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POPULAR SOVEREIGNTY AND CONSTITUTIONAL DEMOCRACY†

In recent times, the idea of popular sovereignty has figured prominently in the rhetoric of neo-populist thinkers and activists who argue that legal and political authority must be concentrated in one single body or individual elected by the people to act in its name. The thesis of this article is that, while the notion of popular sovereignty may seem to offer some support to the neo-populist image of democracy, it serves more persuasively to support the idea of a polycentric, constitutional democracy. The constitutional state can be polycentric and yet feature a sovereign. And if this constitutional state is democratic in the sense of distributing power relatively equally amongst individual citizens, thus empowering the people-several, then it will establish the people-corporate in the role of sovereign..

Keywords: constitutional democracy, Jean Bodin, neo-populism, polycentrism, popular sovereignty

I *Introduction*

The notion of popular sovereignty leads a double life. It lives in a long and continuing tradition of constitutional and political theory, which dates back to the sixteenth century. But thanks to the influence of that tradition, it also lives in the ideologies surrounding active politics, where it is frequently proposed as the ideal that democratic institutions are designed to secure. Since the late eighteenth century, the idea that the people should be sovereign has played an important role in the practice of politics, side by side with the role it has continued to play in theory.

The role it has played in democratic politics has generally been fairly innocuous. It has served as a vague way of giving expression to the common assumption, embedded in the etymology of the term, that democracy gives the *demos* (people) *kratos* (power). In recent times, however, the idea of popular sovereignty has figured prominently in the rhetoric of neo-populist thinkers and activists who argue that only officials elected by the people should be given legal and political authority.[1] Where the idea had previously served as a gloss on democratic

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1 Why the 'neo' prefix? Because, while populists all call for increased power to the people, some argue, reasonably, for increasing that power in non-electoral ways within a constitutional system: say, by means of citizen-initiated referenda or citizen assemblies. On populism, see Jan-Werner Müller, *What Is Populism?* (Philadephia, PA: University of

institutions in general – in particular, the institutions associated with constitutional democracy – it is invoked in this new way of thinking to support a deep revision of those institutions: one that calls for the removal or downgrading of any procedures, organizations, or movements that curtail the power of elected leaders.

As I characterize neo-populism here, it makes two distinguishable complaints about constitutional democracy; my characterization fits with how the approach is generally construed, but I shall take it for current purposes as stipulative.[2] A typical constitutional democracy, broadly understood, will institute many relatively independent centres of authority and power, some elected, some not; in that sense, it will be polycentric, as we may say. The neo-populist complaints about this system are, first, that the sovereign power essential in any state must be concentrated in one single body or individual, making the regime monocentric rather than polycentric, and, second, that the body in which sovereign power is located should be an individual or body elected by the people to act in its name, the assumption being that the people themselves cannot do the job. There will have to be unelected officials in any regime, of course, but neo-populists argue that they should be put firmly under the control of the people's elected representatives.[3]

The thesis of this article is that, while the notion of popular sovereignty, as it figures in traditional theorizing, may seem to offer some support to the neo-populist image of democracy, it actually serves more persuasively to support the idea of a constitutional democracy. In Part II, we look at the notion of sovereignty, including popular sovereignty, as it first emerged in constitutional and political thought. And then in the two remaining ~~subparts~~, we defend constitutional democracy against the neo-populist claims. Part III argues that the constitutional state can be polycentric and yet feature a sovereign of the kind envisaged by those who introduced the idea. And Part IV defends the claim that, if this constitutional state is democratic in the sense of distributing power relatively equally amongst individual citizens, then it will make the people – the people in a corporate sense – sovereign.

The argument is designed to show that popular sovereignty can be achieved within a constitutional democracy, not to argue that it cannot be achieved within a neo-populist one. But in developing that argument, we shall see that, while popular sovereignty within the constitutional model requires power to be distributed relatively equally amongst people, as we might expect in a democracy, it does not require such a democratic distribution of power within the neo-populist model. Where constitutional democracy empowers the people several, as we might put it, neo-populist democracy may fail egregiously on that count.

Pennsylvania Press, 2016) [Müller, *What Is Populism*]; Nadia Urbinati, *Me the People: How Populism Transforms Democracy* (Cambridge, MA: Harvard University Press, 2019) [Urbinati, *Me the People*].

2 See Müller, *What Is Populism*, supra note 1; Urbinati, *Me the People*, supra note 1.

3 Neo-populists also tend to impose a conception of 'the real people' as opposed to the elites in unelected positions, to culturally distinct migrants and sometimes to those who support the 'wrong' side. I neglect these sociological characteristics of neo-populism here, concentrating on the more formal implications of the viewpoint.

One further caveat. The topic of the article is sovereignty in a domestic rather than an international context. The view defended can be connected nicely, I believe, with an account of the sovereignty that states ought to enjoy in the international arena.[4] But I shall have nothing to say here in defence of that account or that connection.

II *The origin and definition of sovereignty*

A BODIN, HOBBES, ROUSSEAU

The person who brought the concept of sovereignty into a central position in thinking about the state is a French legal and political thinker of the sixteenth century, Jean Bodin.[5] He argued that every well-functioning state has to invest supreme law-making authority in a single person or body and that it is an illusion to think that a state might operate under a mixed constitution that divides that authority among many hands. In taking this line, he maintained that it is an illusion to think that the Roman republic had a mixed constitution or that the various medieval regimes that took that republic as a model did or could implement such an arrangement. He rejected such polycentric possibilities, holding that every state has to be governed by one supreme authority.

The radical point of view that Bodin adopted, which is often described as absolutist in character, was taken up in a lightly revised form by Thomas Hobbes in the seventeenth century and in a distinct, more inclusive, version by Jean-Jacques Rousseau in the eighteenth century. Like Bodin, Hobbes used the idea to criticize republican proposals – in particular, the proposals of those in England who waged a civil war with King Charles I and his royalist supporters. Unlike both of them, Rousseau used it to re-construe republican proposals, arguing that there has to be a single sovereign power in the republic: an assembly of all the citizens that imposes its 'general will' on them as individuals.[6]

4 Philip Pettit, 'The Republican Law of Peoples: A Restatement' in Barbara Buckinx, Jonathan Trejo-Mathys & Timothy Waligore, eds, *Domination and Global Political Justice: Conceptual, Historical, and Institutional Perspectives* (London: Routledge, 2015) 37.

5 Julian Franklin, *Jean Bodin and the Rise of Absolutist Theory* (Cambridge, MA: Cambridge University Press, 1973) [Franklin, *Bodin*]; Julian Franklin, 'Sovereignty and the Mixed Constitution: Bodin and His Critics' in JH Burns & Mark Goldie, eds, *The Cambridge History of Political Thought 1450–1700* (Cambridge, UK: Cambridge University Press, 1991); Martin Loughlin, *Foundations of Public Law* (Oxford: Oxford University Press, 2010) [Loughlin, *Foundations*]; Daniel Lee, *Popular Sovereignty in Early Modern Constitutional Thought* (Cambridge, UK: Cambridge University Press, 2016) [Lee, *Popular Sovereignty*]; Daniel Lee, *The Right of Sovereignty* (Oxford: Oxford University Press, 2021) [Lee, *Right of Sovereignty*].

6 In this context, I focus for simplicity on Bodin. The relevant Hobbesian texts are *The Elements of Law, De Cive,* and *Leviathan.* Thomas Hobbes, *Human Nature and De Corpore Politico: The Elements of Law, Natural and Politic* (Oxford: Oxford University Press, 1994); Thomas Hobbes, *On the Citizen*, edited and translated by Richard Tuck & Michael Silverthorne (Cambridge, UK: Cambridge University Press, 1998) [Hobbes, *De Cive*]; Thomas Hobbes, *Leviathan*, edited by Edwin Curley (Indianapolis: Hackett, 1994) [Hobbes, *Leviathan*]. See also Philip Pettit, *Made with Words: Hobbes on Language, Mind and Politics* (Princeton, NJ: Princeton University Press, 2008) [Pettit, *Made with Words*]. The text of Rousseau's on which I mainly

Bodin grew up at the end of a period in which Roman law had achieved a sacrosanct status in secular and ecclesiastical systems, earning the name of the *jus commune* or common law – that is, the law common to state and church.[7] Its precepts had come to be routinely invoked in interpreting or challenging local laws within a state; in negotiating differences between competing, often warring regimes – in particular, the city-states of medieval and Renaissance Italy; and in determining the authority of the Holy Roman Emperor in relation to such regimes and in relation to the pope. The Roman law invoked in such roles had been laid out in a set of texts commissioned in the mid-sixth century by Justinian, the emperor at Constantinople, and rediscovered after a long period of neglect in the later eleventh century.

In his earlier life, Bodin was one of a group of scholars, known as the legal humanists, who argued that the Roman law texts were derived from very different sources and times and did not have the coherence that justified the place they were given by earlier legal scholars and by the authorities they guided. This critique opened up questions about what exactly law is and what gives it legitimacy. While such questions had certainly surfaced among earlier medieval thinkers, Bodin approached them in a novel manner and developed a way of thinking about them that gave a central role to his idea of sovereignty.[8] The principal presentation of his view, *The Six Books of the Commonwealth*, appeared in 1576.[9] This book was published by Bodin at a time of religious and civil strife, just four years after the St Bartholomew's Day massacre of Huguenots in France. The idea of

rely is *The Social Contract*. Jean-Jacques Rousseau, *The Social Contract and Other Later Political Writings*, edited by Victor Gourevitch (Cambridge, UK: Cambridge University Press, 1997) [Rousseau, *Social Contract*]. See also Philip Pettit, 'Rousseau's Dilemma' in Avi Lifschitz, ed, *Engaging with Rousseau: Reception and Interpretation from the Eighteenth Century to the Present* (Cambridge, UK: Cambridge University Press, 2016) 168 [Pettit, 'Rousseau's Dilemma']. My reading of Bodin, like that of Hobbes and Rousseau, is designed to give us a view of sovereignty that, while being faithful in general outline to his approach, does not reflect the nuances of his thought. For a scholarly, sympathetic reading of his work, see Lee, *Popular Sovereignty*, supra note 5; Daniel Lee, 'Citizenship, Subjection, and the Civil Law: Jean Bodin on Roman Citizenship and the Theory of Consensual Obligation' in Clifford Ando, ed, *Citizenship and Empire in Europe 200–1900: The Antonine Constitution after 1800 Years* (Stuttgart: Franz Steiner Verlag, 2016); Lee, *Right of Sovereignty*, supra note 5. And, for essential background, see Quentin Skinner, *The Foundations of Modern Political Thought* (Cambridge, UK: Cambridge University Press, 1978).

7 Cecil NS Woolf, *Bartolus of Sassoferrato* (Cambridge, UK: Cambridge University Press, 1913) [Woolf, *Bartolus of Sassoferrato*]; Harold J Berman, *Law and Revolution* (Cambridge, MA: Harvard University Press, 1983); Joseph P Canning, 'Ideas of the State in Thirteenth and Fourteenth Century Commentators on the Roman Law' (1983) 33 Transactions of the Royal Historical Society 1 [Canning, 'Ideas of the State']; Joseph Canning, *The Political Thought of Baldus de Ubaldis* (Cambridge, UK: Cambridge University Press, 1987) [Canning, *Baldus de Ubaldis*]; Loughlin, *Foundations*, supra note 5.

8 Franklin, *Bodin*, supra note 5.

9 Jean Bodin, *Six Books of the Commonwealth*, abridged and translated by MJ Tooley (Oxford: Blackwell, 1967) [Bodin, *Six Books*]; Jean Bodin, *On Sovereignty: Four Chapters from the Six Books of the Commonwealth* (Cambridge, UK: Cambridge University Press, 1992) [Bodin, *On Sovereignty*].

having one supreme authority in the state appealed to him as a means of dealing with such strife. Hobbes was influenced by a similar motive, as appears in the fact that his best known books, all of them supportive of a single sovereign, were published around the time of the English civil war; his most famous work, *Leviathan*,[10] appeared in 1651, at the beginning of the period when the parliamentary side had gained power over the royalist side, investing it in the protector Oliver Cromwell.

B THE ELEMENTS OF THE ORIGINAL THEORY

The absolutist tradition to which Bodin, Hobbes, and Rousseau belong took sovereignty to be essential for statehood. 'Sovereignty,' Bodin wrote, 'is the absolute and perpetual power of a commonwealth.'[11] But this power must be invested in a particular agent, all of these figures assume, where that sovereign agent may be an individual – a king or queen – or a corporate body. They all took it that a corporate body would be a group of individuals who make their decisions together on the basis of majority rule, with some arrangement to cover ties. The sovereign body in a state might be a committee of elite members, as in an aristocracy, or a committee of the whole citizenry, in what Bodin and the others all described as a democracy (more on this usage in the final part).

Rejecting the notion of law as encoded in Justinian's texts, Bodin opted for the apparently straightforward view that 'law implies command' and that laws are commands imposed on subjects with their support,[12] except when they are 'permissive' of suitable 'rewards or penalties.'[13] He assumes that, if laws are commands, there must be a commander at their origin. And it is this figure of the commander that he casts as the sovereign: '[T]he law is nothing but the command of a sovereign making use of his power.'[14] Expanding more fully on the idea, he says: '[L]aw is the command of the sovereign affecting all the subjects in general, or dealing with general interests.'[15] The order of Bodin's argument might be recast along these lines. In every state, there normally has to be a system of laws governing subjects; laws are essentially commands issued to subjects, and, being commands, they must originate with a commander. This commander, able to make and unmake law, is the figure that he casts then as the sovereign.

What power must the sovereign enjoy? The answer sketched by Bodin was broadly adopted by Hobbes and Rousseau. It consists in this: first, that the sovereign must not be subject to any other individual or body within the jurisdiction and, second, that the sovereign must not be subject even to the laws they make or, indeed, to the laws made by their predecessors. The sovereign is an unbound binder, presiding with unchallenged authority over other agents in the state and over all the laws that hold there.

10 Hobbes, *Leviathan*, supra note 6.
11 Bodin, *On Sovereignty*, supra note 9 at 1.
12 Ibid at 38.
13 Ibid at 57.
14 Ibid at 38.
15 Ibid at 51.

Taking up the first respect in which the sovereign is unbound, Bodin says: '[P]ersons who are sovereign must not be subject in any way to the commands of someone else.'[16] This is because, otherwise, the sovereign would not be able 'to give the law to subjects, and to suppress or repeal disadvantageous laws'; the sovereign could hardly do this, so the thought goes, if there were 'persons having power of command over him.' Taking up the second respect in which the sovereign is unbound, he says that the same consideration applies also in this case, requiring that the sovereign not be 'subject to the law.' But Bodin also cites a further, logical reason in support of the sovereign's freedom from the law, which is that 'it is as impossible by nature to give one's self a law as it is to command one's self to do something that depends on one's own will.'[17]

This statement seems to suggest that the sovereign will be in total charge of legislation but perhaps not of other functions of government such as those associated with administration and adjudication. For Bodin, however, as for the absolutists generally, to be in charge of the law is to be in control of every aspect of the state. This idea mainly derives from the assumption that anyone who controls the law can control others who act in the name of the state; if others act in the name of the state, they will have to act on the authority and the terms set by law and, in effect, by the sovereign who determines that law. 'This same power of making and repealing law,' Bodin says, 'includes all the other rights and prerogatives of sovereignty, so that strictly speaking we can say that there is only this one prerogative of sovereignty, inasmuch as all the other rights are comprehended in it.'[18]

This sketch of the absolutist view may make it seem more extreme – more absolutist – than it really is. Bodin, like Hobbes and Rousseau, does often stress the extreme reading of his views: '[T]he main point of sovereign majesty and absolute power,' he says, 'consists of giving the law to subjects in general without their consent.'[19] But it is crucial to recognize that there are three respects in which that view is tempered by all these authors, although we may continue to focus attention on Bodin. The bonds from which the sovereign has to be free are restricted to enforced, uncontracted, and external constraints, as I shall describe them. Despite enjoying an absolute status, the sovereign in the absolutist view may be subject to constraints of a normative, unenforceable kind; constraints deriving from contracts into which the sovereign enters; or constraints that are internal in the sense of being constitutive of sovereignty itself.

That the sovereign may be constrained in a purely normative, unenforceable manner shows up in the insistence that the sovereign should not break divine or natural law. 'But as for divine and natural laws,' Bodin says, 'every prince on earth

16 Ibid at 11.

17 Ibid at 12.

18 Ibid at 58. He lists the other rights and prerogatives as follows: '[D]eclaring war or making peace; hearing appeals in last instance from the judgments of any magistrate; instituting and removing the highest officers; imposing taxes and aids on subjects or exempting them; granting pardons and dispensations against the rigour of the law; determining the name, value, and measure of the coinage; requiring subjects and liege vassals to swear that they will be loyal without exception to the person to whom their oath is owed.' Ibid at 58–9.

19 Ibid at 23.

is subject to them, and it is not in their power to contravene them unless they wish to be guilty of treason against God.'[20] But this constraint is not enforceable against the sovereign, and it does not introduce a bond of the kind that Bodin wants to exclude. Like the other absolutists, he was quite keen that the sovereign should meet certain customary and normative standards; Hobbes describes these self-interested 'dictates of reason.'[21] But, like them, he insisted that the sovereign cannot be policed by any other individuals or bodies into meeting those constraints. For Bodin, the point of importance was that the 'limitations on the right to make law could not,' as Dieter Grimm puts it, 'be enforced against the will of the sovereign.'[22]

The fact that subjects cannot act to impose limits on the sovereign means that they do not have a legal right to revolt. It is always possible for a revolution to occur, of course, but this would mean an end to the state, not just an end to the sovereign; it would remove the state altogether or replace it by a distinct regime. What if the sovereign becomes tyrannical? Even then, as I interpret him, Bodin holds that there is no legal right to revolt: '[I]t is never permissible for a subject to attempt anything against a sovereign prince, no matter how wicked and cruel a tyrant he may be';[23] no matter how evil, 'the tyrant is nonetheless a sovereign.'[24]

In passing, we should notice that Bodin seems to go further in suggesting that subjects do not have even a moral, as distinct from a legal, right – say, a right under natural law – to revolt. He denounces revolution on the grounds that it would lead to anarchy – the demise of the state – which he takes to be 'worse than the cruelest tyranny.'[25] Hobbes takes a similar line in the normal case but allows that those whom the sovereign is oppressing – for example, by threatening their lives – have no duty in natural law to submit and so have no duty not to revolt.[26] Rousseau says little about whether citizens are morally allowed to revolt if their sovereign – the assembly of all – becomes factionalized and corrupt.[27] But at least one remark in *The Social Contract* suggests that, if the assembly remains the sovereign in the factionalized case, as it presumably will, then while some citizens may have a morally important complaint about its behaviour, 'the Sovereign is alone judge of that importance.'[28]

That the tyrannical sovereign remains legally a sovereign implies that, even the constraint of ruling by law, which is invoked in the very definition of sovereignty, is strictly a normative or moral ideal, not one that others can force the

20 Ibid at 13.

21 Hobbes, *Leviathan*, supra note 6 at 15.41.

22 Dieter Grimm, *Sovereignty: The Origin and Future of a Political and Legal Concept* (New York: Columbia University Press, 2015) at 23 [Grimm, *Sovereignty*]. At least not from within the jurisdiction; Daniel Lee has suggested to me that Bodin would not have ruled against foreign intervention in the case of a sovereign who behaves despotically.

23 Bodin, *Six Books*, supra note 9 at 120.

24 Ibid at 6.

25 Ibid at 92.

26 Hobbes, *Leviathan*, supra note 6 at 14.29.

27 Pettit, 'Rousseau's Dilemma,' supra note 6.

28 Rousseau, *Social Contract*, supra note 6 at II.4.3.

sovereign to satisfy. But, for Bodin and the others, it is a normative ideal that is embedded in the very idea of a state and a sovereign and has a very special status. Where the sovereign becomes tyrannical and ceases to rule by law, the state may strictly remain a state – and the sovereign a sovereign – but only in the sense, we might say, in which a heart that ceases to pump blood remains a heart. All of the absolutists assume that we would not know what a state or a sovereign is if we did not see the connection with law, as we would not know what the heart is unless we understood its role in pumping blood. The normative ideal of ruling by law has the status, we might say, of a functional ideal: an ideal that the functionally normal state must serve.[29]

The second set of constraints to which Bodin thinks a sovereign may be subject are contractual in character. That the sovereign may be constrained by contract derives, in his view, from the fact that entering a contract, no matter who is the agent involved, means accepting the contractually agreed sanction in the event of breaching its terms. Thus, 'if a sovereign prince promises another prince to keep laws that he or his predecessors have made, he is obligated to keep them if the prince to whom he gave his word has an interest in his so doing' – that is, if that prince does not implicitly or explicitly release him.[30] And the same even holds if the sovereign enters a contract with a subject. Such a contract also 'obligates the two parties reciprocally and one party cannot contravene it to the prejudice of the other and without the other's consent.'[31]

The idea of the sovereign entering a contract with a subject is surprising, but it is not specific to Bodin. Rousseau thinks that only a committee of the whole can be sovereign and so has no place for that body making a contract with an individual citizen. But Hobbes does make room for this possibility. 'If a subject have a controversy with his sovereign,' he writes, 'grounded on a precedent law, he hath the same liberty to sue for his right as if it were against a subject, and before such judges as are appointed by the sovereign.'[32] The controversy, as he explains, may concern debt, lands, fines, or whatever, where the right of the subject depends on the fact that the sovereign operates 'by force of a former law, and not by virtue of his power,' which ensures that 'the suit is not contrary to the will of the sovereign.'[33]

29 This is to say that the constraint of ruling by law comes close to being an internal constraint in the sense explained later. David Dyzenhaus endorses something like that view when he says that 'all acts of sovereignty must comply with the law to be recognizable as acts of sovereignty.' David Dyzenhaus, 'Hobbes on the Authority of Law' in David Dyzenhaus & Thomas Poole, eds, *Hobbes and the Law* (Cambridge, UK: Cambridge University Press, 2012) 186 at 198, n 38.

30 Bodin, *On Sovereignty*, supra note 9 at 13.

31 Ibid at 15.

32 Hobbes, *Leviathan*, supra note 6 at 21.19.

33 Rousseau would presumably have nothing against the sovereign making a binding contract with another sovereign. Hobbes might well have a problem, however, since he thinks that a party can make a valid contract with another only if there is an assurance on each side that the other will abide by its terms; at least in the case of a contract or covenant involving a promise of future behaviour that will require the existence of an enforcer in his view. Ibid at 22.29.

The third, and possibly most significant, set of constraints on the sovereign that Bodin allows comprises internal constraints that go into the very definition of sovereignty. One of these is that, while sovereignty is not easily lost – see the discussion of someone who becomes a tyrant – the sovereign must initially be accepted by the people; power alone does not make for sovereignty. In Hobbes and Rousseau, this internal constraint is associated with the contract between subjects or citizens that establishes and enables the sovereign. While Bodin does not invoke any such social contract, he is adamant that, in order to be sovereign, an agent must be accepted in some standard, recognizable fashion by the subjects. Thus, he contrasts the usurper who seeks sovereign power 'on his own authority' with someone who becomes sovereign 'by way of election, or lot, or right of succession, or just war, or by a special calling from God.'[34] And he goes on to suggest that, if the power of someone in office is often 'called into question' –in that sense, it does not gain stable acceptance – then they do not really count as the sovereign.[35]

Apart from the acceptance of subjects, a further internal constraint that the absolutists all acknowledge, although only implicitly in this case, applies where the sovereign is a corporate body or committee. Not often noticed as a constraint, this consists in the requirement they impose that the committee, whether of an elite or of the subjects as a whole, should operate by majority voting, with arrangements for overcoming ties. The assumption is that, if it is to act as a body, then the committee has to follow majority voting; there is no other way for it to constitute an agent. Should the members act on some other basis, so the idea goes, then it will not be the committee proper, and not the sovereign proper, that acts; it will have been displaced – its role will have been usurped – by those who break with the majoritarian way of doing things.[36]

In order to constitute an agent, any system – individual or corporate – must be able to form goals to be advanced across different scenarios, make judgments about how best to pursue those goals in different scenarios, and take the action required on any particular occasion. Like many medieval thinkers before them,[37] the absolutists assume, then, that a committee has to be organized with the acquiescence of its members so that all or some of them coordinate in the joint determination of its general goals; in the formation of judgments about how specifically to realize those goals, now in this scenario, now in that; and in the designation of those individuals who are to pursue this or that goal in this or that type of situation.[38] It is only when a group is organized in some such way, plausibly,

34 Bodin, *On Sovereignty*, supra note 9 at 112.

35 Ibid at 115.

36 As contractualists, Hobbes and Rousseau think that, in setting up the committee or assembly, there must be unanimous support among members that that body will rule by majority vote, but Bodin just takes it for granted that it will do so. According to Rousseau, however, the members might agree by majority voting that on some issue super-majoritarian support is required for change. Rousseau, *Social Contract*, supra note 6 at IV.2.10.

37 Joseph P Canning, 'The Corporation in the Political Thought of the Italians Jurists of the Thirteenth and Fourteenth Century' (1980) 1 History of Political Thought 9 [Canning, 'Corporation'].

38 Christian List & Philip Pettit, *Group Agency: The Possibility, Design and Status of Corporate Agents* (Oxford: Oxford University Press, 2011) [List & Pettit, *Group Agency*].

that it can count as an agent that has a will of its own – that will is going to be reflected in its goals and in the actions to which those goals lead it under the guidance of its judgments. We will assume that that is so throughout this article.

Where this general assumption is plausible, however, the specific assumption that a committee can or should achieve the required sort of organization by a scheme of majority voting is problematic, as we shall see in the final part. But, for the moment, we may let it pass. The important point to notice is that the sovereignty of the committee, whether it be a committee of the elite or of the whole, is in no way compromised by the majoritarian constraint. That constraint is built into the practices that constitute the corporate body and does not regulate an existing, already constituted agency in the manner of an inessential restriction.[39]

C IN SUMMARY

Summing up our observations about the absolutist tradition so far, then, the argument in Bodin goes as follows. Every state establishes a system of laws in the sense that this is a functional ideal based in its nature; laws are commands that subjects must obey; and such commands presuppose a commander or sovereign, whether that be an individual or a committee. In order for the sovereign to play this commanding role, they cannot be subject to any other individuals or bodies or to the laws that they themselves, or their predecessors, have established; they must be able to unmake any such law. But, as sovereign, they will still be subject to normative, unenforceable constraints, to constraints deriving from contracts they entered, and to constraints of an internal, constitutive kind.

We will go along with this original characterization of sovereignty in asking whether the neo-populist objections to constitutional democracy are justified. The conception offered is congenial to neo-populism, as we shall see, so that adopting it here certainly does not tilt the books in favour of constitutional democracy. And, as we shall also see, it actually has some appeal, enabling us to identify a sovereign – albeit not the sort of sovereign Bodin, Hobbes, and Rousseau thought it would identify – in every well-ordered state, whether that state be polycentric or monocentric, democratic or non-democratic.

There are two claims that we have associated with neo-populism: first, that the sovereign power essential to any state cannot be shared among many individuals or bodies – the state cannot be polycentric – and, second, that the state's sovereign power must rest entirely in the hands of an individual or body elected by the people. We address those claims in turn over the next two parts of the article. In Part III, we argue that there is a sovereign power in any polycentric state, contrary to both the neo-populist and the traditional absolutist view; this is to defend sovereigntism, as we might put it, without a commitment to rejecting the mixed

39 For a similar point of view of the constraints to which a sovereign may be subject, although not of the majority constraint in particular, see Loughlin, *Foundations*, supra note 5 at 67–70. And for a contemporary assumption along the same lines, see Noel Malcolm, *Sense on Sovereignty* (London: Centre for Policy Studies, 1991) at 21 [Malcolm, *Sense on Sovereignty*] ('[a] constitution does not limit sovereign authority in the sense of opposing it and reducing it. What it does is to determine – that is, state the rules for – the ways in which that authority is exercised').

constitution. And then in Part IV, we argue that this sovereign in a constitutional democracy can be identified with the people.

III *The polycentric sovereign*

Neo-populism is opposed to the polycentric state by implication rather than as a matter of explicit commitment. To hold, as neo-populists do, that sovereign power should rest exclusively with the elected authority in the state is to assume that it cannot be shared amongst different hands. This opposition to polycentrism was a commitment to which our original absolutist thinkers gave particular prominence. They mounted their opposition by way of an attack on the traditional republican ideal of the mixed constitution. In this part, we will look first at this polycentric arrangement and at their opposition to it; then review the attitudes of thinkers like Charles de Montesquieu, William Blackstone, John Austin, and A.V. Dicey, toward the successful polycentric state constituted by eighteenth- and nineteenth-century Britain; and argue, finally, that there is a sovereign, missed by those thinkers, to be found in that regime and in any effective polycentric system.

A THE MIXED CONSTITUTION

At the time when Bodin and Hobbes were constructing their theories of sovereignty, one of the stock ideas in legal and political theory was that of the mixed constitution. The idea of the mixed constitution had been given prominence by Polybius in the second century BCE in his history of Rome, particularly in his account of the Roman Constitution.[40] The phrase had been in use previously in the Greek world, including in Aristotle's *Politics*, to refer to a constitution in which there were elements of democracy, aristocracy, and monarchy.[41] But Polybius applied it rather freely to Rome itself, and it was a staple of the neo-Roman republican tradition of medieval and modern Europe. Classical Rome, as he saw it, had evolved a system of polycentric power sharing that guarded against the dangers of corruption by having different authorities – be they bodies or individuals – hold one another to account. As in a democracy, ordinary people had a great deal of power, playing a role in electing to office and even in passing laws – these things they did, at least normally, via the tribal and centuriate assemblies – as well as in constituting the courts that considered public and private charges. But great power was also wielded by an elite or aristocracy insofar as political authorities had to be elected from their ranks, those authorities had to propose any legislation to be considered by the people, and they and their predecessors formed the Senate, a body that advised on the full gamut of administrative affairs. Finally, among the authorities in any year, two shared the supreme office of consul and, in Polybius's rather strained reckoning, played a monarchical role within the state.

The important feature of this arrangement, as Polybius described it, is the checks and balances that it incorporates. The structure ensured that the use of

40 Polybius, *The Histories*, vol 3 (Cambridge, MA: Harvard University Press, 2011), book 6.

41 Aristotle, *The Politics*, edited by Stephen Everson (Cambridge, UK: Cambridge University Press, 1996) [Aristotle, *The Politics*].

power was shared amongst many hands to the extent, for example, that the laws could be passed only with the cooperation of a proposing official and a compliant people; that the consuls and other lesser authorities had to make compromises with one another to get anything done; and that the tribunes of the plebs – broadly, the poor – could veto various measures passed by other authorities. And, apart from enforcing a separation and sharing of power, the Roman Constitution also recruited and mobilized different classes in the society and gave them a part in making the system work; the mobilization of ordinary people was visible, not just in the tribal and centuriated assemblies but also in the less formal gatherings in the central forum of the city, often dignified as meetings of the council of the plebs.[42]

Polybius's celebration of the mixed constitution of Rome was endorsed by politicians like Cicero,[43] historians like Livy, and a range of other authors. This constitution later came to be hailed as an ideal in the medieval city-republics of Italy: *ubi multa consilia, ibi salus* (where many councils exist, there is safety).[44] And it became a mainstay of the republican tradition of thinking championed at the time of the Renaissance by a range of writers – in particular, Niccoló Machiavelli in his *Discourses on Livy*.[45]

B THE ABSOLUTIST OPPOSITION

Bodin and his fellow absolutists were passionately opposed to the decentralization of power implicit in the mixed constitution. Believing that every state had to have a sovereign, they saw this constitution as utterly dysfunctional: '[M]ixture,' Bodin says, 'is not a state, but rather the corruption of a state.'[46] Monarchy allowed an individual to be sovereign, aristocracy and democracy allowed an elite committee or a committee-of-the-whole to be sovereign. But where was a sovereign is to be found under the mixed constitution: under what Hobbes derisively described as 'mixarchy'?[47]

In denying that there could be a sovereign under a polycentric regime – in maintaining, as they put it, that sovereignty is indivisible – the absolutists resorted often to rhetoric. If the sovereign is 'to give law to subjects,' Bodin asks, 'who will be the subjects and who will obey if they also have the power to make the law?'[48]

42 There are many excellent accounts of the institutions of republican Rome. For a collection of useful studies, see Harriet I Flower, ed, *The Cambridge Companion to the Roman Republic* (Cambridge, UK: Cambridge University Press, 2014); the overview of Roman institutions, at 50–1, is especially useful. See also Valentina Arena, *Libertas and the Practice of Politics in the Late Roman Republic* (Cambridge, UK: Cambridge University Press, 2012).

43 Marcus Tullius Cicero, *The Republic and the Laws* (Oxford: Oxford University Press, 1998).

44 Daniel Waley, *The Italian City-Republics*, 3d ed (London: Longman, 1988) at 39–40.

45 Niccoló Machiavelli, *Discourses on Livy* (Oxford: Oxford University Press, 1997). See also Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997); Quentin Skinner, *Liberty before Liberalism* (Cambridge, UK: Cambridge University Press, 1998).

46 Bodin, *On Sovereignty*, supra note 9 at 105.

47 Thomas Hobbes, *Behemoth or the Long Parliament*, edited by F Toennies (Chicago: University of Chicago Press, 1990) at 16 [Hobbes, *Behemoth*].

48 Bodin, *On Sovereignty*, supra note 9 at 92.

Hobbes opines, with a little more precision: '[I]f the king bear the person of the people, and the general assembly bear also the person of the people, and another assembly bear the person of a part of the people, they are not one person, nor one sovereign, but three persons, and three sovereigns.'[49] But Hobbes too resorts to mockery, arguing that the mixed regime makes the state into something like 'a man that had another man growing out of his side, with a head, arms, breast, and stomach of his own'[50] and adding that if this man 'had another man growing out of his other side,' then 'the comparison' would be 'exact.'[51] Rousseau goes even further in his mockery of the arrangement. Comparing theorists of the mixed constitution to Japanese conjurors, he says that 'they turn the Sovereign into a being that is fantastical and formed of disparate pieces; it is as if they were putting together a man out of several bodies one of which had eyes, another arms, another feet, and nothing else.'[52]

Bodin and Hobbes both held that a sovereign can retain power while delegating the various functions involved in applying the law, whether in administration or adjudication, to others; indeed, they thought that the sovereign might even delegate the business of legislation itself while retaining reserve powers like that of a veto.[53] Rousseau took a somewhat different line. He argued in *The Social Contract* that only an assembly of all citizens can serve as sovereign; that this body cannot delegate legislation to any officials; and that it ought to delegate administrative and adjudicative powers in what he calls a 'mixed government' as distinct from a mixed constitution.[54] Rousseau's commitment to allowing only an assembly of all to constitute the sovereign derives from his fear that any other arrangement would subject many to dependency and domination.[55] He rejects the delegation of legislation by this body on the grounds that it would endanger its sovereignty.[56] And he requires it to delegate other functions on the grounds that applying the law to particular cases would direct members of the assembly to the individual interests of those involved, including their own, and would jeopardize their capacity to focus impartially on the common interest.[57]

In an innovative move with enormous consequences for later thinking, Rousseau invented the idea of 'the general will' of the community[58] – the people's will, as it shortly came to be known – as the will that the majority in this assembly will support insofar as they focus on the common interest rather than on more partial concerns.[59] Hence, he argued that only if the assembly sticks exclusively to the

49 Hobbes, *Leviathan*, supra note 6 at 29.16.
50 Ibid at 29.17.
51 Ibid at 29.17.
52 Rousseau, *Social Contract*, supra note 6 at II.2.2.
53 See Richard Tuck, *The Sleeping Sovereign: The Invention of Modern Democracy* (Cambridge, UK: Cambridge University Press, 2016) [Tuck, *Sleeping Sovereign*].
54 Rousseau, *Social Contract*, supra note 6 at III.7.
55 Pettit, 'Rousseau's Dilemma,' supra note 6.
56 Rousseau, *Social Contract*, supra note 6 at III.15.5.
57 Ibid at III.4.
58 Ibid at IV.2.9.
59 Patrick Riley, *The General Will Before Rousseau: the Transformation of the Divine into the Civic* (Princeton, NJ: Princeton University Press, 1986) [Riley, *General Will*].

task of making general laws can it be expected to instantiate the general will. Believing that no state could function properly if it does not have a sovereign, Bodin systematically looks for a sovereign in every regime and claims in general to find one. Citing the authority of Herodotus, he thinks that any regimes without a sovereign will be 'continually agitated by the storms of civil sedition until sovereignty is wholly lodged in one form or another' – that is, in a monarchy, aristocracy, or democracy.[60] And he maintains that stable regimes that appear to instantiate a mixed constitution do not actually do so. Thus, he holds that Rome, supposedly the very model of a mixed constitution, is actually a democracy, with the people in ultimate charge of the law and that Venice, an allegedly contemporary example, is actually controlled by an aristocracy.[61]

Hobbes and Rousseau take the same view, as their rhetorical assaults on the mixed constitution reveal: Hobbes supports monarchy, Rousseau supports a qualified version of Bodinian democracy.[62] Hobbes was very conscious of the chaos in England, as he saw it, during the civil war – in effect, the failure of the state – and he put this down to a mistaken belief on the part of the parliamentary side that they could share sovereignty with the monarch. The mistake, Hobbes suggests, was due to their reading the classical authors whom he associated with the mixed constitution: 'I think I may truly say, there was never any thing so dearly bought, as these western parts have bought the learning of the Greek and Latin tongues.'[63] That learning, as he says elsewhere, was taken from 'Cicero, Seneca, Cato, and other politicians of Rome, and Aristotle of Athens.'[64]

But even though the absolutists all took the polycentric state to be theoretically dysfunctional, even impossible, it appeared to do perfectly well in the practice of the eighteenth century.[65] Britain became the model for such a state in that century, at least by the testimony of some prominent writers at the time. It was in imitation of that model that the constitution proposed for the United States in 1787 explicitly endorsed a polycentric division of power.

C THE CASE OF BRITAIN: MONTESQUIEU AND BLACKSTONE

Montesquieu visited England in 1729 and celebrated its Constitution – in effect, its mixed constitution—in *The Spirit of the Laws*, published in 1748.[66] He is well known for defending a separation between the powers of legislation, administration, and adjudication. But he not only held that those powers should be separated, as the absolutists

60 Bodin, *On Sovereignty*, supra note 9 at 105.

61 Ibid at 98.

62 It is qualified and not actually described as a democracy by Rousseau, insofar as the members of the assembly are restricted to voting on laws and prevented from playing a part in the application of those laws.

63 Hobbes, *Leviathan*, supra note 6 at 21.9.

64 Hobbes, *Behemoth*, supra note 47 at 158.

65 David Lieberman, 'The Mixed Constitution and the Common Law' in Mark Goldie & Robert Wokler, eds, *The Cambridge History of Eighteenth-Century Political Thought* (Cambridge, UK: Cambridge University Press, 2006) 317.

66 Charles de Montesquieu, *The Spirit of the Laws* (Cambridge, UK: Cambridge University Press, 1989).

themselves might have allowed; the separation need not compromise the legislative sovereign, after all, as in Rousseau's model of mixed government. Montesquieu also argued that it was important for the preservation of people's liberty that the legislative power should be divided between different bodies, as it was in England, and that it should be checked by the power of the executive. The general principle on which he relies in his praise of the English Constitution is straightforward: 'Political liberty is found only … when power is not abused,' and, in order to protect against abuse, 'power must check power by the arrangement of things.'[67] Why is such checking required? Why would it not be enough to have virtuous rulers? Because 'it has eternally been observed that any man who has power is led to abuse it; he continues until he finds limits.'[68] 'Who would think it!,' he remarks. 'Even virtue has need of limits.'[69]

Applying this line of thought to England, Montesquieu praises both the power of the executive to veto legislation and the division of legislative power. 'If the executive power does not have the right to check the enterprises of the legislative body, the latter will be despotic, for it will wipe out all the other powers, since it will be able to give to itself all the power it can imagine.'[70] And, in the same spirit, he praises the check that each legislative house – the Commons and the Lords – imposes on the other. The English system of checks, Montesquieu says, is embodied in 'the fundamental constitution of the government of which we are speaking. As its legislative body is composed of two parts, the one will be chained to the other by their reciprocal faculty of vetoing. The two will be bound by the executive power, which will itself be bound by the legislative power.'[71] And so 'the three powers,' he concludes, 'will be forced to move in concert.'[72]

Montesquieu has little or nothing to say about sovereignty in this encomium to a system that displays checks and balances like those that Polybius praised in ancient Rome. It is as if he wants to have no truck with a theory that he takes to be refuted in practice. Montesquieu was not the only one who saw England as a polity without the indivisible sort of sovereign that thinkers like Bodin, Hobbes, and Rousseau deemed essential. Another extremely influential writer who follows him in this analysis of the English Constitution is Blackstone, the author in the 1760s of the magisterial *Commentaries on the Laws of England*.

For Blackstone, 'the true excellence of the English government consists in this: '[T]hat all the parts of it form a mutual check upon each other.'[73] Siding with Cicero in the view that government can be 'mixed' and not have a purely monarchical, aristocratic, or popular form, Blackstone highlights the fact that 'the legislature of the kingdom is entrusted to three distinct powers, entirely independent of each other': the king, the lords and the commons.[74] This 'aggregate body,

67 Ibid at 155–6.
68 Ibid at 155.
69 Ibid.
70 Ibid at 162.
71 Ibid at 164.
72 Ibid.
73 William Blackstone, *Commentaries on the Laws of England*, book 1 (Oxford: Oxford University Press, 2016) at 103.
74 Ibid at 41.

actuated by different springs, and attentive to different interests composes the British parliament,' he says, 'and there can no inconvenience be attempted by either of the three branches, but will be withstood by one of the other two.'[75] Where Montesquieu hardly mentions sovereignty, Blackstone is happy to describe the British Parliament, however divided within itself, as the sovereign power.[76] In this body, he says, 'is lodged the sovereignty of the British constitution; and lodged as beneficially as is possible for society.'[77] Thus, he appears to go along with the assumption that there has to be a supreme power in any polity but strongly rejects the notion that this power has to be indivisible.

Montesquieu and Blackstone had an enormous influence on the thinking of those who framed the US Constitution in 1787. This document followed their lead in replicating two aspects of the English or British Constitution that they had emphasized: first, the division of the legislature into two houses of Congress and, second, the legislative role it gives to the executive in allowing the president to veto any bill proposed by Congress. The new Constitution is closer to Montesquieu than to Blackstone, however, in omitting all mention of sovereignty. The notion of sovereignty occasionally figures in the *Federalist Papers*,[78] which offered a defence of the proposed Constitution, but never in characterizing the role or power of the federal legislature or government.

The idea of sovereignty came to play a rhetorical role in the United States, however, insofar as government had to be conducted under a written constitution that had been issued in the name of 'We the People,' that had been approved in popular conventions of people, and that could only be amended under processes involving ordinary people or their representatives. It gave rise to a notion of popular sovereignty that was invoked by James Madison as a publicly acceptable alternative to the sovereignty that the different states had enjoyed under the articles of confederation that the Constitution replaced.[79] But this notion of a sovereign people was little more than a rhetorical device used to counter those who were attached to the sovereignty of the individual states. It was akin to a device invoked by supporters of the parliamentary side in England of the 1640s, when they argued that it is the people, not the king, who is sovereign. The historian Edmund Morgan makes the point nicely: 'As the English House of Commons in the 1640s had invented a sovereign people to overcome a sovereign king, Madison was inventing a sovereign American people to overcome the sovereign states.'[80]

75 It is also important for Blackstone, as for Montesquieu, that 'public liberty' 'cannot subsist long in any state, unless the administration of common justice be in some degree separated both from the legislative and also from the executive power.' Ibid at 173. This too will have the effect of dividing sovereignty insofar as the courts play an active role in interpreting the law, as they surely do. I ignore this aspect of their views, however, since the absolutists take the legislature alone to be sovereign.

76 Ibid at 107.

77 Ibid at 41.

78 James Madison, Alexander Hamilton & John Jay, *The Federalist Papers* (Harmondsworth, UK: Penguin, 1987) [*Federalist Papers*].

79 Grimm, *Sovereignty*, supra note 22 at 38.

80 Edmund S Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (New York: Norton, 1988) at 267.

The claim that, in this sense, the people are sovereign sounds good and may have been politically useful in these contexts, but it can hardly be taken literally. The people envisaged in each case do not constitute an agent capable of taking charge of the law in the manner required within the absolutist tradition. Considered as the people who can change the constitution, for example, they are not there to act except insofar as they are called upon to vote, whether in an election or a referendum. And the result they generate when they act is not the expression of an enduring, sovereign will of the kind envisaged by Rousseau, for example; it is not as if they form overall goals that they then pursue, under the guidance of shared judgments, now in this scenario, now in that.

There were at least two polycentric states in the eighteenth century, then, Great Britain and the United States, and they functioned perfectly well without embedding the sort of sovereign that Bodin, Hobbes, and Rousseau envisaged. While the notion of sovereignty was sometimes employed in describing them, it did not ever signify an agent – individual or corporate – at the origin of law. It was used to characterize the collection of powers in each regime that were forced, to use Blackstone's image, to move in concert. Or it was invoked to a merely rhetorical effect in emphasizing the importance of ordinary people.[81]

D THE CASE OF BRITAIN: AUSTIN AND DICEY

Following Blackstone, there were two legal thinkers who sought to keep the notion of sovereignty alive in nineteenth-century England, John Austin and A.V. Dicey.[82] But they did not break any decisively new ground. While Austin argued for the need of a commanding sovereign at the origin of law – a sovereign less constrained in some ways than Bodin's – he did not see any great difficulty in taking this to be constituted by the three distinct, legislatively significant agencies. The 'sovereignty always resides in the king and the peers, with the electoral body of the commons,' he says, where the 'members of the commons house are merely trustees' for their electors.[83]

Dicey goes further than Austin in emphasizing the role of the electors in England, which is unsurprising given that electoral democracy had been extended in the 1880s when he was first writing on the topic and was much more significant than in the early 1830s, when Austin published his main work. Dicey agrees that Parliament is the legal sovereign, meaning the body that has 'the right to make and unmake law';[84] resisting Austin's emphasis on command, he takes law to be 'any rule which will be enforced by the courts.'[85] And he agrees also that it is

81 In the late eighteenth and nineteenth centuries, the notion of the sovereign played a significant role in France, where it was often cast as the nation, and in Germany, where many came to ascribe it to the constitution or law. See Grimm, *Sovereignty*, supra note 22. But those countries did not raise the polycentric question in the same way as Britain and the United States, and I do not comment on them here.

82 James Kirby, 'A.V. Dicey and English Constitutionalism' (2019) 45 History of European Ideas 33.

83 John Austin, *The Province of Jurisprudence* (London: Weidenfeld, 1954).

84 AV Dicey, *An Introduction to the Law of the Constitution* (Indianapolis: Liberty Fund, 1982) at xxxvi.

85 Ibid at 4.

not a single agent but, rather, 'the King, the House of Lords, and the House of Commons acting together.' But Dicey breaks from Austin, and, indeed, from the absolutist tradition, in claiming that 'the electors are the political sovereign of the State.'[86] ~~Being~~ a group that determines the complexion of the Parliament – the legal sovereign – in regular elections and that might be recruited, as he wished ~~it~~ would be, to vote in referenda on particular laws.

Neither Austin nor Dicey go beyond Blackstone in what they say about the sovereignty of Parliament: this is not sovereignty in the original sense since Parliament is not a single body or agent. And Dicey does not contribute anything much by claiming that the electors are the political sovereign. The electorate does not have an enduring agency or will since it is not organized to pursue certain goals across varying situations. Dicey overlooked this lack, arguing that 'the difference between the will of the sovereign and the will of the nation was terminated by the foundation of a system of real representative government.'[87] The will of the nation had come to be a popular notion in the wake of Rousseau's invention of the general will.[88] But where Rousseau had thought of it as a will formed by a purportedly well-organized, concrete assembly of the people, the will of the nation was an elusive idea better fitted for rhetoric than analysis.[89]

E SCEPTICISM ABOUT SOVEREIGNTY?

These observations may suggest that we should be sceptical about the idea that a system of law has to be subject to an unbound binder of the kind envisaged by absolutists. Those who theorized about polycentric regimes like Great Britain and the United States in the eighteenth and nineteenth centuries made little or no use of the notion of sovereignty, as in the case of Montesquieu, or evacuated the notion of the sense it had enjoyed in the absolutist way of thinking, as in the case of Blackstone, Austin, and Dicey. Those regimes are salient examples of polycentric states, but they are not the only ones. Modern states, certainly modern democratic states, have generally invested executive authorities with such a power of secondary legislation, and judicial authorities with such a power of active interpretation, that despite having different constitutional forms they are all effectively polycentric in character. This is true of modern Britain, among other regimes, despite the fact that the Parliament Act of 1911 effectively gave the House of Commons exclusive legislative power.[90]

Should we be entirely sceptical then of the notion of sovereignty, at least in polycentric regimes? Should we agree with the original absolutists that there is no sovereign in such a regime, rejecting their idea that sovereignty is required for statehood? Should we go along, for example, with ~~the~~ view like that of Herbert

86 Ibid at 290.
87 Ibid at 34.
88 Riley, *General Will*, supra note 59.
89 Istvan Hont, 'The Permanent Crisis of a Divided Mankind: "Contemporary Crisis of the National State" in Historical Perspective' in John Dunn, ed, *The Contemporary Crisis of the Nation State?* (Oxford: Blackwell, 1995) 166.
90 (UK), 1 & 2 Geo 5, c 13.

Hart in his classic text, *The Concept of Law*, first published in 1962?[91] Hart developed a rule-based view of law on the basis of a damaging critique of Austin's idea that law had to emanate from the commands, backed by suitable threats, of a supposed sovereign. His approach would suggest that the notion of a sovereign, including that of a popular sovereign, plays no essential role in understanding the functioning of any state or any system of law.[92]

Hart's view of law is that it involves a system of primary rules of behaviour that are regulated under secondary rules that grant various officials or citizens a power of developing and applying those primary rules and, indeed, the secondary rules themselves. Rules in his usage constitute social norms: regularities that relevant parties expect others to abide by on pain of social or physical sanction.[93] This view purports to eliminate a sovereign by grounding primary and secondary rules in the general acceptance they enjoy in the society. It is a deeply appealing picture of law, and we might assume for purposes of the following argument that it or something close to it is sound. Even on that assumption, as will appear, there is room for recognizing a sovereign – in particular, a sovereign that, unlike Austin's, lives up to the central demands of the absolutist tradition. The claim to be defended is that under a well-ordered polycentric regime – under a mixed constitution – there is always an agency that binds others by law without being bound itself or at least without being bound by enforceable, uncontracted, external constraints.

Is this to agree with the absolutists themselves? Yes and no. It is to agree that there is a sovereign under every effective state and law and a sovereign that broadly fits their specifications; as we ~~put it earlier,~~ it is to be a sovereigntist. But it is to disagree with the absolutists – and, indeed, with sceptics like Hart – in maintaining that the polycentric state can be perfectly effective and that it too ~~can~~ have a sovereign.

This disagreement is based on introducing a candidate for the sovereign in any state – particularly, in the polycentric state – of a kind that absolutists do not envisage, despite the fact that it fits all their specifications on what the sovereign should be. That there is room for recognizing a sovereign in the polycentric state does not mean, of course, that there is a point in doing so. As we shall see in the final part, however, there is at least one reason why it may be important to acknowledge the existence of this sovereign. That acknowledgement enables us to see why the neo-populist critique of constitutional democracy is misplaced and, more strongly, to recognize that such a democracy has a more powerful claim to make the people sovereign than the alternative that neo-populists support.

91 HLA Hart, *The Concept of Law*, 3d ed (Oxford: Oxford University Press, 2012) [Hart, *Concept of Law*].

92 David Dyzenhaus has drawn attention in recent work to a range of thinkers in Weimar Germany who also tended to be sceptical about the notion of sovereignty; the best known is Hans Kelsen, his own favourite is Hermann Heller. David Dyzenhaus, 'Kelsen, Heller and Schmitt: Paradigms of Sovereignty Thought' (2015) 16 Theor Inq L 337.

93 Philip Pettit, 'Social Norms and the Internal Point of View' (2019) 39 Oxford J Leg Stud 229 [Pettit, 'Social Norms'].

F THE FALLACY OF MISPLACED CONCRETENESS

Absolutists and sceptics about sovereignty both assume a conception of the shape that a sovereign has to display that there is every reason to question. Under that conception, the sovereign has to be one of the individuals or bodies that have power within the legal system: the monarch perhaps, an elite body of aristocrats, the legislature, or, in a democracy, the electorate. But that conception is unnecessarily restrictive. It rules out the possibility that it is the polity as a whole that is sovereign: that the sovereign is the group constituted by the different political players – individual and corporate – that are organized under a polycentric network to collaborate in a manner sufficient for agency.[94]

Anxious to present the human mind as an entity that does not compete with the elements in the brain or body of the human being, Gilbert Ryle tells a story that is instructive here.[95] A visitor is shown around the colleges of the University of Oxford, as the story goes, but being anxious to see absolutely everything, asks also to be shown the university itself. As Ryle assumed his readers would know, the request is misplaced, since the university is not an entity coordinate with the colleges but, rather, something superordinate that emerges from their interaction. It is constituted by the colleges insofar as they operate together to organize the admission, teaching, assessment, and graduation of students. The university is a corporate agent constituted by the colleges that exercises such roles. Thus, what each college does in admitting or teaching students, or what they do together in arranging for student assessment and graduation, is done by the university; that corporate body is just a network or organization of the colleges, not a separate entity that it might make sense for a visitor to want to see in its own right.

What Ryle uses this story to suggest is that, just as the university is made up of the colleges in organized collaboration, so the mind emerges from the organized collaboration of different components in the human make-up: it is not an element within that make-up – not, for example, a *res cogitans*, in Descartes's phrase, that lurks within the brain – but something that emerges from those elements. What the story suggests in the current discussion is that the sovereign in a state need not be one of the players in the legal system, as assumed by absolutists and sceptics alike: it need not be a monarch, an elite, a legislature, or, indeed, an electorate. Rather, it may be a superordinate body that emerges from the interaction and cooperation of such agencies.

Alfred North Whitehead gives a name to the mistake that these theorists all make; in his terminology, they commit the fallacy of misplaced concreteness.[96] This idea consists in assuming with a term under analysis that, if it has application in the actual world, the entity it designates must be of a relatively concrete kind. That is the mistake made, in Ryle's reckoning, by philosophers who think that the mind is a force within the person, operating as a receiver of experience, a locus of belief, and a generator of intention and action. And, arguably, it is the mistake made by

94 Noel Malcolm endorses at least the negative part of this lesson, arguing says that the 'idea that sovereignty inheres in a particular body or institution within the state creates all sorts of problems.' Malcolm, *Sense on Sovereignty*, supra note 39 at 22.

95 Gilbert Ryle, *The Concept of Mind* (Chicago: University of Chicago Press, 1949).

96 Alfred North Whitehead, *Science and the Modern World* (New York: Simon and Schuster, 1997) at 51.

those legal and political thinkers who imagine that the sovereign has to be an organ within the body politic, not something whose presence is guaranteed by the way those organs are networked to act together. We can indict these theorists with making this mistake, however, only if we can tell a plausible story about how a superordinate entity like the polity can get to be a sovereign, satisfying the different conditions built into our characterization of sovereignty. Is the polity in that sense an agent with the capacity to determine the law and to do so without having to endure enforceable, uncontracted, and external constraints from within its jurisdiction?

G CAN THE POLITY BE AN AGENT?

It is possible for the polity to serve as a sovereign insofar as it can constitute a group or corporate agent – an agent in the way the university is an agent – and can be invested in the role of making law for its members. The polity – in particular, the polycentric polity – can require individuals to play different parts, whether as citizens, legislators, administrators, or judges; can assign various parts to sub-agencies that individuals form within the polity: the legislature, the administration, the courts; and can require or allow them to enact various more specific tasks, whether collectively in elections or in individual or joint acts of petition and contestation. Can such a body – such a decentralized body, as we may take it to be – constitute an agent that is capable of making and applying the law?

Such a networked matrix of individuals and corporate players, however complex its organization, can indeed constitute an agent. It will do so if it is organized so as to reliably pursue various purposes – fixed or flexible – across variant scenarios, adjusting how it pursues them – that is, what duly assigned members do in its name – in light of reliably formed representations of any opportunity for action and the evolving course of any action undertaken. There is no reason why the functional relationships between the interacting parts in the system should not be organized to have the aggregate effect of giving the whole the profile of an agent. We have no hesitation about crediting a commercial corporation with such a mode of organization, enabling it to pursue its profits reliably on the basis of reliable representations of the economic environment. Why should we have any hesitation in assuming that a polity can do the same?

What are the purposes that a polity might pursue? Its main overall purpose, on a standard account of the role of a state, must be to entrench a system of domestic law, stabilizing it against domestic or foreign threat. The laws established will determine how the subjects of the state's decisions must and may behave. But the laws will also determine the powers and obligations of those who make those decisions – whether, for example, in legislative, administrative, or judicial office. Under laws in the first category, all the members of the society in the normal case will be takers of law. Under laws in the second, some will also be makers of the law, whether permanently or for a limited period in office; indeed, all the members may occasionally be the makers of certain laws, whether directly in referenda or indirectly in elections. We may describe the first category as decision-taker laws, the second as decision-maker laws.[97]

97 The distinction is similar to one that Hart makes, at least when we restrict powers to public powers: 'Rules of the first type impose duties; rules of the second type confer powers, public

Suitably constructed – perhaps in a constitution, perhaps by convention, perhaps in legislation itself – decision-maker laws will enable the polity to act as an agent, forming and reforming the particular purposes it pursues on the basis of the particular information it processes about how things are going. And it can act in this agential identity to entrench a regime of decision-taker laws, to stabilize it against domestic and foreign danger, and, where that is judged necessary, to amend even the decision-maker laws under which it acts. Suitably scaffolded in this agential role, indeed, it can also take on other tasks, depending on what its members, or at least its influential members, want it to do. At one extreme, it may be a night watchman state, confined to discharging just a few fixed functions; at the other, it may be a more enterprising regime, ready and able to take on a range of tasks, whether for the good of an elite or its membership as a whole.

H CAN THE POLITY ACT WITHOUT CONSTRAINT TO FIX THE LAW?

The polity as a whole will act to determine the law in virtue of the initiatives taken by different sub-agencies and sub-agents within the overall group. Thus, its mode of organization, as established in constitution or convention, might require, as in the United States, that decision-taker laws should be passed by two legislative houses; should be endorsed by the president; and, if there is any objection brought by someone with legal standing, should pass muster, under a reasonable interpretation, in the courts. And its mode of organization might require the polity to change any of its decision-maker laws, again as in the United States, only under a suitable procedure: at the limit, with constitutionally entrenched laws, under a procedure for amendment that the constitution itself identifies. If some decision-taker laws are themselves embedded in the constitution, of course, then they also can only be changed under the constitutional procedure for amendment.

Whenever decision-maker or decision-taker laws are introduced or changed in a polycentric polity on lines like these, then that action will engage one or another set of individuals, perhaps one or another sub-agency, within the state: the legislature, the executive, the judiciary, the people in a referendum, or whatever. But acting, as those agents will do, in the name of the polity, and according to the rules of the polity, they will mediate an action by the state as a corporate body. Just as the colleges in Ryle's Oxford will often mediate the action of the university – say, in admitting students – so in any instance these agents and agencies will mediate the action of the state. The polity will act in and through its interacting, constitutive parts.

There is no difficulty in seeing how the corporate polity envisaged here can determine the law without enforceable, uncontracted, and external constraints on its mode or range of legislation. Taking up the first category, there are norms or standards that most of us will think that a state should satisfy but that cannot be enforced on the state by any domestic agency. The legislature may act to impose such standards on the behaviour of the state, of course; the courts may take the state to

or private.' Hart, *Concept of Law*, supra note 91 at 81. For an illuminating discussion and development of Hart's view on this topic, see Jean Hampton, 'Democracy and the Rule of Law' (1994) 36 Nomos 13 at 35–6.

be subject on pain of sanction to them, or citizens may campaign successfully to introduce them as behavioural restrictions on the state. But insofar as those initiatives are taken under the decision-maker laws of the polity, as they normally will be, they are actions made by such agencies in the name of the state they form and, in that sense, actions taken by the state itself. They are self-imposed limitations that will remain in place only so long as the polity continues to endorse them.

The independence of the polity from enforceable, domestic restrictions applies only, of course, to uncontracted constraints. Like any agent, it will be subject to constraints associated with contracts that it makes under certain accepted rules, even laws of its own making. Thus, the sovereign polity may be exposed under its own laws to sanction – say, a sanction imposed in its name by the courts – if it fails to live up to contracts with private individuals or bodies, whether subjects or not.[98] And, of course, to move beyond our domestic topic, it may be exposed under international law to the sanction of other states if it fails to live up to treaties it has made with those bodies or conventions it has implicitly endorsed.

The fact that the state is not subject to enforceable, uncontracted constraints from within its own jurisdiction means, in effect, that it is an unbound binder, in the phrase used earlier: it imposes bonds on its own members, but it is not bound itself by any of those bonds nor by bonds imposed by any other domestic agent or agency. But this is not to say, of course, that it is an agency that operates in any instance on a discretionary basis, for it will certainly be bound by what we earlier described as internal constraints.

Every group agent needs to operate in accordance with an established, constraining mode of organization, as we have seen, and it remains one and the same agent just insofar as it continues to rely on the associated procedures or on procedures adopted under those procedures – that is, adopted under rules for amending the received way of doing things. Thus, the absolutist image of the aristocratic or democratic state requires members to make decisions about purposes, representations, and actions on a majority basis or in accordance with routines adopted on such a basis. And, in doing so, it constrains that agent internally: the membership can act, or at least act in their distinctive corporate identity, only if they abide by such majoritarian constraints.

As this is true of the majoritarian, inclusive polity allowed by Bodin and Hobbes, and required by Rousseau, so it is also true of the polycentric polity. It will remain the same polity only insofar as it operates by established procedures or by procedures that it introduces anew under the established procedures. Thus, it is internally constrained to act under those procedures and to accept the internal constraints that they impose. Short of a constitutional amendment to the constitution, for example – an amendment made under Article 5 – the United States will act only when it abides by the constitution. It will not act as the United States, and will not make a valid law, if it seeks to operate by other means.[99]

98 Janet McLean, 'Personality and Public Law Doctrine' (1999) 49 UTLJ 123.

99 For a different viewpoint on the situation in the United States, see Akhil Reed Amar, 'Philadelphia Revisited: Amending the Constitution outside Article V' (1989) 55 U Chicago L Rev 1043.

Does this particular internal constraint make revolution impossible or undesirable? Yes and no. It makes it impossible in the sense that, if a structural change in the organization of a state is brought about in a revolutionary manner, violent or peaceful – it will be revolutionary insofar as it is not permitted under existing procedures – then strictly it ceases to be the same state. This point is as old as Aristotle: '[T]he sameness of the state consists chiefly in the sameness of the constitution.'[100] It means that there cannot be a right under the law of a state for any unconstitutional change in its constitution. But the legal impermissibility of revolution does not entail its moral impermissibility, contrary to what Bodin and Hobbes maintained. It may well be justifiable overall for people to overturn their constitution, as, indeed, the Americans did when they rejected the 1776 Articles of Confederation in favour of the 1787 Constitution.

According to the absolutist tradition, the sovereign will not be internally constrained, not only by its decision-maker procedures but also by the requirement of being accepted amongst its members. Let it not satisfy this condition, so the idea goes, and it may be a dominating power in the lives of members, but it will not count as a sovereign power. The divide between such a power and a proper sovereign will correspond, in a line from *The Social Contract*, to 'the great difference between subjugating a multitude and ruling a society.'[101]

While the absolutists themselves differed on what would count, in our phrase, as general acceptance, they surely had good reason to distinguish between the suppression of people by brute force or intimidation and their subjection to political rule. Following their lead, Immanuel Kant distinguished in this spirit between the 'civil' condition under which a sovereign rules by law and a barbaric regime of brute force.[102] That a condition is civil, as Kant himself emphasizes, does not mean that it is 'rightful,' meeting suitable conditions of justice. It means only that it satisfies the minimal condition of acceptance that a regime of brute force would certainly breach.

How should we think of that minimal condition of acceptance that sovereignty presupposes? It cannot plausibly require that there should be an acceptable and feasible alternative to the existing regime and that citizens each prefer the *status quo* to that alternative. And it cannot plausibly require that the regime should meet demanding criteria of legitimacy or justice. Either condition would entail that most states in history, and many states today – even, in John Rawls's term, decent states – do not have a sovereign and are not properly states.[103] But the condition for general acceptance may require that the *status quo* has at least one feature that makes it relatively welcome to each. Such a feature would give individuals a

100 Aristotle, *The Politics*, supra note 41 at 3.3.

101 Rousseau, *Social Contract*, supra note 6 at I.5.1.

102 Immanuel Kant, *Practical Philosophy*, translated by MJ Gregor (Cambridge, UK: Cambridge University Press, 1996) at 296–7, 409, 461; Jeremy Waldron, 'Kant's Theory of the State' in Pauline Kleingeld, ed, *Kant: Towards Perpetual Piece and Other Writings* (New Haven, CT: Yale University Press, 2006) 179 at 196–7; Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, MA: Harvard University Press, 2009).

103 John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999) [Rawls, *Law of Peoples*].

reason for complying with the dictates of government over and beyond the danger of retaliation against any act of non-compliance.

The subjects of a state that generally rules on the basis of law, even a law that is flawed by common criteria of legitimacy or justice – even, for example, a law that does not introduce a rule of law in the full sense[104] – will display such a feature and satisfy the acceptance condition, understood in these minimal terms. Such a regime of law will manifestly offer them a framework within which they can coordinate with one another. It will enable them to live together under shared expectations about one another's actions and reactions in this or that scenario, under this or that stimulus. By contrast, a ~~rule~~ in which some individual or corporate power intervenes on a relatively *ad hoc*, random basis in people's lives will not give them even that sort of reason for complying with the regime.

Taking it in this minimal sense, we may treat the condition of acceptance as an internal constraint on the sovereign in any polycentric polity. The condition means that a polycentric regime must rule by law – pace Bodin, it cannot be tyrannical – if it is to count as a superordinate sovereign of the kind envisaged here. Every polycentric regime is likely to meet that condition since it is hard to see how a regime with many mutually checking centres of powers could operate other than on the basis of law. An individual monarch, or, indeed, a single committee, might rule on an *ad hoc* basis, not strictly by law. But how could the different centres in a polycentric state coordinate, if not on the basis of general laws?

The upshot of these considerations, then, is that in a well-run polycentric regime, there is bound to be a sovereign – the polity as a whole – that meets the traditional specifications on what it takes to be a sovereign. The polity as a whole, composed out of interacting individuals and bodies, will bind all its members; it will not be subject to the dictate of any of those members or of any sub-agencies they form; and being able to unmake any law whatsoever, it will not be subject to its own laws. It will rule without restriction or at least without a restriction of an enforceable, uncontracted, and external kind.

IV *The popular, polycentric sovereign*

Neo-populists may respond to the argument of the previous section with the claim that, even if the polity as a whole can be sovereign under a polycentric regime, contrary to traditional absolutist doctrine, the people certainly cannot be sovereign. They will maintain that, in any such regime, even one that counts as a constitutional democracy, those in control are not going to be the people and not – certainly, not exclusively – the people's elected representatives; the controllers will also include the various elites that fill and run the independent offices of state that constrain elected authorities. Those elites do not represent the people's will, it will be said, but the interests only of a technocratic, professionalized sector

104 Lon L Fuller, *The Morality of Law* (New Haven, CT: Yale University Press, 1971); Jeremy Waldron, "The Rule of Law" in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy* (2016), online: <plato.stanford.edu/archives/sum2020/entries/rule-of-law/>.

of society; they constitute the deep state, as it is often pejoratively described, rather than facilitating government by the people, for the people.

It is certainly true that a state may be polycentric without giving the people in an independent sense the role of a sovereign. A state that is controlled by a single party, for example, and that operates on the basis of distinct, mutually checking centres of decision making will certainly count as polycentric. And that state, considered as a networked agent, may be the sovereign under such an arrangement, as we saw in the last part: party members may interact, or cooperate in agencies that interact, so as to ensure that the state is an agent that acts in the sovereign role. But that minority body will not be the people and will have a power of more or less discretionary interference over people in general, enjoying the position of a dominating agent in their lives; indeed, it may also exercise that power in such a way that it counts as an oppressor.[105]

An effective constitutional democracy will establish the polity as the sovereign in much the same way. But the fact that the polity is sovereign does not mean that the people cannot also be sovereign; the people will be sovereign insofar as they constitute a body that is identical with the polity. The question before us, then, is whether a constitutional democracy may be organized so that the people just are the polity? In order to address that question, however, we must first look at what 'the people' must designate if they are to be coterminous with the sovereign polity.

A THE PEOPLE

'The people' is a three-ways ambiguous phrase, and it is important to distinguish its different senses in exploring the possibility that things might be arranged in a constitutional democracy so that the people are the sovereign.[106] First, 'the people' may refer just to the inhabitants or residents of the state's territory or jurisdiction; we may assume that the jurisdiction of the state, as is standard in the contemporary world, is geographically defined. In speaking of the inhabitants in this sense, we consider them just as a population as unorganized as the set of pet animals in the country. The people in this usage is just the multitude, in Hobbes's word: a diverse 'number of men, each of whom has his own will and his own judgment.'[107]

Second, 'the people' may refer not to individuals qua passive inhabitants of the state's territory, but qua members or citizens of the polity who have a role, however minimal, in shaping its operation. In this sense, the people are the body of citizens who sustain the institutions of the state by complying with its laws and by taking steps that signify their broad acceptance of its procedures or at least by not taking steps to signal the absence of such acceptance. Depending on the constitution, they may exercise, or at least enjoy, the right to challenge or petition those in office, for example, to campaign for changes in the laws or policies, to

105 Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge, UK: Cambridge University Press, 2012) [Pettit, *On the People's Terms*].

106 Ibid, ch 5.

107 Hobbes, *De Cive*, supra note 6 at 6.1.

elect individuals to office, to compete themselves for election to office, and to assume any office to which they are elected or otherwise appointed.

But 'the people,' to invoke a third sense of the phrase, may refer also, not to the citizens of the state as individuals but, rather, to a corporate agent they form, if indeed they form such a body. They will form an agent of this kind, as we saw, insofar as they organize themselves so as to be able, first, to form goals for the group to advance across different scenarios; second, to make judgments about how best to pursue those goals in different scenarios; and third, to take the action required on any particular occasion. It is only when a group is organized in some such way, plausibly, that it can count as a corporate agent or body.[108]

The people in the first sense of the term may act individually so that they have an aggregate effect that is welcome to all – ~~namely,~~ in the way the parties in an open, competitive market may each seek to do well for themselves and drive prices to the competitive level at which sellers can just manage to stay in business. But, even in that case, they will not get together in either of the other senses. The people in the second sense will act jointly, not individually, to secure certain goals that they each want to achieve and that none can achieve on their own – ~~namely,~~ in the way those on a beach may act together, forming a chain in the water, to save a swimmer.[109] The people in the third sense are like the body that the members of a club form when they follow procedures for identifying their goals, the means to be pursued to achieve them in this or that context, and the individuals or sub-groups who are to act in its name for one or another effect.

It is only a body of this third, corporate form that can be said to have a will that it enacts – this will is going to be revealed in the goals endorsed and the means adopted for pursuing them. The second sort of group will act on this or that occasion, or routinely over certain stock sorts of occasion, to a common purpose, and, in each case, it may be said to have a shared episodic will about what to do there. But it will not have an enduring will since it will not be organized around procedures that enable it to pursue certain goals reliably across an open-ended range of situations; it will not be organized or networked to be able, as we say, to form its will on this or that issue.

The absolutists all assumed that a popular sovereign would have to constitute a corporate body of the third kind. And if we go along with the conception of the

108 Peter A French, *Collective and Corporate Responsibility* (New York: Columbia University Press, 1984); List & Pettit, *Group Agency*, supra note 38.

109 There are many accounts Bratman's of what such joint action involves. See e.g. Michael E Bratman, *Shared Agency: A Planning Theory of Acting Together* (Oxford: Oxford University Press, 2014); Margaret Gilbert, *Joint Commitment: How We Make the Social World* (Oxford: Oxford University Press, 2015); Raimo Tuomela, *The Philosophy of Sociality: The Shared Point of View* (Oxford: Oxford University Press, 2007); John R Searle, *Making the Social World: The Structure of Human Civilization* (Oxford: Oxford University Press, 2010). For an overview of the issues between such writers, see Kirk Ludwig, *From Individual to Plural Agency: Collective Action*, vol 1 (Oxford: Oxford University Press, 2016). Scott Shapiro applies Bratman's model of shared agency to the legal system, arguing that that it is needed to explain, broadly, the normativity of law. Scott Shapiro, *Legality* (Cambridge, MA: Harvard University Press, 2011). I think that this is better explained within a more parsimonious model. See Pettit, 'Social Norms,' supra note 93.

sovereign as an unbound binder – a determiner of law that is not limited within the jurisdiction by any enforceable, uncontracted, or external constraints – then we must agree with them. It is only a corporate body of that kind that will constitute an agent that can play the role of sovereign in making and applying law, which means that, if the polity as whole is the sovereign in any effective polycentric regime, as we have argued, then the people can only count as sovereign – the corporate people can only count as sovereign – if they are the polity. In a phrase from John Rawls, the polity must be nothing more or less than 'the political organization of the people': it must be the people qua networked or organized to the purpose of making and applying the law.[110]

B EQUATING POLITY AND PEOPLE: THE MAJORITARIAN PATH

Absolutists like Bodin, Hobbes, and Rousseau held that the only way in which the people incorporated could constitute the polity would be by means of a plenary assembly in which all residents – in effect, all adult, male, more or less settled residents – participate and control the making and application of law, whether in a hands-on or arm's-length way.[111] But it is worth noting at this point that such a majoritarian organization would not establish the body as an appropriate sort of agent. No organization or body can serve as an agent if it follows a procedure that makes it insensitive to holding by inconsistent purposes or representations – that is, if it makes the body itself incapable of self-correcting in light of evidence of such inconsistency. But, under certain circumstances, the majoritarian procedure is bound to lead a body that follows it into just that sort of problem.

This is the lesson of the discursive dilemma, so called.[112] Even a body with three individually consistent members is liable to become committed to an inconsistent set of propositions if it follows majority rule in determining how to represent the world. Suppose a group – A, B, and C – want to form a group judgment on whether p, whether q, and whether p&q. And suppose that A and B vote that p, C that not p; B and C vote that q, A that not q; and that the group as a whole consequently holds that p and that q. How will they vote on whether

110 Rawls, *Law of Peoples*, supra note 103 at 26.

111 Two qualifications. First, Rousseau thought that the control, at least in the making of law, ought to be hands on, whereas the others allowed that the sovereign might exercise only arm's-length control, monitoring and managing independent bodies from without. Tuck, *Sleeping Sovereign*, supra note 53. Second, Hobbes (*De Cive*, supra note 6 at 12.8) sometimes speaks as if people's acquiescence in the rule of a monarch – voluntary in character, by his unusual account of what is voluntary – means that even in a monarchy the people rule: '[I]n a Monarchy the subjects are the crowd, and (paradoxically) the King is the people.' Pettit, *Made with Words*, supra note 6 at 67–8.

112 The discursive dilemma is identified in Philip Pettit, 'Deliberative Democracy and the Discursive Dilemma' (2001) 11 Philosophical Issues (supp to Nous) 268; Philip Pettit, *A Theory of Freedom: From the Psychology to the Politics of Agency* (Cambridge, UK, and New York: Polity and Oxford University Press, 2001). It is a generalized version of the doctrinal paradox in legal theory. See Lewis A Kornhauser & Lawrence G Sager, 'The One and the Many: Adjudication in Collegial Courts' (1993) 81 Cal L Rev 1; Lewis A Kornhauser & Lawrence G Sager, 'The Many as One: Integrity and Group Choice in Paradoxical Cases' (2004) 32 Philosophy & Public Affairs 249.

p&q, assuming they continue to follow the majority? Only B will have voted both that p and that q, and so only B will vote that p&q; the majority – A and C – will vote that not p&q: A, because of rejecting 'q'; C, because of rejecting 'p.' Thus, the majoritarian group will be committed to the inconsistent claims that p, that q, and that not p&q.

The discursive dilemma points to a difficulty that turns out to be quite general.[113] Let a voting or related procedure be individually responsive to members in determining the group view on any issue – namely, in the way, majority voting lets the group view be fixed by member views – and, under plausible assumptions, it will limit the group's capacity to be collectively consistent and rational. The price to be paid for ensuring its capacity for collective rationality – a capacity needed if the group is to perform properly as an agent – is not to force the group view about any issue to form on a bottom-up basis – that is, by systematically reflecting the corresponding views of its members. The group must form its attitudes in a more constructive or creative way.

But while the majoritarian way of organizing a group is not going to enable it to operate as a corporate agent, there are many ways of organizing a group to make this possible. All will require the group to impose a top-down filter on the judgments that its bottom-up procedure of voting – or, indeed, any similar, generative mechanism – would yield. A simple example, to return to our three-person case, would be a straw-vote procedure whereby members – or some appointed delegate – check each bottom-up vote in a top-down way to see if it generates an inconsistency with any previous votes; let the vote stand, if it does not; and revise one of the inconsistent set of votes appropriately, if it does. Obviously, an assembly might try to operate something like this procedure rather than relying on the majority voice ~~that appears on the first vote.~~

The absolutists not only held that a purely majoritarian assembly could operate as a corporate agent; they also maintained, as we saw, that no polycentric arrangement like the mixed constitution could do the job. But it is worth noting in passing that they were mistaken on that point too. It is clearly possible under such an arrangement to establish the top-down filter that may be needed to ensure that the body is sensitive to any inconsistencies that become manifest in the judgments to which it might otherwise be led. For a very simple example, consider the way in which the courts may be required to vet any laws proposed by the legislature to ensure that they are consistent with other laws – in particular, with constitutional provisions – and to strike them down or reinterpret them if they are not: this, in order to ensure that the polity speaks in a single legal voice.

113 An early theorem that establishes the general claim is in Christian List & Philip Pettit, 'Aggregating Sets of Judgments: An Impossibility Result' (2002) 18 Economics and Philosophy 89. For an informal review of results, see List & Pettit, *Group Agency*, supra note 38, and for a symposium of relevant, technical papers, see Christian List & Ben Polak, 'Introduction to Judgment Aggregation' (2010) 145:2 Journal of Economic Theory 441. The relation between these results and Arrow's impossibility theorem is discussed in Christian List & Philip Pettit, 'Aggregating Sets of Judgments: Two Impossibility Results Compared' (2004) 140 Synthese 207; Franz Dietrich & Christian List, 'Arrow's Theorem in Judgment Aggregation' (2007) 29 Social Choice and Welfare 19.

The upshot is that the absolutist equation of the people with the majoritarian assembly of citizens cannot work, at least not without some modification of the majority procedures. What of the neo-populist position on this issue? Neo-populists do not propose a plenary assembly of a majoritarian sort but, rather, an assembly that is chosen on a broadly majoritarian, electoral basis. That arrangement will not give rise to a discursive dilemma or a problem of that particular sort since elections do not require people to make judgments on connected issues in a way that might raise the problem. And for all that neo-populism implies, the assembly may not operate with an issue-by-issue set of votes that could give rise to the dilemma; it will presumably be led by the successful party or person, and votes can be organized so as to avoid that problem. Neo-populists may be friendly to referenda, of course, but, in this case too, the spectre of the discursive dilemma need not arise; the question put up for decision may open the possibility of changing the body of law at any time but can be designed to avoid any chance of generating an inconsistency in the law.

But while it may avoid problems of the kind illustrated by the discursive dilemma, the neo-populist, electoral model of how the polity should be organized would scarcely allow for the equation of the people with the polity. In the world we inhabit, there are always going to be sticky minorities, whether of an economic, ethnic, or religious kind, and they are likely to be systematically excluded from an influence on government under a regime where there are few, if any, constraints on the elected representatives – say, the political party – with majority support.[114] They will be locked out of power for reasons independent of the judgments they may form about the bunch of questions at issue in any election or the issue raised in a referendum.[115] In such a regime, the polity as a whole may count as sovereign, but it will be utterly implausible to equate that polity with the people.

C EQUATING POLITY AND PEOPLE: THE POLYCENTRIC WAY

Both the absolutist and the neo-populist models of the polity are monocentric in identifying the sovereign with a particular body, be that the plenary or the elected assembly. And that raises the question as to whether there might be a mode of organizing a polycentric regime so as to give plausibility to the equation of polity and people. In order to approach this question, it is worth reflecting on the case of corporate agents other than the polity.

Take, for example, a club that operates for purposes of socialization or sports or whatever. And consider the way in which we are likely to speak of the members – the membership – in such a case. 'The membership' will certainly be used to speak of the members severally, as in saying that they include men and women, and they have different religions or backgrounds. But can the phrase be used to speak of the agent that the club constitutes, as we may assume? This is

114 Pettit, *On the People's Terms*, supra note 105.

115 Niko Kolodny, 'Political Rule and Its Discontents' in David Sobel, Peter Vallentyne & Steven Wall, eds, *Oxford Studies in Political Philosophy*, vol 2 (Oxford: Oxford University Press, 2015) 35.

the agent that determines the range of activities sponsored among members – for example, that dictates the qualifications required for membership; that makes certain agreements with its employees, service providers, and other clubs; and that owns and manages certain properties. Can such an agential club be equated with its members? Can we say that whatever the club decides or does is decided or done by the membership? Can we treat 'the club' and 'the membership' as co-referring expressions?

We will not be able to do so, for sure, if there are two classes of membership – say, permanent members and co-opted members – where the permanent members control all or most of the decisions, whether in a hands-on or arm's-length way. In that case, whatever the club decides or does is decided or done by the permanent members but not by the members as a whole and not in that sense by the membership. But suppose that all the members in the club share equally in access to controlling its decisions. Suppose, for example, that they are equally eligible to stand for election to the guiding committee, that they have equal votes in determining who gets elected, that they have equal opportunities to identify and challenge committee decisions, and that committee officials are constrained to act in a way that answers equally to the interests of all. And suppose that they have equal access to calling for a review of the constitution under which elections, challenges, and constraints are determined. Would that make a difference?

Plausibly, of course, it would. Whatever their different levels of success on the fronts listed, individual members will not be entitled to complain about things not being done as they would wish; there is an important sense in which they share equally in a system for determining what the club decides and does. And, in that case, it will be perfectly reasonable to equate the club with the membership, treating the corresponding phrases as co-referential. The members considered severally will not be the club, of course, but the members considered in the network or organization imposed by the constitution will be the club. Thus, with any decision like that of limiting its numbers, changing its rules, or entering this or that contract, we will be able to say either that the club or that the membership took that decision. The members considered corporately will be identical with the club just insofar as the members considered severally have more or less equal power – an equal say, or at least an equal chance to have a say, over how the club acts.

This analogue gives us an insight into how the people corporate can be identified with the polity. Let the people considered severally share equally in power over how the state acts, on something like the pattern described, and it will be natural to say that the polity is nothing more or less than the people: nothing more or less than the people in the corporate sense. The several people in this image will act together in their role as citizens – ordinary citizens and citizens in official roles – to sustain the state. And insofar as they are equally positioned to control what is done, the state that they sustain can be equated with the corporate body they constitute: it will be an entity that emerges superordinately from their individual efforts.

The possibility gestured at here is nicely reflected in the use of the Latin word *civitas* among broadly republican thinkers in the Middle Ages. The word

operated very much like the word 'membership' in English. Derived from the word *civis* (citizen), it referred in long usage to the citizenry in the sense of the citizens considered severally or, indeed, to the abstract property of citizenship that citizens share – namely, in the way 'the membership' may refer to the members severally or to the property that unites them. But in a usage that stabilized in the late medieval and modern periods, the word *civitas* also came to designate the state – in particular, the state considered as the citizenry organized to pursue political ends – in the way that 'the membership' can also refer to the club.[116]

This usage is marked in the work of Bartolus of Sassoferrato in the fourteenth century, who maintained that being a free people (*populus liber*), the citizenry of a republic – a *regimen ad populum* or popular regime, as he calls it – can operate as a prince unto itself: a *sibi princeps* – in other words, something like a popular sovereign. They will do this, he says, insofar as they are ruled under arrangements for a rotating, representative council that turns them into a corporate agent: an *universitas*, in contemporary usage. The people several will establish themselves as a corporate body that just is the state: the *civitas* in the sense of the citizenry will just be the *civitas* in the sense of the polity. [117]

If this line of thought is reliable, then it should be clear that there is no objection in principle to the idea that an effective polycentric regime might have a popular sovereign. The polity as such is bound to be sovereign in such a regime. But the people will also be sovereign insofar as they as several individuals share equally in a system for controlling what the state does. Let them enjoy such power severally, and they can be identified, under a corporate guise, with the state itself. They as a corporate people will constitute the polity, and they as a corporate people will be sovereign within the jurisdiction.

This is a claim about the polycentric state that holds true in principle. But might it hold true in practice? In particular, might a constitutional, polycentric democracy ensure its truth? The question is whether the devices associated with constitutional democracies, or at least idealized versions of such institutions, might do the required work. There are broadly two sets of institutions that are going to be required in a constitutional democracy. First, there must be a framework – a constitution together with suitable conventions and laws – establishing decision-maker

116 This usage echoed themes in classical Latin usage as well. On this claim, and on the contrast with the usage in classical Greek, see Clifford Ando, *Roman Social Imaginaries: Language and Thought in Context of Empire* (Toronto: University of Toronto Press, 2015) at 8, 45. I am grateful to Daniel Lee for help on this issue.

117 For background to these brisk claims, see Woolf, *Bartolus of Sassoferrato*, supra note 7; Canning, 'Corporation,' supra note 37; Canning, 'Ideas of the State,' supra note 7; Magnus Ryan, 'Bartolus of Sassoferrato and Free Cities' (1999) 6 Transactions of the Royal Historical Society 65. I describe the required council as representative – that is, in the sense of being selected to represent – and rotating on the basis that for Bartolus in a *regimen ad populum*, a popular regime, the members of the council are selected '*secundum vices et secundum circulum*.' Woolf, *ibid* at 180. For a related translation of '*secundum vices et secundum circulum*,' see Jonathan Robinson's version. Bartolus, *On the Government of a City*, translated by Jonathan Robinson (Toronto: University of Toronto, 2012), online: <individual.utoronto.ca/jwrobinson/translations/bartolus_de-regimine-ciuitatis.pdf>. I am also grateful to Daniel Lee for his advice on this issue.

rules that are subject to the equally shared power of people – in other words, it must include a rule enabling people to act together in various ways to amend the framework. And, second, the decision-maker rules established by that framework must constitute a system, to which people have equal access, for disciplining what those in office can do in the name of the state. Ordinary people, as we might put it, must have power over the framework of government, and, equally, they must have power under that framework.

It may be useful to illustrate the sorts of decision-maker rules that are likely to be necessary for giving people power under the framework. First, they will include rules to allow for the periodic, competitive election of domain-general authorities in the legislature and executive and to establish strict criteria for the appointment, presumably by elected officials, of those in domain-specific roles as judges, election commissioners, central bankers, ombudsman authorities, auditors, inspectors, or whatever. Second, they must also include rules to force the authorities to act in the equal interest of citizens, introducing measures such as constitutional rights, rule-of-law constraints, and a separation of powers. Third, they must involve rules to establish constraints on the exercise of domain-specific roles – and, as appropriate, on the exercise of domain-general roles – making holders accountable within a network where each is exposed to the challenge and review of others. And, finally, they must encompass rules for giving citizens the knowledge, the protection, and the procedures that make it possible for them, individually or in subgroups, to contest effectively the various proposals and enactments of government, whether in the courts, in citizen assemblies, in the media, or on the streets. Such decision-maker rules might help to empower citizens more or less equally, helping to ensure that no one individual or group can have ~~a~~ special ~~influence or impact on~~ what is done in the name of the polity.

Under constitutional-democratic devices of these kinds, the several citizens in a polity might enjoy power in relation to the state – power over and under the framework of government – with sufficient equality to allow us to say that the people that operate as a corporate body under such an arrangement just are the state. This is not the place to try to substantiate that claim in a detailed way. It is enough to register that, in principle, there is nothing to prevent us treating 'the people' and 'the polity' as co-referring phrases under such an arrangement. That lesson is enough to demonstrate the possibility of a polycentric, popular sovereign.

D BUT IS THIS DEMOCRACY?

What we have argued supports the two claims advertised at the beginning of this article. First, that it is possible to have a sovereign in a polycentric state: the sovereign will be the polity itself. And, second, that it is possible for this sovereign just to be the people: the people, corporately organized under decision-maker rules. This argument is sufficient to undercut the corresponding complaints made by neo-populists and, indeed, by the original absolutists themselves. But there is one remaining line that might be run by neo-populists, and we may conclude by addressing it briefly. They might say that, while a constitutional

democracy may establish a polycentric, popular sovereign in some sense of that term, the regime still does not deserve to be called a democracy; it illegitimately usurps that name.

In any area of philosophy, every theory of a given phenomenon – say, freedom or democracy – will have to identify it with something that in ordinary usage answers intuitively to the term, satisfying its common connotations; otherwise, the theory will change the subject. But with almost any plausible target of philosophical thought, and certainly with freedom or democracy, there will be rival theories that satisfy that condition and differ on what constitutes the phenomenon; in traditional terms, they agree on the nominal definition of the target but diverge on its real definition.[118] The issue between those theories will turn, not on which is linguistically or analytically best – they may score equally well on that criterion – but, rather, on which theory identifies a plausible referent for the term: a referent that best serves the purposes of general theorizing in the domain. Thus, in the case of freedom, theories that differ on whether it consists in the absence of interference or the absence of domination will disagree on which phenomenon is the more important – and which is most usefully identified with freedom – within an overall theory of justice.[119]

As this is true of freedom, so something similar is true of democracy. Every theory of democracy must satisfy the ordinary connotations of the term. It was those connotations that support the claim at the beginning of this article that every theory must take democracy to give *kratos* or power to the *demos* or people, in some sense of that phrase; otherwise, it will not count as a theory of democracy. On this approach, then, it would be a mistake to define democracy by the social and political institutions that are taken in a particular theory to constitute it. Political scientists today make that mistake, we might say, in defining democracy by the mere presence of an electoral system.[120]

Wittingly or not, Bodin perpetrated such a mistake in taking democracy to be defined by the use of a plenary majoritarian system. His innovation in that regard led even progressive thinkers to distance themselves from democracy down to the early nineteenth century when the word slowly came to be applied to various representative, usually constitutional, systems.[121] We would do

118 Philip Pettit, 'Analyzing Concepts and Allocating Referents' in Alexis Burgess, Herman Cappelen & David Plunkett, eds, *Conceptual Engineering and Conceptual Ethics* (Oxford: Oxford University Press, 2019).

119 Philip Pettit, *Just Freedom: A Moral Compass for a Complex World* (New York: WW Norton & Company, 2014).

120 Joseph A Schumpeter, *Capitalism, Socialism and Democracy* (New York: Harper Torchbooks, 1984), ch 22; Adam Przeworksi, 'A Minimalist Conception of Democracy: A Defense' in Ian Shapiro & Casiano Hacker-Gordon, eds, *Democracy's Value* (Cambridge, UK: Cambridge University Press, 1999) 23.

121 The Bodinian conception is evident in Federalist 10, for example: 'The two great points of difference between a democracy and a republic are: first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended.' *Federalist Papers*, supra note 78. And it is equally present in James Mill's famous essay on government

better to remain faithful to the original Greek usage of the term, in which any system where ordinary people enjoy power on a relatively equal basis – even an Athens, for example, where office was often determined by lot – counts as a democracy.[122]

When democracy is defined in this relatively ecumenical fashion, different theories can be seen as differing on what constitutes democracy in the real world of social and political institutions. For the original absolutists, it requires rule by a plenary, majoritarian assembly of citizens; for the neo-populists, it requires rule by the individual or body that is elected on a suitable, broadly majoritarian basis by citizens; for constitutional democrats, it requires a matrix of interacting agents and agencies that empowers ordinary citizens more or less effectively and equally. The question before us in the theory of democracy bears on which of those arrangements is likely to be most important in thinking about what justice requires on this front.

Both the absolutist and the neo-populist theories identify the people who have power under their proposals with a group: the corporate group that rules in an assembly, under the first approach, the collective group – not strictly a corporate body, as we saw – that elects the ruling assembly or individual under the second. Neither on the face of it is satisfactory. The absolutist proposal is infeasible, particularly in the majoritarian form in which it must face the discursive dilemma. And the neo-populist proposal, as we noted earlier, would serve not the people in an inclusive sense but, rather, those in a settled or fixed majority.

The constitutional proposal scores over the absolutist insofar as it looks feasible, even in the idealized version required to support the equation of the people – the corporate, superordinate people – with the polity. And it scores over the neo-populist insofar as it promises to serve people more or less equally rather than investing influence wholly in a dominant, culturally entrenched majority. Not only does it meet the analytical requirement for counting as a theory of democracy then, it also identifies a plausible set of social and political institutions as the reality that constitutes democracy.

E THE UPSHOT

How, then, do sovereignty and democracy relate on the approach taken? The upshot can be put in a single line. The people corporate will be sovereign in an effective polycentric regime just insofar as the people several enjoy a democratic distribution of power. A constitutional democracy promises to deliver popular sovereignty, then, establishing the corporate people as the supreme authority in

where he objects to democracy, among other counts, on the ground that 'there will be no dissent that a community in mass is ill adapted for the business of government'; he opts for a representative system that he casts as an invention of his own time. James Mill, 'An Essay on Government' in Jack Lively & John Rees, eds, *Utilitarian Logic and Politics: James Mill's "Essay on Government", Macaulay's Critique, and the Ensuing Debate* (Oxford: Oxford University Press, 1978) at para 24.

122 Josiah Ober, 'The Original Meaning of "Democracy"' (2008) 15 Constellations 3.

the polity and ensuring that its will dictates what is done in the name of the state. That the people-corporate is sovereign, however, is not the reason why the polity is democratic. Things, rather, are the other way around. The people-corporate is sovereign because the polity is democratic. And what makes the polity democratic is that power is more or less equally shared among the people-several.[123]

123 Thus, the democratic nature of the regime does not consist in its empowering the will of the people, contrary to the misleading will-based views that Rousseau spawned. ~~Such,~~ empowerment is a by-product of democracy, not part of its essence, and it ~~is a feature lacking the importance often,~~ ascribed to it in will-based views.