

Popular Sovereignty and Compromise

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Please note that this is a draft. Comments are welcome and appreciated, cr@ifs.ku.dk

I. Introduction

The idea that gave rise to modern democracy was that all political power should emanate from "the people." Those who are subject to the laws should also be the source of the laws. Thus, in modern democratic constitutions, "the people" is posited as the highest authority. "No body, no individual can exert authority which does not emanate expressly from it," as it was declared during the French revolution in 1789.¹ While this principle of popular sovereignty – that all state authority should emanate from the people – has been given different institutional expressions, it is a shared and central aspect of the normative self-understanding of contemporary democracies. Popular sovereignty is a principle and ideal that democratic politicians appeal to when justifying their policies and their own power. To be sure, there are variations in frequency, form, and rhetoric of invocations of "the people" among different politicians, but no democratic politician would or could deny in public that she owes her power to "the people," or that her policies should serve "the people."²

While appeals to the opinion, will, and interests of "the people" are ubiquitous in democratic politics, there is no agreement on what is required for state authority to emanate from "the people." This is abundantly clear in contemporary expressions and discussions of populism across the globe. What differentiates populism from other interpretations of democracy cannot be the appeal to "the people," if I am right that it is a shared feature of the democratic self-understanding that political power must be (in some sense) authorized by the people. The question, rather, is what invoking the sovereignty of the people means, what it allows us to say and do, what institutions and policies it can justify.

Moreover, the idea that the people should in some sense authorize the laws to which they are subject precedes the democratic revolutions of the 18th and 19th

¹ "The Declaration of the Rights of Man and of the Citizen" (*Déclaration des droits de l'homme et du citoyen*), passed by the National Constituent Assembly during the French revolution, in August 1789. [The Declaration says "nation," not "people", because "people" was seen as referring to ordinary people rather than all citizens. Cf. Urbinati, *Democracy Disfigured*, 161.]

² Pierre Rosanvallon, *Democratic Legitimacy*, 1.

century and is a core presupposition of the social contract tradition from Hobbes and Locke to Rousseau and Kant. Thus, the idea of popular sovereignty has pre-democratic roots, even if the idea today has been democratized.³

In modern constitutions as well as in the social contract tradition and in contemporary forms of populism, "the people" tend to be spoken of in the singular, as a unity.⁴ Government should be authorized by a consensual agreement among "the people," and "the people" should be able to consent to the laws under which they live. Given the fact that the people does not speak in one voice and the difficulties of making sense of the idea of popular sovereignty under conditions of disagreement and social complexity, it is tempting to discard these notions and ideals entirely. This paper, however, argues that rather than discarding the idea of popular sovereignty, it should be reinterpreted. I take outset in the idea of compromise as a possible way of thinking about the people as a plurality rather than as a unity. This interpretation is contrasted with the social contract tradition and populism. I shall treat the latter two traditions in somewhat stylized form, but I hope that these examinations will be instructive indications of what it can mean to invoke "the people" as well as a helpful foil for the discussion of compromise. In particular, it will contribute to showing that or to what extent the idea of the unitary quality of the people is fraught with problems.

While the idea of consensus formation is about eliminating disagreements or abstracting from them, a compromise agreement embodies the disagreements of the parties. The idea of compromise also has the advantage of being more true to how actual political agreements are reached in modern, representative democracies than the idea of convergence around a shared understanding of just outcomes. However, there are also downsides to interpreting popular sovereignty via the idea of compromise. While I introduce the idea of compromise not merely as a realistic concession to reality but also as an ideal in its own right, compromise cannot stand alone. The thing is that the justification of compromise itself rests on a consensual basis. Moreover, an exclusive focus on compromise as a way of institutionalizing popular sovereignty tends to entail a narrow understanding of democratic politics, as something that happens in formal institutions among political elites. Thus, the idea of "democracy as compromise" entails a weak link between government and the people, who according to the ideal of popular sovereignty should be the source of political power. For these reasons, we must bring the idea of consensus back into

³ Simone Chambers, "Democracy, Popular Sovereignty, and Constitutional Legitimacy," *Constellations* 11, no. 4 (2004), 153-73.

⁴ Müller; Rosanvallon, *Democratic Legitimacy*, 1-2; Przeworski; Stanton, 325.

our interpretation of democracy and popular sovereignty, but in a way that acknowledges the virtues and necessity of compromise.

II. The Idea of Popular Sovereignty

One way to understand popular sovereignty is to say that government should serve "the people," rather than only a small part of the population. We find such an understanding of popular sovereignty in both the social contract tradition and in populism, but they interpret "government for the people" in very different ways, each with their advantages and disadvantages. In the social contract tradition, the constitution, the government, and the laws, are seen as authorized by the people if the people *could* accept them as free and equal rational beings. This is a form of "hypothetical popular sovereignty," because "it does not directly call on real people."⁵ Populism could be seen as a contrast to the social contract tradition's focus on what rational beings would accept. Indeed, one contemporary populist leader, Nigel Farage, has claimed to give voice to and speak on behalf of "the real people."⁶ And Juan Perón used to say, "the political leader is the one who does what the people want,"⁷ also meaning real, ordinary people.

While contractarianism and populism differ in that one speaks of "rational beings" and the other of "real people," they share the use of "the people" as an *outcome standard*. That is, they judge the legitimacy of political leaders and policies based on whether they provide the people with what they, respectively, should or do want. The contractarian asks what would be acceptable to the people as free and equal rational beings, not what empirical persons actually do accept. And the populist asks whether the government gives real, ordinary people what they want. But neither the contract theorist nor the populist depend on that people in all their diversity actually participate in politics or express their opinions. Or to be more precise, for them, it is not the will formed in actual political procedures that determines what serves the people. In this way, both traditions operate with a moralized and

⁵ Chambers, "Democracy, Popular Sovereignty, and Constitutional Legitimacy," 155.

⁶ <https://www.theguardian.com/commentisfree/2016/jun/24/nigel-farage-ugliness-bullet-fired>. See also Jan-Werner Müller, "Real Citizens," *Boston Review*, <http://bostonreview.net/politics/jan-werner-muller-populism>.

⁷ Müller, *What is Populism?*, 2016, 31.

noninstitutionalized notion of the people.⁸ It is the theorist or the political leader who knows what "the people" should or do want, respectively.

We should note, however, two differences between the contract tradition and populism. First, the contract theorist is explicit about the hypothetical use of "the people" and consensual agreement. This is clearest in Kant and his followers.⁹ By contrast, when populists appeal to "the people", they claim to refer to actual, empirical beings. And when they diverge, populist leaders contrast their own insights into the will of the people with the results of actual democratic elections.¹⁰ Secondly, the Kantian contract theorist tends to use "the people" more as a limit to – or negative instruction regarding – what can be decided than a positive instruction.¹¹ Thus, in Kant the idea of the original contract merely prohibits decisions that would violate the equal standing of citizens.¹² Populists, by contrast, invoke "the people" as a positive justification for whatever policies they want to promote and not merely as a constraint on the legislator.

While the idea of popular sovereignty started out in the social contract tradition as an idea that government power should be used in the interest of the whole people, this is hardly sufficient to make popular sovereignty a democratic idea.¹³ Democracy is not merely "government for the people" but also, in some sense, "government by the people." Democracy requires that the people have the opportunity to participate in government, to be involved in, and to influence political decision-making. And the people's sovereignty cannot be realized by one act of authorization, one act of participation, as in Hobbes.¹⁴ The authorization must happen via actual

⁸ On this aspect of populism, see Müller, *What is Populism?*, 31-32. [Regarding the social contract tradition, it only uses a moralized understanding of the people as an outcome standard, while it is not true of the procedures it recommends].

⁹ According to Kant, ("Theory and Practice," 8: 297), "every legislator [should be bound] to give his laws in such a way that they *could* have arisen from the united will of a whole people ... this is the touchstone of any public law's conformity with right ... even if the people is at present in such a situation or frame of mind that, if consulted about it, it would probably refuse to give its consent." See also *The Metaphysics of Morals*, 6: 315-16, 339-41; Rawls, *A Theory of Justice*, 11.

¹⁰ We heard this several times from Donald Trump during the American Presidential election of 2016.

¹¹ On the notion "negative instruction in Kant, see Onora O'Neill. (1987). "Abstraction, Idealization and Ideology in Ethics," in J.D.G. Evans (ed.). *Moral Philosophy and Contemporary Problems*. Cambridge: Cambridge University Press, 60

¹² Kant, "Theory and Practice," 8: 297.

¹³ Chambers, "Democracy, Popular Sovereignty, and Constitutional Legitimacy."

¹⁴ [Wolin?].

participation, and it must be continuous and iterative over time.¹⁵ This is why it is difficult to understand both contractarianism and populism as presented above as truly or fully democratic interpretations of popular sovereignty. Both of these traditions invoke "the people" in a way that is independent of and does not require that people actually participate in an opinion and will forming political processes. I don't claim that the two traditions are against popular participation of all kinds, but only that they operate with a notion of popular sovereignty, which appeals to "the people" in a way that is independent of actual political procedures of popular involvement.

When we think of actual involvement of and participation by the people, rather than a hypothetical notion of the choice of rational beings or an equally fictitious idea of the wants of a unified people, we must take seriously *the fact of disagreement*. The fact that the people is a plurality of different individuals and that they disagree on most political issues are fundamental "circumstances of politics."¹⁶ Under free and democratic institutions, people will not only have divergent ideas of what constitutes a good and fulfilling life for each one of them; they will also disagree on how they ought to live together. Given this circumstance of politics, any claim to be implementing the will of the people or doing what the people want will be a case of ignoring a part of the people, of disregarding dissenting voices. The people who get what they want in politics will at best be a *part of the people*. Claiming to speak for "the people" is therefore an act of exclusion. We cannot say that any single decision made at a single point in time – any particular law or any particular government – expresses the actual will of the whole people, when we acknowledge that "the people" is a plurality of persons who disagree on what is right and just to do as a people.

A further issue to take into account when we consider participation in politics by actual people in their plurality as part of the principle of popular sovereignty is that such a people has no existence prior to or independently of the political institutions whose source of authority they are supposed to be. Without legal institutions and decision procedures, "the people" is not delimited and cannot act, but will be, in Stephen Holmes' words, "an amorphous blob."¹⁷ In order for power to be vested in "the people" in large and socially complex societies, we need a common, public and legal framework, a constitution, which defines who the people is and that establishes

¹⁵ Timothy Stanton, in Bourke, Richard, and Quentin Skinner, eds. *Popular sovereignty in historical perspective*. Cambridge University Press, 2016, 324-25.

¹⁶ Waldron, *Law and Disagreement*, 101-3, 105-6.

¹⁷ Holmes, *Passions and Constraint*, 1995, 167, cf. 148.

procedures through which the people can act *as a people*, for themselves and by themselves.

According to Holmes, "the constitution is an instrument of self-government, a technique whereby the citizenry rules itself ... A collectivity cannot formulate coherent purposes apart from all decision-making procedures."¹⁸ This is right, but the dependence of popular sovereignty on common legal-political institutions is deeper than this. Holmes views the constitution in *instrumental* terms, but to view political decision procedures as a mere means by which a people can govern itself fails to take full account of the fact that "the people" first come into being with the establishment of common political institutions and decision procedures. The instrumental view of political institutions still operates with a pre-institutional notion of "the people" and popular sovereignty. In order to go beyond the latter notion, we must regard political institutions as *constitutive* of "the people" and popular sovereignty. Democratic and legal institutions do more than make it possible for people to formulate coherent purposes and make decisions together; they create "the people." This means that we cannot understand the principle of popular sovereignty as a purely moral and non-institutional ideal. Rather, we must understand popular sovereignty as a political-legal or constitutional ideal; that is, as an ideal for how a plurality of persons who are created as "the people" by public rules should be related to one another by public institutions, and as an ideal for how they should relate to one another under these institutions, including their rights and duties vis-à-vis one another.¹⁹

While I have indicated some limitations to the interpretations of popular sovereignty and "the people" in, respectively, the social contract tradition and populism, I don't want to suggest that these interpretations are entirely without merit or that they should be abandoned entirely. Both appeals to a hypothetical people of free and equal rational beings and to real and ordinary people have their place in democracy. Later, I return to the question of exactly which place they should have in our understanding of popular sovereignty and democracy. Here my aim has been to show that both of the mentioned interpretations of popular sovereignty are insufficient and, when standing alone, also misleading and even dangerous for democracy. Therefore, the next section will consider an alternative way of interpreting popular sovereignty, which takes seriously, what the other two

¹⁸ Holmes, *Passions and Constraint*, 167.

¹⁹ See Rostbøll, "Kant, Freedom as Independence, and Democracy," *The Journal of Politics* 78, No. 3 (2016): 792-805.

interpretations deny or abstract from, namely the institutional character of democratic politics and the fact of disagreement.

III. The Practice of Compromise

The third way of understanding popular sovereignty and democratic politics, which differs from both the contract tradition and populism, regards conflict and disagreement as fundamental and intractable elements of politics. It rejects that agreement among people can be found by abstracting from these conflicts or that disagreement can be dissolved by rational argument. Moreover, this tradition tends to focus on and describe what actually happens in institutional politics in a representative democracy. For both of these reasons – that disagreement is regarded as intractable and the concern with institutional politics in representative democracy – this tradition gives pride of place to the practice of compromise in politics.²⁰ Compromises do not dissolve disagreement but tolerate them, and in actual institutional politics, compromises are ubiquitous. This tradition tends to be skeptical of any talk of "the will of the people" and of the idea of popular sovereignty.²¹ Nevertheless, I think it is worth investigating the idea and practice of compromise as an alternative interpretation of popular sovereignty. In particular, the tradition (or traditions?) in which compromise is central puts at the center of our attention what the two other traditions neglect, namely the fact of disagreement and the workings of actual representative democratic institutions.

Here, the approach is to begin with the observation that in actual democratic politics, decisions are reached by way of compromise between disagreeing parties rather than being an expression of a consensual will of the people. In representative democracies, compromises are struck between and within different political parties in order to form a government and to gather enough votes to pass legislation. The connection between party politics and compromise was most prominently developed by Hans Kelsen.²² In Kelsen, conflict of interests is the basic fact of democratic politics, and the only way to avoid rule by one interest at the costs of others is to make a compromise among different interests. Political parties are, for

²⁰ The most prominent example of this view of democratic politics, as based in compromise, is Hans Kelsen, *The Essence and Value of Democracy* (2013); cf. Ragazonni in Rostbøll and Scavenius, *Compromise and Disagreement in Contemporary Political Theory*, 2017 (forthcoming).

²¹ Max Weber, who can be seen as a representative of this tradition, for example, regarded "the will of the people" as a fiction. Stanton 2016, 325.

²² Kelsen 2013; cf. Manin, *The Principles of Representative Government*, 1997, 206-18.

Kelsen, the precondition for organizing diverse interests and for making compromise between the latter possible.²³ The positive valuation of political parties and partisanship can be seen in contrast to both most of the older tradition of Western political thought, which was wary of parties and partisanship,²⁴ and to contemporary populism, which prefers a direct, and unmediated relation between leaders or the state and the people.²⁵

I focus on compromise as a political notion in the sense that it takes outset in the political circumstance of disagreement among a politically constituted people who, in their plurality, must find ways of acting together by making common decisions under and through shared political institutions. On this basis, I define compromise as an agreement in which all sides make concessions in order to be able to reach a collective decision, and in which the concessions are motivated by the presence of disagreement.²⁶ One might raise questions regarding whether the concessions must be equal and voluntary, product of reasoning or bargaining, in order for the agreement to be called a compromise.²⁷ But here we can leave those issues aside. The crucial point is to distinguish compromise from consensus. It is the notion that the concessions are motivated by disagreement that distinguishes a compromise from a rational consensus, in which one is motivated solely by the merits of the reasons concerning the subject matter.²⁸ A core impetus behind the practice of compromise is the acknowledgement that "[w]hen an issue is in dispute there is more to be considered than the issue itself."²⁹ The very fact that people disagree on most issues, combined with the need for common action and upholding shared institutions, is what explains the necessity and ubiquity of compromise in politics.

Both the social contract tradition and compromise theorists acknowledge conflicts of interest and disagreement. What differentiates these two approaches to finding agreement is that the contract theorists suggest that we abstract from differences

²³ Kelsen 2013: 40.

²⁴ Rosenblum, *On the Side of the Angels*, 2008.

²⁵ Urbinati, *Democracy Disfigured*, 2014, chap. 3. [Caramani 2017]

²⁶ See Rostbøll and Scavenius, "Introduction," in *Compromise and Disagreement in Contemporary Political Theory*.

²⁷ For different positions on this issue, see Richard Bellamy, "Democracy, Compromise and the Representation Paradox: Coalition Government and Political Integrity." *Government and Opposition* 47, no. 3 (2012): 441–465, at 448-9; Jones, P. and I. O'Flynn. "Can a Compromise be Fair?" *Politics, Philosophy & Economic* 12, no. 2 (2013): 115–135; Weinstock, "On the Possibility of Principled Moral Compromise." *Critical Review of International Social and Political Philosophy*, 16, no. 4 (2013): 537–556. [check these refs] [Weinstock 2017: 2-3: compromise must be noncoercive to be morally attractive]

²⁸ Habermas, *Between Facts and Norms*, 1996: 140-41, 166, 338-39.

²⁹ Arthur Kuflik (1979, 51).

and suppress information "which sets men at odds,"³⁰ while the aim of compromise is to embody the disagreements among people who know who they are and what they want. In contrast to the ideal of consensus, compromise neither abstracts from disagreement nor overcomes it with the force of the better argument. When a compromise has been reached, the parties keep believing that their initial position was wiser or more in line with justice than the compromise solution. If the parties come to believe the agreed-upon option as better than their initial position, then they would not need to compromise – they would have reached a consensus.³¹ A compromise differs from a consensus exactly by the fact that there is no convergence of the parties' beliefs around the superior substantive merits of one and the same option. The parties only accept the compromise agreement, because they could not convince each other of their own preferred option. Thus, while a consensus eliminates disagreements, a compromise embodies them.³²

Populist leaders tell their followers that the reason why they, the people, do not get what they want is that the elite is corrupt and self-serving. The claim that the elite is corrupt and self-serving may and may not be well founded, but to raise and discuss the issue is certainly legitimate and important for democracy.³³ However, the fact of disagreement and the need for compromise in politics point to the reality that in democratic politics no one gets her preferred option. Thus, we must remind ourselves, and in particular populist leaders and followers, that even if political representatives are not corrupt or self-serving, the people will not get exactly what they want. And this is not merely a problem of representative democracy. Referendums also do not give the whole people what they want, unless they are unanimous, which never happens in free, democratic countries.

Notice that the point is not merely that a compromise does not give the people all they want but also that it does not give them what they think fair. The fact that people cannot get all they want has to do with the Humean circumstances of justice such as moderate scarcity,³⁴ which is independent of the need for compromise in politics. The type of political compromise that is our concern is interpersonal compromise, that is, compromise between different persons or parties. This notion of compromise should be distinguished from another use of "compromise," namely

³⁰ Rawls, *A Theory of Justice*, 1999, 17.

³¹ Rostbøll, "Compromise and Toleration," in *Compromise and Disagreement in Contemporary Political Theory*.

³² Gutmann and Thompson, *The Spirit of Compromise*, 2012, 12.

³³ Mény and Surel, in *Democracies and the Populist Challenge*, 2002, 5-6.

³⁴ Hume, *An Enquiry Concerning the Principles of Morals*, sec. III, part I.

compromise as prudence or compromise with circumstances.³⁵ The latter is the type of compromises one has to make when it is impossible to realize all one's plans or principles, not because others disagree about their value, but because objective conditions make it impossible for them all to be realized.³⁶ Political decisions, of course, must take objective conditions into account and can therefore not give people all they want.³⁷ But the important point here is that a political compromise also cannot give people what they regard as fair and still be a compromise. If all agreed that the outcome were fair, they would not need to compromise but would have converged on a shared notion of fairness, that is, they would have reached a consensus.³⁸

"Compromise" might refer both to an outcome and to a process, but in the standard sense, "an outcome characterized as a compromise is reached as a result of the contending parties' participating in a procedure, also called a compromise."³⁹ It is this standard sense that interests me. It makes clear that compromise is not merely an agreement that embodies disagreement; it is also an actual participatory process of coming to such an agreement. In the standard sense, and as I have defined it above, compromise refers to an actual agreement among two or more persons, and as such it requires more than the mental process of accepting something. It requires the actual performance of entering into an agreement with other people.⁴⁰ In this sense, compromise is something *arrived at* and *agreed to*.⁴¹

The fact that a compromise is something arrived at by an actual process among diverse people distinguishes compromise from the hypothetical and fictitious agreements of the social contract tradition and populism. The advantage of interpreting popular sovereignty and the will of the people as a compromise, compared to the other two interpretations, is that it includes an actual procedure of reaching agreement and actual consent. This interpretation accentuates the point that we cannot refer to some merely presumed or idealized agreement as "the will of the people." Moreover, interpreting popular sovereignty as compromise highlights that and how we must be able to point to an actual political process of coming to

³⁵ Benjamin, *Splitting the Difference*, 1990, 10-12.

³⁶ Of course, which circumstances are objective and unchangeable and which are malleable will itself be a matter of dispute, but the distinction is still important.

³⁷ Kelsen uses "compromise" in both senses – interpersonal and with circumstances – without properly making the difference explicit.

³⁸ Cf. Jones and O'Flynn 2013.

³⁹ Benjamin 1990, 5.

⁴⁰ Fabian Wendt, *Compromise, Peace, and Public Justification*, 2016: 16-17; Wendt in *Compromise and Disagreement*.

⁴¹ Cf. Weinstock in Rostbøll and Scavenius 2017; Jones and O'Flynn 2013, 119-20.

agreement and an actual agreement, before we can say that the people will something. Most, if not all, political processes of coming to actual agreement among a plurality of people involve compromise. Of course, the fact that a compromise has been agreed to after a process of compromise does not mean that it is the people as a whole, or all the members of the people, who are the source of the compromise, which is an issue I return to. Here I simply note the importance for popular sovereignty as a democratic ideal – as an ideal of government by the people – to be thinking of a process in which different persons are actually reaching an agreement and that we can see compromise as a possible and politically viable example of this.

Compromise as an actual agreement realizes an ideal of voluntarism that is beyond the reach of hypothetical agreements.⁴² Insofar as a political decision is a product of a compromise, it is possible to say that there is a *fact of agreement* and that this fact confers legitimacy on political decisions, beyond the issue of the substantive merits of the decision made and the external consequences of making a compromise (e.g. peace and stability). The fact of agreement realized by compromise can confer legitimacy on political decisions because of its voluntaristic aspect, that is, "that it is a way of tracking the presence of a certain relation between fellow citizens."⁴³ The most common way of understanding this relationship between fellow citizens is with reference to a norm of mutual respect. By compromising with our fellow citizens and giving compromise obligatory force, we show concern and respect for one another.⁴⁴

If we interpret popular sovereignty in light of this understanding of compromise, that is, if we regard the will of the people as formed by a compromise that embodies and respect disagreement, then it entails respect for the plurality and diversity of society. Thus, there might be a *moral reason* for understanding popular sovereignty as a compromise, namely that it implies a norm of mutual respect. This also means that the reason to compromise is not some relativistic idea of that everyone is equally right, but rather a moral idea of that no one has the right to decide unilaterally who is right. The latter is based on a commitment to the individual right to form one's

⁴² Rossi "Consensus, Compromise, Justice, and Legitimacy." *Critical Review of International Social and Political Philosophy* 16, no. 4 (2013): 557–572, at 561-62, cf. Jones and O'Flynn 2013, 119-20, 127.

⁴³ Rossi 2013, 562.

⁴⁴ Rostbøll, "Democratic Respect and Compromise," *Critical Review of International Social and Political Philosophy* 2017. E-pub ahead of print.

<http://dx.doi.org/10.1080/13698230.2017.1328092>

own view of the good and the right.⁴⁵ This should be seen in contrast to both the relativistic defense of compromise in Hans Kelsen and the value pluralism of some contemporary defenders of compromise.^{46, 47}

IV. Limits of/to Compromise

If the analysis above has some merit, it is worthwhile rethinking popular sovereignty in light of the practice of compromise in democratic politics. That is, it is worth thinking of popular sovereignty as something that – at least partly or as one of its moments – depends on compromises in politics and which realizes the value of respecting the diversity of society. However, there might be some tensions, paradoxes, and pitfalls in giving compromise pride of place in our understanding of popular sovereignty and democratic politics. In this section, I discuss some of these problems, which are both theoretical and institutional. I show that there are limits to the value of interpreting popular sovereignty as a compromise and argue that there should be limits to compromise in actual democratic politics. This discussion will motivate a reconsideration of the place of consensus in our understanding of popular sovereignty and democratic politics.

I have presented compromise as a response to the fact of disagreement, but this defense of compromise might turn out to be incoherent. If disagreement is profound and touches on issues of fair procedures or the norm of equal respect – or on what these means and requires – there is no reason to think people will agree on the value of compromise.⁴⁸ Political disagreements might be just as profound

⁴⁵ Rostbøll, "Compromise and Toleration."

⁴⁶ For a critique of the idea that there is an internal relationship between value pluralism and the defense of compromise, see Overeem in Rostbøll and Scavenius 2017.

⁴⁷ Thus, the emphasis on the empirical circumstance of disagreement should not be confused with the meta-ethical notion of value pluralism. A defense of compromise need not be committed to the idea that values are plural, incompatible, and incommensurable, but can be based on the empirical fact that free citizens tend to disagree about political issues. To defend compromise, this empirical fact must be combined with the normative premise that people should have the right to form and express their own political opinions. Thus, the issue is not whether all values could converge, but rather whether we should respect the empirical fact that free people disagree. I take it as a basic democratic norm that democratic procedures should respect citizens' autonomy to think and decide for themselves and that no one can impose a true answer about their common good from some point outside these procedures. But this is not to say that there are no correct answers in politics.

⁴⁸ Mason, "Rawlsian Theory and the Circumstances of Politics." *Political Theory* 38, no. 5 (2010): 658–683, at 683 n35; Rostbøll and Scavenius, "Introduction."

regarding what counts as fair procedures, as they are about issues of fair outcomes. In addition, some people think that reaching a fair decision is more important than any purported value of compromise – and every compromise, by definition, violates some people's idea of a fair outcome. In light of this, it is insufficient to say that compromise is justified by the fact of disagreement. On the one hand, some people might see no reason to respect this disagreement regarding outcomes; on the other hand, some people might say that their own dissent regarding the right procedure has not been respected. I see no way to solve this problem without appeal to a shared norm that transcends our disagreements and explain why we must respect disagreement, for example, by compromising. As Habermas writes, "even compromises must be grounded, and what grounds the acceptance of compromise?"⁴⁹

Some writers on compromise believe we *can* avoid any appeal to shared or consensual norms. They rightly point out that if the parties regard an outcome as fair, it is not a compromise – a point I also made above. However, these defenders of compromise, for example, Bellamy, also note that in a compromise, "There is an *acceptance* that all are *entitled* to disagree and that we must reach collective agreements in ways that respect our disagreements."⁵⁰ For Bellamy, this acceptance does not amount to the fact that the parties regard compromising as fair. However, the parties are clearly agreeing on something, namely on an *entitlement* to disagree and "a process characterized by mutual respect."⁵¹ Moreover, they are accepting that in a politics of compromise an adherence to the outcome of this process must trump one's first-order policy preferences.⁵² Thus, a justification of compromise depends on some underlying normative agreement. As I have already suggested, this could be an agreement on a notion of mutual and equal respect. When it comes to the interpretation of popular sovereignty, the latter must also incorporate some idea of respect for difference and disagreement, which is a respect for the freedom and equality of citizens. But then we are moving back towards notions inherent in the consensus ideal of the social contract tradition.

Moreover, unless we regard the process of compromise as backed by some norm, it is difficult to see any normative difference between bargaining and compromise – a difference that most contemporary writers on compromise emphasize and make with reference to ideas such as that in compromise, in contrast to bargaining,

⁴⁹ Habermas, *Between Facts and Norms*, 294.

⁵⁰ Bellamy 2012: 457, emphases added.

⁵¹ Bellamy 2012, 457.

⁵² See my "Compromise and Toleration."

concessions are unforced and the result not merely based on the balance of power.⁵³ In the older tradition of Kelsen, compromise was seen as a matter of bargaining among different interest positions. However, if we reduce politics to bargaining among diverse interests, we lack both an idea of principled justification of one's position and of limits to acceptable political outcomes. Whatever would result from the political competition and the balance of power among different parties would have to be accepted as legitimate and right.⁵⁴ We have two problems here. (1) Not all processes of reaching a compromise respect disagreement in the same way or to the same degree. Unless we have a norm of equal respect or the like, we have no *moral* reason to prefer one process to another, for example, a non-coercive process over mere bargaining. (2) If our norm for judging a compromise is only procedural, then we might have to accept as legitimate an outcome, which in itself violates the very same norm that justified the compromise. For example, a *compromise process* that accommodates all positions equally does not necessarily lead to a *compromise outcome* that treats all persons with equal respect.⁵⁵ Similarly, popular sovereignty as a process of compromise might respect the disagreements among the people, but the outcome of this is not necessarily laws that treat people with mutual and equal respect. (If the opinions that are equally accommodated do not themselves endorse equality, then the compromise between them will not as an outcome respect all citizens equally.)

A further drawback of interpreting democratic politics as compromise is that it could undermine the potential deliberative aspect of politics. When citizens elevate compromise to the *goal* of democratic politics, this means that they have given up on the possibility of convincing each other of the merits of their respective answers to common political problems. Instead, they have accepted that no correct answer can be found or agreed to. This disposition undermines the logic of deliberation, in which citizens exchange reasons in order to convince each other of the one right answer to the question at hand. If the parties do not assume that there is one right answer, it is difficult to see what the point of mutual reason giving could be.⁵⁶ Another way to put this point is to say that there is a tension between regarding the political process as being "merely" about accommodating people with different views and interests, on the one hand, and of regarding politics as a matter of learning and improving the quality of political decisions, on the other hand.

⁵³ Bellamy; Rostbøll and Scavenius 2017; Weinstock 2017 2-3 [not on definition of compromise but its moral attractiveness].

⁵⁴ White and Ypi, *The Meaning of Partisanship*, 2016: 150- 163.

⁵⁵ Rostbøll, "Compromise and Toleration."

⁵⁶ Habermas, "Reply to Symposium Participants, Benjamin N. Cardozo School of Law," 1998: 396. But Habermas includes compromise as part of deliberative politics, 394-5.

A second set of problems in understanding popular sovereignty as compromise is related to the institutional locus of compromise and, thereby, to the question of who actually can and do participate in the process of compromise. Kelsen, for example, thought that compromise is something that takes place *in parliament* between political parties. More recently, Gutmann and Thompson connect compromise to *governing* and contrast both to campaigning.⁵⁷ Thus, the locus of compromise is commonly regarded as being *formal institutions* of decision-making, law making, and governing, and something that happens among *leaders* or representatives, rather than the people at large. Indeed, involving the people, appealing to the people, mobilizing the people, and getting the people to vote are seen as having a different logic than compromise and as inimical to "the spirit of compromise." However, as Gutmann and Thompson also note, *both* governing and campaigning are essential aspects of representative democracy. Thus, if we see politics as compromise, this has the risk of reducing democracy to the negotiations of representatives and political leaders in formal institutions of government.

The reduction and isolation of politics to the compromises of party leaders in government institutions can create the separation between ordinary people and political elites to which populism is a response. The problem arises when ordinary people can see no connection between their own concerns and political opinions, on the one hand, and the agreements made among political elites, on the other hand. The challenge is that it is difficult to make the people own the compromises made in government institutions. How can these compromises be seen as some they, the people, have made? One idea that we should avoid here is the idea that parliament or party politics is an embodiment of popular sovereignty.⁵⁸ Thus, we should not say that any actual compromise made in politics is "made by the people" or is "an expression of the will of the people." Indeed, every political agreement made by political leaders can and should be judged by the citizenry outside parliament, by citizens as members of the general public, in terms of whether it (the agreement) actually does express their opinions and will.⁵⁹ Such a judgment presupposes some extra-institutional, non-procedural, and non-compromise standard, which has a consensual aspect to it. Consensus is an ideal that overshoots any actual decision, and which can be used to criticize it. "Compromise" cannot fulfill this role.

⁵⁷ Gutmann and Thompson (2012).

⁵⁸ On this idea, see Bourke 2016, 8-9.

⁵⁹ [Manin 174, 192.]

This points to another problem about seeing popular sovereignty *exclusively* as a process of compromise, namely that the latter has difficulties in accounting for the democratic significance of the informal public sphere of civil society. As Habermas has argued, the informal public sphere plays an essential role in modern constitutional democracy, and it does so by having a different but complementary function and purpose than the formal public sphere of parliament.⁶⁰ While the deliberations of the formal public sphere are aimed at solving problems by reaching agreements and making decisions, the actions and deliberations of the informal public sphere of civil society are aimed at discovering problems, probing and challenging arguments, contesting and disrupting existing power routines. Thus, the activities and deliberations of social movements and other civil society actors cannot be seen as aimed at compromise formation. Indeed, their activities are not aimed at making decisions at all. Compromise belongs to the realm of will formation, whereas the informal public sphere is concerned with opinion formation. However, this does not mean that the latter is not an essential element of the exercise of popular sovereignty. As Nadia Urbinati has argued, in representative democracy "'will' and 'opinion' are the two powers of the democratic sovereign"; while "they are different and should remain distinct, [they are] in need of constant communication."⁶¹

The actions of the informal public sphere might be said to be part of the exercise of popular sovereignty mainly in a negative way, that is, as a way of contesting the claims of political leaders that decisions made in formal institutions express the will of the people.⁶² Thus, the public might contest compromise as an outcome ("That compromise is *not* what we the people want. That is *not* a solutions to our problems"), or to compromise as process ("That process did *not* provide sufficient justification for those policies. That political process did *not* include or consider our concerns"). Again, we cannot understand such processes of public judgment and contestation merely in terms of compromise, since they appeal to norms of what the people want as well as ideals of justification that both point to a consensual ideal that transcends the idea and practice of compromise.

While the idea that the people as a public should be able to pass judgment on decisions made by representatives and be able to contest the claims that these decisions express the diverse interests and opinions of the people is crucial and gives ordinary people a role in representative government, this role is still rather

⁶⁰ Habermas BFN, chaps. 7-8. [see also Urbinati and Warren 2008: 393].

⁶¹ Urbinati 2014, 22; see also Habermas, BFN 442, [ref. to Maus].

⁶² [See Urbinati and Warren 2008: 403 on negative power of the people.]

limited. Here the role of citizens is merely a reactive one, contesting already made decision in public debate and using the vote retrospectively, as a judgment of what the representatives have done and decided.⁶³ In order for the public sphere to have a more active and positive role, the debates, negotiations, and compromises among representatives in parliament must be "porous, sensitive, and receptive to the suggestions, issues and contributions, information and arguments that flow in from a discursively structured public sphere."⁶⁴ Thus, formal, representative institutions are merely the "organized midpoint" of debates that happens throughout society.⁶⁵ These society-wide debates are important aspects of the exercise of popular sovereignty and cannot be thought of as compromises, even if the decisions made on the basis of them are compromises.

In this section, I have argued that there are limits to the value of interpreting popular sovereignty as a form of compromise. The argument has focused on two points. First, the notion and practice of compromise run into problems of coherence regarding the very justification of compromise. If the reason for compromise is disagreement, how do we justify compromise to those who reject its value? If the reason for compromise is respect for diversity, why accept as legitimate compromise outcomes that don't respect diversity? Second, conceptions of politics with exclusive focus on compromise tend to have a narrowly formal and elitist conception of democracy, which give little role to voters and ignores the importance of the informal public sphere of civil society. For these reasons, while the notion and practice of compromise is valuable as a way of acknowledging the diversity of the people and as a reminder that no actual political decisions give people what they want or find right, compromise cannot stand alone as an interpretation of the idea and practice of popular sovereignty. In order to uphold the idea that political power emanates from the people, democratic practice must appeal to an ideal of consensus that reaches beyond and circumscribes any compromise.

V. Bringing Consensus Back In

I set out by arguing that we must reinterpret popular sovereignty in a way that entails actual involvement of the people, while acknowledging that the people disagree about political issues and that "the people" is constituted by, rather than given independently of, and acts upon itself through, legal and political institutions.

⁶³ [Manin, 179; Caramani in APSR 2017; Mansbridge]

⁶⁴ Habermas, BFN, 182.

⁶⁵ Habermas, BFN, 182.

The question, then, is what popular sovereignty can mean under conditions of disagreement and institutionalized politics. The social contract tradition and populism were criticized for not giving sufficient answers to this question. On this basis, I turned to the practice of compromise as a possible way of understanding the people as a plurality, and as something that denotes an actual process of reaching agreement among actual, empirical persons. However, we have also seen that there are serious drawbacks to the idea and practice of compromise. Actual compromises do not necessarily respect diversity, which is the norm that is supposed to justify them, and compromises tend to be made by the few in a form of institutionalized politics that offers little room for participation and influence to the many. For these reasons, I now reconsider whether we, after all, should not grant consensus a place in our interpretation of popular sovereignty.

The fact and complexity is that all the three traditions that we have discussed have some merit as interpretations of popular sovereignty, even if each also has its drawbacks and blind spots. Populists are right that political decisions must include the concerns of real, empirical beings in order to deserve being seen as emanating from the people. Social contract theorists are right that there should be limits to what real people or real majorities can decide, and that these limits can also be justified with reference to an ideal of popular sovereignty. As a minimum, majorities cannot be allowed to make decisions that violate the rights and institutions that are necessary for and constitute democratic politics and "the people" in the first place.⁶⁶ Finally, the compromise tradition is right to emphasize that most political disagreements are intractable, and that agreement cannot be presupposed but must actually be reached among and entered into by diverse parties. The question is whether we in one and the same system can include what the three traditions and interpretations of popular sovereignty get right and avoid what they get wrong. Here I can point only to a possible avenue for answering this question.

A first issue we must clarify is the relationship between popular sovereignty and formal political legal institutions. I have argued that "the people" has no meaning independently of the legal and political institutions that constitute it *as a people*. Moreover, popular sovereignty cannot be *exercised* without political decision procedures. This, however, does not mean that only what happens in formal political institutions is part of the exercise of popular sovereignty. The information gathering, contestations, protests, and argumentation among lay people in civil

⁶⁶ Cf. Habermas, BFN, 180: "in exercising their political autonomy citizens must not violate the system of rights that constitute this autonomy." [But note that Habermas is not a contract theorist].

society are also part of the exercise of popular power. However, we should remember that the latter activities happen not in the realm of decision-making but in the realm of opinion formation. These opinion-forming activities become part of the exercise of popular sovereign only when they are directed at and are successful in influencing decision making. Opinion is an "informal sovereign," and it cannot act and decide on its own.⁶⁷ Nevertheless, it is part of the political power of citizens, and it can be part of the exercise of popular sovereignty by *influencing* formal decision-making.⁶⁸ Thus, the opinion forming power of "the people" exists only in relation to formal institutions and decision procedures, which constitute the people in the first place and through which alone a people can act on itself.⁶⁹

The importance of opinion formation, of contestation and argumentation, is difficult to understand on a narrow model of compromise, which is about reaching decisions. Insofar as opinion formation takes place by appealing to "the concerns of ordinary people," or rely on moral arguments about "what reasonable people would do," they rely on notions of "the people" found in populism and social contract theory, respectively. Indeed, my suggestion is that consensual ideals of "the people" – whether populist or contractarian – belongs to the realm of opinion formation rather than to the realm of will formation or decision-making. Appeals to "the people" are claims about what actual people do want (populism), or about what people as free and equal rational beings would want (contractarianism). As part of the society-wide process of opinion formation and argumentation, such appeals may have inclusive and egalitarian effects. If they are well founded, they may have such effect and ought to have influence on decision-making.⁷⁰ But given the fact of disagreement, no particular opinion about what is the wish or will of "the people" can be allowed unilaterally to determine what should be decided. Nor can we say that any actual political decision is the expression of the will of the people. The important point here is to uphold the separation and distance between opinion and will, which in particular populists are so eager to collapse.⁷¹

Both populists and contractarian moral theorists can use their notions of the people and consensus as *outcome standards* to judge the results of the application of formal

⁶⁷ Urbinati 2014, 22, 27.

⁶⁸ Habermas, BFN, 363, cf. 371-2. [cf Cohen and Arato]

⁶⁹ According, to Urbinati (2014, 25): "Voting for or electing a representative is what makes the forum share in sovereignty and the reference point in relation to which opinion plays its role." However, this might be too narrow. Opinion can affect all parts of the political system, even if elections are central to representative democracy; cf. Habermas, BFN, 442.

⁷⁰ However, non-populist social movements can achieve the same, without the detrimental aspects of the populism – cf. Jean Cohen.

⁷¹ Urbinati 2014, 22, 24, 27, 131-2.

decision procedures. And doing so can be valuable contributions to public debate. But we should not forget that in a constitutional democracy, it is formal procedures that determine who is placed in positions of authority and can make authoritative decisions for society. This is not because formal procedures of elections, representation, and decision making necessarily lead to correct results. Formal procedures of decision-making do not determine who is right but only who gets to decide and what is decided. The fundamental reason for this has already been mentioned, namely, there is no way of ascertaining what people really want or what rational people would want without decision procedures. In large, complex societies, such decision procedures must be formalized. However, these procedures should also not be regarded as infallible guides to the true will of the people. That is why we should uphold the distinction and separation of opinion and will. If we collapse this distinction, there is no external point from which citizens can judge the legitimacy of political decisions. Citizens must as individuals always remain free to question whether or to what extent any decision reflects the will of the people, as they see it.⁷²

The above should not be understood in a positivistic or legalistic manner, as if we were saying that any actually existing constitutional democracy and any nominally democratic procedure actually realized popular sovereignty and were beyond reproach. First, we should note that the best democratic procedures are some that include the concerns of actual people, while also promoting reflection and deliberation.⁷³ Thus, the norms and ideals that justify the procedures of constitutional democracy draw on both populism and contractarianism. It follows from this, second, that the application of formal procedures can always be criticized from the perspective of ideals of popular sovereignty and consensus inherent in both populism and contractarianism. Of course, the opinions of populists and contractarians regarding what the people really want often clash. But this merely shows that there is no way of implementing the opinion of one side without exhibiting that the consensus and "the people" that they refer to in each their way is a fiction. It is for this reason that these appeals belong to the realm of opinion formation. Institutionally and as part of the democratic process, these claims belong to the discussions of the informal public sphere and to the process of campaigning. But when it comes to will formation and governing, we must accept that not everyone agrees with our own understanding of what "the people" want and be open to compromise formation. In this way, one acknowledges the separate

⁷² [See Habermas, BFN, 324.]

⁷³ Dahl, *A Preface to Democratic Theory*, 56-57.

dimensions of popular sovereignty, that is, the distinction between and institutional separation of opinion and will formation.

Here, we must return to two challenges to the notion and practice of compromise. First, what could motivate people who have substantive ideas about what the people want or should want to do to compromise with people who have different ideas about this question? I am not concerned here with empirical reasons such as that disagreement blocks one party's ability or power to implement its idea of what the people want. Rather, I am concerned with a reason to compromise that is consistent with and follows from the notion of popular sovereignty that the party wants to promote. Now, if a party wants to promote "the will of the people" but in the process of opinion formation learns that others have divergent views of what the people want, the party can only implement its view of the popular will at the cost of ignoring or excluding parts of the people. This contradicts the party's own alleged aim. The only normatively coherent response seems to be to accept a compromise that includes the views of other parts of the people (or other political parties).⁷⁴ This, however, gives compromise a consensual basis, that is, it grounds compromise in norms of inclusion and respect for disagreement. But that is unavoidable.

The second challenge in justifying compromise can be seen most clearly from the perspective of social contract theory. The contract theorist could ask, Why should I accept a compromise that violates what free and equal rational beings would accept? I have already argued that there should be moral limits to compromise. This does not mean that we should accept only compromises that free and equal rational beings could accept. First, we don't know exactly what such beings could accept. Second, contractarian constraints should not be seen as positively determining what political decisions should be made, but rather as a negative instruction regarding which decisions should *not* be made. If we regard compromise as justified with reference to norms of inclusion and equal respect, as I just argued we should, this grounding already entails some limits to which compromises should be made. If the reason for promoting compromise in politics were to include the opinions of all parties and respect the diversity of society, it would be contradictory to accept compromises that do not respect this diversity.⁷⁵ Again, despite what some proponents of compromise say, I don't think we can make this argument without presupposing some underlying normative consensus that can justify compromise in politics. That is, we cannot have disagreement and compromise all the way down, as it were.

⁷⁴ See my "Democratic Respect and Compromise."

⁷⁵ Rostbøll, "Democratic Respect and Compromise."

I have suggested that we place populist and contractarian appeals to "the people" in the realm of opinion. Such appeals have value as standards that can be used to judge actual political decisions. However, insofar as these references to the will of the people are *outcome standards*, it is unclear that they entail an ideal of actual involvement by the mass of the people. Populists often criticize current political practice for being conducted by an elite who is remote from ordinary people. However, populist leaders tend not to open up for more actual participation by the mass of ordinary people. Rather, they tend to be or to vote for leaders that they believe are closer to and better understand the concerns of ordinary people.⁷⁶ In this way, populism does not involve a more participatory form of politics than we find in the practice of elite compromise. Thus, we must go beyond all of our three traditions in order to find a form of politics that not merely serves the people or respect their diversity but actually includes them as participants in the exercise of popular sovereignty. I have already pointed to one possible way of including the people in politics, namely *as participants* in the opinion forming processes of civil society. As participants in the formation of public opinion, they will not be directly involved in making compromises, but they will be able *ex ante* to influence the opinions that go into the compromises and to judge the compromises *ex post*. As voters, they also will be able to judge the compromises of their representatives. This, of course, requires, as already noted, that political representatives in the realm of decision-making are open and receptive to the information, suggestions, and arguments generated in and supplied by the public sphere.

⁷⁶ This point is made by Müller 2016, 29-30. [However, Canovan suggests a more participatory understanding of populism.]