

# THE CASE FOR EMBODIED DEMOCRATIC LAW-MAKING

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## **ABSTRACT**

Van der Walt's monograph is firmly based on Lefort's writings on democracy. It therefore purports to refute any specific figuration or incorporation of political power as universal power. Hence Van der Walt's deconstruction of the history of *nomos* and its internal antithesis between *kosmos* and *physis*. Hence, also, the characterisation of democracy as a regime of 'disembodied power', bidding farewell to the classical idea of a 'body politic'. Manent's critique of 'a polity without a body' provides reasons to revisit the very concept of embodiment in Merleau-Ponty. This, in turn, allows us to see Schmitt's paradigmatic analysis of *nomos* as 'taking' in the new key of 'motor intentionality'. Taking as 'jointly developing grip', i.e., as the effort to interface between a plural self and its world, allows a better understanding of the tension between *kosmos* and *physis*. It neutralises its paralysing effects and prepares for the *labour* awaiting any liberal democracy worthy of the name.

## **KEYWORDS**

Democracy, embodiment, *nomos*, Lefort, Merleau-Ponty.

It is a privilege to be invited to a round table on Johan Van der Walt's recent monograph.<sup>1</sup> However, as usual, the honour comes with a challenge. Firstly, it is well-nigh impossible to meet - here I deliberately omit the disclaimer 'within the framework of this comment' - both the width and the depth of the research - rather, the patient and incisive reading - that backs up the overall argument of the book. The book is unique in discussing so many resources which habitually fall outside the scope of Anglo-American philosophy of law, as well as in addressing head-on the profound metaphysical issues underlying a philosophy of law. Secondly, the argument itself is one that leaves scope (indeed, inspires) a manifold of angles for critical reading. From our communications in the past, I know that the author is eager to engage with all of these, and I learnt from the preface of the present book that some of these angles are already anticipated by monographs to appear in the near future. Thirdly, the angle I picked may well fall squarely under the verdict of the present book, thus demonstrating that I missed its critical thesis. For, in a way, I am

<sup>1</sup> (Van der Walt 2020), hereinafter referred to by [LDL <page>].

going to relate law to life, albeit by refusing the *kosmos - physis* gambit. I am going to join the camp of those who reject *demokratia* without *nomos*, albeit by promoting an altogether different theory of the body politic than Carl Schmitt's. Basically, my comments entail a political adaptation of Merleau-Ponty's philosophy of embodiment.

## 1. THE PROBLEM: A POLITY WITHOUT A BODY?

Arguably, LDL takes its cue from Claude Lefort's writings on democracy. This is what the Introduction promises<sup>2</sup>, what the central chapter 6 *From Nomos to Demos* argues<sup>3</sup>, and what the final chapter 11 on the 'distilled concept' of democratic law-making concludes.<sup>4</sup> When it comes to Lefort and the topic of democracy, Van der Walt and I are on the same page(s) regarding quite a few basic tenets.<sup>5</sup> I subscribe, in particular, to the thesis that '(...) democracy [is] the only arrangement of power that engages with the insight that politics is held in an opening that it does not create itself'.<sup>6</sup> Other arrangements of power tend to fill out this opening by either a transcendent or an immanent referent. The various *droit divin* format(s) of political discourse, dominating Europe from the early Middle Ages well into the 18<sup>th</sup> century, deliver illustrations of the former. The totalitarian regimes of Modernity, particularly in the 20<sup>th</sup> century, are clear examples of the latter. Here, the source of power is located in a specific individual or group, e.g., the Leader, the Party, the Army, who are believed to embody 'the People'. These bodily figurations are venerated as incarnations of legitimate political power, justifying, first and foremost, the self-inclusion of a 'we' by reference to real presences. Democracy, says Lefort, cannot afford to refrain from self-inclusion, paradigmatically expressed in the first-person plural 'We, the people ...' However, it pursues to preserve the symbolic character of this constituent reference in the very representation to which it gives rise. In a

<sup>2</sup> 'This book pivots on the insight it draws from Lefort and Böckenförde.' [LDL 6]

<sup>3</sup> 'The themes that Böckenförde raises (...) resurface in Claude Lefort's seminal 1986 essay *Permanence du théologico-politique* and the paradox that Böckenförde articulates in his dictum is also the key focus of Lefort's essay. (...) As we shall see, the essay probes the depths of the predicament of modernity that Böckenförde has only begun to explore.' See LDL[103] and the incisive discussion of the core of Lefort's views in [LDL 6], sections 2-3.

<sup>4</sup> 'Put in terms that we have developed with reference to Claude Lefort (...) liberal democratic legislation is nothing but an intelligent response to irresolvable differences of opinion. It ignores appeals to deeper convictions. It offers no response to the difference between the symbolic and the real. Liberal democratic legislation does not tell anyone that he or she is wrong for having opinions and preferences that conflict with its coercive terms. It simply asks everyone to respect those coercive terms as the outcome of a legitimate legislative procedure and "legitimately" won right to govern.' [LDL 243]

<sup>5</sup> My history with Lefort is a rather long one. He was awarded an honorary doctorate by Tilburg University as early as 1992. At the time, I had the honour of delivering a public lecture on his work on the eve of the ceremony and to chair a seminar with Lefort. Since then, I have acknowledged Lefort's arguments in several publications, a.o., (Van Roermund 1991; 1996a; 1997; 2003b; Van Roermund 2013; 2015; 2020a)

<sup>6</sup> [LDL 67].

democracy, the representation of this ‘we’ is such that the provisory and retroactive features are acknowledged and sustained as a matter of principle, i.e., by the very legal order it claims to establish.<sup>7</sup> If we speak of ‘liberal’ democracy, as the title of Van der Walt’s book does, it is precisely because of the negative and the positive freedom (Berlin) that entailed in this characterisation: the freedom from incorporation of totalising power in the name of the people and the freedom to revisit and revise the contingent constellation of power exercised in its name.

Some readers of Lefort have expressed this by saying that democracy aims to establish a politico-legal order ‘without a body’.<sup>8</sup> Choosing a more nuanced vernacular, Van der Walt observes that Lefort’s view on the aspiration of democracy amounts to ‘a negative instantiation (...) of the universal’, which comes with ‘a certain disembodiment’.<sup>9</sup> At this point of ‘disembodiment’ in regard to democracy I would beg for some disambiguation: What conception of the body is rejected by liberal democracy? Or in a positive vein: What is bodily about the democratic body politic?

This question is definitely inspired by Manent’s critique of contemporary democracy, in particular in the context of the order underlying a supra-national (‘sui generis’) legal order like the European Union. ‘Europe tries to escape from this obligation to respond [to the common wealth of ‘the people’] by hiding in the crowd, by transforming into a crowd. Its “members” are never numerous enough! This is how it purports to push back the issue of the “body” it constitutes or belongs to. However, the spiritual vacuity of an infinitely enlarged Europe is such that the question returns with greater urgency. Who can live in a human world deprived of any form?’<sup>10</sup> The rhetorical question not only suggests the obvious answer ‘nobody’; in the background there is also the belief that there is always already a *nomos* underlying the process of political communication ushering in a *demos*.<sup>11</sup> For those who emphasise that there is no sovereignty without representation, Manent reverses the charges: ‘No representation without sovereignty.’<sup>12</sup> There should be a sovereign gathering – whether it is called ‘polity’, ‘nation’, ‘state’ or ‘union’ is immaterial – in

<sup>7</sup> For an elaborate argument on the representation of the political and its implications for law, see (Lindahl 2018; 2020). Cf. also Bernard Flynn, characterizing democracy on the basis of Lefort as the sustained promise of ‘(...) an interrogation that will call the Law and all authority into question.’ (Flynn 2006) 150.

<sup>8</sup> Cf. (Rancière 1998) 81: ‘Lefort voit l’essence de la démocratie moderne, comme lieu d’un pouvoir sans corps (...)’. Such a phrase is undoubtedly due to Lefort’s own vocabulary, like in the crucial passage on the ‘emptiness’ of the place of power in democracy: Cf. ‘Incorporé dans le prince, le pouvoir donnait corps à la société. Et, de ce fait, il y avait un savoir latent, mais efficace, de ce qu’était l’un pour l’autre, dans tout l’étendue du social. En regard de ce modèle, se désigne le trait révolutionnaire et sans précédent de la démocratie. Le lieu du pouvoir devient un lieu vide.’ (Lefort 1986: 27, 266). See also (Lefort 2000).

<sup>9</sup> [LDL 120].

<sup>10</sup> (Manent 2006) 96-97 [my translation; BvR].

<sup>11</sup> ‘Communication in itself does not produce community.’ Ibid., 43. Elsewhere Manent observes that our democracies are strong in articulating action on words, but weak (as is expected from politics) in articulating words on action. Cf. (Manent and LePain 2013) 11.

<sup>12</sup> Ibid., 49.

which all agents regard each other as involved in actual *participation* before they can be represented as governors and in government. ‘Absent the sovereign, the body politic necessarily tends towards some form of oligarchic domination.’<sup>13</sup>

Manent’s challenge cuts deeper in the flesh of liberal democracy than one might think. In a critical vein, it goes to the heart of the idea of sovereignty as a ‘spiritual’ affair of pure willing. ‘At root’, Manent says,<sup>14</sup> ‘the representational principle amounts to the will to produce the political bond, or more general the social and human bond, by sheer willing, i.e., solely from the soul. Our era is perhaps not very religious but when it comes to socio-political order it is utterly “spiritualist”. We want all our bonds, how ever corporeal they may be, to have their origin, their cause and their term in a pure and exclusively spiritual decision. In the political, social and moral order, we want to be angels.’<sup>15</sup> Hence, as far as Manent is concerned, if ‘restrained self-assertion’ would indeed be the loadstar of democratic politics, the volitional character of the latter would only be squared, making its fallacy even worse. It would amount to the joint will to restrain our joint will *ad infinitum*. With this reduplication, the polity evaporates into the thin air of a representation of ... representations. Indeed, the urge to ban all ontological hypostatization of the *demos* (deity, pedigree, race, leader, party, etc.) and to make the people ‘introuvable’ (Rosanvallon) seems to usher in a ban on all ontological strongholds, especially when they seem reminiscent of ‘the body’, i.e., of incorporation in various modes. This indeterminacy, says Manent, is ‘exciting and frightening at the same time.’<sup>16</sup> In brief, Manent argues<sup>17</sup> (in words by David Janssens) that ‘(...) the democratic principle of consent only becomes operative within a political framework, a body politic that is not itself the result or the product of a consensual and deliberative process.’ To this, Van der Walt’s diagnosis will be, I expect, that it takes us right back to a path of arguments we should avoid: to Carl Schmitt and his tripartite notion of *nomos: Nehmen, Teilen, Weiden*.<sup>18</sup>

## 2. NOMOS AS DEVELOPING GRIP

Does it? As is well-known, Carl Schmitt has argued that the ancient idea of law as *nomos* reminds us of the origin of all law in the Greek *nemein*: to take. The point is a general one. Prior to the creation of ‘value’ in a process of production (e.g.,

<sup>13</sup> Ibid., 49. Of course, Rousseau is also very much present in the argument against false universalism. See the Chapter 3.

<sup>14</sup> (Manent 2001) 230 [my translation; BvR].

<sup>15</sup> In this, Manent shares Rousseau’s doubt regarding his pure and simple model of sovereignty: In effect he says: ‘It would require gods to legislate for people’. CS II, 7.

<sup>16</sup> Ibid., 231. [my translation; BvR].

<sup>17</sup> See (Janssens 2006) for a lucid summary of Manent’s position in the context of the Aristotelian tradition as well as contemporary positions taken by Lefort and Gauchet.

<sup>18</sup> (Schmitt 1958 [1953]).

agriculture, craftsmanship, industrial fabrication), the means of production should be distributed and attributed (e.g., as property in land, resources of capital, work force). Prior to this partition, in turn, what is to be divided should be taken, seized, grasped, brought within one's grip. No cultivation of land, for instance, without a title of ownership being recognized in terms of 'yours', 'mine', 'ours', 'theirs'; and no recognition of ownership regarding this particular part that is waiting to be cultivated, without a preceding seizure of what there is to be shared and distributed in the first place. Another example: were it not for the fact that people managed to 'seize' outer space by technological devices, there wouldn't be a possibility to distribute satellite orbits and without such distribution it would not be possible to use satellites for navigation.

Now, Schmitt presents the triad that characterizes *nomos* ('taking - distributing - producing') as if it would reflect a one-directional, spatio-temporal, or indeed conceptual sequence. Against this, Lindahl, rightly, argues that we have to read the sequence in both directions. 'Taking' cannot take place (in the multiple sense of the word) without producing and distributing. In fact, it is quite astonishing that Schmitt himself was so quick to emphasize the overtones of 'producing' in the last predicate of his triad. For the German word *weiden*, which he proposes as a third meaning of the Greek *nemein*, means first of all 'to herd' or 'to look after' (sheep, cattle). And indeed, though it is undeniable that 'herding' is ultimately geared towards productivity, yet productivity can only be achieved if and when people yield to certain requirements of what they are looking after by 'Mühe und Arbeit'.<sup>19</sup> In order to take, one has to develop a grip. So, let us spell out some of the salient characteristics of the effort of 'developing a grip' as part and parcel of taking.<sup>20</sup>

Merleau-Ponty<sup>21</sup> has argued that 'taking' in the sense of 'grasping' entails a spatial orientation in the world that is fundamentally different from 'pointing'<sup>22</sup>; and pointing, I submit, is very much underlying Schmitt's paradigm of land-taking.<sup>23</sup> By contrast, for Merleau-Ponty, grasping is the paradigm of a mode of intentionality that is bound up with the body. It reveals his notion of the body as a first-person concept. His term

<sup>19</sup> 'effort and labor'. (C. Schmitt 1997 [1950]) 13.

<sup>20</sup> A trivial example inspired by a trip to China: to take up a single bean from a plate is usually not a problem but it requires quite some effort to do it with chop sticks. In this regard, bean taking is not different from land taking.

<sup>21</sup> Though I refer primarily to (Merleau-Ponty 1945), I submit that the core of the argument is preserved in his later work where the notion of 'the flesh' rather than 'the body' is key. One of the reasons why is that the author became increasingly keen on avoiding all associations with an organicist view of the body.

<sup>22</sup> Cf. *ibid.*, 119: 'It must [...] be concluded that "grasping" or "touching", even for the body, are different from "pointing". [...] But how is this possible? If I know where my nose is when it is a question of holding it, how can I not know where it is when it is a matter of pointing to it? It is probably because knowledge of where something is can be understood in a number of ways.' See also on 'Greifen und Zeigen' (Waldenfels 2000) 132ff.

<sup>23</sup> Cf. Rousseau's famous critique of 'civilization' as 'taking by pointing' in (Rousseau 1964 [1754]), as well as his ridiculing 'colonization by pointing' in (Rousseau 1964 [1762]) I, 4.

here is ‘motricité’ – usually translated as ‘motility’ or ‘motor intentionality’.<sup>24</sup> In motility mode ‘(t)he points in space do not stand out as objective positions in relation to the objective position occupied by our body; they mark, in our vicinity, the varying range of our aims and our gestures.’<sup>25</sup> Merleau-Ponty emphasizes that grasping does *nothing* on a ‘conscience symbolique’, in contrast to what Van der Walt appreciates in Lefort’s conception of democracy. Its logic is not governed by ‘taking something as something’ but by ‘getting a grip on something, more or less properly.’ It does not require that ‘what is grasped’ is captured in representation first, for instance as a proxy of former appearances (‘x is the same as y and z’) or as a goal in the future (‘x is a step towards achieving z via y’) or as a bigger whole (‘x is a model of z, with regard to y’). All such examples of intentionality driven by representation, or interpretation, or conceptualisation, or whatever ‘objectifying function’,<sup>26</sup> presuppose already a bodily entrenched intentionality ‘sans aucune représentation.’<sup>27</sup> Motor intentionality occurs at the interface between a self and its world, where the distance between the two poles may become unmeasurably small without disappearing. The more or less subtle pressure exercised from either of them is intercepted before it cancels the opposite pole out. The oscillation never ushers in conflation. It is here where we have to situate Merleau-Ponty’s idea of the body as ‘a mediator of a world’<sup>28</sup>, crucially distinct from the body as a specific, ontic figuration in the world. My pursuit of a ‘body politic’ takes its cue from the former rather than the latter conception.

Let me curb some potential misunderstanding. The distinction is not, as some phenomenologists want us to believe, between the ‘experienced’ body and the ‘physical’ body, but rather between a first-person view of the body and an observational view. Note that the latter is not tantamount to a third-person view: the third person precisely pre-supposes the first person.<sup>29</sup> It allows us to refer to others qua first persons, and even to ‘oneself as another’.<sup>30</sup> Note also that the distinction is not tantamount to another famous one: that between an ‘internal’ and an ‘external’ point of view with regard to ‘the same’ object. It is precisely within the internal perspective that some entity is revealed as ‘external’; and vice versa, it is within an external perspective that an entity emerges as ‘always already’ captured from an internal vantage point.<sup>31</sup> This is why Merleau-Ponty, at some point in his work on perception, prefers the term ‘body schema’ over ‘body’ – a preference I will not

<sup>24</sup> Ibid., 158-9: ‘(...) motility as basic intentionality’; the French text gives ‘intentionnalité originale’ (160).

<sup>25</sup> Ibid., 166.

<sup>26</sup> (Merleau-Ponty 1945) 162.

<sup>27</sup> Ibid., 161.

<sup>28</sup> (Merleau-Ponty 1962) 167. (Waldenfels 2000) 253 reminds us of Husserl’s characterisation of the body as an ‘Umschlagstelle’ between comprehensible sense and natural causality.

<sup>29</sup> Apel has called this ‘a scientific misconception’. Cf. (K.O. Apel 1979) 172-173; 215ff; 323.

<sup>30</sup> Cf. (Ricoeur 1990).

<sup>31</sup> With (Waldenfels 1994) 202: there is a preference in the difference, meaning that the distinction is made from the vantage point of one of the terms distinguished and not from one neutral between the two.

follow, as the former term has to be disambiguated no less than the latter.<sup>32</sup> For similar reasons I refrain from switching to the phrase that Merleau-Ponty came to prefer in his later writing: ‘the flesh’ (‘la chair du monde’ or ‘la chair de l’histoire’).<sup>33</sup> A first-person account of the body works its way from the perspective of an agent qua self, primarily. This includes a specific angle on the concept of identity; what is at stake is identity as selfhood rather than sameness,<sup>34</sup> though selfhood mediated in a specific mode: by ‘embodiment’ rather than representation, by motility rather than interpretation.<sup>35</sup> The body is always already at the side of the first person, hence involved in that specific reduplication of the first person that we call ‘reflexivity’. The body emerges from acts of self-differentiation between the first person and the world of things.<sup>36</sup> It grows and shrinks with increasing and decreasing intensity; thus, it may also wither away (long) before it dies, when signalling at either of the poles is interrupted. Then the body falls back into (whatever is left of) the system of biological functions. On the other hand, it may also absorb more and more of the world.<sup>37</sup> Radiating from a self into the world, it also returns the world to this self. This is the specific sense in which we could call the body ‘an interface’ between the world and a self, as the two poles between which agency oscillates.<sup>38</sup>

My question is, in still other words, how we should conceive of this interface if the self is a plural self, acting jointly in relation to a world it is inclined to call ‘ours’? At this point I am unsure to whom to address my question. It would be premature to direct it to Johan Van der Walt, since I am unsure (yet) whether he will accept my premises. It would be pedantic to address it to whom I take to be his main author, Claude Lefort. For Lefort was a student of Merleau-Ponty’s, the editor of some of

<sup>32</sup> As (Merleau-Ponty 1962)113ff. admits.

<sup>33</sup> See also the excellent analysis of ‘la chair’ and what Lefort makes of it in (Loose 1997) 30 ff. His claim is, indeed, that ‘(...) we cannot understand the scope of Lefort’s political philosophy without a pursuit of the meaning of la chair in Merleau-Ponty’s later works.’ [my translation; BvR].

<sup>34</sup> (Ricoeur 1990) 28 and *passim*.

<sup>35</sup> The reflexivity of this movement is not mediated by a specific state of neural wiring that we call consciousness. This would be a category mistake, even if, in the case of human movement and perception, this specific kind of wiring *is* the causal backside of what an artist or a sportsman ‘as a body’ does. ‘I say of a thing that it is moved, but my body moves *itself*; my movement unfolds *itself*. It is not in ignorance of itself, blind to itself; it radiates from a self. ...’ (Ibid., 354).

<sup>36</sup> (Waldenfels 2000) 251.

<sup>37</sup> As famous singer and conductor Barbara Hannigan says: ‘You just become the music’. See <http://feed.cbc.ca/radio/q/schedule-for-tuesday-october-6-2015-1.3258264/singing-conductor-barbara-hannigan-you-just-become-the-music-1.3258272>; she also expresses her singing as intensified embodiment by saying that ‘she becomes a beast’. Another example is Nan Shepherd’s experience of walking the Cairngorms as ‘interpenetration’: ‘You become the mountain.’ (Shepherd 2011).

<sup>38</sup> Some readers of Merleau-Ponty’s have rejected this evasive notion as connoting a sort of spontaneous and ‘positive’ intersubjectivity; as if the fabric of social relations in their surroundings were already prone to self-expression and would spontaneously usher in some sort of order. Cf. (Visker 1999) 212ff. This would, of course, rule out any genuinely political form of action. It would deny the constitutive role of ‘the political’ for societal order. And it would return the portrayal of politics to the celebration of the body politic in ‘the name of the One’, indeed the One Body.

his most intriguing writings<sup>39</sup>, and the author of an incisive monograph ‘around’ his work.<sup>40</sup> I’d better build on the assumption that the whole of Lefort’s philosophy of the political is a multi-faceted interpretation of what is bodily about the democratic polity, although perhaps in a different vernacular. Yet, references to political embodiment in whatever phraseology are rare in Lefort. Moreover, and more telling, he never addressed (as far as I know) the question that is immediately prompted by his well-known analysis of the political as crucially dependent on ‘staging’ (*mise-en-scène*) a place of legitimate power exterior to (any) society. This question is: What about the political character of this act of staging, itself? It has to be conceived, supposedly, in terms of a theory of action, joint action, more specifically. If it is not on stage, it falls outside the scope of the political, which is counterintuitive. If it is on stage, the political is delivered to an infinite regress, which is counterproductive. Thus, there is scope for further Lefort reading here. A third addressee of my question would be Merleau-Ponty. He certainly gave us a clue to his answer in his statement on European identity, contributed shortly after the Second World War to one of the Round Tables in the *Rencontres internationales de Genève*.<sup>41</sup> By all means we should avoid, he said there, to conceive of a European ‘we’ solely in terms of uniquely identifying properties and values – *l’Europe en représentation*. First and foremost, we should pay heed to *l’Europe en acte*, i.e., to how ‘we’ arrange labor, knowledge, and state order. Moreover, there is more than a hint or two to be found in Merleau-Ponty’s most political book, in particular in his discussion of Marx’s conception of history and revolution. The close connection between embodiment and labor is hard to miss.

Regardless, however, of my embarrassment, I hope to have given a specific twist to the idea of ‘taking’, so prominent in Schmitt’s conception of *nomos* and so crucial in Van der Walt’s critique of it. What would become of *nomos*, indeed, what would become of land-taking as the paradigm of *nomos*, if we would learn to see it as a process of bodily intertwinement with the world rather than imposing an idea or a will (albeit a general one) on the world? What if the core of democracy would be the equality of these interpenetrating potentialities: a *demos* as a plural self and a world as its shared realm of action, instead of an *agon* for power?

### 3. JOINT EMBODIMENT: NEITHER *KOSMOS* NOR *PHYSIS*

Elsewhere<sup>42</sup> I argued, on the basis of examples from arts and sports, that there is considerable conceptual similarity between ‘embodiment’ in Merleau-Ponty, on the one hand, and ‘labour’ in the early Marx. In both cases we see an interface gathering

<sup>39</sup> (Merleau-Ponty 1969; 2003).

<sup>40</sup> (Lefort 1978).

<sup>41</sup> (Merleau-Ponty 1947 [1997]).

<sup>42</sup> (Van Roermund 2020a), ch. 5; (Van Roermund 2020b); see also Lindahl’s rejoinder to the latter in (Lindahl 2020).

agents in the area of tension between both poles, the pole of the self and the pole of the world. I also ventured that identifying the number of agents involved in this gathering is a like drawing a map: the distortions depend on the use aimed at. Most musicians, for instance, will experience their instrument as part of their body indistinguishable from their hands, even as an agent exercising a will of its own as much as they do. Most music schools, while lending out instruments to students, will not. And while the effort of making music is usually considered to gather rather few agents (still quite a few: student, teacher, their violins and bows, manufacturer(s), schools of music, concert hall, audience, etc.), the effort of land-taking obviously involves many, many more. Sooner rather than later, *nomos* as (joint) labour requires division of labour. At this point, representation becomes quintessential, since such gathering requires a narrative of common goals, the identification of tasks ahead and means available, membership criteria and boundaries; in brief, everything that a political order stands for. Meanwhile, however, such order remains rooted in an ‘economy’ of labour that is contingent on joint embodiment. The two lay permanently intertwined in what Van der Walt refers to as *ordo ordinans et ordinatus*, the classical equivalent of Merleau-Ponty’s own distinction between *parole parlée* and *parole parlante*,<sup>43</sup> or the famous paradox of sovereignty (power over the law and power under the law).<sup>44</sup>

Thus, a direct question to Van der Walt with regard to LDL would be if *nomos* as embodiment would not remove the sting from what he sees as a perennial, and paralysing, opposition in the history of the very concept of *nomos*: *nomos* as *kosmos* (order) and *nomos* as *physis* (disorder).<sup>45</sup> If it would, the concept of *nomos* would resurrect in a new key. It would not have to be ‘debunked’ (as in [LDL] 11, 3-4). It would, I submit, maintain its critical potential regarding (what Van der Walt calls) a spiritualised (Hegel), as well as a historicised (Savigny), concept of law (thus addressing both Manent’s and Lefort’s contemporary concerns). It would undergird the idea of the polity as ‘katechontic’.<sup>46</sup> For the two poles of the intertwining do not cancel each other out; well on the contrary, they remain in a reciprocal interpellation, mutually deferring their hypostatisation. And, what is perhaps most important, land-taking as a joint effort to gradually and laboriously come to grips with our environment, may provide a perspective on what is already the most serious challenge of liberal democracy: how to lend form and substance to ecological commitment of any plural self that accepts to be referred to by ‘we, the people’.

<sup>43</sup> (Merleau-Ponty 1945) 229.

<sup>44</sup> (Schmitt 1996 [1922]) 14; see also (Foucault 1988).

<sup>45</sup> Cf., summarising, [LDL 225].

<sup>46</sup> In my view already clearly present in Rousseau: the state as deferring the inevitable decline of civilization by a ruse: an early ‘Philosophie des Alsob’ (Vaihinger).

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