Sovereignty and Constitutional Democracy

Petra Gümplová

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Introduction

In today’s liberal democracies, confronted with the democracy- and constitutionalism-eviscerating effects of global law and transnational governance that emerge from beyond legal and political orders of sovereign states, questions about the democratic legitimacy of law and the autonomy of the democratic political process are more and more brought to the forefront. Yet, the idea that there is a close conceptual link between democratic legitimacy, constitutionalism, and sovereign statehood, and not just a historically contingent association between sovereignty, the state, democracy, and the rule of law, has not captured the imagination of contemporary political theorists.

The weakening of the sovereign state in the process of globalization, seen as the inevitable fate of modern societies, and the popularity of the idea of a cosmopolitan world order based on universal human rights law or the idea of cosmopolitan democracy, have done much to steer attention away from the ways in which sovereignty, democracy, and constitutionalism reinforce one another. Indeed, the mutual relationship between these three has been left largely unexamined in the tradition of normative political theory. In the discourse about constitutionalism and democracy, the notion of sovereignty has been caught up in the dialectic between the liberal critique of the idea of political supremacy and radical-democratic concerns for popular sovereignty coalescing around the notion of the direct and inalienable will of the people as the only legitimate source of law and power.

Liberal political theory, focusing on the protection of people from abuses of state power, has traditionally sought to banish sovereignty from politics. As a supreme, absolute power located in a single source, liberal thinkers claim, appeal to sovereignty gives license to arbitrary exercise of political authority. To prevent the concentration of power in one source, minimize the possibilities of its abuse, and exclude arbitrariness, liberal constitutionalism has, in consequence, divided and limited sovereign political authority through a system of checks, balances, and constitutional guarantees of individual rights, entrenching this system in the constitution.¹

According to the liberal view, the standard of legitimacy in the exercise of political power is provided by the government’s respect for individual rights and its protection of civil liberties. Rights are held by individuals in virtue of their having moral autonomy or dignity that precedes any establishment of a political order. Enshrined in the constitution, rights then make up the core of the conception of political legitimacy and justice, setting boundaries and limits on the will of the sovereign legislator. In constitutional democracies where the sovereign legislator is the people themselves, rights also impose external constraints on the democratic will. Here, the people’s claim to sovereignty thus refers to a mere regulative idea, a criterion with which to judge whether a political regime is legitimate and whether a government is acting in the interests of the people.

Democratic theory, on the other hand, has attempted to defend the principle of popular sovereignty without at the same time falling into the trap of absolutism. Ever since Rousseau, democratic theory has tended to interpret popular sovereignty as a collective practice of self-determination, one that relies on democratic legislation unconstrained by principles of constitutionalism and, especially, constitutionally guaranteed individual rights. Rousseau defined the principle of popular sovereignty as the legislative authority of a collective general will that embodied the direct and equal participation of every member of the community. To prevent the subjection of the people to arbitrary laws and tyrannical governments, Rousseau insisted, only the general will of the people, unlimited and unrepresented in its expression, could have the legitimate legislative authority.

The emphasis on the will of the democratic legislature, unmediated by procedures of the liberal rule of law and unlimited by individual rights, has haunted democratic theory ever since. Modern theory of democracy, upholding the view that the people are the ultimate source of the power that is exercised over them, has struggled in its efforts to find a less radical notion of popular sovereignty, one that would not threaten individual liberties and the stability of the legal order without at the same time succumbing to the neutralizing effects of too many procedural checks and balances.

The dilemma of democracy and liberal constitutionalism, or between the affirmation of direct and radical popular sovereignty on the one hand and the dilution of the principle of a single and omnipotent source of sovereign power (whether a monarch or the people) through the operation of basic constitutional

3 See János Kis, Constitutional Democracy (New York: CEU Press, 2003), 139.
5 See, for example, Carole Pateman, Participation and Democratic Theory (Oxford: Oxford University Press, 1976).
principles on the other hand, has shaped the ongoing discourse on sovereignty in normative political theory. It has prevented liberal-democratic deontology from exploring the historical transmutation of the idea and practice of sovereignty and the possible positive role that sovereignty might have in the theory of constitutional democracy. The ultimate reason, however, for the inability of the concept of sovereignty to find its place in the discourse about the interconnections between democracy, constitutionalism, the rule of law, and political autonomy is the traditional absolutist understanding of the concept itself.

Sovereignty has always been understood in terms of supreme and omnipotent political power located in a single source and unrestrained by law. It was with Jean Bodin and Thomas Hobbes, the first modern theorists of the state as an entity organized systematically around the notion of sovereignty, that the terms of the dominant understanding of sovereignty were set for centuries to come. Hobbes defined sovereignty as supreme authority instituted by individuals through a social contract and embodied by a singular person who makes law by his command. To highlight the novel concept of the ultimate political authority and its unity with law enactment and law enforcement, Hobbes characterized sovereignty in terms of unity, indivisibility, unconditionality, and unlimitedness of the absolute power unbound by the covenant which institutes it.6

Hobbes’s theory gave rise to an interpretation of sovereignty as the absolutist exercise of power by someone who himself is not subject to law. What Hobbes, just as Bodin before him, wanted to convey, however, was rather a new idea of political supremacy that was expressed in legal terms. In doing so, Hobbes and Bodin merely captured the very essence of the modern political order framed in the notion of the sovereign state. In Hobbes’s understanding, sovereignty did not have to entail arbitrary exercise of somebody’s will. Yet, from the very outset of its conceptual history, sovereignty has been generally understood in terms of arbitrary force, lawless exercise of power, command theory of law, and state violence, and, in consequence, the very notion itself has been subjected to recurrent and widely voiced criticism. With the rare exception of Carl Schmitt, most influential political thinkers of the twentieth century have identified sovereignty with perilous arbitrary force and extralegal rule, calling for the elimination of this “intrinsically wrong” concept from political philosophy.7

The attack on the fundamentals of sovereignty has come from several directions. Besides liberal theory, the critique of sovereignty was powerfully articulated in the work of Hans Kelsen, Hannah Arendt, and Michel Foucault. Hans


Kelsen introduced a “pure” theory of law completely separated from politics, which was to dissolve the sovereign authority of a person in a self-contained hierarchical system of legal norms derived from the basic norm.\(^8\) Hannah Arendt, on the other hand, boldly declared sovereignty and tyranny to be indistinguishable from each other. For her, sovereignty represented the arbitrary will of a person claiming to be the ultimate and only source of law and power, only to bring about the destruction of plurality and freedom in the public realm.\(^9\) Arendt presented an innovative conception of power, understanding it as an effect of collective deliberative action among equals in the public-political realm. As such, her conception was directly opposed to the absolutist notion of sovereign will. What she argued was that sovereignty exercised prior to the legal establishment of a political realm could never lead to the realization of freedom; instead, she observed, it paved way for dictatorship and spelled the doom of modern revolutionary constitution-making.\(^10\)

Michel Foucault’s pathbreaking analyses of the nature of power in modern society have given rise to yet another, powerful line of critique against sovereignty. With his account of alternative forms of discipline, domination, and subjugation that pervade society and escape articulation in traditional legal and political terms, Foucault challenged the centralized and hierarchical “juridical model of power.” The disciplinary power and a new paradigm of governmentality without government, in his argument, marked the end of the juridical construction of sovereignty.\(^11\)

In our own time, sovereignty is yet again subjected to a serious challenge, insofar as it no longer provides an adequate explanatory framework for the form and scope of legal and political authority in the contemporary globalized world. According to some of the recent critics, sovereignty is being undermined by multiple contemporary processes such as the decline of the sovereign state and the emergence of new transnational legal and political authorities, the expansion of “soft law” not produced by state legislatures, and changing international norms regarding human rights. All these developments, it is suggested, lead to fundamental transformations in the structure of political authority framed in terms of the constitutional state. While some see in this a movement towards cosmopoli-


\(^10\) Ibid., 152–156.

\(^11\) Michel Foucault, Power/Knowledge (New York: Pantheon, 1972) and Society Must Be Defended (New York: Picador, 2003).
tan democracy based on human rights, others identify an emerging reality of decentered network governance under an omnipresent, flexible, nonhierarchical, and self-reproducing global law. In any case, it is claimed, to understand the nature of these epochal changes and the novel arrangements they bring in their wake, it is necessary to drop the idea of sovereignty altogether and accept the factuality of our life in a “post-sovereign” era.

My point of departure in this book is the view that the desire to move the debate beyond the idea of the sovereign state, and the recurrent normative critiques of the notion of sovereign political authority as something dangerous, ambiguous, or irrelevant, are based on a misunderstanding of the idea of sovereignty. Although encumbered by its association with absolutism, sovereignty is, it needs to be remembered, a foundational concept underlying all modern legal-political orders and their organization into states. It still provides the only explanatory framework we have for the structure of legal and political authority framed in the state, and lives on as the fundamental premise of constitutional and international law. Moreover, as I will propose below, without a positive conception of sovereignty our understanding of democracy is impoverished: it is neither possible nor desirable to conceive of democracy without sovereignty. In fact, rejecting the notion as such means abandoning some of the key normative principles of modern democracy like collective autonomy, self-government, legitimacy, freedom, and political equality.

Accordingly, this book has several objectives. One is to trace the roots of the misunderstanding of the concept of sovereignty in political theory. Towards this purpose, I will reconstruct the early modern paradigm of sovereignty as represented in the work of Bodin and Hobbes, in order to examine its ambiguous legacy. In doing so, my aim is to deconstruct what I call the absolutist model of sovereignty, which interprets sovereign political authority as something that opens the door to the unlimited exercise of power by a single and unitary entity based on the command theory of law. In re-reading Bodin’s and Hobbes’s work, I attempt to separate the theoretically valuable and still valid elements of the concept of sovereignty from the more historically specific views that these two authors put forth regarding the form, location, and scope of sovereignty; for it is those time-bound elements in the original conception that gave rise to the absolutist paradigm that even today continues to make its influence felt in legal and political theory. On the basis of this distinction between historically specific and

13 See, for example, Judith Goldstein et al., Legalization and World Politics (Cambridge, Mass.: MIT Press, 2001).
theoretically enduring elements, it then becomes possible to develop an argument against the essentialist reading of sovereignty that identifies sovereignty with particular institutional arrangements and features typical for the era of absolutism, such as indivisibility, unlimitedness, and extralegality.

A second aim of this book is then to examine the essentially legal character of sovereignty. The concept of sovereignty articulates the existence of a supreme and ultimate political authority circumscribed within the territory of the modern state. This authority only exists as a legally determined authority. Sovereignty and law are thus inextricably linked. As a notion that describes the features of modern political authority, sovereignty must therefore be theorized in legal terms. Up until now, however, this irreducibly legal nature of sovereignty has not been adequately thematized in legal and political theory. For the most part, sovereignty has been understood in purely political terms, as the ultimate political authority existing prior to the legal order. Yet, as both Kelsen and Habermas have convincingly shown, political power is not externally juxtaposed to law but is rather presupposed by law, being itself established by a legal code and constituted in the form of basic rights. Law legitimates political power, which in turn makes use of law as a means of organizing political rule. The co-originality of binding law and legitimate political power is institutionalized in the framework of the state. Since sovereignty can thus be said to be an aspect of the emergence of the modern state, which, again, is a form of organization of political life by the means of law, sovereignty and the medium of law have always been intertwined and are inseparable from one another.

Consequently, I will argue that sovereignty is simultaneously a political and a legal category and has to be conceptualized as such. Law is the expression of sovereignty, but sovereignty is itself constituted and hence also limited by law. For some of its critics, this is precisely where the conceptual ambiguity of modern sovereignty lies: it expresses both the power that enacts law and the law that restrains power. Legal-political theorizing about sovereignty indeed often appears to be caught in the antinomy between sovereignty that, unconstrained, lies beyond law, and sovereignty that is legally constituted and therefore not politically supreme, or, not sovereign. Yet, as I will argue, this seeming paradox built into the conceptual structure of sovereignty is, in fact, the key to understanding its nature. Sovereignty, as a term, captures the mutual containment of law and

17 Foucault, Society Must Be Defended, 13.
politics.\textsuperscript{18} Situated at the intersection of the political and the legal, modern sovereignty is defined by the co-originarity of binding positive law and political power. As Jean Cohen has aptly put it, sovereignty indicates the dependence of political power on the valid, public legal order for its authority, simultaneously as it points to the political origin of law and the political context of law’s application and claim to legitimacy.\textsuperscript{19}

From a theoretical perspective, the key issue of the modern theory of sovereignty thus presents itself as a problem of the appropriate legal theory. To redeem the concept of sovereignty, what is needed is a legal theory that can account for the co-originarity and inseparability of law and power. Moreover, to put the point in Habermas’s terms, such a theory must acknowledge that modern positive law implies the duality of facticity and validity: it has to be able to account for the fact that legal norms are, on the one hand, compulsory facts backed by sanctions, while, on the other hand, they also raise a claim to legitimacy. Modern law, in other words, consists in coercive norms that have to be acceptable and generally recognizable on rational grounds, and legal theory must thus be able to situate the idealizing, normative character of the law’s claim to legitimacy in the context of concrete political institutions and arrangements.\textsuperscript{20}

In pursuing these tasks, this book thus also aims to help bridge the gap that, for the most part of the twentieth century, has been separating legal and political theory. One of the aspirations of this project of rethinking sovereignty is to overcome the unduly legalistic understanding of constitutionalism, which stresses rights and judicial review as the most reliable means of identifying substantive outcomes of democratic politics and largely ignores the question of democratic procedures, institutions, forms of government, and the balance of power. An alternative, political reading of constitutionalism will proceed from the understanding that the democratic political process itself, as defined in the constitution in terms of the division and organization of power and procedures for resolving disagreement, can provide the most legitimate and effective means for resolving disagreements and conflicts in modern liberal democracy.\textsuperscript{21} For such a political account of constitutionalism, sovereignty proves an indispensable concept more attuned to the actual workings of democratic politics than anything a legalistic perspective can provide.

\textsuperscript{20} Habermas, \textit{Between Facts and Norms}, 25–41.
The third and final objective of this book is to situate the foregoing discussion on law and sovereignty in the broader context of democratic theory. To be able to better address questions about the place, the nature, the role, and the meaning of sovereignty in liberal democratic polities, I will, however, first discuss three strands of democratic theory that are all more or less explicitly centered around the notion of sovereignty: the work of Hans Kelsen, Carl Schmitt, and Jürgen Habermas. All three thinkers, despite the significant differences between them in terms of their political values and philosophical approaches, have directly tackled the question of sovereignty with a clear sense of the centrality of this concept for the theories of constitutionalism and democracy. They have, moreover, all addressed the problem of sovereignty from the vantage point of legal theory, linking it to the question of legal normativity. The different concepts of sovereignty that emerge from the work of these three authors can also be looked upon as attempts to respond to concrete practical problems of the twentieth-century democratic politics. Whether in a positive or a negative sense, sovereignty, for each one of these thinkers, represents a pivotal category to be reckoned with in any such project. While Kelsen focused on the transition from post-absolutist state and the command theory of law to the constitutional democratic state based on a purely normativist legal system, Schmitt reflected upon the preparedness of liberal democracy to deal with crises and the state of emergency. For his part, Habermas, over the last few decades, has been concerned with the revitalization of mass democracies in late capitalist societies characterized by the expansion of systemic rationality and increasing democratic deficit. The concern of each of these three thinkers with the reinforcement of the normative foundation of constitutional democracy constitutes the common ground on which they can be engaged in a dialogue on the complex and consequential topic of sovereignty.

Unlike Habermas, Kelsen and Schmitt are not ordinarily considered as prominent theorists of democracy. Indeed, Schmitt, known for his staunch critique of liberalism and parliamentarism, his decisionistic theory of legitimate political action, and the authoritarian implications of his thoughts on the state of exception and dictatorship, does not belong to the mainstream of democratic and constitutional theory. Schmitt’s controversial claim that, during the extraordinary moments of legal rupture, democratic values are best embodied in the personal decision of the sovereign dictator has been largely refuted by modern democratic theory. Yet, in Schmitt’s work, as I will attempt to show, we can also find elements of a theory of democratic constitutionalism that are worth rescuing, especially if viewed from the perspective of what I will call the reconstitution model of sovereignty. Kelsen, on the other hand, has been routinely dismissed as an obsolete neo-Kantian legal philosopher with a singular interest in the purity of legal thought, driven by a vision of complete legal normativity of the political universe.
derived from a supreme legal norm. It is only recently that Kelsen’s theory of
democracy has begun to attract the attention of political theorists, motivated by a
search for the missing normative dimension in his theory of pure legality. 22

While numerous studies already exist that juxtapose Kelsen and Schmitt, 23 so
far there have been no attempts at systematically comparing the work of all three
of these thinkers on the same terms. This is, then, precisely what this book aims
to do, in making a case for Habermas as a way out of the deadlocks created by
Schmitt’s and Kelsen’s radical and ultimately unsuccessful attempts to resolve
the ambiguities of the absolutist paradigm of sovereignty. In developing this the-
sis, I will look at the contributions of each of these authors in a specific order:
Kelsen first, then Schmitt, and finally Habermas. Advancing my argument in
these three steps, I believe, allows me to best outline the trajectory of twentieth-
century proposals to deal with the problem of the relationship between sove-
reignty and constitutionalism, while linking these proposals to the broader con-
text of democratic theory and the pressing issues of the contemporary politics.

Kelsen and Schmitt present us with opposing yet equally unsatisfactory no-
tions about the nature and the role of sovereignty in constitutional democracy.
Schmitt’s concern was to conceptualize the unavoidability of discretionary deci-
sion-making in legal practice. The personal decision of the sovereign dictator,
defying all norms, rules, and procedures, and only laying down its own imma-
nent norms during the very act of making the decision, was, for him, to provide
the missing substantive resource of legitimacy in liberal constitutional systems.
In Schmitt’s conception, democracy is a substantive political form based on col-
lective political unity that is best achieved and sustained by the decision of the
sovereign in some extraordinary moment during which the normal legal order is
suspended. Kelsen, on the other hand, sought to eliminate sovereignty entirely
from the legal and political realms. Due to his absolutist interpretation of sove-
reignty and his insistence on the separation of law and politics, he was drawn to
an implausible, monistic conception of the basic norm. This hypothetical highest
norm, in Kelsen’s work, replaced sovereignty as the ultimate source of validity
for all legal norms in a legal order. Democracy, in effect, was thereby reduced to
a method of legislation, the legality of which was derived from the initial histori-
cal constitution of the state through the contingent act of the first legislator.

Neither Kelsen nor Schmitt managed to fully overcome the connotations of
the absolutist paradigm of sovereignty in their work. As a result, they never quite

University Press, 2008).
23 See, for example, David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen
and Herman Heller in Weimar* (Oxford: Oxford University Press, 1997); Peter C. Cald-
well, *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory and
succeeded in making their respective accounts of the legitimacy of law compatible with democratic politics. It was therefore left to Habermas to offer, as I will argue in the final chapter of this book, a relatively successful and plausible solution to this dilemma. This he accomplished by recasting the traditional notion of sovereignty, one that presented it as the supreme extralegal power of command, in terms of autonomy and deliberative self-rule. In doing so, Habermas has demonstrated how sovereignty, especially its “radical-democratic” normative core as represented by the discursive conception of popular sovereignty in his theory, can be compatible with the idea of the complex and differentiated constitutional state, proving also useful in practical-political projects that address the malaises of contemporary democratic society. Due to its universalist and constructionist nature, the innovative discursive notion of popular sovereignty that Habermas has presented avoids the pitfalls of absolutist and substantive conceptions and has the capacity to transcend specific historical and cultural constellations.

My approach in discussing these three different theories is reconstructive and selective. The intention is not to present any systematic comparison looking at each author’s work in its totality; instead, I will focus on only those aspects of Kelsen’s, Schmitt’s, and Habermas’s writings that directly bear upon the problem of sovereignty, democracy, and constitutionalism. In analyzing their respective contributions, my purpose is to demonstrate why it is important for democratic theory to reconsider the problem of sovereignty. Sovereignty, in my analysis, forms an integral category in modern democratic thought, with major repercussions for democratic practice and politics. Following Kalyvas, I will argue that with an appropriately formulated normative concept of sovereignty, the ideal of collective autonomy, self-government, and self-determination in democracy can be revitalized, preserving a link to the creative reinvention of collective norms and the construction of new political identities. Drawing on a reconstructed notion of sovereignty, it will then be possible to consider anew the democratic principle according to which the people are the authors of the laws that govern them, and hence also to rethink the problem of the legitimation deficit plaguing contemporary politics. Even if not altogether solving the theoretical antinomies of sovereignty, then, it is my hope that this exercise will produce some elements towards a theoretical framework with which to rethink sovereignty in modern times.

To be sure, I am not alone in trying to recover the concept of sovereignty for democratic theory. Recently, there have been attempts within political theory to revitalize it, along with the doctrine of the constitution-making power as formulated in the French constitutional theory of the eighteenth century. In linking so-

vereignty to the revolutionary radical-democratic tradition, the aim of these attempts has been to introduce a new paradigm of sovereign constituent politics and to show the continued relevance of sovereignty, as both a concept and a principle, for projects of profound transformation of society, for example through the creation of a new constitution. To a large extent, this contemporary revival of the idea of constitution-making power builds on the decisionistic paradigm of Carl Schmitt and his view that the people have the capacity to determine their own political existence by giving themselves a constitution in an act unbound by any procedures or norms of some preexisting authority. What remains problematic in this view is the unresolved and continuous tension between the constitution-making power and the constitutional order that this power founds. Sovereign constituent power is located outside the constitution in some normless political state, with its nature irreducible to legally defined procedures and its exercise taking the form of an ungrounded, exceptional sovereign act.

The renewed interest in the doctrine of constitution making and constitution-making power correctly assigns an important role to constitutional politics, placing the constitution at the core of normative political theory. However, the weight this approach gives to the rare moments of the breakdown of the constitutional order devalues the level of ordinary politics, evading the challenge to locate resources for the revitalization of the daily business of politics. This is a crucial methodological issue in regard to which my approach is different. In the discussion that follows, I do not focus exclusively on exceptional moments in the life of a polity, or on revolutionary legal and political transformations. This is not because of the specter of dictatorship that has haunted all modern revolutions aiming to make a dramatic break with the past even at the cost of violence, lawlessness, and undemocratic development; the real challenge, for us today, is to identify possible sources of autonomy and emancipation in day-to-day politics and ordinary institutions. Ultimately, it is a question of not accepting the view that normal politics in our time is, and must inevitably be, paralyzed by rigid formal procedures and practices of bargaining and compromise, becoming monopolized by alienated elites, interest groups, and bureaucrats.

25 Kalyvas emphasizes the role of sovereignty qua constitution-making power during constitution making, stressing the importance of the sovereign beginning for the proper foundation and legitimacy of the ensuing democratic constitutional order. Sovereign constitution-making power is a supra-legislative power that remains an ever-present potentiality next to the constitutional order. See Andreas Kalyvas, “Popular Sovereignty, Democracy, and the Constituent Power,” Constellations 12, no. 2 (2005): 223–244.

26 See, for example, Antonio Negri, Insurgencies: Constituent Power and the Modern State (Minneapolis: University of Minnesota Press, 1999). Negri puts the antagonism between the revolutionary practice of absolute democracy and formal constitutional government at the center of his theory, with no possibility of reconciling the two.

27 See Kalyvas, Democracy and the Politics of the Extraordinary, 6.
The approach to sovereignty in this book for this reason concentrates on ordinary rather than extraordinary politics, hoping to that way yield a normative vision of normal politics more attuned to the realities of modern-day society and its political context. Normal politics does not necessarily amount to the exercise of instrumental power, strategic decision-making, and bureaucratic administration; nor does it have to always lead to depoliticization, fragmentation, low popular participation, and civic privatism. There are resources for collective political autonomy, or for the radical instituting social imaginary, to put it in Castoriadis’ terms, also in ordinary times, for instance in the deliberative processes of collective self-reflection and argumentative will-formation. Linking sovereignty to the vision of social and political autonomy is thus part of the key theoretical aspirations of this book.

A second respect in which my approach differs from most of the current exponents of the doctrine of constitution-making power—or, rather, an important conceptual specification relevant for the argument of this study—concerns the relationship between the notion of popular sovereignty and sovereignty in the original sense of the term denoting the supremacy of the state’s decision-making power and its monopoly of coercive force. In some theories of democracy, especially those that attempt to revive the notion of constitution-making power, the status and even place of popular sovereignty in the institutional design of the modern democratic state remains unclear. In this book, popular sovereignty is taken as a fundamental norm of democracy. Popular sovereignty is the principle according to which the people, broadly defined, are the ultimate source of all power; hence, they need to play a central role in the creation of the laws and institutions that govern their lives. At the same time, it needs to be stressed, popular sovereignty evokes a distinctive political relationship between the people and its government. Popular sovereignty and sovereignty in the sense of the state’s monopoly over authoritative decision-making are thus two complementary phenomena. They do not oppose each other. Although corresponding to two distinct spheres of political action, they cannot be meaningfully separated from each other; modern democracy needs both.

A brief look at the history of ideas shows that the idea of popular sovereignty developed as a critical tool to limit the absolute power of the government and its ability to impose arbitrary laws. It differentiated from the original notion of the supreme political authority of the absolutist monarch as an idea about the ultimate sources of the origin of the government and the normative purpose of the existence of the state. Its genealogy, traceable back to Rousseau, shows popular

sovereignty to have transformed from the notion of a supreme, absolute power of the sovereign ruler into the idea of the absolute power of the people. In Rousseau’s view, the power of the people, as expressed in the general will, had to be indivisible, inalienable, absolute, and unlimited. Rousseau thus merely transferred the seat of absolute sovereignty from the person of the monarch to the general will of the people as a whole. Its subject, we might say, thus changed while its form remained the same.30

However, there is also another tradition of thought, represented by the work of Locke, Kant, and the Federalists in the United States, in which popular sovereignty was never viewed as merely an issue of who the subject of sovereignty was, as a matter of transferring sovereignty from the hands of a single person to a collective body. In this tradition, the principle of popular sovereignty was enlisted to account for the normative purpose of the existence of the state and to answer the question about the origins of the authorship of law and government: the people constituted the government, but did not rule. This type of discourse about popular sovereignty is based on an implicit assumption of the essentially two-track nature of modern politics: on the one hand, there is “the people,” seen as the regulative idea of the ultimate political sovereign and the source of legitimate power, and on the other hand, there is a constitutional government necessary for protecting the institutions that channel, mediate, and proceduralize expressions of the people’s “will.”

Popular sovereignty and the government’s supreme power are thus two aspects of the same concept, distinct from one another but connected, complementary, and inseparable within the framework of the democratic constitutional state. The concept of sovereignty, including the idea of popular sovereignty, as the principle that furnishes us with the source of legitimacy for the supreme decision-making political power and stands behind the capacity of this public authority to make binding decisions, thus has an irreducibly dualistic character that continues to stamp modern liberal democracy. Treating popular sovereignty as a separate and self-sufficient principle seems thus not possible; given the ongoing processes differentiation and systemic integration in modern complex societies, it cannot exist separately from its context within the state as if it were directly juxtaposed and even opposed to it. Accounts of popular sovereignty that fail to acknowledge this two-track character of politics remain thus questionable from both sociological and normative standpoints. The question arises, then: how to understand and conceptualize the relationship between the two aspects of sovereignty and secure a proper mechanism for preserving the supreme power of the people while channeling it into a legitimate administrative activity? The final

chapter of this book will consider the extent to which Habermas’ model of sovereignty in a democratic state may succeed in providing answers to this question.