

Lilliputian Travels: Constitutional Imaginary, Democratic Theory and the Asymmetric Cross-Border Political Participation

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[Is there] not after all some wisdom in the half-serious comment of a friend in Latin America who said that his people should be allowed to participate in our elections, for what happens in the politics of the United States is bound to have profound consequences for his country? Do not dismiss his jest as an absurdity.
-Robert A. Dahl

Barbarous philosopher: try reading us your book on the field of battle.
- Jean-Jacques Rousseau

Introduction

For most laymen, lawyers and theorists who value the ideas of collective self-determination and popular sovereignty, the factual and legalized hegemony of powerful states is perhaps an uncomfortable, but nonetheless unavoidable fact of life.¹ For some, it even merits a half-enthusiastic embrace.² Scholars who have implicitly or explicitly problematized it, however, have done so in six mutually non-exclusive ways. First, they have recognized it as a problem, but have reminded their audience of the achievements of the principles of sovereign equality and non-intervention, and have warned of the risks associated with bolder reformist proposals.³ Second, they have prognosticated or desired the return of the balance of powers, hoping that the emergent powers act as a counterpoise to the domination of the United States, the predominant among powerful states.⁴ Third, they have proposed the development of new legal norms, such as *jus post*

¹ For the most influential analytical, non-normative analysis of the problem see G Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Order* (Cambridge UP, 2004). For Simpson's reflections on the conflicting normative implications of his work, see G Simpson, 'Great Powers and Outlaw States Redux' 43 *Netherlands Yearbook of International Law* (2012) 83.

² U Preuss, 'Equality of States—Its Meaning in a Constitutionalized Global Order' 9 *Chicago Journal of International Law* (2008) 17; A Skordas, 'Hegemonic Intervention as the Legitimate Use of Force' 16 *Minnesota Journal of International Law* (2007), 407.

³ B Kingsbury, 'Sovereignty and Inequality', 9 *European Journal of International Law* (1998), 599; B Roth, *Sovereign Equality and Moral Disagreement* (Oxford UP, 2011); N Krisch, 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order' 16 (3) *European Journal of International Law* (2005), 370.

⁴ M Delmas-Marty, *Ordering Pluralism: A Conceptual Framework for Understanding the Transnational Legal World* (Hart, 2009). R Unger, *What Should the Left Propose?* (Verso, 2006). Some would,

*bellum*⁵, the responsibility to protect (R2P)⁶, or remedial self-determination⁷, which would limit great powers' margin of discretion in contexts where their involvement produces the most dramatic political consequences. Fourth, more ambitiously, they have called for bold reform of international institutions⁸, or, more modestly, have encouragingly described existing legal trends towards a more accountable international order.⁹ Fifth, they have proposed the mobilization of legal rationality inherent in one branch of the law (administrative law), its migration to the international scene, and its implantation into the existing legal processes that have the potential to restrain the negative effects of great powers' hegemony.¹⁰ Sixth, they have put faith in the courts—domestic or international—as privileged points of entry for other-regarding, universalistic considerations which have the potential to alter the outcomes of domestic political processes, and make great powers more responsive towards the polities and groups outside of their boundaries which they adversely affect.¹¹

None among the six approaches have envisaged—as a conceptual possibility, political opportunity, or a moral desideratum—direct political participation of weaker polities or constituencies in the political processes of great powers that adversely affect them. Only quite recently, a version of this possibility has begun attracting attention in international legal theory.¹² In reimagining states as the trustees of humanity, and unearthing the trends in recent international jurisprudence that corroborate it, Eyal Benvenisti has suggested that sovereign states should be held accountable to external actors for the adverse effects they produce outside their borders.¹³

In this paper, I support and further defend the institutional implication of Benvenisti's argument: a call for cross-border political participation. However, I take

indeed, argue that we live in a fully multipolar world, where the talk of 'great' or 'dominant' powers increasingly fails to represent the reality of shifting international power architecture. For a rejection of this view, see U Ozsu, 'The Politics of Multipolarity' 107 *American Society of International Law Proceedings* (2013).

⁵ C. Stahn, et al, *Jus Post Bellum: Mapping the Normative Foundations* (Oxford UP, 2014).

⁶ J Pattison, *Humanitarian Intervention and the Responsibility To Protect: Who Should Intervene?* (Oxford UP, 2010).

⁷ A Buchanan, *Justice, Legitimacy and Self-Determination* (Oxford UP, 2003).

⁸ J Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy and Constitutionalism* (Cambridge UP, 2012).

⁹ J Klabbers, A Peters, G Ulfstein, (eds) *The Constitutionalization of International Law* (Oxford UP, 2009).

¹⁰ B Kingsbury, N Krisch and R Stewart, 68 (3-4) 'The Emergence of Global Administrative Law' (2005) *Law and Contemporary Problems* 15.

¹¹ S Benhabib, *Another Cosmopolitanism* (Oxford UP, 2006), 49; B de Sousa Santos, *Toward a New Common Sense*, K Nash, *The Cultural Politics of Human Rights: Comparing the US and UK*. (Cambridge: Cambridge University Press, 2009).

¹² Although infrequently, similar proposals have been voiced before in the field of political science. See P Schmitter, 'The Future of Democracy: Could it be a Matter of Scale?' 66(3) *Social Research* (1999), 933. Also, the disciplines such as critical human geography are increasingly questioning the inherited spatial assumptions of affectedness, see C Barnett and G Bridge, 'Geographies of Radical Democracy: Agonistic Pragmatism and the Formation of Affected Interests' 103 (4) *Annals of the Association of American Geographers* (2013), 1022. Finally, similar proposals have, as of late, been increasingly voiced in democratic theory. See my discussion, *infra* in section 2 of the paper.

¹³ E Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders' 107 *American Journal of International Law* (2013), 295.

Christopher McCrudden's political objection to Benvenisti's proposal seriously. For McCrudden, one of the important problems with Benvenisti's proposal is that it clearly 'applies to all states equally. The United States [for example,] would be under an obligation to the citizens of Haiti, but Haiti would also be under obligation to the United States.' This symmetry of cross-border political participation might lead to 'a return of neo-colonialism', and result in weaker states 'losing out'.¹⁴

Like Benvenisti, but unlike McCrudden, I agree that cross-border political participation is necessary to respond to the negative externalities produced by various policies of sovereign states. Unlike Benvenisti, I insist on *asymmetric* cross-border political participation: though powerful states should be prevented from formalizing and expanding their already great political influence in the affairs of weaker polities, those polities, together with other adversely affected territorial and non-territorial constituencies should have a robust political presence within powerful states' constitutional orders. In contrast to Benvenisti, I reject the reliance on 'humanity' in legitimizing state sovereignty and in reconciling external political participation with the idea of self-determination.

Instead, the call for *asymmetric* cross-border participation is justified on two accounts. On the one hand, it should be seen as a structural response to the overarching value of global political pluralism. For such pluralism to flourish, it needs to be complemented by the devices that moderate regional or global hegemonies. On the other hand, asymmetric participation is an appropriate, though not exclusive, response to the negative externalities those powers inflict on the weaker polities beyond their borders. The theoretical concept that best captures this proposal is the principle of affected interests, not humanity. Instead of being seen as justifying the creation of a world state, or the disaggregation of existing ones, however, this concept helps structure the range of political and legal options that can be pursued in the name of global political pluralism.

The scope and content of the proposed asymmetric political participation may, for different reasons, be quite modest, but defending this argument is difficult. A significant part of this difficulty stems from our dominant intuitions about the proper workings of collective self-government. Though most radical reformist proposals in international law structure and constrain popular self-government, they do so by continuing to preserve the legally delimited sphere, whatever it may be, for its *undisturbed* exercise. In contrast, the political 'piercing' of a sovereign state, the implantation of other voices in its political process, evokes the image of a poisoned body politic, a schizophrenic collective constitutional mind whose paralyzed will is incapable of rational decision-making.

This anxiety is most visible in the context of political modernity that has embraced sovereignty of a united 'people' but its roots are deeper. Without the ambition to offer an ultimate account of the metaphors of a state and sovereignty in international political thought, in section 1 I sketch out the ways in which canonical political thinkers have suppressed the anxiety of external political influence, and the ways in which contemporary theorists have begun to overcome it. Tracing this trajectory will set the stage for the direct problematization of externalities created by great powers. Doing so will come at a price, which will impel us to justify asymmetric participation

¹⁴ C McCrudden, 'AJIL Symposium: Comment on Eyal Benvenisti, Sovereigns as Trustees of Humanity' *Opinio Juris*, <http://opiniojuris.org/2013/07/25/ajil-symposium-comment-on-eyal-benvenisti-sovereigns-as-trustees-of-humanity/>

not by recourse to the idea of collective self-determination, but rather to global political pluralism.

In section 2, I argue that one of the reasons why contemporary re-revisions of constitutional imaginary have had no bite has to do with the absence of a more specific accompanying moral vocabulary that would have justified the new imaginary's 'activist' implications. Over the last 50 years, however, such a vocabulary gradually developed in democratic theory. Instead of focusing on the will of a pre-existing 'people', democratic theorists have developed a family of arguments that construct the 'people' as a group of individuals who are all affected by a decision or a set of political choices.

In the first part of this section, I catalogue the difficulties confronting the transformation of democratic theory's insights into an institutional proposal for asymmetric political participation. In the second part of the same section, I defend asymmetric cross-border political participation by arguing that the strength of the objections to it hinges on the alleged need to respond to them with precision. I reject that proposition, and outline the content of asymmetric political participation. I argue that it is particularly justified in at least three types of situations: (1) in situations where great powers continuously, pervasively and profoundly affect the interests of individuals, communities and polities outside their boundaries; (2) in situations where great powers, for whatever reason, assume the role of an impartial adjudicator in international conflicts, but fail to act in such a role, or in situations where the political processes of great powers that produce externalities are already contaminated by external interests; (3) most expansively, asymmetric participation is justified to combat the declared aspirations of a great power to perpetual, across-the-board hegemony.

In section 3, I address a specific, but nonetheless serious objection to asymmetric cross-border participation. Following Paul Kahn, one could argue that the constitutional ontology of the most powerful popular sovereign, the United States, makes asymmetric participation unimaginable. This 'people', for Kahn, is not the product of the social contract, but emerges from the 'political eros' shared amongst its members. The people's 'purpose' is to perpetuate itself and to give transcendental meaning to its 'believers', not to perform a set of rationally calculable political tasks. Such people remains free to identify its enemies and demand sacrifice for its survival. In response to Kahn's account, I point to the implicit discursive legitimation of this sovereign's existence that goes beyond the sheer fact of political affiliation, or enmity. Pointing to the ever-present, implicit 'universal' that legitimizes a concrete 'people' will enable us, in turn, to deflate the ontological understanding of popular sovereignty, reconcile it with the ideal of global political pluralism, and provide an initial sketch of a legitimate response to the demand for asymmetric cross-border participation.

In section 4, I address the problem of 'realism', the ultimate obstacle that sooner or later confronts all international legal theory. In this section, I distinguish between two demands of realism, and argue that international legal and political theory should legitimately be seen as a risky practice of political encouragement, discouragement and avenue opening.

In conclusion, I gesture towards the theoretical role of 'Lilliputian travels'. I argue that the call for asymmetric cross-border participation intervenes in current debates in international and constitutional theory in four ways: first (unsurprisingly), as a complement to projects sympathetic to global political pluralism; second, as a complement to other reformist proposals in international law; third, as a site of unexpected ad hoc theoretical alliances between pluralists, reformists and nihilists in

international law; and, finally, as a cross-disciplinary irritant, upsetting, from without, the constitutional obsessions of powerful states.

1. From Gladiators to Cyborgs: Constituent imaginary and the external constituent involvement

Constitutional imaginary is indispensable, but never innocent in subtly structuring the range of conceivable, prudent or moral political possibilities at our disposal. The imaginative space of the state of nature—the home of the social contract, and later on, popular sovereignty, itself—evokes images of pervasive dangers and the futility of self-reliance in overcoming them. Whether situated in the New World, the Amazon, or the ‘old...Germany’, the state of nature covers vast expanses of sparsely inhabited land. Though a particular polity lives in a world full of its peers, its birth is imagined in isolation.

Unsurprisingly, to propose cross-border political participation in the name of the interests affected by negative externalities produced by other states requires us to reject this picture. In his proposal, Benvenisti rightly abandons a vision of the world of unconnected ‘democratic mansions’, based on a ‘solipsist vision of [popular] sovereignty’¹⁵. Though this solipsism perhaps made sense ‘[b]ecause externalities were at [that] time relatively rare’, he claims that their pervasiveness today should impel us to reimagine our domestic and international political existence as a ‘densely packed’ ‘global apartment building’¹⁶.

Like the contractarian vision of the state of nature, this new vision is not innocent either. Under it, the spatial distances between polities are not only reduced, but collapsed. Just like ‘the ship’, (another favorite metaphor of constitutional theory), Benvenisti’s vision powerfully conjures an image of being-in-it-together in confronting the shared set of global challenges. However, it also implies not only the dangers, but also the futility of attempting to challenge the apartment building’s foundations. What is more, while different ‘tenants’ may produce different externalities, none of them is being credited for designing the building, nor is recognized as deriving exorbitant structural advantages from its design.¹⁷ Finally, individual polities are imagined as households, literally domesticating their politics, reducing it to everyday problem solving and preventing us from imagining radically plural ways of what it means to live together.

Like Benvenisti, the demand for asymmetric political participation rejects the contractarian imagery of the state of nature. It does so, however, not only because this imaginary makes us insensitive to the problem of externalities, but also because it hides the problematic agency of the external actors in the political life of weaker polities. Recognizing it as a problem, however, will in turn affect our view of our own political subjectivity, undermining the robust understanding of popular sovereignty and self-determination, and set the stage for a more explicit and unmediated, reliance on the idea of global political pluralism, as a justification for asymmetric cross-border political participation.

¹⁵ Benvenisti, 298.

¹⁶ Benvenisti, 295.

¹⁷ For a similar objection to Benvenisti, see A von Bogdandy and D Schmalz, ‘AJIL Symposium: Pushing Benvenisti Further: Sovereignty as a Relative Concept’, *Opinio Juris* (July 24th 2013) <http://opiniojuris.org/2013/07/24/ajil-symposium-pushing-benvenisti-further-international-sovereignty-as-a-relative-concept/>

a) *Uninterested, predatory, spectral, cooperative, benevolent: external constituent influence and the modern constitutional imaginary*

Though the externalities produced by states might have been comparatively rarer in the world of XVIIth and XVIIIth century. This, however, not the dominant reason why early modern constitutional imaginary de-problematized the constituent role of external actors. The reason why I re-problematize the traces of the external constituent role in Hobbes, Locke, Vattel, Pufendorf and Rousseau is not only to stress the enduring preoccupation with obfuscating the outside as a morally and politically ambiguous problem. It is also to insist on the ideational tradeoff that has informed it. We need to imagine empty spaces that, in turn, make the political environment meaningless. We need to do it, because it makes it possible for us to justify the idea of ultimate legal authority, common good, and finally, popular sovereignty.

In Hobbes' *Leviathan*, the description of unanimous covenanting, the "sovereignty by Institution" allows us to think of an external sovereign as an uninterested actor, (or perhaps too distant, or too slow to act) which allows the covenanting to proceed unhindered.¹⁸ Conversely, "sovereignty by Acquisition" enables us to imagine an external sovereign as completely predatory, since the object of the acquisition are individuals whose political affiliations are not known to us. This, in turn, prevents us from problematizing "acquisition" from *their* vantage point: the political subject that would otherwise be in a position to appreciate external involvement as constitutive vanishes at the very moment of the encounter with the external 'predator'. Beyond these two extreme possibilities, the only way in which the external actor appears as a constitutive *influence* is as a ghost: before the incorporation, the would-be covenanters determine the extent of their commonwealth not by any objective standard, but by a 'comparison with the Enemy we fear'.¹⁹

Though Locke's social contract narrative is somewhat more complicated, the unproblematic image of the external actors is maintained. Isolated individuals conjoin their private plots of land to form proto-political communities and, after a while, 'by consent, ... [they] set out the bounds of their distinct territories'²⁰. While Hobbesian commonwealth emerges in isolation and lives in hostility, the Lockean polity emerges in isolation – physically 'swells up' to a point where contact with the external environment becomes inevitable – but then amicably settles the boundary between itself and adjacent commonwealths.

Against Hobbes, Samuel Pufendorf rejected the idea that the body of commonwealth exists simply by virtue of covenanters' relinquishment of their natural liberty in favour of a third party standing outside of the contract.²¹ His social contract is more sophisticated, as Pufendorf clearly distinguishes between the different types of social contract in the process of polity formation.²² As with Hobbes, the constituted polity doesn't have a right of rebellion against its rulers. More ambitiously than Hobbes, however, Pufendorf's sovereign is under a duty to provide for the well-being – and not just the protection – of his people.

¹⁸ Ibid.

¹⁹ T Hobbes, *Leviathan*, ed. R Tuck (Cambridge UP, 1996), ch 17.

²⁰ J Locke, 'Second Treatise on Government', (Hackett, 1980) Chapter 5 'On Property', sec. 38., 24

²¹ M Loughlin, *Foundations of Public Law* (Oxford UP, 2010), 80.

²² S Pufendorf, *On the Duty of Man and Citizen* (Cambridge UP, ed. By James Tully, bk II, ch 6.7-9

Similar to Hobbes and Locke, however, Pufendorf contemplated no role for external sovereigns in constituting a polity. In contrast to Hobbes before him, and Locke after him, Pufendorf discusses in some detail scenarios of the 'change and perishing of states' that *do* involve external intervention.²³ However, the role of the external sovereign is either unproblematic or elliptical. 'Even if it should happen that a formerly free people comes under the power of some king by war', writes Pufendorf, 'does not on that account cease to be the same people, provided that the victorious king is willing to rule the subject people as a distinct kingdom in the future'.²⁴ What made Pufendorf's externally-imposed 'regime change' unproblematic is the same thing which helps make it appear unproblematic today: the maintenance of the territorial integrity of a state—and by implication identity—of 'the people' that is subject to external intervention.

Like Pufendorf, Emer de Vattel's account of the beginning of political societies is firmly anchored in the social contract tradition. Unlike Pufendorf, Vattel was a republican, in all but name.²⁵ The social contract in the state of nature gives birth to the people, which has a right to institute not only a democratic form of government, but monarchy, or aristocracy.²⁶ However, the keys to the polity's constitution remain firmly in the hands of 'the people', which has 'an indisputable right to form, maintain, and perfect its constitution—to regulate at pleasure every thing relating to the government'.²⁷ This polity 'deliberates and takes resolutions in common; thus becoming a moral person, who possesses an understanding and a will peculiar to herself, and is susceptible of obligations and rights'.²⁸ The moral personhood of a polity, derived from Vattel's crypto-republican commitments, sets the stage for sovereign equality: polities, as 'moral persons', are 'obliged to live on the same terms with other societies or states, as individual man was obliged'.²⁹ Or, as Vattel wrote in a more famous passage, 'a dwarf is as much a man as a giant; a small republic is not less a sovereign state than the most powerful kingdom'.³⁰

Equality between states establishes the presumption of non-interference, and the exceptions to it are 'tightly circumscribed'.³¹ Exceptionally, an external sovereign can gain a right to restrict the freedom of the weaker sovereign as a matter of an unequal treaty. However, this explicit equality between 'dwarfs' and 'giants' is maintained: the legitimacy of the treaty is premised on the giant's non-interference in the internal constitutional governance of a smaller polity, and on their benevolent motivation when it does interfere with the liberty of that polity in the external sphere. And in this latter regard, there is no reason to problematize 'the giant's' involvement with the weaker

²³ S Pufendorf, 'On the Law of Nations and of Nature in Eight Books' in *Political Writings of Samuel Pufendorf*, eds., C Carr, M Seidler (Oxford UP, 1994), bk. VIII, ch 12, para 1, 266.

²⁴ *Ibid.*

²⁵ F Whelan, 'Vattel's Doctrine of the State' 9 *History of Political Thought* (1988) 59, 70 ('Vattel's central conceptions of the state as a unitary, moral person and of the sovereignty of the nation ... are both inconsistent with the idea of a patrimonial monarchy'.)

²⁶ E de Vattel, *The Law of Nations, Or, Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury* (Liberty Fund, 2008), bk.I ch.1.§ 1.

²⁷ Vattel, bk. I. ch.3 §31.

²⁸ *Ibid.*, Preliminaries, §2.

²⁹ *Ibid.*, §11.

³⁰ *Ibid.*, §18.

³¹ S Zurbuchen, 'Vattel's 'Law of Nations' and the Principle of Non-Intervention' (31) *Grotiana* (2010) 69, 82.

polity because the weaker polity actually gets the better deal: it receives tangible 'protection'— enabling it to engage in self-government—in exchange for the 'great power' merely receiving 'honour'.³²

Equally, the exception to the duty of non-interference exists in situations where a domestic ruler violates the polity's 'fundamental laws', effectively becoming a tyrant, or, in situations where ongoing civil war has resulted in the breaking of 'the bands of the political society'. In the first case, 'every foreign power has a right to succour an oppressed people who implore their assistance.'³³ In the second case, the polity ceases to exist—the absence of a political body enables external powers to intervene based on their own sense of justice. However, as Koskenniemi rightly observed, '[t]he unstated assumption is that States do act in good faith'.³⁴ In both cases, the justness of intervention hinges on the conceptual assumption of constitutional (self-)government and peoplehood.³⁵ If a constitution is violated, the intervention is justified; if there is no more 'people', the intervention is justified again: in both cases, the benevolent motivations of external interveners are not questioned.

In contrast to Rousseau's republicanism, Vattel's proto-republican account of external political involvement is more contextual and nuanced, situated firmly within the law of nations. But it is with Rousseau where external *benevolent* influence— assumed by Vattel—is stylized most clearly at the fundamental level: the creation of a political community. For the pre-republicans before Rousseau, external influence is spectral (Hobbes), cooperative (Locke), neutral (Pufendorf), or benevolent (Vattel). But in none of these cases does an external actor co-constitute a polity, nor is he indispensable for the creation of a democracy. With Rousseau, by contrast, a democratic political community *cannot* emerge without an exogenous shock—a benevolent Lawgiver who comes from the outside to act as the 'founder of nations', who 'invents the [political] machine'³⁶. 'This office', continues Rousseau, 'which sets up the Republic, nowhere enters into its constitution'.³⁷ The crucial condition for the legitimacy of his benevolent constitutive involvement is that he must depart once his job of making the political community operational is complete.

Both Vattel and Rousseau, however, point to a deeper issue: in order to see ourselves as self-governing, the external constituent influence, if impossible to ignore, must be seen as benevolent and facilitative. In other words, we have domestic self-government *because of* external constituent involvement and *because* we receive external

³² But cf T Carty and X Zhang, 'From Freedom and Equality to Domination and Subordination: Feminist and Anti-Colonialist Critiques of the Vattelian Heritage' 43 *Netherlands Yearbook of International Law* (2012), 53, Carty and Zhang remind us how the putative equality of (popular) sovereigns is always subject to the auto-interpretation and unilateral decision of the parties to the contract. ("What Vattel portrays systematically is the inevitability of differing world views, perspectives, imaginings, which will inevitably clash and lead to trials of strength"), 62. In contrast to Carty and Zhang see Benvenisti for a more cosmopolitan reading of Vattel. Benvenisti, 307.

³³ Vattel, bk. II ch.4 § 56.

³⁴ M Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge UP, 2005 c. 1989), 118.

³⁵ 'Vattel's view, however, is that the presence of such relations does not detract from the sovereignty of a state, so long as they may be presumed to reflect voluntary choices of the nation, and so long as they are consistent with full internal self-government' Whelan, 78.

³⁶ J-J Rousseau, *On the Social Contract*, bk.II. ch.7.§2.

³⁷ *Ibid*, §4.0.

protection. In this scheme, to challenge the benevolence of that protection—or to turn one’s critical gaze outward from one’s polity—is also to challenge, at a profound level, the possibility of one’s own self-government. Equally, the accounts of state-formation among their contractualist, nominally non-republican, predecessors—Hobbes, Locke and Pufendorf—point in a same direction. In imagining ourselves as forming part of a polity that provides for protection, common good, and *salus populi*, we are invited not only to *approve* of the idea of sovereignty in general, but also to *focus* on the domestic sovereign to the exclusion of larger external constituent actors and political processes. This, then, is the proposition of early modern—both pre-republican and republican—contractarianism: in order to imagine the sovereign polity’s benefits, and later on, imagine formal equality among them, the notion of the constitutive outside, neither an enemy, nor a friend—but a morally ambiguous *problem*—must disappear from our political imagination.

b) Constitutional re-imagination and its implications: from corroded self-determination, to global political pluralism

The relevant fields have only recently begun addressing the implications of the dominant constituent imaginary. At the forefront of this effort have been the feminist scholars in international law and democratic theory. Some of them have sought to recast the relationship between the mutually affecting ‘bounded selves’ of sovereign states in the register of the ‘ethics of care’.³⁸ More radical amongst them have taken the body metaphor further, and instead of challenging the appropriateness of the ‘bounded self’ of a sovereign state, have likened the violent impositions and interventions by dominant powers as violations of bodily integrity.³⁹ Others have challenged the appropriateness of the body metaphor, and have suggested ‘breaking down the state’⁴⁰, where ‘rigid boundary should become permeable’, and where sovereignty itself would be ‘overlapping’, ‘fragmented’, or ‘layered’.⁴¹

Though most of these reimaginings have not been preoccupied with the negative externalities produced by great power politics, some authors have cautiously moved in that direction, while simultaneously warning against the ‘dangerous fiction of collective identity’.⁴² In her call to reimagine a sovereign state, Anne Orford explicitly registers an ongoing hypocrisy: ‘[r]equests to abandon sovereignty are rarely made of more powerful Northern states. It seems very unlikely, for example, that the Security Council would ever authorize peacekeepers to guarantee food to people in New York, or to protect the right of self-determination of Aboriginal people in Australia’⁴³. This observation, however, doesn’t lead to an institutional argument that would seek to address, institutionally or politically, this scandal. Instead, following Donna Haraway, Orford suggests ‘[re]think[ing] of the state as a cyborg [, which] could remind us that the state is a monstrous, constructed hybrid, whose borders are always contingent and

³⁸ K Knop, ‘Re/Statements: Feminism and State Sovereignty in International Law’ 3 *Transnational Law and Contemporary Problems* (1993).

³⁹ *Ibid.*, 325-28.

⁴⁰ *Ibid.*, 332.

⁴¹ *Ibid.*, 333.

⁴² A Orford, ‘The Uses of Sovereignty in the New Imperial Order’ 6 *Australian Feminist Law Journal* (1996) 84.

⁴³ *Ibid.*, 74.

something for which we have to take responsibility.’⁴⁴ The implication of this re-visioning, however, is not to *take aim* at the cyborg: it doesn’t invite us to disrupt the electronic circuitry of modern day Hobbes’ ‘Gladiators’ – trim their transcontinental tentacles, and poison the emotive fuel on which they run. Instead of taking a reformist or militant stance, Orford counsels an *ethos* of thoughtfulness, leading us to meditate ‘the end of innocent communities’⁴⁵, and inviting us to ‘imagin[e] alternatives to sovereignty that are based on the need to live with ambivalence, and with constantly renegotiated differences’.⁴⁶ The cyborgs are (all of) us.

Unlike feminist international lawyers, Bonnie Honig has imagined a possibility of speaking back at the powerful external actors, perhaps even combatively. Demystifying the benevolence of the Rousseau’s Lawgiver, Honig has claimed the ‘subjects best prepared for the demands of democracy are those who exist in *agonistic* relation to a founder [and] whose alienness is a poorly-kept secret’⁴⁷. Such subjects ‘do not expect power to be granted to them by nice authorities ... with their best interest in heart’. They ‘know that if they want power they must take it’, and ‘that such takings are always illegitimate from the perspective of the order in place at the time.’⁴⁸ However, the attempts to ‘carve out a just and a legitimate polity will always be haunted by the violences of their founding’. As a result, such subjects will ‘experience the law as a horizon of a promise but also an alien and impositional thing’.⁴⁹

For our purposes, Honig’s demasking of the external benevolence is important, as it correctly points toward the potential political price for such a move. By understanding the law as (also) ‘an impositional thing’, we may begin to doubt the idea of self-legislation, and more profoundly, collective self-determination. And with our faith in the idea of self-determination corroded, what would stop us from sliding into the disempowering ‘constant renegotiation of differences’ in the world where political power hides behind the visions of ‘layered sovereignty’? Worse yet, by acknowledging the unavoidability of the external constitutive role in jumpstarting our own popular sovereignty, we may even be tempted to accept it without resistance.

None of this means we shouldn’t remain attached to the idea of ‘solipsistic’ democratic mansions. Against Benvenisti, however, abandoning it in the name of humanity *alone* is inadequate. The point here is not, as Carl Schmitt famously quipped that ‘whoever invokes humanity wants to cheat’.⁵⁰ The problem is rather that there is nothing in the idea of humanity that would either reject hegemonic designs, or, in the case we rejected them, justify our suspicion towards humanity’s invocation.

Justifying cross-border participation *beyond humanity*, and justifying its asymmetry *beyond collective self-determination* must gesture towards the principle that informs them both.

It is the overarching ideal of global political pluralism which informs both the humanity’s refusal to be appropriated by the powerful, on the one hand, and which underpins the dignity of ‘self-determination’, on the other. This pluralism has three

⁴⁴ Ibid, 80.

⁴⁵ Ibid, 81.

⁴⁶ Ibid, 84.

⁴⁷ B Honig, *Democracy and the Foreigner* (Princeton UP 2003), 39.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ C Schmitt, *The Concept of the Political* (Expanded Edition) (University of Chicago Press 1996), 54.

faces. As global national pluralism it dignifies our constituent attachments. The reason why we live in ‘apartments’ in the first place, and not in the global communal ‘dormitory’ is because international territorial order privileges the satisfaction of deeply felt political affinities we call nations, wherever possible. This is what unites both the interwar and the post-Second World War self-determination, our revulsion towards annexations, and the commitment to ending international neo-trusteeships such as Kosovo, as soon as practicable. In addition to embracing the pluralism of national constituent attachments, global political pluralism embraces global sociopolitical diversity. For some, a mix of prudential and moral reasons impel the international legal order to respectfully accommodate territorially grounded ideological difference.⁵¹ For others, respecting them is the implication of our flawed knowledge about how to stabilize and constitute non liberal-democratic political orders.⁵² Finally, a thicker moral argument can be made that global sociopolitical diversity is not only inescapable, but inherently a good thing.⁵³

For these pluralisms to flourish, they need to be complemented by a meaningful pluralism of global political powers. Only within the world of triple global pluralism – national, sociopolitical and geopolitical – do our constitutive suspicions about global political hegemon(ies), and the asymmetric political participation as their response, make sense.

2. Justifying Lilliputian travels: Further normative complement to a new constitutional imaginary

For the purposes of this paper, parts of the normative argument for asymmetric cross-border political participation are already available. With Benvenisti, I agree that the idea of humanity may play a (limited) role in justifying cross-border political participation, especially in the context of alleviating grave human suffering. Global political pluralism qualifies cross-border participation by insisting on the need to maintain general asymmetry in such participation in favour of weaker polities.

Finally, the idea of ‘affectedness’, explored here, structures this asymmetry further. Though this idea has gained much traction in democratic theory over the last decade, its salience in the context of power disparities in international order has been hinted at though not fully explored before.⁵⁴ Since Dahl’s tentative musings, democratic theory has developed a line of thought which has recast the character of ‘the people’, and ‘popular sovereignty’ along the lines of the ‘all-affected-interests principle’. For early modern contractarians, the commonwealth, or ‘the people’ emerges as the result of a willful, unanimous social contract. For contemporary democratic theorists, in contrast, the *demos* emerges as the product of the fact of affectedness – either by someone’s decision, a proposed set of choices, or a policy of the existing set of institutions.

The well-known trouble with the principle of affectedness is the difficulty in establishing its institutional implications. In what cases, for example, does affecting the interests of a weaker polity or constituency warrant a duty to give reasons, and in what cases the right to participate in democratic deliberation, the right to vote, or even veto

⁵¹ Roth, *supra* note 3.

⁵² N Bhuta, ‘New Modes and Orders: The Difficulties of a Jus Post Bellum of Constitutional Transformation’ 60 *University of Toronto Law Journal* (2010), 799.

⁵³ [quote]

⁵⁴ R Dahl, *After the Revolution?* (Yale UP, 1970), 67.

rights?⁵⁵ More expansively, some have argued that this principle justifies not only some form of cross-border political participation, but also the creation of a world demos,⁵⁶ the constellation of overlapping non-territorial and territorial demoi,⁵⁷ or jointly formulated immigration regimes.⁵⁸

These questions, in turn, depend on four deeper challenges. First, what counts as having one's interests affected? Should we concern ourselves only with the existing interests, or would the likelihood of future interests being affected also justify asymmetric political participation? For example, should Slovakia have a say over the US foreign policy concerning Ukraine, given the possibility that the crisis in Ukraine, could have effects on its economic interests and geostrategic position? Second, how can we reasonably determine the fact of affectedness, the causal chain that links the action of a great power and the effect it has on the interests of a weaker polity? Is the economic crisis in Greece caused by the European Central Bank, the German economic policy behind the ECB's policy, or is it the result of Greece's own fiscal profligacy? Third, how can we determine the intensity of affectedness?⁵⁹ Arguably, only the non-trivial acts of affecting the interests should merit cross-border participation. Fourth, how do we determine the *legitimacy* of interests that are being affected? Surely not all affected interests merit corresponding political participation. 'The pope', as Alexander Somek remarked, 'has an interest in preventing abortions, but it would be more than odd to concede that the papal legate must participate in national political processes because the pope has a stake in protecting unborn life.'⁶⁰ According to this objection, the fact of affectedness is problematic only if it violates our interest grounded in some idea of justice. If this is so, the appropriate response is to demand the violator to desist from his activity and ask for redress, not political inclusion.⁶¹

The crucial move in defending the asymmetric participation from the vantage point of affectedness is the realization that these challenges are epistemic, not conceptual or normative. The first three specific objections are damaging only if we assume we must give *precise* responses to them in order to justify the principle of asymmetric participation, and its implications. In other words, these objections are objections neither against the substance of the demand, nor against the duty of great powers to approach it in good faith, nor against the legitimacy of political and legal struggle over it.

An analogy will hopefully make this more vivid. The extension of franchise in the 18th and 19th century progressed within the larger 'stakeholder' paradigm, where the right to vote was conditional on having a tangible interest (real property, or wealth in

⁵⁵ For a similar objection, see C McCrudden, "AJIL Symposium: Comment on Eyal Benvenisti, Sovereigns as Trustees of Humanity" <http://opiniojuris.org/2013/07/25/ajil-symposium-comment-on-eyal-benvenisti-sovereigns-as-trustees-of-humanity/>

⁵⁶ R Goodin, 'Enfranchising All Affected Interests, and its Alternatives' 35 (1) *Philosophy and Public Affairs* (2007) 40.

⁵⁷ J Bohman, *Democracy across Borders: From Dêmos to Dêmoi* (MIT Press, 2007).

⁵⁸ A Abizadeh, 'Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders' 35 *Political Theory* (2008) 37.

⁵⁹ S Wheatley, '10. Democracy Beyond the State and the Problem of Too Much Democracy—Observations on Chapter 6: Dual Democracy' in J Klabbers, A Peters, G Ulfstein, *The Constitutionalization of International Law* (Oxford UP, 2009), 381, 382.

⁶⁰ A Somek, 'The constituent power in a transnational context' http://www.wzb.eu/sites/default/files/u32/somek_constituent_power_in_a_transnational_context.pdf

⁶¹ Z Miklosi, 'Against the All Affected Interests Principle', 38 *Social Theory and Practice* (2012) 483.

general) affected by the decisions of the government. Both then and now, it seems morally counter-intuitive to argue that we should have extended the franchise only after we have determined with precision at what level of individual wealth do the decisions of the government affect individual interests. The precision in identifying the correct institutional arrangement has remained equally irrelevant even after the shift in the contemporary paradigm of political participation. Though modern democracies insist on equal concern and respect among its citizens, the equality of their influence is distorted through the choice of an electoral system, the size of the electoral districts, campaign finance laws, or the residency requirements for voting. The contentiousness of the concrete institutional manifestation of this principle doesn't argue against its applicability.

As a result, the demand to give precise response to three challenges, doesn't damage the argument for asymmetric participation. The case for it is even strengthened in three more specific situations.

First, some form of asymmetric cross-border political participation is particularly justified when affecting the interests of others is ongoing, comprehensive and profound.⁶² In the cases of military occupations, international territorial administration, the affected population should have a robust political voice in the processes of decision-making of great powers or their proxies. The semi-protectorates of Bosnia and Herzegovina, and Kosovo for example, should have an institutional voice in the European Union, perhaps in the Committee of Regions, independently of any accession process. Not only states, but smaller communities and political movements should enjoy this possibility as well. For example, local communities in Italy, Korea or Japan protesting the presence of the US military bases are ongoingly, comprehensively and profoundly affected by them. Their representatives should be able to take part not only in the democratic process of their own countries, but also that of the United States, and be able to raise this issue before the various congressional committees.

Relatedly, the precision in responding to five challenges is not necessary even when the continuity, comprehensiveness and profundity of affectedness is *diffuse*. The deregulation of the American financial markets has unleashed the global economic crisis whose effects have been profoundly felt in the peripheral and semi-peripheral countries. In turn, such countries have been forced by the IMF to adopt austerity policies, which have profoundly affected the lives and livelihoods of their populations.⁶³ The fiction of popular sovereignty coupled with "the logic" of international financial markets has naturalized the peripheral policy choices and have conceal the fact that the origins of the crisis, together with its management at the international level, are traceable to the legislative and policy choices enacted in the name of the American people. In such cases, the most seriously affected polities, the international and non-governmental organizations should have the political and legal tools available to more effectively mobilize within the American political system, force their concerns onto the domestic political agenda. Finally, even in situations where there is no ongoing affectedness, great

⁶² For the idea that the seriousness of affectedness should merit some form of inclusion see D Miller, 'Democracy's Domain' 37 *Philosophy and Public Affairs* (2009), 201; C Gould, 'Self-Determination Beyond Sovereignty: Relating Transnational Democracy to Local Autonomy' 37 *Journal of Social Philosophy* (2006), 55; R Smith, 'The principle of constituted identities and the obligation to include' 1 *Ethics & Global Politics*, (2008) 139, 149.

⁶³ N Antonakakis and A Collins, 'The Impact of Fiscal Austerity on Suicide: On the Empirics of the Modern Greek Tragedy' (2014) *Social Science & Medicine* 39.

powers' capacity to repeatedly engage in the production of large-scale negative externalities, the failures of the domestic democratic processes to prevent them further undermine the need to identifying the actors who may be reasonably targeted by their policies.

The fabrication of evidence in the lead-up to the American intervention in Iraq has demonstrated serious flaws in its domestic decision-making process. The capacity to unleash such negative externalities outweighs the need to concretely identify those who can be reasonably affected by such intervention. As a result, not only concrete countries, but more importantly local and international Lilliputian organizations, such as the ANSWER Coalition, the Interreligious Foundation for Civil Organization, United for Peace and Justice, Stop the War Coalition and others should enjoy the enhanced political presence at the various domestic sites of opinion- and will-formation.

Secondly, the precision is not necessary when the asymmetric cross-border political participation is *remedial*. In a number of situations, a great power such as the United States may assume the role of a nominally neutral arbiter in the political conflicts abroad, but its domestic democratic process may be distorted by the political forces that favour one side. The asymmetric cross-border political participation of the other side is necessary to contribute to the restoration of the powerful state's balance of judgment. In this case, we even have a more specific yardstick for judging the degree of its participation. For example, the Palestinian authority should not only have the opportunity to influence domestic public opinion in the United States, but should also enjoy the rough equivalent of AIPAC's robust political presence in the US Congress.⁶⁴ Relatedly, the precision in identifying the concrete content of asymmetric participation is unnecessary where great powers' political process is already influenced by the infusion of foreign money which leaves weaker, and poorer constituencies at a disadvantage in influencing the domestic political process of a powerful state.

Third, the precise calibration of asymmetric political participation is unnecessary from the vantage point of global political pluralism, in the contexts where the object of that participation is to diminish the aspiration towards *perpetual* regional or global hegemonies. The 2010 National Security Strategy justifies the American foreign engagement by linking American self-interest and values to its constructive response to a number of urgent global challenges, such as the non-proliferation of nuclear weapons, protecting the access to global commons, the promotion of food security, or deterring threats to the international financial system.⁶⁵

The American responses to urgent global concerns and the American 'enlightened self-interests' unsurprisingly create a virtuous circle, where the American values contribute to worthy global goals, and their achievement contributes to the American self-interest. The ever-increasing global interdependence is addressed through international institutions, which should give 'a broader voice—and greater responsibilities—for emerging powers', and through bilateral 'efforts ranging from public service and educational exchanges, to increased commerce and private sector

⁶⁴ AIPAC's influence in the US Congress has in the past unsuccessfully provoked demands for it to register as a "foreign agent" under the Foreign Agents Registration Act (FARA). O Nir, 'Leaders Fear Probe Will Force Pro-Israel Lobby To File as 'Foreign Agent'; Israeli Envoy's Bid To Head U.S. Group Torpedoed' *Jewish Daily Forward* <http://forward.com/articles/4064/leaders-fear-probe-will-force-pro-israel-lobby-to/#ixzz3EcjYLGzp>

⁶⁵ The President of the United States, 2010 National Security Strategy, http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf

partnerships'.⁶⁶ The entire US engagement with the world, however, happens on American terms and is predicated on "America's efforts to shape an international system" and "sustain[ing] America's ability to lead in a world".⁶⁷ The endless stream of global challenges translates into a justification for perpetual 'leadership'. This leadership, in turn, derives important part of its dignity from the self-referentiality of American people's self-government, from '[its] struggle to stay true to [its] values and Constitution'.⁶⁸ The example of popular self-government puts an extra gloss on the tacit refusal to contemplate any form of direct American accountability.

Though global political pluralism may in principle be reconciled with temporary, *ad hoc*, or sectoral hegemonies, it nonetheless rejects all projects that seek endless, full spectrum political hegemony. As a result, all forms of asymmetric cross-border political participation that seek to undermine such aspiration are valuable, and the actors who demand cross-border political participation shouldn't need to demonstrate how and to what extent are they affected by this aspiration.

These three situations deflate the need to precisely identify the fact, causality, intensity or the remedy for the fact of affectedness. They still leave us, however, with the question of determining what are the *legitimate* interests that merit some form of political participation. The question here is not the precision in ascertaining facts, but moral evaluation that calls for the authoritative determination of what are the requirements of (global) justice, not political participation. Though seemingly displacing the force of the argument for participation, these objections simply shift the justification for it at another level. If the argument is that the content of the legitimate interest should be authoritatively decided in a democratic process, the asymmetric participation is justified as a remedy to the exorbitant privilege the citizens of great powers enjoy in determining the already operative, if implicit, understandings of (global) justice. If, on the other hand, the argument is that the states should be the judges of the requirements of global justice in the absence of a neutral international arbiter, the asymmetric participation is justified as a means towards pushing great powers towards its creation. Such arbiter doesn't need to be the apex court of a World State, but may be part of a larger international architecture, committed to the value of global political pluralism.

3. Sovereignty in America: Constitutional ontology against asymmetric participation

In order to demand asymmetric cross-border political participation we had to abandon the dominant constitutional imaginary and assert the controlling role of the principle of global political pluralism. The scope of asymmetrical participation has been further structured through a partial reliance on the principle of affected interests. But the proposed change will fail to persuade those who are convinced that the proper register for understanding popular sovereignty is constitutional ontology, not normative theory.

According to Paul Kahn, the force of this understanding of popular sovereignty is particularly strong in the United States.⁶⁹ For him, 'the American people' is not the citizenry over which the state acts as trustee for humanity, but a perpetual community bound by political love: 'It is not consent [or affectedness!] but eros that links us to the

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ P Kahn, 'Speaking Law to Power: Popular Sovereignty, Human Rights and the New International Order' 1 *Chicago Journal of International Law* (2000) 1, 18.

polity and to each other.⁷⁰ By implication, popular sovereignty is not shorthand for a set of normative values. Rather, it is a factual description of a political community's capacity to identify its enemies, and demand sacrifice for its perpetuation. It is the point at which 'infinite appears in finite form'.⁷¹ For those who believe in popular sovereignty, demanding sacrifice, or treating external actors as enemies, is not contingent on moral justification, or cost-benefit analysis. The implication of the 'ontological experience' of popular sovereignty is that its domestic political will 'overflow[s] the legal boundaries of negative sovereignty' in international law.⁷² If Kahn were right, if popular sovereignty is part of the 'American civil religion', such a view of popular sovereignty would pre-empt the debate about the merits of either symmetric or asymmetric cross-border political participation before it even begins. On this account, the point of the American constitutional exegesis is to 'maintain contact with the sacred origins of the community'⁷³, not provide space for responsiveness towards adversely affected external interests.

At this point, it appears that those who wish to reimagine sovereignty either perceptually or normatively have only two options. They can either fully accept the allegedly ontological, quasi-religious understanding of popular sovereignty and abandon their more or less radical reformist proposals. Or, they can simply reject an ontological reading of popular sovereignty as irrelevant. There is however a way to confront this understanding of popular sovereignty and re-emerge from it neither by capitulating to it, nor by ignoring its substance. The purpose of this confrontation is to separate the core existential anxiety catered to by popular sovereignty, from its contingent trappings. Doing so, in turn, should help us imagine the ways in which powerful states should respond to demands for asymmetrical cross-border political participation.

A first step in this direction is the realization of the inescapably discursive character of the formation, and maintenance of a concrete popular sovereign. Externally, peoples produce enemies by imputing them motivations and plans, and by producing evidence for them. In so doing, they assert not only their own right to exist, but specify the particular value of their own existence. In the American case, specifying this particular value was not just an accidental rhetorical flourish, but was inextricably linked with the birth of the American polity.

Kahn writes that 'popular sovereignty began in the United States with the call to sacrifice in an armed revolutionary struggle.'⁷⁴ But in emphasizing popular sovereignty as 'an erotic phenomenon', Kahn neglects the inescapable moral and prudential justification that accompanied its first appearance. Though its 'cosmopolitan context' has long been suppressed in the American constitutional narrative, the Declaration of Independence (1776) is a thoroughly other-regarding document.⁷⁵ In the Declaration, the birth of the new popular sovereign is justified not by extolling sacrifice in the name of some accidental political affinity. Rather, the birth of the American popular sovereign is a thoroughly reasonable affair: it is justified by not by the will alone, but by the *exhaustion of patience* with British oppression and unresponsiveness, meticulously

⁷⁰ P Kahn, *Putting Liberalism in Its Place* (Princeton UP, 2005), 287.

⁷¹ Paul Kahn, 'The Question of Sovereignty', *Stanford Journal of International Law* (2004)

⁷² *Ibid.*, 274.

⁷³ *Ibid.*,

⁷⁴ *Ibid.*,

⁷⁵ D Armitage, *The Declaration of Independence: A Global History* (Harvard UP, 2008), 64.

enumerated in the text of the Declaration itself.

A similar spirit can be unearthed more than a decade later in the Federalist Papers, where the *United States of America* is justified not only as the best available bulwark against 'foreign force or influence', but also as a responsible, other-regarding international actor. In comparison with the alternative (independent states, or several larger confederacies), the united America 'will probably give the fewest' just causes for war, observe 'more perfectly and punctually' the laws of nations, its national government will be 'more wise, systematic and judicious ... and consequently more satisfactory with respect to other nations' and will act with 'moderation and candor' in international relations in general.⁷⁶

Contra Kahn, then, a particular popular sovereign is not only marked by an unconstrained desire to perpetuate the polity, accompanied with its capacity to identify its enemies, and demand sacrifice for its ongoing existence. Rather, the political desire to live together is always mediated by invoking higher, universal values, which justify its existence. The popular sovereign is always a *worthy* popular sovereign. What causes the 'overflow' of popular sovereignty *internationally* is the sovereign's claim to authoritatively identify, interpret, and act on the higher, universal values, which justify its existence.

But this seems to bring us back to where we started. The amended logic of popular sovereignty would equally pre-empt external demands for asymmetric cross-border political participation *domestically*. There is nothing inherent, however, in the interplay between (popular) sovereignty and universal values that would privilege the domination of one set of actors over another.

Antony Anghie's famous insistence on sovereignty's role in perpetuating colonial and neo-colonial domination is thus only half-right.⁷⁷ For Anghie, the modern concept of sovereignty can be traced to Francisco de Vitoria's secularization of divine law, implicated in justifying the 'colonial encounter' between the European empires and the new world. In articulating the secular *jus gentium*, Anghie's Vitoria gave with one hand what he took with the other: the *jus gentium* that removed religious opprobrium from Indians and their customs simultaneously set the stage for external intervention within their own polities in the name of universal values. Though *jus gentium* dignified Indians as fellow human beings, it also justified rights 'to travel and sojourn' in their lands. Equally, once within Indian polities, the Spanish could hardly be subject to Indian jurisdiction: their ambassadors had a right to be heard, and to keep them 'out of the city or province as being enemies' was considered an act of war. Anghie concludes that 'Vitoria's apparently innocuous enunciation of a right to "travel" and "sojourn" extends finally to the creation of a comprehensive, indeed inescapable system of norms which are inevitably violated by the Indians'.⁷⁸

Anghie's understanding of sovereignty rightly challenges Kahn's neglect of the wider discursive structure of the (popular) sovereign's domination. The mark of sovereignty is not only the identification of the enemy. Rather, more expansively, it is the justification of intervention by identifying certain agents as 'barbarous', 'failed' or

⁷⁶ J Jay, 'Federalist no. 3'.

⁷⁷ But cf R Irigoyen, *Francisco de Vitoria y la Política Internacional Argentina de Hipólito Yrigoyen*, Pre Rot S. R. L., Argentina 1993, for a republican reading of Vitoria's work; quoted from G Cavallar, 'Vitoria, Grotius, Pufendorf, Wolff and Vattel: Accomplices of European Colonialism and Exploitation or True Cosmopolitans?' 10 *Journal of the History of International Law* (2008) 181, 186.

⁷⁸ A Anghie, 21.

'outlaw'. Anghie is wrong, however, to attribute the ongoing noxious effects of sovereignty to its interplay with different incarnations of the universal. As Carl Schmitt has pointed out, 'all the Spaniards' rights vis-à-vis the barbarians also were valid in reverse — they were reversible as *jura contraria* [contrary laws], as rights of barbarians vis-à-vis Spaniards, i.e., they were unconditionally reciprocal and invertible.'⁷⁹ However, '[i]t never occurred to the Spanish monk that non-believers should have the same rights of propaganda and intervention for their idolatry and religious fallacies as Spanish Christians had for their Christian missions. This is the limit of the absolute neutrality of Vitoria's arguments, as well as of the general reciprocity and reversibility of his concepts'.⁸⁰

Schmitt's objection is useful because it reminds us of the perils of justifying *symmetrical* cross-border political participation in the name of humanity, or some other universal. And, more importantly, it gestures towards the real, if simple, reason behind the external 'overflows' of internal popular sovereignty (Kahn), and 'the imperial structure of ideas' arising out of the coupling between sovereignty and the assertion of some universal ideal (Anghie).

Against both Kahn and Anghie, it is not the ontology of popular sovereignty, or the logic of sovereignty's relationship with the universal, as such, that set the stage for international hegemonies. Rather, it is the sheer discrepancy in political power. For our purposes, the crucial objection to Kahn is that the legitimacy of such wide discrepancies doesn't follow from his ontological understanding of popular sovereignty. Kahn is right that popular sovereignty will continue to entail the claim of ultimate authority to identify its enemies. He is also right that dying for the earthly immortality of the popular sovereign will remain, for many, the ultimate horizon of political imagination divorced from the existence of global apartment buildings (Benvenisti), or coexisting cyborgs (Orford).

Against Kahn, the commitment to perpetuity and independence can be reconciled with global political pluralism, especially since global pluralism not only tolerates but lends dignity to the idea that polities should be manifestations of their citizens' constituent allegiances. Since the ontological understanding of popular sovereignty (tacitly) relies on some justification, it can, in principle, be reconciled with the idea that a popular sovereign's will has a function *in* and *for* the world that goes beyond exclusively domestic interests. The only non-negotiable object of the people's "will" is the perpetuation of a polity, the refusal to allow this polity to be enslaved or annihilated by others. From this it doesn't follow that 'the people's will' shouldn't be frustrated, weakened, or diluted to the point of serving the goals of global political pluralism and towards maintaining the diversity of interpretations of what universality, in whatever incarnation, requires.

This deflates, but doesn't cancel out, the force of the ontological objection against asymmetric cross-border participation. Kahn's account leaves behind a normative residue that becomes conceivable when the external agent's attempt to penetrate its political space is accompanied by the declaration of good faith, not enmity.⁸¹ The claim

⁷⁹ C Schmitt, *The Nomos of the Earth* (Telos, 2003), 107.

⁸⁰ *Ibid.*, 113.

⁸¹ For Kahn, declared intentions of the intruders play no role in their identification as the enemy. ('[T]he figure of the enemy is constructed from a particular perspective on territory: the enemy penetrates the border. This transgression makes someone an enemy, even if he does relatively little damage and regardless of whether he damages public or private property') P Kahn,

of sovereignty at that point manifests itself as the legitimacy of acting on one's existential anxieties about the perpetuation—not domination or hegemony—of the popular sovereign.

Rather than foreclosing the issue of asymmetric participation, focusing on the question of existential anxieties helps clarify the standard for engagement with external demands for political participation. Such a standard would require demonstration that the demand for asymmetric participation is aimed at undermining a popular sovereign's subjectivity to the point of making it incapable of acting as a comparably independent actor in the international arena. This judgment, in turn, would require balancing the probability of such an event against the legitimate reasons to allow cross-border political participation. Even a bad faith demand for cross-border political participation would be legitimate, for example, if it carried a minimal risk of undermining the capacity of the people of the United States to perpetuate itself, but significantly improved its capacity to act as an impartial arbiter in international conflicts.

4. Beyond the twin demand of 'realism': The onus of proof, the counter-hegemonic catalyst, and the risky encouragement

Kahn's ontological understanding of popular sovereignty, however, can be re-stated in a weaker form. Instead of claiming that the idea of popular sovereignty is ontologically connected with political eros and sacrifice, one could more modestly claim that it is simply 'unrealistic' to expect a meaningful change in the dominant political self-understanding that would allow for the asymmetric cross-border participation.

Either implicitly or explicitly, international legal theorists have largely internalized the imperative to be realistic. Global constitutionalists, for example, have speculated on the desirability of 'transnational citizenship' and transnational functional referenda but have been quick to denounce them as currently 'unrealistic'.⁸² Others, who explicitly defended global political pluralism have implicitly rejected the asymmetric piercing of sovereign equality, as a matter of '*sound* application of the ... premises about morality, in light of a *sober* recognition of the limitations ... in international politics'.⁸³ Even those whose commitment to global political pluralism has led them to propose a far-reaching set of amendments to the United Nations Charter, which would deny the veto to the 'Permanent Five' in the Security Council, have explicitly situated their project both against 'infeasible utopias' as well as 'unimaginative realism'.⁸⁴ Finally, even Benvenisti, whose proposal, on his own admission, appears 'utopian', takes a 'cautious approach' and is 'wary of democratic losses' that might ensue should the interests of those affected be taken into account more expansively under some global constitutionalist system.⁸⁵

The preemptive attempts of these theorists to dispel their detractors' charges of realism almost never succeed. It is important to stress, however, what they implicitly assume. As Raymond Geuss argued, "[w]hat might count as 'constructive' for us, that is, what we, given who we are, could do about something, given our identities and possibilities, need not be the same as what is constructive *for them* (given their identity

'Imagining Warfare' 24 (1) *European Journal of International Law* (2014) 199, 209.

⁸² Klabbers, Peters and Ulfstein, 74.

⁸³ Roth, 130. [emphasis mine]

⁸⁴ Cohen, 24.

⁸⁵ Benvenisti, 327.

and situation).⁸⁶ Geuss rightly observes that

[a]ppeal to the requirement that criticism be ‘constructive’ can thus often have the function of trying to shift the *onus probandi* in a particular way. I, as a critic, am required to formulate my criticism in a way that is shaped to the action-related demands of the target-agents. I must criticism them ...in a way that conforms to what ‘they’ define as what they can ‘reasonably’ be expected to do and results they can ‘reasonably’ be expected to accept.⁸⁷

Though the asymmetric cross-boundary political participation refuses to accept this burden of proof, it is still vulnerable to a differently motivated charge of realism. The proposal is ‘unrealistic’, not if it fails to persuade self-interested status quo powers, but if it fails to act as a counter-hegemonic catalyst. From this perspective, being ‘realistic’ is not correlative with the reconciliation with the powerful states’ political will. Rather, it denotes concern with how powerfully will the proposed change capture the imagination of those who struggle for political and social emancipation. On this view, conceptual and normative innovations must be ‘politically effective’ and ‘motivationally sustainable’. For Lea Ypi, ‘avant-garde’ politics should ‘seek[] to identify certain first-order principles and ... combine them with an interpretation of conflicts and commitments *existing in particular social practices*’.⁸⁸ In other words, if Vitoria’s Indians themselves don’t ask for a politically subversive *ius peregrinandi*, if Dahl’s Latin American friend was only joking, if nobody is asking for an ongoing political presence on the US Senate’s Foreign Relations Committee, then sketching institutional prescriptions along the lines suggested in this paper would be frivolous, whether or not it has a foothold in democratic theory.

But even such ‘emancipatory’ understanding of what is realistic is unduly restrictive. Making conceptual innovations reliant on extant social practices unduly shortchanges the political potential of ‘wilder’ theoretical extrapolations in the long run. An understanding of conceptual innovation as the middle-man between the best normative accounts and the most promising *extant* practice of political and social emancipation downplays the possibility that theoretical accounts may also serve as encouragement to the grassroots and its intellectuals to mobilize around plausible interpretations of what democracy, or popular sovereignty require, but which are not currently on the radar of their imaginations. International legal and political theory should not only be tasked to respond to (and amplify) encouraging trends in political and social struggles, but should legitimately be seen a risky practice of political encouragement itself.

5. Moving forward (theoretically): Asymmetric participation as a four-fold theoretical intervention

Beyond its dubious political success, asymmetric cross-border political participation continues to speak constructively to the register of theory. First, it serves as an *intrinsic complement* to existing proposals in international legal theory which are committed to the

⁸⁶ Raymond Geuss, ‘Must Criticism be Constructive?’ in *A World Without Why* (Princeton UP, 2014), 99. [emphasis Geuss’].

⁸⁷ Ibid.

⁸⁸ L Ypi, *Global Justice and Avant-Garde Political Agency* (Oxford UP, 2012), 40.

idea of international constitutional pluralism, and which are explicitly suspicious to great power hegemony.⁸⁹

Second, it serves as an *instrumental complement* to approaches in international legal theory, such as global constitutionalism or global administrative law, that acknowledge the problem of great power hegemony, but whose projects are animated by other concerns. Though these approaches don't explicitly privilege global political pluralism, asymmetric cross-border political participation can serve as a justifiable tool with which to encourage great powers to move, or to move more briskly, in a desired direction. In his critique of the project of global constitutionalism, Jeff Dunnof has wondered if 'the invocation of international constitutionalism acts as a narcotic in the sense of diverting relevant actors from the hard work necessary to advance the values that [global constitutionalism] associates with constitutionalization'⁹⁰ Though specific, his comment points to a more general problem: various reformist proposals in international legal theory are largely unconcerned with articulating the *political mechanics* of getting from undesirable juridical condition A to desirable reform B. In that regard, asymmetric participation is an instrumental complement, as it shows what that 'hard work' might legitimately entail.

Ironically, asymmetric participation might also be of service to international legal nihilists, 'the anti-lawyers'⁹¹ who don't believe in the emancipatory promise of international law. For them, undermining the claim of great powers' popular sovereignty might be a tactically useful component in a larger struggle that aims at disruption, not reform. The third theoretical role of asymmetric participation, then, is in *setting the stage for an unexpected ad hoc theoretical alliance* between radically opposed approaches in international legal theory: pluralists, reformists and nihilists can provisionally unite, for different reasons, in demanding great powers open up their constitutional orders to external influence by weaker polities and constituencies.

Finally, the argument for asymmetric cross-border political participation will increasingly serve as a *cross-disciplinary irritant*. Its role can be to upset the terms of the debate in adjacent disciplines that have recently become aware of the problem of external political participation. Over the last several years, American constitutional scholars have begun paying more attention to the so-called 'extraterritorial electioneering', recognizing it as part of the 'coming wave of clever ways to bring foreign power into the [American] election processes'.⁹² For Zephyr Teachout, American constitutional lawyers should approach the question 'responsibly' though not 'naively', and 'establish a dialogue' among the American people 'about reasons to exclude some, and engage others, in *our* electoral processes'.⁹³

The challenge of asymmetric participation to this emerging debate is fundamental: the decision to include or exclude is not theirs to make. The 'American people' (or Russian, Chinese or French, for that matter) is an ideational construct, a

⁸⁹ Cohen, *supra* note 8.

⁹⁰ J Dunoff and J Trachtman, 'The Lotus Eaters', <http://www.ejiltalk.org/the-lotus-eaters/> (last visited 2 August 2013).

⁹¹ G Baars, 'The new anti-lawyers: On the emergence of new "anarcho-communist" writing in international law', paper presented at 'gardens of justice' *Critical legal conference 2012, Stockholm*, 14-16 September, 2012.

⁹² Z Teachout, 'Extraterritorial Electioneering and the Globalization of American Elections' (2009) *Berkeley Journal of International Law* 190. [emphasis added].

⁹³ *Ibid.*, 191.

trajectory of domestic and international political ideals, existential and prudential anxieties. Though the commitment to the idea of a popular sovereign and the readiness to die for it may be the ultimate horizon of dominant states' political self-understanding, there is no reason others should accept powerful states' political affinities as a side-constraint on their institutional imagination.