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**Identity vs. representation: what makes ‘the people’?
Rethinking democratic citizenship through (and
beyond)**

Carl Schmitt and Hans Kelsen

by

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Abstract

The concept of ‘citizenship’ has significantly evolved since the work by Thomas Marshall in 1950: the emergence of various kinds of ‘identity/difference’ politics, the transformation of political representation within our ‘glocal’ democracies and the theoretical challenges posed by the EU (especially about pivotal notions such as sovereignty, constituent power and peoplehood) questioned the traditional account of liberal democratic citizenship (sect. 0). Combining political history and theory, the present paper looks backwards to the debate between Carl Schmitt and Hans Kelsen in 1920s Weimar over the fate of parliamentary democracy to distill useful insights for rethinking citizenship via representation. Mapping their topography of democratic governments and their diverging understanding of what keeps a community of citizens together (sects. 1-2) will help developing a more sophisticated notion of ‘the people’ beyond standard dichotomies in democratic theory: namely, those of identity (Schmitt)/representation (Kelsen), constituent (Schmittian)/constituted (Kelsenian) power, substantial (Schmittian)/procedural (Kelsenian) democracy also recurring in the normative understanding of the Union (sect. 3).

Key-words:

Democratic citizenship; political identity; political representation; parliamentary democracy; the people; Kelsen Hans; Schmitt Carl



0. Looking backwards from 2010s ‘glocal’ post-democracies to 1920s Weimar: why the standard account of democratic representation is not enough for fulfilling the promise of citizenship?

Since the pioneering work by T. H. Marshall^I in 1950, the concept of ‘citizenship’ has undergone significant changes. What Marshall had in mind at the time was a threefold classification of the wide range of subjective rights (civil, political and social) and a precise historical account of the way they had been achieved in Great Britain. Within his hermeneutic perspective, the eighteenth century embodied the realization of civil citizenship and individual freedom (liberty of the person, freedom of speech, thought and faith, the right to own property and conclude contracts, the right to justice). The extension of the suffrage throughout the nineteenth century subsequently led to political citizenship (i.e., the right to participate in the exercise of political power), even though the principle of universal political citizenship in England was not recognized until 1918. The twentieth century finally discovered and explored the social dimension of being citizens (from economic welfare and security to the right to live a decent life according to the standards of society). In turn, each kind of citizenship developed its specific institutional forums. From courts of justice to Parliaments and councils of local government, up to the educational system and social services typical of the twentieth century welfare State. Since the shift from feudal to modern society and its competitive market economy, citizenship had been by definition a ‘developing institution’, evolving along the path ‘from Status to Contract’ and beyond.

However, as Maurice Roche pointed out already in 1992^{II}, a variety of structural and ideological challenges have been posed to the often taken-for-granted notion of citizenship and to the model of democracy it designs. Such a claim becomes even stronger when the empirical and theoretical transformations occurring at the end of the Cold War are taken into account. Three in particular have to be mentioned.

On the one hand, as a result of the fragmentation of multinational States (e.g., the Soviet Union and Yugoslavia after 1989), political theorists have been dealing with the need for a more sophisticated exploration of the citizenship/identity nexus. The emerging tension among ethnic groups (as in 1994 Rwandan genocide) proved that the normative



definition of ‘citizen’ and ‘foreigner’ oversteps the boundaries of theory. The global trend towards democratization has developed together with the resurgence of various kinds of ‘identity/difference’ politics^{III}. From such a perspective, the fragile negotiation between claims for equal treatment and those for the preservation of differences has become *the* political problem within our post-Fukuyama age^{IV}. From nationalist and ethnic revivals in the countries of East and Central Europe to the former Soviet Union, from the politics of cultural separatism in Canada to social movement politics in liberal Western democracies, questioning the capacity of liberal democratic citizenship^V to accommodate differences has been the main challenge to the Westphalian, traditional relation between States and individuals^{VI}. Charles Taylor’s *Multiculturalism* (1992) and Will Kymlicka’s *Multicultural Citizenship* (1995) stand as paradigmatic examples of such debates on the background of the liberals/communitarians *querelle* throughout the last decade of the twentieth century^{VII}.

The second macro-level transformation pertains to the concept of political representation in our contemporary ‘glocal’ democracies. Until the beginning of the 1990s, political scientists paid very little attention to the interaction between representative institutions and civil society: they were satisfied with a neo-Schumpeterian conception of democratic government as selection and organization of political elites. However, as a consequence of emerging new forms of both inclusion and exclusion (especially in the case of ethnic and ‘moral’ minorities), a radical change has occurred. As David Plotke foresaw in 1987, «the opposite of representation is not participation but exclusion»^{VIII}. The merely electoral conception of both the democratic game and the community of citizens nurtured at the time by political theory needed to be expanded towards a wider (and wiser) understanding of the dynamic process of ‘continuity and rupture’^{IX} representative democracy should imply. Such a goal has been only partly accomplished so far.

The third and final development has to do with the theoretical and institutional challenges posed by the emerging European Union^X. Although most scholars and observers agree that the European Community has developed into a sort of *Rechtsstaat* through some process of constitutionalization, the question about what kind of polity the Union actually is has not found any definitive answer: permanently suspended between a federal state and a federation of States (as argued by German constitutional lawyers), sometimes it has resembled more a neo-feudal puzzle of multiple sovereignties, constantly affected by its original constitutional and democratic deficits. It stands as a matter of fact



that the traditional understanding of national State sovereignty and constitution-making, together with the standard notion of ‘the people’ – i.e., the conceptual triangle ‘people-State-sovereignty’ – has been deeply impacted by the lack of a clear conceptualization of popular sovereignty at the communitarian level both above and within the Constitution. Against a technocratic Europe founded on an «existential legitimation»^{XI}, political and State theorists have tried, from different perspectives, to understand whether it is even possible or desirable to speak of a ‘European demos’; whether the notion of the ‘constituent power’ traditionally embedded within the Constitution-foundational moment has to be circumnavigated and understood either as a plural constellation of constituent (State) agencies enacting a process of intergovernmental enterprise and elite bargaining (‘the peoples of Europe’ through their respective representative institutions) or as a teleological entity to be progressively achieved through an open process of constitution making and remaking^{XII} transcending member States (thus post-*étatist* featured)^{XIII}, designed to lead in the end to a European, post-national and constitutional patriotism-based people^{XIV}. The ambiguous institutional physiognomy of the Union, consisting of inter-governmental, super-national and infra-national elements and mixing elements of representative government with the executive efficiency orientation typical of ‘confederal’/‘consociational’ democracy^{XV}, makes the overall picture even more difficult to grasp. Without a step further than the traditional understanding of representation, popular sovereignty and peoplehood, Jan Muller’s claim would prove correct: «a normative political theory of the Union cannot proceed»^{XVI}.

Political theory, though, cannot say much without questioning political history. As Pietro Costa^{XVII} argues throughout his superb work, intra-World War Europe and, specifically, the Republic of Weimar represent an extraordinary historical and political laboratory for grasping cleavages and continuities between two diverging notions of citizenship. The optimistic persuasion of 1789 that political order stems naturally from individual autonomy and liberty was replaced by consistent apprehension over the conditions for social stability. The Soviet Revolution in October 1917 had made conflict an indispensable feature of XX century citizenship and proved that the creation of political *Einheit* was far more complex than imagined throughout the previous decades. From such a perspective, the birth of Weimar and the confrontation in the mid 1920s between Carl Schmitt and Hans Kelsen over the anatomy of parliamentary democracy and the identity of



the democratic people offers a dark but useful paradigm for rethinking the notion of liberal democratic citizenship beyond dangerous and unilateral understandings.

Schmitt was theoretically obsessed by the systematic fragmentation of political unity due to the variety of economic and social powers permeating German society in the aftermath of the First World War and urged the political and State theorists of his time to re-examine the domain of citizenship through the link between modern States, liberal parliamentarianism and democracy. On the other hand, Hans Kelsen strongly defended the value of political indirectness and the role of party-system as the beating heart of contemporary mass democracies, and suggested a set of institutional reforms specifically aimed at providing democratic citizenship with a stronger *ex parte populi* (bottom-up) capacity to influence policy- and decision-making processes. While Schmitt did not admit any form of dissent within his ‘democracy of the equals’, Kelsen regarded the preservation of individual freedom and the protection of minorities as the main ‘essence and value’ (*Wesen und Wert*) of modern democracy.

Such two diverging interpretations result from a complex interaction between political transformation and theoretical break-ups with the *Obrigkeitsstaat* (authoritarian State) in the transition from the late Wilhelmine to the new democratic Germany^{xviii}.

From the beginning of the 1920s a wide struggle over methods and aims forced an entire generation of jurists and political theorists to subject their thinking on democracy and on the presuppositions for political and social citizenship to fresh examination. In particular, the new Constitution released in August 1919 under the direction of Hugo Preuss differed from the 1871 Constitution of the Empire on several levels. Not only it was the result of the German defeat in the First World War; nor was it simply authored by a State law theorist (Preuss) rather than by a politician (Bismarck). Most significantly, the constitution-making emerged as a compromise among three main political traditions: the German Social Democratic Party (SPD), the Catholic Center Party (*Zentrum*) and the German Democratic Party (DDP). Although within a federal framework, the Republic of Weimar derived its legitimacy from the German people as a whole rather than from the governments of the individual States (art. 1). However, the Weimar party system never produced stable parliamentary majorities, despite the election of the *Reichstag* on the basis of general suffrage (including women) and according to the principle of proportional voting. The party structure inherited from the Empire proved a constellation of «communities of



conviction and struggle», embodying a wide range of regional, social and religious interests^{XIX}. Therefore, against a *Reichstag* constantly weakened by party splintering, the new Constitution enacted specific strategies for enforcing both representation and decision-making^{XX}.

Weimar parliamentary democracy witnessed an intense debate also on the normative definition of citizenship and on the subjective rights that were implied. Kelsen, together with many State and political theorists of his time, challenged the traditional, organicistic *Volk*-based hypostatization of State order pursued by Gerber and Laband's *Staatslehre*. Such a mythical and anthropomorphic conception of the State was of no help in rethinking citizenship *vis-a-vis* the endogenous transformations of society and the simultaneous socialization and democratization of politics^{XXI}. While de-constructing the conventional notion of *Volk*, he demanded that foreigners living in a country for work's purposes be granted equal political rights. The National Assembly indeed intensively debated the second major part of the Constitution, titled 'Basic Rights and Duties of the Germans'. As Friedrich Naumann argued in his speech at the Assembly on 31 March 1919, the *Grundgedanken* of the new constitutional text emerge lie in a wide set of *Grundrechte* capable of developing an alternative approach in the conceptualization of the rights agenda, an approach which stands between the liberal *Rechtsstaat* and the socialistic emphasis on class conflicts.

As a result of the progressive expansion of the suffrage, Parliament became under Weimar the primary *locus* where citizens could be provided with their own political representation. Through the medium of parliamentary arenas, democratic citizenship was enabled to mirror the multiple groups of social and economic interests permeating civil society. 1920s political theory was then called upon to confront the following questions: are democracy and representation mutually compatible? Is political representation substantiated either by univocal acclamation or dynamic and pluralistic judgement? Was de Maistre – the Catholic Counter-Revolutionary conservative so much praised by Schmitt – making a correct claim when arguing that the people are a sovereign which cannot exercise sovereignty^{XXII} or, rather, the realization of political autonomy by the people under representative democracy involves something more beyond both constitutional-founding and normal, institutionalized politics? These prove still extremely relevant issues for any attempt to rethink democratic citizenship today.



Drawing on Castiglione and Warren's empirical studies^{xxiii}, contemporary democratic theory has assumed a standard paradigm of representation defined by four normative criteria:

- a) it lies on a 'principal/agent', asymmetric relation between territorial constituencies and their representatives;
- b) it is territorially based as it inscribes popular sovereignty and State power within a precise portion of territory;
- c) through the medium of electoral mechanisms, it calls for a certain degree of political responsiveness and accountability from both institutions and elected agents;
- d) universal suffrage introduces the crucial idea of political equality within the framework of representative governments.

However, we believe that features a) and b) no longer help interpreting the evolution of political representation within contemporary 'glocal' democracies. At the same time, features c) and d) have been progressively weakened by new challenges deriving from the evolution of political parties and from the emerging of new forms of public spheres. It is a matter of fact that «the changing political landscape of democratic representation»^{xxiv} has come to include a variety of transnational, extra- and non-territorial actors (from the UN and the World Bank to the EU itself), as well as a wide range of social movements and untraditional civil society institutions. Maurizio Fioravanti and, most recently, Nadia Urbinati have proposed a threefold classification of representational paradigms (juridical, institutional and political), respectively leading to three different models of democracy^{xxv}, i.e. direct, electoral and representative^{xxvi}. Throughout the following pages we will specifically focus on *representative* democracy and question the way it shapes citizenship through a comparative analysis of the arguments developed by Schmitt and Kelsen on the fate of parliamentary institutions and democratic societies in 1920s Weimar. More than a clash of theoretical and institutional attempts to analyse the emerging mass party-State, their confrontation provided twentieth century constitutionalism and democratic theory with an intricate question concerning the way citizenship is imagined, shaped and practiced^{xxvii}: does the democratic Constitution of Weimar involve a corporatist or an individual kind of representation? What is representative (parliamentary) democracy really about in the end: individuals or corporate interests?



The following two sections will respectively examine the two authors' topography of democratic governments, together with their diverging understanding of what keeps a community of democratic citizens together. Alongside the paths developed mainly by Rosanvallon, Urbinati and Canovan^{XXVIII}, the concluding remarks will then try to elaborate some suggestions for rethinking democratic citizenship *via* representation and to develop a more sophisticated notion of 'the people' beyond the constituent (Schmittian)/constituted (Kelsenian) power dichotomy.

1. Re-politicizing democracy: Volkdemokratie and substantial homogeneity towards an existential conception of citizenship

Are we citizens only when we periodically cast our ballot and elect our institutional representatives? Or does active democratic citizenship involve something more?

Democracy – Schmitt claims – rests logically on a series of identities. In this series belong the identity of governed and governing, sovereign and subject, the identity of the subject and object of State authority, the identity of the people with their representatives in parliament, the identity of the state and the current voting population, the identity of the state and the law, and finally an identity of the quantitative (the numerical majority or unanimity) with the qualitative (the justice of the laws)^{XXIX}.

When imagined as an overlap between political will and the rule of law, normative democracy raises in turn two crucial questions:

- 1) Where and how does the political will-formation occur? Are both institutional and civil society procedures involved?
- 2) How does the emergence of a majoritarian consent over policy options deal with dissent? Does pluralism *per se* constitute a mortal threat to the 'identity' of a political community? How inclusive should a democratic people be in the attempt to accommodate diversity while, at the same time, promoting their widely shared values and traditions?^{XXX}

Both sets of questions, respectively pertaining to the domains of political will and political identity, are framed by Schmitt within the threefold crisis (involving democracy, parliamentarianism and the modern State) highlighted in the 1926 preface to *Parlamentarismus*^{XXXI}.



As for the first question, Schmitt, together with Kaufmann and Smend, argues against the «undemocratic conception»^{xxxii} so widely spread in political and State theory at the beginning of the 1920s (e.g., Weber, Jellinek and Kelsen). Conceiving the democratic citizen as a *Privatmann* expressing his/her will through a system of secret ballots is both a cultural misunderstanding and a political mystification. The concept of citizenship pertains to the domain of public, not private law: only when talking and (inter)acting in the sphere of publicity, are political atoms turned into democratic individuals.

“The people” is a concept in public law. The people exists only in the sphere of publicity. The unanimous opinion of one hundred million private persons is neither the will of the people nor public opinion. The will of the people can be expressed just as well and perhaps better through acclamation, through something taken for granted, an obvious and unchallenged presence, than through the statistical apparatus that has been constructed with such meticulousness in the last fifty years^{xxxiii}.

Against the outdated heritage of 1860s and 1870s liberalism, the twentieth century – Schmitt claims – has witnessed the severance between liberal individualism and democratic trends, together with the consolidation of mass democracy. In the age when «old truths have got lost», concepts such as ‘democracy’, ‘liberalism’ and ‘rationalism’, all connected with the tradition of parliamentarianism as *government by discussion*, must be radically re-examined. This applies especially to the multidimensional concept of citizenship. If ‘the people’ can live and act only *au grand jour*, overcoming the proto-liberal (Hobbesian) distinction between *forum interni* and *forum externi*, then the principle of political indirectness embodied by Parliaments means *per se* the death of democracy in its ‘vital’ meaning. Parliamentary arenas prove the grave of democratic politics as far as they replace open and effective deliberation among deputies with party bargaining. The political representation of citizens in turn degenerates into a ‘polycratic’ (mis)representation of economic interests^{xxxiv}. According to Schmitt, the death of ‘the political’ within the domain of democratic citizenship – i.e., the erosion of the *Freund/Feind* distinction^{xxxv} – derives from the ‘Romantic’, liberal passion for headless and endless discussion typical of the bourgeoisie (‘clase discutidora’, as Donoso Cortés names it). Democracy must instead re-found and preserve the existential unity of the people. How? By eradicating democratic citizenship from the soil of ‘a-political’ liberalism and substantially re-politicizing it. The



simultaneous flows running through the veins of mass democracies at the beginning of the XX century – i.e., the expansion of the suffrage and the eruption of social conflict – have unveiled the degeneration of Parliaments into artificial machineries theoretically supported by «moldy greats» (Bentham, Mill and Guizot).

Schmitt's critique of 1860s-1890s liberalism in the face of acclamation also emerges from the provocative, yet often ignored, 1927 treatise on *Volksbegehren und Volksentscheidung*. The third and last section of the treatise is specifically devoted to explaining the juxtaposition between *acclamatio*, an «eternal phenomenon of every political community», and secret ballot, typical of parliamentary liberalism. One year later, in *Die Verfassungslehre* (1928), Schmitt emphasizes once again what he considers the paradox of political representation. For he believes that a democratic people cannot be represented: they must be *present*, as they can acclaim only when physically assembled in one place at the same time.

People and public exist together: no people without public and no public without the people. By its *presence*, specifically, the people initiate the public. *Only the present, truly assembled people are the people and produce the public.* [...] They cannot be represented, because they must be *present*, and *only something absent, not something present, may be represented.* *As a present, genuinely assembled people, they exist in the pure democracy with the greatest possible degree of identity.* [...] only the genuinely assembled people [...] can *acclaim* in that they express their consent or disapproval by a simple calling out, calling higher or lower, celebrating a leader or a suggestion, honoring the king or some other person, or denying the acclamation by silence or complaining.^{xxxvi}

Moving from 1926 Erik Peterson's monograph on the development of *acclamatio* throughout the history of Christianity, Schmitt dates the birth of democracy back to the «scientific discovery of acclamation». Through the institutional formulas of representative democracy, the indirect procedures of secret ballots and the atomization of citizenship, 'the people' as a monolithic entity becomes dissolved. Schmitt argues that democratic citizens do not need technical expertise for expressing their consent or disapproval: as «crucial bearers of political life», fed with «bold political instincts», they only need to manifest their «vital immediateness». Against the logic of liberal universalism, supporting a deliberative (parliamentary) vision of democracy as a government based upon representation and discussion, Schmitt calls for a decision-based democracy. Citizens of any authentically political community are those able to say 'yes' or 'no' through an immediate act of



Entscheidung and ready physically to eliminate (*vernichten*) dissent when perceived as a threat to their homogeneity. Can this be labeled ‘democratic citizenship’? We do not believe so. Rather, the claim we make is that Schmittian *acclamatio* cannot involve at the same time a politics of both presence and ideas^{xxxvii}. Civic dialogue and the art of democratic confrontation (John Dewey), the dynamic interaction between politics and memory, laws and culture that can provide democratic citizens at the same time with individual liberty and the preservation of pluralism^{xxxviii}: all this is missing from Schmitt’s topography of democratic citizenship. The term ‘citizen’ is not part of his political vocabulary: he thinks of democracy as the domain of ‘the people’. From such a perspective, he is not that far from the democratic skepticism running through 1920s North-American political theory. As Walter Lippmann vividly argues in 1922 *Public Opinion*^{xxxix}, «genuinely assembled people» just say ‘yes’ or ‘no’ to a limited spectrum of options. They do not think nor deliberate: they just acclaim. Precisely at the beginning of the second preface of *Parlamentarismus*, he claims that every actual democratic form of government requires, «first, homogeneity and, second – if the need arises –, elimination or eradication of heterogeneity»^{xl}. As an identitarian *Gemeinschaft*, Schmittian democracy lives through the perpetual acclamations of an *ethnos*-founded *demos* kept together by univocal decisions. According to Schmitt, the concept of ‘the foreigner’ reacquires its proper meaning when read beyond the color-blind, universalistic veil of liberalism and rooted back again in the domain of ‘the political’. What liberal theorists, in line with the 1789 principles, imagine as a ‘democracy of mankind’ proves just an ideological *factio*:

[...] the “current usage” of “universal suffrage” implies [that] every adult person, simply as a person, should *eo ipso* be politically equal to every other person. *This is a liberal, not a democratic, idea; it replaces formerly existing democracies, based on a substantial equality and homogeneity, with a democracy of mankind. This democracy of mankind does not exist anywhere in the world today. If for no other reason than because the earth is divided into states, and indeed mostly into nationally homogeneous states, which try to develop democracy internally on the basis of national homogeneity and which, besides that, in no way treat every person as an equally entitled citizen.* Even a democratic state, let us say the United States of America, is far from allowing foreigners to share in its power or its wealth. Until now there has never been a democracy that did not recognize the concept “foreign” and that could have realized the equality of all men.^{xli}



‘Volksdemokratie’ is the term used by Habermas for defining such an «existentialist conception of the democratic decision-making process»^{XLIH}. As the famous commentary on these pages by Leo Strauss (1932) explains, the emphasis on the individual as a *terminus* both *a quo* and *ad quem* within the liberal understanding of citizenship has led to the agony of ‘the political’ as a series of Friend/Foe distinctions along the sequence of specific *Zentralgebieten*. In the domain of ‘the political’, people do not face each other as abstractions, but as politically interested and determined entities: as citizens, governors or governed, politically allied or opponents: «in any case, in political categories». When political theorists stand for the equality of all persons as such, they are not arguing for democracy but for a certain kind of liberalism, not for a State form but for an individualistic-humanitarian ethic.

We now move to the second set of questions raised at the beginning of this section: the issue of pluralism and the protection of minority rights, i.e., the flexibility of the legal and political borders of liberal democratic citizenship. Does the recognition of pluralism irremediably lead to relativism? How can we recognize group and minority differences without jeopardizing the unity of our political, Constitution-based communities? These are crucial normative questions for any political theory aiming at either strengthening or weakening the liberal side of liberal democratic citizenship. They challenge the feasibility of a democratic liberal space in combining the quest for equality and the preservation of differences. We believe that democratic society is no Newtonian space. Rather, it is an historical, dynamic and perpetually evolving creation, «layered with the sediments of time»^{XLIH} and open to both external (ethnic, linguistic) and internal (ideological, cultural, religious...) diversity. Testing the quality of a liberal democratic definition of citizenship means to challenge it through the experience both of foreigners (those who are not (yet) citizens) and of dissenters (those, within the *demos*, sharing a different set of values or opinions). At the beginning of the 1920s Schmitt calls upon German jurisprudence and political theory to rethink the internal and external dimension of contemporary mass democracies, together with the Westphalian configuration of the international landscape. *Der Begriff der modernen Demokratie in seinem Verhältnis zum Staatsbegriff* (1924) begins precisely with contesting the classical tripartition of politics proposed by Aristotle in *Politics* V (i.e., monarchy, aristocracy, democracy and their specific degenerations). The consolidation of mass parties, the irruption of social conflict at the institutional level, the configuration of



ideological pluralism in terms of parliamentary conflicts, together with the progressive expansion of the suffrage, stand as macro-signals of the multiple changes occurring in the underground of European democracies throughout the 1910s and 1920s. Within this framework, Schmitt emphasizes the shift from the nineteenth century State, ascribing political representation on the basis of *Besitz und Bildung* (property and education), to the twentieth century *totaler Staat*. Within this new configuration of power, the State/society antinomy at the heart of any bourgeois Constitution has collapsed: the disintegration of society into a constellation of economic interests affects the institutional arenas and significantly weakens the *Einheit* of the German people. How to rethink, then, the political unity of multi-class democratic States^{XLIV} and their highly fragmented public spaces? Are the British pluralists (G. D. H. Cole and H. Laski) right when claiming that contemporary democratic citizens are trapped by a «plurality of loyalties»? How to make pluralism a positive resource for, rather than a threat to, contemporary mass-party democracies? Both Schmitt and Kelsen believe that these are basic questions for any renewed theory of citizenship in the aftermath of the First World War.

Schmitt touches on such issues in the second preface to *Parlamentarismus* (1926) when elaborating on the concept of ‘substantial equality’ *vis-à-vis* the progressive expansion of the suffrage^{XLV}. Two years later *Die Verfassungslehre*, while providing a more sophisticated definition of democracy as a ‘mixed constitution’ based on the principles of both identity and political representation, still emphasizes national homogeneity as the peculiar feature of democratic citizenship. The reference to a common language, shared historical destiny, traditions, goals and hopes are crucial factors for preserving the ‘equality of the equals’ within national borders^{XLVI}. This is the reason – Schmitt claims – why the Weimar Constitution states that «all Germans» (rather than all ‘persons’) «are equal before the law» (art. 109 RV), in line with the formulation provided by the Swiss Federal Constitution in 1874, the Japanese Constitution in 1889 and the French Declaration of the Rights of Man and of the Citizen in 1789 when discussing political rights in connection with those of the State (articles 6 and 13).

However, many scholars (particularly William Scheuerman and David Dyzenhaus^{XLVII}) have stressed the theoretical flaws of such an interpretation of political (as opposed to liberal) democracy. A broad consensus has developed among Schmitt’s interpreters in downplaying his attempt to reify citizenship and to bypass the ontological



pluralism of any liberal-constitutional democratic government in the name of an existential conception of politics. When no form of dissent is tolerated within the *demoi*, then – as Kelsen points out – political philosophy faces significant problems from a normative perspective. For the univocal ‘we’ animating Schmittian democracy proves incompatible with the idea of a self-critical citizen partaking in politics and its processes of both political will- and public opinion-formation^{XLVIII}. When designed as monolithic, static wholes banishing pluralism from their own boundaries, democracies cease to be liberal. Rethinking democratic citizenship means to develop normative criteria – e.g., egalitarian reciprocity, voluntary self-ascription and freedom of exit and of association^{XLIX} – ensuring positive cultural contestation together with the flourishing of individual autonomy and individuality. How does Kelsen’s understanding of representative democracies contribute to this task?

2. Minority rights and majority rule: Kelsen and the three P’s of democratic indirectness (people, Parliament, parties)

Hans Kelsen wrote about the nature and the limits of modern democracies from the 1920s to the mid 1950s. After his departure from Prague in 1940, he taught firstly at Harvard and later at Berkeley. By combining the Austrian neo-Kantian tradition with the empiristic and neo-Positivist trends animating North-American culture in the aftermath of the Second World War, he developed a unique methodological approach. As the 1955 essay *Foundations of democracy* proves, Kelsen always believed that a strong correlation existed between power configurations and world views within human societies. While democracy *stricto sensu* relies upon ideological pluralism and the valorization of difference, autocracy presupposes a monistic kind of *Weltanschauung*^I. In *Forms of governments and conceptions of the world* (1933) he claims: «the fight in which democracy wins over autocracy is essentially a fight in the name of critical reason against ideologies, which are founded on the irrational instincts of human soul»^{II}. If it is true that any theory of democracy plays with three variables – i.e., popular sovereignty, political equality and political liberty^{III} –, then Kelsen’s understanding of democratic citizenship faces two macro-questions:

1) Who is the people deliberating and critically acting within the public-political sphere? How inclusive should the democratic space be in order to preserve a shared set of



values while, at the same time, allowing cultural contestation and individual self-determination? What can Kelsenian democracy tell us about the civil and political rights of those not *ex ante* belonging to the citizenry either *jure soli* or *jure sanguinis* but entering into a specific community at an advanced moment of their own lives? These are crucial questions for understanding how ‘democratic’ a liberal democratic citizenship should be in Kelsen’s opinion and whether he succeeds in making the two phases of representation and deliberation dynamically interact;

2) if the Kelsenian *demos* does not presuppose any kind of ethnic homogeneity and it does not speak the language of hard nationalism, how does its physiological pluralism affect the political will-formation? This question addresses the role and efficiency of party systems in connecting political representation with intra- and extra-parliamentary deliberation and decision-making. It pertains to the political means modern democracies should be endowed with for educating democratic individuals into active and self-critical citizens.

Such issues constantly emerge throughout Kelsen’s democratic theory writings from the 1920s to the 1960s. Contrary to Schmitt, he acknowledges that liberal parliamentarianism and modern mass democracy share a common destiny: «the failure of the former is *ipso facto* the failure of the latter»^{LIII}. The parliamentarian framework stands as the only possible form the idea of democracy can have within the contemporary social context. Political representation and indirectness are thus conceived by Kelsen not as *vulnera*, but as essential features in the plot of modern democratic citizenship. For Parliaments not only ensure that relevant political issues are expeditiously discussed and resolved, in accordance with a «structural logic of social bodies»^{LIV}. Far beyond, they constitute the only possible ‘compromise’ (a key-word in Kelsen’s analysis of parliamentary democracy) between the notion of political liberty and the principle of labor differentiation imposed by modern nation States.

This leads to the third basic premise of Kelsen’s democratic theory. Contrary to the Schmittian one, Kelsenian democracy is a liberty-, not an homogeneity-based kind of democracy. In the fight against the «torture of heteronomy», in the combination of the quest for liberty with the «anti-heroic» notion of equality, Kelsen discovers the ‘essence and value’ of modern democracy^{LV}. Following the path disclosed by Constant and Condorcet, Kelsen recalls that the idea of liberty has undergone a crucial «semantic transformation»



throughout the centuries. Freedom conceived as the political self-determination of the citizen, as his direct participation to the emergence and expression of the general will (the ancients' 'positive' conception of liberty), has been eroded and substituted by a 'negative' understanding of the individual/community relation. Contrary to the Athenian *agora*, modern democracies are built upon liberty, not upon freedom. They have further developed the Hobbesian separation between *forum interni* and *forum externi*^{1,VI} and the liberal need to preserve the value of individuality in the age of mass democracy. The shift from «liberty within anarchy» to «liberty within democracy» – i.e., from natural to civil liberty – is, for Kelsen, together with Kant and Rousseau, the positive contribution to democracy provided by modern contractualism. In the attempt to achieve equality within liberty – a difficult compromise when referred to the dynamic sphere of citizenship – Kelsen argues against the principle of unanimity in the name of the majoritarian principle. The latter is the closest approximation to the idea of freedom that can be imagined within the framework of contemporary mass-party democratic States.

The very essence of liberal democratic citizenship precisely lies in the chance different groups are given to confront each other and to compete for power. Contrary to Schmitt's *Freund/Feind* politics, no entified, monolithic truths are admitted in Kelsen's democratic theory. Appreciating and preserving the invaluable contribution of dissent to the flourishing of each and every citizen is what makes Kelsenian democracy work. Democratic men and women are called to the practice of compromise in their everyday life, not only as deputies and representatives in the institutional arenas but also as members of an ontologically pluralistic civil society. From this point of view, every exchange, every cont(r)act stands as a compromise: 'compromising' means «putting aside what divides in favor of that which unites». Kelsenian liberal democratic citizenship does not imply any substantial homogeneity nor the artificial quest for a community of *Blut und Boden* (blood and land). On the contrary, constraints on majority actions and the defense of individual liberty and equality become indispensable normative requirements within and outside democratic institutions. While Schmitt portrays Parliaments as places of bargaining among socio-economic interests, Kelsen appreciates their multi-vocal composition. As «collective organisms democratically elected by the people on the basis of a universal, equal right of suffrage», they pursue political will-formation through decisions taken by majority rule. The majority principle differs indeed from the tyranny of the majority as far as it allows the



development of opinions and counter-opinions through a dialectical method. Kelsen properly recalls what Rudolf Smend argued in two short articles published in 1919 and 1923^{LVII} when tracing the genealogy of parliamentary deliberation back to the Medieval civil trial. Already at the time – Smend argues – there was the rationalistic belief that only through dialectical confrontation among different opinions, «particles of reasons that are strewn unequally among human beings gather themselves and bring public power under their control»^{LVIII}. When properly applied, parliamentary procedures, based on philosophical relativism, create the guarantees that the different groups of interests represented in Parliament can raise their voice and mirror the ‘dynamic/dialectic’ structure of authentically democratic civil societies. Parliaments and wider public arenas thus share mutual recognition, protection of minority rights and dialectic, compromise-oriented procedures as normative and methodological features of any deliberation they host. Only when the representative and the deliberative moments of politics are connected in a perpetual interaction, can liberal democratic citizenship be enacted^{LIX}.

Of course, to be effectively applied, the principle of the majority presupposes a certain degree of agreement between the parts involved in the (political, civil, religious, cultural etc.) confrontation. How pluralistic, then, should democratic pluralism be? In revisiting Kant’s international theory (specifically his conceptualization of national units as the main actors of inter-State relations) Kelsen points to cultural and linguistic commonness as the necessary foundation of a (relatively) homogeneous citizenship. It is noteworthy that, throughout the same years, Herman Heller argues for the creation of a welfare state precisely in order to contain social heterogeneity. From the Kelsenian perspective, though, socio-economic inequalities, pointed out by Marx’s critique as the main tool for political oppression in the hands of ‘bourgeois democracy’, can never downgrade democracy *vis-à-vis* dictatorship (be it by a class or by the *Führer*):

If, as precisely the Marxist critique of so-called bourgeois democracy underlines, what matters is the real distribution of power, then the system of parliamentary democracy, with its two essential groups, according to the majority-minority principle, is the ‘true’ expression of the current society’s division in two classes. And if there is any form that offers the chance not to lead this strong opposition, which one can lament, but not deny, into a catastrophe by way of bloody revolution, but to balance it out peacefully and slowly, it is this form of parliamentary democracy [...].^{LIX}



In particular, Kelsen rethinks the notion of citizenship by unveiling the structural link between the *demos*, political associations and parliamentary system in contemporary mass democracies. People, parties and Parliaments (the ‘three Ps’) are strictly connected in the way Kelsen revisits the notion of democracy against the background of European public law^{LXI}. What does he exactly have in mind, though, when speaking of ‘the people’?

Together with the notion of ‘popular sovereignty’ (replacing individual liberty as a consequence of the hypostatization of the ‘State-person’), ‘the people’ is conceived as a juridical fiction. It is «an ethical-political postulate that political ideology assumes as real»^{LXII} as far as «all its members are obedient to the same juridical State order». The “people” exists only from a juridical and normative perspective.

However, when political theorists question the engagement of electors into active citizenship and political mobilization, they refer to a misleading and slippery notion of ‘the people’. Citizens can be either subjects or objects with regards to the exercise of democratic power; they can be either *pouvoir constituant* or *pouvoir constitué*. Even within a radical kind of democracy, those endowed with political rights are just a restricted part of the whole population. Moreover, not everyone feels the urge to vote, even though he/she is a citizen entitled to exercise such a precious right and duty. Nor do those actually voting cast their periodic ‘paper stone’^{LXIII} in the ballot-box all displaying the same level of awareness, unbiased information and critical understanding of what has been occurring around them. In line with the democratic disenchantment expressed throughout the same years in the US by Lippmann and Lowell, Kelsen calls for a more precise and realistic understanding of the multi-level notion of ‘democratic people’. He recalls the recent constitutional evolution in Soviet Russia as a particularly relevant example for political and State theory: by providing foreign citizens coming to Russia seeking a job with full civil and political equality, the Soviet Constitution has for the first time diverted the notion of citizenship from that of nationhood. However, as Kelsen points out again drawing on the Soviet context, the evolution of citizenship does not always lead to a pacific and constructive management of class conflict.

This is exactly where the role of mass political parties emerges^{LXIV}. Rethinking the evolution of citizenship inevitably calls into question the institutional expression of social conflicts within and outside Parliaments. Along with Schmitt, Kelsen claims that mass



democracy *per se* means the erosion of the State/society antinomy due to the synergic socialization and democratization of politics. Contrary to Schmitt, though, he believes that parliamentary arenas must mirror the ‘polyarchy’ of civil society in order politically and visually to represent its various economic and social interests. As he vividly puts it, «the boosts coming from political parties are like many subterranean streams feeding a river that comes to surface only within the popular assembly or the Parliament, where it flows within one single bed»^{LXV}. Unlike Schmitt, who polemically interprets parties as the main reason for the fracturing of political unity^{LXVI}, Kelsen defends the role they play in the fight for expanding civil, political and social rights within indirectness-based democracies. While the former claims: ‘no State without people, no people without acclamations’, the latter replies: ‘no democracy without Parliament, no Parliament without parties’. A full liberal democratic citizenship will be finally achieved only when, through a specific set of parliamentary reforms, the hostility towards parties and parliamentary representation is overcome^{LXVII}.

3. From 1920s Weimar back to 2010s post-democracies: rethinking citizenship via representation. Concluding (not yet conclusive) remarks

What has hitherto been recalled paves the way for an overall rethinking of the structural transformations of liberal democratic citizenship both through and beyond Schmitt and Kelsen. This last section aims specifically at offering some concluding remarks in the attempt to revisit, from a fresh perspective, the multifaceted notion of ‘the people’ which has so far emerged. Moving from different interpretations of the democratic *demos*, Schmitt and Kelsen developed two widely diverging topologies of democracy.

On the one hand, the former portrayed the democratic people mainly as *pouvoir constituant* within the exceptional, super-legal constitution-making^{LXVIII}; on the other, Kelsen emphasized more the institutionalized, procedural side of democratic citizenship when the *demos* subjects itself to laws and is turned into *pouvoir constitué*. In turn, he also casted light on the invaluable contribution of political bodies in providing the constellation of social and economic interests with institutional representation. We suggest that the dichotomy between the two approaches needs to be overcome by moving towards a more sophisticated understanding of democratic citizenship through a renewed notion of



representation founded on a dynamic and perpetual interaction between political will and political opinion. Not only should the idea of occasional constitution-making (a constitutional ‘big bang’) be replaced with that of ‘constitutional evolution’ as an overarching process evolving through time (an evolutionary, not a revolutionary happening)^{LXIX}. Most importantly, we should get reacquainted with the idea that ‘the democratic Leviathan’^{LXX}, i.e., the citizens living and acting within democracy’s universe, can draw on a wide spectrum of means for making their voice heard other than voluntaristic acclamations and/or institutional procedures. Spontaneous forms of popular self-mobilization also contribute to the physiognomy of democratic citizenship within our contemporary representative governments. In his 1928 *Verfassungslehre* Schmitt himself argues (in an ambiguous, sometimes confusing way) that the political unity of democracy, stemming from both the principles of identity and representation, is framed within a threefold relation between the democratic people and its Constitution, depending on whether the former exists ‘prior to’ and ‘above’, ‘within’ or ‘beside’ the latter^{LXXI}. This third concept (the people “beside” the Constitution) refers to the *demos* neither as a *pouvoir constituant* nor as a *pouvoir constitué*. Rather, the people is here conceived as a non-institutionally organized entity expressing political judgment through the multiple channels at its disposal in the democratic public sphere^{LXXII}. As Kalyvas has argued (partially followed by Muller^{LXXIII}), when divested from the visceral anti-liberalism Schmitt endows it with, his claim also helps illuminating the complex anatomy of popular sovereignty within our indirectness-based democracies, while at the same time disclosing unexpected hints for better coping with some European Union conundrums (especially on sovereignty and constitution-making^{LXXIV}). By transposing Bodin, Hobbes and Rousseau’s conceptions of sovereign power into the language of modern constitutionalism through Sieyès^{LXXV}, not only does he partially revise the idea of an *ethnos*-founded *demos* preserving its own homogeneity through an existential conception of politics (as stated in *Parlamentarismus*). He goes further in reminding us that, even after the democratization of the constituent power, the democratic sovereign and its underground presence can never be abolished in constitutional democracies. However, he failed to elaborate further his threefold democratic citizenship design: by banishing public deliberation and collective (self)reflection, downgrading his perception of alternative venues for the citizens to express themselves to a passive, shouting and useless gathering of people. Moreover, due to his



mythologized interpretation of liberalism, he was not able to appreciate the invaluable contribution of political parties to the fulfillment of citizenship. He equated democratic politics with speechless applause and sacrificed the political value of liberty to the preservation of substantive homogeneity. In turn, he dismissed the emancipative potential of democratic citizenship embodied by extra-institutional forms of self-representation and the proliferation of public spheres for political will-formation. Reading Schmitt's democratic theory *vis-à-vis* Kelsen can contribute to disclosing some relevant hints for rethinking 'the people' beyond the identity/representation, constituent/constituted power, substantial/procedural democracy dichotomies, hints useful for the 'chercher le peuple' normative attempts at the European level. Getting reacquainted with the third body of the 'democratic Leviathan' – i.e., with the extra-parliamentary side of politics and the set of social movements keeping democratic citizenship alive beyond its institutionalized framework – proves useful in the sense that:

- a) at the institutional design level, it helps to overcome the schizophrenia of a dualistic model of democracy: far from the simplistic alternative between a substantive (Schmittian) and a procedural (Kelsenian) kind of democratic government, a renewed theory of citizenship and popular sovereignty should also put an end to the poor image of the democratic people as either a primordial, *ex nibilo* and 'over-politicized' energy (outside and above the Constitution) or a semi-dormant actor within a 'depoliticized' and procedures-intoxicated polity^{LXXVI};
- b) with and against Schmitt, it provides the people with self-representational means to express their political will alongside the constituted powers without threatening the democratic order; when applied to the European level, as Muller has pointed out, this reading would require amending the substantial and metaphysical aspects of the Schmittian understanding of the *pouvoir constituant* towards the conceptualization of the European peoples as an inherently plural constituent power capable of making its voice heard as a constellation of self-representing and self-represented publics (what Schmitt, in *Die Verfassungslehre*, refers to as 'apocryphal acts of sovereignty')^{LXXVII};
- c) with and against Kelsen, it reminds us that popular sovereignty does not emerge only through party representation and regularly held elections. Contrary to a neo-Schumpeterian conception of democracy, contemporary *demos* maintain an underground,



extra-institutional self-conscience that can emerge when the two domains of representation and judgment, political will and public opinion(s) are constantly inter-connected. The ‘continuity/rupture’ movement in the exercise of political judgment enables representative politics to supersede an existential and voluntaristic conception of the will^{LXXVIII}, to fulfill the promise of political liberty^{LXXIX} and to make democratic, self-critical citizens out of isolated electors and political atoms.

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^IMarshall 1950. For a philosophical analysis of the concept of ‘citizenship’, see also Veca 1990.

^{II}Roche 1992: 1-8.

^{III}Connolly 1991. On the identity/difference nexus, see the excellent work by Benhabib 1996.

^{IV}We refer to Fukuyama’s claim that the universalization of Western liberal democracy as «the final form of human government» after 1989 meant *per se* «the end point of mankind’s ideological evolution»: Fukuyama 1989; Fukuyama 1992.

^VThroughout the paper we often refer to the notion of ‘liberal democratic citizenship’ (rather than that of ‘democratic citizenship’) in order to emphasize the equal consideration each individual is entitled to as the minimal normative criterion of post-Rawlsian liberal theories of democracies. See Lehning 1997; Lehning 1998.

^{VI}Cfr. Zolo 1994: 3-46.

^{VII}Taylor 1992; Kymlicka 1995.

^{VIII}Urbinati-Warren 2008.

^{IX}I owe such an evoking expression to Urbinati 2005.

^XFor thought-provoking perspectives over the notions of European constituent-power, *demos* and citizenship within the wider and highly debated framework of the European constitution-making, see Lehning 1997; Muller 2000; Henry- Loretoni 2004; Riekman-Wessels 2006; Lindhal 2007; Walker 2007; Dyzenhaus 2007.

^{XI}On such an instrumental and functionalist argument at the EU level in addition to Weber’s threefold articulation of the concept of ‘legitimacy’, see Muller 2000: 1778.

^{XII}Walker 2007 discloses four hypotheses on the concept of a European constituent power: non-constituent



constitutionalism (echoed in the international Treaty-based EU); constitutional skepticism (stressing the miscategorization, the ‘category error’ of ascribing the constitutional label to the European enterprise); constitutional vindication (claiming that a European constituent power is already more or less realized within the emergent constitutional form); finally, post-constituent constitutionalism, recognizing the initial *vacuum* of a supranational constituent power while, at the same time, defending the urgency and positive contribution of its subsequent development.

^{xiii}On the tension between identity and interdependence in contemporary, post-State-centered constitutionalism dealing with a highly fragmented, multilevel and polycentric order, see Carrozza 2007.

^{xiv}On the notion of ‘constitutional patriotism’, framing citizenship within a shared sense of values rather than ethnic origin or common history, see Habermas 1992.

^{xv}See Weiler 1999: 270-284; on the conundrums of European citizenship, see Weiler 1999, 324-357.

^{xvi}Muller 2000: 1777.

^{xvii}Costa 1999-2001.

^{xviii}As Erich Kaufmann wrote in 1927: «The experiences that our nation, and we along with it, have had in war, in collapse, in revolution, and under the Versailles Treaty, domestically and in foreign policy, have shaken us violently awake and led to immense self-reflection» (in Jacobson-Schlink 2002: 4).

^{xix}Jacobson-Schlink 2002: 12. Such an «historical handicap on German parliamentarism» (*infra*: 12, n. 15) proved self-evident throughout the history of Weimar: from 1919 to 1933 no *Reichstag* lasted until its regular end term.

^{xx}Far beyond the initial intentions of the Constitution’s fathers, the President was given a considerable agglomerate of power: from the right to appoint and dismiss the Chancellor and to dissolve the *Reichstag*, to the whole set of emergency powers provided by Article 48.

^{xxi}As the *Hauptprobleme der Staatsrechtslehre* (1911), *Das Problem der Souveränität* (1920) and the *Allgemeine Staatslehre* (1925) prove, Kelsen builds on both the epistemological concept of ‘substance’ developed by Cassirer, Mach and Avenarius and Vaihinger’s theory of fictions to renew the juridical and theoretical notions of ‘State’ and ‘democracy’ in relation to social conflict.

^{xxii}De Maistre 1965.

^{xxiii}Castiglione-Warren 2006, *Rethinking Democratic Representation: Eight Theoretical Issues*, Paper presented at the Centre for the Study of Democratic Institutions, University of British Columbia (in Urbinati-Warren 2008: 387-390).

^{xxiv}Urbinati-Warren 2008, 389.

^{xxv}Held 1987.

^{xxvi}Fioravanti 1990; Urbinati 2006 (especially 17-59); Urbinati 2009 (especially 33-47). For a classic and still influential account of representation, see Pitkin 1967; for a mapping of and critical elaboration on the main theories of political representation in recent democratic theory, see Saward 2010.

^{xxvii}For diverging opinions on the need (and theoretical utility) for contemporary democratic theory to critically engage with Schmitt’s critique of liberalism, see Galli 2000; Richter 2000. While the former pinpoints the «elements of a theory of a ‘living constitution’ and the people’s constituent power» embedded within Schmitt’s political thought, the latter invites contemporary political theorists to leave any Schmittian spectrality aside and turn to the idea of a ‘liberal republicanism’ (a third-way between communitarians and liberals); on both, see Urbinati 2000.

^{xxviii}Precise references to Rosanvallon and Urbinati’s works will be made throughout the following pages. For an excellent re-conceptualization of ‘the people’ in representative democracy and its pathologies (with special emphasis on populist appeals), see Canovan 1999; Canovan 2002; Canovan 2005.

^{xxix}Schmitt 1988b: 26.

^{xxx}Thought-provoking considerations on this point in Kiss 1998.

^{xxxi}Schmitt 1988b: 15-16 (my emphasis).

^{xxxii}Schmitt 1988b: 16.

^{xxxiii}Schmitt 1988b: 16.

^{xxxiv}Schmitt derives the term ‘polycraty’ from the work of Johannes Popitz, prominent financial expert in 1920s Weimar and Prussian Minister of Finance after 1933: see Schmitt 1931a; Schmitt 1931b. For an overview of Popitz’s State theory, see Kennedy 2004: 26-32.

^{xxxv}Cfr. Schmitt 1932.

^{xxxvi}Schmitt 2008: 272.

^{xxxvii}Phillips 1996.



xxxviii Urbinati Nadia, 2010b.

xxxix On this point see Lippmann 1922; Lippmann 1925; Lowell 1921. Both Lippmann and Lowell are quoted in Schmitt's *Volksbegehren und Volksentscheidung*; Schmitt refers to Lippmann's *Public Opinion* also in the second preface of *The Crisis of Parliamentary Democracy*.

xl Schmitt 1988b: 9.

xli Schmitt 1988b: 20-21 (my emphasis).

xlii Habermas 1998: 133. As Muller 2000 recalls, it is plausible that Schmitt's connection between democracy and homogeneity provided a sort of sub-text to the German Constitutional Court's *Maastricht* decision: see *Maastricht Decision*, BVerfGE 89, 155-213 (1993). On this point see both Grimm 1995 and Habermas 1995 (the latter reprinted also in Habermas 1998: 155-161).

xliii Ignatieff 2000: 58.

xliv Giannini 1986: 69. See also Cassese 1994; Carrozza 2006.

xlv Schmitt 1988b: 9-10, 16.

xlvi On this matter see also Schmitt 2008: 258-264.

xlvii Among the most critical and acute analyses of Schmitt's theory of democracy, see Dyzenhaus 1998; Kennedy 1985; Kennedy 2004; McCormick 1997; Mouffe 1999; Scheuerman 1995; Scheuerman 1999; Azzariti 2005.

xlviii Pasquino 1999: xvi argues correctly that the mere criterion of national homogeneity proves insufficient, both historically and theoretically, when defining democracy. After 1848 – he recalls – the major threat to European States has come from within their borders, specifically in the form of class- (rather than ethnic) conflict. The Marxist struggle between the bourgeoisie and the proletarians in mid-nineteenth century Europe proved that groups sharing the same portion of territory and belonging to the same nationality could still face each others as strangers and foes¹. Moreover, when the developments subsequently occurred in the nationhood/citizenship nexus are also taken into consideration, Schmittian democracy proves ideologically unilateral and normatively flawed.

xlix Benhabib 2002.

l Kelsen emphasizes such correlation in many of his political theory writings: see in particular Kelsen 1958 and Kelsen 1955 (especially *Democrazia e concezioni della vita*: 137-144, and *Assolutismo e relativismo nella filosofia e nella politica*: 441-453).

li Kelsen 1982, 49-50 (my translation).

lii Gavazzi 1984.

liii Kelsen 1984: 174, 157.

liv Kelsen 1984: 52.

lv Kelsen 1984: 39-40.

lvi This juxtaposition is polemically discussed by Schmitt in his 1938 essay *Der Leviathan in der Staatslehre des Thomas Hobbes*.

lvii We refer to *Die Verschiebung der konstitutionellen Ordnung durch die Verhältniswahl* (1919) and *Die politische Gewalt in Verfassungsstaat und das Problem der Staatform* (1923).

lviii Schmitt 1988b: 35.

lix On this specific point see the fundamental contributions by Manin 1997; Rosanvallon 2000; Urbinati 2009; Urbinati 2010a; Urbinati 2010c.

lx Kelsen 1955 (my translation).

lxi Kelsen 1984: 50-51.

lxii See Costa 2001 (vol. IV): 21.

lxiii This definition of the ballot paper, developed by Engels, has been recalled by Przeworsky 1999: 49, and, more recently, by Urbinati 2005: 197 and Urbinati 2009: 53.

lxiv For an introduction to political party system (with special reference to the Italian context), see Rossi 2007; see also Katz 1988. For a positive evaluation of political partisanship in contemporary political theory, see Rosenblum 2008 (review by Runciman 2010).

lxv Kelsen 1984: 55 (my translation). On the relevance of party representation in Kelsen's theory of democracy, see Mersel 2006.

lxvi Cfr. Schmitt 2008: 275-276: «There is no democracy without parties, but only because there is no democracy without public opinion and without the people that are always present as the people. [...] The Weimar Constitution recognizes no parties. It mentions the word only once in a disapproving sense in Art. 130, which reads: "Public officials are servants of the collective, not of a party". [...] Parties (factions) are not



recognized in the Constitution. Instead, they are recognized in the house rules of parliamentary democracies like the by-laws for the German Reichstag of 12 December 1922».

LXVII Kelsen 1984: 55-57. Due to space limits, we cannot engage into a detailed account of Kelsen's considerations on institutional reforms: cfr. Kelsen 1984: 80-93 (*The reform of Parliament and The professional representation*).

LXVIII Schmitt, 1988a: 51.

LXIX See Peters 2006.

LXX We derive such powerful expression from Kalyvas 2000.

LXXI Cfr. Schmitt 2008: 268-279 (ch. 18: *The People and the Democratic Constitution*). For a broad and acute analysis of this chapter, see Kalyvas 2000.

LXXII Noteworthy in *Die Verfassungslibere* (ch. 18), while recalling the main scientific contributions to the existing literature on public opinion, Schmitt refers to F. Tönnies (*Kritik der öffentlichen Meinung*, 1922), J. Bryce (*The American Commonwealth*, 1888), A. Venn Dicey (*Law and Public Opinion in England*, 1905), L. Lowell (*Public Opinion and Popular Government*, 1913). No reference, though, is made to Lippmann's writings, contrary to the attention reserved to the American journalist just one year before in *Volksbegehren und Volksentscheidung* and in 1926 in the second preface to *The Crisis of Parliamentary Democracy*.

LXXIII Muller 2000: 1781 acknowledges that, drawing on Schmitt's constitutional theory, «some observers have claimed that intellectual resources for “radical democracy” can be extracted from it»; however, he deconstructs the Schmittian understanding of both representation and peoplehood as innervated by «religious-cum-authoritarian, “substantial” modes of thought» (Muller 2000: 1788) and tries to develop a descriptive (and prescriptive) analysis of the Constitution of Europe with, beyond and against Schmitt himself.

LXXIV Summing up the theoretical questions that can be raised when reading the EU through, beyond and against Schmitt, see Muller 2000: 1779-1880: «[...] does European integration in fact prove [...] that “Schmittian sovereignty” remains caught in existentialist, concretist ways of thinking, which have long lost touch with the intricate “legimitimation through procedure” or the legitimation through prosperity which some see at the heart of the EU? [...] Has Schmittian unitary and decisionist sovereignty, which always asks for the identification of the final arbiter, been extinguished in favor of “pooled sovereignty” and a kind of subtle sovereignty by “mutual recognition, continuity and consent”? [...] Can one say, then, to put it crudely, that if Europe works, Schmitt is wrong? Or is the joke, after all, on the anti-Schmittians, who remain fixated on Schmitt's Weimar writings, and overlook his predictions about the end of the nation-state, and his advocacy of economic *Großräume* (great spaces), in which case the EU would be the first *Großraum* realized?».

LXXV Duncan 2004. Useful remarks on Schmitt's appropriation (and reinterpretation) of Sieyès' notion of the creative *pouvoir constituant* are also available in Muller 2000: 1781-1788.

LXXVI On the limits and clues respectively disclosed by these two images of the democratic people within Schmitt's political and constitutional theory, see Kalyvas 2000: 1532-1556. According to Dyzenhaus 2007 this re-conceptualization would lead towards a «liberal account of the rule of law», whereby Schmitt's ‘negative prescriptive political theory’ and his reading of the constituent power as *das formlos Formende* (‘the amorphous but forming entity’) is simply dismissed. I disagree with such a conclusion and rather retain the notion of a ‘normalized’ constituent power as a powerful mean for making representative democracy work and represented citizens think.

LXXVII This would be the case, for instance, of the mass demonstrations occurred on February 15th, 2003, in London, Rome, Paris, Barcelona, Berlin against the involvement of their national governments in the Iraq War as allies to the US: on this point see Levy et al. 2005 (especially the ‘manifesto’ co-authored by Habermas and Derrida, formerly published on the *Frankfurter Allgemeine Zeitung* and *Libération* and arguing for a Core Europe with a distinctive and self-critical European public sphere).

LXXVIII See Urbinati 1998; Urbinati 2005.

LXXIX The conditions and presuppositions of political judgment throughout intra-electoral periods become crucial questions for representative democracies as they test the quality of representation on a double track. They found the (positive) liberty of democratic citizens on a substantial basis (instead of making it a comet that appears only «at fixed and rare intervals», as feared by Constant in 1819) and compel elected governments to be accountable to the entirety of those they represent.



References

- Azzariti Gaetano, 2005, *Critica della democrazia identitaria. Lo Stato costituzionale schmittiano e la crisi del parlamentarismo*, Laterza, Roma-Bari;
- Benhabib Seyla (ed.), 1996, *Democracy and Difference. Contesting the Boundaries of the Political*, Princeton University Press, Princeton;
- Benhabib Seyla, 2002, *Equality and Diversity in the Global Era*, Princeton University Press, Princeton-Oxford.
- Canovan Margaret, 1999, 'Trust the People! Populism and the two faces of democracy' in *Political Studies*, Vol. 47: 2-16;
- Canovan Margaret, 2002, 'Taking politics to the people: populism as the ideology of democracy' in Mény Yves-Surel Yves (eds.), *Democracies and the Populist Challenge*, Palgrave, Basingstoke: 25-44;
- Canovan Margaret, 2005, *The People*, Polity Press, Cambridge;
- Carrozza Paolo, 2006, 'Uno sguardo al futuro: Stato, Costituzione e processi di globalizzazione', in Panizza Saule (ed.), *Ragazzi, che Costituzione!*, Plus, Pisa;
- Carrozza Paolo, 2007, 'Constitutionalism's Post-Modern Opening' in Loughlin Martin-Walker Neil (eds.), *The Paradox of Constitutionalism. Constituent Power and Constitutional Form*, Oxford University Press, Oxford-New York: 169-188;
- Cassese Sabino, 1994, 'Lo «Stato pluriclasse» in Massimo Severo Giannini', in Cassese Sabino et al. (eds.), *L'unità del diritto. Massimo Severo Giannini e la teoria giuridica*, il Mulino, Bologna: 11-50;
- Castiglione Dario-Warren Mark E. (eds.), 2006, *Rethinking Democratic Representation: Eight Theoretical Issues*, Paper presented at the Centre for the Study of Democratic Institutions, University of British Columbia;
- Connolly William E., 1991, *Identity/Difference: Democratic Negotiations of Political Paradox*, Cornell University Press, Ithaca;
- Costa Pietro, 1999-2001, *Civitas. Storia della cittadinanza in Europa*, 4 vols., Laterza, Roma-Bari;
- De Maistre Joseph, 1965, 'The Sovereignty of the People', in *The Works of Joseph de Maistre*, ed. and trans. J. Lively, Schocken Books, New York;
- Dyzenhaus David (ed.), 1998, *Law as Politics. Carl Schmitt's Critique of Liberalism*, with a foreword by Beiner Ronald, Duke University Press, Durham;
- Dyzenhaus David, 2007, 'The Politics of the Question of Constituent Power', in Loughlin-Walker 2007: 129-146;
- Fioravanti Maurizio, 1990, 'Dottrina dello Stato-persona e dottrina della Costituzione: Costantino Mortati e la tradizione giuspubblicistica italiana', in Galizia Mario-Grossi Paolo (eds), *Il pensiero giuridico di Costantino Mortati*, Giuffrè, Milano: 45-185;
- Fukuyama Francis, 1989, *The End of History?* in 'The National Interest' (Summer): 4;
- Fukuyama Francis, 1992, *The End of History and the Last Man*, Free Press, New York;
- Galli Carlo, 1999-2000, 'Carl Schmitt's Antiliberalism: Its Theoretical and Historical Sources and Its Philosophical and Political Meaning' in *Cardozo Law Review*, Vol. 21, No. 5-6: 1597-1617;
- Gavazzi Giacomo, 1984, *Introduzione*, in Kelsen Hans, *La democrazia*, il Mulino, Bologna: 7-31;
- Giannini Massimo Severo, 1986, *Il pubblico potere. Stati e amministrazioni pubbliche*, il Mulino, Bologna;
- Grimm Dieter, 1995, 'Does Europe Need a Constitution?' in *European Law Journal*, Vol. 1, No. 3: 282-302;
- Habermas Jürgen, 1992, 'Citizenship and National Identity: Some Reflections on the Future of Europe' in *Praxis International*, Vol. 12, No. 1: 1-19;
- Habermas Jürgen, 1995, 'Comment on the Paper by Dieter Grimm: 'Does Europe Need a Constitution?'' in *European Law Journal*, Vol. 1, No. 3: 303-307;
- Habermas Jürgen, 1998, *The Inclusion of the Other*, Cambridge University Press, Cambridge;
- Held David, 1987, *Models of Democracy*, Stanford University Press, Stanford;
- Henry Barbara-Lorettoni Anna (eds.), 2004, *The Emerging European Union. Citizenship, Identity, Rights*,



ETS, Pisa;

- Ignatieff Michael, 2000, *The Rights Revolution*, House of Anansi Press, Toronto;
- Jacobson Arthur J.-Schlink Bernhard (eds.), 2002, *Weimar. A Jurisprudence of Crisis*, University of California Press, Berkeley and Los Angeles;
- Kalyvas Andreas, 2000, 'Carl Schmitt and the three moments of democracy' in *Cardozo Law Review*, 21: 1525-1565;
- Katz Richard S., 1988, *Handbook of Party Politics*, Sage, London;
- Kelly Duncan, 2004, 'Carl Schmitt's Political Theory of Representation' in *Journal of the History of Ideas*, Vol. 65, No. 1 (Jan.): 113-134;
- Kelsen Hans, 1955 (1929), *Essenza e valore della democrazia*, ed. by Gavazzi Giacomo, il Mulino, Bologna;
- Kelsen Hans, 1958 (1912), *Concezione politica del mondo ed educazione*, in Kelsen Hans, *Dio e Stato. La giurisprudenza come scienza dello spirito*, ed. by Carrino Augusto, ESI, Napoli: 45-71;
- Kelsen Hans, 1982, *Il primato del parlamento*, ed. by Geraci Carmelo, preface by Petta Paolo, Giuffrè, Milano;
- Kelsen Hans, 1984, *La democrazia*, ed. by Gavazzi Giacomo, il Mulino, Bologna;
- Kennedy Ellen, 1985, 'Carl Schmitt's *Parlamentarismus* in Its Historical Context', in Schmitt Carl, 1988, *The Crisis of Parliamentary Democracy*, transl. by Kennedy Ellen, The MIT Press, Cambridge-London, xiii-l;
- Kennedy Ellen, 2004, *Constitutional Failure. Carl Schmitt in Weimar*, Duke University Press, Durham-London;
- Kiss Elizabeth, 1998, 'Saying we're sorry: liberal democracy and the rhetoric of collective identity' in *Constellations*, Vol. 4, No. 3: 387-398;
- Kymlicka Will, 1995, *Multicultural Citizenship. A Liberal Theory of Minority Rights*, Clarendon Press, Oxford;
- Lehning Percy B., 1997, 'Pluralism, Contractarianism and European Union', in Lehning Percy B.-Weale Albert (eds.), *Citizenship, Democracy and Justice in the New Europe*, Routledge, New York: 107-124;
- Lehning Percy B., 1998, 'European Citizenship: Between Facts and Norms' in *Constellations*, Vol. 4, No. 3: 346-366;
- Levy Daniel et al. (eds.), 2005, *Old Europe, New Europe, Core Europe. Transatlantic Relations after the Iraq War*, Verso, London;
- Lindhal Hans, 2007, 'Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood', in Loughlin-Walker 2007: 9-24;
- Lippmann Walter, 1922, *Public Opinion*, George Allen & Unwin, London;
- Lippmann Walter, 1925, *The Phantom Public*, Harcourt-Brace, New York;
- Lowell Lawrence A., 1921, *Public Opinion and Popular Government*, Longmans Green, New York;
- Manin Bernard, 1997, *The Principles of Representative Government*, Cambridge University Press, Cambridge;
- Marshall Thomas H., 1950, *Citizenship and Social Class and Other Essays*, Cambridge University Press, Cambridge;
- McCormick John P., 1997, *Carl Schmitt's Critique of Liberalism. Against Politics as Technology*, Cambridge University Press, Cambridge;
- Mersel Yigal, 2006, 'Hans Kelsen and political parties' in *Israel Law Review*, Vol. 39, Issue 2 (Summer): 158-181;
- Mouffe Chantal (ed.), 1999, *The Challenge of Carl Schmitt*, Verso, London-New York;
- Muller Jan, 2000, 'Carl Schmitt and the Constitution of Europe' in *Cardozo Law Review*, Vol. 21, No. 5-6: 1777-1795;
- Pasquale Pasquino, 1999, *Prefazione*, in Schmitt Carl, *Parlamentarismo e democrazia*, Marco Editore, Cosenza: vii-xviii;
- Peters Anne, 2006, 'The Constitutionalisation of the European Union – Without the Constitutional Treaty', in Riekman Sonja Puntsher-Wessels Wolfgang (eds.), *The Making of a European Constitution. Dynamics and Limits of the Convention Experience*, VS Verlag für Sozialwissenschaften, Wiesbaden: 35-67;
- Phillips Anne, 1996, 'Dealing with Difference: A Politics of Ideas, or a Politics of Presence?', in



Benhabib 1996: 139-152;

- Pitkin Hannah, 1967, *The Concept of Representation*, University of California Press, Berkeley
- Przeworsky Adam, 1999, 'Minimalist conception of democracy: A Defense', in Shapiro Ian-Hacker-Cordón Casiano (eds), *Democracy's Value*, Cambridge University Press, Cambridge: 23-55;
- Richter Emanuel, 2000, 'Carl Schmitt: The Defective Guidance for the Critique of Political Liberalism' in *Cardozo Law Review*, Vol. 21, No. 5-6: 1616-1644;
- Roche Maurice, 1992, *Rethinking Citizenship. Welfare, Ideology and Change in Modern Society*, Polity Press, London;
- Rosanvallon Pierre, 2000, *La démocratie inachevée. Histoire de la souveraineté du peuple en France*, Gallimard, Paris;
- Rosenblum Nancy L., 2008, *On the Side of the Angels. An Appreciation of Parties and Partisanship*, Princeton University Press, Princeton-Oxford;
- Rossi Emanuele, 2007, *I partiti politici*, Laterza, Roma-Bari;
- Runciman David, 2010, 'Review Essays: The Paradox of Immediacy' in *Political Theory*, Vol. 38, No. 1: 148-155;
- Saward Michael, 2010, *The Representative Claim*, Oxford University Press, Oxford-New York;
- Scheuerman William E., 1995, 'Is Parliamentarism in Crisis? A Response to Carl Schmitt' in *Theory and Society*, Vol. 24, No. 1: 135-158;
- Scheuerman William E., 1999, *Carl Schmitt. The End of Law*, Rowman & Littlefield, Boston;
- Schmitt Carl, 1931a, 'Die Wendung zum totalen Staat' in *Europäische Revue*, Vol. 7, No. 4: 241-250;
- Schmitt Carl, 1931b, *Der Hüter der Verfassung*, Duncker & Humblot, Berlin;
- Schmitt Carl, 1932, 'Das Zeitalter der Neutralisierungen und Entpolitisierungen' in Schmitt Carl, *Der Begriff des Politischen*, Duncker & Humblot, Munchen-Leipzig: 66-81;
- Schmitt Carl, 1988a, *Political Theology: Four Chapters of the Concept of Sovereignty*, trans. by Schwab George, The MIT Press, Cambridge;
- Schmitt Carl, 1988b, *The Crisis of Parliamentary Democracy*, transl. by Kennedy Ellen, The MIT Press, Cambridge-London;
- Schmitt Carl, 2008, *Constitutional Theory*, transl. and ed. by Seitzer Jeffrey, Foreword by Kennedy Ellen, Duke University Press, Durham-London;
- Taylor Charles, 1992, *Multiculturalism and "The Politics of Recognition"*, Princeton University Press, Princeton;
- Urbinati Nadia, 1998, 'Democracy and Populism' in *Constellations*, Vol. 5, No. 1: 110-124;
- Urbinati Nadia, 2000, 'Schmitt's Critique of Liberalism' in *Cardozo Law Review*, Vol. 21, No. 5-6: 1645-1651;
- Urbinati Nadia, 2005, 'Continuity and Rupture: The Power of Judgment in Democratic Representation' in *Constellations*, Vol. 12, No. 5: 194-222;
- Urbinati Nadia, 2006, *Representative Democracy. Principles and Genealogy*, The University of Chicago Press, Chicago-London;
- Urbinati Nadia-Warren Mark E., 2008, 'The Concept of Representation in Contemporary Democratic Theory' in *Annual Review of Political Science*, 11: 387-412;
- Urbinati Nadia, 2009, *Lo scettro senza il re. Partecipazione e rappresentanza nelle democrazie moderne*, Donzelli, Roma;
- Urbinati Nadia, 2010a, 'La democrazia non ha un altrove' in *il Mulino*, 2: 199-214;
- Urbinati Nadia, 2010b, 'La memoria è nel presente: lontananza e identità' in *Iride*, Vol. XXIII, No. 60: 393-408;
- Urbinati Nadia, 2010c, 'La rappresentanza come processo politico democratico', in Papa Catia (ed.), *Vivere la democrazia, costruire la sfera pubblica. Quaderno della Scuola per la Buona Politica (2007-2008)*, introduzione di Pennacchi Laura, Ediesse, Roma: 143-160;
- Veca Salvatore, 1990, *Cittadinanza. Riflessioni filosofiche sull'idea di emancipazione*, Feltrinelli, Milano;
- Walker Neil, 2007, 'Post-Constituent Constitutionalism? The Case of the European Union', in Loughlin –Walker 2007: 247-268;
- Weiler Joseph, 1999, *The Constitution of Europe. "Do the New Clothes have an Emperor?" and Other Essays*



on *European Integration*, Cambridge University Press, Cambridge;

- Wolin Sheldon S., 1996, 'Fugitive Democracy', in Benhabib 1996: 31-45;
- Zolo Danilo (ed.), 1994, *La cittadinanza. Appartenenza, identità, diritti*, Laterza, Roma-Bari.