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Saki Bailey

International University Collge of Turin, sbailey@iuctorino.it

Ugo Mattei

University of California Hastings College of the Law, matteiu@uchastings.edu

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Social Movements as Constituent Power: The Italian Struggle for the Commons

SAKI BAILEY* & UGO MATTEI**

ABSTRACT

The Italian commons (beni comuni) movement is a powerful example of the way in which social movements are emerging as the new pouvoir constituant serving not only to enforce the protections and guarantees of national constitutions but also, in the context of the declining power of the nation-state, as a counter hegemonic force against the neoliberal economic constitutionalism of the international economic institutions. The common goods social movement in Italy was born out of the concerted action of a number of civil society groups combatting neoliberal privatizations. This commons movement, as will be argued in this paper, is an instance of one of the many struggles taking place throughout the world; from the Bolivian Andes to the Indian Himalayas, where local people are pushing out the state and predatory multinationals, and resisting the collusion of state and market actors to enclose common spaces and resources. These individual struggles for the commons are emerging as a transnational social movement challenging the top-down economic constitutionalism of the World Trade Organization (WTO), and in the context of Europe what has been dubbed the "troika" of the European Central Bank, the European Commission, and the International Monetary Fund (IMF). Part I argues that social movements are giving new life and meaning to the concept of popular sovereignty by challenging the assumptions underpinning the liberal

* Ph.D. Candidate, Goethe University Frankfurt am Main; J.D., U.C. Hastings: Lecturer, International University College of Turin; Executive Director of the Institute for the Study of Political Economy & Law.

** Alfred and Hanna Fromm Professor of International and Comparative Law, U.C. Hastings; Professore Ordinario di Diritto Civile, Università di Torino. In addition to being presented for the first time at the Transnational Societal Constitutionalism Conference in Turin in July 2012, this paper was also presented at the U.C. Hastings Faculty Workshop in October 2012 and at the Uninomade-Teatro Valle workshop on constitutionalism on October 26 2012. The authors wish to thank the participants of these events and in particular Antonio Negri and Sandro Mezzadra for comments on early drafts of this paper.

*constitutional form, namely of private property, and providing a much needed channel for political confrontation where parliamentary politics has failed to protect the public from predatory private actors. Part II offers a participant observation exploring the national constituent role played by the *beni comuni* social movement in upholding the protections and guarantees of the Italian Constitution. Finally, Part III attempts to describe the global commons movement as engaged in a form of bottom-up constitutionalism an emerging form of *pouvoir constituant* in a supranational constituent process of reclaiming commons from predatory multinational actors through bottom-up societal constitutionalism.*

INTRODUCTION

In the aftermath of the June 2011 Italian National Referendum opposing the compulsory privatization of public utilities, the collection of profits on tap water, and the creation of a nuclear program, a constitutional moment¹ has been unfolding in Italy. The referendum prompted a political clash of a constitutional nature between the neoliberal state and the people, united through a social movement under the banner of the *beni comuni* (common goods). In the Italian context, the notion of common goods as a fundamental human right has become a potent political strategy for reclaiming common goods like water, culture, and education, subjecting them to constitutional protections, and protecting their access and distribution through moral communities.² This commons movement, as will be argued in this paper, is an instance of one of the many struggles taking place throughout the world where local people are resisting the enclosure of common resources for private profit. These individual struggles for the commons are emerging as a transnational social movement, challenging the economic constitutionalism of the World Trade Organization (WTO) and international financial institutions, and in the European context what has been dubbed the “troika”: the European Central Bank, the European Commission, and the International Monetary Fund (IMF).

The common goods movement in Italy was the product of the concerted action of a number of civil society groups combating neoliberal privatization: the work of scholars at the Accademia dei Lincei (the most prestigious research institute in Italy) who drafted proposed civil code

1. See generally 1 BRUCE ACKERMAN, *WE THE PEOPLE* (1991) (discussing the theory of “constitutional moments”).

2. Saki Bailey, *The Architecture of Commons Legal Institutions for Future Generations* in *FUTURE GENERATIONS & COMMONS*, Council of Europe *Trends in Social Cohesion Series* (Saki Bailey, Farrell, G. & Ugo Mattei eds.) (forthcoming fall 2013).

reforms to protect common goods; the work of lawyers undertaking an impressive range of activities, from fighting against privatization in courts—both on the constitutional and municipal levels—to assisting communities to organize into legal associations like foundations (in the case of national theaters) to prevent privatization; the work of activists within the water forum who rallied public support for the referendum; and finally the important work accomplished by citizens and local communities reclaiming—as commons—nature, culture, labor, and education from collusive corporate and state actors.

The success of this movement was demonstrated by the unexpected victory of the “Water Referendum,” where in an unprecedented manner over twenty-seven million (the absolute majority of the voting population) Italians turned out to vote with over 95 percent voting against privatization, accomplishing the first 50 percent quorum in Italy in over sixteen years.³ This major victory produced a counter reaction by a neoliberal power elite fearful of popular revolt, leading to modifications of provisions of the Constitution of 1948, approved with a large majority vote by a delegitimized Parliament in order to prevent another popular referendum from taking place in the future.⁴ As a result, a major clash between representative and direct democracy has been taking place in Italy, which led to the occupation of squares, as in Greece and Spain, but also the occupation of actual sites of commons enclosures, such as the Teatro Valle national theater and the high speed train development project in the Susa Valley through the Italian Alp Region.⁵

In July 2012, the ongoing struggle was settled by the Constitutional Court in a landmark decision that shielded referendum results beyond the reach of Parliamentary legislation,⁶ thus offering a major constitutional source of legitimacy to the *beni comuni* movement. Since the Water Referendum results, the former Government, deemed

3. MINISTERO DELL'INTERNO, SERVIZI ELETTORALI: REFERENDUM (June 12, 2011) (It.) [hereinafter REFERENDUM], available at <http://elezionistorico.interno.it/index.php?tpel=F&dtel=12/06/2011&tpa=Y&tpc=A&levs0=0&levsut0=0&es0=S&ms=S> (showing that almost 55% of Italians, more than 27 million people, went to the polling station, where 95% of voters chose to vote “yes” to abolish the decree).

4. According to the Italian Constitution, if both chambers of Parliament in two subsequent votes pass a Constitutional amendment with more than 2/3 majority, the referendum to approve the amendment is precluded. Art. 138 Costituzione [Cost.] (It.). See Ugo Mattei, *Materials for a Subversive Constitutionalism*, 46 GENRE 155 (2013).

5. See *Against the Day*, *The Commons Movement in Italy*, 112 S. ATLANTIC Q. 366 (2013) (Saki Bailey ed.).

6. See Corte Cost., 40, 17 luglio 2012, n. 199, <http://www.cortecostituzionale.it/action/IndiciAnnuali.do> (set “Anno” to “2012” and set “Mese” to “Luglio,” then follow “Visualizza” button and scroll to “S. 199/2012”) (It.).

untrustworthy by the European neoliberal establishment,⁷ was forced to resign in November 2011. A “technical” government, headed by a former European Competition Commissioner, Mario Monti, was formed to carry out the neoliberal policy mandate of the troika. While never elected by the people, the government enjoyed an overwhelming economic emergency based majority in the Parliament.⁸ When elections were finally called in March 2013, the Italian electors overwhelmingly voted against the technical Government with Mario Monti receiving a low 10 percent of the vote. Nevertheless, the very same large emergency-based “grosse-Koalition” majority has been kept in office under the premiership of a secondary figure of the Italian political landscape, the young and well-connected centrist Enrico Letta. This solution, oblivious of the will of the large majority of the Italians, was facilitated by the re-confirmation of President of the Republic, Giorgio Napolitano, whose modified highly proactive role in the shaping of the government demonstrates the drastic nature of the Constitutional transformation that has taken place in Italy.⁹ These dramatic events serve as a clear example of the marginalization of popular sovereignty in the current phase of global capitalism as a result of the rising power of international financial institutions, and thus poses significant questions as to the meaning of state sovereignty and the status of constituent power today.

The Italian *beni comuni* movement is not only a powerful example of the way in which social movements are emerging as an important form of constituent power at the level of the nation-state, but also at the supranational level to limit the power of transnational actors in the absence of a transnational form of representative government. In this context, social movements serve not only to enforce by protest, physical, and legal action the protections and guarantees of national constitutions, but also to act as a counter hegemonic force against the economic constitutionalism imposed by international economic institutions.

7. Michel Rose, *Trichet's Letter to Rome Published, Urged Cuts*, REUTERS (Sept. 29, 2011 5:07 PM), <http://www.reuters.com/article/2011/09/29/us-italy-ecb-idUSTRE78S4MK20110929>; David Marsh, Moment of Truth for Mario Draghi, *Market Watch*, WALL STREET JOURNAL (Mar. 11, 2013 6:00 AM) <http://www.marketwatch.com/story/moment-of-truth-for-mario-draghi-2013-03-11>; *Italian Water Movement Forces Monti to Respect the Results of the Referendum*, EUROPEAN FEDERATION OF PUBLIC SERVICE UNIONS, <http://www.epsu.org/a/8403> (last visited Sept. 15, 2013).

8. Elisabetta Povoledo, *Monti Wins Broad Support in Parliament*, N.Y. TIMES (Nov. 18, 2011), <http://www.nytimes.com/2011/11/19/world/europe/mario-monti-wins-broad-support-in-parliament.html>.

9. Ugo Mattei, *Bipolarismo Sincronico [Bipolar Synchronicity]*, 2 J. ALFABETA 30 (Luglio 2013) (it.)

This paper is divided into three parts: Part I argues that social movements are emerging as an important form of constituent power by: (1) enforcing weakened constitutional public interest protections, (2) challenging the assumption of private property underpinning the liberal constitutional form, and (3) providing a much needed alternative channel for politics where representative government and state politics have failed to protect the public from predatory private actors. Part II provides a specific case for this evolving role of social movements through a participant observation by Ugo Mattei, one of the authors.¹⁰ This section explores the national constituent role played by the *beni comuni* social movement in upholding the public interests protections and guarantees of the Italian Constitution. Finally, Part III discusses the emerging supranational constitutional process, analyzing the *beni comuni* movement as part of a transnational social movement that challenges from below the top-down imposition of global economic constitutionalism by reclaiming the “commons” through a process of bottom-up “societal” constitutionalism.

I. THE PARADOX OF CONSTITUENT POWER

The role of social movements in enforcing the constitution and acting as a form of “constituent power” is by all means an unconventional and even controversial claim. Classical constitutional theory designates the capacity of constituent power to the people through the concept of popular sovereignty; however, it is assumed by these scholars that such constituent power is only legitimately exercised through representative democracy.¹¹ There is an inherent paradox in this designation, which has perplexed constitutional theory from its origins. The paradox is often referred to as the problem of the “non-foundational foundations of law,”¹² and may explain the traditional

10. Part II is the product of two years of full-time political and legal activism where one of the authors (Ugo Mattei) played a nationally-recognized role in the *beni comuni* movement as lawyer, scholar, and activist.

11. There is a long debate on the controversy stretching from Hobbes, Rousseau, Hume, Bentham, Burke, to name a few, and most recently Hardt and Negri, with the concept of “multitude.” See generally MICHAEL HARDT & ANTONIO NEGRI, *MULTITUDE* (2004) [hereinafter HARDT, *MULTITUDE*] (discussing the concept of “multitude,” a network in which all differences can be expressed freely so that all can work and live in common). See also MICHAEL HARDT & ANTONIO NEGRI, *COMMONWEALTH* (2009) [hereinafter HARDT, *COMMONWEALTH*] (arguing a democracy of the multitude is possible by learning the art of self-rule and transitioning to democratic forms of social organization).

12. Gunther Teubner, *Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?*, in *TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM* 3, 16

exclusion of civil society actors as “constituent power” in constitutional theory. This problem of the “non-foundational foundations of law” appeared in legal theory during the shift from natural law to positivism, which produced a kind of chicken-egg problem for constitutionalism: what came first, the constitution or the state? Constituent power or the constitution? How can the state produce constitutional law when it is the constitution itself that produces the state? What segments of society—forms of political and civil organization—are included in this category of the “people” and what is the “state” prior to the making of the social contract, which itself designates and constitutes their political status? Ruth Buchanan describes the paradox of social contract as the product of a myth that positivists have accepted as a concrete reality.

A constitution is essentially an originary narrative, in that it offers an account of the source of both legal and political authority. It does so by purporting to ground that authority in the political will of a “people” understood to be capable of acting as a unified entity. The “people,” however, cannot come into existence as such until after the founding inaugurated by the constitution. The constitutional “moment,” then, is always a type of “pious fiction.”¹³

As Buchanan explains, “the people” are a product of the constitution itself, a unified political entity constituted by the constitutional form, not something that has an *a priori* status. The paradox of the constitutional narrative is that “[t]he origin has to ‘be’ before and after the point of origination.”¹⁴ Hardt and Negri most recently critiqued the disempowering consequences of such a myth, arguing that the designation of a unified political entity of the “people” is instrumental to the nullification of the pre-political subjectivity of the “Multitude” and the conflation of the popular political will as the will of the sovereign; robbing the “Multitude” of their ongoing constituent role in the constitutional process.

Hobbes challenges the existence of the multitude on more directly political grounds. The multitude is not a

(Christian Joerges et al. eds., 2004). See generally GUNTHER TEUBNER, CONSTITUTIONAL FRAGMENTS: SOCIETAL CONSTITUTIONALISM AND GLOBALIZATION (2012).

13. Ruth Buchanan, *Legitimizing Global Trade Governance: Constitutional and Legal Pluralist Approaches*, 57 N. IR. LEGAL Q. 654, 658 (2006).

14. Peter Fitzpatrick, *Breaking the Unity of the World: Savage Sources and Feminine Law*, 19 AUSTL. FEMINIST L.J. 47, 48 (2003).

political body, he maintains, and for it to become political it must become a people, which is defined by its unity of will and action. The many, in other words, must be reduced to one, thereby negating the essence of the multitude itself: "When the multitude is united into a body politic, and thereby are a people . . . and their wills virtually in the sovereign, there the rights and demands of the particulars do cease; and he or they that have the sovereign power, doth for them all demand and vindicate under the name of *his*, that which before they called in the plural, *theirs*."¹⁵

The paradox of "social contract" that results from negating all claims and existence of the Multitude, is that the "social" contract becomes a contract of the sovereign with himself, effectively leaving the sovereign free to pursue his own interests while maintaining the appearance of representing popular sovereignty. But who or what really is the Multitude, and who or what really is the sovereign? There is an entire field of scholarship, which we will not attempt to synthesize, on the nature of the entity we understand as the sovereign: from monarch, to the third estate, to the modern state and the shifting *raison d'état*, from pastoralism to neoliberal governmentality.¹⁶ However, for our purposes, we will focus on the concept of who or what forms of social and political organization are understood to be included in the concept of the Multitude today.

James Tully describes the Multitude as an "unformed constituent power" capable of bringing back "the condition of possibility of the modern idea of popular sovereignty."¹⁷ The Multitude is the pre-political form of "the people," whose constituent power was obliterated for the purpose of safeguarding property rights.¹⁸

15. HARDT, COMMONWEALTH, *supra* note 11, at 42.

16. See generally MICHEL FOUCAULT, THE BIRTH OF BIOPOLITICS (Michel Senellart ed., Graham Burchell trans., 2008) (collecting Foucault's lectures from his seminar course in 1978-79, focusing on the theme of biopolitics); MICHEL FOUCAULT, SECURITY, TERRITORY, POPULATION (Michel Senellart ed., Graham Burchell trans., 2007) (collecting Foucault's lectures from his seminar course in 1977-78, studying the "genesis of a political knowledge that put the notion of population and the mechanisms for ensuring its regulation at the center of its concerns").

17. James Tully, *The Imperialism of Modern Constitutional Democracy*, in THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM 315, 320 (Martin Loughlin & Neil Walker eds., 2008).

18. See text accompanying note 11, *supra*.

In the course of the great bourgeois revolutions of the seventeenth and eighteenth centuries, the concept of the multitude is wiped out from the political and legal vocabulary, and by means of this erasure the conception of republic (*res publica* rather than *res communis*) comes to be narrowly defined as an instrument to affirm and safeguard property.¹⁹

The very constitutional process from the Multitude to the political "people" to *res publica* is an operation functional to maintaining a prefigured distribution of property, legitimized by the idea of "popular sovereignty." Tully goes further and argues that the modern liberal constitutional form itself, which constituted the "republic" and "representative democracy," was functional to the efficient continuation of the hegemonic colonization of non-European people through the destruction of communal property rights for the indigenous and their conversion into private property rights for the colonizers. He describes two fundamental "antagonistic imperatives" in modern liberal constitutionalism, one imperative is that the consent of "the people" must somehow be obtained (the idea of popular sovereignty), and the other is that "governmental power must be divided, constrained and exercised through distinctive institutional forms."²⁰ One such institution is that of private property. As Tully explains, these two imperatives pull in opposite directions and the tension has become more acute in modern constitutions, where the development of the constitutional framework has undergone a process of institutionalization into highly complex and autonomous forms.²¹ Tully refers to this institutional autonomy as "disembeddedness,"²² a defining feature of the modern constitutions, where the structure of law has an independent status from "the activities of those who are subject to it" and thus has the power to

19. HARDT, *COMMONWEALTH*, *supra* note 11, at 50.

20. Tully, *supra* note 17, at 317.

21. *See id.* at 317-19. This notion of "secondary rules" (a concept of H.L.A. Hart) as the defining characteristic of constitutional forms is utilized not only in describing the constitutions of nation-states but also beyond the nation-state, for example, in the theory of Gunther Teubner's societal constitutionalism. *See* Teubner, *supra* note 12, at 16.

22. Tully, *supra* note 17, at 318. Many scholars consider this "disembedded" quality the primary differentiating characteristic between western modern constitutions, considered as "formal," from nonwestern indigenous constitutional forms, considered "customary," where the separation between the constitutional form, customary laws and norms is collapsed. *Id.* It is this very distinction which led to the conclusion by colonial powers that the colonies, prior to western conquest, were essentially lawless. This rhetoric also persists within the "development" packages of the IMF and World Bank in the third world, which bundle neoliberal reform together with the "rule of law" and "human rights."

“constitute the field of recognition and interaction of the people subject to it.”²³ Thus, the “disembedded” and “autonomous” quality of modern constitutionalism facilitates a prefigured set of private—as opposed to public or commons—property relations, which are not only defended by the substantive law, but also rather underpin the entire constitutional form. This effectively renders the institution of property invisible: it constitutes constituents—and constituent power—within the limits of individual private property relations, thus placing private property—and the resulting unjust distribution of wealth—beyond contestation and beyond the reach of constituents, in a neutralized, constitutionally-produced political sphere.

Additionally, the inability of constituents to contest the private property relations structured by the constitution and its bias towards its protection and expansion results in the inability of constitutional law to provide a shield to the takeover of the public sector by predatory private actors. The result being not only to reinforce existing property distributions, but also to effectuate massive transfers of public and common wealth into private hands—as is taking place currently with neoliberal privatizations. Today, intensified by the global economic crisis and austerity measures, governments of modern liberal states under the state of emergency act like the absolute sovereign monarchs of feudal times, transferring to the private sector anything that it desires, as if it were a private owner to serve the interests and profits of corporations.²⁴

In this post-crisis landscape, the very distinction between the public and the private sectors is becoming all but senseless, as visible in so many versions of revolving doors and conflicts of interest that reveal the blatant collusion between state actors and the global ruling élite who profit from privatizations. Increasingly we are witnessing a return to a sort of neo-medievalism, where state sovereignty is weak and constitutional law is reduced to a Leviathan that uses an iron fist with the weak—the people—and the velvet glove with the strong—corporate powers. Meanwhile, the Leviathan is at the mercy of transnational corporate power and its role is reduced to enclosing the commons by a continuous process of privatization of its own sovereignty. In sum, while constitutional law can operate to defend the private sector against the public sector (due process of law and just compensation clause are examples), it cannot seem to defend the public sector against the private

23. *Id.* (internal quotation marks omitted).

24. Ugo Mattei, *Emergency Based Predatory Capitalism: The Rule of Law, Alternative Dispute Resolution, and Development*, in CONTEMPORARY STATES OF EMERGENCY: THE POLITICS OF MILITARY AND HUMANITARIAN INTERVENTIONS 89 (Didier Fassin & Mariella Pandolfi, eds., 2010).

one.²⁵ Today, privatization is possible outside of any constitutional limit or judicial review because states and governments are too weak to impose a legal order over economic forces and private economic actors. Rather than ruling the economy, governments are ruled by economic power through a variety of capture phenomena and by the operation of various ideological apparatuses, including legal academia.²⁶

In this context, what role can constituents play to rectify the current disequilibrium between the public and private sectors given the inherently flawed structure of the liberal constitutional form? *How can the Multitude reassert popular sovereignty when representative government fails to protect the public from the private sector?* Tully presents four theses, explored by Martin Loughlin and Neil Walker, about the ongoing constituent relationship between the people and the constitution.

[W]hen the people subject to a constitutional form see themselves as a multitude (an as yet unorganized and unrecognized potential agent) behind the whole constitutional-constituent formation and strive to exercise all [political, labor, and security/police] constituent powers together, overthrow the regime and bring into being a new kind of constitutional formation, which in turn must be subject to ongoing constituent transformation (so the multitude remains sovereign over the constitutional form to which it subjects itself).²⁷

This thesis, called “radical sovereignty,” suggests that the pre-political Multitude, by an act of radical sovereignty, or revolution, can overthrow the constitution. The question remains, however, when is an act of revolution by the Multitude truly in the name of the Multitude, and when is it an act of cutting the constitutional restraints of the Ulysses’ bind and heeding the sirens’ call for mob rule. While there is clearly danger in treading beyond the limits of the liberal constitutional form, however, given its flaws outlined above, it seems clear that we must expand our notion of constituent power beyond the formalistic

25. See Ugo Mattei, *Beni Comuni: Un Manifesto*, Laterza, Roma-Bari (2011) (it.).

26. See Ugo Mattei, *The Rise and Fall of Law and Economics: An Essay for Judge Guido Calabresi*, 64 MD. L. REV. 220, 241 (2005); see also UGO MATTEI & LAURA NADER, *PLUNDER: WHEN THE RULE OF LAW IS ILLEGAL* (2008) (comparing the role of the rule of law in violent extraction, or plunder, by strong international actors against weaker ones).

27. Tully, *supra* note 17, at 326.

“juridical containment” definition.²⁸ Returning to the question of what forms of social and political organization characterize the Multitude: can we interpret the Multitude, the pre-political form of the people, as politically active citizenry? Can politically active people, autonomous and free from the liberal constitutional form, renew constituent power and the idea of popular sovereignty? Is the solution to fight the private with the private where the public has failed? Today, we are witnessing a new wave of social movements organizing to defend public access to common goods against privatization. Are these social movements playing a constituent role? Are social movements the new *pouvoir constituant*?

A. Social Movements as Constituent Power: Constituent Power without a Constitution

Social movements have a long history of catalyzing change, not only by exerting pressure on politicians, but also on courts, resulting at times in major shifts in law.²⁹ Consider the influence of civil rights activists in the United States on the Warren Court which produced *Brown v. Board of Education*,³⁰ or the Friendly Settlement, which resulted in the U’wa indigenous people’s case against Occidental before the Inter-American Human Rights Commission.³¹ These cases highlight the important role civil society can play, not only in influencing courts, but also in negotiating directly with multinationals themselves in the face of today’s weakening Leviathan. Social movements may offer a new *pouvoir constituant*, providing alternative channels for pursuing justice where states have failed. Many scholars are optimistic that a project for “democratic constitutionalism,” as opposed to the imperial project of “constitutional democracy,”³² is underway and point to nonimperial

28. See *id.* (explaining the juridical containment thesis as stating that “the constitution founds and structures the exercise of constituent powers, as in modern liberal theories of constitutional democracy”).

29. See generally ACKERMAN, *supra* note 1 (describing various “constitutional moments” taking place in four periods of U.S. history, often outside of regular constitutional procedures).

30. See generally William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2086-96 (2002) (highlighting the contributions of groups like the NAACP, ACLU, and SCLC).

31. See Summary of U’wa Indigenous Community/Precautionary Measures, Inter-American Commission on Human Rights Case No. 11.754, ESCR-NET, <http://www.escr-net.org/docs/i/414389> (last visited Apr. 3, 2013).

32. See Tully, *supra* note 17, at 337. Tully suggests that the modern liberal constitutional form is inherently imperial, with property and contract being assumed, and operating “secondary rules,” which structure and establish the distributive stakes

forms of global networking—transnational social movements challenging from below the imperial power of international organizations and multinationals imposed from above.

All over the world, citizens have worked to elect social democratic and workers' parties, only to watch them plead impotence in the face of market forces and IMF dictates. In these conditions, modern activists are not so naive as to believe change will come from electoral politics. That's why they are more interested in challenging the structures that make democracy toothless, like the IMF's structural adjustment policies, the WTO's ability to override national sovereignty, corrupt campaign financing, and so on.³³

As people increasingly witness the dominance of international economic institutions over states, they are losing faith in the power of the state as a forum for transformative politics and are increasingly turning to the power of social movements and the strategy of directly confronting the very structure that renders democracy meaningless; the invisible rules and unaccountable institutions operating at the transnational level which have the power to affect distributions of wealth at local levels. The role of social movements, largely ignored by legal scholars,³⁴ are playing two important functions in the context of

involved, thus functional to the low cost and efficient continuing colonization of non-European people.

33. Naomi Klein, *Reclaiming the Commons*, 9 NEW LEFT REV. 81, 86 (2001).

34. See Balakrishnan Rajagopal, *International Law and Social Movements: Challenges of Theorizing Resistance*, 41 COLUM. J. TRANSNAT'L L. 397, 401 (2003). Rajagopal argues that social movements are not only sources of international law but that they challenge liberal categories of rights (and by extension constitutionalism) and the assumption that legitimate power can only be exercised through recognized political forums. *Id.* at 401-06. Rajagopal points to several reasons why social movements may have been largely ignored by international law scholars, what he identifies as jurocentrism, an institutionalist bias, and elitism. *Id.* Jurocentrism here is the tendency for lawyers to focus on textual analysis of law emerging from legislatures and courts, which prevents the inclusion of text of resistance or analysis of "illegal" interpretative acts by individuals which may go against the very text of the law. *Id.* at 401-02. The institutionalist bias refers to the way in which scholars tend to focus on the state as the major source of law and legal institutions, a narrow conception of the "social" as unified and controlled by the agent of the state. *Id.* at 402-03. Finally, Rajagopal points to the elitist blind spots of international law, given that "most Third World social movements consist of the urban poor, peasants, workers in the informal sector, illiterate women, and indigenous peoples whose resources are being destroyed." *Id.* at 406. It is for the very reason that subaltern subjects tend to be already voiceless within their own nations, excluded from traditional political forums, that they join social movements in the first place. See *id.* at 403-05. Ignored and excluded from the

the decline of the nation state: (1) they are liberating the concept of politics from the liberal constitutional form, which in turn is extending the concept of constituent power beyond representative politics; and (2) they are filling a crucial vacuum where representative politics have failed, offering alternative channels for political engagement. Social movements are expanding our understanding of politics as something more than a set of actions taken in formal political arenas. They are redefining "what counts as political and who defines what is political,"³⁵ thereby reclaiming popular sovereignty and exposing the hidden and unjust assumptions and prefigured distributions of liberal constitutionalism.

Balakrishnan Rajagopal identifies three waves of social movements: the first wave is characterized by organization around the "nation," referring to the national liberation projects of the third world which took place in the 1950s and 1960s; the second wave concerns identity, referring to the civil rights, feminist, and gay rights movements which stretch from the 1960s into the 1990s; and finally, the third wave of "antiglobalization" movements which erupted in the 1990s as a reaction against capitalism, and highlighted the struggle over global resources. It is within this third wave that we locate the social movement of the commons, characterized as the struggle of local communities to reclaim access and governance to common resources from collusive state and market actors.³⁶ Protest movements, in the form of local resistance against privatization, are taking place throughout the world from the Global South to the heart of the West.³⁷

Naomi Klein describes these movements as "reclaiming the commons" and fighting against the negative effects of economic globalization as united through their opposition to what has been identified as a common enemy. "Thanks to the sheer imperialist ambition of the corporate project at this moment in history—the boundless drive for profit . . . —multinationals have grown so blindingly

traditional political forums, it is no surprise that they are also largely ignored by legal scholarship. *See id.*

35. *Id.* at 416. *See generally* BALAKRISHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE* (2003) (analyzing this point by describing the way in which social movements are enacting a "cultural politics" offering alternative conceptions of rights and identities). Similarly, Sally Engle Merry analyzes the way in which NGOS and local organizations play a role in indigenizing and "vernacularizing" transnational norms into local settings thus producing new forms of political activism and subjectivity. *See* Sally Engle Merry, *Transnational Human Rights and Local Activism: Mapping the Middle*, 108 AM. ANTHROPOLOGIST 38, 38 (2006).

36. *See* RAJAGOPAL, *supra* note 35, at 237-39.

37. *See* Klein, *supra* note 33.

rich, so vast in their holdings, so global in their reach, that they have created our coalitions for us.”³⁸ United against corporate power, the commons movement is forming networks of activists in the fight to protect common resources.³⁹ Commons social movements are demanding that property relations are exposed to political contestation in the public sphere through the political process, but—primarily in the Global South—they are also demanding through the political process that the state respect existing traditional communal forms of property.⁴⁰ This is very similar to the aims of the antiglobalization movement, and in many ways the name, “antiglobalization” has never been accurate, as the movement does not fight to suppress globalization, but rather seeks to ensure that “the people who live on the land benefit directly from its development.”⁴¹

Social movements of local communities, reclaiming their autonomy through collective ownership over common resources, not only challenge the logic of private property assumed by liberal constitutionalism, but also the role of the modern state in development. “As one Indian minister said upon being confronted with a local dam-building effort by farmers in the Krishna River valley using local, small-scale technology: ‘If peasants build dams, then what will the state have left to do?’”⁴²

Rajagopal goes on to cite numerous examples of communities in India engaged in self-rule of collective lands and resources: from the panchayat raj amendments to the “tribal *Gram Sabhas*.”⁴³ These communities organizing themselves into social movements are not only challenging the state but the very concept of development as the domain of the state, and instead compelling recognition of local ownership and communal forms of property. These social movements, however, are not necessarily pursuing autonomy from the state, but rather, from the logic of private property. In many cases, the state and traditional public politics prove to be important arenas and sources of support for social movements. The social movements’ “attitude is often strategic, contingent and opportunistic towards institutions of the state—they constrain or work with whichever institutions happens to show more

38. *Id.* at 84.

39. *Id.*

40. “The personal is political,” a slogan reflecting the feminist critique of fundamental and human rights, takes the position that rights, which are primarily based on political and civil rights, often exclude subjects like women governed by the private sphere (family and property law) from the political “public sphere.” See, e.g., J. Oloka-Onyango & Sylvia Tamale, “*The Personal is Political, or Why Women’s Rights are Indeed Human Rights: An African Perspective on International Feminism*,” 17 HUM. RTS. Q. 691 (1995).

41. *Id.* at 88.

42. RAJAGOPAL, *supra* note 35, at 265.

43. *Id.* at 265-66 (stating that the tribal *Gram Sabhas* are local village councils).

support for their interests at any given time.”⁴⁴ It is this “strategic, contingent and opportunistic” attitude of social movements, which reinforces their autonomy and in turn their constituent potential by engaging with constitutional guarantees of protecting the public interest in access to certain fundamental resources but autonomous from the constraints of the constitutional form. This autonomy provides the freedom for social movements to engage in politics, utilizing nontraditional methods and nontraditional forums, such as protests, occupations, transnational networks, and most interestingly—as will be explored in the final section—alternative institutions of governance. These alternative forums for “doing politics” outside the state have in many cases proven more effective for regulating predatory private actors than state regulation.⁴⁵ Increasingly, we are witnessing cases where the state is being sidelined where representative democracy has failed and local communities are directly negotiating with predatory private actors, strategically using both private and public tools and forums, as will be explored in the Italian case of the *beni comuni*. Many scholars argue that “one of the key political developments of recent times has been the direct engagement between social movements operating in transnational mode and the major players in the global economy.”⁴⁶

Gavin Anderson makes a very strong case for the successfulness of direct engagement through the example of the conflict between the U’wa community and Occidental over Amazonian oil resources in Columbia. In this case, the U’wa indigenous people were able to bypass the corrupted state and national politicians by building a transnational campaign that ended in a Friendly Settlement directly with the multinational corporation before the Inter-American Commission of Human Rights, successfully terminating Occidental’s drilling rights in the U’wa’s land.⁴⁷ Such cases demonstrate that the resource wars⁴⁸ have taken a transnational and subaltern turn. In the face of a weakening Leviathan overtaken by powerful corporate actors, it is the Multitude of civil society actors that are proving themselves capable of battling corporate “pirates” in the private channels of free markets, beyond the regulation of the nation-state, for control of crucial resources like water

44. *Id.* at 256.

45. See Gavin W. Anderson, *Societal Constitutionalism, Social Movements, and Constitutionalism From Below*, 20 IND. J. GLOBAL LEGAL STUD. 881 (2013). See also Klein *supra* note 33; Rajagopal *supra* note 34.

46. *Id.*

47. *Id.*

48. See generally MICHAEL T. KLARE, *RESOURCE WARS: THE NEW LANDSCAPE OF GLOBAL CONFLICT* (First Owl Books 2002) (2001) (discussing the growing impact of resource scarcity on the military policies of nations).

and energy. Social movements, unbound by the limits of the state and its constitutional form, offer alternative political strategies and forums in the vacuum created by a weakening Leviathan, and serve to revitalize constituent power without a textual constitution on the transnational level to reassert the constituent role of the people on the national constitutional level—as will be explored in Part III of this paper.

To give a thick practical substance to these theoretical premises, we will now analyze the constituent role played by the Italian *beni comuni* social movement through a “participant observation.” The *beni comuni* movement, as the constituent struggle for the commons, is a good example of a constituent struggle between social movements, the state, and corporate forces. In this next section we will explore how the *beni comuni* movement invoked, indirectly and directly, the constitutional protections of the public and commons described below. Many of these actions pointed directly to constitutional text available in a number of highly advanced and mostly unimplemented provisions of the 1948 Constitution, most fundamentally in Article 3 and Article 42. Through these actions the *beni comuni* movement is exposing the contradictions of the state-private property dualism that colonized the modern constitutional imagination, restoring the democratic constitutional fabric and constituent role of the Multitude.

II. CONSTITUTIONAL & CONSTITUENT ROLE OF THE ITALIAN *BENI COMUNI*

This section describes the referendum campaign and formation of the *beni comuni* as a social movement in the Italian national context, as well as the oppositional neoliberal forces that organized against it. A diverse array of actors (scholars, lawyers, activists, and politicians) produced the complex scenario of struggle for the commons. The *beni comuni* movement used legal (litigation), illegal (occupation) and other political tools to advance an opposition to neoliberalism. The movement utilized a strategy that was fully responsive to the complex and highly pluralistic nature of the law in the contemporary scenario to successfully reclaim the commons from neoliberal privatization. The legal and political actions of the *beni comuni* movement reinvigorated the constitutional debate in two ways: first, by bringing the “economic constitution” within the Italian Constitution to life, reopening the debate about what ought to be the space for the “public” and the constituent role of the people in the constitution; and second, by preventing, through a successful constitutional challenge, the attempt by the neoliberal majority in Parliament to ignore the referendum

result, thereby establishing the will of the people as having a higher constitutional value than the will of Parliament.⁴⁹

A. Background of the Italian "Economic Constitution" & Constituent Role of the Beni Comuni

In Italy, the constituent claim of the commons movement is rooted in the constitution's purpose of defending the people against abuses of power. The idea behind the movement's claim is that the most fundamental constitutional reform that one could promote in Italy today is the implementation of the current constitution, especially Articles 3, 42, and 43, rather than drafting new provisions—which would be illegitimate given the current lack of parliamentary representativeness. The current electoral law, though deemed unconstitutional by the Constitutional Court and discussed for years in the Italian political debate, was never replaced, thus shedding a sinister light on the legitimacy of the current Parliament. Article 3 goes beyond the bourgeois liberal model by making it a "duty" of the Republic to remove the social and economic obstacles that *de facto* make it impossible for everyone to participate in the political life of the country.⁵⁰ Article 42, while considering private and public property on the same level ("[p]roperty is public or private") requires the law to protect private property only as far as it is "accessible to all" and serves a "social function."⁵¹ Article 43 gives constitutional recognition to "communities of workers and users" in the governance of strategic public interest resources. Similar social language is shared by many constitutions of the twentieth century,⁵² but the political effort to implement this vision—through a gradual process of limitation of social inequality—has been

49. Mattei, *supra* note 9.

50. Art. 3 Costituzione [Cost.] (It.) ("All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions. It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organization of the country.").

51. *Id.* art. 42 ("Property is public or private. Economic assets may belong to the State, to public bodies or to private persons. Private property is recognised and guaranteed by the law, which prescribes the ways it is acquired, enjoyed and its limitations so as to ensure its social function and make it accessible to all. In the cases provided for by the law and with provisions for compensation, private property may be expropriated for reasons of general interest. The law establishes the regulations and limits of legitimate and testamentary inheritance and the rights of the State in matters of inheritance.").

52. See generally Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 19 (David M. Trubek & Alvaro Santos eds., 2006).

discontinued since the so-called Reagan-Thatcher revolution. Here, the background of the relevant economic provisions of the Italian Constitution, which the *beni comuni* movement brought to life, are presented.

The Italian Constitution of 1948 was the product of a constituent process in which, for the first time, women could also participate. It is usually described as a great compromise between the three cultural components represented by the political parties that freed the country from Nazi occupation and fascist rule: the socialists and communists, the Catholics, and the liberals.⁵³ In fact, the Yalta agreements placed Italy firmly within the capitalist block. The very powerful Communist party, in Italy always functional in maintaining a capitalist status quo, was to be formally “compensated for a missed revolution with a promised one,” to use the sarcastic description of Piero Calamandrei.⁵⁴ More recent scholarship has argued that the Italian Constitutional text, rather than being a coherent compromise of merits, was a clever move to table the discussion of the most heated issues by postponing them to future political struggles.⁵⁵ There were two technical tools deployed to implement this truce: first was the broad delegation of authority to the formal (ordinary) law to define the limits of economic activity (the so called “*riserva di legge*”); and second were trade union negotiations, supported by the constitutional right of strike, which were seen as a wait-and-see strategy functional to the interests of all the political parties represented in the Assembly.⁵⁶ As a consequence, while the Constitution emphatically sides with labor in its struggle against capital, (particularly in Article 1), the actual text of what is usually known as the “economic constitution” is much more ambiguous and clearly divided in zones of cultural and political influence.

In particular, Article 41, the brain-child of the liberals and heavily influenced by the conservative economist Luigi Einaudi, later to become the first Italian President of the Republic, guarantees free enterprise, which can only be limited by the law in the interest of human health,

53. See generally SONDRÁ Z. KOFF & STEPHEN P. KOFF, *ITALY: FROM THE FIRST TO THE SECOND REPUBLIC* (2000) (providing the historical background of the development of Italian politics and the transition between the First and Second Republics).

54. See PAUL GINSBORG, *STORIA D'ITALIA DAL DOPOGUERRA A OGGI* (1989) (It.). See also Mario Comba, *Constitutional Law*, in *INTRODUCTION TO ITALIAN LAW* 31 (Jeffrey S. Lena & Ugo Mattei eds., 2002). Piero Calamandrei was a liberal champion, a founding father, and a famous scholar of civil procedure, later to become the first Chief Justice of the Constitutional Court.

55. See generally STEFANO RODOTÀ, *IL TERRIBILE DIRITTO* (1981) (It.).

56. See GINSBORG, *supra* note 54.

safety, and dignity.⁵⁷ Article 42 contains a clear protection of private property, which includes the traditional just compensation clause, only limited by the notion of the “social function of private property” borrowed from the European debate of the early twentieth century, and previously rejected in the drafting of the civil code.⁵⁸ This article, especially dear to the social Catholics (Giuseppe Dossetti), avoided taking a position on the “property question” in the Constitutional Assembly by referring it to ordinary law.⁵⁹ Article 43⁶⁰ gives constitutional recognition to the major role that factory councils in the Northern industrial triangle (Turin, Milan, Genova) played in the liberation struggle; and by reserving certain strategic assets to “communities of workers and users,” it can be seen as the “promised revolution”—with a just compensation guarantee!—that the cynical leader of the Communist party, Palmiro Togliatti, used to pacify his constituency so that it respected Stalin’s desires at Yalta. Significantly, this Article, the constitutional basis of any nationalization policy, was practically dormant through the life of the 1948 Constitution and only very recently came to new life, being deployed as a Constitutional base for action by both the occupation movement generated by the referendum on the commons and the attempts to grant direct participation of the people in the administration of the utilities system, which took place in Naples.⁶¹ Finally, Article 9, strictly connected to property law, has also remained dormant for many years but is now playing a very significant role in the attack on current neoliberal policies. This Article gives protection to cultural property and the “landscape,” a notion incrementally interpreted as “the environment,” and offers a powerful constitutional argument for a critique of the logic of exploitation of nature that characterizes the current order. Its introduction into the Italian Constitution was due to Concetto Marchesi,

57. Art. 41 Costituzione [Cost.] (It.) (“Private economic enterprise is free. It may not be carried out against the common good or in such a manner that could damage safety, liberty and human dignity. The law shall provide for appropriate programmes and controls so that public and private-sector economic activity may be oriented and co-ordinated for social purposes.”).

58. See RODOTÀ, *supra* note 55.

59. See GINSBORG, *supra* note 54.

60. Art. 43 Costituzione [Cost.] (It.) (“For the purposes of the common good, the law may establish that an enterprise or a category thereof be, through a pre-emptive decision or compulsory purchase authority with provision of compensation, reserved to the Government, a public agency, a workers’ or users’ association, provided that such enterprise operates in the field of essential public services, energy sources or monopolies and are of general public interest.”).

61. See Alberto Lucarelli, *Commento all’art. 43 della Costituzione*, in 1 COMMENTARIO ALLA COSTITUZIONE 883 (Raffaele Bifulco et al. eds., 2006) (It.).

a leading classicist and Communist representative in the Constitutional convention.

Within the same logic of tabling the issues, as no party knew which would eventually be in the minority, the Italian Constitutional system rejected any "winner takes all" logic. The very same power was vested in the two Chambers; the Prime Minister was seen as a *primus inter pares*, the President of the Republic given a mostly formal *super partes* role of representation (something similar to that of the President in Germany or Israel or to the Monarchy in Great Britain or Spain), and the core of the democratic struggle was intended for the political parties, where citizens could participate in the democratic life of the country.⁶² Parties were formally kept as "private organizations," and their leaders were endorsed with shining credibility and a large level of deserved prestige, due to the role they were able to play in clandestine organizations and later administrative authorities in the progressively liberated areas of the country. The idea was that the more representative democracy is trusted, the less direct citizen's participatory democracy is needed. Consequently, in the Italian constitutional scheme, direct democracy was maintained in a very minor form. The Referendum takes only two forms: first, the abrogation referendum of Article 75 of the Constitution,⁶³ which can be requested by half a million voters that wish to abolish a formal statute not connected with taxation, budget, amnesty, pardon, or ratification of an international treaty; and second, a confirmation referendum can be requested by the same number of citizens if a constitutional change is introduced by Parliament.⁶⁴ This possibility is not available if the change is passed in both Chambers with a two-thirds majority.⁶⁵ While the confirmation referendum has no quorum, the abrogation referendum requires a turnout of half the electorate to validly abolish a law.⁶⁶

62. See Art. 49 Costituzione [Cost.] (It.) ("Any citizen has the right to freely establish parties to contribute to determining national policies through democratic processes.").

63. *Id.* Art. 75 ("A general referendum may be held to repeal, in whole or in part, a law or a measure having the [sic] force of law, when so requested by five hundred thousand voters or five Regional Councils. No referendum may be held on a law regulating taxes, the budget, amnesty or pardon, or a law ratifying an international treaty. Any citizen entitled to vote for the Chamber of deputies has the right to vote in a referendum. The referendum shall be considered to have been carried if the majority of those eligible has voted and a majority of valid votes has been achieved.").

64. See Art. 138 [Cost.] (It.) Said laws are submitted to a popular referendum when, within three months of their publication, such request is made by one-fifth of the members of a House or five hundred thousand voters or five Regional Council.

65. *Id.* "A referendum shall not be held if the law has been approved in the second voting by each of the Houses by a majority of two-thirds of the members."

66. *Id.*

In the last two decades, the “economic constitution” described above, primarily Articles 3 and 42, was transformed by privatization, and the development of the idea of the “regulatory state” replaced that of “entrepreneur state,” which intellectually justified the dismantling of the welfare system in the name of competition and efficiency.⁶⁷ The formal constitution was transformed in 2001 to decentralize the system, enlarging the power of the regions, but the fundamental idea of the social state was never openly challenged until recently. The targets of the constituent attack to the text of the 1948 constitution began with the last shot of the Berlusconi Government. In the process of drafting the *Ferragosto Decree*, Berlusconi blamed the Italian crisis on Article 41 of the Constitution—as we remember, the brainchild of conservative liberals such as Einaudi and De Nicola—which states that free enterprise cannot be carried on in conflict with social utility or in a way that damages human security, dignity, and freedom and that it reserves to the law (again the technique of tabling the issues) to determine the program and the appropriate controls so that public and private economic activity can be aimed and coordinated to reach social purposes.⁶⁸ The position of the Berlusconi Government, carried on in full continuity by Monti and by the current Government, was that the *ex ante* model of administrative control, typical of the civil law tradition, was to be replaced by a system of *ex post facto* redress on the tort law model found in Article 1 of the U.S. Constitution. The *Ferragosto Decree* emphatically stated that, within the necessary time to change Article 41 of the Italian Constitution, all that is not expressly prohibited to the enterprise is now legal.⁶⁹ This unedited style of constitutional reform by decree was deemed constitutionally unacceptable by the Constitutional Court in decision 199/2012, originated by the *beni comuni* movement and discussed below.

The discussion on the formal reform of the economic constitution was thus officially inaugurated in a context in which the very idea of reform had changed from its original meaning. Previously seen as an incremental application of Article 3 of the Constitution in order to reach a more egalitarian society, reform now means, in the neoliberal context, deregulation and increased “flexibility” of the legal system in order to maximize the spaces of free economic enterprise.⁷⁰ While proposals to

67. See SABINO CASSES, *LA CRISI DELLO STATO* (2002) (It.).

68. Art. 41 Costituzione [Cost.] (It.).

69. Art. 3 Decreto Legge 13 agosto 2011, n. 138 (It.).

70. Art. 3 Costituzione [Cost.] (It.) (“All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions. It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby

reform Article 41 of the Constitution are still making their way through Parliament, the first formal victim of the new wave of constituent strategy (dubbed structural reform) was inaugurated by the Monti Government is Article 81 of the Constitution.⁷¹ This article has been rewritten with an overwhelming Parliamentary majority—more than two-thirds—in two separate reads of both Chambers, to include the balanced budget provision arguably “required” the Italians by the troika (the EU Commission, the BCE, and the IMF). The inclusion of a balanced budget provision, coupled with the ratification of the so-called “fiscal compact” agreement, will make it practically impossible to revamp the public sector and to effectively carry on the reform plan of Article 3. The new reform ideology has taken over the Constitution of 1948, introducing, within its very text, a principle that defeats all its promises. Furthermore, as shown by the outcome of the Water Referendum, and later by the 2013 elections, the Parliament enjoyed a very low popularity rate. The delegitimized Parliament, by voting for the reform with an overwhelming majority, made it impossible for the people to call the confirmative referendum (Article 138). The coalition defeated in the Water Referendum did not want to risk the polls again in their first constituent effort. Interestingly, this very significant constitutional reform, one of the handfuls of textual changes since 1948, has been carried out in the complete absence of debate, and when the reform was written into law, the media did not even report the event. Today, many usually informed citizens still do not know that the change occurred.⁷²

The pressure exerted by the “troika” played a large role in installing the technical puppet government capable of implementing austerity measures in the absence of public support. The Monti Government, short of being a technical executive, shows a very marked pro-business attitude. Among its early successes, there was a pension system reform, passed without consultation with the trade unions; a reform of the labor market, dismantling most of the guarantees that the worker’s movement had obtained in the 1970s; and a reform of professional services aimed at liberalization. His attention on the public

impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country.”). This change of meaning of the idea of reform is the object of UGO MATTEI, *CONTRO RIFORME* (2013), a book that has been much debated in the Italian media.

71. *Id.* art. 81 (“Every year, Parliament shall pass the budget and the financial statements introduced by the Government. Interim budget authority may not be granted save by law and for not longer than four months. The Budget may not introduce new taxes and new expenditures. Any other law involving new or increased spending shall detail the means therefor.”).

72. See Ugo Mattei, *Contro Riforme*, GIULIO EINAUDI 128 (2013).

transportation system has also been sustained with an attempted liberalization of the taxicab industry. The Government has, moreover, linked the municipalities to a strict balanced budget requirement that made it necessary to sell a variety of assets; it has reformed the local taxation system by introducing a new tax on immovable property accompanied by a revaluation of the cadastral value—all measures that favor corporate interests by producing more privatization of public property, including a large number of rural areas sold under value by impoverished small owners who could not the heavy tax load. Different measures made it even less likely to maintain public services in public hands, and declared the area around the works of the TAV (High-Speed Rail) train in Valsusa a “site of strategic interest” defined by a red zone broadly protected by criminal law. In sum, by deploying a state of emergency declaration, the Monti Government has been able to implement a “shock doctrine,” facilitating the expansion of capital and profits from the public to the private sector.

A significant part of this policy, in particular the compulsory privatizations of public services, has been deemed unconstitutional by the Constitutional Court in landmark decisions 199/2012.⁷³ The Court, seized by a local government (Regione Puglia) represented by lawyers of the *beni comuni* movement (including Ugo Mattei), decided that the decision directly taken by the people in a referendum, as an exercise of direct democracy, must be respected by representatives sitting in Parliament for a reasonable amount of time. Thus the doctrine of “succession of the law in time” that would apply should a statute have equal value to a referendum, does not apply. Direct democracy, one of the strongest tools of constitutional power available to the people, thus enjoys in Italy a surplus of constitutional force compared to ordinary legislation.

B. The Italian Water Referendum & the Beni Comuni as a National Social Movement

The Referendum of June 13, 2011 was the climax moment of a long struggle to limit the apparently irresistible process of neoliberal commodification and privatization.⁷⁴ This Referendum is often referred to as the “Water” Referendum because much of the political momentum leading to its success was linked to the global struggle against water privatization, whose global visibility was granted by the Cochabamba

73. See Corte Cost., *supra* note 6.

74. See generally UGO MATTEI, EDOARDO REVIGLIO & STEFANO RODOTÀ, *INVERTIRE LA ROTTA: IDEE PER UNA RIFORMA DELLA PROPRIETÀ PUBBLICA* (2007).

war on water of 2000.⁷⁵ Indeed, the very simple platform, “water as a common,” mobilized tens of thousands of activists from its proposal in December 2010 to its success in June 2011, when more than 27 million Italians went to the ballot.⁷⁶ To understand the success of the referendum, we need to consider two important points: first, that water was not the only issue on which the referendum was called, and second, that the referendum was only one part of a larger effort to challenge the neoliberal logic of privatization, which has occupied most of the first decade of the new millennium in Italy.

In June 2011, the Italians were called upon to vote on four questions, only one of which was technically devoted to water.⁷⁷ The first referendum was aimed at stopping a compulsory program of privatization of all public services, and involved public transportation, garbage collection, and other public services provided by local governments, such as nursery schools.⁷⁸ The second referendum, the only one specifically devoted to water, was aimed at abolishing a legal provision, which guaranteed the “remuneration of the invested capital” as part of the final cost to the user of the water supply system.⁷⁹ This referendum aimed at precluding the profit motive from the water service, thus canceling the incentives to private companies to deal with water. The third referendum, presented by a committee different from the “water as a common,” was aimed at abolishing the law that re-established an Italian nuclear program,⁸⁰ and complemented the alternative vision of society proposed by the *beni comuni* movement. The fourth referendum, promoted by the opposition party Italia dei Valori (IDV, meaning Italian Values), was aimed at abolishing laws providing a judicial shield to Prime Minister Berlusconi and was all but legally empty, though very meaningful from the political point of view. Interestingly, while all the referenda were overwhelmingly approved by the voters with majorities of more than 95 percent, the most voted referendum was the question specifically devoted to abolishing profit on water.⁸¹

75. See generally OSCAR OLIVERA WITH TOM LEWIS, COCHABAMBA! WATER WAR IN BOLIVIA (2004) (discussing the Water War, identified as the first great victory against corporate globalization in Latin America).

76. See REFERENDUM, *supra* note 3.

77. *Referendum 2011*, FORUM ITALIANO DEI MOVIMENTI PER L'ACQUA, http://www.acquabenecomune.org/raccoltafirme/index.php?option=com_content&view=category&layout=blog&id=34&Itemid=139 (last visited Sept. 15, 2013).

78. See Corte Cost., *supra* note 6.

79. *Id.*

80. The Nuclear program was already rejected once by referendum in 1986 in the aftermath of the Chernobyl accident.

81. See text accompanying note 4, *supra*.

After a phase of negotiation with the water movement and a major organizational effort to put together a broad coalition of civil society organizations (which included trade unions and environmental and consumers groups, but that purposefully excluded direct political party participation), the referenda were finally deposited at the Court of Cassation in Rome and signature collection officially started on April 22, 2010. This permitted the Referendum to take place in the spring of 2011, in a timely way to stop the compulsory privatization of water designed by the Ronchi Decree.⁸² According to Italian constitutional law, the half million signatures were duly collected in person and officially certified one-by-one by a notary or other public official, and were collected within three months from the date of the Referendum. The collection process proved to be an incredible sign of vitality of the commons movement, which mobilized tens of thousands of volunteers, collecting nationwide signatures in the most remote corners of the country.⁸³ People usually skeptical of political collections of signatures actually lined up, sometimes for hours, to sign, and by mid-July of 2010, more than 1.4 million certified signatures were transported in huge boxes in front of a crowd of media and reporters to the Court of Cassation.⁸⁴

1. Neoliberal Oppositional Powers & Battle at the Constitutional Level

The strategy of the bi-partisan neoliberal coalition opposing the Referendum clearly emerged from the very beginning. The Referendum was ignored by the media, most likely because Berlusconi, well-known for his control over official newspapers, national television channels, and the Democratic Party in power in many regions and municipalities, were extremely hostile to this effort of direct democracy, which could endanger planned privatizations of the water system.⁸⁵ This explains the quite impressive silencing strategy, which was clearly aimed at

82. See Decreto Legge 25 settembre 2009, n. 135, in G.U. 25 settembre 2009, n. 223 (It.) [hereinafter Ronchi Decree].

83. On this point of the mobilization and timeline of the growth of a grassroots water network, see Tommaso Fattori, *From the Water Commons Movement to the Communitarianization of the Public Realm*, 112 S. ATLANTIC Q. 377, 377-87 (2013).

84. FORUM ITALIANO DEI MOVIMENTI PER L'ACQUA, http://www.acquabenecomune.org/Referendum/Letter_to_the_international_water_movements.pdf, <http://www.epsu.org/a/7217> (last visited June 15, 2013).

85. Bernedetta Brevini, *The Day Italians Finally Said No to Silvio Berlusconi*, THE GUARDIAN (June 14, 2011 4:59 PM), <http://www.theguardian.com/commentisfree/2011/jun/14/silvio-berlusconi-italian-referendum>.

making the referendum fail for lack of a sufficient turnout at the polls.⁸⁶ On the merits, the theory of our opponents was that the liberalization of the local public services was a requirement of European law so that the Constitutional Court could not possibly admit the referendum.⁸⁷ As mentioned, a referendum cannot abolish a law that is mandated by international law, which is technically the nature of European legislation. Nevertheless, on January 12, 2011, the Constitutional Court gave a lesson on constitutional and European Law by admitting four of the six questions presented, including two of the three presented by the *beni comuni* movement. The lawyers involved in the argument were very satisfied because the Court clearly stated that European Law does not mandate liberalization nor privatization of public services, and that it is up to the member states to decide whether they prefer to use the private sector or whether they prefer to take direct responsibility of public services. According to the Court, the Ronchi Decree⁸⁸ was a discretionary act of the Italian state, and as such could be abolished by referendum according to Constitutional law.⁸⁹ The Court also discussed, as mandated by its own case law, the issue of the legal vacuum that might follow a referendum because, should it happen after the abolition of the law, the referendum could also not be admitted. The Court held that there would be no vacuum in all the admitted questions because European Law could directly be applied to fill up the vacuum, leaving to each local municipality the choice of what to do with its own public services.⁹⁰

Once the obstacle of admission was passed, the real political difficulties started, because the voters were largely ignorant of the fact that a referendum had been called. With no help from the media, the commons activists had to engage in a very long, old-fashioned, door-to-door campaign because the Internet and social media, which assisted a lot, especially among youth, are still very far from reaching the majority of the population in Italy. To make the issue even more difficult, Italians were already called to a double set of administrative elections in the month of May, and the government refused to have the referendum at the same time.⁹¹ Rather, it strategically opted for the last possible dates, June 12-13, when schools were already closed, many people were on vacation, and students were still away from home to

86. *Id.*

87. Italian Parliament, *Manovra di Ferragosto*, Atto Senato no. 2887, XVI Legislatura (2011), www.parlamento.it/leg/16/BGT/Schede_v3/Ddliter/37308.htm.

88. See Ronchi Decree, *supra* note 82.

89. Italian Constitutional Court, no. 23/2011 and 24/2011.

90. *Id.*

91. Brevini, *supra* note 85.

take university exams. The legal challenge in court against the decision of having an independent date for the referendum—costing Italian taxpayers an estimated 300 million Euros in extra organizational costs—was defeated because both the administrative and constitutional jurisdictions held that the executive enjoyed discretionary power on this matter. This almost desperate situation was subverted by the nuclear accident of Fukushima, which produced a panic reaction by the Italian government. The government attempted to cancel the nuclear referendum by decree, fearful that a majority of the people would show up to the poll as it had for a previous vote in 1986, in the aftermath of Chernobyl.⁹² This attempt produced much stir in the media. This time, the legal reaction was sustained by the Court of Cassation (that confirmed the date of the referendum) and the accident produced a final round of media visibility to the whole referendum campaign. In the last few weeks, when it became clear that the victory was not beyond reach, the Democratic Party and the largest newspaper *La Repubblica* finally gave their support. Moreover, in the administrative elections of Naples, Milan, and Cagliari, three absolute outsiders, enjoying the support of the commons movement, won against establishment bipartisan neoliberal candidates. Consequently, this exciting phase of Italian political life, after the overwhelming referendum victory, became known as the “Italian Spring,” and is being credited for creating the conditions for the fall of the Berlusconi Government.⁹³

The Italians had voted to invert direction away from neoliberal ideology by participating in massive numbers to re-establish responsibility for a renewed public sector and to defend the commons from both privatization and mega-projects of development. This vote has certified a large separation between the Parliament and the people. In fact, the sitting Italian Parliament was already suffering a democratic deficit, having been elected in 2008 with an electoral law—significantly nicknamed “*porcellum*” (the pig’s law)—that curtailed the possibility of the people to choose their representatives. The current Parliament is resented as illegitimate because it is composed of Senators and Deputies chosen by the political parties’ secretariats rather than by the people.⁹⁴ Practically every one of its members either was against the referendum or strategically decided in its favor at the very last minute, and

92. *Id.*

93. Charles Hawley, *The World From Berlin: ‘Berlusconi Has Nothing Left to Offer’*, SPIEGEL ONLINE INT’L (June 15, 2011 2:13 PM), <http://www.spiegel.de/international/europe/the-world-from-berlin-berlusconi-has-nothing-left-to-offer-a-768566.html>.

94. *Grillo Says Current Italian Parliament is ‘Empty Can’*, LA GAZETTA DEL MEZZOGIORNO (June 7, 2011), <http://www.lagazzettadelmezzogiorno.it/english/grillo-says-current-italian-parliament-is-empty-can-no626562>.

certainly was not ready to oppose neoliberalism. Thus, a constitutional crisis began. The official reaction to the Italian Spring followed a path that directly opposed the vision articulated by the commons movement. In the summer of 2011, a strong attack by the so-called “financial markets” targeted Italy. On the first days of August, a “secret” letter, signed by the governors of the European Central Bank, was delivered to Silvio Berlusconi requiring urgent action by decree to reduce the Italian public debt. This letter required a strong liberalization policy not only of the public services, but also of the labor market. A few days later, on August 14, 2011, a day in which most Italians were on vacation, the Berlusconi Government, weakened by internal infighting and by a wave of sexual and corruption scandals, enacted a decree⁹⁵ aimed at introducing urgent measures to calm the international speculation. This included a provision Article 4 of the *Ferragosto Decree*, which entirely reproduced the text of Article 13 bis of the *Ronchi Decree*. By so doing, the Government re-proposed a roadmap for obligatory liberalization and eventual privatization of the public services, maintaining water as an exception. An envelope containing almost 10,000 signatures on an appeal to the President, produced by three of the legal scholars that had prepared the referendum (Lucarelli, Mattei, and Nivarra) and collected in only a few days via the Internet, argued that to write the decree into law would be unconstitutional.⁹⁶ The request was ignored and the *Ferragosto Decree* was urgently signed into law, only to be declared unconstitutional less than a year later by the already mentioned decisions 199 and 200 of the Constitutional Court for its contradiction of the referendum result which, by reproducing an obligation to sell, abridged the prerogative of the local governments (Regions). Rather than paying attention to the will of the people, President Napolitano was keen on following the desires of the international business community, and with practically no consultations, decided the name of the next Italian Prime Minister, installing a “technical government.” Despite the respectful obedience to the European diktat of the *Ferragosto Decree*, Berlusconi could not keep a majority and was forced to resign in favor of a newly appointed Life Senator, the former European Commissioner to the Internal Market, neoliberal economist and President of the conservative Bocconi University in Milano, Mario Monti. This transition, shamelessly negotiated in the shadow of the need to please the so-called troika and the international markets,

95. Italian Parliament, *supra* note 87.

96. See SI ACQUA PUBBLICA, <http://www.siacquapubblica.it/> (last visited Sept. 15, 2013). See also Ugo Mattei, *Beni Comuni*, in GRAMMATICA DELL' INDIGNAZIONE, (L. Pepino & M. Revelli, eds., Edizioni Gruppo Abele, forthcoming 2013).

occurred in a context of relentless propaganda where the declared "emergency" was to avoid "ending like Greece."

2. Beni Comuni as a National Social Movement

To explain the unexpected success of the referendum campaign, one must consider that a national network of local water committees (active in different parts of the country since 2001) was in place since 2006, and a systematic scholarly effort to re-think and criticize the legal basis was in place since 2005 and facilitating easy privatization in Italy. Undoubtedly, these two primary forces contributed to the overall success of the referendum.⁹⁷ The idea of *beni comuni*, in the aftermath of the referendum, was way beyond the single-issue movement of water. In Italy today, the *beni comuni* is the recognized symbol of an alternative and counterhegemonic vision: theoretically articulated in a manifesto (published in September 2011)⁹⁸ that generated a large political and legal literature, many contextual struggles and, even the birth of a political entity: *Alleanza Lavoro, Beni Comuni, e Ambiente* (ALBA), devoted to the cause of the commons.⁹⁹ While ALBA did not so far succeed in gaining national relevance, a new innovative political activity has emerged organized around a systematic and itinerant effort to draft a Code for the commons and other related legislation to continue the work of the Rodotà Commission, which has been significantly dubbed "Costituente per I beni comuni."¹⁰⁰ This *beni comuni* movement was built by a combination of scholars, lawyers, and activists, claiming not only water but nature, culture, labor, and education as commons. The origins of this movement in its different constituent dimensions are explored below.

97. See generally Rodotà Commission Bill, Delegated Legislation to Reform the Civil Code Articles Concerning Public Property, Atto Senato n. 2031, XVI Legislatura (2010) [hereinafter Rodotà Commission Bill].

98. See generally UGO MATTEI, *BENI COMUNI: UN MANIFESTO* (9th ed. 2012).

99. See ALLEANZA LAVORO BENI COMUNI AMBIENTE, www.soggettopoliticonuovo.it (last visited Sept. 2, 2013).

100. See *Teatro: Convocata al Valle Occupato la 'Costituente dei Beni Comuni'*, PORTALE DEL GRUPPO ADNKRONOS, http://www.adnkronos.com/IGN/News/Spettacolo/Teatro-convocata-al-Valle-Occupato-la-Costituente-dei-beni-comuni_3277704796.html (last visited Sept. 1, 2013).

a. *Scholars*

The effort of scholars, in particular the research carried out at the Accademia Nazionale dei Lincei, the most prestigious scholarly institution of the country, was critical in building the *beni comuni* movement. The study carried out at the Lincei was motivated by the observation that Italy, between 1992 and 2000, was the first country in the world from the point of view of privatized assets (roughly 140 billion Euros of value), making it the second worldwide (after Great Britain) in the value of privatizations between 1979 and 2008.¹⁰¹ In 2007, under the Prodi government, the scholarly effort at the Lincei established by decree of a special commission of the Ministry of Justice.¹⁰² Its task was to propose a reform of the provision on public property, contained in the Italian Civil Code, in order to establish some principles governing the possibility and the limits of the privatization of public assets. At the fall of the Prodi government, the now famous Rodotà Commission¹⁰³ produced its reform proposal, which contained the first technical definition of the commons as a legal category and form of property different from both private and public ownership, deserving special protection. This proposal, abandoned by the second Berlusconi government (which took office in April 2008) was resurrected by a bipartisan bill presented by the Piedmont Region in November 2009, but was never discussed by the Senate.¹⁰⁴ In the definition of the Rodotà Commission, the commons are goods “that are functional to the exercise of fundamental rights and to a free development of the human being”

101. See MATTEI, REVIGLIO & RODOTÀ, *supra* note 74.

102. *Id.*

103. The Rodotà Commission introduced the category of “‘common goods,’ that is things that are functional to the exercise of fundamental rights and to a free development of the human being. Common goods should be protected by the legal system to the benefit of future generations too. Common goods’ holders can be either a public legal person or a private. In any case they should guarantee the collective fruition of common goods in the ways and within the limits established by the law. If the holders are public legal persons, common goods are managed by public bodies and are located out of trade and markets; their concession/grant is allowed only in the cases provided by the law and for a limited time, with no possibility of extension. Examples of common goods are, among the others: rivers, streams, spring waters, lakes and other waters; the air; national parks as defined by the law; forests and wooded areas; mountain areas at a high altitude, glaciers and perpetual snows; seashores and coasts established as natural reserves; protected wildlife; archeological, cultural and environmental goods.” Rodotà Commission Bill, *supra* note 97, art. 1, ¶ 3(c). The name of the Commission is derived from the name of its President, a leading Italian property law scholar and former distinguished member of Parliament.

104. *Proposta di Legge al Parlamento [Bill to Parliament]*, ITALIA BENE COMUNE, http://www.italiabenecomune.eu/index.php?option=com_content&view=article&id=10%3Apr-oposta-di-legge-al-parlamento&catid=9%3Adocumentazione&Itemid=8&lang=it (last visited Sept. 1, 2013).

and access to such goods remains whether the formal title of ownership is public or private, and in all cases must be protected for “the benefit of future generations.”¹⁰⁵ Water was included as the first item in the open list of the commons suggested by the Commission. While this political and scholarly effort, justified by a sense of responsibility for future generations, was in place (and here the influence of the Constitutional experience of Bolivia and Ecuador was clear), the very same day, November 26, 2009, that the Rodotà text was presented in the Senate by the Piedmont Region, the lower chamber passed, with a confidence vote and no parliamentary discussion, the so-called “*Decreto Ronchi*,” which introduced a duty for local governments to follow a compulsory scheme of privatization of all local services aimed at transferring control to the private sector.¹⁰⁶ According to Article 113 bis of the Decree, by December 31, 2011, all local services controlled by the public sector, including the water supply system, were to be placed on the market by a public auction. Article 1 of the Decree declared that such release of public control was mandated by European law.¹⁰⁷ This blatant display of neoliberal arrogance generated indignation, and within a few days six law professors, four of whom were already members of the Rodotà commission (Professors Ugo Mattei, Alberto Lucarelli, Luca Nivarra, Stefano Rodotà, with Gaetano Azzariti, and Gianni Ferrara), drafted three of the referendum questions, created a referendum committee, and posted¹⁰⁸ a document on the Internet calling for the beginning of a referendum procedure. Two of the questions presented were eventually admitted by the Constitutional Court to be put on the ballot.

b. Activists Forum Acqua

The efforts of the water network (Forum Italiano dei movimenti per l'acqua) in 2009 produced the *Citizen's Initiative Bill for a Water Reform* statute,¹⁰⁹ which collected more than 400,000 signatures, only 50,000 of which were necessary for such an initiative. The popular *Citizen's Initiative*, however, was never discussed in Parliament. The Forum was

105. Rodotà Commission Bill, *supra* note 97, art. 1, ¶ 3(c).

106. Ronchi Decree, *supra* note 82.

107. *Id.*

108. See text accompanying note 103, *supra*.

109. The Citizen Initiative Bill was a bill introduced by the Italian Water movement. The first was at the regional level in Tuscany in 2005, and the second nationally in 2007. To introduce a bill, at least 50,000 signatures must be collected to present it to Parliament. For more on the bill, see Tommaso Fattori, *Commonification of the Public Realm*, 112 S. ATLANTIC Q. 366 (Saki Bailey ed., 2013).

crucial in organizing an impressive coalition of trade unions, consumer movements, activist groups and a few left-wing political parties (not represented in Parliament), which carried on a massive coordination effort for the collection of the signatures, fundraising, and the production of the materials necessary for the campaign.

c. *"Culture as a Commons" Theater Occupations*

On June 14, 2011, the day after the referendum, a group of precarious workers of the cultural industry: actors, technicians, musicians, and independent producers, occupied the Valle Theater in Rome. Their motto was: "Like water and like air. Let's free culture."¹¹⁰ The Valle Theater, one of the oldest and most prestigious theaters in Europe, was in the process of being relinquished by the Minister of Culture and transferred to the Rome Municipality run by a former Fascist mayor, putting it at risk of privatization.¹¹¹ The occupation was planned as a demonstration aimed at raising public attention to a category of workers that were suffering under the established neoliberal policy of cuts on public spending for culture. The occupants invited this author, Mattei, as a protagonist of the water campaign, to address the permanent assembly, and after a lecture on "culture as a commons," a decision was taken to make the occupation permanent and steps were taken to develop a long-term legal and political plan of a constituent nature. What is occurring at the Valle Theater, short from being an action limited to the world of the arts, is an ambitious political plan to hybridize culture, politics, and economics to transform the Valle into the hub of a large bottom-up occupation network movement of the commons aimed at real constituent power. The long-term plan is to develop an "independent participant foundation,"¹¹² endowed with a set of bylaws capable of offering an example of a legal setting working as a constitution of the commons based on a direct application of Article 43 of the Constitution.¹¹³ Today, the model of the Valle as a commons and as

110. Translated by authors from "Come l'acqua, come l'aria: Liberiamo i saperi." See *Come L'acqua, Come L'aria: Liberiamo i Saperi*, VALLE, <http://www.teatrovalleoccupato.it/come-lacqua-come-laria-liberiamo-i-saperi> (last visited Sept. 15, 2013).

111. Saki Bailey & Maria Edgarda Marcucci, *Legalizing the Occupation: The Teatro Valle as a Cultural Commons*, 112 S. ATLANTIC Q. 396 (2013). See also *Teatro Valle Occupato: One Year and a Half of Commoning (English Version)*, VALLE, <http://www.teatrovalleoccupato.it/teatro-valle-occupato-one-year-and-half-of-commoning-english-version> (last visited Sept. 15, 2013).

112. See *Chi Siamo [Who We Are]*, TEATRO VALLE OCCUPATO, <http://www.teatrovalleoccupato.it/chi-siamo> (last visited Dec. 12, 2012).

113. See Art. 43 Costituzione [Cost.] (It.). A "Community of workers and users" is now running the theater that is thriving in the heart of Rome. Such a "community," mentioned

a method of occupation is being put in action not only in Rome (Teatro Valle and Cinema Palazzo), but also in Venice (Teatro Marinoni), Catania (Teatro Coppola), Naples (Asilo Filangieri), Palermo (Teatro Garibaldi), Pisa (Teatro Rossi), Messina (Teatro Pinelli), and Milan (Macao). In Milan, a thirty-one-story building was occupied on May 5, 2012, in order to transform it into a "cultural common" before being evacuated by a very controversial police reaction.¹¹⁴ This bottom-up constituent effort is rooted in the people's right of resistance and links together all the apparently distant struggles against the neoliberal politics carried on by those that suffer most under its destructive policy.¹¹⁵

in Art. 43 of the Constitution, is neither a public nor a private institution but rather an experience of revolutionary commoning, such as that of workers in Nazi-occupied Italy.

114. See Macao, *Addio alla Torre Galfa Occupato un Palazzo a Brera*, LA REPUBBLICA MILANO (May 19, 2012), http://milano.repubblica.it/cronaca/2012/05/19/news/macao_addio_alla_torre_galfa_occupato_un_palazzo_a_brera-35475294/. Another ambitious occupation attempt has been successful, however, in Pisa, where a large abandoned factory has been occupied, defended against owner's attempts to recover it, and transformed into a "municipio dei beni comuni," with a restaurant, library, workshops, carpenter, bicycle mechanic, nursery school, and sustainable marketplace. The legal case will be argued in court on September 20.

115. The commons movement has quite systematically used the strategy of physical occupation for reclaiming and actually managing commons. Such a strategy directly challenges existing constitutionally reinforced private property relations. From the point of view of property law, these actions would be deemed "illegal"; however, the commons movement refuses the idea of being engaged in an "illegal" practice. Rather, the claim is that occupations are aimed at opening up enclosed common spaces, the access to which is constitutionally guaranteed, and are therefore to be considered legitimate exercises of people's constituent power. These actions are viewed as legitimate so long as they genuinely are aimed at creating access to property (both private and public) to implement its "social function" and to defend the public interest from the abusive use of the right to exclude. It is argued that these occupations are aimed at "opening up" public and private spaces by a formally "illegal" action to recover people's possession of under-utilized or corruptly utilized spaces, functioning as a sort of peoples "drittwirkung," (horizontal application of Constitutional law in private law matters), whose legitimacy is determined by the actual capacity to resist an illegal rule of law by counter-hegemonically turning the law against itself and subverting the very meaning of legality. This, however, still begs the question, when is occupation, which is the very physical act of resisting existing property relations, a legitimate constituent action? The answer to this question cannot be in the law itself. See Gunther Teubner, *Self-Subversive Justice: Contingency or Transcendence Formula of Law?*, 72 MOD. L. REV. 1 (2009). Gunther Teubner poses the question: "Is it lawful to apply the distinction between lawful and unlawful to the world?" *Id.* at 18. He answers, "Thus, as soon as the law encounters its own paradox, then it is exposed to the question of justice." *Id.* Justice, and not law, must be the standard by which to judge what forms of constituent power and which constituent actions are legitimate. Teubner describes this process as an "ongoing discursive process within legal practice itself," which can include actions of those outside of the legal profession, including citizen's protests. *Id.* at 14. See also NIKLAS LUHMANN, *Justice, a Formula for Contingency*, in LAW AS A SOCIAL

d. *"Nature, Labor, and Education as a Commons"*

In the aftermath of the referendum, in the Valle di Susa near Turin, the NoTAV movement (opposing high-speed rail development), which in the last twenty years had resisted a mega development project of a new fifty-six kilometer tunnel through the Alps, occupied an area close to the area where the first perforations were supposed to take place. The movement has declared the area a "Libera Repubblica della Maddalena" (Liberate the Republic of Maddalena), and has experienced, for more than a month, a community economy based on gift and cooperation. It would be beyond the scope of this paper to describe this long and still ongoing saga, however, suffice it to say that the Susa Valley population is still systematically accused—by a media system in a blatant conflict of interest—as a violent and illegal NIMBY (not in my backyard) approach, which has been attacked by the police with violent means and incarceration of activists.¹¹⁶ There again was presented, in a very large assembly, with this author as a representative of the water movement, the idea that the NoTAV was a commons movement, opposing in the general interest the same logic of economic and political concentration of the nuclear industry. The Maddalena was violently evacuated by the police on the morning of June 26, 2011, but the motto of "NoTAV" "nature as a common" remained, a radical reconfiguration of the NIMBY idea from the individual "not in *my* yard" to the defense of collective needs and interests. The theory of the commons has connected the

SYSTEM 211 (Fatima Kastner et al. eds., Klaus A. Ziegert trans., 2004). Luhmann describes the relationship of justice to the law as law's contingency formula. He says, "[J]ustice can only mean an *adequate complexity* of consistent decision-making." *Id.* at 219. Teubner interprets that justice is not found within the consistency of legal decision, "Justice as law's contingency formula explicitly goes beyond internal consistency. It is located at the boundary between the law and its external environment and means both the historical variability of justice and its dependency on this environment." Teubner, *supra*, at 12. The legal system reduces issues of justice to the "binary code" of legality/illegality, but the social world is far more complex than this binary. As Teubner states, "justice needs then to be understood as the subversive practices of law's self-transcendence." *Id.* at 3. The subjects capable of subversive practices must come from an outside position, not necessarily outside the law but in an observational capacity. "In order to find one's way in challenging, as it were, artificial situations, one must observe the observers." LUHMANN, *supra*, at 227. These observers may include judicial decision makers or legislators, but as mentioned above are not limited to the legal profession. *Id.* at 228. Though Teubner does not explicitly include civil society actors or the strategy of occupation, these authors (Bailey & Mattei) take the position that the commons social movements may provide this third outside perspective of justice into the legal system: replacing the economic contingency installed by governments and corporations with a social and global justice contingency.

116. For a site reporting the most recent arrests, see *La Valle Non Si Arresta*, NOTAV.INFO, www.notav.info (last visited Sept. 15, 2013).

NoTAV with the Valle Theater, water, no nukes, and many other experiences of anti-neoliberal resistance. The motto was carried in Turin at the head of a demonstration of more than 20,000 participants that for the first time brought the NoTAV outside of the closed perimeter of the Susa Valley. Instrumental to the success of this march was the Federazione Impiegati Operai Metallurgici (FIOM, a metalworkers trade union), just expelled from the FIAT factory after a dramatic blackmail referendum on January 13, 2011. The trade union marched on October 16, 2010, in Rome, right in the middle of the water campaign, in a gigantic demonstration led by the motto “Il Lavoro è un bene comune” (Labor is a common good). In addition, on December 15, 2011, while the Berlusconi Government was beginning to lose its majority in Parliament because of infighting in the post-fascist part of its coalition, a massive student demonstration against the University Reform Bill took place in Rome, and was stopped by the police, resulting in many arrests of students. Here again, the motto of the protest, which involved many student unions active in the referendum campaign, was “L’Università è un bene comune” (The University is a common good).

e. Assessor of the Commons & ABC Napoli

In Naples, mayor Luigi De Magistris, elected as a complete outsider just weeks before the referendum victory thanks to the strong endorsement of environmental and social activists, in the middle of an embarrassing crisis of garbage accumulation through the city, appointed one of the drafters of the Water Referendum (Alberto Lucarelli) to a newly-established post, that of “Assessor to the commons” (Assessore ai bene comune). This key political role is aimed at experimenting with new forms of local participatory democracy based on Article 43 of the Constitution, and to create a new participant institutional system of governance for the local utilities corporation, in what is the third largest Italian city.

Aqua Bene Comune Napoli (ABC Napoli) was transformed officially into a commons corporation on April 22, 2013. This new “public-common partnership” (as opposed to the public/private partnership) is an experiment (and later hopefully a model) of how public law tools can be utilized to protect citizen’s access to clean and affordable water as well as to increase democratic participation and transparency in water management. Its legal form in Italian public law takes the form of “azienda speciale,” drawing upon an existent form of the public

corporation, however modified to pursue a public and “living purpose”¹¹⁷ which serves humans and the environment in a sustainable manner, as opposed to in the pursuit of profit. This public-common special corporation is a unique case of a public legal form employed by municipal agencies in designing a new type of commons institution aimed at the partnership not of the market and state, but rather the state and citizens. The partnership pursued by ABC's charter attempts to restructure the interaction between the different actors in the public sector and civil society in order to emphasize their complementarity by promoting forms of self-organization and the inclusion and participation of workers and users of water.

As a result of this, the municipality of Naples has thus become a hub for commons activism, having launched a variety of campaigns, including a campaign for a “European Charter of the Commons,” to be proposed as a citizen’s initiative to the European Commission according to Article 11 of the Lisbon Treaty.¹¹⁸ A proposed draft of the Charter, drafted by a high-level academic conference in December 2011, at the International University College of Turin, presented at an International Conference at the Valle Theater in Rome in February 2012, and discussed Europe-wide through partners at European Alternatives¹¹⁹ elaborated the best strategy to make this action effective. Meanwhile, two European Citizen’s Initiatives, one organized by the water movements under the leadership of Riccardo Petrella and the second by labor unions, has already collected more than the one million necessary signatures to bring the issue before the Commission.

In sum, the *beni comuni* movement engaged constituents in a constitutional process from the bottom up: invoking legal tools at local, national, and even super-national levels, and carrying out a strategy through both private and public law tools wherever possible. For example, the occupation of the Valle Theater attempted to translate its radically democratic practice into the private law tool of the foundation, a counterhegemonic use of the law. Other struggles, such as the water campaign and the NoTAV movement are using a variety of legal tools: including resort to courts of law—ordinary, administrative, and even

117. For examples of corporations pursuing a living purpose which could be considered within a broad understanding of “common institutions,” see MARJORIE KELLY, *OWNING OUR FUTURE: THE EMERGING OWNERSHIP REVOLUTION* (2012).

118. Regulation (EU) 211/2011, of the European Parliament and of the Council of 16 February 2011 on the Citizens’ Initiative, 2011 O.J. (L 65).

119. European Alternatives is a civil society organization devoted to exploring the potential for transnational politics and culture. Meetings promoting the commons and the Charter were organized through the Trans Europa Festival in a number of European cities, including London, Rome, Berlin, Paris, Zagreb, and Sophia. *About Us*, EUROPEAN ALTERNATIVES, <http://http://www.euroalter.com/about-us/> (last visited Apr. 14, 2013).

constitutional—to vindicate respect of the referendum and to protect the rights of the people against the antidemocratic use of public authority. In other places, such as in the case of Naples, the very structure of local government authority has been modified to relinquish power to the people for participatory governance of the commons. Finally, the availability of such tools of public participation, which have been provided very recently by European law, such as the European Citizens Initiative, are also in the toolkit *beni comuni* activists to carry in their struggles at the European level. Most significant however, was the contribution of the *beni comuni* movement in modifying the constitution in action by giving full force and effective application to the previously unapplied provisions of the 1948 Constitutional text, as discussed in the first section, bringing life to the “economic constitution” to defend the public and common against the private sector.

III. SOCIETAL CONSTITUTIONALISM OF THE COMMONS FROM BELOW VERSUS TOP-DOWN ECONOMIC CONSTITUTIONALISM

The current decline of state sovereignty as a result of the collusion between public and private sectors, exemplified by the Italian case, suggests that maintaining—and expanding at the global level—a liberal constitutional model will simply recreate the conditions for the continuous enclosure of common resources into private property, and the Multitude into a disempowered constituency of an economic constitution imposed from above without their consent. This section analyzes the supranational constitutional process and considers whether the *beni comuni* movement is part of an oppositional global constituency made up of transnational social movements. In this context, we apply the theory of societal constitutionalism. Can a societal constitutionalism of the commons from below mount a challenge to the economic constitutionalism imposed from above?

A. Democratizing Economic Constitutionalism through Social Movements

A number of scholars¹²⁰ have answered the challenge of articulating a theory of constitutionalism beyond the state: “This approach views

120. Most notably, Gunther Teubner and the scholars, including Saskia Sassen, who were present at the Transnational Societal Constitutionalism conference organized by

constitutionalism as a continuum, and constitutionalization as the process by which various entities acquire constitutional characteristics.”¹²¹ This wider pluralist conception of constitutionalism has been applied to argue for constitutional processes taking place not only in the political sphere, but also in economic and societal spheres.¹²² Many scholars have applied this analysis to argue that a process of “economic constitutionalism” is taking place through transnational economic institutions like the WTO and the EU.¹²³ These scholars argue that these institutions demonstrate constitutional features such as “plausible claims to sovereignty, jurisdictional scope, tenets of citizenship and modes of representation.”¹²⁴ Indeed the WTO and EU both exhibit these characteristics, though as explored below, the lack of democratic representation remains controversial. However, the “systems of transnational law, especially trade law, function as ‘constitutions’ in the sense that they subordinate national constitutions, that is, treat national constitutions as legal regimes under their jurisdiction . . . and open them to free trade.”¹²⁵ The WTO organization, based on “consensus,” and a Dispute Resolution body, which is only a *sui generis* court of law, generates much of its law in a “soft” form, officially under the “suspension of application” of an offending state, but which unofficially operates in effect by the threat of sanction¹²⁶ enforced by the political or economic retaliation of member states.¹²⁷ However, this retaliation enforcement mechanism depends upon stronger member states creating asymmetrical enforcement of Dispute Settlement Understanding (DSU) decisions. As a result, suggested by Peer

Professor Gunther Teubner at the International University College of Turin on May 17-18, 2012.

121. Anderson, *supra* note 45.

122. *Id.*

123. See, e.g., *id.* Neil Walker, *The EU and the WTO: Constitutionalism in a New Key*, in *THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES* 31 (Gráinne de Búrca & Joanne Scott eds., 2001); Joel P. Trachtman, *The Constitutions of the WTO*, 17 *EUR. J. INT’L L.* 623 (2006).

124. Anderson, *supra* note 45.

125. Tully, *supra* note 17, at 319 n.7.

126. Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 22, in Agreement Establishing the World Trade Organization (April 15, 1994), Annex 2, in *WORLD TRADE ORGANIZATION, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS* (1999) [hereinafter DSU]. Article 22 never formally uses the word sanction, but rather states that a plaintiff government has the right to “to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.”

127. Andrew T. Guzman & Beth Simmons, *Power Plays and Capacity Constraints: The Selection of Defendants in WTO Disputes*, *American Law and Economics Association Annual Meetings Paper* 52 (2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=660501.

Zumbansen above, transnational law produced by such institutions like the IMF, World Bank, and the WTO operate as “economic constitutions” precisely because they are capable of forcing weaker state governments to implement neoliberal reform not only in the periphery, in the form of loan conditioned structural adjustment programs and sanctions, but at the very heart of the West, through loan conditioning and austerity measures. The “constitutional” nature of these economic laws is defined not just by their constitutional features such as the “disembeddedness of rules” (Tully) or “secondary rules” (H.L.A Hart), “plausible claims to sovereignty, jurisdictional scope, tenets of citizenship and modes of representation rules” (Anderson & Walker), but also by the “the allocation of authority over other constitutions” (Trachtman), which may assist us to understand the way in which the subordination of national constitutions to transnational law may be the most important criteria for the presence of a supranational economic constitutional process at work.¹²⁸ Trachtman adds to H.L.A Hart’s concept of “secondary rules” as the rules of recognition, rules of change, and rules of adjudication by adding what he calls a “tertiary rule.” This tertiary rule refers to the nonexclusive nature of constitutional rules and the process of inter-constitutional dialogue that takes place not only between constitutions at the state and federal level as we know takes place in the U.S. federal system, but also between constitutions at the state and supranational levels.¹²⁹ To demonstrate this, he points to the dialogue that takes place between courts and legislatures in interpreting laws between the EU level and member states level. The member states of the European Union, while far from ratifying a political constitution, are bound by the laws of the European Union in many areas of law through the EU Directives mechanism. However, more than the mere interpretation of a hierarchy of rules over others, or the idea of the constitution as the “supreme” law of the land, which is useful in understanding the way in which courts institutionalize the constitution, what is more interesting and relevant, according to Trachtman, in understanding constitutional processes on the supranational level, is the ability of political and economic entities to exert authority and institutionalize a political and economic hierarchy, even absent law and a textual constitution, that allocates such authority. It has become increasingly clear since the eruption of the Euro-zone crisis that the European Union exerts economic pressure through the European Central Bank, imposing a *de facto* hierarchy of European decision-making over state sovereignty well beyond the limits

128. Trachtman, *supra* note 123, at 627.

129. *Id.*

of the Treaty of Lisbon. This influence of the European Central Bank in the installation of the Monti technical government in Italy was discussed earlier in Part II.¹³⁰ However, can we really take mere brute assertion of authority as criteria for the presence of a “constitutional” process? Isn’t the very promise of constitutionalism the restraint of tyrannical power? Perhaps not. There are, after all, many constitutions in the world at the nation-state level that allocate authority in seemingly unjust ways, so why not at the supranational level?

What is clear is that while the WTO and European Union exhibit many constitutional features, these organizations fail on one crucial criteria of most western liberal democracies: they lack democratic representation though in different ways. The WTO (much like International Human Rights Regime) depends on the will of stronger states and thus favors those states in its enforcement, as discussed earlier. The European Union also similarly fails to meet the criteria of democratic representation because it lacks a political constitution and depends on technocrats of the European Commission for its implementation. Even if we could argue that the member states are represented in the European Parliament: representative democracy is failing both at the supranational level and at the state level, as discussed earlier in Parts I and II, resulting in state representatives often working against the interests of their own people. Both of the economic constitutions of the WTO and the European Union fail in their democratic representation because they lack a constituency capable of restraining the sovereign by demanding democratic accountability.

However, even with these many problems, the possibility of democratizing the supranational constitutional process remains attractive to many scholars, because it may provide the only way to unveil what is currently understood as technocratic “economic” decisions and subject them to a political process. In this spirit, some scholars promote constitutional pluralism in economic constitutionalism—calling for the broader inclusion of the voice of nonwestern states, and most interestingly, of nongovernmental actors.¹³¹ A pluralist and open vision of constitutionalism thus considers the multiple forms constituents may take outside of the nation-state, the liberal constitutional form, and traditional politics. Some scholars are analyzing social movements as a positive counter-hegemonic force to the constituent power of western states, “providing a ‘discursive interface between international organizations and a global citizenry’ capable of ‘monitor(ing)’ policy making in these institutions . . . bring(ing) citizens [sic] concerns into

130. See Part II discussion, *supra*, about the Monti Government.

131. See, e.g., Buchanan, *supra* note 13.

their deliberations and empower(ing) marginalized groups so that they too may participate effectively in global politics.”¹³² Similar to the way in which social movements, as discussed in the U’wa case, are able to place local communities directly in contact with multinationals, social movements may also be capable of facilitating a relationship between economic institutions like the WTO and the people or the Multitude.

Ruth Buchanan, however, along with many others, argues that social movements are far from being representative of the peoples’ will. She critiques the way in which the countermovement has been primarily led by nongovernmental organizations (NGOs), and the similar problems of NGOs with governmental actors, such as agendas driven by their funders and, as a result, very weak political subjectivity. Third World Approaches to International Law (TWAIL) scholars are referring to this problem as the “NGOization” of social movements.¹³³ For example, Makau wa Mutua points to the incestuous origins of many influential NGOs—they often share the same founders and governing boards as one another; many sharing the same economic, cultural, and class background.¹³⁴ Like Buchanan, Marti Koskenniemi argues for pluralism in the economic constitutional process, but similarly points out the striking “homogeneity of the cultural and professional outlook” of those participants involved on both sides, offering the same legal and technical solutions.¹³⁵ The policies generated by NGOs often mirror that of the WTO and the European Union because they embrace the same liberal “development” and “efficiency” rhetoric as their counterparts. In this context, the commons social movement as a genuinely spontaneous force defined by its direct political action and resisting representation may prove itself to be immune to the normalizing effect of NGOization by deploying a number of strategies and tactics that challenge the brute deployment of authority discussed in Part II, some of which challenge enforce state constitutional guarantees and other illegal constituent practices that target the illegality of the official rule of law.”¹³⁶

Commons movements tend to demand representation by those who are actually part of the movement. Often members are extremely suspicious about foreign funders and outside organizers, and even reject

132. *Id.* at 662-63.

133. RAJAGOPAL, *supra* note 35, at 258.

134. Makau wa Mutua, *The Ideology of Human Rights*, 36 VA. J. INT’L L. 589, 613-15 (1996).

135. Martti Koskenniemi, Talk at Harvard University, Global Legal Pluralism: Multiple Regimes and Multiple Modes of Thought 21 (Mar. 5, 2005), [http://www.helsinki.fi/eci/Publications/Koskenniemi/MKPluralism-Harvard-05d\[1\].pdf](http://www.helsinki.fi/eci/Publications/Koskenniemi/MKPluralism-Harvard-05d[1].pdf).

136. LAURA NADER, *THE LIFE OF THE LAW: ANTHROPOLOGICAL PROJECTS* (2005); UGO MATTEI & LAURA NADER, *PLUNDER: WHEN THE RULE OF LAW IS ILLEGAL* (2008).

them when they know it will undermine their local legitimacy.¹³⁷ Furthermore, as discussed in a previous section, social movements may be far more capable than NGOs of challenging existing institutions and offering true alternatives, because they are actually engaged in the practice of governing the commons. These movements may provide the much-needed institutional “imagination” necessary to formulate true alternatives to the development, rights, and private property packages promoted by the modern liberal state and international economic institutions. The local and practice-oriented nature of commons movements may thus provide the much needed legitimacy and imagination in the making of a pluralistic and open constitutional process. The question that remains is whether such a process could take place at the supranational level absent current constitutional guarantees for democratic participation.

B. Societal Constitutionalism of the Commons

In a debate which took place in May 2011 between Antonio Negri and Gunther Teubner, “The Law of the Common,”¹³⁸ one of the key questions presented was: “[w]here is the [p]otential space for [common] social movements in its relation to global governance?”¹³⁹ The point of intellectual tension between Negri and Teubner in the debate over this question was the issue of the characterization of the “private” as “private property” and the danger of the “common” replacing the “public.” Teubner stated:

While the “common” seeks to overcome the alienation of the private via collective activities and collective modes of attribution, the “public” tends to strengthen the space of open and democratic deliberation, which finds its different forms in each social field. Undoubtedly, common property has a powerful potential, which has been suppressed under the domination of neo-liberal policies of private property. But the choice between different attributions of property rights cannot be decided a priori on theoretical grounds in favour of the

137. RAJAGOPAL, *supra* note 35.

138. See Debate, *The Law of the Common: Globalization, Property and New Horizons of Liberation*, 21 FINN. Y.B. INT’ L L. 1 (2010).

139. *Id.* at 5.

commons, but needs to be governed by public reflection processes within each sphere of life.¹⁴⁰

Teubner argues is that an a priori preference for the commons could result in the dominance over all spheres of life—social, political, and economic—that serves to suppress the integrity and autonomous logics of these other life spheres just as the market society subjects society to the economy. In this way, the commons could—if certain safeguards are not institutionalized internally—promote the regression into a sort of local tribalism, where communities operate as commons “inside” but as private property “outside,”¹⁴¹ excluding users outside of the community to the resources controlled within and, as Teubner points out, shielding this exclusion from public and open democratic deliberation. The emphasis on local control of the commons, as opposed to its direct participatory and deliberative potential, may draw us back to the idea of inherited characteristics as the criteria for membership in these communities, as opposed to membership based on a more open criteria like citizenship or basic human needs and flourishing. This, in effect, would defeat the emancipatory potential of the commons as a critique of private property and rather transform it into a tool for its reinforcement—absent the restraints provided by the public—in the form of the democratic state, or, absent a state, that of self-imposed restraints of the community. The question that emerges is whether it is possible for communities—absent a state-level constitutional process—to provide these self-restraints which ensure the equitable access for those beyond the localized commons community to fundamental resources which should be accessible to all. Teubner and others suggest that such constitutional processes of open public reflection and self-restraint are possible and are taking place beyond the state in civil society.

Constitutional approaches beyond the nation-state can be used to describe the economic constitutionalism taking place from “above,” as discussed in the previous section, but they can also provide tools for understanding and describing constitutional processes taking place “from below.” They can be used to describe the “societal constitutionalism”¹⁴² taking place in civil society, as has been argued by

140. *Id.* at 14.

141. See Carol M. Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 742 (1986) (discussing the commons as vesting property rights in groups that are capable of self-management).

142. DAVID SCIULLI, *CORPORATE POWER IN CIVIL SOCIETY: AN APPLICATION OF SOCIETAL CONSTITUTIONALISM* (2001); DAVID SCIULLI, *THEORY OF SOCIETAL CONSTITUTIONALISM: FOUNDATIONS OF A NON-MARXIST CRITICAL THEORY* (1992); David Sciulli, *Foundations of Societal Constitutionalism: Principles From the Concepts of the Communicative Action and Procedural Legality*, 39 BRIT. J. SOCIETAL SOC. 377 (1988).

other scholars about civil society organizations like labor unions, consumer associations, environmental associations, and digital regulation communities,¹⁴³ which describe constitutional processes taking place “below the radar” of the state.

Instead, civil constitutions are formed in underground evolutionary processes of long duration in which the juridification of social sectors also incrementally develops constitutional norms, although they remain as it were embedded in the whole set of legal norms. In the nation-state, the glare of the political constitution has been so blinding that the individual constitutions of the civil sectors have not been visible, or at best, have appeared as part of political constitutions.¹⁴⁴

Law and lawmaking in this context take place outside the designated liberal constitutional forms of law creation by legislatures and courts, and rather exhibit constitutional features produced by the internal regulations and governance institutions from within these diverse forms of social organization.

Applying this theory of societal constitutionalism, the commons movements may not only be understood to act as sites for mobilizing civil society actors as new global constituents in a process of economic constitutionalism as discussed previously, but can also be analyzed as sites of constitutional—as opposed to tribalistic—processes of community-based resource governance.

Do the commons present a site of constituents engaged in their own civil or societal constitutional processes or are they merely the sites of local tribalism, or as discussed earlier, sites of protest and the demand for inclusion as constituents in the global economic constitution? As Michael Hardt explains in an interview, the previous alter-globalization movements (i.e. Seattle, Washington, Genoa) were nomadic, and functional for mapping the nodes of economic power. However in contrast, many recent protests are taking the form of occupation movements—sharing the same fight against the corporate agenda and the negative effects of capitalism as the alter-globalization movement—that are rooted in time and space for longer periods, therefore presenting new opportunities for organization and alternative

143. See Anderson, *supra* note 45, for an excellent discussion of the theory of societal constitutionalism as applied to social movements in this article.

144. Teubner, *supra* note 12, at 18.

forms of governance.¹⁴⁵ Many commons communities in the commons movement described in Part II in the Italian *beni comuni* movement and the commons movements in the Global South (discussed earlier this section), rather than forming solely as protests, are instead reasserting their right to govern the resources that most affect their lives, currently under threat by the state and the corporation. While it would be beyond the scope of the paper to explore the potentially constitutional features of each suborganization of the larger *beni comuni* movement in Italy (water, theater, labor, education, nature),¹⁴⁶ we offer one example of the Teatro Valle. The Valle, much like the Occupy movement, has adopted the decision-making method of the “General Assembly,” where decisions on programming, direction, funding, and the like are made through a process of “consensus” rather than by majority vote. While there is often disagreement, and not always wholehearted agreement, the procedural rule commits the community to a deliberative process where all viewpoints, even the most marginal, are considered before a final decision.¹⁴⁷ Many commons scholars have noted similar deliberative processes in other commons communities, and such procedural structuring rules have been linked to the effectiveness of these communities to manage resources over long periods of time.¹⁴⁸ The scholarship of Nobel Prize winner Elinor Ostrom describes the institutionalization of such informal rules in governing the commons in terms of “institutional design,” and commons property scholars have demonstrated in an overwhelming amount of case studies how the commons operate as systems of regulation that draw upon both formal and informal sources of law in governing common resources in sustainable way contrary to what is argued in G. Hardin’s “Tragedy of the Commons.”¹⁴⁹ As one commons scholar says, “[a] resource arrangement that works in practice can work in theory.”¹⁵⁰ Commons communities are offering tested best practices—some over thousands of years—which empirically challenge the logic of neoclassical economics

145. Saki Bailey & Tommaso Dotti, *Occupying the Commons: Teatro Valle Occupato*, THE COMMONS SENSE (Aug. 23, 2012), http://www.commonssense.it/s1/?page_id=938.

146. See Bailey, *supra* note 2.

147. See Bailey & Dotti, *supra* note 145. For an in-depth discussion of the governance of the Valle, see Bailey & Marcucci, *supra* note 111.

148. See, e.g., F. Berkes et al., *The Benefits of the Commons*, 340 NATURE 91, 93 (1989); David Feeny et al., *The Tragedy of the Commons: Twenty-Two Years Later*, 18 HUM. ECOLOGY 1, 10-11 (1990).

149. See, e.g., ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990); Elinor Ostrom, *Community and the Endogenous Solution of Commons Problems*, 4 J. THEORETICAL POL. 343, 344-45 (1992).

150. Lee Anne Fennell, *Ostrom’s Law: Property Rights in the Commons*, 5 INT’L. J. COMMONS 9, 9 (2011) (emphasis omitted).

and neoliberal policies. While this scholarship on commons uses the language of “institutional design” as opposed to “societal constitutionalism,” the two approaches share much in common with one another, as they similarly analyze forms of customary and informal law produced outside of formal legislation.

If the presence of law—either as enforceable entitlements or norms reinforced by sanctions—is one prerequisite for the presence of a “constitutional” process, could formally illegal actions like the occupation of the Valle given in the previous example undermine their “constitutional” nature? Teubner suggests in the debate mentioned earlier that the answer hinges on whether the commons can “thematise the restrictedness of their specialized perspective and [] infer self-limitations for their expansionist course of action.”¹⁵¹ Here, Teubner does not state that social constitutionalism depends on the adoption or rejection of the binary of illegality/legality but, however, depends upon the ability of the site of societal constitutionalism to impose or adopt rules of self-limitation, which restrain their actions from expanding into other spheres of life and reinforce the integrity of other constitutional processes at work in society. While the illegal occupation of the Valle was necessary to the birth of the process of a societal constitutionalism—the rules and practices of the commons—and the very assertion of their “specialized perspective” (commons as an organizing principle and logic), the expansion and imposition of these rules and practices to other spheres of life—like, for example, politics or the economy—must be subjected to open processes of deliberation. While specific sites of the commons may exhibit their own intrinsic divides between inclusion and exclusion, their commitment to deliberative processes both within these sites, as well as between these sites, provides an important guarantee for self-restraint.

As Teubner states regarding societal constitutionalism, “[t]he outcome is a multiplicity of independent global villages, each of which develops an intrinsic dynamic of its own as an autonomous area.”¹⁵² In this way, societal constitutionalism is not just the constitutionalism of one particular social sector or community, but rather the aggregation of multiple autonomous sites of constitutionalism in civil society. In this way, the rules of self-limitation in the commons movement may be accomplished precisely through the multiplicity inherent in the movement itself. The plurality of actors and sites that exist within the commons are as diverse as the wide spectrum of interests represented in society: labor reflects the interest of workers, environmentalists reflects

151. Teubner, *supra* note 115, at 6.

152. Teubner, *supra* note 12, at 14.

the interest of nature, digital communities reflect the interest of their users, and so on. Each one in turn generates a plurality of their own civil constitutions. Within the transnational commons movement, there are many autonomous sites, autonomous not only in agenda, but physically autonomous by geography—Indian farmers coordinating common seed banks, New Jersey trawlers coordinating their common fishing grounds, Thai communities coordinating their forest resources, and the occupants of the Valle theater. It may be this very multiplicity of societal constitutionalism within the commons movement which could serve to promote open deliberation and self-imposed limitations; movements that are autonomous from one another, but linked together in their common struggle against predatory state and market actors. Activist Naomi Klein suggests the Zapatistas version:

The Zapatistas have a phrase for this. They call it “one world with many worlds in it.” Some have criticized this as a New Age non-answer. They want a plan. “We know what the market wants to do with those spaces, what do *you* want to do? Where’s your scheme?” I think we shouldn’t be afraid to say: “That’s not up to us.” We need to have some trust in people’s ability to rule themselves, to make the decisions that are best for them. We need to show some humility where now there is so much arrogance and paternalism. To believe in human diversity and local democracy is anything but wishy-washy. Everything in McGovernment conspires against them. Neoliberal economics is biased at every level towards centralization, consolidation, homogenization. It is a war waged on diversity. Against it, we need a movement of radical change, committed to a single world with many worlds in it, that stands for “the one no and the many yesses.”¹⁵³

Central to the commons movement is the very rejection of the idea that all of life can be reduced to neoliberal economics, or in other words, the totalization of the economic sphere in all other spheres of life. The commons movement is the very promotion of the democratization and diversification of the economy from the bottom up and, as such, a critique of the market society and neoliberal policy. In fact, it is the localized and contextual nature of the commons which presents a tremendous challenge for unity as global constituency united against

153. Klein, *supra* note 33, at 89.

top-down economic constitutionalism; but this very fragmentation may catalyze a truly open deliberative process that provides a natural limit to the possibly destructive tendencies of each site of societal constitutionalism.

CONCLUSION

The common goods movement in Italy is a powerful example of the way in which social movements are emerging as the new *pouvoir constituant* as an oppositional force to the process of economic constitutionalism imposed by international economic institutions. They are proving, on both national and supranational levels, that politically active persons organized as social movements are a potent source of constituent power. We argue here that social movements are engaged in the enforcement of national constitutional protections of the public through counter-hegemonic uses of the law, and also at the transnational level, where they are forming global networks capable of not only negotiating with corporate power directly, but also of influencing the top-down economic constitutionalism imposed from above. Social movements are expanding our notion of the public sphere and politics outside of parliamentary processes. Commons social movements are not only sites of political protest outside of traditional political arenas, but also sites of societal constitutionalism, producing alternative forms of resource governance and management. These alternatives provide not just theoretical, but empirical challenges to private property and the developmental state assumed by the liberal constitutional form. To promote a truly pluralist and open vision of constitutionalism, which renews the constituent power of the Multitude, there must be full recognition of the disempowering effects of two fundamental institutions of current capital accumulation: the sovereign state and private ownership. These two institutions share a model of concentration of power and of exclusion that has incrementally squeezed the public interest outside of constitutional law by an imbalance favoring the guarantees of private property over those of democracy. Restoration of the democratic constitutional fabric is a constituent action as long as the struggle for the commons is rooted in the democratic practice of a Multitude with the purpose of restoring the interest of the people over that of profit. In Italy, for instance, constitutional protections are clearly available in a number of mostly unimplemented (Articles 9 and 43) provisions of the 1948 Constitution, most fundamentally in Article 3 and Article 42. Given the failure of representative government and state politics, it is up to the *beni comuni* movement to reclaim their constituent role in enforcing the constitution

and reasserting the role of popular sovereignty. The constituent struggle for the commons aims to produce a new common sense by exposing the contradictions of the state-private property dualism that colonized the modern imagination and underpins the modern liberal constitutional form. There can be no constituent effort, nor liberation from capitalist violence outside of a radical critique of private property rights. The act of the commons social movement engaging in the practices and production of alternative property configurations moves crucial steps in the direction of defeating the corporate agenda. A social movement of the “many worlds,” the many sites of societal constitutionalism of the commons, linked together in a global network, could provide us with a truly bottom-up constitutional and deliberative process capable of reversing the progressive transfer from the commons to the private on local, national, and global levels, giving renewed relevance to the concepts of “constituent power” and “popular sovereignty” today.

