Modern Intellectual History, 16, 1 (2019), pp. 295–308 © Cambridge University Press 2017
doi:10.1017/S1479244317000361

INSOMNIA AND OTHER CONSTITUTIONAL PATHOLOGIES*

JEFFREY LENOWITZ* AND MELISSA SCHWARTZBERG**
*Department of Politics, Brandeis University
E-mail: lenowitz@brandeis.edu
**Wilf Family Department of Politics, New York University
E-mail: ms268@nyu.edu

Richard Tuck, *The Sleeping Sovereign: The Invention of Modern Democracy* (The Seeley Lectures) (Cambridge: Cambridge University Press, 2016)

The publication of Richard Tuck's 2012 Seeley Lectures constituted an important event in intellectual history and political theory. *The Sleeping Sovereign* reflects the depth of Tuck's nearly forty years of historical inquiry into the concepts of rights, reason of state, and freedom, beginning with *Natural Rights Theories*.[1] The leading member of the "Cambridge school" of the study of the history of political thought in the United States, and the Frank G. Thomson Professor of Government at Harvard University, Tuck combines a contextualist, and often intertextualist, approach to the interpretation of canonical works with a theorist's attention to the value these works retain for contemporary political life.

In the *Sleeping Sovereign*, Tuck addresses one of the most central and enduring questions in democratic theory: how can democracy, a concept birthed in a place of small city-states with a circumscribed and active citizenry, retain meaning in the modern world? In answering this question, Tuck explains the development of the sovereign/government distinction, the distinction between the authority that makes the most fundamental higher-order decisions about the organization and principles of a state (sovereign) and the entity that deals with the day-to-day particulars of ruling (government). In tracing this evolving distinction, and explaining its relevance to the functioning of democracy in the modern world,

* A prior version of this essay was presented at a conference on *The Sleeping Sovereign* at Yale University at 7 April 2017. We thank Isaac Nakhimovsky for the invitation to comment on the work and Richard Tuck for his generous response to the discussion, and are grateful to Bryan Garsten, Sam Moyn, and Sophie Smith for their thoughts on that draft. We also thank Duncan Kelly and the editorial team at *Modern Intellectual History* for the invitation to review the work and for their advice.

1 Richard Tuck, *Natural Rights Theories* (Cambridge, 1979).

https://doi.org/10.1017/S1479244317000361 Published online by Cambridge University Press

Tuck presents a fresh take on the long history of constitutionalism, culminating in the conception of a latent public, asleep but waiting to wake and instantiate its will through remaking fundamental law.

Although Tuck does not explicitly draw a connection between his arguments in *The Sleeping Sovereign* and his controversial essay in *Dissent* supporting a left case for Brexit, the book has acquired special salience partially as a result of the latter.[2] *The Sleeping Sovereign* provides a possible genealogy and normative grounding for the democratic value of high-profile referendums, which are of surging global significance. It does so by focusing on two key distinctions that, for Tuck, explain democratic decision making in the modern era. The first is a division between fundamental or constitutional norms, on the one hand, and ordinary legislation and administrative matters, on the other; this is an account of the hierarchy of norms. The second is the role that the people qua sovereign play in occupying themselves with the former, while largely assigning responsibility for the latter to government. The central metaphor in the work, taken from Hobbes, is the sleeping sovereign, who need not occupy itself with the day-to-day matters of governance, but who can rouse himself when necessary to consider fundamental questions of law. The metaphor is irresistible, inviting playful engagement. As such, in this essay, we comment on Tuck's work through an exploration of sleep and its pathologies: insomnia, sleep cycles, sleep inertia, and somnambulism.

In *Sour Grapes*, Jon Elster analyzes the irrationality of attempting to overcome insomnia by sheer will, because sleep is a paradigmatic case of a state that is an essential by-product.[3] He describes a common pattern of insomniacs: (1) the aim of blotting out preoccupying thoughts; (2) the state of pseudo-resignation, by taking up distracting activities such as reading or eating or surfing the Net; and (3) real resignation to sleeplessness, which, depending on one's history of insomnia, may or may not be possible. The connection to Tuck is twofold. We need to worry about the tendency of sovereigns to become preoccupied with the particular as a threat to its sleep, but our ability to act meaningfully on the general level may depend upon some experience with the particular. It also means that the aim of committing oneself to sleep—the activity of self-binding—may be difficult to achieve. How to conceptualize the relationship between the sovereign and fundamental law—whether there were norms that could even bind the sovereign—was a matter of serious concern to the figures that interest Tuck, especially Rousseau. We will argue that the best way to understand fundamental law is as enabling the sovereign to act on an ongoing basis, producing a sleepless sovereign.

---

[2] Richard Tuck, "The Left Case for Brexit," *Dissent* magazine, 6 June 2016, at www.dissentmagazine.org/online_articles/left-case-brexit.

[3] Jon Elster, *Sour Grapes: Studies in the Subversion of Rationality* (Cambridge, 1983), 45–6.

https://doi.org/10.1017/S1479244317000361 Published online by Cambridge University Press

The second part of this essay draws on sleep cycles, in particular the observation that sleep is not binary; indeed, our brain is sometimes more active while asleep than while awake. There is a well-known distinction between REM (rapid eye movement) sleep (which is both active and paralytic) and NREM (non-rapid eye movement) sleep (which has three stages, but becomes "deep").[4] This metaphor helps us to press on the distinctions between fundamental and ordinary law, and between ordinary law and governmental decision making. Our basic argument is that the Rousseauian sovereign is a much lighter sleeper than Tuck suggests; indeed, the sovereign must remain awake to be free, realized both in the creation of legislation and in countering governmental encroachments.

The third section takes up sleep inertia—briefly, the transition from sleep to wakefulness entails a temporary period of reduced alertness and impaired cognitive performance, particularly if a person is awakened from slow-wave, or deep, sleep. Again, if the sovereign is to be capable of meaningful agency when the stakes are at their highest, it may be necessary for it to remain wakeful, or at least in some sort of twilight state. (In other words, it certainly should not act before it has had its coffee.)

Finally, the fourth section of this essay addresses responsibility during episodes of sleepwalking. Legal precedent holds that individuals are not to be held liable for actions taken during their sleep, for one cannot impute responsibility to an unconscious person. The underlying logic of this precedent raises difficulty for Tuck's endorsement of tacit consent in his conclusion, where he argues that the fact that the US Constitution remains unchanged at any given moment implies its endorsement by the sleeping sovereign. Yet if a sleeping agent lacks responsibility for actions it takes while asleep, it is unclear how the sleeping sovereign can express its will by doing nothing.

* * *

Let us begin by drawing attention to the insomniac sovereign—or a sovereign who wishes to choose to sleep. As Tuck argues, what is new in the activity of writing constitutions is "handing the authority to write the laws to an institution that might put in only fleeting appearances and be largely forgotten during the actual political activity of a community . . . The sovereign legislator has an institutional shape but is usually dormant" (251–2). What does the choice to slumber—assuming that the sovereign has not been chloroformed—entail? Why would a sovereign prefer to sleep than to act? This is the major distinction between

[4] National Institute of Health, publication No 17-3440c, "Brain Basics: Understanding Sleep," at www.ninds.nih.gov/Disorders/Patient-Caregiver-Education/Understanding-Sleep, accessed 24 May 2017.

https://doi.org/10.1017/S1479244317000361 Published online by Cambridge University Press

the ancients and the moderns on Tuck's account: Athens was the city that never sleeps. The Athenians did not distinguish between government and sovereignty, for the mass of ordinary people directly rendered decisions in the assembly and, via lot, served as agenda setters in the Council or as jurors. As Tuck writes, Bodin complained that Aristotle had not given a clear account of sovereignty and in particular what it meant to hold dominant power in a city; Bodin's own account is that sovereignty consisted in the right to choose magistrates and to make or repeal law. The trick, for moderns, is how to attend to the fundamental without becoming excessively tempted to engage in the particular.

In *De Cive*, Tuck notes, it turns out that even God is a sleeping sovereign: "When he who has the right to reign wishes to participate himself in all judgments, consultations, and public actions, it is a way of running things comparable to God's attending directly to everything himself, contrary to the order of nature" (94, citing chapter XIII of *De Cive*). What problems might keep the political sovereign up at night? For mere mortals, particular matters can be preoccupying and even distorting: this, in Rousseau, is why the government should not be democratic. The body of people should not "turn its attention away from general considerations, to devote it to particular objectives."[5] This is in part because of the dangerous influence of private interests on public affairs. But it's more than that. The sort of particular objectives Rousseau has in mind, at least at II.6, are matters that deal with individuals: "the law can create privileges, and classes of citizens, and specify the qualifications for membership, but cannot nominate individual people for admission; it can establish a royal government and hereditary succession, but it cannot elect a king or name a royal family."[6] And so, were the sovereign to habituate itself to attention to individuals, it might well make it more difficult for it to pick out the general will, i.e. more liable to mistake the particular will—the will of some subordinate group of citizens—for the general will. So, in Tuck's reconstruction, a particular line of modern constitutional thought conceptualizes constitutional law as Ambien, an aid that enables a sovereign to sleep through the events of, and avoid corruption from, the everyday.

At this point, it is worth noting a related problem regarding the idea of fundamental law: how to reconcile it with an absolute sovereign. As Tuck notes, the status of fundamental law has often seemed puzzling. Bodin is clear that constitutional laws of the realm, especially those that concern the king's estate—which, like the Salic law, "are annexed and united to the Crown"—cannot be

5 Jean-Jacques Rousseau, *Of the Social Contract* (1762), in *Rousseau: The Social Contract and Other Later Political Writings*, ed. and trans. Victor Gourevitch (Cambridge, 1997), 39–152, Book III, chap. 4, 91.

6 Ibid., II.6, 67.

https://doi.org/10.1017/S1479244317000361 Published online by Cambridge University Press

infringed by the Prince (57). Although the consent of the estates was necessary to alter fundamental law, Tuck suggests that the best way to understand it was in terms of a "royal" rather than "seigneurial" monarchy: a king who wanted to rule justly found himself limited in his sphere of action, but nonetheless without *institutional superior*.

An alternative explanation is to characterize the king's limitation as a form of precommitment, following Stephen Holmes. In Holmes's view, Bodin overcame his own injunction against self-binding by arguing that constitutional precommitments are vehicles of royal freedom.[7] In recent work, Daniel Lee emphasizes that, for Bodin, the durable exercise of sovereignty in fact relies on the king recognizing that to alter the laws of the estate would weaken his power: in Bodin's words,

> To change the laws which concern the estate is as dangerous as to remove the foundation or corner stones which uphold the whole weight or burden of the buildings; in which doing, the whole fabric is to be sure shaken, and beside the danger of falling, receives more hurt by the shaking thereof, than it does good by the new reparation, especially if it be now become old and ruinous.[8]

Seigneurial rulership would, in Lee's words, "merely activate or reproduce disruptive forces potentially destabilizing the unity of the state": the sovereign's long-term interest in securing his rule involves self-binding.[9]

Such a defense of fundamental law also appears in Rousseau. To be sure, Rousseau at points seems to reject the binding force of such norms, arguing, "It is contrary to the nature of the body politic for the sovereign to impose upon itself a law it cannot break ... There is not, nor can there be, any kind of fundamental law that is obligatory for the body of the people, not even the social contract."[10] Yet elsewhere Rousseau insists that fundamental laws—key political laws and guiding principles (e.g. equality and the common good)—do possess normative force for the sovereign. In the *Geneva Manuscript*, for instance, he writes, "Indeed, the first law, the only truly fundamental law that flows directly from the social compact, is that each man prefer the greatest good of all in all

---

7 Stephen Holmes, *Passion and Constraint: On the Theory of Liberal Democracy* (Chicago, 1995).

8 Jean Bodin, *Six Bookes of a Commonweale*, trans. Richard Knowles (London, 1606), Book IV, chap. 3, 470. Daniel Lee, *Popular Sovereignty in Modern Constitutional Thought* (Oxford, 2016), 193; Lee, "'Office Is a Thing Borrowed': Jean Bodin on Offices and Seigneurial Government," *Political Theory* 41/3 (2013), 409–40, at 418.

9 Lee, "'Office Is a Thing Borrowed,'" 419.

10 Rousseau, *Social Contract*, I.7, 52.

https://doi.org/10.1017/S1479244317000361 Published online by Cambridge University Press

things."[11] In the constitutional project for Corsica, he writes, "The fundamental law of your new constitution must be equality. Everything must be related to it, including even authority, which is established to defend it."[12] To explain this apparent paradox, we might argue that fundamental laws such as equality are not best explained as constraints on the sovereign's will. Rather, because equality and the common good constitute defining elements of the rightful exercise of sovereignty, they enable rather than restrict sovereign agency.[13]

Why does this matter for the account that Tuck wishes to offer? On his account, the key act of the sovereign is to enact and abrogate fundamental law before returning to bed. But if obedience to fundamental law instead *shapes* sovereign agency—if, in binding the sovereign, fundamental law enables the sovereign to act consistently and justly in the enactment of ordinary legislation—then the purpose of these laws cannot be soporific. Indeed, as we will suggest in a moment, sleep is fraught with peril for the Rousseauian sovereign—so much so that it must will itself to wakefulness.

* * *

Now we turn to the question of sleep cycles, and to the distinction between various forms and "depths" of sleep. Our interest here is on the sleep patterns of the Rousseauian sovereign—how often it wakes to act qua sovereign in assembly. Tuck's own account is that these sovereign assemblies are quite rare indeed—he describes them as "limited and foundational" (136 n. 27), drawing on *Social Contract* III.18, in which they are described as "periodical." As Tuck points out, two questions begin these assemblies: "Whether it please the sovereign to retain the present form of government? And the second, whether it please the people to leave its administration to those who are currently charged with it" (120). These, indeed, are questions of fundamental law, and their alteration should be rare but not impossible—he emphasizes that even the social pact could be legitimately revoked if the citizens assembled to do so.

But does this characterize the ordinary activity of the Rousseauian sovereign? Our sense is that it does not. So, first, it is true that the sovereign legislates rarely: in a well-ordered republic, the first to propose laws "states what all have already

[11] Jean-Jacques Rousseau, *Geneva Manuscript*, in *Rousseau: The Social Contract and Other Later Political Writings*, 153–61, Book II, chap. 4, 160.

[12] Jean-Jacques Rousseau, *Constitutional Project for Corsica*, in Rousseau: *Political Writings*, ed. and trans. Frederick Watkins (Madison, 1986) 275–330, at 289.

[13] Melissa Schwartzberg, "Rousseau on Fundamental Law," *Political Studies* 51/2 (2003), 387–403.

https://doi.org/10.1017/S1479244317000361 Published online by Cambridge University Press

sensed."[14] It is also the case that these assemblies are to be legally fixed and periodic, except when extraordinary circumstances call for additional ones. But that these assemblies would be as rare as a Jeffersonian model—that they would occur only every nineteen years, as Tuck suggests—would be quite surprising.

There are several reasons, we think, to resist such an account. The first is simply conceptual: *Social Contract* is completely preoccupied with the exercise of the general will and the essential character of self-legislation for freedom, and it is hard to imagine that occurring simply on a generational cycle. The other reasons are textual—in III.15 of *Social Contract*, for instance, Rousseau writes,

> As soon as public service ceases to be the Citizens' principal business, and they prefer to serve with their purse rather than with their person, the State is already close to ruin. Is there a call to battle? They pay troops and stay home? Is there a summons to Council? They name deputies and stay home.

And further:

> The better constituted the State, the more public business takes precedence of private business in the minds of Citizens ... In a well-conducted city everyone flies to the assemblies, under a bad Government no one likes to take a step to go to them; because no one takes an interest in what is done there, because it is predictable that the general will will not prevail in them, and finally because domestic concerns are all-absorbing. Good laws lead to making better ones, bad laws bring about worse ones.[15]

It is very difficult to reconcile this vision of public citizenship, characterized by the ongoing exercise of sovereignty via the general will, with a sleeping sovereign. But Tuck suggests that this type of ongoing activity of the sovereign would entail its fall into governmental agency. Now, if the government were democratic, it might well bleed into the exercise of sovereignty; its attention to particularity might be distorting.

But the exercise of sovereignty itself—the activity of legislation—cannot be generationally periodic for Rousseau.

Tuck suggests that Rousseau's vision of England is that the eighteenth-century House of Commons was necessarily governmental, rather than sovereign (136). Perhaps that is the case, but not because it tinkered with matters of particularity to excess. Rather, in *Social Contract*, the critique of England is that the English people "thinks it is free, [but] it is greatly mistaken." "The cooling of the love of fatherland" and the attendant decline in ongoing participation in assemblies led to the false abdication of sovereignty to so-called parliamentary representatives. Thus the English people were under the control of laws they had not ratified in

[14] Rousseau, *Of the Social Contract*, IV.1, 121.

[15] Ibid., III.15, 113.

https://doi.org/10.1017/S1479244317000361 Published online by Cambridge University Press

person, i.e. they were enslaved.[16] It cannot be that, for Rousseau, a "democratic sovereign assembly would inevitably fail" (140), though, to be sure, a democratic government would fail and probably bring the assembly along with it.

Does this mean that the sovereign is always modifying laws, however fundamental? We believe the answer is no. Here a different issue arises, due to the variable salience of these laws, as designated both by being "fundamental" or "ordinary," and by various threshold requirements. Though Tuck suggests that the difference between majority and supermajority were of curiously little interest to the eighteenth-century writers, this was—at least—not the case for Rousseau or Condorcet, and, indeed, at least Rousseau himself drew on brief discussions of supermajority rules in Grotius and Pufendorf.[17]

Now, let us add that we believe that it would have made sense for Rousseau to have neglected vote thresholds beyond majority rule. As one of us has argued,[18] for Rousseau, if a law is not a genuine expression of the general will, it is illegitimate; it does not oblige us. However, if a law is in fact a product of the general will, the number of votes in the majority in favor should be irrelevant. Once we start becoming preoccupied with the size of the majority—with the counting of particular individuals' votes—the outcome seems to be purely aggregative; the will of all rather than the general will. Nonetheless, Rousseau does argue that between simple majority and unanimity are "various uneven divisions, at any one of which this proportion can be fixed, taking the state and the needs of the body politic into account."[19]

Notably, Rousseau argues that the "more important and serious the deliberations are, the more nearly unanimous should be the opinion that prevails . . . The more rapidly the business at hand has to be resolved, the narrower should be the prescribed difference in weighting opinions, in decisions which have to be completed straight away a majority of one should suffice."[20] Note that this seems to challenge the argument that the assembly should meet only rarely—were this the case, why would urgency ever be a consideration? In actuality, the sovereign engages with various questions, of different levels of importance and immediacy, on an ongoing basis—otherwise there would be little need for variation in thresholds.

---

16 Ibid., III.15, 114.

17 See Hugo Grotius, *The Rights of War and Peace*, ed. Richard Tuck (Indianapolis, 2005), 546 n. 2 (Book II, chap.V, xvii); Samuel Pufendorf, *Of the Law of Nature and of Nations*, 4th edn, trans. Basil Kennet (London, 1729), 648–9 (Book VII, chap. II, xvi).

18 Melissa Schwartzberg, "Voting the General Will: Rousseau on Decision Rules," *Political Theory* 36/3 (2008), 403–23.

19 Rousseau, *Of the Social Contract*, IV.ii, 125.

20 Ibid., IV.ii, 125.

https://doi.org/10.1017/S1479244317000361 Published online by Cambridge University Press

Again, why does this matter? It suggests that the Rousseauian sovereign must be a very light sleeper, awakening to address issues of various types. To be sure, the sovereign cannot enact particular decrees, but even in this context it shouldn't sleep too soundly: "Just as the particular will incessantly acts against the general will, so the Government makes a constant effort against sovereignty."[21] This is crucial—if the sovereign were truly to slumber, since there is no other corporate will to resist the government, the Prince will end up oppressing the sovereign and breaking the social treaty, in Rousseau's words. He is explicit: the more force the Government has, Rousseau notes, the more frequently ought the sovereign show itself.[22] Indeed, he regards the encroachment of the government on the sovereign as the "inherent and inevitable vice" that will destroy the body politic.[23] Yet if the sovereign is an insomniac parent, anxiously glancing at government action like some glowing baby monitor, the distinction between sovereignty and government may indeed be unstable. And—as we will discuss shortly—the sovereign must also act, on an ongoing basis, to assent to yesterday's laws—to give them vigor—rather than leaving them to slumber as well.[24]

* * *

We now turn to the third question, motivated by the phenomenon of sleep inertia: What if we're not morning people? What does it mean to be roused from a sound sleep and pressed into action? Is this the optimal condition for making important long-term decisions? We ask these questions because of Tuck's apparent endorsement of extraordinary referendums as a means to operationalize the sovereign side of his sovereign/government distinction, to allow "the mass of citizens" to "genuinely participate in politics" when it comes to the creation of a "set of fundamental acts of legislation" (249).

Problems arise because, as one of us has recently argued, such arguments in favor of using referendums for constitutional ratification—developed in their fullest early form by the Berkshire Constitutionalists—depend upon a high degree of voter information about the potential benefits and costs of adoption or rejection.[25] Absent this information, it is difficult to infer true sovereign authority. Yet these referendums typically take place under conditions known to present a special case of voter ignorance. The issues at stake in constitution

21 Ibid., III.10, 106.

22 Ibid., III.13, 111.

23 Ibid., III.10, 106.

24 Ibid., III.11, 109.

25 Jeffrey Lenowitz, "'A Trust That Cannot Be Delegated': The Invention of Ratification Referenda," *American Political Science Review* 109/4 (2015), 803–816, at 813.

https://doi.org/10.1017/S1479244317000361 Published online by Cambridge University Press

making or in serious constitutional revision are remote from the everyday life and politics of citizens, and this unfamiliarity makes voters especially susceptible to manipulative campaigns. Moreover, in ordinary settings voters are able to rely on partisan cues and interest groups to provide shortcuts on the basis of which they can make reasonably informed decisions. Such cues fall short in the constitutional context, where the implications of the proposed policies may be opaque even to elites, and may also cut across party and interest-group lines.

Although there is limited empirical work on highly salient referendums, what exists seems to suggest that this predicted ignorance is commonplace. Many Dutch and Spanish voters attributed their negative votes on the Constitution of Europe to a lack of information.[26] A supermajority of a sample of voters on the Canadian Charlottetown Accord believed that most voters were confused, and, similarly, a large portion of voters on the Australian constitutional referendum were not only unaware of the subject of the vote, but were targeted by campaigns designed to exploit their bewilderment.[27] Under circumstances in which people are significantly uninformed, subject to manipulation, or both, it would be a mistake to attribute sovereign action to the results of such a vote. As Condorcet noted, in these instances "the nation would seem to have exercised a right when it had not actually done so."[28] Another way of putting this is to appeal to the general juridical and moral principle that formal decisions taken under conditions of non-blameworthy ignorance are not taken to reflect the will of the decision maker. Citizens must understand the question at hand, and the implications of the possible outcomes, if their choice is to be taken as a crucial instance of democratic sovereign action.

And so we come to Brexit. As Tuck himself famously noted in advocating "leave," the implications of Brexit were far-reaching—potentially on par with the long-term implications of the votes in 1788 on the American Constitution. Now, whether Tuck is correct that the prospects for left policies in Britain will be better outside the EU than had Britain voted remain is not our focus—the issue here is not about the substantive merits of Brexit. Rather, there is a serious question about the logic of a referendum in this context, in part because of the grave

[26] Sara Binzer Hobolt, "Taking Cues on Europe? Voter Competence and Party Endorsements in Referenda on European Integration," *European Journal of Political Research* 46/21 (2007), 151–82, at 154.

[27] Harold D. Clarke and Allan Kornberg, "The Politics and Economics of Constitutional Choice: Voting in Canada's 1992 National Referendum," *Journal of Politics* 56/4 (1994), 940–62 ; John Higley and Ian McAllister, "Elite Division and Voter Confusion: Australia's Republic Referendum in 1999," *European Journal of Political Research* 41/6 (2002), 845–61.

[28] Jean-Antoine-Nicolas de Caritat marquis de Condorcet, "On the Need for the Citizens to Ratify the Constitution," in *Condorcet: Foundations of Social Choice and Political Theory*, trans. and ed. Iain McLeann and Fiona Hewitt (Aldershot, 1994), 273.

https://doi.org/10.1017/S1479244317000361 Published online by Cambridge University Press

uncertainty about the operation of Article 50, the consequences for EU nationals living in the UK and UK nationals in the EU, the implications for UK trade with the EU, and so forth. These and other issues were and continue to be a source of speculation and confusion for experts, let alone for ordinary citizens. Given this, it is unclear how one can interpret the referendum outcome as revealing the will and considered judgment of a briefly awakened sovereign.

Perhaps Tuck is right that if the sovereign must awaken for anything, it is to determine the scope and future of its own agency. But if this is the case, it is worth thinking more seriously about the risk of defending sleep as the natural state for the democratic sovereign, and of then relying on a single majoritarian vote upon awakening. Such a model would seem to exacerbate the informational problems that bedevil referendums—the expectation that a sovereign would act best at crucial moments, absent any ability to engage in ongoing deliberation or information acquisition about the consequences of major institutional transformations, would seem to contradict all that we know about voter knowledge, and about sleep. If constitutional change should be an important activity for democratic citizens—a vision we broadly share with Tuck—better for the sovereign to habituate itself to ongoing action through a diverse array of institutions and to take refreshing catnaps, rather than to hibernate.

* * *

We now turn to the end of *The Sleeping Sovereign*'s final chapter, where Tuck simultaneously defends originalism and rebuts worries about the continued authority of long-dead sovereign legislators in the United States. His strategy is to reinterpret the relevant moment of constitutional authorship, or, more accurately, reauthorization, in the present, pointing to the continued slumber of We the People as evidence of the continued acceptability of a given set of constitutional laws. Tuck explains: "it is quite reasonable to say that the fact that the Constitution has not been amended or repealed by the *present* sovereign means that the present sovereign, with all of its other beliefs and commitments, wishes the law to stand" (282, original emphasis). From this, Tuck suggests that originalism and living constitutionalism collapse into each other, in that originalists searching for the original meaning of the constitution should look not at the original moment of authorship, but instead at the common understandings, "the beliefs and commitments," of the present population who accept and reauthorize the law by not changing it (282).

Yet the Berkshire Constitutionalists, whom Tuck weaves into his narrative of the sovereign/government distinction and rightly celebrates for their invention of the ratification referendum, resisted this tacit-consent logic, as their debate

https://doi.org/10.1017/S1479244317000361 Published online by Cambridge University Press

with William Whiting in 1778 demonstrates.[29] At the time, the Constitutionalists were shutting down the local courts of justice to protest what they saw as an illegitimate provisional government in Boston, and to demand the creation of a new constitution approved by the people. Whiting sought to reopen the courts, and argued that the provisional government had received sovereign authorization, even without the explicit creation of a foundational constitution, as evidenced by the fact that towns and citizens across Massachusetts, including those of Berkshire County, continued to use the existing judicial and legislative system and had not yet remade it.[30] Against Whiting's tacit-consent argument, the Constitutionalists claimed that government was only legitimate if based upon a constitution explicitly approved by the people, and that their actions were justified given that "since the Declaration of Independence there has been no social Compact or fundamental Constitution formed or adopted by the great Majority of the People of this State."[31] The debate highlights a fundamental tension between arguments based on tacit consent as a means of constitutional reauthorization and those that derive the legitimacy of democratic governance from the populace's real adoption of higher law.

Indeed, the very logic of tacit consent seems to require a sleepless sovereign. For, while people may talk, walk, and even eat while asleep, they most certainly cannot consent, let alone render the complex judgments necessary to infer acceptance of a constitution from failure to amend. That sleeping persons cannot be held responsible for criminal actions they take is established common law, with discussions dating back hundreds of years. Persons found to have killed or assaulted others during states of sleepwalking or night terrors have been acquitted on the basis of the "sleepwalking defense," the underlying logic of which holds that actions taken by a sleeping agent are either involuntary or at least not performed consciously, and thus cannot be the basis for assigning criminal responsibility.[32]

---

[29] In discussing Whiting, Tuck seems to group him in with advocates of the sovereign/government distinction (193–4). This is a mistake, for Whiting, as least in 1778, was against such a distinction, as can be seen in the central theoretical point of his address—that government was possible without explicit authorization by the popular sovereign.

[30] William Whiting, "An Address to the Inhabitants of Berkshire County, Mass.," in Charles S. Hyneman and Donald S. Lutz, eds., *American Political Writing during the Founding Era: 1760–1805*, vol. 1 (Indianapolis, 1983), 461–79, esp. 461–72.

[31] "A Berkshire Convention Addresses the Superior Court, May 3, 1779," in Robert J. Taylor, ed., *Massachusetts: Colony to Commonwealth* (Chapel Hill, 1961) 110–11, at 111.

[32] Mike Horn, "A Rude Awakening: What to Do with the Sleepwalking Defense?", *Boston College Law Review* 1/46 (2004), 149–82; Alexander Bonkalo, "Impulsive Acts and Confusional States during Incomplete Arousal from Sleep: Criminological and Forensic Implications," *Psychiatric Quarterly* 28/3 (1974), 400–9; A. Roger Ekirch and

https://doi.org/10.1017/S1479244317000361 Published online by Cambridge University Press

Sleep entails—almost by definition—the absence of *mens rea*. Yet even when the action in question is not criminal wrongdoing but merely consent, it is equally difficult to ascribe agency. Thus the criminal codes of the states of Florida and Iowa, and the UK's Sexual Offence Act of 2003, as well as the holding of the Supreme Court of Canada in 2011's landmark *R.* v. *J.A.* case, prohibit sexual intercourse with a sleeping person on the grounds of the inability to consent.[33] One cannot impute meaningful agency to an agent who remains asleep, sovereign or otherwise, which is at odds with the presumption of tacit consent.

The most famous challenge to the claim that people tacitly consent to and reauthorize their political order via inaction is provided by David Hume in "Of the Original Contract," who himself provides a sleep-related hypothetical. Against Locke's claim that a person tacitly consents to a state by living within it, Hume points out, "We may as well assert, that a man, by remaining in a vessel, freely consents to the dominion of the master, though he was carried on board while asleep, and must leap into the ocean, and perish the moment he leaves her."[34] Hume's point is that the difficulty and expense of exit makes framing the choice to stay in a state as a consensual act implausible; one is compelled to decide to stay for reasons unrelated to one's evaluation of the legitimacy of the present regime. Similarly, changing the US Constitution is notoriously onerous and prohibitively costly, made all the more arduous by the myth and veneration surrounding the document that grows the longer its basic shape remains unchanged. As such, it becomes even more difficult to infer consent from failure to amend—perhaps the sovereign suffers from sleep paralysis, wishing to act but finding itself incapable of doing so.

* * *

In *The Sleeping Sovereign*, Tuck provides a compelling narrative of how a series of canonical figures developed some of the fundamental tenets of constitutional theory, highlighting the tension between popular sovereignty and the challenges of direct popular rule in the modern world. As in his other work, Tuck makes familiar texts strange and exciting, challenging prior interpretations while drawing on often overlooked work. Moreover, we share Tuck's normative commitment to the value of majoritarian decision making, even if we depart

John M. Shneerson, "Nineteenth-Century Sleep Violence Cases: A Historical View," *Sleep Medicine Clinics* 6/4 (2011), 483–91.

33 FLA. STAT. ANN. § 794.011(1)(C); Crim LR 75; *R.* v. *J.A.*, [2011] 2 SCR 440, 2011 SCC 28 (Can LII).

34 David Hume, "Of the Original Contract," in Hume, *Essays, Moral, Political, and Literary*, ed. Eugene F. Miller (Indianapolis, 1985) 465–87, at 475.

https://doi.org/10.1017/S1479244317000361 Published online by Cambridge University Press

from the wider model of constitutionalism and of referendums as an optimal strategy for constitutional change.

In conclusion, we direct readers to the first stanza of Theodore Roethke's famous villanelle, "The Waking":

I wake to sleep, and take my waking slow.
I feel my fate in what I cannot fear.
I learn by going where I have to go.[35]

The interpretation of the lines is, of course, a matter of contention and subjectivity. But we prefer to read them as highlighting the inescapability of agency. If the sovereign is to be capable of action when it really counts, perhaps it should never be fully asleep. We might concede that it must remain in a twilight state—that, in particular, the epistemic benefits of "government," of representation and executive decision making, are far too valuable to surrender. But, in turn, excessive sleep may lead to cognitive impairment, which may produce disaster when the fate of the country is at stake. In other words, the sovereign's ability to render meaningful judgments when it counts depends on its continually feeling its own fate, on its going where it has to go.

[35] Theodore Roethke, *The Collected Poems of Theodore Roethke* (Garden City, 1975), 104.

https://doi.org/10.1017/S1479244317000361 Published online by Cambridge University Press