

**Speech, Law, and Civil Society:  
Liberal Thought Against Democratic Politics**

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## Abstract

Historically-informed reflection on democracy reminds us of a curious fact: representative government, supposedly the modern form of democracy, was not originally envisioned as a technical solution to the difficulty of assembling the citizen body of an extensive nation state, but rather as a qualitatively different political form. The first thinkers to dedicate their attention to representative government in a systematic way were perfectly candid in contrasting this type of regime with democracy, which they viewed as an archaic form of politics that was at worst anarchic and at best inappropriate to modern conditions.

Much of twentieth century democratic theory has been staged as a dispute between the advocates of a normative model of participatory democracy and an empiricist research program that takes the identification of democracy with representative institutions for granted. This project does not attempt to relitigate this dispute, but rather to widen its stakes. Political representation is only one facet of the modern anti-democratic project. The fact that modern democratic institutions are composed of anti-democratic political forms raises a more extensive set of problems than an exclusive focus on representation would permit us to see. Behind the debate concerning participatory and representative democracy lies an older and more extensive field of conflict: the dispute between liberalism and democracy. Whether one considers the norm of popular sovereignty, the use of elections, or the practice of parliamentary government by discussion, a cursory historical investigation reveals that the political forms which today are considered inseparable from democracy originate in a struggle waged by hereditary aristocracies against monarchical power, or a struggle waged by the “natural aristocracy” of civil society against democracy itself.

The following study has two stages. The first is a history of liberal thought written with an emphasis on this tradition’s responses to the threat of democracy. This history is divided into three moments, each of which outlines a distinct family of political reflection: juridical liberalism, empiricist liberalism, and parliamentarism. The second stage is an attempt to identify the contribution of each family of liberal reflection to the modern understanding of democracy. In the final chapters, this is extended to contemporary democratic theory, which is correctly understood as the inheritor of liberal, not democratic, political forms, and which renews many aspects of the liberal tradition’s critique of democracy despite its avowed acceptance of democracy.

*This dissertation is dedicated to the memory of my brother, Logan,  
who I am still learning how to live from*

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# Introduction

## The Misidentification of Democracy and Liberalism

Whether it is a matter of forgetting, a long history of commonplace assumptions being buried under the sediment of new political experiences, or a matter of willful amnesia in which new forms are baptized with old names, for the historian of political thought there can be little doubt that what today is described as “democracy” is a chimera of pre-democratic and even anti-democratic political forms. In an important work, *The Principles of Representative Government*, Bernard Manin presents this point of view very clearly:

Contemporary democratic governments have evolved from a political system that was conceived by its founders as opposed to democracy. Current usage distinguishes between “representative” and “direct” democracy, making them varieties of one type of government. However, what today we call representative democracy has its origins in a system of institutions (established in the wake of the English, American, and French revolutions) that was in no way initially perceived as a form of democracy or of government by the people.<sup>1</sup>

Although he died before the basic principles of modern representative government had been formulated, it was already apparent to Rousseau that “the idea of representatives is modern. It comes to us from feudal government, that iniquitous and absurd government in which the human race is degraded and the name of man is in dishonour. In the ancient republics and even in

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<sup>1</sup> Bernard Manin, *The Principles of Representative Government* (New York: Cambridge, 1997), 1. See also Hanna Fenichel Pitkin, *The Concept of Representation* (Berkeley: University of California Press, 1967), 2.

monarchies, the people never had representatives. The word itself was unknown,” and furthermore, that when sovereignty resides with the people, “the deputies of the people, therefore, neither are nor can be its representatives; they are merely its agents.”<sup>2</sup> Rousseau’s view was not the marginal opinion of an atavistic eccentric; the early proponents of representative government were no less candid than its detractors in contrasting representative institutions with democratic political organization.<sup>3</sup>

This study is not an investigation of the relationship between democracy and representation. It does not attempt to relitigate the debate between the mid-century elite theories of democracy and normatively-oriented advocates of participatory democracy.<sup>4</sup> Although Manin’s *The Principles of Representative Government* and Nadia Urbinati’s *Representative Democracy: Principles and Genealogy* raise an important set of questions, the curious fact that modern democratic institutions are composed of anti-democratic political forms raises a far more extensive set of problems than an exclusive focus on the dilemmas of political representation would permit us to see. Whether one considers elections, representation, parliamentarism, limited government, rule of law, or popular sovereignty, the most cursory historical investigation

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<sup>2</sup> Jean-Jacques Rousseau, *On the Social Contract*, in *Jean-Jacques Rousseau: The Basic Political Writings*, ed. and trans. Donald A. Cress (Indianapolis: Hackett, 1987), 198.

<sup>3</sup> Martin Breugh, *The Plebeian Experience: A Discontinuous History of Political Freedom*, trans. Lazar Lederhendler (New York: Columbia University Press, 2013), 105-106; Cornelius Castoriadis, “The Greek *Polis* and the Creation of Democracy,” in *Philosophy, Politics, Autonomy*, ed. David Ames Curtis (New York: Oxford University Press, 1991), 107-108; François Guizot, *The History of the Origins of Representative Government in Europe*, trans. Andrew R. Scoble (Indianapolis: Liberty Fund, 2002), 59-60; James Madison, *Federalist* No. 10, in *The Federalist Papers*, ed. George W. Carey and James McClellan (Indianapolis: Liberty Fund, 2001); Emmanuel Joseph Sieyès, *Sieyès: Political Writings*, ed. and trans. Michael Sonenscher (Indianapolis: Hackett, 2003), lxiii-lxiv, 147n33.

<sup>4</sup> Regarding elite theories of democracy, see Robert Dahl, *A Preface to Democratic Theory* (Chicago: University of Chicago Press, 2006); Joseph Schumpeter, *Capitalism, Socialism and Democracy* (New York: Harper Torchbooks, 1962). Regarding participatory democracy, see Benjamin Barber, *Strong Democracy* (Berkeley: University of California Press, 2003); C. B. Macpherson, *The Life and Times of Liberal Democracy* (Oxford: Oxford University Press, 1977); Carole Pateman, *Participation and Democratic Theory* (Cambridge: Cambridge University Press, 1970).

reveals that each of the elements associated or identified with modern democracy is in fact an artifact of aristocratic struggles against the monarchy, or of the propertied classes against democracy itself. It is not so much that liberalism has been articulated or mixed with democracy,<sup>5</sup> but rather that the former has been identified with the latter. For this reason, to understand the relationship between democracy and liberalism we must make ourselves clear about what liberalism is and has been in all its variety.

### **Three Families of Liberalism**

The first chapters of this study are an attempt to come to terms with this variety, tracing the principles of modern democracy and contemporary democratic theory back to their origins in liberal political forms. By relating two provinces of political reflection, contemporary democratic theory and the history of political thought, it is possible to reveal the liberal and undemocratic origins of the modern democratic imaginary, disenchanting civil philosophy through the use of history.

Like modern democracy, liberalism is composed of a variety of unlike elements. For this reason, it resists being stereotyped or captured in a concise formula. Although the defence of property has been a recurrent feature of liberalism, the political thought and political institutions developed in the liberal tradition cannot be reduced to an apologetics for capitalism or the interests of the propertied classes. And although the articulation of the political order with the private sphere and the invention or re-invention of political forms on the model of private forms

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<sup>5</sup> The term “liberal democracy” is a recent coinage, an artifact of Cold War polemic. See Duncan Bell, “What Is Liberalism?” *Political Theory* 42, no. 6 (June 2014): 703-704.

of sociability reappear again and again throughout this tradition, liberalism involves a great deal more than the political expression of individualistic principles.

For purposes of analysis no less than purposes of presentation, the sheer heterogeneity and creativity of liberal political reflection presents a significant obstacle. In his criticism of empiricist models of democracy, C. B. Macpherson attempted to overcome this obstacle by organizing the variety of liberal-democratic political forms into a chronologically presented succession of “models.”<sup>6</sup> Although this style of analysis captures its variety more adequately than a monistic approach could, the choice to depict the liberal tradition as a collection of self-contained models still obscures its complexity. Like any historical object, a tradition is not a unity, but rather a complex composite in which elements with disparate origins are renamed and repurposed, being placed in relations ranging from neat articulation to tenuous instability. For this reason, this study instead investigates the way that multiple liberal traditions organize and reorganize a collection of three facets: *speech*, *law*, and *civil society*. By asking which of these facets is predominant, it is possible to identify three analytical stances or “families” within the liberal tradition: *juridical liberalism*, *empiricist liberalism*, and *parliamentarism*. This distinction between juridical and empiricist families of liberalism is an expansion of the contrast between the “subject of right” and the “subject of interest” that Michel Foucault employed throughout his 1978-1979 lectures at the Collège de France,<sup>7</sup> while the identification of parliamentarism as a distinct family of liberal political reflection is original to this study.

These three families do not form a chronological line of succession, and they do not have the parsimony or self-containedness of models. Despite emerging at different points in time,

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<sup>6</sup> Macpherson, *Life and Times of Liberal Democracy*, 2-9.

<sup>7</sup> Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France 1978-1979*, ed. Michel Senellart, trans. Graham Burchell (New York: Picador, 2008), 271-274.

none of these families has supplanted another, and each continues to be elaborated up to the present day. And despite possessing enough coherence that each can be identified as a distinct object, these families do not neatly correspond to the geographically or historically localized traditions of liberalism (for instance, the customary distinction between anglophone and francophone or continental traditions<sup>8</sup>). As opposed to the provincial rootedness of a “tradition,” it would be less misleading to speak of something potentially nomadic, like a “stance.” For example, it is possible to find empiricist liberalism in Britain (the Scottish Enlightenment, the utilitarians) and France (Sieyès), and on the move between Austria and America (Schumpeter). And because these facets seldom exist in isolation, but rather are articulated with one another, it will be impossible to place many of the canonical liberal thinkers in any one family exclusively. For instance, the entire body of modern natural law theories should not be understood only as an artifact of juridical liberalism, but rather as a specific strategy for articulating the juridical and empiricist forms of right and utility. And Kant, that greater synthesizer of ideas, assumed a juridical stance in his moral philosophy and social contract theory, an empiricist stance in his philosophy of history, and an early version of the parliamentary stance in his reflections on public reason and enlightenment.

### **A Note on Democracy**

For the same reason that it is necessary to come to terms with the historical variety of liberalism, to distinguish liberal from democratic political forms also requires that we work with

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<sup>8</sup> This view originates with Francis Lieber’s *On Civil Liberty and Self-Government*, ed. Theodore D. Woolsey (Philadelphia: J. B. Lippincott, 1874), 51-55, 279-296. For a more recent example see Larry Siedentop, “Two Liberal Traditions,” in *The Idea of Freedom*, ed. Alan Ryan (Oxford: Oxford University Press, 1979), 153-174.

a definite idea of democracy. The understanding of democracy presupposed in this study rests on a set of conjectures. The first of these conjectures is that democracy is not a word, but a thing. If we were to take a nominalist approach, identifying democracy with the set of political forms that have been described as democratic, we would be unable to raise our question concerning the conflation of liberal and democratic political forms; popular sovereignty, political representation, and parliamentarism would be democratic because they have been described that way after the fact. It is only by revisiting the political and argumentative contexts in which these concepts were first formulated that it becomes possible to understand their strategic meaning.

If democracy is a kind of thing, what kind of a thing is it? At this point, it is necessary to make a second conjecture. Democracy is not a form of state or a form of procedure; it is a form or even *the* form of *politics*, which is to say, it is a form of *power*. In this respect, democracy is nothing other than what its name professes: democracy is the power (*kratos*) of the people (*demos*). It is not an *arche*, a principle of rule or officeholding. This understanding of democracy has anti-statist implications. The concept of democracy employed throughout this study has a certain affinity with that found in the work of contemporary theorists of “radical democracy,” a group that includes the American democratic theorists Sheldon S. Wolin and C. Douglas Lummis, and French theorists Cornelius Castoriadis, Jacques Rancière, and Miguel Abensour. This group of thinkers shares a libertarian, horizontalist view of democratic politics that was reintroduced to political theory by Hannah Arendt’s insistence that politics cannot be equated with the activity of ruling, and that power is a matter of acting in concert rather than acting on the basis of imperative commands.<sup>9</sup>

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<sup>9</sup> Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1998), 32-33, 199-202, 222-225.

But it is important to emphasize that what contemporary radical democrats share is not an adherence to a common norm or to a “school” of democratic theory to be considered alongside the others (e.g. competitive elite models, deliberative democracy, agonistic democracy, etc.). What they share is a common view of a phenomenon that exists independently of their description. This phenomenon is democracy itself. Strictly speaking, there is no such thing as “radical democracy.” The term is redundant. Democracy is radical or it does not exist. *Pace* Tocqueville, democracy is not a providential destiny; it is a return to the origin.<sup>10</sup> Democracy is the solved riddle of all constitutions,<sup>11</sup> but it is not itself a constitutional form.

The radical democrats of twentieth century political thought were by no means the first thinkers to see this. Their contribution was only to restore to visibility what had been obscured by the misidentification of liberal and democratic political forms and the new body of anti-democratic polemic initiated in the nineteenth century. Because democracy is not an idea but a phenomenon, it has a remarkable durability. It is possible to see traces of democracy’s radicalism throughout that body of anti-democratic argumentation that we have come to call political philosophy.<sup>12</sup> Democracy is “the most natural” constitution (Spinoza) or “the solution to the

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<sup>10</sup> C. Douglas Lummis, *Radical Democracy* (Ithaca: Cornell University Press, 1996), 24-26.

<sup>11</sup> Karl Marx, “Critique of Hegel’s ‘Philosophy of Right,’ ” in *Karl Marx: Selected Writings*, ed. David McLellan (Oxford: Oxford University Press, 2000), 34

<sup>12</sup> Arendt observed that “the greater part of political philosophy since Plato could easily be interpreted as various attempts to find theoretical foundations and practical ways for an escape from politics altogether.” To the extent that we may consider democracy to be “the square root of all power, the original number out of which all regimes are multiplied, the root term out of which the entire political vocabulary is ramified,” the tradition of political philosophy may be understood as an attempt to attenuate or eliminate the possibility of democratic politics. This hatred of democracy is evident in utopias of divided labour from the Platonic kallipolis to Sieyès’ representative system, in Aristotle’s parapolitical reduction of politics to the occupation of offices, and in modern reflection on liberty from Hobbes to Berlin. See *Human Condition*, 220-222; Lummis, *Radical Democracy*, 26; Jacques Rancière, *Disagreement: Politics and Philosophy*, trans. Julie Rose (Minneapolis: University of Minnesota Press, 1999), 70-75.

riddle of all constitutions” (Marx).<sup>13</sup> On account of its licentious freedom of “not being ruled” (Aristotle)<sup>14</sup> democracy is a bazaar that “contains all kinds of constitutions,” an anarchic polity in which “there is no requirement to rule ... or again to be ruled,” each living as they like (Plato).<sup>15</sup> Democracy is a paradoxical form of “government without a government” in which everyone and no one is a magistrate (Rousseau).<sup>16</sup> Its freedom is “the same with that which every man then should have if there were no civil laws, nor commonwealth at all” (Hobbes).<sup>17</sup>

## Outline of the Study

The first five chapters of this study discuss the organization of speech, law, and civil society in liberal political orders. The order of presentation roughly follows the chronological development of liberalism. It begins with a consideration of juridical liberalism spanning from Hobbes’ social contract theory, which bridges absolutist and liberal political imaginaries, to Kant’s proceduralist interpretation of the social contract as a kind of *grundnorm* articulating hypothetical conditions of consent. Although modern theories of natural law continue to guide and inspire the formulation of twentieth century democratic theories (most notably the proceduralist theories of John Rawls and Jürgen Habermas), the natural lawyers themselves were quite explicit in their opposition to democracy. But a careful investigation of any social contract theory reveals a fascinating ambivalence: a state of nature is certainly a liberal Robinsonade, but

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<sup>13</sup> Marx, “Critique of Hegel’s ‘Philosophy of Right,’ ” 34; Benedict de Spinoza, *Theological-Political Treatise*, ed. Jonathan Israel, trans. Michael Silverthorne and Jonathan Israel (Cambridge: Cambridge University Press, 2007), 202.

<sup>14</sup> Aristotle, *The Politics*, trans. T. A. Sinclair (New York: Penguin, 1992), bk. 6, ch. 2, 1317a40-1317b16.

<sup>15</sup> Plato, *Republic*, trans. G. M. A. Grube and C. D. C. Reeve (Indianapolis: Hackett, 1992), 557d-e.

<sup>16</sup> Rousseau, *Social Contract*, 179.

<sup>17</sup> Thomas Hobbes, *Leviathan*, ed. Edwin Curley (Indianapolis: Hackett, 1994), 139-140.

any state of equality is at the same time a democratic premise. The puzzle confronting the natural lawyers, then, will be to ensure that this ambivalence is channelled in one direction rather than the other, burying the democratic premises of the social contract and transforming the power of the *demos* into the consent of subjects. The first chapter surveys the deltas of natural law, giving special attention to the points at which the jurists have diverted the river.

The second and third chapters introduce the empiricist disenchantment of the juridical framework and the substitution of a system of needs for a system of norms. Theories of natural law were innovative not only in drawing on the normative resources of consent, but also in their anthropological premises. In contract theories, the unsociability of the *homo aeconomicus* posited by the natural lawyers necessitated the institution of a civil commonwealth. In making a covenant, the *homo aeconomicus* is transformed into a *homo juridicus*. The empiricist response to this was to ask: what if this transformation never took place? What if the insatiability of the appetites did not make one dangerous, but predictable? What if the very unsociability of the subject of interest could itself provide a principle of association? The second chapter traces the origins of the concept of interest in the practical discourse of *raison d'état* and the parapolitical discourse of political economy, and shows how empiricist liberalism transformed the political landscape imagined by the jurists, substituting natural history for natural law, civil society for the state of nature, and *laissez-faire* for the state of right. The third chapter outlines the empiricist theories of representation and the methodical theories of democracy that interpret and construct political life in terms of dynamics originating in civil society *qua* system of needs.

While juridical liberalism attempts to confine politics to the legal dimension or relegate it to the moment of institution, and empiricist liberalism imagines political life on the model of private economic activity, the increasing involvement of the bourgeois in governmental functions

led to the formulation of a third family of liberalism that does not shy from public life. While juridical liberalism established the form of legitimacy that emerges from the exchange of rights in covenants, and empiricist liberalism described and generalized the form of sociability created through the mundane exchange of goods in private contracts, parliamentarism is concerned with the form of reason discovered through the public exchange of words. Parliamentarism combines the juridical preoccupation with the formulation of public, abstract norms and the empiricist image of politics as the staging of an intersubjective procedure. The exchange of words in government by discussion is at once a principle of sociability and source of legitimacy. In this respect (and not only in this respect) parliamentarism is like the political expression of critical philosophy, a synthesis of rationalist and empiricist elements. The fourth and fifth chapters outline the prehistory of parliamentarism and the principles of modern parliamentarism, considering its aristocratic principles of distinction based on property and education and its procedural principles of publicity and government by discussion.

Juridical liberalism, empiricist liberalism, and parliamentarism each feature a particular point of orbit: *law*, *civil society*, and *speech*. In twentieth century political thought, these centres of orbit lost none of their attractive force. Each continued to organize a province of political reflection. What changed, however, is the fact that the discourses orbiting these points no longer identified themselves with liberalism, but rather with democracy. This is not to say that the substance of these centres became democratic. Although democracy has appeared as a providential necessity (Tocqueville) or an inescapable horizon (Lefort) since at least the nineteenth century, in contemporary political reflection democracy appears at most as a source of legitimacy, but not as a form of power. So although twentieth century political thought did not cease to innovate within its three provinces, these provinces did not become democratic for this

reason. While traditional liberal thought *opposed* sovereignty, representation, and parliamentarism to democracy, contemporary liberal thought attempts to *identify* these principles with democracy. The juridical province of liberal democratic thought is best represented by Rawls' neo-Kantian theory of justice, and the empiricist province by Joseph Schumpeter's theory of democracy as a form of method. In much the same way that parliamentarism combines the political forms featured in the juridical and empiricist families of liberalism, the contemporary expression of parliamentarism found in Habermas' proceduralist theory of democracy finds a place for everything, arranging speech, law, and civil society in a distinctive way. For this reason, this program features the most sophisticated and complete version of the misidentification of liberal and democratic forms. Habermas' proceduralist deliberative democracy operates on several levels at once, engaging a wide grouping of interlocutors. For the purposes of highlighting the opposition between liberalism and democracy, one of these interlocutors is especially significant. Habermas' democratic theory was formulated in opposition to Carl Schmitt's concept of democracy as a form of sovereignty, which was itself presented in such a way as to dramatize the opposition between liberal and democratic political forms. In its thematization of speech, law, and civil society, Schmitt's concept of democracy-as-sovereignty is opposed point-for-point to the basic principles of the liberal tradition and Habermas' proceduralist concept. The sixth chapter outlines the dispute between Habermas and Schmitt's concepts of democracy, giving special attention to the place occupied by speech, law, and civil society in their respective accounts.

Contemporary political thought has abandoned its attempt to contrast democracy unfavorably with representative government and other liberal political forms in favour of a strategy of misidentifying democracy with these forms. But fascinatingly, despite this change of

tack it has nevertheless renewed the specifically modern anti-democratic polemic that was developed in the nineteenth century by Constant, Coulanges, Tocqueville, J. S. Mill, and others. The concluding chapter provides an overview of the various representations of democracy produced in the anti-democratic polemics developed from antiquity to the present, showing how the representation of democracy as a form of sovereignty is fundamental not only for the anti-Jacobin liberalism of Constant and other proponents of liberal parliamentarism, but also for contemporary theories of deliberative and representative democracy.

# Chapter 1: Juridical Liberalism

## Juridical, Empiricist, and Parliamentary Families of Liberalism

The history of modern democracy is the history of its occlusion by liberalism. In early modern political thought, the conflict between liberalism and democracy was open. When it was not yet apparent that democracy would be the only possible basis of legitimation under modern conditions, early liberal political thinkers were perfectly candid in opposing their designs to the mis-rule of the *demos*. None of the canonical political thinkers were democrats, and it is hardly an exaggeration to say that, although democracy is certainly “represented” in a certain way in the classic works of modern political thought, it has no “representatives.” Neither Kant, Mill, Constant, Guizot, Sieyès, nor even Rousseau espoused a democratic philosophy.

As it became apparent that democracy was an inescapable normative horizon for moderns, the strategy shifted from polemically contrasting liberalism to democracy towards a strategy of misidentifying the former with the latter.<sup>18</sup> For this reason, contemporary political reflection has mistaken democracy for a combination of political forms developed in the theory and practice of liberalism.<sup>19</sup> Democracy is not a state of right, or a republican legislative state. And in fact, it may be incompatible with the state form as such. It is not a *pouvoir constituant*, or even the norm of popular sovereignty. The *demos* do not gather their power only to give it away and fall asleep. Neither the separation of powers, the differentiation of civil society from the

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<sup>18</sup> Francis Dupius-Déri, “The Political Power of Words: The Birth of Pro-democratic Discourse in the Nineteenth Century in the United States and France,” *Political Studies* 52, no. 1 (March 2004): 118-134.

<sup>19</sup> Ellen Meiksins Wood, *Democracy Against Capitalism: Renewing Historical Materialism* (London: Verso, 2016), 229-230.

state, the institution of parliament, nor the apparatuses of representation are democratic political forms. This was self-evident to the early liberals, but it has been somewhat lost to us.

The following study draws on Carl Schmitt's critique of liberalism. The significance of Schmitt's political thought for democratic theory concerns the way it drives a wedge between liberal and democratic political forms, preserving an awareness of a fact that was self-evident to the classical exponents of liberalism, but has been effaced in contemporary political philosophy. While there is much to gain from adopting or adapting Schmitt's critique of liberalism for the purpose of articulating an unalloyed theory of democracy, there is one respect in which his depiction of liberal thought was inadequate. It is mistaken, or at least misleading, to regard liberalism as a "consistent, comprehensive metaphysical system."<sup>20</sup> In *The Crisis of Parliamentary Democracy*, Schmitt argued that the free competition of ideas in discussion is analogous to the free competition of proprietors in the market, each sphere being only a special iteration of a philosophy in which truth or harmony results from an intersubjective process of competition. In another work, he observed that liberal argumentation tends to move between the poles of ethics and economics, which correspond to the aforementioned competitive activities in discussion and the market respectively.<sup>21</sup> Although this analogy is interesting and revealing, it is possible to construct a more encompassing and complete depiction of liberal political thought by substituting typology with three centres for this unitary "metaphysical system." Discussion (speech) and the market (civil society) then would not be poles, but rather independent centres. And in fact, it is possible to draw on Schmitt's own distinction between bargaining and

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<sup>20</sup> Carl Schmitt, *The Crisis of Parliamentary Democracy*, trans. Ellen Kennedy (Cambridge: MIT Press, 1988), 35-36.

<sup>21</sup> Carl Schmitt, *The Concept of the Political*, trans. George Schwab (Chicago: University of Chicago Press, 2007), 71.

discussion to elaborate the basis of their independence.<sup>22</sup> In addition to these two categories, it is possible to identify a third centre: law. Despite the influential critique of the liberal legislative state advanced in *Political Theology* and elsewhere, and despite resisting the liberal tendency to substitute an impersonal system of norms for a concrete and political apparatus of sovereignty, Schmitt (incredibly) did not identify law as a conceptual centre of liberal political thought alongside discussion and economic life. It is possible to attribute this omission to the professional disposition of the jurist, who is inclined to take the representation of politics as a sphere of legislative competence for granted. But law is not the generic form of politics. More often, law expresses a desire to prevent politics from occurring at all.

### **Consent and Legitimacy as Mystifications**

At its inception, liberalism centres on law, inheriting a juridical understanding of political life from absolute monarchy.<sup>23</sup> The social contract literature forms a bridge between absolutist and liberal concepts of political legitimacy that nevertheless retains the juridical framework of the latter. Although the social contract tradition substitutes the volitional sanction of consent for the authority conferred by divine right, here political power continues to represent itself in the form of law. The social contract literature and the norms of sovereignty, consent, right, and autonomy are all artifacts of *juridical liberalism*. This legal idiom of political thought has never been surpassed or replaced altogether, but it has undergone numerous transformations, as the social contract tradition and the personalistic problematic of sovereignty are displaced by

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<sup>22</sup> Schmitt, *Crisis of Parliamentary Democracy*, 4-6. See also Norberto Bobbio, "The Future of Democracy," *Telos* 61 (September 1984): 7.

<sup>23</sup> Michel Foucault, *The History of Sexuality Volume 1: An Introduction*, trans. Robert Hurley (New York: Vintage Books, 1990), 86-87.

rationalist philosophies of right and autonomy, which continue to receive elaboration in the neo-Kantian political and moral philosophy of Jürgen Habermas and John Rawls.

To disentangle democracy from liberalism, it is necessary to have a clear idea of what liberalism is, and what it has been. So, to understand modern democracy, one must understand liberalism. But conversely, it is also impossible to understand the development of liberalism without keeping democracy in sight. The development of liberal political thought was not only conditioned by its opposition to the monarchical absolutist state and the privileges of the aristocracy, but also to the emerging threat posed by the *demos* to the orders of law, reason, propriety, and distinction.<sup>24</sup> From the very earliest days in the development of liberal thought, democracy has been present in the background in two dimensions: as a threat and as a providential inevitability.

The unavailability of divine right and the dispossession of the aristocratic classes of their privileges are ambiguous developments. Potentially, they have both liberalizing and democratizing consequences. The puzzle for the liberal thinkers at work in these moments, then, will be to channel this ambiguity in one direction rather than the other. The early modern jurists confronted the threat and the inevitability of democracy by burying the democratic premises implicit in the social contract, transforming the *kratos* of the *demos* into the consent of the people.

The entire problematic of legitimacy that underpins the social contract literature should be understood as an attempt to efface a democratic moment that cannot be denied altogether. As C. Douglas Lummis observed, democracy is the only kind of regime that does not need to be

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<sup>24</sup> Wood, *Democracy Against Capitalism*, 230

legitimated.<sup>25</sup> In modernity, democracy is itself the substance of legitimacy.<sup>26</sup> To speak of legitimation is to presuppose that the *demos* do not rule themselves, but rather consent to be ruled.<sup>27</sup> In Hobbes' commonwealth, each and every person consents, and then they go to sleep. In enacting a covenant, they transform from little sovereigns into little subjects. But consent is not democracy.<sup>28</sup> As Aristotle and Hobbes knew well, the norm of consent is entirely consistent with a tyrannical political order.<sup>29</sup> Given that liberal political thought has pursued a strategy of transforming democracy into a form of consent or legitimation, the following question arises: what is being consented to?

### Consenting to the State

Thomas Hobbes inaugurated the modern tradition of social contract theory, a discourse that imagines political thought as a practice of deriving the nature and extension of political obligation from hypothetical conditions of consent. Although he did not use this terminology himself, *On the Citizen* and *Leviathan* can be understood as the first works to substitute

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<sup>25</sup> C. Douglas Lummis, *Radical Democracy* (Ithaca: Cornell University Press, 1996), 28.

<sup>26</sup> This is the meaning of the young Marx's contention that democracy is "the solution to the riddle of all constitutions." Interestingly, this passage reveals the extent to which Marx too (at least in these earlier writings) had a juridical understanding of political life despite his antipathy for legal abstractions. See Karl Marx, "Critique of Hegel's 'Philosophy of Right,'" in *Karl Marx: Selected Writings*, ed. David McLellan (Oxford: Oxford University Press, 2000), 34.

<sup>27</sup> John R. Wallach observes that today, "retreat behind the term consent as political judgment and the equivalent of democracy now sanctions the opposite of democracy—viz. [rule] by the few over the many." See "None of Us is a Democrat Now," *Theory & Event* 13, no. 2 (2010).

<sup>28</sup> On the radical moment buried in social contract theory and the mystifying role played by consent in both the social contract literature and in Rawls' neo-Kantian contractualism, see Sheldon S. Wolin, "The Liberal/Democratic Divide: On Rawls' *Political Liberalism*," in *Fugitive Democracy*, ed. Nicholas Xenos (Princeton: Princeton University Press, 2016), 262. See also Jacques Rancière, *Disagreement: Politics and Philosophy*, trans. Julie Rose (Minneapolis: University of Minnesota Press, 1999), 76.

<sup>29</sup> Aristotle, *The Politics*, trans. T. A. Sinclair (New York: Penguin, 1992), bk. 4, ch. 9, 1295a1-16.

*legitimacy for authority* in a systematic way. The Western concept of authority, which is at home only in the premodern political imaginary, was intimately bound up with the extra-political and “irrational” sources of normativity generated by religion and tradition.<sup>30</sup> Throughout *Leviathan*, however, Hobbes asserts the principle that the “right of all sovereigns is derived originally from the consent of every one of those that are to be governed.”<sup>31</sup> He does not only substitute the principle of consent for the religious authority deriving from the divine right of kings, but even goes as far as to invert the latter.

In the third part of *Leviathan*, Hobbes attempted to settle the relation between the authority of the civil commonwealth and the competing claims made by the church and Christian holy texts. Here, he was primarily concerned with dividing secular and religious authority into mutually exclusive domains, demonstrating that religious and secular authority do not overlap, compete with, or contradict one another. At the numerous points of intersection between secular and religious history, Hobbes drew on biblical texts to illustrate that *religious* authority is founded by means of covenants that express the consent of subjects. His account is emphatically *not* a “divine right of kings.” In fact, it is as though Hobbes has turned this doctrine on its head; he did not argue that the authority of temporal powers is conferred by divine right, but instead that God’s authority is conferred by “secular” means—that is, by means of covenants through which subjects give their consent voluntarily. This becomes clear in the discussion that outlines the two senses in which God claims beings on the earth as being “mine.” In addition to the sense in which he claims ownership over all of creation by means of his natural *omnipotence*, a finite

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<sup>30</sup> Hannah Arendt, “What is Authority?” in *Between Past and Future: Eight Exercises in Political Thought* (New York: Penguin, 2006), 110, 120-124.

<sup>31</sup> Thomas Hobbes, *Leviathan*, ed. Edwin Curley (Indianapolis: Hackett, 1994), 391.

grouping of “peculiar” subjects are also “subject to God’s positive law.”<sup>32</sup> Speaking of Abraham and the Israelites, Hobbes argued that “from the very creation, God not only reigned over all men naturally by his might, but also had peculiar subjects.”<sup>33</sup> To illustrate this, he did not quote scripture but instead chose to place words in God’s mouth, interpreting the words “If you will obey my voice indeed, and keep my covenant, then ye shall be a peculiar people to me, for all the earth is mine” to mean “*all the nations of the world are mine*, but it is not so that you are mine, but in a *special manner*; for they are all mine, by reason of my power; but you shall be mine by your own consent and covenant.”<sup>34</sup> For this reason, Hobbes contended that “the kingdom therefore, of God, is a real, not a metaphorical kingdom,” and further, that it is “a civil kingdom, which consisted first in the obligation of the people of Israel.”<sup>35</sup>

Legitimacy differs from authority in identifying the subject as its normative basis. Although it is true that authority may only be effective to the extent that it secures subjective acceptance,<sup>36</sup> authority is impossible without reference to an “objective” order that does not depend on the will, but only the belief, of its addressee. A Christian subject might resent the restrictions of the ten commandments but obey them nevertheless, since they believe in God. But no such objective belief is necessary to establish legitimacy, which need only make reference to the willing consent of the legitimating subject. As far as the legitimator is concerned, “our faith therein consisteth not in our opinion, but in our submission.”<sup>37</sup> The fact of consent alone is enough for legitimacy to be in force. From a normative standpoint, consent is irreducible;

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<sup>32</sup> Ibid., 273.

<sup>33</sup> Ibid., 272.

<sup>34</sup> Ibid., 273-274.

<sup>35</sup> Ibid., 276.

<sup>36</sup> Max Weber, *The Theory of Social and Economic Organization*, ed. Talcott Parsons, trans. A. M. Henderson and Talcott Parsons (New York: The Free Press, 1997), 382.

<sup>37</sup> Hobbes, *Leviathan*, 263.

whether the subject is moved to consent by the voice of reason or the stirring of the appetites is immaterial. In this way, the resemblance of the political norm of consent to the private principle of contract becomes apparent.<sup>38</sup> Rousseau famously criticized Hobbesian contract theory on anthropological grounds, arguing that the philosophers “spoke about savage man [when] it was civil man they depicted.”<sup>39</sup> But he could have extended this line of argument further, observing that Hobbes’ principle of political association, like his depiction of man, was borrowed from the private forms of association prevalent in a modern commercial society.

Hobbes’ concept of legitimacy is also subjective in the sense that consent is not only secured from all, but from each individually. The norm of consent predates Hobbes, appearing in the premodern political imaginary. However, the principle of Roman law that what touches all should be approved by all (*quod omnes tangit, ab omnibus tractari et approbari debet*) differs from the Hobbesian commonwealth of consent in several important respects. Firstly, this norm was concerned with consent to the laws, or to the rule of “representatives” of a certain type. It would never have occurred to a medieval jurist to derive the authority of the political order *tout court* from the norm of consent.<sup>40</sup> But in Hobbes’ system the moment of politics is concentrated in the moment of institution, and the problems of representation and legislation are entirely encompassed in the establishment of sovereignty.<sup>41</sup> Rather than authoring the law, subjects author a sovereign whose will coincides with law, and who “represents” them in the sense of

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<sup>38</sup> Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge: MIT Press, 1996), 27-28, 91.

<sup>39</sup> Jean-Jacques Rousseau, *Discourse on the Origin of Inequality*, in *Jean-Jacques Rousseau: The Basic Political Writings*, ed. and trans. Donald A. Cress (Indianapolis: Hackett, 1987), 38.

<sup>40</sup> Bernard Manin, *The Principles of Representative Government* (New York: Cambridge, 1997), 86-88.

<sup>41</sup> Habermas, *Between Facts and Norms*, 90.

being authorized by them.<sup>42</sup> Secondly, there is the matter of the approving “all.” The subject of consent referred to by the norm *quod omnes tangit* was not each and every subject of a commonwealth taken equally and individually. In practice, the norm was often applied in a localized way (for instance, by bishops consenting to the ordination of new archbishop), it was applied most rigorously in private rather than public law, and not all subjects were consulted, nor did they consent on the basis of formal equality.<sup>43</sup>

How then did Hobbes arrive at this starting point, deriving legitimacy from equal, freely-consenting subjects rather than simply reiterating the authoritative basis of an already-given society of orders?<sup>44</sup> Undoubtedly, Hobbes was a proto-liberal thinker, and the ideal of unanimous consent reflects an individualistic normative outlook.<sup>45</sup> But a different source reveals itself if one gives close attention to the details of the Hobbesian covenant: incredibly, even Hobbes’ authoritarian version of the social contract begins from, and acknowledges the priority of, democracy.<sup>46</sup>

The later contract theories of Samuel von Pufendorf and Locke featured not one, but two contracts: an initial “horizontal” or “mutual” contract (*a pactum unionis*, which Rousseau would

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<sup>42</sup> Hobbes, *Leviathan*, 100-105, 109, 112-113. On Hobbes’ “authorization view” of representation see Hanna Fenichel Pitkin, *The Concept of Representation* (Berkeley: University of California Press, 1967), 14-37.

<sup>43</sup> It goes without saying that *quod omnes tangit* was not a democratic norm. And yet, the connection between interest and consent first articulated in this norm is central to the representative government (e.g. “no taxation without representation”) we have come to view as the modern iteration of democracy. See Gaines Post, “A Roman Legal Theory of Consent, *Quod Omnes Tangit*, in Medieval Representation,” *Wisconsin Law Review* 1950, no. 1 (January 1950): 69, 71, 77-78.

<sup>44</sup> In continuing Jean Bodin’s polemic against the doctrine of mixed constitutions, Hobbes rejected the classical image of society as a collection of qualitatively different and unequal orders in favour of an atomistic society of equals. See Pasquale Pasquino, “A Genealogy of the Concept of Sovereignty,” *History of European Ideas*, published ahead of print, April 25, 2021, <https://doi.org/10.1080/01916599.2021.1914935>.

<sup>45</sup> Bernard Manin, “On Legitimacy and Political Deliberation,” trans. Elly Stein and Jane Mansbridge, *Political Theory* 15, no. 3 (August 1987): 341.

<sup>46</sup> Richard Tuck, *The Sleeping Sovereign: The Invention of Modern Democracy* (Cambridge: Cambridge University Press, 2015), 86-87, 100, 104n40, 140-141.

later describe as an “association” as opposed to a “contract”<sup>47</sup>) between consenting individuals that establishes society, and a second “vertical” contract (*pactum subjectionis*) that establishes the state.<sup>48</sup> To a democrat, it is easily apparent that these two-stage accounts feature a kind of betrayal of democracy in the transition from the first to the second contract.<sup>49</sup> Hobbes’ account is more parsimonious, but it is also ambiguous—and for that reason, opaque. Although he explicitly excludes the possibility of a society among equals being instituted before the state or commonwealth (*pactum unionis*), the Hobbesian covenant is also not a simple *pactum subjectionis* between sovereign and subject.<sup>50</sup> Hobbes was explicit that men in the state of nature agree *among themselves* to forfeit their power *to a sovereign* with whom they do not contract directly.<sup>51</sup> By combining elements of the *pactum unionis* and *pactum subjectionis*, he ensured both that sovereign power is unlimited (since subjects do not make covenants with the sovereign directly, there is no possibility of holding him to the terms of a contract), and that each and every subject may be considered the author or authorizer of the sovereign’s actions.<sup>52</sup> In this way, the problem of legitimacy is solved at the moment of incorporation, and the democratic moment of the mutual contract disappears, condensed into the single-stage contract.

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<sup>47</sup> Rousseau, *Social Contract*, 201.

<sup>48</sup> John Locke, *Second Treatise of Government*, ed. C. B. Macpherson (Indianapolis: Hackett, 1980), §211; Tuck, *Sleeping Sovereign*, 72. For a more recent iteration of the two contract model, see Habermas, *Between Facts and Norms*, 174.

<sup>49</sup> See especially Hannah Arendt’s critique of the vertical social contract in *On Revolution* (New York: Penguin, 2006), 160-163.

<sup>50</sup> Hobbes, *Leviathan*, 111. See also Tuck, *Sleeping Sovereign*, 106.

<sup>51</sup> Hobbes does not speak of an “exchange” but only a “mutual relation” between protection and obedience. See *Leviathan*, 109-111, 144, 496-497.

<sup>52</sup> *Ibid.*, 109, 112-113. Sir Frederick Pollock recognized that there is only one contract in Hobbes’ civil philosophy, and that the sovereign is not a party to this contract. Nevertheless, he decided to classify the Hobbesian covenant as a *pactum subjectionis*. See “Hobbes and Locke: The Social Contract in English Political Philosophy,” *Journal of the Society of Comparative Legislation* 9, no. 1 (1908): 109-110.

In his earlier work, *On the Citizen*, it is clearer than in *Leviathan* that the institution of a commonwealth of any type at all begins with democracy. Here, Hobbes argued that “when men have met to erect a commonwealth, they are, almost by the very fact that they have met, a *Democracy*.”<sup>53</sup> Democracy does not simply appear as one constitution alongside the others, as it did in the typologies inherited from Aristotle and Polybius. According to Hobbes, aristocracy and monarchy too assume a democratic moment: “an *Aristocracy* or a *council of optimates* with sovereign power, has its origin in a transfer of right from a *Democracy*,” and furthermore, “*Monarchy*, like *Aristocracy*, is derived from the power of the *people*, viz.. by the transfer of its *right* (i.e. *sovereign power*) to *one man*.”<sup>54</sup> In a revealing passage that presents the matter more clearly than the language of authorization, authorship, and representation employed in *Leviathan*, he contended that:

In every commonwealth the *People* Reigns; for even in *Monarchies* the *People* exercises power [*imperat*]; for the *people* wills through the will of *one man*. But the citizens, i.e. the subjects, are a *crowd*. In a *Democracy* and in an *Aristocracy* the citizens are the *crowd* but the *council* is the *people*; in a *Monarchy* the subjects are the *crowd* and (paradoxically) the *King* is the *people*.<sup>55</sup>

Long before Marx or even Spinoza, it was already apparent that “democracy is the truth of monarchy, monarchy is not the truth of democracy.”<sup>56</sup>

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<sup>53</sup> Thomas Hobbes, *On the Citizen*, ed. Richard Tuck and Michael Silverthorne (Cambridge: Cambridge University Press, 2003), 94.

<sup>54</sup> *Ibid.*, 95-96.

<sup>55</sup> *Ibid.*, 137. This choice of selection is borrowed from Richard Tuck’s *Sleeping Sovereign*, which has been an invaluable resource for these discussions of sovereignty and democracy.

<sup>56</sup> Marx, “Critique of Hegel’s ‘Philosophy of Right,’ ” 33. See also Etienne Balibar, *Spinoza and Politics*, trans. Peter Snowdon (London: Verso, 2008), 31-34.

## Consenting to Law

The juridical idiom of political thought is organized by an attempt to square or reconcile two heterogeneous elements: will and law. The linkage of will and law is one of the central metaphysical assumptions of modern Western moral and political thought.<sup>57</sup> Needless to say, this coincidence of will and law is entirely contingent—although it has gone largely unquestioned. The idea that the will is a faculty that “speaks” in the form of imperatives was unknown to the ancients, who had no concept of the will,<sup>58</sup> and would typically imagine law (*nomos*) on the model of the idea (*eidōs*) or intellect<sup>59</sup> (*nous*), or as a model to fabricate.<sup>60</sup> It is difficult to determine where this curious marriage originates. Schmitt, with his characteristic way of narrating history as a procession of metaphysical world-pictures, identified its origin in the rationalist philosophies of Gottfried Leibniz and Nicolas Malebranche, for whom God’s will spoke in the form of general, never particular, enunciations.<sup>61</sup> More recently, Nadia Urbinati has argued that this coincidence of will and law predates liberalism, and that its condition of possibility was not the age of democratic revolutions, but rather the dissolution of the society of orders under absolutist regimes; even before the “rights of man,” men were already equal as

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<sup>57</sup> Western philosophy has made the choice to imagine political and moral life on the model of obeying or transgressing the law. This accident does not originate with Kant, but has been a more or less persistent aspect of the tradition at least since the rise of Christianity. It is equally plausible to imagine political and moral life on the model of differing forms of exchange (e.g. commerce, reciprocity, gift-giving).

<sup>58</sup> Hannah Arendt, *The Life of the Mind* (San Diego: Harcourt, 1978), Vol. 1, 155; Vol. 2, 3.

<sup>59</sup> Aristotle, *Politics*, bk. 3, ch. 16, 1287a23.

<sup>60</sup> Intriguingly, Plato may have reimagined his philosophical doctrine of forms from a theory of unconcealment to a more politically-applicable theory of models or measures in order to better supply the world of human affairs with a rational account of law. See Miguel Abensour, “Against the Sovereignty of Philosophy over Politics: Arendt’s Reading of Plato’s Cave Allegory,” trans. Martin Breugh, *Social Research* 74, no. 4 (Winter 2007): 965-976.

<sup>61</sup> Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (Chicago: University of Chicago Press, 2005), 48.

atomized subjects before the sovereign. Being equal, the sovereign's will addressed them through the medium of law.<sup>62</sup>

The coincidence of will and law is especially evident in the concepts of sovereignty and autonomy. Whether one views the sovereign as the will who decides whether a situation is at hand in which the law applies (the decisionistic sovereignty of the exception), as the will that founds the legal order (the constitutional sovereignty of *pouvoir constituant*), or as a general will that speaks through the medium of legal imperatives (the autonomous sovereignty of the *volonté générale*), both elements are present in each concept of sovereignty. On the one hand we have the monster, and on the other, its coldness.

Juridical *liberalism* favours cold legality over volition, attenuating the anomic, absolutist, or democratic potentialities of the will with the forms of law. These strategies of attenuation vary. In some cases, the element of will is repressed by repressing the concept of sovereignty. This was the case in Hans Kelsen's normativist theory of law, which is only a more contemporary formulation of the ancient principle that laws and not men should rule.<sup>63</sup> Already in Locke's political thought, both aspects of the circumscription of sovereignty by law are fully developed. In the *state of right*, sovereignty is limited spatially by an apparatus of rights it may not trespass against.<sup>64</sup> In contrast to its predecessors, the particularistic rights asserted by the aristocracy against the monarchy, these rights are not understood as historical artifacts possessed

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<sup>62</sup> Rousseau's "republicanism," then, would not be ancient or even liberal, but rather shares its juridical exposition and its sociological conditions of possibility with the absolutist state. See Nadia Urbinati, *Representative Democracy: Principles and Genealogy* (Chicago: University of Chicago Press, 2006), 73.

<sup>63</sup> Carl Schmitt, *Constitutional Theory*, ed. and trans. Jeffrey Seitzer (Durham: Duke University Press, 2008), 187, 273; *Political Theology*, 7, 21.

<sup>64</sup> In Schmitt's terminology, a "principle of distribution." See *Constitutional Theory*, 170. For the classic formulation of this principle in the liberal tradition, see Locke, *Second Treatise*, §6, §12.

by a race or a nation,<sup>65</sup> but instead as metaphysical artifacts of natural law possessed by each and every subject individually. In the *legislative state*, sovereignty is not limited in its extension, but rather in its operation. Power must be exercised in the form of laws that apply generally rather than in the form of particular decrees.<sup>66</sup>

In the legislative state, sovereignty is reimagined as a legislative organ. Liberal social contract theories performed a legalistic reimagining of republicanism in which the public thing, the *res* of the *res publica* was no longer identified with concrete institutions, but instead with law. Jean-Jacques Rousseau, for instance, pronounced that “every state ruled by laws [is] a republic, regardless of the form its administration may take. For only then does the public interest govern, and only then is the ‘public thing’ something real.”<sup>67</sup> Although it is unlimited in *where* it may will, Rousseau’s sovereign is quite limited in *how* it may will. The general will, which “must be general in its object as well as in its essence” and “loses its natural rectitude when it tends toward any individual, determinate object”<sup>68</sup> is not different from the Lockean legislative state, with its norm of rule of law in this respect. The political ideal of autonomy can be understood as an attempt to transform sovereignty from an anomic, exceptional borderline concept ambiguously positioned beside or beneath the normative order into an institution that is juridical through and

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<sup>65</sup> Michel Foucault, *Society Must Be Defended: Lectures at the Collège de France 1975-1976*, ed. Mauro Bertani and Alessandro Fontana, trans. David Macey (New York: Picador, 2003), 52.

<sup>66</sup> Locke, *Second Treatise*, §136-137.

<sup>67</sup> Rousseau, *Social Contract*, 162. See also Immanuel Kant, “Perpetual Peace: A Philosophical Sketch,” in *Kant: Political Writings*, ed. Hans Reiss, trans. H. B. Nisbet (Cambridge: Cambridge University Press, 1991), 99-101. For a similar argument, see Miguel Abensour, *Democracy Against the State: Marx and the Machiavellian Moment*, trans. Max Blechman and Martin Breugh (Cambridge: Polity, 2011), 98.

<sup>68</sup> Rousseau, *Social Contract*, 157.

through.<sup>69</sup> In the concept of autonomy, the will is no longer a faculty of *liberum arbitrium*, but instead becomes a legislative faculty.<sup>70</sup>

## §

It is common to contrast Locke's privatistic political philosophy, with its focus on individual rights and property, with the supposedly more civic or democratic orientation of Rousseau's social contract. And it is indeed true that Locke effected a privatization of political thought. In both the state of nature and in political or civil society, man is imagined as a proprietor. He does not author the law in either situation, and is pleased to task the government with executing the law so as to more conveniently pursue his private affairs of appropriation and proprietorship. But Rousseau's political thought introduced a different kind of privatization that is somewhat more subtle, and—despite his explicit attempts to highlight it<sup>71</sup>—less well understood. It is true that, in contrast to Locke, for whom natural law was received

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<sup>69</sup> Bodin's insistence that a sovereign is not simply a law-giver, and that he cannot be bound by laws is the classic expression of the anomic concept of sovereignty. See Jean Bodin, *On Sovereignty: Four Chapters from The Six Books of the Commonwealth*, trans. Julian H. Franklin (Cambridge: Cambridge University Press, 1992), 11-13, 48-49; Schmitt, *Political Theology*, 5-9.

<sup>70</sup> To the extent that *nomos* has an inner affinity with *ratio*, the transformation of sovereignty into autonomy effects a transition from a decisionist to a normativist concept of law. Arendt claimed that, because his concept of autonomy subordinates the will entirely to practical reason, Kant did not have a concept of the will at all. If her reading of Rousseau were more accurate and less voluntaristic, she might have addressed the same criticism to the original philosopher of autonomy. See Suzanne Jacobitti, "Hannah Arendt and the Will," *Political Theory* 16, no. 1 (February 1988): 61-62; Arendt, *Life of the Mind*, Vol. 2, 149. On Arendt's excessively voluntaristic reading of Rousseau, see William E. Scheuerman, "Revolutions and Constitutions: Hannah Arendt's Challenge to Carl Schmitt," in *Law as Politics: Carl Schmitt's Critique of Liberalism*, ed. David Dyzenhaus (Durham: Duke University Press, 1988), 263-264.

<sup>71</sup> Richard Tuck, "Democratic sovereignty and democratic government: the sleeping sovereign," in *Popular Sovereignty in Historical Perspective*, ed. Richard Bourke and Quentin Skinner (Cambridge: Cambridge University Press, 2016), 115-116. Although the significance of this distinction between sovereignty and government is not as well-appreciated today, it was not overlooked by Rousseau's contemporaries. See Tuck, *Sleeping Sovereign*, 4-5.

heteronomously, Rousseau's philosophy of collective self-authorship of the law introduces a civic element. In comparison with our contemporary arrangement of legislation by representatives, the direct involvement of each citizen in prescribing the law even appears radically democratic. For this reason, in certain currents of democratic theory in the 1960s and 1970s, it was customary to describe Rousseau as an early theorist of "participatory democracy," who advocated for a high degree of popular involvement in the exercise of political power.<sup>72</sup> This premise was also accepted by Rousseau's liberal detractors; Habermas, for instance, criticized Rousseau for conflating legitimation with institutionalization, and consequently collapsing the norm of popular sovereignty into the institutional form of direct democracy.<sup>73</sup>

However, Rousseau was not a democrat at all, let alone a participatory democrat. Like our contemporary theorists of deliberative democracy, he was highly "realistic" about the difficulties of "overburdening" citizens with political participation.<sup>74</sup> Notwithstanding Constant's famous portrait, Rousseau did not understand his project as an attempt to revive the "liberty of the ancients,"<sup>75</sup> but rather as a way of "taking men as they are"<sup>76</sup>—which is to say, as Lockean proprietors:

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<sup>72</sup> Carole Pateman, *Participation and Democratic Theory* (Cambridge: Cambridge University Press, 1970), 22.

<sup>73</sup> Jürgen Habermas, *Communication and the Evolution of Society*, trans. Thomas McCarthy (Boston: Beacon Press, 1979), 185-186. See also Jean Cohen and Andrew Arato, *Civil Society and Political Theory* (Cambridge: MIT Press, 1992), 8n22.

<sup>74</sup> For some characteristic statements of this view, see Cohen and Arato, *Civil Society and Political Theory*, 451; Jürgen Habermas, "Appendix I: Popular Sovereignty as Procedure," in *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge: MIT Press, 1996), 473; "Three Normative Models of Democracy," *Constellations* 1, no. 1 (December 1994): 7.

<sup>75</sup> Benjamin Constant, "The Liberty of the Ancients Compared with that of the Moderns," in *Constant: Political Writings*, ed. and trans. Biancamaria Fontana (Cambridge: Cambridge University Press, 1998), 317-319.

<sup>76</sup> Rousseau, *Social Contract*, 141.

Too small to compare yourselves to anything, stay within yourselves, and do not blind yourselves about your position. Ancient Peoples are no longer a model for modern ones; they are too alien to them in every respect ... You are neither Romans, nor Spartans; you are not even Athenians. Leave aside these great names that do not suit you. You are Merchants, Artisans, Bourgeois, always occupied with their private interests, with their work, with their trafficking, with their gain; people for whom even liberty is only a means for acquiring without obstacle and for possessing in safety.<sup>77</sup>

For this reason, it is more instructive to contrast Rousseau with Aristotle than with Locke. While Aristotle described the principle of democracy as a matter of ruling and being-ruled in turn,<sup>78</sup> Rousseau described his social contract as an arrangement in which one is placed in a double relation, being simultaneously a citizen and subject.<sup>79</sup> The meaning of citizenship for Rousseau was very different than it was for Aristotle. While Aristotle described the citizen as a participant in government, for Rousseau the citizen was an author of law.<sup>80</sup> Although the double relation of citizenship and subjection resembles the reciprocity of ruling and being-ruled, Rousseau followed the liberal tradition in centring politics on the juridical, on problems of sovereignty and law, rather than on participation and the exercise of power.

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<sup>77</sup> Jean-Jacques Rousseau, *Letter to Beaumont, Letters Written From the Mountain, and Related Writings*, ed. Christopher Kelly and Eve Grace, trans. Christopher Kelly and Judith R. Bush (Hanover: University Press of New England, 2001), 292-293. This choice of selection is borrowed from Richard Tuck's exposition in *The Sleeping Sovereign*.

<sup>78</sup> Aristotle, *Politics*, bk. 6, ch. 2, 1317a40-1317b16.

<sup>79</sup> Rousseau, *Social Contract*, 149.

<sup>80</sup> Aristotle, *Politics*, bk. 3, ch. 1, 1275a22-33; Rousseau, *Social Contract*, 149; see also Manin, *Principles of Representative Government*, 29-30. Fascinatingly, this shift from self-government to self-legislation in political thought is mirrored in the development of moral philosophy. See J. B. Schneewind, *The Invention of Autonomy: A History of Modern Moral Philosophy* (Cambridge: Cambridge University Press, 1998), 483, 513-515.

A recent study by Richard Tuck finds that Rousseau, and the modern understanding of democracy in general, have inherited Bodin and Hobbes' distinction between sovereignty and government.<sup>81</sup> Unlike in the ancient political imaginary, which simply described power as supremacy (*kurion*),<sup>82</sup> Hobbes thought it was necessary to distinguish the *right* from the *exercise* of sovereign power, arguing that a citizenry need not participate in the day-to-day activities of governing, but could instead be likened to a sleeping sovereign who retains his title to power even during periods of inaction.<sup>83</sup> Although Rousseau's account is different from Hobbes' in that here citizens do not forfeit their sovereignty to a prince, this is not to say that his political philosophy was democratic. He defined democracy not in terms of popular *sovereignty* or legislative power, but instead as a form of *government* or executive power in which all citizens participate in the exercise of power as magistrates,<sup>84</sup> arguing that this type of government is unnatural, that it has never existed and never will, and that it would only be fit for a people of gods:

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<sup>81</sup> Tuck, *Sleeping Sovereign*, x.

<sup>82</sup> Given the highly specialized meanings of the latter, it is anachronistic to translate *kurios* as sovereignty. For instance, see the Glossaries of T. A. Sinclair and Trevor J. Sanders' translation of Aristotle's *Politics*, 494, 501. Bodin was quite correct to argue that ancient writers had said almost nothing on the subject. See Bodin, *On Sovereignty*, 46-50.

<sup>83</sup> Tuck, *Sleeping Sovereign*, 10-14, 89, 94. Although a distinction between government and sovereignty cannot be found in ancient political reflection, one could argue that it is implicit in the division of labour between the legislative body, the assembly (*ekklesia*) and the council (*boulē*) of 500. In any case, the Athenian *demos* did not go to sleep when the council discharged administrative functions, but rather "awoke" in a different guise; while in the assembly, where all citizens were present, the rule of the *demos* appeared as the rule of everybody, in the council, which was selected by lot, the rule of the *demos* appears as the rule of anybody.

<sup>84</sup> Rousseau, *Social Contract*, 173, 178. See also *Letters from the Mountain*, 257. Norberto Bobbio argues that democracy is compatible with liberalism if the former is understood in a juridical or procedural sense as "popular sovereignty." But this is precisely what Rousseau denies in associating popular sovereignty with republican legitimacy and democracy with a governmental form in which all citizens act as magistrates. See *Liberalism and Democracy*, trans. Martin Ryle and Kate Soper (London: Verso, 1990), 31, 37.

Taking the term in the strict sense, a true democracy has never existed and never will. It is contrary to the natural order that the majority govern and the minority is governed. It is unimaginable that the people would remain constantly assembled to handle public affairs; and it is readily apparent that it could not establish commissions for this purpose without changing the form of administration .... Were there a people of gods, it would govern itself democratically. So perfect a government is not suited to men.<sup>85</sup>

Rousseau's celebrated critique of representation only applies to the representation of sovereignty; in matters of government, he thought an apparatus of representation was desirable.<sup>86</sup> At this point, it becomes clear that Rousseau was no advocate of participation, either in Aristotle's understanding of it or in that of the participatory democrats of past decades. Unlike the Athenian citizen, for whom democracy was identified with an equal entitlement to speak in public (*isegoria*),<sup>87</sup> Rousseau's citizen was mute, "deliberating" only in the solitude of his heart.<sup>88</sup> And again, unlike the participatory citizen imagined by Carole Pateman, C. B. Macpherson, and Aristotle,<sup>89</sup> Rousseau's republican citizen does not exercise power but only authors the law.

But what does this authorship entail? In a curious reversal of Aristotle, who described the law as "intelligence without appetite," Rousseau insisted that "legislative power is the heart of

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<sup>85</sup> Rousseau, *Social Contract*, 180.

<sup>86</sup> *Ibid.*, 198-199.

<sup>87</sup> M. I. Finley, *Democracy Ancient and Modern* (New Brunswick: Rutgers University Press, 1985), 19; Wood, *Democracy Against Capitalism*, 215.

<sup>88</sup> Rousseau, *Social Contract*, 172, 203-204. The connection between modern philosophies of sovereignty and hostility to deliberation is deep, and in no way originates with the opposition between democracy-as-sovereignty and the liberal "government by discussion" presented by Schmitt. Rousseau's critique of the talkative ancient democracy in his *Discourse on Political Economy* is borrowed almost verbatim from Hobbes, who contended that "a democracy, in effect, is no more than an aristocracy of orators." See Tuck, *Sleeping Sovereign*, 140n33.

<sup>89</sup> Aristotle, *Politics*, bk. 3, ch. 1, 1275a22-33; C. B. Macpherson, *The Life and Times of Liberal Democracy* (Oxford: Oxford University Press, 1977), 93-115; Pateman, *Participation and Democratic Theory*, 22-44.

the state,” while “the executive power is the brain.”<sup>90</sup> It would appear then that sovereignty, a will that speaks in laws, stands at the apex of political life, and the loss of common access to the exercise of power has been recompensed with a form of legislative competence that, in the modern political imaginary, is relatively more significant. It is as though the modern republican has exchanged the ancient *kratos*<sup>91</sup> and *isegoria* for *autonomy*. So to put the question differently, what does autonomy entail? In fact, Rousseau’s understanding of the authorship or self-prescription of the law is minimalistic. Even insofar as he co-constitutes the sovereign, the role of the citizen is not particularly involved. In contrast to the Athenian democracy’s principle according to which “anyone who wishes” (*ho boulomenos*) may take the initiative of proposing a law,<sup>92</sup> Rousseau’s subject of autonomy was not invited to *formulate*, but only to *ratify*, legislation. In the ideal republic outlined in his “Letter to the Republic of Geneva,” he wrote that he would “search for a country in which the right of legislation was common to all citizens,” but further stipulated that “I would have desired that, in order to stop the self-centred and ill-conceived projects and the dangerous innovations that finally ruined Athens, no one would have the power to propose new laws to his fancy; that this right belong exclusively to the magistrates,” and that, consequently, private individuals must simply be “content to give sanction to the

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<sup>90</sup> Aristotle, *Politics*, bk. 3, ch. 16, 1287a23-31; Rousseau, *Social Contract*, 194. In his *Discourse on Inequality*, Rousseau put the point even more forcefully, arguing that “it was not the magistrate but the law that had constituted the essence of the state” (75).

<sup>91</sup> Contrary to the common suspicion that democracy was named by its opponents, Josiah Ober argues that the *kratos* in *demokratia* should be understood not as majority rule (power-over), but instead as capacity to do things (power-to). This is consistent with the ancient understanding of citizenship as participation (as opposed to legislative competence or the enjoyment of a catalogue of rights). See “The Original Meaning of ‘Democracy’: Capacity to Do Things, not Majority Rule,” *Constellations* 15, no. 1 (March 2008): 3-9.

<sup>92</sup> Manin, *Principles of Representative Government*, 15-16.

laws.”<sup>93</sup> In this way, the entire juridical dimension—which, for Rousseau, was the substance of republican sovereignty—is collapsed into the volitional moment of consent.<sup>94</sup>

Contrary to the liberal criticisms of a proto-Jacobin or “totalitarian” general will, Rousseau’s concept of sovereignty effects a privatization and attenuation of democratic power.<sup>95</sup> It is not difficult to see how a juridical understanding of political life excludes a wide variety of political action: the common exercise of power, deliberation in public, and even the formulation of law are displaced by a Hobbesian commonwealth of consent. Although in his *Social Contract* Rousseau unequivocally distinguished the impossibility of democratic government from the “republican” and therefore legitimate sovereignty of the general will, in his “Letters from the Mountain,” he described the latter arrangement as democratic.<sup>96</sup> Eager to forget the non-democratic origins of modern political forms, democratic theory has never looked back.

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<sup>93</sup> Jean-Jacques Rousseau, “Letter to the Republic of Geneva,” in *Jean-Jacques Rousseau: The Basic Political Writings*, ed. and trans. Donald A. Cress (Indianapolis: Hackett, 1987), 27-28.

<sup>94</sup> Urbinati, *Representative Democracy*, 76-78.

<sup>95</sup> This reading presents Rousseau as a liberal natural lawyer writing in the tradition of Bodin, Hobbes, and Locke. However, it must be acknowledged that especially in his earlier works (see especially his *Discourse on Inequality*), Rousseau was critical of the anthropological premises of natural law. This early critique centres on the concept of *perfectibilité*, the idea that not only is man situated in history, but history is situated in man. Natural lawyers from Hobbes onwards attributed the qualities of human beings in modern commercial societies to human beings as such in their natural state. Against this representation of nature, Rousseau emphasized that human beings changed along with the historical circumstances in which they found themselves. In the opening passages of his *Social Contract*, he initially bracketed the dimension of *perfectibilité*, choosing to “take men as they are” (which is to say, as modern day bourgeois). However, the sections of the book discussing the Legislator (bk. 2, ch. 7) and Civil Religion (bk. 4, ch. 8) reveal that he did not remain consistent in this respect, and that even in this more liberal work there remains a trace of the classical politics of *perfectibilité* and soulcrafting. Apparently, Rousseau was not entirely convinced of his own argument that the resources of legal form would be sufficient to harmonize private utility with public right.

<sup>96</sup> Rousseau, *Letters from the Mountain*, 254. See also Tuck, “Democratic Sovereignty and Democratic Government,” 116.

## Consenting to be Governed

Liberal political orders did not only draw on the norm of consent to legitimate the relatively permanent institutions of law and the state. This norm also affected the method of selecting officials employed in modern regimes. Not only the legal, but also the governmental structure was subjected to the juridical norm of consent.

In *The Principles of Representative Government*, Bernard Manin raises a question that is both profound and obvious: why did modern representative republics choose to use election, rather than sortition, to allocate public offices? Although it is often described as a “direct democracy,” the Athenian democracy did not allocate every task and decision to the *demos* assembled on the Pnyx. While Aristotle described the direct institution of the assembly (*ekklesia*) as the supreme (*kurion*) body of the democracy, he described the council (*boulē*) of 500, which was selected by lot, as being “of all offices the most democratic.”<sup>97</sup> The Athenians employed both sortition and election to allocate public offices, but whether the account comes from a philosopher or a democrat, ancient sources were unequivocal in associating sortition with democracy and election with aristocracy or oligarchy. The aristocratically-inclined Aristotle, for instance, stated that “the filling of offices ... by lot is regarded as democratic, by selection oligarchic.”<sup>98</sup>

While the meaning of the enigmatic institution of sortition need not concern us here, its association with democracy is significant. This association was not forgotten in the modern age. Both Montesquieu and Rousseau recalled not only that democracy was associated with the

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<sup>97</sup> Aristotle, *Politics*, bk. 6, ch. 2, 1317b17-1318a2.

<sup>98</sup> *Ibid.*, bk. 4, ch. 9, 1294a35-1294b13.

appointment of offices by lot, but also that election was an aristocratic institution.<sup>99</sup> Why then did the architects of modern political orders never seriously consider sortition as an alternative to election? Manin argues convincingly that this could not have been only a prudential matter. Many of the polities in which sortition was passed over in silence in favour of election were neither more populous, more extensive, nor more administratively complicated than the ancient democracy.<sup>100</sup> We also know that these architects had no intention of establishing democracies. This label was only applied to the institutions of representative government after the fact; at the moment of their conception, the framers contrasted their designs with the ill-reputed ancient democracy candidly.<sup>101</sup> Nevertheless, despite the aristocratic sentiments of the framers, modern liberals were more beholden to a norm of equality than ancient aristocrats, and did not wish to simply re-establish the feudal society of orders. It stands to reason that sortition might have received more consideration than it did.

However, Manin points out that although it is less consistent with the norm of equality than sortition, election can do something that the allocation of offices by lot cannot: election can be interpreted as an expression of the consent of the governed.<sup>102</sup> Both the modern state and modern representative government are premised on the individualistic norm of consent, and in both arrangements the people are first atomized and then recomposed on another level.<sup>103</sup> In much the same way that the Hobbesian covenant is the occasion for subjects' consent to the institution of sovereignty, election is the occasion for electors' consent to be governed. From a

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<sup>99</sup> Charles-Louis de Secondat Montesquieu, *The Spirit of the Laws*, ed. and trans. Anne M. Cohler, Basia C. Miller, Harold S. Stone (Cambridge: Cambridge University Press, 2000), bk. 2, ch. 2; Rousseau, *Social Contract*, 207.

<sup>100</sup> Manin, *Principles of Representative Government*, 8-9, 81-83.

<sup>101</sup> See for instance James Madison, *Federalist No. 10*, in *The Federalist Papers*, ed. George W. Carey and James McClellan (Indianapolis: Liberty Fund, 2001).

<sup>102</sup> Manin, *Principles of Representative Government*, 83-86, 92.

<sup>103</sup> Bobbio, *Liberalism and Democracy*, 29.

juridical perspective, election is like a social contract in miniature where the form of legitimacy conferred by the covenant is periodically reiterated.<sup>104</sup> In the same way that Rousseau imagined the citizen as a ratifier (which is to say, a consenter-to) legislation rather than as a governor, the use of election assumes a different form of political equality and citizenship than the allocation of offices by sortition. While in the latter case, citizens are considered equal in their entitlement to act as participators in government, in the former case citizens are imagined as being equal in their entitlement to legitimate the rule of their superiors.<sup>105</sup>

### **Consent as a Norm**

While Rousseau relegated democracy to the moment of consenting to the law, in Immanuel Kant's proceduralist concept of popular sovereignty this moment disappears altogether. Much like Rousseau, Kant argued that only a "republican" constitutional form is legitimate.<sup>106</sup> And exactly like Rousseau, he identified the republican constitution with the legislative state, an arrangement in which all subjects stand in a relation of legal equality to a

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<sup>104</sup> In fact, this arrangement in which the governed consent to the rule of their governors precedes the legitimation of the state by consent; although it was not paired with any elective procedure, *quod omnes tangit* was often understood as a norm of consenting to "representatives" (in the medieval sense), but never as a means of consenting to the institution of an entire principality. See Manin, *Principles of Representative Government*, 88.

<sup>105</sup> *Ibid.*, 92. In addition to this *juridical dimension*, political representation also involves both a *sociological* and a *procedural* dimension. Election does not only realize the juridical norm of consent, it also performs the sociological function of selecting officeholders on the basis of a "principle of distinction," and the procedural function of establishing a relation of responsiveness between electors and elected facilitated by competitiveness among the elected. This sociological function of election (which is no different in modern than in ancient aristocracies) is also discussed in Chapter 4 of Manin's *Principles of Representative Government*, while the procedural dimension is outlined both in Urbinati's "proceduralist" account of political representation and Schumpeter's "methodical" account of inter-party competition. See Joseph Schumpeter, *Capitalism, Socialism and Democracy* (New York: Harper Torchbooks, 1962), 269-271; Urbinati, *Representative Democracy*, 10, 24, 29.

<sup>106</sup> Kant, "Perpetual Peace," 99-100.

common body of law.<sup>107</sup> The republican legislative state implies a separation between the legislative and executive branches that precludes the transformation of the public law and public will into a private, particular will.<sup>108</sup> Here, institutional separation is not a means of limiting power so much as means of preserving generality.

Kant also adopted Bodin and Hobbes' distinction between sovereignty and government. In his account, however, the distribution is reversed; law-bound republicanism and legally arbitrary despotism are differing forms of *government*, while democracy, aristocracy, and monarchy are forms of *sovereignty*.<sup>109</sup> For Rousseau, any combination of sovereign and governmental forms was possible in principle. He considered democracy impossible because it did not accord with human capacities, and not because it was inconsistent with a republican constitution.<sup>110</sup> Kant, however, understood democracy as a form of sovereignty that corresponds to a definite form of government:

Of the three forms of sovereignty, *democracy*, in the truest sense of the word, is necessarily a *despotism*, because it establishes an executive power through which all the citizens may make decisions about (and indeed against) the single individual without his consent, so that decisions are made by all the people and yet not by all the people; and this means that the will is in contradiction with itself, and thus also with freedom.<sup>111</sup>

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<sup>107</sup> Ibid., 99.

<sup>108</sup> Ibid., 101.

<sup>109</sup> Ibid., 100-101.

<sup>110</sup> In fact, Rousseau imagined that it was possible (although not prudential or desirable) for sovereignty to undergo a transformation into democracy in a uniquely direct and immediate way. See *Social Contract*, 201.

<sup>111</sup> Kant, "Perpetual Peace," 101.

For Kant then, democratic sovereignty was intrinsically illegitimate. But was there a democratic dimension in his concept of “republican” government? Despite contending that the *demos* need not be involved in the effective exercise of power, Rousseau still insisted that sovereignty could not be alienated, and that in a republican (and therefore legitimate) constitution, the people would ratify every law.<sup>112</sup> For Kant this was not the case. Unlike in Rousseau’s account, where the *demos* stand in a double relation of “reciprocal commitment” as both citizens and subjects, for Kant the “independence” of citizens did not imply their involvement in political autonomy: “in the question of actual legislation, all who are free and equal under existing public laws may be considered equal, but not as regards the right to make these laws.”<sup>113</sup> At first glance, this resembles the situation of the subject in regard to the Hobbesian prince, where “as in the presence of the master, the servants are equal, and without any honour at all, so are the subjects in the presence of the sovereign.”<sup>114</sup> And in a very Hobbesian fashion, Kant contended that “those who are not entitled to this right are nonetheless obliged as members of the commonwealth, to comply with these laws, and they thus likewise enjoy their protection.”<sup>115</sup> On the other hand, Kant also followed Rousseau in holding that popular sovereignty must extend not only to the constitution of the commonwealth, but also legislation. How to square this circle, reconciling alienation with autonomy? Kant’s answer was to reimagine popular sovereignty not as a constituent power that is present only at the moment of the initial covenant, nor as a legislative power that is present continuously, but instead as a norm or “basic law” that is never

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<sup>112</sup> Rousseau, *Social Contract*, 162, 173, 198.

<sup>113</sup> Immanuel Kant, “On the Common Saying: ‘This May be True in Theory, but it does not Apply in Practice,’ ” in *Kant: Political Writings*, ed. Hans Reiss, trans. H. B. Nisbet (Cambridge: Cambridge University Press, 1991), 77; Rousseau, *Social Contract*, 149.

<sup>114</sup> Hobbes, *Leviathan*, 117.

<sup>115</sup> Kant, “Theory and Practice,” 77.

actually present at all.<sup>116</sup> His proceduralist interpretation of the social contract transforms consent from an actual institution into a hypothetical norm:

We need by no means assume that this contract (*contractus originarius* or *pactum sociale*), based on a coalition of the wills of all private individuals in a nation to form a common, public will for the purposes of rightful legislation, actually exists as a *fact* ... It is in fact merely an *idea* of reason, which nonetheless has undoubted practical reality; for it can oblige every legislator to frame his laws in such a way that they could have been produced by the united will of a whole nation, and to regard each subject, in so far as he can claim citizenship, as if he had consented within the general will. This is the test of the rightfulness of every public law.<sup>117</sup>

In divorcing the dimension of legitimacy from the empirical will of the *demos*, Kant originated the paradoxical derivation of legitimacy from legality that forms the basis of the normativist concept of law.<sup>118</sup> Contemporary proceduralist theories of democracy follow this reasoning quite closely. Habermas, for instance, argues that:

[Democratization] is a question of finding arrangements which can ground the presumption that the basic institutions of society and the basic political decisions *would* meet with the unforced agreement of all those involved *if* they could participate, as free and equal, in discursive will-formation ... democratization cannot mean an *a priori* preference for a specific type of organization, for example, for so-called direct democracy.<sup>119</sup>

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<sup>116</sup> *Ibid.*, 77.

<sup>117</sup> *Ibid.*, 79.

<sup>118</sup> Habermas, *Between Facts and Norms*, 83. See also the section in Chapter 6 outlining the normativist concept of law.

<sup>119</sup> Habermas, *Communication and the Evolution of Society*, 186 (italics added). See also Habermas, *Between Facts and Norms*, 93; *The Theory of Communicative Action*. Vol. 1, *Reason and the Rationalization of Society*, trans.

It is important not to forget that while contemporary proceduralist theories identify this norm with *democracy*, the “republican” Kant was under no such illusion.

### **From the Rights of Englishmen to the Rights of Man**

The social contract tradition in which Hobbes, Rousseau, and Kant stand is consistent with a variety of political forms ranging from absolute monarchy to the republican *legislative state*. Although each iteration of this tradition reappropriated sovereignty through the norm of consent in one way or another, the assumption that the central problem of politics concerns the institutionalization of sovereignty is never put in question. The people sit uncomfortably in the prince’s throne, but the absolutist framework implicit in the politics of sovereignty remains intact. Whether subjects are understood as the authors or authorizers of sovereignty, or as the actual or hypothetical ratifiers of the laws, in any case the *state of right* cannot be derived from the problematic of legitimation by consent.

It is true that something resembling a right of religious conscience can be found in Hobbes’ political philosophy. Although the power to decide the religion of the commonwealth is annexed to the prince, Hobbes conceded that “internal faith is in its own nature invisible, and consequently exempted from all human jurisdiction.”<sup>120</sup> But there is no question of principle in question here, only prudence. The sovereign is not limited by right but by capacity. The fact that Hobbes held that “the words and actions that proceed from [internal faith], as breaches of our

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Thomas McCarthy (Boston: Beacon Press, 1981), 264; Andreas Kalyvas, “Popular Sovereignty, Democracy, and the Constituent Power,” *Constellations* 12, no. 2 (May 2005): 232; Urbinati, *Representative Democracy*, 123-126.

<sup>120</sup> Hobbes, *Leviathan*, 354.

civil obedience, are injustice both before God and man” should be sufficient to dispel the idea that *Leviathan* stipulates any rights of conscience.<sup>121</sup>

And although Rousseau’s general will is not accurately depicted in the portraits of democratic absolutism produced by his liberal critics, it is nevertheless true that the Rousseauian sovereign is not limited by an apparatus of individual rights. Parties to the social contract forfeit their freedom absolutely, and the general will is not limited by a body of higher laws that curtails its *extension*, but only by its form of *operation* through the medium of legal imperatives. In Rousseau’s account, “it is contrary to the nature of the body politic that the sovereign impose upon itself a law it could not break,” since “just as nature gives each man an absolute power over all his members, the social compact gives the body politic an absolute power over all its members.”<sup>122</sup> Georg Jellinek was entirely correct to assert that “the principles of the *Contrat Social* are accordingly at enmity with every declaration of rights.”<sup>123</sup>

Unlike Hobbes and Rousseau, Kant extensively employed the language of right. But in comparison with the ordinary understanding of rights as subjectively-possessed rights against the state, Kant’s usage was idiosyncratic. He did not speak of “rights” but rather of “right,” which he defined as “the restriction of each individual’s freedom so that it harmonizes with the freedom of everyone else (in so far as this is possible within the terms of a general law).”<sup>124</sup> So for Kant, right does not establish a space of private freedom independent of the state, but instead uses the

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<sup>121</sup> *Ibid.*, 354.

<sup>122</sup> Rousseau, *Social Contract*, 149, 156.

<sup>123</sup> Georg Jellinek, *The Declaration of the Rights of Man and of Citizens: A Contribution to Modern Constitutional History*, trans. Max Farrand (New York: Henry Holt and Company, 1901), 11.

<sup>124</sup> Kant, “Theory and Practice,” 73. In a different work, Kant includes a similar formulation. Here, right is defined as “the sum total of those conditions within which the will of one person can be reconciled with the will of another in accordance with a universal law of freedom.” See *The Metaphysics of Morals*, in *Kant: Political Writings*, ed. Hans Reiss, trans. H. B. Nisbet (Cambridge: Cambridge University Press, 1991), 133.

state's power to establish a subject's freedoms *vis-à-vis* other subjects. Kant's definition of "right" has little in common with the American Bill of Rights or the French Rights of Man. It is simply a restatement of the relation of equality established through the generality of legal form that appears already in Rousseau's social contract.

Although the tradition described here is not democratic (and in fact, it should be understood as an attempt to subvert democracy<sup>125</sup>), it is mainly concerned with establishing principles according to which subjects or citizens enact the authorship of their own public life, and not with circumscribing the power of public authority. In other words, its concern is with *legitimation*, not *limitation*. Much like the norm of consent, the idea of ruling through laws is ancient. Aristotle, for instance, favourably contrasted democracies ruled by law with democracies ruled by the decrees of the multitude, even going so far as to state that "where laws do not rule, there is no constitution."<sup>126</sup> In contrast to the *legislative state*, the *state of right* is modern.<sup>127</sup> Where then, do we find its origins? In addition to the legislative state with which it is often confused, it is necessary to distinguish between two different concepts of the state of right, one Teutonic and the other American. Neither of these concepts was the invention of the liberal social contract theorists, but rather are political or historical constructions resulting from internecine national struggles, religious persecution, and colonization.

The *Teutonic state of right* is an artifact of the aristocratic classes' struggles against the monarchy.<sup>128</sup> In much the same way that the modern state of right is predicated on an opposition

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<sup>125</sup> Lee Ward, *Modern Democracy and the Theological-Political Problem in Spinoza, Rousseau, and Jefferson* (New York: Palgrave Macmillan, 2014), 29.

<sup>126</sup> Aristotle, *Politics*, bk. 4, ch. 4, 1291b30-1292a38.

<sup>127</sup> Bobbio, *Liberalism and Democracy*, 12.

<sup>128</sup> This exposition and terminology follow Jellinek's account in *The Declaration of the Rights of Man and of Citizens*.

between the state and civil society, the Teutonic state of right developed in a situation in which monarchical power was checked not by the sphere of exchange, but rather by the administrative competence of families, clans, and associational life more broadly.<sup>129</sup> Unlike the ancient *polis* and *res publica* (or, for that matter, the incorporated Leviathans and general wills of modern social contract theory), which were imagined as unitary structures, the Teutonic state was dualistic, prince and people standing opposite one another.<sup>130</sup> For this reason, the laws of the realm and the rights accorded to subjects were understood neither as determinations of a princely (Hobbes) or popular (Rousseau) sovereign will, nor as determinations of a rational norm (Kant), but rather as the terms of a compact between prince and people.<sup>131</sup>

The Teutonic compact was understood neither as a threshold between prehistory and history, nor as a hypothetical situation employed to determine the content of a transhistorical norm, but instead as an inherited historical artifact produced in the course of an ongoing struggle or negotiation between the prince and the estates.<sup>132</sup> The bearer of these rights is neither the whole of humanity (as in the French declaration), nor even every subject of the polity taken individually and equally. Although he was mistaken to describe the rights asserted in the American war of independence as the “rights of Englishmen,” Burke was entirely correct to stress that, insofar as they *were* possessed by Englishmen, these rights were particularistic, not

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<sup>129</sup> Otto Hintze, “The Preconditions of Representative Government in the Context of World History,” in *The Historical Essays of Otto Hintze*, ed. Felix Gilbert (New York: Oxford University Press, 1975), 305; Jellinek, *Declaration of the Rights of Man*, 92.

<sup>130</sup> Jellinek, *Declaration of the Rights of Man*, 50.

<sup>131</sup> *Ibid.*, 51. This is precisely the situation Hobbes was careful to circumvent with his curious fusion of *pactum unionis* and *pactum subjectionis*: by stipulating that the social contract is not made between a prince and his subjects but rather among subjects themselves, the prince, who is not party to this agreement, cannot be limited by any catalogue of rights appearing as the stipulations of the covenant. See Hobbes, *Leviathan*, 109-111.

<sup>132</sup> Jellinek, *Declaration of the Rights of Man*, 95-96.

universal.<sup>133</sup> In contrast to the formal equalities imagined in the social contract theories of the early modern jurists, the premodern concept of right had no necessary affinity with the basic norm of legislative state according to which the law applies equally to all subjects. Originally, these aristocratic rights were not only particular to a given nation-state, but were also distributed differentially and unequally between the different nations *within* the state.<sup>134</sup> Since these rights are situated in history, and not in the prehistorical or pseudo-historical natural condition depicted in social contract theories, the nations who inherit and possess these rights are presupposed rather than explained. Consequently the problem of forming a people or “society” through a *pactum unionis* (as in Pufendorf and Locke’s accounts) does not arise.

In addition to the premodern and pre-liberal Teutonic concept, it is possible to distinguish a modern or *American concept of right*. In contrast to the Teutonic compact between prince and people, these rights, which we might describe as the universal rights of Americans, correspond more closely to the ethos of the liberal age. Every modern constitution is American in this sense. Despite being formulated in a language inspired by Rousseauian political philosophy, the French Rights of Man are inconsistent with the sovereign legislative state outlined in *On the Social Contract*. They were in fact inspired by the Virginia Declaration of Rights and the American Bill of Rights.<sup>135</sup>

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<sup>133</sup> Edmund Burke, *Reflections on the Revolution in France*, ed. L. G. Mitchell (Oxford: Oxford University Press, 2009), 32-33; “An Appeal from the New to the Old Whigs,” in *The Portable Edmund Burke*, ed. Isaac Kramnick (New York: Penguin, 1999), 497. See also Arendt, *On Revolution*, 34.

<sup>134</sup> Hintze, “Preconditions of Representative Government,” 311-312; Foucault, *Society Must Be Defended*, 156-158.

<sup>135</sup> Jellinek, *Declaration of the Rights of Man*, 11-15, 20.

The modern concept of right is religious, rather than political in origin.<sup>136</sup> The prototype of all universal, individually-possessed rights are the rights of religious conscience.<sup>137</sup> It is impossible to deny the Protestant reformers' contribution to the genesis and development of liberal individualism. But for these rights to be positivized, the Reformation alone was not enough. The political situation in Europe, which was staged as a confrontation between an already existing prince and people, was not hospitable to the concretization of individualistic principles. It was only with the colonization of America that a situation resembling the covenants between individuals imagined in social contract theories appeared as a reality.<sup>138</sup> According to Jellinek, rights of religious conscience were first positivized in Providence in 1636.<sup>139</sup> There has never been any such thing as a natural man, and the idea of forming a state of right in the wilderness would only ever have occurred to a puritan settler. To describe the political situation brought about by colonization as a natural condition is to transfer ideas acquired in society into the state of nature. In this sense, Locke was mistaken to state that "in the beginning all the world was America."<sup>140</sup> But nevertheless, it is in America that we find the beginnings of the modern world of right.

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<sup>136</sup> Ibid., 77.

<sup>137</sup> Ibid., 60, 80. See also Carl Schmitt, *Roman Catholicism and Political Form*, trans. G. L. Ulmen (Westport: Greenwood Press, 1996), 28.

<sup>138</sup> Jellinek, *Declaration of the Rights of Man*, 61-62, 67-68; Arendt, *On Revolution*, 160-164. In 1906, Max Weber acknowledged the debt owed by the modern understanding of freedom to colonial experience, asking: "how are freedom and democracy in the long run at all possible under the domination of highly developed capitalism? ... The historical origin of modern freedom has had certain unique preconditions which will never repeat themselves. Let us enumerate the most important of these. First, the overseas expansions. In the armies of Cromwell, in the French constituent assembly, in our whole economic life even today this breeze from across the ocean is felt ... but there is no new continent at our disposal." See Max Weber, *From Max Weber: Essays in Sociology*, ed. and trans. C. Wright Mills and H. H. Gerth (New York: Oxford University Press, 1946), 71-72. For a fascinating exploration of the connection between colonization and the isonomic freedom of "non-rule," see Kōjin Karatani, *Isonomia and the Origins of Philosophy*, trans. Joseph A. Murphy (Durham: Duke University Press, 2017).

<sup>139</sup> Jellinek, *Declaration of the Rights of Man*, 65-66.

<sup>140</sup> Locke, *Second Treatise*, §49.

In contrast to the Teutonic rights of Englishmen, which stipulated the duties of government rather than the rights of subjects, in the American concept rights were instead understood as a possession of individuals which secured a space of arbitrary, subjective freedom outside the state.<sup>141</sup> The rights of Americans are also very different from Teutonic rights in terms of their “metaphysical” exposition. Although the authors of the declaration of independence initially understood themselves as preserving or restoring the rights of Englishmen, they reimagined these rights as the natural or God-given rights of all persons rather than the inherited, historical rights of English subjects.<sup>142</sup> The normative point of reference for these rights was not the historical relationship of a compact between sovereign and subjects, but instead the extra-political higher laws of God or nature which precede the institution of the state both temporally and normatively.<sup>143</sup>

This transposition of the rights already enjoyed by Englishmen into natural rights did not originate in America, but first appeared in Locke’s political thought.<sup>144</sup> The widely-acknowledged debt owed to Locke by Jefferson does not only concern the content of the Declaration of Independence, but also its exposition. Although he gave little attention to rights of conscience in his *Second Treatise*, Locke’s normative concept of natural law, which is intuited directly, and which sets limits on the lower orders of positive law, is far closer to the rights of Americans than Hobbes’ more rationalistic and naturalistic contract theory, which features a concept of natural law that is descriptive rather than prescriptive, which sets no limits on sovereign power, and which ultimately appeals to consent rather than God or nature as the basis

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<sup>141</sup> Jellinek, *Declaration of the Rights of Man*, 49, 56.

<sup>142</sup> *Ibid.*, 74, 79-80.

<sup>143</sup> *Ibid.*, 47, 74.

<sup>144</sup> *Ibid.*, 54-55.

of normativity.<sup>145</sup> Because modern liberal rights are not based in the legitimating norm of consent, but rather in the extra-political norm of nature, they are understood as being inalienable; there is no giving away what was given by God in the first place. This pre-existent liberty is not established, but instead simply recognized by the state.<sup>146</sup> The Hobbesian social contract is unmistakably the more modern of the two theories; his account is exemplary in its materialism, its abandonment of religious and metaphysical sources of authority, and its geometrical rigour. Hobbes' often-quoted boast that civil philosophy was "no older than ... my own book *De Cive*" is hardly an exaggeration.<sup>147</sup> But ironically, it is precisely Locke's attachment to a more atavistic form of natural law that made him the most essential proponent of the modern state of right.<sup>148</sup>

The question of whether Protestant asceticism and individualism, or the orders of commerce and property are the root of modern civil privatism lies outside the scope of this study. Both commerce and Protestantism relocate the centre of life from the public to the private, from the common to the individual. On the one hand there is the privacy of conscience, the liberties of Locke's *Letter Concerning Toleration*, and on the other there is the privacy of property, the liberties of the same author's *Second Treatise*. It is this dual origin of the modern liberties that allowed Marx to move so effortlessly from the dispute between the political and the religious man to that between the *bourgeois* and the *citoyen* in his early essay on the rights of man.<sup>149</sup> But

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<sup>145</sup> Hobbes, *Leviathan*, 79-100, 110-113, 391; Locke, *Second Treatise*, §6, §12. Habermas astutely interprets Hobbes' contract theory as an attempt to mechanically derive normative positive law from descriptive laws of nature. See *Theory and Practice*, 63-65.

<sup>146</sup> Jellinek, *Declaration of the Rights of Man*, 46, 77, 95-96.

<sup>147</sup> Thomas Hobbes, *The English Works of Thomas Hobbes of Malmesbury*, Vol. 1, ed. Sir William Molesworth (London: Bohn, 1839), ix.

<sup>148</sup> On Locke's atavism, see Jürgen Habermas, *Theory and Practice*, trans. John Viertel (Boston: Beacon Press, 1973), 92-93; C. B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford: Oxford University Press, 1990), 245, 269-270.

<sup>149</sup> Karl Marx, "On the Jewish Question," in *Karl Marx: Selected Writings*, ed. David McLellan (Oxford: Oxford University Press, 2000), 53.

although it is clear that the state of right originates in religious conscience, it is arguably the rights of man as a proprietor that provide the model for modern natural rights. The identification of liberty with propriety is especially evident in the Lockean political philosophy that so perfectly expressed the common sense of the American revolutionaries.<sup>150</sup> Locke's concept of freedom is not formal, but substantive. Unlike for Hobbes, for Locke liberty was not a state of "licence," but instead a matter of following the dictates of reason.<sup>151</sup> Reason acquaints the proprietor with a natural law that does not proscribe limitations, but instead directs him to his "proper interest" in industriously and rationally disposing over property.<sup>152</sup> The legal corollary of this concept of freedom is a concept of law that does not derive its legitimacy from the consent of those subjected to it, but rather from its consistency with a higher law of nature.<sup>153</sup>

The ideological identification of *homme* and *bourgeois* is the normative core of the state of right. As with all liberal norms, its origin story is a Robinsonade. The rights of man as such are really the rights of man as a member of civil society. However, if property is understood as an object of utility rather than a form of right, the equivalence the young Marx detected between the private, moral subject of (religious) conscience and the private economic subject comes into question. Locke lived before the discovery of society *qua* system of needs, and spoke of political and civil society interchangeably. His theory of property is concerned with acquisition, with the conditions under which possession may be recognized in the forms of right. But he did not have

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<sup>150</sup> Habermas, *Theory and Practice*, 87-88.

<sup>151</sup> Locke, *Second Treatise*, §6. Despite initiating the discourse of consent that eventually developed into the sovereign legislative state, Hobbes (ironically) also invented the concept of freedom that underpins the state of right. While Rousseau and Kant understood freedom as a matter of prescribing the law for oneself, for Hobbes, liberty is simply the "silence of the law" existing at the limit of state power. See *Leviathan*, 143.

<sup>152</sup> Locke, *Second Treatise*, §57.

<sup>153</sup> *Ibid.*, §12.

a theory of circulation or exchange.<sup>154</sup> Propriety appears here as a relation between persons and things (Locke even imagined freedom as self-proprietorship, as a matter of relating to oneself as a thing), but not yet as a relation between persons mediated by things. When the political economist of the Scottish Enlightenment discover a province outside the state subject to a “natural law” that makes no reference to the will of God, the prince, or the *demos*, it becomes clear that civil society is home to a set of dynamics, subjects, and grammars of action that have nothing at all to do with the problematic of sovereignty and right elaborated in juridical liberalism. So let us turn our attention from the Robinsonades of the jurists to the Robinsonades of the economists.

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<sup>154</sup> Although the invention of money is the significant turning point in Locke’s natural history of property, it is notable that here, money does not function as means of exchange, but rather as a means of accumulation, an instrument for circumventing the limitations placed on the appropriation of property by spoilage. See Locke, *Second Treatise*, §31, §36-37.

## Chapter 2: Empiricist Liberalism

### From the System of Norms to the System of Needs

In *The Concept of the Political*, Carl Schmitt observed that liberal concepts “typically move between ethics (intellectuality) and economics (trade).”<sup>155</sup> The following chapter follows the movement of liberal thought from one pole to the other, from the system of norms to the system of needs. To travel here we will leave the sometimes-monstrous world of anthropic analogies, of Leviathans and subjects writ large for the colder, steel-encased world of mechanistic analogies.<sup>156</sup> Here, even a man is understood as a mechanism.

While juridical liberalism originated in premodern concepts of consent and natural law and the absolutist concept of sovereignty, *empiricist liberalism* originates in reflections on the effective exercise of power. For this reason, this facet of liberal thought is less concerned with how political power represents itself to the world, and more with the way political power represents the world to itself. In this shift from normativity to facticity, men are taken as they are—which is to say, as how they are in a world already tailored to economic sociability. The consenting subject of right (*homo juridicus*) is replaced by the utility-maximizing subject of

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<sup>155</sup> Carl Schmitt, *The Concept of the Political*, trans. George Schwab (Chicago: University of Chicago Press, 2007), 71.

<sup>156</sup> A history of political analogies has yet to be written. The Hellenic political imaginary most often employed analogies with different *forms of action*: weaving, flute-playing, sailing a ship. In the Christian political universe, analogies typically centred on different *forms of relationship*: relations of kinship, relations between God and his creatures, or between shepherd and flock. The modern political imaginary most often features analogies between the political order and different *kinds of things*. Usually, the state is likened to a subject writ large or a mechanism. Often the two are combined; Hobbes’ sovereign is not the only mechanical man in Western political thought.

interest (*homo œconomicus*),<sup>157</sup> who does not exchange rights and freedoms but instead exchanges the more mundane goods of commerce on which these rights are in fact modelled.

Through these exchanges, the *homo œconomicus* does not found a commonwealth, but instead founds *civil society*. Civil society is not an “exclusive realm of “Freedom, Equality, Property, and Bentham”<sup>158</sup> because the subjects inhabiting it have reciprocally accorded one another abstract freedoms, but rather because it is the site of a “natural” mode of sociability which harmonizes their actions without need of recourse to the transparent, normative coordination of legal form. Here, the sovereign legislator is replaced by the shrewd governor, who does not attempt to positivize laws of right but is instead content to arrange or to allow the self-arrangement of a field of empirical motives. In civil society, private interests are neither forfeited, generalized, nor repressed by the facticity of the sword, but instead liberated, harnessed, and arranged *as* private interests.<sup>159</sup> For this reason, the organization and self-organization of civil society need make no reference to the validity of a law that is consented to because it is just or that is just because it is consented to, but is and in fact must be a matter of coordinating the action of a “nation of devils” progressing from vice to vice (or as we will see, from interest to interest).<sup>160</sup>

For the very moment of its appearance, the discourse of civil society effected a kind of disenchantment of politics by economics. In this way, civil society acts as the epistemic and effective frontier of political power. But in the development of liberal political thought the forms

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<sup>157</sup> This terminology is borrowed from Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France 1978-1979*, ed. Michel Senellart, trans. Graham Burchell (New York: Picador, 2008).

<sup>158</sup> Karl Marx, *Capital Volume I*, trans. Ben Fowkes (New York: Penguin, 1990), 280.

<sup>159</sup> Albert O. Hirschman, *The Passions and the Interests: Political Arguments for Capitalism before Its Triumph* (Princeton: Princeton University Press, 1997), 14-16.

<sup>160</sup> Immanuel Kant, “Perpetual Peace: A Philosophical Sketch,” in *Kant: Political Writings*, ed. Hans Reiss, trans. H. B. Nisbet (Cambridge: Cambridge University Press, 1991), 112-113.

of sociability discovered in this natural province did not remain confined to a negative role, but were eventually drawn into the analysis and construction of political forms. For this reason it is possible to speak of an empiricist family of democratic theory spanning from Sieyès' account of political representation to the competitive elite theories of twentieth century social science.

### **From Facticity to Validity and Back Again**

The preceding chapter presented a juridical reading of Hobbes' political thought. It is certainly true that Hobbes' theories of sovereignty and legitimation by consent established the argumentative context in which all subsequent social contract theorists operated. But Hobbes' anthropology was no less innovative than his ideas concerning the institution of commonwealths by covenants. Between these two elements, man and commonwealth, and the two moments to which they correspond—the state of nature and state itself—it is possible to discern a form of ambivalence that is not unique to Hobbes, but rather is found throughout liberal political thought.<sup>161</sup> This ambivalence concerns the uneasy coexistence of juridical and empiricist families of argumentation.

In the first book of his *Politics*, Aristotle distinguished the political intercourse between human beings (*zoon politikon*) from the merely “gregarious” or social relationships existing

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<sup>161</sup> On this ambivalence in Hobbes, see also Stephen G. Engelmann, *Imagining Interest in Political Thought: Origins of Economic Rationality* (Durham: Duke University Press, 2003), 26. It is fascinating and revealing that Hobbes' account merges the two analogical master images employed in juridical and empiricist political thought respectively: For the jurists and natural lawyers, the commonwealth is understood as a *man*, a willing subject writ large, while for the empiricists, utilitarians, and political economists, the political order is viewed as an artificial *mechanism* that does not possess a will, but only an automatic arrangement of dispositions. At the beginning of his great work Hobbes famously describes the Leviathan as being “but an artificial man,” and sovereignty its “artificial soul.” As we cross the bridge from juridical to empiricist idioms of political thought we will soon see that it is not the Leviathan, but rather the smaller subjects from which it is composed that will be the more significant mechanical men. See *Leviathan*, 3.

between animals. These modes of sociability are distinguished from one another by the differing forms of expression relating men and bees respectively: while social animals are only capable of communicating their private experiences of pleasure and pain to one another through the medium of voice (*phōnē*), political animals possess an additional capacity for speech (*logos*) which permits them to share a common view concerning the just and the unjust.<sup>162</sup> Later in the same work, he took up this distinction once again, arguing that a *polis* fit for free men (and not animals or slaves) is more than a military alliance established for the sake of protection or an association established to facilitate commercial exchange, but must instead assume the form of a close-knit community in which citizens relate to one another as friends for the sake of performing just or noble deeds. On the basis of these distinctions, Aristotle demonstrated that the end of this association is not merely to live, but to live a good life.<sup>163</sup>

In *Leviathan*, Hobbes described the world as matter and life as motion.<sup>164</sup> Unlike inanimate bodies, animals are not only acted upon from without, but may also move themselves through their voluntary motions.<sup>165</sup> The source of this motion is described in a thoroughly materialist way: action is the outcome of deliberation, which is not the mysterious exercise of an incorporeal *res cogitans*, but rather a mechanical process of calculating or “reckoning” with consequences.<sup>166</sup> A human being reasons in the same way an abacus reasons: anterior causes are counted positively and negatively as “appetites and aversion.”<sup>167</sup> Deliberation is simply a process of sliding beads across a frame and counting their sum. It is no less true for Hume than for

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<sup>162</sup> Aristotle, *The Politics*, trans. T. A. Sinclair (New York: Penguin, 1992), bk. 1, ch. 2, 1253a7-17.

<sup>163</sup> *Ibid.*, bk. 3, ch. 9, 1280a30-1281a4.

<sup>164</sup> Thomas Hobbes, *Leviathan*, ed. Edwin Curley (Indianapolis: Hackett, 1994), 3, 34.

<sup>165</sup> *Ibid.*, 27.

<sup>166</sup> *Ibid.*, 22-23.

<sup>167</sup> *Ibid.*, 28, 33.

Hobbes that reason acts as the “slave of the passions”<sup>168</sup> (or as we will see, the interests), and it would be no less accurate to say of Hobbes’ anthropology than of Bentham’s that here, “nature has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*.”<sup>169</sup>

Whether a thing is just or unjust has no objective or intersubjective criteria; to say that something is good or evil means nothing more than to say that one has counted it among their appetites or their aversions.<sup>170</sup> And whether one lives well only concerns whether they have been successful in progressing from desire to desire.<sup>171</sup> To ensure that this progress is not impeded, men institute the commonwealth by means of a covenant in which they forfeit their right to all things, giving their obedience in order to acquire the protection required to pursue a life of “commodious living.”<sup>172</sup> It is not difficult to see how closely the establishment of security and the establishment of propriety are bound together in this account. In the final analysis, security expresses the stability of the distinction between *mine* and *thine*.<sup>173</sup>

The resemblance between Hobbes’ materialistic picture of man and the properties Aristotle ascribed to mere animal life is striking. Just as animals are moved by their pleasures

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<sup>168</sup> David Hume, *A Treatise of Human Nature* Vol. 1, ed. David Fate Norton and Mary J. Norton (Oxford: Clarendon Press, 2007), 266.

<sup>169</sup> Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Kitchener: Batoche Books, 2000), 14. In his history of “monistic interest,” Stephen G. Engelmann insists that Hobbes’ anthropology presents a theory of passion rather than a theory of interest. But this view is difficult to square with Hobbes’ instrumental concept of reason, which he describes as “nothing but *reckoning* (that is, adding and subtracting) of the consequences of general names agreed upon for the *marking* and *signifying* of our thoughts,” or with his reduction of the multiplicity of *passions* to *power*, which he defines economically, as one’s means of obtaining a good.

The limit of Hobbes’ theory of interest is not found in his anthropology, which crudely but consistently describes a subject of interest, but instead in his account of political obligation, which is neither a theory of passion nor a theory of interest, but rather a juridical theory (as Engelmann is well aware). See Engelmann, *Imagining Interest*, 22-26; Hobbes, *Leviathan*, 22-23, 41, 50.

<sup>170</sup> Hobbes, *Leviathan*, 28-29.

<sup>171</sup> *Ibid.*, 57.

<sup>172</sup> *Ibid.*, 78, 80.

<sup>173</sup> *Ibid.*, 78.

and pains, the Hobbesian man is moved by appetites and aversions. The commonwealth founded on his promises is not really a political community (*koinōnia politikē*) shared in common among friends, but rather a *society* instituted for the sake of pacific and commodious relations among *strangers* engaged in the mutual, contractual satisfaction of their private needs. We might imagine that this kind of animal, who is not political or even gregarious, would have no need for speech at all. Unsurprisingly, the marginalization of public deliberation featured in all philosophies of sovereignty first appears in Hobbes' political thought, where the problem of politics is presented as a matter of reducing a "plurality of voices, unto one will."<sup>174</sup>

However, when the threshold separating natural life from life in a civil commonwealth is crossed, the character of human action and normativity undergoes a metamorphosis. In contrast to ancient natural law theories, Hobbes' scientific contract theory re-interprets natural law mechanistically, transforming natural law into natural science.<sup>175</sup> While early modern Thomist natural lawyers had demonstrated that political obligation was rooted in voluntary contracts before Hobbes, they offered no explanation of why parties would enter into covenants in the first place. For this reason, this tradition could account for the legitimacy of the totality of contractual arrangements that already existed as a matter of historical accident, but could not yet establish that political obligation as such was necessarily instituted through covenants.<sup>176</sup> The task of establishing the link between necessity and normativity was left to Hobbes' new science.

Although they are still presented in the normative language of law and right, upon closer inspection Hobbes' laws and rights of nature are in fact descriptive rather than normative.<sup>177</sup> A

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<sup>174</sup> Ibid., 109. See also Tuck, *Sleeping Sovereign*, 140n33.

<sup>175</sup> Jürgen Habermas, *Theory and Practice*, trans. John Viertel (Boston: Beacon Press, 1973), 63.

<sup>176</sup> Ibid., 62-63.

<sup>177</sup> Ibid., 65.

human atom has a right stipulating that they may do anything to preserve their own life, and is subject to a law stipulating that they may not do anything destructive of their own life.<sup>178</sup> But it is important not to be misled by the language of imperative employed here; these laws are not of the same type as positive laws or moral laws. They are not normative *natural laws* but causal *laws of nature* describing facts about human beings. Just as a body falls to earth, a human atom preserves their life. The properties of these atoms (their infinite acquisitiveness, their dangerousness) and their situation (competition, insecurity) are such that they are led, by the irresistible facts of their disposition, to institute a commonwealth. The covenant establishing the commonwealth effects a metaethical transformation: causal *laws of nature* are exchanged for normative *positive laws*. In this way, Hobbes traces a path from facticity to validity, deriving an “ought” from an “is.”

When positive law is substituted for laws of nature it is not only the situation in which action takes place, but also the form of action itself which undergoes a transformation. Once the commonwealth is instituted, it is not the facticity of the sword, but rather the normativity of consent which ensures that obedience persists.<sup>179</sup> Like all such theories, Hobbes’ contract theory is a theory of legitimation and not a phronetic theory of statecraft concerned with the exercise of power. If he had intended to construct a theory of effective power rather than a theory of rightful power, he would have dedicated his attention to where, when, and to whom the sword is applied rather than methodically outlining the conditions under which consent occurs.

Recall the discussion above contrasting Hobbes’ view of the good with Aristotle’s. While for Aristotle, speech made it possible to partake in a common view concerning the good, for

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<sup>178</sup> Hobbes, *Leviathan*, 79.

<sup>179</sup> *Ibid.*, 111, 141.

Hobbes goodness was a factual relation between a person and a thing. Whether an object was an object of good or not could be reduced to a projection of a subject's factual disposition to desire it or to be averse to it: "so long as man is in the condition of mere nature ... private appetite is the measure of good and evil."<sup>180</sup> But when the covenant transforms the facticity of laws of nature into the validity of positive law, the good undergoes a similar transformation:

Whatsoever is the object of any man's appetite or desire that is it which he for his part calleth *good*; and the object of his hate and aversion, *evil*; and of his contempt, *vile* and *inconsiderable*. For these words of good, evil, and contemptible are ever used with relation to the person that useth them, there being nothing simply and absolutely so, nor any common rule of good and evil to be taken from the nature of the objects themselves, but from the person of the man (where there is no commonwealth), or (in a commonwealth) from the person that representeth it, or from an arbitrator or judge whom men disagreeing shall by consent set up, and make his sentence the rule thereof.<sup>181</sup>

So in the commonwealth, good and evil are simply identified with legality and illegality.<sup>182</sup> The covenant does not exactly replicate the intersubjective normativity of speech, but instead makes the unity of sovereignty the judge of the good for all subjects equally. Private vice is transformed into public law.

This curious transformation of facticity into normativity is not limited to Hobbes' political thought. In the opening passages of his *Social Contract*, Rousseau proposed to "bring together what right permits with what interest prescribes, so that justice and utility do not find

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<sup>180</sup> Ibid., 100.

<sup>181</sup> Ibid., 28-29.

<sup>182</sup> Ibid., 78.

themselves at odds with one another.”<sup>183</sup> Although the transition from the state of nature to a civil state changes man in such a way that instinct is replaced by justice, ultimately it is the mechanics of law and not any civic *paieda* that ensures political harmony.<sup>184</sup> The coincidence of right and interest is achieved through the reciprocity of the republican legal form: since parties to the social contract alienate their powers wholly and entirely, and since the law applies equally to all citizens, it is never in the interest of these little sovereigns to author a law that would be burdensome for others, since such a law would be no less burdensome for themselves.<sup>185</sup>

For Rousseau, no less than for Hobbes, natural law was a natural science: “since men cannot engender new forces, but merely unite and direct existing ones, they have no other means of maintaining themselves but to form by aggregation a sum of forces that could gain the upper hand over the resistance, so that their forces are directed by means of a single moving power and made to act in concert.”<sup>186</sup> Whether juridical or economic in its form of elaboration, in all social physics vectors of force appear as vectors of interest.<sup>187</sup> In the transition from natural to civic life interest has not been repressed, but only rearranged. In his attempt to make right and utility coincide, Rousseau did not revive the ancient politics of soulcraft, but instead resigned himself to taking men as they are.<sup>188</sup> But when the law generalizes interest, it takes on a new normative character; for Rousseau, virtue was simply the ability to make one’s interest conform with the

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<sup>183</sup> Jean-Jacques Rousseau, *On the Social Contract*, in *Jean-Jacques Rousseau: The Basic Political Writings*, ed. and trans. Donald A. Cress (Indianapolis: Hackett, 1987), 141.

<sup>184</sup> *Ibid.*, 150. However, see also note 95 above.

<sup>185</sup> *Ibid.*, 148, 157, 161.

<sup>186</sup> *Ibid.*, 147.

<sup>187</sup> As Hannah Arendt observed, the argument advanced in *On the Social Contract* rests on a curious equation of will and interest. See *On Revolution* (New York: Penguin, 2006), 68.

<sup>188</sup> Rousseau, *Social Contract*, 141.

general interest.<sup>189</sup> In the end, the popular prince contracts justly because he has created a situation in which he has only himself to contract with.<sup>190</sup> So although Rousseau's account relies on the mechanics of law rather than the authorization of the prince, here too the institution of a commonwealth transforms facticity into validity.

We have seen how in the classical iterations of social contract theory, the covenant appears as a threshold between utility and right, facticity and validity, social physics and civic existence, and empirical and normative (or "rational") principles of action. The consistently empiricist response to this form of argumentation will naturally be to ask: what if this transformation never took place? Is it possible to imagine the foundation and preservation of political orders without any recourse to the problematic of legitimation by consent? This is precisely what we find in David Hume's political thought. Hume put the principle of consent in question, pointing out that from a motivational standpoint, the reasoning underpinning obedience to a contract is circular. A subject of right simply respects the contract because they have contracted:

We are bound to obey our sovereign, it is said; because we have given a tacit promise to that purpose. But why are we bound to observe our promise? .... Your answer is, *because we should keep our word*. But besides that no body, till trained in a philosophical system, can either comprehend or relish this answer: Besides this, I say, you find yourself embarrassed, when it is asked, *why we are bound to keep our word?*<sup>191</sup>

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<sup>189</sup> Jean-Jacques Rousseau, *Discourse on Political Economy*, in *Jean-Jacques Rousseau: The Basic Political Writings*, ed. and trans. Donald A. Cress (Indianapolis: Hackett, 1987), 119.

<sup>190</sup> Rousseau, *Social Contract*, 149.

<sup>191</sup> David Hume, "Of the Original Contract," in *Hume: Political Essays*, ed. Knud Haakonssen (Cambridge: Cambridge University Press, 1994), 196-197. See also Foucault, *Birth of Biopolitics*, 273-276.

Abandoning the pseudo-historical idealizations of social contract theorists for a survey of history actually lived, Hume argued that, since “human affairs will never admit of this consent ... in the few cases, where consent may seem to have taken place, it was commonly so irregular, so confined, or so much intermixed either with fraud or violence, that it cannot have any great authority,” then consequently “some other foundation of government must be also admitted.”<sup>192</sup> What is this foundation? Hume contended that “the general bond or obligation, which binds us to government, is the interest and necessities of society.”<sup>193</sup> Political obligation does not only originate, but also persists on the basis of interest. Proximate passions for licentious action and domination of others are overcome by distant, reflective interests in living in a society stabilized by the authority of magistrates.<sup>194</sup> When the mechanics of interest are no longer relegated to the state of nature, the problem of politics will no longer be the institution of normativity, but rather a matter of governing a “nation of devils.”<sup>195</sup>

### **From *Raison d'État* to the *Homo Œconomicus***

In Hume’s empiricist account, interest is not transformed into right, and the *homo œconomicus* does not metamorphosize into a *homo juridicus*. Both before and after the institution of a commonwealth, subjects obey only insofar as it is in their interests to do so. But neither Hume’s nor Hobbes’ investigation of political obligation is the point of origin for the politics of

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<sup>192</sup> Hume, “Original Contract,” 192. In his history of civil society, Adam Ferguson makes precisely the same substitution of natural history for pseudo-history. See *An Essay on the History of Civil Society*, ed. Fania Oz-Salzberger (Cambridge: Cambridge University Press, 2001), 7-16.

<sup>193</sup> Hume, “Original Contract,” 200.

<sup>194</sup> *Ibid.*, 196.

<sup>195</sup> Kant, “Perpetual Peace,” 112-113.

interest or the kind of subject imagined therein. They simply presented differing ways of articulating the empirical discourse of utility with the juridical discourse of legitimation.

For Hobbes, and for juridical thought considered broadly, civil philosophy was not a practical activity: “the skill of making and maintaining commonwealths consisteth in certain rules, as doth arithmetic and geometry, not (as tennis-play) on practice only.”<sup>196</sup> The subject of interest does not originate in juridical, philosophical or normative discourse at all, but rather in reflections on the effective exercise of power that accompanied the development of practical and technical arts of government.

Long before Hobbes’ new juridical science of politics understood subjects materialistically, as vectors of appetites and aversions, Machiavelli’s new science of statecraft already featured an anthropology divested of all normative content. Although the audacious, virtuoso prince is still very far from the subject of interest, Machiavelli established the connection between empirical anthropology and practical arts of government. Strategic idioms of political reflection like statecraft rely on a descriptive view of human beings and human action. In leaving the imaginary principalities of antiquity and Christendom behind to find the real truth of the matter, it is necessary to investigate how men actually live and not how they ought to.<sup>197</sup>

Whereas for ancient political thinkers necessity was associated with the reproduction of mere animal life in the *oikos*, and public life was understood as the occasion for performing good or just actions, an unlikely collusion of Christianity and Machiavellianism reversed this distribution. Even before the hyper-privatization of the Reformation, Christianity effected a privatization of the good. In the more complicated and self-reflective forms of subjectivity

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<sup>196</sup> Hobbes, *Leviathan*, 135.

<sup>197</sup> Niccolò Machiavelli, *The Prince*, in *The Prince and the Discourses*, trans. L. Ricci (New York: The Modern Library, 1950), 56-57.

introduced by Christian ethics, reflexiveness prevents a good action from appearing in the light of public; to give alms in the presence of others (or even oneself) is to negate the goodness of the work.<sup>198</sup> And in the violent and unstable world of the Italian principalities, it was not goodness but instead the necessity of the case which acted as the central authorizing principle of political action. In a way that corresponds closely to this reversal, Machiavelli transformed the normative concept of virtue employed by the ancients into the more ambiguous concept of *virtù*, which connotes both aesthetic value and technical skillfulness. A prince possessing *virtù* does not necessarily perform good actions fit to appear in public, but must instead exploit the gap between being and appearance, engaging in a politics of dissimulation as is demanded by the necessity of the case.

Machiavelli's political world was still relatively enchanted. The caprice of *fortuna* had not yet been tamed into probability, public valuations of glory had not yet been displaced by the private appraisals of commercial activity, and audacious, dangerous subjects of passion had not yet become banal, predictable subjects of interest. The understanding of action and anthropology developed in the context of an agonistic politics of dissimulation and pseudo-warfare was ill-equipped to introduce economic forms of rationality into the study of politics. The exchange of blows, kidnappings, and assassinations follows a set of rules that is completely unlike those governing the exchange of goods. *Pace* Sheldon S. Wolin, there is no "economy of violence" in Machiavellian statecraft.<sup>199</sup> For the necessary abstraction to take place, it was necessary to take a detour from prince to principality, shifting the focus of the political arts from the necessity of the case to the "national interest."

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<sup>198</sup> Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1998), 74.

<sup>199</sup> Sheldon S. Wolin, *Politics and Vision: Continuity and Innovation in Western Political Thought* (Princeton: Princeton University Press, 2004), 197-200.

Although unusually rich and imaginative among practical works of political reflection, the placement of what is, in the end, a treatise on statecraft in the canon of political philosophy is curious. Arguably, Machiavelli's influence on statesmen and bureaucrats was no less significant than his reception among civil philosophers. The statesmen of the sixteenth century developed a family of doctrines that adopted and altered the understanding of man, the state, and political reason found in Machiavelli's political science.<sup>200</sup> Machiavellian politics was staged as a question of how a prince was to maintain possession of his principality under constantly changing circumstances. In doctrines of *raison d'état*, the focus shifts from the prince or the prince-principality relation to the interests of the state itself. This view is well-illustrated by the Duke of Rohan's maxim: "*Les prince commandent aux peuples, et l'intérêt command aux prince*" ("The prince commands the people and interest commands the prince").<sup>201</sup> Since interest is a mechanical principle of action, it is unsurprising that it would originate in reflection on the actions of states rather than in the study of actual human activity,<sup>202</sup> which does not ordinarily take the form of economic behaviour unless situated in a world tailored to it. Before the political economists imagined a world of private interests, the early practitioners of *realpolitik* imagined the public interest; and before the discovery of economic rationality, diplomatic science discovered reasons of state.<sup>203</sup>

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<sup>200</sup> See especially Friedrich Meinecke, *Machiavellianism: The Doctrine of Raison d'État and Its Place in Modern History*, trans. Douglas Scott (New Haven: Yale University Press, 1962).

<sup>201</sup> Quoted in Hirschman, *Passions and Interests*, 34.

<sup>202</sup> In a fascinating parallel, the individualist juridical theories of autonomous, rights-bearing subjects outlined in the previous chapter also originate in the discourse of international politics. See Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order From Grotius to Kant* (Oxford: Oxford University Press, 2002), 11.

<sup>203</sup> Hirschman, *Passions and Interests*, 50.

In much the same way that necessity operated as a non-normative or effective limiting and authorizing principle in Machiavelli's statecraft, interest operates as a non-judicial limiting principle in *raison d'état*.<sup>204</sup> But while the political field of necessity was the aleatory province of *fortuna*, who could only be subdued with the help of the prince's character, the political field in which *raison d'état* was developed was understood as an object of impersonal knowledge. In contrast with the prince, the statesman must be distrustful of the testimony of his own wits and instead choose to consult impersonal, methodical forms of knowledge (for instance, that first science of state, *statistics*).<sup>205</sup> Under the shadow of the state and its interests, the prince, whose character and qualities were all-important in Machiavellian statecraft, disappears.<sup>206</sup>

The ontological condition of possibility for the replacement of chance by statistics and probability is a world governed by a more predictable form of action. While Machiavelli's statecraft drew, in an almost artistic way, on the personal characteristics of the prince—his boldness, his audacity; in other words, his *passions*—as resources, in the impersonalistic doctrines of *raison d'état*, the disappearance of the prince is followed by a disappearance of his passions, and their substitution by a form of interested reason divested of all personalistic qualities.<sup>207</sup> In following the transition from one idiom of statecraft to the other, it is possible to glimpse the death of the intemperate aristocrat and the birth of the calculating bourgeois, a figure with so few qualities it is tempting to question whether he is a person at all.

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<sup>204</sup> Engelmann, *Imagining Interest*, 90.

<sup>205</sup> *Ibid.*, 90-96; See also Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France 1977-1978*, ed. Michel Senellart, trans. Graham Burchell (New York: Picador, 2007), 271-275.

<sup>206</sup> Meinecke, *Machiavellianism*, 167-168.

<sup>207</sup> The displacement of the passions by the interests, and their path from international, to intranational, to private life is traced masterfully in Albert O. Hirschman's classic study, *The Passions and the Interests*.

Unlike the highly subjective and ephemeral passions, an interest is a “worldly interest.”<sup>208</sup> And unlike a will, which (if we are to believe Rousseau) cannot be represented, interest has a kind of objectivity that permits it to be pursued as effectively by a third party or an expert as by the interested party themselves. It is for this reason that it was possible for Madison to distinguish the “true interests” of the represented from their “temporary and partial considerations,” and for Burke to distinguish the rational interests of electors from their empirical will.<sup>209</sup> Distinguished as it is by a higher level of reflection and calculation, interest has a higher epistemic value than passion. A passion or affect may deceive, but an interest will not lie.<sup>210</sup> Because of its objective, reflective character, an interest is more predictable than a passion.<sup>211</sup> It is precisely this predictability which makes the ontology (or anthropology) of interest indispensable for methodical sciences of human action. Whether one sets out to construct a scientific jurisprudence, a scientific diplomacy, or a microeconomics, they will be forced to posit the existence of something like a *homo œconomicus*.<sup>212</sup> Because the subject of interest is a predictable subject, they are a governable one. The attribution of interest transforms a subject into an object, but not in the sense that it becomes an object of command. The government of interested subjects does not have the transparency and directness of ruling through authoritative

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<sup>208</sup> Hirschman, *Passions and Interests*, 35. On the objective connotation of the concept of interest, see Hanna Fenichel Pitkin, *The Concept of Representation* (Berkeley: University of California Press, 1967), 157-158.

<sup>209</sup> Edmund Burke, “Speech at Mr. Burke’s Arrival in Bristol,” in *The Portable Edmund Burke*, ed. Isaac Kramnick (New York: Penguin, 1999), 155-157; *Reflections on the Revolution in France*, 52; James Madison, *Federalist* No. 10, in *The Federalist Papers*, ed. George W. Carey and James McClellan (Indianapolis: Liberty Fund, 2001).

<sup>210</sup> Hirschman, *Passions and Interests*, 32, 64.

<sup>211</sup> *Ibid.*, 48-50.

<sup>212</sup> Richard K. Ashley criticizes Neorealist theories in international relations theory for adapting the assumptions of microeconomic theory. But ironically, theories of action built on the *homo œconomicus* did not originate in microeconomics, or even classical political economy, but rather in *raison d'état*—the oldest form of international relations theory. Arguably, Neorealism did not betray the best insights of the older, more phronetic tradition of diplomatic reflection so much as it circled back to them. See “The Poverty of Neorealism,” *International Organization* 38, no. 2 (Spring 1984): 225-286.

imperatives; the governor of *homo œconomicus* does not govern subjects directly, but instead governs their interests.<sup>213</sup>

The discovery that subjects will behave predictably insofar as they act in a self-interested way opened up a new set of possibilities for the arts of government. Ironically, the limitless acquisitiveness of human beings, which for Hobbes precluded all sociability in the state of nature, allowed human action to become governable.<sup>214</sup> The possibilities for the government of interest expanded as the subject of interest diminished in size. With the first *homo œconomicus*, who was not a man at all but rather a state, it was only possible to arrange the predictable vectors of interest (in this case, national interests) in a balance. Like a Hobbesian atom, states in the anarchic province of international politics cannot be placed in relations of sociability, but can only have their dangerousness neutralized insofar as they are dangerous in a predictable way. The authors of *The Federalist Papers* relocated the politics of arranging balances from the international to the domestic sphere.<sup>215</sup> As a means of addressing the problem of “faction,” a kind of subdued state of civil (as opposed to international) war, Madison proposed that, in the institutional structure of the American state, “ambition must be made to counteract ambition” in such a way that “the interest of the man, [are] connected with the constitutional rights of the place.”<sup>216</sup> Rather than being repressed or relegated to a natural prehistory, the mechanics of interest are integrated into the ordinary operation of government. In a way that anticipates Bentham’s *An Introduction to the Principles of Morals and Legislation*, Madison imagined that

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<sup>213</sup> Foucault, *Birth of Biopolitics*, 44-47.

<sup>214</sup> Hirschman, *Passions and Interests*, 56. *Pace* Bertrand de Jouvenel, Hobbesian anthropological premises do not make Hobbesian political conclusions inevitable. See *Sovereignty: An Inquiry into the Political Good*, trans. J. F. Huntington (Chicago: University of Chicago Press, 1957), 244-245.

<sup>215</sup> *Ibid.*, 28-31.

<sup>216</sup> Madison, *Federalist* No. 51.

the role of the legislator would not be a matter of solidifying normative principles in the form of positive laws, but rather a matter of advocating for and regulating private interests.<sup>217</sup> However, the more decisive transformation was not the topographical relocation of interest from the international to the domestic, but instead the creation of a sphere that is simultaneously domestic and anarchic, being at once inside and outside the reach of state power.

### **From Natural Law to Natural History**

Few concepts in the history of political thought had such a wide variety of meanings and interpretations attributed to them as the concept of civil society. The first appearance of the term appears in Roman writers' translations of Aristotle's generic term for the *polis*, *koinōnia politikē* as *societas civilis*.<sup>218</sup> At this point, the civil society already featured the same ambiguity between political and economic meanings found in later iterations of the concept. Where for Aristotle, the *koinōnia politikē* was a purely political concept, which he explicitly contrasted with mere military alliances and associations established to facilitate the exchange of goods,<sup>219</sup> the Roman *societas* referred to both alliances between states and private commercial associations.<sup>220</sup> Much like the Aristotelian *koinōnia politikē*, in Thomas Aquinas' political thought, *societas civilis* still exists for the sake of performing virtuous deeds. However, at this point the understanding of

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<sup>217</sup> Madison, *Federalist* No. 10. John R. Wallach describes Madison's constitutional designs as a kind of "visible hand that produced public virtue out of the pursuit of private interests." In this respect, the authors of *The Federalist* occupy an intermediate position between Hobbes and Mandeville; the transformation of private interest is not achieved by the creation of public authority, nor by the mechanics of private sociability, but rather by interaction of privately interested parties with a public institutional framework. See "Two Democracies and Virtue," in *Athenian Political Thought and the Reconstruction of American Democracy*, ed. J. Peter Euben, John R. Wallach, and Josiah Ober (Ithaca: Cornell University Press, 1994), 222.

<sup>218</sup> Jean Cohen and Andrew Arato, *Civil Society and Political Theory* (Cambridge: MIT Press, 1992), 84.

<sup>219</sup> Aristotle, *Politics*, bk. 3, ch. 9, 1280a30-1281a4.

<sup>220</sup> Habermas, *Theory and Practice*, 47.

virtuous action had been privatized under the influence of Christianity, and the association between freedom and public life was lost.<sup>221</sup> Where for Aristotle, public life in the *koinōnia politikē* was characterized as a free relation between equals, and explicitly contrasted with the despotic “economic” relations between household heads and their wives, slaves, and children, for Aquinas the political order itself was modelled on this apparently private principle of *dominium*. In this way, the Aristotelian distinction between the *polis* and the *oikos* was collapsed into a single form of sociability, the unlimited administrative dominion of a prince who relates to his principality in the same fashion that a household head relates to his domestic social inferiors.<sup>222</sup>

In the Middle Ages, the fragmentation of power between the prince and the corporate estates dualized the political topography of Western states. However, this dualism was not equivalent to the modern differentiation between the political state and a private or depoliticized civil society; relations between lords and vassals were not mediated only by property, but by titles, and consequently retained a directly political character. Rather than produce a distinct concept of civil society, this “democracy of unfreedom” (Marx) retained a certain continuity with the ancient *societas civilis* despite being articulated with a fundamentally different form of economic organization.<sup>223</sup>

When the concept of civil society was reformulated in the modern age, the main principle of private association was not the *dominium* of the *oikos* or the bondage of lordship, but instead

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<sup>221</sup> Ibid., 47-49.

<sup>222</sup> Ibid., 48. Sheldon S. Wolin also came to the conclusion that ancient Christian thought attempted to substitute society for politics, but for different reasons. In Augustine’s political thought, *societas* is not a principle by which the political order is modelled on the administrative organization of the household, but instead describes the peaceful, spontaneous, and harmonious organization of the church in contrast with the coercive and unvirtuous sociability of temporal power. This may be the earliest instance of a disenchantment of politics by society, and the parallel between the pacific, natural, and spontaneous sociability of the church and the self-representation of modern commercial society is striking. See *Politics and Vision*, 115-118.

<sup>223</sup> Cohen and Arato, *Civil Society and Political Theory*, 85-86.

the private contract. This principle of association permitted the labouring activity to escape the household, establishing a world of economic sociability mediated by voluntary exchange relations rather than patriarchal domination. When the originally private form of the economic contract was articulated with the norm of consent, political legitimacy too was understood on the model of contractual association. In the modern natural lawyers' theories of contractual legitimation by consent, a new series of concepts of civil society were developed. In its first modern iterations, civil society once again had a primarily political meaning: in Lockean contract theory for instance, "civil society" simply denoted what in Hobbes' political thought appears under the name "commonwealth."<sup>224</sup> But unlike the Aristotelian *koinōnia politikē*, the civil society of the social contract literature was instrumentalized in the service of property. Its purpose was to terminate the insecurity and inconvenience of the state of nature, establishing a peaceful state of commodious living in which the distinction between mine and thine is stabilized.<sup>225</sup> Although it cannot be identified with the private contracts through which commercial sociability is organized, the early modern concept of civil society can be understood as a kind of public ground-contract or meta-contract that guarantees all subsequent private contracts.<sup>226</sup>

With the development of liberal thought, society was gradually relocated from the public to the private sphere. Rousseau's concept of society is again ambiguous, at once encompassing the political order and private spheres of commerce and polite sociability. The Genevan perceived the connection between the establishment of propriety and the establishment of

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<sup>224</sup> John Locke, *Second Treatise of Government*, ed. C. B. Macpherson (Indianapolis: Hackett, 1980), §87.

<sup>225</sup> Hobbes, *Leviathan*, 78, 80; Locke, *Second Treatise*, §90, §94, §222.

<sup>226</sup> The German sociologist Ferdinand Tönnies, who was also an important scholar of Hobbes, argued that "the legal order [of *Gesellschaft*] can be summed up in a single formula: *pacta esse observanda*—contracts must be kept." See *Community and Civil Society*, ed. Jose Harris, trans. Jose Harris and Margaret Hollis (Cambridge: Cambridge University Press, 2001), 62.

security that was only implicit in Hobbes' argumentation: the "true founder of civil society" is simply the first person to enclose a plot of land and say "*this is mine.*"<sup>227</sup> Rousseau also connected the concept of civil society to what we would today describe as "sociological" or interpersonal relations. Despite criticizing preceding contract theories on the grounds that they had attributed the ideas acquired in society to nature,<sup>228</sup> Rousseau made a related error, attributing the distinguishing features of bourgeois polite society to society as such. His account of civil society *qua* polite society already featured a collection of observations and motifs that would sustain novelistic portraits of bourgeois society for centuries afterwards.

In an ethical sense, society is a site of hypocrisy. In contrast with the wild independence of the savage man, the social man is self-divided, and for that reason, hypocritical. The impossibility of reconciling the egocentric pursuit of one's interests with appearance before the judgement of public opinion forces even the private man to engage in Machiavellian practices of dissimulation: "it was necessary, for his advantage, to show himself to be something other than what he in fact was. Being something and appearing to be something became two completely different things."<sup>229</sup> Society is also a site of inauthenticity. While the savage man is always at one with and at home inside himself, in society man lives always outside himself.<sup>230</sup>

At first glance, the relations Rousseau described here are human relations, either ethical relations between oneself and oneself (inauthenticity, hypocrisy), or social relations between oneself and others (conformity, grand ostentation, deceptive cunning), and not economic

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<sup>227</sup> Jean-Jacques Rousseau, *Discourse on the Origin of Inequality*, in *Jean-Jacques Rousseau: The Basic Political Writings*, ed. and trans. Donald A. Cress (Indianapolis: Hackett, 1987), 60. See also *Discourse on Political Economy*, 127.

<sup>228</sup> Rousseau, *Discourse on Inequality*, 38.

<sup>229</sup> *Ibid.*, 67-68.

<sup>230</sup> *Ibid.*, 80-81.

relations mediated by property or contracts. But a closer examination of Rousseau's socialized man reveals that even the interpersonal relations of polite society are modelled on forms of sociability properly belonging to the world of commerce. In contrast to the *amour de soi* that animates the ethical life of the savage man, the *amour-propre* of the civilized man leads him first to make comparisons between different kinds of objects, and then to ceaselessly make comparisons between himself and others, and to value himself in terms of the comparisons others make between themselves and he. Above all else, it is this obsession with public esteem that causes the inhabitant of civil society to live outside himself.<sup>231</sup> This activity of comparison is nothing but a modelling of interpersonal relations in the image of money, of understanding value as such in the image of exchange value<sup>232</sup> (which has no intrinsic existence as a property, but only emerges as a relation between things).<sup>233</sup> As the anthropology of money has informed us, money is not a thing, but rather an activity of making comparisons.<sup>234</sup> In civil society, relations between things appear in the fantastical form of relations between persons.

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<sup>231</sup> Ibid., 63-64.

<sup>232</sup> Tönnies made a very Rousseauian observation concerning the sociability of civil society: "All *conventional sociability* may be understood as analogous to the exchange of material goods. The primary rule is politeness, an exchange of words and courtesies where everyone appears to be concerned for everyone else and to be esteeming each other as equals. In fact everyone is thinking of himself and trying to push his own importance and advantages at the expense of all the rest ... since all relationships in *Gesellschaft* rest upon *comparing* potential and offered services against each other, it becomes clear why relations to visible material objects take precedence." See *Community and Civil Society*, 65-66.

<sup>233</sup> This is likely what Arendt had in mind when she remarked that all modern spiritual "values" are exchange values. Utilitarian philosophy can be understood as a systematization of the modern conflation of value and exchange value. See *Human Condition*, 235n74.

<sup>234</sup> David Graeber, *Debt: The First 5,000 Years* (New York: Melville House, 2011), 52.

However unlikely it was that such an insight should appear in these somewhat moralistic descriptions of a civilized man who is really only a bourgeois, Rousseau's sociological imagination detected that a new chapter had opened up in the material history of civil society. In this chapter, the inhabitant of civil society is no longer a proprietor concerned with the stability of his estate, but instead a merchant or a shopkeeper for whom property does not exist to be possessed, but instead to be exchanged (it is only in the activity of exchange that objects are related in comparison). From this point onwards, civil society will no longer be understood as an archipelago of *oikos* or a collection of enclosures securing miniature spheres of private autonomy,<sup>235</sup> but rather as a *catallaxy*,<sup>236</sup> the site of an unceasing intersubjective process of circulation. Although this aspect was perceived (dimly) by Rousseau (and indeed by Montesquieu before him<sup>237</sup>), it was the political economists of the Scottish Enlightenment who decisively effected this final transformation in the concept of civil society.

For Adam Smith and Adam Ferguson, the spatial differentiation between the state and civil society was not yet as central as the temporal distinction between what they referred to as

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<sup>235</sup> The resemblance between the static, private, and self-sufficient character of the ancient *oikos* and the modern society of enclosed plots (best exemplified in the American colony) permitted a certain level of compatibility between ancient republicanism and the modern propriety. A Greek would likely view a Lockean proprietor as a puzzling, idiotic figure who had made the bizarre decision to forsake a good life lived among equals for a banalistic life of petty despotism. See for instance Aristotle, *Politics*, bk. 1, ch. 1, 1255b31-34.

<sup>236</sup> This distinction between the household economy of the *oikos* and the market-mediated economy as a "catallaxy" is found in F. A. Hayek, "The Principles of a Liberal Social Order," *Il Politico* 31, no. 4 (December 1966): 604-605.

<sup>237</sup> Montesquieu's contribution to the disenchantment of law by economics was well understood by the Scottish sociologists. Dugland Stewart observed that "The well-merited popularity of *The Spirit of the Laws* gave the first fatal blow to the study of natural jurisprudence." See James Moore, "Montesquieu and the Scottish Enlightenment," in *Montesquieu and His Legacy*, ed. Rebecca E. Kingston (Albany: SUNY, 2009), 179-180.

“commercial society” and earlier forms of economic organization.<sup>238</sup> Rather than emphasizing the dramatic moment of crossing a threshold separating an individualistic natural life from social life in a commonwealth, these early sociologists rejected the natural lawyers’ contention that there was an exclusive distinction between natural and civilized life and that the civilized condition was instituted deliberately, transparently, and politically.<sup>239</sup> Much like Rousseau, Ferguson connected the establishment of propriety with the establishment of political orders. But unlike Rousseau, he did not regard this founding as the deliberate act of a founder or a legislator in disguise, but instead as a blind and unintended action, arguing that “he who first said, ‘I will appropriate this field: I will leave it to my heirs;’ did not perceive, that he was laying the foundation of civil laws and political establishments.” Ferguson’s skepticism concerning the role of deliberate design in the developmental history of human affairs is illustrated well by the following passage:

Like the winds, that come we know not whence, and blow whithersoever they list the forms of society are derived from an obscure and distant origin; they arise, long before the date of philosophy; from the instincts, not from the speculations, of men. The crowd of mankind, are directed in their establishments and measures, by the circumstances in which they are placed; and seldom are turned from their way, to follow the plan of any single projector. Every step and every movement of the multitude, even in what are termed enlightened ages, are made with equal blindness to the future; and nations stumble upon establishments, which are indeed the result of human action, but not the execution of any human design.<sup>240</sup>

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<sup>238</sup> Anastasia Ioannidou, “The Politics of the Division of Labour: Smith and Hegel on Civil Society,” *Democratization* 4, no. 1 (1997): 50-51.

<sup>239</sup> Ferguson quotes Montesquieu’s dictum: “Man is born in society ... and there he remains.” See *History of Civil Society*, 12, 14, 21.

<sup>240</sup> *Ibid.*, 119.

Because “no constitution is formed by concert, no government is copied from a plan,” Ferguson warned that “we are therefore to receive, with caution, the traditionary histories of ancient legislators and founders of states.”<sup>241</sup>

Smith likewise contended that the transition from a rude to a mild condition was not a matter of enacting a covenant, but rather an evolutionary process in which a nomadic hunter becomes a semi-sedentary shepherd, who becomes a sedentary farmer, who eventually becomes a polished man of the town.<sup>242</sup> So here too, civilization is not a question of natural law, but instead a question of natural history, and the substance of this historical civilizing process is not the development of political institutions, but instead the progression from one form of material reproduction to the next. But in Smith’s account, not only temporal progress, but also the spatial coordination of human society is explained in terms of blind action without conscious designs. In addition to the diachronic law of natural history posited by Ferguson, Smith re-introduced synchronic natural laws of sociability into human affairs. But as we will see, these synchronic laws are not situated in the same way as the laws of nature governing Hobbes’ human atoms.

### **From the State of Nature to Civil Society**

Recall how Hume criticized social contract theory on the grounds that it was not the threshold of consenting to the commonwealth, but rather a persistent interest in being governed that accounted for the existence of political order. In the new sciences of interest, the problem will not be a matter of giving an account of political obligation and the force of law that can be

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<sup>241</sup> Ibid., 120.

<sup>242</sup> Adam Smith, *Lectures on Jurisprudence*, ed. R. L. Meek, D. D. Raphael, P. G. Stein (Indianapolis: Liberty Fund, 1982), 14-16.

substituted for the social contract, but rather a problem of defining the dynamics of a sphere *outside* the commonwealth. In much the same way that, in Hume's account, the *homo oeconomicus* is never asked to relinquish their interest, the sciences of interest discovered a sphere in which a kind of "state of nature" persists, never being terminated by the covenant.<sup>243</sup> This sphere that is not separated from the sphere of political authority by the temporal threshold of a contract, but instead by the spatial threshold of differentiation, this "state of nature" that does not precede, but rather exists alongside the state is, of course, civil society.<sup>244</sup> So the question of civil society will not be one of how to account for political obedience without the covenant, but instead a question of what kind of sociability can exist in the absence of relations of political obedience, on the strength of commercial contracts rather than the civic bondage legitimated by the validity of consent and enforced by the coercive facticity of the sword.

This question led political economists to posit the existence of a new kind of law governing this "natural" realm in which positive law is not in force.<sup>245</sup> Recall now how Hobbes transformed the ancient, normative concept of natural law into something more akin to a descriptive law of nature. Before the institution of positive law, laws of motion that dispose subjects to form a commonwealth are already in force. And before the covenant transforms the subject into a *homo juridicus* whose action is regulated by the force of consent, inhabitants of the

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<sup>243</sup> Larry Siedentop argues that the influence of empiricist philosophy is responsible for the individualistic ontology and the neglect of civil society and theories of social change in English liberal thought. For these claims to be plausible, one would have to ignore the Scottish Enlightenment or claim that their work is somehow not "political," forget their contribution to the conceptual development of civil society and its history, and fail to understand that economic thought is not an individualistic science of human monads but a social science of a human relations. Empiricism is the basic condition for a sociological liberalism, not an impediment to its development. See "Two Liberal Traditions," in *The Idea of Freedom*, ed. Alan Ryan (Oxford: Oxford University Press, 1979), 154-156.

<sup>244</sup> Habermas, *Theory and Practice*, 94-95.

<sup>245</sup> Foucault goes as far as to entertain the idea that the discourse of political economy is less a "liberalism" than a political "naturalism." This view is only persuasive if one has already decided to identify liberalism with juridical argumentation. See *Birth of Biopolitics*, 61-62.

state of nature are understood as mute, animalistic *homo æconomicus* moved by their appetites and aversions. Although Hobbes' anthropology was ambiguous, emphasizing both the acquisitiveness and the dangerousness of subjects in the state of nature, the dimension of security takes precedence here; it is primarily the threat of war and not the promise of commodious living that necessitates the covenant.

In the discourse of civil society, this will not be the case. Just like in Hobbes' depiction of the state of nature, in civil society, political economy will discover a world outside the state's regulation of conduct through positive law that is nevertheless governed by a descriptive law of nature. While the laws of nature at work in Hobbes' account disposed subjects to leave or terminate the state of nature, the laws of nature animating civil society are indifferent to the institution of a commonwealth, and will continue operating in the same fashion both before and afterwards. In this respect, the (descriptive) laws of nature animating civil society resemble the (normative) natural laws of Lockean political thought. For this reason, it is actually Locke's concept of the state of nature, and not what he called political or civil society that contributed to the development of the late modern concept of civil society. But unlike Lockean natural laws, which were directly intuited by subjects exercising their reason,<sup>246</sup> civil society's laws of nature were immanent to the form of action undertaken there, and did not require or even permit the transparency of imperative norms. For this reason, the laws of civil society need not be and cannot be positivized.<sup>247</sup>

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<sup>246</sup> Locke, *Second Treatise*, §6.

<sup>247</sup> Habermas, *Theory and Practice*, 95-96.

In the Robinsonade of the eighteenth century's political economy, civil society or "commercial society" is imagined as a *system of exchange*. Ferguson, who occupied an ambiguous position between the republican tradition and the new empiricist thought, was well-positioned to historicize the *homo œconomicus*. In contrast to the civic spirit of the ancients, he proposed to "let those examples be compared with the spirit which reigns in a commercial state ... It is here indeed, if ever, that man is sometimes found a detached and a solitary being: he has found an object which sets him in competition with his fellow-creatures, and he deals with them as he does with his cattle and his soil, for the sake of the profits they bring."<sup>248</sup> Despite substituting a natural history for natural law in a way very similar to Ferguson, Smith's economic writings nevertheless attribute a set of transhistorical properties to man. The division of labour is not the product of historical dynamics themselves, but instead results from the gradual emergence of an anthropological constant that exists independently of the historical dimension. Divided labour is the "necessary, though very slow and gradual, consequence of a certain propensity in human nature which has in view no such extensive utility; the propensity to truck, barter, and exchange one thing for another." This capacity must be "common to all men, and to be found in no other race of animals, which seem to know neither this nor any other species of contracts," since "nobody ever saw a dog make a fair and deliberate exchange of one bone for another with another dog."<sup>249</sup> Differing extensions of the division of labour do not indicate that commodity exchange is a historically produced activity, but rather that this natural capacity has

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<sup>248</sup> Ferguson, *History of Civil Society*, 24.

<sup>249</sup> Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, ed. Edwin Canaan (New York: The Modern Library, 1937), 13.

only manifested itself imperfectly at earlier points in history. So the system of natural liberty does not exist only in the past, as with Rousseau, but in the future. Man is not sometimes a warrior, sometimes a citizen, and sometimes a bourgeois. Even in the wild, he is already a rudimentary subject of exchange. Much like the natural lawyers criticized by Rousseau, Smith has written a Robinsonade identifying the *bourgeois* with the *homme*.<sup>250</sup>

While the exchange of protection for obedience establishes a state, the exchange of goods establishes civil society. The laws of the state combine the validity of consent with the facticity of violent enforcement. In this way, the state does not relate its subjects, but instead distributes them into miniature spheres of security separated by fences of law. In civil or “commercial” society, the dimension of facticity is not mediated by the validity of law and is not applied in the form of a threat of violence, but instead appears immediately in the form of *interest*. Interest does not divide men in the same way as law, nor does it relate them in the same way as a shared *ethos* or a shared set of *mores*. So interest does not establish a state or a community, but rather a *society*.

The liberation of interest from the fetters of law permits the division of labour to advance. It is only possible to dedicate oneself to a particular form of labour and at the same time satisfy a wider variety of needs than one’s own form of labour can meet on the condition that one can acquire the products of others’ labour. In the absence of violent coercion or communal solidarity, the labourer must address themselves to the interests of others in order to induce them to labour

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<sup>250</sup> Taking a wide variety of anthropological evidence into account, David Graeber argues that the barter economies that political economists from Smith to the present day have posited to explain the emergence of money in fact never existed. Exchange in archaic societies is invariably embedded in a wider social context, and does not follow a set of rules resembling those governing the exchange of equivalents. Systems of barter in fact have only been observed in contexts in which money has already been introduced and subsequently become unavailable. Money originates in quantities of credit recorded and later circulated to third parties by bureaucratically organized political authorities. See *Debt*, 21-29, 33, 37-41.

on their behalf. In the frequently-quoted words of Smith, “it is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages.”<sup>251</sup> They address themselves to this interest by offering a product of their own labour (or its equivalent) in exchange. For this reason the division of labour is coextensive with the sphere of exchange: the market.<sup>252</sup>

By bringing their interests into relation with one another through the medium of commodity exchange, the *homo œconomicus* blindly manifests or “administers” the law of nature. Through a multiplicity of exchanges, a natural price emerges that expresses the relation between the costs of production and the demand in the market. This natural price, which is not a product of human design, but results from the blind interplay of interests, governs the exchange activities of the *homo œconomicus* in an optimal way.<sup>253</sup> Unlike positive law, natural law, and the “just price” of Thomist philosophy, the natural price is not normatively determined in any respect. And since, unlike a positive law, this means of relating subjects is not established by convention and consent but is instead “discovered,” it is akin to a natural object, a truth existing independently of human will that must nevertheless be respected in order for action to be coordinated successfully. So the market is not only a site of coordination, but a site of verification.<sup>254</sup>

What form of relation is particular to society? From a sociological point of view, civil society is a system of interdependencies in which subjects labour on others’ behalf not because

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<sup>251</sup> Smith, *Wealth of Nations*, 14.

<sup>252</sup> *Ibid.*, 17.

<sup>253</sup> *Ibid.*, 29. For Smith’s critique of price regulation, see especially the “Digression concerning the Corn Trade and Corn Laws” in Book 4, Chapter 4 of his *Wealth of Nations*.

<sup>254</sup> Foucault, *Birth of Biopolitics*, 30-32.

they are bound by the ties of kinship, community, or the coercive force of the law, but rather because it is in their interest to do so. Because both the ethical normativity of communal association and the ambiguous, semi-coercive normativity of a deliberately instituted legal association are absent, this system of interdependencies is an anomic society in which the others to whom subjects relate are related to as *strangers*.<sup>255</sup> In this respect, civil society is at once social and antisocial. Although more pacific than the coercive facticity of state power, the sweetness of commerce does not extend beyond the shopkeeper's door. The commercial subject of exchange values others rather than viewing them (as the monadic subject of security does) as limitations to their own freedom,<sup>256</sup> but they value them not as persons with dignities, but instead as objects with prices.<sup>257</sup> As far as the subject of interest is concerned, the fact that a human being can speak does nothing to qualitatively distinguish them from a cow in terms of how they are appraised.<sup>258</sup>

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<sup>255</sup> Smith, *Wealth of Nations*, 14.

<sup>256</sup> The young Marx's famous depiction of civil society is still structured around the concepts of security and police. Here, man appears as "an isolated monad ... withdrawn into himself," and others appear as limitations to rather than as conditions for the realization of one's own freedom. Nevertheless, he recognized that a certain bond existed even among these monads, namely the bond of "natural necessity, need and private interest." See "On the Jewish Question," in *Karl Marx: Selected Writings*, ed. David McLellan (Oxford: Oxford University Press, 2000), 60-61.

<sup>257</sup> In a perfectly shameless reversal of Kantian ethics, Sieyès describes a "representative" sociability structured by the division of labour as a system in which others neither appear as *obstacles* to nor the *ends* of action, but instead as *means* to the realization of one's own interests. See Emmanuel Joseph Sieyès, "Of the Gains of Liberty in Society and in the Representative System," in *Emmanuel Joseph Sieyès: The Essential Political Writings*, ed. Oliver W. Lembcke and Florian Weber (Leiden: Brill, 2014), 144-151.

<sup>258</sup> Ferguson, *History of Civil Society*, 24.

In the Robinsonade of the nineteenth century's political economy, civil society is imagined as a *system of competition*. Here, the relation between small producers of unlike commodities mediated through exchange is relegated to the background. From this point onwards, the most important dynamic will instead be the relation between purveyors of similar commodities in competition with one another. While the dynamics of exchange foregrounded by the classical political economists permitted a certain equality to manifest itself in the form of equivalence, the dynamic of competition will instead be a producer of inequality. So civil society and the market is now understood as a sphere of competition rather than a sphere of exchange.<sup>259</sup>

While for Hobbes, the limitless acquisitiveness of human animals prevented all sociability in the state of nature's legal vacuum, political economists positing exactly the same animalistic anthropology discovered a kind of coercive law in the natural province of civil society. Here it is not human animals, but instead actual goats and dogs that inhabit Crusoe's island. Joseph Townsend's *Dissertation on the Poor Laws* describes the introduction of a pair of dogs to an island overrun with goats. With ample food, the dogs multiply, but never to the point of exhausting the supply of goats altogether. The nimblest goats escape to the rocks and continue to procreate. Just as the slowest goats are eaten by dogs, the least surefooted dogs succumb to hunger, and the population of each species on this hellish Noah's Ark is kept in an equilibrium by the interplay of competition and appetite. So although a dog cannot exchange, it can compete. The implication for English public policy was that the state must not supply the poor with any form of relief, since doing so would insulate them from competition and remove their appetitive

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<sup>259</sup> Foucault, *Birth of Biopolitics*, 118-119.

incentive to work. In contrast with Smith's analysis of the English corn laws, it is not the integrity of price formation in exchange, but instead the integrity of the coercive effects of competition that must be preserved as a natural reality. While in the jurists' state of nature appetite in the absence of law prevents all order, in civil society the facticity of hunger is substituted for the facticity of the sword, enforcing a beastly law of competition. And while for Hobbes, "covenants without the sword are but words,"<sup>260</sup> on Townsend's island nature calls in its own debts unaided.<sup>261</sup> Although Karl Polanyi's contention that Townsend introduced the concept of laws of nature into human affairs is likely overstated,<sup>262</sup> it is nevertheless the case that political economy—most likely before Townsend—transformed the appetitive law of nature from a law of insecurity into a law of sociability.<sup>263</sup>

Because the law immanent to the conduct of appetitive subjects of interest cannot be intuited directly, ensuring that the natural law of civil society remains in force will not be a matter of establishing a body of positive law that mirrors or complements the selfish laws of private advantage and the coercive laws of hunger, but instead a matter of ensuring that the dynamics governing the free play of interests and appetites are not disturbed. So in addition to being a field governed by a form of law, civil society will also be a province circumscribed by a kind of "right."

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<sup>260</sup> Hobbes, *Leviathan*, 106.

<sup>261</sup> Unlike the natural lawyers, who were at least aware that their states of nature were imaginary devices, Townsend's island narrative was apocryphal. Much like with contemporary economists, a certain healthy indifference to the facts was inseparable from the professional disposition of the classical political economists. See Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Boston: Beacon Press, 2001), 116-120.

<sup>262</sup> Polanyi, *Great Transformation*, 119.

<sup>263</sup> In the dedicatory letter preceding that very first work of civil philosophy, Hobbes remarked that "Man is a wolf to Man." It is fitting that in domesticating competition, Townsend substituted a dog for a wolf. See Thomas Hobbes, *On the Citizen*, ed. Richard Tuck and Michael Silverthorne (Cambridge: Cambridge University Press, 2003), 3.

## From the State of Right to *Laissez-faire*

Fascinatingly, the liberal tradition features not one but two different ways of establishing the limitation of state power, each with its own independent lineage. While the Lockean state of right originates in juridical theories of natural law and rights of religious conscience, the empiricist principle of *laissez-faire* originates in the effective arts of government running from *raison d'état* to theories of countervailing checks and balances to economic reason.

Even before the American framers' integration of countervailing powers into the mechanics of government, Montesquieu had already discovered that interest-oriented action could serve a limiting function not only *between* states or *within* the operation of the state, but also *against* the state. In contrast to the republican tradition, which had typically viewed the immobile landed wealth of the yeoman farmer as the economic precondition for political liberty, Montesquieu instead emphasized how the moveable wealth of the merchant class acted as a check on state power.<sup>264</sup> The mobility of the *lettre de change* gave its holder a power of exit against the territorially-based power of the state.<sup>265</sup> In this way the differentiation between the state and civil society complements the intra-institutional *disposition des choses* for which Montesquieu is more famous. Although here interest is still understood as a means of balance and not yet as a form of sociability, this is a crucial step towards the relocation of interested action from the state to the "natural" province of civil society.

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<sup>264</sup> Charles-Louis de Secondat Montesquieu, *The Spirit of the Laws*, ed. and trans. Anne M. Cohler, Basia C. Miller, Harold S. Stone (Cambridge: Cambridge University Press, 2000), bk. 22, ch. 14.

<sup>265</sup> Hirschman, *Passions and Interests*, 74-77. See also Albert O. Hirschman, "Exit, Voice, and the State," *World Politics* 31, no. 1 (October 1978): 90-107. For a later reiteration of the same argument, see Benjamin Constant, "The Liberty of the Ancients Compared with that of the Moderns," in *Constant: Political Writings*, ed. and trans. Biancamaria Fontana (Cambridge: Cambridge University Press, 1998), 324-325.

Rather than relying on the forms of right to establish the limits of state power *vis-à-vis* society, Montesquieu discovered a non-judicial, effective principle of limitation that does not say to the state “you may not” but instead “you cannot.” This substitution of effective for normative means of limitation is expressed well in a passage from the essay “On Politics,” where he contended that “it is useless to attack politics directly by showing how much its practices are in conflict with morality and reason ... it is better to follow a roundabout road and to try to convey to the great a distaste for certain political practices by showing how little they yield that is at all useful.”<sup>266</sup> It is not that a governor *may not* confiscate or regulate property because property is the basis of right, but simply that they *cannot* interfere with the power of wealth because modern forms of wealth circulate through invisible circuits of exchange.<sup>267</sup> To govern well, to be informed of the frontier between the facticity of the sword and the facticity of commerce, the governor “must now avail himself of art ... as well as of power and authority” (Sir James Steuart).<sup>268</sup> So, much like the *virtù* of the prince and the *raison d'état* of the statesman, the government of civil society will be a matter of effective power, not a matter of harmonizing action with a system of norms.

It would be more accurate to phrase the effective “you cannot” as an “I cannot.” Whether rights are asserted on behalf of aristocrats, Englishmen, or universalistic natural men, in all cases the juridical principle of right appears as an external limitation against the state on behalf of a party outside it. This was not the case with the effective forms of limitation discovered by the arts of government, which was not an external imposition, but rather a principle internal to the art

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<sup>266</sup> Quoted in Hirschman, *Passions and Interests*, 76-77.

<sup>267</sup> *Ibid.*, 72-73. Foucault is no doubt correct to point out that property forms a sort of “bridge” between the (especially Lockean) problematic of right and the empiricist problematic of interest. This intersection likely accounts for the centrality of property in liberal thought. See *Birth of Biopolitics*, 43.

<sup>268</sup> Hirschman, *Passions and Interests*, 82.

itself. Just as the prince was limited and authorized by necessity, and the statesman by the national interest, the governor is limited not by the rights of the *homo œconomicus* but instead by the invisible dynamics of the market. It is not the claims of a subject, but rather the *de facto* qualities of a process that circumscribe the limits of state power. Effective limitation does not assert the right or interest of an opposed party against the governor. The governor must respect the “laws” of economic sociability in order to better pursue their *own* objectives.<sup>269</sup>

In Montesquieu’s reflections on circulation as a power of exit it is possible to perceive the outline of a major facet of economic sociability that distinguishes it from earlier iterations of the art of government. For the Machiavellian prince, *fortuna* was certainly unknowable, but there was no question of avoiding the province of uncertainty, which was coextensive with the political field. Chance was an inescapable reality of politics (or perhaps even a constitutive reality of politics), and the best a prince could do was to cultivate personal qualities adequate to meet the aleatory occasion. And in *raison d’état*, the vectors of interest stabilizing the balance of power were transparent to the statesman. In the newly discovered province of civil society, and in the new science of interest, political economy, this will not be the case.

## §

The connection between opacity, naturalism, and *laissez-faire* is expressed very well in Burke’s *Reflections on the Revolution of France*, a classic work of empiricist argumentation. Against the juridico-constitutional politics of *perfectibilité* asserted in the French Revolution’s Rights of Man, Burke argued that political institutions are not transparent constructions of human

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<sup>269</sup> Foucault, *Birth of Biopolitics*, 9-11.

reason, but rather the unplanned product of an organic course of development. Because “the real effects of moral causes are not always immediate,” human action is an opaque field of unintended consequences in which motives are more often than not frustrated by their outcomes. The political and social world is so complicated that it would take more than a lifetime to acquire the knowledge and experience required to make it transparent, so there can be neither an *a priori* nor an *a posteriori* science of constitution building. Instead of enacting the designs of the legislator or following the experience of the statesman, it is wiser to find recourse in the experience of the political order itself, which “learns” through the accumulated tests of time.<sup>270</sup> This course of organic development places the political order in correspondence with the “order of the world,” enlisting nature’s peculiar “wisdom without reflection” in designing the second nature of human artifice.<sup>271</sup> This wisdom without reflection is never codified or positivized in such a way that it could become transparent once and for all. The well-ordered state never crosses a threshold of maturity, but instead continues to rely on an opaque, natural process which must not be subjected to the designs of an *a priori* legislator, but instead simply let be.

Burke’s line of argumentation lives its very best days after leaving politics for a career in the private sector, so to speak. In this argumentative context, it is not political institutions and the world of “moral causes,” but rather the commercial sociability of civil society which will be understood as the opaque, natural object of *laissez-faire*.<sup>272</sup> Just as the laws of politics reflect the order of the world, the “laws of commerce ... are the laws of nature, and consequently the laws

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<sup>270</sup> Burke, *Reflections on the Revolution in France*, 61.

<sup>271</sup> *Ibid.*, 33-34.

<sup>272</sup> Concerning the resemblance between Burke’s empiricist political thought and the political economy of the Scottish sociologists, Adam Smith remarked that Burke was “the only man I ever knew who thinks on economic subjects exactly as I do without any previous communication having passed between us.” See Ernst Barker, “Burke and his Bristol Constituency, 1774-1780,” in *Essays on Government* (London: Oxford University Press, 1965), 158.

of God.”<sup>273</sup> Whereas in Burke’s political empiricism, public institutions were opaque to the legislator because they were complex objects fabricated by a natural process rather than by human design, in civil society human behaviour is opaque because it is undertaken in the context of a web of dependencies too extensive and complex to be made transparent to the actor. The *homo œconomicus* is a monad only in a normative sense, but not in an existential sense. Unlike the *homo juridicus* imagined in social contract theories, its existence is defined not by its autonomy, by its capacity to secure a space of independent action through the apparatus of right, but rather through its somewhat inhuman relations of commerce with others.<sup>274</sup>

This ontology of action involves nothing less than a reimagining of human freedom. Sieyès, who had a prodigious ability to invent and detect analogies between economic and political forms, was acutely aware of this. In a way that complements Montesquieu’s critique of the republican yeoman’s form of property, Sieyès proposed that it was not the autarkic *independence* of the small producer, but rather the *interdependence* of partners in exchange that provided the material basis for freedom.<sup>275</sup> Lines of critique focussing on the “individualistic” character of economic action risk overlooking the fact that the subject of interest is always already thrown into a definite form of sociability. To confuse this form of sociability with the default disposition of unrelated individuals is to fall prey to the naturalistic ideology of civil society. The problem of empiricist liberalism is not a matter of circumscribing the autonomy of

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<sup>273</sup> Edmund Burke, *Thoughts and Details on Scarcity* (London: F. and C. Rivington, 1800), 32. This choice of quotation is borrowed from Asher Horowitz and Gad Horowitz, *Everywhere They are in Chains: Political Theory from Rousseau to Marx* (Scarborough: Nelson Canada, 1988), 130.

<sup>274</sup> Foucault, *Birth of Biopolitics*, 277.

<sup>275</sup> Nadia Urbinati, *Representative Democracy: Principles and Genealogy* (Chicago: University of Chicago Press, 2006), 144. On the link between freedom and interdependence see also Sieyès, “Gains of Liberty in Society,” 144-151.

*individuals*, but rather a matter of enframing an intersubjective *sphere of action* home to a specific mode of sociability.

So we can see that the sociability of civil society is opaque not only to sovereigns, legislators, or even the governor whose art informs them “you cannot,” but also to the economic actors themselves.<sup>276</sup> Given this double opacity, how then are actions coordinated in the absence of political and individual planning? How do the interests of the *homo æconomicus* form a system of needs? The political economists posited a principle of coordination which, like Burke’s “wisdom without reflection,” superficially resembles a providential design. But unlike God’s plan, this principle is not mysterious, but simply opaque. Although its operation is not transparent to the agents who act as its parts, this is not to say it is any more mysterious than the sedimentation of time’s tests in political institutions. However, in contrast to Burke’s account of institutional providence, the providence of civil society will be less a process than a mechanism. Its activity will not be a matter of shaping a shared world, but rather a matter of coordinating relations between individuals on an ongoing basis. Once again, we are in the territory of Bernard Mandeville and Adam Smith, where private vices (or interests) are transformed into public benefits by an invisible hand. Here, “every individual is continually exerting himself to find out the most advantageous employment for whatever capital he can command. It is his own advantage, indeed, and not that of the society, which he has in view. But the study of his own advantage naturally, or rather necessarily leads him to prefer that employment which is most advantageous to the society.”<sup>277</sup> In this way, although “he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his

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<sup>276</sup> The opacity of the economic world to economic actors is described very well by F. A. Hayek. See “The Use of Knowledge in Society,” *The American Economic Review* 35, no. 4 (September 1945): 519-53.

<sup>277</sup> Smith, *Wealth of Nations*, 421.

intention ... By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it.”<sup>278</sup>

There are two levels to Smith’s critique of regulation. Firstly, because an interest is more proximate to the interested party than to the regulator, “every individual, it is evident, can, in his local situation, judge much better than any statesman or lawgiver can do for him. The statesman, who should attempt to direct private people in what manner they ought to employ their capitals, would not only load himself with a most unnecessary attention, but assume an authority which could safely be trusted.”<sup>279</sup> Although the simple liberation of prudent individual action might be sufficient to secure a society of independent property holders, it is not yet enough to establish a commercial society mediated by exchange. It is not enough that interests be well-tended to and aggregated. To form a system of dependencies, they must also be related to one another in a specific way. So in addition to this straightforward epistemic argument, Smith makes an additional argument that is not concerned with the prudence of the individual but with the integrity of an intersubjective mechanism. Civil society is not only a province of unintended consequences, but also of a kind of unplanned planning. The blind action of the *homo oeconomicus* produces a spontaneous harmonization of interests. Under circumstances in which “all systems either of preference or of restraint [are] completely taken away, the obvious and simple system of natural liberty establishes itself of its own accord.”<sup>280</sup> So here too, the natural order of the world produces a kind of wisdom that is inaccessible to the reflection of both the governor and the subject of interest. Unlike the anarchical international affairs of interested nations that the statesman could at best hope to balance, the sociability of interested subjects

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<sup>278</sup> Ibid., 423.

<sup>279</sup> Ibid., 423, and also 497.

<sup>280</sup> Ibid., 651.

does not only produce a balance, but also a spontaneous and productive harmonization of means.<sup>281</sup>

Precisely because it is coordinated automatically, civil society is opaque, and no amount of virtuosity or statesmanship is able to subdue or rebalance the action undertaken there. Where Burke's political naturalism disenchanting the forms of right, the naturalism of political economy disenchanting state economic regulation.<sup>282</sup> When state power interferes with this system of natural liberty (for instance, through the regulation of prices or the curtailment of competition), it does not trespass against its rights so much as it distorts its operation. As Smith puts it:

Every system which endeavours, either, by extra-ordinary encouragements, to draw towards a particular species of industry a greater share of the capital of the society than what would naturally go to it; or, by extraordinary restraints, to force from a particular species of industry some share of the capital which would otherwise be employed in it; is in reality subversive of the great purpose which it means to promote. It retards, instead of accelerating, the progress of the society towards real wealth and greatness; and diminishes, instead of increasing, the real value of the annual produce of its land and labour ... The sovereign is completely discharged from a duty, in the attempting to perform which he must always be exposed to innumerable delusions, and for the proper performance of which no human wisdom or knowledge could ever be sufficient; the duty of superintending the industry of private people, and of directing it towards the employments most suitable to the interest of the society<sup>283</sup>

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<sup>281</sup> Foucault, *Birth of Biopolitics*, 54; Hirschman, *Passions and Interests*, 51-52.

<sup>282</sup> The disenchantment of politics by economics predates neoliberalism. It was preceded by the disenchantment of politics by interest in liberal political thought, and the disenchantment of politics by *societas* in Augustine's political thought. See Wolin, *Politics and Vision*, 117, 251, 260.

<sup>283</sup> Smith, *Wealth of Nations*, 650-651.

Bound up by the “laws of his political œconomy” (Steuart),<sup>284</sup> the governor must *laissez-faire*. For this reason, political economy is a “critical” discipline in the Kantian sense: political economy establishes the limits of possible knowledge. It will act as an adjunct to the arts of government in its capacity for performing a critique of governmental reason.<sup>285</sup>

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<sup>284</sup> Hirschman, *Passions and Interests*, 83-84.

<sup>285</sup> Foucault, *Birth of Biopolitics*, 12-17, 280-283, 286. Political economy did not always understand itself as self-limiting or “critical” in this way. The Physiocrats shared the naturalism of the Scottish Enlightenment, but nevertheless held that the *ordre naturel* of the market was transparent to the sovereign, and that its laws of motion must be complemented by their codification in positive law. See Foucault, *Birth of Biopolitics*, 284-286; Habermas, *Theory and Practice*, 90, 100-101.

## Chapter 3: Empiricist Theories of Democracy

### Democracy as Exchange: Sieyès' Sociology of Representation and Divided Labour

Much like Kant's transcendental critique of pure reason, the empirical critique of governmental reason is a matter of making room for freedom. At the limits of their knowledge, the governor encounters the limits of their power. The province of opacity and the province of *laissez-faire* are coextensive. But of course, this is only a particular way of imagining freedom: namely, the way a *homo oeconomicus* imagines it. It is emphatically not the public freedom of the citizen. And while the Montesquieu-Steuart thesis may be correct, and the market may well act as a check on the arbitrary power of the despot, when the market says "you cannot" to political power it does not distinguish between the power of popular and princely sovereigns.<sup>286</sup> So the operation of the market is also an impassable frontier for democracy.

In Emmanuel Joseph Sieyès'<sup>287</sup> writings we find the first and arguably the most significant encounter between the fully-developed discourse of civil society and political thought. It is not entirely outrageous to think of the Abbé as the Adam Smith of political theory. In Sieyès' writings, the system of needs does not appear as the boundary of political power, but instead as the form on which the political organization is modelled.<sup>288</sup> So the problem here is not

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<sup>286</sup> Albert O. Hirschman, *The Passions and the Interests: Political Arguments for Capitalism before Its Triumph* (Princeton: Princeton University Press, 1997), 124.

<sup>287</sup> Emmanuel Joseph Sieyès (1748-1836) was most well known for his pamphlet *Qu'est-ce que le Tiers État?* which theoretically articulated the political principles of the French Revolution, bringing him immediate fame. During the course of the revolution, Sieyès acted as deputy of the Third Estate. However, since his political sympathies were moderate and liberal, he withdrew from revolutionary politics shortly after the Jacobins seized power.

<sup>288</sup> William H. Sewell, *A Rhetoric of Bourgeois Revolution: The Abbé Sieyès and What is the Third Estate?* (Durham: Duke University Press, 1994), 106.

differentiation, but sublimation. Like Hobbes, Sieyès occupied an ambiguous position at the crossroads of anthropic and mechanistic analogies, between juridical and empiricist liberalism. To understand the novelty of Sieyès' contribution to empiricist liberalism and the displacement of democratic by liberal political forms, these elements must be carefully distinguished. When one considers these economic theories of politics separately, it becomes apparent that Sieyès was a highly original political thinker who was ahead of his time in many respects. Across his somewhat scattered writings on these topics we find an idiosyncratic form of political economy, influential reflections on political institutions, and a novel theory of representation. At the core of these contributions lies nothing less than an entirely original account of human freedom.

## §

In Hobbes' political thought the ambiguity between juridical and empiricist elements appears as a kind of two-world theory. The animalistic humans depicted in the state of nature are a rudimentary form of *homo oeconomicus* who calculate or "reckon" with their felicitic appetites and aversions.<sup>289</sup> The enactment of the covenant transforms the facticity of appetitive and violent empirical motives into the validity of obedience, consent, and the institution of the sovereign juridical edifice. In Sieyès' political thought, the coexistence of juridical and empiricist elements appears in a different, less systematic way. Rather than being separated by a threshold, economic sociability and legal forms are intermixed in every facet of his theory. In contrast to the "social

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<sup>289</sup> Bertrand de Jouvenel goes as far as to argue that "Hobbes is the father of political economy. His representation of man is identical with *homo oeconomicus*." see *Sovereignty: An Inquiry into the Political Good*, trans. J. F. Huntington (Chicago: University of Chicago Press, 1957), 239.

theory of representation” developed by his predecessors Mirabeau and Quesnay,<sup>290</sup> Sieyès was not only concerned with putting the juridico-political order in the service of an economic order of civil society that it reflects or represents, but also with reimagining the political apparatus in terms of the principles governing the sociability of civil society.<sup>291</sup>

In recent years, Sieyès’ concept of constituent power has received ample attention.<sup>292</sup> Andreas Kalyvas and others have detected a more democratic (or at least more circumscribed) form of sovereignty which offers an alternative to the absolutist formulation of the concept inherited from Bodin. Drawing on Sieyès, Kalyvas proposes that the sovereign may be understood as the creative subject who constitutes a legal order which they remain at a distance from rather than as a repressive absolute power whose will coincides with the legal order.<sup>293</sup> While the theory outlined in “What is the Third Estate?” is unmistakably influenced by Rousseau’s general will,<sup>294</sup> constituent power is not a form of sovereignty, a concept Sieyès

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<sup>290</sup> This terminology is borrowed from Keith Michael Baker, *Inventing the French Revolution: Essays on French Political Culture in the Eighteenth Century* (Cambridge: Cambridge University Press, 1990), 238-243.

<sup>291</sup> In this respect, Nadia Urbinati understates her case when she describes the political system as a superstructure or reflection of the social order. See *Representative Democracy: Principles and Genealogy* (Chicago: University of Chicago Press, 2006), 140. Michael Sonenscher does something similar in describing representation as a “bridge” between the political system and private life. See “Introduction,” in *Sieyès: Political Writings*, ed. and trans. Michael Sonenscher (Indianapolis: Hackett, 2003), xxix-xxx.

<sup>292</sup> See for instance Andreas Kalyvas, *Democracy and the Politics of the Extraordinary: Max Weber, Carl Schmitt, and Hannah Arendt* (Cambridge: Cambridge University Press, 2008) and “Popular Sovereignty, Democracy, and the Constituent Power,” *Constellations* 12, no. 2 (May 2005); Antonio Negri, *Insurgencies: Constituent Power and the Modern State*, trans. Maurizio Boscagli (Minneapolis: Minnesota University Press, 1999), 211-220.

The recent revival of interest in Sieyès’ theory of constituent power is linked to the revival of interest in Schmitt’s political thought, and in fact replicates Schmitt’s interpretive errors. See Lucia Rubinelli, “How to Think Beyond Sovereignty: On Sieyès and Constituent Power,” *European Journal of Political Theory* 18, no. 1 (January 2019): 61-62.

<sup>293</sup> Kalyvas, “Popular Sovereignty, Democracy, and the Constituent Power,” 225-228.

<sup>294</sup> See especially Emmanuel Joseph Sieyès, “What is the Third Estate?” in *Sieyès: Political Writings*, ed. and trans. Michael Sonenscher (Indianapolis: Hackett, 2003), 136-138.

associated with the politics of absolutism, and carefully avoided.<sup>295</sup> Nevertheless, constituent power is undeniably a juridical element. In contrast to the absolutist concept of sovereignty, the *pouvoir constituant* is not a mechanical man, but instead a man who constructs a mechanism. In this way it conforms to the pattern described above wherein liberal political thought attempts to circumscribe the anomic powers of volition within the forms of law.<sup>296</sup> While parties to the Hobbesian covenant go to sleep at the moment they institute a sovereign, Sieyès' constituent power goes to sleep at the very moment at which it institutes a constitutional order. Once again, dead labour dominates the living, and the monster is swallowed by the coldness.

The empiricist element in this theory is not found in the relationship between constituent and constituted, but rather in the way Sieyès described the *pouvoir constituant*. Much like the parties to the Hobbesian covenant, Sieyès understood the constituent subject in economic terms. However, unlike the inhabitants of the state of nature, the constituent power is not depicted atomistically, but rather as an already-constituted whole. What is the constituent power? The constituent power is the nation. What is the nation? The nation is the Third Estate. Why does the Third Estate enjoy this status exclusively, rather than giving the prerogative of instituting the political order to any subject at all, like in Hobbes' account? To understand this, it is necessary to consider first how Sieyès reimagined the Third Estate. In the prerevolutionary Estates-General, the Third Estate appeared as one—and the least one—among others (the clergy, the nobility). For Sieyès, the Third Estate was not one among the others, but instead the particular universal, the

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<sup>295</sup> In his introduction to *Sieyès: Political Writings* (xxiv), Michael Sonenscher contends that Sieyès' *pouvoir constituant* amounts to an assertion of sovereignty despite acknowledging that Sieyès never used the word. For an interesting criticism of how constituent power has been misinterpreted as a form of sovereignty in recent treatments of the topic, see Rubinelli, "How to Think Beyond Sovereignty."

<sup>296</sup> This aspect of constituent power is evident in Kalyvas' account, which emphasizes that constituent power operates through legislation rather than through rule. See "Popular Sovereignty, Democracy, and the Constituent Power," 227.

part that stands in for the whole.<sup>297</sup> The Third Estate is everything. On what title does this claim rest? What is the substance of the universality appealed to here? In contrast to the historians of the aristocratic right, Sieyès understood the nation not in racial or ethno-historical terms, but rather in terms of certain kinds of activity.<sup>298</sup> These activities are services, employments, works, and functions. A nation is not an entity on behalf of which works are performed, it is the entity that performs the works of society. The Third Estate is the class that undertakes the totality of works, therefore it is not a particular division of the nation, but rather the complete nation.<sup>299</sup> So the problem of constituent power will not be a matter of re-constituting the Estates-General, but instead a matter of constituting a national assembly.<sup>300</sup>

We can see then that Sieyès' constituent subject is not a collection of atomized *homo juridicus*, nor even a collection of atomized appetitive subjects or *homo œconomicus*. Instead, it is a grouping of *homo œconomicus* who have already been related and associated in a definite

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<sup>297</sup> Reading Sieyès' words it is difficult not to think of Marx's description of the proletariat as "a class in civil society that is not a class of civil society, of a social group that is the dissolution of all social groups, of a sphere that has a universal character because of its universal sufferings and lays claim to no particular right, because it is the object of no particular injustice but of injustice in general," who "can no longer lay claim to a historical status, but only to a human one." The parallel between bourgeois and proletarian revolutionary formulations was in no way lost on Marx, who contended that "the condition for the emancipation of the working class is the abolition of every class, just as the condition for the liberation of the third estate, of the bourgeois order, was the abolition of all estates and all orders." See "Towards a Critique of Hegel's *Philosophy of Right*: Introduction" and "The Poverty of Philosophy," in *Karl Marx: Selected Writings*, ed. David McLellan (Oxford: Oxford University Press, 2000), 81, 232.

<sup>298</sup> Michel Foucault, *Society Must Be Defended: Lectures at the Collège de France 1975-1976*, ed. Mauro Bertani and Alessandro Fontana, trans. David Macey (New York: Picador, 2003), 217-220.

Sieyès ironically inverted the aristocratic discourse in which particularistic rights are derived from the conquests of the past, proclaiming that "the Third estate will become noble again by conquering in its turn." See "What is the Third Estate?" 99.

<sup>299</sup> This line of argument was not exclusive to French liberalism. English Whigs likewise understood the middle class as a "general class" fit to represent not only themselves, but the whole of society. See Samuel H. Beer, "The Representation of Interests in British Government: Historical Background," *The American Political Science Review* 51, no. 3 (September 1957): 630-631.

<sup>300</sup> Sieyès, "What is the Third Estate?" 94-98.

way. In other words, Sieyès' constituent power is *civil society*.<sup>301</sup> In one respect, this resembles the more juridically-oriented theory of Locke, for whom the institution of government was not the work of atomized natural subjects, but rather the work of an already-constituted society.<sup>302</sup> But where Locke's pre-governmental society was constituted through legal means, Sieyès' nation is not formed by a *pactum unionis* but instead by purely commercial forms of association. The strange social contract that Sieyès imagined in his "Letters to the Economists" is truly social rather than political. If the development of liberal thought involves a gradual movement from the juridical pole of security and law to the acquisitive pole of propriety and exchange, Sieyès' contract theory stands at the end of this trajectory:

An association is only a more perfect means to obtain with greater profusion and more certainty what each desires, wealth. Therefore society, independently of the power of nature which produces goods, must have a living force coproductive of wealth, and it is necessary that the elements of that force, united by society, produce more than they would if they remained isolated. The sum of the labors of all citizens forms the living force. If there is a citizen who refuses his portion of activity he renounces his rights; no man may enjoy the labor of others without exchange. General labor is therefore the foundation of society, and the social order is nothing but the best possible order of labor.<sup>303</sup>

What we appear to have here is a contract theory that does not narrate the constitution of the state by a single political contract, but instead describes the constitution of society through a

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<sup>301</sup> Baker, for instance, observes that Sieyès "characterized the nation as a socioeconomic entity ... a 'real' order of relations, based on property, rather than a 'personal' order based on status." See *Inventing the French Revolution*, 245.

<sup>302</sup> John Locke, *Second Treatise of Government*, ed. C. B. Macpherson (Indianapolis: Hackett, 1980), §211.

<sup>303</sup> The translation of this passage from Sieyès "Letters to the Economists" is borrowed from an invaluable source, Sewell, *Rhetoric of Bourgeois Revolution*, 76.

multiplicity of commercial contracts. While in Hobbes' contract theory the moment of consent was concentrated in the moment subjects alienate their right to all things and institute a commonwealth, and in Rousseau's contract theory consent was reiterated periodically as citizens assemble to silently ratify the laws, for Sieyès consent was not confined to an identifiable moment but was instead realized continuously in the dynamics of an unceasing process of private, commercial exchange.<sup>304</sup> In place of a "general will," he instead spoke of the "general labour" of society.<sup>305</sup>

Another curious mixture of juridical contract theory and the empiricist discourse of civil society appears in "What is the Third Estate?" where Sieyès asked the reader to consider a natural history of political orders divided into three epochs:

In the first of these epochs, one can imagine a more or less substantial number of isolated individuals seeking to unite. This fact alone makes them a nation. They have all the rights of a nation; it is simply a matter of exercising them. This first epoch is characterized by the activity of *individual* wills. The association is their work. They are the origin of all power.

The second epoch is characterized by the action of a *common* will. Here, everyone involved in the association seeks to give their union consistency. They all want to accomplish its purpose. Thus, they confer with one another and agree upon public needs and how to meet them. Here it can be seen that power belongs to the public. Individual wills still lie at its origin and still make up its essential underlying elements. But taken separately, their power would be null. Power resides solely in the whole. A community has to have a common will. Without this *unity* of will, it would not be able to make itself a willing and acting whole. It is also certain that this whole has no rights that are not connected to the common will.

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<sup>304</sup> Urbinati, *Representative Democracy*, 140-141.

<sup>305</sup> Sewell, *Rhetoric of Bourgeois Revolution*, 77-78.

Now consider the passage of time. The members of the association will have become too numerous and too widely dispersed to be easily able to exercise their common will themselves. What do they do? They will detach all that is needed for overseeing and providing for public concerns and will entrust that portion of the national will—and consequently power—to the exercise of some of their number. This brings us to the third epoch, or the period of *government by proxy*.<sup>306</sup>

Although there is a clear echo of social contract theory in the transition from the first to the second epoch, unlike in the traditional accounts of natural law the incorporation of a multitude into a single will is not the most decisive transition. Sieyès did not present this moment as a threshold, but simply as a stage. In this respect his exposition of the civilizing process resembles the one that appears in the Scottish sociologists' natural histories. Between the second and the third epoch, the problem is no longer the constitution of a juridico-political edifice, but instead a question of how an already-instituted political power is to be exercised. It is this concern with the effective exercise of power and the means by which he proposed that this problem be addressed that brings this pseudo contract theory into the orbit of the empiricist discourse of civil society.

So what are these means, what is “government by proxy”? Sieyès had far more in mind here than the second Lockean contract that effects the institution of government. Government by proxy is only a special case of a phenomenon that, for Sieyès, was the all-encompassing social relation that gives the modern age its specificity. Government by proxy is a special case of representation. But what is representation? For Sieyès, representation is not the monarch's manifestation of the nation's unity, nor is it an activity of exercising reason in public. Sieyès' theory does not speak of the sovereign's representation of public authority or parliament's

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<sup>306</sup> Sieyès, “What is the Third Estate?” 134.

representation of the public sphere, but instead introduces a form of representation originating in the discourse of civil society: political economy.<sup>307</sup> Representation is the division of labour. Conversely, divided labour is representative.<sup>308</sup> To be precise, representation is not a principle illustrated by the division of labour, nor is it a subset of divided labour. For Sieyès, the two are identified outright.<sup>309</sup> It is not inaccurate to speak of a public office holder as a worker hired to labour on one's behalf, nor is it mistaken to speak of a shoemaker as one's representative.<sup>310</sup> Whereas juridical concepts of incorporation and parliamentary concepts of public reason understand representation as a kind of *activity*, either an activity of manifestation, identification, or discussion, in Sieyès' theory representation is fundamentally a *relationship* between representative and represented.<sup>311</sup>

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<sup>307</sup> Murray Forsyth, *Reason and Revolution: The Political Thought of Abbé Sieyès* (New York: Leicester University Press, 1987), 133; Sewell, *Rhetoric of Bourgeois Revolution*, 68-69.

<sup>308</sup> In an unpublished essay entitled "Bases of the Social Order," Sieyès contended that "the division of labour ... is simply the representative system establishing itself spontaneously." See Forsyth, *Reason and Revolution*, 142.

<sup>309</sup> Although the analogy between representation and divided labour may not originate with Sieyès, he was almost certainly unique in identifying the two. It is well known that Rousseau's criticism of political representation hinges on the metaphysical postulate that the will cannot be alienated. It is less often appreciated that he also advanced another critique of representation that does not concern the vice of division, but privatization. The following condemnation appears in Book 3 Chapter 15 of his *Social Contract*: "Once public service ceases to be the chief business of the citizens, and they prefer to serve with their wallet rather than with their person, the state is already near its ruin. Is it necessary to march off to battle? They pay mercenary troops and stay at home. Is it necessary to go to the council? They name deputies and stay at home. By dint of laziness and money, they finally have soldiers to enslave the country and representatives to sell it."

Incredibly, Marx made the same analogy when (approvingly!) describing the practice of deputization in the Paris Commune, where "instead of deciding once in three or six years which member of the ruling class was to misrepresent the people in Parliament, universal suffrage was to serve the people, constituted in Communes, as individual suffrage serves every other employer in the search for the workmen and managers in his business. And it is well known that companies, like individuals, in matters of real business generally know how to put the right man in the right place." See Karl Marx, "The Civil War in France," in *Karl Marx: Selected Writings*, ed. David McLellan (Oxford: Oxford University Press, 2000), 588; Jean-Jacques Rousseau, *On the Social Contract*, in *Jean-Jacques Rousseau: The Basic Political Writings*, ed. and trans. Donald A. Cress (Indianapolis: Hackett, 1987), 197.

<sup>310</sup> Sonenscher, "Introduction," xxix.

<sup>311</sup> Even if one does not share the questionable assumption that there can be any such thing as a "true" concept of representation, Hanna Fenichel Pitkin's *The Concept of Representation* is still an invaluable resource for rigorously distinguishing between the kinds of things that representation can be.

The political developmental narrative introduced in “What is the Third Estate?” was complemented by a social narrative that will appear familiar to readers of Smith:

Here is the progress of [the social] order. First, each man acquires alone nearly all his goods. Their number increases with the means, and as these become more complicated, divisions of labor form; the common advantage requires this, because laborers are less distracted by cares of the same nature than they would be by occupations of different kinds; they therefore tend to produce greater effects with fewer means. The divisions are multiplied continually by virtue of this law of all work: improve the effect and diminish the expense.<sup>312</sup>

So exactly like Smith,<sup>313</sup> Sieyès narrated the civilizing process in terms of the extension of divided labour. But unlike the Scottish political economists, his account was not confined to narrating the development of private, commercial life. Because representation and divided labour are identified, Sieyès did not distinguish the principles of politics from the principles of civil society: “The more a society progresses in the arts of trade and production, the more apparent it becomes that the work connected to public functions should, like private employments, be carried out less expensively and more efficiently by men who make it their exclusive occupation. This truth is well known.”<sup>314</sup> The idea of representative divided labour provided him with a total sociology of modernity.<sup>315</sup>

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<sup>312</sup> Once again, this translated passage from Sieyès’ “Letters to the Economists” is borrowed from Sewell, *Rhetoric of Bourgeois Revolution*, 78.

<sup>313</sup> E. G. West, “Smith’s Two Views on the Division of Labour,” *Economica* 31, no. 121 (February 1964): 24.

<sup>314</sup> Emmanuel Joseph Sieyès, “Views of the Executive Means Available to the Representatives of France in 1789,” in *Sieyès: Political Writings*, ed. and trans. Michael Sonenscher (Indianapolis: Hackett, 2003), 48.

<sup>315</sup> In discussing *The Wealth of Nations*, Joseph Schumpeter commented that “nobody, either before or after A. Smith, ever thought of putting such a burden upon division of labor.” Perhaps he had not read Sieyès. See *History of Economic Analysis*, ed. Elizabeth Boody Schumpeter (n.p.: Routledge, 1986), 182.

Exactly like Rousseau, Sieyès viewed the modern age as the age of commerce, and attempted to articulate a form of political freedom suitable to modern conditions. Since the inhabitants of modern commercial society are too preoccupied with their private acquisitive activities to participate in politics,<sup>316</sup> they must be represented not only in governing (as with Rousseau), but also in legislating.<sup>317</sup> So while for Rousseau sovereignty could not be represented, and appointing a legislative representative was akin to enslaving oneself to a master,<sup>318</sup> for Sieyès being represented in any field of activity at all was akin to placing a servant in one's hire.<sup>319</sup>

## §

Sieyès made the implications of this sociology of representation for democracy very clear in a pamphlet entitled “On the New Organization of France”:

Among men there can only be one legitimate government. It can manifest itself in *two* different forms.

The members of a political association wish either to govern themselves, or to choose some of their number to be occupied with the care and attention that public needs require.

In the first case, it is pure, I would almost say raw democracy, by analogy with the raw materials and the crude foodstuffs ...

Nature has submitted us to the law of labor. She has made the first advances to us, and then said: Do you wish enjoyments? Labor. It is for a more certain, more abundant, and more

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<sup>316</sup> Forsyth, *Reason and Revolution*, 138.

<sup>317</sup> Sieyès, “Views of Executive Means,” 50.

<sup>318</sup> Rousseau, *Social Contract*, 197-198.

<sup>319</sup> Sewell, *Rhetoric of Bourgeois Revolution*, 92.

differentiated consumption, and consequently to impart greater energy to production and to guarantee and perfect his labor ever more, that man decided to unite with his fellows. Reason, or at least experience, still says to man: you will succeed more in your labors the more you learn to limit them. By concentrating all the faculties of your mind on only a portion of the totality of useful work, you will obtain a greater production with less effort and less expense. Hence arises the division of labor, the effect and the cause of the growth of wealth and the improvement of human industry. This matter is thoroughly developed in the work of Dr. Smith ... It applies as much to political labors as to all other types of productive labor. The common interest, the amelioration of the social state itself, cries for us to make of government a distinct profession ...

Hence, a purely democratic constitution not only becomes impossible in a large society, but even in the smallest state it is far less appropriate to the needs of society, far less conducive to the objects of political union, than the *representative* constitution.<sup>320</sup>

The first empiricist theory of representation was presented not only as different from, but in fact as the opposite of democracy. Despite some confusions that will arise later as the concept is transformed beyond recognition, there is no such thing as an empiricist theory of democracy. Although the developmental pattern described here has never existed, and a primitive, raw, and dilettantish democracy has never evolved into representative government, Sieyès was not mistaken in differentiating the representative principle of specialization from the non-specialized nature of actually-existing democracy.<sup>321</sup> Mistakes only arose when his evaluative difference

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<sup>320</sup> Ibid., 90-91. The resemblance between the polarity of democracy and representation introduced here and that which appears in Schmitt's democratic theory is interesting. See *Constitutional Theory*, ed. and trans. Jeffrey Seitzer (Durham: Duke University Press, 2008), 239.

<sup>321</sup> Lucia Rubinelli describes the fact that Sieyès is considered an influential theorist of democracy despite explicitly rejecting the possibility of democracy under modern conditions as a "contradiction." But there is no inconsistency in Sieyès' thought in this respect; his opposition to democracy was unequivocal. It is not his thought, but rather its reception history that is confused. The same might be said of the concept of representative democracy itself. See "Of Postmen and Democracy: Sieyès's Theory of Representation," in *Democratic Moments: Reading Democratic Texts*, ed. Xavier Márquez (London: Bloomsbury Academic, 2018), 98.

compromised his interpretation of raw democracy. In Thucydides' retelling of the funeral oration, Pericles specifically praised the Athenians for their self-sufficiency and versatility, boasting that no other city's man was "equal to so many emergencies."<sup>322</sup> The ancient democrats did not fail to develop their political institutions along the lines of the division of labour—they resisted it deliberately. Many choices in the institutional design of the ancient *polis* are only intelligible if one takes this resistance to bureaucratic rule by specialists into account.<sup>323</sup> Thomas Paine's speculation that "Athens, by representation, would have surpassed her own democracy" would have been entirely alien to the common sense of the ancient democrats,<sup>324</sup> who deliberately avoided the use of election on the grounds that it was an aristocratic or oligarchic institution that allowed the elected to monopolize public offices, depriving the *demos* of a commonly shared space in which to exercise their "happy versatility."<sup>325</sup>

The Athenian democrats were less concerned with the efficiency and productivity of work than with the sharing of power and the development of a well-rounded human type. Smith was famously ambivalent about the technical division of labour within the same trade, which on the one hand was responsible for "the greatest improvement in the productive powers of labour," and on the other hand caused the labourer to become "as stupid and ignorant as it is possible for

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<sup>322</sup> Thucydides, "The Funeral Oration of Pericles," in *The Portable Greek Historians: The Essence of Herodotus, Thucydides, Xenophon, Polybius*, ed. M. I. Finley (New York: Penguin, 1977), 269-270.

<sup>323</sup> See for instance J. W. Headlam, *Election by Lot at Athens* (London: Cambridge University Press, 1891), 31-32; Bernard Manin, *The Principles of Representative Government* (New York: Cambridge, 1997), 16, 32.

Fascinatingly, precisely the same concern with the deprofessionalization of public office can be detected in actually-existing modern democracy. See Bruno Leipold, "Marx's Social Republic," in *Radical Republicanism: Recovering the Tradition's Popular Heritage*, ed. Bruno Leipold, Karma Nabulsi, and Stuart White (Oxford: Oxford University Press, 2020), 190.

<sup>324</sup> Thomas Paine, *Rights of Man, Part II* in *Thomas Paine: Political Writings*, ed. Bruce Kuklick (Cambridge: Cambridge University Press, 1997), 180.

<sup>325</sup> Aristotle, *The Politics*, trans. T. A. Sinclair (New York: Penguin, 1992), bk. 4, ch. 9, 1294a35-1294b13; bk. 5, ch. 8, 1308a3-1308a23; Thucydides, "Funeral Oration of Pericles," 269-270.

a human creature to become.”<sup>326</sup> Of course, the Athenians did not develop and resist the *division of labour in manufacture* specific to capitalist productive organization, but they regarded the more historically-ubiquitous *social division of labour* with suspicion. Dedicating oneself to any one form of work exclusively was considered incompatible with wholeness of character befitting the development of a free man. Excessive specialization in any single craft or even a free art was understood to make a man a part rather than a whole, leading to a one-sidedness and deformity.<sup>327</sup> But it is precisely this social division of labour that most impressed Sieyès, who considered himself to have surpassed Smith by placing it, rather than the division of labour in manufacture, at the centre of his economic sociology.<sup>328</sup> The anti-democratic polemic that appears in “Bases of the Social Order” is articulated against the dilettantism of undivided labour:

Now tell me what is the idea of those who wish to democratize every political action within the body of the public establishment, and every civil or industrial action within the mass of the citizens? To democratize justice, the police, war, finance, etc. It is to democratize shoe-making, building, etc.<sup>329</sup>

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<sup>326</sup> Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, ed. Edwin Canaan (New York: The Modern Library, 1937), 3, 734-735. For an interesting discussion of this ambivalence see West, “Smith’s Two Views on the Division of Labour.”

<sup>327</sup> Jacob Burckhardt, *The Greeks and Greek Civilization*, ed. Oswyn Murray, trans. Sheila Stern (New York: St. Martin’s Griffin, 1998), 185-186. See also Aristotle, *Politics*, bk. 8, ch. 2, 1337b4-22; bk. 8, ch. 6, 1341b8-18.

<sup>328</sup> Baker, *Inventing the French Revolution*, 246; Sewell, *Rhetoric of Bourgeois Revolution*, 95-96.

<sup>329</sup> This translated passage from “Bases of the Social Order” is borrowed from Forsyth, *Reason and Revolution*, 143.

This line of argument strongly resembles the one attributed to Socrates, who was accused of undermining the city’s laws by arguing that it was foolish for officeholders to be selected democratically (i.e. by sortition) when nobody would ever think to select a pilot, a builder, or a flutist with such a method. See Xenophon, *Memorabilia*, trans. Amy L. Bonnett (Ithaca: Cornell University Press, 1994), 7. For a similar argument see also Plato, *Protagoras*, in *Protagoras, Philebus, and Gorgias*, trans. Benjamin Jowett (Amherst: Prometheus Books, 1996), 319a-e.

So while the ancients considered the social division of labour to be a cause of deformity, Sieyès viewed the distribution of persons into specific tasks as a means for the “perfection of the human species.”<sup>330</sup>

The employment of the division of labour as a principle of political organization is not unique to Sieyès, or even to modern political thought. Plato, for instance, drew on the principle of divided labour to the extent of defining justice in his kallipolis as a matter of “doing one’s own work.”<sup>331</sup> In medieval political thought the order of creation is also understood in terms of a distribution of persons and works.<sup>332</sup> But whereas for ancient political thinkers divided labour was above all a problem of *order*, of partitioning kinds of persons and things into place and establishing a hierarchical order of rule,<sup>333</sup> for moderns, divided labour is instead a principle of *productivity* related to the activity of exchange.

## §

We have seen how the principle of contract, with the ambiguous place it occupies between commercial and juridical forms of sociability, introduced the dimension of exchange into political life. We have also seen how Sieyès’ pseudo contract theory pushed the discourse of covenants back to its origin, from the juridical pole to the commercial pole. In much the same way that Hume dispensed with the threshold between the *homo œconomicus* and the *homo*

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<sup>330</sup> Sewell, *Rhetoric of Bourgeois Revolution*, 97.

<sup>331</sup> Plato, *Republic*, trans. G. M. A. Grube and C. D. C. Reeve (Indianapolis: Hackett, 1992), 433b.

<sup>332</sup> Anton-Hermann Chroust, “The Corporate Idea and the Body Politic in the Middle Ages,” *The Review of Politics* 9, no. 4 (October 1947): 437-445; Max Weber, *The Protestant Ethic and the Spirit of Capitalism*, trans. Talcott Parsons (London: Routledge, 2001), 106.

<sup>333</sup> For the domestic economics of the ancients, economy did not refer to an act of exchange but rather to a disposition or arrangement of persons and things. The Greek *oikos* was translated into Latin as *dispositio*.

*juridicus*, for Sieyès too there was an essential continuity between the establishment of civil society through commercial exchanges and the establishment of political power; “Man is born in society ... and there he remains” (Montesquieu).<sup>334</sup> Society is not founded on the reciprocity of legal form, as it was for Rousseau and Kant, but is instead established on the basis of the “reciprocal utility” that emerges through a multiplicity of exchanges.<sup>335</sup>

What then of the other dimension of divided labour, the dimension of productivity? What does productivity have to do with politics? In an essay entitled “Of the Gains of Liberty in Society and in the Representative System” Sieyès introduced a novel concept of freedom that not only corresponds to his own sociology of representation, but arguably expresses the ethos of empiricist liberalism more perfectly than any understanding of freedom developed before or afterwards. The essay begins by considering the concept of freedom as negative liberty or *libre arbitre* that originates in Hobbes’ political thought. In much the same way that democracy is the primitive or “raw” form of legitimate government, negative liberty is the primitive form of liberty. If the development of human sociability is considered from the angle of consumption, the progress of civilization can be understood as a proliferation of *needs*. Just as the negative Hobbesian concept of liberty as a “right to all things” was insufficient to secure the conditions of commodious living,<sup>336</sup> Sieyès’ primitive *liberté d’indépendance* was insufficient to secure the existence of a creature with needs. For a perpetually desiring animal like a *homo œconomicus*, for “creatures moved by ever new needs, and endowed with active faculties,” surely “something other than negative liberty is required.”<sup>337</sup> Unlike Hobbes and Rousseau, however, Sieyès did not

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<sup>334</sup> Montesquieu as quoted in Adam Ferguson, *An Essay on the History of Civil Society*, ed. Fania Oz-Salzberger (Cambridge: Cambridge University Press, 2001), 21.

<sup>335</sup> Sieyès, “Gains of Liberty in Society,” 147.

<sup>336</sup> Thomas Hobbes, *Leviathan*, ed. Edwin Curley (Indianapolis: Hackett, 1994), 80.

<sup>337</sup> Sieyès, “Gains of Liberty in Society,” 145.

propose that *liberté d'indépendance* should be tempered by being harmonized with a system of norms in which “each must be contented with so liberty against other men, as he would allow other men against himself.”<sup>338</sup> For the consistent empiricist, the path from the individualistic *libre arbitre* to the juridical liberty as self-legislation is closed off. So Sieyès did not propose another concept of liberty as autonomy, but instead proposed a novel concept: *liberté de pouvoir*, the effective freedom of attaining one’s ends by employing others as a means.

*Liberté de pouvoir* is not a liberty of non-interference, but a liberty of powers or abilities.<sup>339</sup> It is what allows *homo œconomicus* to exercise their will over the world of things and to satisfy their needs. In a note written around 1793 Sieyès was even unashamed enough to suggest that “liberty always consists in procuring the *greatest product* with the *least cost*.”<sup>340</sup> However, the implications of freedom imagined as *liberté de pouvoir* are not confined to the world of things, but extend into the world of persons. One might even say that *liberté de pouvoir* extends the world of things, or at least the kinds of relations one ordinarily has with things, into the world of persons.<sup>341</sup>

Fascinatingly, there is a curious resemblance between this new liberty and the concept of power that appears in the ancient democratic imaginary. Contrary to the commonly-held view that democracy received its name from its critics, that it was denoted as a form of power (*kratos*) rather than an form of ruling of leadership through officeholding (*arche*) because *kratos* carried a

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<sup>338</sup> Hobbes, *Leviathan*, 80.

<sup>339</sup> Sieyès, “Gains of Liberty in Society,” 145.

<sup>340</sup> Sewell, *Rhetoric of Bourgeois Revolution*, 101-102. Sieyès did not shy away from the fact that, if one accepts his concept of liberty, then “it is your affluence ... which constitutes your power, and that it is the unhindered exercise of your command over means and ends that constitutes your true independence.” See “Gains of Liberty in Society,” 149.

<sup>341</sup> It is quite telling that the concept of representation originally applied to the representation of things and not the representation of persons. See Hanna Fenichel Pitkin, *The Concept of Representation* (Berkeley: University of California Press, 1967), 241.

connotation of violent supremacy, Josiah Ober argues that *kratos* has the meaning of power understood as a capacity to do things.<sup>342</sup> However, the difference between Sieyès' *pouvoir* and the ancient *kratos* is even more revealing than the similarity. Whereas the ancient concept of power involved action in concert as a collective,<sup>343</sup> *liberté de pouvoir* coordinates human action in terms of private, instrumental relations between individuals. And while the wild *liberté d'indépendance* discourages man from entering society, *liberté de pouvoir* demands it. But what kind of a society is best suited to realize this form of freedom? Sieyès' essay quotes from his own "Reasoned Exposition of the Rights of Man and Citizen," arguing that:

Since every man is so constituted as to will his own good, he may enter into contracts with his fellows, and he will do this if he judges that it is to his own advantage ... Thus a society established on the basis of reciprocal utility truly follows from the natural means given to men for attaining their goals ... Thus society does not weaken or reduce the means for realizing his personal ends that are at each individual's disposal when he enters into an association with others. On the contrary, it increases them and multiplies them through a more extensive development of his intellectual and physical powers.<sup>344</sup>

Unlike the raw *liberté d'indépendance*, which encounters others as obstacles and limitations to one's freedom, *liberté de pouvoir* does not shy away from dependency.<sup>345</sup> It views others not as a fetter, but as a means to the satisfaction of one's own needs. So the system of liberty in a

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<sup>342</sup> Josiah Ober, "The Original Meaning of 'Democracy': Capacity to Do Things, not Majority Rule," *Constellations* 15, no. 1 (March 2008): 3-9.

<sup>343</sup> The most indispensable exploration of power understood in this sense is found in Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1998), 199-207.

<sup>344</sup> Sieyès, "Gains of Liberty in Society," 147.

<sup>345</sup> *Ibid.*, 148.

civilized society is at once a system of needs, a system of interdependencies, and a system of means. This image of society could not be further from the Kantian kingdom of ends. In a modern commercial society nobody has a dignity and everybody has a price, and “we are therefore forced to see, in the largest number of men, nothing but laboring machines.”<sup>346</sup> While Ferguson decried the moral situation of the modern commercial state in which man “deals with [his fellow-creatures] as he does with his cattle and his soil, for the sake of the profits they bring,”<sup>347</sup> Sieyès viewed this instrumental relation to others as the very model of liberated sociability, arguing that “when I desire something, I enter into an agreement with myself regarding the means for procuring it. We should think of our relations with our fellow men in an analogous way. Others depend on their will just as we do on ours. It is in our common interest to mutually treat each other as means to our respective happiness, rather than as obstacles.”<sup>348</sup>

Naturally, the economic complement to this society imagined as a kingdom of means is a commercial society. Nadia Urbinati has observed that Sieyès’ concept of liberty as interdependence represents a break with the economic ideal transmitted from the republican tradition of political thought, where the independence of the yeoman farmer was viewed as the necessary corollary to the independence of a non-dominated, republican political order.<sup>349</sup> Unlike in the model inherited from Rome, the liberty of modern commercial societies is not guaranteed by the autarkic independence of producers, but instead by the system of exchange. In this

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<sup>346</sup> This translated passage from Sieyès’ September 1789 speech to the National Assembly appears in Sewell, *Rhetoric of Bourgeois Revolution*, 71-72.

<sup>347</sup> Ferguson, *History of Civil Society*, 24.

<sup>348</sup> Sieyès, “Gains of Liberty in Society,” 150.

<sup>349</sup> Urbinati, *Representative Democracy*, 144. The origin of this ideal can be identified even further back in the past than the world of republican politics. Ellen Meiksins Wood argued that the liberty of the ancient Greek *polis* was based on the economic independence of peasant-citizen farmers. See *Peasant-Citizen and Slave: The Foundations of Athenian Democracy* (London: Verso, 2015), 126-137.

respect, Sieyès has followed the path already travelled by Montesquieu, who emphasized the power of exit enjoyed by mobile forms of wealth in contrast to the yeoman citizen's immobile plot of land.<sup>350</sup>

Sieyès argued that “to have oneself represented in the most things possible increases one's liberty, just as accumulating diverse representations in the same persons diminishes it,” inviting the reader to “search in the private order, to see if that man is not most free who has most work done for him.”<sup>351</sup> As we have seen, he did not view representation or the division of labour as a principle confined to the coordination of economic sociability. If offices are treated like private employments, which is to say, as an “exclusive occupation,” the division of labour can be realized as easily in the sphere of public authority as in the sphere of commercial exchange.<sup>352</sup> In this way, the freedom of *liberté de pouvoir* is extended from the commercial system of needs to the political system of norms. The representative kingdom of means has become total.

However, pushing the economic analogy into the field of political organization raises several problems. If we follow Smith's argument that the division of labour is limited by the extent of the market,<sup>353</sup> the question inevitably arises: what market exists in the sphere of political representation? With what form of currency are officeholders remunerated for their representative labours? Sieyès did not ignore these questions, but instead chose to extend his economic analogies still further. Naturally enough, an officeholder is remunerated with a salary funded by public taxation. In this respect, taxpaying citizens can be regarded as “shareholders in

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<sup>350</sup> Hirschman, *Passions and Interests*, 74-77. This observation was inspired by the similar one found in Urbinati, *Representative Democracy*, 144.

<sup>351</sup> Sewell, *Rhetoric of Bourgeois Revolution*, 92.

<sup>352</sup> Sieyès, “Views of Executive Means,” 48.

<sup>353</sup> Smith, *Wealth of Nations*, 17.

a great social enterprise.” Because they supply the capital, they are the masters (and not, as Rousseau would have it, the slaves) of public officials.<sup>354</sup> But the relationship between political representatives and those they represent does not have the same directness and responsiveness as the relationship between a privately hired representative who may be hired or fired at will and their employer. How then to establish this relationship under the admittedly different conditions of publicly divided labour? Sieyès’ strategy was to make an analogy between currency and votes. We have seen how Sieyès viewed even private, monetary exchange as an expression of the juridical norm of consent. But the converse is also true. A vote, which, in the juridical concept of democracy is understood as a kind of social contract in miniature, may also be understood as a means of payment. Long before neoclassical economists and public choice theorists made the argument that it was more efficient to vote with your dollars, Sieyès proposed that citizens could buy labour with their votes.<sup>355</sup>

Urbinati has shown how for Sieyès, the vote performs an abstraction from particularity that resembles the process that Marx observed in his analysis of the value-form. Just as the ascription of value to a commodity involves an abstraction from its particular, concrete qualities as an object,<sup>356</sup> the extension of voting rights to an elector involves the abstraction of their particular qualities as a citizen into a simple, commensurable, and therefore countable artifact that is tasked with registering the totality of their preferences.<sup>357</sup> When it is understood from this point of view, the vote no longer appears as a juridical entity or as the expression of a

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<sup>354</sup> Sieyès, “Views of Executive Means,” 48.

<sup>355</sup> Urbinati, *Representative Democracy*, 148.

<sup>356</sup> Karl Marx, *Capital Volume I*, trans. Ben Fowkes (New York: Penguin, 1990), 149, 176-177.

<sup>357</sup> Urbinati, *Representative Democracy*, 148.

subjectively-possessed right, but instead becomes a function, an element in an intersubjective, quasi-mechanical process.<sup>358</sup>

This analogy has implications for the question of what kind of a thing can be represented. In monarchical and juridical theories of representation, it is the unity of the realm or the will or the princely or popular sovereign that is represented. And as we will see later, in parliamentarism, truth, reason, and public opinion are represented in the process of government by discussion. What then is represented in an empiricist theory? In the same way that the governor of *homo œconomicus* does not govern persons, but rather their interests,<sup>359</sup> in the empiricist theory of representation it is not persons but instead interests that are represented.<sup>360</sup> And exactly like the private commercial society imagined by the sociology of the Scottish Enlightenment, Sieyès' political society is not bound together by the communitarian resources of solidarity and civic virtue, but instead by the mechanistic relations of interests that exist between strangers.<sup>361</sup> Although Sieyès objected to Rousseau's contention that the will could not be represented,<sup>362</sup> he did not need to. Had he advanced a purely empiricist theory of representation rather than producing a chimera of juridical and empiricist political argumentation, he could have seen that one does not need to have their will represented if only their interest is.<sup>363</sup> In advancing

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<sup>358</sup> Ibid., 152.

<sup>359</sup> Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France 1978-1979*, ed. Michel Senellart, trans. Graham Burchell (New York: Picador, 2008), 44-47.

<sup>360</sup> Baker, *Inventing the French Revolution*, 241; Manin, *Principles of Representative Government*, 188n37. In his ideal typical depiction of the liberal model of democracy, Habermas observes that votes perform the function of registering private preferences, and have the same structure of action as choices in the market. See "Three Normative Models of Democracy," *Constellations* 1, no. 1 (December 1994): 3.

<sup>361</sup> Sieyès, "What is the Third Estate?" 154.

<sup>362</sup> Forsyth, *Reason and Revolution*, 142.

<sup>363</sup> This confusion is not unique to Sieyès, but in fact originates with Rousseau himself. Arendt's observation that Rousseau's political thought rests on a "curious equation of will and interest" is an indispensable insight for anyone who cares to make sense of the ambiguities of his contract theory. In his *Discourse on Inequality*, Rousseau distinguished the will from the merely mechanical operations of the senses, while in his *Social Contract* he

this set of analogies, Sieyès completed the triad that forms the social physics of interest: quantitative *felicity* is the principle that coordinates the action of the *homo æconomicus* in general, *exchange value* (which, in fact, provides the model for felicity) coordinates interested parties in civil society, and the *vote* coordinates interested parties in political representation.

## Utilitarian Theories of Democracy

As a result of his eclectic influences, of his attempt to create a political philosophy faithful both to the principles elaborated in the *Contrat Social* and also to those discovered in the new empiricism of the Scottish sociologists, our attempt to identify Sieyès' contribution to the empiricist theory of democracy has demanded the preparatory work of separating out the empiricist from the juridical elements in his thought. In the nineteenth century, a new family of political reflection was developed that jettisoned the philosophy of right altogether. This is, of course, the utilitarian philosophy of James Mill, Jeremy Bentham, and John Stuart Mill. However, the early utilitarian theories of James Mill and Bentham instrumentalized political organization in the service of the private sphere to such an extent that their contribution to the elaboration of an empiricist theory of democracy was less significant than Sieyès'. The

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distinguished the laws prescribed to oneself by the will from the slavish force of appetite. As with Hobbes, this mechanical concept of appetite is a rudimentary version of the concept of *interest*. Unlike *passion*, it is a predictable (hence "mechanical") empirical determinant. It would seem reasonable to conclude from these contrasts that for Rousseau, unlike Hobbes, the will was something other than the "last appetite." And yet, despite defining the will in opposition to interest, Rousseau proceeded to equate the general will with the general or "common" interest, writing that "what makes the will general is not so much the number of votes as the common interest that unites them." See Hannah Arendt, *On Revolution* (New York: Penguin, 2006), 68; Hobbes, *Leviathan*, 33; Jean-Jacques Rousseau, *Discourse on the Origin of Inequality*, in *Jean-Jacques Rousseau: The Basic Political Writings*, ed. and trans. Donald A. Cress (Indianapolis: Hackett, 1987), 45; *Social Contract*, 151, 158.

“characteristic and primary object and effect” of the protective democracy<sup>364</sup> imagined by James Mill and Bentham was “the securing of its members against oppression and depredation at the hands of those functionaries which it employs.”<sup>365</sup> It would appear then that James Mill and Bentham were less concerned with developing an original theory of democracy than with developing a mechanical institutional model for safeguarding (but not extending) privatistic liberty without drawing on the normative resources of abstract right, which Bentham regarded as metaphysical “nonsense upon stilts.”<sup>366</sup> A political system does not count votes to provide a venue for the exercise of civic rights, but rather because individuals have a closer proximity to their private interests than public officials do.<sup>367</sup> Exactly like in Sieyès’ account, votes—like dollars—are used as an artificial means of registering and aggregating these interests.<sup>368</sup> In an entirely straightforward way, the votes cast by the greatest number protect the interests and felicity of the greatest number. So the early utilitarians’ reflections on “democracy” were more concerned with issues surrounding the extension of the franchise than with making a novel contribution to the analysis of political forms.

The situation of J. S. Mill was more complicated. Unlike Bentham, who Marx aptly described as the “arch-philistine,”<sup>369</sup> the younger Mill had a genuine philosophical talent, and consequently could not unreservedly subscribe to the anthropological assumptions of

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<sup>364</sup> This helpful coinage is borrowed from C. B. Macpherson, *The Life and Times of Liberal Democracy* (Oxford: Oxford University Press, 1977).

<sup>365</sup> Jeremy Bentham, *Constitutional Code*, in *The Works of Jeremy Bentham Volume IX*, ed. John Bowring (Edinburgh: William Tate, 1838-1843), 47. This choice of passage is also borrowed from Macpherson.

<sup>366</sup> Jeremy Bentham, *Anarchical Fallacies*, in *The Works of Jeremy Bentham Volume II*, ed. John Bowring (Edinburgh: William Tate, 1838-1843), 501.

<sup>367</sup> Macpherson, *Life and Times of Liberal Democracy*, 38.

<sup>368</sup> See Asher Horowitz and Gad Horowitz, *Everywhere They are in Chains: Political Theory from Rousseau to Marx* (Scarborough: Nelson Canada, 1988), 152-153; Macpherson, *Life and Times of Liberal Democracy*, 25-26.

<sup>369</sup> Marx, *Capital Volume I*, 258-259n51.

utilitarianism. In many respects, his account of human beings, which emphasizes the open-ended development of their faculties, has more in common with the anthropology of Rousseau than it does with the *homo œconomicus* imagined in the more consistent utilitarianism of his teachers. Because he did not view human capacities as given, it was still possible for J. S. Mill to imagine the possibility of transforming the *homo œconomicus* into a more fully-developed being who was able to go beyond their private partialities and feel themselves to be at one with the larger public.<sup>370</sup> So while for Rousseau, the open-ended *perfectibilité* of human nature exposed man to the corrupting influence of society, and irreversibly socialized men must be taken as they are, for the younger Mill precisely this facet of human nature opened up an avenue leading from the politics of interests back to the politics of virtue. And although he remained committed to the greatest happiness principle, the younger Mill also rejected the monistic, commensurable, quasi-monetary theory of felicity that allowed such a close articulation between Bentham and James Mill's moral philosophy and the discourse of political economy.

While Bentham and the elder Mill's reflections on politics were circumscribed by the narrow mentality of the public policy reformer, J. S. Mill was also open to a wider and richer body of political analysis. The influence of Tocqueville's portraits of the localistic, participatory institutions of the American democratic society and their educative functions were especially formative for J. S. Mill's account of representative government. However, in contrast to the relatively unreflective and benign attitude with which his educators regarded democracy,<sup>371</sup> J. S.

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<sup>370</sup> J. S. Mill, *Considerations on Representative Government* (Amherst: Prometheus, 1991), 64-65, 77-80.

<sup>371</sup> By the nineteenth century, democracy was recognized as a political value by liberals. But this was possible on the condition that its meaning had fundamentally changed: democracy was no longer associated with the anarchic dangers of self-government but instead encompassed only the extension of the franchise in what was still a form of representative government. For an excellent discussion of this shift in the meaning of democracy, see Ellen Meiksins Wood, *Democracy Against Capitalism: Renewing Historical Materialism* (London: Verso, 2016), 204-237.

Mill's view was more skeptical and elitist. He suspected that the extension of the franchise would result in "class legislation" and introduce a levelling spirit of mediocrity into public office.<sup>372</sup> Furthermore, J. S. Mill was even skeptical of parliamentary rule by notables. If Sieyès had followed his own line of argumentation to its conclusion, making government an "exclusive occupation,"<sup>373</sup> he would have advocated for the creation of a class of legal or governmental specialists rather than advocating for what was effectively an amateurish rule by propertied gentlemen.<sup>374</sup> This is precisely the arrangement that J. S. Mill preferred. He argued that not only administration, but also legislation was an activity better suited to trained specialists than to a parliamentary assembly composed of notables, whose role should instead be confined to consenting to the law.<sup>375</sup>

As a consequence of these competing influences, the educational outlook of the American township democracy and the technocratic outlook of the social engineer, J. S. Mill's *Considerations on Representative Government* hopelessly equivocates between participatory and elitist organizational principles. On the one hand, he advocated that every citizen "should be called on to take an actual part in the government by the personal discharge of some public function," but on the other, he also insisted that both legislation and public administration were a "skilled business" best left to experts.<sup>376</sup> In any case, neither the more consistent utilitarianism of Bentham and James Mill nor the somewhat deeper reflections of J. S. Mill made a significant contribution to the development of an empiricist theory of democracy.

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<sup>372</sup> J. S. Mill, *On Liberty*, ed. Elizabeth Rapaport (Indianapolis: Hackett, 1978), 63-64; *Considerations*, 141-143, 159-160.

<sup>373</sup> Sieyès, "Views of Executive Means," 48.

<sup>374</sup> Baker, *Inventing the French Revolution*, 245.

<sup>375</sup> Mill, *Considerations*, 109-112.

<sup>376</sup> *Ibid.*, 64, 103, 115, 289.

## Democracy as Competition: Schumpeter's Copernican Revolution

A new empiricist theory was not advanced until the 1942 publication of Joseph Schumpeter's *Capitalism, Socialism and Democracy*, an incredibly influential work that set the agenda for postwar social scientific research on democracy (that is, elections).<sup>377</sup> It is neither surprising nor inappropriate that the new empiricist theory of democracy should be proposed by a thinker with the training and intellectual disposition of an economist. The Abbé Sieyès was an economist only in a somewhat inexperienced and dilettantish way. His involvement in the politics of constitution-making and his exposure to Rousseauian contract theory were no less significant for his intellectual project than his borrowings from political economy. As we have seen, this led him to produce an ingeniously chimeric marriage of the juridical discourse of law and the economic discourse of civil society. Like the utilitarian philosophers preceding him, Schumpeter's project was not in any way beholden to the political forms developed in juridical liberalism. The disenchantment of law, of the image of society as transparent intentional complex, and of the Rousseauian politics of will proceed without reservations or ambiguities. But Schumpeter's theory of democracy is significant not only because of its influence on postwar political science, or because it features a purer and more consistent empiricism, but also because it manages to articulate democratic theory with a form of economic thought that differs significantly from that found in the works of the Scottish sociologists.

As a preface to his new theory, Schumpeter criticized the "classical doctrine of democracy." According to the classical doctrine, democracy is "an institutional arrangement for arriving at political decisions which realizes the common good by making the people itself

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<sup>377</sup> Macpherson, *Life and Times of Liberal Democracy*, 77-78; Carole Pateman, *Participation and Democratic Theory* (Cambridge: Cambridge University Press, 1970), 3.

decide issues through the election of individuals who are to assemble in order to carry out its will.”<sup>378</sup> The most significant aspects of this doctrine are 1) the assumption that there is a popular will that exists, pre-formed, before the initiation of any political process, 2) the assumption of a common interest, and 3) the assumption that, to the extent that elected officials exist, their function is restricted to discharging the already-formed will of the people.

Our survey of the history of liberal thought has prepared us to see that the association of these three assumptions is not as coherent and intuitive as it might first appear. While the first and third assumptions are derived from Rousseau’s philosophy of sovereignty, the second assumption is (as Schumpeter correctly points out) derived from the intellectual universe of utilitarian political thought.<sup>379</sup> As a matter of intellectual history, it is difficult to imagine who could possibly have subscribed to such a mixture of Rousseauian and utilitarian principles.<sup>380</sup> The closest approximation to a marriage of the first and second assumptions is found in Sieyès, who, as we have seen, was no democrat, and as we will see, held views that in many respects prefigured Schumpeter’s own.<sup>381</sup> Schumpeter thought it was self-evident that a common will could not exist without a common interest, and that the Rousseauian doctrine fell without the support of the utilitarian doctrine.<sup>382</sup> It is tempting to speculate that Schumpeter was forced to posit the inclusion of utilitarian principles in the classical doctrine because he did not understand Rousseau’s formalistic concept of the general will, which is always right not because it takes the common interest as its object, but rather because it operates through the medium of right, i.e.

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<sup>378</sup> Joseph Schumpeter, *Capitalism, Socialism and Democracy* (New York: Harper Torchbooks, 1962), 250.

<sup>379</sup> *Ibid.*, 248.

<sup>380</sup> For a discussion of the non-coherence of Schumpeter’s depiction of the classical doctrine, see Pateman, *Participation and Democratic Theory*, 17-21.

<sup>381</sup> Macpherson contended that the “equilibrium democracy” devised by Schumpeter was a reimagining of the early utilitarians’ “protective democracy.” But Schumpeter’s similarities with Sieyès are far more interesting and revealing. See *Life and Times of Liberal Democracy*, 77.

<sup>382</sup> Schumpeter, *Capitalism, Socialism and Democracy*, 252, 256.

through general laws applying equally to each little sovereign. Rousseau had no need for the hypothesis of a preexisting harmonized interest, since the law creates this harmony through the equality of its application. For the purpose of determining Schumpeter's contribution to the ongoing disenchantment of law by economics, his somewhat incoherent inclusion of utilitarian assumptions must be put aside.

In outlining the deficiencies of the classical doctrine, Schumpeter did not restrict himself to the history of ideas. The classical doctrine is not the error of a real or imagined political thinker, but rather a mirage produced by the transmission of ideals suited to distant times and distant places to the modern world of commercial nation states. Despite the fact that Rousseau and the French revolutionaries did not idealize Athens, but Sparta (a democracy has never served as the norm or model for a modern nation state), Schumpeter attributed the errors of the classical doctrine to the influence of anachronistic "Greek speculations" concerning the desirability of direct democracy on modern social theory.<sup>383</sup> He also recognized that the assumptions of the classical doctrine may actually be well-approximated under modern social conditions in certain circumstances—for instance, in primitive, pre-commercial, and non-differentiated societies (he referred to the canton democracy of Switzerland as an example).<sup>384</sup> So once again, Sieyès' association between democracy and a primitive state of non-differentiation is reiterated. But for a theory that does not take these atavistic and marginal circumstances as its starting point, but instead begins with the conditions of the modern state (which, at this point, is not a *doux* commercial society, as it was for Sieyès, but instead an iron cage of bureaucratically organized

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<sup>383</sup> Ibid., 246, 248.

<sup>384</sup> Ibid., 267.

states and bureaucratically organized firms), the assumptions of the classical doctrine will be untenable and unrealistic.

The most interesting aspect of Schumpeter's criticism of the classical doctrine was not that he denied that the people are capable of executing the law—he does not even entertain the idea—but rather that he denied the existence of the general will and public opinion altogether.<sup>385</sup> So the problem of the classical doctrine is not only that the general will is incapable of perceiving or pursuing the common interest, but rather that no such will exists in the first place. The *volonté générale* rests on an analogy between a subject and subject writ large. This arrangement is epistemically sound because the monstrous subject intuits the world in the same way as the little subject. But even the little subject does not intuit the world without difficulties. Echoing Smith's critique of transparency, Schumpeter argued that an individual subject does not possess the capacity to navigate the play of interests and manufactured opinions to the extent that they could act with the competence attributed to them by the classical doctrine. A *homo oeconomicus* is not a disengaged subject of reason. The scope of their competence barely extends beyond the conduct of everyday life. It certainly is not adequate to encompass the totality of political affairs. For this reason, "the typical citizen drops down to a lower level of mental performance as soon as he enters the political field. He argues and analyzes in a way which he would readily recognize as infantile within the sphere of his real interests. He becomes a primitive again."<sup>386</sup> The problem only becomes more acute when considering these wills in

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<sup>385</sup> Schumpeter was not the first to question the existence of public opinion. John C. Calhoun contended that public opinion "is usually nothing more than the opinion or voice of the strongest interest" and that it "is as much divided and diversified as are the interests of the community." It is unsurprising that this insight should arise first in America, a society that had abandoned the monistic politics of sovereignty for a politics of pluralistic interest balancing very early on. As the reality of class conflict became apparent over the course of the nineteenth century, belief in the formation of a unified public opinion evaporated even in England. See A. H. Birch, *Representation* (London: Macmillan, 1972), 84; Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, trans. Thomas Burger (Cambridge: MIT Press, 1991), 129-140.

<sup>386</sup> Schumpeter, *Capitalism, Socialism and Democracy*, 262.

combination. Even if citizens possessed the ability to form a rational will individually, it would not follow that a coherent, rational will could be formed if they were aggregated.<sup>387</sup> In combining this set of assumptions, the classical doctrine “attributed to the electorate an altogether unrealistic degree of initiative which practically amounted to ignoring leadership.”<sup>388</sup>

If they cannot be taken for reflections of a popular will, the following question arises: how are political decisions in fact made? What is the source of the volition that operates in the world of day-to-day political affairs? Schumpeter effected a kind of Copernican revolution in democratic theory. Democracy is not the rule by, or in accordance with, the popular will. It is a method of will formation:

What we are confronted with in the analysis of political processes is largely not a genuine but a manufactured will. And often this artefact is all that in reality corresponds to the *volonté générale* of the classical doctrine. So far as this is so, the will of the people is the product and not the motive power of the political process.<sup>389</sup>

With Schumpeter’s reversal, democracy is understood not as a regime in which the *demos* exercise their *kratos* (or at least have it exercised by others on their behalf) but instead as a method or procedure for arriving at such a will. In this model, the role of people is confined to the acceptance of political leadership.<sup>390</sup>

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<sup>387</sup> Ibid., 254.

<sup>388</sup> Ibid., 270.

<sup>389</sup> Ibid., 263.

<sup>390</sup> Ibid., 273.

The shift from a substantive to a methodical understanding of democracy alone leaves the nature of the democratic procedure unspecified.<sup>391</sup> It is not Schumpeter's Copernican revolution, but rather his choice of method that places him in the empiricist family of democratic theory.<sup>392</sup> Schumpeter defined the democratic method as "that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote."<sup>393</sup> Being an economist, he was certainly not unaware that competition is a principle of sociability properly belonging to the world of economic action. He stated quite explicitly that "our theory [of democratic competition] is of course no more definite than is the concept of competition for leadership. This concept presents similar difficulties as the concept of competition in the economic sphere, with which it may be usefully compared."<sup>394</sup> In treating economic and democratic competition as mere objects of comparison Schumpeter understated his case. In actual fact, the former serves as the model for the latter. Through the dynamics of competition, a kind of invisible hand of political organization emerges. In the same way that the Smith's *homo œconomicus* was blind to the system of natural liberty constituted by

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<sup>391</sup> Bernard Manin and Nadia Urbinati, for instance, accept Schumpeter's view that will-formation in a representative regime is the outcome of a procedure, but their respective views of what this procedure entails differs significantly. For Manin, this procedure is a deliberative process, while Urbinati understands the representative procedure as an ongoing relationship of responsiveness between representatives and those they represent. See "On Legitimacy and Political Deliberation," trans. Elly Stein and Jane Mansbridge, *Political Theory* 15, no. 3 (August 1987): 338-368; *Representative Democracy*, 10, 20, 58.

<sup>392</sup> In denying the substantive existence of popular sovereignty in favour of an elite-led model of democracy, Schumpeter followed Weber quite closely. However, while Weber's model of democracy was focussed on the habilitation of a class of elites whose inward ethical comportment was all-important, Schumpeter gave no attention at all to the qualities of his democratic elites, but only the competitive relationship that exists between them. See Terry Maley, *Democracy and the Political in Max Weber's Thought* (Toronto: University of Toronto Press, 2011), 77-80, 88; "The Relevance of Max Weber for Political Theory Today," in *The Anthem Companion to Max Weber*, ed. Alan Sica (London: Anthem Press, 2017), 257-282.

<sup>393</sup> Schumpeter, *Capitalism, Socialism and Democracy*, 269.

<sup>394</sup> *Ibid.*, 271.

their activities of exchange, the political system is not transparent to Schumpeter's competing office holders. Rather than employing the image of an invisible hand, Schumpeter instead pointed to a discrepancy between the *social meaning* and the *motive power* of politico-economic action:

It does not follow that the social meaning of a type of activity will necessarily provide the motive power, hence the explanation of the latter ... the social meaning or function of parliamentary activity is no doubt to turn out legislation and, in part, administrative measures. But in order to understand how democratic politics serve this social end, we must start from the competitive struggle for power and office and realize that the social function is fulfilled, as it were, incidentally—in the same sense as production is incidental to the making of profits.<sup>395</sup>

Just as Smith's brewers and bakers act only out of self-love or interest, but nevertheless keep the other denizens of the town well-fed, Schumpeter's political entrepreneurs are self-interested power-seekers first and legislators only as an unintended consequence of a competitive mechanism that ensures that the social end of their activity is realized.

Although he followed Sieyès in advancing a theory of government or democracy modelled on the economic dynamics of civil society, it is Schumpeter's departure from the reciprocal system of means that accounts for the originality of his contribution. Unlike Sieyès, whose theories of government and society were totally encapsulated by his theory of representation, Schumpeter hardly spoke of representation at all. Why is this? Recall the discussion of the naturalistic concept of civil society above. In the same way that Sieyès' kingdom of means was centred on the concept of representation, Smith's system of natural

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<sup>395</sup> Ibid., 282.

liberty was centred on its sister concept, divided labour. Both the representative system and civil society are structured by lateral relations between proprietors mediated by the equivalence of a medium of exchange (votes and money, respectively). Unlike a dog, a human being has a natural propensity to truck, barter, and exchange.

Now recall how Townsend re-imagined the economic system of natural liberty, transforming it from a system of exchange into a system of competition. Although a dog cannot bring its wares to market, it can compete with others of its kind for a share of the slowest goats. The *doux* Robinsonade becomes beastly. So let us return to the human worlds of commerce. Both Sieyès and Schumpeter made analogies between the political system and the firm.<sup>396</sup> But the difference is more revealing than the similarity. While Sieyès focussed on the represented-representative relation between the citizen and the state, imagining voters as shareholders in a firm, Schumpeter instead emphasized the relations between firms themselves competing in a kind of political marketplace.<sup>397</sup> This shift is in keeping with the general trajectory of economic thought. As classical political economy is supplanted by neoclassical economics and theories of marginal utility, the dimension of exchange, with its related set of problems (divided labour, theories of value, the analysis of trade) is increasingly displaced by the dimension of competition.<sup>398</sup> So if Sieyès was the Adam Smith of political thought, Schumpeter was its Townsend.

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<sup>396</sup> Schumpeter, *Capitalism, Socialism and Democracy*, 271-272; Sieyès, "Views of Executive Means," 48.

<sup>397</sup> The firm analogy even extends to Schumpeter's brief comments on freedom. Political freedom is imagined as an entrepreneurial freedom. A citizen is free "in the sense in which everyone is free to start another textile mill." See *Capitalism, Socialism and Democracy*, 272.

<sup>398</sup> Foucault, *Birth of Biopolitics*, 118-119.

## Chapter 4: The Prehistory of Parliamentarism

### Parliamentarism and the Antinomy Between Juridical and Empiricist Liberalism

The preceding three chapters distinguished two families of liberal thought: a juridical liberalism centred on the problems of law, contract, security, sovereignty, autonomy, and right, and an empiricist liberalism centred on a politics of interest, utility, exchange, and competition. Juridical liberalism viewed the problem of democracy as a matter of substituting consent and privatistic rights for the effective exercise of power on behalf of the *demos*. Whether one considers the institutions of the legislative state, the norm of popular sovereignty, or the doctrine of *pouvoir constituant*, juridical liberalism typically pursued a strategy of attenuating the popular will by means of legal form. Empiricist liberalism, on the other hand, did not evade the problem of government and the effective exercise of power, but instead identified an extrapolitical sphere governed by a mode of sociability both different from and inaccessible to the regulation of human conduct through law. But the discovery of civil society did not only establish the frontier of political power. Almost immediately, civil philosophers influenced by the discourse of political economy adapted civil society's grammars of action to the interpretation and construction of political forms.

The distinction between juridical and empiricist families of liberal thought is relatively commonplace. Often, the two forms are (mistakenly) associated with the anglosphere and the European continent, or with negative and positive concepts of liberty. The following chapter will

outline a third family of liberal thought that has seldom been identified as such.<sup>399</sup> Unlike juridical and empiricist liberalism, *parliamentarism* does not attempt to circumscribe politics within the forms of law or a limited sphere of effective competence. Nor does it attempt to model political life in the image of private, non-political forms of sociability. Parliamentarism was born political. In contrast to its cousins, the liberalism of jurists and the liberalism of political economists, this liberalism of statesmen<sup>400</sup> does not shy from public life.

While juridical liberalism imagines political action as legislation, and empiricist liberalism imagines politics on the model of private exchange relations, parliamentarism is properly identified with the principle of *government by discussion*.<sup>401</sup> For the purposes of the following investigation, government by discussion is considered as an activity rather than as an institution. The press is no less involved than parliament in this activity; one need not be a member of government to govern through discussion. Any place where people speak (*parler*) in the fashion characteristic of parliamentarism is a *parle-ment* in this sense. Government by

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<sup>399</sup> In addition to the critique of liberalism that appears in Schmitt's *Crisis of Parliamentary Democracy*, notable exceptions to this can also be found in Kari Palonen's work, and in William Selinger's recently published book on parliamentarism. Selinger observes that it was commonplace to acknowledge the centrality of parliamentarism to liberal thought until the postwar preoccupation with reconciling liberalism with democracy obscured the distinction between parliamentarism and democracy. In contrast to Schmitt, Selinger argues that even today, "we have not escaped the logic of classical parliamentarism." See *Parliamentarism: From Burke to Weber* (Cambridge: Cambridge University Press, 2019), 5-6, 13-16, 203-206.

<sup>400</sup> Manin remarks that treating discussion as the central category of representative government is an *angélisme*. But Burke, Constant, and Guizot were all active in parliamentary politics, and presumably shared the realism that defines the professional disposition of statesmen. In their reflections on politics none of them was tempted to visit Crusoe's island. See Bernard Manin, *The Principles of Representative Government* (New York: Cambridge, 1997), 199. For a rejoinder to Manin's downplaying of discussion, see Selinger, *Parliamentarism: From Burke to Weber*, 24.

<sup>401</sup> Walter Bagehot's coinage (popularized today through the ever-expanding interest in Schmitt's political thought) is still the most appropriate shorthand for parliamentarism. For the original context, see Bagehot's essay "The Age of Discussion," in *Physics and Politics* (Kitchener: Batoche Books, 2001), 88-114.

Selinger's recent work effectively identifies the non-separation of governing and the legislative bodies as the *differentia specifica* of parliamentarism. While this is a perfectly appropriate way of proceeding when framing a contrast between parliamentary regimes and presidential systems, the following chapter is concerned with contrasting parliamentarism with the basic political forms of empiricist liberalism and juridical doctrines of sovereignty. For this reason, we will follow Bagehot and Schmitt in treating government by discussion as the essence of parliamentarism.

discussion occurs both in the sphere of public authority proper and in the intermediate public sphere of civil society. Whether this is the case because society dances to the tune called by at the pinnacles of power,<sup>402</sup> or because the sphere of public authority has transformed into a monstrous debating club modelled on a private society<sup>403</sup> is immaterial. The same forms of normativity and association manifest themselves in both sites.

In parliamentarism, it is possible to identify a kind of synthesis and overcoming of the elements particular to juridical and empiricist liberalism.<sup>404</sup> Much like juridical liberalism, parliamentarism features a normative dimension, and remains invested in the normative promise of reason. But like empiricist liberalism, parliamentarism dispenses with many of the assumptions of the philosophy of the subject. It does not view the social order as a transparent totality, or imagine the political order on the model of a subject writ large. Politics is not a problem of incorporation via legislation, but instead a matter of staging an intersubjective process. While remaining normative, parliamentarism identifies a different source of normativity than juridical liberalism. And while remaining intersubjective, parliamentarism identifies a different procedure for associating plural agents than the commercial forms of sociability generalized by empiricist liberalism. Observing how it combines empiricist and rationalist figures of thought, it is tempting to think of parliamentarism as the political expression of critical philosophy.

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<sup>402</sup> Karl Marx, "The Eighteenth Brumaire of Louis Bonaparte," in *Marx: Later Political Writings*, ed. and trans. Terrell Carver (Cambridge: Cambridge University Press, 1996), 71.

<sup>403</sup> Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (Chicago: University of Chicago Press, 2005), 62-63.

<sup>404</sup> The image of synthesis presented here is inspired by Habermas' essay "Three Normative Models of Democracy," which does not speak of juridical liberalism, empiricist liberalism, and parliamentarism, but rather of liberal democracy, republicanism, and their synthesis in a third "discourse theory" of democracy.

## Titles of the Bourgeois

Modern parliaments acquired their power in struggles with and at the expense of hereditary monarchical and aristocratic power. The semantic association of aristocracy with *hereditary* aristocracy had the effect of discouraging the proponents of bourgeois parliamentarism from averring openly that government by representatives was aristocratic. This disinclination contributed to the ongoing misidentification of democratic with liberal political forms. But parliament is an aristocratic institution, and parliamentarism is an aristocratic procedure.<sup>405</sup> It is not aristocratic only in the trivial sense in which all forms of minority rule are aristocratic, or simply because modern parliaments are descended from (and sometimes cohabitate with) the political organs of the hereditary aristocracy. Max Weber's observation that the sociological soil of all forms of parliamentary government is an aristocratic society is correct, but it does not give us the whole picture.<sup>406</sup> Parliamentarism is not only aristocratic because of its sociological conditions or its class basis, but also because of its very mode of functioning and reproducing itself. Parliamentarism is *intrinsically* aristocratic. This is no less true of bourgeois parliamentarism than it is of its feudal predecessors. Nor, of course, is it aristocratic for the same reason as the medieval parliaments. Modern, bourgeois parliamentarism assumes that representatives are qualitatively different from their electors. The basis of their qualification makes no reference to bloodlines or the pseudo-politics of kinship. The fact that officeholders are selected in competitive elections does nothing to detract from the aristocratic character of

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<sup>405</sup> Carl Schmitt, *Constitutional Theory*, ed. and trans. Jeffrey Seitzer (Durham: Duke University Press, 2008), 250.

<sup>406</sup> Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, ed. Guenther Roth and Claus Wittich, trans. Ephraim Fischoff et al. (Berkeley: University of California Press, 1978), 296.

modern parliamentarism.<sup>407</sup> Like the social class from which they are drawn, parliamentarians form a “natural,” not a hereditary aristocracy. The question is, on what basis do they claim to be the best (*aristoi*)? What principles of distinction<sup>408</sup> are involved, and what do they tell us about this institution?

Carl Schmitt identified three bases of parliamentarism: *property, education, and discussion*.<sup>409</sup> The first of these two presuppositions are personal qualities or possessions of representatives. While the early development of liberal thought featured a tendency towards anthropological abstractions that treated human beings interchangeably (the fact the juridical and empiricist liberalism imagined human beings differently, as a *homo juridicus* or a *homo æconomicus* respectively, does not change this), parliamentarism reintroduced the “who” question into political reflection. The return of this preoccupation with concrete, personal qualities reflects a historical circumstance in which the bourgeois no longer imagined themselves as inhabitants of a state of nature or denizens of civil society, but instead as officeholders. While any and every person can and in fact must consent to the state (or to be governed) and exchange the products of their labour (or their labour itself), it will not do to open the deliberative assembly to anyone who wishes to partake. As Schmitt observed, whoever trusts in parliament does so either “because he considers parliament an elite, or because he believes in the discussion and openness characteristic of the parliamentary legislative process.”<sup>410</sup> The third basis,

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<sup>407</sup> As Aristotle, Montesquieu, and Rousseau knew, election is an aristocratic method of selection. See Aristotle, *The Politics*, trans. T. A. Sinclair (New York: Penguin, 1992), bk. 4, ch. 9, 1294a35-1294b13; Charles-Louis de Secondat Montesquieu, *The Spirit of the Laws*, ed. and trans. Anne M. Cohler, Basia C. Miller, Harold S. Stone (Cambridge: Cambridge University Press, 2000), bk. 2, ch. 2; Jean-Jacques Rousseau, *On the Social Contract*, in *Jean-Jacques Rousseau: The Basic Political Writings*, ed. and trans. Donald A. Cress (Indianapolis: Hackett, 1987), 207.

<sup>408</sup> This phrase is borrowed from Manin. The allusion to his important study of representative government is intentional.

<sup>409</sup> Schmitt, *Constitutional Theory*, 334-338.

<sup>410</sup> Carl Schmitt, *Legality and Legitimacy*, ed. and trans. Jeffrey Seitzer (Durham: Duke University Press, 2004), 64.

discussion, is not a personal quality at all, but rather an activity. With the development of parliamentarism there is a gradual shift in emphasis from distinction based on the aforementioned personal qualities to discussion, as the legitimating force of reason is increasingly associated with public, intersubjective processes of deliberation rather than with the splendid isolation of materially and intellectually independent social notables.<sup>411</sup>

## §

In the ideological self-understanding of the bourgeois, the qualification of property was of course not understood as a means of reserving political power for those who shared their class interests. Instead, parliamentarism reasserts the association between wealth and virtue that is as old as aristocracy itself. But while in premodern aristocracies, wealth and virtue were associated because both were understood as inheritable qualities, in the aristocracy of modern parliamentarism the two are instead associated through a different third term. While it is true that property qualifications were often legitimated on Lockean grounds, i.e. because property was the object of natural rights, and was consequently entitled to political representation alongside or in lieu of the representation of subjects,<sup>412</sup> more advanced forms of argument instead emphasized that property contributed positively to the qualifications of the office holders themselves.

Initially, property was seen as a guarantee of the intellectual *independence* of parliamentary representatives. While historical accounts of democratization have tended to focus

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<sup>411</sup> This shift was not irreversible. For instance, when J. S. Mill argued that parliamentary representatives should act autonomously of their electors, he did not justify this in terms of the conditions necessary for discussion, but instead argued that representatives are entitled to independence in proportion to their distinction from their electors. See *Considerations on Representative Government* (Amherst: Prometheus, 1991), 237, 240, 246-247.

<sup>412</sup> Manin, *Principles of Representative Government*, 105.

on the gradual repeal of property qualifications for electors, the nature and extent of the property qualifications applied to officeholders is no less important for understanding the history of representative institutions.<sup>413</sup> In England, property qualifications for members of parliament were introduced in 1710, while in France, which had a far wider franchise of electors, property qualifications for members of the national assembly were introduced in 1789. The rationale behind these restrictions was articulated in terms of independence. In England, political offices were reserved for “men of substance” because only the condition of property ownership could sufficiently guarantee their independence from the Crown, while in France, where the vote was considered a right, but holding office considered a “function,” property qualifications appeared in the second stage of the system of indirect election in order to ensure that only the qualified would be selected as representatives.<sup>414</sup> Although varying levels and forms of property qualification existed in state legislatures, in America, no property restrictions were introduced for federal representatives. As both the Federalists and Anti-Federalists discovered, electoral selection combined with large electoral districts alone was a sufficient guarantee that wealthy men of substance would dominate political office. Alexander Hamilton observed that “it is said to be necessary that all classes of citizens should have some of their own number in the representative body, in order that their feelings and interests may be the better understood and attended to. But we have seen that this will never happen under any arrangement that leaves the votes of the people free.”<sup>415</sup> While the Federalists regarded this as a political reflection of a natural social order, the Anti-Federalists described this state of affairs as “aristocratic.”<sup>416</sup>

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<sup>413</sup> Ibid., 94-95.

<sup>414</sup> Ibid., 97-101.

<sup>415</sup> Alexander Hamilton, *Federalist* No. 35, in *The Federalist Papers*, ed. George W. Carey and James McClellan (Indianapolis: Liberty Fund, 2001).

<sup>416</sup> Manin, *Principles of Representative Government*, 112-114.

However, the debates surrounding the Federal Convention of 1787 nevertheless feature an interesting and revealing variety of arguments for the use of property qualifications.

Naturally, the simple Lockean rationale that the selection of representatives should reflect the fact that property was a right entitled to protection from government appeared prominently in American debates. Secondly, the rationale that the economic independence afforded by property ownership was necessary to ensure that representatives would not be corrupted reappeared despite the fact that in America, the Crown exerted no influence (here, it was not royal power but instead executive power that threatened to corrupt legislators). Generally, the connection between wealth and independence was articulated in the very ancient and very widespread language of yeoman republicanism. James Madison, for instance, argued that “the freeholders of the country would be the safest depositories of republican liberty.”<sup>417</sup> This line of argument rests on a relationship of resemblance between the social and the political, which are likewise imagined in terms of autarkic independence. A farmer is like a little sovereign. His sheep are his subjects, his farm is his realm.<sup>418</sup> Neither a pacific state of dependency nor a bellicose state of class war is compatible with republican liberty. So the economic precondition of a republic is not exactly a classless society, but rather a one-class society in which every citizen is at the same time an independent proprietor.<sup>419</sup> Proprietor republicanism also featured a desire to encourage a

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<sup>417</sup> Ibid., 103.

<sup>418</sup> Fascinatingly, there is another republican tradition spanning from Aristotle to Arendt that takes the *disanalogy* between the necessity of despotic domestic relations and the freedom of political life as its point of departure. While the glorification of independent yeoman farmers inherited from the Roman political imaginary was easily articulated with both a Rousseauian politics of sovereignty and a Lockean republic of proprietors, this other tradition values plurality over independence and action over abstention. Arguably, it has a greater affinity with democratic politics. This should not be entirely surprising, since, as Arendt notes, “the gulf between the household and the city [was] much deeper in Greece than in Rome.” On the disanalogy between the sociability of the *oikos* and political life proper, see especially Aristotle, *Politics*, bk. 2, ch. 2, 1261a10-1261a37; Arendt, *Human Condition*, 24-25, esp. 24n6.

<sup>419</sup> The distinction between single class and classless societies is borrowed from C. B. Macpherson’s discussion of republican proprietorship in *The Life and Times of Liberal Democracy* (Oxford: Oxford University Press, 1977), 9-19.

certain level of abstention from politics. Like potatoes in a sack, a republic of farmers is associated by the uniform ties of interest, and does not feature the unpredictable political possibilities of an urban democracy disposed to assemble frequently.<sup>420</sup>

In continuity with the ancient model, some participants in the American discussion also reiterated the association between a certain form of proprietorship and personal qualities of political competence. Continuing the age-old aristocratic conflation of wealth with virtue, Hamilton contended that “the advantage of character belongs to the wealthy.”<sup>421</sup> Despite their opposition to hereditary aristocracy and their desire to avoid recreating the social relations of the feudal polity, the Federalists were insistent that a representative government should be comprised of a natural aristocracy who were qualitatively different from their electors both in terms of their property holdings and in terms of their wisdom, virtue, and eminence of character. Naturally, this meant that that election was chosen as a means of selecting officeholders. Elections not only perform the *juridical* function of renewing the legitimacy conferred by acts of consent, but also perform the *sociological* function of selecting a specific kind of officeholder.<sup>422</sup> Both the Federalists and the Anti-Federalists were in agreement with Aristotle that, from a sociological perspective, elections are not a democratic means of producing identity (to produce a resemblance between officeholders and the *demos* at large, sortition would be a more appropriate mechanism of selection<sup>423</sup>) but rather an aristocratic means of selecting social notables distinguished by various politically-relevant qualities.

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<sup>420</sup> This line of argument goes back to Aristotle. See *Politics*, bk. 6, ch. 4, 1318b6-1319a40.

<sup>421</sup> Manin, *Principles of Representative Government*, 120.

<sup>422</sup> Martin Breaugh, *The Plebeian Experience: A Discontinuous History of Political Freedom*, trans. Lazar Lederhendler (New York: Columbia University Press, 2013), 107.

<sup>423</sup> Hanna Fenichel Pitkin, *The Concept of Representation* (Berkeley: University of California Press, 1967), 73.

Fascinatingly, the decision to organize the United States into large electoral districts also reflected a desire to ensure that representatives were qualitatively different from those who they represented.<sup>424</sup> Political representation is not a means of solving the problem of governing an extensive political order, a technical solution to a situation in which “the room will not hold all,” as John Selden put it. On the contrary, extension, like property qualifications, is a means of ensuring that the state will be governed by socially superior representatives and that the political agitations of assembly democracy will not materialize.<sup>425</sup> The connection between extension and the proportion in which representatives were socially distinct from their electors was recognized by both the proponents and the critics of the extensive republic. According to Madison, extension, in addition to representation, was one of the properties that distinguished republican from democratic governments.<sup>426</sup>

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Insofar as they stressed the connections between wealth and virtue, and viewed the social independence of landed property holders as a precondition of political independence, the proponents of representative government did not break with the yeoman republicanism

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<sup>424</sup> Manin, *Principles of Representative Government*, 121-124.

<sup>425</sup> Ellen Meiksins Wood, *Democracy Against Capitalism: Renewing Historical Materialism* (London: Verso, 2016), 216. In *Federalist* No. 51, James Madison entertained a hypothetical example in which Rhode Island was not included in the federation, speculating that without the neutralizing force of extension, majority factions would combine, threatening the security of its inhabitants’ rights. See *The Federalist Papers*, ed. George W. Carey and James McClellan (Indianapolis: Liberty Fund, 2001).

<sup>426</sup> Madison, *Federalist* No. 10, No. 14, and No. 63. Like Montesquieu before him and Madison afterwards, Rousseau associated democratic agitation with small territories and a proximate citizenry, observing that “the strength of the people acts only when concentrated; it evaporates and is lost as it spreads, like the effect of gunpowder scattered on the ground, which catches fire only one grain at a time.” Advocates of representation should take pause to consider that while the Federalists associated extension with representation, Rousseau associated it with tyrannical government. See *Social Contract*, 190.

transmitted to them from Rome via the Atlantic republican tradition. However, while the idea that legislators should be selected from the property-owning strata was not controversial among the architects of American representative government, the *type of property* that should be required as a qualification for representatives was an object of disagreement.<sup>427</sup> While the republican tradition had typically identified the immobile, landed property of the yeoman farmer as the economic precondition of political liberty, in the modern age a new form of property had emerged that seemed to offer a very different if not opposed set of political possibilities.

In order to throw the American arguments into relief, we will first consider the writings of Benjamin Constant, who was not involved in these debates, but nevertheless reflected on exactly the same problem. Like every reader of Montesquieu, Constant was aware of the new forms of property and their political significance. In his essay on the liberty of ancients and moderns, he observed that “commerce confers a new quality on property, circulation,” and proceeded to reiterate Montesquieu’s argument that mobile forms of wealth act as a counter to the despotic exercise of centralized state power.<sup>428</sup> However, in his writings on representative government, Constant contrasted the mobile wealth of merchants and industrialists unfavourably with landed forms of property. Industrial property lacks the “conservative spirit” of landed property, which is a necessary quality in political associations. While landed property can be qualitatively improved over time, industrial property can only be grown quantitatively. And while the mobility intrinsic to industrial and commercial forms of wealth provides a “new means of defense for liberty,” immobile landed property “guarantees the stability of institutions” by binding its owner to the country in which he lives. In this way, it “creates patriotism through

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<sup>427</sup> Manin, *Principles of Representative Government*, 105.

<sup>428</sup> Benjamin Constant, “The Liberty of the Ancients Compared with that of the Moderns,” in *Constant: Political Writings*, ed. and trans. Biancamaria Fontana (Cambridge: Cambridge University Press, 1998), 324-325.

interest.” Exactly like the American proponents of yeoman republicanism, Constant was convinced that it was desirable that the social order of property should resemble the political order of power. Of course, only landed property could satisfy this requirement, since “a farm is a fatherland in miniature.” Finally, while farming landed property makes men dependent on nature, it nevertheless allows them to be independent of other men. In contrast, industrial property places its owner in a state of dependence on other men.<sup>429</sup>

We can see then that an awareness of the new forms of wealth and the capacity of mobile wealth to act as a countervailing power of exit situated in civil society was no guarantee that the argumentation of yeoman republicanism would cease to exert an attractive force. To find their proper place in the ideal elaboration of representative institutions, it would need to be demonstrated not only that the new forms of property could function as an anti-political counter power, but also that they could perform a positive role. This is what we find in the *Federalist*, where Hamilton argues that:

Mechanics and manufacturers will always be inclined, with few exceptions, to give their votes to merchants, in preference to persons of their own professions or trades. Those discerning citizens are well aware, that the mechanic and manufacturing arts furnish the materials of mercantile enterprise and industry. Many of them, indeed, are immediately connected with the operations of commerce. They know that the merchant is their natural patron and friend; and they are aware, that however great the confidence they may justly feel in their own good sense, their interests can be more effectually promoted by the merchant than by themselves ... We must therefore consider merchants as the natural representatives of all these classes of the community.<sup>430</sup>

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<sup>429</sup> Benjamin Constant, *Principles of Politics Applicable to all Representative Governments*, in *Constant: Political Writings*, ed. and trans. Biancamaria Fontana (Cambridge: Cambridge University Press, 1998), 217-219.

<sup>430</sup> Hamilton, *Federalist* No. 35.

We can see then that Constant's line of argument has been inverted. While for Constant, and for those who stand in the republican tradition, landed property owners were distinguished among all other social strata and the owners of other forms of property by a state of material independence that ensured their incorruptibility, for the modernist Hamilton independence appears as a source of partiality. Conversely, what the republicans described as the dependency of owners of mobile property instead appears as a form of *interdependence* that connects them with the interests of all other social strata, and consequently qualifies them to act as the natural representative of all classes. Like the members of the Third Estate, who perform the works and functions of society, the merchant appears as a kind of universal class, a part that stands in for the whole. The affinity between this line of argument and Sieyès' reimagining of freedom as interdependence in his concept of *liberté de pouvoir* is striking. In moving from the analogy between independent proprietors and sovereign statesmen towards an economic politics that imagines society as a system of dependencies in which the general interest is constituted by a process of circulation, representative government has crossed the threshold from juridical to empiricist liberalism.

## §

This revaluation of mobile property did not cause the Federalists to propose that landed property should not be entitled to political representation. On the contrary, Madison still retained the republican suspicion of commercial wealth despite his disagreement with George Mason's preference that only landed property should be represented in the legislature.<sup>431</sup> Hamilton, who was more inclined to advocate for the representation of merchants and financiers, nevertheless

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<sup>431</sup> Manin, *Principles of Representative Government*, 104-105, 121.

predicted that freely-voting electors would select landowners in addition to merchants. While a merchant may act as a stand-in for qualitatively different social strata (manufacturers, mechanics) because he is the interdependent conduit through which their wealth circulates, landowners with large and modest holdings (quantitatively different, but qualitatively identical) form a united interest simply because all are subject to the same taxation. So both landed and mobile property will be represented, and both forms of property will share the interests of a constituency wider than themselves. In addition to landholders and merchants, Hamilton identified a third, non-economic social strata who would likewise be selected as representatives: men of “learned professions.” Unlike the various types of property owners, who form a society of interest with a wider constituency, learned gentlemen “truly form no distinct interest in society; and according to their situation and talents, will be indiscriminately the objects of the confidence and choice of each other, and of other parts of the community.”<sup>432</sup> Hamilton has discovered or rediscovered an additional principle of distinction: *education*.

Four years earlier, Kant had specified that (private) citizens making public use of their reason should do so not only “as a man of learning,” but specifically “in their capacity as scholars.”<sup>433</sup> The Physiocrats, who, like Kant, were not architects of parliamentarism proper, but rather theorists of public reason concerned with the capacity of a critical public opinion to enlighten and rationalize the activity of a public authority it stood outside, went as far as to imagine their public reasoner as a *philosophe*.<sup>434</sup> But one need not be so demanding. In contrast to the continental exponents of a juridically private public opinion, the proponents of

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<sup>432</sup> Hamilton, *Federalist* No. 35. In the same spirit, Johann Caspar Bluntschli argued that “only the learned man is capable of distinguishing carefully between his personal interests and the interests of the whole and to subordinate the former.” See Schmitt, *Constitutional Theory*, 334.

<sup>433</sup> Immanuel Kant, “An Answer to the Question: ‘What is Enlightenment?’” in *Kant: Political Writings*, ed. Hans Reiss, trans. H. B. Nisbet (Cambridge: Cambridge University Press, 1991), 55-59.

<sup>434</sup> Jürgen Habermas, *Theory and Practice*, trans. John Viertel (Boston: Beacon Press, 1973), 88-90.

representative government and parliamentarism were for the most part content to advocate that offices should be occupied by an educated but non-specialist strata. So while one must be a scholar or a philosopher to act as a critic, to act as a legislator it is apparently enough to be a learned gentleman.<sup>435</sup>

While Hamilton only predicted that office seekers possessing these qualities of distinction would naturally be selected by electors, J. S. Mill went so far as to propose an artificial arrangement for enshrining and even magnifying the degree of political influence accorded to men of substance. In his *Considerations on Representative Government*, he only asserted that the opinions of the more educated classes should be given more weight,<sup>436</sup> but in his “Thoughts on Parliamentary Reform,” he went as far as to order several principles of distinction hierarchically: at the bottom, labourers would receive one vote, skilled labourers two, and the supervisors of labour three. Approaching the top, farmers, merchants, and manufacturers would

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<sup>435</sup> Walter Bagehot stipulated that “a Parliamentary statesman will be a man of quite sufficient intelligence, quite enough various knowledge, quite enough miscellaneous experience, to represent effectually general sense in opposition to bureaucratic sense.” See Kari Palonen, *From Oratory to Debate: Parliamentarisation of Deliberative Rhetoric in Westminster* (Baden-Baden: Nomos, 2016), 180.

By the nineteenth century, the politics of educational habilitation would not concern the distinction between a learned gentlemanly legislator and a philosopher or scholar who acts as a critic, but instead the conflict between the learned gentlemen of parliament and the more narrowly educated class of specialists who staffed the growing bureaucratic state. In his technocratic theory of representative government J. S. Mill even advocated that trained legal specialists should formulate new legislation while the role of elected representatives should be confined to ratification. As the legislative state is eclipsed by the administrative state the wholeness of character produced in the education of the gentleman notable is viewed as a sign of amateurishness, while the process of government by discussion in which he participates is viewed as a “tribunal of ignorance” or the tinkering of clumsy hands. When laws are no longer modelled on general norms but instead function primarily as a means of administration, technical legal knowledge provides an assurance of legislative competence that a public exchange of opinions cannot. A parliament confined to giving sanction to the laws and forbidden from formulating them has been stripped of its rationalistic pretensions. Like all merely acclamatory institutions, it no longer represents reason, but only a will. See *Considerations*, 109-113. On the conflict between the educational habilitation of the cultivated gentleman and the training of bureaucratic specialists see also Max Weber, *From Max Weber: Essays in Sociology*, ed. and trans. H. H. Gerth and C. Wright Mills (New York: Oxford University Press, 1946), 240-244.

<sup>436</sup> Mill, *Considerations*, 241.

be given three or four, while men of learned professions would be entitled to the use of five or even six.<sup>437</sup>

In acknowledging electors' preference for men of learned professions, and in acknowledging the fact that this social strata does not form (or consequently, *represent*) a distinct interest, Hamilton stumbled into one of the central dilemmas of political representation: is representation holistic, or pluralistic? Is the representative's task a matter of acting as the trustee of a private, partial interest, or rather a matter of intuiting the general interest and somehow manifesting the unity of the political order? Despite Hamilton's admission that learned gentlemen would be choiceworthy representatives, both the institutional design and the social pluralism of the American political system were more favourable to the development of pluralistic, interest-based concepts of representation.<sup>438</sup> Madison's contention that "the regulation of these various and interfering interests, forms the principal task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operations of government" and that legislators are "but advocates and parties to the causes which they determine" is the paradigmatic expression of pluralistic interest representation.<sup>439</sup>

Naturally, this form of representation belongs to the intellectual universe of empiricist liberalism, which, as we have seen, centres on the privatistic concept of interest. Interest acts as a bridge connecting the private to the public, putting the state in the service of civil society, and representatives are legitimated by their connection to social interests. On the other hand, when Madison speaks of political representation not only as a mechanism of balancing and counterbalancing, but instead as a means of "enlarging" and "refining" a public view which has

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<sup>437</sup> J. S. Mill, "Thoughts on Parliamentary Reform," in *Collected Works of John Stuart Mill Volume XIX: Essays on Politics and Society*, ed. J. M. Robson (Toronto: University of Toronto Press, 1977), 324-325.

<sup>438</sup> Pitkin, *Concept of Representation*, 190-208.

<sup>439</sup> Madison, *Federalist* No. 10.

as its object a “true interest” that he now speaks of in the singular rather than in the plural,<sup>440</sup> it seems that he has departed from the empiricist view of representation as interest advocacy for a more rationalistic concept.<sup>441</sup> One might imagine that Hamilton’s disinterested learned gentlemen would be more adequate proponents of an enlarged and refined interests than the wide but still privatistic claims of merchants and landed property owners. Political virtue then would be associated with the epistocratic qualifications of wisdom and learning rather than with interest positions determined by independence or interdependence. If interest representation is coordinated by the activity of bargaining and the mechanics of balancing, by what principle will a politics of opinion refinement be coordinated? What form of legitimacy is produced by a form of representation that is not connected to the privatistic interests of civil society? If politics is not a matter of interest advocacy, what form of activity appears in a regime composed of educated notables? To uncover the distinctiveness of parliamentarism, we will have to leave the American republic of proprietors for the old world, taking a backwards detour in order to proceed forwards.

### **Premodern Representation and Parliamentarism**

The history of parliamentarism is impossible to understand independently of the history of political representation. Like parliamentarism itself, political representation is a premodern inheritance. Parliamentary representation was not developed independently as a power opposed to the prerogatives of the monarchy so much as it was an appropriation of these prerogatives. So

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<sup>440</sup> Ibid.

<sup>441</sup> On the resemblance between the view expounded by Madison here and the ideology of Whig parliamentarism, see Samuel H. Beer, “The Representation of Interests in British Government: Historical Background,” *The American Political Science Review* 51, no. 3 (September 1957): 629.

let us explore the premodern forms of political representation that parliament later annexed to itself.

In the medieval monarchical theory of representation, political representation is not a relationship between an elector and their representative, nor is it an activity of acting as an agent or trustee transmitting the will or interest of the represented party. Monarchical representation is a descending theory. Like the church, the monarchical state represents from above.<sup>442</sup> The monarch does not *represent on behalf of* the people, but rather *represents to* the people. He does not appear *for*, but *before* them.<sup>443</sup> Unlike the empiricist concept of representation, the medieval theologico-political concept of representation is qualitative. From the medieval perspective, a knight or a cleric is a representative personality in the sense that they represent honour or piety, but Madison's merchants and learned savants, who are not distinguished by any sort of public or qualitative normative principle, but only by their connection or lack of connection to private interests, would not be.<sup>444</sup> In the case of monarchical representation, this qualitative substance is neither interest (as in the empiricist theory) or reason (as in bourgeois parliamentarism), but rather the unity of the nation, realm, or political order.<sup>445</sup> Insofar as this form of representation can be associated with any form of activity, it does not partake in activities of advocacy or discussion, but rather in an activity of *manifestation*, of making the invisible unity of the realm a tangible, visible reality manifested in the person of the sovereign.<sup>446</sup> The prince does not *possess*

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<sup>442</sup> Carl Schmitt, *Roman Catholicism and Political Form*, trans. G. L. Ulmen (Westport: Greenwood Press, 1996), 25-26. Although Schmitt is a valuable authority on the concept of representation, one must take care not to be misled by his tendency to identify qualities particular to the medieval concept of representation with representation as such.

<sup>443</sup> Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, trans. Thomas Burger (Cambridge: MIT Press, 1991), 7-8.

<sup>444</sup> Schmitt, *Roman Catholicism and Political Form*, 19-20. See also *Constitutional Theory*, 243.

<sup>445</sup> Schmitt, *Constitutional Theory*, 245.

<sup>446</sup> This concept of representation as manifestation did not originate in politics, but in the medieval church, where the Pope was understood to represent Christ in the sense of mystically embodying his existence (not in the sense of acting on his behalf), while bishops were understood as representing the Apostles. Later, the concept of

the realm, he is *identified* with it.<sup>447</sup> The modern, absolutist proclamation “*L’Etat c’est moi*” is still consistent with this premodern concept.<sup>448</sup>

Because of its unitary character, the premodern monarchical theory of representation provided a natural background for the development of the modern politics of *voluntas* articulated in theories of sovereignty. Rousseau’s contention that sovereignty cannot be represented is only intelligible against the background of a modern concept of representation;<sup>449</sup> in the medieval concept, representation is entirely consistent with sovereignty. Because monarchical representation is singular, it is mute. Its characteristic media was not the busy speech of the advocate or the elevated, public-facing rhetoric of parliamentary speeches and printed political discussions, but instead the space-binding technologies of insignias and symbols.<sup>450</sup>

The development of modern political representation was not only conditioned by the already-existing monarchical form of representation, but also by its institutional inheritance from the medieval parliaments. Bourgeois parliamentarism is not only a matter of substituting personnel drawn from a different social class, and parliaments did not become modern simply because the hereditary aristocracy’s house of lords was joined by the bourgeois aristocracy’s house of commons. The natural aristocracy of civil society also transformed the nature of this institution and the form of political representation housed within it.<sup>451</sup>

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representation *qua* embodiment took a profane turn that introduced a new set of political possibilities; bishops did not only manifest the *corporeal* personhood of the Apostles, but also the *corporate* existence of their chapters. In an analogous way, while the prince was initially seen as a representative of God, he was eventually understood to represent the wholeness of his principality. See Pitkin, *Concept of Representation*, 241-242; Mónica Brito Vieira and David Runciman, *Representation* (Cambridge: Polity, 2008), 8-15.

<sup>447</sup> Pitkin, *Concept of Representation*, 246.

<sup>448</sup> Schmitt, *Constitutional Theory*, 239.

<sup>449</sup> Rousseau, *Social Contract*, 198.

<sup>450</sup> Habermas, *Structural Transformation of the Public Sphere*, 8.

<sup>451</sup> The extent to which modern parliamentarism differs qualitatively from its feudal predecessor is a matter of contention. For an account that stresses the continuities between modern and premodern parliaments see John Keane, “Dictatorship and the Decline of Parliament: Carl Schmitt’s Theory of Political Sovereignty,” in *Democracy*

Originally, the medieval parliaments were only summoned at the convenience of the king.<sup>452</sup> These parliaments were talkative (*parle-ments*) to the extent that they functioned as a site of consultation. But it is only with the development of modern, bourgeois concept of political representation that parliament truly became a site of government by discussion. The consultative discussions conducted in the medieval parliaments were not open to the public,<sup>453</sup> they did not have a legislative function, and they were in no way considered a means of subjecting royal power to the light of publicity or the force of criticism. In a way that was entirely consistent with the descending, monarchical concept of representation, the medieval parliament acted as a relay from the king to the realm. Unlike a state subject to the suspicious, critical eye of a public sphere or a modern parliamentary opposition, the king retained mastery of the conditions of his appearance. This communicative relay was unidirectional;<sup>454</sup> medieval society lacked both the sociological conditions and the forms of media necessary for the formation of a public opinion. Despite its name, the primary function of the medieval parliament was not discursive but juridical. In keeping with the medieval doctrine according to which what touches all must be approved by all (*quod omnes tangit*), parliament was assembled for the purpose of guaranteeing the realm's consent to measures proposed by the king (typically

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*and Civil Society: On the Predicaments of European Socialism, the Prospects for Democracy and the Problem of Controlling Social and Political Power* (London: Verso, 1988), 164-170.

<sup>452</sup> Pitkin, *Concept of Representation*, 244.

<sup>453</sup> Jean Cohen and Andrew Arato, *Civil Society and Political Theory* (Cambridge: MIT Press, 1992), 202; Vieira and Runciman, *Representation*, 17.

<sup>454</sup> Vieira and Runciman, *Representation*, 15.

measures of new taxation).<sup>455</sup> So the medieval parliament was not primarily an organ of *discussion*, but rather an organ of *acclamation*.<sup>456</sup>

Although this parliament did not act as the bearer of a non-existent public opinion, and did not relay public discussion or criticism to the king, it did present the grievances and concerns of local constituencies.<sup>457</sup> In advocating on behalf of their localities, members of parliament did not act with the autonomy that distinguishes the modern parliamentary representatives. They instead acted on the basis of an imperative mandate.<sup>458</sup> However, in their capacity for acting as the instructed delegates, deputies, or advocates of their constituents, members of parliament were in no way understood as *representatives*.<sup>459</sup> At this point, the concept of representation was entirely monopolized by the monarch.<sup>460</sup> Rousseau was only half right to assert that “the idea of representatives is modern. It comes to us from feudal government.”<sup>461</sup> The institution of parliament, the selection of officeholders by election,<sup>462</sup> and the political concept of

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<sup>455</sup> Ibid., 15. See also A. H. Birch, *Representation* (London: Macmillan, 1972), 24; Pitkin, *Concept of Representation*, 244.

<sup>456</sup> It is unsurprising then that members of parliament in the modern system of representation would be selected using elections. As Manin has shown, there is an affinity between electoral selection and the norm of consent. See *Principles of Representative Government*, 83-86, 92.

<sup>457</sup> Birch, *Representation*, 28; Pitkin, *Concept of Representation*, 244.

<sup>458</sup> Keith Michael Baker, *Inventing the French Revolution: Essays on French Political Culture in the Eighteenth Century* (Cambridge: Cambridge University Press, 1990), 226-227; Beer, “Representation of Interests,” 615; Cohen and Arato, *Civil Society and Political Theory*, 202; Vieira and Runciman, *Representation*, 16.

<sup>459</sup> Pitkin, *Concept of Representation*, 245, 249. Even if one is comfortable with anachronistically attributing a representative role to the medieval parliament, it is not clear that delegates bound by an imperative mandate acting on the basis of instructions can be considered representatives in any sense of the word. Weber, for instance, included “instructed representation” in his typology of representative forms, while Rousseau and Schmitt distinguished between deputies or delegates and representatives proper. See Rousseau, *Social Contract*, 198; Schmitt, *Constitutional Theory*, 284-285, 289; Weber, *Economy and Society*, 293.

<sup>460</sup> Although this ideal type of medieval parliamentarism is based on the English parliament, the relation between the French king and the Estates-General was likewise understood as a system of “representation from above, deputation from below.” Despite the obvious differences between evolutionary and revolutionary historical experiences, there are striking parallels between the appropriation of representation on behalf of the Estates-General and later the National Assembly and that effected by the English parliament. See Baker, *Inventing the French Revolution*, 224-235.

<sup>461</sup> Rousseau, *Social Contract*, 198.

<sup>462</sup> Manin, *Principles of Representative Government*, 90.

representation have feudal origins, but the origins of political representation were not related to the specifically feudal institution of parliament but rather to the political forms of monarchy.

### **Metamorphosis of Parliament and the Appropriation of Representative Functions**

From the sixteenth century onwards, the concept of representation undergoes a four-faceted metamorphosis. The first two of these facets are closely related. Firstly, the monarch's monopoly on representation was challenged and a representative function was increasingly attributed to parliament. In an early (1583) formulation of this doctrine, Sir Thomas Smith stated that:

The parliament of Englande, which representeth and hath the power of the whole realme both the head and the bodie. For everie Englishman is entended to bee there present, either in person or by procuracion and attornies, of what preheminance, state, dignitie, or qualitie soever he be, from the Prince (be he King or Queene) to the lowest person of Englande. And the consent of the Parliament is taken to be everie mans consent.<sup>463</sup>

Smith did not consider parliament alone to represent the realm; parliament performed its representative function only on the condition that the king was present. In this theory, individual members of parliament certainly do not “represent” their constituents. In this respect his view occupies an intermediate position between medieval and Whig theories of representation. It was not until half a century later that Sir Edward Coke referred to knights and burgesses of the

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<sup>463</sup> Thomas Smith, *De Republica Anglorum: A Discourse on the Commonwealth of England*, ed. L. Alston (Shannon: Irish University Press, 1972), 49.

commons as representing the realm independently of the king.<sup>464</sup> And it is only after parliament as a corporate body was understood to represent the realm that members of parliament considered individually were understood as representatives.<sup>465</sup>

Since the unitary concept of representation remained unchallenged at this point, the appropriation of representation by parliament only became possible on the condition of the second facet of this metamorphosis: a change in the relationship between members of parliament and their constituents. As early as the fifteenth century, members of parliament were understood (jointly) as the attorneys (but not yet the *representatives*) of the whole realm rather than as attorneys of their locality.<sup>466</sup> Ironically, this step on the path to the appropriation of representation by parliament was encouraged by monarchs, who found it difficult to secure the consent of parliamentarians bound by imperative mandates.<sup>467</sup>

The third and fourth facets of the metamorphosis of representation do not concern the question of who representative functions were attributed to or the form of relationship involved, but rather the *activity* of representation. In the medieval monarchical concept, representation was understood as an activity of manifestation. The prince represents the realm in the sense that he makes its unity visible and manifest in the particularity of his person. As the subject of representation was extended from the king alone to the king in parliament, the activity of representation was still understood in this way. However, when representative functions are appropriated by parliament in the absence of the king, the meaning of the representative activity

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<sup>464</sup> Pitkin, *Concept of Representation*, 247-248; Vieira and Runciman, *Representation*, 18-19. This development occurred somewhat later in France. See Baker, *Inventing the French Revolution*, 228-235.

<sup>465</sup> Pitkin, *Concept of Representation*, 249-251.

<sup>466</sup> *Ibid.*, 245, 251.

<sup>467</sup> Weber, *Economy and Society*, 295n2; Urbinati, *Representative Democracy*, 67.

undergoes a transformation, and is increasingly understood as a matter of *acting on behalf of* someone else—at this point, the realm taken as an indivisible whole.<sup>468</sup>

The most systematic and consequential articulation of this concept of representation as *acting for* is found in Thomas Hobbes' *Leviathan*. For Hobbes, a representative—like a sovereign—is a kind of *person*. What is a person? Generically speaking, a person is the *author of actions*. There are two types of persons, *natural persons*, who are the authors of their own actions, and *artificial persons*, who “represent” the actions of others. In contrast to the qualitative monarchical theory and its ecclesiastical antecedents, it is impossible to represent principles like the piety of a cleric or the dignity of a prince. Only persons can be personated.<sup>469</sup> We can see then that Hobbes' account features a threefold identification of *representation*, *personation*, and *authorized action*.<sup>470</sup>

To say that a representative is one who is authorized to act is to give the concept such a wide scope that it threatens to become vacuous. The medieval sovereign's performance of manifestation was, after all, a form of action. But Hobbes' use of examples reveals that he imagined representative activity in a more specific way than the generic language of action would suggest. Recall that Hobbes' account of the transition from the state of nature to a commonwealth also involved an anthropological dimension in which the *homo æconomicus* metamorphosed into a *homo juridicus*. It is entirely consistent with this view that Hobbes viewed action primarily in terms of making covenants.<sup>471</sup> Among all the other transformations found in his work (from authority to legitimacy, from natural law to laws of nature, from voice to will),

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<sup>468</sup> Pitkin, *Concept of Representation*, 248-249.

<sup>469</sup> Thomas Hobbes, *Leviathan*, ed. Edwin Curley (Indianapolis: Hackett, 1994), 102-103.

<sup>470</sup> *Ibid.*, 101.

<sup>471</sup> *Ibid.*, 102.

Hobbes' concepts of action and representation substitute the juridical action of the attorney for the dramaturgical action of the *persona*. A personator is not so much the bearer of an image as they are the bearer of a signature. Insofar as they act as a speaker or a doer, they do so in their capacity as a *binder*, a conduit of obligation.

How does an artificial personator acquire this signature? The substitution of legitimacy for authority articulated in Hobbes' contract theory is duplicated in his concept of representation. Unlike in the medieval theory of representation, the title to political power is not descending but ascending. It does not derive from God but from the democratic or pseudo-democratic moment of consent. The representative owns the signature of those they personate because it has been alienated as though it were a piece of property.<sup>472</sup> Rousseau famously argued that sovereignty cannot be represented because the sovereign will cannot be alienated.<sup>473</sup> But for Hobbes, a will can be alienated. It follows from this that representation and sovereignty are consistent. In representation, a signature itself has been signed over. Although the extension of representative competence can be limited in cases in which the representative is not one's sovereign,<sup>474</sup> insofar as they perform the representative activity of personation, the representative actor has been authorized to act in the name of the represented author, binding them to their decisions as if they had willed them themselves.<sup>475</sup>

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<sup>472</sup> The analogy between authorship and ownership is explicit. Hobbes stated that "for that which in speaking of goods and possessions is called an *owner* (and in Latin *dominus*, in Greek *kurios*), speaking of actions is called author." See *Leviathan*, 101-102.

<sup>473</sup> Rousseau, *Social Contract*, 198.

<sup>474</sup> It is interesting to note that, although his account of representation seems to have been formulated to support his theory of sovereignty, Hobbes did not think that representation as such necessarily involved the unlimited and unconditional authorization possessed by the sovereign representative. Chapter 16 of *Leviathan* ("Of *Persons, Authors, and Things Personated*") distinguishes between representation without caveats and a more limited, lawyerly form of representative activity: "every man giving their common representer authority from himself in particular, and owning all the actions the representer doth, in case they give him authority without stint; otherwise, when they limit him in what, and how far, he shall represent them, none of them owneth more than they gave him commission to act." See *Leviathan*, 104.

<sup>475</sup> *Ibid.*, 102.

Despite the fact that his account features a pseudo-democratic concept of legitimacy and articulates the same transformation of representation from a matter of manifestation to a matter of acting-for that attended the appropriation of representation by parliament, Hobbes still imagined representation as the representation of unity. Although a multitude may be personated, a personator is only ever a person in the singular. However, Hobbes' account differs from the monarchical theory in that here, unity has a very different condition of appearance: the unity of the representative is not *manifested*, but *fabricated*. At this moment, "a multitude of men are made *one* person ... For it is the unity of the representer, not the *unity* of the represented, that maketh the person *one*."<sup>476</sup> Much like a sovereign, a representative is a fictitious person.

Because his account uses pseudo-democratic normative resources to legitimate a form of sovereignty that is more consistent with absolutism than with parliamentary power, Hobbes' legacy for the development of political representation is highly ambivalent. Although there is a natural affinity between monarchical rule and unitary concepts of sovereignty and representation formulated to terminate any and all forms of plurality,<sup>477</sup> Hobbes did not specify that a sovereign had to be a monarch. In principle, an aristocratic institution like a parliament or even a democracy could be sovereign, provided it was able to act as though it were one person.<sup>478</sup> This is the paradox of Hobbes' political thought: all constitutions are democratic in the sense that each rests on the consent of the governed, but all constitutions are monarchical in the sense that in order to exist, they must exist as the rule of one person in either a literal or a figurative way. Both monarchy and democracy are the solution to the riddle of Hobbesian constitutional theory.

Hobbes' account of representation as a form of activity was also ambivalent. On the one

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<sup>476</sup> Ibid., 104.

<sup>477</sup> Ibid., 120-121.

<sup>478</sup> Ibid., 118.

hand, the concept of representation as authorization reinforced the parliamentary principle that representatives should act autonomously of the will or instructions of their electors. On the other hand, the form of action imagined in Hobbes' account was still juridical and acclamatory in nature. Given that all consistent philosophies of sovereignty share a tendency to marginalize the discursive dimension of politics,<sup>479</sup> it is unsurprising that the repression of speech is replicated in Hobbes' theory of representation.

The fourth facet of the metamorphosis of parliamentary representation concerns the shift from acclamation to discussion. This transition was a late and fragile development in the history of parliamentarism. In truth, the acclamatory dimension was never eclipsed entirely, and as soon as the highly specific sociological and institutional conditions for government by discussion disappeared,<sup>480</sup> theories of representation once again insisted that the primary function of parliament was acclamatory, not discursive.<sup>481</sup> It is not clear precisely when or how parliament transformed into an institution that was not only a site of consultation and acclamation, but a site of debate. In England, it appears that the function of parliament oscillated between deliberation and acclamation as the balance of power between the king and the nobility shifted. Even very

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<sup>479</sup> In a way that recalls Hobbes' desire to reduce a plurality of voices to a single will, Bodin insisted that "far from being appropriate for the people, deliberation on affairs ought not to be allowed to it at all." Similarly, Rousseau thought it was important that each author of republican sovereignty should 'deliberate' only in the privacy of his own heart, since public discussion threatened to tempt citizens into forming partial societies that would advocate for private interests. See Jean Bodin, *On Sovereignty: Four Chapters from The Six Books of the Commonwealth*, trans. Julian H. Franklin (Cambridge: Cambridge University Press, 1992), 50; Hobbes, *Leviathan*, 109; Rousseau, *Social Contract*, 156, 205.

<sup>480</sup> Even in the English experience from which the ideal type of parliamentarism is drawn, the period in which private MPs were able to act independently of their parties and consequently be open to genuine discussion was confined to the three decades between the 1832 and 1867 parliamentary reform acts, which came to represent a "mythical image for a great part of the liberal bourgeois." See Beer, "The Representation of Interests," 632; Palonen, *From Oratory to Debate*, 183; Schmitt, *Constitutional Theory*, 347; Selinger, *Parliamentarism: From Burke to Weber*, 174.

Keane is skeptical that even this supposed golden age of parliamentarism was entirely free of the patterns of interest representation and sectional voting. See "Dictatorship and the Decline of Parliament," 169.

<sup>481</sup> See for instance Mill, *Considerations*, 109-112. Manin even goes as far as to argue that parliamentary debate has only ever been a means of producing consent, and not an independent principle of government. See *Principles of Representative Government*, 189-190.

early in the history of medieval parliaments, some assemblies were distinguished by the possession of significant deliberative powers. The *Cortes* established in the Spanish kingdom of Leon in 1118 was outstanding in this respect.<sup>482</sup> In addition to realizing the juridical principle of consent, according to which what touches all must be approved by all (*quod omnes tangit*), these parliaments could additionally appeal to a discursive source of legitimacy according to which what concerns all ought to be debated by all (or as was more likely the case, debated by some on their behalf). However, as long as the discursive activities of the medieval parliaments were circumscribed by the conditions of estates advocacy, in which members of parliaments were bound by instructions to advocate for the particularistic interests of their localities, and as long as their proceedings were conducted in the secrecy of the court, even these early deliberative parliaments remained sites of bargaining and not sites of discussion. They could not yet develop the forms of speech and normativity that distinguish modern, bourgeois parliamentarism.

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<sup>482</sup> Birch, *Representation*, 25. See also Keane, "Dictatorship and the Decline of Parliament," 165-166.

## Chapter 5: Modern Theories of Parliamentarism

### Critical and Legislative Concepts of Reason

The first attempt at a synthesis of the juridical discourse of right and the empiricist discourse of utility appeared far earlier than the development of bourgeois parliamentarism. As we saw above in the chapter outlining empiricist liberalism, social contract theory was an ambiguous genre of political thought. In depicting the state of nature, the natural lawyers adopted an early form of the anthropological assumptions of empiricist liberalism. But while inhabitants of the state of nature were depicted as appetitive subjects of interest, their covenants transformed them into the denizens of the commonwealth whose action was coordinated by the normative force of legal regulation. So while contract theories place contracting subjects at the threshold of two worlds, this discourse is primarily juridical in orientation. In Rousseau's political thought, the relation between juridical and empiricist political forms appears in a very clear way: he described his project as an attempt to "bring together what right permits with what interest prescribes, so that justice and utility do not find themselves at odds with one another."<sup>483</sup> A modern republicanism fit for a world of proprietors takes men as they are. Much like Smith's system of natural liberty, the autonomy secured through the social contract does not appeal to the virtue, but only to the interests of citizens. Since the law applies equally to all in their capacity as subjects, no one in their capacity as a sovereign has any interest in ratifying a burdensome law.<sup>484</sup> In law, validity and facticity are united; on the one hand, law appears as the medium of freedom

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<sup>483</sup> Jean-Jacques Rousseau, *On the Social Contract*, in *Jean-Jacques Rousseau: The Basic Political Writings*, ed. and trans. Donald A. Cress (Indianapolis: Hackett, 1987), 141.

<sup>484</sup> *Ibid.*, 148.

*qua* autonomy, and on the other, as a system of “reciprocal coercion” arranging a field of empirical motives.<sup>485</sup>

Immanuel Kant relocated the Rousseauian concept of freedom as autonomy from the world of politics to the world of moral conduct by making two amendments. Firstly, he did not understand moral laws as being general, but instead universal. The validity of legal norms is not only coextensive with a political community, but in fact applies to the conduct of all rational beings.<sup>486</sup> Secondly, he did not understand moral laws as having their basis in the interests of subjects, but made a distinction between the empirical determinants of interest and the rational determination of the will.<sup>487</sup> When adapting his concept of autonomy to the world of politics, Kant went in a more authoritarian direction than Rousseau. Although Kant’s concept of right hypothetically reproduces the same form of reciprocity featured in Rousseau’s social contract, and although citizens of a republic are equal as subjects of law, they are not involved in authoring the law, nor do they enjoy any Lockean right of resistance against a despotic state.<sup>488</sup>

This is not to say that Kant did not attempt to make room for freedom in his own way. Kant’s moral thought was organized by an attempt to place human agents outside the means-ends framework of utilitarian calculation.<sup>489</sup> But the world of empirical politics is not yet a kingdom of ends. Here, man appears as an empirico-transcendental doublet, a subject and an object at once. While Hobbes and Rousseau’s contract theories feature a threshold where a subject of

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<sup>485</sup> Immanuel Kant, *The Metaphysics of Morals*, in *Kant: Political Writings*, ed. Hans Reiss, trans. H. B. Nisbet (Cambridge: Cambridge University Press, 1991), 134.

<sup>486</sup> Immanuel Kant, *Groundwork for the Metaphysics of Morals*, ed. and trans. Allen W. Wood (New Haven: Yale University Press, 2002), 55.

<sup>487</sup> *Ibid.*, 4-5.

<sup>488</sup> Immanuel Kant, “On the Common Saying: ‘This May be True in Theory, but it does not Apply in Practice,’ ” in *Kant: Political Writings*, ed. Hans Reiss, trans. H. B. Nisbet (Cambridge: Cambridge University Press, 1991), 73, 77, 79-83.

<sup>489</sup> Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1998), 155-156.

interest transforms into a subject of right, Kant introduced another kind of two-world model of political sociability that is not bifurcated by a temporal threshold, but instead by a spatial topography. Whereas the liberal tradition has typically identified coercion with the public power of the state and located freedom in a private sphere that it attempts to maximize, totalize, or set against public authority as a means of limitation, Kant reverses this distribution, arguing for obedience in discharging one's private station and freedom in public. The agent's life is split between a private sphere in which they appear as a part of a machine, a thing-like being with a price,<sup>490</sup> and a public sphere in which they are more than a machine, a member of a complete commonwealth who does not have a price, but instead a dignity standing outside all schemes of commensurability.<sup>491</sup> How is this public freedom exercised? Not in pursuing one's empirical interests like a Lockean proprietor, nor even in legislating as a Rousseauian subject of autonomy, but rather in the *public use of reason* in speech and argument.<sup>492</sup> As liberal thought moves from the centuries of Luther and Locke to the century of Frederick, privatistic rights of conscience and propriety are supplemented by public rights of opinion.

## §

Kant's famous essay on enlightenment is preoccupied with the question of maturity. Enlightenment is, first of all, a process in which each citizen develops the competence to employ their own reason. We do not live in an enlightened age, but instead an age of enlightenment. The process of enlightenment is more easily pursued as a public than as an individual. Through

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<sup>490</sup> Kant, *Groundwork*, 52.

<sup>491</sup> Immanuel Kant, "An Answer to the Question: 'What is Enlightenment?'" in *Kant: Political Writings*, ed. Hans Reiss, trans. H. B. Nisbet (Cambridge: Cambridge University Press, 1991), 56, 59-60.

<sup>492</sup> *Ibid.*, 55.

reasoning together, a public crosses the threshold from minority to maturity.<sup>493</sup> But the public use of reason is more than an ongoing educational process. While the individualistic rights of Lockean subjects were formulated normatively in terms of a pre-existing natural law, and guaranteed effectively by a right of resistance that subjects retain even after instituting a government, both the formulation and the effective safeguarding of Kant's reciprocal rights are achieved by the public use of reason. Kant argued that "freedom of the pen is the only safeguard of the rights of the people." In the age of enlightenment, a citizen "must, with the approval of the ruler, be entitled to make public his opinion on whatever of the ruler's measures seem to him to constitute an injustice against the commonwealth."<sup>494</sup>

Insofar as he emphasized the use of public reason as a means of countering the despotic exercise of state power and establishing limitations on the legitimate sphere of public authority, Kant employed a *critical concept of reason*. In exactly the same way that his critical philosophy imagined critique as a practice of establishing the limits within which the understanding may be legitimately exercised,<sup>495</sup> Kant's political philosophy is critical in the sense of establishing the limits within which political power may be legitimately exercised. While juridical liberalism had imagined the limitation of state power in terms of individually-possessed rights, and empiricist liberalism imagined the limitation of state power as matter of circumscribing a sphere of opacity in which the effective exercise of regulatory power would be frustrated by the nature of its object, parliamentarism imagines the limitation of state power as a practice of public criticism. If Montesquieu discovered a power of exit against the state in the *lettre de change*, Kant's political

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<sup>493</sup> Ibid., 54-55, 58.

<sup>494</sup> Kant, "Theory and Practice," 84-85.

<sup>495</sup> Immanuel Kant, *Critique of Pure Reason*, ed. and trans. Paul Guyer and Allen W. Wood (Cambridge: Cambridge University Press, 1998), 113-114.

writings thematize publicity as a power of voice against the state. With the elaboration of parliamentarism, we have arrived in the age of critique.

§

Insofar as public reason assumes a critical form, its existence is negative. Critique only exists in relation to something else, a separate object that threatens to trespass against its legitimate boundaries. For this reason, it is a “merely negative attitude ... which constitutes enlightenment proper.”<sup>496</sup> In addition to this negative function, Kant also envisioned a positive role for the public use of reason. Recall how Rousseau’s concept of autonomy not only articulated a novel concept of freedom, but additionally provided the normative resources for political association.<sup>497</sup> When legal form functions as the medium of will-formation, all parties appear as both authors and subjects of the general will. The relations of formal equality and reciprocity achieved through this double relation ensure that the law is just. In adapting Rousseau’s political concept of autonomy to the analysis of moral practical reason, Kant purged the concept of all empirical determination and widened its field of application from finite political communities to the totality of rational beings.<sup>498</sup> But he did not make any amendments to the form of the argument itself; once again, the normative validity of moral conduct is captured by the grammar of abstract (but not positive) laws. In the field of practical reason, it is “mere lawfulness in general ... that serves the will as its principle.”<sup>499</sup> Kant’s proceduralist

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<sup>496</sup> Immanuel Kant, *Critique of Judgement*, ed. Nicholas Walker, trans. James Creed Meredith (Oxford: Oxford University Press, 2007), §40, 124n10.

<sup>497</sup> Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge: MIT Press, 1996), 102-103.

<sup>498</sup> Kant, *Groundwork*, 4-5, 55.

<sup>499</sup> *Ibid.*, 18.

interpretation of the social contract complements this moral theory of autonomy. Here, citizens of a republic appear in a double relation as actual subjects of law and hypothetical authors of the law. Laws possess validity to the extent that they are consistent with the hypothetical consent of the subjects to whom they apply under these (admittedly less concrete) conditions of reciprocity. In this way the social contract appears as the basic norm of legislation.<sup>500</sup>

It would seem then that the validity of both moral conduct and political legislation may be entirely encompassed by the dimension of lawfulness in general. But in his political writings, Kant did not restrict himself to the normative resources of legal form. In addition to the moral formula of universalizability and the political formula of consent, he additionally posited a “transcendental formula of public right.”<sup>501</sup> This formula is public not only because its validity applies to the sphere of public authority; it does not derive its normativity from the formal properties of legality, but instead from the “*formal attribute of its publicness*.”<sup>502</sup> The transcendental formula of public right stipulates that “all actions affecting the rights of other human beings are wrong if their maxim is not compatible with their being made public.”<sup>503</sup> While maxims that violate the laws of practical reason are distinguished by their inconsistency, by the fact that an actor would have to make an exception for themselves in order to act on the basis of such maxims, maxims that violate the principle of publicity are distinguished by the fact that they can only be averred privately or secretly.<sup>504</sup>

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<sup>500</sup> Kant, “Theory and Practice,” 77-79.

<sup>501</sup> Immanuel Kant, “Perpetual Peace: A Philosophical Sketch,” in *Kant: Political Writings*, ed. Hans Reiss, trans. H. B. Nisbet (Cambridge: Cambridge University Press, 1991), 126.

<sup>502</sup> *Ibid.*, 125.

<sup>503</sup> *Ibid.*, 126.

<sup>504</sup> *Ibid.*, 126-127. Kant makes the concrete political implications of this stipulation clear: both the despotic exercise of public power and rebellious or revolutionary activities are inconsistent with publicity, and therefore are inconsistent with political right by extension.

It is not difficult to see the resemblance between the formula of public right and the juridically-formulated universalizability tests that appear in Kant's practical philosophy and contract theory. Much like these juridical formulations, the formula of public right applies both in the sphere of private moral conduct and in the sphere of public authority. It is at once an ethical and a juridical principle. Without appeal to the attribute of publicness, Kant argued that "there can be no justice ... and therefore no right, since right can only come from justice."<sup>505</sup> And exactly like the categorical imperative and the critical concept of public reason, this formula of public right is "a purely *negative* test, i.e. it serves only as a means of detecting what is *not* right in relation to others."<sup>506</sup> For this reason, some commentators have denied that this principle can be applied to the formulation of legislation in addition to its exclusion.<sup>507</sup>

However, Kant did not only formulate the principle of public right in negative terms. In addition to this negative test, he stipulated an additional "affirmative principle of public right" according to which "all maxims which *require* publicity if they are not to fail in their purpose can be reconciled both with right and with politics."<sup>508</sup> To the extent that publicity appears as a higher norm from which the maxims of positive legislation are derived, Kant's political thought features a *legislative concept of reason*. In an enlightened commonwealth, citizens are not only permitted to submit "forthright criticism of the current legislation," but also to "put before the public their thoughts on better ways of drawing up laws."<sup>509</sup> The normativist concept of law

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<sup>505</sup> Ibid., 125.

<sup>506</sup> Ibid., 126.

<sup>507</sup> Jüri Lipping, "Kant and the Two Principles of Publicity," *The European Legacy* 25, no. 2 (2020): 121.

<sup>508</sup> Kant, "Perpetual Peace," 130.

<sup>509</sup> Kant, "What is Enlightenment?" 57.

according to which *veritas non auctoritas facit legem* (truth, not authority makes law) presupposes this concept.<sup>510</sup>

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In Kant's account of public reason, the synthesis between empiricist and juridical elements remains incomplete. This is not so much because his reflections concern themselves with the role of the press without developing a theory of public reason in the context of parliamentary representative institutions, but rather because his theory confines itself to the dimension of *publicity* without considering the political forms of *discussion*. To the extent that he drew from the economic idiom of empiricist liberalism, Kant was well aware that competitive, intersubjective activities could produce effects that were opaque to and transcendent of the intended ends of participants. He was skeptical that the inward force of individual moral attitudes would be sufficient to produce a moralized political constitution. In a turn of phrase that recalls Rousseau's critique of democracy, he remarked that it would require a "state of *angels*" to establish such a constitution.<sup>511</sup> So Kant instead placed his hopes for a pacific, cosmopolitan

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<sup>510</sup> In the course of describing the transformations of the bourgeois *öffentlichkeit* Habermas helpfully (albeit briefly) distinguishes between critical and legislative concepts of reason. Insofar as he limits his attention to the continental public sphere, which was positioned in a polemical relation against the power of the absolutist state, and insofar as he emphasizes that the principle of publicity poses a "challenge [to] domination as such," or that communicative action possesses an "anarchistic core," Habermas employs a critical concept of reason. But insofar as he anchors the normative dimension of law in argumentatively-redeemed validity claims, and views rational discussion as a means of making law in addition to challenging power (*veritas non auctoritas facit legem*), Habermas employs a legislative concept of reason. Both concepts of reason belong to the intellectual universe of the Enlightenment. Critical reason is concerned with addressing the question of how not to be governed. In the classical image, this question was formulated as a problem of where not to be governed—that is, as a problem of establishing boundaries circumscribed by an apparatus of right. The legislative concept of reason predates the age of critique. The ideal of a political order modelled on the rational idea (*eidos*) was already present in Platonic political philosophy; the *aufklärer* did not invent, but only reformulated the normative promise of *ratio*. See *Between Facts and Norms*, xl, 102-103; *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, trans. Thomas Burger (Cambridge: MIT Press, 1991), 28, 53, 81-82, and especially 99.

<sup>511</sup> Kant, "Perpetual Peace," 112-113.

political order in the mechanical forces of natural providence.<sup>512</sup> In his writings on the philosophy of history especially, he emphasized how the pacification of human relations is a providential, unintended consequence of the “unsocial sociability” of human nature. Human beings are unsociably sociable in the sense that they at once desire to be a part of society and to develop their capacities under social conditions, and on the other hand cannot help but give themselves over to their self-seeking energies. This unsocial sociability places them in a relation of antagonism which in turn indirectly contributes to social progress in pacification despite this progress not being intended by these self-interested agents. Kant’s cunning of nature strongly resembles Burke’s “wisdom without reflection” and Smith’s “system of natural liberty”:

Individual men and even entire nations imagine that, while they are pursuing their own ends, each in his own way and often in opposition to others, they are unwittingly guided in their advance along a course intended by nature. They are unconsciously promoting an end which, even if they knew what it was, would scarcely arouse their interest .... In the same way, trees in a forest, by seeking to deprive each other of air and sunlight, compel each other to find these by upward growth, so that they grow beautiful and straight—whereas those which put out branches at will, in freedom and isolation from others, grow stunted, bent and twisted. All the culture and art which adorn mankind and the finest social order man creates are fruits of his unsociability.<sup>513</sup>

So although the rational will is inefficacious, a natural mechanical process comes to its aid. Through a competitive process that is opaque in its totality to the partiality of the interested

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<sup>512</sup> For a discussion of the way Kant substitutes a philosophy of history for an appeal to civic or moral conduct see Habermas, *Structural Transformation of the Public Sphere*, 108-117; concerning this same substitution in the *arcana* of the German Enlightenment see also Reinhart Koselleck, *Critique and Crisis: Enlightenment and the Pathogenesis of Modern Society* (Cambridge: MIT Press, 1998), 127-137.

<sup>513</sup> Immanuel Kant, “Idea for a Universal History with a Cosmopolitan Purpose,” in *Kant: Political Writings*, ed. Hans Reiss, trans. H. B. Nisbet (Cambridge: Cambridge University Press, 1991), 41, 46.

actors involved, private self-interest is transformed into public virtue.<sup>514</sup> What mechanism is at work here? Competition does not necessarily specify economic competition. Although it is tempting to read a commercial meaning into the image of growing trees that appears in his essay “Idea for a Universal History with a Cosmopolitan Purpose,” Kant does not specify that this is a process of economic competition.<sup>515</sup> And in “Perpetual Peace” he is ambivalent, appealing to both the empirical dimension of security and the empirical dimension propriety. On the one hand, the threat of war from an outside neighbouring power motivates actors to form a state of their own to ensure their security. In doing so, they establish a body of law that they obey not because they recognize its validity, but rather its coercive facticity. In this respect they remain a “nation of devils.”<sup>516</sup> On the other hand, relations in the sphere of international politics are pacified by a “*spirit of commerce*” that only appeals to the self-interested motives of the exchanging parties involved, but nevertheless is incompatible with the conduct of warfare.<sup>517</sup>

We can see that Kant was no stranger to empiricist forms of argumentation. It is surprising then that they did not leave their mark on his account of public reason. In his reflections on publicity, he regresses back into *angélisme*. While the subject of history is a devilish empirical subject, the subject presupposed in Kant’s account of publicity is an ideal transcendental subject. Commentators attempting to assimilate Kant to the modern liberal democratic canon have sometimes assumed that the public Kant envisioned in “Perpetual Peace”

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<sup>514</sup> Habermas observes that this line of argument is a variation on Mandeville’s famous formula. See *Structural Transformation of the Public Sphere*, 109.

<sup>515</sup> There is a strong resemblance between the image of the growing trees and the good Eris from Hesiod: “the other [Strife-brood] was elder born of gloomy Night, and the son of Kronos, the high-seated one who dwells in heaven, set her in the earth’s roots, much the better for men. She rouses even the shiftless one to work. For when someone whose work falls short looks towards another, towards a rich man who hastens to plough and plant and manage his household well, then neighbour vies with neighbour as he hastens to wealth: this Strife is good for mortals.” See *Works and Days*, in *Theogony and Works and Days*, ed. and trans. M. L. West (Oxford: Oxford University Press, 1988), 37.

<sup>516</sup> Kant, “Perpetual Peace,” 112-113.

<sup>517</sup> *Ibid.*, 114.

and elsewhere is an actual, empirical public of citizens.<sup>518</sup> But this is not the case. In exactly the same way that Kant understood consent not as an institution in which empirical citizens legitimate the laws, but instead as a hypothetical norm that an empirically independent prince must take into account when formulating legislation,<sup>519</sup> he did not imagine publicity as an institution (e.g. as a parliament or a press), but instead as a norm:

If, in considering public right as the jurists usually conceive of it, I abstract from all its *material* aspects (as determined by the various empirically given relationships of men within a state, or of states with one another), I am left with the *formal attribute of publicness*. For every claim upon right potentially possesses this attribute, and without it, there can be no justice (which can only be conceived of as *publicly knowable*) and therefore no right, since right can only come from justice.

Every claim upon right must have this public quality, and since it is very easy to judge whether or not it is present in a particular instance, i.e. whether or not it can be combined with the principles of the agent concerned, it provides us with a readily applicable criterion which can be discovered *a priori* within reason itself. If it cannot be reconciled with the agent's principles, it enables us to recognise at once the falseness (i.e. unrightfulness) of the claim (*praetensio iuris*) in question, as if by an experiment of pure reason.<sup>520</sup>

Publicity is reduced to publicizability.<sup>521</sup> It is a quality of a maxim, not a mode of association. The difference between an institution and a norm is not insignificant. An empirical public is qualitatively different from an ideal public. For this reason, certain forms of intersubjective

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<sup>518</sup> For a criticism of this view, see Kevin R. Davis, "Kantian 'Publicity' and Political Justice," *History of Philosophy Quarterly* 8, no. 4 (October 1991): 418.

<sup>519</sup> Kant, "Theory and Practice," 79.

<sup>520</sup> Kant, "Perpetual Peace," 125.

<sup>521</sup> Onora O'Neill, *Constructions of Reason: Explorations of Kant's Practical Philosophy* (Cambridge: Cambridge University Press, 1989), 33-34.

relationships and political forms will not exist in the latter case. Recall how Rousseau criticized democratic government as an *angélisme*. This line of criticism did not reveal that democracy is idealistic so much as it revealed the incompatibility between Rousseau's political metaphysics and the practice of actually-existing democracy. Democracy is only fit for angels because only a people of angels are so perfect that they do not disagree. There is no plurality among angels, just like there is no plurality in a general will, or in any philosophy of sovereignty. In sovereignty, a plurality of voices is reduced to one will.<sup>522</sup> Sovereignty is not even "monological"; because it is mute, it does not possess a *logos*. The same thing could be said of Kant's ideal public. Kant argued that hypothetically, even one enlightened ruler could intuit the general will.<sup>523</sup> Similarly, an ideal public could as easily be imagined as an audience of only one angel. As Kevin R. Davis observes, "there can be no actual debate among an ideal public."<sup>524</sup>

### **From the Representation of Unity to the Representation of Reason**

We have seen how, in his attempt to make room for public freedom, Kant formulated the principles of publicity on the model of legal form. In its formal properties of consistency, its appeals to the normative principles of universality, and its non-dialogical method of formulation, the norms of publicity resemble the legalistic categorical imperative and the image of politics as the realization of moral norms posited by an autonomous will. In these respects, Kantian publicity is like a law in speech's clothing, an alternative politics of autonomy that stops short of

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<sup>522</sup> Thomas Hobbes, *Leviathan*, ed. Edwin Curley (Indianapolis: Hackett, 1994), 109.

<sup>523</sup> It is fascinating that, in his attempt to concretize the ideal of public reason, Nicolas de Condorcet did not reject the Kantian premise that rational maxims of politics presupposed only a single will. The assumptions of juridical liberalism were not abandoned all at once. See Nadia Urbinati, *Representative Democracy: Principles and Genealogy* (Chicago: University of Chicago Press, 2006), 199.

<sup>524</sup> Davis, "Kantian 'Publicity' and Political Justice," 418-419.

the empirical world of political action. When the dimension of plurality is restricted the presence of a hypothetical audience, no discussion takes place. Publicity in the absence of discussion provides an alternative principle by which the will's maxims may be universalized, but it does not provide a stage for the dynamic process of contestation and exchange that distinguishes parliamentarism. Like the will that subjects its maxims to the juridical tribunal of universality, the subject of publicity is not even univocal or monological; a hypothetical public needs ears as little as the subject of publicity needs a voice. For such a subject, a volition alone is enough. Once again, a plurality of voices has been reduced to a will.

Being a statesman himself, Edmund Burke was especially well-situated to investigate the aspects of public reason neglected in Kant's account. Unlike Kant's reflections on publicity, Burke's "Whig" theory of parliamentary representation is situated on the empirical level. In addition to publicity, Burke's account identifies the activity of discussion among a plurality of interlocutors as a rationalizing principle.

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Despite its brevity, the theory of parliamentarism presented in Burke's speech to his electors at Bristol is complex and multifaceted. It would be mistaken to see this account only as a theory of "virtual representation" encompassing the *relation* (or lack thereof) between representatives and those they represent. Burke's reflections on the parliamentary vocation also feature a novel account of the meaning of representation as an *activity*. And in fact, it is this latter facet of his theory that is most significant for the elaboration of parliamentarism. The Whig

theory of representation can be understood as a first attempt at formulating an alternative framework to the representation of interest and two different forms of the representation of will.

Burke's thought expresses the distinctive political situation of the bourgeois, engaged in a two-fronted battle against monarchical and democratic forms of politics.<sup>525</sup> In his famous speech to his electors at Bristol, Burke distinguished parliamentary representation from instructed delegation, arguing that "authoritative instructions, mandates issued, which the member is bound blindly and implicitly to obey, to vote, and to argue for, though contrary to the clearest conviction of his judgment and conscience,—these are things utterly unknown to the laws of this land."<sup>526</sup> Burke's target at this point was not the older "Tory" model of parliamentary activity, where members of parliament bound by imperative mandates would advocate on behalf of their localities, but rather the use of the same practice by the democratic Radical movement of the 1770s and 1780s.<sup>527</sup> But it is interesting to note that the use of instructed delegation is an artifact of both the feudal estates system and modern democracy.<sup>528</sup>

It is also interesting to note that Burke associated the imperative mandate with three different "substances" of representation—or, it might be more accurate to say, three substances of delegation.<sup>529</sup> Firstly, in contrast to the empiricist theories of Madison and Sieyès (neither of

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<sup>525</sup> Samuel H. Beer, "The Representation of Interests in British Government: Historical Background," *The American Political Science Review* 51, no. 3 (September 1957): 615; Carl Schmitt, *Constitutional Theory*, ed. and trans. Jeffrey Seitzer (Durham: Duke University Press, 2008), 252; William Selinger, *Parliamentarism: From Burke to Weber* (Cambridge: Cambridge University Press, 2019), 24-25.

<sup>526</sup> Edmund Burke, "Speech at Mr. Burke's Arrival in Bristol," in *The Portable Edmund Burke*, ed. Isaac Kramnick (New York: Penguin, 1999), 156.

<sup>527</sup> Beer, "Representation of Interests," 615.

<sup>528</sup> Birch observes that in England, the Levellers' demand that parliament should simply act as the agent of the popular will resembled the medieval concept of "representation" (or more accurately, *delegation*). See *Representation*, 37. Concerning the resemblance between Rousseau's attempt to institutionalize "democratic" sovereignty in the Polish diet and the practices of the Old Regime, see Keith Michael Baker, *Inventing the French Revolution: Essays on French Political Culture in the Eighteenth Century* (Cambridge: Cambridge University Press, 1990), 237.

<sup>529</sup> Urbinati, the most rigorous and original contemporary theorist of political representation, argues that delegation is not a form of representation. See *Representative Democracy*, 65.

whom in fact advocated for instructed delegation<sup>530</sup>), parliamentary representation is not a matter of representing the private interests of one's constituency: "parliament is not a *congress* of ambassadors from different and hostile interests, which interests each must maintain, as an agent and advocate, against other agents and advocates." Furthermore, in contrast to Sieyès' identification of representation with divided labour, a representative cannot be understood simply as a labourer in one's hire. A member of parliament "owes you, not his industry only, but his judgement."<sup>531</sup> It is indeed true that in other contexts Burke described parliamentary representation as a matter of interest representation characterized by the activity of bargaining.<sup>532</sup> A political partisan all the way down, Burke was a notoriously inconsistent thinker. For the purpose of outlining the Whig theory of representation, we do not concern ourselves with Burke himself, but only with his speech to the electors at Bristol.

Secondly, Burke distinguished parliamentary representation from the representation of electors' opinions, going so far as to state that a member of parliament "betrays, instead of serving you, if he sacrifices [his judgement] to your opinion." It is not clear what concept of opinion he had in mind here. It is possible that he may be contrasting the mature judgement of

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<sup>530</sup> Despite all their differences, Sieyès' defence of deliberative assemblies strongly resembles the language of Burke's speech to his electors at Bristol. In an attack on democracy and the use of instructed delegation, Sieyès stated that: "It is not in the watches of the night, with everyone in their own houses, that the democrats who are most jealous of their liberty form and fix their individual opinion, to be carried from there into the public space – only to return to their houses to start over again in complete solitude, in the event that no will common to the majority could be extracted from these isolated opinions. We would emphatically say that such a means of forming a common will would be absurd. When people gather, it is to deliberate, to know what other people are thinking, to benefit from mutual enlightenment, to compare particular wills, modify them, reconcile them, and eventually achieve a result that is common to a plurality. I now ask: should what would seem absurd in the most rigorous and jealous democracy be the rule for a representative legislature? It is incontestable that the Deputies have come to the National Assembly not to announce the already formed will of their constituents, but to deliberate and vote freely following their *actual* opinion, illuminated by all the enlightenment which the Assembly can furnish to each of them." See Richard Tuck, *The Sleeping Sovereign: The Invention of Modern Democracy* (Cambridge: Cambridge University Press, 2015), 174.

<sup>531</sup> Burke, "Speech at Mr. Burke's Arrival," 156.

<sup>532</sup> Beer, "Representation of Interests," 616-619; James Conniff, "Burke, Bristol, and the Concept of Representation," *The Western Political Quarterly* 30, no. 7 (September 1977): 332; Pitkin, *Concept of Representation*, 174-186.

distinguished parliamentary notables from the public yet badly-formed opinion of their social inferiors. It would hardly be surprising if the skepticism concerning the people's deliberative capacities found in Hamilton, Madison, and J. S. Mill's theories of political representation was replicated in Burke's even more nakedly elitist account. Unlike Constant, who argued that parliament was a *relay* of public opinion,<sup>533</sup> most theorists of parliamentarism have understood representation either as a matter of *refining* public opinion (to the extent that parliament is understood to have contact with the informal public at all—for Burke, this contact was minimized), or as a matter of *forming* a public opinion that does not exist outside it. But more likely, what Burke had in mind was a non-public opinion that has not been formed by exposure to publicity and informal deliberation at all (let alone being refined by elected men of substance). A non-public opinion is not rational, but volitional. If this is the case, he was likely using opinion as a synonym for *will*, the third substance of delegation. Burke conceded that “my worthy colleague says, his will ought to be subservient to [that of the electors]. If that be all, the thing is innocent,” since “if government were a matter of will upon any side, yours, without question, ought to be superior.”<sup>534</sup> But in the Whig theory, as for Rousseau, representation is not the representation of will. So what then, is its substance? What is being represented here?

We have seen that Burke's Whig theory of representation was formulated in opposition to the delegation of the will. The outstanding representative of the modern politics of the will was Rousseau, who employed the argumentative resources of bourgeois contract theory to reappropriate the sovereignty of the absolute prince without fundamentally transforming its

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<sup>533</sup> Benjamin Constant, *Principles of Politics Applicable to all Representative Governments*, in *Constant: Political Writings*, ed. and trans. Biancamaria Fontana (Cambridge: Cambridge University Press, 1998), 185.

<sup>534</sup> Burke, “Speech at Mr. Burke's Arrival,” 156.

nature.<sup>535</sup> Even when it is attributed to the people, sovereignty is still understood as an indivisible, juridico-volitional substance. Fascinatingly, despite being formulated in opposition to the Rousseauian politics of the will, Burke's theory of representation also rests on an appropriation of the political forms developed to legitimate monarchical power. Much like Hobbes' absolute sovereign, Burke's members of parliament act as trustees distinguished by a high (if not total) degree of autonomy from their electors.<sup>536</sup> And like his bourgeois parliamentary predecessors, Burke's concept rests on the parliamentary appropriation of representative activities from the king. Exactly like a king (and unlike a feudal member of parliament acting as an advocate for his locality), a modern parliament represents the nation as a whole. A representative "is not member of Bristol, but he is a member of *Parliament*."<sup>537</sup>

Despite these resemblances to both the feudal and the modern politics of monarchical representation, Burke's concept of parliamentarism differed from each form of monarchy in two key respects: their respective *basis of unity* and *forms of legitimacy*. The medieval monarch represented the realm as a whole through an act of manifestation in which this unity was made present in the concreteness of his person. Here, representation was an "existential" event.<sup>538</sup> At this point, politics was not yet a problem of legitimacy but rather a problem of authority. The king's authority was understood either as descending from God via divine right or from the pseudo-politics of pseudo-kinship, in which the monarch was imagined as the patriarch of the entire realm.<sup>539</sup> In Hobbes' account, the basis of unity and the form of legitimacy are closely related. The unity of sovereignty was achieved by the incorporation of the plural multitude into

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<sup>535</sup> Jürgen Habermas, "Three Normative Models of Democracy," *Constellations* 1, no. 1 (December 1994): 9; Urbinati, *Representative Democracy*, 72.

<sup>536</sup> Birch, *Representation*, 40; Urbinati, *Representative Democracy*, 21-22.

<sup>537</sup> Burke, "Speech at Mr. Burke's Arrival," 156.

<sup>538</sup> Schmitt, *Constitutional Theory*, 243.

<sup>539</sup> *Ibid.*, 311.

an artificial, unitary subject. The means of unification was a covenant that expressed the consent of each and every subject to the institution of a sovereign commonwealth. For Hobbes, the entire dimension of legitimacy was encompassed in the moment of consent.

None of these bases of unification and forms of legitimacy were available for Burke's Whig theory of representation. Firstly, at this point both the premodern quasi-mystical concept of representation as manifestation and the concept of premodern concept of authority were sufficiently outmoded that they no longer exerted a normative force. Secondly, unlike a prince, a parliamentary assembly makes for a poor figuration of an artificial man. It does not have the existential unity of a person, real or artificial. Furthermore, Burke's account dramatically de-emphasized the normative resources of consent. Although the election of a parliament is different from the hypothetical institution of a commonwealth in that it does not feature that classic occasion for consent, the social contract, we have seen that election itself can be interpreted as a social contract in miniature where the legitimacy of consent is periodically reiterated.<sup>540</sup> However, Burke's theory of virtual representation holds that constituencies need not be involved in the election of members of parliament in order to be adequately represented by them. This concept of representation is uniquely ill-suited to take advantage of the normative resources of consent. Some commentators have attempted to follow the doctrine of virtual representation to its conclusion, raising the question of why Burke thought it necessary that representatives should be selected using elections at all.<sup>541</sup> This puzzle disappears if one considers that election does not only have a juridical function of expressing consent, but also the sociological function of selecting notables distinguished by their qualitative superiority to their electors. Burke, who

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<sup>540</sup> Bernard Manin, *The Principles of Representative Government* (New York: Cambridge, 1997), 83-86, 92.

<sup>541</sup> Conniff, "Burke, Bristol, and the Concept of Representation," 331; Pitkin, *Concept of Representation*, 173.

explicitly opposed the use of sortition on the grounds that it was indifferent to selecting officeholders possessing a “preferable title to command,”<sup>542</sup> thought it was preferable that representatives should form a “natural aristocracy.”<sup>543</sup> His contention that a parliament selected by *fewer* electors would be *more* representative is perfectly consistent if one views representation as a matter of selecting an elite rather than a matter of reiterating consent.<sup>544</sup>

Given that he understood representation as the representation of the realm as a whole, and given that he could not avail himself of the normative resources of authority or consent, what basis of unification and form of legitimacy did Burke choose to employ? Although the Hobbesian and premodern concepts of political representation differ in the ways outlined above, in each theory representation is localized in the concrete person of a sovereign who, like all genuine sovereigns, is understood first of all as a subject of will. Despite denying that sovereignty could be alienated to a prince, Rousseau likewise understood his republican sovereignty in this way; although they lack the existential unity of a concrete sovereign, unity can still be attributed a multitude if only they share a will. Whether the will is legitimate because it has been consented to (Hobbes), because it is constituted by the people themselves (Rousseau), or because it partakes in an extrapolitical source of authority based in God or kinship (as in the medieval theory), in all theories of sovereignty the will is both the substance of unity and the form of legitimacy. This is not so in Burke’s concept of representation. In the Whig theory, “government and legislation are matters of reason and judgment, and not of inclination.” Burke

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<sup>542</sup> Edmund Burke, *Reflections on the Revolution in France*, ed. L. G. Mitchell (Oxford: Oxford University Press, 2009), 50.

<sup>543</sup> Edmund Burke, “An Appeal from the New to the Old Whigs,” in *The Portable Edmund Burke*, ed. Isaac Kramnick (New York: Penguin, 1999), 495-496.

<sup>544</sup> Pitkin, *Concept of Representation*, 171.

has discovered a second source of legitimacy.<sup>545</sup> In addition to the volitional legitimacy of consent, legislation can be legitimated by the normative resources of *reason*. The principle of unification is not an alienated will, an anointed will, or general will, but rather “the general good, resulting from the general reason of the whole.”<sup>546</sup> By denying that a concrete personage is necessary to manifest the unity of the realm, Burke substituted a normative event for an existential event.<sup>547</sup> And by denying that consent is the source of legitimacy, Burke discovered an avenue that leads away from a juridico-politics in which the representative activity was understood on the model of mute, volitional activities of binding, obliging, and consenting to covenants, and towards a different form of action.

What form of action is conducted by a parliament that does not will, but instead reasons? The condition for *government by reason* is *government by discussion*. Burke asked “what sort of reason is that in which the determination precedes the discussion, in which one set of men deliberate and another decide, and where those who form the conclusion are perhaps three hundred miles distant from those who hear the arguments?” Acting as an instructed delegate of a pre-formed will is incompatible with government by reason because it is incompatible with deliberation. Burke contended that “Parliament is not a *congress* of ambassadors from different and hostile interests, which interests each must maintain, as an agent and advocate, against other agents and advocates; but Parliament is a *deliberative* assembly of one nation, with one interest, that of the whole—where not local purposes, not local prejudices, ought to guide, but the general good, resulting from the general reason of the whole.”<sup>548</sup> So government by discussion is not

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<sup>545</sup> For a comparison of the two forms of legitimacy identified here, see Bernard Manin, “On Legitimacy and Political Deliberation,” trans. Elly Stein and Jane Mansbridge, *Political Theory* 15, no. 3 (August 1987): 338-368.

<sup>546</sup> Burke, “Speech at Mr. Burke’s Arrival,” 156.

<sup>547</sup> Schmitt, *Constitutional Theory*, 243.

<sup>548</sup> Burke, “Speech at Mr. Burke’s Arrival,” 156.

only incompatible with the delegation of the will through instructions featured in juridical theories of popular sovereignty, but also with the privatistic bargaining activities of pluralistic interests advocacy featured in empiricist liberalism. In his study of the significance of the distinction between government and sovereignty for modern democracy, Richard Tuck argues that the exclusion of collective deliberation in theories of popular sovereignty “seems surprising to many modern theorists of democracy, for whom (following an idealised and in many ways unhistorical picture of an ancient assembly) the activity of citizens conferring and arguing about their collective decisions is central to the nature of democratic politics.”<sup>549</sup> This view is mistaken. Modern representative government and the “democratic” theories that replicate its forms of association in thought have no democratic heritage at all. The fascination with rational<sup>550</sup> discussion that animates contemporary theories of deliberative democracy has nothing to do with the Athenian *isegoria* and everything to do with the parliamentary norm of government by discussion.

If discussion is the condition for reason, what are the conditions for discussion itself? We have seen that Burke shared the aristocratic outlook of all proponents of representative government. Members of parliament should form a “true natural aristocracy” that “is not a separate interest in the state, or separable from it.”<sup>551</sup> It will not do to select officeholders by

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<sup>549</sup> Tuck, *Sleeping Sovereign*, 5.

<sup>550</sup> In the ancient political imaginary, political speech was not valued because of its rational character. Much of the pathos of Platonic political philosophy is built on the opposition between the rhetorical, oratory forms of speech (*rhētorikē*) employed in the assembly (*ekklesia*) and the dialectic (*dialektikē*) or inquiry (*elenchus*) that could only be conducted between fewer interlocutors set apart from the opinions (*doxa*) of the many. Whether or not Hobbes and Rousseau were correct to describe democracy as an aristocracy of orators, parliamentarism is built on the oratory of aristocrats. See especially Plato, *Apology*, in *The Trial and Death of Socrates*, trans. G. M. A. Grube (Indianapolis: Hackett, 2000), 17a-18c; *Protagoras*, in *Protagoras, Philebus, and Gorgias*, trans. Benjamin Jowett (Amherst: Prometheus Books, 1996), 329a-b, 336b; but also Hannah Arendt, “Philosophy and Politics,” *Social Research* 71, no. 3 (Fall 2004): 432; Kōjin Karatani, *Isonomia and the Origins of Philosophy*, trans. Joseph A. Murphy (Durham: Duke University Press, 2017), 107.

<sup>551</sup> Burke, “An Appeal from the New to the Old Whigs,” 495.

sortition, which is indifferent to their possession of a “preferable title to command.”<sup>552</sup> Instead, they must be elected (ideally by a very limited electoral franchise that is itself composed of men of substance).<sup>553</sup> By what principles of distinction are this aristocracy distinguished from their electors? Again, Burke did not depart from other theorists of representative government, contending that among “the circumstances of men that form what I should call a *natural* aristocracy” are “to be a professor of high science, or of liberal and ingenuous art” or “to be amongst rich traders, who from their success are presumed to have sharp and vigorous understandings.”<sup>554</sup> Exactly like Hamilton’s merchants and men of learned professions, Burke’s members of parliament should be distinguished by their property or by their education. Parliament is not so much a mirror that reflects the nation, but rather a lens that corrects its vision.<sup>555</sup>

But distinction is not the only condition for discussion identified by Burke. In contrast to Mill, who argued that representatives should be autonomous of their electors in the same proportion in which they are qualitatively superior to and distinct from them,<sup>556</sup> for Burke parliamentary autonomy was not a function of *distinction* but rather a condition for *discussion*. And in contrast to Hobbes, for whom the autonomy of authorized trustees was legitimated by the *consent* of those who they personate, for Burke the autonomy of parliamentary representatives was legitimated not by the conditions of their election, but rather by the nature of their *activity*,

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<sup>552</sup> Burke, *Reflections on the Revolution in France*, 50.

<sup>553</sup> Pitkin, *Concept of Representation*, 171.

<sup>554</sup> Burke, “An Appeal from the New to the Old Whigs,” 495-496.

<sup>555</sup> The frequently employed image in which parliament appears as a mirror of the nation should not be mistaken for a democratic doctrine. Political thinkers who used this image presupposed that the nation or society represented featured natural social inequalities that they desired to see reflected in the public order. See for instance the criticism of James Lorimer’s philosophy of government that appears in J. S. Mill, “Recent Writers on Reform,” in *Collected Works of John Stuart Mill Volume XIX: Essays on Politics and Society*, ed. J. M. Robson (Toronto: University of Toronto Press, 1977), 355.

<sup>556</sup> J. S. Mill, *Considerations on Representative Government* (Amherst: Prometheus, 1991), 237, 240, 246-247.

which was itself a source of legitimacy. As we saw above, Burke argued against instructed delegation not on legal grounds or on “sociological” grounds (i.e. because it would submit men of substance to the will of their social inferiors), but rather on *procedural* grounds: mandate independence is justified by the requirements of government by reason, which are coextensive with the requirements of government by discussion. Parliamentary government cannot be either a gathering of mute, pre-formed wills or a congress of ambassadors because it must be a deliberative assembly.<sup>557</sup> If it is difficult to secure the consent of an instructed delegate, to conduct discussions (as opposed to bargaining) with them is impossible.

Recall Burke’s critique of political rationalism and the Rights of Man in his *Reflections*. The world of political and moral causes is so complex that it is not transparent to human reason. Because of this opacity, legislation cannot be *a priori* science. Rather than appealing to the intuition of legislators, it is safer to rely on the mechanical accumulation of experience by political institutions themselves, which are weathered and shaped by time’s tests, in this way partaking in nature’s wisdom without reflection. In comparison with skeptical empiricism of this line of argument, Burke’s account of parliamentary activity appears highly rationalistic and even naïve. Although Burke rejected both the empiricist politics of interest representation and the juridical representation of the will, there is still a sense in which his account of public reason resembles Kant’s. While Kant’s norm of publicity was monological insofar as it found no place for discussion or even precluded it, Burke admittedly did insist on the discursive character of parliamentary activity. But because it is insufficiently linked to the sociability of civil society, Burke’s account of parliamentarism remains within the juridical horizon insofar as he continues to equate the representation of reason with the representation of unity. There is a curious

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<sup>557</sup> Burke, “Speech at Mr. Burke’s Arrival,” 156.

resemblance between his “general reason of the whole” and the corporeal politics of Rousseau’s general will. So while the Whig theory articulates parliament’s dispossession of the king’s representative functions, it does not quite complete the synthesis of rationalist and empiricist elements. Like the regicides he loathed, Burke cut off the king’s head. But a body without a head is still a body.

### **The Sociological Liberalism of the Doctrinaires**

From surveying debates in America, a land with no hereditary aristocracy but only a natural one, we have seen that representative government is an aristocratic form of government in which officeholders are distinguished on the basis of their property or learning. By reading Kant, we have become acquainted with the normative dimension of publicity, and with two concepts of public reason, one critical and one legislative. And in revisiting the prehistory and metamorphosis of modern political representation and the culmination of these developments in Burke’s Whig theory of parliamentarism, we have seen how parliaments appropriated representative functions from the monarch, began to act autonomously of their electorate, and reimagined the representation of unity as the representation of reason.

Each of the theories considered above reveals a facet of parliamentarism, but none presents it in its completeness. Although there are significant similarities between parliamentarism and Madison’s concept of representation as refinement, the Federalists and Anti-Federalists were not directly concerned with parliamentarism, but rather with the wider phenomenon of representative government. Likewise, writing in the typical continental context of an opposition between the press and an absolutist regime, Kant was only attentive to the dimension of publicity (and for that matter, with publicity as a norm rather than a phenomenon),

but not to parliamentarism or even to private forms of discussion. Although Burke was an actual member of parliament writing in the context of a parliamentary government, this practical experience seems to have come at the expense of theoretical ambition. His account of representation, which appears in public speech rather than in a fully articulated work of political reflection, is situated in a polemic against the simultaneously feudal and radical practice of instructed delegation. In attempting to oppose an autonomous concept of representation to the delegation of the will, the Burkean parliament appropriates the unifying function of the king. But in doing so, the prince's body remains intact; for this reason Burke's account of parliamentarism was insufficiently attentive to the pluralistic character of parliamentary reason.

Carl Schmitt has directed us to German and especially French writing produced between 1815 and 1848, where parliamentarism appears as a theoretically articulated program. Among the writings produced in this period, François Guizot's theory of parliamentarism is especially interesting. In his "true doctrine of representation" every element outlined above appears in the context of a complete and coherent whole. Although he has been neglected both in the most important recent studies of representative government<sup>558</sup> and in the slowly-growing literature on parliamentarism,<sup>559</sup> Guizot was arguably the most typical and significant theorist of parliamentarism. In Guizot's writings, the dimension of publicity, the relation between representation and civil society, and the heteronomy of reason appear in a very clear and revealing way. While Burke's theory of parliamentarism appropriated representative functions from the king while leaving the substance of representation somewhat intact, Guizot's writings

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<sup>558</sup> Aurelian Craiutu notes that neither Pitkin nor Manin gives considerable attention to Guizot in their studies of representative government. See *Liberalism Under Siege: The Political Thought of the French Doctrinaires* (Lanham: Lexington Books, 2003), 187.

<sup>559</sup> Neither Selinger's *Parliamentarism: From Burke to Weber* nor Palonen's *From Oratory to Debate and Parliamentary Thinking* includes even one section independently dedicated to Guizot.

are formulated in direct opposition to the concept of sovereignty as a possession or an embodiment of the will. For this reason, Guizot's "true doctrine of representation" is the best approximation of the ideal type outlined in Schmitt's *Constitutional Theory* and *The Crisis of Parliamentary Democracy*, which was likewise formulated in opposition to a concept of democracy that is really only a concept of sovereignty. Conversely, of all the theories that appear in the history of liberal political thought, Guizot's parliamentarism is the one that most strongly prefigures the deliberative turn in contemporary democratic theory, and especially that found in the work of Jürgen Habermas. Exactly like Habermas, Guizot's parliamentarism appeals to the legitimating force of reason, articulates the sphere of public authority with the juridically private public sphere of civil society, and dispenses with the subject-centred concept of reason in favour of concept in which reason circulates through decentred, intersubjective processes of discussion. This should not be surprising, since (as we will discuss in more detail below) Habermas' proceduralist concept of democracy was in turn formulated in response to Schmitt's concept of democracy as a form of sovereignty.

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Guizot was the most notable member of the French Doctrinaires, a politically inefficacious but theoretically inventive group of liberal thinkers who were opposed both to attempts to restore the Old Regime and to the revolutionary, almost democratic politics of the radical liberals. Exactly like Burke, Guizot occupied the characteristic intermediate situation of the bourgeois intellectual, positioned between monarchical and democratic political forces. And much like Burke again, Guizot did not present democratic and monarchical political forms

simply as extremes or opposites, and his liberalism as the reasonable centre between them. Both thinkers' concepts of representation are predicated on identifying a kind of equivalence between democracy and monarchy. While Burke opposed a novel concept of representation to a specific organizational practice, the use of instructed delegation shared by both the Tory estates system and the Radical movement, the equivalence that Guizot detected between democratic and absolutist politics is far broader and wide-reaching. In a way that invites comparison with Sieyès, his reimagining of the political landscape entailed developing a new sociology of modernity and democracy and advancing a completely novel concept of representation.

Like Smith, Ferguson, and empiricist liberalism considered broadly, the Doctrinaires rejected the individualistic discourse of social contract theory in favour of a kind of sociological liberalism.<sup>560</sup> Guizot, for instance, stated that “This necessary coexistence of society and government shows the absurdity of the hypothesis of the social contract ... This hypothesis then, of a primitive contract, as the only legitimate source of social law, rests upon an assumption that is necessarily false and impossible,”<sup>561</sup> and argued elsewhere that “mankind is not merely a series of individuals called me; it is a race, which has a common life, and a general and progressive destiny ... human individuals are not isolated, nor confined to themselves ... they are connected with each other; they act upon each other, by ties and by means which do not require their presence.”<sup>562</sup>

To understand the political institutions of a country, the sociological liberal does not begin by describing hypothetical conditions of consent or enumerating a catalogue of natural

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<sup>560</sup> Larry Siedentop, *Tocqueville* (Oxford: Oxford University Press, 1994) 24-27; “Two Liberal Traditions,” in *The Idea of Freedom*, ed. Alan Ryan (Oxford: Oxford University Press, 1979), 153-174.

<sup>561</sup> François Guizot, *The History of the Origins of Representative Government in Europe*, trans. Andrew R. Scoble (Indianapolis: Liberty Fund, 2002), 49.

<sup>562</sup> François Guizot, *Democracy in France* (New York: D. Appleton & Company, 1849), 32.

rights, since “before becoming a cause, political institutions are an effect; a society produces them before being modified by them.”<sup>563</sup> So instead, they must first give their attention to the state of persons in society. The state of persons does not only include their material conditions of reproduction (that aspect of the social that figured so centrally in the natural histories of the Scottish sociologists), but also the state of their manners or *mores*,<sup>564</sup> their distribution into classes, and the relationships between these classes.<sup>565</sup> Through this continued exploration of the social, the Doctrinaires influenced J. S. Mill’s emphasis on the progressive dimension of social antagonism<sup>566</sup> and Marx’s understanding of history as a site of class struggle.<sup>567</sup> If the Doctrinaires can be said to have an heir, however, it is unquestionably Alexis de Tocqueville. Despite deep political disagreements between the two, Tocqueville was especially inspired by the writings of his teacher Guizot.<sup>568</sup> Many of the apparently novel aspects of Tocqueville’s approach to investigating democracy in America in fact originate in the political sociology of the Doctrinaires. This influence is not limited to the careful attention Tocqueville dedicated to the manners of American society. Like the Scottish sociologists, the Doctrinaires proposed a natural history of the social. Guizot describes social progress in a way that clearly resembles Ferguson’s

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<sup>563</sup> The translation of this passage from Guizot’s *Essais sur l’histoire de France* is borrowed from Craiutu, *Liberalism Under Siege*, 113.

<sup>564</sup> Siedentop, “Two Liberal Traditions,” 157-158.

<sup>565</sup> Guizot, *Representative Government in Europe*, 28.

<sup>566</sup> Craiutu, *Liberalism Under Siege*, 37.

<sup>567</sup> On Marx’s borrowing from the Doctrinaires’ narration of history as class struggle, see the endnote in Michel Foucault, *Society Must Be Defended: Lectures at the Collège de France 1975-1976*, ed. Mauro Bertani and Alessandro Fontana, trans. David Macey (New York: Picador, 2003), 85n6.

<sup>568</sup> Tocqueville’s critics complained that he viewed the United States through Guizot’s eyes. Tocqueville specifically requested a copy of Guizot’s *Histoire de la Civilization en Europe* to assist him in analyzing the American democratic society. Craiutu speculates that this suggests Tocqueville may have formulated his famous ideas about democratic despotism *before* visiting America. See *Liberalism Under Siege*, xi, 92, 99.

account of the wind-like force of human action that blindly shapes society without following the plan of any single projector<sup>569</sup>:

Man advances in the execution of a plan which he has not conceived, and of which he is not even aware. He is the free and intelligent artificer of a work which is not his own. He does not perceive or comprehend it, till it manifests itself by external appearances and real results; and even then he comprehends it very incompletely. It is through his instrumentality, however, and by the development of his intelligence and freedom, that it is accomplished. Conceive a great machine, the design of which is centered in a single mind, though its various parts are intrusted to different workmen, separated from, and strangers to each other. No one of them understands the work as a whole, nor the general result which he concurs in producing; but everyone executes, with intelligence and freedom, by rational and voluntary acts, the particular task assigned to him. It is thus, that by the hand of man, the designs of Providence are wrought out in the government of the world.<sup>570</sup>

The social is more primary than the political, and society is led, as though by providence, to follow a developmental path. But the Doctrinaire concept of the social is very broad. It is not confined to the material development of commercial society and the order of property, but additionally encompasses manners and interpersonal relations. The transformation of one such interpersonal relation assumes central significance. The style of analysis made famous by Tocqueville<sup>571</sup> originates in the writings of the Doctrinaires, who held that democracy is not only

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<sup>569</sup> Adam Ferguson, *An Essay on the History of Civil Society*, ed. Fania Oz-Salzberger (Cambridge: Cambridge University Press, 2001), 119.

<sup>570</sup> François Guizot, *General History of Civilization in Europe*, ed. George Wells Knight (New York: D. Appleton and Company, 1896), 291.

<sup>571</sup> Alexis de Tocqueville, *Democracy in America and Two Essays on America*, trans. Gerald E. Bevan (New York: Penguin, 2003), 59.

a political order, but a social condition.<sup>572</sup> In a way that recalls Tocqueville's earlier depiction of the unfurling of social equality as a providential fact, in which men unwittingly act as "blind instruments in hands of God,"<sup>573</sup> Guizot held that "the empire of the word *Democracy* is not to be regarded as a transitory or local accident. It is the development ... of all the elements of human nature throughout all the ranks and all the depths of society."<sup>574</sup>

Tocqueville's ambivalence concerning the age of democratic providence is well known. On the one hand, he celebrated the self-activating spirit of localistic associational life, but on the other hand argued that political democracy carried with it the threat of a tyranny of the majority. To understand the novelty of Tocqueville's understanding of democracy, it is again necessary to consider how his sociology was anticipated in the writings of the Doctrinaires. The idea of democracy as a tyranny of the majority is modern, but it does not originate with its popularizers Tocqueville and J. S. Mill. The philosophical and aristocratic critics of the ancient democracy depicted it as a regime of licentiousness and excessive freedom both in public and in private. Plato, for instance, described democracy as a tolerant constitution full of freedom and free speech, in which each citizen arranges their life in whichever way pleases them.<sup>575</sup> Aristotle's estimation was similar. He described liberty as the basic principle of the democratic constitution, and subdivided this liberty in the public liberty of ruling and being-ruled in turn and the private liberty of living as one likes.<sup>576</sup> The ancient democracy's champions likewise depicted it as a socially libertine regime. In a passage that contrasts strikingly with the depiction of social

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<sup>572</sup> Craiutu, *Liberalism Under Siege*, 104-106; Siedentop, "Two Liberal Traditions," 159-161.

<sup>573</sup> Tocqueville, *Democracy in America*, 14-15.

<sup>574</sup> Guizot, *Democracy in France*, 13. This more conservative work of Guizot's later years was written after, and in fact in response to, Tocqueville's *Democracy in America*. However, Guizot's theory of democracy as a social condition was developed much earlier, during the Bourbon Restoration. See Craiutu, *Liberalism Under Siege*, 88.

<sup>575</sup> Plato, *Republic*, trans. G. M. A. Grube and C. D. C. Reeve (Indianapolis: Hackett, 1992), 557b-558c.

<sup>576</sup> Aristotle, *The Politics*, trans. T. A. Sinclair (New York: Penguin, 1992), bk. 6, ch. 2, 1317a40-1317b16.

tyranny featured in J. S. Mill's *On Liberty*,<sup>577</sup> Thucydides' Pericles stated that "the freedom which we enjoy in our government extends also to our ordinary life. There, far from exercising a jealous surveillance over each other, we do not feel called upon to be angry with our neighbour for doing what he likes, or even to indulge in those injurious looks which cannot fail to be offensive, although they inflict no positive penalty."<sup>578</sup> The first very influential account of ancient liberty as private tyranny appears in Constant's *The Liberty of the Ancients Compared with that of Moderns*.<sup>579</sup> Constant was aware that the Athenian democracy was socially libertine. So in attempting to associate democracy with private tyranny, he chose to depict Athens as an exception rather than a norm, emphasizing its resemblance to modern commercial societies.<sup>580</sup> His point of reference in depicting the liberty of ancients was the Spartan constitution, which was no democracy at all.

Tocqueville's account of the connection or resemblance between democracy and absolutism is more sophisticated. He did not simply repeat Constant's twofold misidentification of ancient democracy with protoliberalism and an oligarchic barracks society with democracy, but instead framed the problem in terms of the sociological categories employed by Montesquieu and the Doctrinaires before him. Montesquieu's political philosophy was the earliest instance of

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<sup>577</sup> J. S. Mill was not at all unaware of this contrast. See "Grote's History of Greece [II]," in *Collected Works of John Stuart Mill Volume XI: Essays on Philosophy and the Classics*, ed. J. M. Robson (Toronto: University of Toronto Press, 1978), 319.

<sup>578</sup> Thucydides, "The Funeral Oration of Pericles," in *The Portable Greek Historians: The Essence of Herodotus, Thucydides, Xenophon, Polybius*, ed. M. I. Finley (New York: Penguin, 1977), 267-268.

<sup>579</sup> For a survey of the various ways that the contrast between ancients and moderns was employed in political polemics from the seventeenth century to the twentieth, see John R. Wallach, "Deconstructing the Ancients/Moderns Trope in Historical Reception," *Polis, The Journal for Ancient Greek Political Thought* 33 (September 2016): 267-273.

<sup>580</sup> Benjamin Constant, "The Liberty of the Ancients Compared with that of the Moderns," in *Constant: Political Writings*, ed. and trans. Biancamaria Fontana (Cambridge: Cambridge University Press, 1998), 311-312. For a brief discussion of this line of argument in the writings of Constant, Fustel de Coulanges, and others, see Cornelius Castoriadis, "Done and To Be Done," in *The Castoriadis Reader*, ed. and trans. David Ames Curtis (Oxford: Blackwell, 1997), 405-406; regarding this same theme in J. S. Mill's work, see Ellen Meiksins Wood, *Democracy Against Capitalism: Renewing Historical Materialism* (London: Verso, 2016), 228-229.

an empiricist challenge to the discourse of contract theory.<sup>581</sup> The natural lawyers attempted to deduce the nature and extension of political legitimacy from hypothetical conditions of consent. In doing so, they repeated the Cartesian gesture of sweeping aside all forms of historical inheritance and beginning anew. A contract theory is like a political *cogito*. While in the *vita contemplativa* the *cogito* entailed rejecting scholastic philosophy, in the *vita activa* this inheritance assumed the form of imagining away the given world of political institutions and sociological organization.<sup>582</sup> But we have seen that every theory of natural law is a Robinsonade. In describing nature, the jurists really described a determinate society. What were the basic elements of this society? The locus of legitimacy and the locus of consent: prince and subject. Unlike in the premodern contract theories in which laws and rights appeared as the terms of a compact between the prince and the people or estates, the subjects of modern contract theories do not form a people.<sup>583</sup> From a sociological point of view, a contract theory describes an atomized society. Montesquieu challenged the discourse of contract theory on both institutional and sociological grounds. While the jurists attempted to circumscribe power within the forms of right that appeared as conditions anterior to the social contract or as its stipulations, Montesquieu was more concrete. His emphasis on the intra-institutional separation of powers and its influence on the American system of government is well known. But his sociological emphasis on intermediate powers is no less important.<sup>584</sup> Like the later contract theorists, Montesquieu was

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<sup>581</sup> James Moore, "Montesquieu and the Scottish Enlightenment," in *Montesquieu and His Legacy*, ed. Rebecca E. Kingston (Albany: SUNY, 2009), 179-180.

<sup>582</sup> Sheldon S. Wolin, *Tocqueville Between Two Worlds: The Making of a Political and Theoretical Life* (Princeton: Princeton University Press, 2001), 40.

<sup>583</sup> Otto Gierke, *Natural Law and the Theory of Society 1500-1800*, trans. Ernest Barker (London: Cambridge University Press, 1934), 44-46.

<sup>584</sup> The Doctrinaires observed that the existence of aristocratic intermediate associations is the hidden sociological presupposition of Montesquieu's separation of powers. See Siedentop, "Two Liberal Traditions," 166-167.

Despite their debt to Montesquieu's constitutional theory, the American framers did not explicitly address this problem. To the extent that they attempted to identify an extra-judicial means of neutralizing political power, they relied on the *institutional* organization of an extensive political unit and political representation rather than on the

preoccupied with the question of limiting sovereign power. But unlike Locke, for instance, his point of departure was sociological rather than juridical. For Montesquieu, “man is born in society ... and there he remains.”<sup>585</sup> And unlike for Locke again, for Montesquieu there is a gulf separating the legitimacy of right and its effective safeguarding. Just as nature is mediated by history,<sup>586</sup> laws are mediated by the social context of their performance.<sup>587</sup> If covenants without the sword are but words, then a right needs a sword of its own. So what are the sociological conditions of liberty? To speak in terms specific to Montesquieu’s points of reference, the power of the sovereign must be checked by the intermediate powers of the aristocracy and clergy. Above all else it is the existence of an aristocracy that distinguishes a free, monarchical regime from a despotic one.<sup>588</sup> To speak in more general terms, liberty can be secured sociologically only in a pluralistic society in which intermediate forms of association balance the power of the executive. This is the famous *thèse nobiliaire*, which dates back at least to the historical writings of Henri de Boulainvilliers, another important critic of bourgeois contract theory who likewise attempted to limit the growth of administrative monarchical power.<sup>589</sup>

We have already seen that Tocqueville adopted the sociological approach of the Montesquieu and the Doctrinaires. In his review of *Democracy in America*, J. S. Mill even suggested that “the author’s mind ... seems to us to resemble Montesquieu most among the great

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*sociological* existence of an intermediate class. But both extension and representation are means of limiting democratic power from below, not a means of limiting administrative executive power.

<sup>585</sup> Montesquieu as quoted in Ferguson, *History of Civil Society*, 21.

<sup>586</sup> Wolin, *Tocqueville Between Two Worlds*, 42.

<sup>587</sup> It is for this reason that Montesquieu was able to revive the Roman context of law as *lex*, a relation or rapport between things. While juridical liberalism is consistent with the Hellenic concept of law as *nomos*, a boundary or apportionment of land, an empiricist liberalism in which subjects are always already engaged in definite relations of sociability is more consistent with the Roman concept. See Hannah Arendt, *The Promise of Politics*, ed. Jerome Kohn (New York: Schocken Books, 2005), 178-187.

<sup>588</sup> Charles-Louis de Secondat Montesquieu, *The Spirit of the Laws*, ed. and trans. Anne M. Cohler, Basia C. Miller, Harold S. Stone (Cambridge: Cambridge University Press, 2000), bk. 2, ch. 4.

<sup>589</sup> For a very interesting discussion of Boulainvilliers’ critique of natural law, see Foucault, *Society Must Be Defended*, 189-212.

French writers,” and that “this book is as Montesquieu might have written, if to his genius he had superadded good sense.”<sup>590</sup> In different ways, each of these writers also endorsed the *thèse nobiliaire*, or something very much like it. From the Doctrinaires, Tocqueville also inherited a sociologico-political thesis according to which there was a connection between social atomization and the centralization of administrative power,<sup>591</sup> their natural-historical narrative in which these conditions were exacerbated in political modernity, and their insistence that intermediate associations modelled on the pattern of the European nobility were necessary to check the power of the growing administrative state. In America, this set of problems and solutions naturally could not appear in the same form. In France, the liquidation of the intermediary power was a deliberate aim of the revolution, which opposed “both absolute power, and those elements which could mitigate such power.” For this reason, “it was simultaneously republican and centralizing.”<sup>592</sup> But in America, a hereditary nobility never existed in the first place. So Tocqueville instead looked to the localistic associational life of the American townships as a functional substitute for the intermediary powers of the nobility,<sup>593</sup> ingeniously taming democracy with democracy. In this way, social providence and political providence coincide.

The real mystery is not accounting for the American solution, but rather in raising the American problem. In France, the creation of a standing army and a bureaucracy were the deliberate activity of the monarch. Here, atomization was an effect of centralization. In Tocqueville’s depiction of America, the causal order is reversed; here the centralization of

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<sup>590</sup> J. S. Mill, “De Tocqueville on Democracy in America [I],” in *Collected Works of John Stuart Mill Volume XVIII: Essays on Politics and Society*, ed. J. M. Robson (Toronto: University of Toronto Press, 1977), 57.

<sup>591</sup> Craiutu, *Liberalism Under Siege*, 110, 162-166.

<sup>592</sup> Tocqueville, *Democracy in America*, 114-115.

<sup>593</sup> *Ibid.*, 18, 223.

political power instead appears an effect of social atomization. But how to account for this atomization? We have seen that both Tocqueville and the Doctrinaires regarded the development of democracy as the providential destiny of modern civilization. But what is the connection between democracy and atomization? In reviewing *Democracy in America*, J. S. Mill observed that Tocqueville attributed the qualities specific to commercial societies to democratic society.<sup>594</sup> An individualistic outlook, the restless spirit of material improvement, and ceaseless making and unmaking of social ties are no less evident in the decidedly non-democratic, commercial society of England than in America.<sup>595</sup> In the same way that Constant depicted a libertine democracy as a protoliberal regime, Tocqueville depicted an anomic and materialistic commercial society as an appetitive democratic society.<sup>596</sup>

This puzzle does not disappear if we approach it from the other end; the connection between democracy and tyranny is also unclear. It is neither theorized nor even described by Tocqueville. At the time of the work's publication, J. S. Mill immediately noted that actual examples of the "despotism of the majority" were absent from *Democracy in America*, where the problem appeared as "mere abstract speculations," less evils suffered than evils apprehended.<sup>597</sup> Isaac Kramnick argues that Tocqueville's fear of a democratic tyranny of the majority "is based less on what he has found there, less on the reality of American politics, than on what he has read. It is rooted in the writings of the American founders and their insistence that limits be

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<sup>594</sup> J. S. Mill, "De Tocqueville on Democracy in America [II]," in *Collected Works of John Stuart Mill Volume XVIII: Essays on Politics and Society*, ed. J. M. Robson (Toronto: University of Toronto Press, 1977), 191-192.

<sup>595</sup> *Ibid.*, 193-196.

<sup>596</sup> The association of democracy with appetite is classical, and figures in an especially central way in Platonic political philosophy. See especially Book 8 of Plato's *Republic*.

On the replication of this ancient "sociological" critique in contemporary republican criticisms of democracy, see Jacques Rancière, *Hatred of Democracy*, trans. Steve Corcoran (London: Verso, 2014).

<sup>597</sup> Mill, "De Tocqueville on Democracy in America [II]," 175-176.

placed on the sovereign power of the people.”<sup>598</sup> He has not only viewed the United States through Guizot’s eyes, but also through Madison and Hamilton’s. Although Tocqueville certainly had more experience of democracy than the liberal inventors of the democratic tyranny of the majority, neither he nor anyone else has ever experienced such a thing. Notably, the founders’ opposition to majoritarian power was not based on a fear that democratic societies tend to exercise a moralistic or tyrannical social censure, disregarding individual claims to autonomy in their life conduct, but rather on a fear of “faction.” The purpose of the American system of government is the preservation of property and the neutralization of faction. What is the cause of faction? In “Federalist No. 10,” Madison wrote that “the most common and durable source of factions, has been the various and unequal distribution of property. Those who hold, and those who are without property, have ever formed distinct interests in society.”<sup>599</sup> So faction is a state of class warfare. In the same way that democratic atomization is really the atomization that sociologically characterizes a modern commercial society, democratic tyranny is really the class warfare endemic to commercial societies.

We have seen that the Doctrinaires held that the state of society was more fundamental than its political institutions, that they developed a concept of democracy as a social condition, and that they regarded the development of this social condition as a providential inevitability in modern societies. And exactly like Tocqueville after them, the Doctrinaires were concerned with establishing a kind of fit or correspondence between political institutions and the social order—which is to say, a democratic social order.<sup>600</sup> However, unlike Tocqueville, who was at once

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<sup>598</sup> Isaac Kramnick, “Introduction,” in Alexis de Tocqueville, *Democracy in America and Two Essays on America*, trans. Gerald E. Bevan (New York: Penguin, 2003), xxviii-xxix.

<sup>599</sup> James Madison, *Federalist No. 10*, in *The Federalist Papers*, ed. George W. Carey and James McClellan (Indianapolis: Liberty Fund, 2001).

<sup>600</sup> Craiutu, *Liberalism Under Siege*, 135.

politically ambivalent about and intellectually fascinated by the democratic social condition he observed in America, the Doctrinaires took a more apocalyptic view of democratic providence. As Guizot put it in one of the writings of his more conservative later years, “chaos is now concealed under one word—Democracy.”<sup>601</sup> For this reason it did not occur to them, as it did to Tocqueville, that democracy could be moderated by democratic means. Much like the Federalists before them, the problem of democracy would not be a matter of realizing or complementing a democratic society with democratic political institutions, but instead a matter of channelling or attenuating democracy. Guizot, for instance, acknowledged that “though we cannot extinguish this movement, we can guide and govern it.”<sup>602</sup> So through what means did they propose to channel providence? In one respect, their method was the same as that of the Federalists. Democracy can be attenuated by representation. But their vision of representation was quite different. To understand what this vision was, we must first understand its historical point of reference.

Although the Doctrinaires, like Tocqueville, regarded the democratization of social conditions as a providential inevitability, unlike Tocqueville their account of the connection between centralization and atomization was not primarily framed in reference to the democratic social condition. They identified two paths of modernization in European history, each of which resulted from a different balance of social forces between the monarchy, the nobility, and the bourgeois. In France, which represented the typically European developmental path, a weak monarch entered into an alliance with the bourgeois to dispossess the nobility of their power and privileges. It is here, and not in a “democratic” context, that the connection between formal, legal

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<sup>601</sup> Guizot, *Democracy in France*, 10.

<sup>602</sup> *Ibid.*, 66.

equality and equality of social conditions appears as a necessary complement to administrative centralization and the growth of monarchical power. This path was undoubtedly in the back of Tocqueville's mind even as he dedicated his attention to American society. In England, by contrast, the nobility entered into alliances with the commons in an effort to limit the power of the Crown. Here, intermediary powers did not disappear and the monarch did embark on the path of monopolizing administrative functions.<sup>603</sup> Naturally, this history narrated as class struggle is consistent with the *thèse nobiliaire* of Boulainvilliers and Montesquieu. For this reason, in their attempt to identify a form of intermediate power appropriate to the modern social conditions the Doctrinaires did not look to America, but instead to England. And in fact, Tocqueville himself did not advocate that American democracy should be imitated in France. Like the Doctrinaires, he preferred that France should instead adopt the English institution of parliament.<sup>604</sup>

### **The True Doctrine of Representation**

Among the Doctrinaires, the Anglophilic Guizot was especially disposed to look to England as a model.<sup>605</sup> He disagreed with Montesquieu's opinion that representative institutions originated in the woods of Germany, instead identifying England as the privileged place of origin and site of development for representative government.<sup>606</sup> Despite the long, continuous career that representative institutions enjoyed in England, it is important to understand that Guizot did not view these institutions as a premodern inheritance. In tracing the epochal history of European political institutions, he identified four distinct stages: the barbaric, individualistic stage

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<sup>603</sup> Siedentop, "Two Liberal Traditions," 163-164.

<sup>604</sup> Selinger, *Parliamentarism From Burke to Weber*, 144.

<sup>605</sup> Craiutu, *Liberalism Under Siege*, 35, 101.

<sup>606</sup> Guizot, *Representative Government in Europe*, 11, 38-40, 44, 229.

inhabited by the tribes of Germany; the feudal order; an intermediate stage in which both the towns and the monarch gain political power at the expense of the feudal aristocracy; and finally a modern stage, which notably saw the development of not one, but two characteristic political forms: absolute monarchy on the continent and the representative system in England.<sup>607</sup> From this narration of history we can see that Guizot did not regard representative government as a continuation of the premodern estates system, but rather as a specifically modern institution. The diverging developmental paths followed in England and France were in each case influenced by the balance of social forces, but especially by the choice of allegiance made by the bourgeois in particular. The central role of the bourgeois, the modern social class *par excellence*, naturally left its mark on the character of representative institutions. Guizot contended that “the British Parliament, to say truth, dates only from the formation of the House of Commons,” when the power of the towns grew and the “nation” (which is to say, the bourgeois) joined itself to the king’s council.<sup>608</sup>

We have seen that Guizot, like Tocqueville, Montesquieu, and the other Doctrinaires, adopted the *thèse nobiliaire*. Taken in its classical form, the *thèse nobiliaire* is a socio-institutional support for limited government and the state of right. Its purpose and effect are entirely negative, and only concern the attenuation and circumscription of centralized monarchical or administrative power. In attempting to limit political power in American conditions, the Federalists (keen readers of Montesquieu) reimagined the *thèse nobiliaire* in the empiricist idiom of interest balancing. While a monarchical government is exposed to the executive power of the prince, and a democracy to the legislative tyranny of the people, a

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<sup>607</sup> Ibid., 13-15.

<sup>608</sup> Ibid., 24-25.

representative system is a mechanical power in which the interests of man are connected with constitutional rights of place, and arranged in such a way that ambition checks ambition.<sup>609</sup> In this way the institutional form of pluralistic interest balancing acts as a functional substitute for the socio-institutional intermediate powers of the aristocracy.<sup>610</sup>

Guizot was far more inventive in the uses to which he put his novel concept of representation. For Guizot, representation does not only perform the function of *limiting* and supervising executive power, but also serves to *mediate* between public power and civil society and to *rationalize* and legitimate the formulation of legislation.<sup>611</sup> How does representation perform these functions? Let us begin at the beginning, with the basic and original limiting function of representative government. No reader of Montesquieu would be surprised to learn that even in the premodern precursors to representative government, the aristocratic parliament limited the power of the king. Guizot wrote that in England, the monarchy “has always been the government of the king in council, and the king’s council was frequently his adversary. The great council of the king became the Parliament ... From the very fact that power was divided, it followed that absolute power, sovereignty as a right, was never attributed to the king, nor supposed to be in itself legitimate.”<sup>612</sup> In arguing that sovereignty was *never* attributed to the king, he was likely reading the characteristics of the modernized parliament into the entire history of the institution. But if we are interested in reading Guizot as a political theorist and not as a historian, this is not important. What is important are the consequences that follow from the dispossession of the sovereign of their sovereignty. In exploring the prehistory of

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<sup>609</sup> Madison, *Federalist* No. 14, No. 48, and No. 51.

<sup>610</sup> Notably, this arrangement is more adequate to the neutralization of competing social forces (and especially democratic ones) than to the limitation of executive power. This is especially evident in Madison’s *Federalist* No. 51.

<sup>611</sup> Guizot, *Representative Government in Europe*, 227.

<sup>612</sup> *Ibid.*, 228.

parliamentarism and its culmination in Burke's Whig concept of representation, we saw that the metamorphosis of parliament was an ongoing process in which sovereignty and representative functions were gradually relocated from the king, to the king-in-parliament, to parliament itself. Guizot's philosophical history is very different. He was not concerned with the appropriation of sovereignty and representation by parliament, or even with arranging a stable balance between the two centres of power, but rather with the *general dispossession of sovereignty and de-localization of representation*.

A contrast with Constant illustrates the stakes of this dispossession well. Much like in his essay on the liberty of the ancients, Constant began his *Principles of Politics* by framing the classic liberal opposition between individual freedom and majority rule. The recognition of sovereignty of the people does not increase the liberty of individuals. As far as private freedom is concerned, it does not matter whether a prince or a people sits on the throne. So according to Constant, "it is in fact the degree of force, not its holders, which must be denounced."<sup>613</sup> As with Locke, the denunciation of force is expressed in the form of individually-possessed rights that exist independently of all political authority.<sup>614</sup> In a very straightforward if somewhat unoriginal way, Constant argued that freedom does not concern the *possession* of power, but rather its *extension*. Guizot also rejected the problem of possession. But he did not frame this rejection in terms of an opposition between the norms of popular sovereignty and the norms of an individualistic natural law. In *The History of the Origins of Representative Government in Europe* he argued against Montesquieu that:

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<sup>613</sup> Constant, *Principles of Politics*, 175-177.

<sup>614</sup> *Ibid.*, 180.

That is a superficial and false method which classifies governments according to their exterior characteristics; making monarchy, government by one individual; aristocracy, government by several; democracy, government by the people, the sovereignty of all. This classification, which is based only upon one particular fact, and upon a certain material shape which power assumes, does not go to the heart of those questions, or rather of that question, by the solution of which the nature and tendency of governments is determined. This question is, "What is the source of the sovereign power, and what is its limit? Whence does it come, and where does it stop?" In the answer to this question is involved the real principle of government.<sup>615</sup>

Guizot could as easily have associated this form of political science with the highly class-conscious ancient thinkers Aristotle and Polybius, who likewise classified constitutions on the basis of the exterior characteristic of who possessed power. However, the association of this view with Montesquieu is significant. In a narrow way, Guizot rejected this external approach to the classification of governments in order to reiterate his disagreement with Montesquieu's opinion that representative government is an archaic institution; the fact that both the *Wittenagemot* and parliament are aristocratic institutions does not mean that they are identical governmental forms. But this choice also signals that we are moving away from the empiricist idiom of political thought. The most important fact about a government will not be the sociological identity of its *possessors* (Montesquieu) or even the *extension* of its authority (Constant), but rather the *basis of its legitimacy*. With this distinction in mind, Guizot identified two possible forms of government:

The classification which I am about to present is not, then, one that is merely arbitrary and factitious; it does not concern the exterior forms, but the essential nature of governments. I

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<sup>615</sup> Guizot, *Representative Government in Europe*, 48.

distinguish two kinds. First, there are those which attribute sovereignty as a right belonging exclusively to individuals, whether one, many, or all those composing a society; and these are, in principle, the founders of despotism, although facts always protest more or less strongly against the principle; and absolute obedience on the one hand, and absolute power on the other, never exist in full vigour. The second class of governments is founded on the truth that sovereignty belongs as a right to no individual whatever, since the perfect and continued apprehension, the fixed and inviolable application of justice and of reason, do not belong to our imperfect nature.<sup>616</sup>

So in one form of government, sovereignty is possessed, and in the other it is not. Taken alone, the fact that sovereignty is not possessed by the government does nothing to specify the source of its legitimacy or to determine the institutional form it will assume. The juridical discourse of natural law framed the question of legitimacy in terms of possession. In instituting a commonwealth, parties consent to the social contract by dispossessing themselves of their rights as though they were pieces of property. Because it does not treat right as a possession, Guizot's second form of government is unable to employ the normative resources of consent. So what is the source of legitimacy in a governmental form that makes no reference to the normative resources of popular or princely sovereignty? If it does not emanate from the will of a sovereign, what is the source of law? Guizot introduced a second form of law. Like the descriptive laws of nature featured in Hobbes' state of nature and the civil society depicted by the political economists, this law has no author. But like the natural and positive laws explored by the natural lawyers, this law has a normative, imperative character that addresses itself directly to the will of those subject to it:

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<sup>616</sup> Ibid., 52.

If, then, the right of sovereignty cannot be vested in any one man, or collection of men, where does it reside, and what is the principle on which it rests? In his interior life—in his dealings with himself, if I may be allowed the expression, as well as in his exterior life, and in his dealings with his fellows—the man who feels himself free and capable of action, has ever a glimpse of a natural law by which his action is regulated. He recognises a something which is not his own will, and which must regulate his will. He feels himself bound by reason or morality to do certain things; he sees, or he feels that there are certain things which he ought or ought not to do. This something is the law which is superior to man, and made for him—the divine law

The true law of man is not the work of man; he receives, but does not create it; even when he submits to it, it is not his own—it is beyond and above him.<sup>617</sup>

Although Guizot was an admiring reader of Kant who shared and further developed Kant's discovery of the rationalizing power of publicity,<sup>618</sup> we can see from this passage that Guizot's peculiar natural law could not be more different from a philosophy of autonomy. From a normative perspective, Guizot's account of law is what Kant would call "heteronomous."<sup>619</sup> From an ontological perspective, this law is not a *nomos*, an artificial and deliberately enacted statute, but rather a *thesmos*, a law received from above, from a religiously or ontologically based extrapolitical order.<sup>620</sup> It is as though Guizot took up Plato's argument against Protagoras that not man, but God, is the measure of all things.<sup>621</sup> But again, this passage only tells us where the law is found, but not what it is. Even worse, the language of divinity gives the reader the impression that Guizot regressed to the point of appealing to an atavistic, premodern concept of

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<sup>617</sup> Ibid., 51.

<sup>618</sup> Craiutu, *Liberalism Under Siege*, 128-129.

<sup>619</sup> Kant, *Groundwork*, 51.

<sup>620</sup> Ellen Meiksins Wood, *Citizens to Lords: A Social History of Western Political Thought from Antiquity to the Middle Ages*, (London: Verso, 2011), 36.

<sup>621</sup> Plato, *The Laws*, trans. Trevor J. Saunders (Harmondsworth: Penguin, 1970), 716a-d.

natural law. And in fact, his critic Jaime Balmes levelled precisely this charge.<sup>622</sup> In a later lecture, Guizot expanded on this theme, not only identifying the location of the law but also its substance:

All have recognized that a certain law which is distinct from the individual will encircles him—a law which is called either reason, morality, or truth, and from which he cannot separate his conduct without making the exercise of his liberty either absurd or criminal ... speaking philosophically and rightfully, the individual considered in himself, may not dispose of himself arbitrarily and according to his solitary will. Laws which are obligatory are not created or imposed upon him by his will. He receives them from a higher source; they come to him from a sphere that is above the region of his liberty—from a sphere where liberty is not—where the question to be considered is not whether a thing is willed or not willed, but whether it is true or false, just or unjust, conformable or contrary to reason.<sup>623</sup>

Exactly like Burke, Guizot discovered a second source of legitimacy in truth or reason: “the right to power is always derived from reason, never from will.”<sup>624</sup> Truth does not only concern veracity; it is also a source of normativity. Like in classical philosophy, the just and the true coincide. But Guizot’s ontological account of public reason differs from Burke’s in a significant way. While Burke associated reason with the formal property of generality, Guizot’s political rationalism was substantive. In a rare moment of metaphysical speculation, Guizot opined that “unity and consecutiveness are not lacking in the moral world, as they are not in the physical.

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<sup>622</sup> Craiutu, *Liberalism Under Siege*, 133.

<sup>623</sup> Guizot, *Representative Government in Europe*, 291-292.

<sup>624</sup> *Ibid.*, 294. Urbinati distinguishes the original meaning of deliberation from the “rationalist twist” given to it in contemporary discourse theories of democracy and in the writings of twentieth century critics like Schmitt. However, it is evident from Guizot’s writings that a rationalistic concept of deliberation is not such a recent invention as Urbinati contends. See Urbinati, *Representative Democracy*, 198.

The moral world has, like the system of celestial bodies, its laws and activity; only the secret according to which it acts is more profound, and the human mind has more difficulty in discovering it.”<sup>625</sup> Reason is not a faculty of a collective subject, but instead appears as something inherent in the *ordre naturel*. This heteronomous concept of reason as the basis of law is the distinguishing feature of French political rationalism.<sup>626</sup> To use terminology borrowed from Schmitt’s legal theory, Guizot was not a decisionist for whom will, not reason, is the source of legitimacy, but rather a normativist for whom *veritas non auctoritas facit legem* (truth, not authority makes law). Like all normativist theories, Guizot’s political thought is fundamentally at odds with the concept of sovereignty. To attribute sovereignty to a rational principle rather than a personalistic will is to denature the concept beyond recognition. While thinkers like Bodin, Rousseau, and Sieyès transformed the concept of sovereignty, Guizot effectively abandoned it.<sup>627</sup>

Because the truth exists independently of the will, the law is not made or decided on but instead is found or discovered.<sup>628</sup> But the question remains: how to find it? For Guizot, the problem of government was a matter of acquainting subjects with a source of right that is “never to be found localized in this world.”<sup>629</sup> It is at this point that the concrete institutional conditions that follow from the delocalization of sovereignty and the heteronomous, normativist concept of law come into view. In another lecture from his history of representative government in Europe,

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<sup>625</sup> Guizot, *Representative Government in Europe*, 11.

<sup>626</sup> For instance, the Physiocrat François Quesnay stated that “Men and their governments do not at all make their laws, indeed they cannot do so. They recognize laws as consonant with the supreme reason that governs the universe and then declare them; they bring them into society . . . It is for this reason that the words are legislator (bearer of the law) and legislation (bodies of transmitted law) and that no one has ever dared to use the word legisfactor—lawmaker.” See Pierre Rosanvallon, *Democracy Past and Future*, ed. Samuel Moyn (New York: Columbia University Press, 2006), 128-129.

<sup>627</sup> Charles Merriam argues that the Doctrinaires were not concerned with solving the problem of sovereignty, but rather intended to discard the concept altogether. See Craiutu, *Liberalism Under Siege*, 143.

<sup>628</sup> Guizot, *Representative Government in Europe*, 53.

<sup>629</sup> *Ibid.*, 67-68.

Guizot considered two concepts of representation. Firstly, he paraphrased the famous critique of representative sovereignty that appears in Book 3 Chapter 11 of Rousseau's *Contrat Social*:

“What have you done? You have supplied yourself with a representative—you are no longer free—you are no longer in truth a citizen of a free State. Liberty means a man's sovereignty over himself, the right to be governed only by his individual will. And sovereignty cannot be represented, just because the will cannot be represented—it is either the same or something entirely different, there is no medium. Who has certified you that your representative will always and on all occasions have the same will as yourself? He will certainly not be so accommodating. So far then from your being represented, you have surrendered to him your will, your sovereignty, your liberty. You have given yourself up not to a representative, but to a master. And why? Because you are an indolent, grasping, cowardly individual, who pay far more regard to your own personal concerns than to public matters, who will rather pay for soldiers than go to war, who will rather appoint deputies and stay at home than go yourself and share in the deliberations of a national council.”<sup>630</sup>

Secondly, he considered the theory of a different philosopher who he did not name:

Other doctors who, entertaining the same ideas of sovereignty and liberty as those held by Rousseau, and nevertheless believing in representation, endeavour to harmonize these different conceptions. They might say to him “Most true; sovereignty resides in yourself and in yourself alone; but you may delegate without abandoning it;—you do so everyday; to your steward you commit the management of your lands, to your physician the care of your health, and you place your legal affairs into the hands of your solicitor. Life is vast and complicated, your personal control is insufficient for all its activity and demands; everywhere you avail yourself of others in

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<sup>630</sup> Ibid., 286.

the exercise of your own power—you employ servants. This is only a new application of the same principle—you employ one servant more. If he swerve from your directions, if he fail in giving expression to your will, we grant that he abuses his trust. When you give him your suffrage, you do not surrender to him your liberty—he on the other hand in receiving them has renounced his own. The mandate which he holds from you makes him a slave while it makes you free. On this condition representation becomes legitimate, for the person represented does not cease to be sovereign.”<sup>631</sup>

It is hardly implausible to imagine that Sieyès is the other doctor who Guizot had in mind. For Dr. Rousseau, being represented was enslaving oneself. For Dr. Sieyès, representation was akin to placing a servant in one’s hire. Although Guizot was sensitive to the fact that representation is a versatile concept, and that it is possible for a multiplicity of principles or objects to be represented, he was unable to see that, strictly speaking, while in Rousseau’s concept (as in Hobbes’) the question of representation hinges on whether or not it is possible for a will to be represented, in Sieyès’ concept it is instead an interest that is represented. For Guizot, not only in Rousseau’s juridical theory of sovereignty but also in Sieyès’ empiricist account “the theory of representation, that is, of the representation of wills, has reappeared.”<sup>632</sup>

This is not to say that Guizot dispensed with theories of representation altogether. Representative government rests on the truth that sovereignty is not possessed, and that political representation does not concern the representation of the will, but rather the representation of truth or reason.<sup>633</sup> In a formulation that resembles Burke’s Whig concept of representation, Guizot stated that “the electors do not say at the outset to their deputies, ‘Such is our will: let that

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<sup>631</sup> Ibid., 286-287.

<sup>632</sup> Ibid., 289.

<sup>633</sup> Ibid., 52.

be the law.’ They enjoin upon them nothing precise; they simply confer upon them the mission of examining and deciding according to their reason.”<sup>634</sup> A representative is neither a mandated delegate (Rousseau), a hired servant (Sieyès), nor an authorized arbitrary power (Hobbes). As with Burke, representatives are distinguished by their autonomy, and their legitimacy does not derive from the consent of those they represent, but rather from the relationship they enter into with reason.

But what is this relationship? If it cannot possess the truth in the same way that it possesses a will or a right, how does representative government go about finding it? Like every parliamentary thinker before and after him, Guizot’s mentality was aristocratic. His approach to the sociological dimension of political representation was highly conventional, and in no way departs from the views of Madison, Hamilton, Burke, and J. S. Mill discussed above.

Representation differs from the democratic politics of indistinction in that it recognizes differences in capacity.<sup>635</sup> These differences appear as a natural reality inherent in the order of civil society and must be replicated in the composition of representative institutions.<sup>636</sup> The principles of distinction through which the best can be identified are property and education, which guarantee that representatives are superior to their electors in their ability to reason.<sup>637</sup>

However, for Guizot the problem of reason was not to be addressed only by the selection of the most rational personnel as officeholders. He insisted that “representative government does not content itself with demanding capacity before it confers power; as soon as the capacity is presumed or proved, it is placed in a position where it is open to a kind of legal suspicion, and

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<sup>634</sup> Ibid., 54.

<sup>635</sup> Ibid., 58-62.

<sup>636</sup> Ibid., 57, 69, 340-341.

<sup>637</sup> Ibid., 293-296, 345-346.

where it must necessarily continue to legitimize itself, in order to retain its power.”<sup>638</sup> Exactly like sovereignty, reason is not a possession. There is a certain resemblance between Locke’s natural law and Guizot’s law of truth. Both thinkers partake in a certain atavism, and for both thinkers, natural law expresses an objective, normative, rational order. There is also a significant resemblance between Guizot’s law of truth and Kant’s transcendental formula of public right. In a passage that echoes the spirit of Kant’s formula, Guizot wrote that “the publicity of the struggle, which always gives the right the best chance of success, for it has been recognized in all ages of the world that good is in friendship with the light, while evil ever shelters itself in darkness.”<sup>639</sup> In each case the normative resources of public reason are employed in the critique and formulation of legislative norms.

However, a crucial difference between the philosophers and Guizot appears when we consider the question of how this order of reason is accessed. Much like their philosophical thought, Locke and Kant’s political theories are artifacts of a Cartesian, subject-centred epistemic universe in which reason appears as a capacity of a subject. The law of nature and the maxims of public right are revealed to each and every subject insofar as they exercise the rational faculties that allow its natural light to appear to them directly.<sup>640</sup> For Guizot, this was not the case. In contrast to Kant’s ideal, transcendental concept in which the dimension of publicity is reduced to hypothetical conditions of publicizability, Guizot argued that “governments do not, any more than great poems, form themselves on an *a priori* model, and in accordance with defined precepts.”<sup>641</sup> If public reason does not concern itself with *a priori* truths, it will not be

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<sup>638</sup> Ibid., 62.

<sup>639</sup> Ibid., 296.

<sup>640</sup> John Locke, *Second Treatise of Government*, ed. C. B. Macpherson (Indianapolis: Hackett, 1980), §6.

<sup>641</sup> Guizot, *Representative Government in Europe*, 52.

possible to become acquainted with it by looking inwards. So how is this truth accessed? In outlining the principles of parliamentarism, Schmitt raised this question with explicit reference to Guizot:

The ratio of parliament rests ... in a “dynamic-dialectic,” that is, in a process of confrontation of differences and opinions, from which the real political will results. The essence of parliament is therefore public deliberation of argument and counterargument, public debate and public discussion, parley, and all this without taking democracy into account. The absolutely typical chain of thought is to be found in the absolutely typical representative of parliamentarism, in Guizot ... Parliament is accordingly the place in which particles of reason that are strewn unequally among human beings gather themselves and bring public power under their control. This appears a typical rationalist idea. Nevertheless *it would be incomplete and inexact to define modern parliament as an institution that has come into existence out of the rationalist spirit. Its ultimate justification and its obviousness to a whole epoch rests on the fact that this rationalism is not absolute and direct, but relative in a specific sense.* Against Guizot’s maxim, Mohl objected: Where is there any kind of certainty that the possessors of particles of reason are to be found precisely in parliament? The answer lies in the notion of free competition and a preestablished harmony, which, certainly in the institution of parliament, as in politics itself, often appears in a hardly recognizable disguise.<sup>642</sup>

So in contrast to the absolute, ontological rationalism of Platonic political thought, and the direct, subject-centred rationalism of post-Cartesian philosophy, the rationalism of parliamentarism is “relative.” It is neither the *logos* of *being* nor a *capacity* of a *subject*, but rather the outcome of an *intersubjective process*. The question is not “who?” but “how?” This intersubjective process is

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<sup>642</sup> Carl Schmitt, *The Crisis of Parliamentary Democracy*, trans. Ellen Kennedy (Cambridge: MIT Press, 1988), 34-35 (italics added).

nothing other than *government by discussion* performed under conditions of *publicity*. It is “discussion, which compels existing powers to seek after truth in common.”<sup>643</sup> It is evident from this statement, and from the reflections on discussion and publicity that follow, that for Guizot, discussion was the norm of norms. Neither the autonomy of representatives nor freedom of the press has a value independent of their capacity to facilitate the discovery of truth through discussion.<sup>644</sup> They receive their specific meaning only in reference to this norm.<sup>645</sup> It is only with Guizot’s concept of representation that the transition from distinction to discussion in representative government is fully realized.

Unlike for Kant, for Guizot publicity was not a norm, but rather an actual institution. His emphasis on freedom of the press follows from this concern with the concrete conditions of publicity.<sup>646</sup> Exactly like Kant, Bentham, and others, Guizot viewed publicity as a kind of voice against the state, a tribunal of public reason through which the public exercise of power was subject to criticism and limitation. But in Guizot’s account, publicity is not a unidirectional relay. It does not only serve the negative function of protecting civil society from public power, but also acts as a bridge mediating between the system of needs and the system of norms: “in publicity consists the bond between a society and its government.”<sup>647</sup> In Burke’s Whig concept of representation, the autonomy of representatives from their electors was all-important. In order to act according to their superior reason and judgement, members of parliament must not be subject to the will, opinions, or interests of their electors. Their independence was so total that it

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<sup>643</sup> Guizot, *Representative Government in Europe*, 227.

<sup>644</sup> Schmitt, *Crisis of Parliamentary Democracy*, 36.

<sup>645</sup> This suggests that Schmitt’s concept of parliamentarism is based on Guizot’s account in particular. See Jean Cohen and Andrew Arato, *Civil Society and Political Theory* (Cambridge: MIT Press, 1992), 202-203; Schmitt, *Crisis of Parliamentary Democracy*, 3-7.

<sup>646</sup> Guizot, *Representative Government in Europe*, 227.

<sup>647</sup> *Ibid.*, 69.

was unclear why a representative should be selected by the electors of any particular constituency at all. But unlike the juridical liberals, Guizot did not view civil society as a subject of will, a source of binding mandates. And unlike the empiricist liberals, he did not view civil society only as a system of needs governed by the mechanics of interest. For Guizot, civil society is paradoxically a private site involved in the process of public reason. It is not linked to the parliamentary sphere of public authority through the juridical mechanics of delegation or the empiricist mechanics of interest advocacy (and in fact, Guizot and the Doctrinaires were opposed to the institutionalization of pluralistic interest representation<sup>648</sup>), but rather through the exchange of opinions in a process of government by discussion that is not limited to parliament, but in fact circulates throughout the social order. While in Hobbes' privatistic discourse of sovereignty the public interest of the commonwealth coincided with the private interests of the prince, and deliberation could only occur under conditions of secrecy,<sup>649</sup> in parliamentarism it is only the light of publicity that links the public to the private and allows deliberation to occur. Publicity is not only a means of *limitation* and *mediation*. It is also the condition for the social *exercise of public reason*.<sup>650</sup> Through publicity, "a representative government impel the whole body of society—those who exercise power, and those who possess rights—to enter upon a common search after reason and justice."<sup>651</sup> It is for this reason that it is possible for Guizot's members of parliament to be simultaneously autonomous of and linked to civil society; they are not related as *agents* or *advocates*, but instead as *interlocutors*. That Guizot did not view representation as a

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<sup>648</sup> Craiutu, *Liberalism Under Siege*, 228-229.

<sup>649</sup> Hobbes, *Leviathan*, 120. Every consistent juridical liberalism features a privatistic concept of deliberation as reckoning. This is no less true of Rousseau and Rawls than it is of Hobbes. See Manin, "On Legitimacy and Political Deliberation," 345, 348-349.

<sup>650</sup> Craiutu argues that "the originality of [Guizot's] approach lay in defining publicity as the key feature of representative government." See *Liberalism Under Siege*, 171.

<sup>651</sup> Guizot, *Representative Government in Europe*, 54.

process confined to the formal sphere of public authority is illustrated well by his remarks on the “true doctrine of representation,” which he contrasted to the juridical theories of the doctors discussed above:

The true doctrine of representation is more philosophical and more sincere [than the doctors’ theories of representation]. Starting from the principle that truth, reason, and justice—in one word, the divine law—alone possess rightful power, its reasoning is somewhat as follows:—Every society, according to its interior organization, its antecedents, and the aggregate of influences which have or do still modify it, is placed to a certain extent in a position to apprehend truth and justice as the divine law, and is in a measure disposed to conform itself to this law. Employing less general terms:—there exists in every society a certain number of just ideas and wills in harmony with those ideas, which respect the reciprocal rights of men and social relations with their results. This sum of just ideas and loyal wills is dispersed among the individuals who compose society, and unequally diffused among them on account of the infinitely varied causes which influence the moral and intellectual development of men. The grand concern, therefore, of society is—that, so far as either abiding infirmity or the existing condition of human affairs will allow, this power of reason, justice, and truth, which alone has an inherent legitimacy, and alone has the right to demand obedience, may become prevalent in the community. The problem evidently is to collect from all sides the scattered and incomplete fragments of this power that exist in society, to concentrate them, and from them, to constitute a government. In other words, it is required to discover all the elements of legitimate power that are disseminated throughout society, and to organize them into an actual power; that is to say, to collect into one focus, and to realize, public reason and public morality, and to call them to the occupation of power.

What we call representation is nothing else than a means to arrive at this result:—it is not an arithmetical machine employed to collect and count individual wills, but a natural process by

which public reason, which alone has a right to govern society, may be extracted from the bosom of society itself.<sup>652</sup>

In *Between Facts and Norms*, Habermas distinguishes his communication model of democracy and its normative concept of the public sphere from the classical concept of representation. While in the supposedly more modern communication model, the sphere of public authority draws on the spontaneous circulation of arguments in civil society's juridically private public sphere, in the classical representation theory deliberation in representative bodies is isolated from the empirical existence of civil society.<sup>653</sup> But already in Guizot's doctrine of representation it is evident that even classical parliamentarism did not neglect to connect government by discussion in representative institutions to the dynamics of opinion formation in civil society.

By involving civil society in the performance of government by discussion, Guizot introduced an element of plurality into the process of representation. In the empiricist liberalism of Madison and Hamilton, the plurality of civil society was imagined as a plurality of interests. But for Guizot, civil society is also a site of plural opinions. Because he was mainly concerned with insulating the sphere of public authority from the influence of electors, Burke was unable to integrate the discourse of civil society into his concept of parliamentarism, and was in turn unable to imagine representation as anything other than the representation of unity.<sup>654</sup> For Guizot, representation involves a moment of plurality. Plurality is the basic condition for government by discussion. To illustrate the moment and place of plurality in the representative process, Guizot quoted Pascal:

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<sup>652</sup> Ibid., 295-296.

<sup>653</sup> Habermas, *Between Facts and Norms*, 183-184.

<sup>654</sup> Schmitt likewise equated representation with representation of the whole. Once again, this is an effect of his tendency to identify features particular to premodern monarchical representation with the principles of representation as such. See especially *Constitutional Theory*, 245.

Pascal has said, “Plurality which does not reduce itself to unity, is confusion. Unity which is not the result of plurality, is tyranny.” This is the happiest expression and the most exact definition of representative government. The plurality is society; the unity is truth, is the united force of the laws of justice and reason, which ought to govern society.<sup>655</sup>

Despite the fact that it is not private interests, but rather public opinions that are related in discussion, this is not to say that the economic line of thinking that until this point had dominated the discourse of civil society did not leave its mark on Guizot’s doctrine of representation. Although he rejected the empiricist model of interest representation, Guizot sometimes described the process of government by discussion using economic analogies in which representation appeared as an arrangement in which “social forces are, so to speak, brought into competition,”<sup>656</sup> and political power was employed and circulated in much the same way that resources are employed in economic activity.<sup>657</sup> In *The Crisis of Parliamentary Democracy* Schmitt went as far as to argue that the automatic production of truth in discussion is modelled on the automatic production of equilibrium in the market:

It is essential that liberalism be understood as a consistent, comprehensive metaphysical system. Normally one only discusses the economic line of reasoning that social harmony and the maximization of wealth follow from the free economic competition of individuals, from freedom of contract, freedom of trade, free enterprise. But all this is only an application of a general liberal principle. It is exactly the same: That the truth can be found through an unrestrained clash of opinion and that competition will produce harmony. The intellectual core of this thought resides finally in its specific relationship to truth, which becomes a mere function of the eternal

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<sup>655</sup> Guizot, *Representative Government in Europe*, 52.

<sup>656</sup> *Ibid.*, 58, 369-370.

<sup>657</sup> Craiutu, *Liberalism Under Siege*, 169-170, 228-229.

competition of opinions. In contrast to the truth, it means renouncing a definite result ... Only if the central place of discussion in the liberal system is correctly recognized do the two political demands that are characteristic of liberal rationalism take on their proper significance with a scientific clarity ... the postulate of openness in political life and the demand for a division of powers, or more specifically the theory of a balance of opposing forces from which truth will emerge automatically as an equilibrium.<sup>658</sup>

In a more concise but similar way, Pierre Rosanvallon remarks that “for the invisible hand of the economists, the Doctrinaires thus substituted an “irresistible hand” of reason whose empire extends over the world.”<sup>659</sup>

We can see now how all these elements are related. In the true theory of sovereignty, legitimate power is never found localized in the world.<sup>660</sup> The source of right is not a will located in one or many concrete persons, but rather reason. Representative government is the institutional expression of this delocalization of sovereignty and the identification of reason as the source of legitimacy.<sup>661</sup> Reason is not a faculty of the subject, and it cannot be intuited by a solitary individual. Instead, it must be discovered through an intersubjective process of discussion. The basic condition for this discussion is plurality. In the same way that the delocalization of sovereignty demands a division of powers and a plurality of sociological and institutional groupings, the process of representation draws on the circulation and competition of opinions in a pluralistic civil society. Through the discussions that take place both in the juridically private public sphere of civil society and in the parliamentary sphere of public

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<sup>658</sup> Schmitt, *Crisis of Parliamentary Democracy*, 35-36.

<sup>659</sup> Rosanvallon, *Democracy Past and Future*, 125.

<sup>660</sup> Guizot, *Representative Government in Europe*, 67-68.

<sup>661</sup> *Ibid.*, 52, 55, 67-68.

authority, this plurality is transformed into the unity of truth. It is only the possession of this truth, acquired through deliberation, that puts legislators in possession of “sovereignty.”<sup>662</sup> Only at this point can the truth be instantiated in the formulation of rational, legitimate legal norms that govern society.

## §

Guizot’s political circumstances and intellectual influences put him in an especially favourable position to articulate the norms of parliamentarism with a kind of completeness and coherence that had not been achieved before and seldom has since. While the continuous, evolutionary developmental path followed by English parliamentary institutions only permitted English thinkers to recognize the particularity of modern parliamentarism in an occasional and fragmentary way, the post-revolutionary conditions in which French political reflection took place encouraged liberal thinkers to take a synoptic view of this phenomenon and allowed its basic principles to appear in an unalloyed form. Although English parliamentary thinkers like Burke and theorists of public reason like Kant had a certain level of familiarity with the empiricist discourse of civil society, neither of them was able to integrate it into their accounts of government by discussion. This failure was reflected in Kant’s insufficient appreciation for the dimension of plurality and discussion and in Burke’s preoccupation with isolating parliamentary reason from the empirical dynamics of civil society. Guizot and the Doctrinaires put the discourse of civil society at the centre of their political thought, and reimagined civil society in a way that took into view not only the dynamics of competition and exchange that distinguish civil

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<sup>662</sup> Ibid., 53.

society *qua* system of needs, but also included the dimension of manners, *mores*, opinions, and informal sources of normativity.

For this reason, Guizot's theory of parliamentarism—even more so than Kant's public reason—is like the political expression of critical philosophy. In his true doctrine of representation the antinomies between the empiricist discourse of civil society and the juridical discourse of natural law are resolved. Like the empiricism of the political economists, Guizot's theory of representation cuts off the king's head. As for Smith, Ferguson, and Burke, for Guizot the social totality was not instituted through a deliberately executed plan, and for this reason could not appear transparently to the gaze of a great legislator. A decentred society demands a decentred legislator. Sovereignty is disincorporated and delocalized into a pluralistic, intersubjective, competitive process that circulates throughout civil society. However, the form of competition staged here is not the competition of firms or proprietors in the market but rather the competition of opinions in public discussion. Discussion differs from exchanging and bargaining in that it does not produce an equilibrium of utilities but instead produces an ongoing search for the truth. For this reason the process of representation does not only concern the spontaneous harmonization of interests and the effective government of or on behalf of a privatistic civil society.

Parliamentary representation also addresses the central problems of juridical thought. Like the early modern social contract theorists, Guizot's true doctrine of representation does not only concern the effective exercise of power, but also its legitimation. However, unlike the covenants of the natural lawyers, for Guizot the dimension of legitimation did not make reference to the normative resources of consent and volition, but rather to the normative force of truth and reason. Like the jurists, Guizot did not integrate the discourse of civil society in such a

one-sided way that the spontaneous harmonization of interests in civil society disenchanting the legal dimension entirely. He too was concerned not only with the legitimation and limitation of law, but also with the conditions of its formulation. There is an intrinsic link between parliamentarism and the bourgeois legislative state.<sup>663</sup> But Guizot's way of addressing this concern entailed a different way of employing publicity from that which appears in theories of natural law. For the jurists, the publicity of law was a question of application. The validity of law rested on the relation of reciprocity it created in applying equally to each and every member of a public. In Guizot's account, the validity of the law is derived from the conditions of its creation in a public process of government by discussion that involves the private subjects of civil society in addition to parliamentary officeholders (although it must not be forgotten that it does not involve all parties on equal terms).

In parliamentarism, *civil society* appears as the site in which fragments of reason are scattered into a plurality of opinions, *speech* appears as the delocalized, competitive, intersubjective process through which the plurality of opinions is refined into the unity of truth, and *law* appears as the rationally legitimated political form in which truth's norms are instantiated.

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<sup>663</sup> Norberto Bobbio, "Are There Alternatives to Representative Democracy?" *Telos* 35 (March 1978): 26; Schmitt, *Constitutional Theory*, 329; Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, ed. Guenther Roth and Claus Wittich, trans. Ephraim Fischoff et al. (Berkeley: University of California Press, 1978), 293-294.

Table 1. Juridical Liberalism, Empiricist Liberalism, and Parliamentarism

	Juridical Liberalism	Empiricist Liberalism	Parliamentarism
Anthropological projection	<i>homo juridicus</i>	<i>homo æconomicus</i>	“Men of substance” distinguished by property and education
Associated political thinkers	Bodin, Hobbes, Rousseau, Kant, Rawls	Ferguson, Smith, Madison, Sieyès, Schumpeter	Burke, Kant, Constant, Guizot, Habermas
Forms of appearance	Theories of sovereignty, natural law, social contract theory, constituent power	Political economy, natural history, sociology	Explicit reflection on the republic of letters and representative institutions
Form of representation	Mandated delegation  and  Authorization through alienation	Representation as divided labour  and  Election as competition	Government by discussion in civil society (the press) and the sphere of public authority (parliament)
Mechanic of representation	Exchange of rights through consent	Exchange of utilities through bargaining	Exchange of opinions in discussion
Substance of representation	Will	Interest	Reason

## **Chapter 6: Democracy as Sovereignty and Democracy as Procedure**

### **Sovereign and Proceduralist Theories of Democracy and Liberal Thought**

We have identified and contrasted three families of liberal political thought: juridical liberalism, empiricist liberalism, and parliamentarism, considering the intellectual and material contexts in which they emerged, and relating each to the ancillary discourse that was most decisive for its development (jurisprudence and premodern theories of natural law, political economy, and reflection on the premodern institutional inheritance of European political orders). We have also explored each family's relationship to democratic politics. For instance, we have seen how juridical liberalism and modern social contract theories should be understood as an attempt to simultaneously acknowledge and repress a democratic moment that cannot be denied altogether by transforming power into legitimacy. We have seen how empiricist liberalism understood modernity and political representation as the extension of divided labour, and how it contrasted this modernity to the primitiveness and dilettantism of democratic versatility. Finally, we have seen how modern, bourgeois parliamentarism, no less than premodern feudal parliamentarism, is an aristocratic form of government conducted by a natural aristocracy distinguished by their property and learning, and how the activity of government by discussion was imagined in opposition to the muteness of the pseudo-democratic politics of sovereignty and the genuinely democratic practice of delegation.

We have also outlined the contribution of empiricist liberalism to contemporary democratic theory. In Schumpeter's methodical theory of democracy, the economic form of sociability that governs the relationship between firms in competition for market share is

replicated in the competitive dynamics of political parties engaged in a competition for votes. Exactly like civil society, this economic democracy is directed by a kind of invisible hand. The production of policy, rule, and legislation results as an unintended consequence of the competitive striving for political power in exactly the same way that the coordination of production and exchange emerges as an unintended consequence of the firm's attempt to maximize profits.

Until this point, we have put aside the question of how juridical liberalism and parliamentarism have reappeared in contemporary democratic theory. This question demands independent consideration because the relationship between the two families appears in an especially complicated way in twentieth century political reflection. This first complication is that Carl Schmitt, the outstanding defender of the concept of sovereignty in twentieth century democratic thought, was not a liberal at all, but rather one of the most insightful critics of liberalism. Nevertheless, in the same way that the earliest contributions to liberal thought inherited a juridical representation of political life from absolutism, Schmitt's decisionist concept of democracy as a form of sovereignty retains a number liberal thought's distinct features (i.e. the representation of politics as law, the identification of voluntaristic consent as the basis of political legitimacy, the substitution of popular sovereignty for democracy, the substitution of consent for the exercise of power) despite being formulated in a polemic against liberalism. Just as Rousseau is often mistaken for a democratic thinker despite accommodating his theory of sovereignty to the privatistic conditions of commercial modernity, Schmitt (who can be regarded as a twentieth century stand-in for Rousseau) remained liberal in many respects despite himself. Additionally, for purposes of presentation, there is a certain value in choosing Schmitt, rather than a straightforwardly liberal juridical thinker like John Rawls, to stage an opposition between

juridical thinking and parliamentarism, since the contrast between Rawls' juridical proceduralism and a proceduralism that centres on the dimension of speech is not nearly so acute as the contrast between proceduralist and sovereign concepts of democracy. For our purposes, a dispute between the Rousseauian politics of sovereignty and a Kantian theory of public reason is more interesting than a familial disagreement among neo-Kantians.

The second complication is that Jürgen Habermas, the outstanding theorist of parliamentarism in twentieth century political thought, did not confine himself to the dimension of speech, but rather arranged each of the elements that animates the three families of liberal thought (speech, law, and civil society) in such a way that each facet supports the distinctive politics of truth that organizes his proceduralist concept of democracy. Habermas' theory is not unique in this respect; his democratic theory only replicates the organization of the concept of democracy as sovereignty that it was formulated in response to. Schmitt's democratic theory likewise features a politics of truth that takes each of these three elements into account, arranging them in a symmetrical and opposed way. For this reason, the dispute between sovereign and proceduralist concepts of democracy occurs on each of the three levels that we have identified up until this point.

### **Habermas' Proceduralist Concept of Democracy and the Bourgeois Public Sphere**

In his first major work, *The Structural Transformation of the Public Sphere*, Habermas addresses a very Marxian question that, curiously, was never raised by Marx: what are the material conditions of possibility for the norms expounded by the *aufklärer* (and inherited in turn

by Marx and Habermas themselves<sup>664</sup>)? Here, he not only reconstructs the bourgeois public sphere in terms of its content and ideological productions, but instead investigates its material and institutional conditions of possibility. However, rather than relating the public sphere as a superstructure to a set of underlying productive relations, he instead finds these conditions in the *regimes of differentiation* that organize bourgeois political orders.

The bourgeois public sphere investigated in Habermas' historical sociology is not the parliamentary public sphere that developed in its most characteristic fashion in Great Britain, but rather the continental model of a press located outside and against the sphere of public authority.<sup>665</sup> In this respect, his account resembles the writings of the Physiocrats and Kant's reflections on the public use of reason. Strictly speaking, this *public sphere of civil society* is neither public in the sense of being a function of state-sanctioned public authority, nor private in the sense of being kept hidden in the invisibility of domestic privacy (whether this privacy is conceived as a matter of intimacy or propriety), but rather is situated in an intermediate sphere between public and private.<sup>666</sup> Given its ubiquity in liberal political thought and the sheer variety of ways it has been understood, this intermediate sphere of civil society must not be confused with earlier forms; Habermas' civil society is not the early modern civil society of Hobbes and Locke, who equated civil society with political society or the commonwealth.<sup>667</sup> Although he follows Marx and Hegel in understanding civil society as the site of a "system of needs,"<sup>668</sup> for

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<sup>664</sup> Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, trans. Thomas Burger (Cambridge: MIT Press, 1991), 124.

<sup>665</sup> *Ibid.*, 27.

<sup>666</sup> *Ibid.*, 3.

<sup>667</sup> Thomas Hobbes, *Leviathan*, ed. Edwin Curley (Indianapolis: Hackett, 1994), 88; John Locke, *Second Treatise of Government*, ed. C. B. Macpherson (Indianapolis: Hackett, 1980), ch. 7.

<sup>668</sup> G. W. F. Hegel, *Outlines of the Philosophy of Right*, trans. T. M. Knox (Oxford: Oxford University Press, 2008), 186-197.

Habermas civil society is not only home to *bürgerliche gesellschaft*, the site of economic sociability, but also hosts an *öffentlichkeit*, a site in which words, rather than goods, are exchanged.

The first material condition that enabled the emergence of the bourgeois public sphere is the transformation of the *oikos* into the economy. In this development, the process of social reproduction emerges from its confinement in the privacy of the household and forms an intermediate sphere of civil society that is neither public nor private. In contrast to the medieval *societas civilis*, a continuous order in which the domestic, patriarchal principle of *dominium* was reproduced at every level (between God and his creatures, sovereign and subject, patriarch and family),<sup>669</sup> in modernity, civil society *qua* system of needs is coordinated by a new privatistic principle of association: in this “exclusive realm of Freedom, Equality, Property and Bentham,”<sup>670</sup> status or bondage is displaced by contract, and voluntary market relations among strangers supplant the more personalistic principle of *dominium*.<sup>671</sup>

The displacement of activities concerned with the necessity of natural reproduction from the bourgeois household had the unintended consequence of unburdening and consequently enriching the private domestic space, creating a private sphere of sociability in which relations of intimacy could be developed and cultivated.<sup>672</sup> The normative content of the public sphere of civil society results from the projection of a universal anthropological figure discovered in the sphere of intimacy: the *homme*, the human being as such. By developing a new subjectivity in

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<sup>669</sup> Jürgen Habermas, *Theory and Practice*, trans. John Viertel (Boston: Beacon Press, 1973), 48.

<sup>670</sup> Karl Marx, *Capital Volume I*, trans. Ben Fowkes (New York: Penguin, 1990), 280.

<sup>671</sup> Habermas, *Structural Transformation of the Public Sphere*, 19-20.

<sup>672</sup> *Ibid.*, 28. Ancient democracy is often criticized on the grounds that it presupposed a class of slaves forced to labour on behalf of citizens. But it is clear from Habermas’ account that the bourgeois, no less than the ancient citizens, required that they be unburdened of labour by the labour of others as a precondition for the formation of a public sphere.

the intimacy of conjugal relations, the bourgeois discovered that “the [intimate sphere] and not the public sphere itself (as the Greek model would have it) was humanity’s genuine site.”<sup>673</sup> The subjectivity developed under conditions of intimacy did not remain in a condition of sheltered interiority, but instead staked out its own territory in the sphere of civil society, producing a public sphere with a literary character as the development of conjugal intimacy and activities of letter-writing expand into the sociability of the salon, the coffeehouse, and eventually the press.<sup>674</sup> In these literary publics, the *homme* found a site of communication between subjects in their common quality as human beings and nothing more.<sup>675</sup> Habermas emphasizes that the bourgeois public spheres “preserved a kind of social intercourse that, far from presupposing the equality of status, disregarded status altogether.”<sup>676</sup> As a result of these developments, modern private life is bifurcated into roles concerned with propriety and conjugal intimacy, while the mediating sphere of civil society is bifurcated into a system of needs and a public sphere.<sup>677</sup>

This relation of parity in the absence of status distinctions effected the displacement of personalistic authority by rationality. Among subjects relating to one another on the basis of

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<sup>673</sup> Ibid., 51-52. It is worth noting here that Habermas reformulates the ideological identification of *homme* and *bourgeois* criticized by Marx in “On the Jewish Question.”

<sup>674</sup> Ibid., 23.

<sup>675</sup> Habermas, *Structural Transformation of the Public Sphere*, 34. The universality of the *homme* is revealed in its contrast to the more particularistic and political subject of *isonomia*. The contrast between an *equality of status* conferred by *nomos* (enacted law) and *absence of status* reveals the extent to which the bourgeois public sphere attempted to base itself in the extra-political order of nature, which, in the thought of the day, could be normatively equated with a condition of universality.

<sup>676</sup> Ibid., 36.

<sup>677</sup> Ibid., 28-29. Reinhart Koselleck gives a very similar account of the emergence of the bourgeois public sphere. However, while Habermas’ civil society is bifurcated into a public sphere of letters and a private sphere of commerce, Koselleck’s account of the continental Enlightenment instead features a public sphere of letters and a private sphere of *secrecy* housed in the Masonic lodges, a kind of mirror image of the absolutist state’s *arcana imperii* that nevertheless featured the same parity of social status found in the salons. See *Critique and Crisis: Enlightenment and the Pathogenesis of Modern Society* (Cambridge: MIT Press, 1998), 53-75.

parity, it became possible for the “authority of the better argument [to] assert itself.”<sup>678</sup> The divine, heteronomous source of authority that provided the normative and ontological basis for the personalistic monarchical order was displaced by the authority derived from the rationality of the process by which opinion and legislation are formed. In Habermas’ words, “Public debate was supposed to transform *voluntas* into a *ratio* that in the public competition of private arguments came into being as the consensus about what was practically necessary in the interests of all.”<sup>679</sup> Laws come to be understood ontologically as “necessary relations arising from the nature of things” (Montesquieu), and as having the properties of being “rational rules of a certain universality and permanence,” rather than being understood as personal commands. At this point, it becomes possible to invert the Hobbesian formula into its opposite: *veritas non auctoritas facit legem* (truth, not authority makes law).<sup>680</sup>

### **Habermas’ Interlocutors: The Frankfurt School and Hannah Arendt**

*The Structural Transformation of the Public Sphere* is not only an historical inquiry into a category of bourgeois society, but also a contribution to wider debates in critical theory and democratic theory. To appreciate the significance of Habermas’ account, it is necessary to revisit the argumentative context established by his predecessors and contemporaries.

Firstly, the question concerning the institutional conditions for the emergence of enlightenment norms must be seen as a contribution to a set of dilemmas opened up by the first generation of Frankfurt School critical theorists. Under the influence of Max Weber and Georg

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<sup>678</sup> Habermas, *Structural Transformation of the Public Sphere*, 36.

<sup>679</sup> *Ibid.*, 83.

<sup>680</sup> *Ibid.*, 53.

Lukács,<sup>681</sup> Theodor W. Adorno and Max Horkheimer introduced the problematic of rationalization into Western Marxism. In contrast to the optimistic outlook shared by Marx and the liberal *aufklärer*, Adorno and Horkheimer inherited a tragic view of reason from the “dark” writers of the bourgeois (de Sade, Schopenhauer, Nietzsche, Weber).<sup>682</sup> For Weberian Marxism, the link between reason and normativity had been irreparably severed. After Nietzsche, it became impossible to see the value of truth as self-evident;<sup>683</sup> after Weber, it was impossible to think that science could tell one how to live;<sup>684</sup> and after the holocaust, the central political experience for the Frankfurt School (and also for the somewhat younger Habermas<sup>685</sup>), it was impossible to deny the compatibility between rational administrative means and substantive insanity.

Habermas was dissatisfied with the political quietism that followed from Adorno and Horkheimer’s pessimistic diagnoses. With the modernist problematic of rationalization in mind, his contribution as a Frankfurt School theorist can be viewed not only as an attempt to establish the normative foundations of critical theory, but rather to *reestablish* the normativity of *reason* in particular. The problem for critical theory is not the missed moment of philosophy’s

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<sup>681</sup> See especially Georg Lukács, *History and Class Consciousness: Studies in Marxist Dialectics*, trans. Rodney Livingstone (Cambridge: MIT Press, 1971), 83-222.

<sup>682</sup> Jürgen Habermas, *The Philosophical Discourse of Modernity: Twelve Lectures*, trans. Frederick Lawrence (Cambridge: MIT Press, 1987), 106.

<sup>683</sup> Friedrich Nietzsche, *On the Genealogy of Morals*, in *Basic Writings of Nietzsche*, ed. and trans. Walter Kaufmann (New York: The Modern Library, 2000), Essay 3 §24.

<sup>684</sup> Max Weber, “Science as a Vocation,” in *The Vocation Lectures*, ed. David Owen and Tracy B. Strong, trans. Rodney Livingstone (Indianapolis: Hackett, 2004), 17.

<sup>685</sup> Habermas’ preoccupation with the denazification of intellectual and civic life is evident in his quarrels with followers of Martin Heidegger and Carl Schmitt, and in his contribution to the “historians dispute.” See *Philosophical Discourse of Modernity; The New Conservatism: Cultural Criticism and the Historians’ Debate*, ed. and trans. Shierry Weber Nicholsen (Cambridge: MIT Press, 1989).

realization,<sup>686</sup> but rather the uncompleted project of modernity.<sup>687</sup> In *The Theory of Communicative Action* Habermas argues that Weber was incorrect to infer, from the unavailability of a substantial concept of reason, that normative validity claims have no rational content, and proceeds to outline a theory of communicative rationality that is procedural rather than substantive.<sup>688</sup> Habermas' earlier work, *The Structural Transformation of the Public Sphere* is an attempt to identify and describe a concrete historical approximation of the communicative conditions later outlined abstractly in the *Theory of Communicative Action*.

Secondly, the significance of Habermas' identification of civil society as the site of deliberative political sociability can only be appreciated if contrasted with Hannah Arendt's account of the displacement of the public world in modernity. In *The Human Condition*, Arendt presented an interpretation of Western history in terms of the three basic human activities: labour, work, and action. Although she offered rich historical and phenomenological descriptions of each activity, Arendt was mainly concerned with articulating the specific grammar of political action, which she viewed as being threatened or even foreclosed by modern conditions. The most notable of these conditions was the collapse of the separation between the public and the private realms (or a certain version of this separation), and the consequent emergence of an aberrant hybrid realm identical with neither. Apparently aware of the idiosyncrasy of her account, and even wishing to highlight it, Arendt made the curious choice of introducing a new coinage "the social," rather than opting to employ the more commonplace "civil society" or "society," to describe this hybrid.

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<sup>686</sup> Theodor W. Adorno, *Negative Dialectics*, trans. E. B. Ashton (London: Routledge, 1973), 3.

<sup>687</sup> Jürgen Habermas, "Modernity and Postmodernity," trans. Seyla Benhabib, *The New German Critique* 22 (Winter 1981): 11-12.

<sup>688</sup> Jürgen Habermas, *The Theory of Communicative Action*. Vol. 1, *Reason and the Rationalization of Society*, trans. Thomas McCarthy (Boston: Beacon Press, 1981), 249.

The emergence of society, or in her terminology, the “rise of the social” did not result from the legal demarcations between the public and the private being abandoned; in fact, the social first emerged in the liberal institutional orders organized by this separation.<sup>689</sup> The rise of the social resulted from a situation in which the concerns of labouring activity and its characteristic forms of conduct escaped their confinement in the privacy of *oikos*, and threatened to dominate the public realm. The emergence of society can be understood as an incursion of the private into the public not only in the sense that private interests came to dominate politics, but also in the sense that the administration of the collective life-process came to dominate public affairs. In contrast to Habermas, who views public sphere of civil society as site of sociability occupied by the *homme* discovered in the intimacy of the private sphere,<sup>690</sup> Arendt followed Rousseau in seeing the modern discovery of intimacy as a flight from (rather than the germ of) society, which she regarded as a site of conformity, inauthenticity, and invidious comparison.<sup>691</sup> Given the influence of Arendt’s account of political action on his theory of communicative rationality, it is striking that Habermas identifies the institutional conditions of possibility for his public sphere in precisely the same developments that Arendt viewed as the main threat to public life.<sup>692</sup>

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<sup>689</sup> Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1998), 38.

<sup>690</sup> Habermas, *Structural Transformation of the Public Sphere*, 23.

<sup>691</sup> Arendt, *Human Condition*, 38-40; Jean-Jacques Rousseau, *Discourse on the Origin of Inequality*, in *Jean-Jacques Rousseau: The Basic Political Writings*, ed. and trans. Donald A. Cress (Indianapolis: Hackett, 1987), 63-64, 67, 80-81.

<sup>692</sup> Jean Cohen and Andrew Arato, *Civil Society and Political Theory* (Cambridge: MIT Press, 1992), 221.

## Schmitt's Concept of Democracy as a Form of Sovereignty

In addition to the Frankfurt School's skeptical stance towards reason and Arendt's skepticism concerning civil society, *The Structural Transformation of the Public Sphere* also engaged in a dialogue with Schmitt's description of democracy as a form of sovereignty and the corresponding decisionist concept of law. In his *Constitutional Theory*, Schmitt proposed an unorthodox typology of constitutions, arguing that:

State is a certain status of a people, specifically, the status of political unity. State form is this unity's particular type of formation. The people are the subject of every conceptual definition of the state. State is a condition, the particular circumstance of a people. But the people can achieve and hold the condition of political unity in two different ways. It can already be factually and directly capable of political action by virtue of a strong and conscious similarity, as a result of firm natural boundaries, or due to some other reason. In this case, a political unity is a genuinely present entity in its unmediated self-*identity*. This principle of the self-identity of the then present people as political unity rests on the fact that there is no state without people and that a people, therefore, must always actually be existing as an entity present at hand. The opposing principle proceeds from the idea that the political unity of the people as such can never be present in actual identity and, consequently, must always be *represented* by men personally. All distinctions of genuine state forms ... may be traced back to this decisive opposition of *identity* and *representation*.<sup>693</sup>

In contrast to Aristotle's typology, which distinguishes constitutional forms on the basis of the numerical composition of the ruling element (one, few, many) and their agreement with or

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<sup>693</sup> Carl Schmitt, *Constitutional Theory*, ed. and trans. Jeffrey Seitzer (Durham: Duke University Press, 2008), 239.

deviation from the common good,<sup>694</sup> Schmitt's account is dramatically simplified, organizing all differences of form on the basis of a polarity of identity and representation. These poles are not balanced. The widest variety of political forms and political institutions, from monarchy and parliamentarism to government and the state are but differing determinations of the principle of representation, whereas identity is equated only with one. In Schmitt's words: "democracy is a state form that corresponds to the principle of identity (in particular, the self-identity of the concretely present people as a political unity)."<sup>695</sup> In this way, democracy does not appear as one regime among others, as in the Aristotelian taxonomy, but rather as the antithesis of regimes as such. Since "there is no state without representation,"<sup>696</sup> to the extent that it realizes the principle of identity (for Schmitt, this is never actually the case), democracy would paradoxically be a "status" or state-form without a state.<sup>697</sup>

Notably, Schmitt's constitutional theory does not distinguish regime types in terms of their differing *degrees of presence* (in which case the discussed constitutional forms would be organized along a polarity of presence and re-presentation), but rather in terms of different *bases of unification*.<sup>698</sup> In monarchical representation, the prince represents the unity of the realm to the people by means of a performance or an act of manifestation, whereas in parliamentarism, representation is a dynamic and ongoing process of integration.<sup>699</sup> The democratic principle of identity does not unify in the same way. Its specific form of unification is not procedural, but

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<sup>694</sup> Aristotle, *The Politics*, trans. T. A. Sinclair (New York: Penguin, 1992), bk. 3, ch. 7, 1279a22-1279b9.

<sup>695</sup> Schmitt, *Constitutional Theory*, 255.

<sup>696</sup> *Ibid.*, 240.

<sup>697</sup> *Ibid.*, 248. This formulation echoes Rousseau's remark that democracy is a paradoxical and impossible political form, a "government without a government." We will see later how Schmitt's inattention to Rousseau's distinction between sovereignty and government led him to mischaracterize democracy. See *On the Social Contract*, in *Jean-Jacques Rousseau: The Basic Political Writings*, ed. and trans. Donald A. Cress (Indianapolis: Hackett, 1987), 179.

<sup>698</sup> Schmitt, *Constitutional Theory*, 239.

<sup>699</sup> *Ibid.*, 239-241.

substantial; democracy “can be grounded only on a precise and substantial concept of equality.”<sup>700</sup> As for Aristotle, for Schmitt the condition for democratic equality was a kind of sameness or likeness.<sup>701</sup> Although a substance of one kind or another must always be present, the basis of this substantive identification can assume a variety of forms.<sup>702</sup> As Schmitt put it in *The Crisis of Parliamentary Democracy*:

The question of equality is precisely not one of abstract, logical-arithmetical games. It is about the substance of equality. It can be found in certain physical and moral qualities, for example, in civic virtue, in *arete*, the classical democracy of *vertus* (*vertu*). In the democracy of English sects during the seventeenth century equality was based on a consensus of religious convictions. Since the nineteenth century it has existed above all in membership in a particular nation, in national homogeneity.<sup>703</sup>

Despite this admission that a variety of existential bases are possible in principle, in his discussions of democracy Schmitt almost exclusively imagined substantive equality in national or ethnic terms. Here, as elsewhere, he references Rousseau, arguing that:

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<sup>700</sup> Ibid., 256.

<sup>701</sup> Aristotle, *Politics*, bk. 3, ch. 16, 1287a10-22; bk. 7, ch. 3, 1325a34-1325b13. Schmitt’s reliance on Aristotle’s depiction of Athenian democracy is, of course, questionable. The centrality of *nomos* as enacted law in the democratic imaginary indicates that for the democratic ethos, equality was based on a political decision rather than prepolitical, already-existing homogeneity, and even the detractors of ancient democracy described the regime as being home to a wide variety of ways of life, mixing Greek with non-Greek cultural influences. See J. L. Marr and P. J. Rhodes, *The ‘Old Oligarch’: The Constitution of the Athenians Attributed to Xenophon* (Oxford: Aris & Phillips, 2008), 47; Plato, *Republic*, trans. G. M. A. Grube and C. D. C. Reeve (Indianapolis: Hackett, 1992), 557a-558c

<sup>702</sup> Schmitt, *Constitutional Theory*, 259.

<sup>703</sup> Ibid., 264.

The general will as Rousseau constructs it is in truth homogeneity. That is a really consequential democracy. According to the *Contrat social*, the state therefore rests not on a contract but essentially on homogeneity, in spite of its title and in spite of the dominant contract theory. The democratic identity of governed and governing arises from that.<sup>704</sup>

In his *Constitutional Theory*, Schmitt's concept of democratic identity has almost radically democratic implications. Here the "identity of ruler and ruled" is construed in terms of *self-identity*.<sup>705</sup> In a fashion reminiscent of Aristotle's description of democracy as "ruling and being ruled in turn,"<sup>706</sup> the governed and governing are identified simply because *they are the same people*, and democratic identity is produced through *participation*.<sup>707</sup> However, in *The Crisis of Parliamentary Democracy*, Schmitt gave the principle of identity a Caesaristic twist, arguing that:

All democratic arguments rest logically on a series of identities. In this series belong the identity of governed and governing, sovereign and subject, the identity of the subject and object of state authority, the identity of the people with their representatives in parliament, the identity of the state and the current voting population, the identity of the state and the law, and finally an identity of the quantitative (the numerical majority or unanimity) with the qualitative (the justice of the laws) ... All of these identities are not palpable reality, but rest on a recognition of the identity. It is not a matter of something actually equal legally, politically, or sociologically, but rather of

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<sup>704</sup> Carl Schmitt, *The Crisis of Parliamentary Democracy*, trans. Ellen Kennedy (Cambridge: MIT Press, 1988), 14. See also *Constitutional Theory*, 260. This interpretation is misleading; in Book 3 Chapter 16 of his *Social Contract*, where Rousseau argues that the political order is not a "contract" but rather an "association," he was not opposing a legal to an ethnic basis of unity, but rather contrasting two different forms of legal association: a *pactum subjectionis* between prince and subjects, in the first case, and a *pactum unionis* among subjects themselves, in the second.

<sup>705</sup> Schmitt, *Constitutional Theory*, 264.

<sup>706</sup> Aristotle, *Politics*, bk. 6, ch. 2, 1317a40-1317b16. Whether accurately or not, Schmitt describes the principle of democratic identity as "ancient" or "classical." See *Crisis of Parliamentary Democracy*, 14.

<sup>707</sup> Schmitt, *Constitutional Theory*, 248-249.

identifications ... A distance always remains between real equality and the results of identification ... Everything depends on how the will of the people is formed. The ancient dialectic in the theory of the will of the people has still not been resolved: The minority might express the true will of the people; the people can be deceived, and one has long been familiar with the techniques of propaganda and the manipulation of public opinion. This dialectic is as old as democracy itself and does not in any way begin with Rousseau or the Jacobins.<sup>708</sup>

For this reason, “dictatorial and Caesaristic methods not only can produce the acclamation of the people but can also be a direct expression of democratic substance and power.”<sup>709</sup> Here, the principle of identity is not understood in terms of an actually-present self-identity, but is instead construed as a process of *identification*. The *demos* are not only identical with themselves, but additionally may perform an act that identifies them with a separate power. The “direct democracy” of this Caesaristic image is not assembly democracy or even a direct democracy by plebiscite,<sup>710</sup> but rather direct election or democracy by *acclamation*.

A second consequence follows from the democratic principle of identity. From an existential point of view, a self-identical democracy is a regime based on homogeneity and *likeness*, whereas from the institutional perspective, a self-identical democracy is a regime of *indivision*. In contrast to the mechanical image in which politics appears a matter of balancing diverse interests in such a way that ambition counteracts ambition,<sup>711</sup> in the embodied, identitarian image a democracy is only democratic insofar as the problem of reconciling diverse

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<sup>708</sup> Schmitt, *Crisis of Parliamentary Democracy*, 26-27.

<sup>709</sup> *Ibid.*, 17.

<sup>710</sup> For a plebiscitary rather than acclamatory depiction of direct democracy, see Schmitt, *Constitutional Theory*, 285.

<sup>711</sup> James Madison, *Federalist No. 51*, in *The Federalist Papers*, ed. George W. Carey and James McClellan (Indianapolis: Liberty Fund, 2001).

interests does not arise in the first place.<sup>712</sup> Drawing on Rousseau, Schmitt observed that “the ‘general will,’ demonstrates that a true state ... only exists where the people are so homogeneous that there is essentially unanimity. According to the *Contrat social* there can be no parties in the state, no special interests, no religious differences, nothing that can divide persons.”<sup>713</sup>

Two institutional consequences follow from this principle of democratic indivision. Firstly, in a homogeneous democracy, there is neither need nor place for the arrangement of checks and balances internal to apparatus of government imagined by the authors of the *Federalist*, since “a threefold division of powers, a substantial distinction between the legislative and the executive, the rejection of the idea that the plenitude of state power should be allowed to gather at any one point—all of this is in fact the antithesis of a democratic concept of identity.”<sup>714</sup> Secondly, an undivided, self-identical democracy precludes the regime of differentiation between public and private which, in Habermas’ account, permitted the emergence of the public sphere. Schmitt depicted democracy as an undoer of differentiations, arguing that “democracy must do away with all the typical distinctions and depoliticalizations characteristic of the liberal nineteenth century, also with those corresponding to the nineteenth-century antitheses and divisions pertaining to the state-society contrast.”<sup>715</sup> For this reason, he identified democracy as the cause of the “total state,” in which the divisions between public and

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<sup>712</sup> Carl Schmitt, *Legality and Legitimacy*, ed. and trans. Jeffrey Seitzer (Durham: Duke University Press, 2004), 28, 41-42.

<sup>713</sup> Schmitt, *Crisis of Parliamentary Democracy*, 13.

<sup>714</sup> *Ibid.*, 36. On the anti-democratic origins of the separation of powers, see M. J. C. Vile, *Constitutionalism and the Separation of Powers* (Oxford: Clarendon Press, 1967), 33.

<sup>715</sup> Carl Schmitt, *The Concept of the Political*, trans. George Schwab (Chicago: University of Chicago Press, 2007), 23.

private established by the liberal order are dissolved by the fusion of state and society, and everything is politicized.<sup>716</sup>

The principle of identity does not only preclude a variety of interests, but also a variety of opinions. Schmitt observed that “according to Rousseau [democratic] unanimity must go so far that the laws come into existence *sans discussion*.”<sup>717</sup> The democratic *volonté générale* is not formed in a procedure of discussion and the employment of public reason, but rather pre-formed as an accident of a substance. In Rousseau’s concept, public opinion is public not because it is a visible object of public discussion, but simply because it is possessed (privately) by every member of the public. It does not have the reflective, dialogical quality of the liberal concept, but instead expresses the customs or *mores* carried privately in the heart of each and every citizen.<sup>718</sup> The first citizen to articulate a new law “merely says what everybody has already felt.”<sup>719</sup> The general will is intuited directly as a given *factum* rather than the complex product of the exchange of opinions, and the dissenting voice is not an interlocutor but an outsider, a foreigner among citizens.<sup>720</sup> In this image of democracy as a mute community united by the homogeneity of its pre-reflective *mores*, civic virtue is imagined not as a kind of practical excellence or skill (*arete*), as in the ancient imaginary, but instead as a kind of consonance between one’s public

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<sup>716</sup> Schmitt, *Legality and Legitimacy*, 90. Habermas’ *Structural Transformation of the Public Sphere* features a very similar description of state-society fusion, although he does not identify democracy as the catalyst for this “refeudalization” in so straightforward a way as Schmitt.

<sup>717</sup> Schmitt, *Crisis of Parliamentary Democracy*, 14.

<sup>718</sup> Rousseau, *Social Contract*, 172. See also Habermas, *Structural Transformation of the Public Sphere*, 97-99.

<sup>719</sup> Rousseau, *Social Contract*, 203-204.

<sup>720</sup> Rousseau, *Social Contract*, 205; Schmitt, *Legality and Legitimacy*, 27-28, 41-42.

and private interests:<sup>721</sup> “where there is homogeneity, the decision makes itself without discussion, since everyone wants the same thing.”<sup>722</sup>

Whether it is construed in terms of self-identity or instead in terms of identification, the democratic principle of identity is unmistakably personalistic and concrete. In this understanding, the *demos* is not a normative ideal, but an actually-present political body. Furthermore, the *demos* are not present in a state of plurality or self-division, but instead as a Leviathan, a unitary subject writ large. What is suggested in the equivocation between (radical) self-identity and (Caesaristic) identification, in the resemblance between the *volonté générale* and the Leviathan,<sup>723</sup> becomes especially clear in the democratic concept of law as a determination of *voluntas*. In the same way that the absolutist order understood law as an emanation from the will of the prince, in democracy law appears as an expression of the momentary will of the people.<sup>724</sup> The concept of democracy as a form of sovereignty and monarchical absolutism share a decisionist concept of law: *auctoritas non veritas facit legem* (authority, not truth, makes law).<sup>725</sup>

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<sup>721</sup> Jean-Jacques Rousseau, *Discourse on Political Economy*, in *Jean-Jacques Rousseau: The Basic Political Writings*, ed. and trans. Donald A. Cress (Indianapolis: Hackett, 1987), 119.

<sup>722</sup> Schmitt, *Constitutional Theory*, 248.

<sup>723</sup> Hobbes' argument that, in conferring their power to the artifice of sovereignty, men “reduce all their wills, by plurality of voices, unto one will” might as easily have appeared in Rousseau's *Social Contract*. See Hobbes, *Leviathan*, 109. On Rousseau's continuity with the problematic of embodied sovereignty, see Jürgen Habermas, “Three Normative Models of Democracy,” *Constellations* 1, no. 1 (December 1994): 9; Nadia Urbinati, *Representative Democracy: Principles and Genealogy* (Chicago: University of Chicago Press, 2006), 72.

<sup>724</sup> Schmitt, *Legality and Legitimacy*, 24, 62.

<sup>725</sup> Schmitt, *Constitutional Theory*, 268; *Crisis of Parliamentary Democracy*, 43.

## What is Decisionism?

The decisionist concept of law is poorly understood. Decisionism is not simply the legal corollary to dictatorship. It is not the doctrine implicit in the sophist's contention that "might makes right," and although it stands in opposition to the normative, it is nevertheless an expression of the ethical.<sup>726</sup> Decisionism is one of Schmitt's coinages.<sup>727</sup> In his writings on political and legal theory it is generally contrasted with a normativist concept of law, which he associated with the rationalist worldview of liberalism.<sup>728</sup> Although decisionism is primarily associated with Schmitt, he did not understand decisionist legal thought as an invention of his own, but rather as an already-existing type of juridical thought that he simply identified.

In the decisionist concept of law, normative validity does not stand apart from the political order as an independent dimension, but rather is assimilated to facticity. For the decisionist, there is no extrapolitical or prepolitical "higher law." The highest legal power coincides with the highest actual power.<sup>729</sup> To illustrate the pedigree of decisionist thought, Schmitt typically made reference to Tertullian's dictum, which presents the opposition between authority and normativity in an especially stark way: "*audaciam existimo de bono divi praecepti disputare, neque enim quia bonum est, idcirco auscultare debemus, sed quia deus praecipit*" ("I consider it presumptuous to debate the goodness of a divine precept. We should attend to it, not

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<sup>726</sup> For a typical portrait of decisionism, see Richard Wolin, "Foucault's Aesthetic Decisionism," *Telos* 67 (March 1986): 71-72.

<sup>727</sup> Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (Chicago: University of Chicago Press, 2005), 33; Wolin, "Foucault's Aesthetic Decisionism," 72.

<sup>728</sup> See especially *Legality and Legitimacy* and *On the Three Types of Juristic Thought*, trans. Joseph W. Bendersky (Westport: Praeger, 2004).

<sup>729</sup> Schmitt, *Political Theology*, 18.

because it is good, but because God has prescribed it”).<sup>730</sup> However, for Schmitt, the most typical and illustrative representative of decisionist thought was Thomas Hobbes.<sup>731</sup> In Hobbes’ political thought the assimilation of validity to facticity appears in the identification of justice with positive law, which is in turn identified with the will of the sovereign who “by right hath command over others.”<sup>732</sup> This connection between the existential facticity of power and legal validity does not necessarily imply a monarchical or absolutist constitutional form. In Rousseau’s more “democratic” or republican appropriation of the discourse of sovereignty, the same levelling of validity to facticity occurs. Since “the sovereign, by the mere fact that it exists, is always all that it should be,” it follows that “the general will is always right.”<sup>733</sup>

Insofar as the normative order does not stand apart as an independent dimension, but only coincides with the facticity of power, the decision occupies a normative vacuum. Schmitt contended that “that constitutive, specific element of a decision is, from the perspective of the content of the underlying norm, new and alien. Looked at normatively, the decision emanates from nothingness.”<sup>734</sup> Schmitt also rejected the possibility that the use of procedure could invest

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<sup>730</sup> Quoted in Carl Schmitt, *Political Romanticism*, trans. Guy Oakes (New Brunswick: Transaction Publishers, 2011), 96.

<sup>731</sup> For the historian of political thought, this attribution may be unintuitive, given that Hobbes’ political philosophy introduced the anthropological and ontological presuppositions of liberal thought. Schmitt nevertheless insisted that “Hobbes remained personalistic and postulated an ultimate concrete deciding in-stance ... despite his nominalism and natural-scientific approach and his reduction of the individual to the atom.” The personalistic character of Hobbes’ thought is especially evident in his contention that “subjection, command, right, and power are accidents, not of powers, but of persons.” Hobbes, *Leviathan*, 392; Schmitt, *Political Theology*, 33, 47.

<sup>732</sup> Hobbes, *Leviathan*, 78, 100.

<sup>733</sup> Rousseau, *Social Contract*, 150, 155; see also Schmitt, *Constitutional Theory*, 264-265. As we will see later, Rousseau was not a pure representative of the decisionist concept of law. The concept of autonomy, which employs legal form to establish relations of reciprocity between citizens, distinguishes the general will’s legislation from the capriciousness of the decisionist concept of law as an emanation of *voluntas*. It is for this reason that Kant was able to appropriate the concept of autonomy for the liberal tradition. Although he drew extensively on Rousseau, Schmitt’s concept of democracy is more decisionistic. He historicizes the doctrine, originating in rationalist metaphysics, that declarations of the will must have a general form. See Schmitt, *Political Theology*, 48.

<sup>734</sup> Schmitt, *Political Theology*, 31-32.

the decision with the normative power of reason. Since the decision “contains a moment of indifference from the perspective of content,” it follows that “making a decision is more important than how a decision is made.”<sup>735</sup>

Throughout *Leviathan*, Hobbes employed a very distinctive style of argument in which he dissolves or side-steps *epistemic* questions by reformulating them as *political* questions or questions concerning authority. For instance, when discussing the problem of determining whether biblical texts are canonical—that is to say, whether they are the “true registers of those things which were done and said by the prophets and apostles”—he changed the question from one concerning the truth or epistemic authority of these texts to one concerning their political authority, arguing that “it is not the writer, but the authority of a church, that maketh a book canonical.”<sup>736</sup> Hobbes developed the argument further in a significant passage discussing the nature of the authority that scripture holds over Christian subjects:

It is a question much disputed between the divers sects of Christian religion: *From whence the Scriptures derive their authority? Which question is also propounded sometimes in other terms, as How we know them to be the word of God? or, Why we believe them to be so?* and the difficulty of resolving it ariseth chiefly from the improperness of the words wherein the question itself is couched ... The question truly stated is: *By what authority they are made law?*<sup>737</sup>

In contrast with Tertullian, whose maxim illustrates that the decision is more fundamental than the good or the normative, Hobbes’ line of argument demonstrates the independence of the decision from the rational order of knowledge. These positions are consistent if one regards the

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<sup>735</sup> Ibid., 30, 55-56.

<sup>736</sup> Hobbes, *Leviathan*, 257-258.

<sup>737</sup> Ibid., 259.

*normative* order on the model of a *nomological* order, which may be contrasted with the ethical order in the same fashion as form from substance or law from spirit.<sup>738</sup> While the norm establishes an order of impersonal, general, and rational rules (norm as *nomos*, *nomos* as *ratio*), the decision emanates from the will of a concrete person: “*sic volo, sic jubeo, stat pro ratione voluntas*” (“Thus I wish, thus I ordain, my will takes the place of reason”).<sup>739</sup>

## §

Although he preferred to reference Tertullian and Hobbes, the most significant influence on Schmitt’s decisionist concept of law was Max Weber.<sup>740</sup> Undoubtedly, Weber’s concept of charismatic plebiscitary leadership was influential for Schmitt’s concept of sovereignty. Weber stood at the crossroads between nationalist and liberal political convictions, and between sovereign and proceduralist concepts of democracy.<sup>741</sup> But while Schmitt was primarily concerned with the boundary between will and law, the division at which spheres of competence are allocated either to a “who” or to a “how,” Weber’s primary concern was not so much with the question of what kinds of situation must be adjudicated by a concrete person, but rather with

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<sup>738</sup> The distinction made here between the normative and the ethical corresponds to Habermas’ distinction between moral and ethical questions. See “Three Normative Models of Democracy,” 3-6.

<sup>739</sup> This passage from Juvenal’s *Satires* is quoted in Bernard Manin, *The Principles of Representative Government* (New York: Cambridge, 1997), 136.

<sup>740</sup> Agostino Carrino contends that “Schmitt’s concept of decision is in effect a legal translation of Weber’s sociopolitical concept of conflict.” It is in this sense that Schmitt is Weber’s “legitimate pupil” or even his “natural son” as Habermas put it. See Agostino Carrino, “From Norm to Decision to the Concrete Order: The Legal Philosophy of Carl Schmitt,” in *A Treatise of Legal Philosophy and General Jurisprudence* Vol. 12, ed. Enrico Pattaro and Carrado Roversi (Dordrecht: Springer, 2016), 248; Jürgen Habermas, “Value-Freedom and Objectivity,” in *Max Weber and Sociology Today*, ed. Otto Stammer, trans. Kathleen Morris (New York: Harper and Row, 1971), 65-66, 66n4.

<sup>741</sup> Weber’s model of “democracy” is perhaps best described as a mixed constitution, a form of parliamentary dictatorship.

what kind of a person this adjudicator would need to be and what forms of institutional training grounds would be adequate to select and produce a subject of this calibre.<sup>742</sup> In this respect, his concerns were almost classical.<sup>743</sup> As we will see later, this is not the only respect in which Weber's legacy for democratic theory has been ambivalent.

Curiously, Weber's decisionism is less visible in his political writings than in his reflections on the methodology of the social sciences and the existential conditions of science as a vocation.<sup>744</sup> If Habermas is the last of the *aufklärer*, then Weber was the quintessential modernist. In Weber's celebrated lecture on the vocation of science, the unavailability of reason or knowledge as a source of normativity appears very clearly. Here he raises Tolstoy's question, asking what value scientific knowledge, or knowledge of the nomological order, could have for life. Under modern conditions, where the idea of reading God's intentions in the book of nature has become laughable, he asks:

Given these internal assumptions, what is the meaning of science as a vocation now that all these earlier illusions—"the path to true existence," "the path to true art," "the path to true nature," "the path to the true God," "the path to true happiness"—have been shattered? The simplest reply was given by Tolstoy with his statement, "Science is meaningless because it has no answer to the only questions that matter to us: What should we do? How shall we live?" The fact that science cannot give us this answer is absolutely indisputable.<sup>745</sup>

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<sup>742</sup> For a discussion of the significance of the charismatic political hero in Weber's theory of democracy, see Terry Maley, *Democracy and the Political in Max Weber's Thought* (Toronto: University of Toronto Press, 2011), 79. In the preface to the second edition of his *Crisis of Parliamentary Democracy* (1926), Schmitt contended that the hope entertained by Weber and others that the German parliament could function as an arena for the selection and training of political leaders was already outmoded, and furthermore, that this practical-technical function did not constitute a new principled rationale bearing any intrinsic relation to the specific norms of parliamentarism.

<sup>743</sup> Maley, *Democracy and the Political*, 102-103.

<sup>744</sup> Sheldon S. Wolin, "Max Weber: Legitimation, Method, and the Politics of Theory," in *Fugitive Democracy*, ed. Nicholas Xenos (Princeton: Princeton University Press, 2016), 196-197.

<sup>745</sup> Weber, "Science as a Vocation," 17.

Weber was not a positivist, and he did not distinguish facts from values in order to safeguard the integrity of scientific knowledge, but rather to secure a sphere of free decision independent of scientific determination.<sup>746</sup> In an essay that appreciates the political stakes of Weber's methodological writings very well, Sheldon S. Wolin argued that:

The fundamental premise from which Weber argued for the fact-value distinction, which occupied such an important place in the "discipline" of Weberian social science, was that values had to be preserved in their unscientific state so that human beings would have to choose. The existence of the fact/value distinction was nothing less than the fundamental article of faith on which rested the entire decisionist framework of Weber's politics of the soul. As long as science could not, in principle, determine choice, men were forced to be free to choose. In that formulation one can see the secular equivalent of the age-old religious controversy over human free will versus divine predestination, only now scientific "laws" take the place of the providential plan.<sup>747</sup>

Although Wolin presented Weber's dilemma as a modern version of the much older questions of theodicy, which attempted to reconcile freedom of will with God's omnipotence and the determinism of the providential plan, it is not Augustine but Kant who is the decisive influence here. The determinism in question is not providence but rather the lawfulness and causal rationality of the natural world.<sup>748</sup> For Kant, the ontological condition of possibility for the exercise of practical reason was a noumenal world of will distinct from the phenomenal province of lawfully determined nature.<sup>749</sup> Kant's practical philosophy does not simply propose an

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<sup>746</sup> Peter Breiner, *Max Weber and Democratic Politics* (New York: Cornell University Press, 1996), 57.

<sup>747</sup> Wolin, "Politics of Theory," 205-206.

<sup>748</sup> Breiner, *Weber and Democratic Politics*, 64.

<sup>749</sup> Immanuel Kant, *Groundwork for the Metaphysics of Morals*, ed. and trans. Allen W. Wood (New Haven: Yale University Press, 2002), 69-75.

alternative moral decision procedure (i.e. a categorical imperative against a felicific calculus), but rather should be understood as an attempt to discover the metaphysical presuppositions of morals. The metaphysical ground of morality is the freedom of the will set against the causally-determined universe of Newtonian science. Much like Rousseau, for whom action necessitated by the appetites was not free,<sup>750</sup> for Kant empirical determinants in general precluded autonomous human action.<sup>751</sup> Kant's skepticism concerning the coincidence of the phenomenologically-accessible world of lawful nature with the noumenal world of will was not only a matter of "[denying] knowledge in order to make room for faith," but also a problem of making room for *freedom*.<sup>752</sup> Weber's innovation was simply to re-inscribe Kant's ontological distinction into a methodological fork. However, there is a significant respect in which Weber's attempt to make room for freedom departed from Kant's. Peter Breiner observes that:

Despite its tendency to relativize ultimate value positions, this subjective reconstruction allows Weber to defend the sphere of value choices as a whole. This defense arises out of a revision of Kant's conception of moral autonomy. Weber agrees with Kant that there is a radical disjuncture between is and ought based on a categorical split between the world of empirical phenomena and the will. The empirical world is causally determined. Thus, there is no rational way to ground norms based on empirical knowledge. If there are to be imperatives of what we ought to do at all, they must be an attribute of the will. But Weber rejects Kant's argument that reason can provide us with a universal objective moral law of the will that is binding for all rational beings.<sup>753</sup>

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<sup>750</sup> Rousseau, *Social Contract*, 151.

<sup>751</sup> Kant, *Groundwork*, 50-51, 63.

<sup>752</sup> Immanuel Kant, *Critique of Pure Reason*, ed. and trans. Paul Guyer and Allen W. Wood (Cambridge: Cambridge University Press, 1998), 117.

<sup>753</sup> Breiner, *Weber and Democratic Politics*, 62; see also Cornelius Castoriadis, "Individual, Society, Rationality, History," in *Philosophy, Politics, Autonomy*, ed. David Ames Curtis (New York: Oxford University Press, 1991), 72.

Despite positing an ontological fork between free will and determined nature, in Kant's practical philosophy the noumenal realm resembles the nomological phenomenal world. Following Rousseau, Kant rejected the negative, Hobbesian concept of freedom as *libre arbitre*. In the rationalist, juridical understanding of freedom as *autonomy*, a free action is not simply an unimpeded action, or an action in accordance with one's own interests and appetites, but rather a matter of following a self-prescribed rational law.<sup>754</sup> Throughout his *Groundwork for the Metaphysics of Morals* Kant drew analogies between empirically-discovered natural laws and *a priori* moral law, arguing that, since "laws are either laws of nature or of freedom," as moral agents we must "conduct ourselves in accordance with maxims of freedom as though they were laws of nature."<sup>755</sup> Between the *nomos* of causation and the *nomos* of practical reason, there is an unmistakable symmetry.

From a perspective that is skeptical of rationalism and a juridical understanding of freedom, it is as though what Kant gave with one hand, in distinguishing the noumenal province of freedom from the nomological province of nature, he took away with the other by elaborating freedom on the model of juridical form. This was precisely Weber's decisionist perspective.<sup>756</sup> Weber did not understand free action as a matter of *legislating* but rather a question of choosing or *deciding*. His axiological universe dispenses with the proceduralist language of law in favour of a polytheistic language of plural values.<sup>757</sup> In contrast to the rationalist, juridical understanding of freedom, for the decisionist moral action is not a legislative practice that can be evaluated by formalistic criteria of consistency and universalizability. And in contrast to the

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<sup>754</sup> Kant, *Groundwork*, 63; Rousseau, *Social Contract*, 151.

<sup>755</sup> Kant, *Groundwork*, 3, 78.

<sup>756</sup> Habermas, *Communicative Action*, 154.

<sup>757</sup> Breiner, *Weber and Democratic Politics*, 63-64.

empiricist or utilitarian understanding of moral action, values (unlike “value”<sup>758</sup>) do not have the commensurability or equivalence that allows pleasure and pain to be added or subtracted as quantities. In the axiology of plural values, human action is neither a matter of universalizability nor a matter of maximization. This pluralist moral ontology closes off the possibility of understanding moral action as an application of criteria:

It is as it was in antiquity before the world had been divested of the magic of its gods and demons, only in a different sense. Just as the Greek would bring a sacrifice at one time to Aphrodite and at another to Apollo, and above all, to the gods of his own city, people do likewise today ... These gods and their struggles are ruled over by fate, and certainly not by “science” .... The destiny of our culture ... is that we shall once again become more clearly conscious of this situation after a millennium in which our allegedly or supposedly exclusive reliance on the glorious pathos of the Christian ethic had blinded us to it .... As long as life is left to itself and is understood in its own terms, it knows only that the conflict between these gods is never-ending. Or, in nonfigurative language, life is about the incompatibility of ultimate possible attitudes and hence the inability ever to resolve the conflicts between them. Hence the necessity of deciding between them.<sup>759</sup>

In these contests between value-orders personified as “warring gods” the decision appears in a state of absolute independence. The decision is “autonomous” not in Rousseau and Kant’s sense (i.e. because it assumes legislative form, a *nomos*), but rather because it is free of every form of external determination and heteronomy—including the heteronomy allowing procedural criteria, rather than actors, to decide.

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<sup>758</sup> Asher Horowitz and Gad Horowitz astutely observe that Jeremy Bentham’s theory of felicity is a “quasi-monetary” theory that models pleasure on abstract exchange value. See *Everywhere They are in Chains: Political Theory from Rousseau to Marx* (Scarborough: Nelson Canada, 1988), 152-153.

<sup>759</sup> Weber, “Science as a Vocation,” 23, 24, 27; see also Castoriadis, “Individual, Society, Rationality, History,” 72.

In Schmitt's political thought, the situation illustrated by the Weberian imagery of warring gods was replaced by an opposition between the "higher third" and the "either/or." Schmitt associated reticence in the face of the decision with a particular sociological grouping, the bourgeois, who he follows Donoso Cortés in defining as *una clase discutidora*, and with a particular outlook or subjective stance, the aesthetically-oriented occasionalism of the romantic, for whom everything is interchangeable.<sup>760</sup> The defining characteristic of this romantic discussing class is its disposition to evade the decision. This evasion typically assumes the form of a substitution of procedure for decision. These evasive procedures come in two types: a deferral to discussion and a deferral to legality. When asked "Christ of Barabbas?" the liberal proposes a motion to set up an investigative committee.<sup>761</sup> Afraid to give offence by paying tribute to any of the warring gods, the romantic aesthete substitutes the figure of the dialectic, the "higher third" in which all oppositions are reconciled, for the decision.<sup>762</sup> In a Socratic way, the dialectic is pursued through discussion. Nevertheless, the decision never arrives. Discussion is always aporetic. In the deferral to legality, the decision is delegated to the already-existing legal order. In much the same way that for Weber, the impersonality of bureaucracy, a routinized system of norms, stood in opposition to the personalistic law-destroying and law-creating powers of charisma, Schmitt understood legality as an impersonal system of norms distinct from the personalistic power of the sovereign and incapable of performing the vocation of sovereignty: deciding. Deferral is not only a matter of incapacity. Schmitt observed that the parliamentary

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<sup>760</sup> Schmitt, *Political Romanticism*, 76, 90, 108, 116-117; *Political Theology*, 59

<sup>761</sup> Schmitt, *Political Theology*, 62.

<sup>762</sup> Schmitt, *Crisis of Parliamentary Democracy*, 56; *Political Romanticism*, 117.

legislative state “has an interest precisely in having certain conflicts remain latent and left undecided.”<sup>763</sup> He counterposed this familiar portrait of the liberal (who is, of course, unable or unwilling even to take their own side in an argument) to the irrationalist philosophies of direct decision espoused by the radical left (the anarchists Bakunin and Proudhon, the syndicalist Sorel) and the radical right (the counterrevolutionaries Cortés and de Maistre, the fascist Mussolini), who shared an appreciation for the vital, decisive power of myth.<sup>764</sup>

Although Schmitt followed Weber in opposing an anomic decision to the natural order of scientific laws, his way of presenting this opposition was metaphysical (or even theological) rather than methodical. He was more explicit than Weber in presenting the connection between the nomological order of natural causation and the positive legal order. In the course of criticizing the liberal legislative state, he observed that “at the foundation of this identification of state and legal order rests a metaphysics that identifies the lawfulness of nature and normative lawfulness.”<sup>765</sup> The metaphysical condition for the validity of a norm is a normal situation: “all law is situational law” since, in order to apply, the legal order requires a “homogeneous medium.”<sup>766</sup> The theological complement to this metaphysical identity of normative law and laws of nature is the deistic image of God as a watchmaker who no longer acts upon, but instead only fabricates the world and initiates its movement in accordance with invariant laws of motion. In precisely the same way that a deistic metaphysics dispensed with the miracle, the anomic and personalistic element in Christian theology, the rationalistic metaphysical outlook of the liberal

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<sup>763</sup> Schmitt, *Constitutional Theory*, 306.

<sup>764</sup> Schmitt, *Crisis of Parliamentary Democracy*, 65-76; *Political Theology*, 65.

<sup>765</sup> Schmitt, *Political Theology*, 41.

<sup>766</sup> *Ibid.*, 13.

*aufklärung* precluded any exception to the clocklike workings of the nomological orders of legality and nature.<sup>767</sup>

The exception is the occasion for the decision, which is in turn an accident of a substance, sovereignty. Analogous to the miracle in theology, the exception discloses the specificity of the decision as a juristic element.<sup>768</sup> In deciding to suspend the legal order in the exceptional circumstance, the sovereign reveals the incompleteness of the legal order, its inadequacy to all situations, and simultaneously reveals that the legal order does not rest on a more fundamental, rational *grundnorm*, but rather on an anomic and personalistic source of authority. In exactly the same way that Weber's decision stood outside any criteria dictated by the nomological orders of natural causation and Kantian practical reason, for Schmitt, "the exception is that which cannot be subsumed; it defies general codification" and for this reason "confounds the unity and order of the rationalist scheme."<sup>769</sup> In a passage that reveals the vitalistic dimension of the exception, Schmitt insisted that:

Precisely a philosophy of concrete life must not withdraw from the exception and the extreme case, but must be interested in it to the highest degree. The exception can be more important to it than the rule, not because of a romantic irony for the paradox, but because the seriousness of an insight goes deeper than the clear generalizations inferred from what ordinarily repeats itself. The exception is more interesting than the rule. The rule proves nothing; the exception proves

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<sup>767</sup> Ibid., 36-37.

<sup>768</sup> Ibid., 13, 36.

<sup>769</sup> Ibid., 13-14. It is important to note here that, insofar as he describes the decision as a creation *ex nihilo* independent of the worlds of causality and normativity, Schmitt's decisionism falls into precisely the vices he attributes to the "occasionalist" outlook of the political romantic. See Schmitt, *Political Romanticism*, 16-17, 82-83, 161; Victoria Kahn, "Hamlet or Hecuba: Carl Schmitt's Decision," *Representations* 83 (Summer 2003): 68-69; John P. McCormick, *Carl Schmitt's Critique of Liberalism: Against Politics as Technology* (Cambridge: Cambridge University Press, 1999), 75.

everything: It confirms not only the rule but also its existence, which derives only from the exception. In the exception the power of real life breaks through the crust of a mechanism that has become torpid by repetition.<sup>770</sup>

Between Hobbes' reframing of the question of obedience to biblical commandments from an epistemic question ("why we believe them to be so?") to a question concerning authority ("by what authority they are made law?"), and Weber's reformulation of political action as a matter of deciding on plural values, independently of the criteria legislated by the nomological orders of natural causation and practical reason, it is possible to discern the basic elements of decisionism. Firstly, the decisionist concept of law is distinguished from the normativist concept of law in terms of its politics of truth: *auctoritas non veritas facit legem* (authority, not truth, makes law).<sup>771</sup> Secondly, in addition to this dimension concerning modalities of truth, the decisionist concept of law features a dimension that is simultaneously metaphysical and normative: the decision is independent of both natural *causa* and legal normativity. Although it provides the basis for law, the decision is an anomic moment that cannot be captured by legal formulations.<sup>772</sup> For this reason, sovereign, democratic decisions are a substantive form of legitimacy, not legality.<sup>773</sup>

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<sup>770</sup> Schmitt, *Political Theology*, 15.

<sup>771</sup> It is important to distinguish this element from a "postmodern" skepticism; what is put in question here is not the possibility of truth or reason as such, but rather the attempt to invest truth and reason with the force of normativity. Nevertheless, both the modernist skepticism concerning the normativity of knowledge and the postmodern skepticism concerning the possibility of knowledge undermine the rationalistic politics of the *aufklärung*.

<sup>772</sup> Schmitt, *Political Theology*, 12-13.

<sup>773</sup> Schmitt, *Legality and Legitimacy*, 6.

## The Normativist Concept of Law

Schmitt formulated the decisionist concept of law in response to the understanding of law developed in Hans Kelsen's legal positivism. This *normativist concept of law* was consistent with a determinate political order, the liberal legislative state criticized by Schmitt throughout his attempt to rehabilitate the concept of sovereignty.<sup>774</sup> In the decisionist concept of law, the decision is an accident of a concrete sovereign subject. Whether sovereignty is embodied in a prince or instead in the people is immaterial;<sup>775</sup> for the decisionist, it suffices that a political order has a definite and ready answer in the event that it is confronted with the question: "*who decides?*" The normativist concept of law, by contrast, dispenses with the personalistic element altogether. For the normativist, rule of law is not underpinned by the rule of persons. Schmitt observed that for Kelsen, "the highest competence cannot be traceable to a person or to a sociopsychological power complex but only to the sovereign order in the unity of the system of norms. For juristic consideration there are neither real nor fictitious persons, only points of ascription."<sup>776</sup> In a naturalistic metaphysical universe governed with the perfect regularity of *causa*, there is no gap in the system of norms, and no exceptional occasion for the exercise of sovereignty's miraculous and anomic prerogatives. In Kelsen's account, and in normativist

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<sup>774</sup> Schmitt, *Types of Juristic Thought*, 67.

<sup>775</sup> However, consider also Schmitt's remark in *Political Theology* (48) that, when the people became sovereign, "the decisionistic and personalistic element in the concept of sovereignty was thus lost." Schmitt's argument here is obscure, and is not elaborated any further in his writing directly concerned with democracy. For the limited purpose of reconstructing an image of democracy understood as a form of sovereignty, it suffices to put this question aside, and assume here (as Schmitt does elsewhere) that democracy is consistent with a personalistic and decisionist concept of sovereignty.

<sup>776</sup> Schmitt, *Political Theology*, 19. On the disappearance of personalistic sovereignty in the normativist philosophy of the Physiocrats, see Koselleck, *Critique and Crisis*, 145-147.

thought more generally, the political order is a purely juristic, legal entity.<sup>777</sup> In a juridical order that dispenses with the basis of legitimacy provided by a sovereign decision, legal norms simply rest on more basic norms.<sup>778</sup> The state is identified with its constitution, and this constitution is not an organization of power, but rather a basic *grundnorm*.<sup>779</sup> Without the prejudicial basis provided by democratic sovereignty, the liberal legislative state dispenses with the entire dimension of legitimacy in favour of legality. Just as laws, and not sovereigns, are sovereign,<sup>780</sup> in the legislative state legitimacy exists only in the form of a legality which, in the decisionist concept of law, was not a self-sufficient juridical dimension.<sup>781</sup>

In comparison with the decisionist concept of law, the normativist concept is more parsimonious. Rather than consisting of two hierarchically-ordered elements, decision and norm, and occupying two metaphysical registers, the world of the miraculous and the world of normalcy, the normativist order is monistic and homogenous. While in the decisionist concept law exists independently of the nomological orders of natural *causa* and positive legality, the normativist concept presupposes as its condition of validity that the social world resembles the natural world in its regularity, and tolerates no anomic elements outside or beneath the nomological province.<sup>782</sup> And just as the decisionist concept of law features a politics of truth in which the legal order is not derived from the normativity of truth or rationality (*auctoritas non*

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<sup>777</sup> Hans Kelsen, *Pure Theory of Law*, trans. Max Knight (Berkeley: University of California Press, 1967), 279-280, 286; Schmitt, *Political Theology*, 18, 21; *Types of Juristic Thought*, 49.

<sup>778</sup> Kelsen, *Pure Theory of Law*, 193-195. Discussion of Kelsen's political thought in the English-speaking world tends to focus on his legal theory at the expense of his important democratic theory. However even in his reflections on democracy, which feature a "decisionistic" recognition the democratic legitimacy is independent of veracity, Kelsen still denied that the people constitute a prejudicial dimension. See *The Essence and Value of Democracy*, ed. Nadia Urbinati and Carlo Invernizzi Accetti, trans. Brian Graf (Lanham: Rowman & Littlefield, 2013), 1, 8, 17, 36.

<sup>779</sup> Kelsen, *Pure Theory of Law*, 221-224; Schmitt, *Political Theology*, 19, 21.

<sup>780</sup> Kelsen, *Pure Theory of Law*, 334-335.

<sup>781</sup> Schmitt, *Legality and Legitimacy*, 9, 62.

<sup>782</sup> Schmitt, *Political Theology*, 13, 36-37, 41, 48.

*veritas facit legem*), the normativist concept is invested in the normative promise of reason (*veritas non auctoritas facit legem*).<sup>783</sup> Normativity is not a matter of ethical substance immanent to the political community (*voluntas* of the *demos*), but rather is received heteronomously from outside as the *ratio* inherent in the *ordre naturel*.

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Schmitt died before Habermas published his primary work of legal theory, *Between Facts and Norms*. However, although Schmitt's interlocutor was not Habermas, but Kelsen, Habermas' jurisprudence arguably advances a normativist theory of law. While in Schmitt's decisionist concept of law legality ultimately rested on the prejudicial dimension of legitimacy, in Habermas' account the basis of law is not a sovereign decision but rather a transcendental principle of right that resembles Kelsen's basic norm.<sup>784</sup> Insofar as it applies equally to all subjects, legal form itself is a determination of the transcendental presupposition of right.<sup>785</sup> The contrast with Schmitt, for whom democracy was opposed to the state of right, could not be more stark: the jurist contended that when democracy is understood as a form of sovereignty, "*the democratic concept of law* is a political, not a Rechtsstaat-based, concept of law. It stems from the potestas of the people and means that law is everything that the people intends: *lex est quod populus jussit* ... there are no limitations on this *will* stemming from democratic principles."<sup>786</sup> Although he speaks of "legitimacy" throughout *Between Facts and Norms*, arguing that "the

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<sup>783</sup> Schmitt, *Legality and Legitimacy*, 10-11; *Types of Juristic Thought*, 49.

<sup>784</sup> Much like Kelsen, Habermas' point of reference here is Kant. See Habermas, *Between Facts and Norms*, 83.

<sup>785</sup> *Ibid.*, 83, 118-119.

<sup>786</sup> Schmitt, *Constitutional Theory*, 286.

paradoxical emergence of legitimacy out of legality must be explained by means of the rights that secure for citizens the exercise of their political autonomy,”<sup>787</sup> for Habermas legality is more fundamental than legitimacy, and legitimacy is understood as an attribute of a norm, not a decision.

In a similar way, although he connects the basic principles of right to the norm of popular sovereignty, Habermas’ understanding of sovereignty could not be more different from Schmitt’s. While for Schmitt, sovereignty was a power of decision vested in a concrete subject (a prince or a *demos*), and for Kelsen, sovereignty simply indicated that a given legal order was the highest authority in force in a given situation, for Habermas sovereignty is neither a person or a power but rather a norm. Following Kant’s proceduralist interpretation, he argues that the social contract provides “the model for a kind of sociation ruled by the principle of law. It lays down the performative conditions under which rights acquire legitimate validity.”<sup>788</sup> In this interpretation, the emphasis on the volitional moment of consent found in the Hobbesian version of the social contract shifts toward the rational moment of consensus:

Since ultimate grounds can no longer be made plausible, *the formal conditions of justification themselves obtain legitimating force*. The procedures and presuppositions of rational agreement themselves become principles. In contract theories, from Hobbes and Locke to John Rawls, the fiction of a state of nature or of an original position also has the meaning of specifying the conditions under which an agreement will express the common interest of all involved—and to this extent can count as rational.<sup>789</sup>

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<sup>787</sup> Habermas, *Between Facts and Norms*, 83.

<sup>788</sup> *Ibid.*, 93.

<sup>789</sup> Jürgen Habermas, *Communication and the Evolution of Society*, trans. Thomas McCarthy (Boston: Beacon Press, 1979), 184.

The social contract is not understood as an account of the conditions under which the power of sovereignty is constituted, but instead as a basic norm articulating the rational conditions of acceptance for subsequent norms.<sup>790</sup> As Habermas puts it, “the morally grounded primordial human right to equal liberties is intertwined in the social contract with the principle of popular sovereignty.”<sup>791</sup> Just as Kant understood popular sovereignty as a norm rather than as a power,<sup>792</sup> for Habermas democracy itself is not a regime or an institutional form but rather a determination of a norm:

[Democratization] is a question of finding arrangements which can ground the presumption that the basic institutions of society and the basic political decisions would meet with the unforced agreement of all those involved if they could participate, as free and equal, in discursive will-formation ... democratization cannot mean an *a priori* preference for a specific type of organization, for example, for so-called direct democracy.<sup>793</sup>

The norm in question is the discourse principle (D), a discursive, intersubjective reformulation of the Kantian universalizability principle: “just those action norms are valid to which all possibly

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<sup>790</sup> Habermas, *Communicative Action*, 264.

<sup>791</sup> Habermas, *Between Facts and Norms*, 94.

<sup>792</sup> Kant wrote that: “[The original contract] is in fact merely an *idea* of reason, which nonetheless has undoubted practical reality; for it can oblige every legislator to frame his laws in such a way that they could have been produced by the united will of a whole nation, and to regard each subject, in so far as he can claim citizenship, as if he had con-sented within the general will. This is the test of the rightfulness of every public law.” See “On the Common Saying: ‘This May be True in Theory, but it does not Apply in Practice,’ ” in *Kant: Political Writings*, ed. Hans Reiss, trans. H. B. Nisbet (Cambridge: Cambridge University Press, 1991), 79. Concerning this proceduralist interpretation of the social contract and popular sovereignty as the articulation of a basic norm, see also Urbinati, *Representative Democracy*, 123-126; Andreas Kalyvas, “Popular Sovereignty, Democracy, and the Constituent Power,” *Constellations* 12, no. 2 (May 2005): 232.

<sup>793</sup> Habermas, *Communication and the Evolution of Society*, 186.

affected persons could agree as participants in rational discourses.”<sup>794</sup> When this norm is applied in determinations taking the interests of all human subjects into account, it is the basic norm of morality. However, when coupled with the facticity of coercive enforcement and applied to the formulation of law in a finite political community, (D) is the basic principle of democracy.<sup>795</sup>

In much the same way that the normativist theories criticized by Schmitt rest on a metaphysics that ascribes a nomological, rational character to the social world that is separate from, yet parallel to the lawfulness of the natural world,<sup>796</sup> Habermas’ theory of communicative action makes a “risky decision” to “[preserve] the link with the classical conception of an internal connection, however mediated, between society and reason, and hence between the constraints and necessities under which the reproduction of social life is carried out, on the one hand, and the idea of a conscious conduct of life, on the other.”<sup>797</sup> This inner connection between society and reason is based on a social ontology in which social facts are generated by the acceptance of rational validity claims.<sup>798</sup> For Habermas no less than for Hegel, “what is rational is actual and what is actual is rational.”<sup>799</sup> The theory of communicative action also makes an explicit analogy between normativity and veracity. In much the same way that normativity and veracity are related in terms of their shared nomological character in the normativist theory of

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<sup>794</sup> Habermas, *Between Facts and Norms*, 107. Compare with Kant’s formula of universal law: “Act only in accordance with that maxim through which you can at the same time will that it become a universal law.” See *Groundwork*, 37.

<sup>795</sup> Habermas, *Between Facts and Norms*, 94, 108.

<sup>796</sup> In Kant’s critical philosophy, this appears in the parallel between laws of nature and laws of freedom discussed above. See *Groundwork*, 3, 78. In Kelsen’s neo-Kantian jurisprudence, this division appears as a distinction between (descriptive) causality and (normative) “imputation,” each of which is nevertheless a scientific object that operates with lawful regularity. See *Pure Theory of Law*, 75-81; *Essence and Value of Democracy*, 28.

<sup>797</sup> Habermas, *Between Facts and Norms*, 8.

<sup>798</sup> *Ibid.*, 36.

<sup>799</sup> Hegel, *Philosophy of Right*, 14.

law (norm as *nomos*, *nomos* as *ratio*), here truth and justice are understood simply as different but analogous forms of validity.<sup>800</sup>

This rationalist, nomological ontology of the social world underpins Habermas' understanding of law as an instantiation of *veritas*. That he does not only describe, but in fact shares the bourgeois concept of law as an expression of reason is evident both in his attempt to re-establish the connection between reason and normativity throughout *The Theory of Communicative Action*, and in his attempt to construct a discursive theory of law and democracy that replicates the institutional norms of "government by discussion" in *Between Facts and Norms*.<sup>801</sup> Habermas makes an explicit connection between democracy and the concept of law as *voluntas*, on the one hand, and liberalism and the concept of law as *veritas*, on the other. Noting that "the polemic against the classical concept of the legal person as bearer of private rights reveals a controversy about the concept of law itself" he approvingly cites F. I. Michelman's observation that "for republicans rights ultimately are nothing but determinations of the prevailing political will, while for liberals some rights are always grounded in a 'higher law' of (...) reason."<sup>802</sup>

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<sup>800</sup> Habermas, *Between Facts and Norms*, 153.

<sup>801</sup> Habermas, *Between Facts and Norms*, 287-387; *Communicative Action*, 30-31, 249, 292, 325.

<sup>802</sup> Although Habermas does not outright identify his proceduralist concept of democracy with the liberal model, the concept of law grounded in reason is inconsistent with his portrait of the liberal model of democracy. If he were consistent in his presentation, the liberal concept of law would simply accommodate the equilibrium of interests in civil society, the system of norms appearing as a reflection of the system of needs. Habermas' proceduralist concept of democracy is more rationalistic than the truncated depiction of liberalism offered here (which he in fact describes as featuring a "skepticism about reason"), and consequently has a greater affinity with the rationalism of the normativist concept of law. See "Three Normative Models of Democracy," 2-4.

While Kelsen's legal positivism was consistent with the liberal *legislative state* centring on the normative principle of *rule of law*, Habermas' discourse theory of law has a closer affinity with its cousin, the liberal *parliamentary state* instituted to realize the principle of *government by discussion*. His innovation *vis-a-vis* the older, purely juridical normativist theories of law is to recognize the insufficiency of legal form alone to ground the validity of legal norms. For Rousseau, because the general will is general not only in terms of its *composition* but also in terms of its *object*, determinations of the general will in the form of law apply equally to all subjects; this law "loses its natural rectitude when it tends toward any individual, determinate object."<sup>803</sup> The equality of all as objects of law establishes a relation of reciprocity. Each member of the commonwealth simultaneously stands in the place of a citizen who authors the law and also in the place of a subject to whom the law applies.<sup>804</sup> The reciprocity inherent in legal form itself in turn guarantees the justice of the law: "since each person gives himself whole and entire, the condition is equal for everyone; and since the condition is equal for everyone, no one has an interest in making it burdensome for the others."<sup>805</sup> Rousseau's account of the reciprocity of legal form demonstrates how "the concept of a law or legal statute makes explicit the idea of equal treatment already found in the concept of right."<sup>806</sup> In a fashion that prefigures the Kantian proceduralist interpretation of the social contract outlined above, the law appears as a derivation from the conditions of agreement articulated by the social contract: "[the law] is this healthy tool

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<sup>803</sup> Rousseau, *Social Contract*, 157.

<sup>804</sup> *Ibid.*, 149.

<sup>805</sup> *Ibid.*, 148.

<sup>806</sup> Habermas, *Between Facts and Norms*, 83.

of the will of all which reestablishes as civil right the natural equality among men.”<sup>807</sup> For Habermas, however, legal form alone is not a sufficient guarantee of normative validity:

Apparently the normative content of the original human right cannot be fully captured by the grammar of general and abstract laws alone, as Rousseau assumed. The substantive legal equality that Rousseau took as central to the legitimacy claim of modern law cannot be satisfactorily explained by the semantic properties of general laws. The form of universal normative propositions says nothing about their validity. Rather, the claim that a norm lies equally in the interest of everyone has the sense of rational acceptability: all those possibly affected should be able to accept the norm on the basis of good reasons. But this can become clear only under the *pragmatic* conditions of rational discourses in which the only thing that counts is the compelling force of the better argument based on the relevant information. Rousseau thinks that the normative content of the principle of law lies simply in the semantic properties of *what* is willed; but this content could be found only in those pragmatic conditions that establish how the political will is formed. So the sought-for internal connection between popular sovereignty and human rights lies in the normative content of the very *mode of exercising political autonomy*, a mode that is not secure simply through the grammatical form of general laws but only through the communicative form of discursive processes of opinion- and will-formation.<sup>808</sup>

Rousseau’s social contract is ambiguous,<sup>809</sup> occupying an intermediate position between Hobbesian voluntarism and Kantian rationalism. In many respects, his general will resembles the

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<sup>807</sup> Rousseau, *Discourse on Political Economy*, 116-117.

<sup>808</sup> Habermas, *Between Facts and Norms*, 102-103. See also “Appendix I: Popular Sovereignty as Procedure,” in *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge: MIT Press, 1996), 474.

<sup>809</sup> This ambiguity is the reason Rousseau’s account could exert such a significant influence on both the decisionist and normativist concepts of law and on the corresponding images of democracy as a form of sovereignty and procedure respectively. The concept of autonomy, which unifies the heterogeneous elements of will and law, is the basis for this ambiguity.

absolutist concept of sovereignty. Like the will of the prince, the *volonté générale* is a capricious, unlimited, and infallible power.<sup>810</sup> However, insofar as Rousseau insisted that determinations of the general will assume a legal form with a general object, it participates in a “universal justice emanating from reason alone.”<sup>811</sup> Rousseau’s ambiguous rationalism presupposes a subject-centred account of reason. In both the Rousseauian social contract and in Kelsen’s normativist concept of law, rationality is imagined on the model of the Cartesian *idées générales*, which identify rationality with formal criteria of consistency.<sup>812</sup> In much the same way that, for Descartes, the works of a single architect possess a higher degree of unity and perfection,<sup>813</sup> Rousseau’s sovereign remained infallible because it occupied the position of “a private individual contracting with himself.”<sup>814</sup>

For Habermas, the validity of law is not secured by legal form itself (as it was for Rousseau and Kelsen), or by the decision of a prejuridical legitimating subject (as for Schmitt), but rather from a legitimating norm of justice.<sup>815</sup> Laws resting on general consent secured by a majority vote do not have an “internal relation to the search for truth”; truth-orientation cannot be secured by the consent achieved in a volitional moment of agreement, but must instead be sought in the consensus resulting from a rational process of communication.<sup>816</sup> For this reason, the preferred “mode of exercising political autonomy” is not a mute plebiscite in which isolated monads articulate a pre-formed will, but instead a form of government centred on rational

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<sup>810</sup> Rousseau, *Social Contract*, 149-150.

<sup>811</sup> *Ibid.*, 160.

<sup>812</sup> Schmitt, *Legality and Legitimacy*, 10-11; *Political Theology*, 47.

<sup>813</sup> René Descartes, “Discourse on Method,” in *Philosophical Essays and Correspondence*, ed. Roger Ariew, trans. Donald Cress (Indianapolis: Hackett, 2000), 51.

<sup>814</sup> Rousseau, *Social Contract*, 150.

<sup>815</sup> Habermas, *Between Facts and Norms*, 145.

<sup>816</sup> Habermas, “Popular Sovereignty as Procedure,” 474-475.

deliberation. When popular sovereignty is re-interpreted in intersubjective terms, political power is no longer understood as an attribute of an authorized subject—collective or otherwise—but instead is based on communicatively-generated power, which is in turn based on truth-oriented, rational validity claims.<sup>817</sup> In identifying validity as the basis of authority, Habermas takes the discrediting of the philosophy of the subject as an opportunity to reformulate the connection between rationality and the normative force of law.<sup>818</sup>

### **The Politics of Truth and the Politics of Differentiation**

Both the normativist derivation of right from legal form and the image of democracy as a form of sovereignty are derived from Rousseauian contract theory. In a similar way, both the decisionist concept of law and the image of democracy as a form of procedure take up a number of themes first articulated in Max Weber's historical sociology and methodology of the social sciences. The influence of Weber's refusal to imagine freedom from the nomological order of natural *causa* on the model of Kantian practical reason has been discussed in the section above outlining the decisionist concept of law. Fascinatingly, Weber also discovered the connection between rationalization and differentiation that Habermas' proceduralist concept of democracy takes as its starting point.

Weber's famous lecture on the vocation of science presented the connection between differentiation and decision in a very clear way. Here, he did not describe the situation of the

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<sup>817</sup> Habermas, "Three Normative Models of Democracy," 9-10.

<sup>818</sup> This formulation is not original to Habermas. Schmitt identified precisely the same idea in the "relative rationalism" of nineteenth century parliamentarism. See *Crisis of Parliamentary Democracy*, 34-36, 45-46.

deciding moral or political agent as such, but rather a historically specific moment.<sup>819</sup> Conflicts between value-orders only emerge in the context of differentiation between opposed systems of values. The advance of scientific knowledge elicits a “disenchantment of the world” in which the unity of the Christian *ordo* is shattered. In the absence of a coherent totality, the autonomy of scientific, ethical, religious, and aesthetic values in relation to one other becomes increasingly apparent.<sup>820</sup> As the world is fragmented into a pluriverse of irreconcilable value-orders, the responsible political subject increasingly finds himself in a position of having to decide, in the absence of any rational criteria, which of the warring gods to pay tribute to. Weber’s depiction of this polytheistic axiological situation was the inspiration for Schmitt’s sovereign decision, an independently determining moment that makes an ethical either/or choice without the guidance of pre-codified legal criteria. However, Weber’s account of modernity was ambiguous, and with some amendments it is possible to reformulate it in such a way that the process of differentiation leads to rather than away from a rationalist political axiology. Differentiation between value-orders does not only produce fragmentation, the occasion for decision, but is additionally the condition of possibility for rationalization. In an essay entitled “Religious Rejections of the World and Their Directions,” Weber observed that:

For the rationalization and the conscious sublimation of man’s relations to the various spheres of values, external and internal, as well as religious and secular, have then pressed towards making conscious the *internal and lawful autonomy* of the individual spheres; thereby letting them drift into those tensions which remain hidden to the originally naïve relation with the external world.

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<sup>819</sup> Maley, *Democracy and the Political*, 111.

<sup>820</sup> Weber, “Science as a Vocation,” 22-27.

This results quite generally from the development of the inner- and other-worldly values towards rationality, towards conscious endeavour, and towards sublimation by *knowledge*.<sup>821</sup>

For Weber, this twofold process of differentiation and rationalization was, paradoxically, a process of normative impoverishment. Because reason “destroys its own universality” as it “splits itself up into a plurality of value spheres,”<sup>822</sup> the Enlightenment dogma that reason held a normative promise increasingly appears hollow. The age of rationalization is not the age of reason, and a world delivered to the development of these tendencies is not a “summer’s front” but a “polar night of icy darkness.”<sup>823</sup>

Habermas reformulates the connection Weber discovered between differentiation and rationalization in a way that is less pessimistic about the modern existential condition and more hospitable to a normative concept of reason. While Weber described the process of differentiation as a separation between different *orders of value*, Habermas describes this same process as a differentiation between separate *validity claims*.<sup>824</sup> In a Kantian twist, he identifies the three spheres of validity (science, ethics, art) and their differing forms of universal validity claims (truth, normative rightness, and beauty or authenticity) with the objects of Kant’s three critiques (pure reason, practical reason, and aesthetic judgement).<sup>825</sup> In construing these

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<sup>821</sup> Max Weber, *From Max Weber: Essays in Sociology*, ed. and trans. C. Wright Mills and H. H. Gerth (New York: Oxford University Press, 1946), 328. Kōjin Karatani observes that Weber did not exclusively view rationalization as a consequence of the rise of the natural sciences, but rather as a dynamic already present in the development of world religions. See *Isonomia and the Origins of Philosophy*, trans. Joseph A. Murphy (Durham: Duke University Press, 2017), 4.

<sup>822</sup> Habermas, *Communicative Action*, 247.

<sup>823</sup> Max Weber, “Politics as a Vocation,” in *The Vocation Lectures*, ed. David Owen and Tracy B. Strong, trans. Rodney Livingstone (Indianapolis: Hackett, 2004), 93.

<sup>824</sup> Habermas, *Communicative Action*, 176-177.

<sup>825</sup> For a careful investigation of the differences between Weber’s “value-spheres” and Habermas’ “validity-spheres,” see Austin Harrington, “Value Spheres or ‘Validity-Spheres’?: Weber, Habermas and Modernity,” *Max Weber Studies* 1, no. 1 (November 2000): 84-103.

differentiated fragments as provinces of rational validity, Habermas has already set the stage for the reunification of these fragments as moments of a more expansive concept of reason. Notably, this depiction of value spheres as moments of reason resembles the symmetry between the worlds of practical reason and natural causation in Kant's critical philosophy.<sup>826</sup> However, while for Kant, this symmetry was achieved by ascribing a nomological, lawful character to each world, for Habermas this symmetry instead appears as a matter of argumentative validity. Despite accepting that the differentiation of autonomous spheres of validity destroys the "substantial" unity of reason, he nevertheless argues that:

Weber goes too far when he infers from the loss of substantial unity of reason a polytheism of gods and demons [*Glaubensmächte*] struggling with one another, with their irreconcilability rooted in a pluralism of incompatible validity claims. The unity of rationality in the multiplicity of value spheres rationalized according to their inner logics is secured precisely at the formal level of the argumentative redemption of validity claims ... And arguments or reasons have at least this in common, that they, and only they, can develop the force of rational motivation under the communicative conditions of a cooperative testing of hypothetical validity claims ... Only such a theory of discourse could explicitly state wherein the unity of argumentation consists and what we mean by procedural rationality after all substantial concepts of reason have been critically dissolved.<sup>827</sup>

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<sup>826</sup> See the discussion in the section entitled "What is Decisionism?" above. Recall that Weber did not understand ethical action as a matter of exercising "practical reason," and doubtless would not have described the ethical value sphere in these terms.

<sup>827</sup> Habermas, *Communicative Action*, 249.

In a Hegelian fashion, Habermas' theory of communicative action reestablishes the unity of reason fragmented into separate moments.<sup>828</sup> This account differs from a substantialist metaphysics of reason in that here, reason is understood as a property of a process rather than as an ontologically independent entity. Rather than sharing in the unity of a rational substance, the differentiated moments of reason simply share a common grounding in argumentatively-redeemed validity claims.

For the purposes of reformulating the sense in which normativity can be attributed to reason, it is especially significant that the cognitive-instrumental and a moral-practical forms of reason may be placed in a complementary relation if understood as moments of a more encompassing concept of communicative practice. While Weber and the Frankfurt School assumed that the desacralization of Western societies was internally related to the development of an ethically neutralized complex of rationality and action, Habermas argues that this one-sided development of instrumental reason at the expense of all other spheres of validity was not inevitable; in principle, it may have been possible for a modernization to proceed along the lines of a "non-selective pattern of rationalization."<sup>829</sup> And while Weber insisted, for both ethical and scientific reasons, on a separation between factual and evaluative claims, Habermas argues that to understand the meaning of a cultural object one is implicitly committed to an evaluative claim concerning its validity, and for this reason it is impossible to separate facts from values in this way.<sup>830</sup> When the rational moment of veracity and normative moment of rightness are reunited in

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<sup>828</sup> Ibid., 362. Habermas' description of the still-"problematic" Hegelian philosophy here bears an unmistakable resemblance to his own concept of communicative reason.

<sup>829</sup> Ibid., 239-240, 266.

<sup>830</sup> Ibid., 115. Arguably, this is the weakest link in Habermas' account of communicative rationality.

an “unabridged concept of practice,” theory and practice are reunified and reason is reinvested with the normativity that appeared unavailable to the modernist skeptics.<sup>831</sup>

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Although Habermas’ proceduralist concept of rationality performs the same unifying and grounding function as the defunct substantive concept of reason, this concept is not only a substitute or placeholder, but in fact has a number of concrete political implications. The premodern substantive concept of reason as an ontological entity had a natural affinity with a certain political form, the *ordo* of medieval Christendom in which a unifying normative principle of ordered obedience was reproduced at every level (the domestic, the political, and creation as a whole) in relations of *dominium*.<sup>832</sup> The modern concept of reason as a faculty of the subject was somewhat more ambiguous. When the subject is imagined as an architect (Descartes) or a legislator (Kant), the subject-centred concept of reason has an affinity with the bourgeois legislative state (Kelsen). When the subject is imagined as a willing animal (Rousseau), however, it is possible to attenuate the extent to which the political order is fabricated in the image of *ratio*. In this case, modern subjectivism becomes compatible with the political institutions of sovereignty (Schmitt), or with a pluriverse of warring gods (Weber). In the proceduralist concept, however, reason is neither an objective order nor a faculty of a subject, but rather the property of an intersubjective argumentative process. The political form that corresponds to this proceduralist concept of reason is a proceduralist concept of democracy centred on the public *use*

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<sup>831</sup> Ibid., 363-364.

<sup>832</sup> Ernst Barker, “St. Augustine’s Theory of Society,” in *Essays on Government* (London: Oxford University Press, 1965), 257-258; Habermas, *Theory and Practice*, 48-49. The Platonic Republic also fits this model.

of reason in argumentative activities rather than on its *possession* by the subject of right.

Whether the site of argument is located in the parliamentary sphere of public authority or the intermediate public sphere of civil society, in each case the proceduralist concept of reason has the greatest affinity with the norm of government by discussion and its corresponding institutions: press and parliament.

In *The Structural Transformation of the Public Sphere*, Habermas shows how the public sphere was not instituted deliberately, but rather emerged as an unintended consequence of a certain regime of division between public and private. With the development of the capitalist market economy, the private sphere of the bourgeois family was unburdened of social labour.<sup>833</sup> This opened up a space for the development of familial intimacy, and the discovery of a new universal subject, the *homme*, a man-as-such divested of political status distinctions.<sup>834</sup> The territory of the *homme* was gradually expanded from the conjugal family to the wider sociability of the salon, the letter-writing public, and the critical literary journals.<sup>835</sup> Because the *homme* was originally a private subject without status, the literary publics he occupied cultivated a form of sociability among equals; here he and others could communicate in their simple capacity as human beings.<sup>836</sup> Under these conditions of parity, it became possible to appeal to the veracity of reason, rather than the authority of rank, as a decision-making principle; it is only in a speech situation in which subjects are related as equals that “the authority of the better argument could assert itself.”<sup>837</sup> When the public sphere of civil society had expanded to the extent that it could exercise pressure on the state through its critical-polemical activities, and statecraft became

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<sup>833</sup> Habermas, *Structural Transformation of the Public Sphere*, 28.

<sup>834</sup> *Ibid.*, 29, 51-52.

<sup>835</sup> *Ibid.*, 30-34.

<sup>836</sup> *Ibid.*, 34-36.

<sup>837</sup> *Ibid.*, 36.

increasingly open to the influence of a discursively-formed public opinion, the reason exercised in these juridically private debating societies was appealed to as the basis of legal validity. At this point the absolutist or decisionist concept of law as the determination of a personalistic command was inverted. In the normativist concept of law, laws were instead imagined as rational rules in which truth was instantiated (*veritas non auctoritas facit legem*).<sup>838</sup> In this way an institutional *regime of differentiation* provides the condition of possibility for a *regime of truth*.

Schmitt developed his identitarian understanding of democracy as a form of sovereignty in opposition to three institutional elaborations of liberalism. Against the liberal *legislative state* supported by Kelsen's legal positivism, he emphasized the anomic institution of sovereignty, a personalistic, prejudicial force of legitimacy at the base or border of the legal edifice, and the corresponding decisionist concept of law as a determination of *voluntas*.<sup>839</sup> Against the theories of the *pluralistic state* developed by Otto Gierke and Hugo Preuß, which reduced the political order to one association among others in a differentiated pluriverse lacking any hierarchical principle of order, he again insisted on the necessity of determining where or with whom the decisive power of sovereignty is localized.<sup>840</sup> Finally, against the version of *parliamentarism* introduced by the bourgeois, which was not a form of state but rather a set of governmental arrangements articulating the norm of government by discussion, he demonstrated the heterogeneity of this norm from his concept of democracy as a form of sovereignty, which he imagined as mute rather than talkative, as founded on an *ethos* of identity rather than a process of mediation, and as consistent with the decisionist concept of law based on sovereign will rather

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<sup>838</sup> Ibid., 53.

<sup>839</sup> Schmitt, *Concept of the Political*, 67; *Constitutional Theory*, 264-265, 268, 273, 286; *Legality and Legitimacy*, 6, 9, 11, 24, 65-66; *Political Theology*, 10, 12-15, 19, 31-32, 33.

<sup>840</sup> Schmitt, *Concept of the Political*, 23-25, 39-45; *Crisis of Parliamentary Democracy*, 36; *Political Theology*, 10, 18, 32-34.

than as a means of producing the rationality on which the normativist concept of law as *veritas* is based.<sup>841</sup>

Although Schmitt did not choose to systematize his writings in this way, in these three critiques of liberalism it is possible to identify three conceptual poles: *civil society*, *speech*, and *law*. And although his critique of liberalism did not directly engage Habermas as an interlocutor, these three poles appear with no less centrality in Habermas' reconstruction of the bourgeois public sphere: a regime of public/private differentiation permits the emergence of a public sphere of *civil society*. In this intermediate sphere between the worlds of propriety and public authority, a form of sociability based on argumentative *speech* among equals develops. Later, the rationality achieved in the discussions conducted in the public sphere is enlisted to establish the validity of *law*. In a symmetrical way, Schmitt's concept of democracy is predicated on the negation of exactly these elements. The identitarian concept of democracy is not talkative but mute, its unity is not achieved in a rational process of consensus but rather is pre-formed in the homogeneity of democratic *mores*.<sup>842</sup> The integrity of democratic identity precludes all divisions of interest and opinion and all forms of institutional differentiation, which prevents the emergence of civil society.<sup>843</sup> Finally, a *demos* imagined on the model of the Leviathan, the willing subject of sovereignty, is consistent with the decisionist concept of law based on will, not reason.<sup>844</sup>

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<sup>841</sup> Schmitt, *Constitutional Theory*, 255, 260, 264, 268; *Crisis of Parliamentary Democracy*, 3-14, 26; *Legality and Legitimacy*, 24, 62, 65-66.

<sup>842</sup> Schmitt, *Crisis of Parliamentary Democracy*, 14

<sup>843</sup> Schmitt, *Legality and Legitimacy*, 28, 41-42.

<sup>844</sup> Schmitt, *Ibid.*, 24.

Table 2. Democracy as Procedure and Democracy as Sovereignty

	Jürgen Habermas’ <i>Democracy-as-Procedure</i>	Carl Schmitt’s <i>Democracy-as-Sovereignty</i>
Civil Society	<i>Differentiation</i> between private (intimacy and propriety), civil society (bifurcated into system of needs and public sphere), and public	<i>Non-differentiated</i> , sovereign power concentrated at the apex of a unitary, embodied will
Speech	<i>Discursive</i> , diffuse sites of communication circulate rational opinion-formation processes throughout society	<i>Mute</i> community of <i>mores</i> with pre-established common will based on a homogeneous identity
Law	Legitimated by <i>truth</i> ( <i>veritas non auctoritas facit legem</i> ), nomological throughout, legitimacy paradoxically derived from legality	Legitimated by <i>will</i> ( <i>auctoritas non veritas facit legem</i> ), anomic, prejuridical basis of legitimacy at the foundation of the legal order

## Conclusion

### Representations of Democracy in Liberal Thought

In a 1994 essay Sheldon S. Wolin argued that the politics of modern, industrialized constitutional orders were not based on “representative democracy,” but rather on various “representations of democracy.”<sup>845</sup> The same thing could be said of the tradition of liberal thought from its inception to the present day. In revisiting the development of liberal political thought we have not encountered any thinker who presents a democratic political philosophy, although we have seen democracy “represented” here in a variety of ways. None of the early liberal thinkers lived in a democratic political system. They were not disposed to produce original representations of democracy, but remained content to simply repeat the descriptions and critiques of democracy featured in ancient political thought.<sup>846</sup> At this point, the idea of democracy did not enjoy popular legitimacy. It was viewed less as a possibility than as a historical curiosity,<sup>847</sup> so there was no pretension to mis-identify democratic and liberal political forms. For this reason early liberal thought is more clear-headed about the contrast between these forms. The ancient *polis* was not only the primary model of democracy, but was also a kind of dark star that liberal political reflection oriented itself away from.<sup>848</sup>

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<sup>845</sup> Sheldon S. Wolin, “Fugitive Democracy,” in *Fugitive Democracy*, ed. Nicholas Xenos (Princeton: Princeton University Press, 2016), 102.

<sup>846</sup> Sheldon S. Wolin, “The Liberal/Democratic Divide: On Rawls’ *Political Liberalism*,” in *Fugitive Democracy*, ed. Nicholas Xenos (Princeton: Princeton University Press, 2016), 275.

<sup>847</sup> Pierre Rosanvallon, “The History of the Word ‘Democracy’ in France,” trans. Philip J. Costopoulos, *Journal of Democracy* 6, no. 4 (October 1995): 140-141.

<sup>848</sup> Francis Dupius-Déri, “The Political Power of Words: The Birth of Pro-democratic Discourse in the Nineteenth Century in the United States and France,” *Political Studies* 52, no. 1 (March 2004): 120.

What sort of constellation did the early liberals stargazers see in the old books? Ancient political thought represented democracy as an inherently unstable regime full of conflict and faction. Distributing equality to equals and unequals alike, it was unable or unwilling to identify the natural aristocracies socially distinguished by the titles of kinship, wealth, and learning. Notably, Plato's political thought also anticipated the "sociological" understanding of democracy revived later by the Doctrinaires.<sup>849</sup> From this point of view, democracy is not only a political regime or an allocation of offices. It is also a form of society in which the *demos* are as little able to distinguish between their necessary and unnecessary appetites as they are to distinguish their equals from their unequals. Just as the democratic city allocates offices by sortition, the democratic society is carried by its appetites from one way of life to another as though selecting them with the indiscriminateness of a lottery.<sup>850</sup> The *demos* is like an appetite without reason or a belly without a head. Notably, a desire for conformity does not appear among these appetites. In contrast to the image that appears in liberal political reflection from Constant onwards, the vice of democratic society is not overzealousness in social censure, but rather an excessive social libertinism. The ancient philosophers lived in a democratic *polis*. For this reason they could caricature democracy, but could not get away with the outright misidentifications produced in the writings of modern thinkers, for whom democracy was an object more theoretical than real. Both Plato's appetitive democracy and the heroic democracy depicted in the funeral oration of Pericles share a libertine character. In the ordinary social life of such a polity, each freely lives as they like, and does not exercise a jealous surveillance over others.<sup>851</sup> Because this is a point of

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<sup>849</sup> Jacques Rancière, *Hatred of Democracy*, trans. Steve Corcoran (London: Verso, 2014), 93-94.

<sup>850</sup> Plato, *Republic*, trans. G. M. A. Grube and C. D. C. Reeve (Indianapolis: Hackett, 1992), 561b.

<sup>851</sup> Plato, *Republic*, 557b, 558b; Thucydides, "The Funeral Oration of Pericles," in *The Portable Greek Historians: The Essence of Herodotus, Thucydides, Xenophon, Polybius*, ed. M. I. Finley (New York: Penguin, 1977), 267-268.

agreement between its critics and advocates, we have no reason to suspect that the ancient democracy has been misdescribed in this respect.

For the early liberals, the dark star of democratic faction was less significant than the dark star of absolutism, but as the monarchical order broke down the project of attenuating democracy assumed a more and more central importance. It is not until after the French and American revolutions and the extension of the franchise in representative governments that a specifically modern body of anti-democratic polemic was developed. In a reversal of the Platonic image, later liberal thinkers beginning with Constant depicted democracy as a socially and politically repressive regime.<sup>852</sup> According to this line of argument, the displacement of the absolutist state by a supposedly democratic society (or even worse, a democratic political regime) was not sufficient to ensure that modern privatistic liberties would be safeguarded.<sup>853</sup> Relocating power did nothing to limit its extension, and democratic power was arguably even more pernicious than monarchical power, since the latter was less disposed to threaten the order of property on which the modern liberties are based and in fact modelled.

This inversion of the ancient portrait was made possible by a cluster of misidentifications. The late modern representation of political democracy has three points of reference: a historical reference to Sparta that appears in Constant's famous essay on the liberty of moderns,<sup>854</sup> a theoretical reference in the supposedly ancient liberty of Rousseau (which was itself inspired by the Spartan example,<sup>855</sup> to the extent that Rousseau did not simply resign himself to the

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<sup>852</sup> Benjamin Constant, "The Liberty of the Ancients Compared with that of the Moderns," in *Constant: Political Writings*, ed. and trans. Biancamaria Fontana (Cambridge: Cambridge University Press, 1998), 311.

<sup>853</sup> Benjamin Constant, *Principles of Politics Applicable to all Representative Governments*, in *Constant: Political Writings*, ed. and trans. Biancamaria Fontana (Cambridge: Cambridge University Press, 1998), 175-177.

<sup>854</sup> Constant, "Liberty of the Ancients," 315.

<sup>855</sup> Judith N. Shklar, *Men and Citizens: A Study of Rousseau's Social Theory* (London: Cambridge University Press, 1969), 12-32; Nadia Urbinati, *Representative Democracy: Principles and Genealogy* (Chicago: University of Chicago Press, 2006), 34-35.

conditions of modern commercial society), and in the offspring of these two influences, a political reference: the Jacobinism of the radical liberals.<sup>856</sup> It is in this configuration that the representation of democracy as a form of sovereignty first appears.

Later liberal thinkers' discovery of the social permitted the development of a very different but complementary antidemocratic polemic. For J. S. Mill, democracy did not pose a threat to privatistic liberty because it exercises public authority in a repressive way, but rather because a democratic society exercises a private form of tyranny through the compulsive rule of opinion within society itself.<sup>857</sup> This line of argument originates in the social theory of the Doctrinaires, Guizot, and their student Tocqueville, who viewed modern democracy as a form of society, and saw the democratic social condition as a kind of mirror image of the centralized administrative state developed in the continental absolutist regimes. This image of democracy as a censorious society inverts the ancient image of a libertine democracy in an even more direct way, since both images concern a form of society rather than contrasting a tyrannical public authority to a libertine society.

So the question arises again: how did such an inversion become possible? Ironically, the younger Mill himself is our best guide here. In his review of Grote's *History of Greece*, Mill explicitly acknowledged the contrast between ancient democratic libertinism and modern democratic conformity, although he did not explain it.<sup>858</sup> However, in his review of the second volume of *Democracy in America*, Mill made a criticism of Tocqueville's sociology of

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<sup>856</sup> Cornelius Castoriadis, "Done and To Be Done," in *The Castoriadis Reader*, ed. and trans. David Ames Curtis (Oxford: Blackwell, 1997), 406. While the moderate, liberal faction of the French revolutionaries advocated for "representative government," the radical faction did not rally around "democracy," (which was at this point still understood as an archaic and outmoded political form), but rather "popular sovereignty." See Rosanvallon, "The History of the Word 'Democracy' in France," 144.

<sup>857</sup> J. S. Mill, *On Liberty*, ed. Elizabeth Rapaport (Indianapolis: Hackett, 1978), 4-5.

<sup>858</sup> J. S. Mill, "Grote's History of Greece [II]," in *Collected Works of John Stuart Mill Volume XI: Essays on Philosophy and the Classics*, ed. J. M. Robson (Toronto: University of Toronto Press, 1978), 319.

democracy that applies just as well to his own: Mill pointed out that many of the properties that Tocqueville attributed to a democratic social condition are in fact the properties of a modern commercial society. The properties Mill had in mind here are primarily the individualism, the restless activity, and the weakness of social bonds in modern society.<sup>859</sup> But he could have added to this the desire for conformity, which does not reflect the envious levelling impulses of the *demos*, but is in fact related to commercial forms of sociability. The connection between conformity and commerce was perceived especially clearly by Rousseau, who saw that the conformist “spirit of society” in which each person compares the esteem they themselves enjoy to the esteem enjoyed by others is a natural extension of the activity of appraising the value of objects as equivalents in exchange.<sup>860</sup>

At this point it is evident that both specifically modern theories of democracy, the image of democracy as a tyrannical public authority and the image of democracy as a censorious social condition, result from the misidentification of democracy with two specifically modern but non-democratic (or even anti-democratic) developments: sovereignty and commerce.

### **Sovereignty as the Straw Man of Democratic Radicalism**

An extraordinary act of forgetting has made it possible for us to look back on the nineteenth and twentieth centuries as the age of democracy and democratization. But every anti-democrat (philosophers, reactionaries, and liberals alike) from antiquity to the eighteenth century knew what democracy actually was. It is only us who have forgotten. Before we can begin the

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<sup>859</sup> J. S. Mill, “De Tocqueville on Democracy in America [II],” in *Collected Works of John Stuart Mill Volume XVIII: Essays on Politics and Society*, ed. J. M. Robson (Toronto: University of Toronto Press, 1977), 191-192.

<sup>860</sup> Jean-Jacques Rousseau, *Discourse on the Origin of Inequality*, in *Jean-Jacques Rousseau: The Basic Political Writings*, ed. and trans. Donald A. Cress (Indianapolis: Hackett, 1987), 63-64.

work of remembering, we will map the province of political amnesia as it appears in contemporary democratic thought.

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Contemporary democratic theory is in a large part a systematic attempt not to think about democracy. The occlusion of democracy in modern political reflection does not advance a body of argument so much as it rests on a series of identifications and misidentifications. In these attempts at evasion, it has produced two outstanding representations of democracy. Neither of them is original. In the first representation, democracy is misidentified with liberal institutions: the rule of law, representative government, parliamentarism, and the public sphere of civil society. In this image, democracy appears as a form of procedure. While Sieyès, Madison, Burke, and Guizot were at pains to distinguish liberal representative regimes from the anarchic and archaic political forms of democracy, contemporary democratic theory attempts to misidentify them. Contemporary democratic theory also features a second representation of democracy, one that we might describe as a constellation of dark stars. Despite the fact that it no longer disavows democracy in name, but instead attempts to claim it as its own, contemporary democratic theory also renews the liberal critique of democracy. How is this circle squared? How is it possible to champion and denounce democracy at once? It is at this point that the second misidentification appears. Again, this representation of democracy is not original. Contemporary democratic theory reiterates the conflation of what we might provisionally term

“radical democracy”<sup>861</sup> with sovereignty. This misidentification is shared by the critics and proponents of democracy-as-sovereignty.<sup>862</sup>

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In the constitutional theory of Carl Schmitt, who is still unsurpassed as a theorist of sovereignty, the misidentification between participatory or radical democracy and democracy-as-sovereignty is revealed by the ambiguity of Schmitt’s concept of *identity*, which he took to differentiate democracy from representative political forms as diverse as monarchy and liberalism.<sup>863</sup> Like Rousseau’s concept of sovereignty, Schmitt’s concept of identity resembles genuinely democratic politics in its opposition to representation.<sup>864</sup> While representation represents, and in doing so alters the quality of the thing represented, identity is an existential event of presence.<sup>865</sup> The interpretation of identity hinges on how the modality of presence is understood. In the radically democratic interpretation, identity is understood as being produced through *participation*.<sup>866</sup> The *demos* are present in the sense of being present as concrete persons in an assembly.<sup>867</sup> In the sovereign interpretation, the *demos* are identified in the sense that they

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<sup>861</sup> When discussing democracy alongside rivaling concepts of democracy derived from liberal political forms, the “radical” qualification is necessary and clarifying. Elsewhere, we will simply refer to this political form as “democracy.” Strictly speaking, there is no such thing as “radical democracy”; the term is redundant. If democracy is not “radical” it does not exist at all.

<sup>862</sup> Although it must be acknowledged that today, sovereignty has very few advocates (and none who approach the phenomena with the consistency of Schmitt), arguably the fascination with theories of constituent power in contemporary political thought still permits to sovereignty a limited, indirect existence.

<sup>863</sup> Carl Schmitt, *Constitutional Theory*, ed. and trans. Jeffrey Seitzer (Durham: Duke University Press, 2008), 239, 255.

<sup>864</sup> *Ibid.*, 248-249.

<sup>865</sup> *Ibid.*, 264, 272.

<sup>866</sup> *Ibid.*, 248-249, 255.

<sup>867</sup> *Ibid.*, 272.

are *homogenous* with one another.<sup>868</sup> In contrast to the universalist cosmopolitanism of liberal political thought, democratic politics is provincial. It treats equals equally and treats unequals unequally.<sup>869</sup> So identity is a principle of exclusion. Through the mechanics of exclusion, democracy-as-sovereignty achieves homogeneity and indivision.<sup>870</sup> Like the Platonic kallipolis criticized by Aristotle, the excessive unity of this democracy causes it to increasingly resemble a household, and then an individual.<sup>871</sup> Through this sleight-of-hand, the concept of identity transforms the people into a prince. Just like for Hobbes, for Schmitt monarchy was the solved riddle of democracy.

The ambiguity of Schmitt's identitarian concept is also evident in the formula he used to define democracy. Democracy is an "identity of ruler and ruled."<sup>872</sup> Again, this can be understood in two very different ways. In the first instance, the identity of ruler and ruled may be understood as an anti-oligarchic principle, a reference to Aristotle's description of the democratic polity in which all citizens participate in ruling and being-ruled in turn. Here, ruler and ruled are identified in the sense that *they are the same people*. Taken to its conclusion, this formula of indistinction between ruler and ruled has anti-statist consequences (as Schmitt recognized<sup>873</sup>). If ruler and ruled are one and the same, Aristotle's first principle of democratic liberty (ruling and being-ruled in turn) shades into his second, the anarchic liberty of not-being-ruled.<sup>874</sup> In the second instance, the identity of ruler and ruled may be understood as the quality of a relationship

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<sup>868</sup> Carl Schmitt, *The Crisis of Parliamentary Democracy*, trans. Ellen Kennedy (Cambridge: MIT Press, 1988), 14.

<sup>869</sup> *Ibid.*, 9.

<sup>870</sup> Schmitt, *Constitutional Theory*, 248, 260; *The Concept of the Political*, trans. George Schwab (Chicago: University of Chicago Press, 2007), 23; *Crisis of Parliamentary Democracy*, 36.

<sup>871</sup> Aristotle, *The Politics*, ed. T. A. Sinclair, trans. Trevor J. Saunders (London: Penguin, 1992), bk. 2, ch. 2, 1260a10-22.

<sup>872</sup> Schmitt, *Constitutional Theory*, 264; *Crisis of Parliamentary Democracy*, 14, 26.

<sup>873</sup> Schmitt, *Constitutional Theory*, 248-249.

<sup>874</sup> Aristotle, *Politics*, bk. 6, ch. 2, 1317a40-b16.

*between different persons* who are identified either through their resemblance to one another as members of a homogenous community or through a deliberate act of acclamation.<sup>875</sup> Through this form of identity as *identification*, it is even possible to institute a democratic dictatorship.<sup>876</sup> Once again, Schmittian constitutional theory has transformed democracy into monarchy.

How is this transformation possible? Wherever Schmitt described the radical aspect of democracy, it is difficult not to see echoes of Aristotle, and echoing through Aristotle, the political experience of the democratic *polis*. And wherever Schmitt was specific and empirical, attending to the history of democracy as it was actually lived, he accurately depicted the institutional forms and principles of democratic politics, and even included in his portrait several aspects that are ignored or repressed in contemporary liberal reflection on democracy. For instance, he was one of the few contemporary democratic theorists to recognize that democracy has little respect for private property, and that it is distinguished by the participation of laypersons.<sup>877</sup> Before Bernard Manin's groundbreaking work, Schmitt was also one of the few twentieth century writers to give any attention to the use of sortition in democratic politics.<sup>878</sup>

But wherever Schmitt treats democracy theoretically, Aristotle is overshadowed by Rousseau, who he (mistakenly) contends conforms to the ancient tradition, and who he (unfortunately, but correctly) asserts is the fundamental articulator of modern democratic thought.<sup>879</sup> Rousseau's influence on Schmitt's understanding of democracy is either evident or explicitly referenced wherever democracy appears as a form of sovereignty. The marginalization

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<sup>875</sup> Schmitt, *Crisis of Parliamentary Democracy*, 26-29.

<sup>876</sup> Schmitt, *Constitutional Theory*, 266; *Crisis of Parliamentary Democracy*, 27-28.

<sup>877</sup> Schmitt, *Constitutional Theory*, 284-285.

<sup>878</sup> Bernard Manin, *The Principles of Representative Government* (New York: Cambridge, 1997), 81n100; Schmitt, *Constitutional Theory*, 284.

<sup>879</sup> Schmitt, *Crisis of Parliamentary Democracy*, 25.

of discussion featured in all genuine philosophies of sovereignty,<sup>880</sup> the exclusion of the sovereign *demos* from the exercise of power,<sup>881</sup> and a questionable assertion that the social compact does not rest on a contract at all, but rather on the homogeneity of its members<sup>882</sup> are all Rousseauian doctrines. Likewise, Schmitt's description of democracy as a legal regime based on a will that is good simply because it exists is taken from Rousseau's description of a republican (not democratic) constitution.<sup>883</sup>

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The conflation of radical democracy and sovereignty is not limited to the proponents of sovereignty. Urbinati, who is today the most original and significant theorist of political representation, likewise misidentifies the two. Here, the conflation between radical democracy and sovereignty does not concern the dimension of identity as contrasted with representation, but rather the opposition between *directness* and *indirectness*. She correctly observes that the modern body of argument against representation is the child of Rousseau's decisionistic concept of sovereignty, which in turn inherits the qualities ascribed to the monarch in early modern theories of absolutism.<sup>884</sup> In this juridical paradigm in which the people appear as a unitary will,

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<sup>880</sup> Ibid., 14.

<sup>881</sup> Schmitt, *Constitutional Theory*, 283, 287, 297-298.

<sup>882</sup> Schmitt, *Constitutional Theory*, 260, 300; *Crisis of Parliamentary Democracy*, 13-14.

<sup>883</sup> That Schmitt's concept of democracy is based on Rousseau's republican constitution (and not on Rousseau's concept of *democracy*, which he regarded as a form of administrative, executive power or *government* in which all citizens act as magistrates) is especially evident in his contention that since "democracy is a *political* concept and, as such, leads to a decisive political *unity* and *sovereignty*" it follows that "the administrative result can be the most energetic centralization just as well as it can be self-government." See Jean-Jacques Rousseau, *On the Social Contract*, in *Jean-Jacques Rousseau: The Basic Political Writings*, ed. and trans. Donald A. Cress (Indianapolis: Hackett, 1987), 150, 155, 178; Schmitt, *Constitutional Theory*, 264-265, 297-298.

<sup>884</sup> Urbinati, *Representative Democracy*, 6-7, 72.

representation is impossible because to represent is to divide, alienate, and ultimately destroy the sole source of law.<sup>885</sup> Unlike Schmitt, Urbinati is entirely aware that Rousseau did not advocate for a democratic government.<sup>886</sup> And again, her contention that mere directness and presence, which can manifest itself in the form of mute acts of acclamation (as indeed it does in Rousseau's political thought) does not necessarily amount to participation is well-taken.<sup>887</sup>

But despite the carefulness of her argument and the accuracy with which she presents the Rousseauian politics of sovereignty, Urbinati still contributes to the conflation of radical democracy with sovereignty where she seems to imply that the rejection of political representation necessarily rests on the assumption that democracy is a form of sovereignty, and that it is only in a representative politics of indirectness that actors present or represent themselves through the medium of speech.<sup>888</sup> In Arendt's writings especially,<sup>889</sup> which combine a critique of sovereignty (that Urbinati herself draws on fruitfully) with a no less powerful critique of political representation, it is evident that this is not the case. In the same way that the concept of identity allowed Schmitt to equivocate between radical democracy and democracy-as-sovereignty, the concept of directness allows Urbinati to assimilate radical and participatory critics of political representation to the Rousseauian politics of sovereignty that she so insightfully criticizes. But directness is not exhausted by the existential directness of a corporeally present subject of will. As Arendt knew well, one can also be directly present as a speaker and actor in the midst of a non-sovereign plurality.

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<sup>885</sup> Ibid., 57, 73-75.

<sup>886</sup> Ibid., 7, 75.

<sup>887</sup> Ibid., 11, 80, 113.

<sup>888</sup> Ibid., 7, 16, 54.

<sup>889</sup> See especially *On Revolution*, which features both a critique of sovereignty and a critique of representation.

Radical democracy and sovereignty are conflated in an especially complicated way in the democratic theory of Habermas. In an essay entitled “Three Normative Models of Democracy” and also in *Between Facts and Norms* (7.1.2), he outlines three models of democracy. In the liberal model, democracy is understood as a matter of a privatized civil society “programming” the state by means of inputs to the electoral system that resemble price signals in the market.<sup>890</sup> Despite Habermas’ choice to associate the liberal model with Locke, the economic mode of sociability featured in this model more closely resembles the empiricist theories of Sieyès and Schumpeter discussed above.<sup>891</sup> In the republican model, democracy appears as the ongoing ethical self-constitution of a unified political society. It is here that the equivocation between radical democracy and Rousseauian republicanism appears. Finally, in the proceduralist discourse-theoretic model, which is in many respects a hybrid between the two models aforementioned, democracy appears as a decentred communicative process in which the rationalizing and legitimating power of speech is employed to formulate legal norms. These norms do not simply express an equilibrium in the bargaining positions of privately interested parties, as in the liberal model, nor do they express the particularistic *ethos* of a concrete community, as in the republican model. They are not “ethical” but rather “moral.” These norms make no reference to any particular shared form of life, but are more akin to the universalistic moral laws of Kantian practical philosophy.<sup>892</sup>

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<sup>890</sup> Jürgen Habermas, “Three Normative Models of Democracy,” *Constellations* 1, no. 1 (December 1994): 1-3.

<sup>891</sup> In fact, in *Between Facts and Norms*, the introduction of these models follows an exploration of the shortcomings of purely empiricist and normative (i.e. juridical) models of democracy to which two of the three normative models of democracy in many respects correspond (7.1.1).

<sup>892</sup> Habermas, “Three Normative Models of Democracy,” 4-5.

Each of these three models presupposes a certain regime of differentiation between the public and private spheres, or between the state and civil society. In the liberal model, the state is understood as a neutral administrative unit, and society is understood as a system of needs that coordinates itself through economic modes of sociability. Here, the mediation between state and civil society is minimalistic. The administrative activities of the state serve the private interests of society, and the political system is understood as a mechanism for periodically registering the constellation of these interests. The coordination of these two spheres is accomplished entirely through the media of money and coercive administrative power.<sup>893</sup>

The discourse model is more sophisticated. Like the liberal model, it presupposes the existence of a decentred regime of differentiation in which an administrative state and an economic civil society operate independently. But in addition to these two spheres, the discourse theory of democracy adds an intermediate form of civil society that differs from the economy. These (juridically private) public spheres of civil society institutionalize intersubjective communication processes that operate through a third media: the solidarity produced through communicative action.<sup>894</sup> The public sphere of communication is not an independent site of integrative or constitutive activity. It relates to the other spheres by legitimating state power and rationalizing the administration of the economic facet of civil society.<sup>895</sup> In much the same way that the liberal model resembles Sieyès and Schumpeter's economic theories of representation and electoral competition, it is not difficult to see the resemblance between the discourse model

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<sup>893</sup> Ibid., 1-3, 6.

<sup>894</sup> It is difficult to imagine how a debating society (which is to say, an association of *strangers*) would be able to produce the communitarian resources of solidarity. It is more plausible that the public sphere of civil society could produce reason, and through reason, legitimacy.

<sup>895</sup> Ibid., 8-9.

and the theory of bourgeois parliamentarism outlined in the writings of Kant, Burke, and Guizot.<sup>896</sup>

Finally, the republican model is presented in an ambiguous way. In much the same way that Schmitt's identitarian concept of democracy equivocates between the participatory, anti-statist organizational principles of genuinely or radically democratic politics and the statist, absolutist, or quasi-dictatorial principles of sovereignty, Habermas' republican model of democracy likewise combines the civic *ethos* of democratic radicalism with the corporeal politics of Rousseauian sovereignty. Unlike the differentiated liberal and discourse-theoretic models, the republican model of democracy is not decentred and differentiated, but instead appears as an incorporated subject writ large. Like Urbinati, Habermas is aware that this image is inherited from the political forms of early modern absolutism. The republican concept of law is not grounded in an apparatus of subjectively-possessed rights that safeguard the privatistic acquisitive activities of civil society (as in the liberal model), nor is it based in the higher laws of reason (as in the discourse-theoretic model). In the republican concept, law is understood as a determination of the collective will. In other words, its concept of law is decisionist, and in this respect is consistent with the politics of sovereignty. Furthermore, Habermas' description of the republican normative understanding as substantively "ethical" rather than formally "moral" suggests an affinity with Rousseau, for whom the successful formation of the general will presupposed a communitarian ethical consensus at the level of pre-reflective *mores*.<sup>897</sup>

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<sup>896</sup> Although Habermas' preferred point of reference is Kant, his model is arguably more similar to the more complete theory of Guizot, which is attentive not only to publicity, but also to discussion, and is more sensitive to the pluralistic dimension of civil society, its mediating functions, and the fact that in a representative system communicative processes circulate through the whole of society.

<sup>897</sup> *Ibid.*, 4, 7-9.

However, there are several respects in which the republican model more closely resembles the more elusive and poorly-understood political forms of “radical democracy” (or as we would have it, democracy full stop). Unlike in Rousseauian republicanism, which confined citizens’ participation to the ratification of laws formulated by legislative experts, in Habermas’ republican model citizens are involved in the exercise of administrative power to the point that its assumptions concerning the political capacity of the *demos* become “unrealistic.” And again, unlike with Rousseau, for whom public opinion simply denoted a single opinion shared by a public who do not share words publicly, but only carry an identical public spirit in each of their private hearts, in Habermas’ depiction of republican politics power is created through the communicative action of citizens engaged in public speech. Despite describing the republican model of democracy using the statist image of an incorporated subject writ large, Habermas seems to contradict himself outright in depicting republicanism as a decentralized, anti-statist form of politics that militates against the independent power of state agencies.<sup>898</sup> In outlining this model, it is very interesting that he chooses to explicitly reference the political writings of Arendt, a notable critic of Rousseau and the corporeal politics of sovereignty.<sup>899</sup>

For Schmitt and Urbinati, the conflation of radical democracy and sovereignty was achieved through the employment of an ambiguous middle term. For Schmitt, this middle term was the *identity* of ruler and ruled, and for Urbinati, *directness*. Habermas’ strategy is similar. The conflation of radical democracy and sovereignty is achieved through an ambiguous representation of society. The representation of the republican polity as a *political society* makes it possible for it to appear simultaneously as an incorporated subject writ large and as a

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<sup>898</sup> Ibid., 2-3, 6-7.

<sup>899</sup> See for instance Hannah Arendt, “What is Freedom?” in *Between Past and Future: Eight Exercises in Political Thought* (New York: Penguin, 2006), 161-163; *The Human Condition* (Chicago: University of Chicago Press, 1998), 234; *On Revolution* (New York: Penguin, 2006), 66-68, 147-148, 154.

participatory, anti-statist politics of democratic radicalism. Through this sleight-of-hand, it is possible to equate the statist politics of sovereignty inherited from absolutism and the anti-statist inclinations of genuinely democratic politics. Both a democratic polity-against-the-state and a sovereign state that incorporates society into itself are assimilated into a grey night of non-differentiation. In this way, fundamentally opposed forms of politics are identified.

## §

We have seen how this conflation appears on a theoretical level, in Habermas' three ideal-typical models of democracy. But this conflation also appears in his historical description of Western democratic experience. In *The Structural Transformation of the Public Sphere*, Habermas identifies the differentiation between the state and civil society *qua* system of needs as the condition of possibility for the emergence of the public sphere of civil society. With the extension of the electoral franchise in the context of a class society, there is an increasing demand for the state to intervene in the regulation of the social. This intervention undermines the regime of differentiation on which the autonomy of the public sphere is predicated.<sup>900</sup>

Habermas' "refeudalization" narrative is in fact only a reworking of the fusion argument that appears in Schmitt's *Constitutional Theory* and *The Crisis of Parliamentary Democracy*,<sup>901</sup> which attributed the decline of the public sphere of public authority, parliament, to the democratic statification of society. In Schmitt's crisis narrative, the widening of the franchise necessitates the development of disciplined mass parties. Because mass parties in a class-divided

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<sup>900</sup> Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, trans. Thomas Burger (Cambridge: MIT Press, 1991), 141-151.

<sup>901</sup> Jean Cohen and Andrew Arato, *Civil Society and Political Theory* (Cambridge: MIT Press, 1992), 241.

society represent distinct class interests, and not only differences of opinion within a unified “nation” (a nation that, exactly like Sieyès’ Third Estate, is really only a single class, the bourgeois), they are capable of interest bargaining but not discussion. So under conditions of mass democracy, the parliamentary norm of government by discussion becomes an “empty formality.”<sup>902</sup>

From a point of view conditioned by the discourse of differentiation, it does not matter whether democracy is responsible for the societalization of the state or the statification of society. Only the loss of differentiation matters. Both a democratic political society and the state are totalizing forces.<sup>903</sup> In this way, the discourse of civil society dovetails with the liberal equation of democracy and totalitarianism,<sup>904</sup> which is itself only a reworking of Constant, Tocqueville, and Mill’s mythical “tyranny of the majority.”

## **The Study in Summary**

Historically-informed reflection on democracy has reminded us of a curious fact: representative government, supposedly the modern form of democracy, was originally imagined as a means of limiting democratic power and not as a form of democratic regime.<sup>905</sup> Almost as

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<sup>902</sup> Schmitt, *Constitutional Theory*, 341-342, 345-346; *Crisis of Parliamentary Democracy*, 6, 49-50.

<sup>903</sup> Although they do not participate in this equation of radical democracy and sovereignty, choosing instead to (more plausibly) associate radical or participatory democracy with anarchism, Cohen and Arato nevertheless join Habermas and Schmitt in depicting democracy society as a totalizing, de-differentiating, and atavistic political form that is fundamentally at odds with the regime of differentiation that defines political modernity. And although they are critical of the fusion argument found in Schmitt and Habermas’ narrations of the decline of the public spheres, they accept their shared premise that a regime of differentiation is the necessary condition for the institutionalization of government by discussion and communicative action. They are also entirely candid about the fact that “differentiation poses limits to democratization.” See *Civil Society and Political Theory*, xviii, 7, 241, 415, 418, 451, 453-456.

<sup>904</sup> Rancière, *Hatred of Democracy*, 11-13.

<sup>905</sup> See especially Manin, *Principles of Representative Government*.

surprising as this inversion is the shallow depth in which this fact has been buried. One need only have read Aristotle's *Politics* (as every liberal intellectual had) to learn that the ancient democracy understood election as an oligarchic or aristocratic institution.<sup>906</sup> But if they did not want to reach so far back, they might have read the same thing in Montesquieu or Rousseau.<sup>907</sup> One need only have read Rousseau's *Social Contract* or the *Federalist* to see that even for many modern thinkers, democracy was not yet understood as a question of consenting to be governed or consenting to the law as a little sovereign, but rather a matter of the *demos* executing the law themselves.<sup>908</sup> Whether one had read J. S. Mill, Burke, Guizot, or Hamilton, it would be difficult to miss the fact that in the classical reflections on political representation, a representative regime was understood sociologically as a form of "natural aristocracy" distinguished by its possession of forms of property and education inaccessible to the *demos*.<sup>909</sup> One also could read any of these thinkers, and in addition, Sieyès and Madison, and find that from a procedural point of view as well, the operational principles of representative government in all its varieties were originally imagined as being qualitatively different from or even opposed to democratic means of exercising power.<sup>910</sup>

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<sup>906</sup> Aristotle, *Politics*, bk. 6, ch. 2, 1317b17-1318a2.

<sup>907</sup> Charles-Louis de Secondat Montesquieu, *The Spirit of the Laws*, ed. and trans. Anne M. Cohler, Basia C. Miller, Harold S. Stone (Cambridge: Cambridge University Press, 2000), bk. 2, ch. 2; Rousseau, *Social Contract*, 207.

<sup>908</sup> James Madison, *Federalist* No. 10, in *The Federalist Papers*, ed. George W. Carey and James McClellan (Indianapolis: Liberty Fund, 2001); William H. Sewell, *A Rhetoric of Bourgeois Revolution: The Abbé Sieyès and What is the Third Estate?* (Durham: Duke University Press, 1994); Rousseau, *Social Contract*, 173, 178, 180, 198-199.

<sup>909</sup> Edmund Burke, "An Appeal from the New to the Old Whigs," in *The Portable Edmund Burke*, ed. Isaac Kramnick (New York: Penguin, 1999), 495-496; François Guizot, *The History of the Origins of Representative Government in Europe*, trans. Andrew R. Scoble (Indianapolis: Liberty Fund, 2002), 57-62, 69, 293-296, 340-341, 345-346; Manin, *Principles of Representative Government*, 120; J. S. Mill, *Considerations on Representative Government* (Amherst: Prometheus, 1991), 179-180; "Thoughts on Parliamentary Reform," in *Collected Works of John Stuart Mill Volume XIX: Essays on Politics and Society*, ed. J. M. Robson (Toronto: University of Toronto Press, 1977), 322-323.

<sup>910</sup> Madison, *Federalist* No. 10; Sewell, *A Rhetoric of Bourgeois Revolution*, 90-91; Emmanuel Joseph Sieyès, *Sieyès: Political Writings*, ed. and trans. Michael Sonenscher (Indianapolis: Hackett, 2003), lxiii-lxiv, 147n33.

Although a basic acquaintance with the foundational texts of representative government leads one—not inevitably, we will confess<sup>911</sup>—to conclude that representation is at odds with democracy, the relationship between democracy and political representation and our contemporaries’ misidentification of the former with the latter is only one facet of a larger problem. The incompatibility between democracy and representation is only a local expression of the opposition between liberalism and democracy. And the misidentification of representation and democracy is only a subset within a larger body of conflations between liberal and democratic political forms. In addition to political representation, the norms and institutions of popular sovereignty, the legislative state, the state of right, and parliamentarism, which today are understood as being democratic, are in fact artifacts of a two-fronted struggle of aristocratic elites (both hereditary and “natural”) against absolute monarchy and against democracy itself. While early liberal thinkers were perfectly candid in contrasting their political principles to the exercise of democratic power, contemporary political philosophy and democratic theory instead misidentify liberal and democratic political forms.

## §

Liberalism is a multifaceted and complex historical object. Anyone who attempts to take account of its variety in a serious way will find that it stubbornly resists all attempts at reduction and stereotyping. But within the wider tradition of liberal thought it is possible to identify three distinct families or argumentative stances, each of which has not only generated a body of liberal political argumentation, but has also contributed to the development of the norms and institutions

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<sup>911</sup> For a highly original response to what she terms the “incompatibility theory” concerning the relationship between democracy and political representation, see Urbinati’s *Representative Democracy*.

of political representation and “modern democracy” (that is, representative government). Throughout this project, we have subdivided the liberal tradition into *juridical liberalism*, *empiricist liberalism*, and *parliamentarism*, distinguishing between them as ideal types, tracing their development and the relationships between them and lateral discourses (e.g. jurisprudence, political economy, historical and sociological reflection on premodern institutional inheritances), and identifying the specific concepts of political representation corresponding to each family.

## §

We have seen that *juridical liberalism* centres on *law*, imagining the political order as a system of norms, and imagining political action as a legislative activity. Here, the citizen appears as a *homo juridicus*, a conduit of authorization and obligation who encounters others as limitations to their own freedom. *Pace* Marx, it is not the denizen of civil society (*homo œconomicus*), but rather the citizen of the system of norms (*homo juridicus*) for whom security and police are the “highest social concepts.”<sup>912</sup> Juridical liberalism frames the central question of politics in a certain way: the problem is legitimacy, and the solution is consent. Whether one consents to the state (Hobbes), to law (Rousseau), or to be governed (the institution of election), and whether one takes this consent to be a real or hypothetical event or only a norm (Kant), at every instance juridical liberalism is animated by the assumption that power can only be a problem to the extent that it is or is not legitimated.

C. Douglas Lummis has a very simple but very profound insight that puts the juridical frame in question: democracy is the only type of polity that does not need to be legitimated;

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<sup>912</sup> Karl Marx, “On the Jewish Question,” in *Karl Marx: Selected Writings*, ed. David McLellan (Oxford: Oxford University Press, 2000), 60-61.

democracy is itself the substance of legitimacy.<sup>913</sup> To speak of legitimacy is to presuppose that the *demos* do not rule themselves, but instead consent to be ruled. As with all forms of liberal thought, democracy is the dark star of juridical liberalism. But fascinatingly, it is also the solution to its riddle.<sup>914</sup> The problem of juridical liberalism in all its variants is a matter of transforming the *kratos* of the *demos* into the consent of the governed, swallowing up the monster in the coldness of juridical form.

§

We have seen how *empiricist liberalism* developed as a critique of juridical liberalism, effecting a kind of a disenchantment of law by economics. In juridical liberalism, the subject of right (*homo juridicus*) initially appears as a subject of interest (*homo æconomicus*), who is motivated by the facticity of their appetites and aversions to institute a commonwealth through a covenant. The social contract transforms facticity into validity by transforming the *homo æconomicus* into *homo juridicus*. In this way, an appetitive and dangerous subject is bred into an animal who now possesses a “right to make promises.”<sup>915</sup> The empiricist response to this narrative was to ask: what if this transformation never took place? What forms of sociability exist within the dimension of facticity alone? By raising this question, empiricist liberalism undermined the central tenets of juridical liberalism. It was able to dispense with the discourse of natural law by substituting a natural history of the civilizing process immanent to private,

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<sup>913</sup> C. Douglas Lummis, *Radical Democracy* (Ithaca: Cornell University Press, 1996), 28.

<sup>914</sup> This is especially evident in Thomas Hobbes, *On the Citizen*, ed. Richard Tuck and Michael Silverthorne (Cambridge: Cambridge University Press, 2003), 94-96.

<sup>915</sup> Friedrich Nietzsche, *On the Genealogy of Morals*, in *Basic Writings of Nietzsche*, ed. and trans. Walter Kaufmann (New York: The Modern Library, 2000), 493.

material reproduction for the explicit institution of civil government through a contract. In this way, the state of nature was reimagined as *civil society*, the central category of empiricist liberalism. While early modern political thinkers (e.g. Locke) understood civil society as a system of norms, or what Hobbes had called a commonwealth, in the discourse of empiricist liberalism, civil society is reimagined as a system of needs. The denizen of civil society, the *homo œconomicus*, is not an individualistic monad. They do not encounter others as a limitation to their own freedom, but instead view them as means to its realization. So the system of needs is at the same time a kingdom of means.

While juridical liberalism was unable to imagine freedom without relating it to law, seeing it as the space of law's silence (Hobbes), or as a matter of following a law given by reason (Kant), by nature (Locke), or by oneself (Rousseau), empiricist liberalism reimagined freedom as an effective reality. The empiricist concept of freedom finds its most consistent and articulate formulation in Sieyès' concept of *liberté de pouvoir*. In contrast to the *liberté d'indépendance* that broadly encompasses juridical concepts of freedom, *liberté de pouvoir* is a social, intersubjective understanding of freedom as an ability to do things by treating others as a means. A society that maximizes *liberté de pouvoir* is not a collection of monads distributed into miniature spheres of autonomy by fences of law (*nomos*), but instead a system of interdependencies, an arrangement of reciprocal utilities. So civil society is at once a system of needs, a kingdom of means, and a system of interdependencies.<sup>916</sup>

The institutional corollary to the juridical concept of freedom as *liberté d'indépendance* is the state of right, a regime that respects individual autonomy either because the allocation of a

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<sup>916</sup> Emmanuel Joseph Sieyès, "Of the Gains of Liberty in Society and in the Representative System," in *Emmanuel Joseph Sieyès: The Essential Political Writings*, ed. Oliver W. Lembcke and Florian Weber (Leiden: Brill, 2014), 144-151.

sphere of freedom is stipulated by a bilateral social compact between the prince and the estates (as in the Teutonic state of right), or because the subject possesses a body of rights that precede the social contract and were not alienated with the establishment of a commonwealth (as in the American concept of right). Empiricist liberalism is also concerned with the limitation of state power. But the rationale for this limitation is completely different. Once again, the empiricist critique is confined to the dimension of facticity. It does not insist that the state *laissez-faire* because it must respect the validity of individually-possessed rights, but rather because it cannot interfere in the dynamics of an intersubjective process of exchange that is opaque to it and escapes its effective competence.

However, empiricist reflection on political institutions was not confined to the critique of governmental reason. Almost as soon as political economy, the privileged discourse of civil society, appeared, Sieyès developed a public philosophy that was not concerned with insulating the self-arrangement of civil society from public power, but rather with modelling the exercise of public power on dynamics originating in civil society. For Sieyès, political representation is a form of divided labour, and conversely, divided labour is representative. The sociability of civil society and principles of modern government by proxy do not differ in kind.

As political economy was supplanted by modern economics and the dimension of exchange was eclipsed by competition, Schumpeter introduced a new theory of democracy (that is, elections) that focussed on the lateral relation of competition between parties (which he analogized to private firms) rather than the vertical relationship between political representatives and those they represent. In the same way that Smith's brewers and bakers keep the denizens of civil society fed despite acting only on the basis of their self-seeking energies, Schumpeter's political entrepreneurs produce legislation as an indirect consequence of their striving to acquire

power and offices. So the discourse of civil society does not only describe a site, but rather a mode of sociability that can be localized as easily in public as in private life.

§

Finally, we have seen how *parliamentarism*, a third family of liberal thought that is seldom identified as such, centres the question of politics on *speech*, imagining public life as a process of government by discussion. Parliamentarism overcomes the antinomy between juridical and empiricist liberalism by combining elements from both.

Like empiricist liberalism, parliamentarism is a kind of sociological liberalism attentive not only to the qualities of human beings, but the forms of relationship staged between them. It does not imagine the subject as a monad, but instead understands them as being already thrown into an intersubjective process; for parliamentarism too, man is born into and remains within society. Unlike empiricist liberalism, however, it does not imagine the sociability of this society only on the model of privatistic activities of competition and exchange. Parliamentarism was born public. It is unique among the families of liberalism in this respect. Discussion, the form of speech specific to parliamentary sociability, differs from mere bargaining. It is not oriented towards the private interests of the involved parties, but rather to a truth or reason. And like empiricist liberalism again, parliamentarism is based on a certain representation of civil society. But while empiricist liberalism imagines civil society as a site in which reciprocal utilities are exchanged (a system of needs, a kingdom of means, or a system of interdependencies), parliamentarism imagines civil society as an intermediate sphere between the private and the public. This juridically private public sphere of civil society is not only a site in which prices are

formed as an indirect consequence of the exchange of goods in commerce, but rather a site in which truth is formed through the exchange of opinions in discussion.

Like juridical liberalism, parliamentarism is concerned with the normative dimension, with a set of questions concerning the validity of law and the sources of legitimacy. In the continental model developed in the context of absolutism, the exercise of public reason does not reach beyond civil society. Here, the public sphere of the press and the Republic of Letters is tasked with the critique and rationalization of public authority. But in England, the privileged context for the institutional development of parliamentarism, this public sphere of civil society is linked by the mediating power of publicity to the public sphere of public authority: parliament. It does not matter whether we follow Marx in regarding the public sphere of civil society as a secondary site of discussion, dancing to the tune called at the pinnacles of power,<sup>917</sup> or instead follow Schmitt's insistence that parliamentarism represents a socialization of the state in which public authority is transformed into a monstrous debating society.<sup>918</sup> In either case, the same modes of sociability and sources of normativity appear. In the same way that Sieyès and Schumpeter discovered that the principles of exchange and competition need not be exclusively localized in the private sphere of civil society, parliamentarism too is predicated on the delocalization of its characteristic mode of sociability. In a complete parliamentary regime, the whole of society is enlisted in a process of government by discussion that circulates throughout the social order.<sup>919</sup> In parliament, the exchange of opinions is not only mobilized as a critique of public authority, but also applied to the formulation of legislation: *veritas non auctoritas facit*

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<sup>917</sup> Karl Marx, "The Eighteenth Brumaire of Louis Bonaparte," in *Marx: Later Political Writings*, ed. and trans. Terrell Carver (Cambridge: Cambridge University Press, 1996), 71.

<sup>918</sup> Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (Chicago: University of Chicago Press, 2005), 62-63.

<sup>919</sup> Guizot, *Representative Government in Europe*, 54.

*legem* (truth, not authority makes law). So like juridical liberalism, parliamentarism is concerned with the formulation and legitimation of valid (not only effective) law and the basic sources of normativity. But unlike juridical liberalism, it does not locate the source of legitimacy in the volitional moment of consent, but rather in the rational moment of consensus concerning a truth that exists independently of the wills of the involved discussion partners. In this way, to govern by discussion is at the same time to be governed by the truth.

## §

From the nineteenth century to the present, political philosophy has rhetorically accommodated itself to democracy. Rather than asserting that liberal and representative institutions are superior to democracy, these very different political forms are now identified or combined. When qualifiers are attached to democracy at all, it appears as “liberal democracy,” “constitutional democracy,” or “representative democracy.” Putting aside the question of whether there is anything democratic at all in these political forms, the presence of these qualifiers expresses an unwillingness to abandon entirely the hatred of democracy endemic to the liberal tradition. Democracy must be “liberal” or “constitutional” because the *demos* are naturally tyrannical and indifferent to the demands of procedural regularity. It must be “representative” because the *demos* are naturally incapable of governing.

Despite these changes, that is, despite the fact that contemporary political thinkers profess to embrace democracy rather treating it as the dark star to orient their ship of state away from, the three basic facets from which the liberal tradition is constructed (speech, law, and civil society) continue to organize contemporary political thought and its new science, democratic

theory. Furthermore, the specifically modern form of anti-democratic polemic, which depicts democracy as a tyrannical political or social regime, is renewed despite this newly-professed (although always moderated) love for democracy.

## §

The arrangement of speech, law, and civil society is especially central to a dispute between the two twentieth century theorists who most ably represent the norms of popular sovereignty and parliamentary government by discussion. Schmitt's identitarian concept of democracy as a form of sovereignty is unmistakably Rousseauian in inspiration. In a way that resembles Rousseau's general will, Schmitt imagined the *demos* as a monster (specifically a sea monster, a Leviathan) that wills through the cold medium of legal norms. In order that this monster not be disincorporated or dismembered, a democracy-as-sovereignty cannot accommodate the regime of differentiation between public and private, or state and civil society, that organizes modern liberal institutional orders. And because it must be of one mind (or rather one will), it cannot tolerate the discordance of public discussion. Like all genuine monsters, it is mute. Its "deliberations" are an entirely private affair conducted in the darkness of the heart. We have known for a long time now that only beasts or gods can live outside the *polis*. But a democratic Leviathan is a beast, a God, and a *polis* unto itself. It does not recognize a higher God, or any higher law of reason inherent in the natural order. It only follows a law that it gives to itself, because it is given to itself: it is its authority, and not any independent truth that makes its law (*auctoritas non veritas facit legem*).

In its organization of speech, law, and civil society, Jürgen Habermas' proceduralist concept of deliberative democracy opposes Schmitt's democracy-as-sovereignty point-for-point. He does not locate the modern form of democratic politics in the norms of popular sovereignty, or even in the juridically public apparatus of political representation, but rather in the bourgeois public sphere of civil society. The basic material and institutional condition for the emergence of the public sphere is the transformation of *oikos* into the economy. When the labouring activity is performed in the intermediate sphere of civil society, the private household of the bourgeois is unburdened and consequently enriched, transforming from a site of social reproduction subject to necessity into a site of intimacy in which a new way of being a person and relating to others develops. This subjectivity, the subjectivity of human beings in their common parity as human beings (the subjectivity of the *homme*) follows the labouring activity in escaping the confines of the domicile, staking out a new territory in the intermediate sphere of civil society, and establishes new sites of communication more inclusive than the family: the activity of letter-writing, the salons and coffeehouses, the critical literary journals, and finally, the Republic of Letters. Among subjects relating to one another in the absence of status, in their common parity as human beings and nothing more, a new kind of sociability develops: without any order of rank to appeal to, disagreements cannot be adjudicated by status, and it becomes possible for the authority of better argument to assert itself. Initially, the reason implicit in the argumentative activity is applied to the critique and rationalization of state power, acting as a kind of voice against the state situated in the public sphere of civil society, and especially in the institution that mediates between it and the sphere of public authority: the press. Eventually, the press is supplemented by an apparatus that represents civil society within the sphere of public authority: parliament. In the Robinsonade of public reason the *homme*, who was only ever really a

*bourgeois*, becomes a *citoyen*. At this point, reason is not only applied to the critique and rationalization of the state's administration of civil society, but is directly involved in the formulation of legislation. At this point the absolutist formula is inverted: reason, and not authority, is the source of law (*veritas non auctoritas facit legem*).

So in contrast to Schmitt, the institutional condition for democracy is the differentiation of *civil society*, democratic activity is not a mute volitional moment of consent but instead occurs in the form of public *speech*, and *law* is understood as being based in truth, not the volitional authority of the popular sovereign.

## §

In the same way that Habermas' deliberative democracy incorporates each of the three facets of the liberal tradition, it also renews the liberal polemic against democracy. In distinguishing between three normative models of democracy (a liberal model, a republican model, and the discourse-theoretic model that he favours) he depicts the republican model of democracy in an equivocal and even inconsistent way. On the one hand, the republican model has many features in common with a genuine democratic radicalism: it is anti-statist, involving the widespread participation of laypersons in administration and the exercise of public power, and it is coordinated through the normative power of solidarity produced through communicative action. On the other hand, the republican model is also depicted in a way that bears an unmistakable resemblance to the Rousseauian politics of sovereignty: it is based on a prepolitical, prereflective ethical homogeneity; it features a decisionist concept of law as a determination of the popular will; and it is not differentiated, but instead incorporated into a

unitary subject writ large. Habermas even acknowledges that this set of features is inherited from early modern absolutism, the original form of sovereignty.

Despite producing a model of democracy that is the symmetrical opposite of Habermas' in terms of its organization of speech, law, and civil society, Schmitt's democratic theory prefigures Habermas' incorporation of sovereignty and democratic radicalism into the same model. The key concept in this misidentification is an equivocation in Schmitt's concept of identity. Unlike liberalism, which employs representation as its basis of political unification, democratic politics rests on a series of identities, most significantly the identity of the governing and the governed. This identity can be achieved in two ways: the *demos* can be identified in the sense that they are the same people, becoming identified through their shared participation in ruling and being-ruled, or they can be identified with a plebiscitary leader or dictator through a deliberate act of acclamation. So the principle of identity leads in two possible directions: towards a participatory politics of democratic radicalism, or towards a dictatorial politics of sovereignty. It is as though Schmitt managed to discover the mean between "the most austere Democracy and the most perfect Hobbesism" that eluded Rousseau.<sup>920</sup>

In conflating or associating democratic radicalism with sovereignty, Schmitt and Habermas have reiterated the line of argument that began with Benjamin Constant, who projected the political experience of the Jacobin (re)appropriation of sovereignty backwards into the ancient *polis*. From the nineteenth century to the present, the critique of ancient liberty has always been the critique of modern sovereignty in disguise. Liberal political reflection on democracy is in large part an attempt to transform a two-fronted battle against monarchical sovereignty and democratic power, the prince and the plebeians, into a more easily-managed

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<sup>920</sup> Jean-Jacques Rousseau, "Letter to Mirabeau," in *The Social Contract and Other Later Political Writings*, ed. and trans. Victor Gourevitch (Cambridge: Cambridge University Press, 1997), 270.

single front of conflict. Like Constant, Habermas rejected this imaginary, atavistic concept of democracy-as-sovereignty in favour of one more appropriate to the “structural presuppositions of modernity”—that is, to civil society. Schmitt, however, had no such aversion to sovereignty, and was forced by his recognition that democracy is the only possible form of legitimacy under modern conditions to accept democracy and sovereignty at once.<sup>921</sup> As a result of his willingness to accept democracy and sovereignty as a package, this defender of the dictatorial politics of sovereignty ironically came to a more genuine and insightful appreciation of democratic radicalism than any of our contemporary theorists of deliberative democracy and political representation. Hence the disturbing but unavoidable persistence of the interest in Schmitt’s writings in the more radical currents of contemporary democratic theory. Between the liberal skepticism of the former and the Rousseauian sovereignty of the latter, Habermas and Schmitt identify democracy with two anti-democratic institutions: the state, the realm of the prince; and civil society, the province of the natural aristocracy.

## §

Like the charismatic energies of sovereignty that it has so often been concealed behind, democracy is a force of life. Like any force of life, it cannot be loved moderately, or approached with the cold disposition of a tamer of beasts and sea monsters.

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<sup>921</sup> Schmitt, *Political Theology*, 51.

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