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Law's Author, Things Personated, Political Representation

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Abstract

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This dissertation proposes a normative theory of political representation grounded in popular sovereignty and positive law, rather than in democracy and efficient labour allocation. The first three chapters assess the contributions to the idea of representation of three early modern thinkers. Hobbes proposes a formal model of authorised action at a distance, but, contrary to a long-standing consensus in political thought, not an actual theory of representation. Rousseau, a well-known opponent of representation, proposes ideas about government, sovereignty, and positive law, which, despite his contrary intentions, form a foundation for a normative theory of representation. Sieyes refines concepts from both to create a more mature practical statement on representation which he attempts to implement in three revolutionary constitutions in France in the 1790's.

The next three chapters make an argument connecting representation to law creation. First the concept of a decision is defined, and then abstracted through various levels of political authority and action. Law creation is distinguished from all other classes of authorised political decision making by four unique properties which tie in with problems initially raised by the early modern philosophers regarding popular sovereignty. Various numbers of authorised actors are considered as constituting political bodies credentialed to carry out the relevant decisions identified as meeting the minimal conditions of law, and ultimately only assembly — a body numbering in the hundreds, with a reserved place for making recognised decisions, and a formal connection to expressed popular preferences — meets the conceptual requirements of the class of decisions mooted. The thesis ends with an argument connecting law to representation as the solution to the problem of plurality.

Tutte le leggi che si fanno in favore della libertà nascano dalla disunione loro.[1]

[1] Niccolò Machiavelli, *Discorsi sopra la prima deca di Tito Livio* (Roma: Salerno, 2001), 34

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Introduction

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A Theory of Representation

The purpose of this dissertation is to develop a normative theory of political representation. My research question is, What political problem should we see representation as solving? Can it solve this problem and, if so, what are the appropriate institutions and methods for doing so? I shall argue, that if we understand the fundamental problem of politics as the interface between diversity and unity, then representation offers half the solution to the problem; the other half is law. More precisely, a specific sense of positive law (which will be developed in this dissertation) is the solution to the problem of plurality in conditions of popular sovereignty, and a specific sense of representation (which will also be developed in this dissertation) is the means to that solution.

In the last fifteen years, three notable books have been published on this topic: Bernard Manin's *The Principles of Representative Government*,[2] Nadia Urbinati's *Representative Democracy*[3], and Mónica Brito Vieira and David Runciman's *Representation*.[4] The first two sparked much discussion on

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[2] Bernard Manin, *The Principles of Representative Government*, Themes in the Social Sciences (Cambridge: Cambridge University Press, 1997).
[3] Nadia Urbinati, *Representative Democracy: Principles and Genealogy*, Representative Democracy : Principles & Genealogy (Chicago, Ill. ; London: Chicago, Ill. ; London : University of Chicago Press, 2006).
[4] Mónica Brito Vieira and David Runciman, *Representation* (Cambridge: Polity Press, 2008).

the topic (including an amusing debate between their two authors[5]), while the third has only recently been published. All three stand in the shadow of the 44-year-old classic by Hannah Pitkin *The Concept of Representation*.[6]

Pitkin begins with a close but critical reading of Hobbes' ideas on representation, which focusses almost entirely on Chapter XVI of *Leviathan*. She ends the book with a four-chapter discussion of the mandate-independence controversy. In the book, as in nearly every article she published, there is ample attention given to etymologies and every appearance of every inflection of the words she is interested in[7] — not least, all the verb and noun derivatives of *represent*. Ultimately, for Pitkin, the phenomenon of political representation is always a function relating a representer to a represented, whether 'standing for' or 'acting for.' Following Pitkin, a number of writers have tried to categorise forms of representation by the kind of function relating two[8] (or occasionally three[9] or even five[10] parties).

Manin's book posits four principles of representative government: (1) elections at regular intervals, (2) independence from electors, (3) the governed express wishes without control from the governors, and (4) public decisions are the outcome of 'trial by debate.' His book is famous for its provocative

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[5] Hélène Landemore, "Is Representative Democracy Really Democratic? Interview of Bernard Manin and Nadia Urbinati," *LaVieDesIdees.fr*, accessed September 8, 2014, http://www.laviedesidees.fr/spip.php?page=print&id_article=273.
[6] Hanna Fenichel Pitkin, *The Concept of Representation*, 1st paperback edition (Berkeley: University of California Press, 1972).
[7] Including an appendix on etymologies ibid., 241–252.
[8] Anthony Harold Birch, *Representation*, Key Concepts in Political Science (London: Macmillan, 1972), 107–108.
[9] A. Rehfeld, "Towards a General Theory of Political Representation," *The Journal of Politics* 68, no. 01 (2008): 6–8.
[10] Michael Saward, *The Representative Claim* (Oxford: Oxford University Press, 2010), 36.

argument for the inherently aristocratic nature (*principle of distinction*) of representation and for its rejection of parliamentarism and its not altogether grudging acceptance of its replacement, media-driven 'audience democracy.' Representation, for Manin, is not, need not, and cannot be democratic. Even more than Pitkin, Manin does not put representation into context as part of a larger democratic constitutional order — only parts of which adhere to the principles of representative government. And like Pitkin, he avoids discussing the outcome of representative politics, referring to 'public decisions' without pausing to consider the various kinds of public decisions or the normative connection between representative assemblies and law making. But representation, as I shall argue, is wholly about a process and its conditions — not about outcomes or different types of outcome.

Urbinati's book is constructed more as a history of political thought on the topic of representation, though she clearly rejects Manin's aristocratic thesis. Far from being anti-democratic, representation for her is a 'democratic revision of Rousseau's popular sovereignty… [an] ongoing and regulated… reconstructing of legitimacy.'[11] Moreover, as a history of political thought, hers is an elite project, limited to a few big thinkers and big texts, all refracted through the idiom of contemporary political thought on the topic.

Brito Vieira and Runciman's book is theoretically far less ambitious than the others. Its definitions of representation are initially formalistic, but eventually they seek to take the concept outside the boundaries of the state

[11] Urbinati, *Representative Democracy: Principles and Genealogy*, 25.

and the framework of decisions we might regard as strictly political.

All four books make an enormous contribution to our understanding of representation. In my dissertation I will add at least three fundamental insights to this subject. Firstly, I want to examine three seminal philosophers who theorised about representation before its emergence in liberal democratic states, and I will draw from them a vocabulary for addressing the question of representation as a distinctive process attached to a sovereign people who both rule themselves but remain, and accept that they remain, nonetheless divided. Secondly, I want to argue that a close normative connection exists between the kind of problem representation seeks to solve and the kind of problem positive law seeks to solve. Of the four books, only Urbinati's has a serious discussion of law and its connection to representative democracy — and that only in the context of mostly eighteenth century texts with no reference to modern jurisprudence. Lastly, I will identify two broad and radically different types of political engagement implicated in representation — *voice*, that is the ability to make oneself heard in public, and *vote*, the ability to have a measurable impact on actual policy outcomes (not, in case there was any confusion, on the election of office-holders). I hope to show that these two features of the representative process (the two types of engagement, that is) are different, not correlated, and that, counter-intuitively, they are often at odds with each other — and that any form of representation has not only to reconcile the built-in tension between voice and vote but also to harness and exploit it.

The first matter will be dealt with by carefully reviewing the texts of three early modern philosophers. This dissertation does not aim to provide a thorough analysis of thinking on representation. Three thinkers are given an individual chapter each in Part I, because these three began to grapple with the issues raised before there was any institutional instantiation of representative government or representative democracy — and the terms they introduced became, for better or worse, the frames of reference for all who would follow. Important figures in the history of thought on this topic — in particular Condorcet, Guizot, Mill, Fichte, Hegel, Kelsen, and Schmitt — are treated in accordance with their relevance to the specific problems raised in Part II.

On the second: the existing literature on democracy and representation largely ignores the role of law, and most modern jurisprudence pays little more than lip service to democracy. Waldron forcefully argues against the broad exclusion of democracy in general and the legislative process in particular from modern jurisprudence in both of his books on the topic from the late 1990's.[12] But ultimately (in an article from 2000[13]), he rejects as incomplete the possibility that representation can bridge this gap between jurisprudence and the political theory of democracy. I will argue in my dissertation that this apparent incompleteness is an incompleteness in the theoretical work on representation, not in its explanatory power — that is to say, an

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[12] Jeremy Waldron, *The Dignity of Legislation* (Cambridge: Cambridge : Cambridge University Press, 1999); Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford : Clarendon Press, 1999), 19–146.

[13] Jeremy Waldron, "Legislation by Assembly," *Loyola Law Review* 46 (2000): 507–34.

incompleteness that is remediable.

Waldron himself revisited the issue recently in a paper published in 2009, where he gives representation more attention than before and is more charitable to its possible role in connecting law and legislation.[14] This paper does much to advance the argument, but ultimately the question that interests Waldron goes only so far. The question he explores is that of why representative legislation is the preferred method of law making. I would like to ask the question in reverse: Why is law making one of the two tasks we assign to representative institutions and why do we insist (or should we insist) on keeping it there when so many other kinds of political decisions are taken in other governmental departments? What do the two seemingly unrelated tasks that representative assemblies arrogate to themselves — what I call law creation and partial agency in government, or in the late eighteenth century terminology, powers of legislation and powers of surveillance — have to do with each other, why are they both lodged in the assembly, and what do the answers to the first two questions tell us about sovereignty and the problems that representation is being put to solve? This asks Waldron's question 'backwards,' as it were — which is largely what this dissertation will do. Doing so will, I believe, yield a fuller answer.

By seeking to answer what kind of problem representation seeks to solve and has sought to solve — rather than tracking its procedural evolution — we will inevitably have to come to the special role of law in politics. Hints of

[14] Jeremy Waldron, "Representative Lawmaking," *BUL Rev.* 89 (2009): 335.

this path already exist in Ankersmit's 2002 book *Political Representation*, though the jurisprudence is there mostly limited to the natural law tradition.[15]

In contrast to the paucity of literature relating representation to law creation, there is a surfeit of literature on the question of democracy in representation. The hoary question of representation's relation to democracy could fill volumes, but it will not dominate this dissertation. The debate has generally centred on the method of selecting[16] representatives or on the limitations placed on their judgment.[17] The democratic nature of representation is, according to sceptics, either a 'paradox'[18] or, at best, a labour argument — just one aspect of the specialisation[19] of the modern economy.

Lastly, there is a great deal of literature on representative institutions, particularly comparative studies. Much of the literature, especially from the 1980's and 1990's, focusses on electoral methods,[20] but these investigations generally do not connect to any theoretical discussion, but rather to questions

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15 F. R Ankersmit, *Political Representation*, Cultural Memory in the Present (Stanford, Calif: Stanford University Press, 2002), 15–132.
16 A. R Amar, "Choosing Representatives by Lottery Voting," *The Yale Law Journal* 93, no. 7 (1983): 1283–1308.
17 Terence Ball, "A Republic — If You Can Keep It," in *Conceptual Change and the Constitution*, ed. Terence Ball and J. G. A. (John Greville Agard) Pocock (University Press of Kansas, 1988), 145–147.
18 David Runciman, "The Paradox of Political Representation," *The Journal of Political Philosophy* 15, no. 1 (2007): 93–94; Hanna Fenichel Pitkin, "Representation and Democracy: Uneasy Alliance," *Scandinavian Political Studies* 27, no. 3 (September 1, 2004): 336.
19 A. D. Lindsay, *The Essentials of Democracy* (Oxford University Press: Oxford University Press : London, 1929), 56.
20 Arend Lijphart, Bernard Grofman, and Eagleton Institute of Politics, *Choosing an Electoral System : Issues and Alternatives* (New York ; London: Praeger, 1984); Bernard Grofman, Arend Lijphart, and Inc NetLibrary, *Electoral Laws and Their Political Consequences* (New York: Agathon Press, 1986); G. Bingham Powell, *Elections as Instruments of Democracy: Majoritarian And* (New Haven, Conn: Yale University Press, 2000); Larry Jay Diamond and Marc F. Plattner, *Electoral Systems and Democracy* (JHU Press, 2006).

of stability and efficiency, etc. When the literature does get theoretical, it is often largely detached from the legislative process — giving us examples of endogenous preferences and methods of aggregation, but leaving out the level of politics where these matters might be settled.

The body of this dissertation is split into two parts of roughly equal length, one historical and one analytical; they are followed by a few thoughts on institutions in the conclusion. The first part will cover the philosophical contributions of three early thinkers on representation. The second part will make the argument on law and democracy. In the conclusion I will treat the voice-vote distinction very briefly and suggest a few other avenues for future, more empirical and institutionally focussed, research on the topic.

Visions of Representation

Part I is dedicated to three thinkers who discussed representation before it emerged in a form recognisable today. All three thinkers — Hobbes, Rousseau, and Sieyes — had to grapple, each in his own way and his own political context, with the emergence of popular politics practised in the normative tension between an assumption of popular legitimacy and a sharpening understanding of government (and, for that matter, politics as a sphere of action) as something actively executed by a few.

Chapter 1, 'Personation, Not Representation' deals with Hobbes and his approach to representation — or more accurately, his argument on personation, both as it appears in *Leviathan* as a form of representation and as it appears in *De Cive* and *De Homine*, largely the same, but without reference to representation at all. The introduction of representation into the chapter on personation (Chapter XVI, from which the title of this dissertation is adapted) has given Hobbes pride of place in the literature on representation — notably in a fruitful debate over the last decade between Quentin Skinner[21] and David Runciman.[22] Pitkin begins her canonical work on representation with a discussion of Hobbes,[23] and most writers since have followed suit. Hobbes introduces the language of representation in *Leviathan* into a much broader and forceful argument on sovereignty — although this is an argument that he successfully makes twice before and at least once after[24] without using the word 'representation' at all. The terms he introduces for action at a distance and, especially, attributed action, are certainly useful for a discussion of representative government as it would later emerge — if only because so many later thinkers believed them to be — but ultimately, Hobbes is making another argument altogether. His onetime resort to the idiom of

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[21] Quentin Skinner, "Hobbes and the Purely Artificial Person of the State," *The Journal of Political Philosophy* 7, no. 1 (1999): 1; Quentin Skinner, "Hobbes on Representation," *European Journal of Philosophy* 13, no. 2 (2005): 155; Quentin Skinner, "Hobbes on Persons, Authors and Representatives," in *The Cambridge Companion to Hobbes's Leviathan* (New York: CUP, 2007).

[22] David Runciman, "What Kind of Person Is Hobbes's State? A Reply to Skinner," *The Journal of Political Philosophy* 8, no. 2 (2000): 268; David Runciman, "Hobbes' Theory of Representation," in *Political Representation*, ed. Ian Shapiro (New York: Cambridge University Press, 2009), 15–34.

[23] Pitkin, *The Concept of Representation*, 14–37.

[24] Thomas Hobbes, *Man and Citizen: Thomas Hobbes's De Homine* (Garden City, N.Y: Humanities Press, 1978), 83–85.

representation needs to be seen in the context of the political debate he was engaging in at the time. It is, fundamentally, more ideological than philosophical, and he abandons it when it is no longer politically expedient, without losing any of the force of the argument (on *personation*) which he is trying to make.

I argue that Hobbes' argument on personation cannot be the cornerstone of a normative theory of representation. What can, ironically, is the work of a philosopher who explicitly rejects representation, Rousseau. The type of representation Hobbes suggests — a unifying force — is not ultimately as useful for a theory of representation as it has long been held to be. But Hobbes' attempt to formalise attributed action, and to put it in a context of authority — all while grounding sovereignty in the people at large — will be key to the idea of representation put forth by the thinker who is the subject of Chapter 3, Sieyes.

The title of Chapter 2, 'Rousseau Misrepresented,' is not as sarcastic as it might sound. Rousseau's opposition to representation is clear and relatively consistent: although there is room for equivocation in Rousseau's earliest and last works, in the important philosophical texts, not least *On the Social Contract*, there is little room to make the opposite case.[25] Despite this, he nonetheless enunciated three new political principles — (1) the separation of sovereignty from government, (2) the special status of laws and legislation,

[25] Though some have. See, for example, Richard Fralin, *Rousseau and Representation: A Study of the Development of His Concept of Political Institutions* (New York: Columbia University Press, 1978).

and (3) the intimate normative relationship between sovereignty and the creation of law. Rousseau's real and principled and reasonably well-argued opposition notwithstanding, these three principles will form the basis of a normative theory of representation. In Chapter 2, I argue that too much attention is paid to Rousseau's quaint and unworkable institutional designs (Pitkin refers to him as 'romantic… utopian, hopelessly impractical'[26]); those can be easily dismissed, but the fundamental insights behind them deserve to be rescued. Rousseau himself can be forgiven for a lack of institutional imagination. As I argue in Chapter 2, any serious treatment of the three insights identified above will not only yield a conclusion compatible with representation; representation, understood in the way this dissertation seeks to present and defend it, becomes the only logical conclusion.

It is a pleasant, though unintended, irony of my work so far that in studying the philosopher largely credited with first enunciating the basic principles of representation I have concluded that he is not talking about representation at all, but rather using the word as an ideological stick with which to beat his contemporary opponents — while at the same time, in studying the philosopher most famous for his opposition to representation, I have concluded that, despite the sincerity of his opposition, his revolutionary conception of state, society, and law form the building blocks of a powerful and enduring normative theory of representation.

Where the first two chapters deal with thinkers who never lived to see

[26] Pitkin, "Representation and Democracy," 339.

anything like representative government as the term would come to be understood (Rousseau, of course, was influenced strongly, though differently, by both the English parliament of his day and the republican institutions of Geneva), the subject of Chapter 3, 'The Elusive Medium of Exchange,' lived to see some of his ideas actually implemented (or attempted at the very least). Emmanuel-Joseph Sieyes is both the thinker most directly influenced by Hobbes — particularly on the constituent power of the people[27] — and the one who makes the final turn away from Hobbes' notion of representation as embodiment (or what would later be called 'symbolic representation'[28]). In practice, the embodiment idea never really dies,[29] and it crops up either explicitly, as in Schmitt's theory of representation[30] and his more-Hobbesian-than-Hobbes interpretation of *Leviathan*,[31] or implicitly in a variety of attorney-client or guardian metaphors. Sieyes, though, was by no means the first to reject the embodiment idea. Two centuries beforehand, Sir Thomas Smith explicitly did so — ironically, using a largely unhelpful attorney-client metaphor.[32] Nearly a century after Smith and a century before Sieyes, Henry Parker explicitly rejected embodiment as well, but his argument, unlike Sieyes', did not combine what can best be described as the plural and singular aspects

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[27] Murray Forsyth, "Thomas Hobbes and the Consituent Power of the People," *Political Studies* 29, no. 2 (June 1981): 191–203.
[28] Birch, *Representation*, 18.
[29] W. Weymans, "Freedom through Political Representation: Lefort, Gauchet and Rosanvallon on the Relationship between State and Society," *European Journal of Political Theory* 4, no. 3 (2005): 267.
[30] Carl Schmitt, *The Crisis of Parliamentary Democracy*, Studies in Contemporary German Social Thought. (Cambridge, Mass: MIT Press, 1988); Duncan Kelly, "Carl Schmitt's Political Theory of Representation," *Journal of the History of Ideas* 65, no. 1 (2004): 113–34.
[31] Carl Schmitt, *The Leviathan in the State Theory of Thomas Hobbes: Meaning* (Chicago, Ill: University of Chicago Press, 2008).
[32] Thomas Smith, *The Common-Wealth of England, and Manner of Gouernment Thereof* (At London: Printed by Iames Roberts for Gregorie Seton, and, 1601), 78.

of representation.[33]

Like Rousseau, Sieyes granted law as such a special status (derived largely from its generality[34]), though he separated it from terms-of-association decisions as well as from everyday *political decisions* (a term he introduces and whose definition I will refine in Chapter 4).[35] Sieyes' notion of labour[36] is much more fully developed than Rousseau's, however, and, influenced by Adam Smith,[37] he sees political action as requiring both specialisation and some form of neutral, non-emotional means of exchange.[38] Chapter 3 will flesh this out by closely examining two new concepts Sieyes introduces — *indirectness* and *exchange*. The former is often presented solely in the context of voting rules, but I wish to broaden the view to see in it an intrinsic part of Sieyes' political philosophy, as well as giving the first hint of a connection between representation and law creation. The contrast with a seemingly similar concept, federalism, which Sieyes vehemently opposed, provides the best indication of that. The latter concept emerges from Sieyes pre-revolutionary (and largely untranslated into English) work on political economy. Together, they hint at a workable theory of representation that builds on the fundamental insights of Rousseau and Hobbes. I say *hint*, because Sieyes

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[33] Cited in Skinner, "Hobbes on Representation," 163.
[34] Emmanuel Joseph Sieyes, *Political Writings: Including the Debate between Sieyes and Tom Paine in 1791*, ed. Michael Sonenscher (Hackett Publishing, 2003), 71.
[35] Ibid., 8.
[36] Emmanuel Joseph Sieyes, *Écrits Politiques* (Paris: Éditions des Archives Contemporaines, 1985), 62.
[37] Murray Forsyth, *Reason and Revolution : The Political Thought of the Abbé Sieyès* (Leicester: Leicester University Press, 1987), 56, 141.
[38] His novel use of the word "exchange" in strictly political contexts in two early pre-revolutionary essays, "View of the Executive Means" and "An Essay on Privileges," will merit some extended discussion. Examples: Sieyes, *Political Writings*, 10, 79.

himself, either bored of the topic or politically frustrated, never made the final leap.

He did, however, introduce the concept of a political decision and, especially, the combination of *singular* and *plural* aspects of representation[39] — that is, a representative assembly serves the dual function of acting as a body of convention and as a vehicle for the expression of a diverse set of different voices and interests.[40] He managed to synthesise Hobbes' and Rousseau's arguments on sovereignty, but rejected the narrow (and different one from the other) conceptions of representation which both had suggested. Sieyes accepted from Hobbes and Rousseau the separation of state from sovereignty and sovereignty from government, respectively, and the link between sovereignty and the people at large as a constituent power, but for him this implied neither an embodiment form of representation (as in Hobbes) nor a delegated one (as in Rousseau). Representation was more than just the aggregation of particular wills,[41] nor was it simply an alienation of political prerogative; it was rather a constructive manifestation of constituted power, the creation of a space for both *division* and *identification*.[42]

Sieyes, naturally, is a transitional figure in the pantheon of thinkers on representation, straddling the divide between those who had 'visions' of representation as the challenges of popular politics were emerging, and those

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[39] Michael Sonenscher, "Introduction," in *Political Writings: Including the Debate between Sieyès and Tom Paine in 1791* (Hackett Publishing, 2003), xv–xxi.
[40] Forsyth, *Reason and Revolution : The Political Thought of the Abbé Sieyès*, 143.
[41] Keith Michael Baker, "Representation Redefined," in *Inventing the French Revolution: Essays on French Political*, 1990, 250.
[42] S. Nasstrom, "Representative Democracy as Tautology: Ankersmit and Lefort on Representation," *European Journal of Political Theory* 5, no. 3 (2006): 321–42.

who tried to implement those same ideas or variants of them in real institutional design. Beginning with Sieyes, representation as a topic of inquiry moves from political philosophy to constitutional debate. This in itself is not terribly surprising; beginning in the 1780's (and not just in Philadelphia and Paris), the concept is incorporated into constitutions as a method of governance (the term 'representative democracy' begins entering into usage with the drafting of US state constitutions in the first fourteen years after independence[43]), and the leading thinkers on the issue were either involved in drafting constitutions or sought, occasionally successfully, to reform them. But representation as social science gradually sheds some of the insights, especially those connecting sovereignty with the unique properties of law creation, of the early visionaries. Sieyes' insight into singular and plural representation gets lost too, echoed explicitly in Carl Friedrich's brief discussion of the two functions of representation[44] as well as, implicitly, in the contemporaneous work of Schmitt and Kelsen, but rarely appearing elsewhere.

Having examined these 'visions', we can see that sovereignty and the state have been separated from each other and, more dramatically, from government, an entity needing its own separate legitimacy. Though governments can arise in different forms and with different origins, sovereignty, for all three thinkers can emerge only from the people at large

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[43] Willi Paul Adams, *The First American Constitutions : Republican Ideology and the Making of the State Constitutions in the Revolutionary Era*, vol. Expanded (Lanham, Md.: Rowman & Littlefield Publishers, 2001), 231–234.
[44] Carl J. Friedrich, *Constitutional Government and Democracy: Theory and Practice in Europe and America* (Boston: Ginn, 1950), 262–263.

(however differently this is explained and justified by each). The separation of government from sovereignty portends the necessity of positive law — again this is an argument each one makes, but makes in a decidedly unique way. Where does this leave popular sovereignty? It is expressed, for all three, in two unique and seemingly unrelated powers: the creation of law and a partial agency over executive government. These, at least, are the *end*s, and they too are common, though in varied idiom, to all three. The *means* to these ends are muted in Hobbes' and Rousseau's discussions of representation, but are fully formed only in Sieyes': the creation of a separate sphere for the *action* of popular sovereignty and a legitimate means of exchange within that sphere. This implies that civil society or Manin's media-driven 'audience democracy' cannot qualify. The means must rather consist of a formalised space of maximal reasonable diversity for the continual re-enactment of the sovereignty of the people in performing the only two tasks that connect them to the organs of state and government as well as subordinate the latter to its ultimate sovereign.

The three writers under consideration in Part I do more than give us visions of representation; they give us tools and, more importantly, a vocabulary for tackling the fundamental problems of unity and diversity for which representation will turn out, almost *malgré eux*, to be the solution. All three ultimately frame the problem along two dimensions: Firstly, on the issue of sovereignty and whether it is ultimately grounded in the people at large or some other non-popular origin; and secondly, the expression of this

sovereignty in a special kind of authorised decision — positive law — and whether this expression is conceived in the tradition of natural law or legal positivism. The second question takes us into Part II.

Popular Sovereignty and Law

Representative democracy has emerged independently in a few countries (notably the US, UK, and France) in the last 300 years, and been copied and adapted in many more. Refracted through myriad traditions, historical accidents, and path-dependencies, certain patterns nonetheless emerge. In particular, regardless of the design or intentions of constitutional framers, those political institutions most faithful to principles of representation tend to deal primarily in two governmental tasks: some measure of partial agency over the executive (ranging from a requirement of parliamentary confidence to loose advise-and-consent oversight) and law creation. In Condorcet's terms, these are the powers of surveillance and legislation.[45] A connection between these two powers is hardly intuitive; they seem to suggest radically different tasks requiring dissimilar skills, qualifications, and methods of decision making. It is the argument of this dissertation, however, that their institutional pairing is not accidental or incidental at all, but rather an expression of the limited, but crucial, political expression popular sovereignty

[45] Nadia Urbinati, "Condorcet's Democratic Theory of Representative Government," *European Journal of Political Theory* 3, no. 1 (2004): 64.

is supposed to take.

What is more interesting than the connection between these two powers, however, is the connection of either or both of them to the practice of representation. That the power of surveillance should be normatively linked to representation is perhaps not entirely surprising, but the intimate institutional connection of representation to law making deserves more attention than it has hitherto received, and it, analysed in different ways, is the topic of the three chapters that make up Part II.

I will argue that politics is a response to conflict and diversity. The ambition to rule and unite (and to rule by uniting) has always been a feature of both the practice and the theory of politics. From entirely different starting points, both law and representation have sought to deal with the classic ambition to rule and unite while taking into account — and even preserving and enhancing — the built-in problems that politics in a framework of popular sovereignty throws up. Specifically, the problems of *plurality*, as manifest both in the application of authorised political decisions as well as in their formulation and creation, render representation much more than a second-best solution to the requirements of self-government. Rather, they indicate the need for a separate political sphere where law creation, as a privileged form of decision making, is carried out by, and rendered ultimately accountable to, a large and diverse set of people (instead of being the top of a pyramidal chain of command). Part of the solution to this problem, as Rousseau argued, is in employing generality, but it is a generality that goes beyond the wording of

rules. It is, as Waldron suggests, a *generality cubed* — generality manifest in the general terms of law and its general domain across persons and time, generality in the plural method of decision making, and an obligation (or at least aspiration) that the decision be taken in the general spirit. Guizot made a similar argument nearly two hundred years ago, except for him it was not just normative, it was also historical and it was explicitly tied not just to generality but to diversity: the stalemate that plurality created in politics meant that a level of decision making that could be general was needed, and those decisions could only be made by a diverse body of men.[46] To understand this, we will have first to establish where law creation fits into a taxonomy of political decision making.

This argument is developed over three chapters. It begins in Chapter 4, 'Laws' Authors' with a discussion of decisions in general and political decisions in particular. In this chapter, I try to formalise the definition of a *decision*,[47] beginning with Aristotle's[48] definition and ultimately settling on something very close to Raz's.[49] For the latter, the properties of a decision are:

1. **Intention**: In Raz's formulation, this is 'to form an intention' even without a conscious mental act exclusively dedicated to forming this intention. Oldenquist gives examples of choices that do not have this property; these would not properly count as decisions here.

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[46] François Guizot, *The History of Civilization in Europe* (London: Penguin, 1997), xxviii.
[47] A. Oldenquist, "Choosing, Deciding and Doing," in *Encyclopaedia of Philosophy*, ed. P. Edwards (New York, 1967), 97–107.
[48] Aristotle, *The Nicomachean Ethics* (Oxford University Press, 1998), 53–57 [III:2-3].
[49] Joseph Raz, *Practical Reason and Norms* (Princeton: Princeton University Press, 1990), 65–66.

2. **Deliberation**: This property, as noted, is present in all discussions of decision beginning with Aristotle.

3. **Time before action**: Flowing almost directly from the first property is the requirement of time between the intention and the action.

4. **Decisions are reasons**: Just as the third requirement flows logically from the first, so the fourth does from the second. Reasons, however, are a part of deliberation as well.

The kind of decisions which concern us will be *political decisions*, that is, decisions made in conditions of authority and in a general institutional framework of state, a distinction already suggested by Sieyes. In this chapter I will sketch a broad array of political decisions, including the creation of law. Law creation will be defined as a decision meeting the following four requirements:

1. **Generality:** Across time and applications (this discussion draws on Fuller[50], Hayek[51], Austin[52], and Marmor[53]).

2. **Pedigree (sources):** An expansion of Hart's *rule of*

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[50] Lon L. Fuller, *The Morality of Law* (New Haven ; London: New Haven ; London : Yale University Press, 1969), 46–49.
[51] Friedrich A. von Hayek, *Law, Legislation and Liberty : A New Statement of the Liberal Principles of Justice and Political Economy*, vol. 2 (Chicago ; London: University of Chicago Press, 1979), 31–61.
[52] John Austin, *The Province of Jurisprudence Determined*, ed. Wilfrid E. Rumble (Cambridge: Cambridge : Cambridge University Press, 1995), 18–38.
[53] Andrei Marmor, "The Rule of Law and Its Limits," *Law and Philosophy* 23, no. 1 (2004): 1–43.

recognition (drawing on Hart[54], Kelsen[55], and Raz[56]).

3. **Special Institutional Framework:** The specific institutional framework which Raz refers to as *norm-applying institutions* (drawing on Raz[57] and Bentham[58]), more narrow and specialised than the general institutional requirement of the larger set of political decisions.

4. **Publicity:** A separate concept from generality (following Rawls[59] among others).

Having defined a decision, and then the subset of decisions that are political decisions, and then the subset of these that are law-creating, I will seek to show how all the members of the second set which are not members of the third have, despite their broad variance, more in common with each other than any do with those that are members of the third set. Moreover, the distinguishing features of decisions which are law-creating are precisely those which are relevant to the kind of political problem representation comes to solve. A connection between democracy and jurisprudence lies at the core of two books by Waldron — *The Dignity of Legislation*[60] and *Law and*

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[54] H. L. A. Hart, *The Concept of Law*, 2nd ed., Clarendon Law Series (Oxford: Clarendon Press, 1994), 91–110.
[55] Hans Kelsen, *Introduction to the Problems of Legal Theory* (Oxford: Oxford : Clarendon Press, 1992).
[56] Joseph Raz, *The Authority of Law : Essays on Law and Morality* (Oxford: Oxford : Oxford University Press, 1979), 45–66.
[57] Raz, *Practical Reason and Norms*, 132–137.
[58] Jeremy Bentham, *Of Laws in General*, Collected Works of Jeremy Bentham (London: Athlone Press, 1970).
[59] John Rawls, *Political Liberalism*, Expanded ed, Columbia Classics in Philosophy (New York: Columbia University Press, 2005), 66–71.
[60] Waldron, *The Dignity of Legislation*.

Disagreement[61] — but in neither is there a specific and explicit theoretical connection to representation.

Chapters 5 and 6, then, will try to make the philosophical connection between law creation and representation as the concept has been developed in the previous four chapters. Chapter 5, 'Numbers,' deals with the very problem its name suggests. Discussions of one-many-few have been a part of political theory for nearly three millennia. In this chapter, I try to advance this discussion in light of the ideas about sovereignty, government, exchange, and law which emerged in the previous four chapters. If we are to understand political decisions as they are defined in Chapter 4, what are the kinds of numbers of officials that should be involved in these decisions in general and in the decision to create law in particular? Intuitively, the first step is to test whether a decision made by each of those suggested numbers in the standard trichotomy is even conceptually possible. This step precedes, necessarily, any examination of a particular number's merits. The thought experiments proposed by this method lead us to test the theoretical coherence of law creation by the many, understood as something approximating all-affected. This will turn out to be impossible. It's not that direct democracy is impossible; it is very possible. It is that direct democracy *and* the rule of law are impossible together. We can have one, or neither, but not both. A similar thought experiment will rule out — again, not normatively, but conceptually — the creation of positive law by very small numbers. A bit more experimentation with numbers will lead us to *assembly*, which will be fully defined in Chapter 5,

[61] Waldron, *Law and Disagreement*.

as the only conceptually coherent option.

Beyond the thought experiments themselves, the argument on assembly builds largely on the argument Waldron has put forth in *Law and Disagreement*. Representation is generally compared with direct democracy — sometimes as an improvement[62] on the latter and often as a second-best[63] mandated by practical exigencies — though, as Singer pointed out even decades before the internet and reality-TV voting by text message, technology has rendered the 'practical' argument rather obsolete.[64] The operative question in this debate is why the representative process leaves so many people *out*. The question I want to ask is why the two powers alluded to above — legislation and surveillance — need to draw so many people *in*. None of the other forms of decision outlined in Chapter 4 require assembly, yet even in the more direct forms of law making envisaged by Rousseau and especially Condorcet,[65] an assumption reigns that law making will be done in assembly by a large group of people, whether delegated, delegating, or otherwise. This chapter will further seek to distinguish laws from rules, and *ruling* (as a verb) from *legislating* — the latter distinction emerging from the work of Locke,[66] who did not get his own chapter in Part I. This distinction is something I will develop and sharpen in Chapter 5, as well as the following one. Understanding representation in this necessarily plural aspect — having

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[62] George Kateb, "The Moral Distinctiveness of Representative Democracy," *Ethics* 91, no. 3 (1981): 357–74.
[63] G. Brennan and A. Hamlin, "On Political Representation," *British Journal of Political Science* 29, no. 01 (1999): 111.
[64] Peter Singer, *Democracy and Disobedience* (Oxford University Press, 1974), 105–111.
[65] Urbinati, "Condorcet's Democratic Theory of Representative Government," 65–66.
[66] John Locke, *Two Treatises of Government and a Letter Concerning Toleration* (New Haven, Conn; London: Yale University Press, 2003), 193–209 [2: XIX, §211-§243].

diversity as its input, but maintaining diversity in its output — limits the use of the term considerably from its broad metaphorical use in much of the existing literature. In the usage I am suggesting, the principal-agent metaphor is obviously irrelevant, and the much-cited question of whether Bono is a representative of Africa's poor is moot.

Chapter 6, 'The Problem of Plurality,' will take this argument to a more abstract level and introduce the philosophical point of convergence between what have been two largely separate fields of inquiry (legal positivism and representative democracy). This is the *problem of plurality*. Waldron refers to this as the 'elementary circumstance of politics.'[67] Plurality not only dictates a solution in the form of law — general rules about unknown future decisions, instrumental in ordering a plural and diverse world — it also dictates a decision procedure that has disagreement and conflict built into it, as well as one that is grounded in popular legitimacy but in need of a separate 'political stage.'[68] The meeting point for both of these problems — the same problem, in fact — is in legislation by representative assemblies as a part of the institutional framework of state.

Ultimately, analysis of the fourth and fifth chapters will yield only one political solution that can coherently deal with the challenges thrown up in the first three chapters — representation. Synthesising this dialectic of law and popular sovereignty will recapitulate a hidden dialogue between two twentieth

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[67] Waldron, *Law and Disagreement*, 102, 144.
[68] Weymans, "Freedom through Political Representation: Lefort, Gauchet and Rosanvallon on the Relationship between State and Society," 269.

century thinkers who struggled with the same questions while reaching nearly opposite conclusions. Kelsen comes closest to deriving a theory of representation from principles of law;[69] Schmitt connects them even more compellingly, though he does so only to attack it.[70] I end Chapter 6 with a plea for a much narrower use of the word representation in political theory than is current in the literature. Representation, as posited in this dissertation has meaning only in this political context: only when concerned with sovereign decision making powers exercised in assembly on behalf of general publics. Furthermore, a *representative*, as we will come to understand it by the end of this chapter, cannot himself be *represented*.

Part II thus seeks to establish a connection between two components of the plurality problem by building on the distinctions and insights of the thinkers surveyed in Part I. In Part I, we are forced to recognise the absence of unanimity and the need for common rules and norms by which this absence is negotiated in ways that are compatible with the people being sovereign. This recognition is manifest in two ways: in a *practice* wherein a very large number become a much smaller large number while still preserving multiplicity, and in an *outcome* wherein many proposals for public decisions are considered and refined until one general rule is created for untold future instantiations of the problem under discussion. Ultimately, it is representation which links law to

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[69] Kelsen, *Introduction to the Problems of Legal Theory*; Hans Kelsen, *General Theory of Law and State*, ed. Anders Wedberg and Wolfgang Herbert Kraus, Natural Law Doctrine and Legal Positivism (Cambridge, Mass.: Cambridge, Mass. : Harvard University Press, 1945); Hans Kelsen, *The Pure Theory of Law, Its Method and Fundamental Concepts*, trans. C. H. Wilson (Lond.: Lond., 1934).

[70] Schmitt, *The Crisis of Parliamentary Democracy*, 33–50; Carl Schmitt, *Legality and Legitimacy* (Durham & London: Duke University Press, 2004), 17–26; Carl Schmitt, *Constitutional Theory* (Durham: Duke University Press, 2008), 235–252.

popular sovereignty and the Rousseauian conception of the will — and it does so without uniting the population as Rousseau (and, in a partial sense, Hobbes as well) posits as necessary. Part I, then, gave us the terms in which to frame the question, and Part II the analytical framework to answer it. In. In the conclusion, I will suggest questions that can now be asked on the basis of the findings of Parts I and II regarding the institutions which tie sovereign people to political outcomes.

Putting Politics Back Into Representation

This dissertation narrows the domain of representation considerably, going against the grain of recent work on the topic. It is not that I reject the descriptive relevance of 'audience democracy' as it is described in Manin or of all the various methods of claiming to speak or act on behalf of others in civil society, the marketplace, or global forums that Brito Vieira and Runciman and, more recently, Saward discuss. Nor do I reject a non-scientific use of the word *representation* to describe and debate these matters. But representation *sensu stricto* as a component of a normative liberal democratic political theory has a more specialised and limited use. And we need to understand why the very unique — highly formal, even ritualised, and far more powerful than we appreciate — forums which political representation have given birth to over the centuries are still a part of liberal democratic states and their capacity to

continue to secure legitimacy. Political representation, as it is understood in this dissertation, serves to continuously renew the sovereignty of the people over state institutions by establishing a diverse space with a recognised means of exchange to carry out the two tasks most intimately connected with sovereignty as it has been understood for over three centuries.

Representation today is a part of political institutions, arguably even a threatened one, and certainly a misunderstood one. The response to this threat is beyond the scope of this dissertation, but it is, in brief, a revival of parliamentarism — *revival*, in the sense of an ideal, not *return*, in the sense of an imagined past. Parliamentarism is not just threatened by executive and judicial encroachment — though this is an unmistakable and nearly universal trend in the advanced democracies — but also by the kinds of public acts applauded in some of the works alluded to earlier that take a broad, and to me, ultimately unsatisfying view of representation. These overly broad notions of representation free it from the state and ultimately free it from politics. At the theoretical level, this is done by overextending the role of metaphors of representation — whether it is principal-agent, parent-guardian, or any other — and, more importantly, by leaving aside the *diversity* which is a necessary component of representation and focusing exclusively on its unifying characteristics.

But representation is not just about unifying. It is not just about many voices being turned into one voice; it is about many voices being turned into many fewer, but still many other voices which together yield rule-based general

decisions which can apply to many diverse cases — and that do so in a process so imbued with diversity and multiplicity in both inputs and outputs, that it secures legitimacy for legal actions taken by state actors outside representative assemblies. This delicate balance was at the heart of Sieyes' theory of representation — a balance he struck precisely because he needed to answer the questions raised, each in his own unique way, by Hobbes and Rousseau on the methods by which a sovereign but permanently and necessarily divided people can legitimate a government to act in a diverse set of future cases without losing its own sovereignty.

Part I

Visions of Representation

Chapter 1

Personation, Not Representation

In this chapter, I shall argue that Hobbes has given us a subtle and painstakingly laid out theory of authorised political action which forms the basis of his larger notion of consent and sovereignty. This view of authorised action has lost none of its relevance, and it was presented in a remarkably consistent way across a range of texts over several decades. It is not, however, a theory of representation, and it cannot be regarded as the foundation of one either.

And yet, much is made of Hobbes' putative theory of representation, including a still broad and mostly edifying disagreement in the literature of the last decade — more than three and a half centuries after the publication of *Leviathan*! I shall argue that it is not altogether obvious, however, that Hobbes has what can rightly be called a theory of representation. Above all, his discussion of representation has no institutional import. On his terms, representative institutions, as we might understand them today and as they were understood even in the contemporaneous ideological tracts he sought to counter,[71] are either useless or irrelevant. He certainly has a theory of *authorisation* and *consent*. And to make his argument for authorisation, he postulates a unique and fascinating account of representation's meaning and genesis. But that's as far as it goes. To adduce Chapter XVI of *Leviathan*[72] in imputing a theory of representation to Hobbes would be like claiming that John

[71] Skinner, "Hobbes on Representation," 163.
[72] Thomas Hobbes, *Leviathan*, Cambridge Texts in the History of Political Thought (Cambridge: Cambridge University Press, 1991). Quotes and page numbers are from the Cambridge edition. I have also included the conventional chapter and paragraph numbers for ease of reference, even though the Cambridge edition does not number the passages.

Rawls had a theory of the Original Position — rather than a theory of justice which relied on a carefully stipulated original position.

Despite this, Hobbes' 'theory of representation' has traditionally been taken as a starting point in discussions of the topic —with Pitkin memorably referring to Chapter XVI of *Leviathan* as 'the first extended and systematic discussion of representation in English' and later 'the first examination of the idea of representation in political theory' without a language qualification. Though Skinner corrects this error,[73] he too reads a theory of representation into Hobbes' writing on the topic. But is it a fair reading? Hobbes' use of the word is novel, but it is limited to one political context, and it is not repeated when he makes the same argument later in a different ideological climate.

Accordingly, in assessing how Hobbes understands representation, we are actually answering two separate questions. First, we need to understand what representation is for Hobbes, and second, we need to assess the argument he makes about representation, using his definition of the concept. The usefulness of the first does not depend on the validity of the second. And, notably, though Hobbes uses the word 'representation' in a few other contexts, he never relies on it to advance any other argument.

This chapter will argue that Hobbes does not actually put forward a theory of representation as we will be using the term in the rest of the dissertation. Nevertheless, the argument he makes on authorisation did lay

[73] Skinner, 'Hobbes on Representation,' 155; citing Pitkin, *The Concept of Representation*, 14 and Pitkin, 'Representation,' 140.

the groundwork for the first genuine theory of representation, that of Sieyes. This is done in two ways as I will show in detail in Chapter 3: First, Hobbes' concept of the *person* and *personation* are the first serious discussion of political action at a distance, or attributed action; second, his argument that sovereignty emerges from radical individualism will inform the later notion of constituent power.[74] But first in this chapter, we need to establish what Hobbes' concept of the *person* was and the various ways Hobbes suggests persons can be related to each other; this will be the subject of the first section. It will be followed in the second section by a discussion of *dominion* and then, in the third section, a discussion of *multitude*. In the fourth section, all three concepts will be tied together in Hobbes' concept of *personation*, and this concept will be assessed in light of its limitations and relevance to representation. Ultimately, it is the conclusion of this chapter that Hobbes does not have an actual theory of representation, but that he does give us a vocabulary and a set of tools for beginning to construct one.

Hobbes' textual oeuvre makes for occasionally challenging referencing. Books are known by different titles; some are written years before publication or published in parts; there are occasional differences between English and Latin versions (which themselves have separate chronologies); and some texts were set out as parts of a series which never fully materialised. I will stick to standard titles here, and treat five discrete works by the following names.

[74] Forsyth, "Thomas Hobbes and the Consituent Power of the People," 192.

Elements of Law was Hobbes' first major piece of political philosophy.[75] He wrote it in 1640, though it was only published a decade later. It is sometimes known as *Humane Nature* or *Elements of Law, Moral & Politick*, and often its two constituent parts are referred to by name: *Human Elements* or *The Fundamental Elements of Policie* for the first part, and *De Corpore Politico* or just *De Corpore* for the second. In 1642 *De Cive* became the first major philosophical work of Hobbes to be published.[76] It was published in Latin first and then, nine years later, in English.[77] The differences between the two versions will not play a role in this dissertation. It is known by its full name *Elementorum Philosophiae: Sectio Tertia de Cive* as well as by its English name *On the Citizen*.[78]

In 1651 Hobbes published his landmark *Leviathan*, also known as *Leviathan; or, The Matter, Forme, and Power of a Common-wealth, Ecclesiasticall and Civill*.[79] He published a Latin version of it seventeen years later in 1668, and the discrepancies between the two versions will be relevant in this discussion. Finally, in 1658 Hobbes published *De Homine*, also known by the longer title *Elementorum Philosophia: Sectio Secunda de Homine* as well as by the English name it was given upon being translated in the twentieth

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[75] Thomas Hobbes, *The Elements of Law, Natural and Politic : Part I, Human Nature, Part II, De Corpore Politico ; with Three Lives* (Oxford: Oxford University Press, 2008).
[76] Thomas Hobbes, *De cive : the Latin version, entitled, in the first edition, Elementorum philosophiæ sectio tertia de cive, and in later editions, Elementa philosophica de cive* (Oxford: Clarendon Press, 1983).
[77] Thomas Hobbes, *De Cive : The English Version Entitled, in the First Edition, Philosophicall Rudiments Concerning Government and Society* (Oxford: Clarendon Press, 1983).
[78] Thomas Hobbes, *On the Citizen* (Cambridge: Cambridge University Press, 1998).
[79] Hobbes, *Leviathan*.

century, *Man and Citizen*[80] — an occasional source of confusion with the English name for *De Cive*. The works under discussion by the names I will use are: *Elements* (1640), *De Cive* (1642), *Leviathan* (1651), *De Homine* (1658), and the Latin edition of *Leviathan* (1668).

The Matter, Forme, and Power of the Person

We need to begin by assessing Hobbes' exposition of representation in Chapter XVI of *Leviathan* and, then, the role it plays in his larger theory. In Chapter XVI, Hobbes introduces the reader to a set of *actors* (persons, natural or artificial, etc.) and the various types of *relationships* (dominion, ownership, etc.) that tie them together. The discussion begins with the introduction of one of the more curious concepts — the *person* — that is deceptively simple at first, but singularly bounded and inclusive in a way that might not be necessary for representation, but is certainly necessary if representation is to advance Hobbes' idea of sovereignty. The *person* is defined as 'he whose words or actions are considered, either as his own, or as representing the words or actions of another man, or of any other thing to whom they are attributed, whether truly or by fiction.'[81] Note how broad the definition is, including anything that can have words or actions attributed to it. And it is not just a matter of attribution — Hobbes makes clear later that when he uses a

[80] Hobbes, *Man and Citizen*.
[81] Hobbes, *Leviathan*, 111 [XVI,1].

possessive pronoun he is invoking his unique notion of *ownership*. The possessive relative pronoun 'whose' indicates that words and actions are owned by persons in this sense as well.

This is an odd use of the idea of a person. For much of political philosophy's history until very recently, the accepted word for the human political actor, whether considered as an individual or collectively, was simply *man*. Hobbes, however, in preferring 'actor' to 'man' is not just being politically correct, but rather is looking for any 'representer of speech and action'[82] and explicitly invoking the metaphor of the theatre. Despite its obvious shortcomings, the theatre analogy is invoked consistently in the literature on representation from Hobbes onwards.[83] Skinner argues that the leap from theatre to politics is not so big, since theatre had to be authorised in Hobbes' time anyway.[84] This argument is problematic, however, not least since Hamlet, Iago, and others were not around to authorise specific actors' portrayals of them, nor were they obliged to come back and 'own' what befell them on the stage. Perhaps it is better to see the references to the theatre (and, in the same breath, to tribunals) less as metaphors and more as illustrations. It has even been argued that one of the advantages of the otherwise more confusing definition of artificial persons in *De Homine* is that it eliminates the possibility of the theatre metaphor being invoked.[85] The actor that concerns Hobbes is

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[82] Ibid., 112 [XVI,3].
[83] Philip Pettit, "Varieties of Public Representation," in *Political Representation*, ed. Ian Shapiro and Susan Stokes (Cambridge: Cambridge University Press, 2009), 65.
[84] Skinner, "Hobbes and the Purely Artificial Person of the State," 15–16.
[85] David Copp, "Hobbes on Artificial Persons and Collective Actions," *The Philosophical Review* 89, no. 4 (October 1980): 583.

anyone who can 'personate' himself or someone else, i.e., bring words or actions to a public space. The critical elements bear repeating: words or actions on one side, and a public space of any kind on the other.[86] For Malcolm, the importance of the theatre lies in its ability to combine both and to elicit a response at two levels,

> entertaining the image which the metaphor presents, and understanding it as a representation of something else… If we see the actors only as actors reciting lines, we shall get little benefit, aesthetic or moral, from the play; but if we see them only as the characters they represent, we no longer see the play, *qua* play, at all.[87]

Seen this way, the point about the actor is not that he is authorised or a faithful image of the real thing, but the very real effect his artificiality has on an audience.

The taxonomy of Hobbes' persons is illustrated in **Figure 1**. We can regard each entry at any level of the hierarchy as a fully formed category. Arrows pointing down from any category signify a split into subcategories. There is no reason that the illustration in **Figure 1** cannot continue up or down (and indeed it will expand in both directions when we revisit it in **Figure 7** later in this chapter), but here I focus on the five categories Hobbes explicitly names in his exposition on persons and use the arrows to show which are subsets of which. Each node on the diagram — that is, each category regardless of place in the hierarchy — is denoted with a letter in brackets.

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[86] On the importance of the publicity in Hobbes, see Jeremy Waldron, "Hobbes and the Principle of Publicity," *Pacific Philosophical Quarterly* 82, no. 3&4 (September 2001): 447–74.
[87] Noel Malcolm, *Aspects of Hobbes* (Oxford: Clarendon Press, 2002), 227.

The diagram in **Figure 1** engenders only one major dispute near the end. First, persons [p] are divided into *natural* [q] persons or *feigned or artificial* [r] persons.[88] The artificial ones are then divided into those represented *truly* [s] and *by fiction* [t]. Implicitly, then, the only kinds of representation allowed are of artificial people truthfully [s] and of artificial people by fiction [t], or, in other words, all artificial persons [r]. A natural person [q], by definition, represents no one but himself (if that). **Figure 1** diagrams each split on each step down Hobbes' taxonomy. Let's take each category separately.

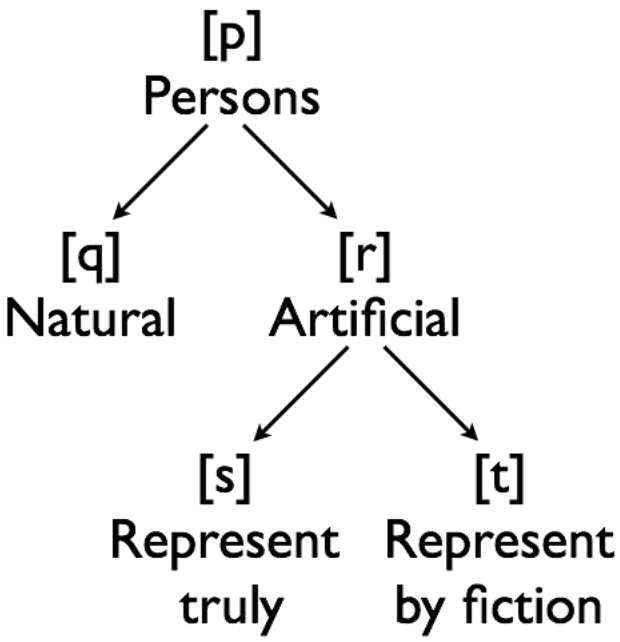

Figure 1: Taxonomy of Persons

The distinction between natural [q] and artificial [r] persons is not entirely one between human and non-human (corporate, institutional, etc.)

[88] Hobbes, *Leviathan*, 111 [XVI,2].

instantiations of persons.[89] The natural person's actions and words are his own. That, and not any resemblance to an actual human being, is the focal characteristic of a natural person, and by extension, the key to understanding the concept of the artificial person. Though Hobbes' notion of representation, once expanded, will explicitly require two parties and implicitly at least three, the first appearance in all of *Leviathan* of the word 'represent' (the word does not appear at all in *Elements of Law* or *De Cive*) comes when the natural person 'represents himself.'[90] This immediately raises a dimension usually ignored in mapping out Hobbes' persons onto actual political actors — time. If a natural person is one who always owns his own words and deeds, then it is a small set indeed. But if one can move in and out of natural personhood based on context, then presumably the other designations are as fluid as well.

The designation *artificial person* is responsible for the most confusion and controversy. Its existence is defined and further categorised by its standing in a relationship to someone or something else that is a form of representation, but whether the artificial person is the one doing the representing or the one being represented is not firmly established. On its own, this ambiguity is not critical. Since the terms at this point are just labels and in their names alone have little analytical weight, all that matters is settling conclusively on one. The original, English-language text of *Leviathan* is not unclear: the artificial person is representing, not represented.[91] Skinner argues that this is backwards. He even laments as 'unfortunate… that so

[89] Pitkin, *The Concept of Representation*, 15.
[90] Hobbes, *Leviathan*, 112 [XVI,3].
[91] Ibid., 111–112 [XVI,2 and XVI,4].

many of his interpreters have followed him at this point.'[92] It takes a few readings (of Skinner) to be sufficiently convinced that the antecedent of both 'him' and 'his' in this sentence is Hobbes; that is, Skinner contends that interpreters err by interpreting Hobbes' idea of an artificial person as Hobbes himself defines it. Fortifying Skinner's argument are references Hobbes makes in later works (*De Homine* and the Latin edition of *Leviathan*)[93] to artificial persons in this sense, though when most of Skinner's essay is reprinted as a chapter in an edited volume, this claim is abandoned.[94] Militating against this claim, however, and doing so rather decisively, are Hobbes' own words in presenting the concept. How could he be so inconsistent? As before, it is worth remembering always that Hobbes was not trying in this text to advance a coherent theory of representation. He was introducing the vocabulary of representation to advance an argument about authorisation, and to that end, the focus of his theoretical persons was on their words and actions in public, and the ownership — their own or of others — of these.

With that confusion out of the way, we can approach the relationship between natural persons and artificial persons and assess it as a form of representation. Based only on this understanding of the definitions of each type of person, we could sketch out a superficial connection as in **Figure 2**. In this illustration, as in all of the next five, solid arrows signify actions, with the direction of the arrow pointing from subject to object.

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[92] Skinner, "Hobbes and the Purely Artificial Person of the State," 11.
[93] cited in ibid., 12.
[94] Skinner, "Hobbes on Persons, Authors and Representatives," 158.

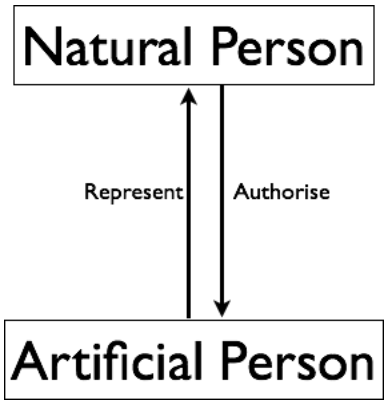

Figure 2: A first glance at natural and artificial persons

Quite simply, a natural person authorises an artificial person who represents the natural person. But there is both much more and much less going on in Chapter XVI than captured in **Figure 2**. It is worth thinking of natural persons and artificial persons as *classes* rather than *roles*. And the class of artificial persons is certainly not representing the class of natural persons; nor is the latter authorising the former. Similarly, the class of judges is not sentencing the class of criminals; a judge in his role as presiding justice can hand down a sentence on a criminal in his role as convict. The illustration in **Figure 2** misses all the possible relationships because it misses all the different ways a political actor can be an artificial person, as illustrated in **Figure 1**.

In developing his argument, Hobbes adumbrates a variety of possible relationships between the various kinds of persons, but avoids too much detail for the permutations that are, for him at least, ideologically irrelevant. For example, 'of persons artificial, some have their words and actions *owned* by

those whom they represent.'[95] If some artificial persons have their words and actions owned by those whom they represent, then others, implicitly, must exist who do not[96] — either because they are owned by someone else who is not being represented or because, though they represent in some form someone else, they themselves own the words or actions. We are left then with three types of artificial persons, even though Hobbes wants to dedicate the discussion to the first type, the one he refers to as representing truly.

An artificial person representing truly is the subject of Figure 3. In this figure, as in the following three figures, we are looking at the different roles artificial persons can play as we move around the taxonomy suggested in Figure 1. The solid arrows indicate direct actions Hobbes has associated with various roles, and the various roles are in boxes. The *actor* is always an artificial person.

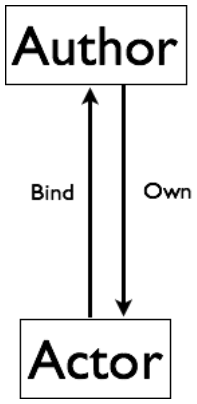

Figure 3: Artificial person representing truly

[95] Hobbes, *Leviathan*, 112 [XVI,4].
[96] Pitkin, *The Concept of Representation*, 21.

Figure 3 shows the simplest kind of relationship an artificial person can have, that of representing truly, and, except for the addition of the Hobbesian terms *bind* and *own* (about which, more below), it looks remarkably like the illustration in **Figure 2**. But as we follow Hobbes deeper into Chapter XVI and add more roles to fully explicate various categories of artificial persons, the divergence from the simple natural-artificial relationship mapped out in **Figure 1** will become greater, and the sorts of actions different parties take will become more varied and more complex.

Even the apparently simple relationship defined in Figure 3 is not as simple as it appears. Ownership, occasionally only obliquely referred to in Chapter XVI by use of possessive pronouns, implies a set of responsibilities for actions and words, except that rather than being contrasted with rights, these responsibilities are just considered as a different category of rights. Pitkin contrasts these 'two aspects of authority,'[97] but for Hobbes they are actually parallel rights — the right of possession as against the right of action.[98] And in fact, what's missing from the pair of arrows in **Figure 3**, though not logically necessary in the pair in **Figure 2**, is the action that is covered by both rights, namely the making of a covenant with a third party. The relationship, in its most abstract arrangement between a natural and artificial person described as 'representing truly,' does not need any other parties and can be characterised fully by the verbs 'represent' and authorise,' depending on the direction: the natural person authorises the artificial person, and the artificial

[97] Ibid., 19.
[98] Hobbes, *Leviathan*, 112 [XVI,4].

person represents the natural person. But once we accept the natural person as *author* and his artificial counterpart as *actor*, their rights over each other take meaning only with the introduction of an active third party — not simply an audience. It is by the actor's covenant with this third party that he binds the author; the covenant itself an expression of the right of possession of the author. Without it, neither owns or binds, though each might represent and authorise. And this right of possession is already present in this simple example and already introduced by its other name, *dominion*, well before other categories of representation are discussed. For some reason, dominion is generally only discussed in the context of representation by fiction (where we can introduce 'incapable'[99] entities, multitudes, etc.),[100] but Hobbes actually puts it right here in the simplest arrangement as a way of binding one actor to actions that are not his own.

We can illustrate this more clearly with the other two kinds of artificial persons (before returning to this one). What or who is actually being represented is apparently deliberately left unclear in order to keep the term as broad as possible. Following Hobbes' convention, we can refer to this as the 'thing represented' ('thing' in the following diagrams). When the thing represented is not a natural person, we have *representation by fiction*. This kind of representation is further split into two categories, though, for the first time in Hobbes' taxonomy, they are not given clear names. This is actually quite exceptional in Chapter XVI where everything is named and occasionally

[99] Ibid., 113 [XVI,9].
[100] See, for example, Runciman, "Hobbes' Theory of Representation," 23.

there are lists of synonyms for a given concept. The two categories of fictional representation are distinguished along one dimension only — the presence or absence of *authority*, that same right of action which only an owner can grant.

In the **Figure 4**, we see an actor — an artificial person, as the actors are in all the examples — making a covenant with a third party by the authority granted him by an author, which binds the thing represented, in whose name he acts and who he personates. This could be a judge [*author*] authorising a guardian [*actor*] to send a child [*thing*] to school [*3rd party*]. It could also be a firm's president [*author*] authorising an attorney [*actor*] to speak for the firm [*thing*] before a judge or the agent of another firm [*3rd party*]. As before, the solid arrows indicate direct actions Hobbes has associated with various roles, and, beginning with this figure and in the following two figures as well, the dotted lines indicate the indirect actions made possible by personation. The various roles are in boxes, and the *actor* is always an artificial person.

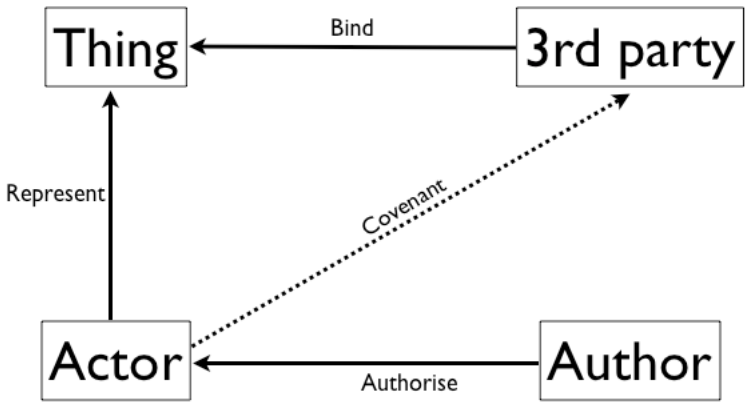

Figure 4: Artificial person representing by fiction (with authority)

Authorised representation — representation by fiction with authority — is the representation that concerns Hobbes, and it is on this form (illustrated in **Figure 4**) that he constructs his theory. The other forms are there to elucidate the important features of this one. We will examine them before returning to this.

Once authority is removed, the model more or less collapses. Covenants oblige no matter what, but when no one has authorised an actor to make a covenant, 'it obligeth the actor only; there being no author but himself.'[101] And so, as in the **Figure 5** below, an attorney [*actor*] really can represent a firm [*thing*] before a judge [*3rd party*], but lacking authority to do so, nothing he agrees to can actually bind the firm or anyone for that matter but himself. This notion of representation is carrying a very light load. Someone can claim falsely — in the sense of, without authorisation — to speak or act for a person and still be his representative; he just cannot actually control or limit that person's actions in any way.

[101] Hobbes, *Leviathan*, 113 [XVI,8].

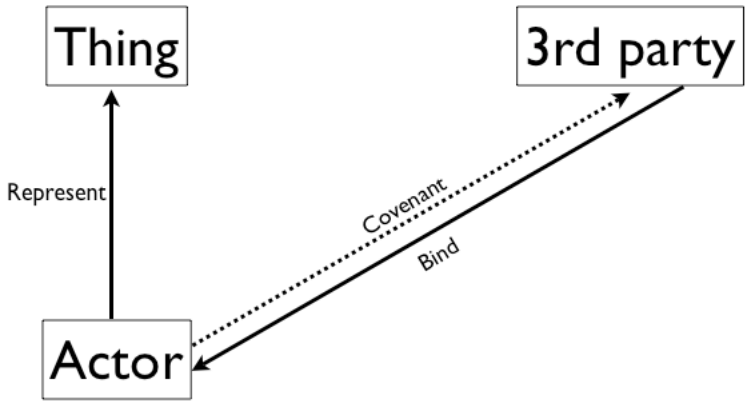

Figure 5: Representation by fiction (without authority)

This amusing possibility illustrated in **Figure 5** is probably the closest that the theatre metaphor comes to describing a thing represented. As no Antonio has actually authorised the actor on stage portraying him to promise Shylock a pound of flesh in the event of default, it is the actor himself who apparently must pay the grisly penalty: 'Is dearly bought, 'tis mine, and I will have it. If you deny me, fie upon your law!'[102] The covenant between Shylock and Antonio, as well as the lack of authority in any sense Hobbes might understand it, could not be clearer. As if to highlight the point, Shakespeare — the playwright for this discussion, if not necessarily the author in the Hobbesian sense — leaves them the only characters who, by the end, are unmarried.[103] Exactly what the actor playing Faustus owes at the end of an evening's performance (of the Marlowe version, if not the Goethe one) is less clear.

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[102] William Shakespeare, *The Merchant of Venice* (New Haven: Yale University Press, 2006), 155 [IV,1]. Thanks to Mark Philp for suggesting this example.
[103] Margaret Atwood, *Payback: Debt and the Shadow Side of Wealth* (London: Bloomsbury, 2008), 152.

What would happen, however, if we introduced an author, but rather than making it a separate person, we made it the thing represented? The picture, as in the **Figure 6**, begins to resemble a rather distant category, that of the artificial person representing truly (seen earlier in **Figure 3** and, superficially at least, **Figure 2** as well).

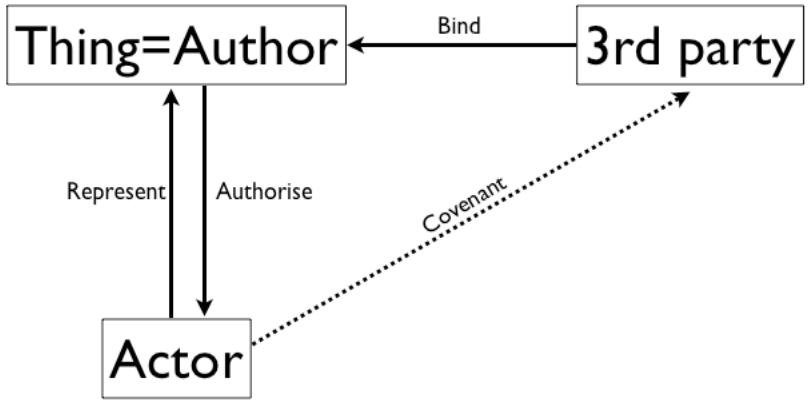

Figure 6: Another look at representing truly

Finally, let's consider what persons are not — or, more to the point, what entities exist in Hobbes' world that are not persons. This is a non-empty set no matter how we interpret the various kinds of persons, particularly if we accept the artificial person as the representative not the represented. 'There are few things, that are incapable of being represented,' including 'inanimate things, as a church, an hospital, a bridge' and 'likewise children, fools, and madmen that have no use of reason.'[104] Clearly the church, hospital, and bridge are not natural persons who own their own words and actions. But nor are they artificial persons speaking and acting for someone else. The 'rector,

[104] Hobbes, *Leviathan*, 113 [XVI,9-10].

master, or overseer' fill that role. They are, rather — in a surprisingly intuitive way — non-persons. But then so might children and madmen be. This is all the more notable for the creation in this text of the most important kind of person (for Hobbes theory at least), the 'person of them all' that is the artificial person of the state.

Where does all this leave that other, primary, political concept, *man*? Not all men (in the sense of human beings) are persons; children, for example, though representable by artificial persons, are neither natural nor artificial persons themselves. It is not clear, however, if in *Leviathan*, Hobbes intended for all persons to be understood as men. The definition that opens Chapter XVI leaves little room for equivocation. A person is 'he' (which already lends a human timbre to the concept), and the words or actions he owns are either 'his own' or 'of another man,' not another person. It is hard to read this definition in any way that allows non-humans into the set persons[105] — inanimate objects are certainly excluded, and probably corporate bodies too.

And yet, despite the rare clarity in wording, there is no such consensus in the secondary literature on Hobbes. This confusion has three sources. The first source of confusion is the invocation of inanimate objects as capable of being represented. Because of recurring confusion about who the artificial person is in Hobbes' model, readers often assume that the represented bridges and churches are artificial persons, and therefore *a minore ad maius* persons. These, though, as established above, are non-persons, and nowhere

[105] Aloysius Martinich, *Hobbes*, Routledge Philosophers (New York: Routledge, 2005), 112.

in Chapter XVI are they characterised as persons, artificial or otherwise.

The second source of confusion is Hobbes' repeated use of person in the context of the state/commonwealth and as 'the person of them all' regarding the multitude. At first glance, this seems an unambiguous confirmation of the hypothesis that just as all men are not necessarily persons, so not all persons are necessarily men (or, in other words, of the existence on non-human persons). But, as we shall see below, much of this hinges on the precise construction of the verb *personate*. If the unity achieved by personation is not separate from the act of representation performed by Hobbes' sovereign, then the 'person of them all' is no longer unambiguously non-human.

The third and final source of confusion is the most problematic, and he is the very man who actually 'owns' the words of Chapter XVI, Thomas Hobbes himself. Hobbes returned to the problem of the person seven years after publishing the English *Leviathan* in *De Homine*. Chapter XV of this book is usually just seen as a 'highly condensed account'[106] of the argument in Chapter XVI of *Leviathan* or, at most, a clarification;[107] Hobbes himself gives no indication that he is making a substantial change. The resemblance is, for the most part, overwhelming — so much so that, when at the end of the chapter Hobbes tells us that 'even an inanimate thing can be a person,'[108] it reads like a clarification about the representability of 'inanimate things' in

[106] Brian Barry, "Review: [untitled]," *The American Political Science Review* 68, no. 2 (June 1974): 760.
[107] Skinner, "Hobbes and the Purely Artificial Person of the State," 12.
[108] Hobbes, *Man and Citizen*, 83–85.

Leviathan, though it is in fact a contradiction of the earlier argument. Moreover, in the explication of this point, 'being' a person never comes up again and is replaced with 'bearing a person' and 'having a person.' To add to the confusion, the chapter is actually headlined 'On Artificial Man,' and while the argument on persons and personation is possibly more coherent than its earlier version in Chapter XVI of *Leviathan*, it nowhere contains any inflection of the word representation. This, as I shall argue at the end of this chapter, is no accident.

'Person' turns out to be an interesting concept whose extension surprises both by what it includes and what it excludes. Martinich argues that by the seventeenth century and possibly before, person was understood as meaning an 'individual substance of a rational nature.'[109] I'm not sure what 'substance' can mean in this context, or that there could be a broad consensus on it; the only remotely consonant use of the word in this manner in the *Oxford English Dictionary* (OED) is by Locke in 1694.[110] Even there, the possible overlaps between *person* and *man* are not nearly as equivocal. Skinner, for his part, avers that this usage 'falls strangely on modern ear.'[111] Granted. But the problem is more than just the usage. We could have been persuaded that it was natural to use the word 'person' for both human and

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[109] Martinich, *Hobbes*, 112.
[110] 1694 J. LOCKE Ess. Humane Understanding (new ed.) II. xxvii. 181 We must consider what Person stands for; which, I think, is a thinking, intelligent Being, that has reason and reflection, and can consider it self as it self. "Oxford English Dictionary Person, N.," accessed June 16, 2010, http://dictionary.oed.com/cgi/entry/50176218?query_type=word&queryword=person&first=1&max_to_show=10&sort_type=alpha&result_place=1&search_id=DBat-7o48GL-8035&hilite=50176218.
[111] Skinner, "Hobbes and the Purely Artificial Person of the State," 6.

non-human objects in the seventeenth century and that the word has since been circumscribed to human beings alone. But if the concept itself is so natural, what is the modern word or phrase that captures it? Is there an easily understandable way of describing a political actor that might be human and might be institutional or corporate that is not gnawingly awkward? *Body*?

The latter is an available image, a 'common literary trope'[112] in the political writing of the time, and one Hobbes himself used himself a decade earlier in distinguishing the two fields of philosophy — natural and man-made. The work of nature, he called *natural body*, and the work of man nothing less than *commonwealth*.[113] And yet he consciously abandons this usable image for the person.

Putting all this together, if non-persons exist and are relevant to representation, and if we accept the resemblance between the ownership-by-default of artificial persons representing by fiction without authority and the actual ownership of natural persons, then our modified taxonomy would look something like the illustration in **Figure 7**. As in **Figure 1**, arrows are there to denote subsets (and not actions). The dotted, double-headed arrow is drawn to highlight the ambiguous synonymy of natural persons on the one hand and artificial persons representing by fiction without authority on the other. The most important evolution from **Figure 1**, however, is the additional levels of taxonomic hierarchy both from above and below.

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[112] Malcolm, *Aspects of Hobbes*, 224.
[113] Hobbes, *De Cive*, 145–146 [XII,1].

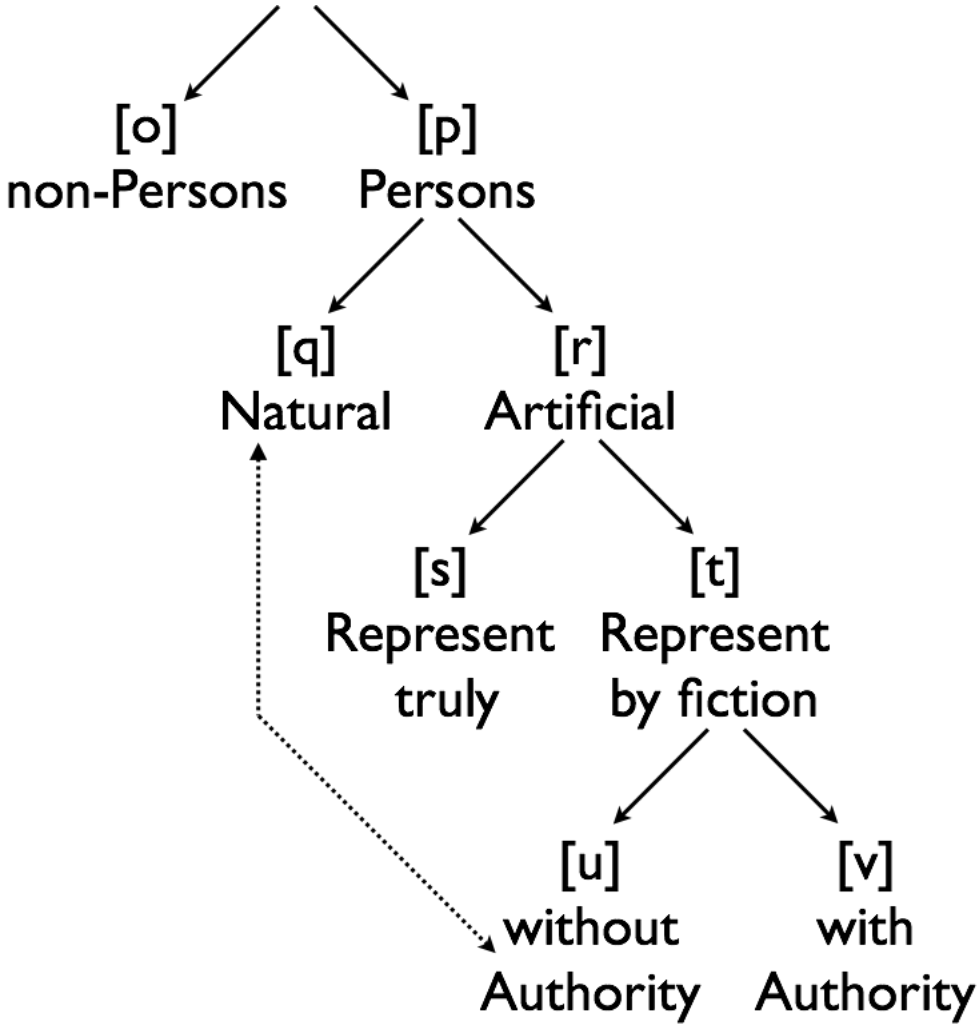

Figure 7: Modified taxonomy of persons

This clarifies a little Hobbes' notion of representation, but it does not clear up the 'centerpiece of the theory':[114] authorisation. In particular, nothing in the relationships we have sketched above justifies the irrevocability of the authorisation that Hobbes demands.[115] It cannot suffice, because the entire model makes sense only with singular persons — one person authorising

[114] David Gauthier, *The Logic of Leviathan: The Moral and Political Theory Of*, Oxford Scholarly Classics (Oxford: Clarendon Press, 2000), 120.
[115] Gregory S. Kavka, *Hobbesian Moral and Political Theory* (Princeton University Press, 1986), 390.

another person acting, etc., with person conceived of in the Hobbesian sense not as a stand in for a human being. The persons might be corporate, but it is hard to see how multiple persons can coherently be put together into one corner of the model without something else doing some of the theoretical lifting.

That Right of Possession Called Dominion

As noted above, the relation between actor and author (**Figure 3**) only has meaning when it involves words or actions and a third party who is not just an audience. Just as the relationship between the natural person and the artificial person is characterised by the reciprocal activities of representation and authorisation, so, when these two parties embark on a covenant, say, with a third party, is their intercourse characterised by the reciprocal activities of *binding* and *owning*. The thrust of Hobbes' argument on authorisation is its binding effects; we might with no small exaggeration see his whole philosophical project as a legitimation of binding will despite judgment. But the parallel action of owning is there, and its import is a lot less clear.

We need to examine what *own* means here and whether we should really be reading it as implied in every use of possessive pronouns. We also need to assess its relation to the word *dominion* that Hobbes loves using in a variety of contexts and with a broad variance in meaning. Pitkin, as noted

earlier, sees not property, but responsibility, in this usage of ownership, though Hobbes, who does not shy from the term in other contexts, does not use the word 'responsibility' in Chapter XVI. Pitkin further suggests that we see in the verb *own* an echo of the usage *own up*, in the sense of 'confess' or 'assume responsibility for.'[116] The *OED* finds no use of this construction until the nineteenth century, and none outside of the United States until nearly 1900.[117] And 'owning' in a sense directly connected to responsibility — not just in confessing or acknowledging, but in feeling responsible in the broadest sense — is something the *OED* associates with American English of the 1970's and 1980's (not terribly far removed from the time and place of Pitkin's, but not Hobbes', writing). On the other hand, the *OED* does identify uses of 'own' to mean 'acknowledge as belonging to oneself, esp. in respect of kinship or authorship' that predate Hobbes by decades, including in the final scene of *The Tempest*: 'you Must know, and owne, this Thing of darkness, I Acknowledge mine.'[118]

I will show that Hobbes' use of the term in his argument on representation subtly shifts through three stages. First, he invokes ownership in a strict and literal sense, but not one where people are both subject and object. Then, he introduces *dominion* as an analogy, to clarify his intention in the usage of ownership — and to distinguish it from actual dominion. Finally, in

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116 Pitkin, *The Concept of Representation*, 18.

117 "Oxford English Dictionary Own, v.," accessed June 16, 2010, http://dictionary.oed.com/cgi/entry/50168569?query_type=word&queryword=own&first=1&max_to_show=10&sort_type=alpha&result_place=3&search_id=tGt4-K6G0ju-2889&hilite=50168569 Naturally, this doesn't disprove Pitkin's claim; the addition of the preposition "up" could have come after the word was used in this sense on its own. Even for that, though, OED finds nothing before 1772.

118 William Shakespeare, *The Tempest* (New Haven: Yale University Press, 2006), 166 [V,1].

expanding his notion of representation from just one person authorising another into something more general that covers actors (and 'things') that might not qualify as persons as he has defined them, he asks us to consider dominion as an actual relationship, one he describes at great length both later in *Leviathan* as well as in the earlier *De Cive*.

The first mention of ownership in Chapter XVI is in the description of artificial persons representing truly (see Figure 2) who 'have their words and actions *owned* by those whom they represent' (emphasis in the original); 'he that owneth his words and actions, is the author.'[119] We have noted the importance of reciprocity in these relationships already. If one party is authorising the other, the second is representing the first; if one party is binding the other, second must be owning the first. Except that it is obvious here that the author does not actually own the actor at all. He owns his words and actions. This is explicitly spelled out, and we can only conclude that the suggested parallel must be that, rather than the actor binding — or independently capable of binding — the author, it is the former's words and actions which bind the latter. Note again how different this is from the authorise/represent relationship of the artificial and natural persons, existing as it does independently. These are not mere synonyms.

After introducing us to ownership as a literal action whose objects are words or actions, Hobbes tries to make the concept more familiar by likening it to a concept he expounds upon repeatedly and at length, *dominion*. 'And as

[119] Hobbes, *Leviathan*, 112 [XVI,4].

the right of possession, is called dominion; so the right of doing any action, is called AUTHORITY and sometimes warrant.'[120] Authority is not a kind of dominion, nor is ownership (of words and actions) necessarily a form of dominion either. The special sense of ownership that reciprocates binding is preserved, and so, importantly, is the parallel structure of rights.

Although this is clear thus far, Hobbes confuses things several paragraphs later by the reintroduction of dominion, but this time not as an analogy at all. In the discussion of representation by fiction (see Figure 3), we have brief and separate treatments of 'inanimate things'[121] and people with 'no use of reason' ('children, fools, madmen').[122] The first group have 'owners, or governors of those things,' that is, men who actually own the objects, rather than just words or actions in the sense the word had been used earlier in the same chapter. The second group lack owners, but they do have guardians, who have actual, not metaphoric, dominion. Both cases, however, are irrelevant for Hobbes' larger theory of authorisation, because neither can be personated prior to the advent of civil government. The explanations are similar, but the wording in the second case is particularly striking: personation of irrational people 'has no place but in a state civil, because before such estate, there is no dominion of persons.' Dominion of persons — and the two methods of acquiring it — merit a long discussion later in *Leviathan*[123] on the rights of sovereigns, and an even longer one, with a detailed analogy to family

[120] Ibid. [XVI,4].
[121] Ibid., 113 [XVI,9].
[122] Ibid., 113–114 [XVI,10].
[123] Ibid., 152–153 [XXI,18-21].

relations in *De Cive*.[124] The description of dominion in *De Cive* is in many ways more subtle and interesting and merits an entirely separate discussion, but what is important here is that the usage invoked at the end of Chapter XVI of *Leviathan* is a continuation of that larger discussion, rather than an extension of the ownership of words and actions. In the latter, ownership is distinct for needing a third party on the one hand, but not needing a civil society on the other; in the former a civil state is required.

From the abstract notion of ownership in the highly stylised model of representation in Chapter XVI, we arrive at a more fully formed idea of ownership in a state where dominion of persons is possible and necessary in Chapter XXI. The connection here with rights is even more nuanced. What we own are 'all the actions (without exception) of the man, or assembly we make sovereign,' an obligation that implies the prior existence of 'rights we pass away.'[125] Clearly, these rights were held in some sort of possession, but Hobbes avoids any talk of owning them. Some kind of transaction clearly appears to have taken place here — some sort of voluntary exchange. Did state-of-nature men own rights and then 'pass [them] away' in exchange for owning actions securing them 'the peace of the subjects themselves'[126]? Gauthier, among others, is not impressed by the awkward and, in many ways, counterintuitive wording. For him, this clearly is exactly such a 'transfer.'[127]

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[124] Hobbes, *De Cive*, 121–128 [IX,1-19].
[125] Hobbes, *Leviathan*, 150 [XXI,10].
[126] Ibid. [XXI,10].
[127] David Gauthier, "Hobbes's Social Contract," in *The Social Contract Theorists: Critical Essays on Hobbes*, Critical Essays on the Classics (Lanham, Md: Rowman & Littlefield, 1999), 59–72.

Hampton's argument, that the obligation to the sovereign is at most a 'loan from the people, not a permanent grant,'[128] relies more on the retention of the right to self-preservation even under a sovereign than it does on the problem of ownership. But both claims have their origin in a common frustration. Both writers want Hobbes' conception of ownership to be more consistent than it is and as closely tied to property — even if just metaphorically — as possible.

One Person Understood in Multitude

The conclusion Skinner draws from Hobbes' discussion of persons and representation is that 'the theory of attributed action lies at the heart of the politics of Leviathan.'[129] The problem with this claim is that using attributed action as modelled in Chapter XVI only really helps explain relations of representation that are in some sense one-to-one. For Skinner this is solved by reinterpreting the artificial person and positing the state as such a person; this way the sovereign represents the artificial person of the state (the '*purely* artificial person of the state', a phrase which, Runciman points out, does not appear in Hobbes[130]) in a way we might recognise from Figure 3 above.

However, the solution cannot be so simple. Hobbes has a numbers problem, and he was well aware of it. Hobbes does not devote much attention

[128] Jean Hampton, *Hobbes and the Social Contract Tradition* (Cambridge University Press, 1988), 203.
[129] Skinner, "Hobbes and the Purely Artificial Person of the State," 27.
[130] Runciman, "What Kind of Person Is Hobbes's State? A Reply to Skinner," 277.

to the usual numbers which bedevilled political philosophy — one, few, many. He focusses mostly on the problem of multitudes. Making a multitude 'own,' in the sense of bear responsibility for, the actions of one state however attributed is at the heart of the politics of *Leviathan*.

If the only representation relevant is the sovereign representative's acting for and standing for the person of the state, then we have only begged the question. Either representation connects these last two constituted bodies — the person of the sovereign and the person of the commonwealth — and then can play no role in making the multitude into some kind of unity, or it is the representation itself that brings about this unity, in which case, it is not entirely clear what its role is in the person of the sovereign. The text of *Leviathan* gives both, seemingly contradictory accounts. In Chapter XVIII, Hobbes writes,

> A *commonwealth* is said to be *instituted*, when a *multitude* of men do agree, and *covenant, every one, with every one*, that to whatsoever *man*, or *assembly of men*, shall be given by the major part, the *right to present* the person of them all (that is to say, to be their *representative*;)[.][131]

The commonwealth is instituted by the voluntary creation of an artificial person who only has any standing when he can be represented by someone else, whether man or assembly. This constitutive step, it is implied ('given by the major part') can even be done by voting, but that is not the representative part. That would make the earlier discussion of representation relevant, but

[131] Hobbes, *Leviathan*, 121 [XVIII,1].

not normatively sufficient. A sovereign represents the 'person of them all,' but representation cannot account for the person itself. Two problems arise. The first one is at the end of this very sentence in the parenthetical observation that the sovereign (a word that is oddly not used in this passage) is 'to be *their* representative' (emphasis added). 'Their' in this case cannot grammatically refer to 'the person of them all,' but only to 'them all.' This throws everything we thought we knew about the Hobbesian model of representation into disarray. Nor is it just a grammatical slip. It is repeated in Chapter XXII as well: 'for of the act of the sovereign everyone is author, because he is their representative unlimited.'[132]

Secondly, it reverses the chronology of the multitude uniting that is given in Chapter XVI itself, right in the middle of the discussion of representation. There, in a famous passage, Hobbes writes,

> A multitude of men are made *one* person, when they are by one man, or one person, represented; so that it be done with the consent of every one of that multitude in particular. For it is the *unity* of the representer, not the *unity* of the represented, that maketh the person *one*. And it is the representer that beareth person, and but one person: and *unity*, cannot otherwise be understood in multitude.[133]

Unity here is not prior to representation, and representation is not something that happens after the multitude problem has been solved. Representation solves the problem and either precedes or is simultaneous to the institution of

[132] Ibid., 156 [XXII,9].
[133] Ibid., 114 [XVI,13].

the person of the state (depending on how we read the first sentence). The simultaneous interpretation is the one favoured by, for example, Schmitt, who folds the person of the state and the person of the sovereign-representative into one, 'brought about by representation.'[134] Schmitt is able to do this only by simply ignoring not just the presence of the person of the state in its representative relation to the sovereign, but the whole model of persons and representation in the half of Chapter XVI that comes before the parts he quotes. Malcolm also notes the ambiguity, but ultimately also rules out a 'two-phase process.'[135] For Runciman and Skinner, in contrast, personation depends on unity; it cannot create it (*pace* the rather explicit suggestion near the end of Chapter XVI[136]).

Runciman splits the process even further, arguing that while authorisation by the multitude is what makes representation possible, representation is not simply reducible to it. His use of the word representation here, though, does not follow the form implied by Hobbes at all. Furthermore, in making this argument, he insists on using the word 'government' in a way that maps only onto the 'executive,' bringing him remarkably close to Schmitt's 'great decisionist' interpretation of Hobbesian representation — precisely what his argument seeks to avoid. It also contradicts Hobbes' insistence that

> [t]he legislator in all commonwealths, is only the sovereign, be he one man, as in a monarchy, or one assembly of men, as in a democracy, or aristocracy. For the legislator, is he that maketh the

[134] Schmitt, *The Leviathan in the State Theory of Thomas Hobbes*, 32.
[135] Malcolm, *Aspects of Hobbes*, 223.
[136] Hobbes, *Leviathan*, 114 [XVI,13].

law.[137]

The exceptions and exemptions Hobbes reserves for the sovereign serve to create a legal hierarchy and final authority;[138] they do not reduce government to a series of unlimited and disconnected sovereign decisions. What Hobbes seeks to unify more than anything is the source of law.[139] And this comes just one paragraph after his claim[140] that natural and civil law mutually entail each other. Of Hobbes' relation to natural law, Mintz writes that he 'retains the name of this doctrine, but little else.'[141]

Hobbes gives many indications that he is quite aware of his numbers problem and is in no hurry to abandon the person model of representation. It is a model that, even in its four-cornered form (see **Figure 4**), functions most coherently when the individual relations are one-to-one. Certainly, a one-to-many relationship (as opposed to many-to-one) cannot work, and Hobbes explicitly spells out the incoherence and inefficiency of one author 'represented by two actors.'[142] Oddly, the one person — or perhaps Person? — who is allowed multiple representatives is God, represented as He is first by Moses, then by Jesus, and finally by the Holy Ghost. Twice Hobbes presents this example,[143] but only in the second does he draw the audacious conclusion that this particular author, usually so insistent on His oneness, is actually three

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137 Ibid., 184 [XXVI,5].
138 M. M. Goldsmith, "Hobbes on Law," in *The Cambridge Companion to Hobbes* (Cambridge: Cambridge University Press, 1996), 278.
139 Alan Ryan, "Hobbes's Political Philosophy," in *The Cambridge Companion to Hobbes* (Cambridge: Cambridge University Press, 1996), 210–211.
140 Hobbes, *Leviathan*, 183–184 [XXVI,4].
141 Samuel I Mintz, *The Hunting of Leviathan: Seventeenth-Century Reactions To* (Cambridge: Cambridge University Press, 1962), 26.
142 Hobbes, *Leviathan*, 130 [XIX,3].
143 Ibid., 114, 339–341 [XVI,12 and XLII,3].

persons!

Except in this example, there is no indication that Hobbesian representation can produce multiple voices. Indeed, Hobbes' political theory is based on the relinquishing of an individual judgment of good and evil to and its replacement by a unified 'public conscience' to guide action,[144] and it needs a mechanism for unifying a diversity of judgments. But representation, as it is sketched out in Chapter XVI, cannot be the mechanism to achieve this.

Why Represent When You Can Personate?

The numbers problem is attenuated only once the idiom of representation is abandoned. Which is precisely what Hobbes does when he recapitulates the whole argument in *De Homine*, inevitably raising the question of whether representation was necessary at all for the theory and what its purpose was there to begin with.

Hobbes' theory of authorisation must contend with his novel take on the condition of man, one characterised by a 'radical abstract individualism'[145] and equality. Something has to come between the dichotomy[146] of unlimited self-reliance and unlimited power concentrated in one body. Having

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[144] Ibid., 223 [XXIX,7].
[145] Carole Pateman, *The Problem of Political Obligation: A Critique of Liberal*, New ed. (Cambridge: Polity, 1985), 38.
[146] Gregory S. Kavka, "Hobbes's War of All Against All," *Ethics* 93, no. 2 (January 1983): 308.

established a natural condition of normatively private judgment, of justifiably 'self-oriented judgment of good and evil' as the appropriate guide to action,[147] as an unequivocal right, Hobbes now has to invent the procedure by which this right is transferred (or even 'renounced'[148]). This procedure — the 'translation of right,' to use the term Gauthier uses to avoid more pronounced and more exact terms like 'renunciation' and 'alienation'[149] — is authorisation. On Hobbes' account, representation is just a mechanism, even if a clearly necessary one. While authorisation is a mainstay of Hobbes' philosophical oeuvre, the word representation plays a part only in its statement in *Leviathan* and nowhere else.[150] The latter then needs to be viewed in the context of the ideological debate of its time — a 'medley of pamphlet warfare and religious fanaticism.'[151]

Skinner makes a compelling argument about the use of representation in *Leviathan* being a response to a raging ideological debate in mid-seventeenth century England. Hobbes, he argues, found himself facing off against three well-formed ideological camps — the parliamentarians, the divinists, and the levellers — all of whom relied on a notion of representation to plausibly advance their respective claims.[152]

Hobbes nicely parries his opponents by co-opting their language and

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147 Gauthier, "Hobbes's Social Contract."
148 Malcolm, *Aspects of Hobbes*, 36.
149 Gauthier, *The Logic of Leviathan*, 124.
150 Richard Tuck, *Philosophy and Government, 1572-1651*, Ideas in Context (Cambridge: Cambridge University Press, 1993), 329.
151 John Bowle, *Hobbes and His Critics: A Study in Seventeenth Century* (New York: Barnes & Noble, 1969), 52.
152 Skinner, "Hobbes on Representation," 156–165.

effectively deploying it against all three (though both the co-opting and the counter-arguing are most pronounced against the first group). Outside the ideological debate, however, it is not entirely clear how necessary representation is to Hobbes' larger philosophical claim on authorisation. It certainly does not figure anywhere in *Leviathan* outside the discussion of sovereignty. I find no reason to quibble with the broad consensus on the tripartite arrangement of multitude-commonwealth-sovereign. Two major questions, however, are left open: the timing of the unity that representation is designed to achieve, and who exactly among the three parties is representing whom.

Pateman calls Hobbes notion of unity 'peculiar,' going as it does from 'no sustained relations' in the state of nature to being 'completely unified through the figure of the Leviathan' in civil society.[153] She argues convincingly for seeing this as a one-step process, but in her haste makes mistakes that Runciman, with his two steps and tripartite relationship, would never make. The Leviathan, she writes, 'becomes the "bearer" of their persons and the "author" of their acts,'[154] though of course, he is better characterised as the bearer of their *person* (singular) and it is they who are authors of his acts.

Similarly, the question of who is actually representing what or whom in the sovereign-commonwealth-multitude triangle should be much easier to answer if the concept of representation is actually to be useful. Clearly, the sovereign cannot be representing the multitude with their multiple wills and

[153] Pateman, *The Problem of Political Obligation*, 52.
[154] Ibid.

private judgments with no mechanism for creating unity. The other two options are not terribly satisfying either. If the sovereign represents the commonwealth (person of the state), then representation is not doing very much; all the action is in whatever creates the person, not in the faithful presentation of it by one man. If the commonwealth represents the multitude, then we no longer have a coherent argument on sovereignty — and for that matter, we do not have a clear mechanism of authorisation, requiring as it does an *actor.*

Hobbes must have been aware of this, as his restatement of the authorisation theory leaves so much of this mess behind. It would be folly to overstate the importance of *De Homine*, something of a prequel to *De Cive*, published as Volume 1 of a trilogy sixteen years after Volume 3. We have already discussed a few of the notable changes in the treatment of artificial persons and inanimate objects and corporate bodies. An arguably more significant change occurs in Hobbes treatment of the numbers problem. Without too much exposition he states what his own terminology in *Leviathan* would not allow — representation need not be one-to-one, but can be one-to-many or many-to-one or many-to-many.[155] I say 'representation,' but even though the word would obviate a lot of awkward sentence structure, Hobbes pointedly does not use it, preferring instead to repeat the verb construction 'bear the person.' The model of representation sketched out in Figure 2 simply cannot work outside a one-to-one relationship, and one-to-one will not suffice for the theory of authorisation. Forced to choose between the grand theory

[155] Hobbes, *Man and Citizen*, 84.

and the rhetorical riposte, Hobbes makes the only intellectually coherent choice by abandoning representation completely.

To what extent does authorisation in *Leviathan* really rely on representation and not just on the Hobbesian notion of *personation*? Hobbes introduces us to the verb 'personate' as simply a synonym for 'represent,' though if anything, it is the former word that is the theoretically novel one. The verb *personate*, with its causative suffix, seems to imply a definition of 'make something a person,' an understanding of the term which perhaps lies behind much of the discussion of the artificial person of the state. But a close reading of both of Hobbes' own definitions and his later uses of the term makes clear that the verb personate, rather than necessarily changing the status of its object changes its subject into an artificial person.

Personation, with all of its possible permutations and overlaps, provides a mechanism for relating radical individualism on the one hand with unity, not least by the ease with which it can explain the establishment of corporate bodies[156] (and even multiple corporate bodies). It, on its own, however, does not provide us with a usable theory of representation. What it does give is a normative foundation for a popular basis of constituent power. This, as we shall see in Chapter 3, was the aspect of Hobbes that most influenced Sieyes' theory of representation. It is a pleasant irony that it emerges in the very discussion where Hobbes uses the word 'representation,' but to mean something radically different. It is even more pleasant irony that the leap from

[156] Runciman, "Hobbes' Theory of Representation," 19.

Hobbes' popular and individualist notion of constituent power to a full-fledged theory of representation would be provided by a thinker with an even more detailed discussion of representation — but an even more adamant opposition to it. He will be the topic of Chapter 2.

Chapter 2

Rousseau Misrepresented

This chapter seeks to separate Rousseau's philosophical insights from his institutional premises and his political conclusions. In short, I argue that the premises (over-reliance on primary assemblies, dismissal of deliberation, etc.) were weak even when Rousseau pronounced them and have certainly not been applicable since the American and French Revolutions, and that this, more than any normative counterarguments, renders the conclusions unimportant. Despite this, however, I argue that some of Rousseau's basic insights are crucial for any theory of representation yet are ignored all too often because of the weakness of his political argument. He uses the language of representation to denounce it, while at the same time offering a range of tools with which to reconsider the way authorised decisions can be made by a legitimate political apparatus in a way that preserves the solemn sovereignty of the people. And it is these tools, ironically, from which the strongest normative case for representation can be made.

Rousseau's political philosophy is most carefully and thoroughly laid out in *On the Social Contract*.[157] Relevant theoretical issues were also raised

[157] *The Collected Writings of Rousseau*, vol. 4 (Hanover, N.H: Published by University Press of, 1994), 127–224 [SC].

before in *Discourse on Political Economy*[158] and the *Discourse on the Origin and Foundations of Inequality among Men*,[159] as well as after in *Letters from the Mountain*,[160] particularly the Sixth, Seventh, and Eighth. Twice Rousseau had to attempt to apply his ideas to actual republics, first in the *Plan for a Constitution for Corsica*[161] and then in *Considerations on the Government of Poland and on Its Planned Reformation*.[162] The first draft of the *Social Contract*, commonly known as the *Geneva Manuscript*,[163] contains a surprising number of insights — it is often much clearer on the philosophical assumptions (they are not yet cleaned up for institutional practice) and the hints regarding which previous thinkers Rousseau is criticising or praising, while often still only hints, are generally clearer.

All these texts were written in the mid-eighteenth century, just before what we now think of as the first big experiments in representative democracy got underway (though there were certainly many inchoate representative institutions before, and Rousseau had strong opinions about those he saw in England as well as in his native Geneva). As such, Rousseau's institutional imagination is limited to the narrow frontiers of classical and early modern political practices. Hume's critique of Machiavelli — that he was 'certainly a great genius' but 'lived in too early an age of the world, to be a good judge of

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158 *The Collected Writings of Rousseau*, vol. 3 (Hanover, N.H: Published by University Press of, 1992), 140–70 [PE].
159 Ibid., 3:1–95 [SD].
160 *The Collected Writings of Rousseau*, vol. 9 (Hanover, N.H: Dartmouth College, 1990), 131–306 [LM].
161 *The Collected Writings of Rousseau*, vol. 11 (Hanover, N.H: Dartmouth College Press, 1990), 123–66.
162 Ibid., 11:167–240.
163 *The Collected Writings of Rousseau*, 1994, 4:76–126 [GM].

political truth'[164] — can be applied to Rousseau in the case of representation, probably more accurately than to Machiavelli.

In a book-length analysis of the rhetoric of *Social Contract* and its construction as an argument, Gildin finds a sharp divide between the first two, more philosophical, books and the last two, which deal with 'the institutions in which these principles must be embodied.'[165] He even takes to calling the first and last pairs of books Parts I and II, respectively, to demonstrate how each part has a roughly parallel three-step argument. 'The nerve of Rousseau's argument in the first two books is his new teaching regarding legitimate sovereignty.'[166] This split has made it easier for various commentators and Rousseau scholars to both find themselves in agreement with the philosophical precepts at the beginning of *Social Contract* while at the same time expressing great scepticism about the institutional concepts at the end. Fralin is a notable exception, trying very hard to squeeze out of the text a more nuanced view of representation than a first read of Rousseau might allow, arguing, among other things, that 'Rousseau's thinking about political institutions was among the last aspects of his political thought to mature,' and that Book III, where the opposition to representation is most unequivocally laid out, was written several years after much of the rest of the text.[167] More problematic, and more common, is the opposite approach — accepting the

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[164] David Hume, *Political Essays*, ed. Knud Haakonssen (Cambridge: Cambridge : Cambridge University Press, 1994), 51.
[165] Hilail Gildin, *Rousseau's Social Contract: The Design of the Argument* (Chicago: University of Chicago Press, 1983), 13.
[166] Ibid.
[167] Fralin, *Rousseau and Representation*, 75.

naive impracticality of the institutional recommendations, but assuming that they must flow from equally naive and impractical philosophical commitments (occasionally worse than naive and impractical — even collectivist and totalitarian[168]).

In fact, though the arrangement of the book doubtlessly conveys a lot of meaning about the relationship of parts of the argument to each other, it is not the case that all the philosophical heavy lifting stops at the end of Book II. One of the most fundamental insights of the *Social Contract*, the total separation and mutual dependence of sovereignty and government, first appears in Book III (more below).

The four sections of this chapter will be divided in a manner resembling that of the *Social Contract*, except that institutions will be first and last, and the principles in the middle. Rousseau certainly rejected representation by the time his political thinking matured; there is no way to finesse this. Despite this, he enunciated three new political principles — (1) the separation of sovereignty from government, (2) the special status of laws and legislation, and (3) the intimate normative relationship between sovereignty and the creation of law — that, notwithstanding his real and principled and reasonably well-argued opposition to it, form the basis of a normative theory of representation.

To establish this, I first recapitulate Rousseau's arguments against

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[168] Lester Crocker, "The Relation of Rousseau's Second Discourse and the Contrat Social," *Romanic Review*, 1960, 43.

representation. Second, I examine Rousseau's sovereignty-government distinction and its implications for institutional design. Third, I discuss the special status of law in Rousseau's philosophy. Finally, I try to determine the procedural implications of Rousseau's generality requirements — specifically, by sharpening the distinction between universality and unanimity.

No Deputies, No Representatives

Let us begin, as it were, at the end — or at least the end for Rousseau. After carefully laying out his fundamental political principles, tying them to a tendentious and stylised historical recounting of Sparta and, especially, Rome, Rousseau closes Book III of *On the Social Contract* with an unambiguous denunciation of representation. What Baker calls Rousseau's 'categorical repudiation'[169] of representation involves both an institutional argument as well as a larger claim about the limitations of collective decision making.

Rousseau ties freedom to self-government. This connection alone does not itself rule out representation, except that for Rousseau the exercise of self-government needs to emerge from will, not interest. It is possible that if governing were about interest alone, representation would not pose a problem. Will, as Pitkin points out, is 'truly personal,'[170] and therefore, while tasks that

[169] Baker, "Representation Redefined," 236.
[170] Pitkin, "Representation," 149.

do not involve will can be safely and legitimately delegated, will always remains with the person bearing it, else it is lost. One can will *instead* of someone else, but not *for* them.

For Rousseau, having already shown by the end of Books I and II that sovereignty is exercised by the general will and that this will is indivisible and inalienable, there is no way to fit representation into his theory of legitimate sovereignty.

> Sovereignty cannot be represented for the same reason it cannot be alienated. It consists essentially in the general will, and the will cannot be represented. Either it is itself or it is something else; there is no middle ground.[171]

At no other point would Rousseau's opposition to representation be so categorical and uncompromising. In this passage from the *Social Contract*, the unacceptability of representation is argued as a purely logical deduction from Rousseau's connection of will to sovereignty, with no 'tolerance for ambiguity.'[172]

But Rousseau's rejection of representation was not always so consistently dogmatic or principled — in *Political Economy* (1755) he even slipped and wrote that 'taxes cannot be legitimately established except by the consent of the people or its representatives,' pointedly noting that even Bodin agreed on this.[173] His opposition to representation, built up in his work initially

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[171] *The Collected Writings of Rousseau*, 1994, 4:192 [SC III,15].
[172] Fred Weinstein, *The Wish to Be Free: Society, Psyche, and Value Change* (Berkeley: University of California Press, 1969), 93.
[173] *The Collected Writings of Rousseau*, 1992, 3:163 [PE 59 (III)].

on practical grounds, crescendos in *Social Contract* (1762) with an atypically rigid and extreme theoretical argument,[174] and is maintained but mitigated (especially in his two proposed constitutions in 1772) on mostly practical grounds in the later works.

The rejection of representation in *Social Contract* comes in a chapter that seeks to distinguish *representatives* from *deputies*, a distinction that becomes crucial but is no less opaque in Rousseau's later proposed constitutions for Poland and Corsica. The oft-quoted sentence in Chapter 15 of Book III of *Social Contract*, 'The deputies of the people… are not nor can they be its representatives'[175] deserves perhaps even more attention than it gets. The construction is curious. It is clear that Rousseau means to say something quite critical, and the tone and context are certainly negative. But in sentences of the type '*A* is not *B*,' where the intention is evaluative, usually either *A* or *B* is understood to be an obviously good thing ('Senator, you're no Jack Kennedy') or an obviously bad one. Rousseau follows the sentence with the observation that people's deputies 'are merely its agents.'[176]

Even with that diminishing ending, there are at least two ways of reading the sentence. We can read the sentence as an analogue of, 'My client is not a murderer, he was merely defending himself,' with 'representatives,' like 'murderer,' obviously bad. Given Rousseau's rejection of even 'the idea of representation,' this is not wholly implausible. But then the sentence makes

[174] Fralin, *Rousseau and Representation*, 71.
[175] Rousseau, *The Collected Writings of Rousseau*, 1994, 4:192 [SC III,15].
[176] In the original French: "Les Députés du peuple ne sont donc, ni ne peuvent être, ses représentants; ils ne sont que ses commissaires." Jean-Jacques Rousseau, *Du Contrat Social* (Les Editions Du Cheval Aile, 1947), 307 [SC III,15].

sense only as a defence of deputies — even if they are 'merely' agents. The thrust of the chapter's arguments simply does not align with such a reading, much less so the suspenseful build-up in the previous chapter about 'the intermediate power' that sometimes appears between government and sovereignty. For all his later backtracking on Corsica and Poland, Rousseau is not here trying to defend a concept he calls 'deputies' as long as those deputies do not begin to resemble another, inadequately defined, concept he calls 'representatives.'

Alternatively, we could read the sentence as a parallel of, 'He is not the Messiah, he's just a very naughty boy.' In this case, the relationship between the concepts Rousseau is calling 'deputies' and 'representatives' is completely reversed. It is not the case that we need to make sure our deputies do not degenerate into representatives, but rather that the problem is that the deputies simply cannot be representatives. And this is not, in Rousseau's argument, because of an institutional or psychological flaw, but because no deputy — indeed, no one — could ever actually be a representative. It is beyond the capacity of one man to hold a relationship with any others that can be described as representative. In this reading of the sentence, *representative* is an obviously good thing, just unattainable — or at least unattainable in the universe of institutional possibilities Rousseau envisages. It is additionally worth noting that if this is Rousseau's actual view, it is almost a perfect mirror image of Hobbes'. For the latter, representation exists in its purest form as an abstract relationship between two persons; the institutional concepts are

poured into this cast. For Rousseau, if we are to take this second reading of the sentence as the preferred one, representation could be a useful aspiration in institutional design if only the brilliant philosopher had not just proved that it is an impossible relationship.

Possibility is not the same as desirability, however. Assuming for a moment that this second reading of the sentence is correct, then, if a form of representative that does not fall into the trap of being 'merely agents' could be conceived, it might not fall afoul of Rousseau's larger philosophical claim. I am not sure the second version (representatives good, but unattainable) is the correct reading of the sentence — though I do not think the alternative (representatives bad, deputies better) is any more plausible — and even if it were, I am not sure that it is an important question if Rousseau could be convinced to change his mind. The question of whether Rousseau's larger system of political thought could be compatible with any kind of representation does, however, merit some discussion.

This question is not as easy to answer as it would seem, largely because of the way Rousseau constructs the argument. Representation is only discussed in the *Social Contract* within an institutional context, but Rousseau's institutional imagination is actually very limited. The contrast with Hobbes is, once more, striking. Hobbes' argument on representation[177] rests on abstraction — an extrapolation, really, from a one-to-one model. Rousseau does not consider representation, even in the abstract, as a relationship

[177] Hobbes, *Leviathan*, chap. XVI.

between two persons.[178] Fralin asserts, in one of the most comprehensive studies of Rousseau's views on representation, that 'one of Rousseau's greatest personal fears was dependence on the will of another person,'[179] even though Rousseau himself abstained from presenting even a metaphorical argument on such an abuse.

This is no coincidence. Rousseau's understanding of the concept emerges from a certain social context that has little to do with the parliamentary politics of the last two centuries. Representation for Rousseau is not a one-to-one relationship because, in its purest form, he takes it to evince a corporate character,[180] a holdover from a medieval conception and practice. Representation, Rousseau argues, 'comes to us from feudal government,' and any association with 'that wicked and absurd Government in which the human species is degraded and the name of man dishonoured'[181] is automatically tainted. The taint is both general — feudalism reeks of the kind of inequality that violates all of Rousseau's primary philosophical commitments — and specific — the manifestations of representation associated with this period are characterised by petitioning and supplicating, always, even when effective, reinforcing an inferior status on whoever makes the representation and blatantly violating any notion of self-governance.

This connection serves not only as a basis for Rousseau's distaste but also as further evidence for Rousseau's highly tendentious account of politics

[178] See 'Functions and Metaphors' in Chapter 6.
[179] Fralin, *Rousseau and Representation*, 129.
[180] Alfred Cobban, *Rousseau and the Modern State*, 2nd ed, Unwin University Books 67 (London: George Allen & Unwin, 1970), 43–44.
[181] *The Collected Writings of Rousseau*, 1994, 4:192–3 [SC III,15].

in antiquity — twisting, for example, his earlier description of Roman tribunes in such a way that they 'represent the people' as part of an executive, but do not function as representatives in the sense of 'usurping the functions of the people.'[182] Rousseau's love of Rome — and, without the fulsome descriptions, Sparta too — focusses primarily on the elevation of the common good to the centre of public affairs. Little comment is made of the fact that in antiquity this is only made possible by the subordination of the individual to the public interest, rather than a collectively formed and continuously reformed general will.[183] (Oddly, Bloom claims that the opposite is the case, writing that 'if he admires the practice of antiquity, [Rousseau] does not accept its theory.'[184])

Friedrich was slightly more charitable on the last mark; he said Rousseau 'was misled by the ancients'[185] and believed that the more important medieval baggage for Rousseau to rid himself of was natural law,[186] not feudalism. As I will argue below, Rousseau's reconciliation with the inability of man to 'discover' eternal law, and the compensatory need for positive law, were the building blocks of his revolutionary notion of sovereignty. This philosophical insight, combined with a flawed or at least incomplete premise on institutions leads to the unequivocal opposition to representation. With a more nuanced assumption about institutions, one that would have been impossible for a philosopher writing in the 1750's, a very different conclusion

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[182] Ibid., 4:193.
[183] Patrick Riley, "A Possible Explanation of Rousseau's General Will," *The American Political Science Review* 64, no. 1 (March 1970): 93.
[184] Allan Bloom, "Rousseau," in *History of Political Philosophy*, ed. Leo Strauss and Joseph Cropsey (Chicago ; London: Chicago ; London : University of Chicago Press, 1987), 561.
[185] Friedrich, *Constitutional Government and Democracy: Theory and Practice in Europe and America*, 261.
[186] Ibid., 268.

is still possible.

Another aspect of representation that bothers Rousseau is generally taken as metaphorical, though in the context of his stylised account of public life in antiquity it might make more sense to take it literally. This is the labour argument, to which we will return in greater detail in Chapter 3. It is not just that one might alienate a right by delegating someone else to exercise one's sovereignty, the delegated labour itself is indecent — a blocked transaction perhaps not as severe as slavery, but morally no different from hiring mercenaries to do one's fighting. 'The word *finance* is the word of a slave; it is unknown in the City.'[187] This economic argument pre-empts the common second-best argument in favour of representation — that popular or primary assemblies might be ideal but the exigencies of efficiency make them impractical. Rousseau attempts to flip this argument by arguing (rather unpersuasively) for the manifest inefficiency of this kind of delegated labour. Democracy has always had an oblique labour argument in it — a 'denial of specialisation' in public affairs[188] — but Rousseau, notably, is an advocate of specialisation in governance, particularly in his 'science of the legislator.' Not accidentally is this given its highest expression in the one political composition of Rousseau's most explicitly infused with economic principles — *Discourse on Political Economy*. In this early text, before Rousseau has actually ruled out

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[187] *The Collected Writings of Rousseau*, 1994, 4:192 In the original: "Ce mot de finance est un mot d"esclave; il est inconnue dans la Cité.' ; Rousseau, *Du Contrat Social*, 305 [SC III,15]. 'City' refers to Rousseau's *La Cité*, the word he introduces in Book 1, Chapter 6 as the outcome of the social pact and the synonym of *republic* and *body politic*. It is often translated in this passage as 'true republic.'

[188] Lindsay, *The Essentials of Democracy*, 56.

representation on conceptual grounds, he already argues that in order to align private wills with the general will, citizens must 'love their duty' enough not to want to shirk it off to anyone else. [189] I have called this argument a *labour argument* in order to place it in the correct context for later labour-based arguments in favour of representation (which we will encounter in Chapters 3 and 5), but it is important to understand Rousseau's argument here as being about more than just labour. Rousseau does not oppose all specialisation in governance (the Legislator as well as the magistracy cultivate skills and a professional ethos that Rousseau clearly does not expect to arise naturally in the people at large). The scathing, arguably hyperbolic, reference to 'finance' indicates Rousseau's general fear of the commodification of public life and civic duty. Beyond that, of course, by pre-empting the labour issue, Rousseau seeks to anticipate what might be perceived as representation's best argument.

Another part of Rousseau's opposition to representation no doubt stemmed from his concerns about deliberation, which he doubted would 'tend toward public utility' or be characterised by 'rectitude.' Though he is concerned that we might not always know what our will is, Rousseau does not believe that speech will help in self-discovery. On the contrary, while 'the people is never corrupted... it is often deceived.'[190] 'Public utility,' in other words, would not only be denied if people talked about it too much; no one would even know by how much they missed the mark. This is why when he

[189] *The Collected Writings of Rousseau*, 1992, 3:150 [PE 28 (II)].
[190] Rousseau, *The Collected Writings of Rousseau*, 1994, 4:147 [SC II,3].

finally allows a modicum of representation in his *Considerations on the Government of Poland* (1772) it is with strictly bound mandates. Urbinati has recently argued that for Rousseau representation and deliberation were the same danger exactly — that Rousseau had to reject representation for the same reason that he

> exiled speech from the assembly: in both cases prospective visions (imagination) would take the place of true/false inferences (cognition). This would infiltrate the realm of politics with perception or malicious fiction.[191]

In the remainder of this chapter, I will argue that Rousseau's opposition can be safely set aside in light of his larger philosophical-political programme, but for now it is important to note just how strong and well-constructed his opposition actually is. Rousseau has given three broad categories of reasons for opposing representation, each of which can stand on its own without needing the other two for rhetorical support. He has mustered a historical argument in the form of representation's feudal pedigree, a social argument in the corrupted labour involved in sending someone else to do the work of a sovereign people, and a psychological argument in the form of the distorting effects of deliberation on the will. Moreover, much of Rousseau's institutional design, if not his philosophical principles, relies on a combination of his interpretation of existing political structures in Geneva, his convenient (if occasionally overly flattering) perceptions of political mores in Geneva, and his own aspirations for reforming his home republic. Popular sovereignty, with

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[191] Urbinati, *Representative Democracy: Principles and Genealogy*, 80.

magistrates only executing the law and not representing any wills, was how Genevois commonly viewed their own constitution in the early eighteenth century.[192] It was certainly how Rousseau viewed it until the great falling out with Geneva that animates the *Letters From the Mountain*. There, in a fit of rage at his hometown, he charged Genevois with uniting what must always remain separate — sovereignty and government.

On Sovereignty, Government, and What's Between Them

One of the most frustrating aspects of any textual analysis is the changing meanings, over time, of certain key words. In Rousseau's writings, words like *force*, *will*, *object*, *person*, and *general* are used in a narrow and specialised way that is both different from ordinary everyday use as well as from usage common in other philosophical texts — differences that have long been 'an obstacle to understanding.'[193] *Sovereignty* is used in a new and unique way. Doubly frustrating is the new and specialised usage of *government* and *representative*, often right next to appearances of the word that are intended to be read in their ordinary sense — or at least, in a sense quite different. These inconsistencies then are manifest across time, in the

[192] Helena Rosenblatt, *Rousseau and Geneva: From the First Discourse to the Social*, Ideas in Context 46 (Cambridge: Cambridge University Press, 1997), 245.
[193] Roger D Masters, *The Political Philosophy of Rousseau* (Princeton: Princeton University Press, 1968), 339.

shift from casual to scientific usages, and often within the same text by Rousseau.

Of all the terms Rousseau introduces in the *Social Contract*, two are key both to his larger political philosophy as well as to his specific argument on representation. They are, ironically perhaps, two of the most commonly used words in political philosophy. *Sovereignty* is among the words he uses a great deal but about which he wants us to think in an entirely different way. Rousseau wants us to do the same thing with *government*, though in this case he repeatedly slips and confusingly uses the word in its more conventional sense.[194]

It is worth remembering that even though Rousseau is using the same word — sovereignty — that so many theorists before him had used as a fundamental building block of the special authority of the state, his use of the word in both the question he poses and the answer he gives marks a radical departure. Wokler reminds us that until Rousseau,

> the concept of sovereignty had been connected by its interpreters with the idea of force, power or empire, and it generally pertained to the dominion of kings or other rulers over their subjects rather than to citizens' freedom… [H]e connected it with the concepts of will or right rather than force of power. [195]

In fact, the 'fundamental assumption' about sovereignty in Rousseau — that

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[194] Gildin, *Rousseau's Social Contract*, 103.
[195] Robert Wokler, "Rousseau and His Critics on the Fanciful Liberties We Have Lost," in *Rousseau and Liberty*, ed. Robert Wokler (Manchester University Press ND, 1995), 193.

law-making power cannot be above the law[196] — stands in contrast to a notion of sovereignty that holds it to be exactly that power, not just in the age of absolutism, but right up to Schmitt and his 'exceptions.'[197]

Rousseau introduces the concept of sovereignty early on in Book I of the *Social Contract* in an argument that closely tracks Hobbes' personation argument, and yet comes to a radically different conclusion. A 'contracting party' of equal individuals forms a collective body 'which receives from this act its unity, its common *self*, its life, and its will.'[198] In case the echoes of Hobbes are not strong enough, Rousseau refers to the union creating a political body as a 'public person.'[199] It often seems like Rousseau is most eager to adopt the vocabulary of Hobbesian personation precisely whenever he is making a major departure from Hobbesian sovereignty. Thus in the *Letters from the Mountain*, he writes, '[G]eneral and personified rule is what I call the Sovereign. It follows that the Sovereign is indivisible, inalienable, and that it resides in all members of the body.'[200] Like Hobbes, Rousseau wants to define this newly unified public person in terms of its relations to the people who comprise it and those who rule, but those relations are entirely different. In Chapter 6 of Book I, the 'City' or 'Republic' or 'body politic' (instead of 'Common-wealth' or 'civitas' or 'Leviathan'[201]) can be called

> *State* when it is passive, *Sovereign* when it is active, *Power* when

196 Cobban, *Rousseau and the Modern State*, 71.
197 Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (University of Chicago Press, 2005), 5.
198 *The Collected Writings of Rousseau*, 1994, 4:139 [SC I,7].
199 Ibid. [SC I,7].
200 *The Collected Writings of Rousseau*, 1990, 9:232 [LM 6].
201 Hobbes, *Leviathan*, 120 [XVII,12].

> comparing it to similar bodies. As for the associates, they collectively take the name *people*; and individually are called *Citizens* as participants in the sovereign authority, and *Subjects* as subject to the laws of the State.[202]

This short passage upends the assumptions of centuries of political theory, and in particular rather provocatively challenges both Bodin and Hobbes on their own terms and in no fewer than three ways.

First, it relates persons and the people they stand for differently. The sovereign is not a different actor from the state; the sovereign, the state, the people, the citizens, etc. can all be considered the same people fulfilling different roles.[203] Not only is the sovereign not a separate man or body of men standing in some relationship to the state, he cannot and must not be. Rousseau accepts that sovereignty 'must be lodged in one definite quarter,' but he is unable to escape the conclusion that this, in a well-ordered state, is the people at large.[204] In the earlier (and unpublished) *Geneva Manuscript*, Rousseau makes the allusion to — and rejection of — Hobbes even clearer. Describing the 'common force' that he wishes to call sovereignty, he invokes, with barely altered terminology, Hobbes' artificial person only to reject entirely the very human manifestation that Hobbes asserted sovereignty must have:

> It is apparent from this that the sovereign is by its nature only a moral person, that it has only abstract and collective existence, and that the idea attributed to this word cannot be likened to that of a

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[202] *The Collected Writings of Rousseau*, 1994, 4:139 [SC I,6].
[203] Ibid., 4:139 [SC I,6].
[204] Charles Edwyn Vaughan, *The Political Writings of Jean Jacques Rousseau*, vol. 2 (Oxford: Basil Blackwell, 1962), 152.

simple individual.[205]

The 'moral person' in the above quote is a very literal translation of Rousseau's *personne morale*, a term which appears half a dozen times in *Social Contract* and which is usually translated as 'fictitious person.' The context of each appearance of this term strongly suggests it is meant to invoke a meaning similar to Hobbes' *artificial person* — or, more accurately, to a common misunderstanding of Hobbes' artificial person.[206] In the passage just cited, then, a collective is formed when individuals contract with each other, and that collective is now personated as some form of unity, but the moral/artificial person is not then manifest as one man or body of men. It is the same people in their capacity as the collective. The same people who, in a different role, will be citizens and in another will be subjects.

This brings us to the second radical innovation of Rousseau's personation. Once it is established that the same individuals can constitute different political actors, the central question becomes what distinguishes them. Here Rousseau introduces *action* — its presence or absence and its type — as the characteristic by which each role and relationship is identified. The same collective of which we speak in its various capacities, the people, are *citizens* when they exercise their sovereignty and *subjects* when they operate under it — sovereignty itself being the active form of the passive state. The grammatical metaphor endures in the *Social Contract* and especially in Rousseau's later *Letters from the Mountain*, where the *objects* of both

[205] *The Collected Writings of Rousseau*, 1994, 4:87 [GM I,4].
[206] See 'The Matter, Forme, and Power of the Person' in Chapter 1 for a discussion of this misunderstanding.

sovereignty and law give those concepts content and further provide an identity test.[207]

The third radical shift to emerge from this passage is the reuniting of sovereignty and the state after their amicable divorce in Hobbes. They are the same people and the same institution, differentiated only by action. In the following chapter, Rousseau will expand on the 'double relation'[208] each individual has as part of sovereign and state to establish the indivisibility of sovereignty, which will later be the backbone of his argument against representation.

But if Rousseau is keen to unite state and sovereignty, it is only a backdrop to a much more dramatic split. *Government*, as Rousseau defines the term, is not just a new role or a new relationship or even a new action state of sovereignty. It is, in its function as well as personnel, completely separate, both by fact and norm. Masters refers to this as 'perhaps [the] most original aspect'[209] of Rousseau's theory; it is also perhaps the most ignored.

Defining government in general is the first task of Book III of *Social Contract*, usually seen as the more political or institutional portion following on the heels of the purely philosophical Books I and II (this, despite the casual use of the word 'government' *sensu lato* more than a dozen times in Book II, generally not with the same meaning it has in Book III). Perhaps this facile dichotomy in the reading of *Social Contract* is the reason why one of its most

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[207] *The Collected Writings of Rousseau*, 1990, 9:232 [LM 6].
[208] *The Collected Writings of Rousseau*, 1994, 4:139–140 [SC I,6].
[209] Masters, *The Political Philosophy of Rousseau*, 335.

important philosophical points is so commonly missed. The definition offered is seductively simple:

> An intermediate body established between the subjects and the Sovereign for their mutual communication, and charged with the execution of the laws and the maintenance of civil as well as political freedom.[210]

On its own, this might not raise too many questions. But this definition does not come on its own; it comes after two books explaining that the subject and sovereign — the two bodies in between which Government mediates — actually comprise the same people.

Government, Rousseau asserts, is also a moral/fictitious person, but is 'endowed with certain faculties; active like the sovereign, passive like the State.'[211] Government 'exists only through the sovereign'; that is, no ordinary collective group of people can institute a government unless they are already endowed with the same special property that allows them to constitute a state, in which government is a part of and whose boundaries it cannot breach. Rousseau makes two further assertions about government which, taken together, make for a giant philosophical leap. First, government is 'distinct from both the people and sovereign, and intermediate between them.' Second, to 'fulfil the purpose for which it is instituted, it must have a particular *self*' (emphasis in original).[212]

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[210] *The Collected Writings of Rousseau*, 1994, 4:166 [SC III,1].
[211] Ibid., 4:168–9.
[212] Ibid., 4:169 "Un moi particulier" in the original; translated also as "a separate self."; Rousseau, *Du Contrat Social*, 257 [SC III,1].

This is particularly striking when we consider that the people and the sovereign, the two bodies bookending government, are actually, by Rousseau's painstakingly argued notion of sovereignty, the very same collective of individuals in different roles. Two sets with identical memberships need to institute a body in between them to make possible the smooth working relationship between them — and that third intermediate body cannot, must not, be the same set!

And this intermediate body is necessary precisely because sovereignty is limited to the general will — forbidden from dealing with particular matters or expressing particular wills or interests. Where the sovereign cannot act, the government steps in. The sovereign does not implement laws or pronounce transgressors,[213] nor does it make war or peace. Interestingly, in the only major institutional essay he wrote before formulating his opposition to representation, the 1755 *Encyclopédie* entry 'Discourse on Political Economy,' Rousseau raises the question of war as an example of a decision made in assembly — and after deliberation, no less![214] On this issue Rousseau was, even by his own standards, impressively inconsistent. Perhaps we can view the allusion to war in 1755 as only to *declaring* war, and thus an act of will and sovereignty separate from the conduct of war as a prerogative of government, but Rousseau never explicitly makes the distinction in this context and, if anything, elides it over the next decade of writing. By the time he writes his *Letters From the Mountain*, he is cautiously noting the interference of the

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[213] Wokler, "Rousseau and His Critics on the Fanciful Liberties We Have Lost," 193.
[214] *The Collected Writings of Rousseau*, 1992, 3:144 [PE 16].

Geneva legislature in questions of treaties,[215] but then asserting that questions of war and peace and foreign policy in general are not acts of sovereignty, but of government, as 'the external exercise of Power does not suit the People at all; the great maxims of State are not within its reach.'[216]

Government, then, 'must be powerful enough to dominate particular will' but not the general will or laws.[217] Its relationship to sovereignty is governed (for lack of a better word) by two 'infallible rules': (1) always adhere to spirit of the law and (2) consult the general will to determine what the spirit of the law is.[218] In much of the text of *Political Economy*, where these two rules are first enunciated, even more than in *Social Contract*, Rousseau uses the word 'government' in its general non-scientific sense. But the context of this passage makes clear that he does actually refer here not to the general apparatus of state but precisely to the intermediate body responsible to the sovereign. Notable also in this passage is the vast leeway granted to governments in applying the law to particular objects — they must adhere to the *spirit* of the law as a boundary condition and consult the general will when in doubt. More interestingly, he explicitly rules out primary assemblies as the only method of consulting the general will, remarking that it is 'impractical' and 'rarely necessary,' an interesting conjunction, since the 'rarely necessary' part implies that it is occasionally necessary and, therefore, that the impracticality is a relative matter, not an impossibility.

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[215] *The Collected Writings of Rousseau*, 1990, 9:238 [LM 7].
[216] Ibid., 9:248 [LM 7].
[217] Bloom, "Rousseau," 575.
[218] *The Collected Writings of Rousseau*, 1992, 3:148 [PE 23 (I)].

The double relation of sovereign and government to people and state recapitulates the recurring separation in Rousseau between the moral and the physical, more often stated as the powers of will and the powers of force. Echoes of this recur, for example, in T.H. Green's claim that 'will, not force, is the basis of the state.'[219] They are expressed in Rousseau's ideas about institutions as well, though Rousseau is at pains to distinguish his separation from Montesquieu's,[220] avoiding a multiplication of authorities, but keeping the physical powers of force with government and the moral powers of will with the sovereign. A nearly identical argument is used by Paine in his 'two main divisions of power,' though for the latter *legislation*, which is explicitly not of constitutional statutes but rather everyday ordinary law, is a 'delegated power.'[221] Rousseau even, at one point in *Social Contract*, gives in to a not entirely compelling corporeal metaphor, with legislative will being the province of the heart and executive force that of the brain.[222]

Whatever metaphor sheds the most light on it, and whatever institutional manifestation can be argued to derive from it, the separation of sovereignty and government necessarily reorients our entire vision of public affairs and the legitimacy of the state. It does not, as in Bloom's overstated claim 'prefigure the distinction between state and society'[223] — the 'Person or

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[219] Thomas Hill Green, *The Political Theory of T. H. Green: Selected Writings*, Crofts Classics (New York: Appleton-Century-Crofts, 1964), 117.
[220] Cobban, *Rousseau and the Modern State*, 83.
[221] Thomas Paine, "Thomas Paine's Answer to Four Questions on the Legislative and Executive Powers," in *The Writings of Thomas Paine*, vol. 2, 1779, chap. 11.
[222] *The Collected Writings of Rousseau*, 1994 [SC III,11].
[223] Bloom, "Rousseau," 575.

Form' of government is explicitly separated from *society*[224] much more forcefully by Locke in the *Second Treatise* half a century before — but it does undermine the sovereignty-based arguments for nearly all forms of government that were current in the seventeenth and eighteenth centuries.

Most importantly for the purposes of this discussion, it raises inevitably the question of popular rule and democracy. Rousseau accepted the tripartite classical taxonomy of regimes by number — one, monarchy; few, aristocracy; many, democracy.[225] Rousseau's innovation is to apply this to government separately from sovereignty, because sovereignty can reside only with the people at large. And legitimate sovereignty has its expression in the dominance accorded to law — a state of affairs Rousseau confusingly calls 'republican.' This form of republic is theoretically compatible with all forms of government, though Rousseau's personal preference is for aristocracy — elective aristocracy at that. In case there is any doubt, Rousseau explains in a footnote that even a monarchy can be a republic, provided that government is not united with the sovereign and that the former is directed by law.[226] It bears emphasising that Rousseau's decidedly revolutionary conception of sovereignty is here advancing a markedly anti-revolutionary argument.[227]

Rousseau does not explicitly identify democracy with sovereignty in the *Social Contract*, though he makes the point much clearer in later writings, especially in the sixth *Letter from the Mountain*, where he writes that the

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[224] Locke, *Two Treatises of Government*, 196–197 [2: XIX, §220].
[225] See 'Numbers in Political Thought' in Chapter 5.
[226] *The Collected Writings of Rousseau*, 1994 [SC II,6].
[227] Richter, "Tocqueville and Guizot on Democracy," 79-80.

'foundations of the State are the same in all Governments,' though the governments themselves might differ. This, after explaining once more that despite the different forms of legitimate government, the middle form aristocracy is the preferred one.[228] Miller argues that this separation between sovereignty and government allows Rousseau to keep the benefits of democracy in sovereignty — checking abuses of power, engendering wisdom in all men, enabling social unity — without the threats democracy has traditionally been seen as having on good government.[229] Put another way, government by aristocracy empowers order and virtue,[230] but the total separation from popular sovereignty limits it, preventing usurpation and preserving liberty.

It is worth pausing here to assess what Rousseau, despite his unmistakable opposition to representation, has given us. He has connected sovereignty and the state to the people at large, but separated government from both, creating an unacknowledged level of public life we might call *politic*s, which is broad but bounded, separate from people's everyday private lives but accessible and ultimately responsible to all. He has tied political legitimacy to popular sovereignty and linked sovereignty with the task of supervising government and enacting law.

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[228] *The Collected Writings of Rousseau*, 1990, 9:233–5 [LM 6].
[229] Jim Miller, *Rousseau: Dreamer of Democracy* (New Haven: Yale University Press, 1984), 108.
[230] Ibid., 106.

Necessity for Positive Laws

Sovereignty, as we have seen, resides not in one man or body of men, but rather in the people at large — *resides* in the people; the people are not the Sovereign. Because sovereignty is not just a place or a human being or a setting, it is an action. More specifically, as Noone argues, it is 'descriptive of a process and not of persons considered individually or collectively.'[231] The process describing the action is sovereignty; the result of the action is law — defined as 'a public and solemn declaration of the general will, on an object of common interest.'[232]

To grasp the centrality of law to Rousseau's theory, we have to realise that Rousseau was writing just as natural law was being eclipsed and law-creation emerged as a focal outcome of public affairs, though if anything, Locke's rejection seventy years earlier of the possibility for consensus on natural law is even more forceful than Rousseau's with its implied need (and, by extension, potential) for unanimity.[233] This, Friedrich argues, was a reasonable next step once philosophers stopped driving to discover eternal laws and started, with Bodin, associating the authority to make rules with sovereignty and the state.[234] Already in the *Discourse on Inequality*, Rousseau made his scepticism of natural law apparent, remarking that 'it is impossible to comprehend the Law of Nature and consequently to obey it without being a

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231 John B. Noone, "The Social Contract and the Idea of Sovereignty in Rousseau," *The Journal of Politics* 32, no. 03 (1970): 702.
232 *The Collected Writings of Rousseau*, 1990, 9:232 [LM 6].
233 I am grateful to Jeremy Waldron and Elizabeth Frazer for clarifying this point for me.
234 Friedrich, *Constitutional Government and Democracy: Theory and Practice in Europe and America*, 268.

great reasoner and a profound metaphysician.'[235] Rousseau himself begins his discussion of law in Chapter 6 of Book II of *Social Contract*, 'if we knew how to receive it [justice] from on high, we would need neither government nor laws,' and concludes that 'in the civil state… all rights are fixed by the law.'[236]

Earlier in Book II, Rousseau makes the critical distinction between *law* and *decree*, a distinction that nearly maps on faithfully to the distinctions Rousseau makes throughout between will and force. Again, a certain grammar governs relations here. Because the people and sovereign and the state are the same subject, what distinguishes them is their action, and each action type has a relevant object. 'Whatever is ordered even by the Sovereign concerning a particular object is not a law either, but rather a decree; nor is it an act of sovereignty, but of magistracy.'[237]

The distinction is crucial, but Rousseau himself resists the temptation to map everything onto earlier concepts in a one-to-one relationship. Both decree and law can involve *will*, for example, but the former is limited to particular will — which Rousseau avers governments and other political actors can and should have — or to what he calls the *will of all*,[238] that will which we today might call an aggregation of interest or, more recently, the outcome of social choice. Why is such an aggregation so different in Rousseau's eyes

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[235] *The Collected Writings of Rousseau*, 1992, 3:14 [SD] The overly literal translation from the French ("très grand raisonneur et un profond métaphysicien") leaves out the apparent sarcasm; it is also translated as "subtle casuist"; Jean-Jacques Rousseau, *Discours sur l'origine et les fondements de l'inégalité parmi les hommes* (Collection Bibliothèque nationale, 1867), 23.
[236] *The Collected Writings of Rousseau*, 1994, 4:152 [SC II,6].
[237] Ibid., 4:153 [SC II,6]. The last word is sometimes translated as "government," though the original text is "magistrature."; Rousseau, *Du Contrat Social*, 225.
[238] *The Collected Writings of Rousseau*, 1994 [SC II,3].

from the 'common interest' and why is it so unsuitable as a basis for law?

Rousseau points out two differences, though he devotes so much attention to one that the other is often overlooked. Firstly, the common interest is manifest not in a 'sum of individual desires' but in a will that is *general* and *public*.[239] The public aspect is critical both to avoid sectional interests and to ensure that the good sought is not just a satisfaction of particular interests collectively stated or aggregated, but rather a true expression of generality, both at the beginning and end of a process. It is further interesting to note that here in Book II is a discussion of interests and goods in public deliberations, an acknowledgement of a phenomenon that Rousseau is elsewhere, particularly in the institutional chapters of Books III and IV, reticent to treat.

The second, decree/law, distinction, however, is not as concerned with publicity as with generality. Recall that each kind of will involves an action and has to have an object. The object of the sovereign will, the one that creates law, cannot deal with a specific judgement or act of administration, or as Rousseau has it, 'there is no general will concerning a particular object.'[240] If it were only a question of general objects, though, Rousseau's idea might not stand out as much, and it certainly would not have such far-reaching implications for the process of promulgation. Austin's command theory of law gave a prominent place to generality — law is defined as 'a command which obliges a person or persons, and obliges generally to acts or forbearances of a

[239] Ibid. [SC II,3].
[240] *The Collected Writings of Rousseau*, 1994, 4:152 [SC II,7].

class'[241] — but Rousseau explicitly rejects commands or force as the identity test of laws, asserting already in *Political Economy* that 'the power of laws depends even more on their own wisdom than on the severity of their ministers.'[242] Rousseau's generality is a bit more subtle:

> When I say that the object of laws is always general, I mean that the law considers the subjects as a body and actions in the abstract, never a man as an individual or a particular action.[243]

But this sentence cannot be considered on its own as a description of the end state of law; we have to remember who it is who pronounces on law. The sovereign is not creating law as a fulfilment of one of its duties, since the action itself is inseparable from the sovereign status. Sovereignty exists only in action, and the sovereign 'acts by means of Laws, and it cannot act otherwise.'[244] This is a much narrower statement of a principle Rousseau outlined earlier in the *Geneva Manuscript* using much more flowery language to make the same point regarding laws, namely that the 'body politic [is] active and sensitive only through them.'[245]

It is in this chapter of the *Geneva Manuscript*, appropriately titled 'On the Necessity of Positive Law,' that Rousseau makes his most sweeping claims about the special status of law and the unique socialising effects of generality- and publicity- based rules. The positive effects he attributes to the process of creating them do not appear until the *Social Contract* and *Letters from the*

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[241] Austin, *The Province of Jurisprudence Determined*, 29.
[242] *The Collected Writings of Rousseau*, 1992, 3:147 [PE 21 (I)].
[243] *The Collected Writings of Rousseau*, 1994, 4:153 [SC II,6].
[244] *The Collected Writings of Rousseau*, 1990, 9:232 [LM 6].
[245] *The Collected Writings of Rousseau*, 1994, 4:99 [GM I,7].

Mountain. In the *Geneva Manuscript*, laws are the 'most sublime of all human institutions.' The generality of law — its lack of a particular object and a private will — ensures that 'all obey while none commands.' Furthermore, 'this healthy instrument of the will of all... re-establishes, as a right, the natural equality among men.'[246]

In *Social Contract*, the language is a bit more reserved, but the claim is, in many ways, even broader in at least two dimensions. Law is now intimately and necessarily connected with justice, and the creation of law assumes a solemnity and intrinsic, rather than simply instrumental, importance.

This double-ended generality — on the source of law and on its object[247] — means that public rules are not simply efficient, but necessarily just. 'Thus,' he writes in one of the last *Letters*, 'there is no liberty without Laws, nor where someone is above the Laws.'[248] Cohen contrasts this with Hobbes' distinction between *good* laws and *just* laws, the former being 'necessary and perspicuous,' but goodness by no means being a test of law's validity.[249] As before, the difference between the two philosophers emerges exactly where the language is nearly identical. Both Hobbes and Rousseau establish a validity test for law and use it to rule out unjust law as a category. In both cases, this derives from law being made by the sovereign. But the logic of the argument could not be more different. For Hobbes, 'The Law is made by the Soveraign Power, and all that is done by such Power, is warranted, and owned

[246] Ibid., 4:98–99 [GM I,7].
[247] Levine, *The General Will*, 95.
[248] *The Collected Writings of Rousseau*, 1990, 9:261 [LM 8].
[249] Joshua Cohen, *Rousseau: A Free Community of Equals* (Oxford: Oxford University Press, 2010), 64–5.

by every one of the people; and that which every man will have so, no man can say is unjust.'[250] In other words, the validity test for law is the identity test, and since the power is warranted — that is, authorised — the results are owned and necessarily just (or not unjust). Rousseau, a century later, writes about a very different kind of sovereign, concluding very similarly that it is

> no longer necessary to ask... whether the law can be unjust, since no one is unjust toward himself... the law combines the universality of the will and that of the object, what any man, whoever he may be, orders on his own authority is not a law.[251]

Both Hobbes and Rousseau ask us not to detain ourselves with questions about a law's justice; both argue that the sovereign act obviates the question. But for Hobbes this is because we *own* the law and its results, and for Rousseau it is because we were somehow formally involved in making it.

The affinity between sovereignty and law having been established and its normative value affirmed, Rousseau wishes to devote attention to the power which forms, creates, and expresses the general will — legislation, the creation of law. When Rousseau first describes sovereignty in Book I as a kind of action, it is still possible to see the action as metaphorical or, at a minimum, not specifically delimited. By Book II, in the discussion on law, the action is narrowed considerably. 'Through the social compact we have given the body politic existence and life; the issue now is to give it movement and will through legislation.'[252] This far into *Social Contract*, Rousseau does not even need to

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[250] Hobbes, *Leviathan*, 239 [XXX,20].
[251] *The Collected Writings of Rousseau*, 1994, 4:153 [SC II,6].
[252] Ibid., 4:152 [SC II,6].

point out that action of the body politic *is* sovereignty, therefore, the action of legislation is the only action which expresses the People's Sovereignty. The reverence Rousseau has for this action is much noted, among others by Riley, who writes that '[l]egislation was the task of giving the most perfect form to an intrinsically valuable activity.'[253] A faint echo of Locke, who argued that through the legislation 'members of a commonwealth are united and combined together into one coherent living body,' is detectable here. In advancing his argument on dissolution of government, Locke wrote, 'This [the Legislative] is the soul that gives form, life, and unity to the commonwealth.'[254]

Here again, though, with both Locke and Rousseau, we run into the problem of multiple uses of the same term. Is legislation just law creation or something more? The question takes on meaningful procedural import with the introduction of Rousseau's *Legislator* (who does not legislate!). At several points Rousseau uses the idea of legislation much as we might today, to describe the process of ordinary law-creation; elsewhere, he indicates that he is referring only to the framing of constitutional statutes.[255] For the latter — *the law*, as in the terms of association — he generally uses the singular form with a definite article, while he observes no such strict rule where he seems to prefer the former. Either way, it is clear Rousseau was not envisioning a large activist industrial nation-state promulgating new laws at a frequent pace — such a development did not come to pass until the nineteenth century, and

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[253] Riley, "A Possible Explanation of Rousseau's General Will," 90.
[254] Locke, *Two Treatises of Government*, 194 [2: XIX, §212].
[255] *The Collected Writings of Rousseau*, 1990, 9:261 [LM 6].

Rousseau certainly did not advocate it or even imagine it.[256] As before, the institutional specifics are not what is most important. Rousseau separates government from both sovereignty and the people, and he separates politics as a practice from the more solemn creation of terms of association — expanding a separation which already appears at the end of Locke's *Second Treatise* and which will be given its most formal and explicit presentation in Sieyes' concepts of *pouvoir constituant* and *pouvoir constitué*. The latter will merit a whole chapter in this dissertation; the former, more than fifty years before Rousseau, envisioned 'the people… at liberty to provide for themselves by erecting a new legislative' upon the 'dissolution' of government.'[257] For Locke, the word *government* did not strictly refer to an executive, but rather comprised both a legislative and an executive, and his use of *legislative*, even more than Rousseau's, has a more obviously broad and ambiguous extension than in the work of later constitutional theorists.

Rousseau writes in the seventh *Letter from the Mountain*, '[L]egislative power consists in two inseparable things: to make the laws… and have inspection over the executive power,'[258] as though these two tasks flowed naturally from an understanding we might have of what legislation strictly entails. This, however, is not the case — not intuitively and not in keeping with the internal logic of Rousseau. These are two tasks that emerge naturally from a Rousseauian conception of sovereignty — separate from government, residing with the people, taking no human form. As such, and despite

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[256] Cobban, *Rousseau and the Modern State*, 88.
[257] Locke, *Two Treatises of Government*, 196–197 [2: XIX, §220].
[258] *The Collected Writings of Rousseau*, 1990, 9:246 [LM 7].

Rousseau, they become the two tasks most compellingly associated with representation.

The extent to which Rousseau's non-representative notion of legislation involved the people in a role more meaningful than simple acclamation is not clear either. Curiously, one of the only significant changes Rousseau makes in his proposed authorities to primary assemblies concerns the initiation of legislation.[259]

And there is one inescapable normative feature of law which gums up the procedural works: to legitimately be subject to a rule, one must be its author; for the people to legitimately be subject to a law, they must be its author. What are the practical, procedural implications of this requirement?

Unanimity, Universality, and Friction

Like Hobbes, Rousseau sought a way to maintain an assumption of radical individualism that was 'unified' somehow in an act of sovereignty. At the same time he wanted to keep a distance from Hobbesian *authorisation* which he viewed as a 'vehicle for despotism.'[260] While in Hobbes the citizen 'owns' the decisions of the sovereign he has authorised, in Rousseau he does

[259] Vaughan, *The Political Writings of Jean Jacques Rousseau*, 2:155.
[260] Istvan Hont, *Jealousy of Trade: International Competition and the Nation-State in Historical Perspective* (Cambridge, Mass. ; London: Belknap Press of Harvard University Press, 2005), 470.

so because he is somehow seen as having decided — legislated — for himself. This tension in Rousseau's political theory creates real challenges in trying to translate it into institutional practice, even if it is not the 'insurmountable conceptual problem' it is occasionally alleged to be.[261]

Rousseau has endorsed 'the absolute sovereignty of public reason,'[262] without much indication as to what to do in cases of disagreement and without a full reckoning with the necessary and essential role disagreement plays in public affairs.

Guizot, in a scathing critique of Rousseau's ideas on representation — or at least, on the conventional view of Rousseau's ideas on representation as understood by focusing only the procedural portions of *Social Contract* — concludes that the only way we can make sense of decision procedures in a Rousseau-approved assembly is by assuming a unanimity requirement, since there would be no way in Rousseau's approach to justify the majority deciding for the minority.[263] Guizot, interestingly, more or less accepts the medieval pedigree Rousseau assigns to the idea of representation; he is not deterred by it. On the contrary, he embraces it as, for Guizot, it was diversity, not any connection to the sovereignty of the people, that gave rise to representation — and it was managing diversity in a potential stalemate that representation

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[261] Riley, "A Possible Explanation of Rousseau's General Will," 96.
[262] J. Charvet, "Rousseau, the Problem of Sovereignty and the Limits of Political Obligation," *The Social Contract Theorists. Critical Essays on Hobbes, Locke, and Rousseau. Lanham: Rowman & Littlefield Publishers, Inc*, 1998, 206.
[263] François Guizot, *The History of the Origins of Representative Government in Europe* (Indianapolis, IN: Liberty Fund, 2002), 289.

achieved its highest function.[264] Rousseau himself is at pains to emphasise that he makes no unanimity requirement for sovereign action, except in approving the initial social compact. The law of majority vote, he explains at the beginning of the *Social Contract*, rests on a covenant and implies unanimity on one occasion,[265] but quite obviously not on every occasion. Near the end, in Book IV, he even expresses misgivings about the possibility of unanimity where it is not needed.[266]

However, Rousseau does not make any a priori assumption of consensus with respect to the general will, only an assumption that consensus is a goal — since endeavouring to achieve such a consensus is the only way to ensure the exclusion of private wills in deliberation.[267] Rousseau himself illustrates this with a useful metaphor in the *Geneva Manuscript*:

> In politics as in mechanics one cannot avoid acting more weakly or more slowly, and losing force or time. The general will is rarely the will of all, and the public force is always less than the sum of the private forces, so that in the mechanism of the State there is an equivalent of friction in machines.[268]

Masters, in writing about legislation, takes up this analogy and extends it much further than Rousseau. He compares the principle of the general will to the principle of a 'frictionless surface' in physics — 'mental constructs which explain reality.'[269] The frictionless surface is necessary for making sense of

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[264] Guizot, *The History of Civilization in Europe*, xxvi–xxviii.
[265] *The Collected Writings of Rousseau* [SC I,5].
[266] *The Collected Writings of Rousseau* [SC IV,2].
[267] Waldron, *Law and Disagreement*, 91.
[268] *The Collected Writings of Rousseau*, 4:88 [GM I,4].
[269] Masters, *The Political Philosophy of Rousseau*, 285–6.

any mechanical movement,

> even though no existent machine avoids friction completely; once the physical relationships have been analyzed on the assumption that that friction is absent, it is relatively simple to calculate the friction which *is* present under any given circumstances. To say that the frictionless surface is an 'ideal' might be misleading, for although it serves as a guide to the most efficient construction of any machine, the total absence of friction is not a feasible goal in practice. [270]

None of this can eliminate the normative problem raised by being on the losing side of a majority decision in a Rousseauian general will. Rousseau himself makes little room for a discussion of disagreement,[271] and not much room for voting procedures either. There are two possible explanations for this. The first is that the general will is very limited in its political scope — relevant perhaps for turning out a terrible government and a few other large, abstract questions, but not something one turns to for the kind of legislation we would today associate with everyday public affairs. Given the limitations on deliberation Rousseau seeks, such a general will would amount to little more than a potential veto.[272]

Another interpretation would place the emphasis on will-formation. Here the friction metaphor — in Masters' extended version if not in Rousseau's more modest enunciation — is most useful. As a method of grounding political legitimacy and ensuring participation for its own intrinsic merit, seeking the

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[270] Ibid., 285.
[271] Cohen, *Rousseau*, 70.
[272] Qvortrup, *The Political Philosophy of Jean-Jacques Rousseau*, 61.

general will could be argued to ensure the kind of self-legislating freedom Rousseau holds as the highest value. Lindsay has described a similar model, noting that 'the process of discovering... [the] will of society is a process of making it.'[273] Concerns about unanimity being imposed would be mitigated by the shared goal, if not the divergent suggested paths. Waldron, in a similar vein, argues that if voters are Rousseauian, rights are built into majority decision making.[274] The built-in vagueness about the scope of 'the law' or 'laws' is, ironically, clarifying here: the process of will-formation for explicit legislation (still at the level of law, not decree) is the process by which the terms-of-association laws are continually affirmed and legitimated.

But this would still require some political sphere that is separate from the totality of public life but broadly engaging of an entire public, some way of losing a specific vote without losing an affinity for the general will. Rousseau hints at this repeatedly with his state-sovereign separation, but his dogmatic opposition to representation prevents him from following it through to its full theoretical realisation.

Conclusion

Rousseau's philosophical insights — (1) the separation of sovereignty

[273] Lindsay, *The Essentials of Democracy*, 43.
[274] Jeremy Waldron, *Rights and Majorities: Rousseau Revisited*, 1993, 420.

from government, (2) the special status of laws and legislation, and (3) the intimate normative relationship between sovereignty and the creation of law — mark a radical departure in political theory. Even today their implications are startling and revolutionary — especially today, in an era of large administrative states and executive and judicial ascendance. The institutional premises he operated under, possibly appropriate for his time, held primary assemblies to be feasible and manageable, as republics were small and new laws were created relatively rarely. The expertise he entrusted to the government, and the lack of it in his assessment of the people, meant that the people in primary assemblies expressed their sovereignty by approving or, rarely, disbanding governments. Even when he writes constitutions for larger republics, the primary assemblies remain the principal forums for political action. The political conclusion he drew from this was his famous rejection of representation — and a series of unworkable procedures in its stead.

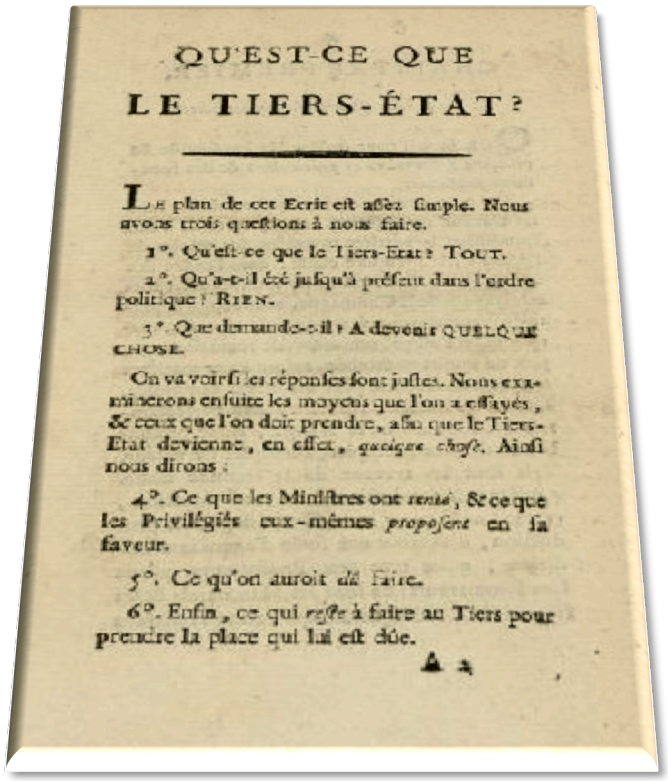
On the face of it, then, a normative theory of representation should not have much to do with Rousseau. But inapplicable as his conclusions turned out to be, and flawed as his institutional premises might be, the fundamental insights express something that even the putative theorists of representation missed. They elevate law to a special status of authorised political decision making, create a separate sphere of politics, and link both ultimately to a formal expression of popular will.

But there exists only one institutional practice instantiating these insights, and it goes by a name Rousseau himself would run from:

representation. Before we can fully appreciate that, however, we will have to detain the discussion with yet another eighteenth century philosopher who took Rousseau's attempt to create a separate sphere for politics outside of sovereignty and extended it much further than Rousseau himself could have imagined.

Chapter 3

The Elusive Medium of Exchange



QU'EST-CE QUE

LE TIERS-ÉTAT?

Le plan de cet Ecrit eſt aſſez ſimple. Nous avons trois queſtions à nous faire.

1°. Qu'eſt-ce que le Tiers-Etat? TOUT.

2°. Qu'a-t-il été juſqu'à préſent dans l'ordre politique? RIEN.

3°. Que demande-t-il? A devenir QUELQUE CHOSE.

On va voir ſi les réponſes ſont juſtes. Nous examinerons enſuite les moyens que l'on a eſſayés, & ceux que l'on doit prendre, afin que le Tiers-Etat devienne, en effet, *quelque choſe*. Ainſi nous dirons:

4°. Ce que les Miniſtres ont *tenté*, & ce que les Privilégiés eux-mêmes *propoſent* en ſa faveur.

5°. Ce qu'on auroit *dû* faire.

6°. Enfin, ce qui *reſte* à faire au Tiers pour prendre la place qui lui eſt dûe.

A 2

If he were not now two centuries in the grave, the Abbé Emmanuel-Joseph Sieyes would no doubt note the irony of turning to him on major political-philosophical questions in light of his own 'indignation and outrage' at those 'obsessed with asking the past'[275] for political wisdom.

Sieyes' was a prominent voice leading up to the constitutions of 1791, 1795, and 1799, each time trying and failing to effect 'a complex form of government involving a multitiered system of indirect elections.'[276] He was largely left out of the discussion in 1793, however, and ceased publishing until after the fall of Robespierre,[277] cautiously raising his voice again in 1794 before resuming full political activity in 1795. His speech to the Convention that July 20, published five days later in the *Moniteur*,[278] together with the never published essay *Bases de l'ordre social*[279] on which it is based, represent the high point of Sieyes' thinking on representation. In these two pieces from 1795, Sieyes finally synthesises the basic philosophical precepts of his pre-revolutionary essays (1788-mid 1789, viz. *Views, Privileges,* and *Third Estate*) with the political exigencies of his first round of constitutional debates (late 1789-1791, enunciated especially his speech on the royal veto

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275 Emmanuel Joseph Sieyes, "Views of the Executive Means Available to the Representatives of France in 1789," in *Political Writings: Including the Debate between Sieyès and Tom Paine in 1791* (Hackett Publishing, 2003), 16.
276 Isaac Nakhimovsky, *The Closed Commercial State: Perpetual Peace and Commercial Society from Rousseau to Fichte* (Princeton University Press, 2011), 25.
277 Erwan Sommerer, "From Contestation to Conservation," *La Révolution Française*, Rupture(s) en Révolution, December 9, 2011, 4, http://lrf.revues.org/index327.html.
278 J. H Clapham, *The Abbé Sieyès: An Essay in the Politics of the French* (London: P.S. King, 1912), 167.
279 Forsyth, *Reason and Revolution : The Political Thought of the Abbé Sieyès*, 14.

and his letters to Paine) and the insights of the successes and failures of the partial implementation of his ideas (1792-1794, a prudently silent period). Though Sieyes would return to constitution framing four years later in 1799 following the Bonaparte coup, he would never again give representation the mature reasoned attention that reaches its peak in his 1795 essay and speech. In fact, his only recorded statement on the issue after 1795 is an extremely brief preface to his *Constitutional Observations* in the aftermath of the coup.[280] And after 1799, though he remained politically very active, he would never return to the topic at all in writing.

Sieyes' most well known contribution to political thought is his distinction between *pouvoir constituant* and *pouvoir constitué*. We will not spend too much time on this distinction in this chapter, not because it is unimportant but because it has been so thoroughly covered elsewhere. For the purposes of this discussion, and even more so in light of the discussion in previous chapters on Hobbes and Rousseau, it is important to note that the expression of popular sovereignty — of the kind Rousseau explicitly talks about, but even more of the kind Hobbes implies — in Sieyes is to be found directly in constituent power alone. Yet it is Sieyes himself who seems to violate the strict dichotomy between constituent and constituted power, arguing for 'representative will' and majority vote already at the constituent phase in his revolutionary pamphlets. When it comes time to actually write a constitution, Sieyes argues that an association exists before any power can be constituted. Its existence comes into being not by a founding contract, but

[280] Reproduced in ibid., 147–148.

rather by a very basic economic arrangement. As Pasquino reminds, what is constituted is not the nation, but *government*.[281]

It is the three pre-revolutionary essays, published as pamphlets and widely read at the time, from which most of this chapter will be drawn. All three were initially published in 1788-1789 and all have been translated into English. Sieyes, even more than Rousseau, had the opportunity to put his ideas into practice, being an active participant in constitutional debates in the revolutionary period. This gives us two other large collections of primary source material besides the 1788-1789 pamphlets. First, his speeches and writings in the actual constitutional debates of 1789-1791, where his ideas mature somewhat and where compromise is forced on him. Second, in his return to politics and constitution framing in 1795. In each of the three periods we can discern both a continuity and a mature response to changing circumstances. Because the argument of this chapter cannot be laid out in a manner that will allow us to proceed through his work chronologically, it will perhaps be helpful to set out separately the chronology of all Sieyes' various contributions on the topic of representation. I have divided them into four discreet periods:

1. Pre-revolutionary political economy (1774-1780): A body of mostly unpublished work on labour, exchange, and markets.

2. Revolutionary pamphlets (1788-1789): The three famous pamphlets (*Views*, *Privileges*, and *Third Estate*) published right

[281] Pasquino, "The constitutional republicanism of Emmanuel Sieyes," 112.

before the revolution.

3. Constitutional debates (1789-1791): The speeches and written arguments from the beginning of the revolution until the 1791 constitution, including the *Royal Veto* and the public debate with Paine.

4. Mature thoughts on representation (1795-1799): The written and spoken work leading up to both the 1795 and 1799 constitutions, including *Bases de l'Ordre*.

In this chapter, I will first trace Sieyes' emphasis on indirectness, whether it is in rule, decision making, or the application of voting rules. Indirectness is a leitmotif of Sieyes' political writing and an emergent property of the *constitué-constituant* distinction. It lies at the heart of his opposition to federalism and it is the foundation of his normative case for a 'public establishment' separate but accountable to the Hobbesian and Rousseauian constituent power of the people.

The normative implications of indirectness are manifest in two radically different spheres, each one the respective focus of the next two sections of this chapter. In the second section, I will discuss the special role Sieyes attaches to law and law making within the public establishment. Much of the language of modern jurisprudence is already there in Sieyes: generality, publicity, stability (which he calls 'permanence'). Just as the distinction between *direct* and *indirect* means is important in the first section, so the

distinction Sieyes makes between *active* and *passive* powers will be in the second section.

The third section is an extended discussion of Sieyes' political economy. Law for Sieyes was directly connected to the protection of private property, and the public establishment he called for necessitated a legitimate means of taxation. The ethos of specialisation went beyond 'private employments' for Sieyes, and was a focal element in his conception of representation (in contrast to Rousseau). Less well known is the importance Sieyes attaches to *exchange*, not just in the marketplace, but in the creation of a forum for settling, or at least peaceably managing, political disputes.

In the last section, I bring the arguments from the previous three sections together to assess the *functions* of representation in Sieyes' theoretical and constitutional work. Since much of my own argument builds on Sieyes' theory, this section will be just a short sample of the things we can piece together directly from Sieyes.

The Importance of Being Indirect

Sieyes cannot really be credited with discovering the difference between constituent and constituted power. Variations of this distinction are

already present in Rousseau and, most notably, Hobbes.[282] Sieyes gives this distinction a name (a memorable one and one that, for Anglophone political theorists, is just French-sounding enough to be cool but familiar enough to be clearly understood) and promptly goes on to violate the most immediate normative constraint of constituent power — some kind of unanimous consent of the people at large — by advocating that the representatives of the Third Estate stand in as a constituent power. Sieyes does this by adding a third step to his state-of-nature story (without using the term 'state of nature') in *What is the Third Estate*? The first two 'epochs' are familiar enough: individual will and common will. In the third, from which the constituent power emerges, we have already moved to *representative will* or what Sieyes also calls *real common will*.[283] In fact, this entire polemic, Sieyes' most influential ideological tract, is at bottom an argument for the representative will of the Third Estate and its legitimacy as a constituent power.

Sieyes calls the action of those entrusted with limited power in the third epoch *government by proxy* (in the original: *gouvernement exercé par procuration*[284]), but this is not the *government* he refers to elsewhere, for which he often is using the term *public administration*, which is much closer to Rousseau's definition. As in Rousseau's definitions of government, citizens, and state, so in Sieyes' scientific terms do we find sets whose memberships overlap and occasionally coincide, but who differ in actions or in relations to

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282 Forsyth, "Thomas Hobbes and the Consituent Power of the People," 193.
283 Emmanuel Joseph Sieyes, "What Is the Third Estate?," in *Political Writings: Including the Debate between Sieyès and Tom Paine in 1791* (Hackett Publishing, 2003), 134–135.
284 Emmanuel Joseph Sieyes, *Qu'est-ce que le Tiers état ?* (Éditions du Boucher, 2002), 52.

other sets. In this same text Sieyes adopts another rhetorical tic of Rousseau's: assigning grammatical roles to his concepts (active, passive, subject, object), especially in cases where membership overlaps.

It is also in *Third Estate* that Sieyes sketches out a distinction between the political and the non-political. Seven years later, in a speech before the Assembly, Sieyes further divides political action into

> two great kinds, ascending and descending action. The first includes all those acts by which the people nominates directly or indirectly its various representatives... The second includes all the acts by which these various representatives contribute to the formation or service of the law.[285]

The ascending-descending distinction has a specific role to play in this speech, as a justification for both indirect election of representatives (ascending) and selection of candidates (descending). The word ascending suggests a gradual process rather than a two-step procedure. This can only serve two purposes to be meaningful. It could be used to constitute and consolidate an organised political authority at various sub-national stages, but as we shall see, this was not what Sieyes had in mind. The second possible purpose would be to moderate, for whatever reason (guarding against passions and prejudices on the one hand or, more to the point, protecting property interests), the immediate preferences of the masses while preserving their participation and therefore safeguarding their sovereignty. But ascending power alone cannot adequately serve this purpose; on its own, all it does is

[285] Speech from July 20, 1795 cited in Clapham, *The Abbé Sieyès*, 168.

create levels of delay and awkward aggregation which might not actually have any of the desired effects. Ascending power can be relevant only for this second purpose if it is coupled with descending power.

Descending power was manifest in selecting from among elected representatives those who would fill executive roles[286] as it was also in selecting candidates at various tiers of the electoral system. And indeed, the responsibility for drawing up a 'list of eligibility' was something Sieyes originally saw as the remit of the King, mostly for the sake of expediency;[287] as late as the end of 1789, Sieyes was not contesting the principle of monarchy.[288] The action of descending power (in the first sense) was referred to by Sieyes provocatively as *crowning* in his public letter to Paine in 1791,[289] though by 1795 he refers only to the job of an *Elector*.

What changed in those four intervening years? Firstly, a king lost his head; secondly, Sieyes abandoned his ambivalent and equivocal attitude to monarchy. But he did this while retaining an innovative insight into representation that he initially conceived of in the context of monarchy — the singular and plural functions of representation. The unifying aspect of representation was something Sieyes, like Hobbes before him, valued, and it was the reason he was willing to tolerate a suspensive veto (but no more than

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[286] Forsyth, *Reason and Revolution : The Political Thought of the Abbé Sieyès*, 130.
[287] Clapham, *The Abbé Sieyès*, 30.
[288] B. Baczko, "The Social Contract of the French: Sieyes and Rousseau," *The Journal of Modern History*, 1988, 109.
[289] Emmanuel Joseph Sieyes, "The Debate between Sieyès and Tom Paine," in *Political Writings: Including the Debate between Sieyès and Tom Paine in 1791* (Hackett Publishing, 2003), 169.

that);[290] it was a method of marrying representation's singular and plural aspects.[291] With the monarchy gone, Sieyes did not lose sight of this double role, nor did he clamour for the monarch's return. In his 1795 address to the convention, he asked to see the assembly fulfilling one role as a collective body and another as the set of its individual members.[292]

This is not to say that Sieyes did not see an office that could still be named and attached to descending power — or at least to selection. In *Bases de l'ordre* he has a detailed discussion of the office of the Great Elector,[293] and it is no great stretch to assume that he imagined himself in the role.

Sieyes does not spend too much time or ink on the ascending-descending distinction, but the active-passive and ends-means distinctions that lie behind it figure prominently elsewhere as well. Despite his love for binary oppositions, Sieyes does not belabour the distinction between *direct* and *indirect* in quite the same way. This is remarkable because the importance of the indirect informs so much of Sieyes' political economy (though, as Urbinati notes, it was Kant who was 'the first to make indirect politics the norm rather than merely an expedient'[294]). He uses the word most often (but not exclusively) in the context of elections, though I think we miss the point if we see indirectness as a technical question of vote aggregation.

The best way of understanding what indirectness is may very well be by

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290 Baczko, "The Social Contract of the French," 116.
291 Sieyes, *Political Writings*, xv.
292 Forsyth, *Reason and Revolution : The Political Thought of the Abbé Sieyès*, 144.
293 Pasquale Pasquino, *Sieyes et L'invention de La Constitution En France* (O. Jacob, 1998), 191.
294 Urbinati, *Representative Democracy: Principles and Genealogy*, 11.

coming to terms first with the one seemingly similar thing which it is not. For Sieyes, the contrast between direct and indirect was sharpest and most manifestly apparent when he discussed *federalism*. Clapham, writing exactly a century ago, claimed rather astonishingly that 'we know little directly of [Sieyes'] views on Federalism,'[295] and while it is true that Sieyes never gave the issue a thorough dissection in any of his writings, he was consistently dismissive of it in his speeches. Its 'obvious' shortcomings frequently serve as a backdrop for another argument. 'Distrust of pure democracy, distrust of local and special interests..., and distrust of federalism were all of a piece for Sieyes.'[296] The latter distrust has been treated as far more mysterious than it should be by both his contemporaries and his later readers, occasionally attributed to hostility to the American constitutional framers or an excess of nationalism.

But what, after all, is so different between the mutlitiered electoral method Sieyes did champion and federalism anyway? The voting districts Sieyes created were never intended to constitute loci of authority or independent political decision making. Quite unlike the antebellum United States Senate or the present-day Bundesrat (or for that matter the Council of Ministers in the European Union), the representatives that are elected by a Sieyesian constituency represent, on the one hand, the citizens of their constituency and, on the other, the nation as a whole; they do not represent

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[295] Clapham, *The Abbé Sieyès*, 34.
[296] Mona Ozouf, "Federalism," in *A Critical Dictionary of the French Revolution*, ed. François Furet, Mona Ozouf, and Arthur Goldhammer (Cambridge, Mass ; London: Belknap Press of Harvard University Press, 1989), 55.

governments at some level below the sovereign apex. The districts Sieyes created had no independent political standing of their own; they served as 'subdivisions of the whole, created by the whole' for one task only — choosing members of the National Assembly.[297] They were, in other words, not federalised at all.

Evidence for this is found in Sieyes' argument on behalf of his proposed reforms, notably in the speech on the royal veto, where he railed against the notion that France should become an 'assemblage of small nations, governing themselves as democracies.'[298] Further evidence is the nature of the electoral divisions Sieyes created — in many ways, his most lasting impact on French political practice. Far from forming the basis for subnational governing units, the boundaries of electoral districts violated traditional boundaries wherever possible 'with the explicit purpose of erasing even the memory of the premodern institutional plurality of French regions.'[299]

Indirectness had values for an entire political system, but it was most manifest in how Sieyes envisaged electing representatives to the National Assembly. From 1791 to 1795 to 1799, his proposals for indirect elections become increasingly concrete and decreasingly complex, and his justifications for indirectness as a method undergo a slight modification, particularly after Sieyes begins to envisage a continuing need for a unifying aspect of representation in the absence of a unifying sovereign king. In 1791, indirect

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297 Forsyth, *Reason and Revolution : The Political Thought of the Abbé Sieyès*, 139–140.
298 Sieyes, *Écrits Politiques*, 234.
299 Hont, *Jealousy of Trade: International Competition and the Nation-State in Historical Perspective*, 133.

election served to 'secure a high type of representative.'[300] Complicating voting procedures did not contradict egalitarian principles, because those were not at the forefront of Sieyes' concerns. Urbinati summarises thus: 'Sieyes' politics was a realm of competence, not equality'[301]

Two years earlier, in the *Observations on the Report of the Constitutional Committee*, published anonymously but later convincingly established as the writing of Sieyes,[302] the Abbé was even blunter. Indirect elections were a method for harnessing the trust of those for whom 'the public interest was unknown.' 'Simple people [*le petit peuple*] may be unable to form a sound judgement as to the qualities necessary to represent them in a legislative body,' but they would have no problem designating the most honest men in their canton to do so for them.[303] Indirect election, at this early stage, reconciles Sieyes 'profound elitis[m]' with 'the political necessity of broad suffrage.'[304]

By 1799, the corners are rounded, and the rhetoric is much less highfalutin. Lists of candidates are selected at three levels (arrondissement, department, and national) for a 400-member Legislative Assembly which could vote, but not deliberate, as well as for a 120-member Tribunate which could receive petitions, propose legislation, and argue in front of the Legislative Assembly. The Senate ('College des Conservateurs') was a powerful third

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[300] Clapham, *The Abbé Sieyès*, 130.
[301] Urbinati, *Representative Democracy: Principles and Genealogy*, 143.
[302] Clapham, *The Abbé Sieyès*, 91.
[303] Sieyes, *Écrits Politiques*, 254.
[304] W. H Sewell, *A Rhetoric of Bourgeois Revolution: The Abbé Sieyès and What Is the Third Estate?* (Duke University Press Books, 1994), 180.

assembly of life members who could review or strike down legislation, and who made the actual choices of the other two houses' memberships based from the selections on national lists.[305] Napoleon would modify Sieyes' proposal to concentrate even more power in the fourth body, the Government; by 1802 the constitution was replaced entirely.

The implementation of indirectness in 1799 seems to reverse Sieyes' earlier, carefully enunciated, distinction of ascending and descending powers, with the ascending power yielding ultimately only lists of candidates for election rather than vice versa. Sewell argues that by this point, Sieyes sought to 'effectively remove popular participation from politics,' charting a gradual disillusionment and 'distrust of the people' that accumulates from 1789 to 1795 to 1799. Is indirectness just a scam? Viewed solely as an electoral method, it certainly can be seen that way. But though Sieyes' method of vote aggregation in indirect elections evolves over three constitutional debates, his notion of indirectness at the heart of a representative system is remarkably consistent, and even able to adjust to his changing view of the monarchy.

And though the secondary literature on Sieyes tends to focus only on elections whenever the issue of indirectness comes up, Sieyes himself used the word sparingly, and in *What is the Third Estate* in two surprising and non-electoral contexts. As I noted at the beginning of this chapter, Sieyes' favourite rhetorical device is the binary opposition. Rather surprisingly, though, he does not spend too much time on the direct-indirect contrast, spelling it out only

[305] Sieyes, *Political Writings*, xxxi–xxxiii; Sewell, *A Rhetoric of Bourgeois Revolution*, 195–196.

once in *Third Estate*, in discussing direct vs. indirect law, either of which is an end to the same means, constitutional law.[306] Near the end of the same pamphlet, Sieyes embarks on an extended metaphor about indirectness:

> It is false to imagine that the truth can be divided up and separated into isolated parts to make it easier for it to enter the mind *piece by piece*. In point of fact, minds often need a sharp shock. Truth can never have too much light to make the kind of deep impression needed to engrave it forever in the depths of the soul, the kind of impression from which that passionate *interest* in what is true, beautiful, and useful is born. Note that in the physical world light is made by reflection, not by a direct ray, and in the moral world it consists of the relationships between, and the totality of, all the truths pertaining to a subject. In the absence of that totality, one is never likely to feel sufficiently illuminated and one often believes that one has found a truth which then has to be dropped once a subject has been given fuller thought.[307]

The direct, in other words, actually falls short of the indirect; it is less effective and less informative. The implication for voting, governing, and for an entire theory of representation — something which often apologises for not quite meeting the aspirations of the direct — is clear.

In the earlier *Views of the Executive Means*, Sieyes contrasts direct and indirect twice more, but each time in a different way. The first time occurs in a section that is the densest in binary oppositions, with *real* property contrasted with *personal* property, *will* with *intelligence*, *exchange* with *domination*, *effect*

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[306] Sieyes, "What Is the Third Estate?," 136.
[307] Ibid., 159.

with *obligation*, and the *ends* of law with its *means*.[308] 'The liberty of the citizen is the sole *end* of every law,' and the relation to that end can be *direct* or *indirect*. In this case, direct refers to 'civil legislation' and indirect to 'laws that concern the government,' or what we called in the previous chapter *terms of association*.[309]

The second time these two terms are opposed to each other in *Views*, it is almost as an afterthought to Sieyes' most nuanced and forceful argument for the importance of indirectness — and for indirectness' importance in the case for representation. Because *common needs* exist independently of individual needs, then a political society needs to have them met by people who are 'given a mandate and separated out from the mass of the citizenry.' This separation he calls the *public establishment*. In the next section we shall see that the separation, rather than the aggregation, of the common need requires authorised decision making that maps neatly onto the attributes we attach to law, or at least to rule of law. And it is here that Sieyes begins drawing in his idea of political economy, which he will develop even further over the following two years. Having identified *national concerns* as the 'only goal,' he divides the means into *direct* and *indirect*. The former is the public establishment itself, while the latter is what Sieyes calls 'the fiscal system.'[310] This seems unnecessarily confusing, and Sieyes abandons this distinction later. The fiscal system itself becomes the basis for a broad view of what

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[308] Sieyes, "Views of the Executive Means Available to the Representatives of France in 1789," 8–10.
[309] See 'Necessity for Positive Laws' in Chapter 2.
[310] Sieyes, "Views of the Executive Means Available to the Representatives of France in 1789," 20.

representation is, and the supposedly direct means is nothing more than a means to an end that is conceived indirectly by an agency that is separate by its essence.

To understand the importance of the indirect to Sieyes, then, we have to understand what he actually meant in the context of elections — or, more accurately, what he did not mean, federalism — and then move beyond elections to see the importance of indirectness in his larger political scheme. The representative system, as he called it, was clearly more than a second-best, and it was not superior to direct democracy because the electoral method was cleaner or weeded out 'all tincture or ignorance and barbarism from the body that makes the laws.'[311] It was superior because the indirectness which it evinced expressed a genuine freedom — in Urbinati's words, a 'coordinated dependence rather than autonomous self-sufficient action.'[312] Autonomy in the Rousseau sense led only to 'bizarre ambiguity'[313] when applied institutionally. The chaotic coordination Sieyes sought, with its ascending and descending powers, needed indirectness not just in its decision procedures, but also in its outputs and its means of deliberation and compromise. Only indirect rule could be legitimate rule.[314]

More broadly, indirectness leads us to an older idea, one that predates any discussion of constitutions by centuries if not millennia. The benefits of indirectness cut directly against *democracy* as the term had been understood

311 Clapham, *The Abbé Sieyès*, 92.
312 Urbinati, *Representative Democracy: Principles and Genealogy*, 145.
313 Forsyth, *Reason and Revolution : The Political Thought of the Abbé Sieyès*, 131.
314 Ibid., 218.

since antiquity and until at least half a century after Sieyes' death. If it is the people at large who govern themselves, there is no normative case to be made for having rules at all. The people alone decide, and, as they have no authority to alienate this power anywhere else, they should be able to decide each case individually on its merits. Why make any rule about future decisions when you can just decide them? A rule of any kind would limit this power and must therefore be abjured. Indirectness then, is both a justification and a benefit of *government* as Rousseau defined the term as well as of *law*.

Law

Can there be self-rule without rules? Or to ask the question without the paradox built-in (and thus, not give away the answer), Can the people be sovereign without rules? Whenever direct democracy is presented as an alternative to representation in a thought experiment, the contrast that is emphasised is in how decisions are made, not in the kind of decisions being made. But why, if the people, are making all the decisions directly, would they make general decisions about future decisions? What would be the point? Take each case — an appropriation for a public works project, a military call-up for a potential offensive or defensive action, an adjudication of a private

dispute — and put it up to a discussion and then a mass vote.[315]

If direct rule were normatively desirable, it is hard to see how the case for law — general rules about unlimited and unknown future public decisions — could be justified, even as a convenience. But if we are to live by law, and not decree (even democratic decree), then we have to create a separate and legitimate space for creating law that preserves the indirect sovereignty of the people — the Hobbesian insight Sieyes is most keen to preserve.[316] What if the argument for representation has less do with its institutional efficiency or its salutary elitism and more to do with the normative case for rule by law? No one but Sieyes has ever come close to making this argument.

Sieyes, as we saw in the previous section, argued for indirect rule as the only legitimate kind, embodied in what he called *public establishment*. The benefits in such indirect rule — generality, publicity, and stability (which he calls 'permanence') — are precisely the attributes which mark out law as different from any other kind of authorised political decision.[317] But for Sieyes they are an integral part of his *representative system*.

Earlier we encountered Sieyes' pseudo-historical narrative in *Third Estate* of the emergence of a common will, combining elements of Hobbes, Locke, and Rousseau, but most clearly a response to the latter insofar as it ends by leaving open the possibility of collective action by majorities and of representative government. But the role of majorities is laid out even more

[315] See 'Direct Democracy and the Problem of Big Numbers' in Chapter 5.
[316] Hont, *Jealousy of Trade: International Competition and the Nation-State in Historical Perspective*, 448.
[317] See Chapter 6.

explicitly in the earlier pamphlet *Views of the Executive Means* where Sieyes also describes the emergence of a common will, but without any pseudo-history at all. In this essay, an association implies common needs, and these automatically require a common will.[318] Though this text lacks the Rousseauian narrative, its epistemic account of will formation is the closest Sieyes comes to Rousseau's general will, though deliberation is now done out loud and collectively:

> In every deliberation there is a kind of problem to be solved. This is to know, in any given case, what the general interest would prescribe. When the discussion begins, it is not possible to identify the direction it will take to reach that discovery with certainty.[319]

Sieyes does not just accept deliberation, he insists that 'individual interests... be allowed to jostle and press' in order that they might serve a function in creating laws that is just as important as their outcomes — publicity. 'That much maligned publicity,' he adds, 'is rarely the source of a little harm and almost always the source of a great deal of good.' Though presented as an argument for free speech, it is in fact an argument against bound mandates — not just as a procedure and not just to preserve a modicum of elitism by limiting popular control. It is, for Sieyes, a necessary feature of the formation of a common will that it be done indirectly, in a separated and public space. Thus, in *Third Estate* he writes that the *representative common will* comprises two distinct features. First, it is 'neither complete nor unlimited; it is no more

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[318] Sieyes, "Views of the Executive Means Available to the Representatives of France in 1789," 11.
[319] Ibid., 39.

than a portion of the great common national will,' and second, the will is not owned by those representatives who exercise it, but rather necessarily 'exercised on others' behalf.'[320]

In both versions of the story, then, a representative common will can be formed without violating the sovereignty of the people. Sieyes has upended both Hobbes and Rousseau on their own terms. This can incorporate deliberation, judgment, opinion formation, and even a decision rule. As with publicity, another vital aspect of the process is built into the procedure and the outcome — *permanence*. The outcomes of deliberation at the Estates-General must be permanent to 'give the laws the degree of solidity and authority that they need,' though the argument here revolves largely around taxes and debt.[321] But the institutions themselves must be permanent to maintain their powers of surveillance.

This dual role is even starker with a third feature of law, *generality*. The representative common will 'acts by way of general laws, never by particular acts of authority.'[322] This is only possible because legislative power itself is 'always the product of the generality of individual wills.'[323] A generality of will is necessary so that a general outcome can follow. In his discussion of law in the *Essay on Privileges*, Sieyes makes the generality requirement of law even more explicit, this time in the context of his larger social argument. 'If a law is good it ought to bind every individual; if bad it ought to be abolished. It is an

[320] Sieyes, "What Is the Third Estate?," 135.
[321] Sieyes, "Views of the Executive Means Available to the Representatives of France in 1789," 44–46.
[322] Ibid., 31.
[323] Ibid., 13.

assault on liberty.'[324]

It is generality, more than anything else, which distinguishes what Sieyes calls *legislative power* from *active power*. Of all of Sieyes' binary oppositions, the word choice of this one is the most surprising, avoiding the obvious up-down, hot-cold parallels of the others. Perhaps this is just an eccentricity, though in contrast to his lack of overall consistency in, say, the direct-indirect pair, the active-legislative couple is more or less unchanged when it is applied to 'powers' in *Views* and when it is applied to 'bodies' in *Third Estate*.[325] Had Sieyes wanted to contrast active with *passive* here he could have (and indeed he does in discussing citizenship and suffrage); alternatively, he could have opposed legislative with some other authorised power broadly defined — executive, administrative, or even a made-up word (he was certainly not scared of those).

In a discussion of public education, Sieyes mentions the need for the Estates-General to rein in the active power of the ministry and connect it to the constitution. He lists other parts of the active establishment: 'the rural police administration, the authentication of civil deeds, the management of public territory,' and later, adds things like taxes and war. He contrasts this with the 'other branch of a public constitution,' the legislative, which 'can be exercised only by a body of representatives.'[326] Introducing a word which will be at least as important to the output of legislation as to the body which enacts it, Sieyes

[324] Emmanuel Joseph Sieyes, "An Essay on Privileges," in *Political Writings: Including the Debate between Sieyès and Tom Paine in 1791* (Hackett Publishing, 2003), 70.
[325] Sieyes, "What Is the Third Estate?," 136.
[326] Sieyes, "Views of the Executive Means Available to the Representatives of France in 1789," 52.

writes that the 'legislative must be no less permanent than the active bodies.' Borrowing without attribution Locke's description of the 'legislative' as 'the soul which gives form, life, and unity to the commonwealth,'[327] Sieyes writes, 'A legislator is made for giving life, movement, and direction to everything connected to public affairs.' It bears noting that Sieyes has left out *unity* from Locke's formulation but added *movement*, a good thing to give if what you are 'watch[ing] over' is an active body.[328]

Sieyes ties all this together at the end of *Third Estate* in a 'proper sequence of positive law' — notably, without recourse to the constituted-constituent distinction, but rather to the three-stage development sketched out at the beginning. Nations, he writes, exist in the second stage and are 'formed by natural law.' Government, by contrast, is 'solely a product of positive law'; it needs 'fixed forms… to guarantee its ability to meet the ends for which it was established and to make it incapable of diverging from these ends.'[329] Positive laws emanate from will. The first positive laws are the constitutional ones which are cleanly divided into two sorts — those that regulate the legislative body and those that regulate the various active bodies, casually grouped together to highlight their marked difference from the legislative body. Even though constitutional law has an apparent precedence over ordinary legislation (and is referred to as 'fundamental'), the constitution is 'no more than the *means*' while legislation that 'define[s] the common interest' is the

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[327] Locke, *Two Treatises of Government*, 194 [2: XIX, §212].
[328] Sieyes, "Views of the Executive Means Available to the Representatives of France in 1789," 55.
[329] Sieyes, "What Is the Third Estate?," 136–137.

actual *end*. Such legislation can be direct or indirect, though he seems to be using these terms in a different way than he did in *Views*. The use of *indirect* in the earlier text more closely maps to *active* in the later one; now both are subsets of ordinary legislation, differentiated by whether they are protective (direct) or permissive (indirect).[330]

If indirectness is a subtle motif in Sieyes theory of representation, the argument from legal positivism is a bit bolder and more concentrated. Though never fully formed, all its parts, particularly the vocabulary of generality, publicity, and permanence, are there. The argument from political economy, however, is louder still, but definitively not consummated.

Labour, Specialisation, and Exchange

It is easy to forget that Sieyes' polemical revolutionary pamphlets were not dry works of political theory, but were first and foremost statements of social pique. The *Essay on Privileges*, in particular, is a screed against the nobility, and *What is the Third Estate?* merely takes the social conclusions of the earlier essay and gives them constitutional import. It was not, in 1789, a new topic for Sieyes or one he just picked up and grafted onto a revolutionary agenda. If anything, the opposite might be true. In 1774 he had already prepared for publication an essay on economics, which was never

[330] Ibid., 136.

published,[331] but was reprinted two centuries later as *Lettres aux économistes sur leur système de politique et de morale*.[332] It was in this essay that, with Rousseau clearly in mind, Sieyes wrote, 'Le travail général est donc le fondement de la société.'[333] In *Privileges*, he restates this in only slightly less Rousseauian tones, averring a 'general law of nature, that of labouring for [one's] bread,'[334] only after first applying his trademark method to the problem in distinguishing a *privilege* from a *reward*. The former is a 'vice beyond all the rest,' while the latter is what the market doles out for services that merit the 'public regard.'[335]

Labour, then, is the key to citizenship and all its attendant rights and duties. Lest anyone doubt who the target of this attack is, he mocks in *Third Estate* aristocratic prejudices:

> What sort of society, with even a modicum of sanity, would take work to be a derogation from nobility, would hold consumption to be honorable and production a form of humiliation, and would call hard physical labor vile, as if anything other than vice ought to be called vile...![336]

The representative system did not just have a class bias against the landed gentry, it had a built-in bias for what Sieyes calls *les classes disponibles*,[337] defined as 'those with the kind of ease that enables a man to

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[331] Sewell, *A Rhetoric of Bourgeois Revolution*, 69.
[332] Sieyes, *Écrits Politiques*, 25–44.
[333] Ibid., 32.
[334] Sieyes, "An Essay on Privileges," 85.
[335] Ibid., 72.
[336] Sieyès, "What is the Third Estate?," 125; ['où le travail fait déroger' in the original, Sieyès, *Qu'est-ce que le Tiers état ?*, 39.]
[337] Sieyes, *Qu'est-ce que le Tiers état ?*, 20.

be given a liberal education, to cultivate his reason, and to take an interest in public affairs.'[338] We have already encountered Sieyes' opposition to federalism in another context. Preserving the indirect nature of local voting, rather than allowing it to constitute fully-formed subnational political units, shuts down an arena where the old aristocracy has a comparative advantage. On this, Baker writes, 'Linking representation to labour meant severing it from land. This had an institutional implication too, as it freed the discourse of representation from the contemporary demands for provincial assemblies.'[339]

Sieyes' political economy ties in nicely with his jurisprudence as well. Recall that his passion for legal stability ('permanence') emerged from his programme for financing the national debt. Taxation he sees as a bi-directional binding of citizens, tying them to the nation's debts and to the decisions to service it. He even suggests regarding taxpayers as 'shareholders in the great social enterprise.'[340]

Though giving a name to the already well known theoretical problem of constituent power is Sieyes' most remembered contribution to political thought, his most important innovation is actually the integration of social contract theory and political economy — less remembered, perhaps, because it emerges from three highly charged pamphlets rather than having been consolidated in a major treatise.[341]

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[338] Sieyes, "What Is the Third Estate?," 110.
[339] Baker, "Sieyes," 317–318.
[340] Sieyes, "Views of the Executive Means Available to the Representatives of France in 1789," 48.
[341] Sewell, *A Rhetoric of Bourgeois Revolution*, 108.

The affinity between law and property is broader than that, however. In *Privileges*, Sieyes writes that the object of the law is 'to preserve the liberty and property of every individual from assault and violence.'[342] This apparent equivalence between liberty and property is, if anything, a moderate restatement of his earlier formulation. In *Views*, he writes that the 'sole *end* of every law' is the 'liberty of the citizen,' but this is only after he has defined liberty as 'an assurance of not being hindered or interfered with in the exercise of… *personal* property or in the use of… *real* property.'[343]

The one economic idea with which Sieyes was most enamoured was the *division of labour*. It is explicitly present in his *Lettres aux economistes* and implicit in his description of the third epoch in *Third Estate*.[344] It bears emphasising that *Lettres* was written before Adam Smith's *The Wealth of Nations* was published; in any event Sieyes did not have an opportunity to study Smith until he was at Chartres in the 1780s.[345] In Sieyes' unpublished essay *Travail*, he is insistent that his idea preceded Smith's and that he took it further anyway (and, fittingly enough, called the excess labour *travail répresentatif*).[346] For Sieyes, unlike for Smith, the division of labour was not just a means to increasing wealth, it was an end in and of itself.[347]

Synthesise this with Sieyes' assertion at the very beginning of *Third Estate* that what a nation needs to survive and prosper is 'private

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342 Sieyes, "An Essay on Privileges," 69–70.
343 Sieyes, "Views of the Executive Means Available to the Representatives of France in 1789," 8.
344 Sewell, *A Rhetoric of Bourgeois Revolution*, 89.
345 Forsyth, *Reason and Revolution : The Political Thought of the Abbé Sieyès*, 56.
346 Sieyes, *Écrits Politiques*, 62.
347 Sewell, *A Rhetoric of Bourgeois Revolution*, 96–97.

employments and *public* services,'[348] and the political implications are clear:

> 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 obligation.[349]

The concept of division of labour alone explains only the specialisation of the public establishment; combined with another important economic idea, free competition, it becomes a normative basis for representative law making too.[350] Thus, Sieyes can argue that the separation of governors and governed is a 'superiority of employments, not persons.'[351] In fact, 'all relations between citizen and citizen' in the representative system are 'founded on the basis of freedom and equality... There is no subordination, but a continual exchange.'[352]

Competition of what, though? Here the metaphors start falling off, and the serious theoretical work remains incomplete. Sieyes enthusiastically adopts the word *exchange* into his theory, but neglects to raise it to philosophical maturity. Exchange is described as an act of *will*, not *domination*.[353] The introduction of exchange, of the chaotic uncontrolled action in a highly regulated public space that is separate from the goods

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348 Sieyès, "What is the Third Estate?," 94; ['Des travaux particuliers et des fonctions publiques' in the original, Sieyès, *Qu'est-ce que le Tiers état ?*, 2.]
349 Sieyes, "Views of the Executive Means Available to the Representatives of France in 1789," 48.
350 Sewell, *A Rhetoric of Bourgeois Revolution*, 80.
351 Sieyes, "An Essay on Privileges," 80.
352 Ibid., 82.
353 Sieyes, "Views of the Executive Means Available to the Representatives of France in 1789," 10.

exchanged and their means of production, is what distinguishes Sieyes' use of labour and specialisation arguments in representation from all the others. In fact, it makes his theory radically different. To the extent Sieyes wants us to consider labour in representation, it is not in either of the two senses we are accustomed to encountering it. He neither seeks to draw our attention to the inefficiency of direct democracy as a decision mechanism, nor does he present us with a polite plea for more elitism in governance (though elements of these no doubt exist in Sieyes' writing). It is, rather, an argument for separating politics into its own chaotic but regulated sphere, away from the active bodies that actually have to get their hands dirty, but always overseeing them and always accountable to the sovereignty of the people.

But Sieyes never does take this argument all the way — never giving us a developed sense of what exchange means in politics. For that matter, he never really develops what it means in economics either; Sewell notes, for example, that he 'scarcely mentions... the anonymous mechanism of prices.'[354] How exchange manifests itself in voting and in the powers of legislation and surveillance is never developed. And though the connection to permanence is there, the connection to generality and publicity is not spelled out in any of Sieyes' texts on the subject — published or unpublished. This is not to diminish Sieyes' accomplishment. His is still the boldest synthesis of democratic theory and political economy until at least the welfare function and game theory treatises of the late-twentieth century (and in my opinion, far superior to those).

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[354] Sewell, *A Rhetoric of Bourgeois Revolution*, 104.

The Functions of Representation

Thus far in this dissertation I have used the term 'function(s) of representation,' but by *function* I mean two totally distinct and unrelated things for which I have been unable to find alternative words. Most of the time my purpose in using 'function' is in the functionalist tradition of the social sciences; by *function* we are to understand, roughly, those attributes and effects, intended or not, which allow for an institution to survive and replicate itself.[355] The indifference to intention or normative valence is the reason I adhere to 'function' rather than any possible synonym. Occasionally in the literature, however, we encounter the term 'function of representation' to mean something unrelated to any functionalist proposition. Here we borrow the term from mathematics, with *function* serving as a broader, more metaphorical, type of formula — an argument connecting a set of domains and ranges. Functions of representation, in this sense, typically connect, trivially, the representer to the represented, along with several other parties (audience, etc.). Usually context should be enough to distinguish when I mean function in the first sense and when in the second. Wherever it is not, I will refer to them as s-*function* and *f-function*, respectively.[356]

As will be evident in Chapters 6, I mostly reject the research tradition that seeks to define representation in terms of the arguments of an *f-function*. For the remainder of this chapter, I will briefly sketch out the *s-function* that

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[355] Jon Elster, *Explaining Technical Change : A Case Study in the Philosophy of Science*, Studies in Rationality and Social Change. (Cambridge Oslo: Cambridge University Press ; Universitetsforlaget, 1983), 55–68.

[356] On *s-functions*, see 'Functions, Singular and Plural' in Chapter 6; on *f-functions*, see 'Functions and Metaphors,' also in Chapter 6.

emerges from Sieyes' work as well and how that coheres with the issues raised by Hobbes and Rousseau in the previous two chapters. Sieyes begins with the same assumptions as Hobbes regarding people's radical individualism and their inherent diversity. Rousseau's separation of sovereignty from state and government allows us to see Hobbes — and, following him, Sieyes as well — as channelling this diversity into a form of popular sovereignty, while leaving open questions of government. But Sieyes transcends the bounds of his predecessors by suggesting affirmative institutional action to create 'unity of action' without necessarily achieving unity[357] (or unanimity).

Sieyes' solution is to introduce a measure of indirectness into every aspect of the kind of political decision making that is an expression of popular sovereignty. It is not just that he connects law to popular sovereignty; Rousseau already does that with the general will. With Sieyes, however, law's inherent indirectness is built in to the method of its promulgation. Division of labour creates a public administration that is separate from but accountable to the *nation* in all its diversity, and, more importantly, *exchange* creates a separate sphere of political action, with Rousseauian emotions attenuated and Hobbessian violence sublimated but with sovereignty preserved for exactly the kinds of decisions which express the sovereignty of the people — and it separates their implementation from the decision makers themselves.

[357] Sieyes, *Political Writings*, 169.

Part II

Popular Sovereignty and Law

Chapter 4

Laws' Authors

Over the next three chapters I will construct the argument connecting representation to the tasks of sovereignty we have already established — law creation and executive supervision. Most of my attention will be on the crucial, but thus far under-theorised, connection between law and representation. In this chapter, I will flesh out the concepts of decision, rule, and norm, and then map out a taxonomy of political decision making in order to separate the act of law creation. Having established the uniqueness of the latter, I will assess it in light of the political problems raised in Part I. Then, in Chapter 5, I will deal with the issue of numbers in political theory in order to make an argument for law creation by assembly and moreover, to understand the conceptual, rather than practical, impossibility of law-based direct democracy. Finally, in Chapter 6, I will tie all these concepts together into a general theory of plurality of politics, yielding representation as the only solution for the kind of political problems raised by the philosophers of Part I. That chapter will end with a plea for a much more limited and circumscribed use of the word representation than is current in the literature. These three chapters together will equip us, in the Conclusion, to move the discussion to institutions.

The goal of this chapter is to set out what is distinctive about law creation and how it ties to representation. This chapter will proceed as follows. First, I will define decisions, rules, and norms. That is, I will define decisions, and ascend a ladder of abstraction from decision to rule to norm to law, pausing for two brief (but relevant) digressions after both decision and rule.

Second, there will be a discussion of political decisions, including law creation, which will be the focus of the rest of the chapter. The third section is devoted to generality. The fourth section will deal with the other properties, besides generality, that distinguish law creation from other political decisions, including publicity, sources, and institutions.[358] The fifth and final section will comprise some introductory remarks on plurality. We will need to explore the problem of numbers in Chapter 5 first before we can return to this problem in more detail in Chapter 6.

My argument throughout this chapter is that law is a unique solution to a class of social problems, and the creation of law is a unique kind of public act — precisely the kind for which representation provides the appropriate tools and methods. Law creation is, in fact, a very special kind of political decision, as I will demonstrate in the second section of this chapter. Before that, however, in the first section, we will have to place law in the hierarchy of decisions and define what these are.

Decisions, Rules, Norms

An old joke has a man offering advice to a friend upset about how much he and his wife argue. 'My wife and I never argue,' he tells his mate, 'because

[358] This section will draw heavily on conversations I have had with Waldron and especially on Jeremy Waldron, "Can There Be a Democratic Jurisprudence," *Emory Law Journal* 58 (2009 2008): 675–712.

on the day we married, we agreed that I would make all the big decisions and she would make all the small ones.' 'How can you tell in advance what is a big or small decision?' he is asked. 'Simple,' he responds. 'Which schools the children attend, where to buy a flat, what car we drive — those are little decisions. A single European currency, NATO expansion, the war on terror — those are big decisions.'[359]

Book III of *Nicomachean Ethics* opens with a long discussion on the concept of *decision*. There is a potential for confusion here, as some older translations use the word 'choice'[360] rather than 'decision'[361] throughout the explication in the first three chapters of Book III.[362] But Aristotle's description leaves no room for ambiguity; the concept he is describing is nothing like 'choice' as we will define it here and it is has generally been understood in the literature. Decision, for Aristotle, is a subset of the 'the voluntary,' and the first distinction he draws between decisions and other voluntary acts is the importance of time — 'things done on the spur of the moment we say are voluntary, but not done from decision.'[363] He contrasts decision to appetite, temper, wish, and judgment, and determines that unlike these, decision requires agency, implies self-control, and cannot be 'non-rational.' Aristotle occasionally uses the word *action* to describe only the possible end of the

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[359] An alternative version has the wife, rather than husband, supplying the punch line: 'And in 60 years of marriage we haven't had to make even one big decision!'
[360] For example in (1893) Aristotle, *The Nicomachean Ethics of Aristotle, Tr. by F.H. Peters.*, trans. Peters, Frank Hesketh, 5th ed.. (London: Kegan Paul, Trench, Truebner & Co., 1893).
[361] As in the 2002 Broadie and Rowe version which I will cite as a reference for the remainder of this discussion, Aristotle, *Nicomachean Ethics* (Oxford: Oxford University Press, 2002).
[362] Out of four translations I consulted, the two older ones preferred 'choice' and two more recent ones 'decision.'
[363] Aristotle, *Nicomachean Ethics*, 126 [III, 2].

process of decision and sometimes the entire process, as when he describes decision as 'intimately connected with virtue… [and] a surer test of character than action itself.' Similarly, decision is a kind of *willing*, though willing is wider and the action at the end of a decision is also *willing* as well. Willing does not have to be rational, though. Appetite does not have agency, and temper does not involve self-control. These cannot be examples of decision, according to Aristotle, anymore than wishing for the impossible can.

What can be wished sometimes are *ends*, though it is the *means* which are chosen or decided upon. The ends-means distinction is crucial for Aristotle, because, ultimately, the definitive aspect of decision comes from *deliberation*. Decision must be preceded by deliberation, and decision is what brings deliberation to an end. Moreover, deliberation and decision operate over exactly the same domains; that is, we can decide only on the matters we can deliberate on.[364] And the domain of deliberation is simple to delimit. Deliberation can be only for means, not ends; and deliberation can be only on matters on which the person or body deliberating can conceivably exercise some sort of agency. We do not deliberate on droughts, but rather on how best to deal with them. In the domestic joke which opened this discussion, then, the husband not only is not actually deciding, he is not even really deliberating on the world's problems — just pointlessly discussing, whether aloud or in his own interior monologue.

More contemporary treatments of decision have emphasised the role of

[364] Ibid., 128 [III, 3].

intention. For Meiland, the two necessary (but not sufficient) conditions for decision were (a) forming an intention to do something and (b) a period of time between forming the intention and actually doing something.[365] Raz builds on Meiland and enumerates four properties which define decision, a definition I will use more or less unchanged.[366] They are

1. **Intention:** 'To decide is to form an intention,' even in the absence of any other conscious mental act associated with decision.

2. **Deliberation:** A mental or social act that weighs the qualities and consequences of the action decided upon is to precede the action itself.

3. **Time:** There must be some temporal separation between the deliberation and the action in a decision — action here referring to the voluntary act deliberated upon, not the entire decision process.

4. **Reason:** 'Decisions are reasons.' This is Raz's major contribution to the literature on decision. '[A] decision is always, for the agent, a reason for performing the act he has decided to perform and for disregarding further reasons and arguments.'

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[365] Jack W. Meiland, *The Nature of Intention* (London: Methuen, 1970), 53–56.
[366] Raz, *Practical Reason and Norms*, 65–66.

I have already noted how unhelpful the translation of Aristotle's voluntary action after deliberation as 'choice' rather than 'decision' is. His insistence that decisions be judged as either good or bad (rather than true or false) does not intuitively work for choices in quite the same way. While it certainly does not take a lot of introspection for me to come up with some bad choices I have made, I can also think of several that were not obviously good or bad. More importantly, this judgement of choice is solely outcome-based. Decisions provide a lot more material for assessment. This is even more the case for political decisions where a seemingly good outcome can occasionally do little do hide a very poor decision.[367]

The two words decision and choice are often used interchangeably, and indeed they have largely overlapping extensions. But they differ along at least five dimensions: options, action, deliberation, time, and reason.

Choice has two necessary conditions that decision does not have. First, a choice must involve *options* — 'comparing and evaluating'[368] two or more alternatives that are different in a way relevant to the choice being made.[369] I can decide to sit in the library and write this chapter; to say that I chose to do so would conjure up the alternative of sitting outside in today's unusually sunny weather. Similarly, I can choose a font to type in among many alternatives. But note the difference between saying that I have chosen a font

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[367] Mark Philp, "What Is to Be Done? Political Theory and Political Realism," *European Journal of Political Theory* 9, no. 4 (October 1, 2010): 480.
[368] Philippe Urfalino, "Deciding as Bringing Deliberation to a Close," *Social Science Information* 49, no. 1 (March 1, 2010): 111–112.
[369] Oldenquist, "Choosing, Deciding and Doing," 98.

and saying that I decided on a font. I can decide on a font anywhere at any time, but to choose a font I must actually select it from the menu; to decide on a font I need a judgement anterior to action that gives a reason. Moreover, I can decide on a font while in the kitchen thinking about this chapter far away from my computer and never get around to actually using it (because I later changed my mind, because I forgot, etc.); I cannot choose a font without picking it from the menu. This illustrates the second necessary condition of choice — it must involve *action*. In fact, the action is ordinarily the expression of the choice.[370] I can decide ahead of time which route to take to my destination, but I have not really chosen one unless I stood at a fork in the road and started walking. Departing even further from decision, *picking*, in the classic formulation of Ullmann-Margalit and Morgenbesser, is like choosing but without reason.[371]

Aristotle related the domain of decision to deliberation, but the connection is actually much tighter than that. Specifying what can be deliberated about places limits on what can be decided upon. Urfalino has gone even further than this, abjuring Raz's four-part definition of decision and rendering it simply as bringing deliberation to an end.[372] But here it is the necessary condition of decision which is not quite necessary in choice. A choice can be made without deliberation[373] — impulsively, randomly (by

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370 Oldenquist has a slightly more nuanced take on the connection between choice and action, but it is not relevant for this discussion.
371 Edna Ullmann-Margalit and Sidney Morgenbesser, "Picking and Choosing," *Social Research*, 1977, 757–85.
372 Urfalino, "Deciding as Bringing Deliberation to a Close," 114.
373 Meiland, *The Nature of Intention*, 61–62.

picking even), or, in the case that will interest us in the discussion of rules, by habit.[374]

If action and options are necessary to choice but not to decision, and deliberation is necessary to reason but not to choice, then two other conditions of decision, while still properties of choice, are somewhat attenuated. First, the *time* involved is generally much shorter, especially as a choice is really only fully made with an action. Second, the relationship to reason is a bit more complicated. A choice is a reason in the trivial sense that the relevant action is carried out, but a choice does not need a particularly good reason for itself. You can decide to choose randomly, and the decision to use this method could be perfectly appropriate, but the choice itself, being random, does not have a lot of reason behind it.

This, as suggested earlier, is particularly true for what we might call *habitual choices*. Habits are a good place for beginning to think through the connection of *rules* to decisions, because they share many properties with choice. If the overlap between choices and decisions is large, habitual choices are clearly in the domain of choices which lies outside that overlap. At the moment each choice is made, there is no deliberation, and the time and reason involved are minimal and, in the case of the latter, nearly tautological. When I was about to embark upon this DPhil, my great-uncle told me about a fellowship he had at Cambridge back in 1956, and warned me that the two most commonly uttered sentences in England were, 'But we've never done it

[374] Oldenquist, "Choosing, Deciding and Doing," 98.

that way,' and, 'But we've always done it this way.' He added that it took him some time and acculturation before he realised that these sentences were not mere statements of fact, but by themselves constituted reasons. (Thankfully much has changed in the ensuing half century!)

A rule and a habit both offer, from different ends, the same economy of deliberation. A rule is a decision to decide in advance — to take voluntary action that might justify deliberation without actually deliberating. Rules introduce a small measure of abstraction to a decision. In an early, pre-*Theory of Justice* paper, Rawls derives two conceptions of rules from two methods of justifying rules — justifying a practice on the one hand, and justifying particular actions falling under it on the other. The former method of justification yields a 'practice conception' in which rules are logically prior to outcomes, while the latter yields a quasi-statistical, almost learning, 'summary conception.' Rawls' 'practice conception' is more relevant for the discussion below, but it is in his explanation of the alternative 'summary conception' of rules that Rawls draws some notable connections between rules and decisions.[375]

The summary conception of a rule holds that a rule is a statistical curve fit based on past decisions. The utility of previous cases with similar people or similar circumstances calls for an economising approach — a rule that functions as 'having decided in advance what to do.'[376] The import of the summary conception, which will not hold over to norms and laws, is that the decisions on particulars are logically prior — and thus normatively prior too.

[375] John Rawls, "Two Concepts of Rules," *The Philosophical Review* 64, no. 1 (1955): 19–25.
[376] Raz, *Practical Reason and Norms*, 73.

Moreover, there is a constant openness to reconsider the rule on strictly 'performance' grounds. If the utility of the decisions begins to flag, the rule itself can and should be adjusted.[377] The practice conception gives the rule itself, rather than its statistical efficacy, a higher priority. In this sense, the summary conception can be seen as a set of habitual choices.

Before abstracting any further, it would be appropriate to detain the discussion briefly for three implications that creating rules has on decision making. In considering these three implications it is important to distinguish between the macro-decision that is actually made to have a rule and the micro-decision that is actually not being taken at each node because the rule is in place. First, there is the obvious *heuristic aspect* of rules. Even without necessarily having any benefit in the world outside the decision maker, rules reduce the cognitive workload. I can knowingly accept that a given rule will often produce suboptimal outcomes and still prefer to have a rule so as not to have to make a decision each time a trivially similar situation arises; I am less likely to have this preference as the stakes get higher. Aristotle refers to law itself as a timesaving device,[378] in a (slightly sarcastic-sounding) argument that presages later arguments for representation, though it is more than time which is being conserved here. The predictability and clarity of a rule is its own benefit, especially when it improves outcomes, but even when it does not.

I use the word 'clarity' in the last sentence very cautiously, as the second implication of rules emerges from the inherent uncertainty they

[377] Rawls, "Two Concepts of Rules," 22.
[378] Aristotle, *Politics: A Treatise on Government* (Public Domain Books, 2004), 115 [IV:6].

engender. The *openness* of rules, to borrow the term Hayek uses,[379] means that we cannot know exactly what their specific outcomes will be. This is why the notion of a rule as just a decision about future decisions is incomplete. If there is a specific and finite set of decisions already in mind, then it cannot be a rule that treats them. A rule has to be set down for some unknown future event — where the circumstances adhere to a familiar pattern, no doubt, but where the actual event cannot be explicitly predicted. Hart broadened this idea with one of his most memorable turns of phrase: 'all rules have a penumbra of uncertainty.'[380] This feature of rules looms even larger the more abstract a form the rule takes (as norm or law, for example). What this means is that the exact application of a rule is not entirely knowable in advance, and, further, that the agent applying the rule faces an entirely different set of information, options, and preferences than the one that made it; they can conceivably be different agents, and it is generally wise to regard them as such.

The third implication of rules is the expectation of *obedience* even in cases — especially in cases — where the rule calls for an action in a specific case where a different action would be preferred in the absence of the rule. Rules on dieting or setting an alarm to wake up at a certain hour are decisions to override micro-preferences at specific times where we might prefer to eat or sleep more. As we shall see when we discuss norms and laws, the more

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[379] Hayek, *Law, Legislation and Liberty : A New Statement of the Liberal Principles of Justice and Political Economy*, 2:31–61.
[380] Hart, *The Concept of Law*, 12.

interesting forms of obedience are not to ourselves but to others. This 'habit of paying obedience' to others was, for Bentham, the hallmark of 'political society.'[381] Hart's forceful argument[382] against this must be borne in mind; obedience (and orders and habits and threats) alone 'cannot yield the idea of a rule.'[383] But Hart's rejection will still stand if we reverse the arrow — that is, accept that the idea of a rule implies, among other things, some form of obedience.

All three of rules' implications come into sharper relief as we move up from the broad definition of rules to the higher order of rules that interest us in political theory. At the next level of abstraction from rules are norms. A *norm*, for the purposes of this work, is a rule with a social aspect. Avoiding dessert on days that I do not go to the gym could be a rule; not wearing a hat when visiting a church is more of a norm. Habitual choices are helpful here as well, but less for their cognitive economy and more for their potential for abstraction. Hayek illustrates this progression as one from 'unconscious habits' to 'explicit and articulated statements' and then finally to 'abstract and general' norms.[384]

Hart uses the word 'rule' for both what I am here calling norm as well as rule. The social aspect emerges in their power to impose obligations, a condition that obtains if and only if there is both a 'general demand of

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[381] Jeremy Bentham, *A Fragment on Government* (Oxford: Clarendon Press, 1891), 137 (I have left out the italics and capitalizations from the original).
[382] Hart, *The Concept of Law*, 24, 80.
[383] Ibid., 80.
[384] Friedrich A. von Hayek, *The Constitution of Liberty* (London: Routledge & Kegan Paul, 1960), 148.

conformity' and 'great social pressure on deviation.'[385] He derives two implications from this. First, that people believe the norms are necessary to 'maintain a social link,' and, second, that those norms may conflict with what we want to do in any specific situation.[386]

We began this section looking at decisions. Then, after sharpening the concept of decision by comparing it with choice and habit, we added a few restrictions to yield the concept of rule. We narrowed even further the concept of rule to get to norm, but we have not yet restricted ourselves to the special kind of decision which is relevant for a theory of representation. To do that, we need only add one more property to norm to make it *law* — it must be systemic. A norm is law when belongs to a set of norms 'having the unity of a system.'[387] Raz cites three features which distinguish a legal system, but the third one, openness, I have already identified at a much lower level of abstraction. The other two, however, do explicitly differentiate law, by virtue of belonging to a legal system, from mere norms or rules. A legal system is first of all *comprehensive*. It 'claims authority to regulate any type of behaviour,' in contrast to the rules of associations, organisations, parties, etc. It does not 'acknowledge any limitation' of this authority.[388] A legal system, secondly, *claims to be supreme*. Raz concedes that this latter condition is a weak one and largely entailed by the first, but he still rightly separates it because the supremacy claim is not just a claim to regulate the behaviour of any other rule-

[385] Hart, *The Concept of Law*, 84–87.
[386] Ibid., 87.
[387] Kelsen, *General Theory of Law and State*, 3 [Part One: I.A.a].
[388] Raz, *Practical Reason and Norms*, 150.

based organisation under the legal system itself, as implied by the first condition, but rather a fundamental claim to 'prohibit, permit, or impose conditions on the institution and operation of all the normative organizations to which members of its subject-community belong.'[389] The law, in this sense (in the singular and with a definite article) is the 'totality of legal norms.'[390] The demand of conformity now emerges from a specific authorised decision-making process, and the pressure on deviation has the full force of the institutions of state to back it up.

On Political Decisions

Having defined decision and, using the contrast with choice as an aide, ascended a certain ladder of abstraction from decision to rule to norm, I now wish to take a subset of decisions — *political decisions* — and see if any such abstraction is possible and what it might yield. What makes a decision — or anything, for that matter — *political*? For Philp, the political is 'centrally concerned with the creation of order and the subordination of conflict.'[391] This qualification, applied to decisions, delimits a domain of decision making — a range of topics. Not everything that is political culminates in what I am calling here political decisions; these emerge from a sovereign political process and

[389] Ibid., 151.
[390] Kelsen, *General Theory of Law and State*, 256 [Part One: II.G.c].
[391] Mark Philp, *Political Conduct* (Cambridge, Mass. ; London: Cambridge, Mass. ; London : Harvard University Press, 2007), 65.

what is interesting about them is their claim to authority. In order to narrow the focus from the political to the political decision itself, I propose two rather modest conditions for a decision to be political. First, the decision must be taken in conditions of *authority* by a person — in the Hobbesian sense — authorised to make a relevant decision. Weber divided such persons into two broad categories, the 'political officials' (*Berufspolitiker*[392]) and 'specialist professionals' (*Fachbeamte*[393]). Mill made a similar division when he introduced the term 'functionary' to describe the latter, who could not be elected[394] and whose work was governed by duty rather than judgment.[395]

The second condition, after authority, I will call the *general institutional requirement* in order to distinguish it from the *special institutional requirement*, which we will encounter below. This stipulates simply that a political decision is taken within and with regards to the institutions of the state.

The point here is not the institutions themselves or how they are constituted. There is a long tradition, much more in the separation of powers literature than, say, in the mixed government literature, of classifying political decisions by the kinds of institutions that are normatively held responsible for them. These accounts are often remarkably different from each other, and generally veer toward descriptive constitutional accounts or normative

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[392] Max Weber, "The Profession and Vocation of Politics," in *Political Writings* (Cambridge: Cambridge University Press, 1994), 319.
[393] Ibid., 327.
[394] John Stuart Mill, *Considerations on Representative Government* (New York: HARPER & BROTHERS, PUBLISHERS, FRANKLIN SQUARE, 1862), 268.
[395] Ibid., 42.

institutional designs. My project is neither of those, and though it will clarify matters to peek into these descriptive separations, I wish to understand something about the relevant political decisions themselves before determining that this one belongs to this official body and that one to someone else. A taxonomy of political decisions will no doubt be illuminating, but it could be irrelevant for institutional design or possibly not crucial in any separation of powers. It is always possible that effective mixed government means spreading out all kinds of decisions across various political actors — possible, but as we shall see, very unlikely. In fact, I have two quibbles with this tradition, one empirical and one methodological.

The empirical problem is that, despite the ubiquity of the number three, the separation literature is internally conflicted about what the powers are or should be in ways that, while constructively ambiguous for institutional design, are less than useful for determining the nature of the actual political decisions being made. Fichte argued that the separations were 'never made with sufficient precision,'[396] and for good reason. Well before Sieyes and Paine argued about what precisely was executive and what legislative, philosophers were already dividing tasks into different branches with often similar names, but different responsibilities and different sources of authority. Locke's legislative, executive, and federative,[397] do not map onto Montesquieu's

[396] Johann Gottlieb Fichte, "J. G. Fichte, Review of Immanuel Kant,Perpetual Peace: A Philosophical Sketch (Königsburg: Nicolovius, 1795)," trans. Daniel Breazeale, *The Philosophical Forum* 32, no. 4 (January 1, 2001): 317.
[397] Locke, *Two Treatises of Government*, 164–165 [2: XII, §143-§148].

legislative-magistrate, state-executive, and judiciary-executive;[398] and neither conforms to Hegel's legislative, executive, and sovereign.[399] Montesquieu's second 'executive,' which he qualifies as 'judiciary,' includes many powers that have nothing whatsoever to do with what we would conventionally think as judicial; it most closely resembles Rousseau's later use of 'government.'[400] His first 'executive' is explicitly concerned with foreign policy, as, implicitly, is Hegel's 'sovereign.' Hegel's sovereign, though, does both more and less than Montesquieu's state-executive, and his 'executive,' in contrast is characterised by action based on decisions made in advance.[401] A similar non-overlapping distinction prevails in Locke's 'federative' and 'executive' powers, and, though his 'legislative' does slightly different things than others', he is the only one to make the explicit connection between law as such and the necessary condition of diversity in its creation:

> [T]herefore in well-ordered common-wealths, where the good of the whole is so considered, as it ought, the *legislative* power is put into the hands of divers persons, who duly assembled, have by themselves, or jointly with others, a power to make laws: which when they have done, being separated again, they are themselves subject to the laws they have made: which is a new and near tie upon them, to take care, that they make them for the public good.[402]

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398 Charles de Secondat baron de Montesquieu, *The Complete Works of M. de Montesquieu*, vol. 1 (London: T. Evans, 1777), bk. XI:6.
399 Georg Wilhelm Friedrich Hegel, *Hegel's Philosophy of Right*, trans. T. M. Knox, Philosophy of Right (Oxford: Oxford : Oxford University Press, 1967) §273.
400 See 'On Sovereignty, Government, and What's Between Them' in Chapter 2.
401 Georg Wilhelm Friedrich Hegel, *Elements of the Philosophy of Right* (Cambridge: Cambridge University Press, 1991), sec. 291.
402 Locke, *Two Treatises of Government*, 164 [2: XII, §143].

This assertion of Locke's stands out for first establishing a class of political decision and only after that sketching out the minimal institutional requirements. It is the exception to what I have called the methodological problem — the tendency in the separations-of-powers literature to focus on institutions first and deal with political decisions as derivatives of the institutional separations, rather the other way around. But we miss something by focusing first on the institutions rather than on the nature of the decisions themselves. Decisions which are taken in conditions of authority by institutions of the state can land upon us in a variety of circumstances, and we have an extensive vocabulary to describe and distinguish them that goes far beyond the names of branches or departments of government — verdict, order, decree, proclamation, regulation, code, sentence, citation, declaration, etc.

Rousseau was in a certain sense the last political philosopher to grapple with the nature of political decisions at this level of abstraction, without tying it immediately into a normative theory of institutions. He had the advantage of ignorance about modern representative constitutions which no one after him could claim. Not until Kelsen would anyone seriously make such an attempt again, and Kelsen, even more than Rousseau, grounds his entire effort in a thick notion of positive law, asserting that 'law is always positive law… created and annulled by acts of human being[s].'[403] Unsurprisingly, perhaps, Kelsen arrives at a conclusion similar to Rousseau's about the fundamental split in political decision making, pointedly distinguishing it from

[403] Kelsen, *General Theory of Law and State*, 118 [Part One: X.B.a].

the received wisdom of constitutionally minded consensus. Regarding the legislative power in opposition to the powers he calls executive and administrative (and, a bit confusingly, 'political'), he agues that 'a dichotomy is in reality the basis for the usual trichotomy.'[404] The 'presupposition' of separation of powers is not empirically robust and not analytically useful,[405] and the functions of administration and judiciary are closely connected in relation to a system of general norms.[406]

It is Schmitt, though, more than anyone else, who convincingly demonstrates the flaw in beginning any argument with the separations rather than closely examining the nature of the decisions made, in particular the nature of law. Separations of powers are only 'meaningful' once the import of general norms has been established. To construct separate branches to 'issue laws in a special procedure' was to 'presuppose' a concept of law without ever defining or justifying it.[407] Schmitt, it bears emphasising, was not trying to justify it at all. On the contrary, the distinction of law troubled Schmitt greatly, as he preferred to see a smoother spectrum of political decisions and political 'decisionism.'[408]

It is worthwhile, then, to take a step back and look at the broader class of political decisions before drawing any conclusions. The decisions that concern us here are not epistemic, and they are not non-controversial; they are

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[404] Ibid., 255–256 [Part Two: II.G.b].
[405] Ibid., 269 [Part Two: III.A].
[406] Ibid., 277 [Part Two: III.D.f].
[407] Schmitt, *Constitutional Theory*, 191 [§13.IV.1].
[408] Alan Wolfe, *The Future of Liberalism* (New York: Alfred AKnopf, 2009), 133–134.

neither virtue-seeking nor utility-maximising. A political decision, in Bernard Williams' formulation, doesn't determine who's right, only who's lost.[409]

About any such decision we can ask a number of questions that might capture the various qualities of political decisions. We might, in the spirit of Hobbes, ask whether it is being issued by a man (in the sense of person as we would use the word conventionally today) or body or person (in the sense that Hobbes used the word). Is it a natural person or an artificial person? The importance here lies not just in the number of people involved in a decision but in whether they are 'personating' in the Hobbesian sense an institution or the state as a whole. Are the author and the actor the same or separate? Is the decision taken by the same authority who issues it or promulgates it? Hobbes' ownership problem is particularly delicate for political actors who are *responsible* for decisions that they have little *authority* to change. We might, in the spirit of Rousseau, delve into the grammar of the decision and seek to determine who is its subject and who is its object? Are the people in either set different or overlapping? If overlapping — or even identical — is it only an action state which distinguishes them? We might, in the spirit of Sieyes, distinguish between direct and indirect decision making.

Does the decision refer to a collective or a singular? Will it have any force at a later time, or does it at least claim to? For how long? Does it shut off some future decisions? Does it necessarily call for others? A decision, as we established earlier, ends deliberation, but it does not necessarily end

[409] Bernard Arthur Owen Williams, *In The Beginning Was The Deed: Realism And Moralism In Political Argument* (Princeton University Press, 2005), 13.

future decision — though, clearly in some cases it can. The signing of a death warrant clearly closes off several future decisions in a particular case, to take one extreme example. It can be commuted, but only if the new decision comes through in due time, as King Edward learns in *Richard III*: 'Is Clarence dead? The order was reversed'![410] A declaration of war empowers a host of decision makers throughout the agencies of the state and has its own unpredictable feedback loop.

Can we view the decision as part of a process, a link in a chain? Does it initiate one, close one, continue one, etc.? Will further decisions be delegated down, pushed up, revisited at the same bureaucratic level? Is a decision expected to be systemic or to create incentives at an individual level that are hopefully socially useful?

Questions can be asked about the sources of political decisions as well. What is the nature of the official or officials issuing the decision or deliberating on it? To the extent that it is part of a process, is the next step at a higher or lower rank? A clerk often has discretion in assessing a tax (Is this shed built property? Was that proposed deduction a business expense?) that is mandated from above. Something quite different is happening when the details of a major policy decision are worked out by senior advisers and cabinet ministers, but where the ultimate reckoning has to be made by the Prime Minister. A combination of the two prevails when a junior officer leads a force into battle according to a carefully constructed orders that also call for

[410] William Shakespeare, *Richard III* (New Haven: Yale University Press, 2008), 108 [II, 1].

him to improvise as conditions develop on the battlefield. With any political decision, regardless of the nature of the official, can we refer back to a human (individual or collective) source for clarification, justification, or revision? Does the nature of the decision have an affinity to the nature of the authority making it? Does it need to be independently justified by a criterion that is separate to the question of authority?

Related to both questions of sources and processes is the question of ambiguity. If a political decision sets in chain a process, is there a level of uncertainty that derives solely from plural number of actors, or is it an inherent and desired aspect of the decision itself? Is the ambiguity there for a specialist to solve at a lower level, for an authority to resolve at a higher level, or something else entirely? Can the agency issuing the initial decision be called on to resolve it or is such an impossibility built in to the process?

Are there necessary properties to kinds of political decisions relating to the process of deliberation and the decision making itself? I emphasise necessary, not desirable or coincident. A decision on the preferred course of action of the members of a body implies, in most cases, some kind of voting; a decision on the wisest carries no such implication. More broadly, handing down a sentence — to say nothing of commuting one — requires little more than a certain kind of institutionalised authority, but determining a verdict generally needs a host of procedures for the result to be a legal verdict in any form we might recognise.

Beyond all this is the question of the availability of the political decision. Is it secret? Is it accessible in some limited form across ranks of officials? And separately from the outcome of a decision-making process, are the reasons publicly known and accessible? When a drone attack is ordered, the decision is secret, though the outcome has some limited visibility. Negotiations with a sworn enemy can be decided upon secretly, and if nothing emerges from the negotiations, they can remain a secret. The deliberations on law making are usually public, though in most countries they have no special status outside of the text of the statute. Deliberations in a jury room are not part of a decision and are rarely publicised. Though some supreme courts publish dissenting opinions, the process of assembling a majority by persuasion is not accessible to the public.

For each of the questions I have asked above, the creation of law stands out — it fully qualifies as a political decision as defined in this chapter, and yet it is qualitatively different from every other kind of political decision in ways that make all the other kinds almost resemble each other in comparison. Though he had a somewhat unclear (in comparison to Hobbes and Rousseau at least) notion of sovereignty, Hegel tied law creation to a power that was essentially sovereign, while all else was 'subsumption,' an application of sovereign decisions, 'distinct from the decisions themselves.'[411] This begins to capture the distinction, but I think it will be most helpful to isolate four properties of law as such (drawn partially not from the literature on sovereignty

[411] *Hegel's Philosophy of Right*, §287.

but rather from the rule-of-law tradition) which distinguish it from all other forms of political decision.

The first, *generality*, will be the topic of the next section. The next three properties will be discussed more briefly following the section on generality. They are *sources*, *publicity*, and a *special institutional requirement*.

Generality

I have pleaded so many times in this dissertation for a very narrow definition of words which are often used quite broadly in common speech as well as in the theoretical literature that I feel I am allowed in this one case to go the other way and, as will be apparent in the argument below, ask for a very broad notion of the word 'generality' which will encompass people, classes, cases, and time. This will be crucial for ultimately tying law to representation.

Generality was something we first encountered in Chapter 2 with Rousseau's law-decree distinction.[412] Rousseau returns to this distinction repeatedly in Book II of the *Social Contract* to emphasise law's connection with publicity and especially generality, and to tie the generality requirement in the 'object of laws'[413] with the agency responsible for promulgating them. Never one to overlook a grammatical point, Rousseau names the will responsible for

[412] See 'Necessity for Positive Laws' in Chapter 2.
[413] *The Collected Writings of Rousseau*, 1994, 4:153 [SC II,6].

law creation with the same adjective, *general*, that characterises the goal of the outcome. This has the effect of both introducing a qualitative requirement for something to be considered law as well as leaving a broad opening for authorised political decision making that does not rise to that level and therefore does not require all the pomp and circumstance that a determination of the general will might. The characteristic that disqualified decrees from such consideration was their focus on the particular; 'there is no general will concerning a particular object.'[414] Law simply cannot address particular parties in this sense. A century later, Fichte would add to this formulation that law addressed to particulars could be only experienced as domination of unequal parties.[415] Similarly, for Mill it was generality that distinguished *order* from plain *obedience* — the latter required only some kind of authority, while the former was expressed in 'general mandate[s].'[416]

And, a century after that, Hayek would turn Rousseau's binary distinction into the 'law-command spectrum,'[417] with two important modifications. First, generality is no longer definitional, at least not for the placement of a decision on this spectrum. On the contrary, generality is so essential to law — 'the most important aspect'[418] — that you do not need to distinguish it from commands or decrees to derive it. It is inherent to law's fundamental abstraction, where the latter term is defined as responding in the

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414 *Ibid., 4:152 [SC II,7].*
415 Nakhimovsky, *The Closed Commercial State*, 36.
416 Mill, *Considerations on Representative Government*, 29.
417 Hayek, *The Constitution of Liberty*, 150.
418 Ibid., 153.

same manner to 'circumstances with only some features in common.'[419] The second modification will be crucial later in this discussion. It is that what distinguishes laws from commands is not the object in the Rousseauian sense, but rather the source. Hayek's spectrum and his choice of words to describe it are not only a challenge to Rousseau, they are obliquely a challenge to Austin as well, who held law as a species of the genus command — distinguished by the general nature of the obligations it imposes.[420]

What was the generality that in Hayek's analysis gave laws their characteristic abstraction? Its essence was that a rule must 'apply to an unknown number of future instances.'[421] This definition already introduces the elements of time and the separation of decision making (in creating the norm) from agency in implementing it. In contrast, Hart defines generality without resorting to either of those features. He held that generality was the 'first feature' of law — Fuller would one-up him by calling it 'the first desideratum'[422] — and that it was manifest in two ways: in the types of conduct it referred to and in the class of persons it applied to.[423]

But Hayek's formulation, even more than the others, indicates that what we are dealing with here is a political decision, as we have defined it in the previous section. The various definitions of generality overlap but often miss that generality is a difficult goal to achieve unless it has played a part in

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[419] Ibid., 149.
[420] Austin, *The Province of Jurisprudence Determined*, 29.
[421] Hayek, *Law, Legislation and Liberty : A New Statement of the Liberal Principles of Justice and Political Economy*, 2:31–61.
[422] Fuller, *The Morality of Law*, 46.
[423] Hart, *The Concept of Law*, 21.

the decision which creates the rule. It is, indeed, a *generality cubed*[424] — generality manifest in the general terms of law and its general domain across persons and time, generality in the plural method of decision making, and an obligation (or at least aspiration) that the decision be taken in the general spirit. Guizot made a similar argument nearly two hundred years ago, except for him it was not just normative, it was also historical and it was explicitly tied not just to generality but to diversity: the stalemate that plurality created in politics meant that a level of decision making that could be general was needed, and those decisions could be made only by a diverse body of men.[425]

Generality, in this sense, is not an aspiration of law. Nor is it an essentially contested concept, like, say, democracy.[426] It is a unique feature of one class of political decision — and a feature that can only really said to be extant not just by its appearance in an outcome or an intention, but also in the process by which the decision was formulated: 'The heart of it not in the chosen — the act itself the main,' in Whitman's words.[427]

There is one more sense of generality which is important — or more accurately, one more dimension along which to measure it. Generality across cases, persons, and classes is not enough for a political decision to result in a general norm; generality must be attained across time as well. This *stability* is often referred to as an entirely different criterion of law (or rule of law), but I

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[424] I am grateful to Jeremy Waldron for suggesting this formulation to me.
[425] Guizot, *The History of Civilization in Europe*, xxviii.
[426] W. B. Gallie, "Essentially Contested Concepts," *Proceedings of the Aristotelian Society*, New Series, 56 (January 1, 1955): 167–98.
[427] Walt Whitman, *Leaves of Grass: A Textual Variorum of the Printed Poems*, ed. Sculley Bradley, vol. 3, 1980, 709.

wish to see it as another aspect of the generality we have been exploring. Hart has referred to the 'enduring and settled character'[428] of law as one of its defining features and to the 'persistence of laws and their continuity'[429] as a hallmark of a legal system. For Sieyes it was easier to lump stability with generality because he referred to stability as 'permanence.'[430] His view was no different from Locke's that 'the laws, that are at once, and in a short time made… have a constant and lasting force.'[431] But the crucial feature of stability which distinguishes it from the other dimensions of generality it precisely its impermanence. Law, understood as positive law, has the possibility of change built in to it, because some human agency has to make a decision for the future to bring law into being, making other decisions about other futures implicitly legitimate too. This feature, needless to say, cannot coexist with a Mount Sinai formulation of law. Hume, in the slightly different context of 'stability of possession,' also argues that the kind of generality rules require implies a need to modify them.[432] Habermas, for his part, summarises the whole discussion by boiling positive law down to 'coercibility and changeability.'[433]

As the previous section has demonstrated, a fuller picture of political decision making is more complex, and yet, the analytical separation of law —

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428 Hart, *The Concept of Law*, 24.
429 Ibid., 51.
430 Sieyes, "Views of the Executive Means Available to the Representatives of France in 1789," 44–46.
431 Locke, *Two Treatises of Government*, 164 [§144].
432 David Hume, *A Treatise of Human Nature*, vol. Volume 3 (London, 1739), 79 [Part II, Section III].
433 Jürgen Habermas, *The Inclusion of the Other : Studies in Political Theory* (Cambridge, Mass.: MIT Press, 1998), 254.

and specifically law creation — is still relevant. In order to fully understand the implications of all this generality, we must first introduce the other three attributes of law which distinguish it from conventional political decisions.

Beyond Generality

The second important feature of law after generality is its *pedigree*. Where in other political decisions it suffices to establish authority, law has to not only be authorised but to be recognised as law. In Schmitt's formulation, law has to be both 'issued by the offices authorized' and 'in the prescribed procedure.'[434] Raz refers to this as the 'sources thesis,'[435] though its most famous exponent was Hart with his 'rule of recognition.'[436] There must be some kind of social consensus around a method for recognising what is or is not the law.[437] Waldron traces the sources thesis all the way back to Hobbes, who wrote in *Leviathan*, 'Nor is it enough the Law be written and published; but also that there be manifest signs, that it proceedeth from the will of the Soveraign.'[438]

The sources thesis, however, has a curious intersection with both

[434] Schmitt, *Constitutional Theory*, 184 [§14.II.1].
[435] Raz, *The Authority of Law : Essays on Law and Morality*, chap. 3.
[436] Hart, *The Concept of Law*, 94.
[437] Leslie Green, "The Concept of Law Revisited," *Michigan Law Review* 94, no. 6 (May 1, 1996): 1700.
[438] Cited in Jeremy Waldron, "Legal and Political Philosophy," in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, ed. Jules L. Coleman, Scott Shapiro, and Kenneth Einar Himma (Oxford: Oxford University Press, 2002), 366; [XXVI,8].

generality as well as with one of the fundamental properties discussed earlier of rules — their built-in uncertainties, and it is in this context that the penumbra of uncertainty needs to be re-examined. It is more than just a logical corollary of what rules are (and laws even more so). It is not just a minor price to pay if we are to get the much more significant benefit of law's generality in future unknown cases. It is an inherent property of law, part of the guarantee that the agent creating it will have nothing to do with its application. The powers of state in the institutions that law deals with bring with them a potential for abuse that is just too high, and the practice of abuse would empty law of the special quality that makes it law to begin with. (I will return to this in chapter 5 in a more thorough discussion of law making by assembly). We do not just institutionally separate the norm-creators from the norm-appliers; we make it impossible to do with law what we can do with other political decisions, namely refer back to the relevant authority for specification or elucidation.

While the decision to create a law is certainly authorised (and its pedigree is a testament to that), it is difficult to maintain a standing authority making the legislative decision to refer back to without subverting the generality requirement. Let's consider how different this is with other political decisions. With decrees, judgments, orders, and the like, we can always turn to the relevant authority for clarification. Details may be delegated down just as reckonings on difficult choices may be sent up, but there is no conceptual separation of agency and authority. But if the authorised *source* of law can

also pronounce upon its particular application, then that law ceases to be law by violating the generality requirement. This cannot be guaranteed solely by force of meta-rules or Hartian 'secondary rules';[439] it must be an inherent property of the decision-making mechanism of law creation. As I will show in Chapter 5, this delimits drastically the range of the number of people involved in law creation — from both directions — and renders impossible a rule-of-law-based direct democracy (that is, you can have direct democracy or you can have laws, but you cannot have both). In other words, this aspect alone of the sources thesis already hints to us that law creation might not work with too few or too many officials involved; neither a 'law-giver' nor direct democracy can provide the sort of political decision that meets the minimal requirements set out in this chapter to distinguish law as such.

The sources thesis has notable implications on another aspect of decisions touched upon earlier — deliberation. Any decision, recall, involves bringing deliberation to an end. With law, the line is particularly sharpened, since the aspects of the deliberation which do not make it into the law itself have no standing. With other political decisions, the reasons one had for making them can easily become reasons for applying them in certain ways when circumstances call for clarification. But law-making's deliberations do not have the same pedigree as law itself; they are not elevated to any status by a subordinate rule of recognition.

If the accessibility of deliberation is conceptually limited, it is a small

[439] Hart, *The Concept of Law*, 94.

price to pay for the much greater accessibility of the decision itself, as evinced by the third feature of law, after generality and pedigree — *publicity*. Waldron traces this too to Hobbes,[440] noting that what publicity provides in *Leviathan* is the same thing positive law gives us: 'univocality, decisiveness, and the resolution of social conflict.'[441]

Hayek discusses the publicity of law extensively under the rubric of 'knowledge.' Knowledge is what enables an individual to 'foresee the consequences of his actions' and translate general laws — positive law as well as laws of nature — into particular acts.[442] The law also 'embodies' knowledge and, in its entirety, its publicity can be seen as a 'division of knowledge.'[443] While Hayek sees law as the mixing of particular and general knowledge in public, Hart emphasises that knowledge alone is not enough. Law needs to be not just publicly known, but publicly 'addressed'[444] — that is, it has to have as its audience the public in general and appeal to a public as such. In Waldron's words, law provides 'public solutions to public problems.'[445]

And just as with generality, so with publicity the output requirement casts a long shadow on the inputs as well. Dewey points this out repeatedly in *The Public and Its Problems*, concluding that '[r]epresentative government must at least seem to be founded on *public* interests as they are revealed to

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[440] Waldron, "Hobbes and the Principle of Publicity."
[441] Waldron, "Legal and Political Philosophy," 368.
[442] Hayek, *The Constitution of Liberty*, 154.
[443] Ibid., 156–157.
[444] Hart, *The Concept of Law*, 22.
[445] Waldron, "Can There Be a Democratic Jurisprudence," 682.

public belief'[446] (emphasis mine).

A corollary of publicity is the presence of three values associated with *rule of law* — transparency, prospectivity, and predictability.[447] And publicity, finally, more explicitly than any of the other aspects of law, ties in with the other of two sovereign powers (legislation and surveillance) that we will eventually come to associate with representation. '[W]ithout publicity,' Mill asks, 'how could they either check or encourage what they were not permitted to see?'[448]

Moreover, combining the publicity and pedigree requirements yields one more distinction of law — the importance of text. The text of law attains an almost numinous quality that no other political decision can have precisely because the final output — and not the deliberations — is so authoritative and must be accessible to all. With only the sovereign authority as a source of a legitimacy, rather than a human agent to refer back to, the text of a law stands alone — not clarified and not delegated either.

It will have to be applied, though, and because of the penumbra of uncertainty, someone will have to decide in particular cases. The fourth property of law deals with just this. There is a *special institutional requirement*, and it is not for law-creating institutions (we'll get to that!). The special institution that emerges directly from the existence of law as such — general, public, etc. — is what Raz calls the 'norm-applying institution.' Again,

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[446] John Dewey, *The Public and Its Problems* (Athens: Swallow Press, 1991), 181.
[447] Marmor, "The Rule of Law and Its Limits."
[448] Mill, *Considerations on Representative Government*, 42.

this flows directly from the 'penumbra of uncertainty' created by law's generality. There must be some agency applying the general to the particular, whatever the origin of the general is. Kelsen divides these into direct (administration) and indirect (judiciary).[449] Aristotle clearly had both kinds in mind when he demonstrated the necessity of a 'magistrate' whose remit was 'adjustment and application' of even the best general rules to the particular.[450] This was not a defect of law; it needed to be 'impossible to explain' the particulars in law because that would violate the requirement of 'general language.'[451] The officials manning the norm-applying institutions apply the general to the particular using Hart's internal point of view — that is, using rules themselves as standards of appraisal.[452]

To summarise the argument thus far, in the phylum of political decisions the genus of law creation differs qualitatively from all the others because its members alone have four properties which no other species has. The decisions are **general**, both in their phrasing and in their goals; their **sources** are recognised as authorised to create general norms in a legal system; the decisions are **public**, with each last word available to practitioners of the external point of view; and of necessity they empower **institutions** to translate them to future decisions on the particular.

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[449] Kelsen, *Introduction to the Problems of Legal Theory* §31.
[450] Aristotle, *Politics*, 98 [III:16].
[451] Aristotle, *Nicomachean Ethics*, 85 [III:11].
[452] Hart, *The Concept of Law*, 98.

Generalised Generality

What are the implications of this special form of decision making with all its entrenched generality? Even before we refract some of the principles of law discussed in this chapter through the lens of popular sovereignty as sketched out by the three philosophers of the first three chapters, we can already enumerate several. First, there is the need for separate agencies to create norms in general and then apply them in the particular. While this is not an inherent property of law in the same way that generality and publicity are, it is not just a question of normative institutional design either. It is an emergent and vital quality of law, a corollary of its membership in the set of rules — and a direct implication of the inherent property of law I which have called the 'special institutional requirement.' If there must be norm-applying institutions in order for there to be norms, and if norms are forms of rules, and if rules cannot be created by the same agency which applies them if they are to conceptually remain rules, then some sort of norm-creating institution is necessary to promulgate positive law. And the separation of this institution from others becomes more than a normative desideratum, as it is traditionally portrayed in the separations literature. This separation, in fact, fosters precisely the kind of indirectness around which Sieyes' theory of representation revolves.

But the agent creating law cannot take any form, or at least not all the forms available to norm-applying institutions (as I will demonstrate in the discussion of numbers in Chapter 5). This is because the issue of the

legislator, whose source is of such critical import, cannot have a human source to be referred back to, else it loses its distinction as law. Law, unlike any other political decision, must stand on its text alone. Its authority comes from its source, and from the recognition of its pedigree. But positive law can exist only after some decision, as Kelsen argues[453] — a decision, in Hart's words, that is a 'deliberate datable act.'[454]

The more we investigate possible methods of making this kind of decision, the more limitations we will encounter, until we return to the fundamental questions raised in the first three chapters of this dissertation. Thus far, we can already say that such decisions can be taken only by plural numbers of officials, not by functionaries and not by individuals.

We also can determine that a generality in the outputs of law creation can be maintained only by the generality in the inputs — by that same generality cubed referred to earlier. A general spirit is not just a method for improving a decision-making procedure; it is an essence of the kind of sovereign decisions that are so different from all other types of political decisions. Rousseau understood this when he separated sovereignty and sovereign decisions from governments and tied the act of law creation to the general will — even if his suggested methods from making those decisions fell short. This is more than just a theoretical affinity. This account is more historically useful too. The rise of plural politics, the institutionalisation of diversity and disagreement, coincides more neatly with the growth of

[453] Kelsen, *General Theory of Law and State*, 33 [Part One: I.C.a.3].
[454] Hart, *The Concept of Law*, 44.

representative government than any ideas on democracy. It was the process that led to what Seidentop calls '*general* political society in which all are subject to a centralised agency acknowledged to have the right to make and enforce rules of conduct binding on *all*.'[455] Hegel too hewed to the general-particular dichotomy in describing the same process: '[A]s the condition of society grows more advanced and the powers of *particularity* are developed and liberated... another form of rational law is required... to maintain its unity and to grant the forces of developed particularity their positive as well as negative rights.'[456] And Mill, for his part, drew the conclusion that such a social organisation demanded a kind of general spirit, which he called a 'generality of electors.'[457] Despite this, however contemporary writing (with the notable exceptions of Waldron and Habermas) on representation nearly always ties it into the democratic rather than the legal positivist tradition — even if only to make a provocative and anti-democratic point, as in Manin.

All of which brings us back to the problems of unity and diversity with which this dissertation began. This is a problem that democracy alone cannot solve, but that a thick conception of law might, as long as that conception is backed by a compatible normative institutional framework. Armed with this chapter's conception of law and law creation, we can begin to make the case for representation as the only possible match. It alone can deal with the problem of unity of action and diversity of the body politic, which Hobbes and

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[455] Larry Siedentop, "Two Liberal Traditions," *The Idea of Freedom: Essays in Honour of Isaiah Berlin*, 1979, 163.
[456] *Hegel's Philosophy of Right*, §273.
[457] Mill, *Considerations on Representative Government*, 16.

Sieyes sedulously sharpened and which Rousseau so unsatisfyingly blunted — a hidden dialogue that reprises itself in the early twentieth century between Schmitt and Kelsen and to which we will turn in Chapter 6.

Finally, if we are to understand law as I have defined it in this chapter, then we can only conclude that the rule of law and direct democracy are mutually incompatible — not impractical, but impossible. Popular sovereignty can be instantiated by direct democracy (maybe) without law or by law without direct democracy. The combination is conceptually non-existent. To demonstrate this, we will take all the ideas of this dissertation thus far — action at a distance, general will, exchange, political decisions, generality — and deal in the next chapter with the problem we first identified with Hobbes, the problem of numbers.

Chapter 5

Numbers

We have identified law as a special method of resolving social conflict and its creation as a special form of political decision — special in that while it exists next to many others (rather than replacing them), it is unique and distinct from them. But how, practically, do we make law? Not how *should* we make law if it is to do certain things or accomplish certain goals, but how *can* we make such a decision so that it can conceptually meet the requirements of Chapter 4. Those were generality, publicity, sources, and the special institutional requirement.

At first glance, this should not matter so much. A law is a law is a law. None of the minimal requirements sketched out for positive law earlier tell us much, directly at least, about how law needs to be created, only that, by the sources thesis, law must have an agreed upon 'pedigree.' The question of what was traditionally in political theory called *constitution* or *form of government*, or as comparitivists have taught us to say more recently, *regime type*, seems to be a political — social, perhaps, or ideological — one. The creation of law is one, albeit very important, public decision, but the way we make it and other public decisions is an outgrowth of our choice of terms of association and institutional efficiency. Each field will certainly place limits on the scope of the other — a law-based monarchy or a popular mass democracy, for example can do certain things but are obviously precluded from others, but fundamentally the nature of law as such and the nature of legitimate public decision making in conditions of state sovereignty are two separate fields of

inquiry, and various combinations of both are equally plausible, if not equally desirable.

This, at least, is the reigning assumption in much political theory, and I think it is plainly wrong.

This chapter seeks to make an argument from numbers, and it seeks to do it not by proposing a solution and then defending it, but by considering the full range of options and, after seeing what must be eliminated, assessing what is left.

The argument of this chapter will be laid out in five parts. In the first section there will be a very brief discussion on numbers in political theory, centred especially on the classical one-few-many taxonomy of regime types. The following three sections will incorporate the findings of Chapter 4 on political decisions and apply to them the vocabulary of popular sovereignty which was fleshed out in Chapters 1, 2, and 3. The second section will do this using big numbers, testing whether any concept of direct democracy can be made compatible with positive law as understood in Chapter 4. The third section will go in the opposite direction and assess small numbers, both in the form of a 'great legislator' or of a unity achieved through unanimity or personation. The fourth section will propose a definition of *assembly* and argue that this is the only coherent forum for carrying out the sovereign political decisions — law creation and executive surveillance — identified at the very beginning of this dissertation. Finally, the chapter will end with a brief

thought on the connection between assembly and textuality.

Numbers in Political Thought

Political thought was historically obsessed with three numbers: one, few, and many. This tripartite distinction was the basis for identifying regime types or stages in constitutional development. Sometimes the number typology is all one needs to know about a regime; other times it is a defining feature in a five-[458] or six[459]- part cycle of regime transition, with good or bad forms of rule by one, few, or many evolving into each other in a predictable cycle, most famously in Polybius' exposition on forms of states.[460] Polybius moves beyond the cycle into a theory of mixed government, which, filtered through Machiavelli, would have an enormous influence on English constitutional thought of the seventeenth century.[461]

In the *Statesman*, Plato formalises the definitions of the regime types he outlines in *The Republic* by adhering strictly to number, opposing monarchy to both a form of government where 'power is in the hands of the few' as well as one of 'rule of the many.' What is sprinkled over several dialogues in Plato

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458 As in Plato, *The Republic* (Cambridge: Cambridge University Press, 2000), 143 [IV,445].
459 A "slight deviation" in two types means they are counted separately, yielding six altogether, in Aristotle, *Nicomachean Ethics* [VIII,10].
460 Polybius, *The Histories, Volume III* (Harvard University Press, 2011), 277 [VI,2].
461 J. G. A. (John Greville Agard) Pocock, *The Machiavellian Moment : Florentine Political Thought and the Atlantic Republican Tradition* (Princeton: Princeton University Press, 1975), 360.

is neatly summarised in Aristotle's *Politics*:

> The words constitution and government have the same meaning, and the government, which is the supreme authority in states, must be in the hands of one, or of a few, or of the many. The true forms of government, therefore, are those in which the one, or the few, or the many, govern with a view to the common interest; but governments which rule with a view to the private interest, whether of the one, or of the few, or of the many, are perversions.[462]

For all the differences in typology and their different ends — descriptive, predictive, normative — there is one quirk that unites all the classic descriptions. One, few, and many would seem to be ideal subjects for a sentence, but they never come with verbs. What is it that they actually *do*? Machiavelli speaks of 'Principality, Aristocracy, and Democracy' [*Principato, Ottimati, e Popolare*] and their possible transitions as 'forms of government' [*stati*], but does not explicitly attribute any action to them.[463] In the English translations I consulted, Plato never uses a verb for any of the numbers, and the only verb I could find in Aristotle was a passive form ('administered'), and not in the main exposition on one, few, and many.[464] Similarly, Polybius uses repeatedly the nouns 'rule' and 'obedience' in describing the roles of different numbers, from which we can deduce that he means to say that one or few or many *rule* (as a verb), though it is notable that he never actual does say that.[465] Aristotle, similarly, uses 'rule' as a noun, referring to 'one-man rule'

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[462] Aristotle, *The Politics; And, The Constitution of Athens*, 2nd ed.. (Cambridge: Cambridge University Press, 1996), 71 [III,7].
[463] Niccolò Machiavelli, *The Discourses* (Penguin Books, 1984), 106 [I,2].
[464] Aristotle, *The Politics; And, The Constitution of Athens*, 91 [III,18].
[465] Polybius, *The Histories, Volume III*, 275 [VI,2].

and 'rulers.'[466]

Are these earlier theorists describing constitutions in which one *rule*s, or few *rule*, or many *rule*? If so, what does this mean practically? Is this 'rule' an activity or just a locus of authorised decision making?

For all the ubiquity of the one-few-many trichotomy in the literature, there is a remarkable lack of specificity in what each of those numbers actually can or should do. Marsilius of Padua provides the exception that proves the rule. He not only insists on always discussing the function of any institution he describes (and on charitably reading Aristotle as doing the same thing); he broaches the numbers distinction strictly in the context of 'the authority to pass laws' in either one man or few men or 'the universal body of the citizens.'[467]

For Guizot, this dilemma sufficed to reject the classical distinction altogether as 'superficial and false.'[468] The very existence of law implied separate spheres of society and government, not a 'sovereignty as a right belonging exclusively to individuals, whether one, many, or all those composing a society.'[469] The relevant questions were not in the 'exterior forms' but rather, 'How is the law formed, and how is it applied?'[470] Guizot's questions are the right ones, but we do not have to throw out everything we know about

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[466] Aristotle, *Nicomachean Ethics* [VIII,10].
[467] of Padua Marsilius, *The Defender of the Peace* (Cambridge: Cambridge University Press, 2005), 80 [ONE:XIII,8].
[468] Guizot, *The History of the Origins of Representative Government in Europe*, 48.
[469] Ibid., 52.
[470] Ibid., 50.

numbers to answer them.

The discussion of the previous four chapters, however, forces us to update this numerology in three (of course!) ways. First, the modern concept of sovereignty, conceptually grounded in a radical notion of individualism and lodged with the people at large, chips away at the ambitions of this numerical typology to describe government in its totality, because something foundational must belong to everyone. This was already apparent in Chapter 1 with the discussion of Hobbes, but was formalised in Chapter 2 with Rousseau's clear-cut separation between sovereignty and government. Rousseau accepts the one-few-many distinction but applies it separately to government and sovereignty. Sovereignty, though, can only be possessed by the many, where government can be of any combination. Like Aristotle, Rousseau distinguishes between good and bad forms of each, using 'republican' for the former rather than 'true' as Aristotle does.

The second development to add to this discussion is a continuation of the problem of the missing verbs. More to the point, as we established in Chapter 4, there are a variety of classes of political decisions, and knowing something about the nature of the decision is crucial before one can possibly design an institution around it. The relevant question then is not just about the number of people involved, but what they are actually doing. Ruling is not the same as governing; and neither is the same as legislating. The emphasis

on deciding is usually one that is attributed to Schmitt,[471] but in fact once sovereignty and government are separated, every political act needs to be assessed as belonging to a class of decision. And the decisions that concern us here are precisely the ones that normatively, if not yet institutionally, are extensions of the people's sovereign prerogative and that only make sense once there has been a separation between sovereignty and government — the power to create laws and the powers of surveillance over government.

Thirdly, the connection of sovereignty to the multitude in Hobbes and later thinkers means we need to treat the concept of *many* a bit more finely. Many can mean two different things, and it might be useful to separate them. In one sense, 'many' is a number much larger than few. Many are not a committee, not a small gathering of people where all can be heard and where consensus can be reached. Many, in the classical sense, is expansive but not exhaustive. It is the poor, as opposed to everyone — not the poor and everyone else together. I will refer to this many as the *exclusive many*. In this sense, it retains a 'frank recognition of the class basis of society'[472] and serves as a basis both for a critique of democracy and for an argument for 'mixed government.' This class basis of many lurks in the background of Hamilton's argument in *The Federalist No. 35* that the charge that the House of Representatives is not numerous enough is 'made up of nothing but fair sounding words.'[473] Democracy, in fact, is the name Plato gives to the

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[471] Wolfe, *The Future of Liberalism*, 133–134.
[472] M. J. C. Vile, *Constitutionalism and the Separation of Powers* (Liberty Fund, 1998), 39.
[473] Alexander Hamilton et al., *The Federalist : With Letters of "Brutus"* (Cambridge: Cambridge University Press, 2003), 159 [No. 35].

corrupted form of rule by the many,[474] and he clearly means the exclusive many. This sense of many prevails not only in Polybian anacyclosis, but survives much longer in ideas of 'balanced government.'

But there is another sense of many which the modern sovereignty literature suggests, and I am almost tempted to distinguish it from the term *many* by calling it *all*. Almost, but a more accurate, though still problematic, term might be *all-affected* (following Dahl[475]), enlarging the relevant pool of deciders to anyone who might have a stake in the outcome of a decision. I shall refer to this instead as the *inclusive* many (see **Figure 8**). This notion of *many*, which Miller associates with Locke,[476] is weighed down by its own circularity, since the very question it raises presupposes an answer. The democratic challenges inherent in assigning geographic boundaries is well known.[477] It becomes even more acute in matters of secession. Should a seceding province need a majority backing within its province, within the remainder of the country it is leaving, and in the country as a whole? What if it only secures two out of these three? What if it secures all three but with high degree of opposition in the putative border region? These may soon be relevant questions. Boundaries, however, are not simply geographical. What is the democratic method, for example, for determining how far to extend the franchise? Like public choice theory, this method of political theory suffers

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474 Plato, *Statesman* (Public Domain Books, 2009), 76.
475 Robert Alan Dahl, *After the Revolution? : Authority in a Good Society* (New Haven ; London: Yale University Press, 1970), 64.
476 David Miller, "Democracy's Domain," *Philosophy & Public Affairs* 37, no. 3 (2009): 206.
477 Frederick G. Whelan, "Prologue: Democratic Theory and the Boundary Problem," in *Nomos XXV: Liberal Democracy*, ed. J. Roland (James Roland) Pennock and John W. (John William) Chapman (New York ; London: New York University Press, 1983).

from the flawed assumption that political decision making can take place without politics.

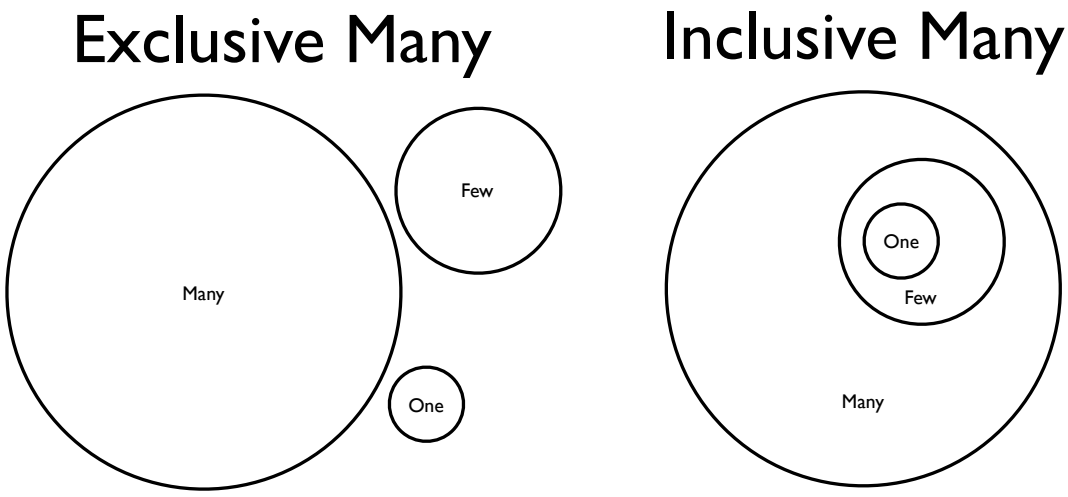

Figure 8: The *exclusive many* is explicitly class based, while the *inclusive many* aspires to express an all-affected principle.

Direct Democracy and the Problem of Big Numbers

Having located sovereignty only with the people at large and having further established two classes of political decision — law creation and executive surveillance — as sovereign decisions, it makes sense that the first number we might seek to assign to these decisions would be a form of *many*, and not just any form but one that gets as close as possible to *all*.

Democratic decision making, in this sense, is usually swatted aside as

impractical more than anything else. It takes too much time and is not feasible in anything larger than a town hall meeting. Peter Singer's riposte to this line of argument deserves to be quoted at length both because the technology he refers to is so quaint and because the argument he makes is truer now, even, than it was when he made it in 1974:

> One of the most common platitudes in political theory, repeated in all the elementary textbooks, is that while direct democracy might be all very well in a small city-state, it is obviously quite unrealistic in a nation-state of several million people. In fact, this platitude is certainly false. With the communications technology available to us today, an extension of Athenian-style democracy to a modern state would be perfectly feasible. Without going into details, it is easy to envisage vote-recording devices installed in private homes and public places, linked to a central computer and operated by means of some personalized device, like those already in use for obtaining cash from the automatic machines outside banks. Proposals could be debated on radio and television, and the public could contribute by telephone... If, then, we have not seized the opportunity provided by technological advances to restore democracy to its purest form, it must be because we are unenthusiastic about such a restoration... or perhaps those who are influential about forming an opinion on these matters are apprehensive about the decisions that might emerge.[478]

Well, what about big numbers, then? If we accept the kind of popular sovereignty which Hobbes, Rousseau and Sieyes have postulated, why not take public decisions to the people at large? The principle that would govern

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[478] Singer, *Democracy and Disobedience*, 106–107.

inclusion, while terribly important in a variety of contexts, is not something we need to pause on for very long here. No principle of citizenship, no test of participation — age, residence, a notion of all affected, etc. — is necessary to show the unworkability of anything remotely like a direct democracy.

The word 'unworkability' might deceive here. My argument has nothing to do with convenience. In fact, the assertion that direct democracy is impractical and that therefore representation is a tolerable second best is wrong on both counts. As Singer shows, it is perfectly possible to open more and more political decisions to the public at large. The precise formulae for credentialing participants and weighting their votes may be difficult for us to imagine now, but so were congresses and parliaments comprising politicians popularly elected by plurality votes or run offs or closed or open lists or single transferable votes when Rousseau and Sieyes first broached popular primary and secondary assemblies in their own times. The supposed unworkability, then, is at most a failure of institutional imagination — on a par with the earlier critique levelled by Hume at Machiavelli[479] — or a status quo bias. The second best claim fails equally.[480] Direct democracy is possible, but the outcome would hardly be an improvement over that on offer in political representation. Rather, by sacrificing the rule of law, it would presumably be much worse.

But let's not rush to despatch direct democracy just yet. As I have been

[479] See the introductory remarks in Chapter 2.
[480] On the distinction between first-best and second-best arguments for representation, see Brennan and Hamlin, "On Political Representation," 111–112.

keen to emphasise elsewhere,[481] the work of a normative political theory should not begin with the assigning of predefined tasks to proper institutions. It should, rather, identify the kinds of public decisions a constituted polity needs to make and determine the method and quality that is appropriate to each class of decision.

The public choices which emerged from all three of the thinkers examined in Part I that are most intimately linked to expressions of popular sovereignty are law creation and executive surveillance. How well can a direct democracy stand up to the minimal requirements of either? Rule by many/all falls short for both and for very similar reasons. This is most easily apparent if we first focus the discussion on law creation.

The best way to assess this is to try to imagine an actual law-making method that does include the many, in some sense that could cover all or nearly all or all affected, etc. Can the people at large make a decision that answers the four minimal requirements set out in Chapter 4 for law creation? To get a firmer grip on the question I have asked, perhaps I should emphasise what I am not asking. I am not asking about the practicalities or feasibility. And I am not asking, Can the people at large make *good* decisions which answer the minimal requirements? The answer to the question I am asking is no, as meeting two of the four requirements will necessarily mean violating the other two. There exists a logical contradiction between law and direct democracy that precedes any normative discussion; in fact, it rules it out. This

[481] See especially the section 'On Political Decisions' in Chapter 4.

will become evident as we take the conditions of positive law from the previous chapter one at a time and see if a political decision can be made by this kind of 'many' without violating any of them.

Of the four conditions, the one most easily met by an imagined mass participatory method of legislation is publicity. Whether what is proposed is a mass popular assembly or a vote by text messages, public decisions are accessible in at least the questions posed and their outcomes. Technical obstacles certainly exist, but there is no reason why a debate and a vote cannot be held in a manner that would still be recognisable as both *direct* and *public*. What cannot be guaranteed is *knowledge* as we defined it in the previous chapter, though even in the absence of knowledge, public decisions could still — and most likely, would still — be publicly addressed in a rightfully conceived direct decision-making process. This kind of address would grant us Dewey's requirements of public interest and public belief.[482] There might be some terrible methods of arriving at a decision or even not arriving at one, but a well designed one would seemingly grant us the kind of decisiveness and univocality that we earlier associated with publicity.

I say *seemingly* because even though the outcome of a decision might be clear if, say, proposals had to pass via a majority of equally weighted and countable votes, there could be no way to guarantee that such a decision would survive to be applied to a challenging future case. The people at large, after all, are authorised to evaluate any decision based on public interest and

[482] Dewey, *The Public and Its Problems*, 181.

public belief, and absent any indirect process, nothing could possibly bind, including an explicit decision to be bound. A popular assembly might both legislate and adjudicate — this was the case both in the *boule* in Athens and the *Sanhedrin* in ancient Israel — or, just as likely, it could change laws ad hoc in response to unforeseen circumstances which inflame public opinion.

In either case, it would also be possible to imagine a decision mechanism that preserves the pedigree requirement. At first glance, this is the simplest of them all. Whatever decision mechanism is created that grants the power of decision to the many will *ipso facto* be recognisable as such and, more broadly, as transcending all the difficulties encountered in Part I of this dissertation in translating the sovereignty of the people into actionable political outcomes. A popular assembly, to take a ready example which need not be the only possibility, can, by custom or unanimous consent, agree that that any measure passed by a majority (of whatever kind) after, say, a third reading and with a mandatory quorum will be heretofore recognised as law. Such a rule of recognition would not contradict the kind of rules of deliberation we earlier alluded to in the original discussion of the sources thesis, but it does raise some difficulties in dealing with two other implications of this property which emerged in the same discussion — delegation and uncertainty.

To understand that, it is necessary to first come to terms with the condition of law creation which any such mechanism would fail to meet — what I earlier called the *special institutional requirement*. If the basis of decision by the many is the participation of the many in creating the binding public

decisions, then it will be impossible for the people at large to constitute credible institutions to interpret and carry out those decisions. On the contrary, since the only legitimate decisions are those taken by the people at large (by whatever mechanism chosen; it does not matter for this discussion which), the penumbra of uncertainty has an entirely different implication for political decisions from the ones alluded to earlier. Whatever uncertainty arises from a particular problem, the people assembled resolves it with a new decision, broadly or narrowly worded as it pleases. Even a decision to establish separate institutions could easily be overruled or rescinded or, less dramatically, the specific case which such an institution might examine could be rendered moot by a new 'law-creating' decisions. The quotes are certainly merited there, because we are clearly no longer dealing with something recognisable as law.

A decision by the many, then, by virtue of its very univocality — by virtue of its signalling the end of a deliberation on a public problem so completely — lacks the kind of uncertainty that is a key feature of law's special status. It renders pointless any other delegated institution's power to implement a general norm in a manner more refined than a strict delegation because any immediate challenge can be taken up by the only institution legitimately empowered to make public decisions, *viz.* the many who passed the 'law' to begin with. This is not to say that a direct democracy cannot create a large bureaucracy for itself as a matter of convenience, only that its ability to carry out political decisions with any authority would be so limited that none of it

could qualify as the kind of special institution, norm-applying, which is necessary for law as such.

It is not difficult to see where this is going. If the publicity and sources requirements implied by large numbers make the institutional requirements challenging, they make the crucial generality requirement absolutely impossible to meet. Not all the dimensions of 'generality cubed' are necessarily violated; there could still be plurality in the form of the decision and an aspiration to the general spirit. But the all encompassing political role of the people means that generality could not possibly be maintained across persons, cases, or time. One might argue that this is even a strength of direct democracy. Why, indeed, should the outcome of one case be determined by the application of a general decision taken when its circumstances were not imagined? In no way, however, could such a process constitute law making. This remains true even in the face of sincere attempts at preserving the general spirit. There is simply nothing to stop a popular assembly — or any mass decision mechanism — from excepting a particular case or revising its putatively 'general' earlier decision to cover a currently desired outcome (and then doing that again).

This kind of democracy, where only decisions taken by the many count, might very well have its advantages, and it certainly could be feasible in certain political communities. It could not, however, be a law-based regime, because it could not take any decision that might resemble law creation as we have come to understand it. The intersection of democracy and the absence of rule

of law has elsewhere been referred to as 'illiberal democracy.'[483]

Since this is, after all, a work of normative political theory, it is worth returning briefly to the third shortcoming for a few more thoughts on institutions. More than just generality is lost in illiberal democracy, the ambiguity of law — Hart's 'penumbra of uncertainty' — fades too, only to be replaced by a more insidious uncertainty in the applicability or durability of any public decision. Recall that one of the features of all political decisions except law creation was that they retained a property of *referability*. That is, it was always conceivably possible to go back to the person or body which made the original decision for further clarification. Law, to be law, cannot have this. Our intuition might lead us to believe that this is an outgrowth of the methods we happen to know for legislation, but it is best to think of this in the other direction completely. This is a necessary property of law which will call for a method of creating it which can guarantee it.

Rule by the many, alas, cannot. It precludes the kinds of separations which the early sovereignty theorists held to be so important. It does not allow for multiple bodies with overlapping memberships to have different roles in political decision making. And by doing both of these things, it does not allow for any distinct political agency to emerge, because everyone is part of the only agency that counts. There is no place in such a society to withdraw from political conflict, no way to contain it by means of exchange and indirectness.

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[483] Klaus von Beyme, "Representative Democracy and the Populist Temptation," in *The Future of Representative Democracy*, ed. Sonia Alonso, John Keane, and Wolfgang Merkel (Cambridge University Press, 2011), 56.

Such a political organisation begins to resemble Sieyes' *ré-totale*.[484]

It is not just that the same people cannot have different roles, as in Rousseau's conception, but that the same role cannot have people in it replaced. These are two different logical overlaps. The Rousseau conception of different sets with coincident membership allows for people to consider themselves sovereign and subject in fulfilling different roles. The problem here is opposite. The same role cannot ever change its membership because it already includes everyone. But changing the membership of a governing set is crucial. Bentham gave a name to this property in his defence of elections (and right after his excoriation of bicameralism). He called it 'dislocability' and contrasted it with 'punibility' (which he occasionally spells 'puniability').[485] Dislocability is impossible in a direct democracy because of the way it 'effaces boundaries and separations, while subjecting everything to the publicly political imperative.'[486]

None of this is to imply that rule by the many is impossible or even necessarily deficient. Bentham's contemporary (and father of a great theorist of representation) James Mill captures the standard charge against direct democracy by arguing that it assumes a community can only act legitimately when assembled but that that is precisely the moment when it is least able to

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[484] Sonenscher, "Introduction," xxi.
[485] Jeremy Bentham, "Constitutional Code," in *The Works of Jeremy Bentham, Publ. under the Superintendence of J. Bowring.*, vol. 9, 11 vols. (Edinb., 1838) [I,16].
[486] Kateb, "The Moral Distinctiveness of Representative Democracy," 373.

reach a decision.[487] Focussed only on *decision*, however, this argument probably was not even entirely valid in its own time; it certainly is not today. Procedures could be dreamed up and technologies mobilised to make decision by the many effective, timely, and executable. But they could not make those decisions law.

Moreover, understanding representation as an approximation of democracy — in its classical rule-by-many sense — or an appropriation of its principles misses the crucial role of positive law in the modern state grounded in popular sovereignty. It also does a historical injustice to the evolution of representative institutions which nowhere grew as convenient add-ons to direct democracy or even primary assemblies. Guizot was adamant about this. 'There is,' he wrote, '[a] fundamental difference between the principle of representative government, and that of democratic government.'[488] The only way to make them compatible, he argued, was to grant the minority opposed to the passage of any law leave to violate it, vitiating it of any 'legal' content. And as late as 1932, Beard and Lewis noted that while representation had 'democratic implications' it was most certainly not 'democratic in conception.'[489] All this gets lost post-war as legal philosophy's place in political theory is eclipsed by social choice, game theory, and outcome-based epistemology, with economics replacing law as politics' ontological basis.

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[487] James Mill, *Political Writings*, ed. Terence Ball (Cambridge: Cambridge : Cambridge University Press, 1992).
[488] Guizot, *The History of the Origins of Representative Government in Europe*, 59.
[489] Charles A. Beard and John D. Lewis, "Representative Government in Evolution," *The American Political Science Review* 26, no. 2 (April 1, 1932): 226.

Unity and the Problem of Small Numbers

Very large numbers, then, do not work — *cannot* work, and not for the reasons that are usually adduced against direct democracy. What about small numbers? I ask not only because small numbers make such a prominent showing in the history of political thought over the centuries, but also because, for reasons that are beyond the scope of this dissertation, prerogatives that had once been the province of parliaments have, in recent decades, gradually but steadily been assumed by executives and judiciaries throughout the advanced democracies.

I wish to ask about very small numbers the same question I asked in the previous section about very large ones, namely whether from a small number of actors we could devise a decision mechanism which would yield a decision answering the minimal requirements of positive law — not, as before, whether this would be advisable, efficient, or otherwise normatively desirable, but whether it could happen at all. Habermas engages in a similar thought experiment when he separates conceptually 'law and the rule of law' from 'will-formation in the constitutional state.' He argues that the conceptual separation does not imply that, say, rule of law can exist without democracy.[490] Rather than show that a broad set does not imply something, I wish to demonstrate that two narrow combinations do not exist at all. Specifically in this section, I show that if will-formation is decision making by a very small number then the outcomes of those decisions cannot, regardless of aspiration,

[490] Habermas, *The Inclusion of the Other*, 253.

be law. Or, to state it affirmatively: will-formation for political action by small numbers is possible, but it cannot meet the minimal requirements of positive law.

The problem is not confined to small numbers that are small only in relation to the larger numbers of people bound by them. Even Robinson Crusoe alone on his island is unable to make a decision that can qualify as positive law. Interestingly, Defoe has him use the word 'rule'[491] when he creates a heuristic to preserve his mental state, and introduces the word law only when he discovers he is not alone and excitedly appoints himself 'absolute Lord and Law-giver.'[492] Crusoe's reasoning through his own lack of authority to execute cannibals raises at least three of the four conditions of law: publicity, sources, and special institutions.[493]

What would law creation by small numbers look like if it were possible? We must be careful not to rush headlong into models lifted straight from the numbers literature — aristocracy, monarchy — because those are not dealing exclusively with law creation or even executive surveillance broadly defined. The purpose of this section, like the previous one, is to borrow the numerical categories and assess whether it is possible to apply them to the kind of political decisions spelled out in Chapter 4.

Naturally, much political theory has been written about the benefits of

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[491] Daniel Defoe, *Robinson Crusoe*, New ed. (Oxford ; New York: Oxford University Press, 2007), 205.
[492] Ibid., 260.
[493] Ibid., 201.

concentrating something as abstract as 'rule' or 'power' in the hands of the few. There have also been several incomplete efforts at theorising a special role for small numbers — as small as one — for tasks that are specifically tied to legislation. Bodin envisioned 'one or several citizens [with] power to manage the state and govern freely' as not something separate from sovereignty; that would still reside with the people and the 'one or several' would only be acting as 'trustees.'[494] We already encountered Rousseau's 'legislator,' erroneously assumed to be limited to foundational moments,[495] in Chapter 2, an attempt to elide the difference between his strict unanimity requirements and his less explicit need for unity in setting out *the law* (as opposed to *laws*). Even Rousseau's occasionally ahistorical retelling of ancient history leaves out any evolutionary improvement in institutions in order to give prominence to 'a great legislator, a Numa or Moses' who sets down the law[496], following Machiavelli who wrote, 'I consider that the most outstanding were Moses, Cyrus, Romulus, Theseus and others of that stamp.'[497]

An unacknowledged echo of this is sounded a full century later in John Stuart Mill's *Considerations on Representative Government* in his discussion of his 'Commission of Legislation.'[498] Like Rousseau's Legislator, the Commission formulates law with a view to its systemic role, rather than as a one-shot solution to a current problem. And just as Rousseau uses a stylised

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494 Jean Bodin, *On Sovereignty : Four Chapters from the Six Books of the Commonwealth* (Cambridge: Cambridge University Press, 1992), 4 [I,8].
495 Gildin, *Rousseau's Social Contract*, 72.
496 Riley, "A Possible Explanation of Rousseau's General Will," 88.
497 Niccolò Machiavelli, *The Prince* (Cambridge: Cambridge University Press, 1988), 20 [VI].
498 Mill, *Considerations on Representative Government*, 112.

account of antiquity to back up his claim, so Mill conjures up a limited account of Athenian law making. But in Mill's case the argument cannot be very useful if it is only relevant for quasi-foundational moments, so he emphasises the limited law making capacity of the Ecclesia versus the 'the less numerous body… called the Nomothetæ, whose duty it was to revise the whole of the laws and keep them consistent with one another.'[499] The argument links number to institutional task ('a numerous assembly is as ill fitted for the direct business of legislation as for that of administration'[500]) without stopping first to analyse the nature of decisions at stake, and that is why its conclusion is so different from my own. It further relies on Mill's recurrent distinction between knowledge and opinion — both necessary, in his analysis, but the former must not trample on the domain of the latter lest crucial decisions be left up to a 'tribunal of ignorance.'[501]

Two strains of thought dominate the argument from small numbers. The first holds that small numbers provide for decision *efficiency*, while the second makes an argument on *elitism*. The latter tradition begins with the class-based notion of many, but works for the inclusive form as well. A healthy scepticism is always in order even in determining the general will, as the people are 'ill-informed, mercurial, susceptible to demagogic manipulation.'[502] The emphasis in this line of argument is less on the ability to make a clear decision, but to make a good one. 'Elite competence' takes precedence over

[499] Ibid., 113.
[500] Ibid., 109.
[501] Ibid., 110.
[502] Levine, *The General Will*, 92.

'mass participation.'[503] The former, however, concerns itself less with the quality of public decision making, and more with its efficacy. This is the thought that informs Schmitt's 'auctoritas, non veritas'[504] reading of Hobbes, which he pleads with the reader to not see as a 'slogan of irrational despotism.'[505] Four centuries before Hobbes, Aquinas laid out the superiority of 'government by one' over 'government by several' on both grounds, comparing the act of governance to a steersman on a ship or a physician, but relying mostly on the need for unity to preserve peace.[506] '[I]t is clear that that which is itself a unity can more easily produce unity than that which is a plurality: just as that which is itself hot is best adapted to heating things.'[507]

Much of this discussion returns us to a problem we tried to solve earlier by separating sovereignty from government — the problem of unity. Collective action needs to be taken, and, in the absence of a general will, or at any rate a means of determining what the general will is, some kind of unity needs to be created even if the end result is nothing more than a general norm which we might recognise as law. The unity necessary here is quite limited, actually. The legislative decision needs to be broad enough to cover unknown future cases, and the illusion that it needs to be issued by a unity emerges only by

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503 R. W Krouse, "Two Concepts of Democratic Representation: James and John Stuart Mill," *The Journal of Politics* 44, no. 02 (2009): 510.
504 Schmitt, *The Leviathan in the State Theory of Thomas Hobbes*, 55.
505 Ibid., 44.
506 Thomas Aquinas, *Political Writings* (Cambridge: Cambridge University Press, 2002), 10–11.
507 Thomas Aquinas, *Selected Political Writings* (Oxford: Blackwell, 1948), 11 (I have elected to use this older translation because it appears more faithful to the original [Manifestum est autem quod unitatem magis efficere potest quod est per se unum, quam plures] and because it is clearer on the point being made here.).

confusing the policy and the politics of legislation.[508]

The unity problem arises in the discourse on representation because of a confusion about what representation is and what its functions are — both its *s-function*, the social purpose that allows it to survive and replicate, and its *f-function*, the relationship it describes between the various political bodies and actors it covers.[509] Often this is expressed as a 'paradox' of presence and absence,[510] and indeed, in the personation moment of Hobbes' putative theory of representation, there is indeed a 'peculiar unity'[511] arising from a 'paradox of a situation where individual private judgement is paramount.'[512]

All this leads us to a political arrangement that is often called 'representation' though it has little to do with the term as I have used it in this dissertation. A better word for this kind of unity, one that creates unity alone without preserving or enhancing any kind of plurality or diversity, is *embodiment*. It is embodiment indeed that is at the heart of Hobbes personation, not representation. Representation, as Sieyes hinted at but could not quite spell out explicitly, has a singular and plural function,[513] something Schmitt lays out very carefully in his *Verfassungslehre*, but not at all in his *Crisis of Parliamentary Democracy*.[514] Notable here is the contrast between Chapter 16 of the former and Chapter 2 of the latter. *Verfassunglehre* has

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[508] Gerhard Leibholz, *Politics and Law.* (Leyden: AWSythoff, 1965), 67.
[509] I allude to this distinction in 'The Functions of Representation' in Chapter 3 and explain it in much greater depth in Chapter 6.
[510] Runciman, "The Paradox of Political Representation."
[511] Pateman, *The Problem of Political Obligation*, 52.
[512] Ibid., 40.
[513] In the social, not mathematical sense (as spelled out in Chapter 3).
[514] Schmitt, *The Crisis of Parliamentary Democracy*.

only been available in English translation[515] since 2008, which explains, partially at least, why the anti-democratic and authoritarian streak of Schmitt's thoughts on representation is better known. In a similar vein, Näsström distinguishes between the two equally essential functions of representation, *division* and *identification*.[516] This 'dual nature'[517] of representation will be the focus of Chapter 6.

Embodiment, sometimes called *symbolic* representation,[518] achieves none of these things. Its 'unity' is for decisions that cannot be law, and the regimes that have claimed this kind of unity were not law-governed societies — and barely had pretence to be. Urbinati describes the unifying function best by noting that representation itself is 'a *process seeking unity not an act of unification*. As such, it presupposes and fosters pluralism.'[519]

A 'unity of action,' to borrow Paine's[520] formulation from his debate with Sieyes, is no doubt necessary for any kind of collective action, but as we have seen, action dictated by an indirect decision in the form of law does not just avoid diversity; it embraces it in its very generality requirement. And as we are beginning to see from the argument in this chapter, that diversity does not just characterise the output; it is a necessary part in ensuring that the very decision

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[515] Schmitt, *Constitutional Theory*.
[516] Nasstrom, "Representative Democracy as Tautology: Ankersmit and Lefort on Representation," 323–325.
[517] Friedrich, *Constitutional Government and Democracy: Theory and Practice in Europe and America*, 262–263.
[518] Birch, *Representation*, 18.
[519] Nadia Urbinati, "Representative Democracy and Its Critics," in *The Future of Representative Democracy*, ed. Sonia Alonso, John Keane, and Wolfgang Merkel (Cambridge University Press, 2011), 45.
[520] Sieyes, *Political Writings*, 169.

is credible as a law and not some less abstract public decision. Representation as unity simply is not representation. Embodiment is, at best, a form of personation in the Hobbesian sense and, at worst, an ill-fitting mask for tyrannical power.

How does all this jibe with the four conditions of law creation as a political decision? As before, let's begin with publicity. A ruler-by-decree or a committee for public safety certainly might not even see themselves as bound by publicity requirements and might not understand publicity as something to aspire to or even hypocritically pay homage to. That is not the case I wish to investigate. What is more curious is what happens when publicity is sincerely an end of both the process and the outcome of a political decision. Small-number government could endeavour to meet this requirement in decisions that claim to be law. But meeting the publicity requirement necessarily interferes with the sources requirement because it makes drawing the line between the deliberation and the actual decision nearly impossible. This might sound like a silly objection, but it really cuts to heart of what makes law so distinct from any other kind of political decision, and why some form of Hart's rule of recognition is so central to that distinction. If law is granted by one wise individual or put together by a particularly talented small group of men and women, then there will be only two ways they can deal with publicity.

The first is to ignore it or, at the very least, to relax it such that it no longer really means anything. Laws are just granted, posted for public consumption but insouciant of public reason. Such outcomes would resemble

edicts more than laws. The public need not even know about them at all or may have details withheld from it, and it may know all about them. They might be publicly minded in intent, but the failure to involve the public in their promulgation — either in addressing the decision to the public or, even if so addressed, in explaining it to the public — would violate a minimal requirement of positive law creation.

The second way of dealing with the publicity requirement would be to embrace it head on, but this would necessarily run afoul of the sources requirement. Some, if not all, of the reason is shared. The veil is pulled on at least some deliberation, whether of one or of a small group. Disagreements might be aired or not, but some kind of reasons are divulged for the promulgation of a new, ostensibly general norm.

The problem becomes one of distinguishing between the reasons and the norm itself, particularly once it becomes crucial to apply the norm to some unforeseen specific circumstance. Deliberation, such a vital part of any public decision, becomes, in such a situation, nearly impossible to separate from the decision itself. Any rule of recognition devised to meet the sources requirement can be fudged by the access both to the deliberations before the decision and the justifications after. Moreover, ready access to the author of such a decision renders the separation of the institutional requirement much weaker than normatively desirable — a problem we encountered with large numbers for a very different reason.

Even without such access we run into problems. The Hebrew Bible gives us the ultimate single lawgiver in the character of the Almighty, and, in the reading of Michael Walzer, one of its greatest legal innovations is the 'law-with-reasons.'[521] In His case, asking for clarifications is not always an option, and still we do not know what to do with the reasons. This is especially true when different reasons are given for the same rule. Walzer alludes to several examples but somehow neglects a glaring one right from the Ten Commandments. These are twice enumerated in a brief peremptory format that is ostensibly free of commentary, first in Exodus 20:8 and again in Deuteronomy 5:16. The commandment regarding the Sabbath is given as a short rule-with-reason, with a completely different reason in each telling. The first Decalogue includes a commandment to 'keep' (*shmor*) the Sabbath as a memory of the seven days of creation.[522] The subsequent Decalogue has in the very same place a commandment to 'remember' (*zkhor*) the Sabbath as a tribute to the memory of slavery in Egypt.[523]

If we can somehow contrive to keep both the publicity and sources requirements, however, we immediately forfeit the special institutional requirement. This is because the only way of holding onto the first two would be to grant absolute power to the one or few decision makers to make a reckoning on every case that is fully public and indisputably the final word. No amount of authorised delegation, in such a case, could be said to be norm-

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521 Michael Walzer, *In God's Shadow : Politics in the Hebrew Bible* (New Haven, Conn; London: Yale University Press, 2012), 26.
522 Robert Alter, *The Five Books of Moses : A Translation with Commentary* (New York ; London: WWNorton & Co, 2004), 431.
523 Ibid., 907–908.

applying, since every specific case could and would be determined by the final word of the authority who made the 'general' decision to begin with. Quite obviously, such a decision could not be general at all, violating the biggest requirement of all. The argument works backwards too; we could insist on special institutions and generality, but then we'd have to sacrifice sources and probably publicity too.

These last two deficiencies bear an uncanny resemblance to the same two deficiencies encountered earlier with large numbers, and they have the same origin, namely, the lack of plausible institutional separations. It is not the case there exists a number of actors for a law-creating decision that by virtue of its magnitude alone guarantees a separation. It is the case that such a separation is a necessary condition of a law-based society and that reserving sovereign decisions for a very small number of men or a very large number precludes that kind of separation.

As before, I am at pains to highlight the modest achievement of the argument thus far. Eliminating very large and very small numbers as the proper forum for the class of political decision which creates law does not on its own answer the question of how positive law as such can be created. But it does eliminate from consideration two historically compelling proposals — direct democracy and benign lawgivers — and it does so not on grounds of convenience, self-determination, autonomy or anything beyond a very thin definition of law as a kind of decision and an account of numbers in political decision making. In the next section, I propose a numerical arrangement that

could work — that is, one that cannot just be dismissed on a numbers-based argument alone. In the following chapter, I will expand the argument from why it *could* work to why it *does* work and is in fact the normative solution to the fundamental questions raised at the very beginning of this dissertation.

Assembly

Corporatist class-based arguments for representative assemblies predate even the sovereignty theorists of the first three chapters of this dissertation. It is only in the revolutionary period, however, that the 'sociological argument' is married to the 'arithmetical argument,' as in Federalist No. 35.[524] More explicitly, Paine suggests a fourth numerical category after 'the democratical, the artistocratical, the monarchical,' namely, 'the representative,'[525] but Paine's proposal is not a solution to the problem of law-making, just a refinement of the 'forms of government' taxonomy. Paine, a contemporary of Sieyes' and, like him, a great advocate of representative government in the revolutionary period of the late-eighteenth century, nevertheless faults direct democracy on mostly practical grounds and 'inconvenience of form.'[526] What is notable about Paine's argument in *Rights of Man* in the context of this discussion is his curious definition of direct

[524] Ball, "A Republic — If You Can Keep It," 149.
[525] Thomas Paine, *Political Writings* (Cambridge: Cambridge University Press, 1989), 167.
[526] Ibid., 169.

democracy, particularly in light of his ongoing debate at the time with Sieyes. He introduces the term *simple democracy* as a contradistinction to *the representative*, the former defined as a 'society governing itself without the use of secondary means.'[527] Secondary means, presumably, are those same institutional mechanisms (and the benefits that accrue from their use) which Sieyes praised with various inflections of the word *indirectness*.

And here, finally, three strands of our discussion begin to converge. Trying to locate the normative law-making competence in any of the proposed numerical arrangements that political theory has generally suggested kept yielding the same problem. For a public decision to meet the minimal requirements of positive law, it could not just have all the requisite forms of generality in its wording and intent, it needed to have the indirectness built in to the very decision itself. And for it to be connected to popular sovereignty as the concept has been understood since at least the seventeenth century, the decision had to come about in the unique sphere of politics with its own regulated 'currency' and formal rules, accessible to all but at a safe remove.

This combination of *indirectness* and *exchange* we have already encountered, but when we met these concepts in Chapter 3, it was Sieyes proposing them as institutional solutions to constitutional problems. We will get there again, but by thinking of numbers the way political theory over the millennia has taught us to — only this time not as a locus of rule, but rather of law creation and executive surveillance. Having agreed, with Rousseau, on the

[527] Ibid., 170.

necessity of positive law that is created and occasionally amended and (hopefully) written down somewhere too, we need a method to arrive at a decision creating it. This method cannot involve all of the people or even a large number of them without losing its status as law for all the reasons outlined at the beginning of this chapter. But it must nevertheless be legitimated by the people at large and formally linked to them, rather than by an imagined or inherited consent.

On the other hand, it cannot involve so few people that it runs into problems of small numbers, such as deliberation that is inseparable from the appropriately sourced outcome of a decision. The number of people ideally involved in law creation has to be large enough to avoid this fault and small enough that referability is impossible, not just undesirable, and that textuality is not just a virtue to pay tribute to, but an unimpeachable feature of the legislative decision. A number that leaves out as many people subject to the law and administering it as possible, but that keeps enough in to be too big for the collegiality of the few.

From this we can derive three corollaries. First, the number of actual officials charged with actively deciding — the *Berufspolitiker* not the *Fachbeamte* — needs to be somewhere in the order of magnitude of Dunbar's number, 150. Indeed, most parliaments, or at least their lower chambers, comprise between 100 and 300 members.[528] Something roughly more than 100 and less than 1000 gives us a genuine plurality, rather than collegiality.

[528] K. C. Wheare, *Legislatures* (Oxford University Press: Oxford University Press : London, 1963), 5.

Dunbar's number is a recently trendy[529] concept that is probably overused in the popular press, and it would be silly to contend that constitutional questions can be settled based on a proposed ratio of primate neocortex sizes to mean group size, the method which Dunbar uses to arrive at the number for humans.[530] 150 is, according to Dunbar, the size of a traditional village, the total number of extended family members an average man might have known in pre-agricultural society, a military company — in short, a standard network of acquaintances.[531] Much smaller groups run entirely informally, while significantly larger ones cannot be managed without a hierarchy developing (else they split into newer smaller groups, firms, clans, etc.).[532]

I do not want to over-rely on a suddenly fashionable academic concept (whose most cited applications always have either 'facebook' or 'friend' in the headline), but rather borrow from it to illustrate the larger point I am making about numbers. Very large and very small numbers are not just suboptimal in making good law; they cannot, by their very natures, arrive at a decision that can be law. The logic behind Dunbar's number, even if the exact number itself falls considerably short of most parliaments that we know by a factor of three or four, holds in this case quite adequately. And it fits well, or at least does not outright contradict, another well-known rule of thumb for legislature size, that the assembly have a membership of roughly a cubic root of the population at

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[529] Robin Dunbar, *How Many Friends Does One Person Need? Dunbar's Number and Other Evolutionary Quirks* (Harvard University Press, 2011).
[530] Robin Dunbar, *Grooming, Gossip and the Evolution of Language* (Faber & Faber, 2011), 55–69.
[531] Ibid., 73.
[532] Ibid., 72.

large.[533] There is a large measure of tolerable variation — indeed Madison remarked that 'no political problem is less susceptible of precise solution'[534] — but the upper and lower boundaries give a reasonably definite order of magnitude and rule out a host of other plausible numbers (a dozen, a thousand, etc.).

Second, beyond the actual number involved, a place needs to be set aside for the decision to be made — what Weymans calls *political stages* that ensure 'conflicts appear legitimate.'[535] By place I do not just refer to the physical space, I refer to the entire set of formal procedures that turns the outcome of a deliberation into an actual public decision — one recognisable as positive law, no less. This place in which to assemble, with its rules of credentials, debate, and deliberation-ending decisions, is the embodiment of Sieyes' elusive *exchange*. It is crucial in the context of numbers, because we are absolutely not talking about a moderately sized collection of authorised individuals who phone in their preferences in an elitist social welfare function. The sources thesis means, among other things, that deliberation needs to be separable from outcome; it certainly does not mean that deliberation can just be skipped.

Before broaching the third corollary, it is worth pausing and reflecting on what the first two alone give us. A moderate number, just too large for

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[533] Donald S. Lutz, *Principles of Constitutional Design* (Cambridge University Press, 2006), 221–241.
[534] Hamilton et al., *The Federalist*, 269 [No. 55].
[535] Weymans, "Freedom through Political Representation: Lefort, Gauchet and Rosanvallon on the Relationship between State and Society," 269.

informality or consensus, but still miniscule in comparison to the population as a whole, of officers is necessary to assemble in order to make general public decisions with general public ends in mind for the resolution of future specific cases by other administrative institutions. The verb gives it away; we have here law-making by *assembly*.

But assembly can mean many things in many contexts. Sieyes' 'primary assemblies' for example meet these first two conditions. A third corollary emerges from this discussion, though, and it too gives rise to an idea first broached by Sieyes. After the roughly three-digit number of officials and the place for exchange, the assembly needs to have a formal connection to the preferences of the sovereign people. Calling it *formal* is not just a way of emphasising its importance. Formal implies a rule-based mechanism for connecting the people with the assembly, rather than a legitimation granted by a real or imagined or inherited consent or even authorisation. This formal connection, furthermore, implies necessarily an indirectness in the decision making process of law-creation — and leaves out primary assemblies as a possible locus of legislation. In this vein, Urbinati writes about elections for representatives that they 'simultaneously separate and link citizens and government… [and] create a gap between state and society at the same time as they allow them to communicate and even conflict, but never fuse.'[536]

There can be greater or lesser degrees of indirectness, but the kind of exchange envisioned by Sieyes is only possible with exactly one degree of

[536] Urbinati, "Representative Democracy and Its Critics," 24.

indirectness. Primary assemblies as an indirect method of selecting representatives would not necessarily contradict this notion, but they themselves cannot be said to be representative, and if they were somehow tasked with law creation they would run into the same lack of separations spelled out earlier in this chapter. A secondary assembly is the only one that can truly be understood to be a representative assembly, and this stipulation leads us to a useful identity test for representation as a narrow political concept: A representative, in this sense, cannot be represented by another representative. The kind of work done by a representative in the very strict sense I propose to use the term is distinct and cannot be replicated in any concatenation of authorisation.

Let me suggest just such a concatenation to clarify this point, though it will only be completely clear at the end of Chapter 6. Alice authorises Betsy to vote for her by proxy in a legislative election. Carol wins the election for their constituency with the votes of Alice and Betsy and thousands of others and is duly credentialed to serve in a secondary assembly. The members of this assembly give their confidence to Doris as the state's foreign minister, and the latter appoints Ethel to argue the government's case at a major international organisation. It is crucial to understanding political representation as I have used the term throughout this entire dissertation to realise that Betsy is not Alice's representative, that Doris is not Carol's representative, and Ethel is not Doris' representative. The only bona fide representative in this entire chain is Carol, as she is the only one carrying out both of the crucial functions of

representation, creating a unity and enhancing diversity. As I will demonstrate in the next chapter, this is why the maddeningly ubiquitous debate about whether Bono 'represents' the world's poor misses the point.[537] Focusing the arguments for or against this proposition on whether anyone has formally authorised him ignores what he could not do even if this were a settled matter. He cannot 'represent' the world's poor because to represent is to do something much greater and much more institutionally and numerically constrained than merely 'speaking for' or even 'acting for.'

The great, inexplicably overlooked, theorist of representative law making by assembly was Johann Gottlieb Fichte. Fichte reformulates Sieyes' ideas not on their political merit but as a logical necessity in the sixteenth chapter — political theorists like to put their theories of representation there, apparently — of his 1796 *Foundations of Natural Right*. Rather immodestly, he claims 'as far as I know' to have presented to the world for the first time ever a 'strict deduction, based on pure reason, of the absolute necessity of representation within a commonwealth.'[538] He does this by showing that it is possible to judge and administer law or to create law, but never both. He veers between making the argument for democracy (that is, direct) and various forms of aristocracy, and he does it without a clear definition of law. He also, confusingly, uses the word 'representative' to refer to his inseparable

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[537] Saward, *The Representative Claim*, 82, 99; Brito Vieira and Runciman, *Representation*, 146–147, 162.
[538] Johann Gottlieb Fichte, *Foundations of Natural Right : According to the Principles of the Wissenschaftslehre* (Cambridge: Cambridge University Press, 2000), 141.

executive and judiciary powers,[539] and 'ephorate' for the law making and executive oversight in assembly.[540]

The word ephorate has never really caught on though, and rather than contriving to introduce an unusual word I will, as I have already done with *government, person, function, choice*, etc., suffice with using an everyday word in its much stricter scientific sense and make every effort to distinguish, where the context is unclear, when I mean to be using it in its non-scientific sense. Accordingly, I will stick with *assembly* to describe the place, the political stage, for regulated, ritualised, formalised disagreement. Only a forum comprising a number roughly adhering to assembly's requirements can provide such a stage, its regulated, ritualised, formalised proceedings bringing to life precisely the kind of *exchange* that Sieyes never got around to adequately defining. It is these highly specialised forms of public speech acts that Hegel refers to as providing an 'opportunity for acquiring knowledge [*Kenntnissen*].'[541]

No discussion of assembly would be complete without reference to deliberation. The earlier remarks on rule of recognition might be read as diminishing the importance of deliberation, but it is the sharp distinction in law, unlike other political decisions, that the sources requirement makes between the validity of the decision itself — the text of the decision and nothing else — and all that precedes it that actually sanctifies the special status of that deliberation. As I will argue in the Conclusion, one of the two major

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[539] Ibid., 142.
[540] Ibid., 141.
[541] Hegel, *Elements of the Philosophy of Right*, 352 [§315].

engagements of representation is not even measurable in the outcome of the legislative decision. Needless to say, where deliberation bleeds into the decision, as in non-law-creating political decisions, or when the very large or very small number of participants renders deliberation too informal to be effective, it cannot be said to play the same crucial role. Public arguing, whose goal might be unanimity but whose outcome can almost never be, takes the best aspects of the unity-seeking small number model with the participatory large number one. Decision making by an assembly too large for collegiality or consensus does not force an artificial unanimity. At the same time, decisions are not characterised by the 'aggregative conception'[542] of social choice; public debate, in Joshua Cohen's formulation, replaces a 'pluralist scheme' of bargaining.[543]

The Same Subject, Continued

If some of this argument rings familiar, that is no accident. Jeremy Waldron has already suggested a very compelling case for linking legislation to assembly by looking at numbers in at least two articles[544] and, most concisely,

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[542] Samuel Freeman, "Deliberative Democracy: A Sympathetic Comment," *Philosophy & Public Affairs* 29, no. 4 (2000): 377.
[543] Derek Matravers, Jonathan Pike, and Joshua Cohen, eds., "Deliberation and Democratic Legitimacy," in *Debates in Contemporary Political Philosophy: An Anthology* (Routledge, 2002), 343–345.
[544] Waldron, "Legislation by Assembly"; Waldron, "Representative Lawmaking."

in the third chapter of *Law and Disagreement*.[545] His argument is empirical and historical — an impressionistic sampling of recurring phenomena that cannot be mere coincidence as well as an examination of an intuition suggested by these impressions. These intuitions, and the institutional evolution he traces, do not conform to much normative political theory or jurisprudence, as he angrily and rightfully points out. Waldron challenges political theorists to enunciate an analytic framework that can incorporate the patterns — and the numbers — he finds, and I'd like to think I have at least partially taken up that challenge.

I will briefly recapitulate his argument and then return to mine. Waldron begins by noting the peculiar coincidence of the large number of legislators in comparison to other political officers in nearly every mature state. He is not here focussing on the bureaucratic apparatus as a whole but rather at the 'highest rungs'[546] or 'apex,'[547] what we have earlier been calling *Berufspolitiker*. Executives comprise between one and two dozen; high courts five to a dozen, with nine a particularly popular number; but legislatures usually number in the hundreds. Path dependencies alone cannot account for this. Different states have taken radically different routes to arrive at this stable equilibrium. Nor, as Waldron points out, can a push for more democratic participation be the impetus for the discrepancy as small executives exclude 99.99999 per cent of the population while large

[545] Waldron, *Law and Disagreement*, 49–51.
[546] Waldron, "Legislation by Assembly," 508.
[547] Waldron, *Law and Disagreement*, 50.

legislatures exclude 'only' 99.99998 per cent.[548] Left unanswered, but crucial to my mind, is why, even if this were a reasonable argument, we would assume that legislation needs more participation than other governmental functions.

Something clearly is going on here which is being missed both by legal philosophers obsessed with a sovereign legislator as well as with the contemporary political scientists 'bewitched by the formal difficulties of public choice theory'[549] or, in my experience, just bewitched by public choice theory even without the difficulties. Waldron deals with this by introducing an analogy with *custom* and by a short disquisition on the idea of *Lex Terrae*, the law of the land. The analogy relates two differences: '(1) sovereign legislator *versus* custom, and (2) monarchical legislator *versus* legislative assembly.'[550] Waldron finds 'surprising affinities' in historical jurisprudence between the second terms of each antithesis. Both cases are models of ascending authority; in both, law is an expression of the people governing themselves.[551]

A thorough survey of the concept and practice of *Lex Terrae* in medieval jurisprudence in both England and Italy[552] shows just how powerful custom, rather than the royal decree, was in law. In Waldron's telling, 'the theoretically tidy idea of projecting the determinacy of law back onto the univocality of a single legislator never really got a grip in political or constitutional reality.'[553] Custom, though, bears a remarkable resemblance to what in Chapter 4 we

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[548] Ibid., 54–55.
[549] Ibid., 53.
[550] Ibid., 55.
[551] Ibid.
[552] Ibid., 56–67.
[553] Ibid., 60.

called *habit*. In both cases, there is a changeable, yet stable, decision to economise on other decisions. And the legitimacy of individual outcomes comes from the prior practice and prior commitment to a decision in total ignorance of its future applications.

My argument and Waldron's approach the same problem, and treat the same lacuna, from different ends. He starts with institutions as they are and pauses to note the peculiarity of number. I start with numbers in the history of political thought before dealing with governance or institutions. He makes a compelling analogy with custom and sovereignty. I have already accepted the separation of sovereignty and government; custom is the collective form of habit, one of the first rungs on the ladder of abstraction I charted from the simplest decisions and choices. He bemoans 'Rex in jurisprudence,' or the absence of politics as a practice as opposed to a necessary evil in legal philosophy.[554] I am frustrated by law's absence — or occasionally trivial presence as a proxy for any outcome of collective action — in contemporary political theory. His work has been enormously influential on my thinking, but that, obviously, has been a one-way transaction so far.

I have adverted repeatedly to the property of some, non-law-based, political decisions which I have, perhaps awkwardly, called *referability*. The absence of referability in law gives rise to a core value of law which is usually treated as inherent rather than derived or functional. *Textuality* is generally just assumed to be a good thing, endowed with some ineffable numinous

[554] Waldron, *The Dignity of Legislation*, 24.

quality. Its quasi-religious status — no doubt strongly influenced by an actual religious tradition that clearly was important in a strictly religious context — is mostly unquestioned. But what is so great about textuality? The ancillary effects of textuality are so tied up with the values of positive law creation that the concept itself does not need to be justified or sought on its own. On the contrary, text itself does not guarantee very much, as it could be written in an ambiguous or unhelpful way.[555] What makes text so seemingly valuable in law is its coherence with the four conditions we keep returning to. And what makes this coherence so strong, in particular the requirements of generality in time and cases and persons, is the blocking of referability. In a military hierarchy, orders can be referred up or down a chain of command for specificity and clarification. The same is true, though in a less starkly obvious way, of any hierarchical bureaucracy. It is certainly true of delegated authority. A government's ambassador at the UN can call in to the Foreign Office for consultations before casting a vote in the Security Council. Referability of a different sort lies at the heart of the judicial principle of precedent.

Who is available for referability in a law passed by assembly? We cannot ask the person who 'wrote' it because so many were involved, and unlike with an executive order or a judicial decision, it is not the writing which carries the authority. We cannot ask the individual legislators who voted for it what they wanted, because they probably disagree and probably had a variety of different intentions when the majority was being cobbled together. We may

[555] Waldron, *Law and Disagreement*, 83–84.

just as well ask those who voted against a bill what they thought they were voting against, though the variety of opinions here would likely be greater and even less helpful. Law, unlike any other political decision, once passed, is its own authority. The text has a life of its own, and any change to it requires a new act of creation.

This is the only way to preserve the plural character of law's future application. It should not surprise us, then, that such plurality has to be built in to the way the decision itself is made.

Chapter 6

The Problem of Plurality

Plurality is the fundamental problem of politics. Regulating the inevitable conflict arising from plurality is the end of politics, and positive law is one crucial means. Understood thus, it is no longer such a mysterious coincidence that the idiom of legal positivism so clearly resembles the idiom of early visions of representation, or that attempts to derive a theory of representation purely from ideas about democracy end up rounding too many theoretical corners or descending into unworkable and contrived models of social choice.

If representation is about efficiency, why has the rise of information technology in the last half century not made a dent in it? If it is about expertise, why is election the only method? If it is about reflecting the people, why not use lot? If it is about popular control of government, why the reliance on general norms? If it is just *acting for* or *standing for* or *speaking for*, why the vast discrepancy in numbers between different, supposedly 'representative,' offices? How are we to explain the persistence of a layer of speech acts and decision making which can only be called 'politics' even in an age of mass media and technologically feasible preference aggregation (or at least, preference reporting)? And how can we explain the lack of such a quality in institutions and organisations that operate above or below the state level, despite the attempts of so much recent theoretical literature on representation to do so?

To make sense of these questions we need first, as I have done In the

last two chapters, to grapple with the various classes of political decisions and then consider the numbers of political officers which are conceptually required for making such decisions (normatively required is a further step). Only then is it possible to see representation less as a relationship between components of a political system and more as a facilitator of a class of distinctively political acts.

In this chapter I wish to focus on two different aspects of what representation does (rather than is) that, regrettably, can best be described by the same word. We can speak of the *function* of representation and refer to what role it plays in society, the purposes it might serve and, in a sociological sense, what forces reproduce it, enabling it to survive and replicate itself as an institution. Many scholars have written about representation's function in this sense, but nearly all of them, except for a few German-speaking thinkers from the interwar years of the twentieth century, had in mind functions that were broadly focussed on either creating unity or enhancing diversity, but for some reason rarely both.

In deriving a theory of representation using the arguments I have presented in the last two chapters, we need to address the function of representation in this sense. But it is also important to address an entirely different tradition of theoretical work on representation which seeks to map out the relationships that ostensibly define the concept — who is acting for whom with respect to what, in its simplest form. These relational claims are also crucial to the argument I am presenting, but I am unable to think of a

more accurate way to describe them except by resorting to the most commonly used word, which happens also to be *function*. The function of representation, in this sense, is the formula that relates all the relevant actors, beginning (obviously) with the ones doing the representing and the ones being represented.

These are both crucial concepts although the first kind of 'function' has nothing to do with the second. In Chapter 3, I introduced the rather awkward (but necessary) terms *s-function* and *f-function* to distinguish between the two senses of function.[556] As I wrote then, it is usually very obvious from the context which one is meant, but whenever there is a possibility of confusion, I will refer to the social sense of function as *s-function* and to the formulaic sense of function as *f-function*. In this chapter, I rely on both terms in places that are necessarily proximate in the development of the argument, so I will endeavour to make the distinction explicit.

It is the argument of this chapter that representation is not merely authorised action at a distance, but a unique political act that necessarily involves a large number of people even at its most minimal theoretical conception. That is, it cannot be modelled even metaphorically by conceiving of one or a few actors acting for themselves or anyone else. This unique act which I am calling *political representation* (or, most of the time when the context renders it obvious, just *representation*) is **the means by which a very limited unity — generalised norms — is created from an**

[556] See 'The Functions of Representation' in Chapter 3.

irreducible plurality in modern politics under conditions of popular sovereignty. This plurality is not just a question of divergent interests or poor information sharing. It is an inherent quality, not a contingent error — a feature, not a bug. Representation, as an expression of this deep form of pluralism, is non-replicable. It mediates between an entire political community and its government for a unique set of acts that cannot be abstracted higher or lower. Not higher, because beyond the boundaries of the nation-state unity cannot be achieved; not lower, because the unity of the nation-state is predicated on its inclusion of the entire citizenry. Where this appears not to be the case, we are no longer talking about representation at all, but some other form of authorised action (if even that).

In this chapter, I tie together the disparate strands of the discussion thus far into a coherent theoretical statement. A recurrent motif of this chapter was already broached in the Introduction but not much treated since — namely, the theoretical shortcomings of much of the existing literature on representation. This will be acutely manifest in the first section, which restates the special status of law creation as a political decision and highlights the conceptual dead ends reached when the distinctions in decision types are not properly maintained. The second and third sections deal with the two radically different concepts that are unfortunately described by the word *function*. In the second section of this chapter I deal with the *s-function* of representation, with the familiar Sieyes-inspired terms *singular* and *plural* and the newer Schmitt- and Hegel- inspired terminology of *identity* and *division*. In the third

section, I focus on the *f-function* of representation and argue that the many common metaphors used to illustrate this 'function' fail to adequately capture what representation can and should accomplish. The fourth section shines a dim light on two early twentieth century thinkers, Carl Schmitt and Hans Kelsen, who are nearly alone in bringing together law and democracy into a theory of representation. And finally, the fifth section will propose a much narrower, but theoretically more useful, definition of representation.

Decisions, Outcomes, Law

One of the more notable books on representation of recent decades is Bernard Manin's 1997 *The Principles of Representative Government*. The book is celebrated mostly for its argument connecting election to aristocracy[557] in contradistinction to the putatively more democratic method of lottery. It came out in a period when much attention was suddenly being paid to selection by lot,[558] or, as it is sometimes called, s*ortition*.[559] Mostly, though, it is a modernisation of theoretical work done by Carl Schmitt seven decades before in *Verfassungslehre*, which was only finally translated into English in 2008,[560] more than a decade after Manin's book was published in English.[561]

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[557] Manin, *The Principles of Representative Government*, 134–143.
[558] Amar, "Choosing Representatives by Lottery Voting."
[559] Gil Delannoi, *Sortition, Theory and Practice* (Exeter: Imprint Academic, 2010).
[560] Schmitt, *Constitutional Theory*.
[561] The French edition came out two years earlier, Bernard Manin, *Principes du gouvernement representatif* (Paris: Calmann-Lévy, 1995).

'Modernisation' should not be taken to mean unequivocal improvement, however. Where Schmitt is keenly tuned to the varieties of political decisions — and especially the uniqueness of law creation — Manin is not.

As the title of the book suggests, Manin's theory is built upon four principles, laid out right at the beginning of the book and from which I will quote directly (though the italics are mine, not from the original):

1. Those who *govern* are appointed by election at regular intervals.
2. The *decision-making* of those who *govern* retains a degree of independence from the wishes of the electorate.
3. Those who are *governed* may give expression to their opinions and political wishes without being subject to the control of those who *govern*.
4. *Public decisions* undergo the trial of debate.[562]

I do not believe any of these four principles can qualify as an actual principle of representation. Two imprecisions pose grave challenges to these principles, though the imprecision is merely symptomatic of a deeper underlying problem. The imprecisions concern 'govern' and 'decision': How broadly is Manin defining the verb *govern* and the noun *decision*? 'Govern' might be understood very narrowly or very broadly. From Rousseau, we get the narrow sense that government is the body which mediates between the people in their sovereign and subject modes; it is a specialised body with a small

[562] Manin, *The Principles of Representative Government*, 6.

membership that decides on the particular, not the general.[563] Understood thus, in the narrow, 'scientific' sense, Manin's principles of representation tell us nothing about those who actually make the general norms, to take just one crucial class of public decision. No matter how loose we are with this narrow sense, the extension of his 'those who govern' leaves out far too many people. Clearly, then, he does not mean to be using government in this or any other narrow sense at all, but rather more broadly as the sum of political officers of state with authority to take action. In this broad reading we might be able to make sense of the third principle, but certainly not of the first two. Surely Manin does not mean to say that every last clerk and official making a political decision should be elected at regular intervals; nor is it likely that he is only limiting himself to officials at the apex of decision-making apparatuses, as the case for or against electing judges, to take but one example, seems orthogonal to his argument about representation.

Manin's problems go beyond merely blurring the extension of the term *government* — even Rousseau did that occasionally![564] Where Manin most errs is in his use of *public decision* (or just *decision*) as the marker of an outcome of a political problem that representation is putatively addressing. The temptation to see politics this way is obvious, and nearly a century of social science has taught us to accept this premise.

To see why this cannot work, it is worth taking a step back to the basic syntax of a theory of representation. We must distinguish between various

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563 See 'On Sovereignty, Government, and What's Between Them' in Chapter 2.
564 Gildin, *Rousseau's Social Contract*, 103.

political bodies as *subjects*; I propose to split the list into quasi-constitutive (*people, state, sovereign*) and constituted (*person, government, assembly*). Various actions are described by appropriate *verbs* which mean quite different things (*represent, rule, govern, authorise*). And they produce various *objects* or outcomes (*policy, decision, law*, or just *outcome*). Different principles may be at stake (*rotation, textuality, exchange, indirectness, all-affected,* among many others). How we use this proposed syntax affects what kind of *theory* we have (*representation, personation, action-at-a-distance*). It would be facile to say that a *theory* is a proposed argument that relates a set of quasi-constitutive and constituted bodies as *subjects* by an action described by one of the *verbs* to an outcome as an *object*, evincing or rejecting one or more of the *principles*. Obviously this greatly oversimplifies things, but it is nevertheless worth bearing in mind if only to separate out what kind of theory we are to make an assessment of.

Does it matter that Manin does not specify what kinds of decisions he means? After all, it is an abstract model of four principles and, like all such endeavours, it should be as simple as possible without sacrificing clarity. The problem is that, as I have demonstrated in Chapter 4, the nature of a public decision directly constrains the range of possible methods for making it. A decision to create a political order is a radically different one from a decision to effect an action inside a circumscribed order, if only because the first one necessarily limits the scope of the second. And a generalised decision about unknown future instances is radically different from a specific decision with an

immediate and limited scope. Rousseau was at pains to make this distinction even if, ironically, he did it in the very text where he most vociferously rejects the concept of representation.[565] This last difference, unlike say the difference between a decision on matters of public health versus one on matters of industrial policy, is relevant for the nature of a decision at a level so abstract that even a short list of principles on legitimate public decision making must be sensitive to it.

In neither sense, then, is it appropriate to attach the verb 'govern' to Manin's representative. This, clearly, is a category error or, at the very least, a syntax error. To go back to the grammatical idiom I have relied on so much in this dissertation, we are using the wrong verb because we are using the wrong nouns. To *represent* is not the same as to *rule* or to *govern*, both of which feature highly on Oakeshott's list of 'confusingly dual- or even triple- purposed words.'[566] If it were, all we would need would be a simple theory of legitimacy of rule in conditions of popular sovereignty.

Nor does adding sovereignty or popular sovereignty to 'representation' clear this all up. The sovereign does not represent and is not represented; it neither governs nor rules. To rule is to exercise power or authority without necessary boundaries, while to govern is a similar action but with limits that are normative and institutional rather than just factual. The institutional limits are why we can easily inflect the verb govern into 'government.' We cannot

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[565] Rousseau, *The Collected Writings of Rousseau*, 1994, 4:153 [SC II,6].
[566] Michael Oakeshott, "The Vocabulary of a Modern European State," *Political Studies* 23, no. 2–3 (June 1, 1975): 322.

turn rule into 'rule-ment,' but we can make it into the more decisive and less institutional 'ruler.' This is no coincidence. Though this distinction is significant, it is more important, for the purposes of this discussion, to emphasise how different both are from representing. Once we have found someone to 'represent,' it cannot be assumed that he or she is thereby 'ruling.'

If we do focus briefly on government as such, we very quickly encounter a principle which is relevant to government, but orthogonal at best to representation. The principle of *rotation* separates government from state and sovereignty by providing for repeated changes in government without conditioning the other two, separating, in Weber's terms, the state from its means.[567] It also provides for a very minimal measure of accountability, as there is no guarantee in theory or in practice that rotation will be effected democratically or wisely — and certainly not both. Good governments might be thrown out; bad governments might stay. All rotation can promise is that every government operate in conditions where it knows it could easily be replaced, and this constitutes a means for creating what James Mill, in his essay appropriately titled simply 'Government,' called the 'identity of interest with its community.'[568]

The most compelling modern statement of the principle of rotation comes not from Mill, however, but from Schumpeter, though he never actually uses the word. Schumpeter's very minimalist conception of popular

[567] Weber, "The Profession and Vocation of Politics," 314.
[568] Mill, *Political Writings*, 38.

sovereignty rests on 'competition for political leadership.'[569] But when he refers to the power to 'produce a government' or 'evict' one, it is clear that he, unlike Manin, is referring to the executive alone. He explicitly rejects the role of representation in producing an inferable will, as it amounts to, at best, a 'mosaic.' This gets lost in translation not just in Manin's four principles and his discussion of rotation,[570] but in similarly informed contemporary work on the topic which holds representation as a form of 'power-sharing'[571] or even as a method of citizens 'replac[ing] their government.'[572]

The principle of rotation may be a worthwhile bedrock of any theory of the executive in a modern state but it is not self-evident that it should feature as a first principle in legislation, adjudication, administration, or any other governmental function. It certainly is not a crucial feature of representation, except in the trivial sense that emerges from the numbers argument — if everyone were in the assembly, then no one could be left out and there could be no rotation.[573]

Manin projects this executive principle onto legislative assemblies because he never really distinguishes between the act of *representing* and that of *ruling*. And he does not do this because he never really distinguishes between the kinds of decisions political bodies make, as I have tried to do in

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[569] Joseph A. Schumpeter, *Capitalism, Socialism, and Democracy* (London ; New York: Routledge, 1992), 271.
[570] Manin, *The Principles of Representative Government*, 29–31.
[571] R. Rogowski, "Representation in Political Theory and in Law," *Ethics* 91, no. 3 (1981): 395–430.
[572] Runciman, "The Paradox of Political Representation," 102.
[573] See the discussion on 'dislocability' in 'Direct Democracy and the Problem of Big Numbers' in Chapter 5.

Chapter 4. Is this executive principle of rotation a relevant one in determining how large groups of people organise public decision making in conditions of constant disagreement and irreducible conflict? It could be conceptually, particularly in the absence of general norms. In other words, there might be an argument to be made for this broader form of the principle of rotation if the entire class of decisions — the creation of positive law — which I sketched out in Chapter 4 were either unavailable or undesirable. But I have already demonstrated that it is available, and I have assumed all along that it is desirable.

Just as earlier we held textuality to be an ancillary outcome of the referability principle, rather than a freestanding desideratum of public decision making, so the principle of rotation needs to be evaluated separately from the concept of representation as sketched here. No doubt it is important, and it is probably normatively desirable too. But it does not have a direct bearing on representation, largely because its most crucial institutional referent is government — that is, the executive — and it is not central in the process of making the classes of political decisions that we have identified with popular sovereignty.

To place this more explicitly in the context of the historical discussion of the first three chapters, what we have here is an over-reliance on Hobbes and personation as a basis for a theory of representation and an under-reliance on Rousseau and the separation of state and government as well as the necessity of positive law. This is how it is possible to talk of representation as allowing

citizens to 'replace their government'[574] when representation does no such thing, and when the same outcome can be achieved without representation altogether. In short, not separating government from either state or sovereignty reduces the entire endeavour of posing a theory of representation into creating a theory of personation or, at best, authorised action at a distance. This was barely adequate in 1651 — and, indeed, Hobbes abandons the term 'representation' in later restatements of his theory. But after Rousseau it is wholly indefensible.

Normative political theory should not rush into institutions without first coming to terms with the various classes of political decisions. Too much political theory ignores the importance of distinguishing the kinds of decisions a well-ordered sovereign people make once they are so constituted. In this dissertation I have attempted to undertake the thought process in the correct order.

Through Rousseau, this process left us with two central realities of political life that were separate from but linked to the sovereignty of the people — positive law and government, narrowly defined. These required two tasks that were expressions of popular sovereignty, namely supervision (or surveillance or partial agency) and legislation. Rousseau could not make the next leap to representative assembly, but armed with the Sieyesian principles of indirectness and exchange, we can.

The argument of this dissertation has unfolded a bit more cautiously

[574] Runciman, "The Paradox of Political Representation," 102.

over the course of the previous chapters. By the end of Chapter 5, I established an argument for law creation and executive surveillance by representative assembly. My argument stands on three interdependent legs. First, from the discussion of decision in Chapter 4, we have isolated law creation as a special class of political decision, intimately connected with popular sovereignty and executive surveillance, as argued in Chapter 2. Second, from the discussion on numbers in Chapter 5, we have established assembly as the only forum capable of taking such a decision by actualising in a political institution the values of indirectness and exchange, as enunciated in Chapter 3. Third, placing all this in the context of popular sovereignty, as it emerges in the early modern period and as discussed in Chapters 1, 2, and 3, gave us the need for a 'formal connection' between the make-up of the assembly and the people at large. I concede that the term 'formal connection' is a bit awkward in comparison to 'election' or 'voting,' but both of these alternative terms assume a consensus on a method for making this connection to popular preferences formal, and we cannot commit to do that before the discussion on engagements in the Conclusion.

What does representation give in this context and how might this account for the confusion? The three steps of the argument each contribute one condition. The *formal connection* brings a direct link to popular preferences, though, quite clearly, depending on the institutional design, it does not necessarily give the voter or mass of voters the ability to replace a government or even necessarily to hold it accountable. A Labour voter

switching to Lib Dem in 2005 in order to punish Blair for the Iraq War may well feel that he is, in Manin's words, 'assigning responsibility,'[575] but it is hard to see how this could describe an SNP voter further north in the same general election, as the latter is taking part only in a direct election for the MP from his constituency while the former conceives himself as, at least on some level, also participating in an indirect election for the executive.

But this method — as well as the three-step argument it yields — is not the standard one, and that is why we end up with the second of the two large imprecisions in Manin's four principles. The first one, on government causes the principles to collapse on themselves because government has to be regarded in its narrow sense for part of one principle to make sense and in its broader sense for the rest. The second imprecision is even more ubiquitous in the literature and even more problematic for a theory of representation. A political theory that seeks to prescribe institutions for actions must come to grips with the nature of decisions and, at some very fundamental level, the different classes of decisions that authorised political action yields. The previous two chapters have, I hope, demonstrated that even the most superficial engagement with this issue must recognise radical limitations on the methods for making certain types of decisions and, in particular, sets out a clear difference between the decision to create general norms for untold future cases and the dispatching of particular choices at specific points in time at various levels of political authority and accountability.

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[575] Manin, *The Principles of Representative Government*, 180.

This imprecision has both conceptual as well as procedural implications. Conceptually, imprecision in relation to decision leads us to misconstrue entirely the nature of politics. This is evident in the economics-suffused notion of politics as analysable in terms of an input of 'psychological egoism'[576] and any kind of outcome which can be characterised as an output — as a decision. It misses entirely the built-in, irreducible pluralism and disagreement that is at the heart of politics, something that is not an issue when finding an equilibrium price for two exchangeable, scarce goods. Moreover, it wrongly holds politics to be a simple clash of intrinsically fungible interests.

But politics cannot be 'confined to interests'[577] or preferences. The non-fungibility of political disagreement is not just theoretical friction in the *perpetuum mobile* of efficient collective decision making. The confusion arises because the over-wrought influence of economics, and the social sciences in general, has pushed political theory in the direction of evaluating systems' outcomes. But not all outcomes are alike or even of a recognisable class. An *outcome* is not a *political decision*. This is clearer when we compare the preferred word for outcome in political science, *policy*, with any of the forms of *decision* outlined in Chapter 4. Can any form of *outcome* or *decision* capture the unique form of decision that is law creation? Considering that rule of law has been, in liberal and republican traditions, 'commonly regarded as a

[576] Waldron, *Rights and Majorities: Rousseau Revisited*, 397.
[577] Williams, *In The Beginning Was The Deed*.

defining condition of a free society,'[578] the failure to distinguish law creation from other outcomes in contemporary theorising on representation is shocking.

The imprecision does not just muddy the concept of a decision; it also short-changes the process — any process — of making a political decision as well. Any model of decision must necessarily abbreviate the process or greatly simplify it. What it must not do, however, is eliminate it altogether. That, though, is precisely what the implicitly social choice-based view of collective decision making does. 'Representatives' in this sense are managing competing interests —upward from constituents, downward from governments and international pressures, and laterally from colleagues — in search of an efficient choice. But an efficient choice is not the same as a decision – as decisionists are rightly keen to emphasise.

This is because social choice attempts to come to terms with plurality by quantifying it. But the plurality of values that generates the plurality of preferences makes them incommensurate, and thus 'there is no common measure according to which they can be ranked or traded off against one another for a determinate reason.'[579] As a result, social choice is not a description of politics; it is a denial of politics. Its usefulness has been adequately proven for a host of complicated acts of collective decision making,

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[578] Hampsher-Monk, Iain and Zimmerman, Keith, "Schmitt's Critique of Rule-of-Law Liberalism," in *Leviathan between the Wars : Hobbe's Impact on Early Twentieth Century Political Philosophy*, ed. Luc Foisneau, Jean-Christophe Merle, and Tom Sorell (Frankfurt am Main ; Oxford: Peter Lang, 2005), 111.
[579] George Crowder, "Pluralism and Liberalism," *Political Studies* 42, no. 2 (June 1, 1994): 296.

but never for anything like the tasks Rousseau associated with popular sovereignty. Whatever its explanatory successes, social utility, as Waldron emphasises, cannot be the basis of general will.[580] Isaiah Berlin and Bernard Williams make the even broader point: that 'practical decision could not in principle be made completely algorithmic, and that a conception of practical reason which aims at an algorithmic ideal must be mistaken.'[581]

An exemplary work of both imprecisions is Robert E. Goodin's recent 'Enfranchising All Affected Interests, and Its Alternatives.' In this essay, Goodin teases out variations of the all-affected principle on a series of simple examples of voting on political problems. The proposed models are clever and simple and raise myriad challenges to the self-evident and well-documented 'circularity of affected interests.'[582] Some of them, like the classic decision to erect a power plant in one jurisdiction which pollutes the environment of another, [583] are mainstays of political theory seminars on democracy. Others are equally thought provoking, like the voting rules of a feudal order considering democracy[584] or a proposed referendum on British restitution to its former colonies[585] (should only UK citizens vote?). Each example in its own way challenges a simple assumption about the all-affected principle, but none makes the distinction between a particular political decision and the creation of a general norm. Although the example of the German power plant is

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[580] Waldron, *Rights and Majorities: Rousseau Revisited*.
[581] Isaiah Berlin and Bernard Williams, "Pluralism and Liberalism: A Reply," *Political Studies* 42, no. 2 (June 1, 1994): 307–308.
[582] Miller, "Democracy's Domain," 215.
[583] Robert E. Goodin, "Enfranchising All Affected Interests, and Its Alternatives," *Philosophy and Public Affairs* 35, no. 1 (2007): 49–51.
[584] Ibid., 52.
[585] Ibid., 53.

presented as 'a law,' it evinces none of the characteristics of positive law and is strictly a particular pronouncement rather than a general one.

Much of the confusion in Goodin's paper follows from the double use of the word 'enfranchise.' Sometimes it is used to signify the right to a vote in the election of a political officer and sometimes it is used to signify the right to be part of an actual political decision — whether general or particular — itself. These two are such different types of political participation that it is scarcely reasonable to describe them with the same word, unless the goal of the model is in fact to leave out entirely that stage of action, with its arguing and bargaining and voting, that we conventionally call *politics*. Even the word 'participation' may be otiose in this context; Pocock describes the act of voting for someone else to attend to the business of government as 'logically the reverse of participation.'[586] Whichever jargon we might prefer, being an active part of the decision is still nothing like being part of the pool of electors for the appointment of the person or persons who will make the decision.[587]

Especially glib is Goodin's semi-sarcastic suggestion that Lebanese voters should have a say in Israeli elections as they are affected by the outcomes.[588] It is revealing, but immaterial to this argument, that Goodin does not think it notable that Lebanese voters do not currently have a say in whether a non-state sectarian military force in their own country should, acting on behalf of another country's revolutionary government, be able to decide

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[586] Pocock, *The Machiavellian Moment*, 515.
[587] And yes, my use of the idiom 'appoint' and 'officers' rather than the more colloquial inflections of 'represent' is deliberate.
[588] Goodin, "Enfranchising All Affected Interests, and Its Alternatives," 57.

matters of war and peace for Lebanon. More interesting is that the model of all-affected enfranchisement should even raise such a question. I suppose it is normal to want to influence the decision making of one's enemies, rivals, and competitors (just as the Tories would love a say in the Labour leadership contest), but if a model of political decision making cannot account for the blindingly obvious reasons why this is never the case, then the model's usefulness, even at a very high level of abstraction, must be called into question. The existence of a constituted polity means very little when the practice of politics as a separate sphere of public conduct is dismissed altogether.

To criticise this kind of model of political decision making for oversimplifying political conduct is not to say that the model eliminates too much essential noise — that it does not capture the passions and bargains inherent in collective action the way a simple presentation of Newton's Laws might leave out friction. The problem is not that it is leaving out how politics might work in 'the real world,' but that it leaves politics out entirely. Two distinctions are crucial in presenting even a frictionless mode of political decision making. Firstly, we must distinguish between particular political decisions of all sorts and the decision to create a general norm as part of legal system. Secondly, we need to distinguish between the layer of decision making that takes place on an authorised and public political stage from the deliberations and incentives that precede that stage, including the appointment by election of authorised officers to that stage. Even the most

abstract model cannot be applied the same way, then, to an authorised political decision and the appointment by election of an authorised political officer to make decisions, nor can it be applied identically to a particular political decision of any kind as it can to a decision to create a general norm for unknown future cases as part of a legal system.

The more recent work of Hélène Landemore[589] avoids these pitfalls by modelling decision nodes that are superficially similar to the ones broached in Goodin's essay at the level of politicians rather than just abstract actors we can assume are citizens. In one extended passage, Landemore proposes a thought experiment on collective decision making, involving deputies from various French cities deciding on a national programme. She attaches numerical values and probabilities to the various choices and accounts for the pressures from above and below that each political actor faces.[590] It is a bit more convoluted and less memorable or immediately clever than any of Goodin's, but ultimately much more theoretically robust and useful. She never adequately explains why her model focusses entirely on officials when so much of the literature does not, which is a shame, as it constitutes such a significant improvement on nearly all the existing literature which she builds on.

Carelessness with nouns (outcomes, policy, decision, law) leads to confusion with verbs (rule, represent, govern). Such confusion leads to

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[589] Hélène Landemore, "Democratic Reason: The Mechanisms of Collective Intelligence," in *Collective Wisdom : Principles and Mechanisms*, ed. Hélène Landemore and Jon Elster (New York: Cambridge University Press, 2012), 251–89.
[590] Ibid., 259–261.

misunderstanding of political bodies (state, people, government) and misattribution of principles (rotation, exchange, indirectness, textuality). The problems of contemporary theories of representation go beyond the syntactical, however. By ignoring the constraints of plurality and the opportunities of law, they also miss the dual function representation serves.

Functions, Singular and Plural

What kind of social function does political representation as we have begun to understand it in this dissertation serve? In asking this question in the sense of functional sociology I am not claiming to identify a social function that can explain representation's place in politics either historically or normatively.

The kind of functionalism in the social sciences I am referring to is self-consciously grounded in the biological sciences — and specifically in the theory of natural selection. It views changes as a stream of random events along the lines of mutations, some of which succeed in surviving and replicating in direct competition with their immediate alternatives, rather than as a result of intention or broader suitability. Elster distinguishes between 'the strong and the weak programme of functionalist sociology.'[591] It is the weaker version, which he also calls *Merton's Principle*, which concerns us here. This method

[591] Elster, *Explaining Technical Change : A Case Study in the Philosophy of Science*, 56–57.

of social science seeks to explain social phenomena by their unintended and unrecognised consequences, the feedback loops that allow phenomena to survive and replicate rather than wither away. In political thought, the most famous evocation of functionalism as a causal explanation was probably the early literature on European integration in the 1950's and 1960's[592], in particular the focus on 'spill-over' effects.[593]

My point in borrowing from the idiom of functionalism is not to argue for a functionalist explanation of representation, whether as a historical thesis about the growth of an institution or as any other kind of thesis. I do not believe that identifying a *function* in this sense can suffice either as a causal explanation or as a normative case for political representation (or, in the spirit of this dissertation, representative law making and executive surveillance). I do, however, want to propose that identifying such a function or functions is necessary to understanding representation precisely because the notion of representation as nothing more than an authorised action at a distance or an extra step in formal democracy is so inadequate.

An early exponent of this functionalist approach to representation is Anthony Birch, who identifies three 'general functions' which representation serves, which he subdivides into eight 'specific functions.'[594] Other twentieth century theorists were perhaps less explicit in their functionalist language, but nearly all accounts tend to fall into one of two broad classes of s-function. The

[592] Ernst B Haas, *The Uniting of Europe; Political, Social, and Economic Forces, 1950-1957.* (Stanford, Calif.: Stanford University Press, 1958), 291–299.
[593] Leon N Lindberg, *The Political Dynamics of European Economic Integration* (Stanford (Calif.); London: Stanford university press ; Oxford university press, 1963), 201–205.
[594] Birch, *Representation*, 107–108.

first class is focussed on creating unity and the second on replicating or enhancing division. Each on its own, however, is incomplete. This incompleteness, as we have seen, features prominently in Sieyes' theory of representation[595] and is at the heart of Sonenscher's reading of Sieyes and his attribution to him of *singular* and *plural* aspects of representation.[596]

The singular s-functions take Hobbes, or a particular reading of Hobbes, as their starting point. Hobbes, after all, uses the idiom of creating unity in his most quotable statement of his theory of representation in Chapter XVI of *Leviathan*.

> A multitude of men are made *one* person, when they are by one man, or one person, represented; so that it be done with the consent of every one of that multitude in particular. For it is the *unity* of the representer, not the *unity* of the represented, that maketh the person *one*. And it is the representer that beareth the person, and but one person: and *unity*, cannot otherwise be understood in multitude.[597]

I have already written about the problematic reversal of chronology that Hobbes makes when he revisits the problem of the multitude becoming one in Chapter XVII.[598] More importantly, I have argued that this is not a theory of representation at all, but rather of personation, a special form of authorised action at a distance. But my rejection of this as a theory of representation does not make it irrelevant for the unity s-function, because most of the

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[595] See 'The Importance of Being Indirect' in Chapter 3.
[596] Sonenscher, "Introduction," xv–xxii.
[597] Hobbes, *Leviathan*, 114 [XVI,13].
[598] See 'One Person Understood in Multitude' in Chapter 1.

proponents of this particular functional approach to representation do not reject it at all. Unity in multitude is the essence of representation for Hobbes; the very act of representation creates that unity in the representer but does not presuppose unity as a precondition in the represented.

The most extreme modern unity theorist is Carl Schmitt. We'll return to his ideas about representation later in this chapter, but it is worth remembering that they exist not just in his better known works but also in a slim volume only recently translated into English on Hobbes' *Leviathan*. In Schmitt's reading, it is the sovereign person that is brought about by representation, not the state. He terms this 'the representation of the baroque,' likening the sovereign-representative to the soul and the state to the 'huge man.'[599] The 'personification of the people and the unity of the Parliament as their representative at least implies the idea of a complexio oppositorum, that is, the unity of the plurality of interests and parties.'[600] Hints of Schmitt's own unifying theory of representation, centred on what Pitkin, in her discussion of fascist theories of representation, calls the 'symbol-maker,'[601] can be found in his downplaying of the importance of the covenants in his reading of Hobbes.

In a more abstract sense, Rosanvallon argues that the expansion of the franchise during the July Monarchy was animated by a 'search for society

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[599] Schmitt, *The Leviathan in the State Theory of Thomas Hobbes*.
[600] Cited in Kelly, "Carl Schmitt's Political Theory of Representation," 117.
[601] Pitkin, *The Concept of Representation*, 107.

without divisions,'[602] constituting a break with the earlier class-based notions of representation. Rosanvallon reads an almost exclusively unifying function in Sieyes' concept of representation, giving 'meaning and embodiment' to the nation and having a 'creative and instituting capacity unto itself... the means to unity and identity.[603] Weymans introduces the term *embody* for this kind of representation, and it is a shame he does not tie it directly to Hobbes, because his embodiment takes place not between a sovereign and a society but rather between a ruler and an 'abstraction' or 'transcendent principles' in a way that recalls the artificial person.[604]

Parallel to the singular functionalism that traces back to Hobbes, there has been an opposite plural approach, and it is at least as old. In fact, as Skinner shows, arguments about the plural function of representation (in a different choice of words) feature prominently in the writings of the seventeenth century parliamentarians in opposition to which Hobbes lays out his theory of representation. As I have argued in Chapter 1, Hobbes does not have a theory of representation so much as one of personation. The use of the word 'representation' is, in my reading, more ideological than philosophical; the argument about personation and sovereignty works just as well when Hobbes lays it out before and after *Leviathan* without using the word at all.

I have already adverted to Skinner's dissection of the contemporary debate on representation which underlay Hobbes' work, and to which he was

602 Pierre Rosanvallon and Samuel Moyn, *Democracy Past and Future*, Columbia Studies in Political thought/Political History (New York ; Chichester: Columbia University Press, 2006), 98.
603 Ibid., 89.
604 Weymans, "Freedom through Political Representation: Lefort, Gauchet and Rosanvallon on the Relationship between State and Society," 6, 13.

responding when he used the word 'representation' for an argument he successfully made before and after without resorting to that word.[605] One of the men to whom Hobbes was evidently responding was the parliamentarian Henry Parker, and Skinner devotes much attention[606] to his work from the 1640's, just before *Leviathan* was published in English. Just as Hobbes can be read as making a clear statement for the singular function of representation, Parker very explicitly posits representation's plural function. That is, representation exists not to create unity but to enhance and replicate division. The aesthetic aspect of replication is built into the very use of the word representation; a representation understood to be a picture or portrait and parliament a representation in just such a sense 'on a smaller scale of "the whole body of the State"' as well as of the 'reall body of the People.'[607]

It was this diversity that was doing the work of making present in any representative scheme. Nearly a century before the English Civil War, Sir Thomas Smith was imagining a parliament in *De Republica Anglorum* 'which representeth and hath the power of the whole realme… [f]or everie Englishman is entended to bee there present, either in person or by procuration.'[608]

This notion of representation is often referred to as *mimetic*, though, confusingly, the word is also sometimes used to describe embodiment-style representation too. At the core of mimetic representation is an assumed plural function. Mimesis is achieved by a large representative sample of the

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[605] See 'Why Represent When You Can Personate,' Chapter 1.
[606] Skinner, "Hobbes on Representation," 156–165.
[607] Cited in ibid., 163.
[608] Smith, *The Common-Wealth of England, and Manner of Gouernment Thereof*, 78.

population that authorises those bodies that make the binding collective decisions. In its expressly *reflective* emphasis, mimesis evinces an s-function which is nearly exactly opposed to the unifying one of personation; representation's function, in fact, is to enhance and replicate divisions. Anything else is not even representative at all, as this commonly used adjectival form hints.

This flies in the face of Hobbes' reasoning in more than just the obvious ways. Brito Vieira points out that the mirror-like aspect of mimesis can only reflect voices, goals, and demands that are already there, but for Hobbes representation created all those by the very act of unifying and creating one person from many.[609] Hobbes' unity does not just strain large collectivities of men; it assumes away the kind of inner conflict that one man can have all on his own long before he has any pretence to act on anyone's behalf or authorise another to act on his.[610]

For Weymans this notion of representation leaves out the politics and suffers from a lack of action. Citing both Lefort and Rosanvallon, he twice refers to mimetic representation as 'passively mirroring.'[611] In both cases, the unmentioned inspiration would seem to be Rousseau, who often described political concepts by their action states rather than by their institutional or

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609 Mónica Brito Vieira, *The Elements of Representation in Hobbes : Aesthetics, Theatre, Law, and Theology in the Construction of Hobbes's Theory of the State*, Studies in the History of Political Thought (Boston: Brill, 2009), 250.
610 Friedrich, *Constitutional Government and Democracy: Theory and Practice in Europe and America*, 263.
611 Weymans, "Freedom through Political Representation: Lefort, Gauchet and Rosanvallon on the Relationship between State and Society," 5, 17.

legal instantiations. Representation occurs when there is a 'political stage'[612] like the one referred to in the previous chapter at the end of the discussion on assembly, and the stage does not 'negotiate the conflict between representatives and represented through union or consensus,' but rather makes 'conflict into the paramount feature of politics.'[613]

The deficiencies of both the singular and plural approaches are actually quite similar, and both arise from the failure to identify an action — a kind of decision, really — that we can associate with representation. In the case of the singular function this is manifest in a lack of specificity; representation is all about authorised action, but the action is not delimited in any way. With the plural function, the problem is even broader, because no action is necessary. Representation is about reflecting or replicating or mirroring, but not about actually *doing* anything. This problem becomes even more acute when writers begin tossing around some readily available but not terribly elucidating metaphors to explain representation, especially but not exclusively of the singular kind.

And yet this attempt at functionalism is not without merits. Far from it, because only by isolating and identifying the two kinds of s-functions — those that unify and those that divide — do we begin to understand the very special nature of representation at the nexus of political plurality. This method of decision making, uniquely, captures both the singular and plural functions, and

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612 Ibid., 8.
613 Nasstrom, "Representative Democracy as Tautology: Ankersmit and Lefort on Representation," 325.

is thus suited only for a very limited class of political decisions which can only be taken by a rather circumscribed number of officials. It is, indeed, possible to imagine political institutions that perform either of these functions separately. What makes representation unique, and what ties it intimately to the challenge of creating general rules owned by all in conditions of plurality, is its aim to perform both functions at once — creating unity and enhancing division.

This duality is nearly self-evident as soon as one chooses to see representatives as not just standing for or making present but as doing something — something for which their plurality is essential. It was also self-evident to at least one theorist of representation who did not employ this method at all, but rather analysed it historically and arrived at a more or less identical conclusion about its built-in dualism. Carl Friedrich, whose three editions of *Constitutional Government and Democracy* (1937, 1941, 1950) on constitutional government neatly span the greatest illusions and challenges and triumphs of liberal government, explicitly rejects as simplistic both Hobbes' unifying approach as well as Burke's unity-through-deliberation approach. Hobbes' unity 'does not logically follow,' but rather 'must be created and recreated through a political process of dynamic activity.'[614] The history of representation (in England at least) is always one of particular interests — Friedrich places a much bigger emphasis here on geography than, say, on class — and a claim on unity. The agent model fails to explain

[614] Friedrich, *Constitutional Government and Democracy: Theory and Practice in Europe and America*, 261–262.

representation because representatives were only agents 'as long as they acted separately,'[615] something which they clearly were no longer doing once they shared a space in an assembly. Once congregated in an assembly, representatives did not suddenly achieve unity or seek the general will but disagree only on what it was, as Rousseau might have it. They were simultaneously 'a set of agents from different interests, and a representative group determining the common interest.'[616]

This property of representation I call *functional dualism*, and it is at the heart of what makes representation a unique political act. To represent is to embody this functional dualism, to reproduce and enhance division while creating a limited unity for two specific authorised political tasks linked with popular sovereignty — creation of law and partial agency in government. The functional dualism is what is non-replicable about representation, and it is missed by all the theoretical attempts to construct a formula for representation that relates political actors to each other and that, unfortunately for our purpose, often employs the word *function* as well, but in an entirely different sense of the term.

[615] Ibid., 262–263.
[616] Ibid., 263.

Functions and Metaphors

The word 'function', of course, is also used in the context of representation in an entirely different sense of the term. For function in its mathematical or formulaic sense, I have introduced the term *f-function*, to distinguish it from the social sense used above and referred to as *s-function.* Seeing representation as a simple (or occasionally not so simple) function relating a set of distant actors — not least the represented and the representing — reigns as an assumption at the heart of much literature on the subject. Sometimes this is stated explicitly, and sometimes it is implied by the use of a host of metaphors. The reason I have introduced this topic so close to the discussion of the s-function of representation, despite the obvious confusion it might cause, is because understanding the simultaneous plural and singular aspects of representation is the first step to unpacking the problematic metaphors.

It is the first step, but alas not the last. Even the metaphors or f-functions that do take the plural aspect of representation into account fail, for the most part, to account for what representation *does* and what representatives *do*. Those same plural accounts are usually plural only, rather than assimilating the duality of representation's s-function into their postulated f-functions, but this is not even the biggest mistake. By ignoring the political task at hand — by ignoring the fundamental political problem that plurality presents us with — conventional theories of representation leave us with a philosophically bare concept of authorised action at a distance that

posits an almost politics-free mode of collective action and raises irrelevant questions but cannot answer crucial ones (the force of general rules in the absence of unanimity).

Hobbes is perhaps the best starting point for metaphors of f-functions. Besides suggesting in *Leviathan* that we think of representatives as guardians (for children, madmen, etc.), he also mentions rectors, masters, and overseers.[617] The guardian metaphor is fleshed out in even greater detail in *De Cive* where the word 'represent' makes no appearance in any inflected form.[618] In both cases, Hobbes is spelling out his theory of personation, and in neither, despite the extensive use of the word in *Leviathan*, can any of these metaphors come close to capturing how to map a function of representation.

What Hobbes does give us is a way of modelling and thinking about authorised action at a distance, what Pitkin calls the 'formal aspect of legal agency.'[619] Her love for etymology has already been noted earlier in this dissertation, and it is in her brief discussion of the various German words for the verb *to represent* that she alludes to the purpose of representation as being an integral part of defining the concept. She distinguishes between *darstellen*, to stand in for, and *vertreten* and *repräsentieren* which both mean 'to represent,' but with emphases on interests in the former case and common good in the latter.[620] What each of these forms explicitly does differently is link two actors in a relation between the one doing the representing and the one

[617] Hobbes, *Leviathan*, 113 [XVI, 9-10].
[618] Hobbes, *De Cive*, 121–128 [IX,1-19].
[619] Pitkin, "Representation," 141.
[620] Ibid., 132–133.

being represented. In this sense, the f-function of representation has only two variables, and the function itself is just the 'sign of the thing signified.'[621]

Pettit calls these two variables the *representers* and the *representees*.[622] He argues that the functions which relate these two variables can be conceived of by resorting to one of three metaphors — clusters of metaphors, really — namely, pictorial arts, the theatre, or court.[623] Brito Vieira and Runciman also work with three metaphors, though they explicitly begin only with individuals and then expand to larger groups. In their 2008 book on representation, they suggest three ways of thinking about representing individuals, each suggesting a different metaphor or set of metaphors and different f-function for representation.[624] These are *principal-agent*, *trusteeship*, and *consent-optional* — for the latter they use the term 'identification' but, because of this word's importance in a different sense in this chapter, I have opted for a less elegant but more exact name. I will rely mostly on their proposed functions and metaphors because their presentation is the most concise and comprehensive, and it faithfully reproduces all the weaknesses I wish to highlight.

The simplest principal-agent model has only two actors in it, with one (*principal*) giving clear instructions to the other (*agent*). Principal-agent metaphors were explicitly alluded to in the late eighteenth century discussions

621 Ball, "A Republic — If You Can Keep It," 146.
622 Pettit, "Varieties of Public Representation," 62–62.
623 Ibid., 65–66.
624 Brito Vieira and Runciman, *Representation*, 66–83.

of representation in both France[625] and in the drafting of early U.S. state constitutions.[626] To make it representative, Brito Vieira and Runciman add a third party, which they initially call an *audience*, but later refer to as *third party*.[627] The addition of a third variable in Brito Vieira and Runciman's model is a concession that the representative relationship is more complicated than simple instructions given, and further, that representation is not merely acting in the interests of a principal. Audience has long been a regarded as a crucial element in any f-function of representation, even if the audience itself has shifted from monarch to other representatives to public opinion.[628] The model accounts for both the flow of liability and authorisation, but also for the imperfect transfers of information and expertise — there must, after all, be a reason why a principal has resorted to an agent to begin with. It is easy to see why a principal might want to authorise an agent before another audience, but it is not clear what is, strictly speaking, political about such an endeavour or how it might be relevant or necessary to certain specific political tasks.

This remains true when the scope of the relationship is broadened in the second model, that of the *trustee*. This is a much more flexible model that makes a much more realistic account of information flows and the gap between interest, knowledge, and benefit. Brito Vieira and Runciman's central objection to this model is not its inadequacy in modelling political decisions, but its implication that the principal on whose behalf a trustee acts cannot

625 Birch, *Representation*, 46–47.
626 Adams, *The First American Constitutions : Republican Ideology and the Making of the State Constitutions in the Revolutionary Era*, vol. Expanded, chap. XI.
627 Brito Vieira and Runciman, *Representation*, 69.
628 Lindsay, *The Essentials of Democracy*, 26–32.

normatively object to any action the trustee takes.[629]

The third model of representation is one where a claim is made for representative legitimacy without a principal actively appointing a representative.[630] Representative claims feature prominently in the work of another contemporary theorist who also proposes an f-function for representation, but one that is much more complicated and realistically political.[631] Brito Vieira and Runciman's is still quite abstract and aims at modelling how such a relationship might be understood in its simplest form. Their consent-optional model (they call it 'representation as identification') recalls Mansbridge's *surrogative representation*.[632] It posits a representative relationship — or, at the very least, a claim to one — on as little a basis as common interest or even sympathy.[633] But of course, a claim cannot possibly be enough to delimit a political role without attaching some kind of prescribed action to it. Though this might sound obvious in looking at the third metaphor (feeling sorry for someone and doing absolutely nothing about it does not make me that person's representative), it is equally true for all three. Neither the agent nor the trustee, even when more content is cast into the abstract forms adumbrated above, begins to provide an answer to the problem of plurality unless their role can be conceived within that same plurality.

Updating the model to include groups of people rather than individuals

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629 Brito Vieira and Runciman, *Representation*, 79.
630 Ibid., 80.
631 Saward, *The Representative Claim*.
632 J. Mansbridge, "Rethinking Representation," *The American Political Science Review* 97, no. 04 (2003): 522–524.
633 Brito Vieira and Runciman, *Representation*, 80–82.

does not address this problem. In a later chapter of the same book, Brito Vieira and Runciman expand these three models into groups, but it is not to introduce any plural aspect of representation at all. Rather, it is the groups being represented, and the unifying, singular aspect of representation which is enhanced instead of counterpoised. The groups being 'represented' must be conceived as some kind of unity, whether before they are represented or by the act of representation itself, for any of the models to make sense. And this, very simply, does not address the problem of politics in plurality or the challenge of general norms that are tied to popular sovereignty in conditions of disagreement.

Careful readers might wonder if this section really needed to be separate at all. It seems that what makes f-functions of representation so flawed is their adherence to only one kind of s-function — that is, that all these metaphors fail only because they view representation in its singular aspect, having only a unifying function. But there are metaphors for representation that explicitly do reflect the plural function as well and still fall short. Earlier I alluded to the notion of representation as being a mirror to society at large, a large-many-to-small-many f-function. Here too, the unanswered question is, What for? Reflecting the people without any power to do anything accomplishes very little, and on the other hand, just having a sampling majority decide outcomes raises the question of why any diversity at all — and any large number of members — would be necessary. It is impossible to begin to map the relation of representatives to the people without accounting for the

kinds of political decisions they are charged with making. Interestingly, the Smith text I quoted in the previous section as an example of plural functionalism asks us to consider representatives as 'attornies,'[634] a metaphorical role we might ordinarily associate with the principal-agent model or possibly the trustee one.

Two authors have recently taken the discussion of representation's f-function to a much higher level of sophistication. I can only briefly summarise their work here. Andrew Rehfeld proposes a function linking *the represented* to *the representative* and *the audience* governed by *rules of recognition* and all serving what he calls *the function*, which itself is very close to what I have called the s-function. This is followed by six conditions linking actors such as the *claimant* and *the selection agent* via a *decision rule* and a *qualified set*.[635] Michael Saward, for his part, formalises the entire f-function as the 'making [of] a representative claim' with up to five actors playing a part — the *maker*, *subject*, *object*, *referent*, and *audience*.[636]

Both Rehfeld and Saward transcend bad metaphors, but they do not transcend the problem that representation cannot really be described by any f-function, however nuanced and multivariate its account of its s-function might be. A theory that stops here is not a theory of representation, but a theory of authorised and attributed action. To call it representation is to reduce representation to something Philip Larkin called, in a different context, 'like

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[634] Smith, *The Common-Wealth of England, and Manner of Gouernment Thereof*, 78.
[635] Rehfeld, "Towards a General Theory of Political Representation," 4–6.
[636] Saward, *The Representative Claim*, 36.

asking someone else to blow your own nose for you.'[637] And the reason is that representation is not a relationship between the people and their government. If it were, it would be the task of the theorist to draw up the most useful, abstract function possible, with just enough variables to accurately account for all the necessary actors and no more. This description, however, fails on two counts. First, it does not account for the separateness of government, and, effectively, its non-representative character. Second, and more important, representation is not merely a relation of any kind; it is a relation with an action. The kind of body which can be representative — a law-making and government-surveilling assembly — does not just stand in relation to the people it represents. It is not a large many-to-small many f-function. It has a purpose and an s-function as well.

These metaphors fail without taking into account representation's functional dualism (that's *s-function*) just as the more sophisticated f-functions cannot properly account for representation's limited yet consistent appearance in very circumscribed institutional contexts because no account of what representation is can be complete without an account of what representation does.

These accounts that focus exclusively on f-functions and their attendant metaphors miss the point, as the method by which we authorise certain actions is at best a means, not an end in and of itself. And representation, even if it could be mapped out by an f-function, is itself a means, not an

637 Andrew Motion, *Philip Larkin : A Writer's Life* (London: Faber, 1993), 119.

end.[638] What is central to politics is not the authorising of action but the plurality itself which foments all the dilemmas of concerted action.

The Rechtsstaat and Its Critics

Functional dualism makes a brief and very explicit appearance in Friedrich's work, and makes an even bigger, though less explicit, imprint on the thinking about representation of two other contemporary thinkers, Carl Schmitt and Hans Kelsen, who were no less swept up by the political dramas of the German-speaking world of first half of the twentieth century. Sieyes and Condorcet (and, for that matter, Guizot) formulated philosophical ideas against a backdrop of institutional instability and crisis, sometimes as participants, sometimes even as victims, occasionally as commentators or ideological polemicists, and not rarely even as entirely disconnected philosophers. The German-speaking theorists of the state in the interwar years were writing and arguing and acting at a much quicker and more dizzying pace in places where modern states were replacing cosmopolitan empires defeated in war. Unlike the figures covered at the beginning of this dissertation, they were not imagining a political reality before the institutions it called for existed, but rather adapting accumulated knowledge and experience onto hastily constructed new political orders. Their fate in the history of ideas has been

[638] Beard and Lewis, "Representative Government in Evolution."

different too. Political philosophy has learned to ignore when necessary the actual events in England or France or the United States when assessing the debates around representation from centuries past, but it is hard for a reader of 1920's political thought to *not* know what would ultimately develop in the German-speaking lands of central Europe in the 1930's and 1940's — though of course, the contemporary writers certainly did not know it themselves.

Both Carl Schmitt and Hans Kelsen, like Carl Friedrich, were educated in the old world of pre-1914. All three had their most fecund and original writing after this old world fell apart, and all three lived long enough to have their lives entirely upended by the chaos which followed and to observe the new one that replaced it in 1945. Kelsen and Schmitt stand out virtually alone among all the thinkers about representation since Rousseau to place law at the very heart of their theoretical work. Their respective attitudes to law, the state, and sovereignty of these 'radical intellectual enemies'[639] are generally held to be polar opposites of each other, and each man's personal fate in the upheavals of the 1930's and 1940's was quite different too. The Jewish-born (he had three different religions over the course of his life) Kelsen left Austria and Germany, first for Switzerland and eventually for the United States, while Schmitt enthusiastically (at first at least) welcomed Nazi rule and refused, after the war, any 'denazification'. He thus lived out the remainder of his long life outside the academic establishment — just long enough to enjoy being rediscovered in the 1970's by a new generation of radical left, radical right,

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[639] Sandrine Baume, "On Political Theology: A Controversy between Hans Kelsen and Carl Schmitt," *History of European Ideas* 35, no. 3 (2009): 369.

anti-American, and barely disguised anti-Semites of a fashionable anti-imperialist bent, among others.

What these two men have in common is that both pick up the challenge dangling since Rousseau posited the separation of government and sovereignty and the necessity for positive law as an expression of popular sovereignty and do what Rousseau did not do by constructing a law-based theory of representation. Schmitt's contribution is the more significant one, made all the more ironic by his rejection — in philosophy as well as in the politics of his own day — of the very *Rechtsstaat* that he explains so well in *Verfassunglehre*.[640]

Kelsen explicitly rejects a dualism that is very different from the functional dualism I have described above and attributed to his contemporary, Friedrich. The dualism Kelsen rejects is between law and state, a dualism most closely associated with Schmitt, whom he refrains from naming but with whom he is obviously engaging in a sort of hidden, not necessarily deliberate dialogue. This dualism derives directly from Hobbes (though Kelsen does not name him either) and the idea of the state as a *person*, which, according to Kelsen, 'turns the state into an object of legal cognition, an object enquiry for the theory of public law,' and posits that 'the state *qua* power is essentially different from the law.'[641]

Kelsen's long rejection of law-state dualism is crammed into section 48

[640] Available in English (finally) as Schmitt, *Constitutional Theory*.
[641] Kelsen, *Introduction to the Problems of Legal Theory*, 98 [§47].

of *Introduction to the Problems of Legal Theory*.[642] By coincidence or not, 48 is the same number as the article in the Weimar Constitution that Schmitt obsesses over in determining that the sovereign is the state of the exception,[643] and thus that the power of the person of the state is separate to the law itself. Kelsen does accept, however, something like the functional dualism of Friedrich, though he characterises it with the more provocative term 'fiction of representation.'[644] In making the case, though, he uses, somewhat sarcastically, the term 'representative' only to mean directly authorised. Kelsen's 'fictional' representation, with its combination of singular and plural functions, is closer to what I have actually been calling representation in this dissertation. The fictional, as it were, is the real thing — and nothing else.

Schmitt, too, uses the word 'representation' for only half of this dualism, but he uses it for the other half. In counterpoising *representation* to *identity*, it is identity that creates unity and representation which replicates division. Schmitt does not lay it out in quite these terms. The word 'unity' is central to his exposition of both *identity* and *representation*,[645] but only in his exposition of identity do we get something approximating the singular s-function alluded to above (and which features so prominently both in his book on Hobbes as well as in *The Crisis of Parliamentary Democracy*). In describing the 'two opposing formative principles,' Schmitt always uses *representation* to

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642 Ibid., 99–106 [§48].
643 Schmitt, *Political Theology*, 5–12.
644 Kelsen, *General Theory of Law and State*, 289–291 [Part Two: IV.B.g].
645 Schmitt, *Constitutional Theory*, 284 [§19.II.2] In the original, "Identität" and, notably, "Repräsentation" rather than the alternative German words mentioned earlier. Carl Schmitt, *Verfassungslehre* (München und Leipzig: Duncker und Humblot, 1928), 257.

refer to the *whole* of the people in reference to their fundamental plurality.

The mature thoughts on representation are not in the well-known apologia for plebiscitary democracy *The Crisis of Parliamentary Democracy* or even the less well-known but equally inflammatory *The Leviathan in the State Theory of Thomas Hobbes*, but in the comparatively sober synthesis of political theory and jurisprudence that is the *Verfassungslehre*. Schmitt's scepticism about law-based parliamentarism is no weaker in *Verfassungslehre* than it is in the first two chapters of *Crisis*,[646] but his exposition of what the 'bourgeois Rechsstaat' is, rather than what it fails to be, is more detailed and more nuanced.

Schmitt's debt to Sieyes and Hobbes is well documented,[647] but his debt to Rousseau is less so, perhaps because it manifests itself in an emphasis that is little noted, or at the very least little understood, on positive law. The 'cornerstone of the Rechsstaat' is the 'idea of the subordination to a general "inviolable" norm.' Law cannot be the will of persons, but something that is 'generally reasonable.' Only by investing law as such with 'certain qualities' could we distinguish it from commands emerging from will or power.[648] In his more abstract treatment of legal philosophy *Legality and Legitimacy*, he makes an argument about direct democracy (which he just calls

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[646] See especially, Schmitt, *The Crisis of Parliamentary Democracy*, 26–44.
[647] Kelly, "Carl Schmitt's Political Theory of Representation," 133–134.
[648] Schmitt, *Constitutional Theory*, 180–182 [§13.I.1 and §13.I.2]. The echoes of Hobbes, whom he cites a few sentences are later, are clear, however the translation into English might be exaggerating it more than necessary. Schmitt avoids the Hobbesian-sounding 'Personen' and sticks to the more traditional but ambiguous (in this context) 'Menschen,' repeatedly contrasting in this section the rule of law ('Herrschaft des Gesetzes') and the rule of men ('Herrschaft des Menschen'). Schmitt, *Verfassungslehre*, 138–139.

'democracy') very similar to the one I made in Chapter 5 about decisions by large numbers, writing that such 'law is the momentary will of the people present at the time... the will of a transient majority.'[649] Such statutes are expressions of political will, but they fail to meet any generality or stability requirements, and thus can hardly claim to be 'law' at all.

In elucidating his concept of law, Schmitt introduces another kind of duality, the formal and political concepts of law (the slightly confusing use of 'concept' for both genus and species is his). The upshot of the political concept is that for a statute to count as a general norm with pretensions to last in time, it has to be the result of a particularly prescribed authorised decision making process.[650] Having established law as something answering not only a requirement of generality, a 'residue of respect' for which is 'an absolute minimum,'[651] but also a sources and institutions requirement ('that which is issued by the offices authorized for legislations and in the prescribed procedure for legislation'[652]), Schmitt opens up a long discussion on the separation of powers.[653] What is relevant for this topic though is his insistence, before launching into the details, that such separations do not make any sense as purely institutional or procedural niceties; they are only meaningful when a certain class of political decisions which aspire to be general norms are set out. Separation is 'only meaningful' when 'a concept of

649 Schmitt, *Legality and Legitimacy*, 24.
650 Schmitt, *Constitutional Theory*, 184–188 [§13.II and §13.III].
651 Ibid., 196 [§13.IV.5].
652 Ibid., 184 [§13.II.1].
653 Ibid., 220–224 [§15].

law is already self-evidently pre-supposed.'[654]

The discussion of law and separations of powers is a prelude to what is one of the most innovative and concisely developed theories of representation in the literature, all laid out in one chapter. Schmitt follows Hobbes and Fichte in placing his theory of representation in the sixteenth chapter of his most substantive work of normative political theory.[655]

It is notable in this context how many of the common metaphors of representation Schmitt explicitly rejects, particularly those that describe authorised action at a distance. A representative is not 'an employee on special assignment,' nor is he an 'agent, attorney, [or] exponent.'[656] The agency model is explicitly rejected, and with it, implicitly, authorised action at a distance as a starting point for a theory of representation. 'X stepping in for Y,' Schmitt writes, is not an instance of representation[657] — an oblique restatement of Hegel's similar claim that representation could not be defined simply as 'the replacement of one individual by another.'[658] Advocacy and trusteeship are similarly dismissed as usable metaphors because they violate publicity requirements, and 'representation can only occur in the public sphere.'[659]

A representative is not a commissioner because a representative body

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[654] Ibid., 191 [§13.IV.1].
[655] Ibid., 235–252 [§16] I have considered but ultimately rejected placing ten chapters of fluff before this one in my dissertation in order to continue this tradition.
[656] Ibid., 245 [§16.III.3].
[657] Ibid., 244 [§16.III.2].
[658] Hegel, *Elements of the Philosophy of Right*, 350 [§311].
[659] Schmitt, *Constitutional Theory*, 242 [§16.III.1].

is more than a collection of atomised interests, and parliament is not a 'committee of interest advocates.'[660] This is in contrast to government which, in an echo of Rousseau, Schmitt separates from sovereignty and from law making.[661] A direct conclusion of the 'formal concept of law' is that government is 'merely a committee of the popular assembly' which itself is tasked with 'supervision of governmental activity.'[662]

Law and, especially, publicity play a central role in Schmitt's theory of representation. The nexus of two seemingly opposing concepts — identity and representation, the two sides of what I have called functional dualism — is 'public discussion and public votes' which yield 'general norms.'[663] This is the stage for 'national learning' and the place for 'uniting the entire intelligence of a people.'[664]

The significance of this is not just as a rejection of a bunch of tired metaphors. It is a dramatic narrowing of the definition of what a representative *is* by focusing on what a representative *does*. A representative, Schmitt argues, 'cannot allow himself to be represented.'[665] This, I want to suggest, is as good an identity test for representation as can be devised. If some kind of authorised political action can itself authorise a further step of action at a distance, then it might be agency or trusteeship or delegation, but it cannot be representation. This brings us back to the concatenation of

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[660] Ibid., 249 [§16.IV.1].
[661] Ibid., 237 [§16.I.3].
[662] Ibid., 328 [§24.I.1].
[663] Ibid., 339 [§24.III.1].
[664] Ibid., 325 [§24.II.3].
[665] Ibid., 340 [§24.III.2].

authorised actions I presented at the end of the previous chapter and to a final attempt to define what representation is and is not.

Representation: What Is It Good For?

Let's recall the chain of authorised political acts first broached in the discussion of numbers. Alice would like to vote in an upcoming parliamentary election but cannot make it to the polls. Luckily, she lives in a country where proxy voting is legal, and she formally authorises Betsy to cast her vote for her. Betsy casts Alice's vote and her own for Carol, who subsequently wins the election and is, in accordance with the local constitution and electoral by-laws, credentialed to sit in Parliament. After being sworn in and taking up her seat, Carol votes confidence in a new government, a government which includes as its foreign minister Doris. Doris, after consulting with her professional diplomatic staff and her own private secretaries, concludes that a new initiative at a major international organisation is worthy of her government's support, and she successfully persuades the other ministers in the government in which Carol, along with the majority of Parliament, expressed their confidence. Acting on the government's behalf, then, Doris instructs Ethel, who serves as the ambassador to the relevant international organisation, to argue in favour of the initiative in its plenary debate and to cast her vote accordingly.

What should be clear following the account of decisions, numbers, and both kinds of functions is that among that group of five active political persons, only Carol is a representative. The other four are engaged in authorised political actions of vastly varying natures, but none can be said to be engaged in the act of representation.

All five of these women are performing tasks that can be modelled as an f-function. We could even model a very complicated f-function to include several, if not all, of them at once. Each one can be described by at least one of the common metaphors alleged to describe representation. We can see Alice and Betsy as principal and agent, respectively. We can see Ethel as an attorney or Carol as a trustee or Doris as a guardian. Those metaphors, however, fail to capture the essence of political representation.

Moving from f-functions to s-functions brings this challenge into high relief. The authorised roles of Betsy and Doris certainly have a singular aspect, just as that of Ethel's has a plural one. But only Carol's evinces the functional dualism that distinguishes ordinary action at a distance from actual political representation. Carol alone takes the authority derived from her formal connection with her constituency and brings it to a designated political stage not to carry out instructions and not to create more unity, but to mix the plurality that characterised her authority with that of all other representatives and, without hiding or abandoning the disagreement at the heart of their work, to participate in the process of creating partial, isolated, and limited unities in the form of general norms. The others are authorised to use their judgment on

how to pursue designated ends, while in Carol's case it is her judgment itself which is fully authorised. The others are authorised to participate in political action geared to specific ends, while in Carol's case it is the process itself which is her remit.

In this vein, we can begin to understand what representation is by first looking at what it is not. It is not authorised action at a distance. Hobbesian authorisation and personation are only a first step. The dominion or ownership he envisages for actions of one authorised by another do not on their own suffice to explain the ownership of legal norms by the vast majorities who have little to do with their promulgation, nor does it explain why we might resort to such norms when other more efficient ways of collective decision making are technically feasible. Only once we apply these Hobbesian concepts to a Rousseauian law-based society built on popular sovereignty do we begin to approach a Sieyesian solution.

Representation is not acting for or speaking for, and it is not a claim of legitimacy either. It is not reproducible or replicable either, the way those authorised actions might be. This problem highlights the vapidity of theoretical arguments about representation outside (or above) the confines of the state and, simultaneously, the institutional danger of extra-parliamentary replacements such as the de facto replacement of parliamentary debate with debate inside large unwieldy coalition governments and mass media or academic forums. The replacement often has more entertainment value than parliamentary debates, but it is in every other way a poor substitute.

Representation above or below the level of the sovereign state is not an impossibility, but it is much rarer than contemporary theory might lead us to believe.[666] Because it is so intimately tied to positive law, because, in addressing the problem of plurality, it adopts positive law as the only logical means, it must exist within a system of norms, defined by Raz as having the properties of openness, supremacy, and comprehensiveness.[667] This is what makes representation in federalism possible, but not in the way it is conventionally seen. To understand this, we must distinguish between the three similar but fundamentally different concepts of *indirectness*, *federalism*, and *multiple bases*. Sieyes contrasted the first two in order to ground his opposition to federalism of any kind. The principle of indirectness is a necessary feature of representation; it allows for the creation of a separate sphere of political arguing, bargaining, and voting. Primary assemblies cannot for this reason be considered representative, even if only a small number of people actually show up. Federalism implies multiple levels of constituted political authority. Lower level units can form a basis for representation to a higher level, or they can simply send their own delegates. A political assembly credentialed in the latter rather than the former manner is not a representative body but a forum for appointed and bound ambassadors of constituted governments rather than sovereign people. The German Bundesrat functions this way, as does the European Council even with its qualified majority voting. The United States Senate was envisioned this way, but it evolved very quickly into a representative assembly constituted on a different electoral basis.

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[666] Brito Vieira and Runciman, *Representation*, 149–181.
[667] Raz, *Practical Reason and Norms*, 150. See "Decision, Rules, Norms" in Chapter 4.

I say 'evolved' because this is not something that suddenly happened with the passage of the Seventeenth Amendment in 1913 and its provision for the Senators of each state to be 'elected by the people thereof.'[668] In fact, the case of the U.S. Senate provides an excellent illustration of these three different, though occasionally overlapping, concepts. As it was conceived in the Great Compromise in Philadelphia, Senators were the appointees of governments of member states in the Union; they formed an upper chamber next to the House of Representatives, which was both popularly elected and apportioned in accordance with the relative population of the states.[669] Since 1865, American states have come to be seen as subnational units, but in 1787 they were still understood as constituted political units that enjoyed a certain measure of sovereignty. Long before the constitutional amendment formalised direct elections, the notion that Senators were in Washington to do the bidding of state governments had fallen into constitutional desuetude. In northern states, this was the case already before the Civil War. The famous Lincoln-Douglass debates in 1858 illustrate just how much state legislative elections came to be understood as indirect polls for U.S. Senate. Lincoln and Douglass campaigned in legislative districts in Illinois and voters voted for the state legislators based on party as electors (among other tasks, obviously) for the U.S. Senate seat for their state. We remember Douglass having won because more districts sent Democrats to Springfield than Republicans, not

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[668] John R. Vile, *A Companion to the United States Constitution and Its Amendments* (ABC-CLIO, 2010), 271.

[669] I ignore here the three-fifths rule, which inflated the power of slave states by counting, albeit partially, slaves themselves in apportioning seats — without, of course, granting the slaves the vote.

because more citizens directly voted for him and not because he managed to convince more legislators to vote for his appointment either. The legislators elected in 1858 were certainly representatives of the people of Illinois, but so was Douglass; he was not the representative of the Illinois state legislature.

The U.S. Senate then, is nothing like the Bundesrat or the European Council. It is, regardless of the degree of indirectness in the election of its members, a representative assembly of the people of the United States. What distinguishes it from the House is the radically different *basis* of representation, in this case the wildly mal-apportioned (in relation to population or geographical size) seat distribution. Other countries with two chambers employ other forms of different bases, often mixing single member constituencies with some form of proportional vote, and equally often (in federal states) having a much less equal distribution of seats by subnational unit territory.

In short, the principle of indirectness lies at the heart of representation, 'a mediated and indirect process of decision making.'[670] That indirectness is in the essence of the decisions being made and their relation to the sovereign people; it is not to be found necessarily in the various levels of authority in a federal state. Federalism and indirectness are different and can exist separately from each other. A federal-level assembly whose membership is determined by lower-level member governments is not a representative assembly; one whose membership is determined by a formal connection to the

[670] Urbinati, "Representative Democracy and Its Critics."

people at large is, as its very indirectness makes binding instructions, on the one hand, and referability on the other, impossible. Such an assembly, operating next to another representative assembly with a differently apportioned membership or with a combined membership, would evince indirectness by multiple bases of representation.

The European Parliament, as it attains increasing powers of both surveillance and legislation, could very well claim to be a representative institution, while the Council of Ministers, no matter how democratically grounded their positions are and no matter how much more proportional qualified majority voting is made, will never be a representative body as it lacks, by definition, any functional dualism. Ministers may bargain with each other to sway votes, but they are ultimately not bargaining with each other as members of an assembly but bargaining with actual governments who are the ones to formulate the instructions for voting.

Other international institutions are even less 'representative' in this sense. The U.N. is literally a 'congress of ambassadors,' the formulation Burke famously used to describe a hypothetical parliament convened under bound mandates.[671] This is not a criticism of the U.N. It is simply a plea to recognise the package of special properties in representation and not wring the term of content in order to foist it on any group of authorised political actors.

Representation is a unique means for dealing with plurality in political

[671] Edmund Burke, *The Works of the Right Hon. Edmund Burke: With a Biographical and Critical Introduction, and Portrait After Sir Joshua Reynolds* (Holdsworth and Ball, 1834), 180.

life — a means for surveillance and partial agency in government, a means for generating a system of unities as expressed in general norms, the creation of which is itself an ongoing recapitulation of popular sovereignty. This process serves both to discover the general will and to make it and remake it.[672] Its emergence in both theory and practice needs to be seen as part of the larger emergence of Siedentop calls the 'idea of a general political society' and its implication of 'rules of conduct binding on all.'[673] The general political society gives rise not to market clearing allocations as the way of resolving irreducible conflict — at least not just to that — but to what Waldron memorably dubs, in homage to Rawls, the *circumstances of politics*: (1) the 'felt need for a common framework or decision or course of action on some matter,' and (2) 'disagreement about what that framework or decision or action should be.'[674]

These circumstances bring us closer to understanding representation's analytical evolution and normative justification than even the most sophisticated multi-staged functions of authorised action at a distance. Representation is not a shortcut for legitimate self-rule, and the research tradition that seeks to locate its essence there will always come up short. A better avenue passes first through positive law as a solution to essential conflict, and representative assembly as the means for creating positive law and supervising the vast and nearly autonomous organs administering it.

That is, as the **means by which a very limited unity —**

672 Lindsay, *The Essentials of Democracy*, 43.
673 Siedentop, "Two Liberal Traditions."
674 Waldron, *Law and Disagreement*, 102.

expressed in generalised norms — is created from an irreducible plurality in modern politics under conditions of popular sovereignty, representation constitutes a unique solution to the problem of plurality in both process and outcome.

It is a fundamentally plural-to-plural relationship, though the plurality of representatives is a comparatively small one, nothing like the more inclusive forms of 'many' alluded to in the previous chapter and nothing like the 'all-affected' forms alluded to above in this one. Because representation requires a stage, a place for the conduct of politics, the many who constitute the representatives must be sufficiently small to be able to fit in and function on the stage, while still being large enough to make collegiality, consensus, and referability impossible. That is, they must retain the essence of plurality in order to go about their business as a necessary component of the special tasks designated to them — and unlike all the other authorised political tasks undertaken by a modern bureaucratic state accountable to popular sovereignty.

This problem of plurality cannot simply be wished away. It is the essence of the political condition. Normative political theory which models plurality out fails at its first task and ignores the very problem that has been with us since the dawn of popular sovereignty and arguably before. The solution to this problem is legitimate government under constant surveillance of a small, dedicated plurality — just large enough that it cannot possibly function by collegiality and consensus — that also promulgates generalised,

public, stable, institutionally backed norms. A fully formed entity answering Rousseau's 'necessity of positive law.' The means to this solution is an assembly as a dedicated political stage with a recurring formal connection to the sovereign people.

The solution to the problem of plurality, in other words, is positive law, and its means is *representation*.

Conclusion

A Political Political Theory of Political Representation

Representation has been a prominent issue in the field of political theory for half a century now. The reigning research tradition on this topic mixes a formalised notion of authorised action at a distance with concepts from democratic theory. Standard debates revolve around issues like first- or second- best cases for representation,[675] mandate versus independence,[676] the compatibility of representation with democracy for better or worse,[677] and, recently at least, the possible expansion of theoretical work on representation to realms of political theory beyond the institutions of advanced democratic states.[678]

My project has left this tradition entirely behind because, I have argued, it fails to capture the central feature of representation within modern democratic politics. It has resulted, by the end of this dissertation, in a reworking of the concept of representation into something much narrower and more specialised than we might be familiar with, and it has yielded a normative theory of representation that is grounded in the necessity of positive law as a solution to the problem of plurality. Taken as a whole, this dissertation forms an argument for political representation as an ideal and raises questions about the institutional arrangements to facilitate this ideal and their implications on popular sovereignty.

In the first section of this conclusion I recapitulate and summarise this

[675] Brennan and Hamlin, "On Political Representation," 112–115.
[676] Pitkin, *The Concept of Representation*, 144–167.
[677] Landemore, "Is Representative Democracy Really Democratic?"
[678] Brito Vieira and Runciman, *Representation*, 149–181.

argument, and in the second section, I treat very briefly these institutional arrangements. This treatment is necessarily short, and it is here to guide us in future avenues of research on the topic. In the third and final section, I draw some relevant political conclusions.

A Theory of Representation

A proper history of the idea of representation would begin well before Hobbes; a proper history of the practice would begin well before any seventeenth century debate on parliamentary power. This dissertation is not a historical study or a history of ideas, and its treatment of early modern philosophers of representation makes no pretensions to be exhaustive in any sense. What I have sought to accomplish in the first three chapters is quite different.

From Hobbes, we do not get a theory of representation. The oft-cited Chapter XVI of *Leviathan* proposes a very innovative way of attributing authorised political action, which Hobbes calls *personation*. In *Leviathan*, and only in *Leviathan*, does Hobbes also describe this phenomenon with the word 'representation' as well. His use of this word is ideological, not philosophical; it is relevant to a contemporary political debate. And while personation may not be a fully formed theory of representation, it does leave with us with a brimming toolbox of concepts which an actual theory of representation must

grapple with. Hobbes' explication of the *person* might be remembered for the confusing distinctions between natural and artificial persons, but the real contribution is the modelling of various methods of granting limited authority to a political actor. These are the first stabs at what I call *f-functions* of representation. Hobbes' concept of *dominion* or *ownership* allows for assigning responsibility in a more complex way than simply reversing the direction of authority. And his disquisition on unity in multitude, with its emphases on publicity and law, lays the groundwork of the problem of plurality.

A century later, Rousseau writes about representation in terms that are a bit more recognisable to us, but unlike Hobbes, he condemns the practice rather vociferously. At the same time, he brings three insights that are key to my understanding of representation. First, Rousseau separates sovereignty from government, and both from state. Sovereignty can only be popular, as far as he is concerned, but constituted government can take a variety of forms as long as it is bound by law. Second, he argues for the necessity of positive law, and distinguishes this form of political action from others by its generality. Third, he draws an intimate normative link between positive law and popular sovereignty, but, importantly, he does not propose representation as a means for manifesting this link, nor does he suggest any other realistic alternative. What he does do, finally, is leave his readers with unsolved puzzles on unanimity, universality, and generality.

Rousseau is so widely read over the coming centuries, that it is a bit of

a mystery that so much of these insights is lost. He shares with Hobbes a radical assumption of individualism and a notion of sovereignty ultimately grounded in a diverse multitude. But by separating government from the question of sovereignty — and, crucially, separating law creation from government — he leaves an opening for a separate assessment of the means of making decisions which are not general. Rousseau wishes to preserve generality both in law and in some kind of agency for overseeing government, and securing for the sovereign people some kind of partial agency in the performance of its duties. But where Rousseau is able to separate government as such from his analysis of state and sovereignty and generality, he is unable to make a parallel separation for the means of making the very general decisions he wants to preserve as expressions of sovereignty. He is thus left with the challenge of dealing with both plurality and generality in a way that seems to require unanimity in a place where unanimity is impossible.

Sieyes takes up the challenge wholeheartedly a few decades later. He brings a more mature and modern take on both positive law and the institutions of state. He isolates *political decision* as a category of action. He refines Rousseau's notions of popular sovereignty and government, as well as of positive law, avoiding (for the most part) the ambiguities and double meanings of these terms which account for so much of the confusion in Rousseau. He further introduces two new principles that bridge the gap in Rousseau's thinking. *Indirectness* and *exchange* are what allow for the diverse, plural political stage that maintains its separation from government to

be the locus of both legislation and executive surveillance. Sieyes' work fully develops the concept of indirectness, as it is useful for him in his arguments against federalism as well as in his evolving views on assembly and the monarchy. Unfortunately, his concept of exchange is never as fully developed, and so he leaves us without a fully formed theory of voting or decision-making processes inside and out of a representative assembly.

It bears emphasising that the above is not an exhaustive history of ideas about representation. These predate the seventeenth and eighteenth century discourse which I spent three chapters on. What is special about the period I have chosen to cover and the three men whose work I have analysed here is that they capture the moment when popular sovereignty and rule of law meet — and when absolutism, local control and improvisation, and natural law definitively fade. None of the three posit a mature theory of representation (though Sieyes comes close), but they do leave us with all the concepts we need to create one.

And the way to set about doing this, and for which I have argued, is to begin not with institutions and then hand out tasks, but to begin with the operations of a political order and then determine the nature of institutions necessary for them. To do this, it is first imperative to properly define a *decision* and then, as Sieyes tried to do, a *political decision*. A decision is a voluntary action involving *intention, deliberation, time,* and *reason*. It is different from *choice, habit, rule,* or *norm*. A political decision is a decision made under conditions of authority in the context of institutions of state.

Political decisions, too, can ascend a ladder of abstraction, as decisions become decisions about other decisions, to rules and norms and, ultimately, positive law. If we consider the various classes of political decisions at any level of abstraction — a general ordering troops into battle, an ambassador voting no at a U.N. General Assembly, a clerk rejecting your driving license application, a judge announcing a verdict and sentence, a state prosecutor issuing an indictment, or a parliament creating a law — we cannot escape the finding that the various kinds of authorised decision making in the context of institutions of state except for the creation of law all have more in common with each other than any one of them has with the decision to create a law.

Law, I have argued, has four properties that distinguish it from other political decisions. It is *public*. It has clear *sources* or pedigree. It has a set of norm-applying *institutions* to give it force in specific situations. And, most importantly, it is *general* in respect of people, cases, and time — as well in the general spirit of its wording. This generality imposes all sorts of limitations and boundaries on its content and, necessarily, on the process of its creation. It leaves law, uniquely among political decisions, without the property I have called *referability*, something which privileges textuality in law far above its already privileged role in other forms of political decision. This is what the cynical doctrine of recent decades known as *originalism* and identified with U.S. Supreme Court Justice Antonin Scalia[679] pretends to overlook; you cannot just scour the old editions of dictionaries to figure out what lawmakers

[679] Antonin Scalia, "Originalism: The Lesser Evil," *University of Cincinnati Law Review* 57 (1989 1988): 849.

intended when a law was created because they probably had different reasons for supporting a proposed law, as did the minority who opposed it. What they did agree on was the text itself. The difference between law and its lack of referability, and administrative, executive, judicial, military, and other kinds of political decisions, which are handed down for specification and referred up for clarification, could not be starker.

Once this very special class of political decision is isolated, it becomes necessary to determine what possible method can be devised for making it. This discussion is logically prior to a normative discussion about what method is most advisable or just or efficient. It is, rather, a conceptual discussion of which method or methods are actually possible given the constraints of the definition of positive law as a political decision meeting four minimal conditions. I have followed over two millennia of political theory in pursuing this discussion in relation to numbers — that is, examining the number of authorised political actors participating in such a decision.

A brief examination of political decision making by a very large number — *many* in the sense of 'all' or 'all-affected' — shows that at most only two of the four conditions of positive law can be maintained at any time. Direct democracy is certainly possible, and it has for a long time been technologically feasible, but it can work only if we first sacrifice the rule of law. Very small numbers run into the same limits; we cannot maintain all four conditions of law creation at the same time. The only number that works is something on the order of a three-digit number — still a tiny fraction of the population at

large, but large enough to preserve the dynamic of a *many*, and, crucially, too large for consensus, collegiality, and unanimity, and thus too large for referability. This is the only condition under which a decision as outcome can preserve publicity, pedigree, the role of separate norm-applying institutions, and, most importantly, generality.

The number alone, however, does not provide an adequate response to the challenge taken up, but never brought to completion, by Sieyes. The values of indirectness and exchange can only manifest themselves if this group of authorised political officers numbering roughly in the hundreds have a place for the entire process of making such a special political decision — a *stage* in every sense of the term. And their role in that place must itself have a formal connection to the expressed preferences of the people at large.

These, then, are the three conditions for representative assembly: **number**, **place**, and **formal connection**. The argument for representative assembly as a means of law creation and partial agency in government rests on three equally important and logically independent theoretical foundations. First, popular sovereignty will require the separation of government from state and sovereignty, and some means of both supervising its daily operations and bounding it with general norms. Just as government and the application of norms require appropriate institutions, so will these expressions of popular sovereignty require their own institutions. Second, the isolation of law creation from every other form of political decision making gives us the means by which popular sovereignty is expressed — in positive law. And third, the argument on

numbers gives us representative assembly as the only possible institution that can do this work. **Popular sovereignty**, **positive law**, and **numbers**: these are the theoretical foundations of a very special political phenomenon, representation.

The older research tradition of representation gave us tools for dealing with authorisation or legitimacy or, occasionally, coordination. But, I have argued, this approach takes us straight into the fundamental problem of politics, the problem of plurality. This is not a problem that can be solved with more efficient coordination or information sharing or preference ordering. It is a problem that can be manageably mitigated inside a constituted political community by general norms taken in the general spirit, and representation is the means to do so.

In Chapter 6, I argued that this approach made for better political theory. In the remainder of this Conclusion, I'd like to argue that it makes for better politics too. First though, we need a better handle on what a 'formal connection' can and cannot be.

Avenues of Future Research

If representation is the means by which an irreducibly diverse sovereign people achieves limited unity via general norms, then theoretical work on

representation must also look at those sovereign people themselves and their participation in the enterprise of representation. I have not had the space to do so in this dissertation, but participation — or, for that matter, voluntary non-participation — in representation constitutes a second component of any serious research project on the topic. But it is impossible to carry out without this preliminary project — without a comprehensive theoretical foundation of what representation is, what makes it a special phenomenon in public life, and what social problems it seeks to solve and by which means. This dissertation has been an attempt to establish just such a primary foundation.

This second component is another project, beyond the scope of this work. We might consider the project of this dissertation a pure theory of representation and the complementary project I am here suggesting an applied theory of representation. It must focus on the institutions and practices which secure legitimacy for the order of rules and oversight which political representation provides. There is of course a surfeit of comparative work on electoral systems,[680] but political theory has not been able to adequately address the question because it has not been working with an adequate theory of representation. Political theory is not always sensitive to competing engagements of political participation, and it is often entirely detached from the properties of law that make it a special kind of political decision rather than just a binding outcome of an iterated game.

Here I very briefly to sketch out the questions an applied theory of

[680] A very thorough recent collection can be found in Diamond and Plattner, *Electoral Systems and Democracy*.

representation should seek to answer. The two that are of immediate interest are the engagements of participation and the mechanics of the formal connection. The entire project is predicated on understanding representatives as performing an action in plurality and related both to their constituents and to each other in a plural manner. Functions mapping authorisation are obviously inadequate, but we will want to have a grasp of the various levels of accountability — between representatives and the people at large, among representatives, and between representatives and the other organs of state. Such accountability varies along the time dimension, too, sometimes being forward-looking or backward-looking ('promissory' and 'anticipatory' in the formulation of Mansbridge[681]). Accountability differs from personation or authorisation; it does not directly proscribe or prescribe action. In Philp's definition, it is the requirement 'to inform and explain/justify… conduct,'[682] and it captures in it the various plural-to-plural relationships inherent to representation.

An examination of the engagements of participation would seek to explain what citizens achieve by participating in a representative system that makes laws on their behalf and supervises vast and intrusive governments on their behalf as well. In particular, it needs to come to terms with the different, and often competing, engagements involved. I call the two classes of engagement *voice* and *vote*. We are fortunate in English to have two different words for these concepts; in other languages (French and Hebrew, for

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[681] Mansbridge, "Rethinking Representation," 516–519.
[682] Mark Philp, "Delimiting Democratic Accountability," *Political Studies* 57, no. 1 (2009): 32.

example), these are described by the same word. Even in English, we have the ambiguous phrase 'to have a say,' which elides the distinction between the two.

But these are two completely different engagements with representation, and any institutional design — any method of voting or coalition forming — must come to terms with the difference. What I call *vote* is the ability to actually influence the outcome of any political action. It is similar to the weights attached to some of the choice models discussed in Chapter 6. To have a vote, in this sense, is to be able to identify the impact of one's one preference in how an issue is settled, whether by legislation or by any other authorised political action.

What I am calling *voice*, on the other hand, is the measure of being heard, or needing to be heard, before a collective decision is made, regardless of whether this will have any impact at all on the outcome. Mill attaches much importance to voice in his *Considerations on Representative Government*, asserting that 'to have no voice in what are partly his own concerns is a thing which nobody willingly submits to.'[683] Elsewhere in the same volume he equates the absence of voice to 'exercis[ing] no will in respect to... collective interests.'[684] What he does not acknowledge, however, is that having a voice is a radically different kind of engagement from having an actual impact on an outcome, and that the two are not correlated. On the contrary, he describes a

[683] Mill, *Considerations on Representative Government*, 181.
[684] Ibid., 57.

'numerical majority' as 'alone possess[ing] practically any voice.'[685]

The distinction is underdeveloped in political theory and not fully appreciated in institutional design. Urbinati makes a nod to the difference in a very limited context, comparing the different notions of equality implied by *isonomia* and *isegoria*,[686] the equal 'distribution of suffrage' and the equal 'distribution of voice,' respectively.[687] An even earlier hint can be found in the Sieyes-Paine dialogue alluded to in Chapter 3. In discussing bicameralism, Paine distinguishes between splitting an assembled body for discussion from splitting the same body for counting votes.[688]

As we have already established that representation is not just an authorised action at a distance that can be modelled in a simple f-function, and that a representative is not just *speaking for* or *acting for* someone else, we will also need to determine how a representative's power to speak and act do count, and how they express the capabilities of ordinary citizens to speak and act. To treat voice and vote as identical, or, even if not identical, highly correlated, will trip us up. Far from being correlated, these two engagements can often be at cross-purposes with each other.

This is a complex research project, as it involves empirical research on electoral methods, and it must bring on-board the concept of representation as determined in this dissertation. It will need to actually formalise the formal

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685 Ibid., 145.
686 Nadia Urbinati, *Mill on Democracy: From the Athenian Polis to Representative Government* (University of Chicago Press, 2002), 60.
687 Urbinati, *Representative Democracy: Principles and Genealogy*, 40.
688 Paine, "Thomas Paine's Answer to Four Questions on the Legislative and Executive Powers," 243.

connection that links popular sovereignty to the powers of legislation and surveillance.

Let me give one example of the disconnect between voice and vote. In the United States in the 1990's an electoral reform was introduced known as majority-minority districts.[689] The stated purpose of this reform was to increase the number of African-Americans in the House of Representatives, and this was achieved by redrawing congressional constituencies to create districts with overwhelming black majorities. In the states of the Deep South, the changes were dramatic and their results were partially unanticipated. Before 1990, Southern states sent congressional delegations that were nearly all white, and roughly evenly split between Democrats and Republicans. The white Democrats who won seats usually depended on a coalition of black and white voters, while the white Republicans had overwhelmingly white voters. With the advent of majority-minority districts, these same states began to send a few black Democrats to Washington — and a whole lot more white Republicans. For the first time since Reconstruction, the U.S. Congress had a critical mass of black congressmen raising issues of crucial importance to their community, but, after the 1994 election, they were now all on the losing side of the party distribution.[690]

The issue was a big source of resentment among many Democrats, particularly white liberals from outside the Deep South during the long winter

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[689] C. Cameron, "Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?," *The American Political Science Review* 90, no. 4 (1996): 794.
[690] Majority-minority districts have largely disappeared in the last decade, and the cascading effects of that worth studying too, but not relevant directly to this discussion.

their party spent out of power in the U.S. House of Representatives between the elections of 1994 and 2006. Did this reform serve its intended beneficiaries well? At present, we lack a theoretical framework for fully assessing this question. A theory of representation that only sees authorised action or a complicated model of social choice cannot account for the benefits of increased voice that this reform brought, even at the cost of decreased vote; nor can it tell us if the cost of one outweighed the benefit of the other. We lose something very fundamental about politics when we focus only on outcomes, as though each particular decision carries the same weight as one formulated and carried out in the strictures of what we earlier called 'generality cubed.' It bears emphasising that the unanticipated results of majority-minority districts were not merely a coordination failure in the manner of left-wing voters making protest votes in the presidential elections in the U.S. in 2000 or France in 2002 and thus dooming their standard-bearer. It is not a problem of empirics, but rather a built-in theoretical tension in how representation works and what all that indirectness and exchange can actually provide for its sovereign people.

A research project that builds on the theory of representation as enunciated in this dissertation could fruitfully mine the rhetoric of electoral reform in various mature democracies.[691] When people complain of 'wasted votes' in status quo electoral systems, it is often nonsense, but deeply interesting nonsense that reveals much about the payoff citizens expect from

[691] Alan Renwick, *The Politics of Electoral Reform : Changing the Rules of Democracy* (Cambridge ; New York: Cambridge University Press, 2010); Reuven Y. Hazan and Monique Leijenaar, *Special Issue on Understanding Electoral Reform* (Abingdon: Routledge, 2011).

participation, and occasionally to the competing roles indirectness plays. A Labour voter in a southern constituency that goes to the Liberal Democrats and a Labour voter in a very northern constituency that goes to the Scottish Nationalist Party might both complain about a wasted vote, but they probably mean very different things, not least because in much of England (but much less so in the rest of the United Kingdom), general elections have come to be understood, at least partially, as indirect elections for the executive.

Lurking behind all these questions is the basic problem of legitimating collective decision making even in the face of reasoned opposition. How much voice and vote, and in what combination, does a well-structured political community need to grant all its citizens so that they continue their constructive participation in its institutions and with its rules? Singer addresses a version of this problem with the title 'The Problem of Minorities,' but I believe it needs a thorough re-examination in light of the larger problem of plurality, as well the nexus of law and representation.[692]

Of special interest in this context are two related problems, what we might indelicately call *haters* and *losers*. The latter are constituencies which constitute semi-permanent minorities in politics — that is, not on the losing side in a particular decision or outside a specific coalition, but structurally excluded from any conceivable social or legislative majority. The kinds of engagements a representative system must provide in such a case seem different, intuitively at least, from those it must provide to accommodate a

[692] Singer, *Democracy and Disobedience*, 42–25.

more transient minority. The former are an even greater challenge, as they would be the minority that is committed to breaking the rules and upending the very system that legitimates a standing legal order. How does institutionalised representation accommodate them? And how can it prevent losers becoming haters?

Finally, future research on engagements and mechanics of representation needs to account for how people choose to participate at all and, importantly, what it means if they do not. In José Saramago's novel *Seeing*, voters ignore polling until four o'clock in the afternoon on election day, and then stream in to cast blank ballots. The result — thirteen percent for the 'party on the right,' nine percent for the 'party on the middle,' and two and a half percent for the 'party on the left' — so exasperate the government that they force a second election. When this one yields an even higher percentage of blank ballots, the prime minister deems it a 'vile assault on the very foundations of representative democracy.'[693] Blank ballots, of course, are not the only way citizens can exercise an *exit* option in a modern representative system. As with voice and vote, an applied political theory of representation should be able to shed some more light on the problem of *exit* in representative politics, as well its uses, abuses, risks, and the circumstances of its potential efficacy.[694]

Such a research project, an applied theory of representation, is made

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[693] José Saramago, *Seeing* (Houghton Mifflin Harcourt, 2007), 31.
[694] My use of the terms "voice" and "exit" are, naturally, inspired by Albert O Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms* (Cambridge, Mass: Harvard University Press, 1970).

possible by the completion of this one. Hopefully it can yield findings about the normative mechanics of modern parliaments — how they are elected, the nature of coalitions, their relation to executives[695] — that can be measured by their adequacy in dealing with the problems of plurality rather than just 'stable government' or efficient preference aggregation. This is crucial both to have a mature discourse about electoral reform in countries where there is interest in such an endeavour, as well in newly democratising countries that wish to break free of the pattern of one-man, one-vote, one-time post-liberation elections.

Conclusion

It is the rare researcher who does not develop strong feelings for his subject. It has been impossible to write so much about representation and its relation to the problem of plurality and not feel just how threatened it is in the advanced democratic states, and how eclipsed the parliamentary forums for expressing and cultivating this plurality have become. The explosion of civil society has stripped elites of their monopoly on political action and discussion, and this, certainly, is a mostly welcome development. At the same time, alternative forums besides the representative 'stage' have cropped up and arrogated to themselves tasks that they are ill-suited for. I am convinced that

[695] Wheare, *Legislatures*.

we are poorer citizens for this.

This trend is by parts institutional, normative, and ideological. In a strictly institutional sense, we are witness to the growing power of executive[696] and judicial powers.[697] The former is a response to two large trends of the recent decades. First, the reality of post-1945 national security challenges bears little resemblance to those of the era before, which were characterised by eras of peacetime punctuated by occasional wars. In the last seven decades, and even more so since 2001, we have become accustomed to states and governments that are always on alert to perceived threats. This is unlikely to change. Second, politicians operate in a very different media environment, where quick responses are valued and slow deliberation often impossible. In recent years, the media environment in which politics operates has become characterised not just by its rapidity and immediacy, but by its fragmentation. Where radio and television were once dominated by one or at most a few outlets of middle-brow, broad-based, publicly minded content — often publicly owned — today there is an available forum for any discussion and the option, much exercised, to exclude or ignore other views. This kind of political interaction Manin calls 'audience democracy,'[698] but he does not seem to recognise it for the poor substitute for representative politics that it is.

Executive power isn't the only claimant on what were once parliamentary prerogatives, and this institutional change flows from a third,

[696] As celebrated in Eric A. Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (Oxford University Press, 2011).
[697] As lamented in Jeremy Waldron, "The Core of the Case against Judicial Review," *The Yale Law Journal* 115, no. 6 (April 1, 2006): 1346–1406.
[698] Manin, *The Principles of Representative Government*, 218–230.

normative trend. Recent decades have seen an explosive growth in the discourse of rights, both in political theory and in the wider world of contemporary politics. The notion that divisive social issues are political in nature and require all the tools of political practice — arguing, bargaining, voting — has taken a backseat to the notion that some ordering constitutes a 'trump' and that it must therefore be addressed immediately and without recourse to public debate, public opinion, or public judgment. It has also, under the guise of 'human rights,' taken politics outside the state with mostly deleterious effects that go entirely unrecognised by a global human rights community in love with its own perceived sense of superiority. In such a conception of politics, the slow careful work of mobilisation and debate counts for very little.

And this feeds into a fourth trend, which is more ideological than anything else. At the same time that a large variegated media environment has seemingly disintermediated politics from the sovereign people, there has been a countervailing loss of faith in democratic politics and the capabilities of the public to make prudent judgment. The third and fourth trends even occasionally feed into each other. Elites mistrust the popular sentiments and use rights to impose unpopular outcomes on a population that reacts with an impotent backlash. The process of arguing and making and then correcting mistakes is circumvented, and we are poorer people for it. The sum total effect of all four trends has been a steady devaluation in representative assemblies. People can watch people they are predisposed to agree with

scream at each other in reality-show-style political entertainment; elites can transfer more economic and foreign policy to ‘professional’ bodies (or even supranational ones) that are immune from normal modes of democratic accountability. But nothing can replace the floor of a representative parliament, where all the relevant cleavages of a political community are replicated, and where speech acts and political decisions are regulated by an occasionally quaint, highly formalised set of rules, and where the outcomes are expressed as general norms, publicly accessible compromises that involve public judgment at every step, and that the public, for better or for worse, will have to be responsible for and inevitably revise accordingly. A stage, in other words, where politics can be practised during business hours, and which, when the day is over, can be left behind too.

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