

Political Theory

<http://ptx.sagepub.com>

The Legitimacy of the People
Sofia Näsström
Political Theory 2007; 35; 624
DOI: 10.1177/0090591707304951

The online version of this article can be found at:
<http://ptx.sagepub.com/cgi/content/abstract/35/5/624>

Published by:
 SAGE Publications
<http://www.sagepublications.com>

Additional services and information for *Political Theory* can be found at:

Email Alerts: <http://ptx.sagepub.com/cgi/alerts>

Subscriptions: <http://ptx.sagepub.com/subscriptions>

Reprints: <http://www.sagepub.com/journalsReprints.nav>

Permissions: <http://www.sagepub.com/journalsPermissions.nav>

Citations (this article cites 14 articles hosted on the SAGE Journals Online and HighWire Press platforms):
<http://ptx.sagepub.com/cgi/content/refs/35/5/624>

The Legitimacy of the People

Sofia Näsström

Stockholm University, Sweden

In political theory it goes without saying that the constitution of government raises a claim for legitimacy. With the constitution of the people, however, it is different. It is often dismissed as a historical question. The conviction is that since the people cannot decide on its own composition the boundaries of democracy must be determined by other factors, such as the contingent forces of history. This article critically assesses this view. It argues that like the constitution of government, the constitution of the people raises a claim for legitimacy. The failure to see this is what makes many theorists run into the arms of history. They submit the legitimacy of the people to the arbitrary and asymmetrical forces of the present.

Keywords: *legitimacy; the people; consent; contingency; constitution*

Legitimacy is today intrinsically bound up with the constitution of government. The prevailing idea of legitimacy is that government must rest on the consent of the governed.¹ But what about the people? Does it make sense to speak of the legitimacy of the people?

Few political theorists question the importance of the people as a legitimizing force in politics. The people has in its power to confer legitimacy upon governments, parties and policies, a fact which makes it one of the more used and abused concepts in the history of politics. To speak "in the name of the people" is to speak the language of power. It can be employed for a variety of purposes, as a bolster for kingship, as a justification for the resistance against the king or, as the case is today, as a call for both cosmopolitans and nationalists to reclaim power to the people in the face of globalization.² But drawing attention to the people as a source of legitimacy is one thing, and

Author's Note: Earlier versions of this article have been presented at the Stockholm seminar in political theory and at the workshop "Power, Legitimacy and the Political" at the Third Annual Conference in Political Theory in Manchester. I would like to thank the participants of both groups for valuable comments, in particular Benjamin Ardit, Andreas Gottardis, Noel O'Sullivan, and Alexandra Segerberg. I would also like to express my gratitude to Margaret Canovan, the editor Mary G. Dietz, and two anonymous reviewers for many helpful suggestions in the final completion of the article. The article was made possible through a research grant from the Swedish Research Council.

asking for its *own* legitimacy another. Interestingly enough, this latter question has received little attention in political theory. “How to decide who legitimately make up ‘the people,’” writes Robert Dahl, “is a problem almost totally neglected by all the great political philosophers who write about democracy.”³

Globalization has not done much to change this condition. Despite increasing talk of boundaries, borders and peoplehood, the attempt to confer legitimacy upon the people remains a rarity in political theory. The constitution of the people is typically brought up as a question of identity—does it need to be thick or thin in order for democracy to work?—whereas its legitimacy remains unexplored.⁴ If one listens to many liberal and deliberative theorists of legitimacy, including Robert Dahl himself but also Jürgen Habermas, Frederick G. Whelan, Seyla Benhabib and Rogers M. Smith, there is a good reason for this. The constitution of the people, they argue, escapes the hold of both human rights and democracy. For while human rights may be valuable in protecting the interests of citizens, they have little to say on the boundaries of the citizenry itself. “Human rights,” as Smith puts it, “transcend boundaries; they do not define them.”⁵ With democracy, the problem is reversed. The fact is, writes Whelan, that boundaries comprise a problem “that is insoluble within the framework of democratic theory.” The persons who are supposed to confer legitimacy upon the people are trapped in an infinite circle of self-definition. They cannot themselves decide on their own composition.⁶

In an effort to alleviate the significance of this gap, these theorists adopt a strategy of exclusion. They draw a Maginot line between history, on the one hand, and legitimacy, on the other. The aim is to demonstrate that the initial question is misconstrued and that there is no such thing as a “legitimate” people. Who gets to be included in the people is not a democratic but a historical question. It results from the contingent forces of history. In discussing the people we have no choice but to assume the position of the historian:

Since the voluntariness of the decision to engage in a law-giving praxis is a fiction of the contractualist tradition, in the real world who gains the power to define the boundaries of a political community is settled by historical chance and the actual course of events—normally, by the arbitrary outcomes of wars and civil wars.⁷

To see the implications of this argument it might be useful to make a brief comparison. Imagine that someone were to make the same argument, only this time we substitute the constitution of the people with the constitution

of government. The notion of a legitimate government, we are told, is a fiction of the social contract tradition. Who gets to rule in society is not a democratic question. It is determined by the actual course of events, by the arbitrary forces of power, contest or civil war. Now, governments are not ideal constructions. They are seldom as legitimate as we would wish them to be. But to argue that there is no such *claim* to be made—to say that we must give up the notion of a legitimate government and accept that governments are shaped by historical forces—is a thought that most of us probably would find odd, if not undemocratic. It reminds us of the early conservative critique of the social contract tradition.⁸ And yet, this is precisely what many liberal and deliberative theorists ask us to accept in the case of the people. Why is that? What makes the constitution of the people different from the constitution of government? Why is the latter a question of legitimacy, and the former not?

The purpose of this article is to critically assess the rationale behind the Maginot line. Like the constitution of government, the constitution of the people raises a claim for legitimacy. The difficulty to see this has to do with how one understands the gap in the constitution of the people. What many liberal and deliberative theorists have in common is that they interpret the gap as a problem, a fact which prompts the resignation to history. Since it is impossible to arrive at a self-constituted people, defending democracy for these theorists becomes tantamount to defending the line between history and legitimacy.

As I shall argue, however, this interpretation overlooks its democratic significance. Teasing out the normative underpinnings of consent within the early social contract tradition, this article demonstrates that the impossibility of the people to account for its own constitution forms part of the theory of legitimacy. The criteria of legitimacy do not add up into a coherent whole. They contain a gap, or what Claude Lefort refers to as “the dissolution of the markers of certainty”—a moment of contingency that guarantees the continuation of the democratic project.⁹ Contrary to what is assumed by many liberal and deliberative theorists of legitimacy, the gap in the constitution of the people is therefore not a problem. It is *productive*, a generative device that helps to foster ever new claims for legitimacy. The failure to see this is what makes them run into the arms of history. They surrender the claim of a legitimate people to the contingent and often violent forces of history.

This article is not alone in its attempt to make the people into a question of legitimacy. Margaret Canovan, Bonnie Honig, Alan Keenan, and Chantal Mouffe belong to those who in recent years have called attention to the

paradox of founding a legitimate people.¹⁰ Although they associate the paradox with different theoretical sources—with republicanism or with the tension between liberalism and democracy—they often converge in their critique of liberal and deliberative democracy. They call for a politics of contestation, stressing that the search for consent undermines the contingent, productive, and above all political nature of the people.¹¹ The present article takes side with these theorists in seeing the impossibility of closure as a constitutive element of legitimacy. However, it differs in that it traces this element right to the centre of modern consent theory itself. As I shall argue, it is precisely because we *adhere* to the principle of consent that the disagreement on the constitution of the people has productive force.

The article begins with an examination of the Maginot line. What is the rationale behind this exclusionary strategy? It then situates the constitution of the people within the early social contract tradition and its idea of legitimacy based on consent. It shows that this familiar tradition can be interpreted to hold two different frameworks of legitimacy—one concerned with government and the other with the people—and that both carry a logic of democratic contingency at their heart. The third and final part takes this insight as an occasion to revisit the strategy of the Maginot line and invite some critical questions. For if both government and people raise a claim of legitimacy, what could it mean to exempt the latter from the realm of legitimacy? It ends by delineating the difference between democratic and historical contingency and how it plays out in current debates on globalization and migration.

The Maginot Line

In recent years, the constitution of the people has moved into the centre of political theoretical concerns. Globalization has sparked off a debate on the scope of democracy, and the growing number of migrants and refugees in the world has induced many theorists to reflect on criteria of political membership. At stake are the proper boundaries of the people, how they may be transformed, negotiated, or extended in the face of globalization and migration.¹² Still, few political theorists have moved beyond this discussion to elaborate on the idea of a legitimate people. What reasons are there for excluding the people from the demands of legitimacy?

In the literature, two arguments stand out as particularly influential, and both are sourced in the idea of consent. According to the first argument,

conceding legitimacy to the people is a practical impossibility. The notion of a voluntary association of free and equal individuals is first and foremost a political ideal, and should not be taken literally.¹³ In practice, no society is founded on the consent of individuals. Unanimous consent is impossible to achieve, and in the case in which it is not, something must in fact have gone wrong. For as long as individuals are free and equal they are likely to disagree on the proper definition of the people. They are expected to have conflicting views on the boundaries of society. This is why many theorists—implicitly or explicitly—refrain from submitting the boundaries of the people to the demands of legitimacy. It demands *too much*. With unanimous consent as requirement no society can be legitimate, a conclusion that only plays into the hands of those who prefer anarchy to statehood.¹⁴ The best one can do is to assume the existence of a people, and from there on proceed with the discussion of legitimacy.

John Rawls is probably most explicit on this point. In *A Theory of Justice*, and even more accentuated in later books, is the conviction that one must bracket questions concerning the foundation of society. Since no society is a “cooperation which men enter voluntarily in a literal sense,” political philosophy is bound to take the existence of society for granted. It must assume a “closed society,” one that individuals enter by birth and leave by death.¹⁵ In *The Law of Peoples*, Rawls goes further and defends this assumption with reference to political stability. He contends that each society must exercise “self-respect of themselves as a people,” and that migration in the end runs the risk of undermining this common culture.¹⁶ Like Michael Walzer, he does not think that voluntariness of membership is a goal worth striving for. It is better to perfect justice within existing societies, so that fewer people would like to leave their homes in the first place. For “to tear down the walls of the state is not . . . to create a world without walls, but rather to create a thousand petty fortresses.”¹⁷

The stance that one can omit boundary questions from the realm of legitimacy has prompted much criticism.¹⁸ To Rogers M. Smith, the assumption of a closed society is not, as Rawls would have it, pure abstraction. It reproduces the old doctrine that demands allegiance to society at birth. For “[t]he more we stress that people do not have real, practical choices to do other than embrace their inherited memberships, the more we undermine the claim that their membership rests on anything like true consent.” So while unanimous consent may be impossible to achieve in practice, this is not a reason for excluding the boundaries of the people from the demands of legitimacy. Quite the opposite: “if we want to defend that basis for legitimacy,”

Smith writes, we should try “to make membership by choice more a reality.”¹⁹ In a similar vein, Seyla Benhabib argues that everyone in society should be entitled to “voluntary self-ascription,” to decide whether or not to accept continuing membership in their communities of origin. In case they decide to opt out, they should have the right of exit and entry, or else the idea of voluntary self-ascription would be vain.²⁰

Smith and Benhabib are both critical to Rawls’s assumption of a closed society. At the same time, neither suggests that the people should be regarded as a voluntary association. They both stress that while it is wrong to assume a closed society, it is equally mistaken to opt for open borders. According to Smith, the instability that would result from such unrestricted flows of migration would make it difficult for any democracy to “fulfil its responsibilities toward its ongoing members, much less to outsiders.” What is required is instead a recognition of the fact that peoplehood always is born out of a combination of coercive force and persuasive storytelling.²¹ Benhabib defends what she calls “porous” as opposed to open borders, arguing that any wider admittance would be incompatible with the idea of democratic citizenship. It is “the prerogative” of democratic peoples to control the criteria of membership, always bearing in mind, though, that this right of the people to care for its own welfare is conditioned by the rights of others.²²

So far we have considered a practical objection to the legitimacy of the people. Rawls, Smith, and Benhabib all put a high value on the principle of consent. Still, and although they interpret the criteria of membership differently, no one is prepared to open up the people to a claim of legitimacy. Since unanimous consent is impossible to mobilize—no society is founded on voluntary agreement—they think it more prudent to leave the claims of legitimacy aside and presuppose the existence of a circumscribed people. In that way, it is possible to forestall difficult questions about the foundation of society, questions that in the end may come to backfire against democracy itself. Let us imagine, however, that one was to issue a vote on the proper constitution of the people. Not only does everyone turn up, but there is also in fact unanimous consent among the individuals. Would this be legitimate?

This brings us to the second argument against the legitimacy of the people. If we listen to many contemporary theorists of legitimacy, the notion of a legitimate people is not only a practical but also a logical impossibility. In order for the people to be a voluntary association, it is required that everyone consents to its construction. But whose consent is necessary?

On closer inspection, it turns out that the vote on the proper constitution of the people is caught in a vicious circle. The vote does not concede legitimacy to the people. It presupposes it. It indirectly takes for granted what it sets out to decide, namely, who properly belongs to the people.²³

Jean-Jacques Rousseau is among the first to acknowledge this gap in the theory of legitimacy. As he points out, the constitution of society depends on a prior authority that could not itself have been appropriately legitimated. In order for the people to be legitimate,

[T]he effect would have to become the cause, the social spirit which is to be the work of the institution would have to preside over the institution itself, and men would have to be prior to laws what they ought to become by means of them.²⁴

Many liberal and deliberative theorists call attention to the same problem.²⁵ According to Frederick Whelan, democratic self-governance “cannot be brought to bear on the logically prior matter of the constitution of the group itself, the existence of which it presupposes.”²⁶ In a similar vein, Jürgen Habermas notes that a “constitutional assembly cannot itself vouch for the legitimacy of the rules according to which it was constituted.”²⁷

Two features of this second argument need to be underscored. To begin with, it is more commanding than the former. If the first argument uses practical circumstances against the legitimacy of the people, this argument seeks to convince by means of logical reasoning. The constitution of the people is neglected, not because it is thought to be impracticable, but because it refuses political theorization. We do not choose to neglect the legitimacy of the people; we are *compelled* to do so. The reason is that the people is unable to consent to its own constitution. Furthermore, and accordingly, it raises a more serious challenge to the idea of consent as a normative principle of legitimacy. When political scholars reject the legitimacy of the people with reference to its practical impossibility, they still remain dedicated to the idea of consent. Although the facts of reality force them to accept nonvoluntary standards of association, they never doubt the desirability of consent itself. Unanimous consent, while impossible to achieve in practice, still forms the rationale behind their search for legitimacy. The conviction is that the more voluntary the association, the better. In this latter case, however, it is different. The problem is that even an ideal situation of unanimous consent cannot do away with the gap in the constitution of the people. The notion of a people consenting to itself is self-refuting. It is impossible, not only in a practical but in a theoretical sense as well.

The Turn to Historical Contingency

The second argument seemingly offers a strong case against a theorization of the people in terms of legitimacy. If the people cannot consent to its own constitution, why insist that it should? Better then to release the people from the demands of legitimacy to begin with. What complicates matters, though, is that the same argument that forces these theorists to exempt the people from the realm of legitimacy also can be used as a buttress for authoritarian government. As Robert Dahl notes, critics of democracy often prefer to focus on problems that “advocates of democracy tend to neglect, or worse, conceal.”²⁸ Indeed, the most cunning criticism lies in paying more homage to democracy than democracy itself—to be concerned with precisely those problems to which no solutions seem to exist. A brief glance at history reveals that the gap in the constitution of the people has been well exploited by adversaries of popular rule.

According to Edmund Burke, the idea of a voluntary association of free and equal individuals is a fiction of social contract theory. The people are not free to write their own history. They are the unwilling products of history, subordinated to an authority they have not chosen themselves. Society does indeed stem from a contract, but this is a superior historical partnership, and “as the ends of such a partnership cannot be obtained in many generations” it binds subsequent generations.²⁹ Nearly two centuries later, Carl Schmitt calls attention to the same problem. Democracy, he writes, requires “identification between governed and governing.” But since such identification builds on a prior demarcation, “a distance” always remains between the equality of the people and the results of their identification. When it comes down to it, therefore, “everything depends on how the will of the people is formed,” that is to say, on the decision of the one who is sovereign.³⁰

How is one to avoid such a reading? How does one prevent the involuntariness at the foundation of society from turning into a pretext for authoritarian rule? This is the point where many liberal and deliberative theorists adopt the strategy of the Maginot line. Rather than admitting the gap in the constitution of the people, they externalize it. The argument consists in taking the impossibility of constitution-making to its logical consequence. If the people *cannot* decide on its own composition, it *cannot* be part of a theory of legitimacy. It must be guided by factors independent of the theory of legitimacy, such as the contingent forces of history.

This argument takes on different shapes, depending on the theoretical outlook of the author. The most common view is to think of the constitution

of the people as the outcome of a historical agreement. Rawls, for one, embraces this view. As he tells us, “[N]ot every generation is called upon . . . to give itself a new and just constitution.” Whether they can do so depends on historical factors: “that the founders of 1787-91 could be the founders was not determined solely by them but by the course of history up until that time.” We must realize, therefore, that “those already living in a just constitutional regime cannot found a just constitution, but they can fully reflect on it, endorse it, and so freely execute it in all ways necessary.”³¹ In this same spirit, Thomas Nagel turns to the current condition of globalization, only to interpret it as a historical struggle for power. Seeing no real chance of legitimate foundation in the present, he concludes that the path to legitimacy runs through illegitimacy. A lesson, he writes, of “the cunning of history.”³²

Another and more dynamic version contends that the people is the outcome of a retroactive process of legitimacy. For Jürgen Habermas, the constitution of society is not voluntary, but determined by historical chance. In the course of time, however, democracy “catches up” with history. It retroactively transforms society into a legitimate and constitutional democracy. A constitution that is democratic—“not just in its content but also according to its source of legitimation—is a tradition-building project with a clearly marked beginning in time.” The circular self-constitution at the foundation of society expresses “the future-oriented character, or openness, of the democratic constitution.” It means that “all the later generations have the task of actualizing the still untapped normative substance of the system of rights laid down in the original document of the constitution.”³³

Like Habermas, Benhabib argues that the constitution of the people rests on “unexamined prejudices, ancient battles, historical injustices, and sheer administrative fiat.” In this, she argues, Carl Schmitt is right.³⁴ Still, through “democratic iterations” it becomes possible for an already existing people to reconstitute itself on a daily basis by negotiating the relationship between popular sovereignty, on the one hand, and human rights, on the other.³⁵ From a more narrative perspective, Smith contends that since appeal to democratic processes “cannot by itself answer the question of who should get to participate in those processes,” the question must be provided by means “beyond those that democratic theories generate,” that is to say, by “historical ethically constitutive stories” of peoplehood.³⁶

By drawing a Maginot line between history and legitimacy, these theorists paradoxically join the conservative critique of consent theory. In the absence of what they see as a legitimate resolution to the constitution of the people, they too dismiss voluntariness as a fiction, albeit for diametrically

opposed reasons. If Burke and Schmitt explore the problem of founding for authoritarian purposes—they want to restore what they regard as the historically tried wisdoms of the past and the power of the sovereign—contemporary theorists of legitimacy seek to alleviate the *significance* of the gap by excluding it from the realm of legitimacy altogether. They try to cut off the theory of legitimacy at its root. How the people is established, they want to argue, is one thing, and how it proceeds after that another. Legitimacy starts off where history leaves off. Frederick Whelan thus captures a widely shared view—both among advocates and critics of legitimacy—when he remarks that the constitution of the people “is insoluble within the framework of democratic theory, and it may be that democracy is practicable only when a historically given solution of this issue (justifiable or not, by some theory other than democratic theory) is acceptable.”³⁷

The attempt to write off the constitution of the people as historically contingent is compelling, but not entirely convincing. It gives rise to contradictory intuitions. On the one hand, it should be admitted that the argument taps into strong intuitions about how peoples are formed. To see this we need only compare the arguments brought into play in the constitution of the people with those in the constitution of government. If we were to ask citizens of modern democracies how their governments are constituted, they would almost certainly refer to a principle: the principle of consent (majority rule). They would insist that as long as they are free and equal, they should have a democratic say in the constitution of government. If we were to ask them about the constitution of the people, however, they would probably refer to a past war, revolution, or agreement. Constitution-making would in this way be associated with a fact of history, and not, as in the case of government, with a claim for legitimacy.

On the other hand, the reference to history does not seem to make the demands for legitimacy fade away, and particularly not today. For why should we accept the community in which we live simply because we were born into it? What if I think that the present boundaries of the people privilege some individuals at the expense of others? Am I not then, as a free and equal individual, entitled to ask for its legitimacy? The drawing of the Maginot line notwithstanding, the constitution of the people continues to trouble the democratic mind. In the words of Bernard Yack,

Resignation to the contingencies of history does not at all fit with the rhetoric of popular sovereignty. Yet, in effect, that is what many liberal democratic theorists seem to demand from peoples uncomfortable with the shape of their communities: that they should accept whatever potential injustices history

has served up to them with the boundaries of states so that we can all get on with the task of establishing liberal democratic forms of government. That this advice almost invariably comes from people who are quite comfortable and unexposed within the given boundaries of states, people who, in effect, are happy with the partners they were given when the music stopped playing at the dance of history, makes it harder to accept than it would otherwise be.³⁸

What do we make of these different intuitions in the constitution of the people? One way to address the problem is to take a closer look at the theoretical underpinnings behind the claim for legitimacy. Doing so will reveal that what many liberal and deliberative theorists of legitimacy describe as a problem in the constitution of the people, and what prompts them to turn to history, in fact is an integral part of legitimacy itself.

Criteria of Legitimacy

In its most familiar version, the quest for legitimacy goes back to the early social contract tradition. In the sixteenth and seventeenth centuries, many theorists were concerned with developing new principles for the understanding of society. The aim was to separate the rule of society from both the sacred authority of God and its representative on earth, the king. The state of nature was an important device in this break from the theological-political logic. By commencing from a state of nature it was possible to hold a place between past and future, to circumvent the authority of the existing regime and to begin anew. The argument being made is that since individuals are free and equal by nature, society can no longer be regarded as a natural or divine state of affairs. It is a human artifice, and as such, it raises a claim for legitimacy.

Thomas Hobbes, John Locke, and Rousseau belong to the most vigorous defenders of this view. What they have in common—and what merits us to treat them as a distinct group of thinkers—is that they establish the conditions of society by means of a social contract.³⁹ According to this idea, the individuals in the state of nature do not form a body of people who *then* contracts with a government. The contention is that individuals agree with each other—“everyone with everyone”—to set up a common and legitimate government.⁴⁰ This assumption is worth emphasizing. It implies that individuals cannot agree with a stranger to draw up the terms of society. Nor can they enter into a contract with an already existent government (since there is no body of people capable of undertaking such a task). Government can only

be constituted out of the contracting individuals themselves. As Rousseau puts it, “[O]nly those who are associating may regulate the conditions of the society.”⁴¹

In the following section I shall undertake a rereading of this argument. The aim is to show, firstly, that the move into society could be taken to hold not one but *two* different frameworks of legitimacy: one addressing the constitution of the people, and the other the constitution of government. If the framework associated with government has been at the centre of the modern consent tradition—indeed, it often provides the standard criteria of legitimacy—the framework associated with the people has been largely unexplored. It has remained veiled under assumptions of a given people.⁴² Moreover, it will be argued that each framework carries a fundamental gap at its core, a moment of contingency without which there would be no claim of legitimacy in the first place. This moment stages legitimacy in such a way that it becomes “impossible to occupy,” and thereby engenders a process of questioning in society.⁴³

Let us begin with the most familiar version, the one pertaining to government. In the literature on consent, it is common to distinguish between three steps in the constitution of a legitimate government: the postulation of a state of nature, the criteria of legitimate government, and the specific form of government corresponding to these criteria. Our attention will be on the second stage, or more precisely, on the *terms* of this move from the boundless state of nature to the constitution of government. Under what conditions would individuals be willing to concede legitimacy to government?⁴⁴ To answer this question we will make some necessary simplifications that, while associated with the contested idea of a natural state of mankind, still have a strong bearing on the contemporary discussion on legitimacy.

First of all, we will assume that individuals are free and equal. It does not matter to our argument if freedom and equality is guaranteed by God, natural law, or mutual recognition. It suffices to say that in order for government to be legitimate, we must be prepared to accord it “a right that we otherwise reserve to ourselves, the right to conduct our own lives and affairs as each of us deems appropriate.”⁴⁵ Secondly, we will presume that there is a diversity of conceptions of the good. Individuals disagree on ends and purposes, which in turn explains the quest for government. Thirdly, we will assume that individuals are characterized by both self-preservation and reason. The fourth assumption, finally, concerns the state of nature itself. By postulating a state of nature, we take it for granted that government is constituted solely by the individuals who go together to form a common society.

How then does one construct a legitimate government out of a multitude of free and equal, and thereby also conflicting, wills and desires? This question gives rise to what I shall refer to as the *government framework* of legitimacy. The claim is that in order for government to be legitimate, political authority must be *above* the citizens and *identical* with the citizens at the same time: on the one hand, the disagreement between individuals calls for an authority situated over and above the citizens themselves. In order to avoid a war of all against all, or in Locke's terms, to avoid disagreement in the interpretation of natural law, one needs an authority powerful and neutral enough to settle disputes among its members. The authority must be able to intervene in conflicts without itself taking part in it. Or else, its legitimacy is compromised and society reverts into anarchy. On the other hand, one cannot appeal to any higher authority than the citizens themselves. If individuals agree to establish a common government—everyone with everyone at the same time—this authority cannot be separate from the individuals who are subject to it. It must be identical with the contracting individuals themselves, or else it undermines their freedom and equality.

On this reading, the constitution of a legitimate government is an impossible enterprise. The criteria do not match. It would, as Rousseau remarks, "require gods to give men laws."⁴⁶ Still, or rather because of this, few theorists deem this a good reason for renouncing the claim for legitimacy. The fact is that legitimacy is contingent on this gap. For without holding on to *both* criteria—without a gap—there would be no legitimate government. It means either that individuals resort to a higher authority (in line with Burke and Schmitt) or that they are able to live together without a government, a fact which makes the claims for legitimacy redundant (in line with anarchism). The gap is therefore indispensable to the constitution of a legitimate government. It specifies the terms within which the question of legitimacy is posited.

In *Leviathan*, to take a powerful example, Hobbes is at pains to demonstrate that the generation of the Commonwealth meets the above criteria. He seeks to show that while the artificial person of Leviathan possesses an absolute authority over its subjects—it defends them from the harm of one another—it still remains one with its subjects. The reason is that all individuals simultaneously authorize "one man or assembly of men to bear their person."⁴⁷ So while Leviathan is placed above the contracting individuals, this does not compromise their freedom and equality. The individuals are themselves the authors of everything that Leviathan says or does. He is "the real unity of them all in the same person." In obeying Leviathan, Hobbes claims, individuals obey their *own* will.⁴⁸

This reading of legitimacy has not gone unchallenged. By arguing that individuals authorize one person to represent them all, Hobbes places Leviathan outside of the contract between individuals. He does not himself enter into any agreement. To Locke, this proposal is deficient. One cannot exempt one person from the social contract, for it means that this person stays in the state of nature, and who would dare to trust someone who remains judge in his own case?⁴⁹ This insight leads Locke onto a different path in the constitution of a legitimate government. Rather than equating government with the representative person of Leviathan, he seeks to establish a legitimate government by means of a move from unanimous to majority consent. The contention is that by agreeing with each other in the state of nature, we *simultaneously* agree to the will of the majority. For

every Man, by consenting with others to make one Body Politick under one Government, puts himself under an Obligation to every one of that Society, to submit to the determination of the *majority*, and to be concluded by it; or else this *original Compact* . . . would signify nothing, and be no Compact, if he be left free, and under no other ties, than he was before in the State of Nature.⁵⁰

But if no one can be subjected to the political power of another without his own consent, how can the majority speak for all?⁵¹ “The great problem of politics,” Rousseau writes, “[is] to find a form of Government that might place the law above man.”⁵² In contrast to his predecessors, however, he refuses to put authority in the hands of a representative or a majority. It would go against his assumption that everyone who enters society should “remain as free as before” in doing so. At the same time, Rousseau is not prepared to make authority identical with the individuals themselves. For “how will a blind multitude, which often does not know what it wills . . . carry out an undertaking as great, as difficult as a system of legislation.”⁵³ His answer to the problem is to distinguish between the will of all and the general will. For while the former may get it wrong—it falls prey to self-interest—the general will is never mistaken. It “is always upright and always tends to the public utility.”⁵⁴

What Hobbes, Locke, and Rousseau have in common is that they seek to find a device—the representative person of Leviathan, the principle of majority rule and the general will—by which to make political authority at once above and identical with the contracting individuals. The relative merits of their proposed solutions are not what concern us here. The attention is on the terms of the discussion, the fact that neither proposition is able to

square the circle of authority. The gap in the constitution of government indicates that the quest for consent is not merely hypothetical (something that we *would* agree to) or real (something that we *do* agree to), but also has productive and creative force. In each case, it prompts us to search for new answers as to what constitutes a legitimate government, and in this manner opens up society to the unforeseen and unpredictable. We keep asking for its legitimacy.⁵⁵

The Constitution of the People

Still, if the criteria associated with the government framework provoke new answers as to what constitutes a legitimate government they seem to be of little assistance in the constitution of a *legitimate people*. Today we are not only attuned to theorizing the characteristics of a legitimate government. We also discuss the proper constitution of the people, whether it should be conceived of in local, national, regional or cosmopolitan terms. We debate questions of migration, national self-determination, and the need for a so-called all-affected principle to tell us who the legitimate people are.⁵⁶ In this respect, we are not only concerned with how individuals can create a common government. We are also troubled with the composition of these individuals themselves. Who are the persons who, in agreeing with each other, establish a common government? Why this “multitude” of individuals, rather than another? Indeed, if the establishment of society requires the agreement of individuals, why does it not require the agreement of the whole world?⁵⁷

What is worth noting is that while both Hobbes and Locke provide detailed answers as to why individuals unite in the state of nature, they do not make the unity itself into a question of legitimacy. This is why Hobbes can proceed directly from postulating a state of nature, which knows of no boundaries, to the idea of a particular multitude without worrying much about the demarcation of one such multitude from another. His prime concern is to show how a multitude of free and equal individuals can authorize Leviathan to present their person. Who legitimately constitutes *the multitude* is not part of his investigation. The multitude’s composition is taken to be dependent on other factors. As he tells us, “[T]he multitude sufficient to confide in for our security” is not determined by consent, but “by comparison with the enemy we fear.”⁵⁸ By this argument, he clearly anticipates the work of Carl Schmitt, who often is charged for making the identity of the people (we) dependent on the powers of the enemy (they).⁵⁹

The same goes for Locke, though his understanding is different from that of Hobbes. The composition of individuals who agree with each other in the boundless state of nature is here derived, not from the enemy that we fear, but from the fact of agreement itself. To unite into a community, Locke writes, “any number of Men may do, because it injures not the Freedom of the rest: they are left as they were in the liberty of the State of Nature.”⁶⁰ The point he makes—and here he anticipates another theorist of great influence, Robert Nozick—is that since individuals are free to enter or not enter into society, the persons dissenting are self-excluded. They disagree from the very start, which means that they form part of a *different* community. The problem of constitution-making thereby resolves itself spontaneously, since everyone who enters society does so voluntarily, as a free and equal individual.⁶¹ But while this is a clever way of addressing the boundary question, it does not provide us with an answer as to what makes it legitimate. The composition of individuals who unite into society is one thing, and legitimacy another.⁶²

Placed in its historical-political context, Hobbes’s and Locke’s inattention to the legitimacy of the people should perhaps come as no surprise. In the sixteenth and seventeenth centuries, the prime concern was how to replace the divine right of the king with a government based on individual consent.⁶³ Our contemporary world, however, is one of boundaries and boundlessness, of growing interdependency and movement. The proposition that individuals can begin a new community without injuring “the Freedom of the rest” therefore looks anachronistic at best. The setting up of a new community, or decisions regarding exit and entry, is a matter that today calls forth intense debate and negotiation. This suggests that contemporary theorists face a different challenge compared with Hobbes and Locke. The question is not so much how to find a new legitimacy for the existing regime, but how to replace the existing regime with a new one. At issue is the legitimacy not of government but of the people itself. Nevertheless, and as we have seen in this article, the language of legitimacy remains essentially the same. Like their predecessors, many liberal and deliberative theorists exempt the people from the demands of legitimacy. The notion that legitimacy is about government, it seems, has become an article of political faith.⁶⁴

But legitimacy is not necessarily predetermined for government. An interesting and much discussed anomaly in this respect is Rousseau. Rousseau is explicitly concerned with the problem of foundation, the fact, as he writes, that “men would have to be prior to laws what they ought to become by means of them.”⁶⁵ His proposed solution to this problem in the form of a Legislator has spurred much discussion among contemporary

critics of the modern consent tradition, not because it succeeds in filling the gap, but because it fails in doing so.⁶⁶ As William Connolly argues, the reference to the Legislator both conceals and reveals the original violence that lies behind the working of a general will, and in this respect it makes us aware of the paradox of politics.⁶⁷ Alan Keenan and Bonnie Honig take the argument one step further by making the paradox into a constitutive element of legitimacy. According to Keenan, the gap indicates that we “must abandon any hope of solving the problem of uncertain democratic legitimacy.” Since the work of refounding a people is “never ending” we should instead try to develop forms of civic virtue that are responsive to this moment of contingency.⁶⁸ To Honig, Rousseau’s many attempts to get around the paradox of politics are expressive of a chicken-and-egg problem intrinsic to law itself. In each case, she writes, “the problem exceeds the proposed solution.” As citizens we are always in the midst of a struggle of which comes first: “good people or good law?” The paradox identified by Rousseau is therefore not a problem of foundation, but it “recurs daily in democratic regimes.”⁶⁹

Rousseau is often acknowledged as a republican thinker, someone who deviates from the modern tradition in that he puts more emphasis on inequality, on the role of law and of citizen participation, a fact which in turn could explain his concern with the people. But how much of an exception is Rousseau? By paying attention to the theoretical underpinnings behind the quest for consent it is possible to see that while Rousseau is an anomaly, he is only partly so. For while he differs from other theorists within the social contract tradition in being attentive to the foundation of a legitimate people, he still addresses it by means of the normative assumptions within that tradition. He relies on their force. To see this, we should retrace the central elements of the gap identified by Rousseau. Let us assume—again in line with the social contract tradition—that individuals are free and equal. They are self-preserving creatures, always looking out for their own well-being. Moreover, while they disagree on the conception of the good they are rational enough to see that each stands to gain from entering into society. They have reached the condition when man, as Rousseau puts it, “consult[s] his reason before listening to his inclinations.”⁷⁰

Imagine, however, that the claim of legitimacy has changed. The question no longer concerns the constitution of government. It concerns a prior, and for our contemporary circumstances most significant, issue: the constitution of the people. The problem is that individuals disagree on the proper understanding of the people. According to some, humanity is the correct political unit. The people must include all individuals in a cosmopolitan political

community. According to others, membership is a question of qualification. It builds on certain criteria, such as the national, cultural, economic, or social status of individuals. The problem is how to resolve this conflict. How does one construct a legitimate people out of a plurality of conflicting wills and desires? Recall that the people must be constituted by the contracting individuals themselves. Disagreement between individuals must be tamed, yet not to the detriment of freedom and equality itself. Under what conditions would individuals be willing to concede legitimacy to the people?

By posing the question in this way we are able to discern a central yet often overlooked framework of legitimacy within the modern consent tradition. I shall refer to it as the *people framework* of legitimacy, and it elucidates the elements of the gap identified by Rousseau. The claim is that in order for the people to be legitimate, political authority must be *prior* to the citizens and *simultaneous* with the citizens at the same time: on the one hand, the disagreement on the appropriate constitution of the people calls for an authority prior to the citizens themselves. In order to avoid conflicting claims in the interpretation of the people, one needs an authority that is powerful and freestanding enough to induce a plurality of individuals to go together and form a common people. Or else, its legitimacy is compromised and society reverts into anarchy. On the other hand, this authority cannot precede the individuals who join the people. In order to be legitimate, the authority in question must be simultaneous with the citizens themselves. All individuals must agree—every one with every one—to constitute a common people. If they have not had the chance of doing so, they are no longer free and equal. They are assimilated into a people they have not themselves consented to.

This framework cuts against strong intuitions about legitimacy. In the next section, we shall discuss the significance of the criteria in greater detail. For now it suffices to note that the framework displaces the conventional terms of legitimacy in two senses. Notice, first, that it challenges the widespread idea of the people as a source of legitimacy. In discussing political membership, Rawls, Walzer, Benhabib, and Smith assume the existence of a circumscribed people. The contention is that first we have the people, and then we have legitimacy. The former is the basis of the latter.⁷¹ By shifting focus to the above framework of legitimacy, however, the role of the people changes. The people is no longer the source, but the *object*, of legitimacy. We cannot first stipulate who the people are only then to go on doing democratic politics as usual. Rather, people-making is what legitimacy is all about. It raises a continual quest for legitimacy. The criteria of legitimacy are such construed that they cannot be fulfilled. We have always to begin again.⁷²

Furthermore, and accordingly, this framework challenges the historical reading of the people. Among contemporary theorists, it is common to interpret the constitution of the people as a historical event. Rawls, Nagel, and Habermas, among others, think of the constitution of the people as a fact of history, something we can refer back to, reflect upon, endorse, or reject. If one conceives of the people in this way, that is, as originating at a specific point in time, a legitimacy gap soon arises between the individuals who found the people and those who live within it. The reason is that the composition of the people changes whenever a new person is born—what Hannah Arendt refers to as “inner migration”—or someone passes away.⁷³ It also changes as a result of migration. So while the generation constituting the people is supposed to enter it voluntarily, this is not the case with subsequent generations. They belong to a people they have not themselves consented to. Political theorists have sought to dispose of this problem in different ways, for example by appealing to ideas of national continuity,⁷⁴ tacit consent,⁷⁵ and periodic revolutions.⁷⁶ For Rawls, Nagel, and Habermas it is a matter of catching up with the constitutional moment *ex post*, to actualize and amend it according to present circumstances.

If one accepts the above criteria, however, the description of the problem changes. The gap in the constitution of a legitimate people cannot be filled in with time. We cannot argue that in due course, the people will catch up with itself. For unlike the gap between generations, the gap in the constitution of a legitimate people is not alleviated by having the next generation of people deciding for themselves. It resides in the very act of constitution-making itself. The point is that if individuals are to agree on the constitution of the people, the authority constituting the people must be prior to the citizens and simultaneous with the citizens at the same time. This is why the founding of a legitimate people is a recurrent event, not because new persons constantly are born into society, or because they migrate, at least not *per se*. As the people framework of legitimacy suggests, it is because human beings deem themselves free and equal that the constitution of the people has productive force. Man is born free, and yet everywhere he is in chains, and this is what sets them in motion.

Democratic, Not Historical, Contingency

In this final section we shall turn full circle back to the exclusionary strategy examined in the beginning of the article. Granting that the constitution of the people raises a claim for legitimacy, what does it mean to assume the

path of the Maginot line? The following discussion seeks to draw out the implications of this move. The intention is to show that this way of arguing overlooks the difference between democratic and historical contingency. It interprets the gap in the constitution of the people as a problem, and in so doing, it ironically reiterates the same critique that conservative thinkers once raised against the idea of a legitimate government. The failure to see the parallel has profound implications for how one conceives of the present state of affairs. It leads to a thinking that under the mantle of democracy cultivates a right of might.

Let me illustrate the point by way of a comparison with the objections once raised against the idea of a legitimate government. Today, it is uncontroversial to claim that government should rest on the consent of the governed. At the time of its inception, however, this was a provocative idea, and the defenders of royal power did their best to refute it. They argued that it was both a practical and logical impossibility. Sir Robert Filmer scorns at the idea of governments being constituted through popular consent: To admit such a thing, he writes, "is to image little less than an impossibility."⁷⁷ For unlike the king, which is a stable entity, the people is "a body in continual alteration and change." "They which are the people this minute," he writes, "are not the people the next minute," a fact which in his view testifies to the futility of popular rule.⁷⁸ For how is one to establish a stable and responsible government, when the basis of this government—the people—is in constant change? The idea is preposterous, "for in a shorter time than the word can be spoken, every government is begun and ended."⁷⁹

Many thinkers also pointed to the logical impossibility of a people being at once governors and governed. Citizens could not plausibly be at two places at the same time.⁸⁰ This objection often served as an intellectual weapon against the idea of popular consent. According to a later critic, Joseph de Maistre, the notion of a people governing itself is a contradiction in terms: "It is said that the people are sovereign, but over whom?—over themselves, apparently. The people are thus subject. There is surely something equivocal if not erroneous here, for the people which command are not the people which obey."⁸¹ The conclusion he draws is that the people cannot be self-governing. Government requires a clear separation between those who rule, on the one hand, and those who obey, on the other. To suggest otherwise is in his view self-deception.⁸²

The conservative critique is extreme, and most contemporary theorists of legitimacy prefer to take a more moderate position. Although they might be discouraged at the prospects of achieving a fully legitimate government, they never doubt that government raises a claim on those who rule, i.e., that

they should do so on behalf of their subject. Curiously enough, it is different with the people. In this case, many liberal and deliberative theorists end up taking the same uncompromising position as conservatives once did in the case of government. As we have seen in this article, the idea of a legitimate people is rejected with reference to both its practical and logical impossibility. Like popular access to government once was expected to undermine the stability of society, Rawls, Benhabib, and Smith are reluctant to open up the people to a claim for legitimacy. The supposition is that if individuals are free and equal vis-à-vis the boundaries of the people, this would set in motion an overwhelming flow of migration, undermining the stability of the most effective democracies. Furthermore, the idea of a legitimate people is rejected for logical reasons. The claim is that since the people cannot decide on its own composition—it leads to a circular reasoning—the notion of a legitimate people must be consigned to the category of the impossible.⁸³

What are we to make of the fact that contemporary theorists use the same argument against the legitimacy of the people as conservatives once did in the case of government? Why assume such an uncompromising position? The unwillingness to conceive of the people in terms of legitimacy is not wholly unexpected. There is, after all, a crucial difference between the political conditions in which the respective claims are made. The call for a legitimate government started out from a condition of monarchical rule. It was progressive in that it demanded individual consent to the rule of society. Today, however, and partly due to these claims, the situation is different. Many contemporary theorists have the privilege of commencing from a condition of popular rule. They can, at least in theory, presume the existence of a community of free and equal citizens.⁸⁴ This suggests that contemporary theorists of legitimacy have more to defend than their intellectual predecessors. Crudely stated, if yesterday's conservatives rejected the idea of legitimate government with the purpose of defending monarchy, today's theorists reject the idea of a legitimate people in an attempt to defend democracy. The fear is that by opening up the people to a claim of legitimacy, and thereby laying bare the impossibility at its root, one indirectly calls democracy itself into question.

Is the fear justified? This is the point where many liberal and deliberative theorists go wrong. They overlook the democratic significance of the gap. A fully legitimate people is indeed impossible to achieve, but therein resides its power. The criteria of legitimacy make the people into a site of perpetual contestation. They guarantee that the claims of a legitimate people do not come to a standstill.⁸⁵ If this view typically goes without saying in the case

of government—irresolvable disagreement is regarded as an essential aspect in the constitution of government, at least in the liberal view—it still remains highly contentious in the case of the people. By assuming the strategy of the Maginot line, liberal and deliberative theorists dismiss the disagreement on the constitution of the people as external to democracy. They replace democratic with *historical* contingency. The difference is not trivial. For while the former is placed at the heart of legitimacy—it triggers off ever new claims—the latter serves to rule out any such claims. It fosters a people based on the arbitrary forces of history, a position which is problematic for two reasons.

To begin with, it has implications for how one interprets the challenge facing democracy in the light of globalization. There is today widespread disagreement on the proper constitution of the people. Should it be local, national, regional, or cosmopolitan? By ignoring the democratic contingency in the constitution of the people, we may come to believe that the most desirable move is to put an *end* to this conflict. We may come to think that to defend democracy we must first let history do its job—finish the conflict by means of force, power, or violence—so that the demands of legitimacy can then “take up where history leaves off.”⁸⁶ But this way of reasoning is wanting. The constitution of the people is not a historical event. It is an ongoing claim that we make.⁸⁷ Considering this, the exclusionary strategy of the Maginot line runs the risk of throwing us into a perpetual state of exception. It awaits a historical resolution to the people that will per definition never occur. The challenge is not to end the disagreement on the constitution of the people (how could that be?), but to find the appropriate democratic mechanism by which to foster its continuation.⁸⁸

Now, most of the theorists discussed in this article would probably agree to this. They would stress that the whole point of making the people contingent on history is to open up democracy to change. By arguing that the people is the outcome of historical forces—of a past “agreement,” a “retroactive” process of legitimacy, “democratic iterations,” or historical “storytelling”—it is possible to free democracy from its relationship within the nation-state, and affirm the idea of democracy as ongoing and incomplete. So, it might be asked, what is actually the difference between democratic and historical contingency? Are they not in the end saying the same thing, that democracy is an unfinished project? This brings us to the second problem: the presumed factuality of historical contingency, and the role that it risks playing in the current debate on democracy.

According to Dahl, Rawls, Habermas, Benhabib, Smith, and others, the constitution of the people is contingent on history. It is the result of a *de facto* power, a brute historical force existing beyond the realm of legitimacy. But this argument—while professing to refer to an objective historical situation—is itself contingent on the principle of legitimacy. This is clear once we reconstruct the path towards exclusion. As we saw in the first section, the constitution of a legitimate people is interpreted as an impossible enterprise, and in the attempt to cut off the ambiguity it yields, these theorists draw a Maginot line. The claim is that since the people cannot decide on its own composition, it cannot be part of a theory of legitimacy. It must be determined by other factors, such as the arbitrary forces of history.

This line of reasoning itself speaks against any simple reference to historical contingency. The fact is that the gap in the constitution of the people is what *makes* these theorists turn to history. The appeal to history only comes about in relation to the order of legitimacy it seeks to escape.⁸⁹ Or differently put, it is not despite, but *because*, they keep to the normative underpinnings of consent that these theorists submit the constitution of the people to the arbitrary forces of history. The drawing of the Maginot line, therefore, is not a neutral recording of a historical fact. It is itself part of the democratic contestation involved in constituting the people.

This insight puts the argument made by contemporary theorists of legitimacy in a new light. If the exclusion of the people from the realm of legitimacy is not a *de facto* situation, but a legitimate claim among others, what is its overall significance? What could it mean to hand over the constitution of the people to history at *this* very point in history? By making the people contingent on history, liberal and deliberative theorists not only forestall popular access to the constitution of the people. In effect, they also give free reign to the historical forces they seek to exclude. Who legitimately make up the people is not something that we may lawfully contest on this view. What is beyond the Maginot line is also beyond the constraints of legitimacy. The problem is that this democratic withdrawal indirectly works to the advantage of the status quo. It benefits those who possess power, status, and force by lending them the opportunity to operate freely in the world without any demands of legitimacy in return. Considering this, the appeal to history takes on a role different, perhaps, from what these theorists themselves intended. It does not serve to open up democracy to change, but to put it on hold. It tells us that when it comes to the constitution of the people, as opposed to the constitution of government, we have no choice but to submit to the asymmetrical forces of the present.

Toward a Different Cosmopolitanism

Let me conclude by briefly delineating how this predisposition shows up in current debates on globalization and migration, and what it would mean to give priority to democratic as opposed to historical contingency. If one thinks of the people as the outcome of historical contingency, it is close at hand to regard globalization as an external force that, from a position outside of democracy, comes to question the preexisting boundaries of the people. According to this logic, globalization is the main problem, whereas democracy—reformed democracy at the nation-state level or transformed democracy at the cosmopolitan level—is the solution to this problem. It mitigates or corrects the forces of globalization.

To shift focus from historical to democratic contingency is to turn the question around. It helps us see that what “the enemy” once did for Hobbes, “globalization” does for contemporary theorists of cosmopolitan democracy: it takes them directly from the nation-state to the cosmopolitan level without having to submit the boundaries of the people to a claim of legitimacy. For while today’s proponents of cosmopolitan democracy often tell us *why* we need to transform the boundaries of democracy—globalization here speaks for itself—*who* is doing the transformation is seldom part of their investigation. Nor need it be. Since the constitution of the people is taken to fall beyond the realm of legitimacy, globalization mediates in its place. It bridges the gap that democracy cannot fill on its own.⁹⁰

By recognizing the democratic contingency of the people, we are able to meet the challenge of globalization in a different way. We understand that when contemporary theorists refer to the contingency of history, they are not only resigning to the forces of globalization. They also *produce* the forces they claim to redress. They are themselves partakers in a contestation on the proper constitution of the people. This awareness reorients our attention away from globalization towards democracy itself. We start asking different questions. Rather than enquiring into how the nation-state can mitigate the forces of globalization, we begin to wonder what makes the nation-state into a legitimate people in the first place. Rather than asking how global governance can be made more democratic, we start getting curious about who has the initial power to sanction this move towards global governance. How does one make sure that it does not leave out or assimilate individuals against their own will? If it does, this can no longer be dismissed as the unhappy result of “the cunning of history.”⁹¹ It is the outcome of political will, and as such, it calls for ongoing critique and opposition.

To think of the constitution of the people as historically contingent also has implications for how one conceives of migration. It often becomes an external phenomenon vis-à-vis the boundaries of democracy, a problem that must be dealt with by various criteria of political membership. This view is perhaps most clearly articulated in Michael Walzer's well-known discussion of membership and migration. In speaking of justice, he writes, we "assume an established group and a fixed population, and so we miss the first and most important distributive question: How is that group constituted?" This sounds like a promising question, but as he continues, "I don't mean, How *was* it constituted? I am concerned here not with the historical origins of the different groups, but with the decisions they make in the present about their present and future populations."⁹²

By referring to constitution-making as a historical question, Walzer in effect achieves two things at the same time. He places the constitution of the people beyond the reach of legitimacy, and in so doing makes migration (rather than the people) into the privileged object of politics. Benhabib proceeds in the same way. By political membership, she writes, "I mean the principles and practices of incorporating aliens and strangers, immigrants and newcomers, refugees and asylum seekers, into *existing polities*."⁹³ The result is that the discussion of political membership—of inclusion and exclusion—takes place against the backdrop of a people that itself remains unquestioned. Migration is the problem, whereas the people is the one that resolves it.⁹⁴

Is this a proper approach? Witness to times of war and increasing migration, Hannah Arendt wrote a most insightful essay on the relationship between nation-states, statelessness, and human rights. As she notes, the fact that individuals and groups have to flee their homes for political, religious, or economic reasons is not new for the modern period. What is unprecedented is "the impossibility of finding a new one."⁹⁵ With the rise of the modern nation-state system, the whole world became mapped out, thereby making it very difficult for individuals or groups to set up a new community. As a result, refugees, asylum seekers, and stateless persons soon turned into a permanent problem within the system. Deprived of their original citizenship, they were to regain their dignity as humans under the protection of declarations of human rights. The great irony, though, was that the loss of the original polity also expelled them from humanity as such. Human rights were in effect the privilege of citizens, and to be bare human was therefore to be deprived of the only thing that in reality could protect their humanity: the belonging to a political community.⁹⁶

What Arendt emphasizes is that migration is the result of political organization rather than overpopulation. Nation-states are themselves the source of the problem that they seek to rectify.⁹⁷ If this was a salient question for Arendt at the time of writing, one could argue that the question is even more so today. Due to growing interdependency, decisions taken by contemporary nation-states—whether they concern the economy, the environment, or war-making—not only have consequences well beyond their own jurisdictions, but also are often the direct cause of migration itself. Still, if one thinks of the people as the outcome of historical contingency, this insight has little bearing on the question of legitimacy. Since belonging to a political community is a matter of history, the attention is on the aliens, the stateless, and the refugees—by what right could they be included in the existing polity? For Benhabib, the challenge is to find a proper balance between the self-determination of the people and the rights of others in such a way that

[i]f you and I enter into a moral dialogue with one another, and I am a member of a state of which you are seeking membership and you are not, then I must be able to show you with good grounds, with grounds that would be acceptable to each of us equally, why you can never join our association and become one of us. These must be grounds that you would accept if you were in my situation and I were in yours. Our reasons must be reciprocally acceptable; they must apply to each of us equally.⁹⁸

But if migration is sourced in decisions and actions taken by the people, how reciprocal could this process of reason-giving be? By shifting focus from historical to democratic contingency, we reorient our attention from migration to the people itself. It becomes clear that rather than resolving the problem of migration, the “reciprocity of reason giving” perpetuates the status of migrants by means of democratic law. It takes the existence of the people as given, and thereby makes progress and change dependent on a human right which, as Arendt foresaw, is no right except for those who already *have* rights, that is, for those who are situated within the boundaries of a people. If this bias seems unavoidable, perhaps even justifiable, with regard to the principle of self-determination, it is only because one keeps thinking of the people in terms of historical contingency. In line with the previous discussion, however, we know that the people is the object and not the source of legitimacy. Like the constitution of government, the constitution of the people raises a claim of legitimacy. We realize therefore that when Walzer, Benhabib, and others make the people contingent on history—and so

bestow existing peoples with the privilege to formulate criteria of political membership—they are not merely accepting a fact of history. They are making a claim in the present. This is a great advantage, for it means that it can be challenged accordingly.

Notes

1. In textbooks and other descriptions of legitimacy, it goes without saying that legitimacy concerns government. See, for example, Richard Flathman, "Legitimacy," in *A Companion to Contemporary Political Philosophy*, ed. Robert E. Goodin and Philip Pettit (Oxford: Blackwell, 1993), 527-33.

2. Edmund S. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (New York: Norton, 1988); John Dunn, *Setting the People Free* (London: Atlantic, 2005); and Margaret Canovan, *The People* (Cambridge: Polity, 2005).

3. Robert Dahl, *After the Revolution? Authority in a Good Society* (New Haven, Conn.: Yale University Press, 1970), 60.

4. As Hannah Arendt points out, the term *constitution* is ambiguous in that it refers both to an act and to its result. Hannah Arendt, *On Revolution* (New York: Penguin, 1965), 145. In our case, it can refer to both the act of constituting the people, and the nature or character of this people once constituted. I shall discuss the people in the former sense. This means that whether one thinks of the people as a collective identity, a multitude of individuals, or a plurality of groups is of secondary importance. The focus is on the prior act of demarcation, the separation of one such people from another.

5. Rogers M. Smith, *Stories of Peoplehood* (Cambridge: Cambridge University Press, 2003), 158.

6. Frederick G. Whelan, "Prologue: Democratic Theory and the Boundary Problem," in *Liberal Democracy*, ed. R. J. Pennock and J. W. Chapman (New York: New York University Press, 1983), 16. See also Robert Dahl, *Democracy and Its Critics* (New Haven, Conn.: Yale University Press, 1989), ch. 14, 204; Jürgen Habermas, "Constitutional Democracy: A Paradoxical Union of Contradictory Principles?" *Political Theory* 29 (2001): 774; Seyla Benhabib, *The Rights of Others* (Cambridge: Cambridge University Press, 2004), 15-19; Smith, *Stories of Peoplehood*, 154, 158; Thomas Nagel, "The Problem of Global Justice," *Philosophy and Public Affairs* 33, no. 2 (2005): 128, 145-47; Claus Offe, "'Homogeneity' and Constitutional Democracy: Coping with Identity Conflicts through Group Rights," *Journal of Political Philosophy* 6 (1998), 116-17; and Ian Shapiro and Casiano Hacker-Cordón, eds., *Democracy's Edges* (Cambridge: Cambridge University Press, 1999), 1-3. The most classical description is made by Jean-Jacques Rousseau, *The Social Contract and Other Later Political Writings*, ed. V. Gourevitch (Cambridge: Cambridge University Press, 1997), 71.

7. Jürgen Habermas, "The European Nation-State: On the Past and Future of Sovereignty and Citizenship," in *Inclusion of the Other: Studies in Political Theory*, ed. C. Ciaron and P. de Greiff (Cambridge, Mass.: MIT Press, 1998), 115-16, 140-43. See also Habermas, "Constitutional Democracy," 773-76; Robert Dahl, *After the Revolution?* 62; Dahl, *Democracy and Its Critics*, 3; John Rawls, "Reply to Habermas," in his *Political Liberalism* (New York: Columbia University Press, 1993), 402-3; John Rawls, *The Law of Peoples* (Cambridge, Mass.: Harvard University Press, 1999), 38-39; Benhabib, *The Rights of Others*, 175, 178; Seyla Benhabib, *The Claims of Culture* (Princeton, N.J.: Princeton University Press, 2002),

177; Smith, *Stories of Peoplehood*, 43; Whelan, "Prologue," 16; and Nagel, "The Problem of Global Justice," 145-47.

8. Edmund Burke, *Reflections on the Revolution in France* (Oxford: Oxford University Press, 1993), 91ff.

9. Claude Lefort, *Democracy and Political Theory*, trans. D. Macey (Cambridge: Polity, 1988), 19; and Claude Lefort, *The Political Forms of Modern Society*, ed. J. B. Thompson (Cambridge: Polity, 1986). See also C. Mouffe and E. Laclau, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics* (London: Verso, 2001); Alan Keenan, *Democracy in Question: Democratic Openness in a Time of Political Closure* (Stanford, Calif.: Stanford University Press, 2003); and Bernard Flynn, *The Philosophy of Claude Lefort* (Evanston, Ill.: Northwestern University Press, 2005). See also the special section on Lefort in *Thesis Eleven* 87, no 1 (2006).

10. Margaret Canovan, *The People*; Bonnie Honig, *Democracy and the Foreigner* (Princeton, N.J.: Princeton University Press, 2001); Bonnie Honig, "Between Decision and Deliberation: Political Paradox in Democratic Theory," *American Political Science Review* 101, no. 1 (2007): 1-17; Keenan, *Democracy in Question*; and Chantal Mouffe, *The Democratic Paradox* (London: Verso, 2000). See also, among others, William Connolly, *The Ethos of Pluralization* (Minneapolis: University of Minnesota Press, 1995); and Jacques Rancière, *Disagreement: Politics and Philosophy* (Minneapolis: University of Minnesota Press, 1999).

11. For the difference between abundance and lack (or immanence and transcendence) in the understanding of radical democracy, see L. Tonder and L. Thomassen, eds., *Radical Democracy: Politics between Abundance and Lack* (Manchester, UK: Manchester University Press, 2005). For an overview of different agonistic positions, see Andrew Schaap, "Political Theory and the Agony of Politics," *Political Studies Review* 5 (2007): 56-72.

12. Considering this, one would expect there to be a vibrant discussion as to what render these new boundaries of the people legitimate. Instead, globalization has produced a growing interest in "global governance." Many liberal and deliberative theorists proceed directly from the nation-state to the constitution of a federation or world government, discussing matters of accountability and the need for global institutions to express the consent of the governed. See, for example, the contributions in David Held and Mathias Koenig-Archibugi, eds., *Global Governance and Public Accountability* (Oxford: Blackwell, 2005).

13. See, for example, John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971), 13; and Habermas, "The European Nation-State," 115-16.

14. Robert Paul Wolff, *In Defense of Anarchism* (Berkeley: University of California Press, 1998).

15. Rawls, *A Theory of Justice*, 13, 8; Rawls, *Political Liberalism*, 12, 136; and Rawls, *The Law of Peoples*, 26.

16. Rawls, *The Law of Peoples*, 34, 39 n. 48.

17. Rawls, *The Law of Peoples*, 39 n. 48; and Michael Walzer, *Spheres of Justice* (Oxford: Blackwell, 1983), 39.

18. Smith, *Stories of Peoplehood*, 135-41; and Benhabib, *The Rights of Others*, 74-94. For a critique of Rawls from a justice perspective, see, among others, Charles Beitz, *Political Theory and International Relations*, rev. ed. (Princeton, N.J.: Princeton University Press, 1999); and Andrew Kuper, "Rawlsian Global Justice: Beyond *The Law of Peoples* to a Cosmopolitan Law of Persons," *Political Theory* 28, no. 5 (2000): 640-74.

19. Smith, *Stories of Peoplehood*, 137.

20. Benhabib, *The Claims of Culture*, 19-20, 131-32.

21. Smith, *Stories of Peoplehood*, 137, 43.

22. Seyla Benhabib, "Beyond Interventionism and Indifference: Culture, Deliberation and Pluralism," *Philosophy and Social Criticism* 31, no. 7 (2005): 767; and Benhabib, *Claims of Culture*, 172-74.

23. A telling example, as Margaret Canovan points out, is the 1973 border poll in Northern Ireland, where 98.9 percent voted for union with the United Kingdom. The Unionists (in majority) saw the verdict as an expression of the will of the people, whereas the Catholic nationalists, knowing that they would be outvoted, called the boundaries of the electorate itself into question and abstained. They argued that by handing over the constitution of the people to "the people of Northern Ireland," one had settled the question in advance. Canovan, *The People*, 110-11.

24. Rousseau, *The Social Contract*, 71.

25. See note 6, above.

26. Whelan, "Prologue," 40.

27. Habermas, "Constitutional Democracy," 774.

28. Dahl, *Democracy and Its Critics*, 3.

29. Burke, *Reflections*, 95-97.

30. To Schmitt, who was active during the Weimar Republic, the gap is filled by the decision of the *Reichskansler* (as opposed to what he sees as the unproductive discussion of the Reichstag). Carl Schmitt, *The Crisis of Parliamentary Democracy*, trans. E. Kennedy (Cambridge, Mass.: MIT Press, 1988), 22-32. See also Carl Schmitt, *Political Theology*, trans. G. Schwab (Chicago: University of Chicago Press, 1985). For a critique of Schmitt, see Mouffe, *The Democratic Paradox*, ch. 2; and Chantal Mouffe, *The Return of the Political* (London: Verso, 2005), ch. 8.

31. Rawls, "A Reply to Habermas," 404-5.

32. Nagel, "The Problem of Global Justice," 146-47.

33. Habermas, "Constitutional Democracy," 774. See also Jürgen Habermas, *Die nachholende Revolution* (Frankfurt am Main: Suhrkamp Verlag, 1990), ch. 6; and Jürgen Habermas, "Why Europe Needs a Constitution," *New Left Review* 11 (2001): 16.

34. In this context it is worth noting that while Benhabib gives Schmitt "right" in that the constitution of the people rests on the arbitrary forces of history, this is the exact point where Mouffe—who often is charged for being too compliant with his constitutional thinking—*distances* herself from him. As she points out, the problem with Schmitt is that he takes the identity of the people as a given: "Because of that, his distinction between 'us' and 'them' is not really politically constructed; it is merely a recognition of already-existing boundaries" (Mouffe, *The Democratic Paradox*, 54).

35. Benhabib, *The Rights of Others*, 178; Benhabib, *Claims of Culture*, 177; and Seyla Benhabib, "Democracy and Difference: Reflections on the Metapolitics of Lyotard and Derrida," *Journal of Political Philosophy* 2, no. 1 (1994): 18.

36. Smith, *Stories of Peoplehood*, 154, 158, 186ff.

37. Whelan, "Prologue," 16.

38. Bernard Yack, "Popular Sovereignty and Nationalism," *Political Theory* 29, no. 4 (2001): 529.

39. Thomas Hobbes, *Leviathan: Parts One and Two* (Englewood Cliffs, N.J.: Prentice Hall, 1958); John Locke, *Two Treatises of Government*, ed. P. Laslett (Cambridge: Cambridge University Press, 1988); and Rousseau, *The Social Contract*. It should be noted that while I discuss the work of Hobbes, Locke, and Rousseau, the focus of interest is not with the theorists per se. The attention is on a shared position. On the social contract, see Otto von Guericke,

The Development of Political Theory (New York: Norton, 1939), pt. 2, ch.2; J. W. Gough, *The Social Contract: A Critical Study of Its Development* (Oxford: Clarendon, 1936), "Introductory," chs. 8-11; and Michael Lessnoff, *Social Contract* (London: MacMillan, 1986), "Introductory," chs. 4-5.

40. As Lessnoff points out, the term *social contract*—which often is associated with Gierke's distinction between "Gesellschaftsvertrag" and "Herrschaftsvertrag"—easily gives the impression that Hobbes, Locke, and Rousseau never were concerned with establishing "Herrschaft." This would be misleading. The difference is that unlike their predecessors, they establish a ruling authority *directly* from the agreement between individuals. Or, differently put, they try to create legitimate "Herrschaft" by means of a Gesellschaftsvertrag. See Lessnoff, *Social Contract*, 28-30.

41. Rousseau, *The Social Contract*, 68.

42. Note that what I call the *people framework* and the *government framework* are not synonymous with Gierke's "Gesellschaftsvertrag" and "Herrschaftsvertrag." They both refer to the former. Moreover, and as the term *framework* indicates, the focus is not on particular theories of legitimacy, but on the preconditions under which they might obtain. Finally, it should be noted that the terms *people* and *government* in this context are my own, and that Hobbes, Locke, and Rousseau often use the terms in a different sense (if at all).

43. Lefort, *The Political Forms of Modern Society*, 279. Lefort's view results from a phenomenological analysis of the symbolic power inherent in the democratic revolution. He describes the move from the sovereignty of the king to that of the people, and the ensuing shift in the symbolic description of power. What happens in the move is that the divine right of the king, and the rank and order associated with it, is replaced by "the dissolution of the markers of certainty" (Lefort, *Democracy and Political Theory*, 19). As I will try to demonstrate, a similar dissolution of certainty is engendered in the turn to the so-called state of nature.

44. This focus leaves out two important questions. Concerned with legitimacy, we take the postulation of a state of nature at face value. How to understand this position itself, and its role in the justification of political order, is therefore not part of the investigation. In focusing on legitimacy, we also leave out its institutional implications, such as what political mechanism is required to construct a legitimate "government" or "people."

45. Flathman, "Legitimacy," 527.

46. Rousseau, *The Social Contract*, 69.

47. Hobbes, *Leviathan*, 142. For a critique of Hobbes's idea of the contract, that it renders society too unstable since it suffices that one person disagrees to declare it null, see Samuel Pufendorf, *On the Duty of Man and Citizen*, ed. J. Tully (1673; reprint, Cambridge: Cambridge University Press, 1991), book 2, ch 2; and Robert Filmer, "Observations upon Aristotles Politiques," in his *Patriarchia and Other Writings*, ed. J. P. Sommerville (Cambridge: Cambridge University Press, 1991), 268.

48. Hobbes, *Leviathan*, 142. For a discussion of Hobbes's concept of representation, see Hanna Pitkin, *The Concept of Representation* (Berkeley: University of California Press, 1967), chs. 1-2; and her two articles on Hobbes in *American Political Science Review* 58, no. 2 (1964): 328-40 and 58, no. 4: 902-18. See also Quentin Skinner, "Hobbes on Representation," *European Journal of Philosophy* 13, no. 2 (2005): 155-84. If Pitkin has a conceptual approach, arguing that Hobbes's concept of representation mainly is a response to internal theoretical problems, Skinner argues that one must see representation as a rhetorical strategy on Hobbes's part against the parliamentarians—what Hobbes calls the "democratic gentlemen"—of his time. The parliamentarians had argued that power is inherent in the people itself, thereby making it possible for the people to resist the king in case he was not properly authorized.

Fearing this constraint on his power, Hobbes, as Skinner writes, denies “that civil associations are created out of pre-existing and unified bodies of people.” He claims that there is no such thing as a natural body of people, only a multitude of free and equal individuals, and that the only way in which this multitude can enter into society is if they agree among themselves to authorize Leviathan to present their person. In this way, there is no “people” there to authorize or resist the king.

49. “This,” Locke writes in a well-cited passage, “is to think that Men are so foolish that they take care to avoid what Mischiefs may be done [to] them by *Pole-Cats*, or *Foxes*, but are content, nay think it Safety, to be devoured by *Lions*” (Locke, *Second Treatise*, § 93). See also §§ 90-91. Locke does not, at least explicitly, respond to the theory of Hobbes. His aim is to refute Filmer’s *Patriarchia*. See John Dunn, *The Political Thought of John Locke* (Cambridge: Cambridge University Press, 1969); and Jeremy Waldron, *God, Locke and Equality* (Cambridge: Cambridge University Press, 2002).

50. Locke, *Second Treatise*, § 97. See also § 96.

51. On this reading, equating everyone’s consent with majority consent is Locke’s attempt to square the gap in the constitution of a legitimate government. This is in line with John Dunn’s view that Locke’s comments on majority consent “were a part of his formal analysis of the concept of political legitimacy. They were in no sense whatever a proposal for the appropriate form of social organization.” Dunn, *The Political Thought of John Locke*, (129).

52. Rousseau, “Letter to Mirabeau,” in his *The Social Contract*, 270.

53. Rousseau, *The Social Contract*, 68.

54. Rousseau, *The Social Contract*, 59. As Keith Michael Baker points out, this suggests that Rousseau—like Hobbes—also uses the image of a representative in his understanding of popular rule: the general will. The difference lies primarily in the location of this representative device. If Hobbes places the representative in the person of Leviathan, Rousseau places it in the idea of community itself. This move allows him to speak of direct popular rule without having to submit the governing process to the temporary will of the people (the will of all). See Keith Michael Baker, *Inventing the French Revolution* (Cambridge: Cambridge University Press, 1990), ch. 10.

55. Hanna Pitkin seems to arrive at a similar understanding in her discussion of obligation and consent. She calls attention to the paradox of obligation, the fact that “men are both superior to their government and subject to it.” To this paradox, she concludes, “No one has the last word because there is no last word.” Hanna Pitkin, “Obligation and Consent II,” *American Political Science Review* 60, no. 1 (1966): 49-52.

56. See, among others, David Held, “Democratic Accountability and Political Effectiveness from a Cosmopolitan Perspective,” in Held and Koenig-Archibugi, *Global Governance and Public Accountability*, 249-50; Nancy Fraser, “Reframing Justice in a Globalizing World,” *New Left Review* 36 (2005): 69-88; and Robert Goodin, “Enfranchising All Affected Interests, and Its Alternatives,” *Philosophy and Public Affairs* 35, no. 1 (2007): 40-68.

57. This is Sir Robert Filmer’s objection to the idea of the contract: how do you explain that there are many political communities in the world? See Filmer, *Patriarchia*, 20. Filmer, of course, is not concerned with opening up the people to a claim of legitimacy. He raises the objection to contest the idea of society as a voluntary association. For him, the kings—who have inherited their powers from Adam—are the only rightful rulers. Nevertheless, Filmer’s objection can be compared with an argument often raised by contemporary critics of Rawls: if individuals are free and equal, why limit the agreement in the original position to a closed society?

58. Hobbes, *Leviathan*, 140.

59. See Tracy B. Strong, "Foreword," in Carl Schmitt, *The Concept of the Political*, trans. G. Schwab (Chicago: University of Chicago Press, 1996), xxiii-xxiv. See also Mouffe, *The Return of the Political*; and, for a different view, Jacques Derrida, *Politics of Friendship* (London: Verso, 1997).

60. Locke, *Second Treatise*, § 95, 331.

61. Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974), pt. 3. As Nozick argues, this "process goes on; worlds are created, people leave them, create new worlds, and so on." 299.

62. An example that is often used to elucidate Locke's idea is the agreement of the Pilgrim Fathers of the *Mayflower* in 1620: "We do solemnly and mutually, in the presence of God and of one another, covenant and combine ourselves together into a civil body politic." The example serves to illustrate that in the social contract, there is no force prior to the agreement between individuals, but they are themselves its only legitimate origin. But society is not only a matter of self-exclusion. Not only does the *Mayflower* example illustrate the inbuilt discrepancy between those who are partakers of the agreement (fathers) and all those who fall under its jurisdiction (the mothers, the women, and the children), and the silent contract between them; see Carole Pateman, *The Sexual Contract* (Stanford, Calif.: Stanford University Press, 1988). It also demonstrates the need to ask who are authorized to step on the boat in the first place since this decision predetermines the boundaries of jurisdiction, not only vis-à-vis the ones who are left behind in the country of origin but also, more importantly, vis-à-vis the already existing inhabitants in the country of arrival. See Jacques Derrida, "Force of Law: The Mystical Foundation of Authority," in *Deconstruction and the Possibility of Justice*, ed. D. Cornell, M. Rosenfeld, and D. G. Carlson (London: Routledge, 1992).

63. Why do Hobbes and Locke never raise the question of how to constitute a legitimate people (rather than a legitimate government)? Perhaps because they, in line with contemporary thinkers, *could take it for granted*? For the prehistory of "the people" in the Roman tradition before the Reformation and the rise of the social contract tradition—including Hobbes's attempt to wipe out "the people" by means of his theory of representation—see Canovan, *The People*, ch. 2.

64. For two recent attempts to rethink democracy as a question of beginning rather than governing ("herrschen," or command) based on the work of Arendt and Schmitt respectively, see Patchen Markell, "The Rule of the People: Arendt, Arche and Democracy," *American Political Science Review* 100, no. 1 (2006): 1-14; and Andreas Kalyvas, "Popular Sovereignty, Democracy and the Constituent Power," *Constellations* 12, no. 2 (2005): 223-44.

65. Rousseau, *The Social Contract*, 71.

66. See, among others, Paul Riceour, "The Political Paradox," in *Legitimacy and the State*, ed. W. Connolly (New York: New York University Press, 1984); Connolly, *The Ethos of Pluralization*, 137-40; 165-69; Honig, *Democracy and the Foreigner*, 18-25; Honig, "Between Decision and Deliberation"; and Keenan, *Democracy in Question*, 41-54.

67. Connolly, *The Ethos of Pluralization*, 138.

68. Keenan, *Democracy in Question*, 52-54.

69. Honig, "Between Decision and Deliberation," 3, 5-6. Like Skinner's reading of the problem of representation in Hobbes, Honig argues that Rousseau's many twists and turns are intentional. We should not ask for his argument, but what he is *doing* with it. See also *Democracy and the Foreigner*, 37.

70. Rousseau, *The Social Contract*, 53.

71. This way of thinking is not only common in discussions on political membership (Benhabib, Rawls, Smith, and Walzer) but also forms a centerpiece among scholars who examine the role of the nation. The difference is that while theorists of legitimacy often presuppose the existence of a people, scholars concerned with nationhood do not stop there. They ask for its identification. For what kind of entity does one actually assume in speaking of a “closed society”? As Bernard Yack argues, it is the absence of a proper answer to this question that opens the door to the nation: “For the nation provides precisely that what is lacking in the concept of the people: a sense of where to look for the prepolitical basis of political community” (Yack, “Popular Sovereignty and Nationalism,” 524). For an illustrative example of how the nation is able to “fill” this gap, see Emmanuel Sieyès, *Political Writings*, ed. M. Sonenscher (Indianapolis, Ind.: Hackett, 2003), 133–44.

72. In line with Lefort’s understanding of power as an “empty place,” the people framework of legitimacy is without substance. It does not tell us what legitimacy is. It rather provides the criteria we use when we *ask* that question. It is not wholly unbiased, however. As many theorists have noticed, Lefort’s understanding of power is dependent on there being a sovereign place of power which then is “emptied out” of its content through democratic questioning (Flynn, *The Philosophy of Claude Lefort*, 148; and Keenan, *Democracy in Question*, 8). As Lefort himself puts it, the people is there and declared sovereign, but since it has no body attached to it, its “identity will constantly be open to question” (Lefort, *The Political Forms of Modern Society*, 304; my emphasis). In our case, the retreat to a plural state of nature also sets in motion an irreversible process of questioning in society. From this position of boundlessness, however, the question is not “Who are the people?” but “Who constitute the people, and by what authority?” “We,” the persons who have to start all over again, does not refer to an irreducible people, but to an irreducible and an-archival multiplicity. See Sofia Näsström, *The An-Archival State: Logics of Legitimacy in the Social Contract Tradition*, Stockholm Series in Politics 99 (Stockholm, Sweden: University of Stockholm, Department of Political Science, 2004); and Simon Critchley, *Infinitely Demanding: Ethics of Commitment, Politics of Resistance* (London: Verso, 2007), esp. ch. 4.

73. Hannah Arendt, “Civil Disobedience,” in her *Crisis of the Republic* (New York: Harcourt, 1972), 88.

74. Yack, “Popular Sovereignty and Nationalism”; and Sieyès, *Political Writings*.

75. Locke, *Second Treatise*, §§ 113–22; and Rousseau, *The Social Contract*, 123–24.

76. See Thomas Jefferson in a letter to Colonel Smith, 1787, in *The Life and Selected Writings of Thomas Jefferson*, ed. A. Koch and W. Peden (New York: Modern Library, 1944), 436; and Thomas Paine, *Rights of Man, Common Sense and Other Political Writings*, ed. M. Philp (Oxford: Oxford University Press, 1995), 92. For a discussion of Jefferson and Paine, see Arendt, *On Revolution*, 232ff.; and Honig, “Between Decision and Deliberation,” 8ff.

77. Filmer, *Patriarchia*, 20.

78. Filmer, “Observations upon Aristotles Politiques,” 277.

79. *Ibid.*, 255. See also 261, 274.

80. *Ibid.*, 275, 268; and Filmer, *Patriarchia*, 31–32. See also Morgan, *Inventing the People*, ch. 2.

81. Joseph de Maistre, “Study on Sovereignty,” in *The Works of Joseph de Maistre*, ed. and trans. J. Lively (New York: Schocken, 1965), 93.

82. Conservatives are not alone in emphasizing the gap in the constitution of a legitimate government. With the gradual acceptance of individual self-government, many classical anarchists call attention to the same inconsistency. According to a contemporary advocate of anarchism, Robert Paul Wolff, the defining mark of the state is “the right to rule,” whereas the

primary obligation of the individual is “the refusal to be ruled” (Wolff, *In Defence of Anarchism*, 18). To Wolff, this suggests that a legitimate government is a contradiction in terms, equal to the category of the “round square” or the “married bachelor.” Unlike conservatives like Filmer and de Maistre who take this impossibility to speak in favour of authoritarianism, Wolff assumes the opposite. Government can only take place at the expense of individual autonomy, and since that is out of the question, we must resort to anarchism; Wolff, *In Defence of Anarchism*, 71.

83. See note 6, above.

84. Some, like John Rawls, make it more explicitly than others. On the “taken for granted” nature of political community among political theorists, see Margaret Canovan, *Nationhood and Political Theory* (Cheltenham, UK: Edward Elgar, 1996).

85. This conclusion is in line with the democratic thinking of both Mouffe and Honig. As Mouffe points out,

By showing that consensus is a *conceptual* impossibility, it does not put in jeopardy the democratic ideal, as some would argue. On the contrary . . . such a rejection constitutes an important guarantee that the dynamics of the democratic process will be kept alive. (*The Democratic Paradox*, 33)

In a similar vein, Honig argues that we should not see Rousseau’s legislator as a “betrayal” of the democratic ideal. For “in the end it is up to the people themselves to accept or reject his advances” (Honig, “Between Decision and Deliberation,” 5-6). As I have tried to demonstrate in this article, the productivity of conflict is not only characteristic for the tension between liberalism and democracy (Mouffe) or for the paradox of law within republicanism (Honig). It also forms a centrepiece in the (always impossible) quest for consent within the early social contract tradition.

86. Dahl, *After the Revolution?* 62.

87. For a revealing account of how this claim operates in politics today, in the debate on nationalism, cosmopolitanism, and populism, see Canovan, *The People*. See also Benjamin Arditi, “Populism as a Spectre of Democracy: A Response to Canovan,” *Political Studies* 52, no. 1 (2004): 135-43.

88. The question of how to institutionalize this conflict falls beyond the scope of this article. However, it is an exceedingly important topic. As Lefort and others have shown, the absence of certainty associated with modern societies is ambiguous. It gives birth not only to democracy but also to the experience of totalitarianism. Characterized by the lack of stable and secure foundations, there is always the risk that modern societies seek to “banish the indeterminateness that haunts the democratic experience” by affirming the People-as-One. Lefort, *The Political Forms of Modern Society*, 305, pt. 3.

89. To Giorgio Agamben, this way of reasoning is significant for modern democracy. For whereas the medieval notion of exception is “an opening of the juridical system to an external fact,” the modern version attempts “to include the exception itself within the juridical order.” It rules by means of exclusion. Giorgio Agamben, *State of Exception*, trans. K. Attell (Chicago: University of Chicago Press, 2005), 26.

90. Sofia Näsström, “What Globalization Overshadows,” *Political Theory* 31, no. 6 (2003): 808-34. See also Jens Bartelson, “Facing Europe: Is Globalization a Threat to Democracy?” *Distinktion*, no. 8 (2004): 47-60; and Marc G. Doucet, “The Democratic Paradox and Cosmopolitan Democracy,” *Millennium: Journal of International Studies* 34, no. 1 (2005): 137-55.

91. Nagel, "The Problem of Global Justice," 147.

92. Walzer, *Spheres of Justice*, 31.

93. Benhabib, *The Rights of Others*, 1; emphasis added.

94. For the argument that it is the other way around, i.e., that foreignness resolves the problem of founding the people, see Honig's illuminating discussion in *Democracy and the Foreigner*.

95. See also Hannah Arendt, "The Decline of the Nation-State and the End of the Rights of Man," in her *The Origins of Totalitarianism* (New York: Schocken, 2004), 372. This is what Michael Walzer refers to as the asymmetry between emigration and immigration: you have a right to leave your country of origin, yet no corresponding right to enter a new one. To Walzer, this is a moral asymmetry. See Walzer, *Spheres of Justice*, 40. See also Benhabib, *The Claims of Culture*, 171-75.

96. See also Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, ed. W. Hamacher and D. E. Wellbery, trans. D. Heller-Roazen (Stanford, Calif.: Stanford University Press, 1998).

97. Arendt, "The Decline of the Nation-State," 373, 376-77.

98. Benhabib, *The Rights of Others*, 138. See also Benhabib's discussion of Arendt's "right to have rights" in ch. 2.

Sofia Näsström is assistant professor in political science at Stockholm University. She has published articles in *Political Theory* and the *European Journal of Political Theory* and is coeditor of a Swedish textbook in political theory. Her research interests include representation and constitution-making under postnational conditions and the relationship between ethics and politics.