

# A-LEGALITY, REPRESENTATION, CONSTITUENT POWER REPLY TO CRITICS

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## **ABSTRACT**

In different ways and from different angles, the participants in this special issue critically probe the conceptual and normative underpinnings of the model of legal order developed in to *Authority and the Globalisation of Inclusion and Exclusion* and other writings. This offers me the opportunity to flesh out these underpinnings more fully and to draw out some of their implications which were not discussed in the book. In particular, my response focuses on the concepts of, and systematic relation between, representation, recognition, constituent power, equality, restrained collective self-assertion, and a-legality.

## **KEYWORDS**

Representation, Recognition, Constituent Power, Equality, Restrained Collective Self-Assertion, A-Legality.

I can imagine no greater intellectual gift than the range of insightful commentaries that have come my way in the symposia on *Authority and the Globalisation of Inclusion and Exclusion* (henceforth *Authority*) hosted by Enrica Rigo, Fiona MacMillan, and Giorgio Pino at the University of Rome III, and by Peter Niesen at the University of Hamburg. My heartfelt thanks to all of them for organizing these events. I am extremely grateful to Ferdinando Menga, a dear intellectual and personal friend, for his generous initiative to put together this special issue of *Etica & Politica / Ethics & Politics*. It is a rare privilege to be given philosophical license to write an extended Response to Commentators in this prestigious journal. Many thanks, finally, to Alessandro Ferrara, Thomas Fossen, David Owen, Markus Patberg, and Gianfrancesco Zanetti for their comments, sympathetic yet critical, which

help me to better understand the possibilities and limitations of *Authority*,<sup>1</sup> opening up fresh perspectives for further thinking about authority and the politics of a-legality.<sup>2</sup>

## 1. ALESSANDRO FERRARA

Ferrara's comments move along two vectors. The first points out that the IACA-model of law offers a strong rebuttal of those legal and political theories for which inclusion without exclusion is possible, namely, Hardt and Negri's "cosmopolis of the multitude" and the philosophies of difference, in particular those espoused by Derrida, Nancy, Esposito, and Agamben. *Authority* indeed inveighs against theories of the multitude, as regards their attempt to imagine a (global) political collective that has no outside. Yet I also argued that there are elements in Hardt and Negri's account of the multitude that have affinities with the notion of a-legality, and that are worth salvaging from what I view as an otherwise untenable project. Furthermore, I share Ferrara's concern about philosophies of difference, when they advocate a notion of community that could include without excluding, and that, as he pointedly remarks, identify community with humanity. Against these philosophies, *Authority* argues, as Ferrara puts it, that "no transcending of exclusion is possible, unless we are prepared to altogether renounce the ability of law to steer action." But I would be chary of dismissing all philosophies of difference as relativistic. I understand much of the work being done under this blanket term as searching for an alternative to both universalism and relativism. Perhaps there are ways of acknowledging that a certain sense of the *universalis* is irreplaceable in politics, without having to embrace *universalism* in the strong sense of an all-encompassing legal order as the regulative idea of an authoritative politics of boundaries. In any case, instead of too quickly dismissing philosophies of difference lock, stock, and barrel, I would like to reserve a more definitive evaluation of where I stand vis-à-vis these philosophies for another occasion.

The second vector of Ferrara's analysis focuses on a-legality. Ferrara is concerned about what he views as an ambiguity, or in any case an ambivalence, in my description of a-legality. This leads to two problems. The first is that I grant too wide a

<sup>1</sup> Note to the reader: In *Authority* I added an asterisk to the pronouns "we" and "us"—we\*, us\*—to indicate the first-person plural use of these pronouns. As this makes for somewhat cumbersome reading, I have omitted this usage hereinafter, with the exception of a couple of citations of the book, relying on the benevolent reader to identify when the subjective and objective cases of the pronoun designate the first-person plural perspective.

<sup>2</sup> I appreciate comments to a draft of this *Reply to Critics* by Lukasz Dzedzic and Ricardo Spindola.

scope to the concept of constituent power. The second is that it remains unclear how restrained collective self-assertion stands in relation to political liberalism. I take the opportunity of responding to these questions at some length, drawing out, hopefully, productive convergences and divergences between Ferrara's work and mine.

### *1.1. Sharing a Meal*

Ferrara's concerns about a-legality begin with an incident that introduces my earlier book, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (henceforth *Fault Lines*): a clochard walks into a restaurant, demands a free meal, and, when it is served, invites the waiter to sit down and share it with him. Ferrara chafes at my describing this incident as standing on the same footing with, say, the Karnataka State Farmers Association's torching of fields of GMO's owned by Monsanto in India, or signal acts of resistance like those of Homer Plessy or Rosa Parks in the United States. "A-legality seems to cover phenomena difficult to reconcile: a) idiosyncratic violation of the background assumptions on which law, like any other practice in a given society, rests; and b) intentional violation of legal provisions perceived as inconsistent with higher norms or worth reconsidering." Ferrara adds that "while a-legality in the first sense hardly seems to possess legal significance, a-legality in the second sense is at the core of liberal constitutional theory."

The easy answer to Ferrara's objection about the example of the clochard is that it serves to introduce and render intuitively accessible a novel way of looking at legal boundaries and their contestation. I vividly remember the difficulties I encountered, when first mooted the ideas to be worked out in *Fault Lines*, in getting my interlocutors to grasp why there might be more to the inside/outside distinction than the contrast between the domestic and the foreign. Their bemusement was dispelled as soon as I described the incident with the clochard, which is why I included it in the opening pages of *Fault Lines*.

But an editorial answer falls short of doing justice to the relevance of this incident for a study on a-legality. Here is a catena of reasons that justifies its relevance:

First, the incident shows lawyers and legal theorists that legal rules are only half of the story of how the law orders; the other half is the pragmatic order to which those legal rules are correlative. What Kelsen calls the subjective, material, spatial, and temporal "spheres of validity" of legal norms have their counterpart in a pragmatic order that establishes who ought to do what, where, and when. Unless one undertakes an inquiry into law as a pragmatic order, and not merely as an order of rules (as legal positivism is prone to do), a concrete exploration of the boundaries of legal orders cannot get off the ground.

Second, the incident is relevant in its capacity to illuminate the distinction between the own and the strange as distinct from and irreducible to the domestic/foreign dyad. It shows why the contrast between the own and the strange is constitutive

for the boundedness of all legal orders, and why an account of how legal boundaries are posited, breached, and transgressed demands an inquiry into the first-person perspective, both singular and plural, of legal ordering.

Third, the incident is relevant exactly because it is modest and discreet, in contrast to the “big” events that tend to monopolize the imagination and analytical prowess of political and legal theorists. This is also the case for Ferrara’s defense of what he calls the “judgment model” or “paradigm of judgment” in political philosophy, which focuses, following Ackerman and Michelman, on modes of “higher lawmaking.”<sup>3</sup> I take this to be a reductive approach to the contestation of legal orders, if nothing else because what Ferrara, following Ackerman, calls the “signaling” function that kicks off modes of higher law-making, namely, “the formal placing of a constitutional problem on the public agenda,” actually begins much earlier: in micro-political events like that of the clochard.<sup>4</sup> The incident is exemplary, in my view, because it invites us to reorient our thinking about and sensitivity to the disruption of legal orders in a way that, without neglecting macro-political events, adverts to the micro-politics of a-legality in which the limits and fault lines of legal orders *also* announce themselves.

Fourth, and closely tied to my insistence on a granular approach, I think it is safe to say that this incident remained only that: an ephemeral interruption of a legal order that, in retrospect, led to no fundamental transformation of the Dutch legal order. But far from being a drawback, this finding highlights an important point: whether an event is an exemplary event in the strongly transformative sense of the term that interests Ferrara, only becomes apparent in hindsight. The meaning of what takes place now is shot through with ambiguity, for its significance and capacity to mobilize individuals to novel forms of joint action can only be established after the event, and never fully or definitively. On the one hand, what seemed to be a simple incident—a syncope that barely disturbs the steady heartbeat of order—can become, with the benefit of hindsight, a veritable foundational moment, the significance of which eluded its protagonists in that now. On the other, what now seems to be a revolutionary moment, galvanizing participants to great achievements and sacrifices, can retrospectively appear to be, literally, a revolution, that is, a return of the same. The paradox of representation entails that there is no way of definitely establishing whether an act taking place now is an act of constituent power or of constituted power; only retrospectively, and only inconclusively, will it manifest itself as the one or the other.

<sup>3</sup> Alessandro Ferrara, *Justice and Judgment: The Rise and the Prospect of the Judgment Model in Contemporary Political Philosophy* (London: Sage Publications, 1999), 133-149. Bruce Ackerman, *We the People: Foundations* (Cambridge, MA: Harvard University Press, 1991); Frank Michelman, “Always Under Law?” in *Constitutional Commentary* 12 (1993) 2, 227-47.

<sup>4</sup> Ferrara, *Justice and Judgment*, 113. Bruce Ackerman, *We the People: Transformations* (Cambridge, MA: Belknap Press, 1998), 40 ff.

Fifth, the incident intimates that there can be no collective action absent a *world* in which we are always already situated, and which is itself called into question, in one way or another, in the face of a-legal acts. I was reminded, when witnessing the incident with the clochard, of Hannah Arendt's comment that "[t]o live together in the world means essentially that a world of things is between those who have it in common, as a table is situated between those who sit around it; the world, like every in-between, relates and separates men at the same time."<sup>5</sup> The restaurant table assigned their places to the clochard and the waiter; it joined and disjoined them. The invitation to sit down and share the meal was the equivalent of yanking the table away from those who sit around it, leading to their disorientation because they no longer have their own place. By calling into question what counts as one's own place, the clochard's invitation rendered conspicuous the world the clients of the restaurant called their own, even if only for a flash. It betokened the encounter between a home world (*Heimwelt*) and a strange world (*Fremdwelt*).<sup>6</sup>

A sixth and final point concerns Ferrara's qualification of the incident with the clochard as an instance of "idiosyncratic" behavior, in contrast to signal cases of civil disobedience. Can it be taken for granted that there is a perspective from which one might adjudicate conclusively for all parties concerned, including the clochard, what is idiosyncratic and what is not? More pointedly, is it at all possible to distinguish between what merits political and legal attention (e.g. civil disobedience by Plessy and Parks or direct action by the Karnataka State Farmers Association), and what does not (e.g. the invitation to share a meal with a clochard), absent the structures of relevance and importance made available by a subject-relative and irreducibly contingent circumambient world?<sup>7</sup> Ferrara's qualification of the event shows, I believe, that all judgments about what counts as relevant and irrelevant have a *blind spot*, a domain of normative indifference that is insurmountable, even if variable over time for any given order, because a blind spot conditions the possibility of issuing such judgments in the first place. In brief, responding to the incident by labelling it as "idiosyncratic" illustrates what the IACA-model of law calls the asymmetrical structure of recognition, marked by the precedence—*Vorgängigkeit*—of what questions a legal order and the retroactivity—*Nachträglichkeit*—of the response.

<sup>5</sup> Hannah Arendt, *The Human Condition* (Chicago: Chicago University Press, 1958), 52.

<sup>6</sup> See the fragment "Heimwelt, Fremdwelt, die eine Welt," in Edmund Husserl, *Zur Phänomenologie der Intersubjektivität*, edited by Iso Kern (The Hague: Martinus Nijhoff, 1973), 214-218. See also the eponymously titled article by Klaus Held in *Phänomenologische Forschungen* 24 (1991), 305-337.

<sup>7</sup> See Alfred Schütz, *Reflections on the Problem of Relevance*, translated by Richard M. Zaner (New Haven, CN: Yale University Press, 1970).

### 1.2. Signaling an Umwelt

These preliminary considerations prepare the way for a more principled response that engages directly with Ferrara's concern that "a-legality cannot be a legal concept because it reaches down deeper than law." As he points out, "law as institutionalized collective action is a human practice. Like any human practice, it unfolds against the backdrop of a *background*, a *lifeworld*, a *lifeworld*." Moreover, "that backdrop includes expectations that everybody knows that everybody knows to be shared. These expectations . . . cannot be enumerated piecemeal in propositional form, they amount to a non-propositional holistic habitus, they cannot be changed at will." As such, "[t]hey are not rules, but what makes it intelligible whether a rule has been followed."

I am puzzled, I must confess, as to why the IACA-model of law in *Authority*, or its earlier presentation in *Fault Lines*, runs afoul of Ferrara's view. After all, the Conclusion of *Fault Lines* argues that the book's aim is "to justify the claim that legal orders are necessarily organized as an inside over and against an outside by reference to the phenomenological notion of a world." Whereas the globe is a very large thing, "a world is a nexus or whole of meaning-relations co-given and pre-given with the things, events, and acts that populate it." Moreover, "in the absence of this co- and pre-given world we could not even begin to make sense of a novel apparition as more or less unintelligible. . ." (*Fault Lines*, 262-3) *Authority* fleshes out these preliminary ideas, noting that a background is an ingredient feature of collective action, and *a fortiori* of institutionalized and authoritatively mediated collective action: "Acting together presupposes a variable range of practices, skills and assumptions that are shared by participant agents in the form of a knowing-*how*, hence which are not common knowledge in the form of a knowing-*that* we are acting together and what it is that we \* are doing together." Moreover, I noted that legal representations of collective unity cannot stand on their own; they require foundational narratives that embed collective action in a world, promising their addressees that participating in joint action contributes to orienting oneself in a world worth living for, even in the face of adversity. If there are any remaining doubts about our agreement on this point, *Authority* concludes its discussion of this feature of collective action by noting that "the background . . . can never be rendered fully transparent to participants in collective action in the mode of a knowing-that. Ultimately, collective action is only intelligible within a *world* (or more precisely: a circumambient, hence limited world: an *Umwelt*), which can only be partially explicated." (*Authority*, 52-3)

The worldliness of collective action points to a further convergence between the IACA-model of law and Ferrara's "judgment paradigm" of politics. In earlier writings I have sought to evince how the interruption of collective action discloses a world: the *Umwelt* of collective action becomes more or less conspicuous to its participants through a-legal behavior that irrupts into a pragmatic order from the

domain of the unordered. Ferrara's work helps me to integrate a second, distinct form of world-disclosure into the IACA-model of law, which I had neglected in earlier work: exemplarity.<sup>8</sup> Phenomenologically speaking, the exemplary is a modality of what Heidegger calls a "sign," a *Zeichen*. The directional arrows of a car are, in *Being and Time*, the privileged instance of a sign, the function of which is to indicate the whole of relations in which drivers and pedestrians are situated with respect to each other, and which they must heed when moving around if they are not to collide.<sup>9</sup> In other words, a sign discloses a world: it draws our attention to the background of collective action and orients us by opening up a horizon for future action.

Although Heidegger illustrates the sign's operation with reference to a totality of equipment, his characterization of the world-disclosing function of signs has considerable political significance. Rosa Parks' and Homer Plessey's acts were exemplary because their civil disobedience partook of the world-disclosing function of a sign.<sup>10</sup> Elsewhere, I have argued that the Tent Embassy set up by Aboriginal activists in front of Old Parliament House, in Canberra, is a world-disclosing sign, an act of "symbolic" resistance that adumbrates another world, a world inside and outside the circumambient world of international law in which Australia finds its place.<sup>11</sup> Another, more recent example is Kenza Drider's public use of the *niqab*, in response to the French ban on face covering.<sup>12</sup> The examples could be multiplied indefinitely.

These are, as one might put it, counter-examples or counter-signs that intimate another world by interrupting the extant legal order and rendering conspicuous the world in which it is embedded as a limited, hence circumambient, world. They illustrate what I have called a-legal interruptions of collective action. Yet there are also exemplary things and acts *within* legal orders that show the world in which it is situated and seek to preserve it, such as the monumentalization and commemoration of collective origins. Other signs take on an exemplary character because they aim to preserve a collective by transforming it. This form of exemplarity is no oddity

<sup>8</sup> Alessandro Ferrara, *The Force of the Example: Explorations in the Paradigm of Judgment* (New York: Columbia University Press, 2008).

<sup>9</sup> Martin Heidegger, *Being and Time*, translated by John Macquarrie & Edward Robinson (Oxford: Basil Blackwell, 1985), §17.

<sup>10</sup> Ferrara, *The Force of the Example*, 37.

<sup>11</sup> Hans Lindahl, "Intentionality, Representation, Recognition: Phenomenology and the Politics of A-Legality," forthcoming in Thomas Bedorf and Steffen Herrmann (eds.), *Political Phenomenology. Experience, Ontology, Episteme* (Abingdon: Routledge, 2019).

<sup>12</sup> See Kim Willsher, "'Burqa ban' in France: housewife vows to face jail rather than submit," in *The Guardian*, April 10, 2011, available at: <https://www.theguardian.com/world/2011/apr/10/france-burqa-law-kenza-drider> (accessed on May 22, 2019). Of particular interest is that Drider's use of the *niqab* amounts to the claim that her identity as a modern subject has been misrecognized by the very legal order that claims to defend modern subjectivity by prohibiting its use in public spaces.

to law-making. Ferrara would surely identify the enactment of the American constitution or the US Supreme Court's ruling, *Roe v. Wade*, as exemplary in this sense. In short, regardless of whether the exemplary is situated inside or outside a legal order, it partakes of the sign's capacity to open up a world of and for collective action.<sup>13</sup>

Importantly, while these cases instance what is intended to operate as a (counter-)sign, something can *become*, perhaps through a process akin to psychoanalytic condensation, a (counter-)sign without initially having been intended to be such, or operated as such. The *niqab* and the *burqa* are good examples of this. No less consequentially, (counter-)signs can take on new meanings, disclosing novel worlds. So, for instance, the lyrics of *Bella Ciao*, which became famous as the anti-Fascist anthem of resistance sung by Italian partisans during World War II, was given an animal rights twist by activists who sang it during a recent demonstration in Amsterdam demanding animal liberation.<sup>14 15</sup>

I referred, previously, to “signal acts of resistance” and to “signal events,” when referring to Parks, Plessy, and direct action by the Karnataka State Farmers Association. I can now render explicit the two senses that govern my use of the word “signal”: what is deemed important and what discloses a world.

<sup>13</sup> I venture the hypothesis that further developing these ideas would require shifting attention from signs to symbols, in particular to “dominant symbols,” in Turner's sense, which “saturate” norms and values with emotions and, conversely, orient emotions by rendering them intelligible as drivers of action. See Victor Turner, *The Forest of Symbols: Aspects of Ndembu Ritual* (Ithaca, NY: Cornell University Press, 1967), 30. It seems to me that a political phenomenology runs parallel to the paradigm of reflective judgment, not by highlighting the peculiar kind of sensibility that Kant associated to judgment but rather the *motivational* force deployed by symbols. In effect, symbols, political symbols in particular, galvanize to action by eliciting emotions, and emotions evince motivational structures that move persons to act in one way rather than another. Chantal Mouffe and others have complained, correctly, that models of rationality premised on rational calculation of interest or on moral deliberation banish the affective dimension from politics, and which is an integral dimension of the individual identification with a collective. Although I must leave this issue for another occasion, phenomenological insights into the affectivity of world-disclosure and of affectivity *as* world-disclosure contribute, I believe, a promising avenue of approach to understanding the symbolic force of the exemplary. See Chantal Mouffe, *On the Political* (London: Routledge, 2005), 24.

<sup>14</sup> As Italians know all too well, the anti-Fascist version of *Bella Ciao* is itself a re-appropriation of an older version of the folk song sung by the “mondinas,” the female seasonal paddy rice workers in the Po Valley, who protested at the harsh working conditions they endured during the late 19<sup>th</sup> and early 20<sup>th</sup> centuries. The animal rights lyrics of *Bella Ciao* sung during the demonstration can be heard (in Dutch) on this Facebook video of the Party for the Animals: <https://www.facebook.com/PartijvoordeDieren/videos/vb.102287806490622/351797965728686/?type=2&theater> (accessed on August 24, 2019)

<sup>15</sup> These examples underscore the strong affinities between a phenomenological radicalization of the concept of representation and the notions of “translation,” as developed by Derrida, and “reception,” as espoused by Stuart Hall and Hans-Robert Jauss.



Yet a caveat is required: although a sign can disclose the world otherwise, it cannot disclose the world directly.<sup>16</sup> As *Roe v. Wade* and the *niqab* show all too well, signs open up and close down circumambient worlds, they enworld and deworld. Likewise, the commemorations of Australia Day signal for numerous Aboriginal peoples the Day of Mourning or Invasion Day, and, since January 26, 2007, Aboriginal Sovereignty Day.<sup>17</sup> In each of these cases, like in so many others, the sign rives a collective in two, or if you wish, it joins and separates two worlds. For some individuals and groups, these signs exhibit the force of the example, or as Ferrara deftly puts it, “the force of *what is as it should be*.”<sup>18</sup> For others, the force of the example is exemplary violence: the force of *what is as it should not be*. It would seem that such signs vouch for the irreducible ambiguity of the exemplary, which can call forth self-incongruency, even radical self-incongruency (meaning by such irreconcilable visions of collective identity), *because* it enables self-congruency. The exemplary, as a mode of the sign, signals a circumambient world; the counter-exemplary, as rendered manifest in a-legality, signals the limits and, to a lesser or greater extent, the fault lines of collective action and its circumambient world.

I wrap up these ideas by making explicit how they mesh with the IACA-model of law: the exemplary and the counter-exemplary are, respectively, situated representations and counter-representations of collective unity. Likewise, a representation of collective unity is always also the co-presentation of a circumambient world.

### *1.3. A-Legality and Civil Disobedience*

We have reached the crux of the matter: the ambivalence that Ferrara detects in my conceptualization of a-legality. In its proper sense, or so he avers, a-legality consists in an “intentional violation of legal provisions perceived as inconsistent with higher norms or worth reconsidering.” When described in this way, a-legality can easily be accommodated in political liberalism, namely, as civil disobedience. Not surprisingly, Ferrara refers on several occasions to the acts of civil disobedience by Parks and Plessy as instances of a-legality. Is he right? Can we substitute civil disobedience for a-legality without remainder, either conceptual or normative?

<sup>16</sup> In a brilliant study, Menga compellingly argues that polities have an *Umwelt*, but no direct access to the world, and that preserving this difference is essential to democratic politics. See Ferdinando G. Menga, *Ausdruck, Mitwelt, Ordnung: Zur Ursprünglichkeit einer Dimension des Politischen im Anschluss an die Philosophie des frühen Heidegger* (Paderborn: Wilhelm Fink, 2018). See my review of Menga’s book in *Contemporary Political Theory* (2019), available in a read-only version here: <https://rdcu.be/byQxL>.

<sup>17</sup> “Australia Day - Invasion Day,” See <https://www.creativespirits.info/aboriginalculture/history/australia-day-invasion-day> (accessed on May 22, 2019).

<sup>18</sup> Ferrara, *The Force of the Example*, 2-3. See also Alessandro Ferrara, “Debating exemplarity: The ‘communis’ in sensus communis,” in *Philosophy and Social Criticism* 45 (2019) 2, 146-58, 147 in fine.

A-legality is the name I give to experiences of what manifests itself as strange from the first-person plural perspective whence a legal order establishes what counts as legal or illegal. Hence, a-legality is a relative concept in the strict sense of the term: nothing is a-legal as such. Cognitively speaking, the strange concerns what is more or less unintelligible or incomprehensible in terms of the conceptual framework with which reality is apprehended. The compound expression, a-legality, yokes the two dimensions of what constitutes strangeness as a legal phenomenon. On the one hand, *a-legality* concerns behavior that prima facie can be qualified by a given legal order as either legal or illegal. If no such qualification were possible, then behavior would not even register as being legally relevant.<sup>19</sup> On the other, behavior is *a-legal* because it resists qualification either as legal or as illegal. A-legality interrupts legal intentionality—the disclosure of something as legal or illegal—by intimating another way of drawing the legal/illegal distinction that entrammels the further course of collective action. So a-legality is both *inside* a legal order (as legal or illegal) and *outside* it (as neither legal nor illegal).

But the strange is never only a cognitive experience; in fact, phenomenological studies of intentionality gainsay that experience is every only cognitive. As concerns legal orders, qualifying behavior as legal or illegal, or as just or unjust, does not have the same emotional valence. Paul Ricoeur refers to the emotional structure of political and legal experience when noting that “our first entry into the region of lawfulness (*droit*) [is] marked by the cry: “that’s not fair!”<sup>20</sup> Instead of simply saying it, one cries out this experience, which in turn calls attention to the embodiment of an intentionality in which the cognitive and emotional dimensions of experience can only be dis severed ex post, through an abstractive move. The anti-austerity *Movimiento de los indignados*, in Spain, makes this explicit in its self-identification. In this vein, and although I cannot develop this idea here at any length, suffice it to note that the experience of the strange is emotionally charged. By confronting individuals and groups with the contingency of legal order, a-legality calls forth a complex of emotions that may include fascination, anger, hilarity, discomfiture, fear, and

<sup>19</sup> Analogously, Ferrara notes that “the idea of *total incommensurability* is ultimately incoherent. For people who articulate their understanding of the matter at hand from within vocabularies that are totally unrelated could not, strictly speaking, make sense of their being in any kind of relation with one another.” Ferrara, *Justice and Judgment*, 183.

<sup>20</sup> Paul Ricoeur, *The Just*, translated by David Pellauer (Chicago: Chicago University Press, 2000), x. For her part, Douglas-Scott notes that “[j]ustice is an emotive concept . . . Our sense of justice is . . . gained . . . cumulatively, through experiences of its perceived opposite, through the sensations of indignation or intolerability.” Sionaidh Douglas-Scott, *Law After Modernity* (Oxford: Hart Publishing, 2014), 175, 208.

even dread. Ferrara himself evokes this emotional charge of strangeness when referring to Steve Bannon.<sup>21</sup> These considerations on the emotional density of a-legality are linked, on the one hand, to the motivational force of exemplarity, to which I have already referred heretofore, and, on the other, to the world-disclosing function of rhetoric, to which I shall refer when engaging with David Owen's commentary. Developing these ideas more fully would require a full-blown study of the embodied nature of intentionality, a task I briefly refer to again when discussing Zanetti's comments.

Although the examples I have marshaled typically concentrate on behavior that registers as illegal, a-legality also includes behavior that is *prima facie legal* but that resists qualification as legal. So, for example, in *Fault Lines* I discuss the social unrest leading up to the fall of the Milošević regime in Yugoslavia. In the wake of a ban on the assembly of persons in public spaces, dwellers of Belgrade decided to walk their dogs, side by side, in the streets of the city.<sup>22</sup> Their act was legal, but at the same time an affront to the regime—a “counter sign” in the sense described heretofore. Notice that cases such as these do not fall, on the face of it, under Ferrara's description of a-legality, namely an “intentional *violation* of legal provisions perceived as inconsistent with higher norms or worth reconsidering.” (emphasis added)

But perhaps such cases should be construed as an *indirect* intentional violation of legal provisions. Moreover, they seem to confirm Ferrara's assumption that a-legality has an *intentional* character, a feature he offsets against the spuriousness of the clochard's dinner invitation. Yet here again my account of a-legality is broader than what Ferrara takes it to be. In *Fault Lines* I refer to situations in which legal behavior has no intention of challenging the law, yet resists qualification as either legal or illegal. Think, for instance, of open-pit mining operations that fall squarely within the scope of the law, yet which come to appear as unacceptably detrimental to the environment. So also the clochard's dinner invitation may not have been intended to challenge the law, yet questions who ought to do what, where, and when. Thus, the animus to violate rules with a view to transforming a legal order is not a necessary feature of a-legality. To couch this point in the vocabulary of political liberalism: civil disobedience by no means exhausts the precinct of a-legality. It is a broader category that seeks to characterize the *general* nature of experiences in which the putative unity of a legal order is challenged, whether intentionally or unintentionally.

<sup>21</sup> To be sure, Bannon is strange for Ferrara as a person with liberal convictions, not so for persons who share Bannon's world-view; strangeness, as I noted, is a relational concept. This points to an interesting methodological issue: it is impossible to illustrate strangeness without presupposing a shared world between author and readers in which behavior can appear as either familiar or strange.

<sup>22</sup> I am grateful to Ivana Ivković, a doctoral student in legal philosophy at the Tilburg Law School, for describing this incident to me.

Surely, however, civil disobedience is the core *political* manifestation of a-legality. Nope. Notice that Ferrara's characterization of a-legality, as cited above, runs parallel to Rawls' famous definition of civil disobedience, namely, "a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government."<sup>23</sup> Crucially, acts of civil disobedience, despite being illegal, presuppose fidelity to the constitutional order in which they take place. By participating in acts of civil disobedience "we are appealing to others to reconsider, to put themselves in our position, and to recognize that they cannot expect us to acquiesce indefinitely in the terms they impose upon us."<sup>24</sup> Rawls adds that "it is important that the action can be properly designed to make an effective appeal to the wide community," such that "it is understood."<sup>25</sup>

Here is the rub: what about those situations in which formulating the claim in a way that can be "understood" by the majority would require stripping the a-legal claim of the normative point that those who engage in an illegal act are concerned to make? What is the political price to be paid for the pragmatic move to formulate a demand for recognition in a way that could be understood by its addressees and lead them to respond favorably?

Let me make this quite concrete with a reference to Ackerman's interpretation of the Foundation (always with capital letters in his work) of the American Republic. To his credit, he recognizes the ambiguity of the Founding, which, all fustian wording notwithstanding, excludes in the process of including. He points to three "founding failures," "the most obvious [of which] is the Founders' politics of exclusion. To win the right to speak for the People, the Federalists did not suppose they needed to appeal to women or slaves or Native Americans."<sup>26</sup> The practices of higher law-making of the Reconstruction and the New Deal have, even if imperfectly, embraced a more inclusive interpretation of "We the [American] People" than that of the Federalists, by granting rights to women and slaves. The Civil Rights Act takes this emancipatory process further. Certainly, the exclusion of Native Americans remains to be adequately addressed; but this demonstrates that "the Founding deserves to be treated as at best the beginning, but not the end, of an ongoing American struggle for popular sovereignty," the *telos* of which is an all-inclusive collective wherein women, Blacks, and Native Americans can recognize themselves and be

<sup>23</sup> John Rawls, *A Theory of Justice* (Cambridge, MA: The Belknap Press, 1971), 364. See also Rawls' essay, "The Justification of Civil Disobedience," in John Rawls, *Collected Papers* (Cambridge, MA: Harvard University Press, 1999), 176-189. For a fuller discussion of Rawls' (and Philip Pettit's) conception of civil disobedience, see Lindahl, *Fault Lines of Globalisation*, 182-4.

<sup>24</sup> Rawls, *A Theory of Justice*, 382.

<sup>25</sup> *Ibid.*, 382, 376.

<sup>26</sup> Ackerman, *We the People: Transformations*, 88.

recognized by all other Americans as free and equal citizens of the Republic.<sup>27</sup> As Ferrara describes it, the enactment of the Fourteenth Amendment, the New Deal, and Civil Rights legislation are exemplary by dint of securing a greater self-congruency of the American collective. In sum, Ackerman conceives of civil disobedience, as do Rawls and Ferrara, in terms of a struggle oriented to progressively begetting mutual reciprocity between free and equal citizens.<sup>28</sup>

Although there are only two further, cursory references to the exclusion of Native Americans in the first volume, and none in the third, of Ackerman's *We the People*, nor in Ferrara's commentary thereof, there can be no doubt that Rawls, Ackerman, and Ferrara would vigorously support civil disobedience by Native Americans oriented to obtaining the rights required for them to burgeon as individuals and groups on an equal standing with all other American citizens and minorities.

Yet, need inclusion be the *nisus* of all indigenous peoples? Might there be indigenous persons or groups of indigenous persons for whom their recognition as Native *Americans* is a form of domination because they are included in Ackerman's narrative of "an ongoing American struggle for popular sovereignty"? The question is neither hypothetical nor spurious, as evinced, amongst others, by the Lakota Sioux Indian Declaration of Sovereign Nation Status in 2007, following up on their withdrawal from the 1851 and 1868 Treaties agreed between their forefathers and the US government at Fort Laramie, Wyoming.<sup>29</sup> Were they or other like-minded indigenous peoples to engage in a-legal acts oriented to demanding political sovereignty vis-à-vis the American Republic, their resistance would not be civil disobedience in the sense espoused by Rawls and Ferrara. For they would not resist that they have been excluded in the Founding and thereafter; they would resist their *inclusion* in the Republic. They would not demand the right to have rights in the American Republic; they would demand *not* to have rights therein, so as to be able to participate in a collective they could call their own.<sup>30</sup> Likewise, they would resist having to demand that they be recognized as Americans, as the price to be paid for making their demand "understandable" to the broader public. Their recognition as Native Americans is an act of misrecognition of who they take themselves to be *because*

<sup>27</sup> *Ibid.* In Ferrara's words, "all these transformative events are instances of a more and more complete realization of the political identity of the American People as a nation." Ferrara, *Justice and Judgment*, 131.

<sup>28</sup> See Alessandro Ferrara, *Reflective authenticity: Rethinking the project of modernity* (London: Routledge, 1998), 13-16, for the role of mutual recognition in the judgment paradigm of politics.

<sup>29</sup> "Freedom! Lakota Sioux Indians Declare Sovereign Nation Status," at <https://nativeamerican-netroots.net/diary/50> (last accessed on June 12, 2019).

<sup>30</sup> I borrow this formulation from Nanda Oudejans, "The Right not to Have Rights: A New Perspective on Irregular Immigration," in *Political Theory* 47 (2019) 4, 447-474.

they are recognized, albeit formally, as free and equal citizens of the American Republic.<sup>31</sup>

It may well be the case that, for pragmatic reasons, such indigenous persons and groups see no alternative for themselves other than to make use of the rights the American legal order grants them, and, as a consequence, are inured to fighting for greater inclusion and/or a limited autonomy regime. But does this entail that “we can assume that an implicit consensus to [the project of a political community] is expressed by the citizen who resides in his country, exercises her right to vote, collects the benefits of her participation in the division of labour and exerts the prerogatives of citizenship”?<sup>32</sup>

The analysis I just offered of “Native American” resistance illustrates why a-legality encompasses both weak and strong dimensions of a challenge to collective unity, the correlates of which are, respectively, the limits and fault lines of a legal order. A limit refers to the strange insofar as it appears as unordered but *orderable* within the legal order it challenges. Acts of civil disobedience fall within this dimension of a-legality. As described by Rawls, civil disobedience regards a demand for recognition oriented to securing inclusion in a legal order on the basis of the practical possibilities available to that order, but which it has not (yet) realized. Homer Plessy’s and Rosa Park’s conduct is a-legal in this sense. The IACA-model of law argues that Plessy’s and Park’s challenges can call forth transformative acts of collective self-*assertion* that aim to recognize the other as one of us. Park’s challenge did. A fault line, by contrast, concerns a challenge to the boundaries of collective unity that is unordered and *unorderable* within the legal order it challenges. Such is the case for indigenous peoples and individuals who refuse to view themselves as Native Americans because the American Republic is, for them, the outcome of a violent colonization to which they refuse to submit normatively, even if they can do no other, factually speaking.

#### *1.4. Judgment*

These considerations on a-legality prepare the ground for assessing Ferrara’s comments on constituent power. As he sees it, the concept of constituent power deployed by the IACA-model of law is “at the core of liberal constitutional theory.” In particular, Ackerman’s theory of “unconventional adaptation” shows constituent power to be a “limited breach of legality . . . in the service of creatively transforming

<sup>31</sup> For an analogous discussion of the Quebec Secession Reference by the Canadian Supreme Court and its implications for First Nations, see Hans Lindahl, “Recognition as Domination: Constitutionalism, Reciprocity and the Problem of Singularity,” in Neil Walker, Stephen Tierney and Jo Shaw (eds.), *Europe’s Constitutional Mosaic* (Oxford: Hart Publishers, 2011), 205-230.

<sup>32</sup> Ferrara, Justice and Judgment, 192-3.

‘the point’ of living together.” Although the breaches of legality displayed in unconventional adaptation have different levels of intensity, they share “the kind of discontinuity with established legal, political, social patterns that Lindahl captures under a-legality *in its second meaning*.” But whereas Ackerman’s model of unconventional adaptation can accommodate the difference between constituent power and constitutional interpretation, the IACA-model of law collapses this important distinction into the single rubric of constituent power.

As to this last point, I happily concede that *Authority* does not offer a sufficiently differentiated notion of constitutional transformation. But that was not its aim. It focused exclusively on establishing whether the exercise of constituent power germane to global constitutionalism could avoid the logic of inclusion and exclusion as per the IACA-model of law, not on providing a full-fledged theory of constituent power. An earlier article deals head on with different modalities of constitutional transformation, so I will not canvass these here.<sup>33</sup>

I also agree that there are significant affinities between my account of constituent power and Ackerman’s model of unconventional adaptation. Ackerman’s reconstruction of the phases through which higher law-making breaches legality to transform collective action—signaling, legitimating, proposing, triggering, ratifying, and consolidating—offers a fine-grained functional analysis of constituent power. These phases parse what my formulation of the paradox of constituent power condenses into the two moments of seizing the initiative to represent a collective otherwise and the self-recognition by the addressees of that initiative.<sup>34</sup>

There are significant differences between the two accounts of constituent power, too. Most obviously, Ackerman’s three-volume *We the People* ignores those revolutionary foundations, such as the Bolshevik Revolution of 1917, that “challenge . . . an entire constitutional tradition.” Instead, he focuses on revolutionary foundations, such as the American Revolution, that “challenge . . . well-established norms.”<sup>35</sup> The IACA-model of law, by contrast, offers an account of constituent power that encompasses *both* kinds of revolutionary foundations. For, as noted earlier, a-legality does not only manifest itself as what is unordered but orderable in a legal order; it also comprises challenges that, as unordered and unorderable, can lead over into a new legal order. Ackerman does discuss revolutionary foundations in his most recent book. But what is of cardinal importance to my examen, namely, in what way representation is effectual in the exercise of constituent power oriented to what Ackerman calls a “revolutionary ‘new beginning’” or the “collective struggle

<sup>33</sup> Hans Lindahl, “Possibility, Actuality, Rupture: Constituent Power and the Ontology of Change,” in *Constellations* 22 (2015) 2, 163-174.

<sup>34</sup> Ackerman, *We the People: Transformations*, 32-68.

<sup>35</sup> *Ibid.*, 11.

for political *redefinition*,” remains unclarified in this book as well.<sup>36</sup> So I ask for Ferrara’s indulgence, as I will dedicate no further attention to Ackerman’s work. While certainly engrossing as regards the cornucopia of doctrinal and historical materials his work puts on display, its theoretical framework regarding representation and constituent power is meager.

Ferrara’s own thinking is far more interesting in this respect. And so I propose to take up the question about constituent power by focusing on where I think Ferrara and I stand closest to and furthest removed from each other: *judgment*.

He is interested in Ackerman’s theory of higher law-making because it illustrates, in his view, the turn towards the judgment paradigm of politics. More precisely, Ferrara’s inquiry focuses on Kant’s notion of *reflective* judgment, as he rejects any attempt to posit trans-subjective and a priori criteria that could determine how to settle political conflict. Habermas’ appeal to the transcendental conditions of an ideal speech situation and Rawls’ concept of rationality, as developed in the *Theory of Justice*, are good examples, he posits, of an approach to intersubjectivity that attempts to overcome the irreducibility of plurality by appealing to determinative judgment. The Linguistic Turn exposes this move as foundationalist: “there is simply no way of grasping reality from outside an interpretative framework, and . . . there exists an irreducible multiplicity of interpretative frameworks.”<sup>37</sup> Ferrara argues in favor of “reflective” or “exemplary” universalism as an alternative to the foundationalism of principle universalism and the relativism of the Linguistic Turn. In his view, an exemplary act of higher law-making enables a collective to become more congruent with itself over time by dint of progressively realizing the conditions for equal and free citizenship that truly hold *for us*, while perhaps also inspiring other collectives to adopt this exemplary law as their own. Leading by example.

I am sympathetic to this approach insofar as I understand authority to be contextually responsive in a way similar to Ferrara’s notion of exemplary law-making. “Authority is the capacity to articulate a representation—a vision—of who we\* *really* are/ought to be that, in hindsight and for the time being, gains wide allegiance among its addressees and motivates them to act as a group that can deal with challenges to its contingent existence.” (*Authority*, 329) Not surprisingly, both Ferrara and I are interested in developing a contemporary reading of the Aristotelian notion of *phrónēsis*, the discussion of which I postpone till my response to David Owen.

Ferrara’s focus on judgment and my interest in representation show similarities and differences. Following Kant, Ferrara holds that judgment in general posits “the

<sup>36</sup> Bruce Ackerman, *Revolutionary Constitutions: Charismatic Leadership and the Rule of Law* (Cambridge, MA: Harvard University Press, 2019), 27, 35, 40-2. (italics added in the “re” of “redefinition”)

<sup>37</sup> Ferrara, *Reflective authenticity*, 11. I was struck, when reading Ferrara’s books, that there is not a single reference to Lyotard’s interpretation of reflective judgment, presumably because it belongs to the post-modernism Ferrara is keen to distance himself from.



particular *as* contained under the universal.”<sup>38</sup> Notice the isomorphism: to represent is to represent something *as* something. To assert that higher law-making has the structure of a reflective judgment is to aver that it is a situated representation of collective unity.

While judgment/representation is our common cynosure, it also marks a fork in our paths: we approach the “as” of judgment/representation differently. For Ferrara, the “as” in “the particular as contained under the universal” functions as the placeholder for a bidirectional approach that has judgment going from the universal to the particular or from the particular to the universal. Instead of going down the path of reflective judgment, I turn back towards the common root of judgment, to dwell on the work done by the “as” of “something as something.” Ferrara will perhaps urge me to not tarry too long with the representational “as” and to retrace my steps, rejoining him in an inquiry into reflective judgment and its claim to universality. Otherwise, he monishes, a theory of judgment risks falling prey to the relativism of the Linguistic Turn.

But the “as” of judgment/representation debars any quick return to reflective judgment. To judge is to posit something as something *anew*, such that the “anew” always hovers somewhere between “again” and “new.” Judgment re-judges. On the one hand, this means that there can be no first or last judgment, hence that no judgment can be conclusive. On the other, the interplay between the referent and the semantic content of judgments dissolves the simple opposition between determinative and reflective judgments. To disclose something as having this or that meaning never only reprises a pre-given meaning, such that the particular would be but the application of the “universal.” Nor does judgment ever create meaning *ex nihilo* when going from the particular to the “universal.” Judgment is neither simply determinative nor simply reflective because it always finds itself somewhere between the unattainable extremes of the pure production and the pure reproduction of meanings.<sup>39</sup> Perhaps there is a sense in which the universal remains at work in judgment/representation; but we do well not to take for granted that the structure of reflective judgment will save the day. Instead, we need to further clarify what the “as” has to teach us about the obliquity of legal ordering.

<sup>38</sup> Ferrara, *The Force of the Example*, 18 (italics added) The internal connection between judgment and representation is evident in Ackerman’s conception of a “dualist” constitution, for both “higher” and “lower” law-making are modes of the political representation of the people. See Ackerman, *We the People: Foundations*, 6-10.

<sup>39</sup> This also holds for works of art, which are themselves representations. No work of art is either the first or the last, none is conclusive about what it aspires to reveal, and none can be either purely repetitive or purely innovative with regard to earlier works of art. And like a sign—nay, because it *is* a sign—a work of art is embedded in and reveals a world. See Martin Heidegger, “The Origin of the Work of Art,” in David Farrel Krell (ed.), *Martin Heidegger: Basic Writings* (London & New York: Routledge, 2011), 83-140.

If we now focus on constituent power, an important lesson can be garnered from the representational/judgmental “as,” which highlights where the judgment paradigm of politics and the IACA-model of law part ways. The nub of the matter is the relation between representation/judgment, temporality, and the ontology of collective transformation.

Ferrara’s question is how to validate the enactment of the first constitution of a collective if we cannot appeal to a trans-subjective and a priori criterion of validity that is external or transcendent to the founding act. Only an internal, immanent standard will do the trick, which he dubs self-congruency or reflective authenticity. Restated, the question is the following: how to establish that the founding act is an act of the people itself, such that the enactment of a constitution is well and truly a *self-congruent* act? Ferrara’s response to the conundrum is to distinguish between cultural and political identity:

the People *qua* collectivity endowed with a political identity did not exist prior to the enactment of a constitution. The people, back then, were just a collectivity endowed with a *cultural* identity. At some point in their history, however, the people *so conceived* constituted themselves as a people *qua* collectivity endowed with a *political* identity, and in that transformation, as in all transformations, something changes and something remains the same . . . From now on all subsequent interpretations and adjustments of the constitution will have to issue from the people *so conceived* and be congruent with that original moment of founding.<sup>40</sup>

In brief, self-congruency entails that the political identity of a collective, as expressed in its constitution, should be “aligned” with its “core [cultural] identity,” namely, with those features of its cultural identity that truly define “who we are.”<sup>41</sup> As he understands it, this conception of self-congruency or reflective authenticity avoids naturalizing certain identity components, while also permitting “a collectivity endowed with a cultural identity [to seek] a transformative deliverance from certain undesired, or no longer desired, aspects of its own identity.”<sup>42</sup>

Ferrara’s focus on the passage from the particular to the universal in his analysis of reflective judgment goes hand in hand with a certain interpretation, largely implicit, of the temporality deployed in the “as” of judgment/representation. Specifically, the move to distinguish between cultural and political collective identities takes for granted that a collective already exists, albeit only with a cultural identity of its own, *prior* to the representational act of enacting a constitution that gives it a political identity. Ferrara needs to make this assumption to be able to hold on to the notion of a “core identity,” such that, in Michelman’s words, the first constitution, and all

<sup>40</sup> Ferrara, *Justice and Judgment*, 145.

<sup>41</sup> *Ibid.*, 146.

<sup>42</sup> *Ibid.*, 147.

acts of higher law-making that follow it, can be “aptly attributable to all affected persons.”<sup>43</sup>

Although Ferrara vigorously defends the internal, immanent criterion that undergirds the collective self-congruency of reflective universalism against the external, transcendent criterion of what he calls “principle universalism,” this stark cleavage conceals a more fundamental agreement between both forms of universalism. In both cases, the question of the validity of founding acts demands finding an *independent and objective* set of identity-criteria to track the self-congruency (reflective universalism) or self-rule (principle universalism) of a collective for all persons concerned. While reflective universalism abjures impartiality under *principles*, it shares with principle universalism the quest for an independent and objective criterion that could vouch for “*impartiality* without principles,” the title of the last chapter of Ferrara’s *Justice and Judgment*. I wonder, however, whether the price that Ferrara pays for this strategy is not too steep. Does not postulating a pre-existent and pre-political cultural identity as the *fons et origo* of collective self-congruency reintroduce the foundationalism he seeks to eradicate from politics?

Furthermore, as the citation of Ferrara makes clear, his understanding of constitutional transformation embraces a simple linear temporality of a before and an after, in which an extant cultural collective becomes a political collective through an initial constituent act that, if all goes well, is “aligned” with its core cultural identity, while also leaving room, in subsequent acts of higher law-making, for reinterpreting the constitution in ways that better “reflect” that political identity.<sup>44</sup> This teleological interpretation of constituent power has a significant drawback. Strictly speaking, nothing new emerges in a teleological concept of change: the passage towards greater political self-congruency actualizes cultural possibilities that were already there, latent, from the very beginning. In good Aristotelian fashion, constitutional change means, for the model of collective self-congruency, the progression from *dínamis* to *enéргеia*.

Drawing on a phenomenological radicalization of the “as” in judgment/representation, the IACA-model of law rejects this simple linear account of transformation, underscoring the paradoxical temporality at work in representation. Let me phrase this in terms of Ferrara’s distinction between cultural and political identity: a constituent political act originates the cultural identity of a collective if it succeeds, retroactively, in representing an original cultural identity. A polity with a distinct cultural identity is the *effect* of a successful retrojective anticipation, not an aborning of our better political self that unfolds who we already are, culturally speaking. To paraphrase Bert van Roermund’s wonderful formulation of the temporal paradox en-

<sup>43</sup> *Ibid.*, 143, citing Michelman, “Always under Law?”, 234.

<sup>44</sup> *Ibid.*, 148.

sconced in the representational “as,” the foundation of a collective posits a past cultural identity that we can look forward to. This paradoxical temporality introduces discontinuities in and reorganizations of the consecution going from past to present to future, disrupting a linear understanding of collective transformation as the process by which a collective becomes more or less authentic.<sup>45</sup>

Crucially, while Ferrara is right to note that judgment/representation claims to articulate what truly conjoins us, and that what truly joins us is never simply “at the subject’s disposal,” as per his comments, the temporal paradox of constituent power gives the lie to the idea of a “core identity” that is fully independent of the *unauthorized positivity* of representational acts that succeed—nowise fully, always provisionally—in founding a collective by including and excluding, and which ruins the attempt to independently and objectively track progress toward or deviation from collective self-congruency and authenticity for all parties concerned.

The importance of the representational “as” is not limited to its temporal dimension; it also brings about a representational difference between the represented and its representations. As I have sought to show in *Authority*, processes of collective self-identification are also always processes of collective self-differentiation: we identify ourselves as *this*—rather than as *that*. The point is not simply, as Ferrara puts it, that “something changes and something remains the same.”<sup>46</sup> Instead, the representational “as” differentiates a collective with respect to *itself* in the very move by which it posits its identity over time. As a result, collective self-representation is always also, to a lesser or greater extent, a collective self-*mis*representation, which is something quite different to understanding the career of a collective as becoming more or less self-congruent over time. This is why I earlier insisted that signs also operate as counter-signs, and the exemplary as counter-exemplary, giving rise to a split collective self.

The implication of this train of thoughts is also clear, I hope, for the notion of constituent power: while every collective’s possibilities are in excess of its default setting of legal order, the possibilities for living and acting together are in excess of the possibilities available to any given collective. Constituent power goes hand in hand with *constituent powerlessness*. “We can,” i.e. we are capable of asserting ourselves as a collective by including the other (in ourselves) as one of us, runs up against a “we cannot”: the other (in ourselves) who obstinately demands to be treated as other than us, e.g. as a sovereign Indian nation rather than as a group of Native Americans. Constituent powerlessness explains why I am loath to reserve the honorific label of constituent power, as Ferrara urges me to do, for transformations of a constitutional order oriented to securing its greater self-congruency.

<sup>45</sup> See Lindahl, “Possibility, Actuality, Rupture,” for a more detailed analysis of the temporal dislocations at the heart of an ontology of change.

<sup>46</sup> Ferrara, *Justice and Judgment*, 145.

### 1.5. *Collective Self-Restraint and Political Liberalism*

I'll conclude my response to Ferrara with some remarks about the relation between collective self-restraint and political liberalism. He notes, in this respect, that, like liberal theories of democracy, Chapter 7 of *Authority* pleads for self-restraint in law-making. A first mode of self-restraint is the deferral of decisions about claims to collective unity, which, in his words, "include[s] judicial review or democratic experimentalism." The second mode of self-restraint "orients us to prefer a kind of checkerboard legal order with a plurality of sub-domains regulated by alternative regimes." And a third concerns an inversion of Schmitt's account of the exception. These three modes of self-restraint are part and parcel of political liberalism, Ferrara remarks. Surprisingly, however, the book's index has no entry on political liberalism nor on liberal rights. Is the concept of authority championed by the IACA-model of law crypto-liberal, as he suggests?

Ferrara is right to note that I have avoided matriculating the IACA-model of law in political liberalism. But this is part of a broader strategy. I have also avoided any attempt to affiliate my work with post-modernism, agonism, structuralism, Marxism, communitarianism, cosmopolitanism, political realism, or any of the other "isms" that populate the contemporary philosophical landscape. My concern has been to outline a concept of legal order that is up to the task of understanding why globalization processes necessarily unfold as the globalization of inclusion and exclusion. This enterprise touches on a host of issues that are hotly debated in contemporary political philosophy, in many of which political liberalism has taken an outspoken stance. But I have wanted to work out my own position on the question about inclusion and exclusion, resisting the temptation of too quickly attaching a philosophical label to it.

Nevertheless, I welcome the opportunity to specify how collective self-restraint, as per the IACA-model of law, stands with respect to political liberalism. Like political liberalism, the defense of collective self-restraint outlined in *Authority* and *Fault Lines* defends a clutch of institutions that aim to accommodate pluralism. Yet while both Ferrara and I are keen to defend such institutions, our justifications thereof *converge and diverge*, as do our assessments of the extent to which those institutions can fulfil the promise of accommodating plurality.

In the final paragraph of his most recent book, *The Democratic Horizon*, Ferrara notes that, like other theories of democratic politics, he endorses "pluralism, the unattainable and undesirable quality of hegemonic closure, permanent contestation and agonism."<sup>47</sup> He also foregrounds an important difference with respect to those theories, a difference, if I understand him correctly, that remains faithful to

<sup>47</sup> Alessandro Ferrara, *The Democratic Horizon: Hyperpluralism and the Renewal of Political Liberalism* (Cambridge: Cambridge University Press, 2014), 219-20.

political liberalism, and which defines it as such: the refusal to relinquish the democratic “distinction between legitimate (*consensus-deserving*) and arbitrary power.”<sup>48</sup> This means that in a democracy, including a “multivariate democracy,” legitimate power is *intransitive* power: power that we, as a whole, exercise over ourselves. Here, then, is the bottom line: political liberalism refuses to relinquish the principle of identity as the independent and objective criterion that allows of adjudicating for all affected parties what counts as legitimate and as arbitrary exercise of power. Having rejected the attempt by principle universalism to posit a transcendent set of conditions for collective identity, Ferrara appeals instead to an immanent set of conditions of collective identity that, when met, give rise to collective self-congruency. Thus, his defense of (hyper)plurality is also—and ultimately—a defense of unity, of *plurality within unity*, because, in his reading, collective identity is the independent and objective (albeit not transcendent) criterion that allows of differentiating between legitimate and arbitrary power: we, as a unity, rule over ourselves.

I agree that the aspiration to realizing collective identity, hence to achieving unity, is an ingredient element of democratic politics. And I agree that reflective judgment expresses this aspiration without embracing the mode of foundationalism he rightly detects and condemns in principle universalism. I know of no other theory of political liberalism that is more sensitive to and more creative in dealing with the tension between unity and plurality than Ferrara’s. Yet if representation cannot but pluralize what it unifies, if it cannot but differentiate what it identifies, then not only are the realization of collective self-identity and self-unity postponed *sine die*, but are subverted from within by difference and plurality.

So, yes, collective self-assertion encapsulates the aspiration to realizing collective identity and unity, hence to being able to distinguish between legitimate and arbitrary power. But the representation of collective unity calls for collective self-restraint, as far as that goes, because no legal order can justify how it draws this distinction without ultimately falling prey to a *petitio principii*. No collective self-congruency without a blind spot as to what counts as collective self-congruency; this insight differentiates the IACA-model of law from Ferrara’s defense of political liberalism. This entails an important correction to Ferrara’s reading of my inversion of Schmitt’s exception: I am not claiming, as he puts it, that “the exception is aimed at including the other without assimilating her to one of us.” My inversion of the exception consists precisely in not applying the law that is applicable in those cases in which including the other *cannot but* assimilate her to one of us. This reading of the exception is the extreme mode of restraint whereby “a collective acknowledges that it has an outside . . . that eludes the collective’s self-assertion and that *ought* to be preserved as its outside . . . if collective recognition of the other (in ourselves) is

<sup>48</sup> Ibid.

not to collapse into a process of totalization and therewith of domination.” (*Authority*, 345)

I added the proviso “as far as that goes,” when indicating that the representation of collective unity calls for self-restraint, because self-restraint may not go so far as to imperil collective self-assertion, that is, to imperil, in the judgment of authorities, what we are really about as a collective, even though there is no hard and fast criterion thereof. For those who pertinaciously resist inclusion, exposing the *petitio principii* for what it is, acts of collective self-assertion in response to their demands for recognition are acts of domination.

In contrast to models of reciprocal recognition, liberal or otherwise, asymmetrical recognition is the name I give to the attempt to think through the normativity of authority if collectives are finitely questionable and finitely responsive in the face of a-legal challenges. That collectives can be responsive to what questions their contingent existence attests to the transformative potential of collective self-assertion. That their questionability and responsiveness are finite bespeaks the tragic dimension accruing to self-restraint. This tragic dimension resonates in Ferrara’s paraphrase of Luther’s famous—apparently spurious—exclamation in the Diet of Worms: “Here we stand; we can do no other.”

## 2. THOMAS FOSSEN

Fossen notes, correctly, that representation is the central concept of *Authority*, even though it does not figure as prominently in the book as, say, recognition. Drawing on his rich article, “Constructivism and the Logic of Political Representation,” he takes issue with the concept of representation defended in my book. There is, in his view, a dyadic mode of representation—“representative agency”—distinct from and irreducible to the triadic mode of representation—“representation-as.” Because it ignores the former, or so Fossen expostulates, *Authority* runs into trouble when making sense of collective action. For the one, the book too quickly assumes that all forms of constituent power involve usurpation and violence, losing sight of its invitational forms. For the other, it proves incapable of exploiting the important political distinction between representative and participatory democracies, as it levels down both to modalities of the representation of collective unity.

### 2.1. *Two Modes of Representation?*

I begin by examining Fossen’s move to discern two modes of representation. The distinction allows him to champion a constructivist reading of representation, while

also defending the priority of the represented over their representatives. This priority is important, he holds, if we are to make sense of representatives as being responsive and accountable to their constituencies.

I am sympathetic to his move to develop a concept of political representation that takes up the cause of (a certain reading of) constructivism and that insists on the responsive nature of representation. But, I will argue, what he wants to say about representative agency and the priority of the represented is captured by a phenomenological reading of the interplay between the referential and semantic functions of representation, which is always and only the representation of something as something to someone.

Fossen moots the distinction between the aforementioned modes of representation in the course of a critique of Michael Saward's analytical framework of representational claims. I'll ignore Saward's framework, concentrating on Fossen's conceptualization of the two modes of representation, which he exemplifies as follows: "(a) The lawyer represents her client before the court; (b) In her closing statement to the jury, the lawyer represents her client as an innocent bystander."<sup>49</sup> Perusal of these two examples reveals three key differences, according to Fossen. Whereas (a) deploys a relation between two individuals, (b) involves a statement, an individual, and an account of a role in some situation. Furthermore, they are semantically different. Most importantly, "the relation of subject and object in (a) is dyadic ( $x$  represents  $y$ ), whereas in (b) it is triadic ( $x$  represents  $y$  as  $z$ )."<sup>50</sup> Because Saward and other constructivists focus only on representation-as, Fossen holds that they lack the analytical wherewithal to account for the priority of the represented, hence the responsiveness incumbent on representative agents.

Fossen goes to considerable lengths to parry the objection that acting-for-others collapses into representation-as. According to the objection, (a) can be reconstructed as stating that the lawyer represents someone *as* her client. Fossen retorts that this "does not capture the point of representative agency, because by the same token we could say that she represents herself as a lawyer. We could not, however, just as well say that she acts on her own behalf in the courtroom."<sup>51</sup> But this rebuttal is clearly wrong. To assert that the lawyer represents the client is to say that the lawyer treats someone *as* such, referring to her in certain ways, laying out certain arguments beneficial to her case, etc. Likewise, to represent someone *as* one's client in a courtroom scenario is to represent oneself *as* a lawyer, undertaking the kinds

<sup>49</sup> Thomas Fossen, "Constructivism and the Logic of Political Representation," forthcoming in *American Political Science Review*, (2019) doi:10.1017/S0003055419000273. I also ignore in what follows other contributions to the current debate on representation among political theorists, such as the work of Nadia Urbinati. I hope, on another occasion, to contrast my own approach to the positions defended in that debate.

<sup>50</sup> *Ibid.*, 4.

<sup>51</sup> *Ibid.*, 5.



of actions one would expect of a lawyer in a courtroom situation. Finally, it is misleading to argue that a triadic reading of (a) is incorrect because it could just as well mean “that she acts on her own behalf in the courtroom.” This claim only makes representational sense to the extent that lawyering is a role with certain obligations and rights that lawyers are expected to fulfil and in *this* sense “act on their own behalf.”

In brief, there is no relation between a lawyer and a client—no acting-for-others—that is not mediated by roles and, more generally, by a nexus of meanings: a *world*, phenomenologically speaking. Accordingly, the parties in what Fossen calls representational agency appear to themselves and to each other *as* something: someone represents someone else as a client and herself as her lawyer ( $x$  represents  $y$  as  $z$ ;  $x$  represents  $x$  as  $w$ ). Likewise, someone represents someone else as her lawyer and herself as a client by paying a fee, answering certain legal questions, etc. ( $y$  represents  $x$  as  $w$ ;  $y$  represents  $y$  as  $z$ ).

Fossen is aware of this riposte, but moves to deflect it: “besides offering statements about her client as in (b), the lawyer does lots of things in her capacity as a representative that do not characterize the client in an immediate or explicit sense, such as listening to him and objecting to the prosecutor.”<sup>52</sup> Certainly; but the distinction between implicit and explicit characterizations of something (as this or that) concerns two different modalities of the triadic structure of representation, not an argument in favor of a dyadic relationship! As Husserl, Heidegger, and Merleau-Ponty have repeatedly pointed out, there are pre-predicative—implicit—modes of practical intentionality that only become predicative—explicit—when whoever acts is called on to vouchsafe what she is doing. Heidegger famously distinguishes between *Verstehen* (understanding) and *Auslegung* (interpretation), that is, between implicit and explicit modes of practical intentionality.<sup>53</sup> When I pick up a hammer to repair a shoe, I usually do not say, “this is a hammer”; I simply hammer away, and in so doing reveal something as something. But when asked, “What are you holding?”, I answer “(This is) a hammer.” It is not otherwise with the lawyer and the client in Fossen’s example. He misinterprets the triadic relation— $x$  represents  $y$  as  $z$ —by assuming that it must be explicit. Even if one reserves the concept of representation for explicit relations, e.g. statements by someone about something, they have the same triadic structure as implicit relations.

Why is Fossen such an ardent advocate of two “logically” distinct modes of political representation? Because he wants to salvage what Saward’s analytical framework of the representational claim cannot account for, namely, the priority of the represented over the representative. “The priority of the represented is not a metaphysical commitment to the existence of interests prior to the practices of political

<sup>52</sup> *Ibid.*, 6.

<sup>53</sup> Heidegger, *Being and Time*, §§ 31 and 32.

representation . . . but a pragmatic commitment concerning the order of justification implicit in the idea of representative agency.”<sup>54</sup> I concur; but the idea of representative agency is neither necessary nor helpful with a view to rejecting this metaphysical commitment and defending responsiveness. In point of fact, I wonder whether Fossen can coherently defend both commitments if he argues for two “logically” distinct modes of representation. For if representational agency is not mediated by a web of meanings, i.e. if it is not caught up in a triadic relation, then I do not see how Fossen can avoid positing “clienthood” and “lawyerhood” as properties that accrue *directly* to individuals, independently of the representational practices in which someone appears as a client and someone else as a lawyer. Conceptualizing representational agency as a dyadic relation endorses a form of realism; Fossen’s construal of representation-as champions constructivism. He cannot have it both ways.

A pragmatic account of representation in general, and of political representation in particular, is best served by hewing to phenomenological philosophy’s founding insight about our intentional or mediated relation to reality, namely, that something *appears* as something to someone. Instead of postulating a metaphysical range of properties that things might possess of themselves, phenomenology focuses on things as *experienced*, i.e. not on what things *are* of themselves but rather on things as they are *given* to someone. This means that things appear to us as this or as that within a world of meanings that elicits our attention and action. No representation, theoretical or practical, of something as something without the co-presentation of a circumambient world we actively engage with in terms of what Heidegger calls “care” (*Sorge*).

How, concretely, does the triadic structure of representation avoid both simple realism and simple constructivism? Everything turns on the “as” of “something as something.” As I have sought to show in *Authority* and earlier work, the “as” of representational acts eschews the two modes of originalism proper to a metaphysics of presence. It gives the lie to an original unity given directly and prior to all representations, which would simply reproduce the former; and it gives the lie to an original unity that emerges *ab ovo* through a purely productive act, such that there would be nothing to represent. In a similar vein, Ferdinando Menga explores the paradoxical dynamic at work in what he calls the logic of creative expression:

If “something” were in fact given prior to the expression, the expression would be enervated [*depotenziert*], would be superfluous, for what it seeks to express would already be given and appropriated prior to the expressive event . . . Conversely, if there were absolutely nothing that preceded the expression, it could, strictly speaking, not express anything, because it could not appropriate or link up to anything.<sup>55</sup>

<sup>54</sup> Fossen, “Constructivism and the Logic of Political Representation,” 12.

<sup>55</sup> Menga, *Ausdruck, Mitwelt, Ordnung*, 62.

Herein lies the ineradicably contingent character of experience, as Menga compellingly shows. By the same token, because the “as” entails that representations are always and only defeasible representational *claims*, representatives are called on to *justify* what Fossen calls their “characterizations” of the represented, in the same way that, say, scientists are called on to justify their theoretical models, or painters their paintings. Fossen observes that

being ‘responsive’ toward the represented does not mean that the representative should operate like a one-way conveyer belt, transforming citizens’ given preferences into actions or policies. That would presume their interests to be fully transparent to citizens themselves, and short-circuit contestation of how they are to be portrayed. Crucially, the *genuine interests* of the represented . . . are logically distinct from what anyone makes of them.<sup>56</sup>

Here we stand shoulder to shoulder: “authority,” I argue, “is the capacity to articulate a representation—a vision—of who we \* *really* are/ought to be that, in hindsight and for the time being, gains wide allegiance among its addressees and motivates them to act as a group that can deal with challenges to its contingent existence.” (*Authority*, 329) Fossen speaks of “genuine interests” of the represented; I refer to authoritative representations as articulating, more or less successfully, what “really” concinnates us. In both cases, responsive representation involves the priority, which is not simply temporal, of the represented with respect to the representational claims—the precedence or *Vorgänglichkeit* of the represented. On the other hand, a representation is not merely a reproduction of the represented because the challenge to which representation responds is not independent of how the response represents it—the retroactivity or *Nachträglichkeit* of the representation. See here the double asymmetry that governs representational processes, an asymmetry that avoids both pure realism and pure constructivism without having to appeal to a mode of political representation distinct from the triadic structure indicated above. The interplay between representation *of* and representation *as* does all the work necessary to explain how representation in general, and political representation in particular, can be responsive. The notion of “representative agency” falls prey to Ockham’s razor.

## 2.2. *Constituent Power and Violence*

Let us now consider the first of the two objections Fossen addresses to *Authority*, which turns on the conditions governing the efflorescence of a collective, that is, on constituent power and its relation to representation. As Fossen reads me, I would hold that “constituent power operates essentially through a kind of dissimulated annexation [because] all collective action stems from a moment of illicit appropriation,

<sup>56</sup> Fossen, “Constructivism and the Logic of Political Representation,” 11. (italics added)

a taking or seizure.” To the extent that this annexation succeeds, “the addressees are swept up into a collective, and this ineluctably carries an element of violence. This moment of violence is then *veiled* because in order to succeed the initiatory act must present itself as legitimate.”

I have indeed insisted on exposing the moment of unauthorized inclusion and exclusion that accompanies the emergence of collectives. The concern animating this strategy is to debunk claims to universality that aborning global legal orders are wont to claim for themselves. Yet to acknowledge this does not mean that constituent power is simply an act of annexation: to take is also to *initiate*, to set something new on its way. I consistently argue in *Authority* and earlier work that constituent power *empowers and disempowers*, that it opens up and closes down possibilities for joint action. Accordingly, the act of seizing or taking the initiative is never only an annexation, dissimulated or otherwise, never only an illicit appropriation of collective unity. To take or seize the initiative through unauthorized representational acts is always also to *create* an opportunity for joint action, which would not arise absent such acts, and regardless of whether they explicitly present themselves as constituent acts or emerge silently, as interventions that unexpectedly change the course of daily interaction. In a word: constituent power innovates, *unveiling* novel opportunities.

Furthermore, as Fossen himself acknowledges, seizing the initiative is not on its own sufficient for the success of constituent power. There is a fundamental *passivity* in constituent power, which depends on the continued uptake—activity—of its addressees, who may or may not recognize themselves in a representation of what joins them together as members of a collective.<sup>57</sup> Securing uptake in the form of self-recognition by constituent power’s addressees turns on being responsive to their interests. Thus, constituent power may or may not be authoritative in the sense noted above, namely, it may or may not be successful in articulating a vision—a representation—of who we really are with which its addressees can durably identify. For this reason, I insisted in Chapters 4 and 6 of *Authority* that the exercise of power has an *intransitive purport*: someone seizes the initiative to say “we” on behalf of *us*, not of them. The theory of constituent power outlined in *Authority* nowhere espouses the view that “addressees are swept up into a collective” or that acts of constituent power are simply illegitimate, passing themselves off as legitimate.

Although *Authority* rejects a reductive interpretation of constituent power as a moment of loss and incipient decay, it does emphatically argue for the *ambiguity* of constituent power and its representational claims. The act of seizing or taking the initiative to represent collective unity enables new possibilities for living and acting together; but constituent acts cannot enable without also disabling other practical

<sup>57</sup> See Hans Lindahl, “Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood,” in Martin Loughlin & Neil Walker (eds.), *The Paradox of Constitutionalism* (Oxford: Oxford University Press, 2007), 9-24.

possibilities, marginalizing alternative interpretations of what counts as the commonality of joint action. Constituent power *unveils and veils, reveals and conceals, discloses and closes* what counts as the jointness of joint action. In this, my account of constituent power seeks to do justice to the triadic structure of representation and the radical contingency of nascent collectives: we are represented/represent ourselves as *this*, rather than that. The virgule exactly captures the ambiguity of constituent power, which hovers forever between transitive and intransitive modes of power.

Having said that, Fossen is right to chide me for a too massive notion of violence, which needs to be disambiguated. On the one hand, I want to hold on to the insight that no legal collective can arise without acts of inclusion and exclusion that cannot be fully justified, yet which succeed in imposing themselves on other possibilities for joint action, and which can be *enforced* against those who resist the terms of inclusion and exclusion. The “force” of what counts as “the force of the better argument” (Habermas) is never only argumentative. Yet there is a second sense of violence that needs to be distinguished from the first. Waldenfels helpfully limns it as “a violence directed against *the other as other*, which therefore covers the entire gamut of exploitation, humiliation, and torture, and that culminates in the annihilation of the other.”<sup>58</sup> Although *Authority* should have explicitly distinguished between these two forms of violence, my account of restrained collective self-assertion does offer elements to disambiguate them, and suggests how it ought to deal with them: collectives assert themselves by transforming what counts as joint action in response to demands for recognition of an identity threatened or violated by the terms of collective inclusion and exclusion. They restrain themselves through acts of deferral that “also [make] room for preserving the other (in ourselves) as other than us.” (*Authority*, 346)

### *2.3. Invitation and Imposition*

Fossen will look askance at this *distingo*. He takes it that I conflate two distinct issues: collective ontology and authorization. This conflation is not surprising, correlative as it is to my conflation of two logically distinct modes of political representation. Whereas collective ontology concerns representation-as, authorization regards representational agency. Because it conflates these two modes of political representation, the IACA-model of law is blind to invitational modes of constituent power. Concomitantly, it sees a temporal paradox where there is none.

Consider his argument more closely, beginning with the notion of an invitation, which Fossen opposes to an imposition. My account of constituent power is reduc-

<sup>58</sup> Bernhard Waldenfels, *Schattenrisse der Moral* (Frankfurt: Suhrkamp, 2006), 191, fn. 18. For a rich development of and bibliography on this theme, see Menga, *Ausdruck, Mitwelt, Ordnung*, 67-8.

tive, he avers, as it only accounts for the imposition of collectivity, whereas the Hamburg symposium on *Authority* illustrates the broad range of collectives that emerge through the exercise of constituent power in the invitational mode: “Peter says: ‘Shall we discuss Hans’ new book in Hamburg?’” Fossen acknowledges that “of course, Peter must assume the standing to invite”; in other words, Peter *takes the initiative* to invite us to Hamburg. True, this initiative or self-attribution of standing “usually comes unasked, may sometimes be impertinent, and you cannot un-invite yourself. But you can ignore or refuse an invitation. And when you do, if it is genuinely an invitation, that’s the end of it.”

I am grateful to Fossen for this perceptive comment, which allows me to introduce nuances into the account of constituent power that have been absent in *Authority* and my earlier writings. Public lawyers will perhaps hoot and holler, protesting that Fossen’s example trivializes the political gravitas and preconditions of constituent power. But this would miss the point of his example. It is deliberately trivial precisely because Fossen wants uncluttered access to the varieties of acts through which collectives emerge.

So I am happy to follow him in this methodological move, although I will take it in another direction altogether. What I find interesting is that the disjunction he posits between invitation and imposition elicits two inverted questions. The first: can constituent power ever be purely an imposition, or does it always involve, at least minimally, an invitation? The second: can constituent power ever be purely an invitation, or does it always involve, at least minimally, an imposition? Understanding why constituent power must trade in both dimensions allows for differentiation, with some manifestations of constituent power that are more invitational or more “impositional” (if I may be allowed the neologism) than others, while also inveighing against a simple diremption of its two poles.

Does the IACA-model of law reduce constituent power to imposition, neglecting an invitational moment? Nay! As noted heretofore, I argue in *Authority* and other writings that there is a fundamental passivity in constituent power: that someone says “we” on behalf of us, as in “Shall we discuss Hans’ new book in Hamburg?”, is never enough to get a collective up and going. In effect, constituent power depends on the uptake of the addressees of this representational act, on their self-recognition as members of a group of individuals who, say, are interested in discussing a book. Naked coercion can never be sufficient to secure this uptake, if nothing else because whoever commands that coercion be used against recalcitrant addressees depends on the uptake and recognition of those who exercise coercion. For this reason, I refer in *Authority* to the exercise of constituent power as *convoking* or *interpellating* individuals to view themselves as members of a collective. So the concept of constituent power I defend is congenial to an invitational dimension. In fact, it asserts that such a dimension is an ingredient feature of constituent power, inasmuch as the convocation to view ourselves as members of a group can be refused

or ignored by its addressees. This invitational dimension bespeaks an irreducible asymmetry between who invites and who is invited, which is part and parcel of the paradox of constituent power.

Can constituent power be an invitation to act together devoid of all imposition? Fossen himself hints at the answer when noting that “you cannot un-invite yourself.” Exactly. Someone has invited me to participate in a symposium, and I cannot get away from the invitation, to which I *have* to respond in one way or another, even if by ignoring it. The invitation *forces* me to respond to it, *imposes* itself on me, even though I can respond in different ways. An invitation places me in a situation of being obligated towards someone, an obligation to which I have not and cannot have consented in advance of its imposition. In short, an invitation speaks to an elemental form of imposition, as that to which I cannot not respond in one way or another. See here a second, inverted, asymmetry between the inviter and the invitee. And while I can respond in different ways, am I ever fully “free” from the invitation’s force, in the sense that it is indifferent how I respond, whether by accepting, refusing, or ignoring it? This second asymmetry points to a variable range of contextually determined modes and intensities of the force that an invitation brings to bear on the invitee, such that it is never simply “the end of it” when one responds, and regardless of how one does so. It makes a difference, for example, whether who responds to a symposium invitation is an internationally reputed academic or a tenure-track assistant of its convener, even when the latter is no martinet. The advent of collective action is embedded in social fields that render invitations more or less forceful, depending on who extends them, and which differentiate and constrain the range of responses available to the invitees to whom they are addressed.

Fossen is surely right to argue that there are significant differences between constituent power that convenes an academic symposium, as compared to one that, say, calls forth a legal order in the wake of a bloody revolution. But both situations resist the simple disjunction he posits between invitation and imposition, which are always commingled. Once again the ambiguity of constituent power. . .

#### *2.4. The Temporality of Constituent Power*

Consider, now, its temporal dynamic. There is no paradox, Fossen argues, in the invitational form of constituent power, a paradox that rests on my conflating representational agency and representation-as. For an invitation to participate in joint action only brings into play representation-as. “Note again the triadic structure of representation-as: x (*subject*) represents y (*referent*) as z (*characterization*) . . . [t]he referent must be logically prior to being represented . . . but the priority need not be chronological: it does not have to *exist* before it is invoked in representation.” The prior existence of a we would only hold necessarily for representative agency, hence for a situation in which a collective has already emerged: “The chronological inter-

pretation makes sense on the assumption that the sense of representation in question is representative agency.” That is:  $x$  represents  $y$ . Representation-as is prospective; representational agency, retrospective.

Notice, to begin with, that this argument confirms my earlier remark that, despite his avowed intention, Fossen ends up embracing realism to save constructivism. Representational agency is a form of representation in which the represented individual or group *already exists* as this or that particular individual or group, *prior to and independently of* the representation itself. In turn, representation-as involves the *ab ovo* production of a collective, which only comes into existence with the acceptance of an invitation to participate in joint action. Notice also that, taken together, these two modes of representation involve a specific *temporal interpretation* of a collectivity’s career, the inception of which begins now, at present, in the exchange of invitation and acceptance, thereafter becoming the original or originating past of a collective. To the extent that invitation and acceptance are comparable to the to-and-fro unfolded in deliberation, Fossen’s model of representation approximates the discourse-theoretical assumption that constituent power, in its rational form, involves a linear temporality that originates in deliberation and leads over to representation. I’ll return to this point when discussing Patberg’s comments.

“Shall we discuss Hans’ new book in Hamburg?” Peter convokes a range of individuals to engage in joint action. His is a representational act, in a twofold sense. Representation *of*, the referent of which is a group, not simply an aggregate of individuals: “Shall *we* [i.e. we together, not we each] discuss Hans’ new book in Hamburg?” Representation *as*: “Shall we gather together as the group of individuals who is interested in discussing Hans’ new book in Hamburg?” The group does not exist prior to this representational act. We had not thought of ourselves as members of a group interested in Hans’ new book prior to Peter’s invitation. That we are a group and what we are as a group depends on Peter’s representation of us. Peter—or someone else—must take or seize the initiative to convoke the group, which means that, by definition, his representational act cannot have been authorized in advance by those whom it convokes as members of the group. Yet, when inviting us to go to Hamburg, Peter presupposes that we *already* share an interest in reading and discussing Hans’ book, prior to the invitation, which is why he invites—selects—*us*. The presupposition is not merely logical: it is also chronological.

But, as mentioned heretofore, there is a fundamental passivity in acts of constituent power: Peter’s invitation may well fall entirely flat. How embarrassing, perhaps even painful, for Peter and Hans; but this simply shows that the representation of a group depends on there being a group to represent. If no one accepts the invitation, there was no such group, and the invitation is, in hindsight, misguided or inappropriate. Yet, as it happens, each or some of us accept the invitation, representing ourselves as members of the group by reading Hans’ book, preparing comments



for the symposium, communicating with each other to avoid overlap in our questions, traveling to Hamburg, participating in the discussions, and so on. Our uptake of Peter's invitation gives retroactive credence to the presupposition that we *are* a group and what we are as a group. The representation proved, in hindsight, to be appropriate, confirming that Peter is authorized to act in our behalf by convening and organizing the symposium in which we will jointly discuss Hans' book. In the same way that the failure of an invitation shows that representations depend on the represented, so, too, its success.

Accordingly, Peter's representational act has the temporal structure of a retrojective anticipation. An anticipation: "*Shall* we discuss Hans' new book in Hamburg?" A retrojection: "Shall *we* [the group who *is* interested in Hans' work] discuss his new book in Hamburg?" Here, then, is the temporal and ontological paradox at work in constituent power, a paradox that plays out in the interplay between representation of and representation as: we *are* not simply the group that we are, but rather we *become* who we are by *representing* ourselves. Only this way of describing the temporality of representation can avoid the oscillation between realism and constructivism, between the reproduction and the production of an original unity, regnant in Fossen's theory of representation.

### *2.5. Participatory Representation*

I conclude with some remarks about Fossen's second concern: the IACA-model of law papers over significant differences between representative and participatory democracy, due to its insistence that collective unity is always a represented unity.

The easy answer to this concern would be that the IACA-model of law works at a higher level of generality than what is required to engage with the distinction between representative and participatory democracy. But this response would underestimate the potential of the IACA-model of law to contribute to a discussion about this dyad, even though I have not developed it fully in *Authority*.

To begin with, because participation is a form of representation, the conceptual framework of the IACA-model of law defends the cause of participatory democracy against those who would restrict democratic decision-making to "representative" organs. To argue that collective unity is always and necessarily a represented unity in no way entails a boilerplate defense of current institutional practices of representation. Nor is it conceptual fastidiousness exercised to the benefit of armchair scholarship. The Netherlands, for instance, has been witness to a bitter political debate in which initiatives oriented to the constitutional entrenchment of referenda have been defeated with an appeal to Article 50 of the Dutch Constitution. It reads as follows: "Parliament represents the entire Dutch people." Bert van Roermund and I have made short shrift of this argument, noting that referenda are forms of political representation, hence that Article 50 should not be invoked to curtail them. There may be excellent reasons to avoid the constitutional entrenchment of referenda, but

not the bromide that referenda are in breach of the principle of representation.<sup>59</sup> The same argument about representation can be extended to other forms of citizen participation, such as Dorf and Sabel's "democratic experimentalism," Arendt's "workers' councils," or motley extra-institutional participatory venues invented by alter-globalization movements.<sup>60</sup> This expanded view of representation is also germane to the current disenchantment with traditional channels of representation in what Pierre Rosanvallon calls "counter-democracy."<sup>61</sup>

As concerns "representative" democracy, I have elsewhere resisted a too narrow interpretation of its scope, arguing that Article 50 of the Dutch Constitution could be rephrased as follows: "The legislative, executive, judiciary, and citizen decision-making organs represent the entire Dutch people." One thing is the appointment procedure for political representation, electoral or otherwise; another altogether the representation of collective unity by a range of bodies. The notion of checks and balances, so dear to advocates of the rule of law, only makes sense against the backdrop of a joint representational practice, namely, the representation of collective unity. Checks and balances between public powers is one of the ways in which democracies institutionalize the insight that the representation of collective unity is both necessary and impossible. In this vein, the well-known "counter-majoritarian" function of constitutional courts, which, on occasion, invoke constitutional norms to defend minority interests, presupposes that the court represents the interests of the collective as a *whole*, hence also minority interests when the legislative majority identifies itself as being the whole.<sup>62</sup>

If the IACA-model of law offers a defense of participation, it also cautions against assuming that participation can overcome the ambiguities that befall representation. The analysis of the emergence of the World Social Forum, in Chapter 4 of *Authenticity*, shows that participation does not, and cannot, get started through participatory acts. The WSF, which presents itself as a forum for discussion without representation, got off the ground by way of a small group of intellectuals who seized the initiative to draw up the Charter of the WSF. The Charter certainly opens up a space

<sup>59</sup> Hans Lindahl and Bert van Roermund, "Is er een plaats voor het referendum in de representatieve democratie?" in *Openbaar bestuur. Tijdschrift voor Beleid, Organisatie & Politiek*, 10 (2000) 1, 26-29.

<sup>60</sup> Arendt's discussion of the relation between representation and participation is more ambiguous than what I assume, or so argues Hanna Lukkari. Although Arendt often opposes the two terms, Lukkari explores other passages in which Arendt views participation as a form of representation. See Hanna Lukkari, "Hannah Arendt and the Glimmering Paradox of Constituent Power," forthcoming in Matilda Arvidsson, Leila Brännström and Panu Minkkinen (eds.) *Constituent Power: Law, Popular Rule, and Politics* (Edinburgh: Edinburgh University Press, 2020).

<sup>61</sup> Pierre Rosanvallon, *Counter-Democracy: Politics in an Age of Distrust*, translated by Arthur Goldhammer (Cambridge: Cambridge University Press, 2008).

<sup>62</sup> Hans Lindahl, "Rechtsvorming als politieke representatie: de kwestie van constitutionele toetsing," in E.-J. Broers & B. van Klink (eds.), *De rechter als rechtsvormer* (The Hague, Boom Juridische Uitgevers, 2001), 173-196.

for broad consultation and participation by interested parties, but it also begets the conditions for establishing who counts as an interested party, i.e. those interests that deserve to get a hearing in line with the scope of the WSF, and those that do not. The IACA-model of law reminds us that legal orders are a species of *authoritatively mediated* collective action, which means that authorities claim to be entitled to draw the boundaries of what counts as relevant and appropriate participation in legal ordering. While these boundaries can be renegotiated, they are never only the result nor the object of participation. My concern, therefore, is not to downplay the importance of participation; it is to ensure that claims about participatory decision-making neither mask the authoritative moment that sets the limits of participation nor conceal that, like all forms of representation, participatory practices cannot represent collective unity without also misrepresenting it.

### 3. DAVID OWEN

Owen helpfully points to parallels between Jim Tully's and my work on imperialism and legal universalism, as well as to the parallel between Jacques Rancière's notion of disagreement (*mésentente*) and the concept of a-legality. With reference to a-legality, Owen suggests that the conceptual framework I put in place offers more resources than Rancière's for making sense of politics as the transformation of police. Nonetheless, he argues, the IACA-model of law needs to be pushed further to adequately conceptualize the normativity of acts of representation that respond to a-legal challenges. My appeal to *phrónēsis* cannot carry this burden, he asserts, for it remains within the compass of what Rancière calls police. To address this shortcoming, Owen's interesting proposal is to discern two distinct modes of normativity: justification and vindication. Whereas my interpretation of responsive representation focuses on the prospectivity of justification, the IACA-model of law would do well, he argues, to focus on the retrospectivity of vindication. "The central question with respect to founding, re-founding or transforming a policy is not whether the actions are justified—often they may, at least in moral terms, have as a success condition that they are not—but whether they are vindicated."

#### 3.1. *Mésentente and A-Legality*

I cannot pursue the parallel between Jim Tully's work and mine in this Response to Commentators, although I very briefly referred to him in *Authority*, and will do so again in my reply to Zanetti. By contrast, there is not a single reference to Rancière in *Authority* or my earlier work. The absence of attention to Rancière's work is not coincidental. For the one, *Authority*, like *Fault Lines*, has sought to develop a conceptual framework building on phenomenology and collective action

theory, only foraying into adjoining philosophical perspectives where this was of help to elucidate the specificity of my own project. For the other, and mindful of the resemblances and discrepancies between the IACA-model of law and Rancière's work, I have wanted to reserve a fulsome discussion thereof for another occasion.

This is, nonetheless, a propitious opportunity to discuss salient points of convergence and divergence between our respective projects, especially because, as Owen points out, Rancière has recently engaged in a debate with Honneth about recognition and disagreement. This collation will be of help when discussing Owen's distinction between justification and vindication. Indeed, it seems to me that the core issue Owen raises concerns the normativity of *rupture*. Equality (Rancière), vindication (Owen), and asymmetrical recognition (Lindahl) are different ways of conceiving the vexed relation between normativity and the temporality of rupture.

Owen observes that both disagreement and a-legality can be read as exploiting the distinction between two modes of unjustified exclusion and inclusion: "(a) 'unjustified' as failure to comply with, or fall under, the relevant rule or standard, and (b) 'unjustified' as not subject to a normative rule or standard, that is, outside the game of justification . . ." Whereas the unjustified, in the first sense, is the domain of police, thus of illegality as concerns the law, unjustified, in the second sense, appertains to the realm of politics, hence to a-legality in the law. In both cases, what is at stake is the encounter between (dis)order and an-*other* order, which Rancière dubs "heterogeneous," and I, "strange." In Rancière's words,

Spectacular or otherwise, political activity is always a mode of expression that undoes the perceptible divisions of the police order by implementing a basically heterogenous assumption, that of a part of those who have no part, an assumption that, at the end of the day, itself demonstrates the sheer contingency of the order, the equality of any speaking being with any other speaking being.<sup>63</sup>

By laying out who ought to do what, where, and when, that is, by positing the subjective, material, spatial, and temporal boundaries of behavior, a legal order determines what can *appear* as (il)legal from the first-person plural perspective of the respective collective. In Rancière's argot, a legal order lays out an "order of the sensible," of what can and cannot appear—hence of what is included and excluded—from the first-person plural perspective articulated by a legal order. In this sense, the account of legal (dis)order advanced by the IACA-model of law stands close to Rancière's notion of police:

The police is thus first an order of bodies that defines the allocation of ways of doing, ways of being, and ways of saying, and sees that those bodies are assigned by name to a particular place and task; it is an order of the visible and the sayable that sees that a

<sup>63</sup> Jacques Rancière, *Disagreement: Politics and Philosophy*, translated by Julie Rose (Minneapolis: University of Minnesota Press, 1999), 30.

particular activity is visible and another is not, that this speech is understood as discourse and another as noise.<sup>64</sup>

What is more, both approaches coincide in noting that the other of (dis)order manifests itself through *rupture*, through interruptions that reveal the contingency of what participants call (dis)order. Likewise, they concur in exploring the transformative potential of the encounter between (dis)order and the heterogeneous/strange. And both insist on prioritizing subjectification over subjectivity, in a broad sense of subjectification that, in the reading proposed by the IACA-model of law, includes all four dimensions of legal order in the gerundial mode of an ordering: spacing, timing, subjectifying, and materializing behavior.

There are also significant differences between our two démarches. While both projects are interested in the notion of political agency, mine approaches it from a first-person perspective, both singular and collective. As is clear from his reference to an “order of bodies,” Rancière abstracts from the first-person perspective when conceptualizing the encounter between police and politics. But to characterize disagreement as an encounter between “bodies” that intervene through speech and act in heterogeneous “orders of bodies” is to fundamentally distort the experience of being wronged (*tort*)—lest one has in mind Merleau-Ponty’s notion of a *corps-sujet* or *corps propre*. I see here a residual manifestation of Rancière’s early commitment to a structuralist critique of subjectivity. The absence of an embodied first-person singular perspective in Rancière’s work goes hand in hand with the lack of a conceptual framework to explain “community” as a first-person plural concept, and its inception through disagreement. The reference to a “we” remains *incontournable*, yet unclarified by Rancière: “Any political subjectification holds to this formula. It is a *nos sumus, nos existimus . . .*”<sup>65</sup> Likewise, the very idea of political claims that resist exclusion and demand inclusion presupposes the reference to a first-person perspective, both singular and plural.<sup>66</sup> As Deranty perceptively points out, “[p]olitical claims arguably arise as claims *about* aspects of social reality, and since the claims are to be made by the agents themselves, some anchoring of politics within forms of experience appears inevitable.”<sup>67</sup>

My concern goes further, however, than re-anchoring politics in forms of experience. What Rancière’s analysis of political agency misses is an account of the structures and conditions of possibility of concrete experience itself, absent which no sense can be made of what he calls the “fields of experience” in which the encounter

<sup>64</sup> *Ibid.*, 29.

<sup>65</sup> *Ibid.*, 35.

<sup>66</sup> *Ibid.*, 38, 41.

<sup>67</sup> Jean-Philippe Deranty, “Between Honneth and Rancière: Problems and Potentials of a Contemporary Critical Theory of Society,” in Katia Genel and Jean-Philippe Deranty (eds.), *Recognition or Disagreement: A Critical Encounter on the Politics of Freedom, Equality, and Identity* (New York: Columbia University Press, 2017), 33-80, 50.

between police and politics takes place. How and why is it that “[p]olicing is not so much the ‘disciplining’ of bodies as a rule governing their *appearing*. . .”?<sup>68</sup> Again the question imposes itself on us: does one do justice to the mode of appearance of who raises a political claim, and of the claim as the experience of being wronged, by stating that a “body” appears to another “body”? And what are the general structures of experience such that a *mésentente*, in the twofold sense of misunderstanding and “not heeding,” might describe the mode of appearance of the heterogenous?<sup>69</sup> In fact, can the notion of the “heterogenous” adequately grasp the nature of the experience of disagreement that Rancière construes in terms of misunderstanding and not heeding?

My own endeavor has been to describe (il)legality and a-legality by appealing to the key phenomenological concept of (collective) intentionality, namely, the appearance of something as something to someone. Intentionality, I aver, is the point of departure for articulating the experiences of normality and familiarity accruing to legal (dis)order, while also offering a precise description of the experience of rupture in which the a-legal irrupts into a legal order, revealing a *strange*—not merely a heterogenous—order. What Rancière calls disagreement is but a particular—the political—manifestation of a mode of appearance that cuts across *all* domains of experience, namely, the experience of the strange. Husserl characterizes this experience thus: “accessibility in its genuine inaccessibility, in the mode of incomprehensibility.”<sup>70</sup> When Rancière notes that although “politics implements a logic entirely heterogenous to that of the police, it is always bound up with the latter,” he offers a simplified version of the paradoxical mode of appearance of the strange, as described by Husserl.<sup>71</sup> Likewise, when Rancière notes that “politics is . . . made up of relationships between worlds,” he echoes, perchance unwittingly, Husserl’s phenomenology of the encounter between a *Heimwelt* and a *Fremdwelt*. A-legality, in my reading, is the legal mode of appearance of the strange: what appears from the first-person plural perspective articulated by a legal order appears as either legal or illegal (hence the “legality” of a-legality), yet is unintelligible in its legal intelligibility because it resists qualification through *both* terms of this binary distinction (hence the “a” of a-legality). For this reason, I claim that “[a]-legality is the central manifestation of the political in legal orders.” (*Authority*, 308)

<sup>68</sup> Rancière, *Disagreement*, 29. (italics added)

<sup>69</sup> As Rancière notes, the notion of *mésentente* is linked to *entendre*, such that disagreement means both misunderstanding and not hearing or heeding. See Jacques Rancière, “Critical Questions on the Theory of Recognition,” in Genel and Derant (eds.), *Recognition or Disagreement*, 83.

<sup>70</sup> Husserl, *Zur Phänomenologie der Intersubjektivität*, 631.

<sup>71</sup> Rancière, *Disagreement*, 31.

### 3.2. *Emancipations and the Paradox of Re-Subjectification*

All of this would be of merely marginal significance, yet another episode in the intermittent skirmishes between (post-)structuralism and phenomenology, if our differences only turned on the appropriate conceptual framework to characterize disagreement/a-legality. Yet the divergence in our conceptual frameworks leads to significant differences in our descriptions of representation, recognition, and, paramountly, equality—arguably the guiding principle of Rancière’s project of emancipatory politics. I can do no more than briefly discuss these differences, reserving their systematic treatment for another occasion.

The central philosophical wager animating *Authority* is that thinking through representation and recognition as modes of the basic dynamic of (collective) intentionality provides the key to the question of the globalization of inclusion and exclusion and, more generally, to the question of legal order and authority.<sup>72</sup> This wager leads to a very different assessment of political representation than Rancière’s, for whom representation is “by rights, an oligarchic form [of government], a representation of minorities who are entitled to take charge of public affairs.”<sup>73</sup> “Representation’,” he adds, “might appear today as a pleonasm. But it was initially an oxymoron.”<sup>74</sup> This critique appeals, of course, to the distinction between representation and participation. Rancière digs deeper into the concept of representation that undergirds his caustic assessment of representative democracy in a recent interview on the occasion of the French presidential election campaign of 2017:

“[r]epresentative democracy” is a more than ambiguous term. It conveys the false idea of an already-constituted people that expresses itself by choosing its representatives. Yet the people is not a given that pre-exists the political process: rather, it is the result of this process. This or that political system creates this or that people, rather than the other way around.<sup>75</sup>

This passage is redolent of Fossen’s account of the connection between constituent power and representation. Once again, representation is construed in terms of the simple disjunctions between production and reproduction, and constructivism

<sup>72</sup> The internal connection between these three terms is made explicit in Lindahl, “Intentionality, Representation, Recognition: Phenomenology and the Politics of A-Legality.”

<sup>73</sup> Jacques Rancière, *Hatred of Democracy*, translated by Steve Corcoran (London: Verso, 2007), 53.

<sup>74</sup> *Ibid.*

<sup>75</sup> Éric Aeschmann, “Representation Against Democracy: Jacques Rancière on the French Presidential Elections,” in *Verso Books Blog*, March 20, 2017, available at: <https://www.verso-books.com/blogs/3142-representation-against-democracy-jacques-ranciere-on-the-french-presidential-elections> (last accessed on May 5, 2019). Asserting that a “political system creates a people” effectively falls back on the Althusserian reading of structure that Rancière was keen to reject with his interpretations of subjectification and emancipation.

and realism, which, in Rancière's case, has him identify representation with reproduction and realism.

Elsewhere, Rancière notes that "every subjectification is a disidentification, removal from the naturalness of a place . . ." <sup>76</sup> Yes. But there can be no subjectification other than through a novel identification that includes a collective self—collective self-identification—and excludes other-than-self—other-differentiation. Subjectification through disidentification and a novel identification takes place as a *re-identification* and *re-differentiation*. Indeed, the paradox of representation makes a *subrosa* comeback as the paradox of re-identification: *collective identity begins with a re-identification*. To found a collective self through a novel identification is to re-identify an original self to which there is no direct access, and which only manifests itself retroactively, in the re-identification. Furthermore, because there is no direct access to an original collective self-identity, that is, because there are only original re-identifications, the representational "as" opens up the possibility of re-identifying collectivity *otherwise*, even if never *ex nihilo*.

The question of identity is, of course, central to a theory of recognition, so it should not surprise us that Rancière concludes his first intervention in the debate with Honneth by asserting that his account of subjectification amounts to "a kind of 'Rancièrian' conception of the theory of recognition," albeit different from Honneth's. <sup>77</sup> His reservations about Honneth run parallel to his concern about representation, namely, how to interpret "the 're' of recognition." <sup>78</sup> There is in Honneth, Rancière remarks, "a notion of the subject that has a strong consistency as a self-related identity, and there is also a strong emphasis on the community as a nexus of interrelations based on a model of mutual recognition." <sup>79</sup> By these lights, the "re" of recognition confirms, in Honneth's work, a pre-given identity and community. Small wonder that the title of their debate is diremptive: "recognition or disagreement." If there is a theory of recognition in Rancière, it has to be found in the priority of subjectification over subjectivity, a priority political liberalism is wont to overlook. But what is the nature of the dynamic of recognition that emerges from an account of politics that privileges the internal connection between subjectification and disagreement over the catenation of identity and mutual recognition?

Rancière provides no comprehensive answer to this question, so it is up to his readers to piece it together. One of the various characterizations he offers of subjectification offers a clue of the way to go: "By subjectification I mean the production through a series of actions of a body and a capacity for enunciation not previously identifiable within a given field of experience, whose identification is thus part of the

<sup>76</sup> Rancière, *Disagreement*, 36.

<sup>77</sup> Rancière, *Disagreement*, 95.

<sup>78</sup> *Ibid.*, 84.

<sup>79</sup> *Ibid.*, 85, 86.



*reconfiguration* of the field of experience.”<sup>80</sup> Rancière effectively notes that subjectification produces a new subjectivity by disidentifying and calling forth a novel identity, an identity that was “not previously identifiable” in a police order. Moreover, he characterizes the internal connection between these two dimensions of subjectification as a “reconfiguration” of a field of experience. The question about recognition is, therefore, how to make sense of the “re” of reconfiguration. Perusal of his work reveals that Rancière’s interpretation of subjectification appeals repeatedly to variations on this enigmatic “re”: “redescription,” “reconfiguration,” “reframing,” “redistributing,” “reconstructing,” and so forth.<sup>81</sup> This is accordant with Rancière’s claim that even though subjectification produces a novel subjectivity, it does not do so *ex nihilo*. A paradox, the paradox of subjectification, creeps almost imperceptibly into a “Rancièrian’ theory of recognition”: subjectification is only possible, it seems, as a *re*-subjectification.

Am I not simply projecting the IACA-model of law onto his political project? To address this question we must go straight to the heart of his political theory: equality. Indeed, Rancière claims that “[e]quality is the only universal in politics.”<sup>82</sup> But how does equality “work” in subjectification? Against Honneth and against all advocates of what he calls the “presupposition of inequality,” he argues for the “presupposition of equality.”<sup>83</sup> But what equality is at stake here? Not, as Honneth would have it, the equality of “what constitutes human beings, but [rather] what constitutes those human beings as members of a political community.”<sup>84</sup> Notice that in the first of the passages of his work adduced in this Response to Commentators, Rancière insists, as he does elsewhere, “on the equality of any speaking being with any other speaking being.” Yet in his reply to Honneth, he focuses on the presupposition of equality as the presupposition of membership in a bounded collective: *political* equality. Although the equality of all with all allows for an indeterminately large number of configurations of collective unity, subjectification calls for the emergence of a concrete, bounded collectivity, organized in one or way or the other, but not in any way. Rancière is quick, however, to cut off the route to a pre-given equality that subjectification would merely confirm:

In a political declaration, when a collective subject says, ‘We, the workers, are (or want, or say, and so on),’ none of the terms defines an identity. The ‘we’ is not the expression of an identity; it is an act of enunciation which creates the subject that it

<sup>80</sup> *Ibid.*, 35 (italics omitted and added)

<sup>81</sup> Rancière, “The Method of Equality,” in Genel and Deranty (eds.), *Recognition or Disagreement*, 141, 142, 143, 146.

<sup>82</sup> Jacques Rancière, “Politics, Identification and Subjectivisation,” in John Rajchman (ed.), *The Identity in Question* (New York: Routledge, 1995), 65.

<sup>83</sup> Rancière, “The Method of Equality,” 139.

<sup>84</sup> Rancière, “A Critical Discussion,” in Genel and Deranty (eds.), *Recognition or Disagreement*, 114.

names. In particular, ‘workers’ does not designate an already existing collective identity. It is an operator performing an opening.<sup>85</sup>

This reading of representation calls for careful analysis. To begin with, Rancière errs when holding that “a collective subject says, ‘We, the workers . . .’” *Someone* takes—seizes—the initiative to say “we” on behalf of us, workers, and of us, the collective of workers, spokesperson for the larger collective of which we are a part, yet have no part.<sup>86</sup> This is, furthermore, a representational act in the triadic sense noted earlier: someone represents a multitude of individuals *as* a unity composed of workers. We are convoked—interpellated, in a non-Althusserian sense—to recognize ourselves and the broader community of which we are part (without a part), as workers. To be sure, the collective of workers does not exist prior to such representational and cognitive acts; but the presupposition of equality is not a purely logical presupposition. Whoever seizes the initiative to represent a collective presupposes that the collective already exists, such that what remains to be done, in what Rancière calls emancipation, is to *verify* equality: “[e]mancipation designates that prior decision to enact the capacity of anybody and verify it.”<sup>87</sup> Verification takes place as the more or less successful uptake of the convocation by those who recognize themselves as workers, that is, by their retroactive self-recognition as members of a collective.

Here then is the answer to our question about the temporal dynamic at work in the “re” of a Rancièrian theory of recognition. As has transpired, “re” is not an adscititious appendage to the “cognition” of what is given. It captures the paradoxical temporality deployed by representation: “We, workers, are equal to all other members of the collective, even though we have not been given our part therein, and intervene in the police order to represent who we *really* are as a collective of equals.” If it is not to be an avatar of the correspondence theory of truth, the verification of equality, i.e. of what really joins us, deploys the retroactivity of an original

<sup>85</sup> Rancière, “Critical Questions on the Theory of Recognition,” in Genel and Deranty (eds.), *Recognition or Disagreement*, 92-3.

<sup>86</sup> Rancière introduces “Proletarian Nights,” as follows: “The point is not to revive memories of the sufferings of factory slaves, of the squalor of workers’ hovels or of the misery of bodies sapped by unbridled exploitation. All that will only be present via the views and the words, the dreams and the nightmares of the characters of this book. Who are they? A few dozen, a few hundred workers who were twenty years old around 1830 and who then resolved, each for himself, to tolerate the intolerable no longer . . . The historian will ask what they represent . . . But perhaps the masses who are invoked have already given their answer. . . [I]t is precisely because those men are *other*. That is why they go to see them the day they have something to *represent*, something they want to show to the bourgeoisie (bosses, politicians, judges). It is not simply that those men can talk better. It is that what had to be represented before the bourgeoisie was something deeper than salaries, working hours or the thousand irritations of wage-labour. What has to be represented is what those mad nights and their spokesmen already make clear: that proletarians have to be treated *as if* they have a right to more than one life.” Jacques Rancière, “Proletarian Nights,” in *Radical Philosophy* 31 (1982), 11-13, 11.

<sup>87</sup> Rancière, “The Method of Equality,” 140.

representation. To verify the presupposition of equality, to engage in an emancipatory process, is to recognize ourselves otherwise, as e.g. a collective of workers, where the “re” of recognition means retrojecting what is yet to come into a past that was never a present. Rancière refers to political activity, in the first of the passages cited heretofore, as “a mode of *expression* that undoes the perceptible divisions of the police order by implementing a basically heterogenous assumption.” (italics added) This is exactly right: political activity is a mode of what Merleau-Ponty calls creative expression, namely the “original repetition” made possible by the “as” of, say, “we [as] workers.”<sup>88</sup>

In brief, the recognitive “as” opens up the possibility of recognizing ourselves (and the other) *otherwise*, and not simply as the confirmation of a pre-given collective identity over time, while also precluding that recognition and representation are simply productive or performative operations. It explains why emancipatory subjectification comes about as a re-subjectification. The strong claim I want to defend is, therefore, that although *Authority* focused primarily on the structure and contestation of emergent global legal orders such as the WTO, the analysis of constituent power developed by the IACA-model also accounts for the dynamic of emancipatory struggles launched from *outside* the orders they contest.<sup>89</sup>

If this reconstruction of a Rancièrian theory of recognition marks the point of greatest convergence between his political project and mine, so also it betokens the greatest divergence in our conceptions of emancipation. Beyond their differences as to the priority of equality and freedom, Honneth and Rancière view emancipation as a universalizing process oriented to progressively including those who have been misrecognized or wronged through their exclusion. The IACA-model of law is certainly sensitive to demands for recognition as demands for inclusion. But it also argues that recognition is not restricted to the demands of those who are part of a collective in which they have no part. The ambiguity of the recognitive “as” entails that demands for recognition also comprise demands for *exclusion* by those who have a part in a collective of which they do not want to be part.

Thus, Rancière incorrectly asserts that “[e]quality is the only universal in politics.” As we have seen, his defense of the equality of membership in a bounded collective is a defense of *political* equality. But there can be no political equality (not even in a “human” community) other than through inclusion and exclusion: we recognize ourselves as this (human) community, rather than that one. Presuppositions of political equality *and* inequality are the two faces of the single representational process

<sup>88</sup> Menga, *Ausdruck, Mitwelt, Ordnung*, 49.

<sup>89</sup> A point I develop at greater length in response to Ralf Michaels’ comments on *Authority*. See the special section, “CLSGC Book Symposium on Authority and the Globalisation of Inclusion and Exclusion,” in *Duke Journal of Comparative and International Law* 29 (2019) 3, 361-472, especially 417-419 and 457-9.

of subjectification. The cognitive “as” reveals that political equality and inequality—more accurately: an originating re-equalization and re-inequalization—are constitutive features of subjectification because some, or even many, may contest their *inclusion* in a collective, demanding to be treated unequally rather than equally. This is what Nietzsche had in mind, I think, when provocatively asserting, “[e]quality for equals, inequality for unequals”—that would be the true voice of justice: and, what follows from it, ‘Never make equal what is unequal’.”<sup>90</sup> This insight is no enemy of emancipation; instead, it suggests, more cautiously, that there can be emancipations, but not emancipation. Only thus can a theory of subjectification as emancipation be consonant with Rancière’s insistence on the irreducible contingency of any given police order. I return to this point when discussing Zanetti’s comments.

### 3.3. *Constituent Circumspection*

I have dedicated considerable attention to Rancière’s work; digging into his theory of disagreement prepares the way for engaging with Owen’s two reservations about *Authority*, the first of which concerns my move to conceptualize authority in terms of *phrónēsis*. Very much in line with the category distinction between police and politics, Owen notes that a prudential interpretation of authority reduces the latter to recognition within a police order. In his words, “*phrónēsis* in both classical and contemporary understanding is typically seen as requiring an order of continuous aspect perception against which discernment of the relevant saliences occur.” The whole point of Rancière’s distinction between police and politics is to highlight that “a police order is an order of recognition; politics is a struggle over recognition.” *Phrónēsis* has its place in the former, not in the latter.

Let me start by noting that the IACA-model of law moots the notion in the context of the inclination of contemporary legal and political theory to partition authority into its theoretical and practical modes, a partition that maps onto the category distinction between “is” and “ought.” Once this category distinction is posited, all further discussion of authority, as concerns law and politics, becomes an issue about legitimacy. I resist this move, which I view as reductive of the phenomenon of political and legal authority. I use *phrónēsis* as a conceptual placeholder for an authoritative politics of boundaries that maintains an internal connection between “is” and “ought,” a point I make by insisting that a demand for recognition confronts collectives with the question “What is/ought our joint action to be about?” To borrow Ferrara’s lucent formulation, *phrónēsis* offers elements for “a vocabulary with which we sum up who we are when we are in the process of redefining who we want to

<sup>90</sup> Friedrich Nietzsche, *Twilight of the Idols and the Anti-Christ*, translated by Reginald John Hollingdale (London: Penguin, 1990), 113.

be.”<sup>91</sup> More broadly, *phrónēsis*, in my reading, alludes to the concreteness and contextuality of responsive representations of collective unity, not to political realism, a connotation typically associated with the notion of prudence.

Moreover, when conceptualizing authority, the IACA-model of law takes up the first-person plural perspective of a legal collective to explore how it can respond to demands for recognition, demands, I argue, that are to a lesser or greater extent in excess of the cognitive possibilities of the legal order. Thus, appealing to the notion of *phrónēsis* neither gainsays nor traduces the distinction between the limits and fault lines of legal orders. It acknowledges the finite questionability and finite responsiveness available to an authority who must deal with a demand for recognition by taking up the first-person plural perspective articulated by a legal order.

For the same reason, I have insisted, in my response to Ferrara, on the need to hold fast to the notion of constituent power, against moves to reduce demands for recognition to demands that understand themselves as demands for inclusion within a police order. But if constituent power is not to be the production *ex nihilo* of a collective, then it, too, must latch onto social reality, representing concrete possibilities for living and acting together otherwise, perhaps unbeknownst to the envisaged participants of an emergent collective, yet that retroactively become visible to them as their own possibilities. Even though constituent power exploits the surplus of meanings available in social reality, it could not represent collectivity otherwise unless representations have some purchase on a social and natural reality that is “intrinsically organized to a minimal degree, since it must be at least *organizable*.”<sup>92</sup> In short, *phrónēsis* must do its work if constituent power is to succeed in convoking multifarious individuals to institute themselves as a novel and durable order of recognition. Owen correctly notes that *phrónēsis* is deployed in curating an order of recognition; I want to add that it is also deployed by constituent resistance to a police order in the course of “struggles over recognition” that could eventuate in “aspectival change.”

For these reasons, my interest in the term is linked to the richer set of features associated to the Heideggerian notion of *Umsicht*, translated into English as “circumspection.” Indeed, Heidegger translates *phrónēsis* as “solicitous circumspec-

<sup>91</sup> Ferrara, *Reflective authenticity*, 12. As I have tried to show, when discussing his account of foundations, everything turns on how to interpret the “re” of “redefining,” which I have sought to clarify in terms of the paradox of representation.

<sup>92</sup> Cornelius Castoriadis, *Philosophy, Politics, Autonomy*, edited by David Ames Curtis (Oxford University Press, 1991), 89

tion” (*fürsorgende Umsicht*) in his interpretation of Book VI of Aristotle’s *Nicomachean Ethics*.<sup>93</sup> I have no interest in rehabilitating *phronēsis* as outlined by Aristotle. Nor do I intend to engage in an exegesis of the (shifting) glosses of *phronēsis* that go from Heidegger’s Marburg and Göttingen manuscript of 1922 to the publication of *Being and Time* in 1927, nor in ascertaining whether his reading of Aristotle is “accurate.” Instead, I pick out those aspects of his characterization of *phronēsis* that are relevant to understanding the concrete, contextual nature of responsive representations of collective unity. The following features are salient:

1) *Umsicht* is rooted in a practical engagement with reality that deploys the dynamic of disclosing something *as* something, e.g. of something as legal or illegal. This is important for my inquiry because, as I mentioned earlier, my philosophical wager is that the concept of authority ultimately turns on illuminating the nature of this dynamic. Although I have not developed the topic in *Authority*, a fuller treatment of responsive representation along the lines of circumspection would extend this dynamic to *judgment*. For, as discussed in my response to Ferrara, judgment is one of the modes of disclosing something as something, in particular an assessment of what counts as relevant and important for collective unity in the situation at hand.

2) The *Um* of *Umsicht* means a “looking around” in the sense of a co-presentation of the broader nexus of relations that lend something its meaning as something: a circumambient world or *Umwelt*. The exercise of authority demands a sharp eye for the concrete, contextual possibilities for joint action against a background of skills, practices, and assumptions about reality, absent which no representational claim about collective unity can get off the ground. Circumspection is *worldly* and *enworlds*, as one might put it.

3) *Umsicht* plays on the polysemy of the German, where *Um* also means “that for the sake of which.” Authority, on this reading, regards the collective self-reference of a looking around that seeks to respond to the question, “what is/ought *our* joint action to be about?” *Umsicht* captures the reflexivity of the first-person plural perspective.

4) The relation between who we are and who we ought to be speaks to *phronēsis* as the disclosure of something that “*can be otherwise*” than as it is.<sup>94</sup> In the ordinary course of legal ordering, circumspection exploits the possibilities made available by a given order of recognition. By contrast, struggles over recognition demand a looking around that looks anew, picking out those features of the circumambient world—

<sup>93</sup> Martin Heidegger, “Phänomenologische Interpretationen zu Aristoteles,” in Martin Heidegger, *Phänomenologische Interpretationen ausgewählter Abhandlungen des Aristoteles zur Ontologie und Logik* (Frankfurt: Vittorio Klostermann, 2005), in Martin Heidegger, *Gesamtausgabe*, Vol. 62, 376.

<sup>94</sup> *Ibid.*, 382 (italics in the original). This is the point where my reappropriation of *phronēsis* is furthest removed from Aristotle, for whom the concept remains bound up in a metaphysics that bestows priority on actuality (*enérgeia*) over possibility (*dínamis*). See Lindahl, “Possibility, Actuality, Rupture.”

those patterns of what is relevant and important—that open up spaces for recognizing ourselves otherwise through durable reconfigurations of the subject (representation of) and content of collective unity (representation as). Looking around as a looking anew is also a looking back and looking ahead.<sup>95</sup>

5) *Umsicht* as a solicitous circumspection involves choosing the “right occasion and the appropriate time” to disclose something as something.<sup>96</sup> Responsive representations of collective unity hearken to the context of legal ordering in the temporal form of *kairòs*. Hence, circumspection can call forth, but by no means entails, prudence in the sense of political realism. *Umsicht* as attentiveness to the right time to act can also mean biding one’s time until the conditions are propitious for representations of collective unity that allow us to recognize ourselves otherwise than heretofore.<sup>97</sup>

6) There is a sixth feature I want to add, although it falls beyond the purview of Heidegger’s discussion of circumspection: the *rhetorical* dimension of *phrónēsis*. While I have foregrounded the absolutely central role of the “as” of disclosing something as something, if we are to make sense of authority, I have said little or nothing about how the “as” operates discursively, such that collective unity can be represented/recognized otherwise. A full-blown analysis of this important question will have to wait for another occasion. For the moment, I submit that metaphor, metonymy, and analogy are three rhetorical tropes that capture the tralatitious effects of the representational “as.” So, returning to Rancière’s example, the representational claim that “we are [all] workers” is metonymic. The part that has no part represents itself as a *pars pro toto*. One misunderstands the nature of these tropes if one levels them down to “figures of speech”; they are discursive modes of the representational “as” whereby something is disclosed as something. In the same way that there are “live metaphors,” to borrow Ricoeur’s felicitous expression, so, too, live metonymies and live analogies contribute to novel representations of collective

<sup>95</sup> Zanetti’s development of a “situational potential,” originally introduced by François Jullien, meshes well with this dimension of *Umsicht*. According to Jullien, “[i]nstead of constructing an ideal Form that we then project onto things, we could try to detect the factors whose configuration is favorable to the task at hand; . . . In short, instead of imposing our plan upon the world, we could rely on the potential inherent in the situation.” Zanetti adds: “the situation potential is circumstantial and circumstances make up the potential. Thus, what becomes fundamental is to look at the various factors at play, having their exploitation in sight . . . The heedful study of circumstances is of crucial importance.” Succinctly: circumspection is a circumstantial heeding. See Francois Jullien, *Treatise on Efficacy: Between Western and Chinese Thinking* (Honolulu, HI: University of Hawaii Press, 2004), 16; Gianfrancesco Zanetti, “On Normative Discourse,” in *Ratio Juris*, 29 (2016) 1, 44-58, 51.

<sup>96</sup> Martin Heidegger, *History of the Concept of Time: Prolegomena*, translated by Theodore Kisiel (Bloomington: Indiana University Press, 1992), 274. See also Heidegger, *Phänomenologische Interpretationen zu Aristoteles*, 383.

<sup>97</sup> Negri characterizes *kairòs* as an ingredient element of constituent power in Antonio Negri, *Time for Revolution*, translated by Matteo Mandarini (London: Bloomsbury, 2003), 151-182.

unity by enworlding us otherwise. They do not simply appeal to established structures of relevance and importance; metaphor, metonymy, and analogy open up new first-person plural perspectives on what counts as relevant and important. Their import is ontological.

Synopsizing my reading of *phrónēsis*, the authoritativeness of what I would like to call *constituent circumspection* turns on its capacity to offer representations of collective unity that succeed in disclosing us and our world otherwise by allowing us to retroactively recognize ourselves in these metaphorical, metonymic, and analogical operations as the articulation of who we really are/ought to be about. If, as Ricœur, suggests, there are “metaphorical truths,” so also there are “metonymic truths” and “analogical truths.” In their absence, the “verification” of equality unfolded in emancipatory subjectification would not be possible.

### 3.4. *Justification and Vindication*

How do these considerations on Rancière and *phrónēsis* stand when assessed in light of Owen’s distinction between justification and vindication? As he notes, even if it is possible to meet the challenge concerning the political realism typically associated with *phrónēsis*, the question remains how “to conceptualize the normativity of the constitutive exclusion and inclusion entailed in acts of representation by which a putative collective unity is constituted as a unity and of the authority of such acts.”

Whereas *Authority* would purport to justify founding acts of inclusion and exclusion, one would do better to vindicate them, Owen posits. The distinction is important, he argues, in his critical examination of Rainer Forst’s defense of a “right to justification.” Indeed, justification takes place within a “space of reasons,” that is, within a police order (Rancière) or a “recognitive order” (Honneth). Owen objects to Forst, like Rancière did to Habermas in *Disagreement*, that justification works within the context of an order of aspectual-continuity. By contrast, aspect-change evinces rupture, the foundation of a new space of reasons. “The issue raised by cases of aspect-change is whether they can adequately be captured in terms of the language of justification.”<sup>98</sup> Vindication is the better candidate to make normative sense of such situations, for it “mark[s] a reconfiguration of the space of reasons that the relevant agents do not have reasons, all things considered, to regret, even though the reconfiguration was not one for which justificatory reasons could be given independently and in advance of the aspect change itself.”<sup>99</sup> A significant temporal difference follows forthwith from this distinction: “whereas justification is always in the

<sup>98</sup> David Owen, “Power, Justification and Vindication,” (manuscript on file with the author).

<sup>99</sup> *Ibid.*



present of practical deliberation and hence prospective, vindication is always retrospective.”<sup>100</sup>

My defense of asymmetrical recognition runs parallel to Owen’s concerns about justification. When conceptualizing struggles for recognition in terms of a double asymmetry between the demand for recognition and the response thereto by a legal order, I posit that “authorities claim the prerogative to ultimately decide, on the basis of the point of joint action, who raises a *justified* demand for recognition, and is, as such, entitled to participatory equality in the collective.” (*Authority*, 278) I subsequently unpack this thesis as follows:

collectives will frame their response to demands for recognition by the other in such a way that their acts of recognition can be acts of collective *self*-recognition. In other words, although collectives exist in the mode of questionability, theirs is a finite questionability. While the domain of what is important to joint action is certainly amenable to reconsideration and adjustment, no collective action is possible absent a variable domain of *normative indifference* to which the collective does not and cannot respond by changing the default setting of the point of joint action, because the default setting is a response to the question: What is/ought *our* joint action to be about? (*Authority*, 280)

The distinction between limits and fault lines underscores the finite questionability and finite responsiveness of any given “order of recognition,” beyond which lies the domain of normative indifference whence the strong dimension of a-legality irrupts into legal (dis)order: *the unordered and unorderable*. Against theories of justification such as those proposed by Forst, Habermas, and their kin, I argue that

[l]egal orders claim to be authoritative by dint of having instituted or being capable of instituting relations of reciprocity between the members of the collective; but this claim has a *blind spot* that cannot be suspended by reciprocity. To the contrary: this blind spot is the condition of possibility of reciprocity. As a result, acts of recognition that institute relations of reciprocity are also always exposed to being a form of domination *because* they bring about and enforce relations of reciprocity. (*Authority*, 318-9)

If I am not mistaken, Owen and I agree that justification is key to what I have called collective self-assertion, that is, an authoritatively mediated collective self-transformation that shifts the limit between legal (dis)order and its other in response to demands for recognition. And we agree that the justificatory practices available to a collective cannot bridge the fault line marking a legal rupture. This rupture signals the exercise of constituent power, in my idiom, and aspectual-change, in Owen’s. For instance, when discussing the performativity of a circular reasoning deployed in two famous judgments of the European Court of Justice, I noted that “legal transformation involves a rupture which cannot be fully bridged in terms of

<sup>100</sup> Ibid.

‘deliberation’ or ‘reason-giving’ . . . the ‘circle of understanding’ operant in [constituent power] can only be productive if it is vicious.”<sup>101</sup>

The question then becomes how the paradox of constituent power and vindication compare regarding their normative interpretations of legal ruptures. It may be helpful to cite Owen on the structure of vindication: “The vindicatory demand is to ask whether we have, all things considered, reasons not to regret doing *y*.”<sup>102</sup> There is a certain parallel between there being no regret for the foundation of a collective and the notion of *success*, which I introduced to conceptualize the paradoxical nature of authority: “an authority can only lead if it succeeds in appearing to its addressees as obeying what they are really about.” (*Authority*, 330) Like vindication, success speaks to a constituent act that articulates what joins us together as a durable collective through representational acts that secure the uptake of a wide range of their addressees. Like vindication, success is a retrospective category (to be distinguished from the retroactivity of the representational act). Alluding to Isaiah Berlin, Owen refers, in this context, to the “Machiavelli question,” namely, “whether the republic established is a well-functioning stable republic that endures and the future generations of citizens living a free civil life cannot, all things considered, regret its establishment despite the moral costs this involved.”<sup>103</sup> Vindication is the realm of “political virtuosi,” Owen points out.<sup>104</sup> Constituent circumspection as described heretofore is, I posit, the virtue on display in the successful foundation of a novel collective.

Yet vindication does not exhaust the normative problem posed by rupture, as Owen himself acknowledges. It remains, normatively speaking, an ambiguous achievement. Look again at its canonical formulation: “The vindicatory demand is to ask whether *we* have, all things considered, reasons not to regret doing *y*.” (italics added). Who identifies with the “we” who do not regret the closure that founds “our” collective, and who resists such self-identification? I have deliberately used the term “success” to highlight that foundational acts are

irreducibly ambiguous: authority, to be such, must hearken to a summons; but an ineradicable positivity animates its response, in which commanding and leading the way are inextricably intertwined. The congruence *and* incongruence of question and

<sup>101</sup> Lindahl, *Fault Lines of Globalization*, 211. And elsewhere: “the performative circularity governing *Van Gend & Loos* and *Martin v. Hunter’s Lessee* attests not so much to the absence of reasons but precisely to the *creation* of a reason for acting.” See Hans Lindahl, “The Paradox of Constituent Power: The Ambiguous Self-Constitution of the European Union,” in *Ratio Juris* 20 (2007) 4, 485-505, 500.

<sup>102</sup> David Owen, “Justification and Vindication in Political Philosophy,” (manuscript on file with the author).

<sup>103</sup> Owen, “Power, Justification and Vindication.”

<sup>104</sup> Owen, “Justification and Vindication in Political Philosophy.”

response, of other and self, goes to the heart of what authority is about . . . (*Authority*, 330-1)

Founding acts can never be fully nor definitively vindicated. Contingency and what is at least a residual foundational violence, in the sense discussed in my response to Fossen, are irreducible features of all legal orders. Constituent circumspection enworlds and deworlds, empowers and disempowers. For this reason, a combined justification-vindication program, as proposed by Owen, does not suffice to make sense of the normative issues raised by legal ruptures. The notion of *restrained* collective self-assertion proper to asymmetrical recognition suggests that the authoritativeness of an authoritative politics of boundaries turns on asserting ourselves as a collective by including the strange (in ourselves) as one of us in a way that also makes room for preserving the strange (in ourselves) as other than us.

Here, then, is a final feature of (constituent) circumspection: 7) *forbearance*, not as an expression of the political realism associated to prudence, but rather as a holding back that holds out to preserve the strange as strange.

#### 4. MARKUS PATBERG

Patberg's comments focus in the main on constituent power, an issue addressed in the final chapter of *Authority*. But I would do no justice to his questions if, in responding to them, I did not engage with his own theory of constituent power, systematically developed in his recent book, *Usurpation und Autorisierung*. Indeed, Patberg's intervention in the Hamburg symposium builds on his critique, in this book and other publications of his, of my account of the paradox of constituent power. So I avail myself of the opportunity to discuss his own position more fully than would be usual on an occasion such as this one.

##### *4.1. Constituent Power as Original Deliberation?*

Patberg's book is an intrepid discourse-theoretical account of constituent power. While drawing on discourse theory, Patberg does not shy away from revealing a fundamental lacuna in Habermas' approach to constituent power. "Ultimately, Habermas does not aim to reveal the performative meaning of *constituent* praxis but rather of the *constituted* praxis of self-legislation."<sup>105</sup> Patberg aspires to redress this deficiency at both the state and supra-state levels.

As regards states, he pleads, on the one hand, for the constitutional entrenchment of an assembly that allows citizens to exercise constituent power *directly*, without

<sup>105</sup> Markus Patberg, *Usurpation und Autorisierung. Konstituierende Gewalt im globalen Zeitalter* (Frankfurt/New York: Campus Verlag, 2018), 179.

any intervention of constituted powers, thereby preserving the hierarchical relation between constituent and constituted powers. On the other, he offers a reconstruction of the normative presuppositions to which all concerned persons must adhere if their participation in state constituent praxis is to be rational. Patberg also advances a two-step model for the institutionalization of democratically legitimate constituent praxis: the enactment of an interim constitution lays down the organizational rules for an interim constituent assembly that, once elected, enacts a durable constitution. Here is where Patberg takes most distance from Habermas: whereas Habermas construes collective self-rule as the *telos* of a historical process, Patberg posits that collective self-rule can be realized at the moment of revolutionary foundation and later, when the *demos* itself reforms the constitution—constituent power redux, as one might call it. Whereas Habermas accepts the non-discursive origin of a constitutional discourse, settling for a dialectical process oriented towards realizing all-inclusiveness, Patberg defends the much more ambitious view that the normative and factual conditions for an all-inclusive constitutional discourse can be realized at the foundation of a collective.

To be sure, these ideas regard the exercise of constituent power at the national or state level, not at the supranational level explored later in his book, which is the point of departure for his critique of the theory of constituent power outlined in *Authority* and earlier publications of mine. As his interpretation of supra-state constituent power depends on and “scales up” state constituent power, we must first assess the viability of his discursive-theoretical account of the latter. For if his account of state constituent power does not work—and so I will argue—, a vantage point will have been gained from which to challenge his critique of the paradox of constituent power and to deal with the three questions he addresses to my account of global constitutionalism.

Like all classical theories of constituent power, Patberg’s approach opposes two concepts and then subordinates the second to the first term of the conceptual pair: constituted power is opposed and subordinated to constituent power; the bearer of constituent power, to its subject; representation, to deliberation; representation, to presence. In this, Patberg both follows and takes a step beyond Habermas. He follows him, because, like Habermas, he contrasts popular sovereignty, in which “justified and binding decisions about law and policy” are the outcome of “face to face” deliberation by “the totality of citizens,” to the indirectness of “the parliamentary principle of establishing representatives for deliberation and decision making.”<sup>106</sup> And like Habermas, Patberg appeals to metaphors such as a “system of sluices,” “transmission belts,” and “communicative streams” to convey a unidirectional process leading from the *demos* to its representatives. Going a step beyond Habermas,

<sup>106</sup> Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, translated by William Rehg (Cambridge, MA: The MIT Press, 1996), 170.

Patberg points out that deliberation at the foundational moment cannot take place between the totality of *citizens*; citizenship is the outcome of a deliberative process between *persons*, or more precisely, by those who participate in deliberation with a view to enacting a novel constitution.

We have reached what is surely the *question de confiance* confronting Patberg's entire theory of constituent power. Can an original constituent act take place as a deliberative praxis that authorizes representation by an interim constituent assembly, while also avoiding the danger of usurping constituent power? Is *original deliberation* possible prior to all representation?

Predictably, an answer to this question turns on how the interim constitution is enacted. Drawing on and modifying Andrew Arato's account of constituent praxis, Patberg proposes to establish roundtables composed of "representatives of the significant societal groups" that, once appointed, jointly draw up an interim constitution. This interim constitution eschews all substantive determinations, limiting itself to laying down the organizational rules for an interim constituent assembly, the members of which are to be appointed in "free elections."<sup>107</sup> As Patberg concedes, deliberation between the members of the roundtables presupposes that they act as representatives. But this need not be a problem, he argues, as long as the roundtables succeed in creating procedural rules that respect the normative principles of non-violence, equality, inclusiveness, and discursiveness.

Can these conditions be met? Focusing for the moment on inclusiveness, who gets to identify who deserves representational standing in the roundtables? Would this not require an earlier act of deliberative authorization that establishes who may identify who may participate in roundtables? But then: who identifies who is authorized to participate in that earlier act of deliberative authorization? In short, is not the authorization of representation caught up in an infinite regress? Relatedly, is it possible to determine which deliberative groups count, at least provisionally, as "significant" (*maßgeblich*), or even as groups that might be concerned parties to a constituent act, absent a prior *substantive* representation of the collective unity of which those groups are deemed to be part? "Original" deliberation by the constituent roundtables presupposes a representation of collective unity, hence both an opening up and a closing down of practical possibilities for joint action, without which it makes no sense to speak of a subject of constituent power, in the singular, nor of "free elections" by an identifiable range of persons, in the plural. To belabor the point: can these persons have been identified as (future) voting citizens without a substantive representation of collective unity that includes and excludes, a representational act that, by definition, could not have been authorized in advance by those whom it includes and excludes?

<sup>107</sup> Patberg, *Usurpation und Autorisierung*, 207.

This predicament becomes acute when Patberg addresses the problem of how to activate the deliberative process leading up to an interim constitution. Indeed, how does deliberation get started? His answer is that deliberation is launched by a “political movement that agrees on the necessity of a radical transformation of the constitutional order and that, as a sign of resistance to the dominant relations, occupies public places, generates communicative power, because the participants are motivated to engage in collective action.”<sup>108</sup> This account of the original foundational moment—assuming such a zero point in time can actually be identified: *quod non*—exactly parallels the description by Antonio Negri and Michael Hardt of how militants mobilize the multitude to exercise constituent power. “In the postmodern era, as the figure of the people dissolves, the militant is the one who best expresses the life of the multitude.”<sup>109</sup> By resisting the extant order of domination, militancy aims to bring about “the collective construction and exercise of a counterpower capable of destroying the power of capitalism and opposing it with an alternative program of government.”<sup>110</sup> Patberg refers to an “avant-garde” that activates constituent power, rather than to a revolutionary militancy.<sup>111</sup> But the upshot is the same; deliberation begins with an unauthorized representational claim of collective unity. *The origin of deliberation is an original representation.*

The notion of an original representation is, of course, a paradox, the paradox at work in the exercise of constituent power: an act of constituent power only succeeds if its addressees retroactively recognize themselves as having been its subject, hence recognize those who seized the constituent initiative as having been their representatives—a constituted power. It disrupts the simple linear temporality that governs the “systems of sluices,” “transmission belts,” and “communication streams” leading from constituent to constituted power, from the subject to the bearer of democratic legitimacy, from deliberation to representation, and from presence to representation. Instead, the paradox bespeaks the temporal dislocation of, as Van Roermund puts it, a past we can look forward to. Patberg comes within a whisker of acknowledging the retrojective anticipation deployed by the paradox of constituent power in the very sentence that culminates his argument for deliberation as marking the immaculate beginning of political praxis. In his words, the enactment of an interim constitution “opens up the possibility of *representing future* associations of legal associates in revolutionary foundational moments.”<sup>112</sup>

<sup>108</sup> *Ibid*, 213-4.

<sup>109</sup> Antonio Negri and Michael Hardt, *Empire* (Cambridge, MA: Harvard University Press, 2000), 411.

<sup>110</sup> *Ibid*, 412. See Lindahl, *Fault Lines of Globalization*, 216.

<sup>111</sup> Patberg, *Usurpation und Autorisierung*, 319 ff.

<sup>112</sup> *Ibid*, 20. (Italics added)

If this paradoxical temporal dynamic governs constituent praxis, how can one know that the avant-garde or the militant truly represents the collective? If, paradoxically, the beginning of political praxis is an original representation, can we ever fully disentangle and oppose usurpation and authorization in constituent praxis?

#### 4.2. *Mixed Constituent Power*

This exordium on representation and deliberation allows me to offer a focused response to Patberg's comments to *Authority*. For starters, Patberg mischaracterizes my position when holding that I would have constituent praxis "*pretend* that we can presuppose what we are actually in the process of bringing about." (italics added) Nowhere do I refer to the representation of collective unity as a pretense; I have insisted that representations are representational *claims*, and that they are *authoritative* claims to the extent that a wide range of addressees retroactively recognizes itself in those representations as depicting what, for the time being, *really* joins them together. Something altogether different is that collective unity is *presupposed*, making of representational acts of what we are "really" about defeasible wagers dependent on take-up by their addressees. If we already knew, prior to representational acts, what it is that really conjoins us, then no representation of collective unity would be necessary. Likewise, I nowhere argue that "one has to speak on behalf of a collective that can *only* be the result of the founding act." (italics added) Were such the case, there could be no representation, and the paradox of constituent power would collapse into the pure performativity of an *ex nihilo* production.

Nor is the paradox "retrospective" or "pessimistic," as Patberg erroneously claims in his book on constituent power.<sup>113</sup> There is a fundamental difference between retrospectivity and retroactivity. In the former, you look back to the past, which appears with a new meaning after a revolutionary or transformative event. In the latter, you retroject into a past that was never a present what is yet to come and will never fully arrive, e.g. a European common market. The paradox is anything but pessimistic: innovation, revolutionary or otherwise, is possible only because there is no direct access to an original unity given directly and prior to representation. That collective unity is always a represented unity means that we can be represented *otherwise* than heretofore. As indicated in my response to Fossen, it would be reductive to view representation only in terms of domination, usurpation, loss, and decay; it is also creative, opening possibilities for understanding ourselves and the world we inhabit in new ways. The pure reproduction or pure production of collective unity are forms of originalism emphatically abjured by the paradox of constituent praxis.

<sup>113</sup> *Ibid*, 140-1.

Patberg's three questions focus on making sense of constituent power beyond the state. He probes the empirical and normative plausibility of the paradox of constituent power from the perspective of a theory of "mixed" constituent power. Drawing on and modifying recent work by Cohen and Habermas, Patberg extrapolates the normative and institutional framework for state constituent praxis to the supra-state level, while also recognizing that supra-state constituent praxis, although distinct from state constituent power, is not independent thereof. Accordingly, the two stages of constituent praxis outlined heretofore lead over to a third stage in which the members of the participant states engage in a constituent praxis to distribute competences between the states and a supranational polity, either in the form of a functional coordination between states or of their political integration into a "boundary-transgressing collective." While the EU is thus far the only empirical instantiation of the latter, "the projects of constitutional transformation in the direction of a democratic world order . . . would need to rest preponderantly on this type."<sup>114</sup> Here, exactly, is where Patberg's inquiry joins up with mine: what can a theory of constituent power tell us about the prospects of global constitutionalism?

In particular, and turning to his first question, the paradox of constituent power relies, or so Patberg remonstrates with me, on "the hypothetical notion of a non-constituted initial situation, which does not exist in today's world." Empirically speaking, we are witness to a plethora of constituted states, the members of which can join together in functionally or politically organized supra-state collectives. Normatively, he argues, the model of "mixed" constituent power shows that the exercise of "[supra-state] constituent power creates an outside, but not every exclusion is an unjustified exclusion."

I have no problems with the empirical diagnosis offered by Patberg about the central role of states in a global context. The paradox of constituent power by no means precludes that transnational and global constituent praxis can build, in one way or another, on the institutional structures of states, which may be, for the time being at least, irreplaceable. The point about the paradox is *conceptual*, not empirical. I argue, and have evinced as concerns the EU, that the paradox *also* holds sway in transnational and global polities, and that it does so for the very same reasons I have elaborated on heretofore when discussing Patberg's deliberative model of state constituent power: the origin of deliberation is an original representation of collective unity.<sup>115</sup> The DiEM-25 campaign, invoked by Patberg in the very last sentence

<sup>114</sup> *Ibid.*, 270.

<sup>115</sup> See Hans Lindahl, "The Paradox of Constituent Power: The Ambiguous Self-Constitution of the European Union," in *Ratio Juris. An International Journal of Jurisprudence and Philosophy of Law*, 20 (2007) 4, 485-505. Patberg takes me to task on normative grounds for arguing that the ECJ, in the *Van Gend & Loos* and *Costa v. ENEL* rulings, deployed the paradox of constituent power. Only a constituent assembly, not a judicial body, can enjoy democratic legitimacy to exercise consti-



of his book, is an excellent example of an avant-garde that seeks to activate constituent power through representational claims about a past to which “we Europeans” can look forward. Nothing here about “a non-constituted initial situation.” But DiEM-25’s representational claims offer a perspective of Europe that includes and excludes when claiming to represent what really joins together its citizens. More generally, can we really assert, in the face of Brexit and other contemporary developments, that the EU simply “belongs” to the members of the founding states? The problem, for multifold citizens of Member States, is not their exclusion from the EU; it is their *inclusion* therein, which they vigorously resist: “Not in our name!” And is it not the case that those who the EU calls “economic migrants” lay claim to a form of membership in the EU because the EU cannot close itself off as an internal market without also including itself and what it excludes as part of a global market? Here again, there is inveterate resistance to a representational claim—“Not in our name!”—, but now because those who claim to be concerned parties have been unjustifiably *excluded* from the EU.<sup>116</sup>

The conceptual point about the paradox goes further than this, however. Crucially, the IACA-model of law does not take for granted that the advent of global legal orders is only possible as a “levelling up” of state *demos*. What is perhaps most alluring about a range of alter-globalization movements, such as the *Vía Campesina*, is that they reach across borders to forge novel communities that are *irreducible* to Patberg’s preferred option of more encompassing collectives of persons composed of state citizens. In the same vein, what to think of alter-globalization movements by indigenous peoples who gather to (re-)claim sovereignty *against* the states that treat them as their citizens? And what to make of the Global Alliance for the Rights of Nature, which, uniting people and organizations from around the world without regard to their citizenship, initiated and supports the International Rights of Nature Tribunal to try serious breaches of such rights?<sup>117</sup>

One fundamentally distorts the constituent potential of such movements if one characterizes them in terms of the three-step model propounded by Patberg. My

constituent power; to mantle European judges with constituent power is to legitimate an undemocratic usurpation. My point is, however, that an (interim) constituent assembly *also* emerges through an unauthorized representational act of the collective it creates, thereby undermining any simple disjunction between legitimate and illegitimate constituent praxis. See to this effect my considerations on Ackerman and the founding of the American Republic, in my response to Ferrara. Regarding the EU, I have nowhere suggested that the modes of representation available to judicial law-making are sufficient to deal with what I take to be the two key political questions confronting the EU: What really defines the *commonality* of the common market? Is the *market* what is really common to us?

<sup>116</sup> See Hans Lindahl, “In Between: Immigration, Distributive Justice, and Political Dialogue,” in *Contemporary Political Theory* 8 (2009) 4, 425-434. Unfortunately, the article appeared in truncated form in the journal; the full version is available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1726285](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1726285).

<sup>117</sup> Global Alliance for the Rights of Nature, available at: <https://therightsofnature.org/?cli action=1568718838.902> (last accessed on September 17, 2019).

point can be made in terms of the structure of representation, which, as noted in *Authority* and in my response to Fossen, is always representation *of* a collective and its representation *as* this or that unity. In effect, the exercise of constituent power beyond the state is not only about the representation of sundry state citizens *as* members of this or that supra-state collective; it also opens up the possibility of novel referents *of* representation, giving rise to transnational or global collectives that are something other than larger unities of state citizens.

Patberg is skeptical of the capacity of alter-globalization movements to successfully exercise constituent power: “only states have the capacity to establish global legal orders backed by the monopoly of force.” Chapter 7 of *Authority*, as he notes, acknowledges a certain primacy of the state in our contemporary context, in light of its capacity to exercise physical force to uphold collective action, both by states and transnational and emergent global legal orders. This is certainly a realistic evaluation of our contemporary situation. Indeed, most states are capable of using force to block the exercise of constituent power by alter-globalization movements. One is well-advised, therefore, to refer to the constituent *potential* of alter-globalization movements. Moreover this argument does not provide the kind of strong normative defense of state-centered constituent power that Patberg hopes it will yield. For can one take for granted that the force that states would bring to bear on such movements is simply legitimate force when alter-globalization movements refuse to follow the constitutional pathways available for social transformation? After all, the exercise of constituent power that gives rise to the state was itself forceful in a way that was not and could not be the outcome of what is purely the “force of the better argument.” Nor will any constitution, not even an impeccably liberal constitution, fully succeed creating the conditions in which only the force of the better argument triumphs. Every constitution frames what can count as the force of the better argument; no constitution succeeds in fully eliminating the blind spot of what counts as the force of the better argument in a given collective. Patberg notes, following Nielsen, that “not every actor who articulates a claim to constituent power automatically also has a legitimate entitlement to exercise it.” I would go a step further: although *all* exercise of constituent power claims to be legitimate, *no* such exercise can fully legitimate itself in light of the conditions that govern the emergence of collective action. This also holds for the states that, claiming the legitimate monopoly of power for themselves, block the exercise of constituent power by alter-globalization movements, if necessary with “all due force.”

### *4.3. The Non-Discursive Origins of Discourse*

This takes me to Patberg’s second question: is there an independent normative criterion that allows of establishing whether the exercise of constituent power by a social group is legitimate or illegitimate? Is there no difference between vulnerable alter-globalization movements that engage in acts of constituent resistance and, say,

alt-right movements that would do the same? Must we not, ultimately, posit a normative criterion that is universal in character if we are to evade relativism in our account of constituent power?

I start by noting that, in contrast to Patberg, I have steadfastly refused to engage directly in a normative account of constituent power, insisting on the need to first unpack the dynamic that governs the inception of any possible collective, to then spell out the normative implications that follow therefrom. As a conceptual matter, I am no less interested in making sense of the structural conditions for the exercise of constituent power by an alt-right movement than by DiEM-25. Those conditions, or so the IACA-model of law argues, lead back to a-legality and the paradox of representation. Whether propelled by an alt-right group, by DiEM-25, or by any other political movement, constituent power emerges from the domain of what is unordered for a given order. Moreover, and regardless of the political stance of constituent power, it must claim to colorably articulate who we are/ought to be as a collective. Also, it can only be validated *ex post*, through acts of collective self-recognition of their addressees. And, finally, no claim to the representation of collective unity raised by constituent power can validate itself fully and definitively, as it combines in variable measure invitation and imposition.

What *normative* implications follow from a-legality and the paradox of constituent for a theory of constituent power?

As has transpired in *Authority* and my earlier remarks on Patberg's commentary, there are excellent reasons for being cautious about the attempt to enumerate a discourse-theoretical set of "pre-judicial" principles that can and must be met at the foundation of a collective if constituent power is to be democratically legitimate. I submit that the paradox of constituent power destabilizes each of the four principles that Patberg identifies with respect to state constituent praxis, and a fortiori for "mixed" constituent praxis—non-violence, equality, inclusiveness, and discursiveness.

Non-violence. I have granted to Fossen, when responding to his complaint about my assimilating constituent power to violence, that *Authority* and other writings do not adequately distinguish between inaugural violence and the violence visited on the other *as* other. As concerns the former, which is the bone of contention between Patberg and myself, I insist that the emergence of a collective must rely on unauthorized representational acts that cannot but *marginalize* in the process of including, a more or less forceful marginalization that is experienced as violent by those excluded from a collective when the force of the law is brought to bear on their acts of resistance to the legal order.

Equality. The paradox of constituent power entails that equality is never simply given prior to representation. As I have shown in my comments on Rancière, and to which I return when discussing at some length Zanetti's question concerning equality, the exercise of constituent power is always also a process of *equalization*

*and inequalization*, whereby a residual, yet irreducible contingency cleaves to any determination of the individuals and groups who are to be treated equally and unequally. The incorporation of indigenous peoples into state orders is a particularly poignant example of the ambiguity of political equality, and the perils of assuming that states—even self-styled constitutional democracies—can bank on full legitimacy when participating in supra-state collectives. Patberg’s model of constituent power misses the *mis*representations and *mis*recognitions perpetrated by state constituent power with respect to those individuals and groups who demand political autonomy vis-à-vis state sovereignty. So also it misses the potential misrepresentations and misrecognitions that would ensue from a discourse-theoretical institutionalization of “mixed” constituent power in a transnational and global setting.

Inclusiveness: I have sought to show, in Chapter 5 of *Authority*, why the principle of democratic identity will not do the work that is expected of it, namely, to yield an independent criterion of legitimate authority. The question about who counts as affected by or subject to a legal order is itself *sub judice* in struggles for recognition, not a pre-given criterion that stands above the fray and allows of settling this question authoritatively for all parties involved. The all-affected or all-subjected principle encapsulates the *problem* and the paradoxical emergence of normativity deployed in asymmetrical recognition, not its solution.<sup>118</sup> Moreover, the problem is not merely to ensure a greater inclusiveness; as I have argued at length in *Authority* and elsewhere, what about those cases in which inclusion is the problem, not the solution, raised by constituent praxis?

Discursiveness: While constituent power is never simply an “irrational” act, insofar as it involves a contestable claim about what conjoins us, discourse has a non-discursive origin that is effectual in the form of a blind spot that cleaves to every constitutional discourse, and which it can never fully suspend regarding what counts as a *justified* demand for recognition. Here I join forces with Rancière’s critique of Habermas, and Owen’s critique of Forst. In other words, every legal collective has a blind spot in the form of normative claims that resist integration into the circle of reciprocity and mutual recognition made available by a constitutional discourse, yet which the collective cannot simply shrug off as surd, other than at the price of falling prey to a *petitio principii*.

Thus, I am troubled by Patberg’s strong normative claim that “mixed” constituent power can realize the non-contingent conditions for justified exclusion. This claim may seem plausible as long as one assumes that a collective can constitute itself in a moment of original deliberation prior to all representation. The paradox of constituent power reveals, however, that such claims fall prey to a metaphysics of

<sup>118</sup> See Lindahl, “Authority and the Globalization of Inclusion and Exclusion: Conceptual and Normative Issues,” 468.

presence, that is, to the assumption that there can be a direct or unmediated collective self-identity. Because no collective can emerge absent acts that *seize* the initiative to represent us as this, rather than as that, constituent praxis is irreducibly contingent, which is why constituent praxis by those who contest the terms of exclusion and inclusion of an extant legal order remains a latent possibility confronting every constituted collective. Patberg is right: unless constituent power can be discursively grounded, a constitutional discourse will not deliver the criteria for democratic legitimacy demanded by discourse theory. Habermas is right: constitutional discourse has a non-discursive origin.<sup>119</sup>

Is avowing that constituent acts have a normative blind spot they can neither remove nor fully justify tantamount to professing relativism? Does it involve normatively assimilating an alt-right movement to, say, DiEM-25? Not at all: the normative question called forth by the paradox of constituent power is how to deal, even if only indirectly, with the blind spot ensconced in the exercise of constituent power, including those cases in which those who would exercise constituent power on discourse-theoretical grounds claim that they should be followed because their cause is the cause of democracy.

This is where collective self-restraint and asymmetrical recognition enter the picture. I take the liberty of citing in full an apposite passage of *Authority*:

Against the charge of relativism directed against it by legal universalism, the IACA model of law argues for a concept of authority in which collective *self*-assertion is tempered by the injunction to preserve the strange as strange, hence to preserve the ‘inter’ of intersubjectivity as *beyond our control*. It is the way in which a collective acknowledges that it has an outside—a domain of the strange—that eludes the collective’s self-assertion and which *ought* to be preserved as its outside, including the outside within ourselves, if collective recognition of the other (in ourselves) is not to collapse into a process of totalisation and therewith of domination. (*Authority*, 345)

#### *4.4. Constituent Self-Restraint*

These considerations on collective self-restraint are also germane to Patberg’s final question, namely, whether constituent praxis should exercise self-restraint, a question that is in fact a variation on the earlier question about the distinction between legitimate and illegitimate constituent power. I mooted this very issue in the Julius Stone Address 2018, an issue that, as Patberg astutely notes, is not dealt with in *Authority*. Here again, I take the liberty of citing the relevant passage in full, as a

<sup>119</sup> Although he interprets discourse otherwise than Habermas and his followers, Philip Pettit’s conception of constituent power also falls prey to a metaphysics of presence: “[t]he constituting people assume a direct presence in elections and referenda and a represented presence in the authorities who run the government and in those private attorneys and social movements who contest government proposals and decisions.” Philip Pettit, *On the People’s Terms: A Republican Theory and Model of Democracy* (Cambridge: Cambridge University Press, 2012), 286.

caveat to Patberg's claim that "the projects of constitutional transformation in the direction of a democratic world order . . . would need to rest preponderantly on [the model of 'mixed' constituent power]":

No less than the emergent global legal orders they resist, the politics of boundaries through which alter- and anti-globalisation movements endeavour to assert themselves is authoritative if it exercises self-restraint. By seizing the initiative to represent us otherwise, the dynamic of inclusion and exclusion is already at work in alter- and anti-globalisation movements. They claim that commonality and recognition are on their side, in contrast to the partiality and misrecognition of the global legal orders they resist. Yet they cannot but marginalise in the process of unifying, even if differently . . . This is no argument against resistance to and the transformation of contemporary patterns of global inclusion and exclusion . . . But the dynamic of representation does entail that there are human emancipations in the plural, not the emancipation of humanity in the singular. Emancipatory resistance, like all representational processes, pluralises in the process of unifying.<sup>120</sup>

Although Patberg takes me to argue that "a global hierarchy of public authority, for example a cosmopolitan democracy, is unlikely or perhaps impossible," my claim is not empirical. For all we know, a cosmopolitan democracy along the lines of the three-step model outlined by Patberg may well emerge! My point is rather that such a polity would generate an outside, without ever being able to fully justify the terms in which it draws the distinction between inside and outside. A "world democratic order" that were to claim that it has or could secure the normative and institutional conditions for justified exclusion at its foundation or thereafter would immediately forfeit its democratic character, becoming a project of global imperialism.<sup>121</sup>

## 5. GIANFRANCESCO ZANETTI

I am grateful to Zanetti for his perceptive comments, the first on the problem of equality, the second on social ontology, the third on biocultural rights. The first two comments allow me to further elaborate on features of collectivity apposite to the

<sup>120</sup> Lindahl, "Inside and Outside Global Law," 34.

<sup>121</sup> See here the point of departure for a critique of "egalitarian universalism" as defended, inter alia, by Habermas and Cohen, in particular Jean Cohen, "Whose Sovereignty? Empire versus International Law," in *Ethics and Foreign Affairs* 18 (2004) 1, 1-24. Çubukçu makes a similar point when arguing against the move by egalitarian universalists to set up a simple disjunction between "empire's law" and "law's empire." See Ayça Çubukçu, *For the Love of Humanity: The World Tribunal on Iraq* (Philadelphia, PN: University of Pennsylvania Press, 2018), 146-157. I'll briefly return to egalitarian universalism when discussing Zanetti's contribution.

IACA-model of law. The third question—fittingly his last question and the last question to be addressed in this Response to Commentators—takes me to the very edge of my thinking about legal ordering, summoning me to ingress into novel terrain.

### *5.1. (In)equality: Conceptual Aspects*

“It is a pity that Lindahl does not directly address the issue of equality in any specific chapter . . .” My comments on Rancière and Patberg have already begun, I hope, to redress this omission. A systematic and complete analysis of (in)equality greatly exceeds what I can provide in this Response, so I will settle for unabashedly prelusive and fragmentary thoughts about (in)equality, focusing successively on some of its conceptual, genetic, and normative aspects.

In line with the general conceptual strategy of *Authority*, it makes sense to raise the question about (in)equality from the perspective of law as a species of collective action. Approaching (in)equality in this way has the advantage of bringing into play the first-person plural perspective and its attendant notions of collective identity and difference. To see why, it is helpful to introduce the distinction between sameness and selfhood, or as Ricœur puts it, *ipse*- and *idem*-identity.<sup>122</sup> A demand for equal treatment is a demand to be treated the *same* (*idem*) as others. This is a demand directed to a collective, hence a demand that confronts it with the question, “What is/ought our joint action to be about?” As such, it convokes the other members of a collective to identify and recognize *themselves* (*ipse*), both as a collective and as individual agents, otherwise than hitherto. To engage in the discourse of (in)equality is to evoke the language of identity/difference. And because the dyad identity/difference belongs to the bailiwick of (mis)recognition, struggles for equality are struggles for the recognition of whom, having been “othered,” demands inclusion as one of us.

A demand for equal treatment amounts, along these lines, to the claim that an agent has been *unjustifiably excluded* from the exercise of certain rights and obligations by the default setting of collective action. Who demands equal treatment makes a claim about the point of joint action: who we *really* are/ought to be about enjoins bestowing certain rights (and obligations) on agents, which had been made available to others in the collective. The reader of *Authority* will recall, to this effect, the following feature of collective action: “[5] *Inclusion and exclusion*: The point of joint action determines what is important to joint action and what is not, hence what kinds of places, times, subjectivities and act-types are included therein, such that other possible combinations of these four dimensions of behaviour are marginalised as inconsequential.” (*Authority*, 51) All forms of protest about (in)equality within a collective question how the legal order draws the distinction between legal

<sup>122</sup> Paul Ricœur, *Oneself as Another*, translated by Kathleen Blamely (Chicago: Chicago University Press, 1992), 116. See also Lindahl, *Fault Lines*, 81-90.

(dis)order and the unordered, hence between what is relevant and irrelevant to collective action. In the same way that a-legality reveals legal boundaries to be the questionable limits of a legal order, so, too, a-legality reveals the intra-ordinal cleavage between the equal and the unequal to be the questionable limit between collective selfhood and the other. In short, all claims and counterclaims about (in)equality within a legal order are, at bottom, claims and counterclaims about inclusion and exclusion, hence about the boundaries, limits, and fault lines of that order.

For the same reason, struggles for equality are struggles about what counts as the unity of a collective. The struggle by the Civil Rights Movement against the segregation of whites and blacks mandated by Jim Crow laws in the Southern United States consisted in a struggle to transform a legal order by reconfiguring the rules that established who (e.g. blacks) ought to do what (e.g. sit), where (e.g. in the back of the bus), and when (e.g. while travelling). More generally, the struggle against racial discrimination, as epitomized by “I have a Dream,” Martin Luther King’s stirring address culminating the March on Washington in August, 1963, illustrates why struggles for equality are struggles to change the threefold unity of legal orders. The unity of a pragmatic order: “We can never be satisfied as long as our bodies, heavy with the fatigue of travel, cannot gain lodging in the motels of the highways and the hotels of the cities . . .” The unity of a legal system: “There will be neither rest nor tranquility in America until the Negro is granted his citizenship rights.” The unity of a first-person plural perspective: “I have a dream that one day this nation will rise up, live out the true meaning of its creed: ‘We hold these truths to be self-evident, that all men are created equal’.”

Most political and legal theories focus on struggles for equality; Ferrara’s references to acts of civil disobedience are exemplary in this respect. Yet the IACA-model of law suggests that there are also struggles for *inequality*, struggles by those who resist being treated in the same way as others and demand differential treatment. One response to such demands is to enact a limited autonomy regime, recognizing a minority group as different to the majority regarding certain dimensions of social life, e.g. its linguistic or religious facets. In such cases, however, the recognition of inequality in the form of an *autonomy* regime goes hand in hand with the recognition of equality in the form of a *limited* autonomy regime. The recognition of a minority group as different, as other than us, presupposes the recognition of the minority and its members as the same as us because they are deemed to share with us what truly or really unites us *all*. Equality must be presupposed if a collective is to make room for inequality by recognizing a group as a minority group: plurality within unity; a differentiated collective identity.

There is withal a more radical struggle for inequality: the struggle in which a group resists being recognized as a minority group within a larger collective. These are struggles sparked by the other (in ourselves) who demands to be recognized as other than us. Theirs is a demand for inequality that seeks to release them from



participation in the collective of which they are forcibly part. Theirs are demands for exclusion as a result of *unjustified inclusion* in a collective. They do not resist having been “othered”; they resist having been “served.” In this vein, my response to Ferrara alluded to demands for sovereignty by indigenous peoples in the United States and Australia. And, when exploring the similarities and differences between Rancière’s work and mine, I noted that whereas Rancière focuses exclusively on equality, namely, on subjectification as the demand for recognition of those who are a part but have no part in a collective, the IACA-model of law also makes room for struggles for unequal treatment by those who have a part in a collective of which they want no part: a right not to have rights, to repeat Oudejans’ startling formulation.

But on closer inspection, such struggles for inequality are struggles for a more fundamental equality. Granted, these are not emancipatory struggles for equality *within* a given collective of which a group is deemed a minority; they are struggles for emancipation *from* that collective—for secession. But this demand for recognition as a group that is other than us involves a demand to be treated as *equal* to the addressee of the demand, namely, to be recognized as a sovereign collective. For instance, the Lakota Sioux indicate in a communication of December 20, 2007, that, “[f]ollowing Monday’s withdrawal at the State Department, the four Lakota Itacan representatives have been meeting with foreign embassy officials in order to hasten their official return to the Family of Nations.”<sup>123</sup> Analogously, the Aboriginal Sovereign Treaty ‘88 Campaign of Australia asserted the following: “We, the Aboriginal People, restate that we are the Sovereign Owners of Australia. There have been no treaties with us and we have never ceded our Sovereignty.”<sup>124</sup> When discussing the Aboriginal Tent Embassy and the famous *Mabo 2* ruling of the Australian Supreme Court, I speculated about the possibility of enacting a coimperium between indigenous peoples and the Australian collective as a way of responding to the demand for recognition as sovereign peoples raised by members of the former.<sup>125</sup> Here again, a coimperium would imply reciprocal recognition between the Australian state and indigenous peoples as *equal* under international law. Thus, is not their demand to be treated as *other than us*, e.g. us, the citizens of Australia or the United States, derivative with respect to their demand to be treated as *one of us*, e.g. us, the members of the international community of sovereign nations? In both situations, a group’s grievance that it has been unjustifiably included in a colonizing

<sup>123</sup> See “Freedom! Lakota Sioux Indians Declare Sovereign Nation Status.”

<sup>124</sup> Aboriginal Sovereign Treaty ‘88 Campaign, “Aboriginal Sovereignty—never ceded,” in *Australian Historical Studies*, 23 (1988) 91, 1-2. See also Australian Institute of Aboriginal Studies and Torres Strait Islander Studies, <https://aiatsis.gov.au/collections/collections-online/digitised-collections/treaty/treaty-88> (accessed on July 1, 2019). Notice the “re” of “restate.”

<sup>125</sup> Lindahl, “Intentionality, Representation, Recognition.”

collective is co-originally the complaint that it has been unjustifiably excluded from the collective of nations.

Is, then, a demand for a more capacious equality—ultimately universal equality: the equality of all with all—the presupposition of *all* demands for (in)equality? Can there be a struggle for inequality that is not, at bottom, a struggle for equality? I hold this question in abeyance, returning to it after discussing the genesis of (in)equality.

### 5.2. (In)equality: Genetic Aspects

In her defense of political equality sketched out in *The Origins of Totalitarianism*, Arendt reminds us that equality is not a given; it is the outcome of an equalization: “We are not born equal, we become equal as members of a group on the strength of our decision to guarantee ourselves mutually equal rights.”<sup>126</sup> In another text she refers approvingly to a passage in the *Nicomachean Ethics* in which “Aristotle explains that a community is not made out of equals, but on the contrary of people who are different and unequal. The community comes into being through equalizing, *isasthèna*.”<sup>127</sup> These two passages adroitly introduce a second aspect of political (in)equality: its genesis.

The reader of *Authority* will recognize that we are back on familiar ground. For the book shows that no legal order is static—an *ordo ordinatus*; law only exists in the gerundial mode: as a legal order-ing—an *ordo ordinans*. Likewise, I argued that there is neither collective unity nor plurality: there are only processes of unifying and pluralizing. In the same way, we would search in vain for identity and difference; legal order as an ordering is always and only a process of identifying and differentiating. So too, and finally, representation recasts equality as a verbal noun. Zanetti puts it very well: “[e]quality is an *aequalitas aequans*, never an *aequalitas aequata*.”<sup>128</sup> This thesis builds on his earlier work on equality, in which he contrasts what he calls “input” and “output” equality, that is, equality as the instigation to and outcome of law-making, a distinction analogous to the distinction introduced by Waldron between the “basic equality” of human beings and “equality as a policy aim.”<sup>129</sup>

Zanetti’s decisive move is to invert the traditional reading of the relation between these two terms. While conventional theories of equality assume the simple priority of “basic equality,” with which “equality as a policy aim” strives to align itself, Zanetti

<sup>126</sup> Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt Brace, 1951), 301.

<sup>127</sup> Hannah Arendt, “Philosophy and Politics,” in *Social Research* 57 (1990), 83.

<sup>128</sup> Gianfrancesco Zanetti, “Equality,” paper presented at the “Norms and Values in the European Migration and Refugee” Conference, hosted by the University of Milan on September 9-11, 2019 (draft manuscript on file with the author).

<sup>129</sup> Gianfrancesco Zanetti, “Astrology and Race: Aspects of Equality After Critical Race Theory,” in *Columbia Journal of Race and Law* 2 (2012) 2, 267-278, 275-276. See also Jeremy Waldron, *God, Locke, and Equality: Christian Foundations in Locke’s Political Thought* (Cambridge: Cambridge University Press, 2002), 1-3.

notes that “first comes equality as a practice, for example, in egalitarian policies. The much-vaunted basic equality, pace Waldron, becomes the outcome. Equality as a practice, the fighting for equality, is the *prius*; basic equality, the *posterius*.”<sup>130</sup> He adds that “there is no logical contradiction between the two alternative conceptual itineraries, from basic equality to equality as an aim, from equality as an aim to basic equality.”<sup>131</sup> By sustaining the tension between both itineraries, Zanetti eschews the pure reproduction of equality, wherein equality-as-aim merely aligns itself with basic equality, and the pure production of equality, in which basic equality is but the effect of equality-as-aim.

Basic equality is both the presupposition and the outcome of equality-as-aim because basic equality is always a *represented* equality, a point I made earlier, when discussing Rancière’s theory of subjectification. If the assertion that all humans are equal is to have any purchase, then one needs to spell out in what sense humans are equal, that is, to determine the concept of humanity for political and legal purposes.<sup>132</sup> Two decisive implications follow from this insight. First, the representational “as” folds inequality into equality: equality-as-aim represents basic equality as *this*—rather than as *that*. Second, equality-as-aim deploys the paradoxical temporality of the representational “as”: equality-as-aim originates basic equality if, retroactively, it succeeds in representing an original basic equality. In other words, the representation of basic equality unfolds as an original re-equalization. When taken in conjunction, these two features entail that *an original re-equalization and re-inequalization are the two faces of the single process of representation*. It has often been lamented that the sempiternal formula of justice, “Treat the equal equally and the unequal unequally,” is formal, hence unable to provide a substantive criterion with which to adjudge on the (in)justice of legal orders. The real issue is that the paradox of representation is operative in struggles for justice. Basic equality does not provide an independent and objective standard that could conclusively and objectively settle a struggle for equality between all parties concerned. It is part and parcel of what the struggle is about. This, as I read him, is the gist of Zanetti’s insight, which I cite in full:

Equality is an *aequalitas aequans*, never an *aequalitas aequata*. Every result of normative equality practice can be charged with forgetting about those who are somehow left out. Equality is a critical category, bound by its very logic to a performative necessity to conceptualize itself as a substantial category: as based on, and implementing, an universal notion of basic equality. That equality, however, is but the outcome of the normative narrative of those equality practices.<sup>133</sup>

<sup>130</sup> Zanetti, “Astrology and Race,” 277.

<sup>131</sup> Ibid.

<sup>132</sup> A point I raise when discussing human rights in *Fault Lines* and in *Authority*.

<sup>133</sup> Zanetti, “Equality.”

### 5.3. (In)equality: Normative Aspects

We can now return to the questions that concluded Section 6.1. Can there be a demand for unequal treatment by an individual or a minority that does not demand a more capacious equality? Is the realization of universal equality—the equality of all human beings qua human beings—the ultimate and necessary presupposition of all struggles for recognition of an individual or group identity/difference threatened or violated by a given legal order?

I'll get started by noting that all discussions about (in)equality are *concrete*, that is, they unfold as a situated struggle in which an individual or a group demands (un)equal treatment of a collective that must respond to this demand in one way or another, if nothing else by ignoring it. The concrete, situated, nature of struggles for (in)equality also holds in those cases in which the demand for (un)equal treatment addressed to a collective is couched in terms of basic equality: the equality of human beings qua human beings.

All demands for (un)equal treatment are demands that an extant (in)equality be redressed. In other words, they are claims that a legal order *breaches* equality, hence that an original equality needs to be *restored* by transforming the legal order, either reconfiguring intra-ordinal (in)equality or allowing a group to secede, e.g. indigenous peoples' demands for sovereignty. Accordingly, such demands are representational claims that deploy the twofold dynamic at work in the representational "as." On the one hand, the individual or group who demands (un)equal treatment claims that equality means *this* for the situation at hand, whereas the legal order allegedly in breach of equality determines it as *that*. On the other hand, a demand for (un)equal treatment deploys the temporal paradox of representation. The claim that a collective is in breach of equality unfolds as a retrojective anticipation: a past equality that we can look forward to. The tandem breach/restoration, implicit in Rancière's "presupposition of equality," bespeaks an *original representation of equality*.

Consider, for instance, the Lakota Sioux demand for sovereignty vis-à-vis the United States, as discussed in my response to Ferrara. They demand to be welcomed back into the "Family of Nations." But this demand for equality omits that the erstwhile treaties the Sioux signed with the United States were between a member of a community that represented itself as the international community of "civilized" nations, on the one hand, and an Indian people, on the other. It is not to this representation of the international community of nations to which the Lakota Sioux and other indigenous peoples appeal, when demanding sovereignty today. They present their foundation as the re-foundation of an initial condition of *full* equality between all sovereign peoples; thus, their re-foundation as an equal sovereign people would *found* them and the international community of nations. The Family of Nations to which, in their words, they would "return," is the Family of Nations they

look forward to. In short, the Lakota demand for sovereignty is a demand for an *original re-equalization*.

But what price do they pay for representing themselves as a sovereign nation equal to all other nations under international law? What might be elided by depicting themselves (*ipse*) as being the same (*idem*) as other sovereigns from the first-person plural perspective of the international community of nations? An obvious price would be the informal inequality that ensues from entering the relations of economic and political dependency linked to what James Tully and others call the “free trade imperialism” of contemporary processes of globalization, and that Bhupinder Chimni cuttingly qualifies as the emergence of an “imperial global state.”<sup>134</sup> But even if this issue were addressed, could a sovereign indigenous people avoid the pressure of formal equality that demands taking on board the legal, political, economic, and police/military trappings of a modern state? Could it survive, let alone flourish, as a member of the international community of states absent these state appurtenances? By representing itself as a sovereign people, that is, by claiming the same—equal—treatment for itself as other sovereign peoples under international law, an indigenous people becomes different—unequal—with respect to *itself*. An original re-equalization goes hand in hand with an *original re-inequalization*. An indigenous people is in excess of the representation of itself as a sovereign nation under international law, and so also its demand for equality is in excess of the equality that the international community of nations has on offer, were it to respond by welcoming the indigenous people “back” into its fold.

This is not to say that the Lakota Sioux people would not be prepared to pay the price of sovereignty under international law. There *is* a form of inclusion and recognition to be had in such equalization. The point I want to make is, instead, that the equality to which their recognition as a sovereign people would give rise does not amount to equality without remainder, as suggested by egalitarian universalists—a *vertical* form of equalization. Their recognition as members of the international community of nations would be a *lateral* equalization that opens up one way of being equal by closing down others.

These considerations suggest, more generally, that the challenge raised by those who demand (un)equal treatment and the response thereto by the respective collective appeal explicitly or implicitly to a more encompassing equality as the respective horizons of justice within which the equal must be treated equally and the unequal unequally. In other words, all representations of collective unity, of what renders us

<sup>134</sup> James Tully, “The Imperialism of Modern Constitutional Democracy,” in Martin Loughlin & Neil Walker (eds.), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford: Oxford University Press, 2007), 315–338; Bhupinder S. Chimni, ‘International Institutions Today: An Imperial Global State in the Making’, in *European Journal of International Law*, 15 (2004) 1, 1–37. See also Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005).

the same as—hence equal to—others from the first-person plural perspective of a given collective, go hand in hand with a representation of what renders us the same as—equal to—all other human beings from a first-person plural perspective: basic equality. This follows from the structure of collective action, which, as noted in *Authority* and in my response to Ferrara, always involves the co-presentation of a circumambient world in which collective action is embedded. But because there is no direct access to what unifies us as human beings, that is, because basic equality must be represented as this or as that, what counts as basic equality—i.e. what we are *really* about as human beings—is directly or indirectly at issue in all struggles for intra-ordinal (in)equality, as well as in struggles oriented towards securing secession from a given collective.

Thus, basic equality does not have a critical function with respect to any given collective because it operates as a pre-existent, independent, and objective criterion to which all parties must have submitted in advance of their struggle if their interventions are to count as interventions aiming to secure human equality. Instead, basic equality enjoys a critical function because it does not collapse into *any* of its representations, that is, because *every* legal and political representation of human equality is contingent. There is an irreducible difference between a circumambient world and the world, as Menga points out.<sup>135</sup> This is no dirge for rationality, no repining about contingency! As I have insisted earlier in this Response, the representational dynamic at work in struggles for equality is much more than a story of loss and decay; it is also the scene of innovation, of social bonds of which we may have been nescient, and to which we only accede *après coup*, through novel representations of what renders us equal as human beings.

Perhaps, then, a case can be made for defending a certain reading of the universal without defending universalism. It would be a strictly negative universal called forth by the *Faktum* that there are first-person plural perspectives *on* human equality, but no first-person plural perspective *of* human equality.<sup>136</sup>

#### 5.4. Social Ontology

Zanetti's second remark focuses on social ontology, as manifested in the questionability of collectives. As he puts it "[t]his exposure, this vulnerability, nevertheless, is probably a condition of their value (a la Nussbaum) for human beings; it is not a regrettable feature of our human condition. An unquestionable collective, an

<sup>135</sup> See footnote 16.

<sup>136</sup> The theses that (1) there is no equality but rather a process of equalization, (2) no inequality but rather a process of inequalization, and (3) equalization and inequalization are the two inseparable faces of representational processes are one possible point of entry for a critical engagement with Badiou's political philosophy, an engagement, however, which I postpone for another occasion. See, amongst others, Alain Badiou, "Philosophy and Politics," in *Radical Philosophy* (1999) 96, 29-32; Alain Badiou, *Being and Event*, trans. Oliver Feltham, Continuum, London, 2006.

unquestionable legal order, would strike us as inhuman and nightmarish.” I welcome the opportunity to further clarify the social ontology of restrained collective self-assertion, contrasting it to two other social ontologies.

A first contrast takes its point of departure in the debate internal to analytical philosophy between methodological individualism and theories of collective action. Against the former, social ontologies of analytical provenance insist—correctly—that collectives have an existence irreducible to that of the participants therein, even though collective existence is not independent from the existence of those participants.<sup>137</sup> To defend this thesis, contemporary analytical philosophers develop remarkably fine-grained accounts of collective action that focus primarily on its structural features and on taxonomies attentive to such features. I have greatly profited from this patient elucidation of collective action, not least when borrowing Shapiro’s notion of “massive shared agency” to identify a distinctive feature of legal orders as a species of collective action.<sup>138</sup> Nevertheless, what is largely absent from these analytical approaches to social ontology is a genetic account that fully embraces the representational dynamic that holds sway in collective action. This is perhaps most clearly the case in the work of Margaret Gilbert, whose writings have been an important source of inspiration for the IACA-model of law. Although Gilbert draws, amongst others, on elements of social contract theory to explain the notion of political obligation attendant on collective action, her work is largely impervious to the problem of representation, other than in a derivative, institutional sense of the term.<sup>139</sup>

By contrast, the IACA-model of law draws on a phenomenologically inspired theory of representation to radicalize the social ontology available to theories of collective action of analytical provenance. The representational dynamic of collective action suggests that two further features are part and parcel of social ontology: questionability and responsiveness. On the one hand, because an original unity can only be represented, without there being any direct access thereto, it is irreducibly questionable *that* a manifold of individuals is a collective, and *what* conjoins them as a collective. Couched in Gilbert’s phraseology, “we each” (and, I would add, “we other”) is ensconced in “we together.” On the other, and correlatively, collectives cannot but ex-sist by responding, at every step of their career, to the practical question, “What is/ought our joint action to be about?”

<sup>137</sup> I hasten to add that there is significant debate between theorists of collective action, with some, such as Searle and Pettit, defending a robust existence of collectives, and others, e.g. Bratman, embracing a weak version thereof.

<sup>138</sup> Scott Shapiro, ‘Massive Shared Agency’, in Manuel Vargas and Gideon Yaffe (eds.), *Rational and Social Agency: The Philosophy of Michael Bratman* (Oxford: Oxford University Press, 2014), 257-292.

<sup>139</sup> See Margaret Gilbert, ‘Obligation and Joint Commitment,’ in *Utilitas* 11 (1999) 2, 143-163; *A Theory of Political Obligation* (Oxford: Oxford University Press, 2008); Margaret Gilbert, *Joint Commitment: How We Make the Social World* (Oxford: Oxford University Press, 2013).

A further advantage of reading social ontology in a representational key is that it impugns what I would call the implicit political Cartesianism of some analytical theories of collective action. Against Cartesianism, I argue that because collective unity is always a represented unity, a collective emerges as an *us* before becoming a *we*: no group gets off the ground unless someone summons two or more individuals to view themselves as a collective. Thus, a theory of collective action must begin as a theory of collective *passion*. No less importantly, insofar as representations of collective unity *respond* to the other who interpellates us, I defend a social ontology in which we begin *elsewhere*, in alterity, in a-legal challenges. Collective action is always collective *re*-action, in the twofold sense of acting anew and acting in response to. Both insights into the finitude of collective action challenge the Cartesian assumption that collective self-assertion means the self-grounding of the subject of a legal order. Cast thus, the questionability and responsiveness to which representation gives rise resonate with what Zanetti calls the “exposure” of collectives.

A critique of political Cartesianism also governs my intervention in a second debate concerning social ontology, a debate that turns on the problem of collective self-assertion. As pointed out in the Introduction to *Authority*, modernity stands in the shadow of the experience of radical contingency that marks what Hans Blumenberg identifies as the epochal passage leading from transitive to intransitive conservation: self-preservation.<sup>140</sup> Self-preservation, in Blumenberg’s apothegmatic formulation, “is not only a new rational principle among others, but the principle of modern rationality itself.”<sup>141</sup> All the “isms” of contemporary political philosophy—liberalism, Marxism, communitarianism, political realism, agonism, etc—are marked by this experience of radical contingency; each of them is an attempt to come to terms with that experience in one way or another. So, too, the IACA-model of law, which conceptualizes contingency in terms of a-legality.

At issue in the epochal passage leading from transitive to intransitive conservation is the ontological import of power. This ontological determination of power has its roots in Scholastic philosophy, namely, in the characterization of divine power as a “bringing forth of things into being,” where the “bringing forth” is determined as a “making” (*facere*) or “doing” (*agere*), and the thingness of things—their reality—as

<sup>140</sup> “Contingency expresses the ontic constitution of a world created from nothing and destined to disappearance, a world conserved in being only through the divine will, [a world] measured against the idea of an unconditioned and necessary being.” Hans Blumenberg, “Kontingenz,” in Kurt Galling (ed.), *Die Religion in Geschichte und Gegenwart. Handwörterbuch für Theologie und Religionswissenschaft* (Tübingen: J.C.B. Mohr, 1959), Vol. III, 1794.

<sup>141</sup> Hans Blumenberg, “Self-Preservation and Inertia: On the Constitution of Modern Rationality,” in D.E. Christensen *et al.*, *Contemporary German Philosophy* (University Park, PA: Pennsylvania State University Press, 1983), Vol. 3, 218. See further Dieter Henrich, “Die Grundstruktur der modernen Philosophie,” in Hans Ebeling (ed.), *Subjektivität und Selbsterhaltung: Beiträge zur Diagnose der Moderne* (Frankfurt: Suhrkamp, 1976),



made- or feasible-being.<sup>142</sup> This is not the place to delve into the details of the inversion of the relation between existent and possible being that leads over the epochal threshold from Scholastic to modern philosophy. Suffice it to say that instead of *regressing* from real possibility to logical possibility, as was required in a consideration of the relation between the existent world and its divine creator, the principle of self-preservation has humankind's ontological productivity consist in a bringing forth into being that *progresses* from logical to real possibility. For a being to whom a material must be given as the condition for its productive, ordering activity, other worlds are possible (feasible) working out from the existent world.<sup>143</sup> The clarion call of alter-globalization movements, "Another world is possible," presupposes the novel ontology that yokes human power to possibility as feasibility; so also all contemporary references to the "empowerment" of those individuals or groups that a legal order has "disempowered."

*Authority* moves within the horizon of this epochal transition, contrasting two modern stances with respect to the challenge of radical contingency, hence two different approaches to social ontology and its associated concept of normative power—authority—as the capacity to order collective existence.

The first leads back to the concept of practical freedom that obtained its initial full-blown formulation in what Kant's *Grundlegung* calls the negative and positive moments of freedom. In this vein, if humans are initially in thrall to an alien world-order that resists their self-activity (heteronomy), the first—negative or destructive—moment of freedom consists in rendering the extant world-order non-binding and orderable for human action. In its second—positive or productive—moment, freedom is the power of the will to be the ground of its own principles. To become free, to become a subject, is to become the formal ground of a world order that can aspire to necessity if it falls under a law that meets the negative condition of non-contradiction: a universal law.<sup>144</sup>

This interpretation of freedom finds its most significant political expression in Marx's account of revolutionary praxis. In its first, negative moment, revolutionary praxis deploys a critique of the ideology that makes of capitalism an allegedly necessary world-order. This prepares the way for the positive moment of revolutionary

<sup>142</sup> Thomas Aquinas, *Summa Contra Gentiles*, translated by James F. Anderson (Notre Dame, IN: University of Notre Dame Press, 1975), Book II, 5.

<sup>143</sup> The first philosophical articulation of the shift from a regressive to a progressive interpretation of the relation between logical and real possibility is found in the second section of Kant's pre-critical essay on the existence of God. The section's title aptly summarizes the epochal transformation: "On internal possibility, in so far as it presupposes existence." See Immanuel Kant, "The Only Possible Argument In Support of a Demonstration of the Existence of God," in David Walford (ed.), *Theoretical Philosophy, 1755-1770, The Cambridge Edition of the Works of Immanuel Kant* (Cambridge: Cambridge University Press, 1992), 107-201, 122-126.

<sup>144</sup> Immanuel Kant, *Groundwork of the Metaphysics of Morals*, translated by H.J. Paton (London: Routledge, 1991), BA 97, BA 119.

praxis that, acting upon an oppressive world that has lost its binding character, brings forth a new and universal world-order rid of internal contradictions: communism. On this reading, constituent power is the political manifestation of freedom as autonomy, the bringing forth into being of a necessary social and legal order in which humanity has become identical to itself: the emancipation of humanity from contingency. All of this is encapsulated in the terse wording of Thesis 11: “Philosophers have hitherto only *interpreted* the world in various ways; the point is to *change* it.”

Rancière’s characterization of subjectification as a process of disidentification and novel identification is but one of various late echoes of the social ontology articulated by the negative and positive concepts of freedom limned in Kant’s *Grundlegung*. A second is Hardt and Negri’s project of a fully immanent self-governing global multitude. A third is the early Habermas’ critique of the ideological function of technique in the welfare state. Habermas portrays praxis as a two-step movement of destruction and construction that, in *Legitimation Crisis*, manifests itself as the critical reduction of advanced capitalism to the status of facticity (*bloße Existenz*: mere existence) in view of its transformation into a classless society characterized by the universalizability of the ends of action.<sup>145</sup> A fourth is Philip Pettit’s interpretation of republican freedom as non-domination.

The social ontology that undergirds the modern concept of praxis as a collective self-grounding is indentured to the determination of (legal) ordering as, literally, the realization, the bringing-into-being, of universalizable practical possibilities. Legal ordering, as a mode of collective self-ordering, is, on this reading of modern social ontology, a mode of emancipatory praxis that, beginning from a situation of contingent existence, strives to real-ize necessary existence.

Normatively speaking, this ontological interpretation of collective self-assertion involves a passage from an initial situation of misrecognition of some parties by others to a situation in which all affected parties could reciprocally recognize each other as free and equal citizens: an inside without an outside. Certainly, it may be necessary to postpone *sine die* the realization of complete reciprocal recognition, postulating it as the regulative idea of an authoritative politics of boundaries. But an all-inclusive legal order that we are capable of real-izing is the a priori and objective standard of authority, of normative power, to which all affected parties must submit if they are to act rationally. This conception of authority is tantamount, in terms of the tension between unity and plurality, to the assumption that reasonable political plurality can be contained within the unity of one legal order, whether through a revolutionary act of constituent power at some point in historical time or through

<sup>145</sup> “Jürgen Habermas, *Legitimation Crisis*, translated by Thomas McCarthy (Boston, MA: Beacon Press, 1975), 105. “The discursively formed will may be called ‘rational’ because the formal properties of discourse and of the deliberative situation sufficiently guarantee that a consensus can arise only through appropriately interpreted, generalizable interests, by which I mean needs that can be communicatively shared.” *Ibid*, 108.

progressive constitutional transformations. All these readings of authority are variations on a *politics of identity*, that is, of political practice oriented to realizing self-identity through an emancipatory process that purifies collective subjectivity of all strangeness. On this view, constituent power is, ultimately, the power to overcome contingency.<sup>146</sup>

Returning to Zanetti's remark, while this strand of thinking about the modern concept of rationality embraces the questionability of collectives, hence a social ontology that acknowledges their contingent existence, it conceives of the normativity of collective responsiveness as the imperative to realize a legal order released of all contingency: the "injunction to complete inclusion."<sup>147</sup> In a word, it is a reading of social ontology in which responsiveness aims to render collective existence *unquestionable*. The passage from questionability to unquestionability is the passage from facticity to validity, from contingency to necessity. Its terminus, even if postponed indefinitely in historical time, is collective self-assertion interpreted as the self-grounding of a collective that has become the subject of a legal order with an inside but no outside. On this reading, the strangeness of a-legality is provisional; it is levelled down to an occasion to celebrate the collective self's power to appropriate the other through a self-appropriation that realizes a universalizable possibility that we in truth already are. Kant puts it very well, when characterizing the negative dimension of freedom as the power of the will to be "able to work independently of determination by *alien* causes."

In contrast to the political Cartesianism implicit in this normative reading of social ontology, mine is a more modest interpretation of collective self-assertion—and of constituent power. It is an interpretation that remains within the horizon of modernity; but its greater modesty is captured by the thesis that collectives can deal with their contingent existence but not overcome it: not in fact, not in principle.

Like so much else in *Authority*, the dynamic of representation is at the heart of this thesis. On the one hand, representation entails that there is no direct access to an original unity that could conclusively settle the key practical question, "What is/ought our joint action to be about?" There is a gap—an in-between—that joins and separates a collective self and the representations thereof; a collective self is always more and other than any of its representations. Thus, the dynamic of representation precludes the realization of necessary existence because the self-identification through which a collective subject would ground itself is destabilized by a concurrent self-differentiation. Likewise, and no less importantly, representation debars direct access to the other who challenges a collective's claim to unity. The response to the

<sup>146</sup> See also Ferdinando Menga, "Was sich der Globalisierung entzieht. Die unaufhebbare Kontinuität bei der Stiftung von Weltordnungen," in Dietmar Koch *et al.* (eds.), *Globalisierung – Eine Welt?* (Tübingen: Attempo-Verlag, 2015), 64-73.

<sup>147</sup> Jürgen Habermas, *The Postnational Constellation*, translated by Max Pensky (Cambridge: Polity Press, 2001), 148.

practical question regarding who we are/ought to be is always also an oblique response to the other's challenge, interpreting it as this or as that. If we are always in excess of any representation of ourselves, so too the other's challenge is in excess of any of our representations thereof. There is a gap, an in-between, that joins and separates the collective self and its other because the other is more and other than how the collective represents it when representing itself.

This twofold in-between refuses domestication or neutralization. It not only remains open but is the primordial Opening that governs a social ontology for which collectives cannot but exist in the modes of questionability and responsiveness. Called forth by representation, this in-between distils how I have sought to carry forward Waldenfels' insight that the rationality available to the play of question and response is not synthetic, not the progressive unification of plurality, but rather an "open linkage": the question to a collective remains open because the response does not exhaust it; the collective response remains open because another response was possible.<sup>148</sup> To view rationality as an open linkage is to champion the empowerment of those who are disempowered, while also holding open the question about what forms of disempowerment emerge *because* they are empowered.

What I call restrained collective self-assertion articulates the normativity that follows from this insight. Qua collective self-assertion it acknowledges the emancipatory capacity of the collective self to recognize the other (in ourselves) as one of us, transforming the default setting of joint action to include who had been excluded. Qua collective self-restraint it embraces the insight that no collective is ever fully in control of itself or of its relation to the other, hence that it must make room for the other (in ourselves) who is other than us.

Taken together, restraint and self-assertion qualify Blumenberg's thesis that self-preservation is the modern principle of rationality. For legal ordering is not only about collective self-assertion in the face of the strange but also about the preservation of the strange that refuses integration into collective action. Legal collectives acknowledge in this indirect way that they exist in the mode of a finite questionability and a finite responsiveness. Yet if, as noted earlier, collective self-assertion can be curbed but not elided, there comes a point at which a collective cannot hold back to hold out because to do so would be to betray what, in the judgment of its authorities, we are really about. Collectives are questionable all the way down; but if the first-person plural perspective is to be sustained, authorities have to draw the line somewhere between what is questionable and what not, even if there is no fully independent criterion of where the line should be drawn, and even if what is deemed unquestionable for a given collective can change over time. Because there are fault lines and not only limits, the finitude of restrained self-assertion also evokes

<sup>148</sup> Bernhard Waldenfels, *Order in the Twilight*, translated by David J. Parent (Athens, OH: Ohio University Press, 1996), 18.

the tragic condition that haunts collective existence, beyond which lies the realm of the unordered and unorderable whence novel collectives might emerge.

### 5.5. *Bíos, nómos, phúsis*

Only nominally can I conclude this long—too long—Response to Commentators with some remarks on Zanetti's third comment: "I would have . . . expected Lindahl . . . to discuss bio-cultural rights: can such rights be deemed a form of self-restrained action? The current environment crisis makes the discussion (not the acceptance) of any normative device that may help to contrast it an issue of critical relevance." My response is only nominally a conclusion because it is no more than a promissory note for new research. I limit myself in what follows to some brief, scattered, and utterly embryonic ideas about how biocultural rights reveal certain presuppositions and lacunae of the IACA-model that call for further thinking.

At first glance, the IACA-model of law has no difficulties in accommodating biocultural rights, if defined as "collective rights of communities to carry out traditional stewardship roles vis-à-vis Nature, as conceived by indigenous ontologies."<sup>149</sup> Biocultural rights are a response to a challenge to collective unity raised by communities that demand the recognition of their identity/difference, "a way of life that has developed out of a holistic relationship between Nature and culture."<sup>150</sup> Their challenge is a-legal by virtue of calling into question the very distinction between legality and illegality as it pertains to property law, to which environmental law as we know it today remains in large measure indentured. More broadly, biocultural rights emerge in response to a challenge to "the market economy, which views land as a universally commensurable, commodifiable and alienable resource."<sup>151</sup> As such, they are a response to the question, What is/ought our joint action to be really about? Granting biocultural rights to groups that claim "a form of community stewardship over land and all that is associated with that land" consists in an act of recognition whereby "communities . . . are empowered to maintain their traditional modes of land tenure," that is, to preserve the integrity of their identity/difference threatened or violated by a legal order.<sup>152</sup>

On the face of it, therefore, biocultural rights deploy the two faces of asymmetrical recognition. On the one hand, they recognize the other (in ourselves) *as other than us*; they literally make room for a holistic "cosmovision" in which "a community's identity, its culture, spirituality and system of governance are inseparable from

<sup>149</sup> Kabir Sanjay Bavikette and Tom Bennett, "Community stewardship: the foundation of biocultural rights," in *Journal of Human Rights and the Environment*, 6 (2015) 1, 7-29, 7. See also Sanjay Kabir Bavikatte, *Stewarding the Earth: Rethinking Property and the Emergence of Biocultural Rights* (New Delhi: Oxford University Press, 2014).

<sup>150</sup> Bavikette and Bennett, "Community stewardship," 8.

<sup>151</sup> Ibid.

<sup>152</sup> Ibid.

its lands and waters.” On the other hand, granting biocultural rights to such communities is also an act of self-recognition: the recognition of the other (in ourselves) *as one of us*. Whatever the differences between the movements that have pushed for biocultural rights, they “converge in a common goal: to protect local ecosystems and to accept that this goal is best achieved by securing the rights of communities who live in them.”<sup>153</sup> This goal is *our* goal too, the goal of the broader collectives in which those communities are situated. We recognize ourselves in those communities in our concern for protecting local ecosystems as part and parcel of the ecosystems in which we are situated as the broader collective. The conservation of Nature is also collective self-conservation. In the very move by which biocultural rights posit a difference they also posit an identity.

Furthermore, and in line with the finiteness of questionability and responsiveness, the attentive reader of Bavikette and Bennett’s article uncovers the traces of an excess, a strange remainder that gets elided when biocultural rights are granted to those communities, even when they couch their demands for recognition in the language of ecosystems and human rights. In effect, the language of “ecosystems” is, at first blush, the antipode of “cosmovisions” and “traditional ways of life.” Closer consideration shows, however, that these three terms are concatenated in the very move by which they mark a difference. A cosmovision and a traditional way of life are expressions used by whom speaks and acts the techno-scientific language of ecosystems and the language of rights to render the strange accessible, recognizable. To grant communities biocultural rights in recognition of their cosmovision and traditional way of life with a view to protecting ecosystems is to already have culled their challenge, separating the orderable from what remains unorderable for the respective legal order.

When biocultural rights are interpreted in this way, Zanetti is surely right to indicate that they operate as a form of collective self-restraint—directly, *vis-à-vis* the respective communities; indirectly, *vis-à-vis* Nature. I would add that biocultural rights are also an ingredient element of collective self-assertion. What appears ever more urgently and menacingly as a looming environmental catastrophe reaches us from the realm of what, having been banished to the domain of the unordered, challenges us to reconsider what counts as relevant and important for collective action, i.e. to reconsider what we qualify as legal (dis)order in the face of a-legality. Looming environmental catastrophe is the mode of manifestation of the other (in ourselves) that we call Nature, and which increasingly *constrains* collective action. “Nature resists; it cannot be entirely established in front of us,” as Merleau-Ponty puts it.<sup>154</sup> Certainly, Nature resists its transformation into a commodity, as reflected in capitalist property law. Yet the commodification of Nature through capitalist property law is

<sup>153</sup> *Ibid.*, 20.

<sup>154</sup> Maurice Merleau-Ponty, *Nature: Course Notes from the Collège de France*, translated by Robert Vallier (Evanston, IL: Northwestern University Press, 2003), 83.

but one manifestation of a more profound transformation, which, while inaugurated with capitalism, cuts across the distinction between capitalism and socialist modes of production:

For the first time, nature becomes purely an object for humankind, purely a matter of utility; ceases to be recognized as a power for itself; and the theoretical discovery of its autonomous laws appears merely as a ruse so as to subjugate it under human needs, whether as an object of consumption or as a means of production.<sup>155</sup>

The strangeness of a primordial wildness, of a wilderness that, resisting collective appropriation and domestication in either mode of production, both threatens and opens up new possibilities for conviviality, calls for collective self-assertion, for a reordering of the default setting of joint action that reconfigures what counts as (il)legal behavior. From this vantage point, biocultural rights are part and parcel of a response to a specific experience of the radical contingency of collective existence, a response that seeks to *order* the unordered by transforming the default setting of what our joint action *really* is/ought to be about. In this reading, biocultural rights are an expression of restrained collective self-assertion.<sup>156</sup>

But Zanetti's invitation to reflect on biocultural rights cuts deeper: it challenges me to reflect on the presuppositions and limitations of the IACA-model of law itself.

The terms in which I have just described how biocultural rights can be accounted for by the IACA-model of law hints at an assumption that demands critical examination: they are rights granted to a *human* community. Biocultural rights posit the human relation to Nature as the object of rights and obligations that arise in the framework of collective action between human agents. Construed thus, biocultural rights extend the *scope* of legal ordering as a species of collective action; but they

<sup>155</sup> Karl Marx, *Grundrisse: Foundations of the Critique of Political Economy (Rough Draft)*, translated by Martin Nicolaus (London: Penguin Books, 1973), 336, available on line at: <https://www.marxists.org/archive/marx/works/1857/grundrisse/> (last accessed on August 16, 2019).

<sup>156</sup> A further development of this line of inquiry would have to engage with Heidegger's critique of *Ge-stell*, "enframing" as the mode of disclosure of technology, "in which the real reveals itself as standing-reserve (*Bestand*)," such that "everything is ordered to stand by, to be immediately on hand, indeed to stand there just that it may be on call for a further ordering." At the background of this interpretation of technology lies Heidegger's interpretation of modern rationality as the secularization of divine power in the form of human self-empowerment. Perhaps an interpretation of restrained collective self-assertion along the lines of asymmetrical recognition can parry Heidegger's thesis that, through *Ge-stell*, "man exalts himself to the posture of lord of the earth. In this way the illusion comes to prevail that everything man encounters exists only insofar as it is his construct. This illusion gives rise in turn to one final delusion: it seems as though man everywhere and always encounters himself." See Martin Heidegger, "The Question Concerning Technology," in Heidegger, *Basic Writings*, 287-317, 305, 298, 308. For a critical analysis of Heidegger's genealogy of modern rationality as developed in the Nietzsche volumes, see Hans Lindahl, "Collective self-legislation as an *actus impurus*: a response to Heidegger's critique of European nihilism," in *Continental Philosophy Review* (2008), 323-342.

leave undisturbed what counts, for legal purposes, as a *collective* and what counts as collective *action*.

In the concluding pages of *On Social Facts*, Gilbert raises the question about whether the notions of collective action and plural subjectivity can be extended to nonhumans. In her view,

there is an available sense of ‘social’ in which man may be the only ‘social animal’. That sense – in which social beings are plural subject forming beings – is important. It needs to be articulated and properly understood. Meanwhile, nothing in what I have said entails that animal populations may not be plural subjects.<sup>157</sup>

The question Gilbert does not raise, however, is whether the notions of collectivity and plural subjectivity could conjoin humans and non-humans. This question is the background issue informing Christopher Stone’s renowned article on the standing of trees:

It is not inevitable, nor is it wise, that natural objects should have no rights to seek redress in their own behalf. It is no answer to say that streams and forests cannot have standing because streams and forests cannot speak. Corporations cannot speak either; nor can states, estates, infants, incompetents, municipalities or universities. Lawyers speak for them, as they customarily do for the ordinary citizen with legal problems.<sup>158</sup>

Stone’s article inspired US Supreme Court Justice William O. Douglas’ dissenting opinion in the *Sierra Club v. Morton* ruling:

The critical question of “standing” would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage. Contemporary public concern for protecting nature’s ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation.<sup>159</sup>

The question about who counts as a participant in collective action has become ever more pressing in light of a slew of suits with nonhuman beings as plaintiffs, which a range of courts around the world have declared admissible and, in some cases, ruled favorably for the plaintiff. Local communities are, moreover, issuing ordinances that grant rights and standing to nonhuman beings. The Ecuadorian constitution of 2008 recognizes certain rights to Nature, and Bolivia’s Plurinational Legislative Assembly passed the Law of the Rights of Mother Earth in 2010. Legal

<sup>157</sup> Margaret Gilbert, *On Social Facts* (Princeton, NJ: Princeton University Press, 1992), 442-444, 444.

<sup>158</sup> Christopher Stone, “Should Trees Have Standing? – Toward Legal Rights for Natural Objects,” in *Southern California Law Review* 45 (1972), 450-501, 464.

<sup>159</sup> *Sierra Club v. Morton*, 405 U.S. 727, available at <https://supreme.justia.com/cases/federal/us/405/727/> (accessed on July 24, 2019).



personhood has been granted to rivers and large ecosystems by rulings, legislation, and treaties in, amongst others, Colombia, India, and New Zealand.

If these legal developments challenge the notion of collectivity, they also call attention to notion of *action* presupposed in collective action theory. In response to the question concerning the criterion for extending plural subjectivity to a nonhuman group, Gilbert responds:

wherever a set of creatures behaves in such a way that it would be appropriate for them to think “we are doing A” where “we” is the plural subject concept. But if this is so the concept in question is a derivative one, derived from the core concept of a (human) social group . . .<sup>160</sup>

Arguably, the reflexive structure of representation undergirds the concept of action espoused by Gilbert. The cited passage can be reformulated as follows: non-human groups engage in collective action if they represent *themselves* as doing A jointly. This conceptualization of action underpins, in any case, the IACA-model of law, for which action is a process of self-identification and other-differentiation through responsive representations. While this model of representation draws on the phenomenology of intentionality, the IACA-model of law has yet to fully exploit the phenomenological concept of intentionality. So it may be helpful to focus on intentionality as such, exploring non-representational modes of intentionality that not only condition representational processes of collective self-identification and other-differentiation, but also shed new light on who might count as a participant in collective action, hence on the capacity of nonhuman beings to be granted rights and legal personhood.

These questions suggest that biocultural rights pose a more radical challenge to the IACA-model of law if they are read as one of a range of indications that the conceptions of collective action undergirding much of contemporary theorizing about legal order can no longer be taken for granted. Most generally, biocultural rights demand reconsidering the category distinction between society and Nature that largely informs the philosophical conceptualizations of collective action, including the IACA-model of law. Here again, Marx reveals what is perhaps the basic presupposition that informs the modern understanding of the human relation to Nature deployed in social productive processes, namely, nature as the “material substrate” of labor, the forming activity of a subject: the laborer.<sup>161</sup> If this model is

<sup>160</sup> Gilbert, *On Social Facts*, 443.

<sup>161</sup> “The use values, coat, linen, &c., *i.e.*, the bodies of commodities, are combinations of two elements – matter and labour. If we take away the useful labour expended upon them, a material substratum is always left, which is furnished by Nature without the help of man.” True, Marx later, and presciently, castigates the destructive consequences of the capitalist mode of production for both nature and labor: “Capitalist production, therefore, develops technology, and the combining together of various processes into a social whole, only by sapping the original sources of all wealth—the soil (*Erde*)

to contribute to making conceptual and normative sense of legal ordering in the face of potentially catastrophic environmental degradation, then it must reconsider, perhaps radically, the presuppositions of what might be called the politics of boundaries that governs the human relation to Nature.

When approaching this vast field of inquiry, I will stay away from postulating either a simple unity or duality of *nómos* and *phúsis*. What interests me is to conceptualize the relation between its two poles as what Merleau-Ponty calls an *entwinement* or chiasm, and how this entwinement plays out in a politics of boundaries. In other words, instead of simply removing or solidifying this boundary, I conjecture that a more fruitful approach is to explore how their entwinement renders the boundary between *nómos* and *phúsis* unstable and provisional, such that legal orders are compelled to redefine who and what counts as a participant in collective action, and what really is its point, when responding to such challenges. In short, what interests me is to understand the *nómos/phúsis* divide as the outcome of iterative responses by legal orders to the emergence of normativity in Nature.

At issue, therefore, is a radicalization of the concepts of representation and asymmetrical recognition that animate my earlier thinking about legal ordering as a mode of collective action. As I envisage it, this radicalization moves along two vectors. The first stays on the level of representation and asymmetrical recognition. As concerns representation, it calls into question the assumption that, in US Supreme Court Justice Earl Warren's apodictic formulation, "legislators represent people, not trees or acres."<sup>162</sup> The task for the IACA-model of law is to conceptualize responsive representation as the representation of a collective unity comprising humans and non-humans. As regards asymmetrical recognition, the task is to clarify how normativity emerges from Nature, a thesis I briefly alluded to, but left fallow, when referring to the legal recognition of animals rights and even of ecosystems.<sup>163</sup> (*Authority*, 333)

and the labourer." But his censure is based on the matter-form distinction, which remains unquestioned. This, it seems to me, is what one might call the metaphysical *question de confiance* raised by environmental degradation: does critically reassessing the category distinction between Nature and society demand moving beyond the interpretation of the matter/form opposition germane to the modern principle of self-preservation and operant in Marx's concept of labor? See Karl Marx, *Capital*, translated by Samuel Moore and Edward Aveling (London: Elecbook, 1998), Vol 1, 64; 726-7.

<sup>162</sup> *Reynolds v. Sims*, 377 U.S. 533 (1964), cited by Stone, "Should Trees Have Standing?", 487.

<sup>163</sup> This initiative to radicalize the concepts of representation and asymmetrical recognition can and should be pushed further, by way of an inquiry into how they condition the possibility of a political and legal relation to future generations (and not only of human beings!). For instance, Article 50 of the Dutch constitution reads: "Parliament represents the entire Dutch people." Should not future generations fall under "the entire Dutch people"? Appealing to a phenomenology of responsibility, Menga proposes a reading of intergenerational justice that compares favorably, in my view, with approaches to the topic which rely on social contract theory. As he shows, these mainstream approaches elide the double asymmetry that governs our relation to future generations. See Ferdinando Menga, *Lo scandalo del futuro. Per una giustizia intergenerazionale* (Rome: Edizione di Storia e Letteratura,

A second, more fundamental vector explores the conditions that explain and justify this extension of the scope of representation and asymmetrical recognition. In this context, I propose to draw on and carry forward phenomenological explorations of human embodiment—of *embodied intentionality*—as the locus of the entwining of *nómos* and *phúsis*. With different accents, phenomenological and post-phenomenological philosophies call attention to embodiment as a constitutive feature of human subjectivity.<sup>164</sup> Here again, my colleague, Bert van Roermund, has taken the lead in opening up this field of inquiry for legal theory.<sup>165</sup> Accordingly, two fundamental questions confront the IACA-model of law. Most generally: why and how might embodied intentionality condition the possibility of legal ordering as a representational and recognitive process? And then: in what way or ways might embodied intentionality destabilize all attempts by legal orders to definitively partition reality into the domains of society and Nature?<sup>166</sup>

My hunch is that the key to these questions, and more generally to embodiment as the locus of the entwining of *nómos* and *phúsis*, is *life: bíos*. The very notion of environmental *degradation*, and of legal responses that could deal with this existential challenge, only makes sense against a background concern about life and about what counts as life for the law. Invocations of a “right to a healthy environment” fall far short of capturing the novel ways in which environmental degradation challenges the doctrinal and philosophical conceptualization of a “right to life.”

2016, especially 97-112; Ferdinando Menga, “Natalità come appello di giustizia. Quello che *Vita activa* può insegnarci sulla responsabilità intergenerazionale,” in *Studium* 114 (2019) 6, 130-165; Ferdinando Menga, “Was sich der (Ohn-)Macht entzieht: Lévinas’ ethischer Widerstand der Transzendenz im Licht einer Zukunftsverantwortung,” in Rebekka A. Klein and Friederike Rass (eds.), *Gottes schwache Macht: Alternativen zur Rede von Gottes Almacht und Onmacht* (Leipzig: Evangelische Verlagsanstalt, 2017), 55-72.

<sup>164</sup> Maurice Merleau-Ponty, *Le visible et l’invisible* (Paris: Gallimard, 1988); Jacques Derrida, *L’animal donc que je suis* (Paris: Galilée, 2006); Bernhard Waldenfels, *Das leibliche Selbst: Vorlesungen zur Phänomenologie des Leibes* (Frankfurt: Suhrkamp, 2000).

<sup>165</sup> Van Roermund argues that embodied intentionality is prior to and conditions the possibility of political representation as elaborated in *Authority*. While agreeing with him on the need to integrate embodied intentionality into a theory of the “body politic,” as he puts it, I hold that there is no embodied intentionality that is or can be only pre-representational: it is always also *post*-representational, that is, the *result* of apprenticeship in practices that involve political representation, either directly or indirectly. See Bert van Roermund, “Representation and Beyond,” and my response to his comments, in an Author Meets Readers section, forthcoming in the *Indiana Journal of Global Legal Studies* (2020). Van Roermund will further elaborate on his interpretation of embodied intentionality in *Law in the First-Person Plural*, forthcoming with Edward Elgar in 2020.

<sup>166</sup> Bruno Latour’s “politics of nature” and the ethics of complexity theory are two excellent interlocutors for this endeavor. See Bruno Latour, *Politics of Nature: How to Bring the Sciences into Democracy*, translated by Catherine Porter (Cambridge, MA: Harvard University Press, 2004); Bruno Latour, *Facing Gaia: Eight Lectures on the New Climactic Regime* (Cambridge: Polity Press, 2017). As concerns complexity theory, see Edgar Morin, *The nature of nature*, translated by J.L.R. Bélanger (New York: Peter Lang, 1992; for its connection to post-structuralist ethics see Minka Woermann, *Bridging Complexity and Post-Structuralism* (Dordrecht: Springer, 2016).

This set of issues makes a very discrete appearance in *Authority*, when I discuss Carl Schmitt's thesis about the threefold meaning of *nómos* as taking, distributing, and cultivating. In his view, social order begins, logically and chronologically, with a taking, a *Nahme*: initially a land-taking, and more recently a taking of the seas and space. Were he still alive, Schmitt would no doubt refer to the seizure of deep sea beds, the Arctic, and outer space as part and parcel of this primordial taking. This seizing is the precondition for distributing, i.e. for the allocation of rights and obligations. In turn, legal distribution is the logical precondition for cultivation, namely, "the productive work which normally occurs with ownership."<sup>167</sup> He adds: "[t]his third meaning of *nómos* obtains its content from the type and means of the production and manufacture of goods."<sup>168</sup>

By and large, I have followed Schmitt's reading of this progression to both support and critique his interpretation of *nómos* as a taking. (*Authority*, 169-73) I point out, however, that the paradox of representation also demands inverting Schmitt's progression: taking and distributing come second because economic processes—*weiden* as producing or cultivating—come first, absent which the former would spin in thin air. (*Authority*, 293-4) I will take a further step: might *weiden* come first because "culture"—as cultivation—evinces how life first makes its appearance in social order, an order of beings for whom to live is to be in a reflexive process of exchange with their surroundings, a reflexive process that already begins with metabolism?<sup>169</sup> In this inversion of Schmitt's thesis, *weiden* comes first because life and its continuation are the primordial concern driving social order. However disparate their historical periods and corresponding social orders, this concern conjoins

[t]he search for pasture and the tending of animals, which nomads like Abraham and Lot pursued; Cincinnatus plowing his field; the shoemaker Hans Sachs at work in his shop; the industrial work of Friederich von Krupp in his factory - all this is *nemein* in the third sense of our word: to pasture, to run a household, to use, to produce.<sup>170</sup>

The point is not, however, to simply invert Schmitt's construal of the political, legal, and economic dimensions of social order: the paradox of representation has *nómos* going both ways.

Returning to Zanetti's comment, perhaps the deeper significance of emergent biocultural rights lies in exposing a *nómos* of the earth that is reaching its end, and adverting to a new *nómos* of the earth, a novel configuration of the bidirectional

<sup>167</sup> Carl Schmitt, "Appropriation/distribution/production: toward a proper formulation of basic questions of any social and economic order (1953)," in *Telos* 95 (1993), 52-64.

<sup>168</sup> *Ibid.*

<sup>169</sup> Hans Jonas, *The Phenomenon of Life: Toward a Philosophical Biology* (Evanston, IL: Northwestern University Press, 2001).

<sup>170</sup> Schmitt, "Appropriation/distribution/production."

relation between taking, distributing, and cultivating. When read in this way, biocultural rights—an expression that tethers society to life and therewith to Nature—invite a reflection on how embodied intentionality informs the representational and cognitive processes through which legal orders respond to environmental degradation. On this reading of the task that lies ahead, three categories may help to orient further thinking about authority and a politics of a-legality in the Anthropocene: *bíos, nómos, phúsis*.