Rethinking ‘Modern Democracy’: For a Democratic Critique of Political Modernity
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La Souveraineté est du tout inseparable de l’État … La souveraineté est la forme qui donne l’être à l’État.
Charles Loyseau

Politics is the art of associating men for the purpose of establishing, cultivating, and conserving social life among them. Whence it is called symbiotics.
Johannes Althusius

It is commonly assumed that the democratic passage to political modernity coincides with a transfer of sovereignty from the king to the people, from the One to the Many.

According to this canonical and highly influential view, the historical birth of modern democracy occurs during the two great 18th century revolutions in North America and France, whereby sovereign power was subtracted from monarchy and illicitly seized by its subjects to be relocated in the people as the ultimate foundation of the newly erected constitutional ‘sister’ republics.

By appropriating the king’s supreme prerogatives, the people wore his sovereign mantle, sat on his vacant throne, and replaced him as the highest legitimate authority.

In this passage, democratic sovereignty marks a reversal that turns upside down the sources of political authority without, however, breaking away from the monarchical paradigm. Thus, with the modern advent of democracy, sovereignty changed hands but essentially it remained the same.

1 “Sovereignty is entirely inseparable from the state…Sovereignty is the form that gives existence to the state.” Charles Loyseau, Traité de Seigneuries, Paris: Abel l’Angelier, 1614, Book II.4, p. 25.
This dominant narrative has some far-reaching historical, theoretical, political, and normative implications. Let me briefly mention the most important, which I will address in the following sections of this chapter.

To begin with, democratic modernity is understood in terms of the regal paradigm of power. The conceptual and political structure of popular sovereignty indicates the historical continuity of monarchical rule and its quantitative extension. As Judith Shklar succinctly put it, “The word sovereignty has scarcely any meaning at all apart from absolute monarchy.” One can speak of modern democracy as a post-monarchical regime insofar as the abolition of kingship does not entail the elimination of monarchical sovereignty as such but only the replacement of one carrier/subject of supreme power with another. With popular sovereignty, power changes hands but its essence and logic remain intact. Broadly speaking, political modernity represents a reconfiguration and rearrangement that reproduces at its core an undemocratic mode of power.

Secondly, modern democracy is reduced to and absorbed by the state-form, which was co-original with monarchical sovereignty. The doctrine of the democratic (national) state is but a theory about the gradual democratization of the absolutist state and how it became increasingly inclusive, national, and popular. Democracy in its modern manifestation exists only in and through the centralized and hierarchical form of the state. “If, for example,” Bernard Bosanquet wrote, “we speak of the ‘sovereignty of the people’ in a sense opposed to the sovereignty of the state – as if there were any such thing as ‘people’ over and above the organized means of expressing and adjusting the will of the community – we are saying what is, strictly speaking, meaningless.” Consequently, popular (national) sovereignty turns out to be identical with state sovereignty and democracy and statehood become indistinguishable from each other.

Thirdly, according to this dominant paradigm, the modern theory of constitutionalism emerges as a liberal doctrine of the limitations and constraints placed on popular sovereignty in order to curb the absolutist (monarchical) tendencies of the people (as the

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nation) expressed through majoritarian rule. Constitutional government is a government limited by law, internally divided into separated powers and branches that check, balance, and control each other, aiming to restrain the excesses and arbitrariness of the sovereign people, treated as a direct threat to individual rights and minorities.\textsuperscript{11}

Furthermore, as an outcome of the political transfer of regal sovereignty, democracy consists of those theological and transcendent residues that were constitutive of and foundational to the powers of the kings and their divine right to rule.\textsuperscript{12} The modern democratic revolutions have reaffirmed and renewed the indissoluble link between religion and politics by replacing God with the People, that is, by deifying the latter: \textit{vox populi, vox dei} – the voice of the people is the voice of God.\textsuperscript{13} As Tocqueville powerfully put it while commenting on popular sovereignty in the United States, “The people reign over the American political world as God rules over the universe. It is the cause and the end of all things; everything rises out of it and is absorbed back into it.”\textsuperscript{14} Hence, the political theology of sovereignty becomes a political theology of democracy.\textsuperscript{15}

Finally, the modern theory and practice of state sovereignty was invented and grew out of a larger Eurocentric political, legal, and economic international world system.\textsuperscript{16} The making of modern democracy becomes intelligible within the broader geopolitical framework of the history of European imperial expansion, transnational markets, and colonialism.\textsuperscript{17} In fact, the Western democratic state appears as an effect of the colonial encounter, complicit and deeply implicated in the historical and spatial movement of capital that appropriated, unified, partitioned, and exploited the globe.\textsuperscript{18}


My contribution seeks to refute this grand narrative and its implications that continue to dominate existing scholarship on political modernity, democracy, sovereignty, and the state. The main argument is quite straightforward. I claim that the rediscovery of democracy cannot and must not be understood as a mere transfer of sovereignty from the king to the people, unfolding immanently within the uninterrupted continuity of the statist paradigm. Simply put, this prevailing historiographical narrative is flawed. Instead, I argue, the democratic imaginary corresponds to a very different experience of sovereignty, which not only is distinct from, prior and external to the regal paradigm but, at times, opposed and antagonistic to it. The question of democracy does not pertain solely to where sovereignty lays and who possesses it but mainly to what sovereignty is and how it is manifested and enacted. My approach, therefore, redefines political modernity as a series of struggles between two distinct ontologies of power and forms of sovereignty, irreducible and external to each other, the democratic and the monarchical, which have always ended with the victory of the latter over the former.

I proceed in four steps. First, I present the canonical theory of sovereignty to highlight its monarchical, statist, absolutist, imperial, and theological attributes. This is the celebrated theory of sovereign power as supreme command that became paradigmatic of political modernity (Section One). Second, I trace the first formative episodes of the conceptual and historical invention of popular sovereignty as constituent power and describe its rise in opposition to the regal model (Sections Two and Three). Third, I examine the basic principles of this alternative paradigm that account for its distinct political content and normative orientation. The central claim is that the concept of constituent power discloses the radical truth of democratic sovereignty, which is worldly and egalitarian, revolutionary and emancipatory, federative and constitutional (Section Four). Finally, by way of conclusion, I briefly explore some implications of my reading in relation to political modernity. In particular, I consider whether a revival of democracy qua constituent power might entail a radical departure, that is, a democratic exit from the modern (Section Five).

I. The Statocentric Model: Sovereignty as Command
In 1576, Jean Bodin famously defined sovereign power (puissance souveraine) as a “power of command,” which he qualified as “the most high, absolute, and perpetual power… over the citizens and subjects in a commonwealth.” With this concept of sovereignty, he arrived at the fundamental political distinction between “him who commands” and “him who owns obedience;” that is, between he who makes laws and he who obeys them. For Bodin, the sovereign is one who commands without being subject to the commands of another, one whose will is not subject to the will of someone else.

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20 Bodin, On Sovereignty, Book I:10, pp. 49, 51.
Hence, his sovereign is a sort of ‘uncommanded’ commander.\textsuperscript{22} He described the sovereign right of commanding as unitary, absolute, inalienable, and perpetual, the exclusive source of juridical norms and their implementation, unbound by laws, set above them, grounded on divine right and justified by a transcendent source of authority. Internally, it cannot be divided or shared; externally, it should not be surpassed or downgraded.

For a human association to be political, Bodin went on to argue, there must exist a recognized sovereign with a monopoly of the unlimited power of command, that is, a single coercive instance of final legal jurisdiction in a political community with the effective ability to command obedience and secure internal order. Such a political association is the state \textit{(l’état)}. Bodin introduced the seminal distinction between sovereignty and forms of government by elevating the former to a logically necessary feature of state organization.\textsuperscript{23} His concept shaped the modern language of state, its authority and unity by supplying all the key traits associated with statehood.\textsuperscript{24} Thus, in the last quarter of the sixteenth century, he set the theoretical foundations for what will become the paradigmatic modern theory of state sovereignty and positive jurisprudence in Western political theory and European public law. It offered the general principles for a centralized legal and administrative organization of rule, based on a single supreme political and legislative authority, independent from all other polities.

Bodin’s definition was so successful that it spread into different political and juridical traditions, appearing regularly in subsequent modern thinkers of the state theory, from Thomas Hobbes, who concurred that “Sovereign Power” is “this Right to give Commands” to Samuel Pufendorf to Emer de Vattel’s definition that “sovereignty is that public authority which commands in civil society, and orders and directs what each citizen is to perform, to obtain the end of its institution,” and from Jeremy Bentham to John Austin.\textsuperscript{25} The achievement of Bodin’s theory can be attested by the fact that it spilled over to non-statist political philosophy. For instance, even Baruch Spinoza who is credited with a theory of absolute democracy, asserted that the sovereign is he who “has the sovereign right of imposing any commands he pleases.”\textsuperscript{26} This broadening influence and hegemonic standing also resounds in Jean-Jacques Rousseau’s failure to break with

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\item \textsuperscript{22} Bodin, \textit{On Sovereignty}, Book I:8, p. 11.
\item \textsuperscript{23} Martin Loughlin, \textit{The Idea of Public Law}, Oxford University Press, 2003, pp. 73-7.
\item \textsuperscript{24} Within four years of its initial publication, Bodin’s treatise was reprinted eight times. Sixteen reprints appeared during the next two decades. It became known and read all over Europe, acquired the status of a classic, and was made into a textbook in European Universities. See also, Otto Gierke, \textit{Natural Law and the Theory of Society 1500-1800}, Boston: Beacon Press, 1957, p. 40; Giddens, \textit{The Nation-State and Violence}, pp. 93-4.
\item \textsuperscript{26} Benedict de Spinoza, \textit{A Theologico-Political Treatise}, translated by R.H.M. Elwes, New York: Dover Publications, 1951, p. 207.
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the state paradigm because of his absolutist, unitary notion of sovereignty as the general will of a collective being. Thus, it is customary to regard Bodin as the founder of modern state theory and his definition as the first systematic statement of modern sovereignty according to which within every political community there is a supreme political and legal authority, a determinate, undivided absolute power of command, which is not itself subject in any way to the superior commands of another, both internally and externally.

In fact, Bodin’s sovereign discourse anticipated and strongly shaped the formation of modern international law and the European interstate system through the constitutive idea that the institution of the state is sovereign over its own territory (the exclusivity principle or external sovereignty) and has absolute control over its subjects (the internal hierarchy principle or internal sovereignty). The Peace of Westphalia (1648) codified the criterion of non-intervention by one state in the affairs of another and sanctioned the supreme authority of the power to command as the primary norm of modern international relations among sovereign states.

This sovereign claim to command reasserted itself proudly in the beginning of the 20th century, in Max Weber’s famous definition of the modern state as that entity “which lays claim to the monopoly of legitimate physical violence within a certain territory”, the sole possessor of the exclusive rights of jurisdiction and control over a particular people. Weber elevated the state to the supreme impersonal rational-legal authority, “usually defined as the right or power to issue obligating commands.” While the modern form of the state depersonalizes further and fully formalizes Bodin’s sovereign, it operated within the same paradigm by taking up the supreme power of command as its defining mark. Sovereignty becomes a legal-rational power of coercion and domination, a formal, procedural authority, immanent to the centralized bureaucratic organization of the modern state. In Weber’s expositions, bureaucracy seems to bear the true marks of sovereignty and legality is its chief tool. As mechanized sovereignty, one of the main tasks bureaucracy performs is the rational and legal organization of domination, that is, to

realistically estimate and efficiently increase “the probability that a command with a given specific content will be obeyed by a given group of persons.”\(^{32}\) By being the most effective instrument of domination, bureaucracy must also be the supreme political power, the real procedural sovereign.

Two further observations are relevant in this context. The first pertains to the imperial origins of Bodin’s concept of sovereignty as supreme command. The other relates to its theological content and transcendent foundations.

With respect to the first observation, it is interesting to note that the theoretical and conceptual sources of Bodin’s theory of the sovereign command lie elsewhere further back in history. It was born on the battlegrounds of the Roman imperial armies and can be traced in the military title of the *imperatores* who, as a supreme general was the chief holder of the higher command on the field.\(^{33}\) The noun *imperium* originally meant ‘command,’ either as a specific command or as the power to give commands in general.\(^{34}\) Gradually, for the Romans, *imperium* came to mean a plenitude of power (*plenitudo potestatis*) to take any necessary measure in the name of public utility, invested in several public magistracies.\(^{35}\) This power that empowered its holder “to investigate, to punish, to administer justice, and make (legal) decision” was deemed personalistic, hierarchical, and repressive.\(^{36}\) In the end, it became identical to the ultimate executive prerogative of the Roman emperor to decide in the last instance and progressively blended into a centralized imperial authority.\(^{37}\) In fact, the Roman Emperor is the first sovereign figure in Western political history.\(^{38}\)

After the collapse of the Roman Empire, the concept of *imperium* as supreme command encountered Christian theology and during the Middle Ages became an indispensable property of the Kaiser of the Holy Roman Empire, who proudly claimed the *imperium mundi* of a Roman emperor, sanctioned by the Pope, and thus asserting a near-absolute and universal dominion over his Christian subjects under the omnipotence of god.\(^{39}\) It is

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this higher instance of command that resurfaced anew in Bodin’s absolutist theory in
terms of *summum imperium* after a protracted struggle among kings, princes, emperors,
and popes over the appropriation of sovereign power.\(^40\) This time, however, it was
deprived of its formal imperial title, de-personalized, kind of territorialized, and detached
from the authority of the Church. Hence, Bodin’s modern concept of sovereignty has
Roman and republican imperial origins.\(^41\)

This Roman ancestry of the modern theory of sovereignty as command resonates
indirectly but tellingly in Hans Kelsen’s critical description of what he labeled the
“exclusive quality” of state sovereignty. Because of its claim to supreme power and the
unconditional priority it assigns to its national legal order, Kelsen asserted that, “the
sovereignty of one State excludes the sovereignty of every other State.”\(^42\) The sovereign
cannot accommodate rivals and contenders. Who is supreme is by logical necessity
higher than everybody else and can have neither superiors above nor equals alongside.
War is the only relation it can entertain with them. Its power of command must remain
undivided and unlimited. It cannot be challenged, shared, or divided. Its right to war is
inviolable. This “dogma of sovereignty,” Kelsen added with great insight, anticipating
recent arguments by Antonio Negri and Michael Hardt on the imperial nature of
sovereignty, is “the main instrument of imperialistic ideology directed against
international law.”\(^43\) For Kelsen, the sovereign nation-state is a predator, envious of all
other states, and possessed by solipsistic fantasies of total domination and absolute
command. It seeks constant expansion, as it cannot tolerate the presence of an equal,
perceived as a threat and an enemy to its monopoly of command. Expansion is a
necessity of survival for the state. Sovereignty, Jacques Derrida concurred, “can only
tend toward imperial hegemony.”\(^44\) The political destiny of modern sovereignty as
command is imperial.\(^45\)

In addition to its imperial derivation and disposition, Bodin’s sovereign also has strong
theological connotations. Either as a human simulacrum of the divine command or as
founded on or sanctioned by God, his conception of sovereign power is impossible to

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\(^{40}\) Antony Black, *Political Thought in Europe 1250-1450*, Cambridge University Press, 1992, p. 113-4. It is
not a coincidence that Bodin’s first work on public authority and sovereign majesty was titled *De imperio*,
written during his stay at the Law School of Toulouse. Bodin, *On Sovereignty*, Book I:8, p. 88. This early
work has not survived, probably because he requested to be destroyed when he died. See also, Merriam,
*History of the Theory of Sovereignty Since Rousseau*, p. 11-2; David Held, *Democracy and the Global


\(^{43}\) Hans Kelsen, *Introduction to the Problems of Legal Theory*, translated by Bonnie Litschewski Palson and

\(^{44}\) Derrida, *Rogues*, p. 102.

separate from his religious views.\textsuperscript{46} It is often easily forgotten that Bodin was deeply preoccupied with religion, wrote prolifically on theological matters, his writings abound with references to mystical entities and supernatural forces, and his political works directly appeal to divine law and cosmic order.\textsuperscript{47} The influence of the Hebrew Bible is as strong as is his fondness for neo-Platonism.\textsuperscript{48} Bodin’s monotheism permeates his entire political theory in a way that his concept of the sovereignty becomes unintelligible outside his religious worldview, such as his metaphysical belief in the immorality of the soul, his faith in revelation, in the freedom of the will, and in a divinely ordered universe. The state is a manifestation of God and a segment of his unquestionable universal omnipotence and omnipresence. The explicit analogy between God and sovereignty is so clear in Bodin that one can unreservedly speak of a political theology of sovereignty, whereby politics becomes inseparable from religion:

Just as God, the great sovereign, cannot make a God equal to Himself because He is infinite and by logical necessity two infinites cannot exist, so we can say that the prince, whom we have taken as the image of God, cannot make a subject equal to himself without annihilation of his power.\textsuperscript{49}

Likewise, although sovereignty is free from all positive legal norms, it remains bound by and subordinated to the Law of God, which provides the ultimate invisible limit to political power and endows the sovereign command with its normatively just content:

For if justice is the end of law, law the work of the prince, and the prince is the image of God; then by this reasoning, the law of the prince must be modeled on the law of God.\textsuperscript{50}

A failure to abide by divine law, or its secular universal equivalent, the law of nature, turns the sovereign into a transgressor of God’s commandments and exposes him to absolute punishment.\textsuperscript{51} Thus, for Bodin, the tyrant, redefined in theological terms as a sovereign lacking “a special calling from God,” must be never resisted by his subjects although he always remains subject to divine justice and retribution.\textsuperscript{52}

For just as the great God of nature, very wise and just, commands over the angels, so the angels command over human beings, human beings over beasts, the soul


\textsuperscript{49} Bodin, \textit{On Sovereignty}, Book I:10, p. 50.

\textsuperscript{50} Bodin, \textit{On Sovereignty}, Book I:8, p. 45.

\textsuperscript{51} Baxter, “Jean Bodin’s Daemon and His Conversion to Judaism,” pp. 298-300.

\textsuperscript{52} Bodin, \textit{On Sovereignty}, Book II:5, p. 110.
over the body, heaven over the earth, and reason over the appetites ... But contrarily, if it happens that the appetites are disobedient to reason, individuals to magistrates, magistrates to princes, and princes to God, then we see that God moves to avenge his injuries and to secure the execution of the eternal laws established by him.  

If one tries to eliminate from Bodin’s political theory all his references to God, divine and natural law, and to sovereigns as the lieutenants of God, the whole structure of his argumentation would fall instantly. Perhaps for this very reason, his theology of modern sovereignty persists as a necessary but unacknowledged premise in subsequent allegedly secular political and legal doctrines of the state. For instance, Hobbes, following Bodin, described the sovereign as a “Mortall God, to which wee owe, under the Immortal God, our peace and defence.” As Schmitt perceptively noted, “In the theory of the state in the seventeenth century, the monarch is identified with God and has a position exactly analogous to that attributed to God in the Cartesian system of the world.” This political-theological discourse, grounded on transcendent foundations and sacred beliefs, will persist in explicit forms well into the 18th century and the beginning of the 19th in most theories of sovereignty, reaching an apex in the writings of Joseph de Maistre and Hegel. The theological presence in modern theories of sovereignty that sacralizes order and sanctifies the state challenges and subverts grant narratives and their modernist certainties that portray political modernity as a secular age, purified of all theological content and thus superior, either diachronically, to a religious and irrational past, or synchronically, to less modernized and ‘underdeveloped’ societies.

At the end of these long, laborious conceptual passages, the sovereign power of emperors passed on from kings to peoples, to their presidents, their representative assemblies, and to state administration. Sovereignty became the name for the modern state, usually embodied in personal executive powers and prerogatives, but still carrying the traces of its martial and theological origins, acknowledging no human superior and not subject to anything and anybody, stubbornly seeking to enforce obedience over a particular people. These attributes find their best expression in Hobbes’ theory, where the sovereign “is not

54 Engster, Divine Sovereignty, pp. 70-1.
57 For a powerful and informed statement of this argument, see Kathleen Davis, Periodization and Sovereignty. How Ideas of Feudalism and Secularization Govern the Politics of Time, University of Pennsylvania Press, 2008. For the sacralization of order and unity in theories of state sovereignty, see Laski, Studies in the Problem of Sovereignty, pp. 1-26.
Subject to the Civill Lawes… Nor is 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.” A similar meaning informs John Austin’s emphasis on the sovereign nexus of command and obedience. The relation between the sovereign and its subjects is purely that of “soveraignety and subjection,” in which all the members of a society are “dependent” and “subject” to the supreme free will of the sovereign. This reaffirms Austin’s debt to Bodin and Hobbes’ doctrines, according to which the basic principle that “sovereign power is incapable of legal limitation”…hold[s] universally or without exception.”

Bodin’s theory of sovereignty successfully dominated modern political theory and practice, shaping prevailing understandings of modernity, democracy, and international relations. Its commitment to the primacy of coercive command suggests a statist conception of sovereignty that consists of a repressive force, emanating from the top, hierarchical and unitary, supported by a centralized administration, and in need of external checks and balances. Michel Foucault described accurately this juridical model of sovereignty as “anti-energy… a power that only has the force of the negative on its side, a power to say no; in no condition to produce, capable only of posing limits.”

It is exactly these same attributes of state sovereignty that Hannah Arendt deplored deeply and vocally condemned. For, it divides between superiors and inferiors and whose “very essence is obviously to command and be obeyed.” Her normative denunciation of sovereignty became one of the central pillars of her critique of political modernity and its chief actor, the state. She warned against the homogenizing drive of sovereignty that destroys the constitutive multiplicity, the very plurality, of the public space. Sovereignty for Arendt is theological and anti-political, “because … [its] ideal of uncompromising self-sufficiency and mastership, is contradictory to the very condition of plurality.” Arendt’s critique uncovers the statist strategies of control and domination lurking in the paradigm of sovereign command and evokes the violence generated by its vertical form of ruling. She abhorred in particular the democratic, popular version of absolute sovereignty, which she traced it back to a theological theory of the will, a new ‘mortal god,’ the secular people, “one supernatural body driven by one superhuman, irresistible ‘general will’.”

60 John Austin, The Province of Jurisprudence Determined, p. 254.
64 Arendt, The Human Condition, p. 234.
In what follows, I seek to recover an alternative theory of sovereignty as constituent power that radically departs from the canonical paradigm of command in order to investigate its democratic implications. The conceptual and political history of constituent power speaks directly against this master narrative of command and subjection. It illuminates important but neglected dimensions of the democratic experience and discloses another understanding of sovereignty. Negatively put, the modern advent of democracy cannot and should not be treated as a mere transfer of sovereignty from the king to the people, unfolding within the statist, theological, and imperial paradigm of the supreme command. In positive terms, popular sovereignty qua constituent power discloses a different imaginary of sovereign power, not only historically prior but also analytically and ontologically distinct from the regal model: democratic, egalitarian, federative, constitutional, emancipatory, and revolutionary.

II. Popular Sovereignty as Constituent Power

Two hundred fifty years before Bodin announced his theory of state sovereignty, as early as the first quarter of the fourteenth century, Marsilius of Padua laid the foundations of a new concept of political power that inaugurated the radical doctrine of popular sovereignty. He wrote during the turbulent conflict over the locus of power between the Holy Roman Emperor Louis IV and Pope John XXII that had led to a temporary breakdown of political authority, creating a fissure from within which popular sovereignty came into being. Marsilius claimed that none of the two are sovereign because they do not have the superior power to appoint either oneself or the other. Since neither the Emperor nor the Pope could settle their quarrel, he asserted, a supreme authority had to decide the matter. It is the multitude, he claimed, that has the final right to appoint secular and spiritual rulers. In the space separating the two higher institutions of medieval politics, in the void opened up by their struggle for supremacy, a new political subject made its appearance: the sovereign people. In his most renowned and controversial text, *Defensor Pacis*, completed in 1324, Marsilius announced that,

The efficient power to establish or elect the ruler belongs to the legislator or the whole body of the citizens … And to the legislator similarly belongs the power to make any correction of the ruler and even to depose him, if this is expedient for the common benefit. For this is one of the more important matters in the polity; and such matters pertain to the entire multitude of the citizens.

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Marsilius’ intervention, however, does not stop here. Not only did he recognize the multitude as the real and true subject with the supreme authority to appoint its rulers; he also extended its scope to include the formation of government, the establishment of its fundamental laws, and the creation of public offices. For, he asserted, “it pertains to the legislator [i.e. the multitude] to correct governments or to change them completely, just as to establish them.” Marsilius, in fact, transforms the act of appointment to an act of founding, thus introducing the idea of sovereignty in terms of a productive multitude, “a universal active causality” that “forms,” “establishes,” and “differentiates” the parts of the political association (civitas or regnum). He defined this sovereign power, which resides in “the whole body of citizens or of its weightier part,” as an originary and creative “power to generate” (generare formam) new legal forms and political institutions:

Since, therefore, it pertains to the whole body of the citizens to generate the form, that is, the law, according to which all civil acts must be regulated, it will be seen that it pertains to the same whole body to determine this form’s matter, that is, the ruler, whose function is to order, according to this form, the civil acts of men …For to whomever pertains to generate some form, it also pertains to determine the subject of that form.

This singular formulation of the sovereign power of the multitude as form-giving suggests an extra-institutional force that institutes political authority, determines the form of government, and establishes a just constituted order.

It is noteworthy to observe here that Marsilius’ theory of popular sovereignty departs from the theological imaginary of Middle Ages. His incipient invention of democratic sovereignty breaks away from those metaphysical and transcendent medieval notions of power and politics that survived in Bodin’s doctrine of sovereignty as command. His intervention situates the beginnings of the post-classical reinvention of democracy apart from the religious monotheistic imaginary of Judeo-Christianism. Instead of relying on the logic of transcendence and the model of a demiurgic divine figure as an external ordering power, he turned to ancient materialist traditions with a strong biological orientation. Blending creatively Aristotle’s text On Animals (De partibus animalium) and Galen’s treatise On the Formation of the Foetus (De formatione foetus), Marsilius described the power to constitute in terms of physical natality and compared the creative sovereign act to that of animal birth. The political constitution of a community is

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70 Marsilius, Defensor Pacis, Book I: 18, p. 87.
71 Marsilius, Defensor Pacis, Book I: 8, 15, pp. 26, 63-4.
72 Marsilius, Defensor Pacis, Book I: 15, p. 62, 64, 65.
74 Gewirth, Marsilius of Padua, pp. 50-6.
similar, “in an analogous manner,” to the organic constitution of the animal. The sovereign action, he argued, “in appropriately establishing the civil form and its parts was proportionate, therefore, to the action of nature in perfectly forming the animal.” His incipient theory of the constituent power of the multitude is informed by a physico-biological materialism and grounded on a naturalistic reasoning, devoid of any transcendentalism, successfully displacing the theological and mystical Pauline metaphor of the sacred body politic. In a bold gesture, he described the institution of political community in terms of animal anatomy and physical desire, thus initiating the most ambitious de-sacralization and de-theologization of the political in the context of medieval philosophy. The political body through the animal metaphor expresses its immanence to the material and mortal world of living beings and their physical relationships. Marsilius’ theory of popular sovereignty operates strictly on the plane of immanence. It is an affirmation of the powers of this world that dispenses with external causation. He understood constituent politics as, “those methods of establishing governments which are affected by the human will.” The existence of political associations is not divinely ordained nor does it rest on ideas of sin and biblical transgression; rather, it emanates materially from the actual social activity of the multitude, the “legislator humanus” who desires a free, peaceful, and sufficient life. With Marsilius, the second historically advent of democracy results from a profane, anti-religious theory of politics and is carried out by means of a materialist method.

With these two major innovations, in the late Middles Ages, Marsilius introduced the general idea of popular sovereignty as constituent power. He is the first author to define sovereignty in terms of the power of the multitude to constitute. It is important, therefore, to clarify these novel elements that remain present in the subsequent trajectories of the concept.

Marsilius’ originality rests first of all on the appropriation of the ancient figure of the Legislator (νομοθέτης), in order to rework it in the direction, not of a mythical lawgiver and individual founder of cities, but of an actual community, “the multitude of the needy,” the “assembled multitude.” The “primary legislator” (principatus institutor) is a “primary authority,” and the multitude is always the legislator because it has the supreme

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77 Marsilius, Defensor Pacis, Book I: 15, p. 62.
79 Marsilius, Defensor Pacis, Book I: 9, 10, 12, pp. 29, 36, 44, 46.
80 Marsilius, Defensor Pacis, Book I: 19, pp. 89-97.
power to establish and abolish its governments and depose its rulers.\textsuperscript{82} Correspondingly, the laws derive their authority from the legislator, that is, from the multitude. With this synthesis he brought together the legislator, the sovereign, and the multitude in the new formulation of a collective power of the many to constitute their political world. The many, the plural, the poor, and the “\textit{vulgus}” are names he interchangeably used to describe the sovereign as a collective founder who can decide the political form of its common existence either in a primary assembly of all through majority rule or by its elected representatives.\textsuperscript{83}

Moreover, by expending the faculty to constitute as to include the power to form and establish governments, Marsilius suggested a crucial distinction, differentiating between two separate acts: the act of making laws and the act that institutes a government. The latter designates a founding moment, temporarily and ontologically prior to any specific government. It is the source of authority, the legitimacy of ordinary laws, and the final judge. The distinction between the legislator and the government points at a differentiated binary concept of power divided between the “\textit{universitas civium}” of the multitude and the “\textit{pars principans}” of the government. It is in this way that Marsilius anticipates the key distinction between a constituting community and the constituted commonwealth, which will become central in later doctrines of modern constitutionalism as \textit{pouvoir constituant/pouvoir constituée}.\textsuperscript{84}

Marsilius, furthermore, asserted the superiority of those who participate in the establishment of a government over those who rule and command within a given institutional framework.\textsuperscript{85} The act of establishing/forming is superior to the act of commanding. One important reason is that the common life of the multitude neither emanates from nor depends on the rulers or the government. It is a shared life that proceeds immanently and self-sufficiently from the many, that is, autonomously from the government. There is a dimension of externality of the multitude in relation to its institutions as it is recognized as a political subject that can exist outside positive law, that is from the supreme coercive command. While the many can exist apart from the government, the government cannot live apart from them. Additionally, ruling depends on and is inferior to constituting, because, as Marsilius stated by deploying Aristotelian categories of causality, the former is subordinate to the latter in the same way that a cause is always prior and superior to the effects it generates. Moreover, the supremacy of the many over the few is supported by the logic that “every whole … is greater in mass and

\begin{itemize}
  \item \textsuperscript{82} Marsilius, \textit{Defensor Pacis}, Book I: 12, 15, 18, pp. 45, 48, 64, 87-8. Also see, Gewirth, \textit{Marsilius of Padua}, pp. 172, 183.
  \item \textsuperscript{83} Marsilius, \textit{Defensor Pacis}, Book I: 12, pp. 45-46. Marsilius also anticipates the revolutionary idea of the constitutional convention.
  \item \textsuperscript{84} Respectively, Marsilius relegated the power of command to an inferior status even within the instituted order, thus minimizing its political significance. In his differentiated hierarchy of powers, command is secondary to legislation, which itself is inferior to the act of constituting. The latter belongs exclusively to the entire community, which also retains its legislative powers while the right of command is granted to the constituted structure of government in its administrative capacity and remains subordinated to the sovereign authority of the multitude. See, Ulmann, \textit{Principles of Government and Politics in the Middle Ages}, pp. 272-6.
  \item \textsuperscript{85} Gewirth, \textit{Marsilius of Padua}, pp. 167-225.
\end{itemize}
in virtue than any part of it taken separately." ~86 Finally, he also echoed Aristotle’s theory of collective intelligence when he claimed that the multitude is also superior in terms of its wisdom, better than of any part taken separately. ~87 In this elaborate defense of the principle of popular sovereignty, the many are treated as supreme because they are antecedent to all constituted authorities, self-sufficient, capable of virtue and wisdom, and for this reason, the authors of their political forms.

III. Sovereign Acts of Resistance

Two centuries and a half after Marsilius’ ‘discovery’ of the constituent power, in a time of another intense crisis, at the aftermath of the 1572 St. Bartholomew’s Day massacre, several French Huguenot writers, known as the Monarchomachs (‘those who fight kings’), renewed this democratic discourse of popular sovereignty in order to defend their radical doctrine of tyrannicide. ~88 By radicalizing aspects of Marsilius’ philosophy, they brought together active resistance and constituent power to advance their doctrines of sovereignty, and eventually laying the foundations for later theories of rebellion, revolt, insurrection, and revolution. ~89 With the Monarchomachs the constituent power becomes revolutionary. Active, even violent resistance is treated as a legitimate extra-legal force of political change, rightfully exercised by the people or their representatives in exceptional cases of necessity and self-defense. Relying on Marsilius’ suggestion that the multitude can depose unjust rulers and suspend the law in times of crisis, the Monarchomachs went further to explore the disobedient and seditious effects of constituent politics and to rethink the conflictual and revolutionary nature of popular sovereignty.

In fact, their rethinking anticipates the right of democratic revolution. The right of a people to disobey, resist, depose, or kill their (tyrannical) rulers derives from their sovereign power to constitute the political forms of their common life. ~90 Resistance

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~86 Marsilius, Defensor Pacis, Book I: 12, p. 46.
against tyrannical rule is a manifestation of constituent politics and an affirmation of popular sovereignty.\textsuperscript{91} The Monarchomachs, in fact, put forward a new justification, based on the democratic logic that “those who \textit{constitute} one Form, may \textit{abolish} it,” that is, on the principle of popular sovereignty, according to which, the people as constituent power are prior and superior to the forms they constitute, including kings.\textsuperscript{92} This collective right that trumps monarchical legality rests on the power of the many to constitute. It offers normative and political validity to the exceptional recourse to legitimate resistance on the part of the people. For the Monarchomachs, it is the sovereign people who decide on the extreme situation of tyrannicide. In this way, they can rightly be credited for inventing the first modern democratic theory of resistance in moments of crisis and emergency.

The emphasis on the revolutionary excess of the constituent power carries a double meaning. On the one hand, it reveals the conditional and authorized existence of all constituted powers. It therefore puts limits on the subjects’ duty of obedience, which is a conditional obligation that depends on the ruler’s performance.\textsuperscript{93} Political forms are denaturalized to the extent that they are regarded as human historical creations, the result of collective action, reversible and revocable, to be amended, transformed, and/or replaced. On the other hand, it argues for an extra-constitutional check on the constituted authorities, a just device for maintaining the reign of law and limiting the dangers of arbitrariness and tyranny. Thus, rulers are subject to limitations and constraints established by the many in their constituent capacity. The first traces of modern constitutionalism are already visible in this seditious attempt to determine the limits of power and to set up political safeguards against the transgressions of the constituted order. Here, the notion of a limited government ruled by law appears internal to the democratic doctrine of active resistance, that is, intrinsic to the power to constitute.\textsuperscript{94}

In 1573, François Hotman asserted, “that the People reserved to themselves all the power not only of \textit{creating}, but also of \textit{abdication} their Kings.”\textsuperscript{95} One year later, the French protestant Théodore de Bèze proclaimed the first principle of his new doctrine of legitimate (violent) resistance: “they who have the power to \textit{create} a king, have the power to \textit{depose} him,” as they have also “the power to \textit{judge} him.”\textsuperscript{96} This supreme power to judge and overthrow rulers belongs solely to the people because “peoples do not come from the rulers … and that peoples accordingly, are not created for their rulers, but

\textsuperscript{91} Franklin, \textit{Jean Bodin and the Rise of Absolutist Theory}, pp. 47-53.
\textsuperscript{92} This is Sidney’s classical version, almost a century later, which exemplifies the normative meaning of popular sovereignty based on the power to constitute. It also testifies to its discursive permanence beyond and after the Monarchomachs. Algernon Sidney, \textit{Discourses Concerning Government} [1680], edited by Thomas G. West, Indianapolis: Liberty Fund, 1996, ch. 1.6, p. 20; Gierke, \textit{Natural Law and the Theory of Society 1500-1800}, pp. 256-7; Franklin, \textit{Jean Bodin and the Rise of Absolutist Theory}, pp. 43-8.
\textsuperscript{94} Franklin, “Introduction,” pp. 37, 42-5.
\textsuperscript{95} François Hotman, \textit{Franco-Gallia: Or An Account of the Ancient Free State of France} [1573], BiblioBazaar, 2007, X, p. 82 (emphasis added).
\textsuperscript{96} Theodore de Bèze, \textit{Rights of Magistrates} [1574], in \textit{Constitutionalism and Resistance in the Sixteenth Century}, pp. 124, 126 (emphasis added).
rulers rather for their peoples." Politically speaking, the people are above the monarch. The right to disobey and resist that the many possess, results from the primacy of the constituent subject over the constituted order. It is because the people constitute their rulers that they have the right to resist and depose them. According to Beza, a people can disobey and rebel against an unjust ruler because they have constituted him. It is the power of constituting that confers to the people the sovereign right to resist. His principle is unequivocal: those who constitute have the right to disobey.

Five years later, in the *Vindiciae contra tyrannos*, Junius Brutus the Celt appealed to the same principle by further accentuating the elements of self-determination and externality in popular sovereignty. He succinctly asserted, following Marsilius and Beza, that “a people can exist of itself, and is prior in time to a king.” Their collective existence is superior to and does not depend on the state, because they give rather than receive. In fact, the life of the people proceeds immanently from themselves as they are capable of living apart from the state. By recognizing the people’s political externality to the instituted forms of government, Brutus exposed their autonomous, extra-institutional life as the sovereignty of the “populus constituens.” He reached the conclusion that, as kings are constituted by the people, it seems definitely to follow that the people is more powerful than the king. For such is the force of the word: one who is constituted by another is held to be lesser; and one who receives his authority from another is inferior to his appointer.

Brutus, like other Monarchomachs, treats the right to remove and depose any constituted authority and even to kill unjust rulers as derivative, emanating from the sovereign power of the people to constitute. He also anticipated the idea of the constitutional convention when he acknowledged the exceptional “proviso” according to which established rules and procedures of the normal order are suspended because, “should the need arise, either the whole people, or else a kind of epitome of the whole people, would be convened in extraordinary assembly.”

A few decades later, the great Calvinist jurist, Johannes Althusius, relying on the Monarchomachs’ doctrines, affirmed the same principle of popular sovereignty *qua*

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101 Brutus, *Vindiciae, contra tyrannos*, pp. 71, 156.
103 Brutus, *Vindiciae, contra tyrannos*, pp. 75, 169.
104 Brutus, *Vindiciae, contra tyrannos*, pp. 74 (emphasis added), 68-74, 92, 94, 130.
105 Brutus, *Vindiciae, contra tyrannos*, pp. 78, 82.
constituent power and provided the clearest formulation yet.¹⁰⁶ In *Politica methodice Digesta*, published in 1603, he defended active resistance on the grounds that,

> It cannot be denied that the greater is that which constitutes the other and is immortal in its foundation, and that this is the people … By nature and circumstance, the people is prior to, more important than, and superior to its governors, just as every constituting body is prior and superior to what is constituted by it.¹⁰⁷

For Althusius, “the right of sovereignty … does not belong to individual members, but to all members joined together and to the entire associated body of the realm.”¹⁰⁸ Sovereign power, therefore, when properly understood as the power to constitute, cannot conceivably reside in any individual or group of individuals less than the whole people. Moreover, as a power that founds/grounds a political and constitutional order, it remains irreducible to and heterogeneous from that order. It is this collective sovereign right that justifies the removal, deposition, and overthrow by the people of the constituted authorities when these become unjust and tyrannical.¹⁰⁹ The exercise of the right of resistance pertains to the people in their sovereign capacity as constituent power or their representatives. Althusius, like the Monarchomachs, formulated a democratic theory of resistance based on the primacy of the sovereign power of the many to constitute, that is, their autonomous power of associating “for the purpose of establishing, cultivating, and conserving social life among them.”¹¹⁰

It is crucial to notice here that from a historical and political point of view Bodin’s statist concept of sovereignty as command was formulated in response to the theory and politics of popular sovereignty as constituent power. It was explicitly invented and deployed against the Monarchomachs in an attempt to preserve and strengthen the authority of monarchy by repudiating the claims of disobedience and resistance in the name of a hierarchical order and a monarchical peace.¹¹¹ In other words, the early theory of modern state sovereignty developed as a polemical reaction to incipient formulations of democratic sovereignty deemed unruly and anarchic. The discourse of the sovereign state emerged to refute the rebellious claims and the self-assertion of the many against the

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¹⁰⁸ Althusius, *Politica*, IX, p. 70.
few with the explicit purpose of imposing obedience through the coercive command of a centralized state power.

In this confrontational context, Althusius’ work stands out. His theoretical intervention represents a crucial moment in the development of popular sovereignty. He sought to defend the distinction between the practice of constituting a political association (*consociatio politica*) and the act of commanding against Bodin’s absolute sovereign power of the king by rejecting altogether the state-form in the name of an alternative political organization, proper to the constituent power: the federation. Within this polemical exchange between constituent power and command, Althusius introduced the first modern theory of federative association. In doing so, his work brought the logic of popular sovereignty to its ultimate political logic by providing for the first time the appropriate constitutional form fitting to popular sovereignty. With Althusius, democracy finds in the federative principle its own singular organizational and governmental structure beyond the centralized and unitary abstract state. His refutation of Bodin in the name of popular sovereignty qua constituent power does not only challenge the monarchical paradigm of sovereignty, it also questions the legitimacy of modern statehood. In fact, the development of sovereignty as the power to form and establish governments passes through the rediscovery of the federation as a superior alternative to the absolute and indivisible authority of the state. Althusius is both a thinker of the constituent power of the sovereign people and the first modern proponent of federalism, understood as the mutual binding of families, villages, communities, guilds, cities, and provinces that freely associate together through mutual promises into a compound federative body (*universalis publica consociatio*). With Althusius, therefore, the federation becomes the most natural and rational expression of constituent politics; the state, by contrast appears as its greatest rival and enemy.

IV. Democratic Sovereignty

The early theoretical and historical development of popular sovereignty suggests a clear distinction between state sovereignty as command and democratic sovereignty as the power to constitute. Their differences are substantial as they are separated by distinct histories, ontologies, normative orientations, and political objectives.

As Martin Loughlin has correctly pointed out, “Constituent power as a ‘power to’ is different from ‘power over’.” Very different, indeed. In the state paradigm the

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emphasis is on the moment of (coercive) command while the constituent version privileges the act of establishing and instituting. The one is repressive when contrasted to the dynamic and productive dimension of the other. Consequently, whereas the principle of command is based on the model of ruling that of constituting evokes a founding event. The sovereign is not a ruler but a lawgiver and a founder. Instead then of fixating on a superior command emanating from the top, the notion of the constituent sovereign redirects attention to the underlying sources of the instituted reality located at the bottom. The first relies on a vertical structure while the second operates horizontally; the first is unbound and absolute, the second exists through binding mutual promises. In addition, the model of command aims at securing order and stability; the constituent power, by contrast, provokes change and alteration. Moreover, contrary to the paradigm of the sovereign command that invites personification – from the ancient imperatore to the king to the modern executive - the constituent power conveys the collective and impersonal attributes of sovereignty, its associative public dimension and its federative inclinations. All these contrasts illustrate how popular sovereignty re-imagined democracy against the regal paradigm of command.

In fact, popular sovereignty indicates a collective practice, involving a plurality of actors coming together to co-institute, to establish jointly.\footnote{For a discussion of the etymological and semantic content of the concept of constituent power, see Andreas Kalyvas, “Popular Sovereignty, Democracy, and the Constituent Power,” Constellations, 12:2 (2005), pp. 235-7.} Two crucial aspects are involved in the semantic composition of sovereignty as the power to constitute, indicative of two democratic principles.

First, there is equality. An emphasis on the prefix co- presents the concept descriptively: on the one hand, as a negation, that is, the impossibility that one could ever co-institute anything by oneself; on the other, positively, prescribing that if one wants to co-institute, one has to do it in co-operation with others. Acting together, in concert, means to “do certain common acts as a society, which are acts not of a certain part but of the whole.”\footnote{George Lawson, Politica Sacra et Civilis [1660], edited by Conal Condren, Cambridge University Press, 1992, p. 24.} These acts point at a federative and associative structure of public authority. They are egalitarian to the degree that the coming together is articulated in terms of equal participation. In all theories of the constituent power, the politics of new foundations are undertaken jointly and voluntarily, free from asymmetrical power relations and arbitrary interferences, that is, free of inequality, in true co-operation. Sidney accurately grasped this egalitarian presence when he claimed that, “every number of men, agreeing together and framing a society, became a compleat body, having all power in themselves over themselves, subject to no other human law than their own. All those that compose the society, being equally free to enter it or not, no man could have any prerogative above others.”\footnote{Sidney, Discourses Concerning Government, 1.5, p. 99.} This egalitarian meaning indicates that the sovereign act of constituting is performed among peers by mutual association.
Second, popular sovereignty consists also of a generative principle. By underlying the second component of the verb to co-institute, theories of the constituent power saw in sovereignty a creative form-giving power. Popular sovereignty is presented in its instituting capacity, with the faculty to ‘instaure’ new political orders, to bring into being novel constitutional forms, to enact new beginnings. Sovereignty establishes political and legal orders and determines constitutional forms. In a word, it is a productive power, often portrayed as the extra-legal source of all legality. This positing aspect of the constituent sovereign is fully captured by Schmitt’s definition of sovereignty as a “founding power” (die begründende Gewalt). The second principle is positive and generative, creative and instituting.

Correspondingly, the sovereign power to constitute pertains to relations of mutual association and self-constitution. The subject of the constituent power is not prior or external to the act of constituting. Rather, it constitutes itself as it constitutes for itself. By framing the political forms of its collective existence, it also produces its own public identity. This process of self-formation is immanent to the degree that the constituent power makes both the subject and the object of politics in the absence of an antecedent, external causality. It is best captured by Althusius’ definition of constituent politics as “symbiotics,” that is, as a horizontal practice of freely associating and dissociating with others, the forming of a commonality through reciprocal promises and pledges for the sake of “mutual communication of whatever is useful and necessary for the harmonious exercise of social life.” The constituent subject is not a pre-formed agent, a natural homogeneous unity credited with an organic collective selfhood, antecedent to the sovereign act of constituting. Rather, it consists of a plurality in the making, an artificial

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compound body formed during the constituting activity, outside the instituted commonwealth.

Popular sovereignty consists also of a revolutionary principle.\textsuperscript{127} It is forged during extreme situations of crisis, conflict, and transformation, designed for resistance and revolution, expressing an exhortation to rebel.\textsuperscript{128} This is the principle of disruption: self-authorized, unruly, against the fixity and permanence of the statist nomos. There is here a strong “desire for alteration.”\textsuperscript{129} The concept indicates discontinuities and ruptures in the constitution of the political, it ponders alterity and otherness against legal closure, and is attentive to accelerated temporalities with sudden unpredictable and contingent outcomes. Theories of constituent power expand the boundaries of politics as to include its own foundations and beginnings. Since Marsilius’ original formulation, the people arrive at the moment of a rupture, staging a dispute, in times of exception, to constitute anew their political existence and to renew their constitutional identity.\textsuperscript{130} In this post-classical invention of democracy, popular sovereignty is revolutionary.\textsuperscript{131}

As surprisingly as it may sound to some, this revolutionary principle of sovereignty comes into being and coexists with constitutionalism.\textsuperscript{132} Democratic revolutions are constitutional, that is, moments of popular sovereignty and genuine constitutional making. The constituent power is certainly one of the main foundations of modern constitutionalism and public law.\textsuperscript{133} It consistently treats politics in terms of constitutional politics; the constitution is understood politically and politics, in turn, is analyzed constitutionally, bridging thereby the unconvincing and politically suspicious distinction between politics as the field of factual power and the constitution as the realm of pure normativity. Any meaningful and compelling distinction between higher and


\textsuperscript{129} Lawson, \textit{Politica Sacra et Civilis}, p. 227.

\textsuperscript{130} Even contemporary liberal thinkers have come to realize that democratic legitimacy presupposes a break with the inherited legality. John Rawls, for instance, has acknowledged 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,” \textit{Political Liberalism}, Columbia University Press, 1993, p. 23.


ordinary laws in fact presupposes the constituent power of the people. This distinction, which corresponds to one of the main principles of modern constitutionalism, emanates from popular sovereignty: the people are sovereign by virtue of their power to constitute.\textsuperscript{134} The fundamental constitutional law, “the law of lawmaking,” enjoys higher and greater legitimacy than normal legislation because it is a sovereign expression of constituent power.\textsuperscript{135} This is the modern idea of democratic legitimacy and the democratic foundations of constitutional government.\textsuperscript{136}

“Democratic theory,” Schmitt argued, “knows as a legitimate constitution only the one which rests on the constituent power of the people.”\textsuperscript{137} Karl Marx had already expressed this view in prescient terms. “Democracy is the solved \textit{riddle} of all constitutions,” he claimed, because,

Here, not merely \textit{implicitly} and in essence but \textit{existing} in reality, the core of constitution is constantly brought back to its actual basis, the \textit{actual human being}, the \textit{actual people}, and established as the people’s own work. The constitution appears as what it is, a free creation of man.\textsuperscript{138}

In a democratic regime, the legitimacy depends on how inclusive, free, and equal participation is during constitutional politics. Precisely because this concept of sovereignty recalls at the center of modern democratic theory the normative ideal of political autonomy, it points at a distinctive theory of political legitimacy. Actual participation in the founding defines the experience of democracy. It is this primacy of participation over obedience that demands from the subjects of a political order to \textit{co}-institute it. Popular sovereignty as constituent power evokes the general value of political liberty: free is to live under one’s own laws. It re-invents the ancient democratic principle of self-government. In Cornelius Castoriadis’ apt formulation, it is the explicit, lucid self-institution of society.\textsuperscript{139}

At the same time, the relationship between sovereignty and constitutionalism, democracy and law, is dialectical to the degree that the constituent power supersedes the constitutional universality of the instituted society. As Marx insisted, the “constitution is no longer equivalent to the whole” and does not monopolize the political because it corresponds to “only \textit{one} facet of the people.”\textsuperscript{140} With democracy, there is an irreducible

\textsuperscript{134} For a detailed distinction of this point, see Raymond Carré de Malberg, \textit{La Loi, expression de la volonté générale} [1920, 1922], Paris: Economica, 1984, pp. 103-39.
\textsuperscript{135} For the concept of “the law of lawmaking,” see Frank Michelman, \textit{Brennan and Democracy}, Princeton University Press, 1999, p. 48.
\textsuperscript{136} According to Maurice Duverger, “It is the constitution that derives its authority from the constituent power and not the constituent power that derives its authority from the constitution.” Maurice Duverger, “L’Égénité des gouvernements de fait,” \textit{Revue du Droit Publique} (1948), p. 78.
\textsuperscript{140} Marx, “Critique of Hegel’s Doctrine of the State,” pp. 87, 88.
political outside to the formal organization of power. As the constituent power cannot be absorbed or consumed by the order of the constitution, democratic politics escapes its total constitutionalization and full juridical “objectification.”\textsuperscript{141} It remains both below and next to the constituted powers as a force of innovation, alterity, contingency, and most importantly, as a democratic presence.\textsuperscript{142} The idea of the constituent power as the excess of constitutionalism is a reminder that politics cannot be reduced to abstract legality and that democracy exceeds its constitutional forms.\textsuperscript{143}

Equally important, the incipient reinvention of democracy in the late Middle Ages prior to and independent from the colonial history of the modern Western state points at the anti-imperial content of popular sovereignty. Not only because it predates the age of conquests but also because it challenges normatively and analytically any attempt to impose a form of government on those who never participated in its establishment. Hence, besides simply describing a specific political act of a plurality of actors who engage with each other, acting in concert, to erect and set up something new, the concept of popular sovereignty \textit{qua} constituent power, also prescribes who should perform this act and how it must be carried out.\textsuperscript{144} It contains, in addition to its descriptive meaning, a specific normative injunction. This injunction has the form of a ‘ought’ statement. It consists of a norm that excludes that one might constitute something by oneself for another. If one wants to constitute a new political and legal association, one ought to co-institute it, to institute jointly with others. This norm is intrinsic to popular constituent sovereignty and indicates the ‘who’, that is, the concrete identity that is competent to legitimately create such an association. It is, in short, a general authorizing norm because it confers upon someone a certain extra-legal competence, namely the right to participate in the enactment of new political forms of constituted authority. It confers a norm-creating power in the absence of positive rules. In its formal expression, the political norm of authorization immanent to the sovereign act of constituting both describes and prescribes that the first constitution is/ought to be jointly created and that the founding of a new political association must evenly involve all those who will be included in it. The constituent principle of popular sovereignty suggests that not any practice 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 political and juridical order. Should a person or group appropriate the power to constitute at the exclusion of all those who will be its addressees, the ensuing political form should be regarded as imposed, thus, invalid and illegitimate, the result of an act of usurpation. Such an act would not be democratic but rather a repressive command, an expression of coercive imposition.\textsuperscript{145} Institution by conquest, thus, amounts to such a tyrannical act. For this reason, sovereignty as

\textsuperscript{141} Marx, “Critique of Hegel’s Doctrine of the State,” pp. 80, 90.
constituent power is inherently democratic and anti-colonial, since it consists of the predicates of equality, inclusion, participation, and reciprocity, that is, of the norms of self-determination and autonomy.

A democratic theory of the constituent power, in fact, provides critical lens to evaluate different foundings and to distinguish between democratic new beginnings and imperial conquests. Constituent democracy offers principles of political 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 when it comes to the making of the modern age through the Western imperial attempts over the last five centuries to appropriate space and subjugate peoples, the theory of popular sovereignty offers a powerful critical discourse that exposes and opposes the democratic deficit of such imperial discretionary attempts at global command. It is this strong sense that the doctrine of the constituent sovereignty of the people is inherently anti-imperial and anti-colonial.

Finally, popular sovereignty enacts a rupture with theological and transcendent notions of power, politics, and subjectivity and questions the alleged theological provenance of popular sovereignty, powerfully captured by Carl Schmitt’s influential claim that it is merely another secularized theological concept of the modern state theory. A principle of immanence that dispenses with external cauasation is present in the constituent power. For instance, this concept has always been placed underneath the civil and legal edifice, emanating from the bottom, from the many, those who compose a genuine collectivity. Its various names that designate it - ‘the community,’ ‘civil society,’ ‘the multitude,’ ‘the poor,’ ‘the plebs,’ ‘the commons,’ ‘the demos,’ ‘the people’— suggest that, in the last instance, the many are the ultimate foundation of the political, the utter social limit of any politics that survives the dissolution of governments, the disruption of legal systems, and the collapse of instituted powers. This persistent constitutional externality is due to the immanence of constituent power to social life. It is internal to concrete relations of mutual association, formed by actual pledges and promises; in exchanges, agreements, covenants, and contacts; in corporations, alliances, and federations. Popular sovereignty is relational and plural and operates strictly on the plane of historicity and immanence. It is profane and material, the affirmation of the powers of this world, of change and contingency, of beginnings and ends, and the recognition that the political world is made by its participants.


Although it is true that during its long history this worldly concept was periodically tainted by elements of political theology, these have remained extraneous, later additions, which never coalesced with the conceptual core to become a constitutive part. By the third quarter of the 18th century, Hamilton could proclaim in the opening lines of the Federalist Papers, “that it seems to have been preserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for the political constitutions on accident and force.”

Political authority, the grounds of ruling, the government itself, are not inaccessible, beyond judgment and contestation; instead, they are relativized and de-centered, regarded as human, that is, mortal artifacts, without extra-social support, lacking banners of truth or markers of certainty, open to questioning, and thus, provisional and revocable, conditional and frail.

Popular sovereignty possesses its own unique logic that clearly differentiates it from the competing statist paradigm of command. Its defining principles describe the democratic content of the sovereign power of the many, which is both revolutionary and constitutional. This reorientation of modern democratic theory toward the power to constitute initiates a shift from the logic of determination to the principle of self-determination, from immobility to movement, from order to change, from the One to the Many, from the transcendent to the immanent, from heteronomy to autonomy. It is a shift that marks the second, post-classical birth of the democratic project and the political imaginary of autonomy. With the constituent power, democracy exists in the radical event of its self-alteration. It is a politics of becoming and freedom, the movement of political transformation and constitutional change.

Hannah Arendt, following Machiavelli, described this constituent politics as the “augmentation of foundations … this notion of a coincidence of foundation and preservation by virtue of augmentation.” The constituent power inaugurates a fascinating, unprecedented exploration into the

150 Alexander Hamilton, Federalist No. 1, The Federalist, p. 3. Madison concurred and explained “the improvement made by America on the ancient mode of preparing and establishing regular plans of government” as “a revolution by the intervention of a deliberative body of citizens.” James Madison, The Federalist, No. 38, pp. 235, 234; Thomas Paine, The American Crisis V [1778], p. 169; Paine, Rights of Man, p. 668; Arendt, On Revolution, pp. 46-7. From the seventeenth century on, the term constitutio came to designate a written document and a set of explicit superior, higher, fundamental legal norms and procedures instituted by human beings in opposition both to customs or conventions and to a transcendental natural law. Gerald Stourzh, “Constitution: Changing Meanings of the Term from the Early Seventeenth to the Late Eighteenth Century,” Conceptual Change and the Constitution, pp. 43-4.


153 Castoriadis, The Imaginary Institution of Society, pp. 135-59, 353-68.


radical nature of democratic politics, that is, a politics that revisits its foundations and politicizes its origins.\textsuperscript{157} Democracy, in short, begins democratically.\textsuperscript{158}

**V. A Democratic Exist from Statecentric Modernity?**

I would like to conclude with some preliminary and tentative reflections on the relationship between democracy and political modernity. Certainly, everything depends on how one defines the latter. And as far as definitions go, there are plenty. The one I tried to suggest throughout this chapter is rather minimal and although quite conventional it is often overlooked. My approach stresses the central role of the modern state and its animating principle of sovereignty as command in the political constitution of modernity. As Skinner notes, “By the beginning of the seventeenth century the concept of the State – its nature, its powers, its right to command obedience – had come to be regarded as the most important object of analysis in European political thought.”\textsuperscript{159} Indeed, the state, as a fact and as a norm, as discourse and as practice, has become an indispensable attribute of the modern condition, displacing communes, cities, leagues, and federations as alternative models of political community.\textsuperscript{160} The emergence of the state and the emergence of modernity constitute two facets of one and the same reality. With an uninterrupted history of several centuries, constantly on the offensive, expending well beyond its original European space, presently spread across the entire surface of the globe, the state is the most enduring political achievement of the modern age, the driving force of the modernizing project, and the pivotal concept of modern political and legal theorizing. It still remains today the sole institutional model of political association and the only legitimate actor recognized by international law. Thus, “although one speaks of the ‘modern state’ strictly speaking the adjective ‘modern’ is pleonastic.”\textsuperscript{161} With the advent of sovereignty as command, the state has become one of the basic attributes of the modern grammar of politics. The geopolitical and symbolic configuration of modernity is clearly statecentric.\textsuperscript{162}

In this context, the pressing question to ask is whether democracy and popular sovereignty as constituent power are possible at all in a modern world that came to be


\textsuperscript{158} As Friedrich correctly observed, “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. Friedrich, Constitutional Government and Democracy, p. 128. Also, see Arendt, *On Revolution*, p. 146; Schmitt, *Constitutional Theory*, pp. 104-105.


\textsuperscript{162} Thus, despite a wide shared belief that the age of globalization has provoked a crisis of the state, a quick look at the geopolitical map of the contemporary world indicates otherwise. Not only the number of states is on the rise but moreover many secessionist movements seek to form their own states. In addition, the current global economic financial crisis seems to have caused a reaction characterized by statist and nationalist responses against the arbitrariness of world markets. Contrary to many widespread predictions that the 21\textsuperscript{st} century will mark the end of the state, there is a proliferation and strengthening of this modern political form as it is adapting to new conditions.
shaped and universally dominated by the Eurocentric state-form, that is, by sovereignty as supreme command. As I have suggested throughout this chapter the answer must be negative. From a historical, conceptual, and normative point of view, the post-classical democratic project that begun to emerge in the early fourteenth century onwards seems at odds with the organizational logic of statist politics and its centralized apparatus of domination. After all, it must not be forgotten, as the genealogy of the sovereign command clearly indicates, that the theory and practice of the state grew out in reaction to the rebellious aspirations of popular sovereignty and asserted itself against the egalitarian and emancipatory claims of disobedient multitudes. Bodin’s ‘discovery’ of the sovereignty of the supreme command was motivated by the radical theories of the Monarchomarchs, which he deemed destructive to order and peace; Althusius retorted with his federalist model that was formulated in response to the rise of centralized states and to the theory of sovereignty that came to support them, provoking multiple polemical reactions from Hobbes to Pufendorf, who reaffirmed the unitary and absolutist qualities of state sovereignty as the only guarantee of stability and security and argued against the right to rebel; George Lawson and John Locke took up the task to defend and further develop the idea of popular sovereignty as constituent power and resistance against the discretionary and authoritative powers of the supreme command and its repressive prerogatives. This antagonistic relationship continued throughout the eighteenth century all the way into the twentieth, from the anti-colonial struggles that shook the Western hemisphere from North to South to the Soviet revolution, when Lenin dissolved the Constituent Assembly and usurped the revolutionary powers of the soviets in order to strengthen the party-state. All these struggles and those that followed them ended with the ultimate victory of the state in one form or another.

Thus, against existing orthodoxies that speak of the modern age as inherently democratic, I have suggested that, in fact, the modern political experience of democracy has been in a perpetual conflict with its rival paradigm of command and its logic of domination and subjection. These struggles have resulted in historical defeats and unrealized aspirations that have been so pervasive as to empty the idea of democracy of its radical constituent popular content, transforming it into a ruling ideology, an administrative and police discourse, a nationalist creed, and an imperial instrument of global governance. The idea of a democratic state appears as an oxymoron because democracy and state represent two different and conflicting experiences of the political, two irreconcilable imaginaries that tend to cancel each other. From such a revisionist perspective, therefore, political modernity represents at best the neutralization of democracy and at worst its evacuation. In fact, the entire development of modern political thought and the fortunes of modern political history can be rewritten afresh from the perspective of this long recurrent antagonism between two sovereign projects that have always ended with the triumph of the sovereign command and its universal consolidation as the sole organizational model of political association.

To rethink democracy today, in short, means to radically question the primacy of the state form and its sovereign command. It also means that the modern age is deeply

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undemocratic despite its own pretentious, self-professed claims. And what’s more, it indicates the pressing need to think beyond the statocentrism of political modernity. Let’s recall that democratic constituent politics is the explicit, lucid self-institution of society, whereby the members come freely together as equals and jointly become the authors of their constitutional and political identity in such a way that they all affirm their fundamental equality to practice their political freedoms. Democracy is the only politics we know of that promises to the addressees of the law that they will be as well the revolutionary authors of the law. The constituent sovereign powerfully evokes concrete practices of collective autonomy and mutual association among a plurality of equals that are incompatible with the vertical and unitary organization of state structure that reduces politics to a relationship between rulers and ruled, that is, between the few who command and the many who consent to obey. Popular sovereignty envisions a federative and associative structure of public powers that defies centralization, hierarchy, and monopoly of coercion. Respectively, democracy *qua* the constituent power exists in horizontal, reciprocal, and diffused relations of power that combine self-rule and shared rule. In this case, I have argued, popular sovereignty as the self-constitution of federal communities remains in opposition to political modernity in a way that any future revival of democracy might well entail an exit from the modern.