbolic dimension of publicity.[114] During extraordinary politics, "where the people appears as the subject of the constituent power," Schmitt argued, "the political form is determined according to the principle of identity; the nation is *here*; it should not and it cannot be represented."[115] But in normal times, he added a few paragraphs later, "Nowhere is there a moment of total and complete identity of the immediate people with itself as a political unity."[116] This gap, which obstructs the people from permanently becoming one with itself, warrants political representation and heralds the second, ordinary moment of democracy.

Schmitt returned to the same issue a few years later in a work devoted exclusively to the guardian of the constitution.[117] As in his previous writings, he ascertained that the preservation of the constitution requires the existence of a particular institutional instance able to realize and maintain the political unity of the state in cases where this unity is in danger of dissolution because of partial and antagonistic interests that polarize the political field and attempt to control the state in order to advance their particular power positions.[118] The only difference is that now he defined this institution in Benjamin Constant's term as a *pouvoir neutre* rather than as a commissarial dictatorship.[119] In a democratic constitution, Schmitt maintained, the role of the guardian should be bestowed on a democratically elected president. Neither a supreme or constitutional court nor the parliament can play this role.[120] Only the president, according to Schmitt, has all the attributes that qualify him as the real guardian of the constitution.

[114] Schmitt, *V*, pp. 350–351.
[115] Schmitt, *V*, p. 205.
[116] Schmitt, *V*, p. 207.
[117] Schmitt, *HV*.
[118] Schmitt, *HV*, pp. 132–140; Schmitt, *V*, pp. 351–353.
[119] Benjamin Constant, *Political Writings*, ed. Biancamaria Fontana, Cambridge: Cambridge University Press, 1995, pp. 183–193.
[120] Schmitt, *HV*, chaps. 1–2.

The independence of the president from the parliament endows him with an element of impartiality and objectivity vis-à-vis particular interests. Likewise, this independence and neutrality from party interests is reinforced by his direct election from the people. In addition, the president has already a set of constitutional powers that confer upon him the authority to take effective decisions in defense of the constitution. Finally, and crucially for Schmitt, in a democracy, the president represents the unitary will of the sovereign people and can thus speak and act on their behalf. For this reason, interestingly enough, he did not argue that the executive is superior to and above other political institutions. This, in his view, would transform it from a constituted office, devised to protect the constitution, into a sovereign constituent power, outside the constitution. The executive is *a neutral constituted power*, located on the same level as the other constituted powers. Hence, he defined it not as the carrier of the constituent power but, interestingly enough, as the carrier of neutral power (*als Träger einer neutralen Gewalt*).[121] In this role, the main task of the executive is to mediate among the other branches of the government. It is a predominantly coordinating role that only occasionally, in cases of emergency, is displaced in favor of a more active and discretionary political role.

Schmitt's concept of representation considerably advances our understanding of his relationship to Weber, helping to clarify some important differences through the notion of charismatic leadership. Too much has already been said on this topic.[122] For example, it is argued that Schmitt's understanding of sovereignty was shaped by "his reception of Max Weber's theory of charisma."[123] The only difference is that, while Weber introduced charisma against the "iron cage" of rationalization, Schmitt, by radicalizing it, turned it against the "iron cage" of technology. Or that Schmitt's notion of the president was predicated on the choice "for substance over form, for an ethic of pure conviction and executive will, unconstrained by any rules. The person who expresses the conviction will indeed be a 'new prophet': one who does not so much seek to survive the ghosts of dead religious ideas,

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[121] Schmitt, *V*, p. 351.

[122] Jürgen Habermas has loudly declared, "that Carl Schmitt was a 'legitimate pupil' of Max Weber." Stammer, *Max Weber and Sociology Today*, p. 66. Also, see Mommsen, *Max Weber*, pp. 381–389; Gary L. Ulmen, *Politischer Mehrwert: Eine Studie über Max Weber und Carl Schmitt*, Weinheim: VCH Acta humaniora, 1991; Rune Slagstad, "Liberal Constitutionalism and Its Critics: Max Weber and Carl Schmitt"; Elster and Slagstad, *Constitutionalism and Democracy*; Matthias Eberl, *Die Legitimität der Moderne: Kulturkritik und Herrschaftskonzeption bei Max Weber und Carl Schmitt*, Merburg: Tectum Verlag, 1994.

[123] McCormick, *Carl Schmitt's Critique of Liberalism*, p. 135.

but rather to state a new vision that can harness the impulses which cause such ghosts to haunt us."[124] And yet, not only is there no textual evidence in Schmitt's writings concerning charisma or charismatic legitimacy, but these interpretations also fail to mention those cases in which he scorned the concept of charisma as being irrational and subjective.

I limit myself here to only a few preliminary comments, derived from the concept of representation that indicates crucial differences between Weber's notion of charisma and Schmitt's theory of representation. Schmitt, who adopted a rather traditional and conventional reading of Weber, explicitly distanced himself from Weber's theory of charismatic legitimacy, arguing that the executive should not derive its authority from inner characteristics and superhuman personal attributes but rather from the superior, normative ideas and values that it represents.[125] While the charismatic president rules because of certain extraordinary charismatic qualities that have been recognized and shared by the subjects, for Schmitt he rules because of his capacity to represent the unitary, sovereign will of the people and to act as a neutral and intermediary power.[126] In addition, he referred to charisma with subtle irony in order to validate his theory of the secularization of political concepts. He coldly asserted that charismatic legitimacy "is nothing other than a derivation of a secularized Protestant theology, a deformation of an original theological image. In fact, in the New Testament, the charismatic legitimacy of the Apostle Paul represents the theological origins of whatever Max Weber did say as a sociologist about the theme of charisma."[127] Herein lies a crucial difference. Whereas Weber lacked a theory of democratic legitimacy that he subordinated either to legal legitimacy or to charismatic legitimacy, Schmitt openly advocated and promoted a democratic principle of legitimation, based on the theory of the constituent power of the people that is represented by the president only *ex ante*, in normal times. The belief that his notion of the elected executive is another version of charismatic rule misses this fundamental distinction. Likewise, Schmitt explicitly criticized Weber's concept of charisma as bordering on the irrational, insisting that "the Pope is not the Prophet but the Vicar of Christ. Such a ceremonial function precludes all the fanatical excesses of an unbridled prophetism. The fact that the office [i.e., of the pope] is made independent of charisma

[124] Dyzenhaus, introduction to *Law as Politics: Carl Schmitt's Critique of Liberalism*, ed. David Dyzenhaus, Durham: Duke University Press, 1998, p. 11.

[125] Schmitt, *RCPF*, p. 14.

[126] Schmitt, *V*, p. 351.

[127] Carl Schmitt, *Politische Theologie II. Die Legende von der Erledigung jeder Politischen Theologie*, Berlin: Duncker und Humblot, 1970, pp. 41–42.

signifies that the priest upholds a position that appears to be completely apart from his concrete personality."[128] As George Schwab has rightly noted, "although [Schmitt] spoke of the president being the leader of the German people, he did not imply that the president had to possess charismatic qualities."[129]

Still, there is a controversial aspect in Schmitt's constitutional theory of representation that clouds his notion of normal democratic politics and could partly explain his infamous turn to Nazism. It pertains to the notion of the guardian of the constitution and its relationship to presidential representation. He not only endowed the president with the power to represent a slumbering, thus invisible constituent sovereign; he also ascribed to the president the task of defending the constitution. In *Die Dictatur*, the president is understood as the institutional entity equivalent to commissarial dictatorship in times of crisis. Thus, while he can suspend the constitution, he can never abrogate it. In an article published in 1924, he asserted that the president could neither abolish the constitution nor suspend the "institutional minimum" of constituted authorities contained in the constitution.[130] Clearly, he wanted the executive to correspond to a form of emergency authority aimed at the preservation of the existing constitution. Although the president was conceived to be both the representative of the unity of the people in normal times and a commissarial dictator in exceptional moments, Schmitt never endowed the office with the originating constituent power to create a new constitution. Either as a representative or as a delegate, the president, in a democratic regime, can never be sovereign.

To be sure, Schmitt's theory of the president as the guardian of the constitution, even if not defined as charismatic, is unappealing, and in fact it helped him to justify his support of Hitler in 1933. There are two main reasons for this. First, as I have tried to show, although Schmitt did not aim at undermining constitutionalism, his theory of the executive is not only ambiguous but is also misguided. By endowing it with two different roles, as a *representative* of the sovereign people in normal times and as its *delegate*, in the form of commissarial dictatorship, during exceptional situations, he came close to embracing an extremely strong version of a mighty executive, far stronger than the other branches of the state. As it has been correctly noted,

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[128] Schmitt, *RCPF*, p. 14.
[129] Schwab, *The Challenge of the Exception*, p. 71.
[130] Carl Schmitt, "Die Dictatur des Reichspräsidenten nach article 48 der Weimarer Verfassung," *DD*, pp. 213–257.

If the ultimate justification for the President to act alone in emergencies is his position as the true representative of the popular will, then, he can permanently suspend parliamentary controls by using the power of dissolution and referendum as an "appeal to the people" to legislate over the parliament. We do not think that Schmitt really intended to justify the emergence of a sovereign dictatorship entitled to abrogate the entire constitutional order on a permanent basis. But the idea that the President of the Reich could use his plebiscitary legitimacy to act as the *sole* defender of the constitution would not prevent it either.[131]

Second, the idea of presidential democracy is rather at odds with a radical, participatory model of self-government. Presidentialism can sometimes be a factor of political stability, but it hardly advances the practices and institutions of popular intervention. It drives the balance toward the pole of representation, the aristocratic pole of politics, rather than toward the one of identity, the democratic pole, leaving the popular will in a constant state of suspension. It evokes an elitist model of democracy with strong overtones of a populist and authoritarian view of politics. Although Schmitt's theory of representation is vital for rectifying some common distorted interpretations of his work, it cannot be adopted by a project of radical democracy. This aspect of his constitutionalism departs considerably from democratic theory, leaning dangerously toward a plebiscitarian version of the executive.[132]

   This brings me to the final point regarding the question of whether Schmitt sought to defend or to subvert constitutionalism. Along with the distinction between the substantive and the procedural part of the constitution and the central role of political representation, he introduced an additional argument. It is of a less institutional nature than the first two and of a more symbolic and pedagogic character. It points also, interestingly enough, to certain affinities between Schmitt and the Aristotelian or Hegelian republican tradition. For Schmitt, a democratic constitutional order cannot survive without having the active allegiance of its citizens, that is, without a corresponding

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[131] Gabriel L. Negretto and José Antonio Aguilar Rivera, "Liberalism and Emergency Powers in Latin American. Reflections on Carl Schmitt and the Theory of Constitutional Dictatorship," *Cardozo Law Review*, 21:5–6 (2000), p. 1821.

[132] At this point, Negri's critique is on the right mark but inconclusive. The concept of representation, Negri perceptively notes, is "one of the fundamental juridical-constitutional instruments for controlling and segmenting the constituent power.... From this perspective the crisis of the concept of the constituent power will not reside only in its relationship to constituted power, constitutionalism, or any juridical refinement of the notion of sovereignty. This crisis will also concern the concept of representation because, at least from the theoretical point of view, a primary and essential denaturalizing and disempowering of constituent power takes place on this theoretical-practical node." Negri, *Insurgencies*, p. 12.

"ethic of the Constitution." Once the various segments of the population stop viewing the constitution as a higher norm and degrade it to everyday politics, its affective and symbolic functions are considerably damaged. The constitution is not only a formal text. It keeps alive the founding moment and preserves the memory of the popular origins of a political regime. It incarnates the political unity of the people, the identity of the regime, and the sources of its legitimacy. For this reason, the citizens must be loyal to a set of higher, substantive, political forms and principles and should identify with their constitution rather than with some prepolitical, abstract moral values, or even with a purely organic ethnic mythical past. Schmitt argued, in a tone that anticipates today's discussions about constitutional patriotism,[133] that "unity rests, therefore, before anything first in the Constitution, recognized by all parties: in fact, the Constitution, which is the common foundation, demands an unconditional respect. The ethic of the state becomes the ethic of the constitution. The substantiality, the univocity, and the authority of the Constitution might create a very effective unity."[134]

I do not think that by the "ethic of the Constitution" he meant an attachment to any particular country, state, or *ethnos* in view of their historical and cultural attributes. What he meant by this formulation is that a constitution is stable and efficient when it depends on a population's conscious affection for a set of higher political values, when the citizens recognize the constitution as their constitution – that is, when through the constitution, as through a mirror, they see themselves as the constituent power. A democratic constitution, in order to cultivate this ethic of civic loyalty, must constantly remind its citizens that it is their creation, their product in their capacity as constituent sovereign subjects. Thus, not only did Schmitt not argue for the abolition of constitutionalism and the establishment of a permanent state of exception, but he also warned against the trivialization and instrumentalization of the fundamental laws. If the substantive core of the constitution is relativized and reduced to a sheer ensemble of formal regulations and abstract procedural rules, that is, to sheer legality, it would no longer be capable of generating and sustaining the ethos necessary for gaining the trust of the citizens. In a telling passage, he warned against the proliferation of "a pluralism of notions of legality, a pluralism that destroys the respect toward the Constitution and reduces the foundation of the Constitution to an uncertain terrain, surrendered to the attacks coming from everywhere."

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[133] Habermas, "Struggles for Recognition in the Democratic Constitutional State," in *The Inclusion of the Other*, pp. 224–225.
[134] Schmitt, "Staatsethik und pluralistischer Staat," p. 164.

Such attacks, launched from particular wills and interests, can only result in tearing the constitution "to pieces."[135] For Schmitt, constitutionalism is not a modus vivendi. As he strenuously put it, "it is also possible that the Constitution would dissolve itself by being reduced to the rule of the game and its ethic to a pure ethic of fair play; in the end . . . the unity is reduced to a set of fluctuating agreements among heterogeneous groups. In such a case, the ethic of the Constitution dissolves even more and it becomes the ethic that can be reduced to the slogan: *Pacta sunt servanda*."[136]

For similar reasons, Schmitt also claimed that democracy itself requires an "ethos of the democratic conviction."[137] To survive, a constitutional order cannot rely on pragmatic considerations, strategic balances of power, or trust in formal legality. It needs a profound attachment that will be strong enough to sustain allegiance, especially during moments of crisis. To generate that sort of commitment and symbolic identification, it is necessary for a constitution to visibly embody its democratic, popular origins and to codify the principle of popular sovereignty.

Taken together, these arguments challenge the conventional depiction of Schmitt as an intransigent opponent of constitutionalism and as a categorical proponent of dictatorship and a permanent exception. His warnings about the decomposition of the constitution into pieces, which amounts to a subversion of the popular foundations of democratic power and its perversion into a lifeless juridical machine, can now be better appreciated. Although aspects of his theory remain unattractive, especially those referring to a plebiscitarian executive, his professed concern before 1933 to "safeguard and assure the Constitution of the Reich in force" against the centrifugal political forces of the communist and Nazi parties should not be disregarded.[138]

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[135] Schmitt, "Die Wendung zum totalen Staat," p. 178.
[136] Schmitt, "Staatsethik und pluralistischer Staat," p. 164.
[137] Schmitt, "Der Begriff der modernen Demokratie in seinem Verhältnis zum Staatsbegriff," p. 28. Note here the interesting affinities between Schmitt and Hegel with regard to the ethical dimension of the constitution. For a penetrating and detailed comparative discussion of Hegel and Schmitt, see Jean-François Kervégan, *Hegel, Carl Schmitt. Le politique entre spéculation et positivité*, Paris: PUF, 1992, pp. 261–323.
[138] Schmitt, "Die Wendung zum totalen Staat," p. 178; Schmitt, "Strong State and Sound Economy. An Address to Business Leaders," pp. 231–232; Schmitt, *LL*, pp. 90–91.

6

The Extra-Institutional Sovereign

Taken together, Schmitt's first and second moment of democratic politics share some remarkable similarities with Bruce Ackerman's theory of "dualist democracy."[1] Before turning to Schmitt's third moment of democracy, it is worth comparing the two constitutional thinkers. Despite the fact that the first was a conservative with authoritarian preferences and the second is a contemporary liberal constitutional scholar, there are many significant affinities that transcend rigid ideological oppositions and prevailing political dichotomies. Indeed, such a comparative exercise sheds more light on Schmitt's constitutional theory by inserting it into a wider historical context. More importantly, it clarifies the enduring relevance of his theory of the extraordinary as a critical lens for examining and evaluating one of the most ambitious contemporary efforts to articulate a democratic theory of constitutional politics. This comparative reading is also a suitable point of entry into Schmitt's theory of the third moment of democracy and the deeper theoretical and political reasons that propelled him to supersede dualist politics.

From Schmitt to Ackerman and Back to Schmitt

Much like Schmitt, Ackerman divides modern politics into two distinct periods: normal and higher lawmaking. The first refers to ordinary politics conducted by pressure groups, political elites, interest aggregation, party officials, and public bureaucrats according to the rules and procedures of an existing legality and with a minimum of democratic participation. In

[1] Ackerman, *We the People: Foundations*, pp. 6–7.

contrast, the second moment describes those rare instances of popular mobilization, the formation of spontaneous mass-based movements, and the increase of politicization, all of which point at the prospective radical transformation of the constitutional system.

For Ackerman, as well as for Schmitt, normal lawmaking is understood in terms of privatization, depoliticization, and civic apathy.[2] In a tone strikingly similar to Schmitt's observation about the invisibility of the sovereign people in ordinary periods and the retreat of the masses from actual politics, Ackerman asserts that "during normal times, the People simply do not exist."[3] Along with this disappearance of the people, Ackerman recognizes that ordinary politics is also characterized by widespread pluralism and political fragmentation, devoid of any collective project that could unify the popular sovereign around some concrete fundamental issues. This fragmentation explains and justifies the predominance of relations of bargaining, negotiation, and compromise among organized interests, driven by their narrow, particular interests.[4]

Ackerman and Schmitt agree that in extraordinary times the sovereign people wake up to reaffirm their supreme power of self-determination and self-government. During these periods, there is an intensification of popular mobilization, an extensive consensus around some fundamental constitutional changes, and the formation of spontaneous, informal movements that directly challenge the established balance of forces and the prevailing constitutional status quo. All of these developments become crystallized in a new general will, which seeks to speak directly, against the ossification and inadequacies of the instituted political system. In these singular moments, the people decide to introduce radical constitutional changes. Rather than expressing private interests, they press for pivotal modifications in the name of the public good. As Ackerman forcefully asserts, during constitutional politics, "We the People can reclaim our power to rewrite the Constitution in ways that express our modern constitutional identities. We can become masters of our own house."[5] For Ackerman, therefore, constitutional politics means that "the People rule, and judges and other officials have an *obligation* to follow the People when, after appropriate public debate and decision, a mobilized majority hands down new principles to guide the polity."[6] In Schmitt's terms, Ackerman's notion of constitutional politics

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[2] Ackerman, *We the People: Foundations*, p. 271.
[3] Ackerman, *We the People: Foundations*, p. 263.
[4] Ackerman, *We the People: Foundations*, p. 271.
[5] Ackerman, *We the People: Transformations*, p. 414.
[6] Ackerman, *We the People: Transformations*, p. 92.

describes the extraordinary reactivation of the constituent power of the people and the self-assertion of the democratic sovereign who seeks to take a new fundamental political decision concerning the constitutional essentials.

Ackerman, of course, does not use Schmitt's terms. He seeks explicitly to distance himself from Schmitt's theory of the constituent power. He disclaims "the arbitrary character of acts of constituent power," because they imply that "where the law ends . . . pure politics (or war begins)."[7] But despite this categorical rejection, some very suggestive affinities between the two versions of radical constitutional change persist. They can be discerned on a very elementary level in Ackerman's focus on the power of "the constitutional will of the people," of "popular decisions," and of the "revolutionary redefinition of sovereignty."[8] As well as these terminological homologies, the reader can also find several other substantive similarities. One of the most fascinating is the central role both thinkers assign to constitutionalism. They understand extraordinary politics in terms of constitutional change. The constitution is at the center of their political theory and normative investigations. Extraordinary politics, for instance, is defined according to struggles that affect the fundamental, constitutional norms of a polity. For Schmitt and Ackerman, the constitution represents the highest and most important dimension of politics. A transformative strategy of power should, consequently, aim at the constitutional core. Here we find a common evaluation of constitutional politics and a similar appreciation of the central, architectonic importance of the juridical system. Their writings represent a unique case in which the constitution is understood in political terms and respectively democratic politics is analyzed in constitutional terms.

A second parallel between the two constitutional scholars is the attention they both devote to the relationship between this collective act of radical constitutional transformation and the rupture with preexisting legal structures. Both Schmitt and Ackerman focus on legal disruptions and juridical discontinuities. Despite his distinct phraseology, Ackerman acknowledges that genuine constitutional changes usually break with inherited forms of legality and disrupt the existing system of laws. He explains this rupture by noting that if the people were to act in more immediate ways in making the fundamental decision regarding the form of their political existence, they would necessarily operate outside the restraints of formal constitutional procedures.[9] This tension between popular power and the established legal order, legitimacy and legality, informs several of Ackerman's most

[7] Ackerman, *We the People: Transformations*, pp. 11, 425.
[8] Ackerman, *We the People: Foundations*, pp. 23, 27, 217.
[9] Ackerman, *We the People: Foundations*, p. 175.

provocative suggestions. During constitutional politics, "it is appropriate to look beyond the rules of the present case," such as extraconstitutional procedures of amendment, which dispense, in the case of the U.S. Constitution, with the limitations imposed by the formalism of Article 5. For Ackerman, extraordinary politics should "move beyond Article Five" to encompass more popular, participatory – thus democratic – forms of constitutional revision.[10] His approach approximates that of Schmitt in that it highlights the illegality of these processes and practices. Rather than confining these to formal procedures as those enumerated in and permitted by the constitution, Ackerman introduces a compelling theory of extraconstitutional forms of constitutional revision.[11]

Furthermore, the reason that propels Ackerman to circumvent formal amendment procedures brings him near to Schmitt's position. For Ackerman, important constitutional innovations, though they do not challenge the entire juridical order, cannot be carried out solely by procedural, legal mechanisms of formal alteration because they will lack the appropriate democratic legitimacy. From a normative perspective, crucial constitutional reforms require extensive popular support. Here, Ackerman approximates Schmitt, not only in his critique of monistic democracy, which in the forms of parliamentary sovereignty and majoritarianism have reduced democratic politics to the powers of elected representatives, but also in his recognition that constitutional changes demand broader popular participation. Ackerman, like Schmitt, links constitutional politics to the need of democratic legitimacy. He spells out a doctrine of legitimate democratic constitutional transformations by widening the realm of the political so as to permit vast popular participation in the extraordinary process of constitutional politics in order to counterbalance the "Founding deficits" of legal and formal procedural changes.[12] "During periods of constitutional politics," Ackerman argues, "the higher lawmaking system encourages the engaged citizenry to focus on the fundamental issues and determine whether any of the proposed solutions can gain the considered support, and therefore, the accompanying *political legitimacy*, of a mobilized majority."[13] If Ackerman's theory of constitutional politics suggests a break with the established legality, it is because it must be seen as part of "a more general theory of

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[10] Ackerman, *We the People: Transformations*, p. 415.
[11] Ackerman, *We the People: Foundations*, p. 24. This stress on revolutionary reforms marks a significant difference between Schmitt and Ackerman.
[12] Ackerman, *We the People: Transformations*, p. 88.
[13] Ackerman, "Higher Lawmaking," p. 66 (emphasis added).

revolutionary legitimacy."[14] Like Schmitt, Ackerman recognizes that the modern constitutional order can draw its legitimacy only from the democratic practice of self-determination, according to which citizens should always view themselves as authors of the fundamental laws to which they become subjects.

Finally, Ackerman, like Schmitt, understands the constitution to be a set of higher regulative principles that shape and determine political life. Any radical constitutional change, therefore, must be the result of a popular action. While the people cannot and should not, for both Ackerman and Schmitt, rule themselves directly in normal times, they should act as sovereign in those instances of sweeping constitutional alterations. Only in the historically rare and politically singular moments of constitutional transformation can the citizens affirm and express their sovereign power and determine the framework of subsequent normal lawmaking that they entrust to political elites, the state, and impersonal institutions. These moments are infrequent and out of the ordinary; but they lay the foundations for the ensuing quotidian politics, generating the necessary amount of democratic legitimacy that would sustain the regime during periods of everyday, institutionalized politics. The motivation behind Ackerman's relativization of the importance of legality during times of constitutional politics is similar to that which compelled Schmitt to argue that an activated constituent power goes beyond legal, positive norms. Both recognize that the production of democratic legitimacy takes place outside (or at least at some distance from) inherited juridical structures. And both agree that democratic legitimacy should come prior to liberal legality during periods of constitutional creation.

At this point, however, and in spite of these crucial similarities, Ackerman and Schmitt follow different paths, aiming at different and even opposite goals. While Schmitt's underlying objective, as I argued, was to expropriate constitutionalism from liberalism, Ackerman's goal is quite different. Ackerman's insightful explorations in the constitutional history of the United States are informed by the certainty that liberalism and democracy can and should be reconciled. His project is to reinvigorate liberalism by making it compatible with democracy. Dualist democracy is Ackerman's answer to this problem of synthesis because it "may reconcile competing aspects of the liberal democratic ideal."[15] As he discerningly puts it, "When the higher track is empty, the liberal obtains insurance; when it is crowded, the democrat has a means of amplifying the voice of the People in a way that will

[14] Ackerman, "Neo-Federalism?" p. 158.
[15] Ackerman, "Neo-Federalism?" p. 183.

attest attention for a long time to come."[16] Whereas the first moment refers to the democratic foundations of modern politics, the second illustrates the liberal elements of normal periods of stability. This temporal division, which locates democracy within the foundations of a constitutional and legal order and liberalism at the center of the subsequent everyday politics, permits Ackerman to elaborate a dualist model that mixes, in two distinct temporal instances, democracy and liberalism, the extraordinary and the ordinary.

The main merit of Ackerman's doctrine of a two-track lawmaking process is that it transverses the usual opposition between substance and form and challenges the rigid distinction of essence and procedure. In a similar vein, he remains attentive to the tensions between legitimacy and legality. Moreover, his effort to reconcile them amounts to an acknowledgment of an initial friction between popular power and individual rights. In addition, Ackerman is not reluctant to address problems of change and transformation. In contrast to the complacency of hegemonic liberalism, he seeks remedies in radical proposals that point beyond liberalism itself. Being more sensitive to the flaws of institutionalized liberalism, he succeeds in incorporating into contemporary liberal theory a radical drive, that of extraordinary democratic politics usually neglected by the apologetics of today's triumphalism and by the moralizing excesses of political philosophy.

In that sense, Ackerman represents today the most ambitious and provocative attempt to bring together popular sovereignty with individual rights.[17] His "logic of accommodation" directly challenges the self-absorption and deafness so characteristic of other liberalisms, which tend to repress and avoid this tension either by assuming a functional, abstract consubstantiality or co-originality between political and individual autonomy or by reducing the first to an instrumental and inferior attribute of the second.[18] By contract, dualist democracy, as Ackerman asserts, "is democratic first, rights-protecting second."[19] He maintains that the "judicial protection of rights depends on a prior democratic affirmation of the higher lawmaking

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[16] Ackerman, "Neo-Federalism?" p. 183.

[17] Ackerman, *We the People: Foundations*, p. 13.

[18] For the consubstantiality or co-originality thesis, see John Rawls, *A Theory of Justice*, Cambridge, Mass.: Belknap Press of Harvard University Press, 1971, pp. 221–222; John Rawls, "The Idea of Public Reason Revisited," in *Collected Papers*, ed. Samuel Freeman, Cambridge, Mass.: Harvard University Press, 1999; Jürgen Habermas, "On the Internal Relation between Law and Democracy," in *The Inclusion of the Other*, p. 259. For the instrumentality thesis, see Charles Larmore, *The Morals of Modernity*, Cambridge: Cambridge University Press, 1996, pp. 181–186.

[19] Ackerman, *We the People: Foundations*, pp. 13, 16.

track," because, "it is the People who are the source of rights," and not vice versa.[20]

Notwithstanding these significant contributions, one must ask if Ackerman's version of constitutional politics and his theory of dualist politics succeed in resolving the tension between liberalism and democracy. Is his model of dualist democracy a convincing answer to this problem? I see two main drawbacks that impair his project. First, Ackerman adopts a restrictive, narrow conception of democratic constitutional politics during extraordinary normal times, which ultimately mitigates the principle of democratic legitimacy and neutralizes popular power. Second, and perhaps more importantly, he dangerously bifurcates constitutionalism into two mutually exclusive moments by confining popular sovereignty to the first, founding moment. These shortcomings can be better illuminated when seen from the point of view of Schmitt's theory of the extraordinary.

To begin with, Ackerman deradicalizes the moment of constitutional politics. He makes important concessions when it comes to the first moment, which was supposed to be one of democratic legitimacy and popular participation. Interestingly, Ackerman describes the first moment of democratic constitutional politics in strong, vibrating sentences about the "mobilized masses of ordinary citizens," which "may finally organize their political will with sufficient clarity to lay down the law to those who speak in their name on a daily basis in Washington."[21] He suggests a participatory model of constitutional politics, in which the people, though in rare historical occasions, become the sole originators of constitutional transformations: "The heart of dualism is the belief that a mobilized citizenry may, on appropriate occasions, take the law into its own hands and give governors new marching orders. If established institutions successfully block the movement at the threshold, they betray the Constitution's foundational commitment to popular sovereignty."[22] These words convey the image of popular upheaval during periods of constitutional struggle, where the reflexive masses, "in an act of self-government," decide to alter the constitutional form of their political organization.[23] Ackerman's radical language is also reinforced by his critique of reformism and "narrow incrementalism."[24] Addressing Edmund Burke's conservative fears, he counterproposes a model of radical

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[20] Ackerman, *We the People: Foundations*, pp. 13, 15.
[21] Ackerman, *We the People: Foundations*, p. 20.
[22] Ackerman, *We the People: Foundations*, p. 280.
[23] Ackerman, *We the People: Foundations*, p. 294.
[24] Ackerman, *We the People: Foundations*, p. 24.

constitutional change, which, though it does not represent a total rupture, does involve illegal acts and broader civic participation. This emphasis on radical popular innovations permits Ackerman to speak about "new beginnings" and to describe constitutional politics as the reassertion of "the revolutionary promise" of American constitutionalism.[25]

Beyond rhetoric, however, another more complicated picture comes into the fore. Ackerman, in the second volume of his trilogy, appears more cautious. He underplays the dimension of illegality and direct participatory popular interventions as the main characteristics of constitutional politics in favor of a more mundane notion of "unconventional" initiatives and "legally anomalous" procedures, initiated by political elites.[26] This modification of his original thesis might well be the outcome of criticisms, like those raised by Arato.[27] In Ackerman's subsequent version, the model of dualist politics is itself reproduced in miniature within the first moment that was initially formulated as one of democratic legitimacy. It is more accurate to describe constitutional struggles as being dualistic themselves, combining radical changes with a respect for the established legality.[28] There is a shift in emphasis from the extraordinary dimension of constitutional changes to their normal aspects. Following Arato's recommendation that "the new system of politics must not only be dualistic in outcome, but must also be dualistic at its genesis," Ackerman now labels his model of constitutional politics as one of "closer continuity" characterized by the need of "legalistic support from preexisting institutions."[29] This restatement swings from rupture to continuity, from the extraordinary to the ordinary.[30]

The presence of legality and continuity even during higher lawmaking politics has an elitist taint. Ackerman endows the executive with considerable representational power during moments of higher lawmaking. Thus, he underplays his previous descriptions of constitutional politics as involving mass-based movements, democratic forums, and quasi-direct forms of popular participation that imply, in the final instance, that the people have spoken and have spoken through their own mouth. With regard to the details of

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[25] Ackerman, *We the People: Foundations*, pp. 302, 318.

[26] Ackerman, *We the People: Transformations*, pp. 385, 87.

[27] Arato has reiterated and further developed his critique of Ackerman. Arato, *Civil Society, Constitution, and Legitimacy*, pp. 131–133, 194–195, 243–247. Also, see Alessandro Ferrara, *Justice and Judgment*, London: Sage Publications, 1999, pp. 128–132, 223–225.

[28] Ackerman, *We the People: Transformations*, pp. 94, 384.

[29] Ackerman, *We the People: Transformations*, p. 94.

[30] Ackerman, *We the People: Transformations*, p. 387. This shift is also reflected in his abstract model of constitutional change, composed of five complicated and protracted steps that look more like a normal incremental, piecemeal reform rather than an extraordinary new beginning. Ackerman, *We the People: Transformations*, p. 67.

the argument, Ackerman draws a very different picture. It is the president who "speaks in the special accents of We the People of the United States."[31] The driving force behind constitutional movements comes from the top of the political pyramid, the executive, who initiates a process of extraconstitutional reform and organizes popular mobilization. The president directs constitutional politics, or at least its initial stages, through elections that are now considered "as a principal forum through which they [i.e., citizens] can engage in mobilized debate and decision on our future as a nation."[32] Instead of national conventions, which Schmitt considered as partial forums of democratic constitutional politics, Ackerman juxtaposes a "plebiscitarian use of the Presidency."[33] This version of constitutional politics is based on the strategic positioning of the executive office, "the higher lawmaking matrix." The people, by contrast, remain a conglomeration of voters, who by reelecting the 'constituent' president demonstrate their approval of his extraconstitutional amendments. With this version, which emphasizes "two basic innovations – Presidency and referendum," we come back to the point from which we were supposed to depart initially: periodical, institutionalized elections.[34]

Ackerman's theory of constitutional politics hosts elements of an incipient version of presidential plebiscitarianism. This solution does not only conflate the constituent power of the people with the president; it restricts and confines it within normal electoral politics consisting of two consecutive elections. It is a theory of presidentialism that essentially equates participation during constitutional politics to populist electoral practices. The result of this version of extraordinary politics is that, for Ackerman, the citizens cannot act outside institutionalized spaces, procedural rules, and executive powers. They are either led by a plebiscitarian president (during higher lawmaking) or regulated by formal procedures (during normal lawmaking). Ironically enough, while Schmitt and Ackerman may disagree on their understanding of the relationship between liberalism and democracy, or on the notion of extraordinary constitutional breaks, they converge on issues bearing on presidentialism and plebiscitarianism.

Nonetheless, Ackerman is much more sensitive and attentive to the multiple dangers relating to this model of plebiscitarianism than Schmitt ever was. He is aware of the risks of arbitrariness and authoritarianism involved in

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[31] Ackerman, *We the People: Foundations*, p. 294.
[32] Ackerman, *We the People: Transformations*, p. 389.
[33] Ackerman, *We the People: Transformations*, p. 388; Ackerman, "Higher Lawmaking," pp. 86–87.
[34] Ackerman, *We the People: Transformations*, p. 410.

this particularly elitist version of presidentially led constitutional politics.[35] As a remedy, he proposes some abstract, mostly indeterminate reflections about ways of "deepening institutional dialogue between political elites and ordinary citizens" during extraordinary politics.[36] Duality seems to have infiltrated higher lawmaking. The people are made into a rhetorical referent to justify the plebiscitarian authority of the president or are sublimated to the eternally 'absent other' of liberal constitutional theory, constantly evoked but never found. Because of these concessions to liberalism and institutionalized politics, Ackerman's first, founding moment does not substantially differ from normal politics and ordinary lawmaking.

Second, the theory of dualist democracy, though introduced by Ackerman in order to reconcile substance and form and to overcome the defects associated with monistic democracy, itself is confronted with a critical obstacle: the dichotomization and compartmentalization of politics into two distinct, unrelated temporal moments. This is a treacherous terrain. Ackerman is aware of the difficulty and confronts it. He acknowledges that "the line between normal and higher lawmaking must be drawn in a subtler way."[37] A failure to argue for particular mediations between the liberal and the democratic aspects of modern politics questions his claim of a two-track constitution as a viable, superior alternative to monistic democracy.[38]

The relationship between extraordinary and normal politics raises the question of whether some participatory forms of democracy can persist within the constraints of regular, formalized, and professionalized politics. One of the most serious problems this dualistic model of democracy faces, therefore, is the lack of continuity and communication between the two moments: founding and normalcy, freedom and order.[39] The people assume two different, even opposing roles. They are divided between a sterile depoliticization and juridification and a precarious overpoliticization, or, as Jean Cohen and Andrew Arato describe, between "'soulless reformism' and 'revolutionary fundamentalism,' between civil privatism and the total politicization of society."[40]

Ackerman seems trapped in this binary tension. His depiction of constitutional politics as a large popular movement, however, has a clear democratic

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[35] Ackerman, *We the People: Transformations*, pp. 411–412.
[36] Ackerman, *We the People: Transformations*, p. 85.
[37] Ackerman, *We the People: Foundations*, p. 270.
[38] Ackerman, *We the People: Foundations*, p. 7.
[39] For sharp but sympathetic and reconstructive critique of dualistic democracy, see Arato, "Forms of Constitution Making and Theories of Democracy," pp. 210–219.
[40] Cohen and Arato, *Civil Society and Political Theory*, p. 565.

orientation, notwithstanding his emphasis on presidentialism and referenda. But how can the problem of mediating between the two moments of modern politics be addressed through a careful examination of Ackerman's allusions to popular movements? Against the limitations imposed by the hierarchical structures of party politics, he suggests that his model of constitutional politics consists of "popular" and "unconventional" movements oriented toward revolutionary reforms, operating outside institutionalized politics, within irregular and informal public spaces that are neither juridified nor colonized by procedural formal rules and organized interests.[41] These movements compose the popular basis of executive initiatives. Although the relationship between these spontaneous movements and the president is not clear, Ackerman definitely endows them with an important role – mainly, the generation of democratic legitimacy for the proposed constitutional transformations. Most crucially, he introduces movements in an effort to find an alternative form of collective action that would be more immediate and concrete than institutionalized politics and relatively free from the restraints of established political interests, entrenched majorities, and impersonal legality.

However suggestive these allusions to the critical role of spontaneous, extraparliamentary movements in the process of constitutional politics may be, Ackerman abstains from developing a systematic theory. Thus, his references to irregular, informal popular activities remain partial and underdeveloped. One does not know exactly how he envisions a theory of movements to be related to his two-track lawmaking model. For instance, he does not clarify the place of these movements within constituted powers and the role they should play in normal politics. One does not know if he expects them to disappear completely or to remain in a latent and dormant form, waiting to emerge in periods of constitutional crisis and political innovation. Similarly, their role during extraordinary moments remains unclear. For instance, does Ackerman have in mind the rich literature on new social movements or more populist forms of mass mobilization? Finally, their relationship with the broader constitutional framework is uncertain. Are they totally illegal and unregulated or do they remain bound by some higher norms? Are they merely defensive or offensive movements? Do they exercise power or are they limited in generating legitimacy only through consent? Do the proposals for constitutional changes emerge from these movements or from charismatic presidents who afterward mobilize some sectors of the population to support and disseminate them?

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[41] Ackerman, *We the People: Foundations*, pp. 281–282, 305, 310, 274, 280, 290; Ackerman, *We the People: Transformations*, p. 385.

Ackerman implies in a suggestive paragraph that they might have come from the "public interest groups" that operate during normal politics and which are the only collective agents able to articulate political demands based on normative issues and general concerns, appealing to a common constitutional identity, transcending the narrow politics of pressure groups and administrative power.[42] But he remains reluctant to develop this line of argumentation, giving the impression that popular movements engaged in constitutional politics sometimes are created and manipulated from visionary, charismatic plebiscitarian presidents or that they emerge out of nothingness in the form of an unpredictable and spontaneous popular eruption to suddenly disappear once the constitutional changes have been brought into completion.

This failure cuts off the possible links between normal and extraordinary politics. Ackerman's approach occludes the various forms in which the sovereign constituent power can survive within constituted politics.[43] He keeps the two moments – democratic and liberal – temporally distant from one another. But this version is not a convincing reconciliation or even a synthesis; it is an unstable mechanical articulation, based on a narrowly defined principle of democratic legitimacy.

Popular Assemblies and the Extra-Institutional Sovereign

Like Ackerman, Schmitt too was aware of the limitations and difficulties associated with this dual approach. Unlike Ackerman, however, he understood that dualist democracy might ultimately be unsuited for solving the tension between the people outside and before the constitution, in a constant flux, or inside it, but in a semidormant form, subordinated to representation, legality, and procedural norms, that is, to state power. Although he thoroughly investigated the possibility of striking a balance between the *constituent* and the *constituted* people by developing a model of dualist politics, Schmitt criticized both the reduction of democratic constitutional politics to formal mechanisms of amendment processes and the imprisonment of sovereignty to national elections. Thus, he warned against the tendency during institutionalized politics of "the people [to] sink from the

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[42] Ackerman, *We the People: Foundations*, pp. 247–249.
[43] Here, Ackerman becomes vulnerable to Negri's objection that "What is lost here is the essence itself of constituent power. . . . Only a pale liberal image of it is left, whereas instead the strength of constituent power is always and only democratic." Negri, *Insurgencies*, p. 311.

political condition back into the unpolitical, [to] lead a merely cultural or merely economic or merely vegetative life, and serve another politically active people."[44]

This preoccupation represents one of the most engaging topics in modern democratic theory. The fundamental problem is not only how to differentiate clearly between the *constituting* power and the *constituted* powers but also how to preserve both terms of the equation without sacrificing one to the other. Once more, the problem of democratic sovereignty reemerges at the center of Schmitt's political thought as an anxiety concerning the subterranean survival of the constituent sovereign during ordinary politics, which is also an anxiety about the possibility of retaining some forms and practices of sovereign popular self-rule. And although he acknowledged the normative, superior value of the constitution, as the juridical incarnation of the fundamental constituent decisions, he did not reduce democratic politics to constitutional politics to the degree Ackerman does. He recognized that there must be a third possibility cutting across overpoliticization and depoliticization, the extraordinary and the normal – a possibility that lies between constitutional ruptures and constitutional veneration.

Schmitt, contrary to Ackerman, directly confronted the disappearance of the extraordinary, quite familiar in current liberal theories, by asserting that the constituent power of the people "cannot be transmitted, alienated, absorbed, or consumed. It always continues to virtually exist, *to co-exist*, and to remain superior to any constitution that proceeds from it."[45] He supplied this aphoristic declaration with an underdeveloped but highly suggestive theory of the third moment of democracy. It is here that he located the people *next* to the constitution. He thought that adding this third instance would allow him to avoid the aforementioned dilemmas by safeguarding some aspects of the concrete and physical presence of popular sovereignty. This addition was consistent with his idea of democracy and in accord with the "democratic principle" that consists "in assuring the greatest possible participation of the citizens" in public life.[46]

In the first moment, we witnessed the sovereign in its full but evanescent manifestation; in the second, we watched its gradual repose and quasi-permanent fading; in the third and final moment, we attest to its partial reawakening. Hence, Schmitt's investigations into this third and last face of democracy can be a starting point for rethinking problems bearing on

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[44] Schmitt, *V*, p. 215.
[45] Schmitt, *V*, p. 91 (emphasis added).
[46] Schmitt, *V*, p. 223.

the survival of extraordinary politics and, with it, of popular participation within constituted politics.

Schmitt addressed this problem in two ways. First, he approached it indirectly by introducing the enigmatic term of the "apocryphal" acts of sovereignty.[47] Because the sovereign cannot be extinguished or abolished once the founding decision about the form and content of the constitution is taken, it has to find other channels of expression. That is, even under conditions of normal politics the people need, for reasons of democratic legitimacy, to periodically arise from within the constituted powers. They do so through "inauthentic" political forms and institutional channels, such as referenda and periodic plebiscites.[48]

Schmitt described these "inauthentic" acts of sovereignty as "apocryphal." They are apocryphal because, although they do not signify a conscious, explicit manifestation of the self-constitution of society, they regain something of their extraordinary character as they occasionally emit constituent decisions, while still mediated and affected by a generalized passivity and depoliticization.[49] These apocryphal acts indicate, according to Schmitt, that extraordinary politics can never be fully abolished, even when it is assimilated to the normal structures of proceduralism and legality. It inevitably reappears during everyday politics as it strives to survive within an institutionalized political system, even through intermediary and diverted ways. This persistence testifies to the fact that the extraordinary can never be absorbed by normal politics.[50] The instituted society is always subject to the subterranean pressure of the democratic, instituting society. Such a pressure posits limits to the tendency toward the political dispossession of the people from its political powers.[51]

Schmitt was captivated by these apocryphal acts of sovereignty. He probably understood them as minor but telling indications of the sovereign's resoluteness to struggle for its survival against its eventual fossilization. He thought of these acts as tiny but important manifestations of democratic

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[47] Schmitt, *V*, p. xii.

[48] Schmitt, *V*, pp. 238, 242–246, 251.

[49] Schmitt, *V*, p. xiv.

[50] As the creator cannot be consumed by its creations, so the constituted object – the constitution – cannot assimilate the constituent subject – the people. In Schmitt's political theology, "constituent power is the secularized version of the divine power"; as Preuss has pointed out, the *demos* can "create an order without being subject to it." Ulrich Preuss, "Constitutional Powermaking for the New Polity: Some Deliberations on the Relations between Constituent Power and the Constitution," *Cardozo Law Review*, 14:3–4 (1993), p. 14.

[51] For a discussion of political dispossession, see Pierre Bourdieu, "Delegation and Political Fetishism," in *Language and Symbolic Power*, pp. 203–219.

resistance to and within proceduralism. If, however, he accepted the posi-
tive dimension of these apocryphal acts, he also recognized their limitations:
they are not sufficient to overcome the binary division between the first
and second moments of democracy. Schmitt, it appears, appealed to these
acts of sovereignty mainly to substantiate his critique of the formalism of
liberal constitutionalism, which, while aspiring to eliminate the sovereignty
of the people, nonetheless acknowledges it in a reluctant, indirect manner.
Although liberal constitutionalism struggles to subdue extraordinary acts
within a closed and self-referential system of abstract legal norms in order
to stifle the originating power of the people and to tame democracy, it can-
not entirely evade the underground presence of popular sovereignty.[52] It
can appropriate only some of its functions and relegate them to some state
organs and procedural mechanisms so as to make them less radical and
better controlled by the political system.[53] For Schmitt, the dilemmas of the
juridical excesses of liberalism are best manifested in these apocryphal acts
of sovereignty, which can be seen as expressions of an "instituted constituent
power."[54] They reveal, on the one hand, the unavoidable presence of the
extraordinary and, on the other, the attempts to neutralize and inactivate it.

Schmitt did not, therefore, regard these acts as the definitive solution to
the bifurcation of dual democracy. Quite surprisingly, given his conservative
loyalties and his preference for state authority, Schmitt opted for a more rad-
ical solution. Next to institutionalized, formal politics, he pointed at various
informal and spontaneous public spheres where the people could voice their
sovereign will and recover parts of their constituent power. Extraordinary
politics reappear not within the constitutional order, but at its edges, next
to it, in extra-institutional and self-organized political spaces. For Schmitt,
these public spaces constitute the third moment of democracy. He now
located the people neither *outside* nor *inside* the constitution but rather *next*
to it, in the fringes and in close proximity to formal structures of power
and abstract legality but at the same time in a relative distance from the
established order.

These noninstitutionalized public realms could provide, according to
Schmitt, a space for the constituent power to partially reaffirm itself outside
the official channels of decision making. This act of reaffirmation, however,
should be achieved without undermining the stability of the democratic
order. In this manner, the constituent power of the people "alongside the

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[52] Schmitt, *V*, p. 288.
[53] Schmitt, *V*, pp. 107–108.
[54] Koubi and Romi, *État, constitution, loi*, pp. 79–81.

juridical system," he claimed, in a tone comparable to that of a radical demo-
crat, "continues to exist as an effective power, immediately present – and
not thanks to the mediation of norms, of validities, or of fictions prescribed
in advance."[55] This claim suggests that the constituent sovereignty of the
people remains somehow concretely and physically visible even after it has
created a stable institutional structure.[56] Extraordinary politics cannot be
consumed by the institutions that were designed to represent and visualize
sovereignty symbolically. The popular sovereign may be invisible but not
deceased. For Schmitt, these "popular assemblies" (*Volksversammlungen*)
allow citizens to remain active, without, however, regaining their total con-
stituent powers.[57] The sovereign wakes up but does not stand up to replace
the existing constitutional order with a new one. The main function of these
assemblies is not to initiate a new radical constitutional change; they do not
signify a new founding or a new beginning. Their aim is more mundane,
although not completely ordinary. That is, they guarantee that extraordi-
nary politics will not disappear in a constitutional democracy, even though it
has retreated from the official political realm after affecting the fundamental
constitutional decisions.[58]

In this third moment of democratic politics, the people recover some-
thing of their original, concrete physical visibility by circumventing political
representation. They acquire again an effectual, tangible political presence
that the institutionalized political system should reckon with as a necessary
resource for the ongoing generation of democratic legitimacy during normal
times. This struggle to save the constituent power and to avoid the reduction
of the ordinary to liberal politics explains why Schmitt did not abandon the
principle of identity and points to his attempt to articulate a democratic
theory of the everyday. Although he conceded that in a stable constitutional
democracy identity is subordinated to representation (whereas in the first
moment identity prevails over representation), he realized that the complete
disappearance of the democratic principle of identity would amount to the
renunciation of democracy as such: "The principle of the form of represen-
tation can never be absolute and pure, that means, to be realized by ignoring
the always somehow existent and present people. It is impossible, for the
reason that there is no representation without a public life, and there is no

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[55] Schmitt, *V*, p. 242.
[56] Schmitt, *V*, pp. 242–243.
[57] Schmitt, *V*, p. 244.
[58] Schmitt, *V*, p. 242.

public life without a people."[59] Thus, he sought to outline an alternative three-dimensional model of democracy. In this third moment, he placed the people in these spontaneous, extra-institutional popular assemblies, next to the constitutional order and in synchronicity to normal politics.

By keeping open several venues for more direct expressions of popular power against the imperialistic tendencies of state bureaucracy, organized interests, political elites, and impersonal procedures that colonize the field of the political in normal times, the self-organized popular assemblies could become the repository of democratic vitality and legitimacy. It is in these informal publics that the citizens can exercise, though in a mitigated way, some of their extraordinary powers outside the mediating mechanisms of representation and regular elections. As Schmitt claimed, "the people do not lose anything of their importance for the public life" after establishing a new constitutional order:

The people is a notion that becomes existent only in the domain of the public life [*Offentlichkeit*]. It appears only in the public life: the public life is the very first of its creations. People and public life exist together; no people without a public life and no public life without a people. And it is the *presence* of the people that creates the public life. Only the present people, which is physically assembled, is a people constituting the public life. It is on this truth that rests the just idea that informs Rousseau's famous thesis: The people cannot be represented. It cannot be represented because it must be *present*; only an absent people can be represented, and not a present people.[60]

Of course, as I have already discussed, Schmitt rejected the idea of a pure, absolute democracy. He did not dismiss, however, the view that some minimal physical presence of an effective people is necessary, and even inescapable, as an external check, if the established constitutional order wants to remain democratic. For this reason, he elaborated the notion of popular assemblies surrounding and enveloping the constitutional order where the people could appear and act physically, outside statist forms of representation and at a distance from inherited legal norms. Contrary to liberalism that ignores the assembled people as such because the specificity of liberal constitutionalism is to ignore the extraordinary, Schmitt investigated forms of spontaneous, unregulated popular presence in normal politics in order to indicate ways of preserving extraordinary politics in normal times.

[59] Schmitt, *V*, p. 208.
[60] Schmitt, *V*, p. 243.

These assemblies, however, should neither be confused with elections nor be organized by political parties.[61] In this case, the sovereign people would not be seen as being next to the constitution but rather absorbed by it. For this reason, the citizens should form an autonomous, extra-institutional space to act in informal, irregular, and spontaneous forms. Although their aim is not a new refoundation of the constitutional order, they nonetheless challenge the reduction of democratic politics to mere procedures, formal rules, and professional elites. Schmitt suggested that the continuing generation of democratic legitimacy depends on supplies coming not only from an elected president but also from these informal sites of political mobilization and agitation.

By locating parts of the constituent power of the people next to the constitution, Schmitt's approach opens up the possibility for rethinking the survival of democratic participation within a lasting constitutional state. More importantly however, he sought to illuminate the civic arenas that could counterbalance the hegemony of organized pressure groups, the infiltration of state-bureaucratic control, and the reduction of institutionalized politics to particular wills. At this point, he was simply responding to Sieyès's warning that "a nation should not place itself under the fetters of a positive form. It would be to irrevocably lose its freedom, because it would take only a moment for tyranny to succeed and to tie the people, with the pretext of constitutionalism, to a form, in such a way that they will not be able to express freely their will."[62]

Although Schmitt did not offer more than a few pages to analyze the role of these popular assemblies, he was quite clear on their singular task – namely, to salvage, even in a weak form, extraordinary politics and to keep alive the ideal of active citizenship. He suggested that when citizens act within the circumscribed limits of constitutionalism, they are transformed into a private entity, expressing fragmented particular interests through mediating mechanisms and in hierarchically organized groups rather than speaking in the name of "We the People." This claim relied heavily on Rousseau's conceptual distinctions.[63] Hence, although Schmitt, wrongly I think, considered presidential representation as a necessary institutional bulwark against the colonization of the bourgeois parliament by private organized interests and its failure to represent the unity of the people, he also acknowledged the insufficiency of his own model of presidential

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[61] Schmitt, *V*, pp. 244–245.
[62] Sieyès, *Qu'est-ce-que le Tiers état?* p. 183.
[63] Schmitt, *V*, pp. 244–245.

representation and, thus, the need to be combined with the principle of identity. Normal politics should not renounce all forms of democratic identity nor can it be offered unconditionally to liberalism.

This third moment of democracy also links Schmitt's political theory with various models of radical democracy. The similarities between this argument and the tradition of the extraparliamentary left, for example, are striking and intriguing.[64] Although this historical comparison falls outside of the bounds of the discussion here, suffice it to say that he was able to avoid the excesses of an absolute model of direct democracy because he integrated it within a broader constitutional framework. The third moment cannot be independent from the second one. Thus, he escaped the limitless inflation of political activities that would have overburdened his theory of the public forums with the virtually unfeasible requirements of constant political mobilization, unlimited time, and perfect knowledge. On the other hand, however, he understood that the limits of the dualistic model could be transcended only with what today one may find in theories of noninstitutionalized popular sovereignty, which focus on the need for more direct, concrete forms of popular participation and political agitation that generate democratic legitimacy and resist the closure of politics within sterile and normalizing juridical and bureaucratic structures of the centralized state.

Disappointingly, despite his preoccupation with salvaging popular sovereignty during normal politics, Schmitt spent considerably little time and space to explicate his idea of spontaneous and autonomous popular assemblies. He did not develop this part of his theory and never confronted vexing questions, such as defining the relationship between institutionalized and noninstitutionalized sovereignty. Do not these assemblies entail a form of divided and thus weak sovereignty? How should one resolve cases of conflict between the second and third moment? Who, in other words, is the final and higher authority? Nor did he go into great detail about the links, if any, among institutionalized public spheres, such as the parliament and the parties, and noninstitutionalized forums. Additionally, he did not clarify

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[64] For example, according to Mario Tronti, the importance of extraparliamentary forms of popular mobilization and particularly of their "aggressive energies" is crucial for solving problems in democratic politics. In a similar vein, Herbert Marcuse had argued that in those cases "in which bourgeois democracy (on the basis of its immanent antinomies) seals itself off from qualitative change – through the parliamentary democratic process itself – extra-parliamentary opposition becomes the only form of 'contestation,' 'civil disobedience,' direct action." See Mario Tronti, *Il Politico. Da Machiavelli a Cromwell*, Vol. I, Milan: Fetrinelli, 1979, p. 3; Herbert Marcuse and Theodor Adorno, "Correspondence on the Student Revolutionaries," *New Left Review*, 233 (1999), p. 130.

what might be the effective political influence of these popular assemblies. Although he suggested that they should make decisions, he never specified in what forms, with what content, and to what effect. Therefore, despite his provocative insights into the popular assemblies and their proximity to the constitution, Schmitt never developed this idea more extensively. The relationship between a legally institutionalized and symbolically represented and a noninstitutionalized physically assembled popular sovereign remains vague. This omission is significant in that it does not clarify the relationship between legally codified basic rights and noninstitutionalized extraordinary acts of political mobilization that might become illegal in some cases.

Independently of these obvious gaps in his theory of popular assemblies, Schmitt's understanding of a third moment might be proved very prescient for today's investigations in democratic theory. His search for a third moment that rescues traces of direct popular participation is extremely telling. His theoretical approach transcends the limitations of Ackerman's notion of dualist politics and points to Arendt's theory of civil disobedience to be discussed in Chapter 9. It also questions the vision of a permanent revolution as the only remedy to the bureaucratization and proceduralization of institutionalized democracy, as the extreme left at times has endorsed. This, Schmitt implied, would have amounted to a perpetual state of nature, that is, to a permanent lawlessness. He proposed a different solution, attempting to avoid the poles of "political elitism" and "democratic fundamentalism."[65] He confronted this problem by investigating the possibility of public counterpowers to redeem the collective democratic consciousness of a constitutional order. The basic intuition informing the logic of these popular assemblies is, as Cohen and Arato have remarked, that they break with the idea that "democracy is the sum total of procedures and institutions articulated in a constitution and that these can be theoretically grasped by a utilitarian model of politics."[66] Indeed, normal democratic politics consists of something more: the occasional, mitigated, concrete, and physical appearance of the extraordinary.

Schmitt's third moment, besides its meager formulation, faces certain problems. The first has to do with his insistence of reducing the expression of the sovereign popular will to mere acclamation. This objection is similar to the problems identified in the discussion of his theory of the first extraordinary moment. For Schmitt, the sovereign people cannot speak or deliberate; they can only shout and acclaim. This formulation obviously threatens the

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[65] Cohen and Arato, *Civil Society and Political Theory*, pp. 561, 563.
[66] Cohen and Arato, *Civil Society and Political Theory*, p. 588.

entire edifice constructed precisely to permit effective popular rule. This lack of public deliberation and dialogue among citizens instantly cancels the reflexive capacity of the *demos* to lucidly debate and critically consider public issues. It also undermines its ability for thoughtful and responsible action inspired by political principles and shaped by normative considerations. His speechless 'politics of the will' is not enough for a radical democratic project with a normative content.

This lack of deliberation and speech affects the internal coherence of Schmitt's argumentation (leading to some blatant contradictions) as well as the normative intent of his constitutional theory. For brevity's sake, I comment on only one such contradiction. On the one hand, Schmitt correctly criticized plebiscites and referenda as being too restricted to be of any use in the third moment. He based his criticism on the fact that they reproduce the image of the people as a passive political actor, confined to respond to the initiatives of the political system. In cases of plebiscites and referenda, Schmitt explained, "the majority of the citizens tend in general to leave the political decision to others and to answer the questions asked with replies that involve a minimum of decision. Thus it easily approves an accomplished fact. During the Napoleonic plebiscites, a 'no' signified insecurity and disorder, while a 'yes' was nothing else than an approbation after facts of an accomplished event, thus a minimum of decision."[67] In addition, he also treated plebiscites as institutionalized forms of democratic intervention, regulated by procedural rules that threaten the spontaneous character of the extraordinary – hence, as "apocryphal." On the other hand, however, he contended that the people next to the constitution, in the popular assemblies, could express their will only by acclamation, that is, only by a yes or a no to the leader's propositions. This is how Schmitt understood the public assemblies: "only the people physically assembled can do what is at the very center of its activity as a people: it can acclaim, that is, to express its agreement or disagreement with a simple exclamation, to shout 'yes' or 'no,' to applaud a leader or a proposition, to wish long life to a king or to any other person, or to refuse to acclaim by falling silent or by murmuring instead."[68] This idea of acclamation as a type of direct rule is unsustainable, even laughable. Not only does it not differ much from a plebiscite or a referendum, but it also represents a form of institutionalized, vertically orientated politics, which he had already rejected as unsuited for the third moment.[69]

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[67] Schmitt, *V*, pp. 86–87.
[68] Schmitt, *V*, pp. 243–244.
[69] Schmitt, *V*, p. 243.

Sadly, there is an additional serious limitation to Schmitt's theory of democratic constitutionalism. He reduced democracy to the principle of equality, divesting it of the values of collective freedom. He claimed that, while liberty is an inherent attribute of liberalism, substantive equality, by contrast, is the defining mark of democracy.[70] This was a serious historical and conceptual blunder that caused him many theoretical problems and political puzzles and made him unable to see the emancipatory dimension of democratic politics. For instance, his argument regarding the constitutional position and legal status of political rights in his model of constitutionalism is confusing. Schmitt vacillated between placing them in the lower liberal-procedural part, because they are formal rights or to the higher political-democratic part because they are constitutive of democratic citizenship and political equality.[71] He was, therefore, quite indecisive concerning political rights. Partly because of his 'Marxist' understanding of rights as exclusively defensive and bourgeois in character and partly because of his pejorative understanding of liberty as a central attribute of the liberal legacy rather than of the democratic tradition, he neglected the emancipatory impulses of democratic politics and divested the regime of popular rule from one of its deepest and strongest normative values. This depreciation of the ideal of political freedom coupled with his strong separation between the political and the social led him to banish the value of collective autonomy from his conceptualization of democracy.[72]

Finally, Schmitt's analysis of popular assemblies in terms of the constituent power raises another problem. By limiting the scope of the sovereign power strictly to constitutional making, he faced the following paradox: once it has established a new constitutional and legal order, it is predestined to withdraw. Its success signals its retreat. Apart from the creation of fundamental legal norms, the sovereign people have nothing else to do. They have to either exercise their constituent power by creating a new constitution or remain inactive, waiting for the next historical constituent opportunity. This identification of the extraordinary as constituent power signifies that the sole attribute of sovereignty is the founding of new constitutions. Having adopted this juridical version of extraordinary politics, he could not free himself from the consequences following the identification of the sovereign

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[70] Schmitt, *V*, pp. 224–225.
[71] Schmitt, *V*, pp. 168–170.
[72] For a similar point, see Carlo Galli's brilliant essay, "Carl Schmitt's Antiliberalism: Its Theoretical and Historical Sources and Its Philosophical and Political Meaning," *Cardozo Law Review*, 21:5–6 (2000), pp. 1597–1619.

with the constituent subject. He was trapped in a very rigid legalistic conceptual framework, reducing the extraordinary to the juridical category of the constituent power. He failed to see that the people could express their instituting will in many different ways, equally extraordinary, transgressive, and productive, apart from creating a new constitution.

Ultimately, Schmitt was unable to perceive the people outside legal categories. What he did not seriously consider is that, though the founding of new constitutions is a necessary attribute of democratic extraordinary politics, it is not sufficient. This juridical definition of popular sovereignty reverberates, as might be expected, in his theory of popular assemblies. If these were introduced to provide a space for the survival of the extraordinary, it becomes rather difficult to see how this proposal could be materialized. The problem lies in the inability of the constituent power to act otherwise than by producing new constitutional norms and by emitting fundamental laws. Many other important aspects of politics, related to the social-economic structure, the symbolic field, and struggles for recognition, are still left out. Schmitt ignored multiple forms of radical contestation that do not target the constitution directly but rather endeavor to challenge peripheral constellations of everyday power relations, local forms of domination, and more hidden practices of subordination that escape from the pincers of the legal system and thus from the constituent power.

Despite these problems haunting Schmitt's political and constitutional theory, his depiction of the popular assembly in terms of the category of the extraordinary sovereign remains prescient. By claiming that a democratic constitutional state cannot be reduced to some formal rules and procedural mechanisms, his writings could make an important contribution to current debates in democratic theory. For instance, his argument that the nearly awake sovereign acts outside the established political system and circumscribes the existing procedural mechanisms and legal limitations points to the need to supplement formal, instituted democracy with peripheral, participatory, and quasi-direct practices of popular intervention and collective power. The proliferation of autonomous public spheres, which might be interpreted, in Cohen's and Arato's terms, as a "normal, albeit extrainstitutional, dimension of political action," counteracts the colonizing tendency of the juridical system to reduce political freedom to the ritual of periodical elections.[73] By encircling the constitution with multiple, active public assemblies, Schmitt advanced an extremely original and pertinent argument

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[73] Cohen and Arato, *Civil Society and Political Theory*, p. 566.

concerning the survival of extraordinary politics during normal times and the broadening of the political. This form of collective and popular mobilization points to the possibility of preserving what has been described as the "utopian horizon of a democratic and just civil society." That is, while presupposing and acknowledging the existing constitutional framework of an institutionalized democracy, it "extend[s] the range of legitimate, even if initially extralegal, citizen activity."[74]

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[74] Cohen and Arato, *Civil Society and Political Theory*, p. 567.

TAMING THE EXTRAORDINARY

Hannah Arendt

Freedom [is present here], inasmuch as a new beginning has to be made.

Johann Gottlieb Fichte[1]

Ce qui est légal, c'est ce qui est la Révolution, en sorte que, traitant de la Révolution, je m' assois sur la base, sur la pierre fondamentale des lois. Il ne faut pas dire: la Révolution, mais la fondation.

Jules Michelet[2]

Hannah Arendt is one of the most studied and cited authors today. Her major writings are virtual classics. Her theory of totalitarianism, her agonistic reconceptualization of action, her late preoccupation with reflective judgment, and her understanding of the crucial role of narratives and storytelling have increasingly dominated our understanding of her work. Likewise, themes related to her intellectual relationship to Martin Heidegger, her alleged proximity to deconstructionism and postmodernism, and her communicative theory of politics have provided new interpretative prisms, substantially contributing to a renewal and reconfiguration of Arendt studies. This revival, however, has neglected her writings on revolution and new political beginnings. As a consequence, her rich reflections on the politics of the extraordinary remain, with a few scattered exceptions, relatively marginal and overlooked.[3] This neglect has been explained by Dana Villa's

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[1] Johann Gottlieb Fichte, *Foundations of Transcendental Philosophy* [1796–1799], Ithaca: Cornell University Press, 1992, p. 292.

[2] Jules Michelet, *Cours au collège de la France: 1838–1851*, Vol. I, Paris: Gallimard, 1995, p. 19.

[3] For instance, see Bonnie Honig, *Political Theory and the Displacement of Politics*, Ithaca: Cornell University Press, 1993; Arato, *Civil Society, Constitution, and Legitimacy*, pp. 240–245; Jeremy Waldron, "Arendt's Constitutional Politics," in *The Cambridge*

claim that a focus on founding acts "hypostatizes the moment of foundation as *the* paradigm of initiatory action. To some extent, Arendt shares the blame: her analysis in *On Revolution* tends to focus on founding as the political practice par excellence."[4] This dismissal reflects a broader trend in Arendt scholarship that is gradually moving away from the political qualities of her writings. Today she is read more as a philosopher and a moral thinker rather than as a political theorist concerned predominantly with the secular realm of appearances.[5] Not surprisingly, *On Revolution* has been examined and commented upon less than her other classics, such as *The Origins of Totalitarianism* and *The Human Condition*, and even her originally unpublished manuscript on judgment that appeared posthumously as *Lectures on Kant's Political Philosophy*.[6] Compared with these texts, *On Revolution* is regarded as a secondary treatise lacking the philosophical insights, theoretical vigor, conceptual clarity, political significance, and intellectual originality of her other major works.

This critical approach is not new. As early as 1964 George Lichtheim set the tone, echoed by many subsequent critical reviews. He pointed out the lack of factual evidence and the misuse of historical knowledge and scolded Arendt's tendency to psychologize social-political processes by replacing historical narrative with the hidden motives and subjective beliefs of the revolutionary actors.[7] He complained that her historical comparison "shows an inclination to discuss political topics in philosophical terms, and vice versa, until the distinction between metaphysics and politics is lost or dimmed in a twilight zone where it no longer seems to matter whether we are dealing with actual events, contemporary beliefs about these events, or subsequent reflections upon them by thinkers motivated by convictions and interests quite foreign to the participants."[8] Arendt's methodology, he concluded,

Companion to Hannah Arendt, ed. Dana R. Villa, Cambridge: Cambridge University Press, 2000, pp. 201–219; Albrecht Wellmer, "Arendt on Revolution," in Villa, *The Cambridge Companion to Hannah Arendt*, pp. 220–241.

[4] Dana R. Villa, *Arendt and Heidegger: The Fate of the Political*, Princeton: Princeton University Press, 1996, pp. 76–77.

[5] Joseph Beatty, "Thinking and Moral Considerations: Socrates and Arendt's Eichmann," in *Hannah Arendt: Critical Essays*, ed. Lewis P. Hinchman and Sandra K. Hinchman, Albany: State University of New York Press, 1994, pp. 57–78; Seyla Benhabib, "Judgment and the Moral Foundations of Politics in Hannah Arendt's Thought," in *Situating the Self: Gender, Community, and Postmodernism in Contemporary Ethics*, New York: Routledge, 1992, pp. 121–147.

[6] Arendt, *OR*; *OT*; *HC*; and *LKPH*.

[7] George Lichtheim, "Two Revolutions," in *The Concept of Ideology and Other Essays*, New York: Random House, 1967, pp. 115–122.

[8] Lichtheim, "Two Revolutions," p. 117.

was "mere dogmatism – as doctrinaire as anything produced by the most extreme rationalists."[9] One year later, Eric Hobsbawn wrote a short but equally severe critique dismissing this text as irrelevant for the study of modern revolutions. He claimed that her arguments were "impossible to use in the analysis of actual revolutions," because of "a certain lack of interest in mere fact" and her "preference for metaphysical construct or poetic feeling over reality."[10] Even sympathetic readers of Arendt have concurred that this text is a "book full of paradoxes, the text itself is marked by violent jolts, startling vistas. Shock mingles with surprise, doubt with assent, in a tangled web of response that eludes any comfortable characterization, even the reassurance of recognition."[11] Despite its qualities, it abounds with perplexities, "perversely selective if not downright misleading," and adopts a methodology that "is at first just plain baffling."[12] It is not difficult to find traces of this negative assessment in most recent major studies that seem to agree with these initial reactions. Today, for instance, Hanna Pitkin deems *On Revolution* "a profoundly incoherent book," "an extraordinarily confusing and confused book."[13]

What perplexes the readers of this text is the alleged lack of a coherent pivotal argument that could unify Arendt's insightful but otherwise inchoate observations into a persuasive, systematic thesis.[14] Even those who have defended it against its critics have predominantly done so on the grounds of Arendt's famous but highly contested argument about "the rise of the social" in modern times and the concomitant decline of the political realm.[15] Thus, the complex and rich structure of the book has been reduced to only one of

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[9] Lichtheim, "Two Revolutions," p. 118.

[10] Eric J. Hobsbawn, "Hannah Arendt on Revolution," in *Revolutionaries: Contemporary Essays*, New York: Pantheon Books, 1973, pp. 201–208. For Arendt's reaction to these negative reviews, see Elisabeth Young-Bruehl, *Hannah Arendt: For the Love of the World*, New Haven: Yale University Press, 1982, pp. 402–406.

[11] James Miller, "The Pathos of Novelty: Hannah Arendt's Image of Freedom in the Modern World," in *Hannah Arendt: The Recovery of the Public World*, ed. Melvyn A. Hill, New York: St. Martin's Press, 1979, p. 177.

[12] Miller, "The Pathos of Novelty," pp. 178, 180.

[13] Hanna F. Pitkin, *The Attack of the Blob: Hannah Arendt's Concept of the Social*, Chicago: University of Chicago Press, 1998, pp. 219, 223, 225.

[14] Margaret Canovan, *Hannah Arendt: An Interpretation of Her Political Thought*, Cambridge: Cambridge University Press, 1992, p. 249.

[15] For some telling examples, see Bikhu Parekh, "Hannah Arendt's Critique of Marx," in *Hannah Arendt: The Recovery of the Public World*, ed. Melvyn A. Hill, New York: St. Martin's Press, 1979, pp. 77–78; Seyla Benhabib, *The Reluctant Modernism of Hannah Arendt*, Thousand Oaks, Calif.: Sage Publications, 1996, pp. 155–166; Villa, *Arendt and Heidegger*, p. 149.

its many dimensions, namely her critique of "the social question" and its per-
nicious effects on action. As a consequence, *On Revolution* often is regarded
as developing in more detail her earlier formulation of the corrosive effects
of the social, which is treated as the main conceptual pillar that inspires and
orients her historical comparison of the two modern revolutionary expe-
riences.[16] Paradoxically, if we accept this interpretation, *On Revolution* is
less a treatise about political revolutions and more a sociological-historical
study of the demise of public spaces and the decline of political freedom,
prompted by underlying social-economic factors, poverty being the most
important.

   This conflation of the social question with Arendt's study on revolu-
tion makes the book look exhausted and anachronistic, as if it came from
another era, irrevocably gone. As a result, her extremely astute political
observations on extraordinary new beginnings are reduced to a conglom-
eration of fragmentary comments that stop short of providing a compre-
hensive understanding of genuine political transformations. Although the
originality of Arendt's criticisms of sovereignty and popular will and of an
organic, unitary macrosubject are today fully recognized and praised, the
broader theoretical framework within which they are situated is disregarded,
perpetuating the impression that *On Revolution* consists of a set of loose
statements with no relevance for contemporary politics. It is no coincidence
that as of today we do not have a systematic engagement with her writings
on revolution that would place them next to her other major achievements.

   My aim in the following three chapters is to revisit these writings and
to demonstrate their enduring pertinence for reconceptualizing the poli-
tics of the extraordinary toward a democratic direction. By turning into a
virtue what Villa describes as a cause of blame, I argue that *On Revolution*
goes beyond a mere hypostatization of the moment of foundings to articu-
late a methodical, coherent alternative model of extraordinary politics that
demands the same attention as any of her other ideas.[17] By placing this text
at the center of my reading of Arendt's political theory, I am interested not

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[16] Pitkin, *The Attack of the Blob*, p. 204. For earlier examples of this reading, see J. A.
   Honeywell, "Revolution: Its Potentialities and Its Degradations," *Ethics*, 80:4 (1970),
   pp. 251–265; Richard Bernstein, "Rethinking the Social and the Political," in *Philosophical
   Profiles: Essays in a Pragmatic Mode*, Philadelphia: University of Pennsylvania Press, 1986,
   pp. 238–259; Jean Bethke Elshtain, "Hannah Arendt's French Revolution," *Salmagundi*, 84
   (1989), pp. 203–213; Sheldon Wolin, "Hannah Arendt: Democracy and the Political," in
   Hinchman and Hinchman, *Hannah Arendt: Critical Essays*, pp. 296–299; Canovan, *Hannah
   Arendt*, p. 249.
[17] Elisabeth Young-Bruehl, "From the Pariah's Point of View," in *Hannah Arendt: The Recov-
   ery of the Public World*, p. 21.

only in rescuing it from the relative obscurity in which it has been relegated but also in excavating and clarifying the underlying central arguments that consist of an ambitious reconceptualization of the relationship among constitutional making, political freedom, and extraordinary politics. Once the social question and the effects of pity are no longer seen as composing its central interpretative axis, her contributions to a democratic theory of the extraordinary can be more fully exposed. Arendt was concerned more with the political causes lurking behind the successes and failures of extraordinary politics rather than with external obstacles, such as poverty, class relations, international geopolitics, and the like. Not that these factors are insignificant for the study of revolutions. They were simply not directly relevant to her project, which consisted primarily in elucidating the political dynamic and historical impact of extraordinary deeds. Here I follow and further develop Ferenc Fehér's insightful suggestion that Arendt proposed a "dejacobinization of the revolutionary" event and Arato's claim that she sought to articulate a republican model of constitutional making that "alone could create the new order, and ... provide a way of transcending the antinomy of permanent revolution and revolutionary amnesia."[18]

Concomitantly, the basic concepts and arguments developed in her study on modern revolutions represent a significant departure from the more existential content of her previous writings. Freedom and action take on different meanings from their earlier dramaturgical formulations. In Arendt's words, the "revolution, known to us for almost two hundred years, has been more closely identified with freedom than has any other political phenomenon or occurrence."[19] Furthermore, her theory of spontaneous new beginnings is now historically substantiated and politically developed in the form of a collective project of original higher lawmaking aimed at the creation of lasting republican government. Similarly, her exposition is more sensitive to the constitutive role of political institutions, the nodal importance of the juridical system, the significance of constitutional norms, the problem of power, and the flaws of representative liberal democracies than in any of her other writings.

Most importantly, her critical analysis of different models of constitutional politics is an attractive corrective to Weber's and Schmitt's respective

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[18] Ferenc Fehér, "Freedom and the 'Social Question' (Hannah Arendt's Theory of the French Revolution)," *Philosophy and Social Criticism*, 12:1 (1987), p. 24; Arato, *Civil Society, Constitutionalism, and Legitimacy*, p. 129.

[19] Hannah Arendt, "Revolution and Freedom/A Lecture," in *In Zwei Welten: Siegfried Moses zum füfundsiebzigsten Geburtstag*, ed. Hans Trimmer, Tel Aviv: Verlag Bitaon, 1962, p. 584.

theories of extraordinary politics and offers a more appealing point of entry into the three moments of democratic politics. Although Arendt cannot be considered a conventional or committed democratic thinker, she nonetheless provides the conceptual and normative resources for rethinking the troublesome relationship between liberty and order, freedom and authority, the constituent and the constituted power, extraordinary and normal politics.[20] Thus, like Weber and Schmitt, Arendt investigated the unprecedented significance for modern politics of singular moments of disruption, transformation, and innovation. Unlike Weber, however, she thought that radical changes neither signify a personalistic manifestation of the irrational nor are by nature incompatible with legality, and contrary to Schmitt, she rejected the idea of total breaks and absolute foundings. Crucially, Arendt introduced political freedom at the center of her understanding of the extraordinary, filling the gap opened up by Weber's and Schmitt's overemphasis on the legitimate origins of political domination.

Arendt held onto the possibility of reconciling extraordinary politics with a lasting constitutional government by broadening the second moment in order to salvage the experience of political freedom within a firm juridical framework. Her project was informed by a constant preoccupation with the thorny problem of how freedom could survive the institutionalization of spontaneity during normal politics. Thus, contrary to Weber's hopeless binary opposition between change and continuity and against the displacement of charismatic movements in favor of a dreadful executive, she sought to keep alive the "revolutionary spirit" during ordinary lawmaking by diverting it into a system of derevolutionized constituent councils. Compared to Schmitt, Arendt was acutely aware of the paradoxes and risks inherent in the logic of pure discontinuities, and introduced a key, though relatively overlooked distinction, between *absolute* and *relative* new beginnings. In a similar vein, she replaced Schmitt's glorification of a popular sovereign will with a pluralistic and multiperspectival definition of the public realm. In doing so, she broke with the philosophy of the subject that kept haunting Schmitt's endeavors. Likewise, whereas he purged his first decisionistic moment of the extraordinary from speech, she confidently relocated persuasion and discussion at the heart of her understanding of the constituent power. At the same time, much like Weber and Schmitt, Arendt remained attuned to the costs of seeking to confine action within rigidly delineated

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[20] For a critical discussion of Arendt and democracy, see Wolin, "Hannah Arendt: Democracy and the Political," pp. 289–290; Claude Lefort, *Democracy and Political Theory*, trans. David Macey, Minneapolis: University of Minnesota Press, 1988, p. 55.

legal structures. Although she recognized the need for bounded public spaces, these cannot exhaust or consummate politics. As a consequence, she became increasingly appreciative of the role that spontaneous voluntary associations and acts of civil disobedience could play in an instituted republic. As freedom exceeds formal, procedural constraints, she gestured toward a third moment to allow for the emulation of the founding experience alongside the restrictions imposed by the imperatives of stability, legal security, and constitutional continuity.

7

Extraordinary Beginnings I

Arendt's Critique of Schmitt

Arendt, apparently appalled by Schmitt's adherence to Nazism in 1933, never discussed his work directly. For this reason, I begin with a preliminary comparative discussion of Arendt and Schmitt, seeking to establish the terms of a dialogue that actually never took place. Her critique of sovereignty, her distinctive appropriation of the constituent power, and her theory of spontaneous beginnings become more intelligible if set against the background of Schmitt's political and constitutional theory. For example, the perplexing issue of extraordinary new beginnings, which is one of her central preoccupations, comes at times extremely close to Schmitt's constitutional writings. Arendt, much like Schmitt, focused on the relationship among radical breaks, revolutionary changes, and constitutional transformations. Both thinkers were similarly captivated by the politics associated with constitutional foundations and instituting, political practices.[1]

Despite Arendt's lack of explicit engagement with Schmitt's political theory, one can still find some few, scattered remarks about Schmitt that reveal more than an accidental interest. In one of these, Arendt exhibits a hesitant appreciation of his "very ingenious theories" that "still make arresting reading."[2] On other occasions, she referred to Schmitt as "the famous professor of constitutional and international law" and as an "outstanding scholar[s]" and jurist.[3] Although it is not clear what Arendt considered to be

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[1] Arato, *Civil Society, Constitution, and Legitimacy*, p. 17. For a similar approach that unfortunately stops short of drawing the appropriate conclusions, see Walter L. Adamson, "Beyond 'Reform or Revolution': Notes on Political Education in Gramsci, Habermas and Arendt," *Theory and Society*, 6:3 (1978), pp. 429–460.

[2] Arendt, *OT*, p. 339.

[3] Arendt, *MDT*, p. 252; Hannah Arendt, "The Image of Hell," *EU*, p. 201.

"ingenious" in Schmitt's theories or which attributes of his work qualify it as "famous" and "outstanding," what stands out in these telegraphic comments is the importance she ascribed to the legal and constitutional dimension of his texts.[4]

As of today, there are two general readings of the relationship between Arendt and Schmitt. The first focuses on the underlying similarities between the two thinkers, which can be traced back to a shared political existentialism, a common fascination with the autonomy and purity of the political, and an analogous interest with a groundless decision (Schmitt) and act (Arendt).[5] Many sympathizers of Arendt have challenged this interpretation in their attempt to demonstrate that her thought is not only incompatible with Schmitt's work but also hostile and fiercely opposed to it.[6] I distance myself from both readings. Instead of focusing on Schmitt's and Arendt's alleged political existentialism, I shift the focus of attention to their writings on extraordinary foundings. Likewise, rather than viewing her as an avowed opponent of Schmitt, I see her as attempting to rethink the pivotal issue of how to contain and limit the risks, arbitrariness, and excesses inherent in the extraordinary politics of secular founding. Her approach seems to be neither identical nor antithetical to Schmitt's. It can be better described as unraveling its internal paradoxes and pointing to its dilemmas and perplexities, but also as sharing some comparable concerns and orientations.[7] In fact, I argue, both thinkers grappled with a similar set of questions and related themes, and although they parted company in their respective answers, they shared a

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[4] It is interesting to note that as of today little has been written on the relationship between Arendt and Schmitt. Outside the English-speaking world, there is only one, to my knowledge, comprehensive critical comparative discussion of Arendt and Schmitt. See Enrique Serrano Gómez, *Consenso y conflicto. Schmitt, Arendt y la definición de lo político*, Mexico: Centro de Estudios de Política Comparada, A.C., 1998.

[5] Martin Jay, "The Political Existentialism of Hannah Arendt," in *Permanent Exiles: Essays on the Intellectual Migration from Germany to America*, New York: Columbia University Press, 1985, pp. 237–256. George Kateb has argued that Arendt's theory of political participation has a "dark underside" related to her fascination with existential borderline cases and, more particularly, with death as the most extreme, authentic, and intense form of individual self-sacrifice for one's community. See Georges Kateb, "Death and Politics: Hannah Arendt's Reflections on the American Constitution," *Social Research*, 54:3 (1987), pp. 612–613.

[6] For example, see Maurizio Passerin d' Entrèves, *The Political Philosophy of Hannah Arendt*, London: Routledge, 1994, pp. 86–87; Villa, *Arendt and Heidegger*, pp. 115–117.

[7] The critical comparison of Arendt and Schmitt undertaken in this chapter relies and expands on Arato's "Forms of Constitution Making and Theories of Democracy," pp. 191–231, and William Scheuerman's "Revolutions and Constitutions: Hannah Arendt's Challenge to Carl Schmitt," in Dyzenhaus, *Law as Politics*, pp. 252–280.

common interest in elucidating the vexing, sometimes obscure, relationship between the constituent power and those extraordinary instances of radical political and constitutional innovation.

Arendt, like Schmitt, embarked on redefining the idea and practice of revolutions by stressing their elective affinity with the demise of traditional, transcendental authority, the secularization of modern politics, the emergence of the people as the sole legitimate political actor, the invention of constitutionalism, and the erosion of the political. Unlike Schmitt, however, she was alert to the dangers and excesses associated with a popular politics of groundless absolute beginnings, which she largely attributed to what was the pillar of Rousseau's (and Schmitt's) political theory: the theological legacy of a sovereign will. Furthermore, Arendt's historical investigations, which aimed to recover the "lost treasure" of the revolutionary past, were motivated predominantly by her effort to elaborate a systematic theory of freedom rather than to explore the legitimate origins of political domination. For this reason, I think, she was able to recognize the benefits as well as the threats that revolutionary undertakings pose to freedom. Although she sporadically wrestled with the problem of legitimacy, she was reluctant to confront it directly, given its association with the nation-state, domination, violence, and the unbridgeable gap it presumes between the rulers and the ruled.[8] Instead, she diverted questions of legitimacy to her discussions of authority, the corresponding problem of justification, and the recurrent need for absolutes.

Arendt's acute observations of the modern revolutionary experience expose, better than Weber's and Schmitt's, the paradoxes and perplexities of all founding ruptures that often take the form of what she called a "vicious circle" between the constituent power and the constituted powers, the creator and the creation, the extraordinary and the ordinary. If unresolved, this circle could necessarily wind up in the equally troubling problem of infinite regress. This vicious circle may be avoided but at the heavy cost of a frustrating return to a foundationalist position and the resurrection of ultimate extrapolitical grounds.

This solution, Arendt foresaw, marks an unequivocal negation of the radical ramifications of extraordinary politics and the freedom associated with it. An appeal to external principles, she noted, will impose significant limits on the freedom of a political community to determine its own mode of

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[8] Benhabib, *The Reluctant Modernism of Hannah Arendt*, p. 200.

political organization and to affirm and shape its constitutional future.[9] Simply put, on the one hand, extraordinary politics is intimately related to freedom insofar as the process of creating a new constitutional order is synonymous with the originating power of establishing "the man-made public space or market-place," "a tangible, worldly reality, something created by men to be enjoyed by men rather than a gift or a capacity."[10] On the other hand, extraordinary politics is confronted with the problem of authority and the recognition that the new order cannot rely solely on the arbitrariness of the factual number and sheer volition of the founders and that, therefore, an absolute, extrapolitical source of authority, beyond the people themselves, is usually summoned to justify the institution of society.[11] This tension reflects a deeper conflict between freedom and authority, contingency and determinism, and reveals the paradox of freedom: an unconditional, total affirmation of freedom threatens and undermines freedom itself. As she put it, "an act can only be called free if it is not affected or caused by anything preceding it and yet, insofar as it immediately turns into a cause of whatever follows, it demands a justification which, if it is to be successful, will have to show the act as the continuation of a preceding series, that is, renege on the very experience of freedom and novelty."[12]

One of Arendt's merits is to have brought to the surface the ambiguous, obscure relationship between the people and its constitution, the constituent and the constituted, and the built-in circularity of secular founding projects, what Carré de Malberg in 1922 had already described as "un cercle vicieux."[13] Arendt sought to explore and resolve one of the most difficult problems of constitutional theory: the unauthorized, arbitrary dimension of extralegal constitutional making. A republican process of constitutional making presupposes that the citizens have the legitimate authority to draft a new constitution. But because they operate outside the instituted legality, they lack this authority, which can be given to them only retroactively by a new constitution that acknowledges them as the legitimate supreme authority of a secular republic. In this case, however, the foundations of a new

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[9] Arendt, *OR*, pp. 161, 166, 183–184; Hannah Arendt, "What Is Authority," *BPF*, pp. 139–140; Hannah Arendt, "Willing," *LOM*, pp. 202–203, 214–215.

[10] Arendt, *OR*, p. 124.

[11] Arendt, *OR*, p. 182.

[12] Arendt, "Willing," p. 210.

[13] Raymond Carré de Malberg, *Contribution à la théorie générale de l'État*, Vol. II, Paris, Librairie de la société du Recueil Sirey, p. 494.

constitution are arbitrary for no authorization was given to the revolution-
aries to draft a new higher law:

Those who get together to constitute a new government are themselves unconstitu-
tional, that is, they have no authority to do what they have set out to achieve. The
vicious circle in legislating is present not in ordinary lawmaking, but in laying down
the fundamental law, the law of the land or the constitution, which from then on, is
supposed to incarnate the "higher law" from which all laws ultimately derive their
authority.[14]

How can higher lawmaking be justified if the legal and institutional prin-
ciples of validity necessary for assessing the rightness or fairness of con-
stitutional creation are absent at the very moment of founding? By raising
the question of whether an extraconstitutional authority is an impossible
concept outside the constituted powers and an established system of law,
Arendt challenged Schmitt's version of extraordinary politics, which derived
the foundational principles of a legal system from a juridical void, law from
lawlessness.[15] For Arendt, it is not at all clear where the instituting author-
ity lies or who constitutes this authority.[16] Is it the unconstituted people
who create the constitution (but on what grounds?) or is it the consti-
tution that gives concrete juridical and political life to the abstract and
fictional category of the people (but in that case, who creates the con-
stitution?)?[17] Moreover, how can a political community of equals enact
the first fundamental principles of the land outside fixed and recognized
procedures and rules that are indispensable for shaping, regulating, and
endowing this process with authority and for defining who is equal and
according to what criteria?[18] Does it make sense to speak of genuine con-
stitutional making without assuming an existing institutional framework of
mutually recognized rights and duties that coordinates and guarantees the
valid scope of constitutional politics and channels the entire process of higher

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[14] Arendt, *OR*, pp. 183–184.
[15] Arendt, *OR*, pp. 183–184.
[16] For an exposition of the constituent paradox, see Sheldon S. Wolin, "Collective Identity and
Constitutional Power," in *The Presence of the Past*, pp. 12–13.
[17] Jacques Derrida, "Declarations of Independence," *New Political Science*, 15 (1986),
pp. 7–15. For an insightful comparative discussion of Arendt and Derrida related to the
perplexities of foundations, see Honig, *Political Theory and the Displacement of Politics*,
pp. 86–109.
[18] Frank Michelman has applied this paradox to democracy, claiming that there is a deeper
paradox, which he calls the "paradox of democratic commitment." Michelman, *Brennan
and Democracy*, pp. 33–34.

lawmaking?[19] Can the making of higher law take place outside any form of law, in a state of nature? How, she further asked, can the authority of the new established powers be derived from an extraconstitutional source, the constituent power? As she perceptively put it in her discussion of the French Revolution, the "authority . . . of the new power, the *pouvoir constitué* . . . could not be guaranteed by the Constituent Assembly, the *pouvoir constituant*, because the power of the Assembly itself was not constitutional and could never be constitutional since it was prior to the constitution itself."[20]

Although Arendt endorsed and celebrated the modern revolutionary experience as the highest manifestation of political freedom and constituent power, she pointed at an alternative model of extraordinary politics in order to escape the arbitrariness, frailty, perplexities, and violence associated with revolutions. Her project was to formulate an alternative theory of the extraordinary that was capable of overcoming the dilemmas of previous historical experiences and theoretical formulations and breaking the vicious circularity of political foundings. Indeed, a key presupposition of her political project is the recognition that, although the authentic founding of a new secular republic is the highest manifestation of political freedom, it is simultaneously the most dangerous and murky moment of politics. It is this "riddle" and "mystery" that Arendt sought to resolve.[21]

I begin with the evolution of Arendt's concept of political freedom that foregrounds her critique of the Jacobin version of constitutional politics and then discuss her own version of extraordinary politics in the next chapter. The gradual maturation of her understanding of freedom from *The Human Condition* to the *Life of the Mind* also provides a starting point for establishing the terms of the debate on the extraordinary between Arendt and Schmitt. Such a reconstructive, comparative reading is made possible by her attempt to explicitly link freedom with modern revolutions, collective founding practices, and the drafting of new constitutions – that is, with the constituent power, rather than with individual virtuosity, performance, and agonism.[22]

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[19] For a detailed discussion of this problem, set against Derrida's and Honig's versions of the perplexities of foundations, see David Ingram, "Novus Ordo Seclorum: The Trial of (Post) Modernity or the Tale of the Two Revolutions," in *Hannah Arendt: Twenty Years Later*, ed. Larry May and Jerome Kohl, Cambridge, Mass.: MIT Press, 1996, pp. 221–250.

[20] Arendt, *OR*, p. 163.

[21] Arendt, "Willing," pp. 214, 203.

[22] For Arendt's several notions of action, see d' Entrèves, *The Political Philosophy of Hannah Arendt*, pp. 64–100.

Political Freedom as Founding

Surprisingly, the concept of freedom is not central to Arendt's study of the agonistic, heroic, and self-revelatory aspects of politics, despite her renowned celebration of action in *The Human Condition*.[23] It is not even intelligibly or systematically defined.[24] Although at times she alluded to the intrinsic relationship among starting something new, natality, the public space, and freedom, she did not provide a systematic account of the last concept.[25] Freedom appears only marginally in some isolated, peripheral parts, always subordinated to a dramaturgical and expressive model of action.[26] It is evoked mainly, but only indirectly, in those parts in which she proffered her ideal vision of action as a public contest for excellence, glory, and eminence among citizens, who disclose who they are in front of their peers through speech and deeds.[27] Freedom looks like the individual faculty of public appearance and as the capacity to struggle for immortality.[28] It is by no accident that some commentators, following Arendt, have described her concept of freedom as the "virtuosity of performance."[29]

On those few occasions when Arendt referred explicitly to freedom, however, it was in order to relate it neither to the revelatory and disclosing capacities of the self nor to the founding of new republics, but rather to the

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[23] Interestingly, in *OT* Arendt defines freedom "as an inner capacity ... identical with the capacity to begin." Note here that, despite the obvious similarities with her later, more systematic definitions, the capacity to begin is considered to be an inner capacity rather than a world-disclosing and a world-building capacity. She defined political freedom, by contrast, as "identical with a space of movement between men." Arendt, *OT*, p. 473.

[24] For Arendt's ambiguity regarding the concept of freedom, see Pitkin, *The Attack of the Blob*, p. 245. As Michael Gottsegen rightly observes, "In Arendt's discussion of freedom, it should be noted that a certain ambiguity arises from her uses of the term." Michael Gottsegen, *The Political Thought of Hannah Arendt*, Albany: State University of New York Press, 1994, p. 39.

[25] Arendt, *HC*, pp. 177–178, 231. In her study of totalitarianism, Arendt declared that "Beginning, before it becomes a historical event, is the supreme capacity of man; politically, it is identical with man's freedom. *Initium ut esset homo creatus est* – 'that a beginning be made man was created' said Augustine. This beginning is guaranteed by each new birth; it is indeed every man." Arendt, *OT*, p. 479.

[26] Arendt uses the concepts of freedom and action interchangeably. As she put it, "the *raison d'être* of politics is freedom and ... this freedom is primarily experienced in action," only to add a couple of pages later that "for to be free and to act are the same." Arendt, "What Is Freedom?" *BPF*, pp. 151, 153.

[27] Arendt, *HC*, pp. 49–55, 205–207.

[28] Arendt, *HC*, pp. 179, 194.

[29] Villa, *Arendt and Heidegger*, 1996, pp. 45, 54–55; Honig, *Political Theory and the Displacement of Politics*, pp. 4, 3. For freedom as virtuosity in Arendt, see Arendt, "What Is Freedom?" pp. 158, 153, 154, 163; Arendt, *OR*, pp. 70, 119.

ancient Greek meaning of the term, more specifically as it emerges out of
Aristotle's distinction between the public and the private.[30] "To be free,"
Arendt claimed, "meant both not to be subject to the necessity of life or to
the command of another and not to be in command oneself."[31] The freedom
of the ancients had to do with "the free man's status, which enabled him
to move, to get away from home, to go out into the world and meet other
people in deed and word."[32] When she explicitly defined freedom in ancient
Greece, she asserted:

Freedom meant that one could do as one pleased, forced neither by the bidding
of a master nor by some physical necessity that demanded laboring for wages in
order to sustain the body nor by some somatic handicap such as ill health or the
paralysis of the members. According to Greek etymology, that is, according to Greek
self-interpretation, the root of the word for freedom, *eleutheria*, is *eleuthein hopós
eró*, to go as I wish, and there is no doubt that the basic freedom was understood as
freedom of movement. A person was free who could move as he wished.[33]

   On all other occasions, Arendt's references to freedom are limited to
a critical function. They are deployed to attack the modern conflation of
individual freedom with the self-mastery and free will of a sovereign subject,
or to refute liberal notions of economic liberty and the uninhibited pursuit of
individual, private self-interest.[34] Most of the time, her allusions to freedom
were vested in the form of offering a critique of the conventional view
of liberty as individual autonomy rather than providing a comprehensive
alternative vision of what political freedom is or ought to be.
   Arendt set forth to develop a more systematic theory of political freedom
in her subsequent studies on modern politics. Despite her penetrating critical
observations regarding the modern age, the rise of the social, the decline of
the political, and the growing phenomenon of world alienation, she confi-
dently located the experience of freedom within the horizon of modernity
and, more particularly, in the revolutionary events that started unfolding
from the eighteenth century onward. Freedom was now defined less in terms

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[30] Arendt, *HC*, pp. 12, 30–31.

[31] Arendt, *HC*, p. 32.

[32] Arendt, "What Is Freedom?" p. 148.

[33] Arendt, "Willing," p. 19. In an earlier text, Arendt defined freedom as freedom of movement,
which, according to her, is the oldest definition of freedom we have: "Being able to depart for
where we will is the prototypical gesture of being free, as limitation of freedom of movement
has from time immemorial been the precondition for enslavement. Freedom of movement is
also the indispensable condition for action, and it is in action that men primarily experience
freedom in the world." Arendt, "On Humanity in Dark Times," *Men in Dark Times*, New
York: Harvest Book, 1968, p. 9.

[34] Arendt, *HC*, pp. 234–235, 32.

of individual performance and virtuosity and more as a collective capacity to initiate new political beginnings and to deliberately participate in the extraordinary founding of new constitutions.

There are several important changes that endow freedom with a slightly different meaning from the one she suggested in *The Human Condition*. In her essay "What Is Freedom?" but mainly in *On Revolution*, political freedom, besides free movement and sheer spontaneity, has an explicit instituting and positing dimension that goes well beyond the public disclosure of oneself. The emphasis is not so much on the individual's virtuosity, although this still plays an important role, but rather on the capacity of a collectivity to lucidly institute new spheres of political participation, forms of self-government, and forums of public deliberation and contestation and thus to consciously shape and determine its political existence. Freedom is increasingly defined as a spontaneous, extraordinary event that erupts in the midst of the ordinary and the everyday, as an experience of the singular act that, like a miracle, shatters the preestablished instituted order of things and radically changes the expected course of history by opening up new possibilities not determined from antecedent causes.[35]

What emerges out of Arendt's reflections on freedom is its "specific productivity," which now occupies the center stage in her investigations of modern politics.[36] Of course, what associates this modified, more political version to her earlier formulation is the notion of new beginnings and the idea that to be free is "to call something into being, which did not exist before, which was not given, not even as an object of cognition or imagination, and which therefore, strictly speaking, could not be known."[37] But what this "something" might be is quite different from an existential understanding of natality. Freedom brings into being new institutions, public spheres, higher constitutional-legal structures, and regime forms. In this more mature version of freedom, the accent is put on its institutional, collective, and juridical dimensions rather than on its existential and individual properties. In fact, new beginnings come gradually to resemble Schmitt's constitutional politics.

The freedom of the moderns leans more toward the pole of political foundations and becomes synonymous with revolutions. "Because," as Arendt emphatically asserted, "revolutions are the only political events which confront us directly and inevitably with the problem of beginnings," and because

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[35] Arendt, "What Is Freedom?" p. 170; Arendt, *HC*, p. 246.
[36] Arendt, *HC*, p. 191.
[37] Arendt, "What Is Freedom?" p. 151.

in modern revolutions "freedom *qua* beginnings became manifested in the act of foundation," the "positive notion of freedom . . . was identified with the act of foundation, that is, the framing of a constitution."[38] Note here that freedom as the act of framing new constitutions is nothing other than another formulation of the constituent power as the power to constitute. That is, Arendt's seminal contribution is to locate freedom at the center of her appropriation and reinterpretation of the concept of constituent power. As a result, she added, "in the case of foundation – the supreme act in which the 'We' is constituted as an identifiable entity – the inspiring principle of action is love of freedom."[39] In this later version, freedom as new beginning is fully manifested and exercised through the extraordinary, spontaneous processes of founding a new government and drafting a new constitution. It becomes synonymous to the constituent power. "The great consequence which the concept of beginning and origin has for all strictly political questions," she argued, "comes from the simple fact that political action, like all action, is essentially the beginning of something new; as such, it is, in terms of political science, the very essence of human freedom. . . . The centrality of origin . . . is still fully alive . . . [in] *the act of foundation* itself – that is, *the conscious beginning of something new*."[40]

Thus, although freedom is still defined as new spontaneous beginnings, its meaning shifts from natality to instituting deeds and founding practices. This shift endows freedom with a clear and uncontestable political character for two additional reasons. First, it establishes the necessary condition of normal politics, namely, stable and secure public spaces and deliberative bodies, that is, spaces of freedom, in which citizens can act, speak, compete, and engage in relations of mutual disclosure as well as in "'expressing, discussing, and deciding,' which in a positive sense are the activities of freedom."[41] Freedom as founding implies that to be free is to act in such a way as also to make possible freedom as disclosure. The latter is conceptually dependent upon and normatively subordinated to the former. To be able to reveal oneself in front of an audience of peers means that a public space of freedom has been firmly established, constitutional norms for regulating the agonistic contest instituted, and the boundaries that delineate the proper frontiers of the political defined.[42] In that sense, Arendt's concept of freedom is dual as

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[38] Arendt, *OR*, pp. 21, 167, 234.
[39] Arendt, "Willing," p. 203; Arendt, "What Is Freedom?" p. 146; Arendt, *OR*, p. 234.
[40] Arendt, "Understanding and Politics," *EU*, pp. 320–321 (emphasis added).
[41] Arendt, *OR*, p. 235.
[42] Arendt, *OR*, p. 126; Gottsegen, *Hannah Arendt's Political Thought*, p. 133.

it consists of the extraordinary freedom of founding and the normal freedom of disclosure.

Second, and most importantly, this new elaboration of freedom as new beginning stresses the element of acting in concert according to the common project of self-determination, whereby a community of free and equal individuals decides to jointly lay down the political and legal foundations that will govern power and secure normal politics without appealing to any extrapolitical source, metaphysical principle, or transcendental agency.[43] By establishing a secular republic, the citizens affirm their desire to have an equal say over their collective existence and to shape their future.[44] As Arendt put it, "Real political action comes out as a group act."[45] In the opposite case "man-made, historical processes have become automatic" or, to put it more clearly, they appear to be automatic from the perspective of the many. Implicit in this formulation of freedom is that during extraordinary politics individuals see themselves as the agents and the originators of their own political world. They become lucid and conscious historical actors. They are coassociates in a common, extraordinary enterprise. For Arendt, "the world, in gross and in detail, is irrevocably delivered up to the ruin of time unless human beings are *determined to intervene, to alter, to create what is new*."[46] By doing so, they not only challenge the internal division between rulers and ruled but also come to realize that they are not tied down by the objective necessity of history or by prepolitical social, moral, and economic determinations beyond their reach.[47]

A revolution, therefore, besides being spontaneous and creative, is also the moment of higher political freedom, because the distinctions, limitations, and inequalities that separate citizens and prevent them from acting in concert are transcended as the community participates in the deliberations and activities aiming at the genuine generation of power and the making of new fundamental constitutional essentials. This recognition of active participation in revolutionary times is at the very heart of Arendt's understanding of freedom, viewed as an extraordinary deed of collective self-institution. By seeing themselves as the exclusive creators of their own world, as the

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[43] On a different understanding of the relationship between democracy and new beginnings in Arendt's work, see Pachen Markell, "The Rule of the People: Arendt, Arché, and Democracy," *American Political Science Review*, 100:1 (2006), pp. 11–13.

[44] Arendt, "What Is Freedom?" p. 168.

[45] Hannah Arendt, "On Hannah Arendt," in *Hannah Arendt: The Recovery of the Public World*, ed. Melvyn A. Hill, New York: St. Martin's Press, 1979, p. 310.

[46] Arendt, "The Crisis of Education," *BPF*, p. 192.

[47] "The revolution," Arendt asserted, "had set out to abolish . . . the age-old distinction between ruler and ruled." Arendt, *OR*, p. 237.

ones who have a clear, untransferable responsibility toward it, the members of a political community intervene consciously and directly in the making of their collective existence. As Arendt clearly wrote, "It was only in the course of the eighteenth-century revolutions that men began to be aware that a new beginning could be a *political phenomenon*, that it could be the result of what men had done and what they could consciously set out to do . . . novelty was no longer the proud and, at the same time, frightening possession of the few."[48]

Arendt is clearly moving away from freedom defined as an individual faculty toward freedom as a collective, creative capacity.[49] Thus, although Canovan's suggestion that Arendt rejected "the idea of self-determination by a 'general will'"[50] seems plausible, it is nonetheless challenged by the concept of freedom-as-founding. Arendt dismissed the general will but not the normative ideal and political practice of self-determination. Presumably, she was looking for another definition of self-legislation, free from the voluntaristic, rationalist, and moral connotations often associated with the works and legacy of Rousseau and Kant. As I see it, Arendt, after encountering the two modern revolutions, attempted to rethink the category of self-determination by linking it to the extraordinary moment of constitutional making and political foundings. It is in the two modern revolutions that the experience of a new, higher freedom made its appearance in the theater of history: the freedom to determine with one's peers one's political and constitutional existence by initiating new legal beginnings and institutional changes.[51] Revolutionary freedom is extraordinary because it defies social determinations, historical precedents, and natural causalities and subverts established political inequalities and hierarchies. It reveals the creative capacity of a self-organized community to break with a preordered state of affairs and to change the course of events.[52] Arendt is quite explicit regarding this aspect of freedom when she described revolutions not in terms of extensive violence, seizure of power, or illegal breaks, but rather as "the amazing formation of a new power structure which owed its existence to nothing but the organizational impulses of the people themselves."[53]

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[48] Arendt, *OR*, pp. 46–47.

[49] Arendt, *HC*, p. 194.

[50] Canovan, *Hannah Arendt: A Reinterpretation of Her Political Thought*, p. 212.

[51] Arendt, *OR*, pp. 11–13, 21, 27–29.

[52] This aspect of Arendt's thought has been carefully investigated by Pitkin, *The Attack of the Blob*, pp. 194–200.

[53] Arendt, *OR*, p. 257. In Kateb's pertinent words, political freedom comes to describe Arendt's version of "grand politics." George Kateb, *Hannah Arendt: Politics, Conscience, Evil*, Totowa, N.J.: Rowman & Allanheld Publishers, 1983, p. 18.

This conceptualization of the extraordinary in terms of political freedom-as-founding, as "the act of constituting," shares some suggestive similarities with Weber's and Schmitt's political thought.[54] On the one hand, Arendt, in a move reminiscent of Weber, introduced the extraordinary against the petrification and ossification of Western civilization brought about by instrumental rationality, scientific reason, and the rise of positivism. In this sense, she comes very close to his view of the rationalization of Occidental culture and the increasing instrumentalization and bureaucratization of politics. In the context of Western modernity, she argued, echoing Weber, cultural stagnation is expressed in the forms of homogenization and normalization, that is, of conformism, uniformity, and social control brought about by the bureaucratization of modern administrative mass societies.[55] The paradigm of production that had come to dominate modern culture promulgated a hegemonic worldview based exclusively on the priority of means over ends, on purposive and success-oriented behavior, and on the principle of utility.[56] For instance, the subordination of ends to means, for Arendt as well as for Weber, gives rise to meaninglessness, because it ultimately reduces questions of meaning to technical issues of successful means. Instrumental rationality "changes every attained end immediately into the means to a new end, thereby, as it were, destroying meaning whenever it is applied."[57] Correspondingly, not only has it led to "the degradation of politics into a means for something else," but it is also responsible for "the instrumentalization of action."[58]

Despite her cursory repudiations of Weber's theory of the disenchantment of the world, Arendt too was concerned about the "growing meaninglessness of the modern world," the new threats to individuality, and the decline of freedom.[59] It should come as no surprise, then, that her lamentations are reminiscent of Weber's anxiety concerning the "iron cage" of modernity. Her pessimistic prognosis about the future of Western culture with which she concluded her historical narrative on the modern human condition recalls Weber's own concluding remarks in *The Protestant Ethic and*

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[54] Arendt, *OR*, p. 145.

[55] Arendt, *HC*, pp. 40–44; Hannah Arendt, "Some Questions of Moral Philosophy," *Social Research*, 61:4 (Winter 1994), pp. 747–748.

[56] Arendt, *HC*, p. 305.

[57] Arendt, "The Concept of History," *BPF*, p. 80.

[58] Arendt, *HC*, pp. 230, 180.

[59] Arendt criticizes Weber's disenchantment of the world for romanticizing the past and projecting a holistic and abstract vision of history that mystifies the outcomes of human actions, situating them within a grand narrative of impersonal forces. Arendt, "The Concept of History," pp. 63–64, 78.

the Spirit of Capitalism. In Arendt's bleak outlook, "It is quite conceivable that the modern age – which has begun with such an unprecedented and promising outburst of human activity – may end in the deadliest, most sterile passivity history has ever known."[60] "Stagnation" and "petrification" characterize this passivity, which has turned politics into a series of "automatic processes," and which endangers the autonomy of the political, threatens the possibility of freedom, and undermines the faculty of spontaneous beginnings.[61] Arendt's views on Western modernity echo Weber's belief that the modern age has developed more pervasive forms of domination and normalization, raising uncontestable threats to individuality.[62] "Since the beginning of this century," she observed, "the growth of meaninglessness has been accompanied by loss of common sense. . . . Our quest for meaning is at the same time prompted and frustrated by our inability to originate meaning."[63] In that sense, Arendt shared Weber's diagnosis that modernity leads to the twin loss of freedom and meaning.[64]

Much like Weber's thesis on the modern conflict between charisma and bureaucracy, Arendt saw modernity as inescapably twofold: freedom and necessity are intertwined into a complex historical configuration generating a permanent tension. Arendt's politics, as Canovan rightly suggests, "moves within the framework of a contrast between two alternative political responses to the predicament of modern humanity": totalitarianism or freedom.[65] For Arendt, "What usually remains intact in the epochs of petrification and foreordained doom is the faculty of freedom itself, the sheer capacity to begin, which animates and inspires all human activities and *is the hidden source of production of all great and beautiful things*."[66] The capacity to begin is, like Weber's charisma, a source of resistance against the disciplinary tendencies of a soulless modernity that haunt mass, industrial societies; it is also the sole origin of political innovation. What was charisma

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[60] Arendt, *HC*, p. 322; Arendt, "The Concept of History," p. 90.

[61] Arendt, "What Is Freedom?" pp. 168, 169.

[62] Arendt, *HC*, p. 40.

[63] Arendt, "Understanding and Politics," pp. 313–314.

[64] Contrary to Weber, Arendt does not look for a solution in a charismatic movement or leader who will reenchant the world by disseminating new values and beliefs and produce new collective identities. Arendt, *OT*, pp. 250–266, 341–388; Hannah Arendt, "On Violence," *CR*, p. 134. Arato correctly observes that, "Arendt shows nothing but scorn for presidential or plebiscitary-charismatic constitution making." Arato, "Forms of Constitution Making and Theories of Democracy," p. 206. For a brief comparative discussion of Arendt and Weber, see d'Entrèves, *The Political Philosophy of Hannah Arendt*, pp. 24–26.

[65] Canovan, *Hannah Arendt: A Reinterpretation of Her Political Thought*, p. 62.

[66] Arendt, "What Is Freedom?" p. 169.

for Weber, the faculty of new beginnings is for Arendt: the source of radical historical alterity, political creativity, and historical novelty.[67]

   From a political and institutional perspective, however, her assessment of modernity supersedes Weber's predominantly cultural critique. Its strong political character borders on Schmitt's critique of the *quantitative* total state and the *Expertenstaat* – although it still echoes Weber's anxieties about the rise of modern state bureaucracy.[68] For Arendt and Schmitt, the existence of the administrative welfare state is predicated upon the mutual absorption of state and society. According to this fusion thesis, while the state increasingly simulates the household, social relations are administrated by the bureaucratic state, which expands its area of jurisdiction to spheres of life that were traditionally considered to lie outside the political.[69] These changes describe the gradual subordination of politics to "pure administration" and the erosion of the public realm in favor of a collective national household, "a gigantic, nation-wide administration of housekeeping."[70] "In the modern world," she argued, "the two realms indeed constantly flow into each other like waves in the never-resting stream of the life process itself."[71] As a result, "modern society discards the distinction between what is private and what is public . . . that is, it introduces between the private and the public a social sphere in which the private is made public and vice versa."[72] This interpenetration of the public and private not only depoliticizes and privatizes the public sphere but also undermines the possibility of freedom by replacing the faculty of new beginnings with an instrumental and utilitarian behavior, which is for her by its very nature antipolitical. Arendt's argument against the growth of the modern state is derived from what Seyla Benhabib correctly describes as her "phenomenological essentialism," and thus is slightly distinct from Schmitt's approach, based on a conservative ideology.[73] Both

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[67] Claude Lefort has captured Arendt's proximity to Weber with respect to the disruptive, instituting potentialities of political action against the background of modern industrial societies. Lefort interprets her distinction between public and private as one "between the *enchanted* world of politics and prosaic life . . . [as] the distinction which located the *sacred* or *enchantment* in the realm of the visible, in the appearance of the public space." Claude Lefort, "Hannah Arendt and the Political," in *Democracy and Political Theory*, Minneapolis: University of Minnesota Press, 1988, p. 51.

[68] Schmitt made a similar argument in a brief but crucial essay, published a few months before the rise of Nazism to power and his own adherence to National Socialism. Schmitt, "Weiterentwicklung des totalen Staats in Deutschland," *PB*, pp. 211–213; Schmitt, *LL*, pp. 100–108.

[69] Arendt, *HC*, p. 33.

[70] Arendt, *HC*, p. 28; Hannah Arendt, "On Violence," *CR*, p. 178.

[71] Arendt, *HC*, p. 33.

[72] Hannah Arendt, "The Crisis of Education," *BPF*, p. 188.

[73] Benhabib, *The Reluctant Modernism of Hannah Arendt*, pp. 123–124.

analyses, however, share a similar social-historical explanatory framework for the mutual penetration of the public and the private and a comparable concern about the decline of the political and the rise of impersonal, anonymous forces inscribed in the very nature of the modern Occidental state.[74]

Apart from this common critique of the social state, however, there is one more telling parallel between Schmitt and Arendt. Both thinkers invoke the concept of the "miracle" to describe the instituting potentialities of politics. In that sense, they can both be described as thinkers of the singular event. While Arendt used the term "miracle" to portray the indeterminate, spontaneous dimension of the faculty of new beginnings, Schmitt deployed the same term to characterize the radical, disruptive effects of the sovereign constituent decision.[75] Against the prevalent assumptions of legal formalism, he juxtaposed the sovereign decision as the only force able to break away from a dogmatic legal positivism and the formal proceduralism of state legality, which he thought had occluded the moment of genuine legal and constitutional creation.[76] The sovereign decision is like a "miracle," Schmitt asserted, as "the power of real life breaks through the crust of a mechanism that has become torpid by repetition."[77] In a similar vein, for Arendt, free action "seen from the viewpoint of the automatic processes which seem to determine the course of the world, looks like a miracle."[78] Freedom resembles miracles because it "break[s] through the commonly accepted and reach[es] into the extraordinary, where whatever is true in common and everyday life no longer applies because everything that exists is unique and *sui generis*."[79] Freedom, in other words, signifies a spontaneous "br[eak] with the normal standards for everyday behavior," during which "single instances and single events, interrupt the circular movement of daily life in the same sense that the rectilinear *βίος* of the mortals interrupts the circular movement of biological life."[80] Like the sovereign decision, Arendt's free action "has an inherent tendency to force open all limitations and

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[74] For a discussion of Arendt's fusion thesis, see Cohen and Arato, *Civil Society and Political Theory*, pp. 181–187. For a similar discussion in Schmitt, see Cristi, *Carl Schmitt and Authoritarian Liberalism*, pp. 179–199; Thornill, *Political Theory in Modern Germany*, pp. 66, 84–86, 88–89.

[75] For a discussion of this similarity between Arendt and Schmitt, see Andreas Kalyvas, "From the Act to the Decision: Hannah Arendt and the Question of Decisionism," *Political Theory*, 32:4 (2004), pp. 320–346.

[76] Schmitt, *PT*, pp. 36–38.

[77] Schmitt, *PT*, pp. 15, 49–51.

[78] Arendt, *HC*, pp. 246, 247.

[79] Arendt, *HC*, p. 205.

[80] Arendt, *HC*, p. 206; Arendt, "The Concept of History," p. 43.

cut across all boundaries."[81] Revolutions are such political events because "by definition [they] are occurrences that interrupt routine processes and routine procedures."[82] From the perspective of the established structural determinations, Arendt asserted, freedom

is a miracle – that is, something which could not be expected. If it is true that action and beginning are essentially the same, it follows that the capacity for performing miracles must likewise be within the range of human faculties. This sounds stranger than it actually is. It is in the very nature of every new beginning that it breaks into the world as an "infinite improbability," and yet it is precisely this infinitely improbable which actually constitutes the very texture of everything we call real.[83]

Schmitt and Arendt meet each other unexpectedly on the terrain of the indeterminate instituting dimension of the political act, in which "every accident necessarily destroys, for better or for worse, the whole pattern in whose frame the prediction moves and where it finds its evidence."[84] For both authors, this singular extraordinary event is seen as an unexpected, spontaneous instituting occurrence. Notwithstanding these important similarities, Arendt departs from Schmitt's model of extraordinary constitutional politics at least in two important areas: popular sovereignty and absolute breaks.

Against Sovereignty

The concept of sovereignty has been a constitutive attribute of modern theories of democracy. From Marsilius de Padova to Baruch Spinoza to Rousseau, democratic politics has gradually come to mean the regime of popular sovereignty. The people, who emerged intact and revitalized from the debris of absolutism and the secularization of politics, gradually came to be recognized as the supreme source of legislation and legitimate political authority, which once were the exclusive attributes of the king.[85] To Schmitt, this was a conventional, self-evident truth beyond dispute. It not only defined the inescapable horizons of modern Western political experience and the very nature of democracy but also marked the starting point of his constitutional

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[81] Arendt, *HC*, p. 190.

[82] Arendt, *OR*, pp. 27, 172–173; Arendt, "On Violence," pp. 109, 27.

[83] Arendt, "What Is Freedom?" pp. 169, 170–171; Hannah Arendt, "Preface," *BPF*, p. 5. Canovan disassociates miracles from foundings. Her interpretation focuses on the Christian origins of the concept of miracle, while placing political foundations and forms of constitutional making in the Roman political legacy. In Canovan's reading, miracles are performed only by individuals. Canovan, *Hannah Arendt: A Reinterpretation of Her Political Thought*, pp. 146–147.

[84] Arendt, "On Violence," p. 109.

[85] Otto Gierke, *Political Theories of the Middle Age*, trans. F. W. Maitland, Cambridge: Cambridge University Press, 1900, pp. 37–61.

and political explorations. Arendt, on the other hand, represents an exception to this tradition. Her critical attitude toward popular sovereignty strikes us with its unrivaled originality. Much like Kelsen, but for different reasons, she boldly challenged the normative primacy of sovereignty and contested its natural affinity to the ideal of a free government.[86] She launched one of the most provocative and penetrating attacks on sovereignty.[87]

Although Arendt did not fully clarify her critique of sovereignty until her comparative examination of the two first modern revolutions, elements of such a critique appear for the first time in her study on totalitarianism and her acute observations on the formation of the modern state and the rise of national sovereignty. A more explicit and theoretically sustained confrontation with the issue of sovereignty appears in *The Human Condition*. There she shows how sovereignty endangers the nature of the political by replacing freedom with hierarchical control and rulership, substituting the plurality of the public sphere with homogeneity and sameness, and supplanting horizontal cooperation among equals with the vertically structured command-obedience relationship.[88]

Whereas in Greek antiquity, for Arendt, sovereignty was restricted to the private realm of the *oikos*, in modern times it conquered the public space to become the regulative principle of politics, whereby command and coercion between rulers and ruled displaced speech and deed among equals acting in concert. Sovereignty transforms the citizens from peers into obedient subjects and dependent recipients. This rise of an omnipotent sovereign occurred alongside the rise of the modern nation-state and the formation of a central bureaucratic and administrative apparatus. This parallel development signifies that the modern state is somehow a mere replica, in a larger scale, of the private realm, where a monological, mostly silent patriarch rules over all its subjects.[89] In Arendt's writings, sovereignty emerges as an apolitical force, belonging to the private sphere of dominion, darkness, dependence, and inequality.

Additionally, sovereignty destroys the plural, multiperspectival dimension of public spaces. Once introduced into the democratic discourse as popular

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[86] See Hans Kelsen, *Das Problem der Souveränitat und die theorie des Völkerrechts*, Tübingen: J.C.B. Mohr, 1920; Hans Kelsen, *Allgmeine Staatslehre*, Vienna: Nachdruck, 1993, pp. 102–119.

[87] Benhabib, *The Reluctant Modernism of Hannah Arendt*, pp. 205–209.

[88] Arendt, "On Violence," p. 139.

[89] In ancient Greece, according to Aristotle, it was believed that the sovereign had established over his subjects the same relationship of domination that the head of a family exercises over his wife and his children or a master over his slaves. Aristotle, *Politics*, trans. H. Rackham, Loeb Classical Collection, Cambridge, Mass.: Harvard University Press, 1990, I. i. 7–9, p. 9.

sovereignty, it presupposes that the people compose a solid, seamless homogeneous collective entity, becoming a surrogate for the personal properties of the fallen monarch. This displacement bestowed the sovereign people with a uniform, omnipotent will reminiscent of the indivisible, absolute properties of the king. Here begins the perilous fiction of the People as One. The problem with an absolute collective will, portrayed as "one supernatural body driven by one superhuman, irresistible 'general will,'"[90] is that, in contrast to a constellation of plural opinions, it cultivates sameness, with the result that "there is no possible mediation between wills as there is between opinions . . . the general will was nothing more or less than what bound the many into one."[91] What is unique about the political, namely its plurality, is eradicated. The idea of the popular sovereign "excludes all processes of exchange of opinions and an eventual agreement between them."[92]

Arendt's fear of the oneness of the sovereign will is also a fear of totalitarianism. Recall that totalitarianism "substitutes for the boundaries and channels of communication between individual men a band of iron which holds them so tightly together that it is as though their plurality had disappeared into One Man of gigantic dimensions."[93] Is it not the case that popular sovereignty has totalitarian impulses inherent in it? Or that it is inimical to "different locations," "differences of position," and a "variety of perspectives," which constitute the very fabric of the public realm and account for disagreement, deliberation, and public contest among equals?[94] Arendt was convinced that the sovereign homogeneous people destroys the common world shared by all citizens by speech and deed and shatters the "inbetween" space that relates and separates individuals and groups, preparing the ground for absolute domination.[95] Sovereignty is ultimately hostile to the very nature of politics because it undermines the very presuppositions of freedom by imposing a hollow uniformity that reduces a politically constructed equality to a natural, organic homogeneity.[96] Sovereignty, for Arendt, has a totalitarian kernel.

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[90] Arendt, *OR*, p. 60.
[91] Arendt, *OR*, pp. 76, 77.
[92] Arendt, *OR*, p. 76.
[93] Arendt, *OT*, pp. 465–466.
[94] Arendt, *HC*, p. 57.
[95] Arendt, *HC*, pp. 52, 182, 198–199.
[96] Despite this strong condemnation of sovereignty, Arendt's conclusions are not always as unequivocal as they appear. While she initially rejected the category of sovereignty as an essentially nonpolitical and even antipolitical capacity, at times she struggled to explore an alternative conceptualization that would not threaten plurality, individuality, and freedom.

By the time Arendt completed her study on the two revolutions, she had further developed her critique of sovereignty. In advancing her own version of extraordinary politics, she became fully aware of the dangers inherent in sovereignty and, unlike Schmitt, realized that a politics of the extraordinary would be fatally jeopardized by the presence of a sovereign. Supplementing her previous criticisms, she now focused almost exclusively on the pernicious effects of sovereignty during moments of radical constitutional transformation.

It is well known that Arendt saw the social question as one of the main causes of the failure of the French Revolution. By concentrating exclusively on this sociological aspect of her interpretation, however, one misses another crucial element, political this time, of her comparative analysis of the two revolutions: the harmful results of popular sovereignty for extraordinary politics. While at times she conceded that in the American Revolution "the absence of the social question was, after all, quite deceptive, and that abject and degrading misery was present everywhere in the form of slavery and Negro labour"[97] – implying that poverty could not be the sole or the predominant cause of the French failure – she was rather unambiguous in tracing one of the main sources of the American success to "the great and, in the long run, perhaps the greatest American innovation in politics as such . . . the consistent abolition of sovereignty within the body politic of the republic, the insight that in the realm of human affairs sovereignty and tyranny are the same."[98] The American revolutionaries by expelling sovereignty also succeeded in dispelling the myth of the People as One. "The word 'people,'" Arendt confidently observed, "retained from them the meaning of manyness, of the endless variety of a multitude whose majesty resided in its very plurality."[99] Concomitantly, she attributed to sovereignty one of the main reasons of the French failure. The unfortunate decision of "the men of the French Revolution [to] put the people into the seat of the king" was partly responsible for the French tragedy.[100]

The question is why Arendt perceived sovereignty to be one of the determining causes of this political tragedy, apart, of course, from the reasons she

Arendt, *HC*, pp. 235, 245. Pitkin is certainly correct in characterizing Arendt's view on sovereignty as "ambivalent and ambiguous," involving "an inescapable tension" between endorsing the notion of political self-determination while rejecting that of sovereignty. Pitkin, *The Attack of the Blob*, p. 200.

[97] Arendt, *OR*, p. 70.
[98] Arendt, *OR*, p. 153.
[99] Arendt, *OR*, p. 93.
[100] Arendt, *OR*, pp. 156, 94.

had already discussed in her previous writings. Why is it a threat to extraordinary politics? Why does it have to be excluded from spontaneous new beginnings? One way to answer these questions is to revisit her discussion of the origins of sovereignty. Whereas in *The Human Condition* she situated the birth of sovereignty in the ancient Greek *oikos*, she subsequently relocated it in the theological notion of an omnipotent will dating back to the Judeo-Christian origins of Western civilization.[101] In this revised version, sovereignty is defined as the will, understood as *liberum arbitrium* – that is, as both an arbitrary, individual choice among pregiven options and an absolute, transcendental creative power (the divine creator).[102] For Arendt, although the will was "Hebrew in origin," making its appearance for the first time in the Jewish tradition along with the divine lawgiver and his demand for obedience, it was not until Paul that it was elevated to an independent faculty – divine and human alike.[103] The concept of the will was born at the very moment humans were confronted with the tantalizing moral question of whether to voluntarily obey a transcendental law and to freely choose the good instead of evil.[104] In Christianity, rather than in the Greek *oikos*, one finds the real historical birthplace of modern sovereignty as the absolute demiurgical power to create *ex nihilo* and to decide arbitrarily about opposed options without being determined or compelled by external forces.[105] This faculty of the will traveled intact from early Christianity to the organized church and the pope to the absolute king until it finally reached and contaminated the body politic in the form of national and popular sovereignty.[106] This transformation of the carrier of the will culminated, during the French Revolution, in the growth "of a multiheaded monster, a mass that moves as one body and acts as though possessed by one will."[107] It was not only that the sovereign people pulverized in their passage all differences; it was also that the concept of the will, coming from a theological and moral tradition, deified the people, molded according to the attributes of a limitless divine power and located outside human laws.[108]

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[101] Arendt, "On Violence," p. 138.
[102] Arendt, "Willing," p. 208.
[103] Arendt, "Willing," pp. 63, 66; Arendt, *OR*, pp. 188–190, 194, 206.
[104] Arendt, "Willing," p. 68.
[105] Arendt, "Willing," pp. 69, 207–208; Arendt, "What Is Freedom?" p. 161.
[106] Interesting enough, Arendt, once again, comes extremely close to Kelsen's discussion of the will. Like Arendt, Kelsen attributed this demiurgic power of the will to the Judeo-Christian theological tradition. And, like Arendt, he condemned this formulation, reminiscent of her own critique of the will. See Kelsen, "Foundations of Democracy," pp. 19–20.
[107] Arendt, *OR*, p. 94.
[108] Arendt, *OR*, p. 183.

Here Arendt's critique goes beyond the French Revolution. Indeed, it is likely she also had in mind Schmitt and his famous thesis about the theological origins of modern, secular political concepts.[109] From the perspective of his political theology, the democratic-Jacobin "belief that all power comes from the people takes on a meaning similar to the belief that all authoritative power comes from God."[110] But for Arendt, this transposition could not challenge the theological content of absolute monarchical sovereignty and, in fact, it did not break with the metaphysical assumptions associated with a transcendental power.[111] Although this conceptual transposition may have been useful to the revolutionaries in justifying and explaining the extraordinary process of new beginnings, circumventing the problem of infinite regress, it bequeathed them a pernicious legacy that contributed to the failure of their radical endeavor. They were able to explain the genuine institution of a new order by attributing to the sovereign people the absolute will of a demiurgic entity able to create *ex nihilo* new laws without any reference to preestablished causes and determinations. They confronted the problem of new foundations and the enigma of legal origins with the help of the popular will, which they reformulated as a self-originating and supreme legislator and thus as the ultimate ground of politics. This choice had the advantage of enabling them to theorize and account for extraordinary foundings when causal chains and deterministic explanations were cancelled out during juridical breaks:

To the extent that the universe and everything else in it can be traced back to the region of this absolute One-ness, the One-ness is rooted in something that may be beyond the reasoning of temporal men but still possesses a kind of rationale of its own: it can *explain*, give a logical account of, the existentially inexplicable. And the need for explanation is nowhere stronger than in the presence of an unconnected new event breaking into the continuum, the sequence of chronological time.[112]

By locating the popular legislator in a state of nature, the revolutionaries thought that they could settle the problem of beginnings, because "the problem of beginnings is solved through the introduction of a beginner whose own beginnings are no longer subject to question."[113] But the costs of covering up the problem of the origins of new foundations by summoning the fictional image of an omnipotent Creator-People were very high. The view

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[109] Schmitt, *PT*, pp. 36–52.
[110] Schmitt, *CPD*, p. 31.
[111] Arendt, *OR*, p. 155; Arendt, *HC*, p. 17.
[112] Arendt, "Willing," p. 208.
[113] Arendt, *OR*, p. 206.

that "the human legislator – created in God's own image and therefore able to imitate God – when he lays the *foundations* of a human community, [and] creates the condition for all future political life and historical development," was far from being priceless.[114] This fiction undermined the extraordinary politics of the French revolutionaries in three crucial ways.

First, by appropriating the image of a transcendental sovereign creator located outside the realm of its creation, the French revolutionaries produced a dangerous doctrine about the externality of the sovereign from all legal and normative constraints, which in Sieyès's and Schmitt's writings took the particularly alarming version of a constituent sovereign residing in a lawless state of nature.[115] In this formulation, the sovereign will of the people, during extraordinary moments, untied by legal restrictions, operates in a normative and legal vacuum. For Arendt, this removal of all traces of legality from extraordinary politics invites the return of unconstrained force and violence. Lawlessness, insecurity, and legal indeterminacy become the marks of revolution. When the French revolutionaries

said that all power resides in the people, they understood by power a "natural" force whose source and origin lay outside the political realm, a force which in its very violence had been released by the revolution and like a hurricane had swept away all institutions of the *ancien régime*. This force was experienced as superhuman in its strength, and it was seen as the result of the accumulated violence of a multitude outside all bonds and all political organization. The experience of the French Revolution with a people thrown into a "state of nature" left no doubt that the multiplied strength of a multitude could burst forth, under the pressure of misfortune, with a violence which no institutionalized and controlled power could withstand.[116]

For Arendt, the consequences of this conceptualization were to prove perilous for the politics of the extraordinary. Basically, it destroyed the juridical persona of citizens, leaving them naked and defenseless before a mighty collective will. The notion of a legal void meant that all preexisting rights and norms were erased. This void affected the citizens predominantly

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[114] Arendt, "Willing," p. 208; Arendt, *OR*, p. 186.

[115] Arendt, *OR*, pp. 180–181. Arendt, however, never mentions one of the most important motivations behind Sieyès's choice to locate the constituent power in a juridical state of nature. Besides pointing at a theory of democratic legitimacy, Sieyès sought as well to develop a theory of political freedom. As Arendt has shown, this formulation raises many troubling questions. At the same time, Sieyès's attempt is worth noticing because it reveals the tensions between political freedom and the legal system and challenges the conventional liberal view that freedom can exist only within an instituted reality. In a sense, Sieyès's project can be interpreted as an effort to extend the boundaries of the political to accommodate forms of political intervention that overflow the bounds of the legal system. Sieyès, *Qu' est-ce que le Tiers état?* p. 183.

[116] Arendt, *OR*, p. 181.

through the suspension of the habeas corpus and the ensuing guarantee that like cases be treated alike. During those moments of extraordinary politics, the citizens, divested of their rights, helplessly witnessed themselves relapsing into an infernal natural state, "outside the range of law."[117] Suddenly they became the prey of sheer factual revolutionary force. For Arendt, who experienced the rise to power of Nazism and personally witnessed the consequences of "rightlessness," the idea that during founding moments the sovereign remains in a natural state was terrifying.[118] To be stripped of one's rights meant to be completely vulnerable to discretionary violence and indefensible to abuses such as arbitrary arrest.[119] "The great danger arising from the existence of people forced to live outside the common world," she warned, "is that they were thrown back, in the midst of civilization, on their natural giveness, on their mere differentiation," and thus expelled from humanity altogether.[120] Consequently, the "men of the French Revolution," she insisted in her historical analysis, "had no conception of the *persona*, and no respect for the legal personality which is given and guaranteed by the body politic . . . [they] were no longer concerned with the emancipation of citizens, or with equality in the sense that everybody should be equally entitled to his legal personality, to be protected by it and, at the same time, to act almost literally 'through' it."[121] From the perspective of a normless sovereign will, the revolutionary terror can hardly appear as an accidental, isolated phenomenon. It constituted the very core of what the French Revolution was about. By locating the sovereign constituent power in a natural state, the French Revolution reduced the extraordinary to a state of pure lawlessness and inhumanity. The entire society was living "outside the pale of the law."[122]

Based on the conclusions Arendt had reached in her study on totalitarianism, where she declared that "the first essential step on the road to Total Domination is to kill the juridical person in man," it is clear how she must have assessed the French revolutionary experience.[123] Once the existing system of laws was suspended and all preestablished norms were

[117] Arendt, *OR*, p. 107; Arendt, *OT*, pp. 294–295.
[118] Arendt, "The 'Nation of Minorities' and the Stateless People," *OT*, pp. 269–290.
[119] Arendt, *OT*, pp. 295–296. For an excellent discussion of Arendt's ambivalent attitude toward rights, which reveals both the strengths and the limitations of her approach, see Jean Cohen, "Rights and Citizenship in Hannah Arendt. Dilemmas of Arendtian Republicanism," *Constellations*, 3:2 (1996), pp. 164–189.
[120] Arendt, *OT*, pp. 302, 297.
[121] Arendt, *OR*, p. 108.
[122] Arendt, "The 'Nation of Minorities' and the Stateless People," *OT*, p. 277.
[123] Arendt, *OT*, p. 447.

removed, French revolutionary society descended into the chaos of a natural state that "left all inhabitants equally without the protecting mask of a legal personality."[124] As it has been correctly noted, the idea that the politics of the extraordinary takes place in a juridical state of nature fails to "defend the identity and security of individuals in the midst of large scale political transformation."[125] In Arendt's words, "the nation-state cannot exist once its principle of equality before the law has broken down. Without this legal equality, which originally was destined to replace the older laws and orders of the feudal society, the nation dissolves into an anarchic mass of over- and underprivileged individuals."[126] This is what exactly happened to the French Revolution.[127]

Whereas the American revolutionaries "feared the so-called state of nature, the untrod wilderness, unlimited by any boundary, as well as the unlimited initiative of men bound by no law," in the French case this pre-political sovereign culminated in a perverse type of extraordinary politics that turned into sheer discretion and into a pure, natural *factum brutum*.[128] Arendt was keenly concerned with this extralegal dimension of sovereignty that threatened to ensnare the security and liberties of its citizens in a revolutionary fever. In some instances, she even expressed her reservation about whether there is any form of extraordinary politics of new founding that could avoid relapsing into a natural state. In a pessimistic tone she remarked that we "know to our sorrow that freedom has been better preserved in countries where no revolution ever broke out, no matter how outrageous the circumstances of the powers that be, and that there exist more civil liberties even in countries where the revolution was defeated than in those where revolutions have been victorious."[129]

Furthermore, Arendt, echoing Hegel's critique of the notion of the absolute will as "a freedom of the void," whose actualization amounts to "the fury of destruction," was convinced that the notion of a sovereign necessarily entails excessive voluntarism.[130] As pure *voluntas*, the sovereign turns into a fleeting and unstable will, changing constantly according to its unpredictable moods and random wishes. This assumption has been accepted by those jurists who have attempted to capture the singular marks of sovereignty. Hugo Grotius, for instance, in his treatise on war and peace, defined the

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[124] Arendt, *OR*, p. 108.
[125] Arato, "Forms of Constitution Making and Theories of Democracy," p. 226.
[126] Arendt, *OT*, p. 290.
[127] Arendt, *OR*, p. 181.
[128] Arendt, *OR*, p. 167.
[129] Arendt, *OR*, p. 115.
[130] Hegel, *Elements of the Philosophy of Right*, pp. 38–39.

ideal sovereign according to the freedom it has at all times "to change its volition" (*cui voluntatem mutare licet*).[131] Similarly, Spinoza, who like Sieyès and Schmitt located sovereignty in a state of nature, declared that the sovereign "is thus bound to live according to his own laws, not according to anyone else's, and to recognize no man as a judge, or as a superior in religion. Such, in my opinion, is the position of a sovereign, for he may take advice from his fellow-men, but he is not bound to recognize any as a judge, nor anyone besides himself as an arbitrator on any question of right."[132] For John Austin, too, one of the defining characteristics of sovereignty is its ability to "abrogate the law at pleasure." This characteristic, he added, confirms "the position that 'sovereign power is incapable of legal limitation' will hold universally or without exception," and therefore the view of a "Supreme power limited by positive law, is a flat contradiction in terms."[133] But the most vivid formulation remains Hobbes's:

The Soveraign of a Common-wealth, be it an Assembly, or one Man, is not Subject to the Civil Lawes. For having power to make, and repeale Lawes, he may when he pleaseth, free himselfe from that subjection, by repealing those Lawes that trouble him, and making of new; and consequently he was free before. For he is free, that can free when he will: Nor is it possible for any person to be bound to himselfe; because he that can bind, can release; and therefore he that is bound to himselfe onely, is not bound.[134]

Arendt adopted this definition of sovereignty to claim that the "sovereign . . . [is] bound by no universal law and acknowledg[es] nothing superior to itself."[135] Instead, however, of endorsing this emblematic feature of sovereignty, she subjected it to a fierce, relentless critique. She associated this conceptualization of sovereignty with an etiology of the failure of the French Revolution to yield a stable, lasting constitutional order. And for Arendt there was no doubt who to blame: the sovereign popular will. Its shaky and volatile nature was totally antithetical to order and stability. As the sovereign can never limit itself, similarly it can never establish an enduring constitutional order. Consequently, this version of sovereign extraordinary politics is trapped in its own illusionary omnipotence, which

[131] Hugo Grotius, *Le droit de la guerre et de la paix*, Paris: PUF, 1999, book I, chap. 3, para. 7, p. 98.

[132] Benedict de Spinoza, *A Theologico-Political Treatise*, trans. R. H. M. Elwes, New York: Dover Publications, 1951, p. 211.

[133] John Austin, *The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence*, Indianapolis: Hackett, 1998, pp. 255, 254.

[134] Hobbes, *Leviathan*, ed. Richard Tuck, Cambridge: Cambridge University Press, 1992, part II, chap. 26, p. 184.

[135] Arendt, *OT*, p. 230.

was only a concealed impotence. Unregulated and faced with no limita-
tion, unshaped and boundless, the sovereign is vulnerable to its own tran-
sient, fluid dispositions to plunge finally into terror. The shift from the
republic to the popular will, Arendt observed, "meant that the enduring
unity of the future political body was guaranteed not in the worldly insti-
tutions which this people had in common, but in the will of the people
themselves." By seeking to deduce the origins of power from an unstable
sovereign will, the French revolutionaries could do nothing to avoid "the
fateful frailty and faithlessness of revolutionary governments."[136] She con-
cluded this critical remark by forcefully arguing that "the so-called will
of a multitude (if this is to be more than a legal fiction) is ever-changing
by definition, and that a structure built on it as its foundation is built
on quicksand."[137]

   In addition, as the sovereign banishes plural opinions from the political
sphere, the only way it can possibly express itself, apart from violence, is
through inarticulate noises. Contrary to the Constitutional Convention in
Philadelphia, therefore, the French National Assembly manifested itself only
through "the hissing or applauding galleries which attended the delibera-
tions . . . [and which] were the valid expression of the constituent, or even
the consenting, power of the people."[138] Here, Arendt could have as well
been attacking Schmitt's argument that the constituent sovereign will can
express itself only by acclamation. In her discussion of the genealogy of
the will, she claimed that in the Judeo-Christian tradition the concept of
free will corresponds to the individual, arbitrary, inward faculty of saying
no or yes to a set of predetermined choices.[139] Contrary to the American
revolutionaries who "knew that the public realm in a republic was con-
stituted by an exchange of opinion between equals, and that this realm
would simply disappear the very moment an exchange became superflu-
ous because all equals happened to be of the same opinion," their French
counterparts were facing constitutional failure after failure.[140] The down-
fall of the Constitution of 1791 "was followed in quick succession by one
constitution after another until, in an avalanche of constitutions lasting
deep into our century, the very notion of constitution disintegrated beyond
recognition."[141]

[136] Arendt, *OR*, p. 77.
[137] Arendt, *OR*, p. 163.
[138] Arendt, *OR*, p. 125.
[139] Arendt, "Willing," p. 83.
[140] Arendt, *OR*, pp. 93, 144, 159.
[141] Arendt, *OR*, p. 125.

Arendt blames Rousseau's intellectual and political legacy for this out-
come, because his theory of popular sovereignty that located the formation
of political opinions in the private sphere of the isolated individual dodges
public communication and argumentation.[142] But, interestingly enough, she
also pointed to Schmitt's constitutional theory and to his decisionistic politics
of speechlessness. In a suggestive footnote placed at the end of a sentence on
the frailty and instability of the sovereign will, she commented on Schmitt's
notion of sovereignty with the observation that "Carl Schmitt is the most
able defender of the notion of sovereignty. He recognizes clearly that the
root of sovereignty is the will: Sovereign is who wills and commands."[143]

Finally, Arendt's views are also critical of Schmitt's definition of the
sovereign as the one who decides on the friend-enemy distinction.[144] For
Arendt, this aspect of sovereignty becomes particularly dreadful during rev-
olutionary moments. In her discussion of Robespierre, she not only casti-
gated his moral purism but also pointed to the exclusionary consequences of
the transformation of extraordinary politics into war. This militarization of
the political, which is inherently inscribed in the very flesh of the sovereign
popular will, becomes a predominant trend in this version of revolutionary
constitutional politics. One reason, of course, has to do with the exclusion-
ary effects of sovereignty as such, which arise out of its relations of com-
mand and obedience. Sovereignty can have only inegalitarian consequences
because of the hierarchical and asymmetrical relation between rulers and
ruled. The concept of sovereignty, she argued, much like Michel Foucault,
presupposes a zero-sum game and a quantitative notion of power.[145] Either
one possesses power and is sovereign or one remains a powerless subject
in a situation of subordination and subjection. This formulation, Arendt
added, is based on "the insight that the freedom of one man, or a group,
or a body politic can be purchased only at the price of the freedom, i.e.,
the sovereignty, of all others."[146] This binary, oppositional logic is partic-
ularly worrisome in revolutions, transforming the extraordinary politics of

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[142] Arendt, "What Is Freedom?" p. 163.

[143] Arendt, "What Is Freedom?" p. 296n21. Of course, Arendt fails to see the significant differ-
ences between Rousseau's and Schmitt's notions of sovereignty, particularly the instituting
dimension of the latter. Schmitt's version fuses the legislator and the people instead of
keeping them separate, as Rousseau did.

[144] Schmitt, *CP*, p. 39. Jeremy Waldron misses this aspect of Arendt's theory when he asserts
that she relied on a Schmittian understanding of enmity. Waldron, "Arendt's Constitutional
Politics," p. 206. For an illuminating discussion of Arendt's rejection of the friend-enemy
distinction, see Dana R. Villa, *Politics, Philosophy, Terror: Essays on the Thought of
Hannah Arendt*, Princeton: Princeton University Press, 1999, pp. 81, 109, 123.

[145] Arendt, *HC*, p. 200.

[146] Arendt, *OR*, p. 164.

foundings from a cooperative activity to institute and organize a new struc-
ture of power into a military conflict for the annihilation of one's enemies.
The example of the French Revolution is again exemplary. It "disintegrated
into war, into civil war within . . . and with it the newly won but never duly
constituted power of the people disintegrated into chaos and violence." Pol-
itics became a "battlefield" and "it was violence and not power, that was to
turn the scale."[147]

Equally important is how Arendt associated this exclusionary dimension
of sovereignty with constitutional politics. Only by postulating an "Other,"
an enemy, can the idea of sovereignty as one and indivisible be consoli-
dated.[148] The quest for homogeneity logically leads to the penalization and
incrimination of plurality and differences so that, on the one hand, they are
perceived as real, concrete threats that fragment and weaken the supreme
sovereign and, on the other, they justify the suppression of any form of
dissent and disagreement whenever there is a potential threat of dissolu-
tion. Like countries at war, France during the revolution could not tolerate
dissension and criticisms. It had to assume perfect uniformity of beliefs as
the necessary condition for the revolution's success. This invocation of an
enemy, according to Arendt, explains why the French Revolution experi-
enced such a high intensity of violence and terror. In an effort to ground
popular sovereignty on a stable and secure footing, the revolutionaries pos-
tulated a real or imaginary enemy that they had to annihilate. What is
even more troubling is that they did not limit themselves to the inquisi-
tive search for external enemies but, by extending this oppositional logic
to its ultimate consequences, they discovered that the enemy could well be
within each apparently virtuous citizen. Schmitt's friend-enemy distinction
became internalized. Such was the case, Arendt claims, with Rousseau and
his devoted disciple Robespierre, who thought that "such an enemy existed
within the breasts of each citizen, namely, in his particular will and interest;
the point of the matter was that this hidden particular enemy could rise to
the rank of a common enemy – unifying the nation from within – if one
added up all particular wills and interests."[149] By way of concluding this
presentation of Arendt's critique of popular sovereignty, it can be said that,
from her own singular perspective, the grammar of sovereignty is violence,
while its syntax is discretion and arbitrariness.[150]

[147] Arendt, *OR*, p. 91.
[148] Arendt, *OR*, p. 77.
[149] Arendt, *OR*, p. 78.
[150] Arendt, *OR*, p. 175.

These Impossible Absolute Beginnings

Arendt, Bonnie Honig argues, "seeks in the American Declaration and founding a moment of perfect legitimacy."[151] If Honig is correct, there would not be much difference between Schmitt's version of constitutional politics and Arendt's republican politics of founding, apart from perhaps their contrasting views on sovereignty and the popular will. But did Arendt elaborate a theory of "pure legitimacy"?[152] I do not think so. Aware as she may have been of the impasses and dangers inherent in Schmitt's attempt to develop a pure theory of democratic legitimacy, Arendt kept a distance from such a formulation. She did so by repudiating the notion of an *ex nihilo* constitutional creation as well as the identification of the extraordinary with an absolute break and a total legal hiatus irrevocably separating the past from the present. The relative success and durability of the American Revolution provided her with the appropriate historical material and conceptual resources to explore an alternative theory of the extraordinary. For Arendt, while the possibility of a new spontaneous beginning signifies a break from the preestablished political, institutional, and legal order, it does not correspond to an absolute rupture. In her interpretation of the failure of the French Revolution, she directly blamed, along with sovereignty, the apocalyptic fiction of a total break and the eschatological faith in the possibility of an entirely new beginning.[153]

Arendt's critique of an absolute beginning took a variety of forms and was vested in different arguments. Despite some noticeable variations, all of her critical observations were informed by a broader understanding that absolute breaks, besides being politically dangerous and unsuccessful, are ultimately nonsensical and hopelessly implausible. The idea that something can emerge out of a complete eradication of the past or, respectively, that something can be exclusively constructed on an institutional and legal *tabula rasa* without any preestablished support was to Arendt a deeply misleading illusion.[154] "No man begins *ab novo*," she resolutely asserted while discussing the notion of history as alterity, because "man's capacity for change" is not boundless.[155] Once again, she traced the fallacy of a total rupture back to the Judeo-Christian tradition and the metaphysical doctrine of a divine

[151] Honig, *Political Theory and the Displacement of Politics*, pp. 107, 9.
[152] Honig, *Political Theory and the Displacement of Politics*, p. 107.
[153] Arendt, "Willing," p. 205; Arato, "Forms of Constitution Making and Theories of Democracy," pp. 209–210.
[154] Arendt, "What Is Authority?" p. 141.
[155] Hannah Arendt, "Civil Disobedience," *CR*, pp. 79, 78.

power interrupting time and dividing world history before and after God's interventions. To this tradition that survived intact in modern times, though in an inverted secular form, she counterposed the Roman experience and the idea of reenactment and renewal.[156] In any case, and aside from the question of the historical and conceptual origins of the belief in a "legendary hiatus," action cannot take place in a temporal vacuum.[157] Absolute nothingness and total contingency do not exist.[158] A beginning exists only in relation to something that antedates it. Extraordinary politics presupposes and depends upon ordinary politics, without which it would neither be possible nor make any sense at all.

For this reason, Arendt did not see any contradiction between her theory of freedom as an unpredictable, spontaneous beginning "determined by its own nature and obeying its own laws" and her critique of absolute *ex nihilo* foundings.[159] To be sure, she sometimes used the misleading expressions of "altogether new" and "absolute novelty" to describe the instituting character of extraordinary politics, giving thus the impression that she may have affirmed total new beginnings.[160] As her arguments unfold, however, it becomes clear that she did not equate spontaneity with pure contingency. Spontaneity is not threatened by a minimum of continuity or by the institutional and legal traces of the previous order. Threats to freedom are causality and determinacy and the corresponding idea that something exists only insofar as it has been caused and determined by something antecedent to it. That the new can appear within a preexisting framework does not mean that it ceases to be spontaneous. For instance, that the "new always happens against the overwhelming odds of statistical laws and their probability, which for all practical, everyday purposes amounts to certainty," does not mean that the new appears outside these laws. Rather it emerges in relationship with them, even if this relation is a negative and reactive one.[161]

A new beginning emerges from within and against the ordinary. In this case, the emergence of the new remains an accidental event because the elements, relations, and figures composing the surrounding framework do not determine or control its unpredictable occurrence. Rather, they provide the matrix within which any such event can meaningfully take place. In the case of an absolute break, the event itself – decontextualized and dehistoricized – would have remained unintelligible and incomprehensible from the point of

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[156] Arendt, "Willing," pp. 203–205, 211; Arendt, "What Is Authority?" p. 140.
[157] Arendt, "Willing," p. 204.
[158] Arendt, "Willing," p. 146.
[159] Arendt, "Willing," p. 62.
[160] Arendt, *OR*, pp. 21, 212.
[161] Arendt, *HC*, p. 178.

view of its actors as well as its spectators, who would have lacked the cognitive and evaluative means to assess its singularity. A preestablished context not only provides the available means to address the issues of self-limitation and stability but also generates the necessary underlying cognitive map with which historical actors can locate their enterprise and become conscious of its unique and out-of-the-ordinary significance. The idea of a singular, spontaneous event loses its singularity once detemporalized and severed from its background horizon of meanings. Without such a horizon, there is no way of ascertaining the singularity of a phenomenon, simply because there are no standards of measurement to assess and judge its uniqueness in relation to the norm and the ordinary. In a void, no comparisons, distinctions, and evaluations can ever be made. Everything melts into an indistinct, fuzzy, eternal sameness. In Arendt's words, to think of an absolute beginning is "thinking the unthinkable."[162]

In a telling sentence, she captured this aporetic dimension of absolute beginnings that dispenses from any preexisting order, succumbing to what she so eloquently depicted as the "'melancholy haphazardness' of the particular."[163] She reproached Kant for failing to distinguish between absolute and relative beginnings, a distinction that Saint Augustine had drawn in terms of the difference between "the *principium* of the Heaven and the Earth and the *initium* of Man."[164] Developing this insight further, Arendt concluded that a "characteristic of human action is that it always begins something new, and this does not mean that it is ever permitted to start *ab ovo*, to create *ex nihilo*."[165]

Aside from these important philosophical reflections on the absurdity of absolute beginnings, Arendt was also deeply concerned about the dangers lurking behind this Promethean depiction of cataclysmic breaks. She mainly identified, through her comparative discussion of the French and American revolutions, two such dangers: the violence prowling behind any act of pure rupture; and the paradoxical outcome of an absolute founding, which, though it claims to irreversibly break with the past, usually ends up with a counterrevolution or a restoration and a return to the old order of things.

One of the most vital factors behind the American success that Arendt repeatedly stressed was the absence of such a belief in absolute ruptures. This absence was due to the fact that, for Arendt, the American Revolution was closer to the Roman tradition and the republican legacy than to the

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[162] Arendt, "Willing," p. 208.
[163] Arendt, "The Concept of History," p. 89.
[164] Arendt, "Willing," p. 110.
[165] Hannah Arendt, "Lying in Politics," *CR*, p. 5.

Judeo-Christian heritage. This permitted the American revolutionaries to avoid the violence associated with absolute *ex nihilo* foundings. As she suggested, "there existed no gap, no hiatus, hardly a breathing spell between the war of liberation, the fight of independence which was the condition of freedom, and the constitution of the new state."[166] Moreover, the Declaration of Independence and the framing of the Constitution, rather than claiming to be *ex novo*, simply

> confirmed and legalized an already existing body politic rather than made it anew. Thus the actors of the American Revolution were spared the effort of "initiating a new order of things" altogether; that is, they were spared the one action of which Machiavelli once said that "there is nothing more difficult to carry out nor more doubtful of success, nor more dangerous to handle."[167]

Arendt's qualm with total beginnings is informed by their intrinsic relationship to violence.[168] She developed this argument by exploring the consequences of imputing into foundings the category of fabrication and by replacing action (*praxis*) with making (*poiesis*). This transformation necessarily generates violence and coercion. The idea of an absolute founding sublimates the political community into a demiurgic artist or a potent dictator, both of which aspire to redesign from the beginning the legal, institutional, and political structure of society.[169] By reducing politics to the activity of making, the French revolutionaries made extensive use of instrumental rationality and of the means-ends logic. They fashioned themselves in the image of "architects," who, dispensing with speech and deed, constructed a new polity in a way similar to that of an artist who creates a new work of art.[170] Apart from the fact that the equation of politics with fabrication is a nonpolitical undertaking, whereby the initial plan exists only in the mind of a silent creator outside the public realm of appearances, persuasion, and joint action, it also invites violence, as it is transmuted into an act of coercion exercised upon the living material of a human community in order to yield something completely new, namely, to fit reality within the rigid patterns of a grand intellectual design.[171] Robespierre and the Jacobins, precisely because they distanced themselves from the practice of relative foundings and sought to achieve a full rupture with the past, "understood the act of

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[166] Arendt, "Willing," p. 141.
[167] Arendt, "What Is Authority?" pp. 140–141.
[168] Arendt, *OR*, pp. 20, 37, 39.
[169] For the relationship among absolute foundings, the paradigm of making, and tyranny, see Arendt, "What Is Authority?" p. 112.
[170] Arendt, *OR*, p. 208.
[171] Arendt, *HC*, pp. 227, 305–306; Arendt, "What Is Authority?" p. 111.

founding entirely in the image of making; the question to them was literally how to 'make' a unified or a French republic, and their justification of violence was guided by and received its inherent plausibility from the underlying argument: You cannot make a table without killing trees, you cannot make an omelet without breaking eggs, you cannot make a republic without killing people."[172]

That the American revolutionaries were able to avoid the language and practice of absolute ruptures was due to the fact that they relied on a preexisting legal layer composed of royal and company charters, common law, and colonial pacts, which remained intact during the entire period of political foundation.[173] By refusing to eliminate them, the American revolutionaries remained within the law even during such exceptional moments.[174] They escaped the lawlessness and power vacuum that a complete break would have necessarily created.[175] The preexisting legality was not broken; it was used as a foothold to secure the new beginning. Hence, the new was born neither out of a total break from the past nor as a simple smooth, natural evolution or organic growth. It unexpectedly emerged out of the traces of past legal practices and relations to become an independent reality of its own. In James Madison's formulation, the survival of colonial law and statutes "obviate[d] pretexts that the separation from G. Britain threw us into a State of nature and abolished all civil rights and Obligations."[176] As the metaphor of natality suggests, a relative beginning signifies that "in each instance something new comes into an already existing world."[177]

In addition, the American revolutionaries also relied on the existence of public bodies of self-government that preceded the revolution. By maintaining these participatory public spaces, they were able to discuss, debate, disagree, persuade each other, deliberate, and agree on common issues without resorting to violence. These dispersed spaces of freedom and appearance provided the framework for speech and deed and, thus, for contest and cooperation, which formed the agonistic and communicative fabric that sustained the process of extraordinary politics by generating the necessary power to

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[172] Arendt, "What Is Authority?" p. 139; Hannah Arendt, "The Eggs Speak Up," *EU*, pp. 270–284. For this reason and to avoid these consequences, Arendt at times argued, although inconclusively, that action should not be confused with creation and creativity. Arendt, *HC*, p. 296; Arendt, "Willing," p. 217.

[173] Arendt, *OR*, pp. 168, 177–178.

[174] Arendt, *OR*, p. 92.

[175] Arendt, *OR*, p. 148.

[176] James Madison, "Letter to George Washington, Oct. 18, 1787," in *Writings*, ed. Jack Rakove, New York: Library of America, 1999, p. 141.

[177] Arendt, "What Is Freedom?" p. 167.

carry it out.[178] Here, Arendt's arguments evoke Montesquieu, because without these preconstituted public realms, which an absolute beginning would have destroyed as the French did by dissolving all intermediate self-organized political bodies into an amorphous mass, the Americans would likely have succumbed to similar power struggles and internecine fights.

This argument is extremely illuminating for one additional reason. It shows that Arendt did not dismiss the notion of the constituent power as it has been argued.[179] As Negri has correctly pointed out, "Arendt has given us the clearest image of constituent power in its radicalness and strength."[180] She rejected Sieyès's (and Schmitt's) version of constituent power, which she had identified with the sovereign nation or a popular will and located it in a lawless natural state. Contrary to this version, she sought to decenter the constituent power by relocating it within a multitude of participatory public spaces. The uniqueness of the American Revolution, she claimed, was derived from the fact "that there never was any serious questioning of the *pouvoir constituant* of those who framed the state constitutions."[181] Instead of seeking to replace the extensive and plural quality of the constituent power with an absolute, normless will, the American revolutionaries accepted and integrated into their federal system its multiple sites, in "a number of subordinate, duly authorized bodies – districts, counties, townships."[182] By doing so, the Americans accomplished two things: first, they effectively uncoupled the constituent power from sovereignty, relocating it in multiple preconstituted assemblies; and, second, they tied it to processes of deliberation, mutual persuasion, and public dialogue, that is, to processes of discursive opinion formation and decision making.[183]

The thrust of this argument is indeed remarkable. Arendt did not criticize the French Revolution and Sieyès (or Schmitt) for imposing their doctrine of

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[178] Arendt, *OR*, pp. 168, 175–176.
[179] Here I strongly disagree with Alan Keenan's argument that Arendt rejected altogether the notion of the *pouvoir constituant* as being inexorably tied to the concept of the national will. Although he is right to stress Arendt's disagreement with the constituent power *qua* national will, he is wrong when he claims that she dismissed the constituent power as such. As I see it, Arendt sought to reformulate and reconceptualize the content, scope, and location of the constituent power so as to save its radical potentialities for political freedom, which she thought were obliterated by Sieyès's (and probably by Schmitt's) version. Alain Keenan, "Promises, Promises. The Abyss of Freedom and the Loss of the Political in the Work of Hannah Arendt," *Political Theory*, 22:2 (1994), p. 310.
[180] Negri, *Insurgencies*, p. 19.
[181] Arendt, *OR*, p. 165.
[182] Arendt, *OR*, p. 165.
[183] Arato, *Civil Society, Constitution, and Legitimacy*, p. 39.

the constituent power upon the revolutionary events. Rather, she reproached them for perverting and thus destroying the idea of the constituent power. By deifying and severing it from public spaces, they misused and wasted its instituting potentialities. As she forcefully affirmed, "Had the Federal Convention, instead of creating and constituting the new Federal power, chosen to curtail and abolish state powers, the founders would have met immediately the perplexities of their French colleagues; they would have lost their *pouvoir constituant*."[184] But they did not. In fact, with this argument, Arendt asserted that not only were the American revolutionaries able to keep intact and effective the constituent power, but they also avoided the vicious circle of foundational politics. By salvaging the constituent power, they salvaged extraordinary politics.[185] Her attitude toward the constituent power is in complete accord with her singular notion of power. Recall that, for Arendt, power is generated only "where word and deed have not parted company."[186] And this is one of the main functions of preconstituted political bodies: they composed the public framework within which the revolutionaries were able to meet, discuss, debate, and act and thus to generate constituent power, that is, the power to constitute a government and its laws.[187]

For Arendt, the constituent power is effective only when it is firmly located in extraconstitutional public spaces. The idea that it is situated in a state of nature in a sovereign form, composed of a formless multitude of isolated and speechless individuals, is either a contradiction in terms that cannot account for the sources of this power or a mere rhetorical device that, while acknowledging the existence of the constituent power, ultimately destroys it by severing it from mutual relations of persuasion. To Arendt, the idea that the constituent power is in a state of nature must have sounded more like a euphemism instead of a sincere and principled espousal of its radical potentialities. To invoke the constituent power while rejecting the vibrant self-organized political bodies with which this power can become an actuality amounts to undermining the politics of the extraordinary as such. At the same time, however, she was cautious to distinguish her own position from a simple reformist or evolutionary argument that could threaten her notion of new beginning. For this reason, she insisted, drawing nearer to Schmitt this time via the writings of Thomas Paine, that the constituent power, although

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[184] Arendt, *OR*, p. 165.
[185] Arendt, *OR*, p. 166.
[186] Arendt, *HC*, p. 200.
[187] Arendt, *OR*, p. 145.

it should be located in preconstituted public bodies, still remains antecedent and prior to the constitutional order: "The space of appearance comes into being whenever men are together in the manner of speech and action, and therefore *predates and precedes all formal constitution of the public realm and the various forms of government*, that is, the various forms in which the government can be organized."[188]

Thus, whereas the constituent power is outside the constitution and prior to a particular governmental form, it does not find itself in a prepolitical natural state. This means that, first, Arendt tenuously refused to conflate all politics with institutionalized politics, avoiding the liberal juridification of the political and the reification of the constitution; and, second, she avoided the mistake of reducing all extraconstitutional politics to a legal and institutional vacuum. The "organized multitude" exists outside the state but does not dwell in a natural condition.[189] In this sense, Arendt opted for Locke's version of an intermediary original community situated between the natural and the political state against Hobbes's clear-cut distinction between the prepolitical and the political. This aspect of Arendt's critique of absolute beginnings is impressive. She seeks to demonstrate not only that a total beginning is unintelligible, dangerous, violent, and ultimately impossible but also that it fails to resolve the perplexities of the extraordinary politics of new foundings. Approached as a theorist of relative new beginnings, her critique of the French Revolution is better understood. For instance, in Schmitt's vein but with a different reasoning, she castigated the deputies of the French National Constituent Assembly for seeking to monopolize the constituent power "instead of taking their resolutions and deliberations back to the people, cut[ing] adrift themselves from their constituent powers."[190]

The second part of Arendt's critique of absolute founding points to its hopeless futility. Although it might seem to represent an irreversible break with the past, it is usually followed by a counterrevolution or a restoration: "It is well known that the most radical revolutionary will become conservative on the day after the revolution."[191] Unfortunately, she did not devote much time in elucidating the causes of this failure. Even so, the thrust of her analysis is clear: most revolutions since the French have gone wrong because, among other things, they were conceived as *ex nihilo* foundings.[192]

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[188] Arendt, *HC*, p. 199 (emphasis added).
[189] Arendt, *OR*, p. 166.
[190] Arendt, *OR*, p. 126.
[191] Arendt, "Civil Disobedience," p. 78.
[192] Arendt, "What Is Authority?" p. 141.

Along with this idea of a complete rupture comes the fact that "there is nothing left for the 'beginner' to hold on to."[193] As the new regime aspires to be born out of nothingness, it does not find any concrete support that could sustain it. Its foundations are suspended in an institutional, historical, and legal vacuum, in the void created by an absolute rift opened up between the "no-longer" and the "not-yet."[194] Instability and ultimately collapse are what one can expect of such a new regime, insofar as "the beginning has, as it were, nothing whatsoever to hold on to; it is as though it came out of nowhere in either time or space."[195] The politics of absolute beginning is tragically fragile. The impulse to derive the new from an ontological emptiness accounts for the evanescent, short-lived prospects of new constitutions. As power is severed from its discursive anchors in preestablished public realms, the extraordinary dissolves into the abyss it has prepared from itself. Negating all preexisting reality, it ultimately negates itself. For Arendt, pure legitimacy, *pace* Schmitt, can never generate a viable system of legality; it will be sucked back into the void from which it tried to emerge. Absolute beginnings are dangerously close to absolute nothingness. Thus, they represent a painful passage to restoration and to the affirmation of the old order of things. Arendt's underdeveloped insights can be illuminated by what Albert Hirschman, relying on Tocqueville, has nicely described as the "futility thesis."[196] Seen from Hirschman's perspective, Arendt's critique can be rephrased as suggesting that the more a revolution aspires to a total break with the past, the more likely it is that this past will return in one form or another. As if because of an inescapable law of gravity that pulls them back, *ex nihilo* beginnings are ironically transformed into a reaffirmation of the past. With this paradoxical dialectic, they are nothing less than mere continuity: *plus ça change plus c'est la même chose.*[197]

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[193] Arendt, "Willing," p. 208.
[194] Arendt, *OR*, p. 205; Arendt, "Willing," p. 203.
[195] Arendt, *OR*, p. 206; Arendt, "On Humanity in Dark Times," p. 11.
[196] Albert O. Hirschman, *The Rhetoric of Reaction: Perversity, Futility, Jeopardy*, Cambridge, Mass.: Harvard University Press, 1991.
[197] Hirschman, *The Rhetoric of Reaction*, p. 43.

8

Extraordinary Beginnings II

Arendt's Response to Schmitt

Arendt's critique of absolute beginnings is both ingenious and extremely suggestive in clarifying the perplexities of a pure theory of political foundings. It is not itself, however, free from its own ambiguities. She acknowledged that the problem of arbitrariness is not exclusively confined to total breaks. This problem haunts all extraordinary politics, "because beginning's very nature is to carry in itself an element of complete arbitrariness."[1] Freedom's futile character, what she called "the abyss of freedom," is inscribed in the very nature of the act to constitute. Even if one dispenses with the eschatological myth of a full rupture, one is still confronted with the unavoidable arbitrariness inherent in all extraordinary projects. Freedom, for Arendt, has its own perils: "The frightening arbitrariness with which we are confronted whenever we decide to embark upon this type of action, which is the exact counterpart of consistent logical processes, is more obvious in the political than in the natural realm."[2]

This means that extraordinary politics – absolute or relative – not only is arbitrary, boundless, and unpredictable; it is also deeply unstable and fragile.[3] As she admitted, "the capacity to act is the most dangerous of all human abilities and possibilities."[4] Even if we dispense with the theological fantasy of an eschatological break, we are still confronted with the problem of arbitrariness. Free action can have perverse effects because it is by definition groundless and indeterminate. Its purity and autonomy, which she so passionately defended, are simultaneously the causes of its brevity and

[1] Arendt, "Willing," p. 207.
[2] Arendt, "The Concept of History," p. 88.
[3] Arendt, *HC*, p. 195.
[4] Arendt, "The Concept of History," p. 63.

frailty. Arendt faced directly this predicament that haunts extraordinary beginnings.

I now focus on her explicit responses to this predicament and explore their relevance for rethinking the category of the extraordinary. Arendt made two crucial, interrelated moves that need to be carefully investigated before any assessment is made of her politics of constitutional beginnings. First, she replaced Schmitt's decisionistic model of constitutional politics with her own contractarian version of an original, horizontal founding contract; and, second, she sought to deduce a normative principle from the very act of constitutional politics rather than from external, nonpolitical sources.

The Founding Compact

In contrast to Schmitt's decisionistic, sovereign popular foundings, Arendt explored an alternative model of extraordinary constitutional making that relies heavily on the tradition of social contract theory. Her investigations were based on a historical reconstruction of the North American colonial experience of the first settlers and on her own theory of promises, which she first formulated in *The Human Condition*. By inserting this historical precedent into her broader theoretical framework, she sought to avoid the flaws and excesses of the French Revolution, while, at the same time, escaping the need to appeal to either the authority of the past or the paradigm of fabrication. Indeed, the human faculty to make binding promises points to a potential source of stability and permanence – based on reciprocity and mutuality – that differs from both the command-obedience relationship and the category of making.[5]

As opposed to the muteness and instrumentality of making, promises are directly related to speech, argumentation, and cooperation among diverse individuals.[6] They are integral to the public, egalitarian, and dialogical form of action.[7] In addition to respecting differences and plurality (in fact, they emerge out of plurality itself), the binding force of mutual promises yields a permanent and firm institutional and legal order. For this reason Arendt considered the faculty of promises as one of the most important practices for counteracting the abyss of freedom and the risks of arbitrariness involved in action, especially in those risky, indeterminate moments of new constitutional beginnings. Moreover, although power emerges spontaneously each

[5] Arendt, *HC*, p. 245.
[6] Arendt, *OR*, p. 86.
[7] Arendt, *OR*, p. 170.

time individuals gather together in public to act in concert, it remains, like Weber's charisma, in a *status nascendi*.[8] Power is episodic and evanescent by nature. It is vulnerable to and dependent upon the contingent and spontaneous nature of human action. In the faculty of making promises, Arendt sees an indispensable capacity for stabilizing and preserving power. Promises cement joint action, prevent extraordinary politics from degenerating into sheer arbitrariness, and protect the newfound spaces of appearances from unpredictability.[9]

Arendt was fully aware that, even if new beginnings do not constitute absolute breaks, they are still affected by the absence of a fixed and predictable institutional framework and the lack of a juridical protective wall. After all, they still represent a radical rupture with the past, even if it is a relative one. Founding moments are always immersed in indeterminacy. Even if during extraordinary transformations actors are not necessarily thrown back into a lawless natural state of mere, naked life, they still are intimidated by what she so eloquently described as the surrounding ocean of instability and uncertainty. Her discussion of the Mayflower Compact is very revealing in this sense. The journey from the old continent to new unexplored lands, from one side of the Atlantic to the other, exemplifies the unpredictable potentialities as well as the hidden dangers of any new beginning. This historical event takes on symbolic proportions in her narrative that go far beyond the historical colonization of North America. The geographical passage across the ocean to new, unfamiliar territories illustrates metaphorically the symbolic and political rupture occurring between the past and the future, the rift that extraordinary initiatives open between the old and the new (world).

As with the first settlers, modern revolutionaries were faced with the specter of the wilderness of a state of nature, unlimited by any boundary or law.[10] Political and constitutional beginnings are characterized by the same fears and expectations as the experience of populating the new, uncharted colonies. Both events face a lack of a stable and predictable institutional, legal framework. The founders, like the first settlers, had to rely mostly on their own powers. Their deeds were dangerously boundless and unpredictable.[11] It would be unrealistic to expect them to orient their interaction successfully without the guidance of some clear and general norms

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[8] Arendt, *HC*, pp. 199–202.
[9] Arendt, *HC*, pp. 244–245.
[10] Arendt, *OR*, p. 167.
[11] Arendt, *HC*, pp. 233, 244.

or traditional practices that regulate social coordination and bestow some predictability and consistency upon human intercourse.[12] For the revolutionaries of the eighteenth century, as for the settlers before them, there was an urgent need to find how to be relieved from the unavoidable but menacing contingency of their founding freedom.

For Arendt, this is precisely one of the major tasks of extraordinary politics. Along with the generation of (constituent) power, it must also generate its own stability, without however relinquishing the radical freedom of the actors and the original novelty of their endeavors. What might be their response to such an exceptional situation? How can they seek to extricate themselves from this unpredictability? How might they be able to construct a new political order and reach some islands of stability?[13] To answer these strenuous questions, Arendt revisited the Mayflower Compact, which for her symbolized the original, generic experience of "enactment," "constitution making," and "framing," and seventeenth-century social contract theories, initiating thus a critical, constructive dialogue with the legacies of Hobbes and Locke.[14]

In Arendt's view, there are two likely solutions to the problem of secular beginnings, which evoke two different versions of the social contract. Extraordinary politics can take the form either of "mastery which relies on domination of one's self and rule over others" or "of the faculty of promising . . . [that] corresponds exactly to the existence of a freedom which was given under the condition of non-sovereignty."[15] The first option points to a Hobbesian covenant, whereas the second approximates a Lockean founding contract. In the first case, the contract is concluded among isolated, self-interested, egocentric individuals with the aim of transferring power to a third party outside the contract: the ruler. The goal is to legitimize the formation of the state as a centrally organized political power. Individuals surrender all their rights, except the right to life, to a higher, external authority in return for peace and security.[16] In the second instance, the contract is concluded among the individuals themselves who are already members of informal associations, enmeshed in webs of social relations. Locke, following Samuel Pufendorf, evoked a two-staged contract to account for the formation of "civil society" – the original community – located after the

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[12] Arendt, *HC,* p. 244.
[13] Arendt, *HC*, p. 244.
[14] Arendt, *OR*, p. 167; Arendt, "Civil Disobedience," p. 85.
[15] Arendt, *HC*, pp. 244, 245.
[16] Arendt, "Civil Disobedience," p. 86.

natural state but prior to the formation of government. Locke's social contract is therefore more symmetrical and horizontal than Hobbes's, because it allows for mutual promises among free and equal individuals without the appeal to a third external party and outside the political state.[17] It potentially has also a more egalitarian character because of the reciprocal relations among coassociates who voluntarily agree to constitute a new community, to delimit the legitimate scope of the political, and to agree on some fundamental rules that will regulate their interactions during ordinary times.[18] A new body politic is predicated on the ability of individuals to reach a founding agreement about the form of government without having to renounce all of their freedoms to an absolute ruler. The agreement is concluded among a plurality of individuals, already immersed in various groups, affiliations, and relationships and united by the desire to live together in a stable political order that will preserve and defend their three unalienable, natural rights.

Of course, her stance toward the social contract tradition is far from uncritical. Although she was certainly attracted to Locke's contractarian model for refusing to deduce the political order from a completely normless natural state and for leaning toward a more symmetrical and egalitarian form of agreement, she nonetheless distanced herself from both versions.[19] Arendt's founding contract does not aim to secure the private benefits or individual rights of the contracting parties.[20] The foundation of a republican constitutional order is not predicated on the protection of certain negative liberties or on the institutionalization of prepolitical natural rights. For Arendt, the molding of the political order according to some unalienable human rights reduces the political to the prepolitical and the artificial to the natural. It thus instrumentalizes the legal system, which becomes a means for the satisfaction of private interests. It also reduces politics to a sheer procedural mechanism for safeguarding mere life against the allegedly threatening tendencies of power.[21] Arendt does not share this instrumentalization of the political as a means for the safe realization of bare life and private ends. To the contract of "liberation" (negative liberties), she juxtaposed the contract of "freedom" (positive liberties).[22] Her version is a consensual contract to participate in government. This appropriation of the juridical device of contractarianism does not necessarily confine Arendt to a liberal framework,

[17] Arendt, "Civil Disobedience," p. 86.
[18] Arendt, *OR*, pp. 169–170.
[19] Arendt, *OR*, pp. 170, 171.
[20] Gottsegen, *The Political Thought of Hannah Arendt*, p. 123.
[21] Arendt, "What Is Freedom?" p. 155.
[22] Arendt, *OR*, pp. 32–33.

as, for instance, Negri argues.[23] Rather, she belongs in a broader republican tradition that has sought to appropriate the contractarian discourse for establishing the priority of political freedom.

Furthermore, Arendt opposed traditional contractarianism for adopting (implicitly or explicitly) a utilitarian, strategic model of individual action. What appears politically legitimate is a unanimous consent based on the pragmatic decisions of rational egoists and their success-oriented attitude. In this case, the founding political compact is divested of its extraordinary character and political form and reduced to an ordinary civil act that is similar to a private contract or an economic exchange relation among market-oriented individuals. The extraordinary becomes the simulacra of the normal. Whether Arendt is relying here on Hegel's critique of the social contract or on the civic-republican tradition remains an open question worthy of a study of its own.[24] What is obvious, however, is that she strongly disagreed with a depiction of the original, constituting agreement along the lines of a civil contract, which was basically applied in exchange relations and meant to regulate the interactions among private, possessive owners.[25] Contrary to this tradition, Arendt juxtaposed an alternative theory of the social contract according to which the contracting actors seek consent through speech, debate, persuasion, and reasoning.[26]

This version stresses the pivotal role of deliberation and argumentation among individuals involved jointly in a common project that aims at reaching a normative rather than a prudential agreement regarding the basic structure of society, its constitutional essentials, and the proper boundaries of institutionalized spaces of appearance. In her version actors aim through speech and persuasion to organize and stabilize power so as to make possible its survival and reproduction within bounded public spheres that will also secure political freedom and public happiness. Arendt's arguments point to the political character and discursive form of the founding agreement.

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[23] Negri, *Insurgencies*, p. 18.

[24] Arendt herself preferred to emphasize the republican aspect of her contractarianism. Arendt, *OR*, p. 171.

[25] Arendt's appeal to the social contract tradition has often been misinterpreted. For example, Pitkin has argued that ultimately Arendt fell back to a model of "the utilitarian calculation of self-interest that reduces all things to 'the merely necessary and useful,'" treating "human beings as means to one's private ends." According to Pitkin, "Arendt's citizens seem no less selfish than any 'rational economic man.'" The reason for this misinterpretation lies, I think, in a limited understanding of the social contract tradition, confined exclusively within the limits of a bourgeois, liberal theory. Hanna Pitkin, "Justice: Relating the Private and the Public," in Hinchman and Hinchman, *Hannah Arendt: Critical Essays*, p. 271.

[26] Arendt, "What Is Authority?" p. 96.

The political and constitutional order is based on the reciprocal recognition of cooperating persons who voluntarily decide to become coassociates in the institution of a new political community.[27] Her model of contractarian founding does not ascribe the capacity of original covenanting to a private and instrumental reason. Instead, it turns to the binding force of the use of "predicative or argumentative speech," expressed in the faculty of mutual promises and the practices of public deliberation.[28] With this argument, she relocated the world-building capacity of action from the faculty of making to the binding power of mutual promises – that is, to a particular attribute of speech. It seems that promises can substantially (although not completely) contribute to carrying out the same demanding task of constitutional making as fabrication does but without the threatening and antipolitical elements of violence, mastery, and sovereignty that are inherent in the process of making. Hence, Arendt asserted,

binding and promising, combining and covenanting are the means by which power is kept in existence; where and when men succeed in keeping intact the power which sprang up between them during the course of any particular act or deed, they are already in the process of foundation, of constituting a stable worldly structure to house, as it were, their combined power of action. There is an element of the world-building capacity of man in the human faculty of making and keeping promises. Just as promises and agreements deal with the future and provide stability in the ocean of future uncertainty where the unpredictable may break in from all sides, so the constituting, founding, and world-building capacities of man, concern always not so much ourselves and our time on earth as our "successor," and "posterities."[29]

Finally, Arendt saw the founding covenant as a practice that increases rather than diminishes power. Contrary to classical contract theories in which the contracting members give up, in the form of a transfer, their personal powers to create a political state, in her version the parties form an alliance which "*gathers together* the isolated strength of all the allied partners and binds into a new power structure," in which all the coassociates partake.[30] The classical version, on the other hand, not only fails to establish realms of political participation, it also disempowers and dispossesses the covenanting party, who,

far from gaining a new power, and possibly more than he had before, he resigns his power such as it is, and far from binding himself through promises, he merely

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[27] Arendt, *OR*, p. 175.
[28] Arendt, *OR*, p. 86.
[29] Arendt, *OR*, p. 175.
[30] Arendt, *OR*, p. 170.

expresses his "consent" to be ruled by the government, whose power consists of the sum total of forces which all individual persons have channeled into it and which are monopolized by the government for the alleged benefit of all subject.[31]

In her neo-republican version the contracting party "gains as much power by the system of mutual promises," whereas in the classical, liberal version "he loses [i.e., power] by his consent to a monopoly of power in the ruler."[32] The participants "have neither rights nor power as long as their physical safety is guaranteed."[33] Thus, whereas in the former instance the participants enter into an agreement to augment the power of "the organized multitude" and to constitutionalize political freedom, in the latter their isolation is institutionalized and protected at the price of denying their powers.[34] Devoid of their powers, and thus completely dependent on the commands of the centralized government, they silently retreat into their private sphere, abandoning normal politics to the state and its officials.

These crucial differences between two versions of contract also inform Arendt's critique of the French Revolution and her approval of its American counterpart. The Mayflower Compact provides her again with a historical example of how a new beginning can be initiated through "an instrument to generate more power, more strength, more reason, and not to abolish them."[35] Thus, the French Revolution failed not only to secure a stable postrevolutionary constitution of freedom but also to increase the power of the citizens, which was instead taken away from them and given to the monopoly of a fictitious popular sovereign. One of the principal causes behind the French failure, she claimed, was a misunderstanding of the intersubjective origins of power and its replacement with strength and force. The American Revolution, by contrast, sought "not to limit power but to create more power, actually to establish and duly constitute an entirely new power center."[36] Claude Lefort has provided a name for Arendt's model of a contractarian revolutionary founding: "plural revolution" (*révolution plurielle*).[37] Its plurality is due to the survival of diversity and the continuing coexistence of a multiplicity of self-organized public spaces that cut across the social field.[38] For Arendt,

[31] Arendt, *OR*, p. 170.
[32] Arendt, *OR*, p. 170.
[33] Arendt, "Civil Disobedience," p. 86.
[34] Arendt, *OR*, pp. 166, 170–171.
[35] Arendt, *OR*, p. 152.
[36] Arendt, *OR*, p. 154.
[37] Lefort, *L' invention démocratique*, p. 189.
[38] Lefort, *L' invention démocratique*, pp. 190–192.

it was of greater relevance that the very word "consent," with its overtones of deliberative choice and considered opinion, was replaced [i.e., during the French Revolution] by the word "will," which essentially excludes all processes of exchange of opinions and an eventual agreement between them. The will, if it is to function at all, must indeed be one and indivisible . . . there is no possible mediation between wills as there is between opinions.[39]

Arendt, however, never sought to clarify and further develop her reflections on covenanting foundings and extraordinary constituting compacts. She stopped short of proposing a systematic and general theory of a republican contract. This omission left her theory of contractarian beginnings inconclusive, which even if it does not directly undermine the salience of her approach, it nevertheless challenges its persuasiveness. For instance, Arendt did not confront the single most important question: can her notion of the contractarian foundation of a republican government convincingly account for political obligation and a stable constitution of freedom? Arendt herself was not always confident. At times, she acknowledged that promises are not enough to found a lasting free government and that a contractarian extraordinary beginning is as vulnerable to the threats of instability as a decisionistic one. Indeed, after exposing the role of promises, persuasion, and contracts, she suddenly conceded that,

while power, rooted in a people that had bound itself by mutual promises and lived in bodies constituted by compact, was enough "to go through a revolution" (without unleashing the boundless violence of the multitudes), *it was by no means enough* to establish a "perpetual union," that is, to found a new authority. Neither compact nor promise upon which compacts rest are sufficient to assure perpetuity, that is, to bestow upon the affairs of men that measure of stability without which they would be unable to build a world for their posterity, destined and designed to outlast their own mortal lives.[40]

If this is the case, however, one might ask whether mutual promises, like the "restlessness" and "everlasting movement" of the will, are not also built on quicksand.[41] The main question, here, is how binding promises really are and how much solidity and stability they can yield in a newly founded, secular republic.

[39] Arendt, *OR*, p. 76.
[40] Arendt, *OR*, p. 182 (emphasis added).
[41] Arendt, "Willing," p. 145; Keenan, "Promises, Promises: The Abyss of Freedom and the Loss of the Political in the Work of Hannah Arendt," pp. 309–320.

The Immanent Principle: Arendt and Habermas

Besides promises and contracts, Arendt investigated an additional potential solution to the problem of the arbitrariness involved in extraordinary beginnings. To the "frightening arbitrariness with which we are confronted whenever we decide to embark upon this type of action, which is the exact counterpart of consistent logical processes" and of its unpredictable potentialities that expose both its "greatness and its dangers," she juxtaposed the notion of "consistent" or "principled" action.[42] Actions are "consistent" when they are guided by principles that inspire and inform them.[43] For Arendt, of course, these principles are neither transcendental norms – remaining vestiges of the declining Western metaphysical tradition – nor rational, universal precepts with a cognitive content imposed on the public sphere from the outside. If this were the case, she would have seriously compromised the radical freedom of actors and undermined her notion of action as the faculty to unpredictably start something new without being determined or conditioned by outside rules. If the principles of action were deduced from a metaphysical appeal to natural law, reason, tradition, history, truth, or divinity to become binding on political actors during extraordinary politics – acting with banisters, to paraphrase Arendt – we could no longer view founding acts as a manifestation of freedom. And it would make no sense to speak of the power of the multitude to voluntarily constitute themselves in organized political communities without the mediation of external forces. There would be neither extraordinary event nor new beginning. Instead, we would have to see action as mere behavior, a collective conduct with a regulated, automatized character, resembling a habit and falling under the spell of objective processes conditioned by antecedent, superior causes or transcendental laws.

This issue that evokes the tension between freedom and necessity also represents another way of revisiting the recurrent problem of the vicious circularity of foundations. If extraordinary politics means total contingency, it is difficult to see how it might avoid arbitrariness and legal nihilism. If, on the other hand, this threat of arbitrariness is contained through the deployment of absolute norms, extraordinary politics would be robbed of its original and singular instituting powers and transformed into another cog in a chain of successive determinations. It would no longer be extraordinary at

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[42] Arendt, "The Concept of History," pp. 88, 63, 87; Arendt, "What Is Freedom?" p. 152.
[43] Arendt, "What Is Freedom?" p. 152.

all. The effects on freedom would be fatal. How can Arendt simultaneously avoid freedom turning into arbitrariness, on the one hand, and a boringly repetitive necessity taking over freedom, on the other? Can this circle be squared?

These questions were at the very core of Arendt's response to the failure of the French Revolution and could be redirected against Schmitt's version of extraordinary politics, which comes very close to a model of absolute, uncompromising popular voluntarism. Because she recognized that promises and mutual pledges are necessary but not sufficient to dissolve the tension between freedom and stability, she introduced the concept of principled action to counteract the intrinsic dangers of freedom and extraordinary deeds. This problem bearing on the very nature and possibility of action propelled her to investigate the idea of immanent principles as an additional way of solving the paradox of new beginnings. Extraordinary politics may avoid arbitrariness and violence, while remaining unfettered from causal determinations and transcendental grounds, if it is guided not by any kind of principles but by some general, clear, and stable principles.

These must be immanent. They must be extracted and reconstructed from within the instituting action itself at the very moment of its performance. In Arendt's words, the constituent action carries its own principles within itself, instead of being subsumed by external norms, which would threaten the autonomy and dignity of the realm of human affairs and destroy the "in-between" space shared by all the participants. If, therefore, the main task of principles is to channel and regulate freedom, they must not confront the founding actors as external imperatives but must be forms of self-limitation coming from within, dictated by the instituting act itself. As she categorically put it, "What saves the act of beginning from its own arbitrariness is that it carries its own principle within itself."[44] Hence, principles of extraordinary action are impeccably immanent as they emanate solely from the constituent practice.[45] "The manifestation of principles comes about only through action, they are manifest in the world as long as the action lasts, no longer."[46] For this reason, I think, it is misleading to assert, as Kateb does, that Arendt's notion of a principle "comes to one from outside and inspires 'from without.'"[47] It is better to approach Arendt's notion of principle in terms of an implicit standard that becomes explicit through the performance

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[44] Arendt, *OR*, p. 212.
[45] Arendt, *OR*, p. 203; Arendt, "What Is Freedom?" pp. 152–153.
[46] Arendt, "What Is Freedom?" p. 152.
[47] Kateb, *Hannah Arendt*, p. 12.

of the extraordinary deed itself, that is, during the very moment of constituting a new order. Here, we are confronted with an immanent, performative norm, where "the manifestation of principles, coincides with the performing act."[48] Principles are inherent in action.

Arendt's references to principled action, though infrequent and vague, are of critical importance for a theory of the extraordinary. Alongside the founding contract and mutual promising, she introduced the notion of a principled action that constitutes the other main check against the arbitrariness and instability of new beginnings. Immanent principles protect extraordinary politics from losing sight of what it has to accomplish and thus preventing it from turning either into a self-defeating whimsicality or into a self-deceiving permanent revolution.[49] With this argument, she further developed her more theoretical statement that "political power . . . is always limited power and since power and freedom in the sphere of human plurality are in fact synonyms, this means also that *political freedom is always limited freedom.*"[50]

It should be noted right away that the principles that arise immanently from the founding action to limit it are reminiscent of but not similar to regulative, normative standards. Like normative standards, "they are much too general," they circumscribe the perimeters of the operational authority of new beginnings, coordinate the actions of plural individuals, and avoid the inherent arbitrariness of extraordinary politics.[51] Unlike them, however, they are not the product of abstract, rational thinking. They do not correspond to moral norms claiming universal and transhistorical validity, nor do they reflect a shared historical identity that could be hermeneutically extracted from a common ethical life. Acting according to some common immanent principles, actors are able to orient themselves during extraordinary founding moments despite the contingent and spontaneous character of their founding endeavor without seeking shelter in some extrapolitical, universal, abstract rules that could threaten their political freedom to start something new unburdened by preexisting determinations and causal stipulations.

In order to keep intact this frail balance between freedom and self-limitation, Arendt was adamant about the fact that the notion of a principle differs radically from motives, intentions, purposes, or goals, which,

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[48] Arendt, "What Is Freedom?" p. 153.
[49] Arendt, *OR*, p. 213.
[50] Arendt, "Willing," p. 201 (emphasis added).
[51] Arendt, "What is Freedom?" p. 153; Arendt, *OR*, p. 212.

contrary to principles, tend to instrumentalize action by reducing it to a simple means, something prior or posterior to action.[52] Because they point to the existence of antecedent causes or subsequent aims that determine and control human action, they threaten the faculty of new beginnings. In that sense, they undermine the autonomy of the political by reducing it to a means for a higher end. Besides their utilitarian and teleological implications, Arendt noted, they also reproduce the traditional metaphysical dualism between appearance and essence. The postulation of some hidden motivations or of a final goal that action must necessarily realize, unavoidably divides politics into two realms, in which the one, the deeper and truer, determines, in the form of an ultimate ground, the other, the epiphenomenal and superstructural. But, for Arendt, "In the realm of human affairs, being and appearance are indeed one and the same."[53] There is no place in her theory to resurrect foundationalist arguments. In this respect, she remains resolutely postmetaphysical, accepting as definitive and irrevocable the successive deaths of God and metaphysics.[54] In fact, she wanted to understand her work as "promoting a new kind of thinking that needs no pillars and props, no standards and traditions to move freely without crutches over unfamiliar terrain."[55]

Principled action, therefore, does not endanger or negate the groundlessness of the instituting deed because it does reduce it to something prior, external, or superior to itself. Here, Arendt was clearly seeking to arbitrate between contingency and determinacy. On the one hand, a fully spontaneous action may fade away into pure haphazardness, frivolity, and violence, unable to stabilize itself in the form of a lasting constitutional order. On the other hand, it may change into a simple causal effect and be transformed into a mere manifestation of a broader natural process. The notion of a principled action appealed to her precisely for its capacity to overcome this dilemma. It has also the additional capacity to mediate between universalism and particularism, universal morality and situated ethics.[56]

[52] Although there is no doubt that, despite her fervent antiteleologism and antiutilitarianism, she had, however reluctantly, to introduce a minimal teleological element in her theory of action – mainly with the argument that the institution of freedom and the establishment of public spheres of political participation is always the "true objective," "the aim," or "the ultimate task" of a revolution – she was nonetheless quite clear that motives, goals, and purposes do not constitute principles. Arendt, *OR*, pp. 61, 141, 154, 155; Kirk Thompson, "Constitutional Theory and Political Action," *Journal of Politics*, 31:3 (1980), p. 661; Ingram, "Novus Ordo Seclorum: The Trial of (Post) Modernity or the Tale of the Two Revolutions," p. 225.

[53] Arendt, *OR*, p. 98.

[54] Arendt, "Introduction to Thinking," *LOM*, pp. 10–11.

[55] Arendt, "On Humanity in Dark Times," p. 11.

[56] Arato, *Civil Society, Constitution, and Legitimacy*, p. 332n39.

Kateb has rightly observed that principles depersonalize the actor who no longer acts according to private self-interest and subjective preferences. Yet, they cannot be understood as abstract, universal norms under which singular political events are subsumed.[57] Arendt's principles are intrinsically related to the performance of a particular act.[58] At the same time, however, immanent principles are not extracted from a specific substantive cultural identity, ethnic substance, or a shared ethos of a historical tradition. Arendt's writings tenaciously resist a communitarian interpretation.[59] A principle emerges out of the constituent act itself rather than from common memories or historical traditions or even from a prepolitical community structured around a strong sense of a shared identity. Principled action lifts actors from their life contexts, collective self-understanding, and personal interests, and even if it does not form an impartial, objective, external point of view, "it is not bound to any particular person or to a particular group."[60]

The immanent principles of action also point to the possibility of breaking with the perplexities of new beginnings. They are crucial for avoiding the circularity that torments extraordinary politics. They also account for a secular, republican theory of authority. Principles, in Arendt's theory, are not derivative rules that presuppose legal continuity and could turn the new beginnings into a covert evolutionary process. Nor are they created *ex nihilo*, coming from nowhere and arising out of pure nothingness. They do not emerge from a total vacuum through a Promethean, self-originating act of collective creativity. New beginnings are neither a gradual development of something preexisting nor a legal 'big bang.' As Arato aptly puts it, principles have the advantage of being able to draw on "resources that have not been formalized and that are available when appeal to legal resources would inevitably turn circular at moments of foundation. Principles can break this circle without resort to violence or arbitrary threats of force."[61]

Arendt applied the notion of principled action to expose some of the deeper reasons that caused the tragic failure of the French Revolution. One the one hand, there "were no longer principles upon which to act or motives by which to be inspired."[62] Lacking clear principles, the revolution degenerated into a disorientated, incoherent, and violent medley of inarticulate

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[57] Kateb, *Hannah Arendt*, p. 12.

[58] Arendt, "What Is Freedom?" p. 152.

[59] For Arendt's "resolutely anti-communitarian" stance, see Ronald Beiner, "Rereading Hannah Arendt's Kant Lectures," *Philosophy and Social Criticism*, 23:1 (1997), p. 30; Wellmer, "Arendt on Revolution," p. 223.

[60] Arendt, "What Is Freedom?" p. 152.

[61] Arato, *Civil Society, Constitution, and Legitimacy*, p. 333n39.

[62] Arendt, *OR*, p. 97.

initiatives that did not have anything to do with the constitution of freedom or the establishment of public spheres of political participation. On the other hand, when the revolutionaries tried to overcome this lack, they mistakenly selected some external and nonpolitical principles, such as pity, life, the alleviation of poverty, or a supreme rational Being. For instance, by replacing principled action with the liberation of humanity from suffering, they compromised the political character of the revolution, reducing it to social engineering.[63] It is not sufficient, therefore, to have some guiding principles; these principles must also come from within the constituent practice derived from the extraordinary performance itself. The French revolutionaries seem to have failed on both counts: at the beginning their actions were unprincipled; afterward they chose the wrong ones. By contrast, their American counterparts were able to carry out their extraordinary instituting project by faithfully and consistently following some immanent political principles.

While addressing the lack of authority that plagues all extraordinary moments of constitutional beginnings, Arendt claimed that the American founders made a startling discovery. They realized that, in the face of a lack of existing positive norms to sanction their endeavor, they had to derive the authority to establish a new constitution from the extraordinary act of beginning itself.[64] In Arendt's words, "it was the authority which the act of foundation carried within itself" that saved the American Revolution from the violence and arbitrariness that accompanies legal breaks.[65] It is this fidelity to immanent principles that safeguarded the political character of the revolution from lapsing into terror and a permanent state of nature and for endowing the ensuing constitutional document with authority. At the same time, the appeal to immanent principles broke with the vicious circle of new beginnings.[66] The "unforgettable story" that the American Revolution teaches us, Arendt wrote, is that while constitutional politics as an act of extraordinary collective freedom calls into being a new legal and institutional order that did not exist before and which could not be known even by the faculty of imagination, it escaped arbitrariness and randomness

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[63] Arendt, *OR*, pp. 111–114.
[64] Arendt, *OR*, p. 198.
[65] Arendt, *OR*, p. 199.
[66] Here, I borrow the notion of self-limiting power from Cohen and Arato's theory of the self-limiting radicalism of the new social movements that they have taken from the Polish dissident movement in the 1970s. See Cohen and Arato, *Civil Society and Political Theory*, pp. 493–494; Andrew Arato, "Revolution, Civil Society, and Democracy," in *From Neo-Marxism to Democratic Theory: Essays in the Critical Theory of Soviet-Type Societies*, New York: M. Sharpe, 1993, pp. 296–312; Jadwiga Staniszkis, *Poland's Self-Limiting Revolution*, Princeton: Princeton University Press, 1984.

as it was guided and framed according to some principles that delineate its scope, content, and direction.[67] Principles are the laws of action.[68]

   Arendt argued that the founding act might avoid arbitrariness if inspired and guided from within by a general, clear principle(s). It had to be an immanent principle, not just any kind of principle. It had to be distilled from within the constituting action itself at the very moment of its performance. She understood this immanent principle as a norm of authorization that bestows authority on the founding actors to establish a new constitutional order in a situation of legal void.[69] "The absolute, from which the beginning is to derive its own validity," she wrote, "and which must save it, as it were, from its inherent arbitrariness is the principle which, together with it, makes its appearance in the world."[70] Arendt appealed to a general norm of authorization as the main check against the illegality of extraordinary politics.[71] She regarded this principle as immanent to the founding act, emanating solely from the constituting practice.[72] She viewed the authorizing principle in terms of an implicit standard that becomes explicit at the very moment of founding a new constitutional government.

   Arendt's references to a principle of authorization immanent to the founding activity, though infrequent and vague, are of critical importance to a democratic theory of the extraordinary and an important corrective to Schmitt's approach. But what are these immanent principles? Arendt mentions honor, glory, distinction, excellence, the love of equality, and even justice.[73] But why did she view these principles as immanent to the constituent action? This remains a mystery. She never explained how they emerge out of the constituent founding act.[74] This aspect of her political thought remains relatively neglected in the secondary literature.[75] Little is said, for example, about the importance of principles for Arendt's project, for the relationship between principles, beginnings, and authority, or on how freedom and

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[67] Arendt, *OR*, p. 151.

[68] Arendt, *OR*, p. 212.

[69] Kelsen, *Pure Theory of Law*, p. 56.

[70] Arendt, *OR*, p. 212.

[71] Arendt, *OR*, p. 213. With this argument, she further developed her more theoretical statement that "political power . . . is always limited power and since power and freedom in the sphere of human plurality are in fact synonyms, this means also that political freedom is always limited freedom." Arendt, "Willing," p. 201.

[72] Arendt, *OR*, p. 203; Arendt, "What is Freedom?" pp. 152–153.

[73] Arendt, "What Is Freedom?" p. 152. For the principle of justice, see Arendt, "Some Questions in Moral Philosophy," *Social Research*, 51:1–2 (1984), p. 741.

[74] Kateb, *Hannah Arendt*, pp. 12–13.

[75] Gottsegen, *The Political Thought of Hannah Arendt*, pp. 33–39.

action rely on norms in order to avoid the dangerous excesses of voluntarism. Aside from some scattered references to the etymological affinity between principles and beginnings (two of the several meanings of the Greek world αρχή), Arendt did not elaborate on what a principled action really means and how it springs from within the constituent action. One needs to look beyond her theoretical framework in order to answer these questions. To do so, I turn to Habermas's writings on higher lawmaking and constitutional making. Despite some enduring differences between the two thinkers, they do come close to each other's position on one important issue: the immanent principle of new beginnings.

Habermas, like Arendt, seeks to separate the process of extraordinary, constitutional making of "a radically democratic republic" from both moral foundationalism and a voluntarist model of popular sovereignty.[76] The first blurs the distinctions among politics, law, and morality; the second reduces right to might and validity to facticity.[77] Habermas attempts, as had Arendt before him, to mediate between "a blind *Decisionism*" and "a moral *containment*."[78] His starting point is a reconstruction of the conditions of a democratically legitimated genesis of law.[79] He adopts, therefore, a distinctly procedural approach, delving into the inescapable procedural presuppositions of the practice of original self-constitution, whereby citizens view themselves as the authors of the law to which they also are its subjects as addressees.[80] Given his previous critique of the sovereign constituent power, which he had erroneously associated with an ethnic theory of democracy, Habermas, much like Ackerman, is reluctant to adopt Arendt's terminology. This reluctance is also enforced by an additional reason. He considers the concept of the constituent power to be too close to plebiscitarianism and democratic absolutism, based on the fiction of a homogeneous macrosubject.[81] But despite his aversion to a plebiscitarian version of a voluntaristic sovereignty, he makes three straightforwardly Arendtian moves.

First, Habermas appears to accept, at least partially, the link between the politics of the constituent power and the original production of higher legal norms. Although he does not seem aware that by doing so he restates the idea of the constituent power, he does comment positively on understanding

[76] Habermas, *Between Facts and Norms*, p. 471.
[77] Habermas, *Between Facts and Norms*, pp. 102–103.
[78] Habermas, *Between Facts and Norms*, p. 453.
[79] Habermas, *Between Facts and Norms*, p. 28.
[80] Habermas, *Between Facts and Norms*, p. 289.
[81] Habermas, *Between Facts and Norms*, p. 184.

constitutional making in terms of "jurisgenesis" because it avoids the meta-physical fallacies of natural-law theories. Arendt's concept of power, Haber-mas approvingly observes, designates "an *authorizing* force expressed in 'jurisgenesis' – the creation of legitimate law – and in the founding of insti-tutions. It manifests itself in orders that protect political liberty . . . and above all in the freedom-founding acts that bring new institutions and laws 'into existence.' It emerges in its purest form in those moments when revolution-aries seize the power scattered through the streets."[82] Second, by attempting to extract principles from the formal but actual democratic process of con-stitutional making, he aspires to free the act of founding from appeals to external sources, such as universal morality, subjective value systems, or an arbitrary will. The very act of founding a new higher legal and political order from which the constitution of a self-governing political community originates, contains, for Habermas, implicit principles that are spelled out, substantiated, and explicated during the historical framing and ordering of a new constitutional document.[83] Finally, much like Arendt, he alludes to the similarities between social contract theories and his own approach.[84] In the beginning, he notes, there is a multitude of individuals who share the same willingness and commitment to constitutional lawmaking, through which they will decide which norms, rules, legal rights, and higher laws they must mutually concede to each other for establishing a democratic association of free and equal persons through the medium of positive law. Despite the many differences that can divide the founding participants, there is a com-mon minimal orientation they all share, namely, that they are all involved as participants in the democratic process of instituting a new order. The adjective "democratic" is of a paramount importance.

In this cooperative, democratic process of making a law about lawmak-ing, the parties can rely only on the process itself and its implicit presup-positions, such as symmetry, autonomy, solidarity, equality, mutuality, and inclusiveness. Actors are involved in the same activity of establishing new juridical foundations, despite the fact that they may disagree on many sub-stantive issues. They have, therefore, to rely on the reciprocal process itself if they want to institute an inclusive constitution that will appeal to all the

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[82] Habermas, *Between Facts and Norms*, p. 148.

[83] Jürgen Habermas, "Constitutional Democracy: A Paradoxical Union of Contradictory Prin-ciples?" *Political Theory*, 29:6 (December 2001), pp. 776–777.

[84] Habermas, *Between Facts and Norms*, pp. 91–94; Jürgen Habermas, "The Nation, The Rule of Law, and Democracy," in *The Inclusion of the Other*, pp. 136–140.

participants. One of the main characteristics of this process is the recognition that a democratic foundation rests on "the horizontal association of citizens *in status nascendi*."[85] For this reason, the participants try to make explicit the norms that regulate their founding enterprise. Equality and autonomy are two such norms, because they are already implicit in the form of the constituent relations and procedures that are practiced by all those involved during the process of democratic constitutional making.[86] Constitutional making looks, therefore, more like a process of discovery, excavation, and reconstruction rather than of original creation.[87] Because the participants operate with the juridical category of the constituent power, they make use of the grammar of law.[88] In doing so, they realize they must first include in the new constitutional document the same norms that they have been practicing all along, and which are the implicit presuppositions of constitutional making. These include the rights and duties they granted to each other during the performance of the process of constituting a new political and legal order. For Habermas, "The performative *meaning* of this constitutional making practice already contains *in nuce* the entire content of constitutional democracy. The systems of rights and the principles of the constitutional state can be developed from what it means to carry out the practice that one has gotten into with the first act in the self-constitution of such a legal community."[89]

The extraordinary act of constituent higher lawmaking enacts those principles of equality, autonomy, mutuality, and solidarity, which are also the very conditions of its possibility – already performed during the manifestation of the constituting act. They are immanent, though amorphous and unthematized, to the founding act itself, and independent of any particular social-cultural context and shared identity. In Arendt's term, they are derived from the act of beginning itself. These principles become explicit as they are codified and constitutionalized. However, for Habermas, while the form of the higher constitutional principles is always already presupposed in the very manifestation of the constituent power, their substantive content is contingent upon the hermeneutical self-understanding and volitional attitudes of concrete historical collectivities that aim to constitute themselves

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[85] Habermas, *Between Facts and Norms*, p. 133.
[86] Jürgen Habermas, "Postscript," in *Between Facts and Norms*, p. 457.
[87] Habermas, *Between Facts and Norms*, pp. 156–157, 185.
[88] Habermas, "Constitutional Democracy: A Paradoxical Union of Contradictory Principles?" p. 776.
[89] Habermas, "Postscript," p. 453.

into a political organizational form, according to their particular needs, historical consciousness, and conceptions of the good.[90]

In order for Habermas's model of constitutional making and original self-legislation to match Arendt's antifoundationalist approach, however, it needs to be disassociated from his broader theory of discourse ethics. Habermas himself alludes to this uncoupling when he points out that an "*unmediated* application of discourse ethics (or of an unclarified concept of discourse) to the democratic process leads to muddled analyses; these then offer skeptics pretexts for discrediting the project of a discourse theory of law and politics at its inception. Hence differentiations are necessary."[91] By distinguishing among ethical-political, moral, pragmatic, and legal discourses, Habermas breaks with the rationalistic constraints and transcendental assumptions imposed by discourse ethics.[92] However, I would like to further develop this argument. Instead of deriving the immanent principles of higher lawmaking from the illocutionary binding force of language oriented toward mutual understanding, it seems more promising to derive them from the extraordinary act of constitutional making itself.[93] In this case, it is not communicative reason as such that generates constitutional principles but rather the actual performance that involves a plurality of parties engaged in the constituting process of mutually granting to each other those powers and freedoms that they already acknowledge during the founding enterprise by simply practicing them. Actors who aspire to regulate their "living together" by means of positive law do not need to find refuge in the universal pragmatics of language. They only need to be aware that mutual participation in the founding act contains immanently the norms of equality, autonomy, participation, mutual respect, publicity, and solidarity. By engaging in democratic constitutional politics, the participants perform, recognize, and conform to these principles. They need, however, to become aware of their existence as they retrieve, reconstruct, clarify, and thus institutionalize them in the

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[90] Arendt, *OR*, p. 213.

[91] Habermas, *Between Facts and Norms*, p. 158.

[92] Jürgen Habermas, "On the Pragmatic, the Ethical, and the Moral Employment of Practical Reason," in *Justification and Application: Remarks on Discourse Ethics*, trans. Ciaran Cronin, Cambridge, Mass.: MIT Press, 1993, pp. 1–18; Habermas, *Between Facts and Norms*, pp. 159–162.

[93] Also, see Ingram's provocative and compelling attempt to read Arendt's theory of constitutional politics from a Habermasian stance. Ingram seeks to solve the vicious circle of foundations by resorting to Habermas's notion of an ideal speech situation, which he reads in terms of reasoning, promises, and deliberation. Ingram, "Novus Ordo Seclorum: The Trial of (Post) Modernity or the Tale of Two Revolutions," pp. 232–245.

form of constitutional principles of justice. They also have to substanti-
ate them through hermeneutical practices of reflexive self-understanding
based on their existing historical needs and aspirations and their particular
identities.

This reinterpretation of Arendt's notion of principled action through
Habermas's contribution to the literature of constitutional politics might
yield some interesting insights. First of all, it avoids any reference to an evo-
lutionary, developmental framework that would approach the extraordinary
politics of foundations in terms of the gradual progression of a fundamental
norm. Neither Arendt nor Habermas view immanent principles as prior to
the founding moment. Second, once detached from the theory of the ideal
speech situation and discourse ethics, this strategy of retrieval avoids the
danger of a quasi-transcendental derivation of these original principles and
thus bypasses the resurrection of linguistic foundationalism that would have
avoided the vicious circularity of the founding act simply by transforming
logos into another ground of politics. In addition, it confronts successfully
the arbitrariness of political action and the specter of legal nihilism.

Extraordinary politics can be as principled and consistent as normal poli-
tics, even if it operates in an indeterminate, unstable environment where for-
mal, legal constraints have been weakened and challenged by an audacious,
disruptive constituent power, reclaiming its instituting powers. Although the
extraordinary is not guided by existing positive legal norms, it does obey
an inner, principled logic. In the previous chapter, I described how Arendt's
approach points to the possibility of the dedramatization of the constituent
power. Here, I want to stress how it can also contribute to its reconceptual-
ization as a self-limiting, norm-oriented, and self-authorized power, which,
although located outside the instituted reality of the ordinary, is still able
to avoid the abyss of arbitrariness and the violence of a normless natural
state without appealing to extrapolitical rules. Moreover, the concept of a
principled constituent act bypasses with remarkable dexterity the antithesis
of universalism and contextualism. Principles of action neither are univer-
sal and transhistorical nor local and reflective of the dominant cultural
ethos of a historical community. Rather, they are embedded in the perfor-
mance of the founding action itself. Finally, the concept of principled or
consistent action takes us back to the idea of public deliberation and argu-
mentation, though not in Habermas's strong, dreadful version. Widespread,
informal, and extraconstitutional processes of persuasion and contestation
are necessary to apprise the participants of these immanent principles, whose
existence is not intuitively apparent to the actors. If the American Revolu-
tion was more successful than the French, according to Arendt this was

also partially due to the fact that it was what we might call a "principled revolution."[94]

[94] Arendt, *OR*, p. 213. It is important not to confuse Arendt's notion of immanent principles with the Hegelian or Marxist idea of an immanent *telos*. That new beginnings carry their own principles does not mean that they are predetermined and preconditioned to realize their true essence or objective fate. Principles guide action; they do not foreordain its ends or foreclose its unpredictable future-oriented potentialities. Principles in Arendt's political theory do not describe the ultimate destiny of action. They only safeguard freedom from its own arbitrariness and frailty. Principles are immanent, enabling conditions rather than end results.

9

The Republic of Councils

Beyond Democracy and Liberalism?

One of the most frequent objections against Arendt's political theory, shared by friends and critics alike, is her alleged neglect of normal, constituted politics. Margaret Canovan, one of the first to articulate this objection, complains that "it is unfortunate that the same concern for rare events that gave her the unparalleled insight into *extraordinary politics* should have led her to overlook *normal politics* altogether."[1] Honig reiterates this criticism: "Lodged in the same opposition of *ordinary* versus *extraordinary* discourse as Austin's, Arendt's account reverses Austin's valuation and privileges not the *ordinary* but the *extraordinary*, celebrating the latter's exceptional and rule-resistant character. . . . Indeed, Arendt's exclusion of the *ordinary* from her account of action leaves her open to the same sort of criticism Derrida levels at Austin for excluding the *extraordinary* from his."[2] Similarly, for Kateb, "Arendt's talents are best engaged by what is extraordinary, not by the normal."[3]

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[1] Canovan, "The Contradictions of Hannah Arendt's Political Thought," *Political Theory*, 6:1 (1978), p. 21 (emphasis added). Interesting enough, Canovan, in a subsequent article, argued that it would be a mistake to view Arendt exclusively as a thinker of new beginnings. In this revised version, Canovan correctly points out that one of Arendt's main preoccupations was the observation of limits. She calls this preoccupation "a politics of limits." Canovan, "Hannah Arendt as a Conservative Thinker," in May and Kohl, *Hannah Arendt: Twenty Years Later*, pp. 14–21.

[2] Honig, *Political Theory and the Displacement of Politics*, pp. 94, 93 (emphasis added).

[3] George Kateb, "Political Action: Its Nature and Advantages," in Villa, *The Cambridge Companion to Hannah Arendt*, p. 135. Cohen and Arato have also expressed serious doubts about whether it is possible, from within Arendt's theoretical framework, to convincingly reconcile the constituent power with the constituted powers, new beginnings with juridical stability and institutional continuity. Although Arendt deliberately attempted to reach such a reconciliation by explicitly rejecting the idea of a permanent revolution, she nonetheless failed because "the establishment of an unlimited power, inevitably returning us to a model

These criticisms raise a crucial issue regarding Arendt's theory. A comprehensive theory of the extraordinary, unlike Weber's but like Schmitt's, must take into account not only the first moment of the original founding but also the second one, that of the stabilization and conservation of the constituent compact. A purported inability to incorporate the second moment into a broader theory of extraordinary politics could take Arendt directly back to the limitations and aporias of Weber's theory of charismatic legitimacy, leaving us with a radical but also ephemeral, and thus impotent, instituting power. Is this what happened? Is it true that Arendt "has no fascination with the ordinary?"[4]

As I argue, Arendt, much like Schmitt, did attempt to formulate a theory of the constituted reality that could account for everyday, normal politics. She was fully aware of the importance of ordinary politics. Rather than neglecting it, she attributed the collapse of ancient Greek politics to precisely such an omission. "One, if not the chief, reason for the incredible development of gift and genius in Athens, as well as for the hardly less surprising swift decline of the city-state, was precisely that from the beginning to end its foremost aim was *to make the extraordinary an ordinary occurrence of everyday life.*"[5] By developing the idea of a federal constitutional republic, she sought to succeed where the ancients had failed.

Before turning to a critical presentation of Arendt's attempt to theorize the institutionalization of the extraordinary, it would be helpful to unravel the difficulties involved in any such project. By shifting attention from the first to the second moment, some very telling similarities between Arendt and Schmitt come to the fore. Her approach is remarkably similar to Schmitt's discussion of normal, constituted politics. Both Arendt's and Schmitt's efforts become more intelligible when they are set against the background of Weber's theory of charisma. Independently of whether they were consciously seeking to respond to Weber's inability to account for the stabilization and institutionalization of the revolutionary power of charisma, they both provide an engaging and potentially fruitful response to the despairing conclusion that charismatic politics is condemned either to remain in a *status nascendi* or to be routinized and transformed into

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of permanent revolution, could not yield stable political foundations. . . . Can freedom whose vehicle is public communication and discourse stop at the limits constituted by supposedly sacred foundations?" Cohen and Arato, *Civil Society and Political Theory*, pp. 194, 192–193. See, Arendt, *OR*, p. 5.

[4] Kateb, "Death and Politics: Hannah Arendt's Reflections on the American Constitution," p. 614.

[5] Arendt, *HC*, p. 197 (emphasis added).

something else, namely, traditional or rational legitimacy.[6] Although Arendt and Schmitt differ in their respective answers concerning the particular institutional form of the constitutionalization of the extraordinary (plebiscitarian presidentialism versus a federal republic of councils), they were alert to the paradox of extraordinary politics and equally involved in the search for a reconciliation between the first and second moment.[7]

The constitutionalization of the extraordinary and the transformation of the constituent power into a constituted government safeguard the achievements of new beginnings, stabilize the realm of appearances, and, most importantly, delineate the scope of the political within which normal freedom and agonistic contestation can take place safely. For Arendt, the revolutionaries of the eighteenth century knew very well that only a constitution, the end product of extraordinary politics, could "lay down the boundaries of the new political realm and . . . define the rules within it, that they had to found and build a new political space within which the 'passion for public freedom' or the 'pursuit of public happiness' would receive free play for generations to come."[8] Although a thinker of the political, she did not advocate a total politicization of society. To prevent this from happening, she argued that the expanding tendencies of the political must be contained in order to guarantee stability and continuity. Politics must be limited in its scope and aspirations. This is why normal politics is such a necessity. The instituted public realm, Arendt claimed, "is limited by those things which men cannot change at will. And it is only by respecting its own borders that this realm, where we are free to act and to change, can remain intact, preserving its integrity and keeping its promises."[9] Arendt did not welcome total politics or permanent revolution.[10]

While the extraordinary and the pathos for new beginnings are at the center of her political thought, her project was actually much broader. Like Schmitt's, it also included the quest for normalcy, permanence, and order. After all, only the solidity of lasting institutions enable individuals to share, on an everyday basis, in the generation and exercise of power, and to experience the pleasure of public action and agonistic participation. As she acknowledged in an indisputably transparent passage, "No civilization – the man-made artifact to house successfully generations – would ever have been

[6] Weber, *ES*, pp. 246, 1121.
[7] For Arendt's critique of plebiscitarianism, see Arendt, *OR*, p. 228.
[8] Arendt, *OR*, p. 126.
[9] Arendt, "Truth and Politics," *BPF*, pp. 264, 263.
[10] Honig, *Political Theory and the Displacement of Politics*, p. 202.

possible without a framework of stability, to provide the wherein for the flux of change."[11] In another revealing statement written approximately at the same time and after discussing the collapse of ultimate foundations, she observed that "the world needs such pillars in order to guarantee continuity and permanence, without which it cannot offer mortal men the relatively secure, relatively imperishable home they need. . . . The world becomes inhuman, inhospitable to human needs – which are the needs of mortals – when it is violently wretched into a movement in which there is no longer any sort of permanence."[12]

   Arendt searched to supplement the intense but short-lived experience of extraordinary politics with a limited but more permanent freedom. For this reason, she insisted that the "common and the *ordinary* must remain our primary concern, the daily food of our thought – if only because it is from them that the uncommon and the *extraordinary* emerge."[13] Note that this concern took a predominantly juridical and constitutional solution.[14] In modern, secular societies, it is mainly the legal system that stabilizes the collective instituting power, containing "the enormous risks inherent in the secular realm of human affairs."[15] As she put it, "Foremost among the stabilizing factors, more enduring than customs, manners, and traditions, are the legal systems that regulate our life in the world and our daily affairs with each other." This cementing force of positive laws informs her claim that despite the multiplicity and variety of legal systems, they all are primarily "designed to insure stability."[16] Laws yield predictability, regularity, and security against the boundless potentialities of action. They shield social interaction from arbitrariness and uncertainty by providing a stable framework for the regulation of social life and the institutionalization of freedom. Positive laws are the most prominent response to the subterranean threat

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[11] Arendt, "Civil Disobedience," p. 78.

[12] Arendt, "On Humanity in Dark Times," pp. 10–11.

[13] Arendt, "Action and the Pursuit of Happiness," paper delivered at the meeting of the American Political Science Association, September 1960, cited by Melvin A. Hill, "The Fictions of Mankind and the Stories of Men," in *Hannah Arendt: The Recovery of the Public World*, p. 275 (emphasis added).

[14] I depart from Honig's depiction of Arendt as an opponent of legality. Honig's claim that Arendt refused to identify politics with juridical settlement and that instead she understood "politics as a disruptive practice that resists the consolidations and closures of administrative and juridical settlement for the sake of the perpetuity of political contest" is inconclusive in that it underplays the crucial role of positive law in stabilizing the founding compact and in procuring security and predictability in human affairs. Honig, *Political Theory and the Displacement of Politics*, pp. 2, 112–113.

[15] Arendt, *OR*, p. 191.

[16] Arendt, "Civil Disobedience," p. 79.

of an abysmal, groundless freedom because they "are primarily designed to function as stabilizing factors for the ever changing movement of men."[17] They enable the actors to orient themselves with relative safety according to a given and known system of rules and expectations. The figuration of normal power takes a legal, procedural form, because only laws can establish the "fences which hedge in, protect, and limit the space in which freedom is not a concept, but a living, political reality."[18]

   In addition, having experienced the totalitarian madness of National Socialism, Arendt was very sensitive to the dangers contained in political projects that aspired to overcome positive law. "Laws establish the realm of public political life . . . [and] the downfall of nations begins with the undermining of lawfulness."[19] This is the reason why she understood, as Schmitt did, the second moment of politics as that of legality.

> Positive laws in constitutional government are designed to erect boundaries and establish channels of communication between men whose community is continuously endangered by the new men born into it. . . . The boundaries of positive laws are for the political existence of man what memory is for his historical existence: they guarantee the pre-existence of a common world, the reality of some continuity which transcends the individual life span of each generation, absorbs all new origins and is nourished by them.[20]

Positive laws keep at bay the inherent arbitrariness of freedom, bind the otherwise boundless action, and shelter normal politics from the totalitarian specter of a "rightless" natural state. Consequently, an important criterion for distinguishing a successful from a failed politics of the extraordinary is the extent to which it has been able to create a new, lasting form of legality that regulates and protects the boundaries and channels of public communication and contestation among individuals and preserves the constitutive plurality of the public realm.[21] Arendt's approval of the American Revolution consists of a diagnosis of its partial success, due in part to the establishment of a secure constitutional structure composed of general, clear, and prospective norms that regulate and order expectations among plural actors. In other words, the exceptionality of this revolution is that it established a new principle of legality that put an end to extraordinary politics.

[17] Arendt, *OT*, p. 463.
[18] Arendt, "Karl Jaspers: Citizen of the World?" *MDT*, pp. 81–82.
[19] Arendt, "Understanding and Politics," p. 315.
[20] Arendt, *OT*, p. 465.
[21] Arendt, *OT*, pp. 462, 465.

Notwithstanding this insistence on legality and the juridical, Arendt, like Weber and Schmitt, remained well attuned to the limitations of a successful institutionalization and legal containment of the extraordinary. Among these was the likelihood that a republican constitution could undermine the constituent power of the community. A lasting constitution would likely forever bar the possibility of radical new beginnings. Here lies the core of her critique of the American Revolution, which obliterated the revolutionary spirit by excluding the ward system from the constitutional document.[22] From the point of view of Arendt's republicanism, the American postrevolutionary arrangement abolished all compelling justifications for resorting to the constituent power. New beginnings were seen as threats to the stability of the newly founded institutional and legal order. Arendt discussed this likelihood by dispiritedly commenting that freedom becomes "the direct aim of political action . . . only seldom – in times of crisis or revolution."[23] Moreover, she feared the prospect that the juridical system of positive laws would exterminate and consume the constituent power and abolish the extraordinary freedom of the organized multitude by suffocating it within a rigid legal proceduralism. Although "laws are the stabilizing forces in the public affairs of men," she observed, "[l]awfulness sets limits to actions, but does not inspire them; the greatness, but also the perplexity of laws in free societies is that they only tell what one should not do, but never what one should do."[24] Or, to put it slightly differently, the constituted powers might restrict the faculty of action within immutable legal norms, replacing spontaneity with new forms of control and normalization. "Conservatism, in the sense of conversation," Arendt warned, "which accepts the world as it is, striving only to preserve the status quo – can only lead to destruction, because the world, in gross and in detail, is irrevocably delivered up to the ruin of time unless human beings are determined *to intervene*, *to alter*, *to create what is new*."[25]

When the legal system absorbs and exhausts extraordinary politics, nothing can stop impersonal, mechanical juridical processes for banishing from normal politics spontaneous action and thus freedom itself. Arendt remained convinced that the generation of power rests primarily on the physical participation of citizens and their freedom to initiate new beginnings. "Political institutions, no matter how well or how badly designed, depend for

[22] Arendt, *OR*, pp. 132, 135–136, 138–139, 241–242.
[23] Arendt, "What Is Freedom?" p. 146.
[24] Arendt, *OT*, p. 467.
[25] Arendt, "The Crisis in Education," *BPF*, p. 192.

continued existence upon acting men; their conservation is achieved by the same means they brought them into being. . . . Utter dependence upon further acts to keep it in existence marks the state as a product of action."[26] It is quite likely, however, that the level of political participation will be affected by the instituted norms and procedural rules, which tend to replace the unpredictability of human initiatives with the stability and protection procured by legal regulations and institutional structures. The prospects of an elimination of new beginnings in favor of a lasting legal system can end in new forms of homogeneity, conformism, and social control – that is, in the loss of freedom.[27] Normal politics is susceptible to such a juridification of the political, which, moreover, has been responsible, according to Arendt, for the troubling fact "that the very notion of constitution came to be associated with a lack of reality and realism, with an over-emphasis on legalism and formalities."[28] Having reached this conclusion, she anxiously asked, "if the end of the revolution and the introduction of constitutional government spelled the end of public freedom, was it then necessary to end the revolution?"[29]

If freedom is defined as the faculty of spontaneous new constitutional beginnings, it is worth pondering whether the generations succeeding the founders could ever enjoy such an extraordinary freedom. The revolutionaries, concerned as they were with the construction of a permanent republic, were inclined to immortalize the constitutional document and to sacralize its legal foundations.[30] By doing so, they inevitably limited the freedom of their successors to initiate in their turn new beginnings and thus to partake in the highest manifestation of freedom: original constitutional making. Elster has aptly described this phenomenon as "the paradox of democracy," according to which "each generation wants to be free to bind its successors, while not being bound by its predecessors."[31] In fact, the more a constitution is regarded as emanating from the citizens themselves, the more likely it is that it will consist of strong amendment rules to guarantee its future survival, preventing the reactivation of constitutional politics. Why, after all, should a 'good' and 'successful' constitution have to live with the constant danger

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[26] Arendt, "What Is Freedom?" p. 153.

[27] Arendt, *HC*, pp. 40–41.

[28] Arendt, *OR*, p. 126.

[29] Arendt, *OR*, 134.

[30] Arendt, "The Concept of History," p. 71; Arendt, "What Is Authority?" pp. 120–121.

[31] Jon Elster, *Ulysses Unbound: Studies in Rationality, Precommitment, and Constraints*, Cambridge: Cambridge University Press, 2000, p. 115; Elster, *Ulysses and the Sirens*, p. 93.

of being overthrown by a new revolution? It seems more prudent to try to protect it against any unruly future change.

This attitude poses a new threat, which corresponds to one of the fundamental dilemmas of extraordinary politics: the constituted political community in its historical continuity will probably never be able to enjoy the experience of new, unpredictable founding acts as its founders did. It will not be allowed to initiate its own revolution and thus to partake in the exhilarating "honor and joy" of extraordinary politics.[32] It will remain under their founders' prohibitive shadow. This tension between extraordinary and normal politics is at the heart of Arendt's preoccupations. And it raises the problem of whether political freedom is at all possible in times of everyday, normal lawmaking. Arendt portrays this vexing problem in a remarkably lucid passage:

If the foundation was the *aim* and *end* of revolution, then the revolutionary spirit was not merely the spirit of beginning something new but of starting something permanent and enduring; a lasting institution, embodying this spirit and encouraging it to new achievements, would be self-defeating. From which it unfortunately seems to follow that nothing threatens the very achievements of revolution more dangerously and more acutely than the spirit which has brought them about. Should freedom in its most exalted sense as freedom to act be the price to be paid for foundation? This perplexity, namely, that the principle of public freedom and public happiness without which no revolution would ever have come to pass should remain the privilege of the generation of the founders, has not only produced Robespierre's bewildered and desperate theories about the distinction between revolutionary and constitutional government which we mentioned earlier, but has haunted all revolutionary thinking ever since.[33]

Here lies for Arendt, as well as for Weber and Schmitt, one of the main challenges confronting extraordinary politics. It is a challenge that brings to the surface the tragic irony of the politics of the extraordinary: its success may bring its death. This ironic outcome seriously endangers the prospects and desirability of reconciling extraordinary and normal politics:

To the extent that the greatest event in every revolution is the act of foundation, the spirit of revolution contains two elements which to us seem irreconcilable and even contradictory. The act of founding a new body politic, of devising the new form of government involves the grave concern with the stability and durability of the new structure; the experience, on the other hand, which those who are engaged in this grave business are bound to have is the exhilarating awareness of the human

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[32] Arendt, "Karl Jaspers: A Laudatio," *MDT*, p. 74.
[33] Arendt, *OR*, pp. 232–233.

capacity of beginning, the high spirits which have always attended the birth of something new on earth. Perhaps the very fact that these two elements, the concern with stability and the spirit of the new, have become opposites in political thought and terminology . . . must be recognized to be among the symptoms of our loss.[34]

If the main threat for the first moment is a permanent revolution, the ever-present menace for the second one is stagnation and juridification. A routinized, purely procedural and autonomous legal and political system seriously jeopardizes the possibility of spontaneous action and political freedom.[35] While the moment of foundations suffers from the consequences of a surplus of freedom, the second moment suffers from a deficit of freedom. One can discern here Arendt's supreme fear: a fear of depoliticization. She was anxious that normal politics would conclude in political apathy. In Schmitt's terminology, it is a concern about the neutralization of politics and the disappearance of the constituent power within the constituted institutions. If for Schmitt, however, depoliticization implies a legitimation deficit, for Arendt the stakes are much higher.

For one thing, depoliticization and the retreat from the public realm that often plagues normal politics signify deprivation and alienation. Privatization, for Arendt, means to be deprived of the experience of being heard and seen by one's peers. When citizens stay away from the public space of freedom, they become "imprisoned in the subjectivity of their own singular experience, which does not cease to be singular if the same experience is multiplied innumerable times. The end of the common world has come when it is seen only under one aspect and is permitted to present itself in one perspective."[36] This existential critique of depoliticization during normal times is coupled with a theory of world alienation.[37] Here, alienation takes the form of an estrangement from the world, caused by the withering of "community sense" and the decline of public participation.[38] Such a world would not only be dehumanized; it would also be one of "unbearable boredom."[39] Most importantly, from a political perspective, the closure of extraordinary politics and the decay of the public realm represent an abdication of power that ineluctably leads to the disintegration of plurality, the increase of normalizing forces, and the appearance of new forms of

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[34] Arendt, *OR*, pp. 222–223.
[35] Honig, *Political Theory and the Displacement of Politics*, p. 116.
[36] Arendt, *HC*, p. 58.
[37] Arendt, "What Is Freedom?" p. 146.
[38] Arendt, *HC*, p. 209.
[39] Arendt, *HC*, p. 176; Arendt, "Civil Disobedience," p. 78.

domination.[40] Although the legal system stabilizes and protects the public realm, it is only the active, everyday, physical participation of citizens that keeps it alive.[41] Should this acting together decline or be replaced by procedural rules, state coercion, and an impersonal system of general laws, the public realm will whither away as well.[42] As Seyla Benhabib points out, Arendt's model of the public space is "ocular" and "holistic" rather than "auditory," insofar as it requires face-to-face interaction among citizens. Lack of physical presence in the public realm automatically signals the decline of power and the decay of the political.[43] In accord with her republicanism, Arendt regarded depoliticization as the last step before the coming of the totalitarian threat. After all, among other reasons, it was the decline of the common world and the dissolution of the common sense that led to the rise of National Socialism in interwar Germany.

How did Arendt try to solve this antinomy between new beginnings and legal stability, extraordinary and ordinary politics? Is the price for permanence the renunciation of freedom, as Weber expected? Will normal, everyday politics inevitably absorb the constituent power, thus blocking the reactivation of the instituting impulses of politics? Despite the failure of the American Revolution on this matter, Arendt remained hopeful. The fact that this revolution failed to preserve the extraordinary does not mean that all founding deeds have to follow its example. The loss of the experience of new beginnings is not inevitable or necessary. Arendt was relatively optimistic that a dialectical negotiation between founding and permanence is still a viable and feasible option: "Man's urge for change and his need for stability have always balanced and checked each other."[44] If today we are inclined to view this tension as an irreconcilable opposition, this is not because of some objective necessity, whether natural or logical. Arendt blamed modern ideological discourses and their inadequate conceptual apparatuses for upsetting this balance and, along with it, the possibility of reconciling extraordinary and normal politics.[45] She also criticized the ideological mystifications and deceptive abstractions of modern political doctrines that have propagated a

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[40] For the idea of privatization as abdication, see Kateb, "Death and Politics: Hannah Arendt's Reflections on the American Constitution," pp. 608–609.

[41] Arendt, *HC*, pp. 198–199.

[42] Arendt, "Truth and Politics," p. 259.

[43] Benhabib, *The Reluctant Modernism of Hannah Arendt*, pp. 200–203. Note here another similarity between Arendt and Schmitt. Although they may disagree on many issues, they are more or less on similar ground when it comes to defining political participation as the physical presence of the citizens in the public realm.

[44] Arendt, "Civil Disobedience," p. 79.

[45] Arendt, "Civil Disobedience," p. 79.

binary image of politics, bifurcated between conservatives and progressives, right and left.

Against the trend toward privatization inherent in postextraordinary, normal politics, Arendt formulated an unusual theory of constitutional republican federalism and ordinary politics, with the hope that it would keep alive the "revolutionary spirit" of radical new beginnings. The solution is an idiosyncratic combination of a council system of elementary republics and a powerful judiciary, inspired by the U.S. Supreme Court. These two central institutions embody, during normal politics, the constituent power, thus composing the two institutional pillars of her republican vision of the ordinary.

From the Constituent Power to the Constituted Republic

When Hans Morgenthau asked Arendt about her political loyalties, she responded that "the left think that I am conservative, and the conservatives sometimes think I am left."[46] She could not have been more accurate. Her political theory consists of an outstanding attempt to bring together radical change and legal continuity, the extraordinary and the ordinary. The consequences of this uniquely syncretic body of thought become most apparent in her attitude toward democracy, which continues to divide Arendt scholarship. For some, Arendt was an antidemocrat who embraced elitism, advocated political exclusion, defended restrictions on universal suffrage, and rejected social justice.[47] For others, she is a proponent of a radical, participatory version of democracy, especially when it is juxtaposed with actually existing liberal representative governments.[48] I would like to briefly revisit this debate before tackling directly Arendt's own constitutional model of normal politics, which can become more intelligible if it is seen against the background of her understanding of democracy.

Her views on democracy are deeply influenced by her republicanism, which she strongly distinguished from democracy. Renewing republican reservations, Arendt indicted democracy on four accounts. To begin with,

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[46] Arendt, "On Hannah Arendt," p. 333.

[47] Canovan, "The Contradictions of Hannah Arendt's Political Thought," pp. 5–6; Wolin, "Hannah Arendt: Democracy and the Political," pp. 289–306.

[48] Jeffrey C. Isaac, *Arendt, Camus, and Modern Rebellion*, New Haven: Yale University Press, 1992, pp. 18, 256–259; Isaac, "Oases in the Desert: Hannah Arendt on Democratic Politics," *American Political Science Review*, 88:1 (1994), pp. 156–168; d' Entrèves, *The Political Philosophy of Hannah Arendt*, pp. 2, 9, 64–65; Honig, *Political Theory and the Displacement of Politics*, pp. 4, 10, 77; Wellmer, "Arendt on Revolution," p. 224.

democracy is more or less a regime where the numerically largest group rules. It is a form of rulership of the many over the few. Obviously, Arendt understands democracy here as majority rule.[49] Instead of subverting inherited relations of command and obedience, democracy is just another even more dangerous and sophisticated modality of domination better suited to modern times. Understood as a legally unrestricted majority rule, democracy "can be very formidable in the suppression of the rights of minorities and very effective in the suppression of dissent without any use of violence."[50] Instead of the few dominating the many, now the many dominate the few.[51] As such, democracy does not differ much from despotism or the tyranny of the majority. Arendt identified as a second major flaw democracy's alleged anti-institutional biases. Democracy seems to resist any form of stabilization and constitutionalization and to elude the necessity of "objective institutions."[52] It is a form of government that does not know boundaries and limits, remaining in state of perpetual becoming because there is no differentiation of law and power, authority and freedom. This lack of distinction constitutes the source of its instability and frailty. Arendt's formulation points directly to the sources of the alleged tension between democracy and constitutionalism. Democracy subverts legal and institutional limitations placed on the popular will, whose natural condition is one of uninterrupted motion. As she anxiously observed, laws "are always in danger of being abolished by the power of the many, and in a conflict between law and power it is seldom the law which will emerge as victor."[53] Democracy comes extremely close to an unconstitutional regime.

In addition, and as it has been frequently noted, Arendt tends to equate democracy with the "social question" and the futile attempt to solve by political means economic inequalities, material suffering, and the perennial problem of poverty.[54] Here, she was concerned about the instrumentalization of politics and its utilitarian transformation into a mere tool for the satisfaction of extrapolitical, usually material, goals. Finally, what troubled Arendt in a democratic state is the lack of discursive procedures of

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49 Arendt, "On Hannah Arendt," p. 333.
50 Arendt, "On Violence," p. 141.
51 Arendt, *OR*, pp. 164, 226, 228, 305n41.
52 Arendt, *OR*, p. 121.
53 Arendt, *OR*, p. 151.
54 Pitkin, "Justice: On Relating Private and Public," pp. 261–288; Eli Zaretsky, "Hannah Arendt and the Meaning of Public/Private Distinction," in *Hannah Arendt and the Meaning of Politics*, ed. Craig Calhoun and John McGowan, Minneapolis: University of Minnesota Press, 1997, pp. 207–231; Bernstein, "Rethinking the Social and the Political," pp. 238–303.

public-opinion formation. She believed that the views of the majority cannot be formed according to practices of deliberation and mutual persuasion; rather, they spring organically from a collective will that claims to naturally embody the public good. She saw a "decisive incompatibility between the rule of a unanimously held 'public opinion' and freedom of opinion."[55] Democracy is driven by the need for consensus and thus cultivates homogeneity. Therefore, democratic legislation lacks the deliberative qualities of disagreement, contest, and agon. This is so, because democracy as the regime of popular sovereignty is inherently hostile to plurality. The specter of sameness haunts the perspectival qualities of the public space. The myth of popular sovereignty undermines the agonistic dimension of the sphere of appearances, that is, the common world that makes freedom possible in the first place.[56]

How did Arendt respond to the excesses and flaws of democratic rule? What is her "new concept of the state" and her "new form of government?"[57] To answer these questions, which will bring us directly at the heart of her concept of normal politics, I need to examine her understanding of the nature of constitutionalism and then revisit the elements that compose her critique of the Western liberal state.

Concerning constitutionalism, Arendt, like Schmitt, distinguished between two constitutional types, a distinction that reflects a deeper difference between constitutive and prohibitive rules.[58] In the first case, constitutional norms have a positive, productive, and enabling effect on politics. They not only aim at preserving the constituent power within the framework of everyday politics but also facilitate the continuing and unimpeded generation of normal power within a stable legal and institutional order. Rather than approaching a constitution solely as a list of legal limitations and normative restrictions imposed on the public realm and the government in the name of some prepolitical natural rights, she defined the constitution as the preservation, organization, and increase of power.[59] Like Schmitt, Arendt was aware that her definition departs from the conventional, liberal views on constitutionalism that tend to identify it exclusively with a government limited by law whose task is to protect private liberties from an omnivorous public power. In a confident tone, she asserted, echoing Schmitt, that

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[55] Arendt, *OR*, p. 225.
[56] Arendt, *OR*, p. 228.
[57] Arendt, "Thought on Politics and Revolution," *CR*, p. 230; Arendt, *OR*, p. 249.
[58] Arendt, *OR*, p. 145.
[59] Arendt, *OR*, pp. 149, 152.

this commonly held understanding does not exhaust the nature of constitutionalism as a whole. It rather refers to only one particular, and quite distorted, version, that of liberal constitutionalism. The problem with this model, according to Arendt, is that "the liberties which the laws of constitutional government guarantee are all of a *negative character* . . . they claim not a share in government but a safeguard against government."[60] She claimed that the modern republicans of the eighteenth century had a different understanding of constitutionalism to which they attached a distinct nonliberal meaning. For them, the constitution "was by no means the safeguards of civil liberties . . . but the constitution of power."[61] Likewise, the goal of extraordinary constitutional making "was not to limit power but how to establish it, not how to limit government but how to found a new one."[62]

There are some striking similarities between Schmitt and Arendt, derived from a common understanding of the constitutional text as a positive, productive document. Both make a crucial distinction between a constitution that makes politics possible by generating, channeling, facilitating, and stabilizing power and a constitution that limits, fragments, and hinders the formation of new power centers. This distinction anticipates recent discussions about "positive" and "negative" constitutions and "enabling" versus "impeding" norms.[63] Likewise, when, for instance, Schmitt maintained that in a democratic constitution the constituent power should continue to exist within the constituted powers, he was expressing a concern similar to that of Arendt, who claimed that the republican character of a constitution depends on whether the revolutionary spirit is able to survive the end of the revolution.[64] Both authors were interested in revealing the underlying thread that links the constitution to the constituent power, the normal to the extraordinary. For Arendt, one of the main virtues of a constitutional document

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[60] Arendt, *OR*, p. 143.

[61] Arendt, *OR*, p. 150.

[62] Arendt, *OR*, p. 148. Sheldon Wolin, closely following Arendt, defines a constitution according to whether it assures "a continuous generation of power." Based on this generic definition, he maintains that "constitutions are not neutral or purely formal; they are prescriptive. This is because they deal with the highest of all political stakes. Constitutions and their politics are about power: about what power is to be used for, by whom, and according to what understandings and justifications, as well as to privilege certain public meanings and symbols. A constitution, even a liberal one, does not legitimate all types of politics, as the provisions of the original document regarding slavery and disregarding women demonstrate. A constitution is an attempt to constitute the conditions that will favour certain forms of politics over others." Wolin, *The Presence of the Past*, pp. 11, 3.

[63] Holmes, "Precommitment and the Paradox of Democracy," pp. 227–228.

[64] Schmitt, *V*, p. 91; Arendt, *OR*, p. 120.

has to do with its ability to stabilize and regulate the orderly flow of the constituent power and to endow it with a procedural and legal form that will not disrupt normal lawmaking with the unpredictable and uncontrollable eruptions of the constituent event. Self-constraints are neither completely repressive nor purely negative. Political power is the worst enemy of itself if left to its own vanity. She expressed with remarkable clarity this paradox of power:

> Power can be stopped *and* still be kept intact only by power, so that the principle of the separation of power not only provides a guarantee against the monopolization of power by one part of the government, but actually provides a kind of mechanism, built into the very heart of the government, through which new power is constantly generated, without, however, being able to overgrow and expand to the detriment of other centers or sources of power. Montesquieu's famous insight that even virtue stands in need of limitation and that even an excess of reason is undesirable occurs in his discussion of the nature of power; to him, virtue and reason were powers rather than mere faculties, so that their preservation and increase had to be subject to the same conditions which rule over the preservation and increase of power. Certainly it was not because he wanted less virtue and less reason that Montesquieu demanded their limitation.[65]

Furthermore, Arendt shared with Schmitt a critical attitude toward liberalism. Time and again, she reproached liberalism for its antipolitical orientation, which has been the cause of the privatization of modern politics.[66] This reproval can be traced back to the fundamental commitment of the liberal government to protect and advance "the pursuit of private happiness even against public power."[67] Instead of sustaining and strengthening the pursuit of public happiness, the liberal state is solely concerned with shielding negative rights against the encroachments of public authorities. Arendt's critique of liberal negative rights, despite her later oscillations on this matter, is well established and does not need to be repeated here.[68] What is less discussed, however, is a particular aspect of this critique. Along with its protection of negative liberties, Arendt, like Schmitt, commented disapprovingly on liberalism's notorious fear of power. "The liberal writer," she icily observed, is characterized by "his conviction that all power corrupts and the constancy of progress requires constant loss of power, no matter what its origin may

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[65] Arendt, *OR*, pp. 151–152.
[66] Arendt, "What Is Freedom?" pp. 148–149.
[67] Arendt, *OR*, p. 127.
[68] For Arendt's ambiguity concerning negative, civil rights, in her latest writings, see "Thoughts on Revolution and Politics," *CR*, pp. 220–221.

be."[69] She came even closer to Schmitt when she extended this critique to include, as he did, liberalism's additional fear of the constituent power of the multitude, that is, of extraordinary power. Like Schmitt, she eagerly reminded her readers that liberal representative states have been inspired not only by their "distrust of power in general" but also by their "fear of the revolutionary power of the people in particular."[70] What is remarkable is that she was able to formulate such a critique without having to bring up the notion of a popular sovereign will. The merit of her critique of liberalism is that it is as insightful and sharp as Schmitt's but free from its populist and plebiscitarian elements.

This indictment of liberalism is fully consistent with her theory of the public and participatory origins of political power.[71] If power arises from deed and speech, from citizens meeting and interacting in the public realm, it logically follows that liberalism's understanding of freedom as "freedom from politics" – derived from "the liberal credo: 'The less politics the more freedom'" – is responsible for the decay of the political in liberal democracies.[72] To Arendt's mind, liberalism is an indisputably antipolitical doctrine but one with harmful political implications as well. Thus, whereas she attributed the failure of the French Revolution to its boundless democratic drive, she was equally severe in her assessment of the cause of the American failure that she tracked it down to the liberal obsession with private property, civil rights, and economic self-interest. This liberal obsession ultimately put an end to the most promising republican experience.

Surprisingly enough, there are moments when Arendt's critique of liberalism is more vigorous than Schmitt's. Although most secondary literature tends to emphasize Schmitt's fervent antiliberalism and to downplay or overlook Arendt's own critical attitude, it seems to me that she radicalized her own objections to such a degree that they can hardly be matched by Schmitt's. Recall that for Schmitt, liberalism was a threat to the autonomy of the political because of its moralistic and economic nature, its inability to draw political distinctions, and its obstinate opposition to power and sovereignty. Liberalism was perceived to be dangerous only in a negative sense. What made it so threatening to Schmitt's eyes was also its corrosive impact on a strong government, public authority, and political stability.

[69] Arendt, "What Is Authority?" p. 97.
[70] Arendt, *OR*, p. 154.
[71] Arendt once said, "I never was a liberal. . . . I never believed in liberalism." Arendt, "On Hannah Arendt," p. 334.
[72] Arendt, "On Humanity in Dark Times," p. 23; Arendt, "What Is Freedom?" p. 149.

Liberalism is incapable of making decisions, generating power and legitimacy, fighting its enemies, and procuring order and security. But how much can one fear from such a "will-less" and passive doctrine? Schmitt never hid his contempt for liberalism and its naive belief in universal humanism as well as its propensity for forbearance and compromise. Were it not for what he considered to be the hypocrisy of liberal moralism, he may hardly have considered liberal doctrines an enemy worth fighting against. By contrast, in Arendt's writings, liberalism poses a much greater threat. Given her republican definition of politics as freedom, the antipolitical character of liberalism had far-reaching implications. In some of her writings, the liberal distrust of power and political liberties explains the emergence of a new form of modern tyranny. A liberal, depoliticized society prepares the ground for the rise of an "oligarchic government," because "public happiness and public freedom have again become the privilege of the few."[73]

As in the case of democracy, Arendt's critique of liberalism is deeply informed by her republicanism, which understood privatization and politicization in terms of corruption and despotism. In the republican tradition, corruption connoted a lack of care and dedication for the common good in favor of the selfish pursuit of private interests.[74] To lose interest in public affairs is to cease to be a citizen and to avoid sharing in governmental responsibilities. "The reckless pursuit of private interests in the public-political sphere," she warned, "is as ruinous for the public good as the arrogant attempts of governments to regulate the private lives of their citizens are ruinous for private happiness."[75] If citizens are led by necessity or choice to place their private, material interests above political action and the public interest, then, in the view of the republican tradition, the political community is directly threatened by corruption and tyranny. Corruption endangers the entire edifice of a republic, paving the path for political oppression. By corroding political participation, it leads to the neglect of institutions, to their instrumental use of politics for private, selfish benefits, and to the loss of political liberty.[76] As she asserted, "the dangers of corruption and perversion were much more likely to arise from private interests than from

[73] Arendt, *OR*, p. 269.

[74] George Kateb, "Arendt and Representative Democracy," *Salmagundi*, 60 (1983), p. 24.

[75] Arendt, "Public Rights and Private Interests," in *Small Comforts for Hard Times: Humanists on Public Policy*, ed. M. Mooney and F. Stuber, New York: Columbia University Press, 1977, p. 104.

[76] Peter Euben, "Corruption," *Political Innovation and Conceptual Change*, ed. Terence Ball, James Farr, and Russell L. Hanson, Cambridge: Cambridge University Press, 1989, chap. 11.

public power."[77] From Arendt's perspective, liberalism appears as a corrupted republic.

This aspect of her criticism of liberalism becomes more apparent when she provocatively indicted it for the rise of Nazism. Arendt, in her first major political study, related liberalism, conceptually and historically, with totalitarianism. She established this relationship by pointing to the effects of the liberal "rationalization of the recklessness with which private interests were pressed regardless of the common good." The consequences were perceived to be so terrible that she felt obliged to warn that liberalism – "the bourgeoisie's political philosophy" – "was always 'totalitarian,'" because "it always assumed an identity of politics, economics and society, in which political institutions served only as the façade for private interests."[78] Although in her later writings she moderated the harshness of this claim by arguing, in her dispute with Eric Voegelin, that liberals are not totalitarians, she still insisted that this "does not exclude the fact that liberal or positivistic elements also lend themselves to totalitarian thinking." And if "one has to draw even sharper distinctions because of the *fact* that liberals are not totalitarians,"[79] she nonetheless maintained the paradox of liberalism: "Liberalism, the only ideology that ever tried to articulate and interpret the genuinely sound elements of free societies, has demonstrated its inability to resist totalitarianism so often that its failure may already be counted among the historical facts of our century."[80]

Here Arendt not only is reviving the republican critique of liberalism; she also takes it in a new direction, linking the rise of totalitarianism with the liberal theory of negative rights and its depoliticizing effects on the practice of public freedom. The exclusive protection of negative private liberties fails to defend freedom against the totalitarian spell. It is not only an excessive overpoliticization that breeds totalitarianism. Liberal depoliticization, too, by destroying the public spaces of appearance, is so impotent and powerless in the face of totalitarian challenges that it proves to be inept to stop the drive for total mastery. By destroying the sources of power, liberalism allows for the rise of total domination. Even if it is not after all totalitarian by nature, it is nonetheless "pre-totalitarian."[81] The liberal protection of private rights fails to shield against the annihilation of freedom. For Arendt, it is only the

[77] Arendt, *OR*, p. 252.
[78] Arendt, *OT*, p. 336.
[79] Arendt, "A Reply to Voegelin," *EU*, p. 405.
[80] Arendt, "The Eggs Speak Up," *EU*, p. 282.
[81] Arendt, *OT*, p. 474.

living power of a community acting in concert that can halt violence and domination.

At this point, however, the similarities between Schmitt and Arendt end abruptly. Although their critique of liberalism shared important similarities, they parted company when it came to the crucial issue of what is to be done. Their institutional and political responses are opposed to each other. For Arendt, representation, in either its legislative or executive versions, does not constitute an attractive solution. Rather, it is seen as part of the problem. Her own response favors a republic of elementary councils combined with the institution of judicial review, which Schmitt abhorred and rejected. Thus, whereas he pushed the public assemblies to the margins of the second moment to locate them alongside rather than within the constituted reality, she, in a bold gesture, relocated them at the center of the normal republican constitutional order. This move has led many of her commentators to see her as a proponent of radical, participatory democracy.[82] They are eager to rely on her rejection of representation as an obvious indication of her democratic loyalties. But is it true that she rejected the political role of representation? Is it true that, as Kateb has claimed, "Concerning representation Arendt was unequivocal. It is abdication"?[83] To answer this crucial question, it is helpful to examine the grounds upon which she sought to exclude representation from her theory of ordinary politics.

From a normative point of view, it is difficult to reconcile Arendt's notion of political freedom with representation. The argument that the citizens are represented means that, while they cannot exercise their political powers directly, they exercise them by proxy. This argument entails, however, that only the elective representatives can exercise the faculties of speech and deed. But such a monopoly unavoidably reintroduces the old distinction between an active minority and a passive majority, that is, rulers and ruled.[84] Arendt, contrary to Weber and Schmitt, sought consciously to overcome this distinction even for normal times. A functional differentiation between the representatives and the represented signifies the demise of the public world and the loss of freedom. In representative states, she lamented, "once more, the people are not admitted to the public realm, once more the business of government has become the privilege of the few, who alone may 'exercise

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[82] Kateb, "Arendt and Representative Democracy," p. 4; Dagmar Barnouw, "Speech Regained: Hannah Arendt and the American Revolution," *Clio*, 15:2 (1986), p. 138.

[83] Kateb, "Death and Politics: Hannah Arendt's Reflections on the American Constitution," p. 608. For a similar reading of Arendt as an unmitigated opponent of representation, see Wellmer, "Arendt on Revolution," pp. 220–241.

[84] Arendt, *OR*, p. 237.

[their] virtuous dispositions' (as Jefferson called men's political talents). The result is that the people must … sink into 'lethargy, the forerunner of death to the public liberty.'"[85] Arendt did not hide her aversion for the liberal representative government precisely because it deliberately seeks to restrict the political realm to the workings of an isolated and independent parliament. In representative democracies, the parliament emerges as the main legitimate political institution that can claim to represent or reflect the opinions of an entire community and which is thus authorized to legislate in its behalf. When the function of the government is transferred from the citizens, organized in public spaces, to special state organs that alone can deliberate about and speak in the name of the public good, an enormous political inequality is taking place. The independent, elected officials, who profess, because of some particular intellectual, moral, professional, and political faculties and talents, to represent the common interest of the community, inevitably will disenfranchise the citizens by relegating them to the margins of public affairs. This division of labor is for Arendt a form of political dispossession and means nothing more than the renunciation of one's freedom.

Moreover, in Arendt's conceptual apparatus there is little space for representation for the simple reason that speech and deed are nonrepresentable faculties. They exist only during their actual exercise by the citizens. The belief that a few hundred representatives could speak and act in the name of the represented is for Arendt, besides dangerous and inimical to freedom, an absurd and nonsensical idea. Speech and action cannot be represented; they can only be practiced. As Kateb has correctly pointed out, "If action is speech, it is clear that a political actor cannot be represented in political action. Political action is therefore direct participation in the conversation of diverse equals, or more rarely, in written composition for the occasion."[86] Arendt also objected to 'descriptive representation,' according to which the parliament must accurately reflect and mirror the exact political composition of the entire electoral body.[87] She rejected this formulation that treats the legislative assembly as a literal tiny replica of society, because nothing can reproduce or duplicate the plurality of the public realm. Not only would such a body dominate other extraparliamentary publics; it would also fail to transfer to the parliament the variety of opinions formed in society. In fact, opinions, like initiatory action and revelatory speech, are nonrepresentable.

[85] Arendt, *OR*, pp. 237–238.
[86] Kateb, *Hannah Arendt*, p. 16.
[87] Pitkin, *The Concept of Representation*, pp. 60–91.

Inevitably, therefore, in a representative assembly only the perspectives and views of the elected officials will be heard and seen, thus excluding the vast majority of the opinions of the electorate. This exclusion damages and disrupts the vital process of rational opinion formation. "In this system," she exhorted, "the opinions of the people are indeed unascertainable for the simple reason that they are non-existent. Opinions are formed in a process of open discussion and public debate, and where no opportunity for the forming of opinions exists, there may be moods – moods of the masses and moods of individuals, the latter no less fickle and unreliable than the former – but no opinion."[88] With an argument that turns Schmitt's theory of representation on its head, Arendt asserted "that the only thing which can be represented and delegated is interest or the welfare of the constituents, but neither their actions nor their opinions."[89]

Moreover, can the representative officials claim that, by disclosing themselves in front of their peers in the legislative assembly, they are revealing who their constituencies are? Can one disclose oneself through another? Certainly not. In Arendt's dramaturgical definition of political action, representation clashes with her theory of action. This interpretation is reinforced by her definition of political action as spontaneous new beginnings. In this case, it becomes even more apparent that action cannot be represented, and as a consequence only the representatives will be able to start something new. Despite her critique of Rousseau, there is an obvious affinity between her position on representation and his. Interestingly enough, she goes back to a Rousseauean argument in order to criticize liberal, representative governments for reducing freedom to the single day of elections.[90]

If Arendt rejected representation as trust, what about representation as imperative or binding mandate? Did she endorse the figure of the representative as delegate? Was she arguing only against the image of the fiduciary? It would seem so, given her support for a constitutionally entrenched system of councils, which both historically and conceptually were intertwined with the principles of delegation, instruction, and revocation. But even in this case she appeared adamantly opposed to delegation.[91] The reasons are exactly the same as with the model of trust, with the slight difference that now the dispossessed and the powerless are on the other side of the equation. It

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[88] Arendt, *OR*, p. 269.
[89] Arendt, *OR*, p. 269. Recall that for Schmitt interests cannot be represented because they are materially visible. Only immaterial ideas and abstract norms can.
[90] Arendt, *OR*, pp. 236, 253; Arendt, "Public Rights and Private Interests," p. 104.
[91] Kateb, *Hannah Arendt*, p. 126.

is the representatives who, bounded and controlled by their constituencies, are unable to exercise their political liberty to speak, to act, and to reveal who they are, or to initiate spontaneous new beginnings. They are legally constrained to discharge the mandates of the represented. Paradoxically, by agreeing to fill such a lofty political position they relinquish their genuine citizenship rights. They are transformed into mere intermediary organs obliged to act in the name of those who elected them and who are legally entitled to control them. As she sarcastically stressed it, "If the elected representatives are so bound by instructions that they gather together only to discharge the will of their masters, they may still have the choice of regarding themselves as either glorified messenger boys or hired experts who, like lawyers, are specialists in representing the interests of their clients."[92] Whatever form of political representation one chooses, someone – the represented or the representative – is dispossessed and disempowered. Freedom becomes the privilege of some to the detriment of others. As a result, it appears that between the principle of representation and the practice of action there is no space for negotiation or contamination. They seem to exclude one another.

Having initially rejected direct democracy and after excluding representation in its various forms, it is worth asking to which legal and institutional devices Arendt had recourse in order to solve the problem of government and normal politics. We are back full circle to the question with which I began the investigation of Arendt's political alternative: What is her novel theory of republican government? What did she propose regarding the organization and regulation of political power after the successful end of extraordinary politics? What institutional form does her vision of normal politics take? Although she never developed a comprehensive and systematic alternative to democracy and liberalism, she did point to a distinct form of government. Contrary to Weber's failure to account for the normalization of charisma and against Schmitt's replacement of the constituent power with its symbolic representational embodiment in a personalistic executive, Arendt inserted the extraordinary within the newly established constitution so as to keep it alive and operative, although in an appeased and regulated form. She substantially renewed the socialist discourse of councils – the "wards" in Jefferson's letters, the *soviets* in 1905 and 1917 Russia, the *Räte* in post–World War I Germany, and the revolutionary councils in 1956 Hungary – by infusing them with her theory of the constituent power and the revolutionary spirit that survives the closure of the revolutionary period.

[92] Arendt, *OR*, p. 237.

At first glance, she seems to have adopted a rather conventional formulation, according to which councils are mainly territorially and professionally based units organized into a pyramidal network that culminates in a federal legislative national council. But rather than referring to these elementary republics in terms of workers' democracy or self-management as was often done in the Marxist-socialist tradition, she defined them in terms of the normalization of the extraordinary.[93] The councils are the institutionalized embodiment of a stabilized, pacified, and thus derevolutionized constituent power. It is not by chance that she defined them as "constituent bodies" with the "original power to constitute" during ordinary times.[94] But what did she really mean by this unusual definition? Did she unwittingly revert to a model of permanent revolution?

I do not think so. First of all, with the displacement of the parliament as the traditional locus of legislation, the "popular councils" become the leading legislative bodies, responsible for normal lawmaking, and thus the new "organs of self-government."[95] They become strong publics in the sense that they are "permanent organs of government," "organs of action," which "were not content to discuss and 'enlighten themselves' about measures that were taken by parties or assemblies; they consciously and explicitly desired the direct participation of every citizen in the public affairs of the country."[96] The popular councils are not only invoked by Arendt to describe a public, diffused process of deliberation, debate, argumentation, and opinion formation. In addition to providing a stable, secure framework for "discussion and exchange of opinions, mutual instruction and information on public business," they are also designed as to take political decisions and to enact new laws.[97] They are lawmaking bodies. They were construed, in Arendt's own striking terms, so as "to permit the citizens to continue to do what they had been able to do during the years of revolution, namely, to act on their own and thus to participate in public business as it was being transacted from day to day."[98] This comparison is noteworthy. Whereas during

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[93] Arendt's theory of councils has often been described as an argument for council democracy and as the institutional realization of direct democracy. I think that this description is inaccurate. Arendt was more than critical of direct democracy. Moreover, as I show in this section, she was interested in highlighting the republican rather than the democratic dimension of the council system. See John F. Sitton, "Hannah Arendt's Argument for Council Democracy," in Hinchman and Hinchman, *Hannah Arendt: Critical Essays*, p. 307.

[94] Arendt, *OR*, p. 267.

[95] Arendt, *OR*, p. 247.

[96] Arendt, *OR*, pp. 264, 263.

[97] Arendt, *OR*, pp. 247, 119.

[98] Arendt, *OR*, p. 251.

the revolution, politics takes the form of extraordinary constitutional making, during normal, postrevolutionary times, it takes the more mundane form of normal, everyday lawmaking. Popular councils correspond to the institutionalization of the constituent power. They allow active citizen participation in the decision-making process that Arendt suggestively described in terms of refoundations and reenactments.

Here the comparison with Schmitt is again instructive. For Schmitt, in ordinary politics the constituent power of the sovereign people fades away into a quasi-permanent repose. It is not extinguished, but it is nonetheless lethargic in a way that makes it nearly impossible to be reactivated during normal lawmaking – thus the need for presidential representation. For Arendt, by contrast, the constituent power of the organized multitude remains always awake and active in the institutionalized form of the council system. Because she was attuned to the danger that a resting constituent power might never wake up again, she thought that in a council system the constituent power would retain its singular legislative, instituting powers, limited however to the making of everyday laws, which of course remain inferior to and bounded by the higher, fundamental norms of the land. Arendt gave to this permanent though limited normal constituent activity the remarkable name of "augmentation," by which she meant the "augmentation of foundations."[99]

If the first extraordinary moment is one of genuine foundations, then the second normal moment is that of their augmentation and amendment. What Arendt meant by this peculiar expression is that ordinary republican politics has the form of a constant alteration, improvement, and enhancement of the original constitutional document that will further develop its inner principles but without affecting the legal and political identity of the constitutional regime. On her account of normal lawmaking, the elementary republics engage in genuine political action when their deliberations and decisions touch directly on constitutional matters. Normal political action becomes a *constituted constitutional action*. This understanding of legislation as augmentation, illustrates Arendt's attempt to solve the problem of how to preserve the extraordinary without having to indulge in a permanent revolution.

Normal politics takes the form of "a kind of necessary augmentation by virtue of which all innovations and changes remain tied back to the foundation which at the same time, they augment and increase."[100] Though

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[99] Arendt, *OR*, p. 201.
[100] Arendt, *OR*, p. 202.

the revolution has ended and a constitutional government has been established, extraordinary politics continues with the normal means of ordinary lawmaking. The constitution remains the central subject matter of politics as usual and its principles and stipulations become the targets of constant legal change and improvement. Normal lawmaking is a process of continuous amendments, and normal politics is a permanent reform.[101] In this way, ordinary politics could still retain its dignity, even its extraordinary character, by turning the constitution into an unfinished project, open to future interventions, modifications, and amendments by an active *demos*.[102] She elegantly described this process as the "coincidence of foundation and preservation by virtue of augmentation."[103] This politics of augmentation can be described as a semiconstitutional politics. With this surprising move, Arendt combined legal stability with constitutional change and institutional novelty in order to keep alive the practice of new beginnings together with a respect for lasting foundations.[104]

Despite this original, promising redefinition of a federal republic in terms of normal, constituent councils, Arendt's solution is still faced with certain difficulties. The first relates to the role of the judiciary. The second pertains to the practical implementation of popular councils and how they are supposed to work. Regarding the first issue, she seems at times more inclined to locate

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[101] Arendt would probably not have disagreed with the characterization of the constitutional amendment process as "a domestication of the right to revolution." Dellinger, "The Legitimacy of Constitutional Change: Rethinking the Amending Process," p. 431.

[102] Waldron, "Arendt's Constitutional Politics," p. 213.

[103] Arendt, *OR*, p. 202.

[104] One brief observation is warranted here. With this argument, Arendt makes a Jeffersonian move against Jefferson's theory of periodic constituent assemblies and recurrent revolutions. Although she rejected Jefferson's solution on the ground that repeated constitutional conventions "would either have thrown the whole body politic out of gear periodically or, more likely, have debased the act of foundation to a mere routine performance," she accepted the underlying idea of an active constituent power during normal politics. She departed from Jefferson's particular solution but not from his original inspiration and intentions. Honig has nicely captured this unique aspect of her thought in terms of a politics of permanent constitutional reform: "Our commitment to augmentation and amendment may derive from our reverence for a beginning that is in the past; but our practices of augmentation and amendment make that beginning our own, not merely our legacy but our own construction and performative. The commitment to augmentation protects that which was glorious because it was a performative from being sanctified and turned into a law of laws, an absolute whose irresistibility would ultimately and necessarily destroy the uniquely political character of the republic. On this reading of Arendt, augmentation is both a necessary condition of politics and a constitutive of one form of the activity itself. What Leo Strauss says of Machiavelli applies equally to Arendt: 'Foundation is, as it were, continuous foundation.'" Arendt, *OR*, p. 255; Honing, *Political Theory and the Displacement of Politics*, p. 115.

the practice of augmentation in the Roman Senate or the U.S. Supreme Court rather than in the popular councils.[105] Thus, she claimed that the Court "is exerted in a kind of continuous constitution-making, for the Supreme Court is indeed, in Woodrow Wilson's phrase, 'a kind of Constitutional Assembly in continuous session.'"[106]

If the Court is a kind of continuous constituent power, however, it will certainly become entangled in politics and power.[107] After all, the constituent power as a higher form of power is power nonetheless, and as such it requires a public space, which the Court can hardly be. Arendt herself had already rejected the likelihood of the judiciary becoming the seat of power, arguing that instead it must remain exclusively the seat of authority. It may appear that she is betraying the "institutional differentiation between power and authority" and violating the principle of institutional separation among the different branches of the government that she had advocated.[108] Despite this confusing formulation, however, there are strong indications in her writings that point to a separation between the popular councils and a Supreme Court.

Arendt herself attempted to differentiate between legislation and adjudication by implying that fusing augmentation, interpretation, and authority in a singular political instance was characteristic of the Roman Senate and not of the modern institution of judicial review. Her discussion of foundations, authority, and refoundings in the Roman Senate must be read as the description of an antiquated institution rather than as a call to duplicate this institution in modern times. "In Rome," she noted, "the function of authority was political, and it consisted in giving advice, while in the American republic the function of authority is legal, and it consists in interpretation. The Supreme Court derives its authority from the Constitution as a written document, while the Roman Senate, the *patres* or fathers of the Roman republic, held the authority because they represented, or rather reincarnated, the ancestors whose only claim to authority in the body politic was precisely that they had founded it, that they were the 'founding fathers.'"[109] Only in the Roman Republic had the site of authority the form of augmenting the foundations. Modernity has brought about their separation and relocation

[105] For a critical discussion of Arendt's espousal of judicial legislation, see Gottsegen, *The Political Thought of Hannah Arendt*, pp. 124–125, 131.

[106] Arendt, *OR*, p. 200.

[107] Arendt, *OR*, p. 201; Arendt, "What Is Authority?" pp. 122–123; Arendt, "Truth and Politics," p. 260.

[108] Arendt, *OR*, p. 200.

[109] Arendt, *OR*, p. 200.

in different institutions. In modern republics, authority takes the form of impartial judgment, interpretation, and constitutional review, while the popular councils are assigned the responsibility of carrying out the functions of lawmaking and augmentation. I am more inclined to interpret Arendt's intentions, however unclear they may be at times, as involving a disaggregation between augmentation and conservation that in the ancient Senate were combined. In her republican model, the first becomes an attribute of legislation (councils), while the second remains in the hands of the judiciary (courts).

The Problem of Representation

A second problem arises from Arendt's unsatisfactory grappling with the problem of how to institutionalize the extraordinary in a system of councils. When she described their function, she reluctantly returned to a model of representation she had harshly criticized and rejected: delegation. This system, she admitted, consists of a hierarchical, pyramidal structure. The councils compose a complex system of "co-coordination and integration through the formation of higher councils of a regional or provincial character, from which finally the *delegates* to an assembly *representing* the whole country could be chosen."[110] But in order to avoid the unpleasant restoration of delegation as instruction, Arendt redescribed the relationship between the delegates of the lower and those of the higher councils as one of "confidence" among equals. A few lines later, she added that this relationship of confidence among delegates would be based on a form of special "personal trust," so that the higher delegates are "not subject to any pressure either from above or from below."[111]

Delegation or representation? Arendt finally opted for the second. But in this case the members of the higher councils will be freer than their peers situated in the lower levels of this pyramidal edifice and therefore will partake more in the joys of political action. Additionally, she abstained from illustrating the legal and political relationship between inferior and superior delegates. Who will control whom in cases of disagreement and conflict? Who will have the last word? Who will take the final decisions? What forms of accountability will be available to the lower councils? Most importantly, with what means will the inferior councils insure that their decisions and resolutions are respected by the superior councils, which could very easily

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[110] Arendt, *OR*, p. 267.
[111] Arendt, *OR*, p. 278.

ignore them in favor of their own views and verdicts? These questions, which point at the crucial issue bearing on the particular institutional and procedural mechanisms of coordination in the process of council decision making, indicate that Arendt did not have solutions to the many lacunas plaguing the organizational structure of these councils.

Although she perfunctorily relegated these questions to "important studies on this subject [that] have been published in recent years in France and Germany," advising "anyone seriously interested [in them] . . . [to] inform himself," she failed to mention that the assumptions that inform her own version of popular councils differed greatly from the existing literature on this subject.[112] After all, the classical discourse on councils was a socialist discourse on binding delegation, entailing the technical constitutional checks of imperative mandate, strict instruction, permanent consultation, rotation of offices, and the right of revocation. These can hardly be compared with her own formulation. Indeed, Arendt herself had criticized the model of workers' councils for failing to retain their political purity.[113] But she never developed any institutional argument for why the same failure would not be reproduced by her own republican council model.

These are important omissions, but more puzzling is, despite her strong critique, Arendt's acknowledgment of certain significant positive attributes inherent to the principle of representation. Recall that one of her main objections to democracy was its lack of institutionalized processes of opinion formation and of mechanisms for the filtering and refinement of opinions. Democracy was found lacking those devices that could distinguish sound from trivial views. Arendt agreed in principle with the justification of representation in *The Federalist*, according to which only representation "can serve as the great purifier of both interest and opinion."[114] She acknowledged that "views in their endless variety seem to stand also in need of purification and representation, and it was originally the particular function of the Senate to be the 'medium' through which all public views must pass."[115] That she accepted this function of representation as purification becomes more apparent in her critique of the French Revolution. In contrast to the experience of North America, the French revolutionaries failed to institute

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[112] Arendt, "Thoughts on Politics and Revolution," *CR*, p. 232.

[113] Arendt, *OR*, pp. 274–275. Habermas has pointed out the huge "anti-institutionalism" involved in a system of councils. Habermas, *Between Facts and Norms*, p. 480. For an effort to confront this problem, see Sitton, "Hannah Arendt's Argument for Council Democracy," p. 314.

[114] Arendt, *OR*, pp. 226–227; Madison, *The Federalist*, no. 10, p. 59.

[115] Arendt, *OR*, p. 228.

a stable, working system of representation. Consequently, "there existed no medium to pass them [i.e., the opinions] through," with the grim result of creating a "chaos of unrepresented and unpurified opinions...crystallized into a variety of conflicting mass sentiments." This lack of representation, according to Arendt, led to "the death of opinions."[116]

It is evident from these passages that Arendt was not always hostile to representation. Rather, she was deeply ambivalent and uncertain: dismissive of representation but also appreciative of its political merits. She was hostile, and even so not always consistently, to the introduction of representation in the process of legislation but not to its special contribution in the process of opinion formation, especially for judicial review and the working of courts. Arendt might have responded to these charges by pointing out that despite her ambiguity on the issue of representation, her proposed "council-state" remains more open and inclusive than the actual liberal, representative governments. It enables more citizens to share in public affairs and public happiness – though not everyone will share in the same degree, given the hierarchical structure of popular councils.[117] Independently of how one may assess this aspect of her political thought, her ambivalence toward representation indicates that Arendt was critical of the principle of *representative government* but not of *representation* as such. Besides, the members of the councils do not abdicate their political freedoms once they have selected the persons to represent them in the higher stages of the pyramid. In contrast to the citizens of a liberal representative government, they still continue to deliberate, debate, discuss, act, and generate power even after they have selected their representatives for the higher councils. Her republic of councils does not divide between active and passive citizens as a representative government does, nor does it limit political involvement for the many to the day of national elections. It is a more inclusive and participatory theory of the ordinary that seeks to reconcile the freedom of the many with that of the few by making it possible for both the lower and the higher councils.

Even in that case, however, Arendt still cannot demonstrate why and how the selection of the higher delegates will not take the form of an elective aristocracy or that the same people will not be chosen over time, again and again, to occupy the higher layers of the council system. Likewise, she cannot reconcile the divide separating those who will make the laws in the superior federal parliament from those who, in the inferior councils, can

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[116] Arendt, *OR*, p. 228.
[117] Arendt, "Thoughts on Politics and Revolution," p. 233.

only speak, deliberate, and display themselves and who are deprived of the practice of lawmaking. Of course, if she had accepted the principle of rotation and lottery as the sole mechanism of council selection, her argument would have come extremely close to a model of direct democracy. But there is no space in her theory for such a move. Those elected to the higher councils must be chosen by their peers according to their excellence and to their dedication to the common good and not by an impersonal mechanism that levels personal qualities. They must be the "best."[118] Thus, given her admission that her system is an elitist one and that it has "the shape of an essentially authoritarian government," her insistence that she had successfully reconciled equality and authority sounds highly controversial and annoyingly self-congratulatory.[119]

The Moment of Civil Disobedience

In his famous address in January 1838 before the Springfield, Illinois, Young Men's Lyceum, Abraham Lincoln, commenting on the definitive closure of the revolutionary epoch, remarked:

Thousands have won their deathless names in making it so. But the game is caught; and . . . with the catching, end the pleasures of the chase. This field of glory is harvested, and the crop is already appropriated. But new reapers will arise, and *they*, too, will seek a field. It is to deny, what the history of the world tell us is true, to suppose that men of ambition and talents will not continue to spring amongst us. And, when they do, they will as naturally seek the gratification of their ruling passion, as others have *so* done before them. The question then, is, can that gratification be found in supporting and maintaining an edifice that has been erected by others? Most certainly it cannot. Many great and good men sufficiently qualified for any task they should undertake, may ever be found, whose ambition would aspire to nothing beyond a seat in Congress, a gubernatorial or a presidential chair; *but such belong not to the family of the lion, or the tribe of the eagle*. What! Think you these places would satisfy an Alexander, a Caesar, or a Napoleon? Never! Towering genius disdains a beaten path. It seeks regions hitherto unexplored. It sees no *distinction* in adding story to story, upon the monuments of fame, erected to the memory of others. It *denies* that it is glory enough to serve under any chief. It *scorns* to tread in the footsteps of *any* predecessor, however illustrious. It thirsts and burns for distinction; and if possible it will have it, whether at the expense of emancipating slaves, or enslaving freemen.[120]

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[118] Arendt, *OR*, pp. 278–279.
[119] Arendt, *OR*, p. 278.
[120] Abraham Lincoln, "The Perpetuation of Our Political Institutions," in *Abraham Lincoln: Speeches and Writings, 1832–1858*, ed. Don E. Fehrenbacher, New York: Library of America, 1989, p. 34.

Arendt would have concurred with Lincoln's acute description of the paradoxical predicament facing any postrevolutionary generation. While it has the privilege to live in a lasting constitutional republic tasting the fruits of the revolutionary legacy, it is nonetheless deprived of the unique and unrivaled experience of initiating new political and constitutional beginnings and of starting something new. Although its freedom is firmly grounded and institutionally protected, it remains incomplete and limited. She would even have agreed with the last two sentences, where Lincoln interprets the coming civil war not in the name of equality and justice but on the grounds of reenacting the constitutional moment for those who aspire to repeat the extraordinary deeds of the founding generation. But where she certainly would have concurred is with the final sentence of the speech. After lamenting the gradual dissolution of the revolutionary legacy and the fading of the founding memories, Lincoln declared that "now, that they have crumpled away, the temple must fall, unless we, their descendents, supply their places with other pillars."[121]

These last words might shed some light on Arendt's preoccupation with civil disobedience and the need to keep open some venues for more spontaneous and irregular forms of political intervention to reinvigorate the participatory spirit of a juridified republic. Her engagement with the problem of civil disobedience, however, is elusive. Hence, it has often been seen as a conjectural intervention in one of the most controversial and heated debates related to the turbulent political context of the 1960s rather than as a systematic set of theoretical reflections related to her overall political thought. Moreover, in those few instances in which Arendt's theory of civil disobedience is examined in theoretical terms, it is mainly in connection with liberal representative democracies and their limitations. For example, Kateb has argued that Arendt viewed civil disobedience as a necessary supplement to parliamentarism, interest-group politics, and mass democracy that could alleviate their flaws. Thus, he concludes, civil disobedience was meant to overcome the structural limits that liberal constitutional democracies have placed on political participation.[122] This interpretation suggests that Arendt was finally contented with a system of dual power divided between an ordinary formal-legal party politics and an extraordinary informal-illegal political action.[123]

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[121] Lincoln, "The Perpetuation of Our Political Institutions," p. 36.
[122] Kateb, *Hannah Arendt*, pp. 131, 144–145.
[123] Kateb, *Hannah Arendt*, p. 20.

It is true that Arendt began paying attention to civil disobedience only in the 1960s and that she hardly discussed the relationship, if any, between the republic of councils and civil disobedience. Did she intend civil disobedience to be solely a means for rectifying problems associated with liberal representation, or did she also contemplate the possibility that even in her republican theory of government based on scattered and diffuse popular assemblies and an authoritative court there would still be problems that only a third political moment could solve? Were her arguments for civil disobedience an indication that she arrived at a compromise with the liberal state and that she supported a form of extra-institutional dissent and protest in order to keep alive a minimal presence of action and freedom within a liberal context? Or, on the contrary, did she realize that even in the most participatory republic, normal politics would always impose certain structural limitations and exclusions and that some voices would remain silenced and therefore that there would still be a need to open up other, illegal, venues of political participation that exceed the bounds of the institutionalized sphere of politics? I would like to explore this second version to see whether it fits with her vision of extraordinary politics and her understanding of political freedom as new beginnings.

Arendt ascribed two different functions to civil disobedience. The first is to protect the constitutional status quo and to forbid legal changes through ordinary lawmaking that could radically alter the content and character of the republican constitution. It is not inconceivable that the councils, especially the higher ones, could initiate radical augmentations and constitutional changes and carry them out through a shrewd manipulation of the legal mechanisms of normal legislation. Like Schmitt, Arendt was aware of the potential problem lurking behind any normal politics: normal legislation might turn into a concealed extraordinary act of lawmaking, usurping the power of the multitude and replacing it with that of the constituted legislative bodies.[124] It may be that "the government is about to change and has embarked upon and persists in modes of action whose legality and constitutionality are open to grave doubt."[125] For example, the higher councils together with the courts might be tempted to usurp the powers conferred upon them by the lower councils to initiate an augmentation that could threaten the original foundations, the essential core of the established constitution, and the identity of the republican regime. In such likelihood, the civil

[124] Arendt, "Civil Disobedience," p. 75.
[125] Arendt, "Civil Disobedience," p. 74.

dissenters, lacking the instruments of recall, might step outside the formal boundaries of institutionalized politics and directly appeal to the authority of the constitution against violations committed by the government of councils. They might compel it, through illegal pressure, to restore, respect, and abide by the meaning and authority of the constitutional document. By breaking ordinary law, they could appeal to the authority of the higher law against any unwarranted change initiated by ordinary lawmaking.

In the second case, civil disobedience has a more active and creative role to perform. No longer simply a reaction against constitutional violations, it brings new changes and modifications to the constitutional document by using illegal means.[126] Civil dissenters break the law in order to stress the need for some widespread modifications. Although the government may not deem them necessary, some citizens consider they would redeem and further extend the content and principles of the constitution, without however challenging the authority of the entire constitutional government. In this third moment, augmentation is not legally carried out. Civil disobedience might be seen as an illegal amendment and a refounding of the constitution outside the council system. As Arendt put it, the "law can indeed stabilize and legalize change once it has occurred, but the change itself is always the result of extra-legal action."[127]

Arendt made two observations that are critical for understanding civil disobedience as a form of semi-extraordinary politics located alongside the constitutional order in a fashion reminiscent of Schmitt's scheme to place the constituent power of the people at the fringes of normal politics. On the one hand, she recognized the affinity between civil disobedience and revolution. Although civil disobedience operates within an established constitutional authority, it turns out that the changes disobedience aspires to enact could be so sweeping as to undermine the entire juridical order.[128] This proximity between civil disobedience and the extraordinary worried Arendt and accounts for locating it at the periphery of normal institutionalized politics. There is no better place to see her anxiety than in her ruminations regarding the proper location of civil disobedience. Thus, in one case she correctly conceded that it is extremely difficult to incorporate it into any kind of constitutional law and to justify it on purely legal terms given that by definition it represents a violation of the law. No legal system can accommodate such a contradictory provision. Illegality can hardly be legalized while remaining illegal. She was aware of the

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[126] Arendt, "Civil Disobedience," p. 75.
[127] Arendt, "Civil Disobedience," p. 80.
[128] Arendt, "Civil Disobedience," p. 77.

difficulties concerning "whether it would not be possible to find a recognized niche for civil disobedience in our institutions of government."[129]

A few pages later, however, she acknowledged some important benefits of such an inclusion of civil disobedience within the established institutions of normal politics. A protracted political crisis may prepare the ground to "find a home for civil disobedience, not only in our political language, but in our political system as well."[130] Among such benefits, the institutionalization and legalization of civil disobedience will make it part of everyday, normal politics, endowing these acts not only with the aura of legality but also with the necessary stability and continuity, making them more efficient in their political-constitutional struggles.[131] If civil disobedience becomes part of the juridical structure, it will partake in both the strength and permanence that only the law can bestow. At the same time, however, an inclusion of civil disobedience in the system of laws may compromise its spontaneous and instituting nature by making it part of everyday lawmaking and thus vulnerable to the same limits and flaws that inevitably plague all normal politics. The law imparts a kind of rigidity that could be a further cause for the privatization of politics, the gradual decline of the public sphere, and the erosion of freedom. Hence, keeping civil disobedience at the edges of constitutional law may protect and enhance its spontaneous, disruptive powers to initiate illegal extraordinary innovations and redeem the rebellious spirit of the constituent power.

A potential resolution of this dilemma can be extracted from Arendt's attitude toward social movements. While discussing civil disobedience, she downplayed her previously negative assessment of social movements in favor of a more positive account.[132] By reevaluating these informal and spontaneous voluntary associations, she sought to achieve two tasks. First, she indirectly linked civil disobedience to the constitution by proposing the introduction of a new clause on the right to association.[133] This proposal reflects her effort to find a meeting ground for normal and extra-institutional political activities. Thus, while illegal, civil disobedience could also rely on certain entrenched constitutional principles to achieve an element of legality and lawfulness. Illegal action carried out in the name of higher norms may provide the necessary link between the second and third moment. In addition, by moving between legality and illegality, procedures and spontaneity,

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[129] Arendt, "Civil Disobedience," p. 99.
[130] Arendt, "Civil Disobedience," p. 101.
[131] Arendt, "Civil Disobedience," p. 101.
[132] Also, see Arendt, "Thoughts on Politics and Revolution," pp. 202–203.
[133] Arendt, "Civil Disobedience," pp. 95, 102.

movements could reinvigorate the "decline in the appetite for action" with which any form of normal instituted politics is inevitably confronted.[134] They could also reanimate the constituent power, especially when nonviolent organized dissent aims at rescuing the extraordinary from the oblivion of ordinary politics by pressing directly for constitutional changes through illegal means against the rigidity and interests of the institutional organs. In this case, self-organized movements seem to approximate the politics of original constitutional making more than the institutionalized forms of everyday politics. Whereas during normal times politics often takes the form of legal augmentation through the prescribed use of constitutional rules, civil disobedience could be treated as a more erratic, episodic, and informal manifestation of political freedom, bypassing established institutions in order to push illegally for constitutional augmentations.

Arendt's views on movements of civil disobedience could mediate between extraordinary and normal politics in a variety of ways. First of all, movements do not have the aristocratic, hierarchical, and elitist structures that councils do. They are free from the entanglements of representation. Likewise, they operate apart from the existing mechanisms of organized power. They are based on the premise of a more direct, democratic form of participation, where citizens are able to speak and act for themselves. Finally, whereas movements of civil disobedience are noninstitutionalized collective subjects, they are not disorganized or amorphous. They avoid the hierarchy endemic to institutionalized politics without consisting of a simple conglomeration of individual wills like a crowd.[135] Consequently, even though they are characterized by more or less fluid and precarious internal structures, and thus are vulnerable to change and ultimately to decay, they are not completely lacking in organizational and political forms. They are extrainstitutional but not anticonstitutional. They are based on the participatory practices of mobilization among free and equal citizens who decide to act collectively and directly – to speak for themselves – outside the confines and mediations of the instituted political system.

This formulation, however, of civil disobedience invites Kateb's objections. He sees it as another form of group politics, implying that there is no difference between interest groups and movements. Both are voluntary

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[134] Arendt, "Civil Disobedience," p. 96.
[135] As Cohen and Arato maintain, "The first task of new social movements is to form the very subject that must become the collective actor who will participate in political negotiations and exchanges and then the bearer of gains and losses." Cohen and Arato, *Civil Society and Political Theory*, p. 556.

associations.[136] Here, I disagree with Kateb. Had Arendt implied that movements of disobedience were associations of interest, she would have denied the very conceptual and normative foundations of her political theory, which is based on the critical distinction between the political and the social.[137] Movements of disobedience, although they express the concerns and anxieties of minorities most of the time, have to frame their demands and grievances in general, political terms. They need to appeal to generalizable interests and principles rather than speaking in the name of their particular identities and needs. This is one of the main differences between movements of disobedience and pressure or interest groups. Whereas the former, according to Arendt, act in the name of the public interest, the latter act in order to advance their narrow particular interests. Arendt defined pressure groups as "degenerate" voluntary associations that correspond to "the organization of *private* interest groups for the purpose of public, political influence."[138]

In addition, Arendt understood voluntary associations, as opposed to lobbies, in terms of deliberation and mutual persuasion. After all, although interest groups may be voluntary associations in a formal sense of the term, they are not political entities, as movements are, given the fact that to act politically is not to be concerned with oneself but with the world, which pressure groups decidedly are not.[139] And whereas these groups are based on interests, movements are based on opinions. Interests are taken as given and natural, whereas opinions need to be formed and shaped through discussion, debate, and deliberation.[140] It is precisely this public and political nature of the voluntary associations of dissenters that compels movements to transform their claims into a generalizable discourse that potentially could appeal to all rather than to some particular groups and interests. In other words, everything suggests that for Arendt voluntary associations were informal organizations for the rearticulation of the public interest outside of the existing legality and procedural formalism. As Benhabib has argued, for Arendt,

The constitution of a public space always involves a claim to generalizability of the demands, needs, and interests for which one is fighting.... Whichever class or social group enters the public realm, and no matter how class or group specific its demands may be in their genesis, the process of public-political struggle transforms the

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[136] Kateb, "Arendt and Representative Democracy," p. 42.
[137] Arendt, "Civil Disobedience," p. 96.
[138] Arendt, "Public Rights and Private Interests," p. 104; Arendt, "Civil Disobedience," p. 96.
[139] Arendt, "On Hannah Arendt," p. 311.
[140] Arendt, "On Hannah Arendt," pp. 331–332.

attitude of narrow self-interest into a more broadly shared public or common inter-est. This, I think, is the fundamental distinction between the "social-cum-economic" and "political" realms for Hannah Arendt.[141]

I can now ask again the question that I have tried to avoid and only partially addressed up to now: What precisely does it mean to say that vol-untary associations are located next to the constitution? Arendt alluded to one potential interpretation. She suggested that, although the movements act in illegal, spontaneous, and noninstitutionalized ways, they do not aim to subvert and destroy the existing constitutional and political framework. Civil disobedience is not a revolutionary constituent act and does not aspire to play this role. I see at least two additional reasons why such a purely extraor-dinary character is impossible. First, civil disobedience does not always suc-ceed in mobilizing broader segments of the population and thus cannot claim the inclusiveness of the constituent power. Arendt most often associates it with minorities and excluded voices. Likewise, civil disobedience is more common than extraordinary politics but less frequent than normal politics. For these two reasons, it does not always approximate or coincide with a radical new beginning.

More importantly, civil disobedience presupposes a set of constitutional political rights without which it could not function as a political movement. Thus, it does not operate prior to or below the establishment of a constitu-tional government. Though not part of the formal constitutional and legal order, civil disobedience does lean on it. Constitutional rights secure and enable the practice of civil disobedience. Legality provides the conditions of possibility for illegality. Acts of civil disobedience presuppose fundamental rights only to radicalize them beyond their prescribed jurisdiction. That is, movements of disobedience take these rights beyond their areas of compe-tence. Although they might act illegally, they do so not in order to negate the constitutional order but in order to affirm it on a higher normative level. At the same time, however, movements of disobedience seek to radicalize and extend the use and applicability of these freedoms to spheres and issues that are not directly or explicitly prescribed in the original constitutional text but implied by its normative nature, revolutionary origins, and historical development.

The semi-extraordinary politics of movements seeks to deepen and expand the power of these freedoms beyond the formalism and procedu-ralism of the existing legal system, even when they seem to violate them

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[141] Benhabib, *The Reluctant Modernism of Hannah Arendt*, p. 145.

by adopting illegal but legitimate forms of political struggle. In this sense, movements represent the political consciousness of an institutionalized order that, through the survival of limited forms of direct mobilization, reminds the political community of the utopian and radical dimension of republican constitutionalism.[142] Civil disobedience is a way to reassert the links between the constituent and the constituted power and to mediate between the first and second moment, the extraordinary and the ordinary. They move between insurrection and assimilation, between illegal and legal new beginnings. While they do not pretend to act as an unadulterated constituent power they cannot be reduced to the mere formal legalism of the second moment. Because of their ambivalent relation both to the first and second moment, movements of disobedience can be located neither before nor inside the constitution but reside instead alongside it.

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[142] Cohen and Arato, *Civil Society and Political Theory*, pp. 576, 587–588, 590, 594–595, 600.

Conclusion

A Democratic Theory of the Extraordinary

The writings of Max Weber, Carl Schmitt, and Hannah Arendt consist of unique and powerful insights on the extraordinary and the politics of foundings. Their respective notions of *charisma*, *constituent power*, and *new beginnings* were deployed to describe political origins and account for originary and transgressive moments of symbolic and legal innovation and for constitutional creation. These three concepts clearly distinguish their authors' approaches from the conventional concerns of modern political theory, setting them apart from its prevalent orientations and interests. The atypical qualities of Weber, Schmitt, and Arendt not only continue to enrich our political vocabulary with new concepts and arguments but also open up imaginative ways to think about the significance of unpredictable and discontinuous deeds that defy the established order, challenge the scope and content of institutionalized politics, and transgress the limits of the possible and the accepted. All three thinkers sought, despite the many differences that separate their works and their distinct perspectives, to elucidate those brief and rare events of political excess whereby a community redefines itself and radically transforms the form of its existence.

More importantly, however, their accounts of the extraordinary suggest elements of a new theory of democracy with a radical intent. Although these elements of the respective projects of Weber, Schmitt, and Arendt remained incomplete, even unclear, often misunderstood, and thus over-looked or marginalized by most scholarly commentaries, they do gesture toward an original, compelling understanding of radical democratic politics. Undoubtedly, this claim is paradoxical, indeed counterfactual, given the critical attitude of the three thinkers regarding the government of the many. Even if they came to terms with the fact of modern mass democracy and learned to accommodate their worries through elaborate strategies of

containment, such as strong executives, personalistic representation, emergency provisions, and acts of disobedience, there is no question that none of them were strongly committed to democratic politics. Nonetheless, despite their distrust of popular government, their thoughts on the extraordinary consist of promising insights on how to rethink democracy from the point of view of the lucid and deliberate self-institution of society.[1]

It is those insights which I sought to retrieve by removing them from the broader theoretical context, philosophical underpinnings, and political intentions of their authors. My goal was to initiate a dialogue among the three distinctive versions of the extraordinary with the hope it may bring about a new reconfiguration, steered this time explicitly in the direction of a radical democratic project. Such a comparative reading was necessary as no formulation was free from conceptual limitations, theoretical flaws, and political problems. Thus, before concluding my study on the extraordinary with some broader reflections on its implications for democratic theory, I first sum up briefly how a dialogue among the three thinkers undertaken in this study soothes some of the most pressing problems each of them encountered in their respective explorations of the extraordinary politics of foundings.

My starting point was Weber's theory of charisma. This choice was not favored simply on the grounds of chronological consistency. Rather, Weber's binary logic epitomizes at its best the problems and dilemmas associated with the politics of the extraordinary. The most pressing is the hostility charismatic power exhibits toward its institutionalization through its uncompromising externality to the symbolic, political, and legal orders it brings into being. By splitting politics into two opposed, almost irreconcilable moments, Weber failed to account for the survival of the extraordinary within normal times and missed the opportunity to steer charisma in the direction of the constituent power. His inability to find the proper balance between the revolutionary power of an unstable, fleeting charisma and the proceduralism of legal-rational authority is reflected in the abortive figure of a strong plebiscitary executive.

Weber's failure, however, sets the stage for Schmitt's and Arendt's more positive attempts to reconcile extraordinary and ordinary politics. These attempts display a better, and one may say a dialectical, appreciation of the second moment that defies Weber's negative depiction as a legal iron cage. Schmitt and Arendt were attuned to the limits of a dualist approach, gesturing to an additional third dimension of politics, that of informal, spontaneously formed public spaces and extra-institutional assemblies, which resist

the normalizing and disempowering tendencies of instituted state politics by keeping alive the experience of extraordinary occurrences.

Likewise, but from a different point of view, Schmitt's theory of the constituent popular sovereign might escape its narrow juridical nature by incorporating the symbolic powers of charismatic innovation. Although Schmitt opposed charisma explicitly, his version of extraordinary constitutional foundings could substantially benefit from its inclusion into a broader, postjuridical framework. In limiting the scope of sovereignty strictly to constitutional making, Schmitt reduced extraordinary politics solely to the creation of legal norms. This overly legalistic formulation excludes multiple kinds of radical acts that do not target directly the formal constitution but instead aim at the symbolic construction of social relations and the hegemonic articulation of political subjectivities that exceed the sphere of pure law. Similarly, Schmitt's mute constituent sovereign seems in desperate need of Arendt's theory of speech, deliberation, and persuasion. His speechless 'politics of the will' undermines most of the democratic implications of his constitutional writings, and it is Arendt's merit to have uncovered how through diffused practices of informed public debate citizens become capable of collective political action – that is, able to reason, judge, and act, even in moments of legal indeterminacy and political arbitrariness. It is also here that Schmitt's theory of sovereignty could be reformulated along the lines of a performative theory of political freedom as the act of beginning something new, something unpredictable. For this reason, Arendt's version of the extraordinary supplements Schmitt's emphasis on legitimacy with a robust theory of freedom. The establishment of a new constitutional and political order addresses the problem not only of legitimate authority and its sources but also of collective self-legislation and political self-determination.

In a similar vein, I think, Arendt's notion of new beginnings, certainly the most attractive version of extraordinary politics, equally profits from a dialogue with Weber and Schmitt, especially when it comes to the themes of creativity, sovereignty, and decision. Arendt's aversion to popular sovereignty, her disregard for the political role of meanings and ideas, her strong ontological distinctions that merge the categories of making and creation into one seamless model, and her unresolved ambivalence toward the will, all of which informed her suspicion toward democracy, can benefit substantially from Weber's notion of charismatic movements and Schmitt's theory of the constituent sovereign will. It is not only that her disproportionate reliance on opinion undermines her own insights on action by reducing it to a decision-less deed, a deed that discloses and performs but never decides. It is also her views on pluralism that vacillate between a radical perspectivism

and an unthematized, almost unexplained act of consenting that benefit from Weber's theory of the symbolic and charismatic constitution of a new collective subject as the lucid agent of extraordinary new beginnings.

In the rest of the conclusion, I briefly discuss two general implications that follow from my comparative reading of the three authors regarding a democratic theory of the extraordinary. The first refers to the founding moment itself and points to a democratic understanding of new beginnings and its normative significance and critical ramifications. The second pertains to a radical conceptualization of democracy as consisting of three moments or dimensions, depending on the particular location and role of the extraordinary in relation to the democratic instituted order.

In assessing the question of democracy's beginnings, it seems to me that most of the time democratic theory and political science have evaded this question by focusing instead on normal politics and ordinary lawmaking – that is, on instituted democracy. Questions pertaining to participation, legislation, deliberation, legitimacy, sovereignty, power, freedom, and representation have all been confined to the study of a stable, constitutional democracy. Even the identification of the defining traits of democracy has been restricted to an enumeration and description of a number of criteria that characterize an established democratic government. Hence, democratic politics is portrayed as static and frozen, always already instituted – that is, as normal politics regulated by the state and its electoral institutions, monopolized by political elites and bureaucrats, and organized by formal procedures. It is permanently disciplined and perennially tamed. As a consequence, because the question of the origins of these institutions, rules, and norms is not considered to belong to the province of democratic theory, it is excluded from the study of democracy.

The encounter of the extraordinary and democracy challenges this dominant orientation and brings the politics of beginnings and foundings to the center of the study of democracy. By shifting attention to democracy's beginning, it makes the founding of democracy vital and even indispensable to a more comprehensive and broader understanding of the nature, content, and scope of a free government. In a word, a theory of the extraordinary redirects attention to *how*, *when*, or by *whom* a constitutional democracy is created. This orientation renews and strengthens the normative dimension of democratic theory by reintroducing the ideal of political autonomy as collective self-determination. Emphasis on the acts and practices of self-founding revitalizes the classical quest for democratic freedom as the will to live under one's own laws, which is better actualized and approximated when these laws are the higher, fundamental principles rather than the secondary,

derivative norms of ordinary lawmaking. The politics of the extraordinary denotes the democratic origins of the basic structure of society and situates the foremost moment of political freedom at the sources of power and its constitutional framework. It is in these brief and intense periods of the institution of the political that a greater degree of political participation and popular involvement becomes both possible and desirable.

Thus, a democratic theory of the extraordinary provides a critical lens to evaluate different foundings and to distinguish between democratic and non-democratic new beginnings through a new conceptualization of democratic legitimacy that goes beyond a limited approach to free electoral procedures of elite circulation and the study of public opinion. A theory of the extraordinary represents the abstract norm of democratic founding, in accordance with which we can recognize, measure, and assess the legitimacy of existing practices of political and legal new beginnings in relation to whether and how much they approximate or depart from its participatory and inclusive attributes. Especially today, with the project of a European constitution facing major challenges, the problem of democratic foundings is topical again. Similarly, the American appropriation of constituent power to establish new regimes demands the elaboration of a critical discourse to register and evaluate the democratic deficit of such imperial attempts at global command. A democratic theory of the extraordinary suggests that not any act can claim to be constituent and not any actor can contend to be a founder, even if the actor and the act have been successful, that is, effective in creating a new constitutional document. Should a person or group appropriate the power to constitute a legal order at the exclusion of all those who will be its addressees, the ensuing constitutional law should be regarded as invalid, the result of an act of usurpation. Such an act would not be democratic but rather a repressive command, an expression of coercive imposition.[2]

Furthermore, a democratic theory of the extraordinary avoids the traps of legal fetishism, so characteristic of liberal constitutionalism, without however disowning the importance of the law for democratic politics. By locating the sources of higher fundamental norms – the constitutional identity of a political association itself – outside the constitution, it breaks with the reductionism of pure legality and formal proceduralism. It stresses the transgressive dimension of democracy but without reducing popular politics to it. The idea of the extraordinary as the democratic excess of constitutionalism is a reminder that politics cannot be conflated to abstract, mechanical legality. For example, I consider the overall relationship that a constitution and a people maintain is crucial for a theory of democratic constitutionalism. In fact, the theory of the extraordinary shifts the focus from an internal, and

sometimes rather technical, examination of a constitution to how constitutions relate to its addressees, who, as its creators as well, at times exceed and transgress the constituted order and its higher authority. The politics of the extraordinary is uniquely attentive to moments of legal disruptions and symbolic discontinuities and avoids the problem of a total juridification of politics.

The extraordinary is a reminder that instituted reality does not exhaust and cannot consume all forms of political action, which often emerge at the edges of the existing statist *nomos*. Such a constitutional outside does not necessarily have to be exclusively populated by beasts or gods. Nor does it amount to a war of all against all in a normless state of nature. It may as well provide the possibility for expanding the boundaries of political space, enlarging the practice of democratic action, and involving more direct and effective popular forms of political participation that aspire to shake and transform the instituted relations and structures of state power and whose object is the constitution of society as such. From this point of view, phenomena such as civil disobedience, irregular and informal movements, counterinstitutions, protests, insurgencies, street fighting, and illegal upheavals are as (if not more) important to democracy as normal politics. In assuming that a constitutional order confronts an irreducible outside, a theory of the extraordinary expands the boundaries of politics so as to involve more diverse, direct, physical, and conflictual forms of political participation that call into question the existing institutions and seek to change them through deliberate collective action.

The second implication of a democratic theory of the extraordinary advances a new theory of democracy as three-dimensional, incorporating the originary dimension of foundings alongside normal politics and the dimension of spontaneous, informal movements and extra-institutional assemblies. As Ernst Kantorowicz, who in his influential historical treatise on medieval political theology discovered that the king, against all physical appearances, had actually not one but two bodies, I would like to suggest, in like fashion, how the popular sovereign, against all theoretical appearances, has three bodies, each marking one of the three different locations it occupies and the distinct roles it performs in relation to the instituted order.[3]

Democratic theory, especially when it maintains radical emancipatory aspirations, should not reduce the collectivity to its constituted form. It should rather distinguish its potential distance from the official political system. In Castoriadis's words, "The instituted society is always subject to the subterranean pressure of instituting society."[4] Similarly, Sheldon Wolin claims that, "Democratic action, or the demos as autonomous agent, might

be defined as collective action that initially gathers its power from outside the system."[5] But that the people are not permanently or totally consumed by the established political powers does not mean they have to remain everlastingly confined outside any stable legal and political framework. This version of direct democracy, of a perpetually self-instituting society, is a contradiction in terms as far as the extraordinary is negated by the urge to turn it into a lasting, that is, an ordinary, phenomenon. Its singular character is lost. It is this insight that separates radical from direct models of democracy and refuses to oppose democracy and constitutionalism or to sacrifice the distinction between higher and ordinary law. At the same time, however, unlike liberal doctrines or purely procedural theories of democracy, a democratic theory of the extraordinary seeks to keep alive and effective the instituting power of the people after the conclusion of founding acts and during periods of normal politics. The problem of juridification is addressed by the politics of extra-institutional and extraparliamentary movements that supplement the inescapable legitimation deficit and mitigated democratic freedoms of an instituted democratic order. Informal public assemblies and self-organized movements keep alive the spirit of new beginnings and directly generate democratic legitimacy during ordinary politics but without disrupting the existing legal and constitutional framework or claiming to replace abstract procedures and institutionalized representation.

Democracy's three moments or dimensions gesture toward a circular theory. I propose to view the first and third moment of democracy as two interrelated and intersected aspects of radical popular politics differentiated by degree and intensity rather than by quality. In this version, the sovereign is not fixed in a natural, normless state but rather emerges from informal, extraparliamentary self-organized spaces. Instead of invoking a mythical people surging forth *ex nihilo*, I suggested shifting to a plurality of social movements and voluntary political associations as the inescapable ground upon which popular sovereignty is constructed. During moments of ordinary politics, the citizens might continue to exist not only in mediated forms channeled by various devices of representation but also in more direct, physical and concrete extra-institutional organized forms. These movements neither operate in a normative or sociological vacuum nor are defined as disorganized masses capable only of acclamation. They are entangled in a series of self-constituted and self-formed networks and discourses that exist alongside instituted politics and representative forms. As such, they testify to the creative capacity of collective actors to develop spontaneous self-organized counterinstitutions apart from the juridical system and the constituted order of the state machine.

In normal times, these movements transgress the limits of legality in order to radicalize the utopian and radical content of a democratic government and to broaden and expand existing political freedoms. But it might be that in some rare cases they move away from illegal strategies toward more radical, extralegal activities. Such a shift signifies, in certain specific historical conjunctures, that some of the movements are able to mobilize and encompass broader strata of the population, to form wider organic alliances, to articulate new norms and rights, to formulate original collective aims that transcend the confines of the existing regime, and to propose a new hegemonic founding project. In this case, they overcome their everyday divisions and antagonisms to coalesce around a redefinition of the people and the sovereign. Instead of breaking the law in the name of the established norms and principles, these new political alliances transgress the law and decide, once again, to propose a new political order. In moments like these, movements and their allies become the new popular, constituent subject. In other words, they are moving toward the direction of becoming the new carriers of the constituent power. They shift from being next to the instituted order to being outside it. Their illegal actions become extralegal as they target directly the existing symbolic and juridical structures of instituted power. From within noninstitutionalized popular assemblies, as extraordinary struggles develop, the sovereign gradually wakes up to take a new fundamental decision concerning the form of its political existence. Herein we are witnessing the overlapping of the third and the first moment. The more the citizens' initiatives in the extra-institutional spontaneous popular assemblies are politicized and united, the more they tend to converge with the sovereign constituent will, and the more ordinary politics starts vacillating toward extraordinary politics.

This cyclical theory of the three "bodies" of democracy accounts for the possibility of the people to act collectively in a lucid and reflective manner outside the command and constraints of formal institutions. Although they might be in an environment of institutional uncertainty, legal vagueness, and political contingency, they still preserve some minimum organizational forms of collective action and some patterns of political interaction, spontaneously instituted in popular assemblies and carried out by informal movements. The collapse of a political system with its established laws and norms does not automatically entail the fragmentation or the disappearance of the people as a conscious political force. Because during ordinary politics they remain active within irregular and informal noninstitutionalized relations taking place in informal popular assemblies, they have the capacity to act collectively in a lucid and reflective way, even though the main official and

representative procedural and legal channels of political expression and will formation have been disrupted.

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