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Habermas, Popular Sovereignty, and the Legitimacy of Law

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Abstract
Habermas' theory of popular sovereignty has received comparatively little sustained critical attention in the Anglo-American literature since initial responses to *Between Facts and Norms*. In light of subsequent work on group agency, this paper argues that Habermas' reconstruction of popular sovereignty—in its denial of the normative force of collective citizen action—is best understood as a renunciation of the doctrine. The paper is structured in three sections. Section 1 examines Habermas' treatment of popular sovereignty prior to *Between Facts and Norms* as both (i) a principle of constitutional legitimacy or normative justification for the modern *Rechtsstaat* and (ii) a concept of legitimation for the rule of the ascendant liberal bourgeoisie. Section 2 then argues that Habermas' reconstruction of popular sovereignty in *Between Facts and Norms*, by discounting the role of collective citizen agency in the justification of the modern constitutional state, empties the doctrine of its core normative content. The final section briefly elaborates on this claim by reference to Habermas' theory of the public sphere.

Keywords Popular sovereignty · Legitimacy · Constitutional theory

Introduction

Jürgen Habermas' stance towards the doctrine of popular sovereignty can be characterised as consistently ambivalent. In a 1971 debate with Niklas Luhmann, Habermas identifies parliamentarianism and popular sovereignty (*Volkssouveränität*) as components of the bourgeois (*bürgerlich*) ideology of the liberal constitutional state (*Rechtsstaat*) (Habermas and Luhmann 1971, p. 243). This description—with its Marxist terminology—might seem remote from Habermas' later account of popular sovereignty in *Between Facts and Norms* (1992/1996), which aims to integrate democratic will-formation and the rule of law, and to reconcile republican and liberal

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insights.[1] While there is indeed an 'evolution' in Habermas' thought on popular sovereignty, however, this should not be overstated. Habermas' early work already evinces a reluctance to reduce bourgeois ideology to 'mere' false consciousness or oppression. In *The Structural Transformation of the Public Sphere* (1962/1989), for instance, Habermas writes that during the French Revolution 'the liberal model sufficiently approximated reality that the interest of the bourgeois class could be identified with the general interest and the third estate could be set up as the nation' (1989, p. 87). This anticipates the argument that popular sovereignty, however counterfactual its normative content may be in liberal-democracies, contains immanent directedness to principles of un-coerced agreement and public autonomy. Popular sovereignty is framed equivocally by Habermas as simultaneously inseparable from the rise of bourgeois political domination and indispensable as a normative standard of legitimacy for the law of liberal-democratic constitutional states.

Habermas' account of popular sovereignty has received comparatively little sustained critical attention in the Anglo-American literature since initial responses to *Between Facts and Norms*.[2] The account remains attractive, moreover, for theorists seeking to reconcile a concern for the democratic self-determination of citizens with a commitment to constitutionalism, the rule of law, and broadly anti-populist sentiments.[3] In light of resurgent nationalisms and the threat of populist movements, Habermas' procedural interpretation of popular sovereignty might plausibly be seen as a descriptively realistic and normatively attractive construal of Claude Lefort's famous thesis regarding the 'empty space' of power in contemporary societies (1988).

Habermas' rational reconstruction of popular sovereignty as a normative foundation for the legitimacy of law in *Between Facts and Norms* is nonetheless, I argue in this paper, ultimately best understood as a renunciation of the doctrine.[4] My argument is more far-reaching in its implications than the relatively well-known concern that Habermas' reconstruction dissolves the *radical-democratic content* of popular sovereignty by integrating it within rights of political participation, parliamentary procedures, and public communication (Maus 1995). On a more fundamental level, Habermas' reconstruction undermines the proposition that popular sovereignty is essential to the legitimacy of modern law, because it withdraws any normative significance from the *collective political agency* of citizens.[5] Habermas, that is to say, retains the terminology of popular sovereignty, and its legitimating power, while proposing a reconstruction which expressly discounts the possibility in principle that democratic collective action could serve as a core normative criterion for the legitimacy of modern law.

[1] On Habermas' relation to Marx more generally see Shoikhedbrod (2021).

[2] See, however, Chambers (2004, 2009), Cheneval (2006), Markell (2000) and Olson (2009, 2019).

[3] For recent, broadly Habermasian, accounts of the normative foundations of liberal constitutionalism see, for example Arato (2016) and Patberg (2020).

[4] The method of rational reconstruction examines 'the implicitly assumed normative contents of empirically established practices … from the participant perspective' (Habermas 2011, p. 291).

[5] See Christodoulidis (2021, pp. 93-102), for a related critique of Habermas' stance on the emancipatory role of labour.

The paper is structured in three sections. The first section examines Habermas' treatment of popular sovereignty prior to *Between Facts and Norms* as both (i) a principle of constitutional legitimacy or normative justification for the modern *Rechtsstaat* and (ii) a concept of legitimation for the rule of the ascendant liberal bourgeoisie with ideological implications. The second section then argues that Habermas' reconstruction of popular sovereignty in *Between Facts and Norms*, in its denial that collective citizen agency is essential for the justification of modern law, empties the doctrine of its core normative content to a greater extent than is commonly recognised. The final section elaborates on this claim by reference to Habermas' theory of the public sphere.

Popular Sovereignty: Between Normative Legitimacy and Ideological Legitimation

Popular sovereignty is the doctrine that all legitimate power that is exercised through the public institutions of the state ultimately derives from the people (Lee 2016, p. 1). It is possible to trace (with due attentiveness to the distinctively modern features of state sovereignty) popular sovereignty to the *populus Romanus* or even the Athenian *demos* (Straumann 2016; Ostwald 1989). In contemporary terms, however, the predominant application of the doctrine of popular sovereignty is as a principle of normative justification and sociological legitimation for the liberal constitutional state. Popular sovereignty – whether ultimately fictional or not – supports the exercise of public power after the withdrawal of traditional sources of political authority (Grimm 2016, pp. 89–124; Böckenförde 2017, pp. 152–68; Loughlin 2010, pp. 183–272). The doctrine of popular sovereignty has nonetheless always been susceptible to sceptical reproaches that it is a fiction, myth, invention, or rhetorical artifice, deployed by elites to justify their rule (for historical analysis see Morgan (1988); for astute analysis in a sociological register, Thornhill (2011, pp. 212–28, 252–3). From an historical perspective, the thesis that popular sovereignty has often provided ideological support for elite rule is indeed well-attested across classical, early modern and recent periods. An instructive example is Theodor Mommsen's analysis of the *lex regia* – the legal instrument which transferred authority from the Roman *populus* to the emperor – as a fiction or '*ex post facto* juristic construction' fabricated by Ulpian to legitimate imperial rule (Mommsen 1887, pp. 876–9). In a modern context, Edmund Morgan provocatively referred to the 'invention' of popular sovereignty by the ascendant bourgeoisie in seventeenth century England and in eighteenth century America (Morgan 1988, pp. 50–1, 256).[6]

These critical claims regarding popular sovereignty are suggestive of the applicability of ideology critique. Ideology may be defined as 'a set of beliefs, attitudes, preferences that are distorted as a result of the operation of specific relations of power,' where the distortion characteristically 'takes the form of presenting these

[6] Morgan (1988, pp. 49-50) claimed in the case of civil war England that it 'would perhaps not be too much to say that [parliamentary] representatives invented the sovereignty of the people in order to claim it for themselves.'

beliefs, desires etc., as inherently connected with some universal interest,' when in fact they serve 'particular interests' (Guess 2008, 52). An ideology, that is to say, is a theory or doctrine which tends to distort social reality and thereby fortify 'the stability of existing or emerging relations of power' (Stahl 2022, p. 5). On these definitions, the reproach that the modern doctrine of popular sovereignty has an ideological dimension seems eminently plausible. At a high level of generality, the doctrine attributes ultimate political agency to all citizens within constitutional orders established and governed by elites, in which democratic engagement is usually restricted to the intermittent election of representatives, and where there are entrenched systems of social and economic inequality.[7]From a sociological perspective, the concept of popular sovereignty can be characterised as a 'semantic' residue left over from attempts to mitigate paradoxes of self-rule in early modernity; a residue which obscures the reality of political rule in pluralistic and functionally differentiated modern societies (Luhmann 2002, pp. 319–71). Recent 'progressive' critiques of populism from a liberal-democratic viewpoint relatedly evince a concern to undermine a 'substantive' conception of 'the people' as an entity with a shared sovereign will (Müller 2017; Mudde 2019). It can be countered in this context that the reduction of popular sovereignty to 'mere' ideology also results in a distorted picture. One must undoubtedly acknowledge, for instance, the status of popular sovereignty as a normative ideal, associated with ideas such as democratic control of office-holders, citizen self-determination, consent, and an aspiration to equality. From this perspective, the failure to realise popular sovereignty as an ideal does not preclude a principled justification of its normative content. This rejoinder is nonetheless also double-edged in its implications: the claim that a doctrine contains immanent emancipatory content might just as well serve to enhance its ideological effectiveness by offering illusory promises of partial approximation.

For popular sovereignty to be more than a juridical postulate or an ideological construct, some content needs to be given to the political agency of 'the people.' If one accepts that a 'substantive' conception of the people as a 'macrosubject' with a shared will is theoretically unsustainable and normatively unattractive, then the most viable alternative is an appeal to the possibility of political collective or group agency (Pettit 2012; Lindahl 2016). Broadly speaking, contemporary accounts of group agency also reject the status of 'the people' as a 'macrosubject,' but argue that a network of shared intentions to act in common allows for normatively significant attributions of collective action to a democratic group agent (Lindhal 2016, pp. 141–2; Pettit and List 2011). For such accounts, which seek to rescue the content of popular sovereignty without reverting to a populist conception of the people, the idea of collective action is fundamental. This is because, absent some explanation of the capacity for citizens to engage in collective political action, then 'the people' is neither an agent nor capable of exercising any agency. Yet this is to reduce popular sovereignty to a theoretical postulate with no material significance as a normative source of justification for legal norms.

Habermas' treatment of popular sovereignty prior to *Between Facts and Norms* is notable for its consideration of both the normative and legitimating dimensions

[7] For a recent analysis of these troubling features of Western liberal-democracies see Landemore (2020).

of the doctrine. In *Legitimation Crisis* (1973/1976) and *The Theory of Communicative Action I* (1981/1986), popular sovereignty is considered simultaneously as a normative principle of *legitimacy* directed to the idea of a society of free and equal citizens, and as an ideological doctrine of *legitimation* for the liberal constitutional state. Habermas' earlier treatment of popular sovereignty as a doctrine of legitimation – which thematises the distance between an aspiration towards a society of free and equal citizens governing their mutual relations through law and political reality – provides indispensable context for the arguments of the next two sections. For while *Between Facts and Norms* certainly maintains a stated concern to reconcile normative, sociological, and historical perspectives on popular sovereignty (as reflected in Chapters 2, 8 and the Appendices), its reconstruction of the foundations of the liberal-democratic constitutional state in Chapters 3 and 4 tends to sideline the legitimating functions of popular sovereignty.

Habermas' discussion of Max Weber's concept of legitimation (*Legitimationsbegriff*) assumes that the problem of legitimation is especially acute for 'rational authority' or 'the legally-formed and procedurally-regulated type of authority characteristic of modern societies' (Habermas 1976, p. 97). On what valid principles can rational-legal authority ground its claim to legitimacy? A conspicuous feature of the modern attitude towards authority is a reluctance to recognise domination in personal form (1976, p. 22). A further feature, inseparable from the dissolution of 'thick' ethical and religious frameworks and the rise of moral pluralism, is the tendency to renounce transcendent (divine or natural) justifications for political rule. As an historical process, this reflects a shift from heteronomy to autonomy, from content-rich cosmologies, tribal particularism and personalistic domination, to universalistic systems of meaning, consolidated by urbanisation and economic modernisation and differentiation of spheres of action and social systems (1976, pp. 11–12, 22). As Habermas later puts it, it is characteristic of modernity that it must generate its own normative resources rather than rely on external legitimation (1996, p. 121).[8] These tendencies explain the motivation to derive legitimate political authority from the will or consent of the people in the 'secularised' state.

The doctrine of popular sovereignty promises to satisfy this demand for a 'self-generative' justification of political authority. In contrast to pre-modern justifications for rule which appeal to external principles like nature, divine right, or uncommon practical wisdom, popular sovereignty is grounded in the intentional agency of the same individuals who will be subject to the constitutional norms they establish. This explains the potential for popular sovereignty to serve within a rational justification of the modern legal system (1976, pp. 100–101).

In *Legitimation Crisis* it is the ideological dimensions of popular sovereignty, rather than its immanent normative potential, which take centre stage. Habermas notes that the rise of modern popular sovereignty reflects the universalistic tendency of 'bourgeois ideologies' and is coeval with the depoliticisation of the public realm or the tendency for legitimation to be reduced to civic privatism (mediated by liberal systems of rights) and the 'formal' democracy of participation in elections (1976, pp. 22, 36–7, 74). With the rise of the constitutional state or *Rechtsstaat*, popular

[8] Cf. Habermas (1986a, p. 7).

sovereignty and parliamentarianism are not only expressions of the autonomy of the political, but also allow 'the socially dominant class' to convince itself 'it no longer rules' (1976, pp. 22, 101). The ascendant bourgeois places the people symbolically in the seat of power formerly occupied by the monarch, while assuming a position of economic domination. Whereas the 'political theories of the bourgeois revolutions demanded active civil participation in a democratically organised will-formation,' the incomplete application of this ideal reveals not only the extent to which bourgeois culture is ideological, but also the degree to which it remains 'dependent on motivationally effective supplementation by traditional world-views' (1976, pp. 76–7). This dependence is significant insofar as it suggests that in reality bourgeois liberal society falls short in the generation of its own normative resources.

It is in his more extensive engagement with Weber's theory of rational-legal legitimacy in *The Theory of Communicative Action I* that Habermas sets the foundations for his use of popular sovereignty as a justificatory standard for the liberal-democratic constitutional state in *Between Facts and Norms*. As Habermas points out, the development of modern law occupies a central, yet equivocal, position in Weber's account of rationalisation and the processes of world disenchantment (*Entzauberungsprozesses*) (Habermas 1986b, p. 243). For Weber, the rationalisation of law makes possible both the 'institutionalisation of purposive-rational economic and administrative action and the detachment of subsystems of purposive-rational action from their moral-practical foundations' (1986b, p. 243). Modern law (in contrast to the law of traditional pre-modern societies) becomes functionally necessary 'as the moral sources that supply the necessary motives to the occupational system dry up' (1986b, p. 251). This functional role can be seen in three central features of modern legal orders. Firstly, modern positive law is an expression of the will of a sovereign lawmaker regulating social life through conventions, rather than the promulgation of the truth of a pre-existing natural order (1986b, p. 259). Secondly, and relatedly, legal subjects in modern legal systems are not punished for their evil dispositions or moral turpitude, but rather for deviating from conventional positive norms (1986b, p. 259). Thirdly, modern law is formal in the sense that it carves out spaces for 'morally neutralised' domains of action in which private individuals can legitimately exercise their free choice (*Willkür*). Modern law's ambivalent status rests on the fact that it simultaneously provides necessary social integration in decentred, pluralistic and differentiated societies, and establishes a protected domain for strategic purposive action.

For Habermas, Weber nonetheless neglects the need for rational justification of the modern legal order as a whole. It is here that popular sovereignty enters the stage. An initial attempt to provide the required justification is found in the seventeenth century early modern theories of natural law, which sought to establish the rational foundations of legitimate political domination (1986b, pp. 260–2). Analysis of the immanent normative content of these natural law accounts reveals that the rise of positive formal law is irreducible to strategic action, while also signalling the need for a new autonomous foundation for legal validity following the collapse of traditional sources of authority. As one moves forward to the revolutionary constitutional achievements of the late eighteenth century, the notion of a 'higher-law' grounded in fundamental rights and popular consent supplies the structurally-necessary mode

of justification for binding legal norms to perform their integrative function. The primary expression of the new mode of justification is found in the catalogues of basic rights promulgated in liberal-bourgeois constitutions and the principle of the sovereignty of the people, which ties the competence to make law to the exercise of democratic will-formation (1986b, pp. 260–2). Popular sovereignty—and the associated idea that a constitution is the expression of reasonable agreement among citizens—provides a normative foundation for legitimate legal-rational domination under modern secular social conditions (1986b, pp. 260–2).

The picture which emerges from Habermas' treatment of popular sovereignty prior to *Between Facts and Norms* is hence genuinely multi-dimensional in the sense that it foregrounds the tension between the sociological reality of the doctrine of popular sovereignty and its justificatory credentials. On one hand, the doctrine of popular sovereignty was deployed strategically by the rising bourgeois liberal elite to justify its rule. On the other, the doctrine contains immanent directedness towards a society of free and equal citizens governing their shared social life through law. It indeed seems plausible that it is necessary to keep both dimensions in view in order to arrive at a satisfactory account of popular sovereignty: the doctrine does not only offer *normative grounds of legitimacy*, but reflects a *strategy of legitimation*.

The explanatory benefits of foregrounding the multi-dimensional character of popular sovereignty as both a principle of legitimacy and a strategy of legitimation can be seen by reference to Habermas' construal of the normative role of 'the people.' Habermas' early analysis of popular sovereignty already rejects the idea of 'the people' as a sovereign 'macrosubject' and avoids exorbitant claims about popular extra-constitutional agency. *The Theory of Communicative Action I* points forward to a theory of democratic will-formation through communicative action directed to validity claims of normative rightness, not an account of the sovereign people as the agent of constitutional creation and change. Indeed, one can already detect in Habermas' discussion of Weber a tendency to blur the doctrine of popular sovereignty with broader democratic and republican ideas of equality and public autonomy. As the paradoxes of constituent power suggest, not to mention the nationalist mobilisation and manipulation of popular power in the twentieth century, the idea of the sovereign people as a unified extra-constitutional agent has little to recommend it from either a descriptive or a normative perspective.[9]Habermas' scepticism about the people as concrete unified constituent subject also reflects the historical reality that late eighteenth century constitution-making processes were conducted by representative conventions and assemblies comprised predominately of the ascendant liberal political class and then – often for strategic reasons of popular legitimation—subsequently imputed to the people or Nation as a 'corporate' body.[10]

[9] For the paradox of constituent power, or the need for the same people who are to constitute a new settlement to always already be united under constitutional forms which channel their constituent activity, see Loughlin and Walker (2007). For a Habermasian resolution, grounded in an ideal-regulative account of constitutional legitimacy, see Zurn (2010). See also Gowder (2019).

[10] For the 1789 United States Constitution see *Federalist* 63 (Madison), Ciepley (2017) and Bailyn (2017). For constitution-making in the French Revolution see Sieyès (2003), Baker (1994) and Furet (1981). One should, of course, also note the historical context for Habermas' reflections on post-WWII

If one accepts the basic contours of this analysis, however, it raises questions for Habermas' reconstruction of popular sovereignty in *Between Facts and Norms*. Taken as a whole, Habermas' earlier treatment of popular sovereignty suggests that a literal construal of the doctrine that all legitimate state power derives from the people is unsustainable. Yet acknowledgement of this would seem to motivate both (i) the development of an alternative theory of collective political agency which maintains the core normative claim of popular sovereignty and (ii) a heightened attentiveness to the potential for a reconstruction of the democratic content of the doctrine that is grounded in claims to 'normative rightness' to downplay or conceal the doctrine's ideological dimensions in modern constitutional states.

Popular Sovereignty and The Legitimacy of Law in Between Facts and Norms

Popular sovereignty and human rights are, Habermas argues in *Between Facts and Norms*, the only ideas which can justify modern law in a post-traditional context (Habermas 1996, p. 99). The central axiom of Habermas' attempt to reconcile republican and liberal commitments through a reconstruction of the immanent normative content of popular sovereignty and rights is the thesis of co-originality (*Gleichursprünglichkeit*). According to the co-originality thesis, the normative foundations of the modern constitutional state can be reconstructed by reference to the process whereby citizens engage in democratic will- and opinion-formation and author a system of laws, inclusive of basic private and public rights, which govern them as addressees. Popular sovereignty and the 'rule of law' presuppose each other, as Habermas puts it retrospectively, as the co-original principles for the democratic *Rechtsstaat* (2005, pp. 78–9).

Habermas characterises popular sovereignty (*Volkssouveränität*) in *Between Facts and Norms*, conventionally enough, as the principle that 'all state power derives from the people' (*wonach alle Staatsgewalt vom Volke ausgeht*) (Habermas 1996, p. 169).[11]Habermas also insists that his reconstruction retains the basic 'intuition' of popular sovereignty in its intersubjective (re)interpretation of popular agency in terms of communicative rationality (Habermas 1996, p. 301; Habermas 1998, pp. 148–51). On a closer examination, however, Habermas' account is more revisionist in its implications that these claims would initially suggest. Firstly, Habermas consolidates his rejection of a literal robust interpretation of 'the people' as a 'macrosubject' by discounting the idea of collective agency more generally. Secondly, the co-originality thesis entails the subordination of collective citizen agency to the legal form (*Rechtsform*) and the basic rights which Habermas characterises as constitutive for modern legal orders (1996, p. 125).

Footnote 10 (Continued)

German politics, and the threat of nationalism and populism, in considering his attitude towards appeals to a popular *Volk* (Habermas 2005, pp. 11–23).

[11] Translation amended.

In this section 1 argue that Habermas' reconstruction of popular sovereignty in *Between Facts and Norms* is better understood as a renunciation of the core justificatory content of the doctrine insofar as it denies any normative force to collective political action. Habermas' re-interpretation of popular sovereignty in line with the theory of communicative action and liberal-democratic proceduralism may, in fact, be read as an internally consistent demonstration of the unsustainability of the modern doctrine that the collective agency of the people underlies the legitimacy of public power. For although Habermas seeks to 'save the appearances' by retaining the terminology of popular sovereignty, the doctrine is emptied of its core normative content when detached from any exercise of collective agency by citizens.

This section elaborates on these claims by reference to the concepts of 'the people' and sovereignty in Habermas' reconstruction. Habermas' statements on 'the people' ultimately suggest that it refers to a necessary juridical fiction, not a collective agent, yet the promise to retain the basic intuition of popular sovereignty seems to require the latter. Habermas' account of active citizenship subordinates democratic control to the legal form and the basic rights of a liberal constitutional order, thus moving beyond a mere rejection of the modern sovereign paradigm to a more wholesale denial of the normative force of collective agency.

It is worth anticipating a potential objection to this argument up front. On one level, of course, a reconstruction of a political doctrine leaves significant scope for a reinterpretation of its immanent content. Habermas is clear, moreover, that his reconstruction operates within the bounds of a 'post-metaphysical' or 'post-foundational' approach to justification. Yet it is far from self-evident that a discourse-ethics model of law grounded in a theory of communicative action need retain a commitment to popular sovereignty, even a domesticated variant. Habermas, it is true, claims that the role of social theory is not to construct ideal principles from a philosophical perspective, but rather to offer reconstructions of existing normative practices (Finlayson 2019, p. 44). Yet Habermas' reconstruction is more revisionist than is often recognised, and is in fact more consistent with the abandonment of the concept of popular sovereignty and its associated terminology, because its rejection of the normative significance of collective citizen action empties the doctrine of its core justificatory content. This is not to suggest the impossibility in principle of developing an alternative approach to constitutional legitimation, grounded in a discourse-ethics model of rational consensus, which attributes a significant role to the political group agency of citizens.[12] It is to claim, however, that a reconstructive theory which denies any normative force to collective citizen agency in the justification of valid legal norms is scarcely viable as an interpretation of popular sovereignty.

[12] Consider, for example, the more thoroughgoing renunciation of the sovereign paradigm, in favour of a deliberative, discursive, and inclusive 'roundtable' model of constitution-making, defended in Arato (2017). The ambivalence of Habermas' treatment of popular sovereignty remains evident in more recent work on the normative reconstruction of a *pouvoir constituant mixte* (or mixed constituent power) in relation to the EU. For critical discussion of this theme – out of scope for the current study – see Patberg (2020) and Bozzon (2021).

The People

Habermas, in Chapter 2 of *Between Facts and Norms*, remarks that the ideas of the '*Staatsvolk*' and the concrete association of free and equal citizens are just as unavoidable as legal constructions, as they are undesirable if interpreted as models for society *in toto* (Habermas 1996, p. 80). Yet while Habermas acknowledges that a literal construal of the sovereign people is theoretically unsustainable, he does not examine the full implications of this point for the legitimation of the constitutional state. If 'the people' is best understood as a political or juristic construction, then this compromises the project of extracting immanent normative content from the doctrine of popular sovereignty. For the status of popular sovereignty as a justificatory principle which can ground claims to legitimacy, as well as serving as a doctrine of legitimation, is difficult to sustain in the absence of some form of collective political agency.

Habermas' interpretation of 'the people' is best contextualised by reference to the Principle of Democracy. The Principle of Democracy stipulates that 'only those statutes may claim legitimacy (*legitime Geltung*) that can meet with the assent (*Zustimmung*) of all citizens in a process of legislation that in turn has been legally constituted' (Habermas 1996, p. 110). This principle rests on both Habermas' (i) underlying theory of communicative action and discourse as a model for the attempted resolution of contentious claims to validity and (ii) account of the formal properties of modern law which relieve citizens from the onerous burdens of moral judgment in post-traditional societies (see Baynes 2016, pp. 47–81). More precisely, the Principle of Democracy is derived from the interpenetration of the Discourse Principle (D) and the legal form (*Rechtsform*) (Habermas 1996, p. 121).[13] Whereas (D) describes general conditions for valid action norms—namely that they could be agreed on by all those potentially affected insofar as they participate in a rational discourse—the legal form means that citizens can order their normative expectations on the supposition that (i) exercise of free-choice is a sufficient source of law-abiding behaviour (ii) law concerns itself with social actors' external relations and (iii) law abstracts from moral motivations (Habermas 1996, p. 112).[14] The Principle of Democracy, Habermas contends, motivates an identification of popular sovereignty with the exercise of public autonomy by citizens through self-legislation (*Selbstgesetzgebung*) (Habermas 1996, p. 104). Citizens, on this view, are to be regarded as the ultimate authors of the laws which govern them, inclusive of basic constitutional laws which specify the content of both their fundamental private and public rights (Habermas 1996, p. 104).

Habermas, as noted above, expressly rejects the idea of the people as a 'macrosubject' and the related view that popular sovereignty could be concentrated in 'a collectivity' or 'physically tangible presence of the united citizens or their

[13] The Discourse Principle is characterised by Habermas (1996, p. 107) as a general principle of impartiality which is 'neutral' with respect to norms of morality, politics, and law.

[14] Cf. Finlayson (2019) who associates the *Rechtsform* with a more 'substantive' conception of the rule of law. See also Baynes (2016, p. 166).

assembled representatives' (Habermas 1996, p. 136).[15] Popular sovereignty is rather to take effect 'in the circulation of reasonably structured deliberations and decisions' (Habermas 1996, p. 136). Habermas also states in this context that 'the principles of the guaranteed autonomy of public spheres (*Gewährleistung autonomer Öffentlichkeit*) and competition between different political parties, together with the parliamentary principle establishing representative bodies for deliberation, exhaust (*erschöpfen*) the content of the principle of popular sovereignty (*Volkssouveränität*)' (Habermas 1996, p. 171). As discussed in more detail in the final section, Habermas' theory of popular sovereignty as legislative public autonomy is also supplemented by an appeal to his rightly influential theory of the public sphere (*Öffentlichkeit*) (1989). The informal discourses of the public sphere, Habermas argues, complement formal legislative processes because they are 'more or less autonomous,' while allowing for a mutual flow of communication with the political system (1996, p. 299). The public sphere, for Habermas, is not only 'the impulse-generating periphery' surrounding the political centre and cultivating normative reasons; it also affects all parts of the system 'without intending to conquer it' (Habermas 1996, pp. 371, 442, 445; see also Olson 2019, p. 303). In this sense, Habermas, seeks to maintain a commitment to the 'radical-democratic' content of popular sovereignty through its displacement to sites of contestation which can feed into the political system, potentially with disruptive implications.

Habermas offers, then, a theory of popular sovereignty without 'the people,' and not merely in the sense that it rejects a romanticised Rousseauvian conception of the *Volk* as assembled collective.[16] For Habermas, the legitimacy of enacted law—while dependent upon formal processes of deliberation and informal communications in the public sphere—does not require any appeal to the capacity of citizens to exercise political agency as a collective subject (1996, p. 263). The identification of popular sovereignty with communicative practices and representative democratic law-making procedures empties collective political agency of explanatory relevance and normative significance. Popular sovereignty becomes 'anonymous,' as it is dissolved into the rule of law, democratic procedures for the enactment of statutes, and intersubjective flows of communicative power (1996, p. 301). Habermas' renunciation of popular collective agency, while intelligible as a reaction against nationalism, entails that 'the people' is a mere *façon de parler* amenable to an error-theory (1996, pp. 299, 372).

The suggestion here is not, of course, that Habermas should have subscribed to a 'substantive' conception of the 'the people.' It is rather that Habermas' rejection of any notion of collective citizen agency dissolves the normative content of popular

[15] This point is reiterated even more stridently in subsequent works. See, for example, in Habermas (1998, pp. 131, 135, 151), where a substantial notion of 'the people' is pointedly characterised as romantic and even associated with far right or nationalistic calls for defence of the fatherland (*Vaterland*). Habermas' unequivocally rejects 'popular sovereignty in the form of the *ethos* of a more or less homogenous people (*Volk*),' and the idea that there is a 'subject of power that draws its sustenance from pre-legal sources' (Habermas 2005, p. 104).

[16] On Habermas' claim to reconcile Kantian and Rousseauvian approaches see Habermas (1996, pp. 463–90). Habermas expresses a clear preference for a liberal Kantian model of republican constitutionalism in *The Inclusion of the Other* (1998, pp. 78, 101).

sovereignty while retaining its terminology and associated legitimating credentials. Consider, for example, Habermas' thesis that citizens are both the authors of the laws which govern them and their addressees. The doctrine of popular sovereignty, if it is to function effectively as a justificatory principle, entails that constituted authorities – comprised of a small subset of citizens—should not determine constitutional structures and competences (see Maus 2011, pp. 78–9, 126–7 and Patberg 2020, p. 5). On Habermas' explanatory model, citizens are authors of law through participation in representative procedures and communicative action in the public sphere. Any reference to 'the people' in this context is 'shorthand' for citizen communicative practices, which lack the unified overlapping beliefs and intentions necessary for group agency (Pettit and List 2011). Yet this is to reduce popular sovereignty to a fiction or juridical construction. If there is no collective democratic agent which determines constitutional structures and competences, then the exercise of constituent power must be attributed to citizens acting individually or to their representatives. In both cases, the normative force of popular sovereignty as a principle of collective action is dissolved. The renunciation of any form of group agency at the level of the determination of constitutional essentials entails that there is no space for citizens as a collective to engage in the sorts of communicative practices which are supposed to justify popular sovereignty as a principle of legitimacy. It does still leave open the possibility of retrospective juridical attributions of agency to the people which serve a function of legitimation for the liberal constitutional state.

Without the potential for collective agency by citizens, the doctrine of popular sovereignty rests on an illusory attribution, and indeed its acceptance would reflect a form of cognitive distortion which supports the maintenance of established power structures. Habermas acknowledges the potential for his reductive construal of 'the people' to divest popular sovereignty of its 'radical democratic potential' (Habermas 1996, p. 169), but does not address the more fundamental concern that a reconstruction of a doctrine to save its immanent normative content would seem to have gone awry when its core justificatory claim is denied.

Sovereignty

Habermas' reconstruction has as little time for the ultimate sovereignty of the people as it does for the people as collective agent of sovereign power. It stands to reason that if there is no sovereign people, the people cannot be sovereign (see Rasmussen 2014). A clear implication of the discourse theory of politics and law is that there is no longer any sovereign in the constitutional state (Habermas 1996, p. 169). For Habermas, the empty place of sovereign power vacated by the absolute monarch as a result of the bourgeois revolutions is not reoccupied by the people; the 'symbolic location of discursively fluid sovereignty remains empty' and the forces of social solidarity are only regenerated in complex societies by diffuse communicative practices of self-determination (Habermas 2005, p. 104; 1996, p. 443). I argue in this sub-section that Habermas' rejection of the paradigm of sovereignty flows into a more general and far-reaching renunciation of collective citizen agency as a central justificatory criterion for law.

The Principle of Democracy and the co-originality thesis both, of course, directly conflict with the proposition that there is, in any liberal-democratic polity, a sovereign unconstrained by its own laws.[17]The Principle of Democracy subjects all enacted law to the higher tribunal of the Discourse Principle, with its requirement for the agreement of all those affected by an action norm, and to the procedural (and arguably also substantive) constraints of the legal form or *Rechtsform*. The application of the Principle of Democracy presupposes, moreover, a system of basic rights which carves out spaces for individuals to exercise private and public autonomy (Habermas 1996, p. 121). Habermas' appeal to the co-originality thesis assumes that basic rights depend in turn on a democratic process of self-legislation i.e. they are rights which consociates in a democratic constitutional order grant to themselves (Habermas 1996, p. 409). There is nevertheless no viable role in Habermas' reconstruction for a sovereign parliament, let alone a sovereign fundamental popular legislator. The Principle of Democracy requires not only the channelling of legislative enactments through 'fair and reasonable' procedures (Habermas 1996, p. 304); even fundamental law-making is, on Habermas's view, subject to the *Rechtsform* as a condition of the possibility for a required transition from legality to legitimacy.

It is nonetheless essential to the modern idea of popular sovereignty that the citizens of a polity exercise some form of collective agency over the constitutional essentials which set the terms of their political co-existence. Popular sovereignty has served, as suggested above, an ideological function, by presenting a misleading picture that a unified popular sovereign underlies both founding moments and ordinary politics in constitutional democracies. Yet Habermas' move to uphold the status of popular sovereignty as principle of legitimacy, while denying collective citizen agency, seems more apt to conceal and exacerbate the ideological and distorting dimensions of the doctrine, than to clarify its immanent normative significance.

A closer look at the constraints that Habermas imposes on foundational law-making provides the clearest evidence of the validity of these claims. Habermas' logical genesis of rights places the basic right of citizens for 'equal opportunities to participate in processes of opinion- and will-formation' (i.e. in which citizens exercise their political or public autonomy) after three more basic categories of rights (Habermas 1996, p. 123). One implication of this ordering, Habermas acknowledges, is that the first three categories of rights (equal individual liberties, citizenship under law, and legal actionability and protection) are akin to legal principles which must guide the framers of constitutions' (Habermas 1996, pp. 122, 126). As noted above, foundational constituent agency is, on Habermas' view, subject to the Discourse Principle and the legal form (Habermas 1996, p. 168).[18]Habermas' logical genesis of rights also, however, entails that the agency of citizens must work within the constraints of a conception of basic liberties which reflects relatively 'thick' normative presumptions of liberal constitutionalism.

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[17] On early modern conceptions of sovereignty as the representation of the autonomy of the political domain see Lee (2016) and Loughlin (2010, pp. 50–88).

[18] Habermas (1996, p. 168) also requires legal discourses to be compatible with moral discourses. A practical implication of this for the *Rechtsstaat* is that all laws must at least respect (not contradict) the moral universalisation principle.

Habermas' answer to this concern is that the basic rights embody legal principles which do not prejudice the agency of foundational law-makers because, consistent with the co-originality thesis, they are necessary conditions for the very use of the legal form (Habermas 1996, p. 126). The basic rights are not to be understood as *Abwehrrechte*—or liberal rights against the state—because they 'only regulate the relationships among freely associated citizens prior to any legally organized state authority from whose encroachments citizens would have to protect themselves' (1996, p. 122). At least with respect to fundamental citizen agency, however, these responses are unconvincing. The three categories of basic rights reflect a liberal interpretation of the optimal relationship between individual freedom and state power, both in their formulation and in their wider practical implications. Unless one assumes that the modern legal form can only be realised fully within a liberal order, then Habermas' analysis reads thick normative liberal commitments into the preconditions of fundamental law-making, and subordinates democratic citizen agency to the basic categories of liberal rights.

A similar point can be made with respect to the outcomes of fundamental or constitutional law-making. For Habermas, a discourse-theoretic interpretation of the principle of popular sovereignty (*diskurstheoretischen Deutung des Prinzips der Volkssouveränität*) will generate (i) the judicial guarantee of comprehensive legal protection for individuals (ii) the subjection of the executive administration to oversight by both legislative bodies and the judiciary (iii) the principle of the separation of the state and (civil) society (Habermas 1996, p. 169). These are foundational commitments of modern constitutionalism and an associated liberal construal of the rule of law. The impression that Habermas' reconstruction transmutes popular sovereignty into the institutional procedures of a liberal constitutional state is also corroborated by the conditions placed on the democratic genesis of legal statutes (Habermas 1996, p. 263). Interpreted in procedural terms, popular sovereignty, Habermas states explicitly, refers to (formal) boundary conditions that enable the self-organisation of a legal community, but which are not immediately at the disposition of the will of citizens (Habermas 1996, p. 301).

Habermas' theory is indeed susceptible in this context to a similar objection to the one it levels against Rawls' political liberalism. Rawlsian liberalism, Habermas alleges, demotes the democratic aspect of constitutional settlements to inferior status (Habermas 1998, p. 69; see also Finlayson 2019, pp. 160–72). This is because, on the Rawlsian theory of justice, the basic liberal rights which constrain political will-formation are withdrawn from democratic self-determination, and the founding act presented as unrepeatable (1998, p. 70). For Rawls, on Habermas' critique, liberal rights are consequently placed outside the process of joint public deliberation. Yet, even granted that Habermas' schema of liberal rights emerge from a process of democratic deliberation, the process is itself made subject to a theory of action norms and liberal rule of law constraints. Habermas' reconstructive approach hence suggests that the results of fundamental deliberation are always already sedimented in a liberal constitution, where the authors of the laws are 'citizens who communicate' inside an existing legal system.

Habermas' decision to label this account a reconstruction of popular sovereignty is intelligible given the doctrine's association with democratic legitimacy. Yet the

retention of the terminology of popular sovereignty is misleading because it suggests a residual appeal to collective citizen agency that is ruled out by the underlying assumptions of the theory. Alternatively, one could argue that the fidelity of Habermas' reconstruction of popular sovereignty to the deep commitments of liberal-constitutionalism implicitly exposes the latter's reliance on a purported democratic collective agency which is a *post facto* construction.

Habermas and the Public Sphere

The public sphere is, for Habermas, the intermediary place where the 'sovereign self-organisation' of society has withdrawn (Habermas 1996, pp. 373, 486). In this concluding section 1 scrutinize Habermas' treatment of the public sphere as the site of a displaced collective citizen agency in *Between Facts and Norms* by reference to *The Structural Transformation of the Public Sphere*.[19]An examination of Habermas' account of the public sphere, I suggest, supports the arguments of the previous two sections regarding the dependence of popular sovereignty as an effective normative principle upon some form of collective democratic citizen agency.

In *Between Facts and Norms*, Habermas grounds the legitimacy of the constitutional state not only on undistorted forms of political communication, but indirectly on the communicational infrastructure of the public sphere (Habermas 1996, p. 409). Civil society, through the public sphere, can exercise influence on the political process, as communicative power is translated into institutional form through constitutionalised procedures of democratic opinion- and will-formation (Habermas 1996, p. 371). Parliamentary deliberation is reliant on communication in the public sphere, while the latter needs to be channelled in the 'sluices' of democratic procedure before it can serve as an input for the enactment of legitimate and valid law (Habermas 1996, pp. 307, 325). The public sphere accordingly traverses both institutionally-structured forms of political deliberation and informal communications from the periphery, where communicative power may be 'exercised in the manner of a siege' (Habermas 1996 pp. 371, 486; see also Olson 2019). From a Habermasian perspective, one could argue in this context that if a political regime claims to embrace the ideals of public non-institutional opinion- and will-formation, and yet also significantly constraints their modes of expression, then it would itself justly be characterised as ideological in its appeals to popular sovereignty.

Habermas' appeal to the public sphere in *Between Facts and Norms* presupposes the earlier analyses of *The Structural Transformation of the Public Sphere*. The origin of the public sphere in sovereign power explains its connection with an oppositional political consciousness, which challenges arbitrary power with the demand for general and abstract laws (Habermas 1989, p. 54). Yet the ascendent

[19] For the significance of *The Structural Transformation of the Public Sphere* for Habermas' later work see Scheuerman (2012, p. 40). For concerns about the displacement of the collective agency of citizens into the public sphere see Maus (1995, p. 877). For reflections on the public sphere since *Between Facts and Norms* see Habermas (2005, pp. 9–11, 114–47). See also De Angelis (2021), Kellner (2014), McKenzie (2018), and O'Mahony (2021).

liberal-bourgeois political class institutionalises and domesticates this function, establishing the public sphere rather as an 'organ' of the state to ensure an association between law and public opinion (1989, p. 81). Habermas insists that, notwithstanding these points, the public sphere never loses immanent normative directedness towards an ideal of uncoerced agreement by equals. A 'morally pretentious rationality' (*moralisch prätentiöse Rationalität*) which seeks what is 'just and right,' is intrinsic 'to the idea of a public opinion born of the power of the better argument' (1989, p. 54). At least in its original self-conception, the competition of private arguments in public debate is supposed to transform *voluntas* into *ratio* through the pursuit of consensus in an easy-going compulsion (*leichtfüßigen Zwang*) impartially directed to promotion of the general interest (1989, pp. 82–3, 88).

To be sure, in *Between Facts and Norms* Habermas acknowledges several obstacles to the flow of communicative power into the public domain in contemporary societies (Habermas 1996, pp. 183, 373). In particular, the effective operation of 'subjectless' communicative power requires a 'culture' of robust and informed public debate (1996, p. 378). The transmission of the communicative power of the public sphere into the institutional centre, therefore, presupposes the existence of an already established constitutional state (*Rechtsstaat*) with a strong liberal-democratic culture.[20]Habermas nevertheless suggests that 'unleashed cultural pluralism' in the public sphere can assume at least some normative burdens for the doctrine of popular sovereignty (1996, p. 308). Yet read in light of *The Structural Transformation of the Public Sphere*, this claim would seem to underestimate the extent to the public sphere serves a significant ideological function for liberal society. In historical terms, the establishment of a public sphere under the constitutional state reflects the domination of the rising educated bourgeois propertied class, manifested most obviously in high property qualifications for the franchise and restricted access to participation in public debate (1996, pp. 84–5). In addition, the new understanding of private civic autonomy allows individuals to see other individuals not as the realisation, but rather as a limitation of their own liberty. From this perspective, Marx's analysis rings true. The liberal-bourgeois order mediates the gap between its particular interest and its universalistic claim to validity through the partial identification and partial separation of the individual 'as such' and the liberal-bourgeois subject. The 'fully developed bourgeois public sphere,' that is to say, was based in ideological fashion 'on the fictitious identity of the two roles assumed by the privatised individuals who came together to form a public: the role of property owners and the role of human beings pure and simple' (1996, p. 56).

Habermas' appeal to the eighteenth century French 'philosophical society' as a prototype for the bourgeois public sphere and its normative potential is instructive in this context (Habermas 1989, pp. 27–56). Consistent with Habermas' analysis, François Furet argues that the old academic form of the learned society 'gave birth to embryonic forms of democratic power in response to a civil society's search for

[20] A 'robust' liberal political culture is a pre-requisite for Habermas' (1996, p. 461) conception of popular sovereignty' in the sense that it must meet democratic *Sittlichkeit* halfway. On the language of 'periphery' see Honig (2001).

autonomous expression' (Furet 1981, p. 186).[21]Membership in a philosophical society was primarily dependent on the capacity to participate in rational discussion, not social position, so that it is plausible to say that membership in these societies was 'a prefiguration of the functioning of democracy' (Furet 1981, p. 174). Furet's analysis, however, also raises some difficult questions for Habermas' reconstruction of popular sovereignty. At least part of the impetus for the aspiration towards universality found in the philosophical society was self-conscious opposition to the particularism of the corporate entities of the *Ancien Régime*, which were defined by a bounded community of occupational and social interests. The 'mechanism' of seeking a unanimous position through rational debate in the philosophical society presupposed 'the breaking up or atomisation of society into equal individuals' and decline of corporate solidarity and traditional authority (Furet 1981, p. 174). One can even say that the philosophical societies 'gave a fictive appearance of unity by means of the people's will' to a crumbling political society (Furet 1981, p. 199). In concrete terms, the 'triumph of social opinion,' which culminated in bold assertions of the rights of the people and the will of the Nation, tended to emanate most stridently and influentially from the new 'hidden oligarchy' of the rising liberal bourgeois (Furet 1981, pp. 187–9). Claims by this elite to speak on behalf of the people as whole—appeals to popular sovereignty—indeed often functioned as a strategy of retrospective ideological legitimation.[22]

It would be one-sided to *reduce* the public sphere to a category of an individualistic bourgeois society which constructs the idea of democratic agency as part of a strategy of legitimation. Yet even if this is only part of the story—albeit consistent with Habermas' early work on legitimation and the public sphere—it raises questions for a post-metaphysical reconstruction of popular sovereignty in functionally-differentiated pluralistic societies. The doctrine of popular sovereignty has an ideological dimension when it attributes an artificial form of collective agency to the people as a unity in a societal structure which favors particular political and economic interests. Claims by the part to represent the people as a whole promote an ideological distortion insofar as the beliefs and desires of the minority are correlated with the universal interest (Guess 2008, p. 52). If citizens can neither form a collective agent nor be sovereign, as Habermas' analysis entails, then we are left with the awkward conclusion that the attempt to rescue immanent normative content from the doctrine of popular sovereignty – to 'save the appearances' – might only serve to sustain the ideology.

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[21] Cf. Baker (1994, pp. 9–10).

[22] Cf. Habermas (1998, 140).

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