

Prepared for the Legal Theory Workshop at Yale Law School
February 2010

Dear colleagues:

What follows are excerpts from three chapters of a book manuscript that I am working on. This is most definitely a work in progress, so there is still time for me to really take your comments into account in my thinking.

I've included the table of contents for the whole book, to satisfy (or pique) your curiosity, but I have shared text from only one line of argument about popular sovereignty and representative government, leaving out almost entirely a separate but intertwined argument about religion. (That's for another workshop...)

Thanks very much for having a look at this.

-Bryan Garsten

The heart of a heartless world:

liberal religion and modern liberty

Bryan Garsten

DRAFT: Not for circulation or citation.

© 2010 Bryan Garsten

Table of Contents

Chapter One: The liberal stance towards authority4
Religion and freedom.....
Freedom through representation
Neither ruling nor being ruled.....
Being sovereign without ruling.....
A more modest sovereignty.....
Recent debates about religion and liberalism
Summary of the argument.....

PART ONE: Politics

Chapter Two: Usurping popular sovereignty.....
Who speaks for God?
Who speaks for the People?
Re-interpreting the French Revolution
Re-interpreting tyranny of the majority.....
The problem of democratic government.....
Why usurpation is unavoidable
Usurpation in America
Napoleon as exemplar

Chapter Three: Competing to speak for the people.....
Elitist elements of representative government.....
Beyond the mixed-government interpretation.....
Who will separate the powers?
Multiple and competing representations.....
How to think about voting
Carl Schmitt's misunderstanding.....
Against cabinet government

Chapter Four: Being Represented.....
Partial and divided identifications
Trust and jealousy.....
Civil society as a vantage point.....
The virtues of alienation.....
Imagination and self-representation
Judging

PART TWO: Religion

Chapter Five: Usurping divine right

- The instability of divine right.....
- Parties and sects.....
- Representation in the Church.....
- Prophets and miracles.....
- Unifying the two heads of the eagle
- Civil religion
- Political theology

Chapter Six: Competing to speak for God

- Polytheism and pluralism
- Hebrew federalism
- The multiplication of sects.....
- Church to sect to denomination
- Vox populi* vs. *Vox dei*.....
- The self-destruction of Christianity?

Chapter Seven: Being liberal

- Varieties of non-atheism
- Why liberalism needed the Romantics
- Kant, French liberalism, and American Transcendentalism
- The strange desire to believe
- Illusion and self-deception.....
- The pleasures of the unhappy consciousness.....
- The dangers of self-deification and idolatry
- Ecstasis*, standing outside ourselves

Chapter Eight: Judging liberalism

- Why being represented requires being liberal
- Why being liberal requires being represented
- The problem of internal authority and identity.....
- The problem of judgment.....

Chapter One: The liberal stance towards authority

What distinctive form of citizenship do modern representative governments require? What kinds of religious beliefs and sentiments threaten that form of citizenship, and what kinds support it? These are the central questions of this book...

...In representative democracies most citizens do not participate in the activity of ruling or governing. Insofar as citizens engage with politics at all, the activities in which they are most likely to participate are watching or hearing about politicians, judging them, and communicating their judgments by voting in elections or by voicing their opinions to others. As ordinary citizens, we are spectators and judges much more often than we are governors. In fact, the structure of our system of government seems designed to frustrate any effort at widespread popular involvement in the activities of rule. How should political theorists respond to these facts?

Lamentation is one response – we can wish that our system allowed for more participation and for a more republican sort of citizenship. Rationalization is another option – we could explain why the principle of popular sovereignty itself is misguided or utopian. In what follows I want to make my way towards an alternative to both of those responses. I want to draw attention to a fundamentally democratic line of thought that explains why it might make sense to put most citizens into this position – the position of spectators and judges of political rule rather than participants in it. It is a line of thought that I find in some of the first thinkers to call themselves “liberals” in

France and also in some of the American founders, a line of thought that was central to early arguments for “representative government” after the democratic revolutions in the U.S. and France.

A participatory republican will immediately jump to complain that this way of thinking is little more than a rationalization for locking the people out of their rightful place as sovereign. But the argument to be advanced here is that while representative governments do not place us in the position of ruling ourselves, they do aim to place us in the position of sovereign. This is the peculiarity of our position as citizens in representative governments: we are meant to be sovereign without ruling. I will have to explain what I mean in a moment, but let me say at the outset that I think that a failure to appreciate the peculiarity of this aspiration often leads political theorists to describe poorly the challenges that confront citizenship in our systems, too often oscillating between lamentation and rationalization. The misunderstandings here resemble those that greeted the writers who defended representative government in post-revolutionary France. Those liberals had political rivals on their left and on their right, and they were caricatured from both directions. Jacobin republicans dismissed them as reactionaries, while monarchists rejected them as radicals. Neither of the traditional parties truly understood the new form of government being proposed. To a surprising extent, debates in political theory today continue to reprise those old controversies, and the distinctive character of citizenship under representative governments continues to be lost amid the arguments between participatory republicans and various sorts of elitists.

The pull of the participatory ideal is strong; it is hard to escape the notion that freedom requires involvement in rule. This notion seeps into our understanding of representative government, allowing us too often to rest satisfied with what I will call the *simple model* of representation. The simple model is one in which the most important fact about our representatives is that they are our agents. The simple model is not just another name for the traditional anti-Burkean position that representatives should be delegates rather than trustees, because many

understandings of trusteeship also fall into the simple model; though they allow a representative more discretion, they still conceive of his or her task as one of being a (deliberative) agent of the people. The key point about the simple model of representation is that it aims to show us how we can see the actions of politicians as being somehow *our* actions, and so it aims to show us how we can think of representative government as a version of self-government.

Why are we so wedded to the notion that we as citizens are (indirectly) ruling ourselves? I think it is partly because we make the following assumption: If we are not ruling, we must be submitting to the rule of others. We do not want to be *subjects*. The simple model of representation promises to reconcile the political, sociological observation that we seem to have rulers with our desire not to be ruled by others. But perhaps the basic assumption – that we have no options other than ruling and being ruled – can be challenged. To put forth that challenge was, I want to argue, a fundamental theoretical aim of the liberals arguing for representative government in France after the Revolution...

Neither ruling nor being ruled

The idea that citizens should *rule* was the position of the Jacobin republicans who supported popular sovereignty. The idea that they should *be ruled* was the position of the old regime monarchists who supported divine right. The liberals were satisfied with neither position; their political goal was to offer an alternative to both the Jacobins and the monarchists, and thus to end the struggle between those two parties. They wanted to preserve the gains of the revolution and yet bring the revolution to a close, finding some way to enshrine the new freedoms and liberties in a stable constitutional order. In time many of them came to think that a constitutional monarchy was the best means of

doing this, but their political defenses of monarchy should not be confused with the arguments of monarchists such as Joseph de Maistre. When liberals such as Constant and Guizot supported the Bourbon restoration they thought they were supporting, as Chateaubriand put it, a “monarchy built on the basis of equal rights, of morality, of civil liberty, of political and religious toleration.”¹ Even when supporting a king, liberals aimed to articulate a position distinct from both that of divine-right monarchists and that of the popular-sovereignty republicans. If many observers thought the liberals were opportunistic trimmers without a principled position of their own, that was because few could imagine a coherent political stance outside the traditional alternatives of ruling and being ruled.

Those two alternatives were the ones that had structured thinking about politics at least since the ancient Greeks. In Aristotle’s political science, for example, political regimes were classified first and foremost by the way in which they answered the question, who rules?² If one individual ruled, the regime was either a kingship or a tyranny; if a few ruled, it was an aristocracy or an oligarchy; if all ruled, it was a “polity” or a democracy. In practice many constitutions were “mixed” in various ways, but these mixtures never escaped the fundamental alternatives; they only distributed different parts of rule according to different principles. In polities and democracies citizens took turns ruling and being ruled, but Aristotle never conceived of the possibility that they could escape these categories altogether. At any particular moment in time, he assumed, any particular citizen was doing one or the other.

The challenge that liberals posed to this traditional account of politics can be seen if we ask Aristotle’s question, who rules?, about the systems of representative government that we have inherited from them. What answer would we give?

In ordinary political rhetoric we often hear that “the people” rule. Yet we also know that there is something ideological about this reply. I know that I am one of the people, and yet I do not remember ever having ruled. Like most citizens, my political experience consists mainly in following

laws that are drafted and approved by other people, and in being punished if I do not follow those laws.

It is true that I can participate in two important processes related to ruling: I can participate in the process through which we select some of our rulers, by voting or even by becoming active in campaigns. And I can participate in the process through which public opinion is shaped, by writing, canvassing, speaking, and so on, on the understanding that elections require our rulers to pay some attention to public opinion. But neither of these activities really adds up to “ruling” in the ordinary sense of the word. Perhaps they make our rulers somewhat accountable to us, but they do not contradict the fact that they rule and that we do not. Accountability is necessary precisely because someone else is in charge.

With this observation in mind, it is hard not to conclude that the language of “self-rule” obscures more than it reveals. Historians of political thought who are familiar with the truly republican aspirations found during the revolutionary moments in the United States, Great Britain and France marvel at how easily we today use the language of those revolutionaries to talk about a system that allows so little room for citizens to actually participate in governing themselves. Our practice of “democracy” seems to them little more than a mockery of the democratic aspirations of the Levelers or the Jacobins or anti-federalists like Brutus and the Federal Farmer.³ Empirical political scientists and sociologists agree with these historians on the fundamental point. They too have pointed out the obvious gap between the rhetoric of self-rule and the elitist, oligarchic reality of modern democratic politics.⁴ Participatory democrats agree too: their point is that we should reform representative institutions to give the people more of a role in government, and thus to make good on what is now only a promise, the promise of self-rule. What practically everyone who looks at the liberal system of government notices, in short, is that it does not permit the people to rule. If we were to follow Aristotle in conceiving of only two possible positions for individuals with regard to

rule – that of ruling or being ruled – then the observation that in representative governments most of us usually are not ruling would require us to conclude that we are being ruled – that we are subjects. This is the pessimistic conclusion to which many observers are drawn.

Those who want to oppose this conclusion often find themselves drawn into the distinctly modern language of political representation. This language is often used as a way of escaping the dilemma posed by the choice between ruling and being ruled. Representation offers the possibility that we can rule and be ruled *simultaneously*. To conceive of this possibility we only have to imagine that the people doing the ruling are acting as our agents, and therefore that in submitting to their rule we are only submitting to our own actions. A whole set of debates then arises about precisely what sort of relationship we would have to have with our representatives to make this idea plausible. Some argue that the representatives would have to “mirror” or somehow embody certain substantive traits of the citizens, while others argue that the relationship could be one created by a purely formal process of authorization such as the one described by Hobbes in chapter sixteen of *Leviathan*.⁵ But those debates between substantive and formal representation – as well as related debates between substantive and descriptive representation and between trustee and delegate understandings of representation – all take place within the framework of a theory that aims to show how citizens who do not seem to be involved in the work of ruling can nevertheless be thought of as agents of self-rule rather than as subject to higher authorities.⁶ The modern idea of representation aims to reconcile the fact that some people seem to rule others with the idea of human equality. It aims to offer most citizens a way of escaping the view of themselves as ruled subjects.

It worth noting that not all concepts of political representation are meant to show that citizens are not subjects. In medieval understandings of representation, representatives were sent to state their constituents’ wishes to the monarch and to bind their constituents to the monarch’s decisions. There was no illusion that the state of being represented mitigated the state of being

subject to a higher authority. That illusion is one that is unique to the notion of representation found in modern political thought. According to the modern notion, the ruling government is not a power *to which* citizens represent themselves; it is *itself* a representative of those citizens.⁷

However: While the modern notion of representation does offer a possibility not imagined in Aristotle's politics, it does not leave behind altogether the dichotomy central to Aristotle's approach. The two possible categories in which individuals can fit remain those of ruling and being ruled. The innovation of modern representation consists in the idea that we can occupy both categories at once. But as we have already seen, this notion of representation often seems to fly in the face of ordinary experience. The sensation of being ruled will always be more familiar and direct than the idea that we are metaphorically engaged in self-rule. This is why defenders of the modern notion of representation find themselves resorting to mysterious, even quasi-mystical language to explain what they mean, while doubters find it easy to dismiss the idea of representation as an obfuscation designed to fool subjects into accepting their subordinate political status. Aristotle's dichotomy is one that captures the alternatives that ordinary political experience seems to offer, and the effort to escape the dilemma by grabbing both of its horns at once raises at least as many difficulties as it solves.

“Representative government” – the sort of political system characterized by regular elections, multiple parties, separation of powers, protections for freedoms of speech, assembly and religion – was a distinct innovation defended by the post-revolutionary liberals, and it aimed to offer citizens a much more radical escape from the Aristotelian choice between ruling and being ruled than modern “representation” could offer. In representative government, citizens are meant neither to rule nor to be ruled *nor to do both at once*. Instead they are meant to occupy a position outside the whole activity of ruling and being ruled. This alternative position is one that I will call *being represented*. From this unique position, citizens are empowered to *judge* their rulers but not, in the ordinary case

anyway, to be rulers themselves. The key point to understand if we want to see why liberals thought this could preserve the gains of the revolution is they thought it was possible to make the people sovereign without turning them into rulers.

Being sovereign without ruling

Citizens who judge but do not rule were meant to realize a certain kind of democratic sovereignty. The distinction between sovereignty and rule is made difficult to grasp because the term “popular sovereignty” has often been used interchangeably with that of “popular rule.” But an important strand of modern political thought strictly differentiated between the two, and the difference is one that is crucial to the distinctively liberal view of authority that is presumed by the structure of representative governments.

If sovereignty and rule were the same, then the Aristotelian question which we entertained, “who rules?,” could be rewritten as “who is sovereign?” without changing its meaning. But clearly this is not right. For Aristotle, the various possible answers to the question “who rules?” pointed directly to the various types of political regimes that were possible – oligarchy or democracy, kingship or tyranny, and so on. For the modern theorists of sovereignty, however – Hobbes, Locke and Rousseau, to stay with the most familiar – answering the question of who should be sovereign in a polity did not settle the question of what sort of government should be in place. The whole structure of their theories was designed to separate the question of sovereignty from that of rule. Hobbes’s argument for unified sovereignty was compatible with a variety of governmental structures, from a parliamentary assembly to authoritarian rule by a single individual.⁸ Locke’s insistence on government by consent was compatible with a number of different types of

government.⁹ And Rousseau's argument for democratic sovereignty was compatible with monarchy and aristocracy as well as democracy. In fact Rousseau made clear his judgment that democratic government was not at all the best way to administer democratic sovereignty.¹⁰

Rousseau is often treated as if he were a theorist of participatory democracy and popular rule, but he in fact made the strongest case for distinguishing being sovereign from governing or ruling. He made the disjunction between sovereignty and government the centerpiece of the third book of the *Social Contract* and he warned readers not to ignore it. On his account, the distinction between sovereignty and government was the distinction between legislation and execution. The legislative power was analogous to the faculty of the will in an individual person; it was the power to decide what to do, the power wielded by the sovereign. The executive power, on the other hand, was analogous to the physical power of the individual. It carried out the decisions of the sovereign will and applied them to particular situations. The government wielded executive power.

The reason that Rousseau thought the two powers had to remain analytically distinct was that the sovereign will had to remain wholly *general* in order to retain its unique legitimacy. Only legislative acts that were general in scope and application could be viewed as coming from and touching all citizens equally. And only the fact that the general will came from and touched all citizens equally made it compatible with the freedom of all citizens. For if submitting to the general will meant submitting to the rule of particular other people, it would seem to require giving up one's freedom. Democratic sovereignty gained its special claim to legitimacy from the fact that it did not require this, the fact that, as Rousseau put it, "each, by giving himself to all, gives himself to no one."¹¹ But acts of government or rule were *necessarily* particular. They affected different people in different ways, and they reflected particular officials' judgments about particular issues. Therefore, as soon as a legislative power engaged in executive acts of government, it lost its claim to be "no one" and became someone in particular, a ruler with particular goals and interests. If submitting to the

sovereign general will was different from submitting to a ruler, as Rousseau insisted it was – if it was more democratic and more compatible with freedom – that was only because the sovereign could not mandate anything that was not general enough to affect all citizens equally. Only by remaining separate from most acts of government could the sovereign popular will maintain its wholly general character and so preserve its unique democratic legitimacy. What this meant was that the sovereign could not govern.

It is true that Rousseau's sovereign is often described as the source of basic or constitutional law. But Rousseau was quite clear that a) an outsider (the "Legislator") was needed to do the work of actually writing the basic law, at least at first, and b) the sovereign could not bind itself with a fundamental law, since the very nature of sovereignty was to be wholly free at every moment in time.¹² Thus it seems to me that the role of the sovereign in creating any basic law was severely circumscribed by Rousseau. If we leave behind the moments of founding and turn to ordinary politics, the only role for the sovereign that Rousseau took the time to speak of in any specificity was the role of voting at set intervals on two questions: whether the current form of government should continue, and (if so) whether the individuals occupying the offices in that arrangement should continue to do so.¹³ The striking fact about these questions is that both asked the sovereign citizens to regard the work of government as something that *other* people do. The main activities that Rousseau prescribed for sovereign citizens were watching and judging their government. Rousseau described the sovereign not as an active ruler but instead as an authority distinct from the rulers and tasked with evaluating them.¹⁴

The oddity of the position of sovereign in this account emerges especially clearly in the treatment of how citizens should *think* when acting in their capacity as sovereign. When they found themselves on the losing side of a vote, for example, Rousseau asked them to follow a law to which they had not consented. Rousseau's treatment of this situation was striking: he wrote that in casting

their vote they had not been expressing their own preference or opinion about the proposed law; instead they had been expressing a provisional view about what the majority would conclude about the law, for it was the majority view – the general will – that they really wanted to follow. Thus when they lost the vote, Rousseau argued, they should simply realize that they had been wrong in their guess, and they should be pleased to discover what the majority view, the general will and therefore their own will, actually was.¹⁵ The psychological oddity of Rousseau’s response here can be understood as arising from his insistence that citizens acting as sovereign should try to occupy a position different from both rulers and ruled. As rulers, they would naturally treat their own views as authoritative rather than making them provisional on their accord with the majority view. As ruled, they would regard following laws they did not agree with as an act of obedience rather than one of freedom. To vote as a sovereign, as Rousseau described it, was to eschew both of these familiar points of view and instead to inhabit a new and distinct vantage point, one designed precisely to protect us from being contaminated by the activities and attitudes that are a part of ruling and being ruled.

Though the strangeness of this vantage point is most apparent in Rousseau, it was not absent from other social contract theorists. Consider briefly Locke’s theory in the *Second Treatise*. In Locke’s account the state of nature was never wholly left behind, even once a government had been established. By “the state of nature” he meant the state in which each individual could judge for himself how to punish others for violating the laws of nature. This right of judgment was preserved in the midst of civil society, most obviously in the right of revolution.¹⁶ No one else had the authority to judge when a ruler had put himself into a state of war with his people; only the people could make that determination: “*The people shall be judge,*” Locke proclaimed.¹⁷ The key point for us is that this right to judge one’s rulers was quite distinct from a right to rule oneself, which Locke never suggested persisted in civil society. As in Rousseau, sovereignty was different from rule. Sovereign

judgment could be kept by the people even though rule had to be given to kings, princes, aristocrats and other elites – including representative assemblies. The liberal tolerance for elitism that so irks traditional republicans arose not from an opposition to popular sovereignty, but from an insistence that sovereignty was different from ruling. The post-revolutionary liberals would build on this idea that allowing others to rule did not necessarily make them sovereign over us.

...

Summary of the argument

...

The main argument, clear already I hope, is that representative governments ask citizens to occupy a distinctive standpoint with respect to authority – both political and religious authority. They ask this through their structure, which puts in place many different authorities at once, and which thereby complicates the ability of any one of those authorities to claim that it is representative of the people. To understand this structure, it is necessary to understand the problem that it was meant to address. That is where I begin the next chapter. I argue that it is a mistake to view liberals as motivated primarily by a reactionary or anti-democratic sentiment, that they were concerned instead that democratic authority would be *usurped* by demagogic politicians. Usurpation used to be a common term in political writings, even among writers such as Rousseau who were devoted to deeply democratic accounts of sovereignty, but the term has been largely forgotten in contemporary political theory. Reviving it will help us to identify more precisely the relationship between liberal representative government and democratic principles...

Chapter Two: Usurping popular sovereignty

“I do not believe,” wrote François Guizot, “either in divine right or in popular sovereignty, as they are almost always understood. I see in them only usurpations of power.”¹⁸ The two modes of politics that Guizot rejected here were the guises in which ruling and being ruled appeared in nineteenth century France. Popular sovereignty was the means by which citizens asserted their right to rule, while divine right was the ultimate justification for the *ancien régime* hierarchies that had ruled them. To find a standpoint outside ruling and being ruled, as I am suggesting liberals tried to do, required elaborating an alternative to both divine right and popular sovereignty (in the sense of popular rule). In this chapter I want to describe why both of those sorts of politics were unsatisfactory. Guizot’s mention of “usurpation” points to the key issue. Usurpation occurs when someone assumes the mantle of an authority to which they do not have a legitimate claim. When a monarchical succession was contested, for example, supporters of the losing side might call the newly crowned king a “usurper” if they doubted the legitimacy of his claim to the throne. But worries about usurpation were not limited to monarchical contexts. Liberal thought was motivated in part by the observation that both divine right and popular sovereignty were especially susceptible to usurpation.

These two seemingly opposite modes of politics were susceptible to usurpation because both placed ultimate authority in an entity that was abstract and distant, an authority whose will could only be known, if at all, through intermediaries. Neither God nor the sovereign people could speak in a way that could be understood directly. (We will see that even the prospect of direct voting by an entire citizenry would not eliminate this problem for popular sovereignty.) Since there was always a

need for an interpreter, there was always room to debate the interpretations, always room to propose new and better interpreters. There was also always room to accuse the current interpreters of seeking to be the authorities themselves rather than representing the higher authority they were supposed to represent. This was to accuse them of usurping the authority that rightfully belonged to God or to the people. Usurpation occurred when leaders seized authority that rightfully belonged elsewhere – but both divine right and popular sovereignty located authority in an entity that was *always* elsewhere, always outside any particular individuals or offices. Thus they both made it possible to contest *all* exercises of authority as usurpations. After the revolution in France, this feature of popular sovereignty seemed a dangerous source of ongoing instability. The French liberals sought a way of bringing the Revolution to a close (*terminer la révolution*) without losing its accomplishments.¹⁹ But at the level of abstraction we are at here, the problem was not unique to France or to its revolution. The instability would arise within any effort to posit popular sovereignty as “a kind of divine right of public authority.”²⁰ The unstable succession of usurpations unleashed by the French Revolution was merely an echo of the difficulty that had always plagued the politics of divine right.

Who speaks for God?

There is no clearer or more vivid description of this problem as it manifested itself in divine right than the one offered by Thomas Hobbes. Hobbes is probably most famous for his description of the state of nature, in which individuals who judge right and wrong for themselves fall into a war of all against all, a war that can only be escaped by recourse to a powerful sovereign authority. Less well known is his argument that this powerful image of the state of nature was the natural outcome of a politics of divine right.

Hobbes examined government by divine right in detail in the second, often unread, half of *Leviathan*, and in the parallel argument in *De Cive*.²¹ He retold the biblical story of the kingdom of the Jews in the time of Moses and just afterwards. As Hobbes told the story, God had originally ruled over the Jews directly, making his voice heard to them. He had commanded his people “by a voice, as one man speaketh to another.”²² His subjects had included Adam before the fall, then Noah and his companions, and then Abraham, whose covenant had consisted in agreeing to obey “the Lord that spake to him.”²³ Abraham’s covenant had been the one renewed by Moses and maintained until the time of Saul, the one that was supposed to be brought back to life at the second coming. Hobbes maintained that this kingdom of God was “a real, not a metaphorical kingdom,” a regime of civil laws not only about the relation of men to God but also about their relations with one another. In this kingdom “God himself was their king” and God “governed the civil state of their commonwealth.”²⁴ The function of Moses and the other priests who had exercised authority in this commonwealth had been to deliver the commandments of God and thus to act as his “lieutenants or vicars.” These rulers had not ruled in their own name; they had been instruments of God’s authority.²⁵

After Moses, the high priests had sought to continue governing “by divine right, that is, by authority immediate from God.”²⁶ But Hobbes observed that this period of time was one during which there had in practice been *no* sovereign power.²⁷ While the high priests had had the right of governing, they had found they could not always exercise that right. The reason for this was that their subjects had often insisted upon looking for “a sign” before submitting to them. In *De Cive* Hobbes made a similar point, remarking that the Jews under Moses and his successors had been a people “avid of prophets,” meaning that they had sought the advice of individuals who claimed to have immediate knowledge of God’s will.²⁸ The Israelites’ habit of seeking signs and prophets had undermined the authority of the priests.

Hobbes's account suggested that this instability was built into the nature of rule by divine right. So long as a ruler ruled only in the name of God, the subjects always had a reason to disobey him. They could claim that the ruler did not accurately speak for God, that they knew a better statement of the divine will through another channel – through a sign or a prophet. In *De Cive* Hobbes had further emphasized the subjects' independence in this sort of regime by noticing that they kept for themselves the power to punish violations of God's laws.²⁹ Because the laws came from God not man, they could be enforced by any man. The basic point was that under government by divine right, where all rule was in the name of God, all rule could be disputed in the name of God. The effect was that "every man did that which was right in his own eyes."³⁰

Of course, every man doing what was right in his own eyes was also Hobbes's description of the state of nature, and the doctrine that everyone should judge good and evil for himself was one of the pernicious doctrines that he blamed for the dissolution of states.³¹ The anarchy of judgment dramatized in his famous chapter on "the natural condition of mankind" was not merely a thought experiment; it was, he suggested here, the natural outcome of government by divine right.

The reason that anarchy arose under government by divine right was that God's commands could not be known directly. Hobbes devoted a great deal of wit and energy to belittling the claims of those who said they had direct access to God's will. He ridiculed talk of visions, inspiration, miracles, and prophecies, and he suggested that no one who claimed to know God's will could be wholly free from suspicion.³² Perhaps, if Adam had never committed the original sin, we would all have access to the divine will and rule by divine right could avoid this outcome. But in our world, saying that God ruled was effectively the same as saying that no one ruled. The question of who speaks for God was irresolvable because no definitive evidence could ever be given to substantiate such a claim. Everyone could use his or her interpretation of divine right as a pretext for disobeying the government, as they had tended to do in the Mosaic kingdom after Moses himself had died.

In Moses's time, God had intervened directly to resolve disputes about who spoke for him. Hobbes retold a striking story about what had happened when several leaders (Korah, Dathan and Abiram) had gathered two-hundred fifty princes together and challenged the monopoly that Moses and Aaron had held on divine authority: "God caused the earth to swallow Korah, Dathan, and Abiram with their wives and children, alive, and consumed those two hundred and fifty princes with fire."³³ In later times government by divine right continued to spark such controversies about who spoke for God, but God himself no longer stepped in to end those controversies. That is why Hobbes thought that a state, a "mortal God," was necessary. On Hobbes's telling, the Hebrews themselves reached essentially the same conclusion. To escape the continual conflict about who spoke for God, they begged to be given a king of the kind that ordinary nations had. They wanted to be rescued from the freedom to judge for themselves: "Make us a king to judge us, like all the [other] nations," they asked.³⁴ In asking for such a king, the Hebrews were giving up on the aspiration to be governed by divine will or by the closest approximation possible. In Hobbes words, they "deposed that peculiar government of God" and "rejected God."³⁵ They rejected government by divine right because it seemed to invite constant complaints and contests about whether divine authority was being usurped.

Later in the book we will come back to Hobbes's proposed solution, but for now it is enough to notice that the problem he described plagued not only the ancient Hebrews, but the whole history of Christianity. A glance at the history of the Church before the Reformation shows constant struggles over the question of who represented God, from debates about the relative claims of councils and popes to schisms between the papacies of Avignon and those of Rome. A rich set of reflections on the nature of representation appeared in writers grappling with the problem, such as Marsilius of Padua and Nicholas of Cusa. The Reformation can be seen as a complaint that the Church itself had usurped divine authority, but of course competition almost immediately broke out

among those who claimed better access to that authority, and the history of the Reformation has been the history of multiplying sects, each launched with the goal of escaping the usurpations of existing ecclesiastical institutions. Hobbes viewed the English civil war as yet another example of this endless struggle that the Hebrews had experienced, a contest between the Anglican clergy, Presbyterians, other Puritan dissenters and, in the background, Rome itself. He hoped to convince his readers that they should follow the ancient Hebrews and, exhausted by such struggles, give up on the aspiration to be governed by a lieutenant of the divine will. On this point, though not on others, the liberals were followers of Hobbes.

Who speaks for the People?

We could follow an analogous line of thinking through Hobbes's writing on the problems that come from locating authority in "the people." We would see him insisting that a group of individuals did not have a single voice that could be known, that they could only speak through intermediaries, and therefore that a battle to speak in their name would inevitably erupt between potential intermediaries, as it had in England between the Parliament and the King.³⁶ For post-revolutionary liberals, however, it was not the appearance of this problem in Hobbes's text that mattered. It was the concrete manifestation of the problem in events. They saw in the course of the French Revolution a dynamic very much like the one that Hobbes had described.

When French historians and theorists who have a liberal cast of mind have retold the story of the revolution, they have told it in such a way as to bring out the importance of this dynamic. The most important voices here are probably François Furet and Claude Lefort, both of whom stimulated a renewed appreciation in France for nineteenth century liberals and both of whom

linked the instability and violence of the revolution to the fact that revolutionaries located all ultimate authority in the sovereignty of the people. I will challenge some of the implications that they drew from their insights later, but first it will be helpful to build on their insights into the way in which the revolution produced contestation between different parties claiming to represent the ultimate authority.

In 1789 the Estates-General, convened to make recommendations to the King, had radically overstepped its commission by declaring that all sovereignty resided in the Nation and then claiming to be, in its new manifestation as National Assembly, the sole authorized voice of that Nation. If everyone would have simply accepted this claim, then the delegates' move might have been able to create a *state* in the sense that Hobbes had recommended and in the sense that the Assembly's main architect, Emmanuel Sieyès, had hoped it would. Predictably, however, the National Assembly's claim to be the sole legitimate spokesperson for the Nation soon came under attack. The attack came from two directions. On the one hand, a variety of societies, committees, and local assemblies claimed better access to the popular will than the National Assembly in Paris. On the other hand, the defenders of the King asserted that his historically privileged position as representative of the whole country could not be ignored. These contests played themselves out in different arenas – in the formal debates within the Assembly over constitutional provisions such as whether to include a royal veto in the new constitution; in the discussions of philosophical societies such as the Jacobins; and in the less intellectual but equally important *journées* of protest and violence on the streets.

The historian Keith Baker has given us a clear portrayal of one key moment demonstrating the inescapability of such contention in his account of the debate in the National Assembly over the issue of the royal veto. Sieyès opposed giving to the king any sort of veto over the actions of the legislative Assembly, while others wanted to give him either an absolute veto or a suspensive veto. It was a sign of how dominant the rhetoric of popular sovereignty in these debates was that the

advocates of the vetoes usually did not directly contest the idea that sovereignty lay ultimately in the nation. Instead, they argued for the veto by pointing out that the National Assembly could be wrong about what the nation willed and that it would be tempted to assume for itself the sovereignty that rightfully belonged in the nation. Joseph Mounier, a monarchist supporting an absolute veto for the king, maintained that acts of the National Assembly could not be considered as acts of the sovereign people itself, since the representatives in the National Assembly were not bound to vote precisely as their constituents wanted. The legitimacy of the National Assembly was not unquestionable, he argued. Legislators could usurp the people's authority just as a king could. Others recommended a "suspensive" veto that would allow the king to send a piece of legislation back to the National Assembly to be reconsidered either by a new set of legislators elected to the next session, or directly by the more local assemblies of their electors. The suspensive veto was meant to be a way of appealing directly to the people, who would have the chance to either inform their local assemblies more directly about what they thought, or to send new representatives to the National Assembly. "This suspensive veto," argued Grégoire during the debates, "is only an appeal to the people, and the people, assured that it will be able to pronounce definitively, will not be embittered by it."³⁷ Sieyes replied forcefully that both sorts of veto were unacceptable because both implied that the nation's will could be known through some conduit other than that of the National Assembly itself:

The national will has come to be considered as if it could be something other than the will of the representatives of the nation, as if the nation could speak in any other way than through its representatives. False principles here become extremely dangerous...

The people or the nation can have but one voice, that of the national legislature....In a country that is not a [direct] democracy – and France cannot be one – the people, I repeat, can speak or act only through its representatives.³⁸

For Sieyes, the only way to attribute a singular will to a multitude such as the French citizenry was to take the representative assembly's pronouncements as *definitive* of that will

The National Assembly did not heed Sieyes's warning. When the Assembly finally voted on September 11th, 1789, it chose the third option, a suspensive veto, and it required that a period of four years go by before a vetoed measure could be taken up by the Assembly again. As Baker tells the story, this decision had disastrous consequences: “[B]y institutionalizing competing claims to express the general will in the assembly, the king, and the people – and by ensuring a period of sustained uncertainty, in the case of disagreement between the crown and the assembly – it simply exacerbated the problem it was meant to resolve....When the Constitution of 1791 was finally adopted, it therefore embodied a fundamental contradiction, and a recipe for constitutional impasse.”³⁹ When disputes arose in 1792, the long waiting period enshrined in the constitution sapped confidence that the opposition would have a chance to wield influence at all. Grégoire's prediction that the people would not see the veto as an obstacle proved wrong. The suspensive veto and the long waiting period helped convince the opposition that they could not pursue their objectives inside the constitutional framework or under a king, and left them giving up on reform and turning to the much more radical strategy of revolt. On August 10, 1792, the royal palace at the Tuilleries was stormed, the King was taken prisoner, and the National Assembly was soon cast aside in favor of the Convention that would institute the Terror.

Baker concludes from this sequence of events that to opt for the suspensive veto was “to opt for the Terror.”⁴⁰ Historians with their eye on the material contingencies of history regard such a judgment as unsupportable, but whether or not we accept Baker's causal story we can at least see the theoretical point that he, following Furet, sought to make: The rhetoric of popular sovereignty seems to have encouraged a fundamental instability by inviting charges of usurpation against every new group of authorities. Once the ultimate source of authority was located in the wholly abstract

and untouchable entity called “the people,” a seemingly never-ending struggle to be recognized as the legitimate representative of that entity was unleashed. Lefort has famously written that the idea of popular sovereignty replaced the concrete inhabitant of ultimate authority, the king, with “an empty seat” of power that all fought to occupy and that none could occupy securely. Furet applied the thought directly to the revolution throughout his influential *Interpreting the French Revolution*:

The characteristic feature of the Revolution was a situation in which power was perceived by everyone as vacant, as having become intellectually and practically available. In the old society exactly the opposite had been the case: power was occupied for all eternity by the king...⁴¹

Politics was a matter of establishing just *who* represented the people, or equality, or the nation; victory was in the hands of those who were capable of occupying and keeping that symbolic position...⁴²

[The various parties] had to compete for the conquest of that evanescent yet primordial entity, the people’s will.⁴³

[T]he new legitimacy – direct democracy – was bound by its very nature to produce a cascade of usurpations whose cumulative effect constituted revolutionary power.⁴⁴

Lefort and Furet often described this dynamic as a wholly new phenomenon arising from the new rhetoric of democracy. That is because they contrasted it with the concrete location of authority under a king. But they also acknowledged the structural similarity between the indeterminate place of authority in a democratic ideology and its equally indeterminate place under a system of divine right. Furet, in discussing the earlier historian Cochin’s view, characterized the “cult” of democratic social authority as “a substitute value for the transcendence of the divine.”⁴⁵ In Hobbes’s account of

the ancient Hebrews, that transcendence produced endless contestation; in Furet's account of the revolution it did the same.

To follow this analogy through, we could say that the problem of ending the revolution was analogous to the problem of escaping Hobbes's state of nature. On the 9th of Thermidor (July 27th, 1794), the day that Robespierre was arrested, the French saved themselves from the Terror by giving up on the aspiration to be governed by as perfect a representation of the sovereign people as possible. This moment was akin to the one in Hobbes's story when the Hebrews gave up their aspiration to be governed by the most perfect representation of divine will possible and instead asked for an ordinary king. In both cases, a citizenry exhausted by conflict made the decision to locate authority in a more concrete, though less ideal, authority than the abstract one it had been pursuing.

In the second half of this book we will look into the implications of such a moment for religion, but here the topic is its implications for democratic politics. It is clear that liberals observed the unstable dynamics of revolutionary France and thought those dynamics were, to a large extent, a consequence of the rhetoric of popular sovereignty. But there is a crucial ambiguity hidden in this common formulation of their position. Two very different lessons could be drawn from the revolutionary experience with popular sovereignty, depending on how exactly the link between that principle and revolutionary politics was interpreted.

Re-interpreting the French Revolution

The Terror, and the general instability that Furet and others pointed to, could be understood as a consequence of the principle of popular sovereignty or a corruption of that principle. Liberals are

commonly credited with the former view, but I want to suggest that many actually adopted something closer to the latter.

The common view is that the liberals saw the Terror as a consequence of an uncompromising commitment to the democratic principle of popular sovereignty. As Furet controversially stated, “Pure democracy culminated in government by the Terror.”⁴⁶ On this view, the liberals introduced representative government as a step away from pure democracy, an effort to control and limit the people’s ability to wield power by constitutionally protecting property rights, putting decisions in the hands of elites, and generally retreating from the goal of further democratization. On this view, the post-revolutionary liberals were repeating a point about the decline of states that can be found throughout the history of western political thought. Since Plato’s *Republic*, political philosophers have viewed democratization as the path that political regimes took towards decay and corruption. The traditional advice in (for example) Aristotle, Polybius, Cicero, Blackstone and Montesquieu, was to avoid or at least slow this process of decay by resisting efforts at over-democratization and trying instead to mix democratic principles with oligarchic ones. An observer of the French situation steeped in this mode of thought, such as Edmund Burke, would have felt a strong impulse to fit the revolution into this pattern by seeing the political instability that it produced as a sign of corruption, a sign of the imbalance that comes from too great an emphasis on democratic principles alone. To view post-revolutionary liberals as echoing a similar point of view, as many do, is to view them as a *reaction* (in the real anti-revolutionary sense of the word) against the ideals of the revolution and an effort to balance democratic principles with aristocratic or oligarchic ones.

To those revolutionaries who were not yet ready to give up on their cause, the relative quiet that came with Thermidor and the Directory was the calm of defeat. As Benjamin Constant began to write pamphlets supporting the Directory, Babeuf was planning a conspiracy to overthrow that

governing body and put the country back on the path towards revolutionary ideals. In chronicling that conspiracy (which failed), Babeuf's admirer Filippo Michele Buonarrotti defended it by making a contrast between two political "orders." The first, what the Jacobins had proposed and what Babeuf thought he was defending, was "the order of equality." This was an ideal according to which citizens would come together to decide their fate under conditions of real social and economic equality. The second order, instantiated in the Directory that liberals such as Constant were defending, was dismissed as the "the order of egoism."⁴⁷ Buonarrotti's characterization of liberalism was later reinforced by Marx, who labeled Constant a spokesman for the bourgeoisie.⁴⁸ According to Buonarrotti, Marx, and a long tradition of historical work that followed their lead, post-revolutionary liberalism gave up on the democratic ideals of the revolution for the sake of pursuing a base egoism. As different as Babeuf's and Burke's views of the revolution were, however, they were united in viewing the liberal program as a compromise of democratic principles. Whether they viewed liberalism as a defeat or a victory, they agreed that it was a step away from democracy.

There was, however, a different way of understanding the causes of the revolutionary instability and terror, and another way of understanding the liberal response to it. Instead of viewing the Terror as a necessary consequence of the principle of popular sovereignty, one could insist that it had been a departure from and a corruption of that democratic principle. From this perspective, the liberal project could be viewed as an effort to protect the integrity of democratic sovereignty against those who tried to usurp it. According to this second view, the problems of instability and violence had come not from the faulty way in which popular sovereignty had been put into practice. The mistake had been to allow some people to speak for the rest. As soon as this sort of representation was introduced, usurpation became a possibility and contestation a certainty. Representation, because it made usurpation possible, had unleashed a potentially endless cycle of dissatisfaction and rebellion. On this second view, the problem revealed by the unstable dynamic of

the revolution was not the principle of popular sovereignty but the idea that popular sovereignty could be represented.

Such an interpretation would have found support in the sacred text for popular sovereignists, Rousseau's *Social Contract*. In spite of the many efforts to pin the sins of the revolution on Rousseau, any fair reading of his book would have to admit that he offered a powerful way of condemning those sins.⁴⁹ Rousseau had famously argued that sovereignty could not be represented at all. He made the point at a conceptual level: Sovereignty resided in a general will, but the nature of a will was to be at every moment free. To promise to regard someone else's will as our own, as we do whenever we agree to be bound by the actions of a representative, was to bind ourselves in the future and thus to destroy our will; it was tantamount to putting ourselves into slavery. Rousseau certainly recognized that something like representatives would be necessary, that not all citizens could be involved in public administration, but he argued that the work of public administration was the work of government rather than work for the sovereign. He allowed the sovereign to deputize individuals to do that work, but insisted that we not regard those deputies as the bearers of our sovereignty. Rousseau's word for what occurred when deputies did present themselves as sovereign rather than as mere government was "usurpation." He claimed that usurpation was virtually inevitable, that it was the cause of the decline of all political regimes.⁵⁰

Had Rousseau been alive to witness the delegates to the Estates-General declare that sovereignty resided in an abstract entity called the "Nation" and that their own assembly would be the exclusive voice of that Nation, he surely would have regarded their actions as a classic case of usurpation. The whole thrust of book three of the *Social Contract* was to reveal and oppose this kind of action. According to Rousseau, delegates of the sovereign people had no status at all, and had to fall silent when in the presence of the people themselves. But when Sieyes defended the National Assembly's revolutionary action, and when he opposed a royal veto that would ask local committees

to evaluate the legislative Assembly's proposals, he argued that "the people...can speak or act *only* through its representatives." This was precisely the opposite of Rousseau's position. It was, in fact, a restatement of the Hobbesian position that Rousseau had set himself against. Jacobins like Robespierre, who had argued for the populist appeal implicit in the suspensive veto, were closer in spirit to Rousseau.⁵¹

In contrast to the traditional point of view that identified democratization as the force pulling political regimes towards decay, Rousseau's writings suggested that the real threat came not from democratic sovereignty but from its usurpation by particular individuals or groups claiming to act in its name. As Arthur Melzer points out, the novelty of Rousseau's position in this context can be seen by noticing how revisionist his account of Roman history was.⁵² Usually the story told about the fall of Rome was that the patricians had lost out to the plebs in a classic case of over-democratization. But Rousseau highlighted the fact that this movement was actually a consolidation of power by plebian members of the senate and by the tribunes, all of whom were usurping power from the people themselves. "When the people has rulers who govern for it, whatever name they bear, the government is an aristocracy," he wrote.⁵³ Rousseau's new approach was (in a general sense) adopted by the historian Cochin when he told the story of the French revolution. Cochin emphasized the same consolidation of power in the hands of those who presented themselves as authorized spokesmen for the people, showing how popular sovereignty was interpreted in such a way as to produce "a cascade of usurpations whose cumulative effect constituted revolutionary power."⁵⁴ The Rousseauian diagnosis in evidence here was, as both Furet and Melzer point out, close in spirit to the phenomenon that Michels identified in the mid-twentieth-century as "the iron law of oligarchy."⁵⁵

Of the two interpretations of the French Revolution – the one that blamed the principle of popular sovereignty and the one that blamed the usurpation of that sovereignty – it seems to me that

many liberals endorsed the latter. If we look at Constant's earliest pamphlets written in response to the revolution, we find him reproaching those writers who blamed the Terror on revolutionary principles rather than on the misdeeds of particular men. In "Des effets de la Terreur" (1797), for example, he responded to a pamphlet written earlier that year by Lezay-Marnezia, titled *Des causes de la révolution et de ses résultats*, which had argued that the revolution and the terror were necessarily linked, because all revolutions necessarily turned to excess, drawn that way by the need to mobilize the poor and the need to protect their fragile gains from their many enemies. "The terror is inseparable from the revolution," Lezay-Marnezia had written. "One cannot imagine the one without the other." He recommended trying to enjoy the liberty gained while leaving behind and forgetting the terrible course taken to achieve it.⁵⁶ Against that point of view, Constant insisted that the revolution was separable from the terror and that its gains could have been protected with a non-terroristic government. Lezay-Marnezia's position, he claimed, would only fuel the arguments of reactionaries in France and discourage revolutionaries elsewhere in Europe. "The terror was neither a necessary consequence of liberty nor a necessary *reinforcement* to the revolution," he wrote. "It was a consequence of the perfidy of internal enemies, of the coalition of foreign enemies, of the ambition of a few villains, of the bewilderment of many senseless people... The republicans were never anything but its victims..."⁵⁷

In later writings Constant always maintained this point of view, defending the fundamental principles of 1789 and suggesting that they would not have led to later excesses if the constitution of 1792 had been followed. He frequently blamed individuals or groups for using the language of popular sovereignty as a "pretext" for their own despotism.⁵⁸ The claim to rule in the name of the popular will was one that Constant saw put to use not only by the Jacobins but also, later, by Napoleon, who he attacked in his influential pamphlet *The Spirit of Conquest and Usurpation*. He explained that while leaders who truly had the national will behind them, such as George

Washington or William III, could not be said to be usurpers, it was in practice always difficult to know when individuals truly spoke for the nation: “This is why I always mistrust those men who, during a revolution, rise at the head of peoples.”⁵⁹ Arguably the least republican or democratic work that Constant produced was the published version of *Principles of Politics Applicable to All Representative Governments*, in which he endorsed an important role for a “neutral” monarch and defended allowing the hereditary aristocracy some role in government. But even in that work he insisted in the first chapter that popular sovereignty was the only acceptable basis of authority, the only alternative to rule of the stronger. There are complications in his view, some of which we will come to shortly, but on the whole it is fair to say that he was much more likely to blame the excesses of the revolution on individuals who usurped popular sovereignty rather than on the democratic principle of popular sovereignty itself. Furet often treats Constant as something of a hero for having resisted the lure of Jacobinism, but Constant would never have written the most-quoted sentence from Furet’s work; he would never have said that “pure democracy culminated in government by the Terror.”⁶⁰ In fact, Constant’s position offers a window into the way in which liberalism can be seen as an effort to apply Rousseauian democratic principles more thoroughly.

Re-interpreting tyranny of the majority

If the line of argument about usurpation that we have taken from Rousseau suggests a reinterpretation of the Terror, it also points to a new way of thinking about an old bugaboo of democratic theory – the tyranny of the majority. Whenever people defend liberalism as a necessary *restraint* on democracy, they invoke the danger of majority tyranny. They identify democracy with majority rule and therefore see in it an inherent threat to minorities. According to this line of

thought, the only remedy for the problem is to moderate our commitment to democracy principle itself.⁶¹

Thinking about usurpation in the way that Rousseau and Constant did suggests a different way of interpreting tyranny of the majority, one that takes the blame off of democratic principle. The crucial thought is that the principle of popular sovereignty gives authority to the people *as a whole*, not to the majority. If we keep this obvious but important fact in mind, and not let ourselves be distracted by our customary understanding of democracy as majority rule, we are quickly led to the conclusion that a majority claiming to act in the name of all is just as guilty of usurpation as Napoleon is.

The most awkward moments in social contract theories come when theorists try to explain why the will of the majority should be taken as the will of all. Locke resorted to an unconvincing mechanical analogy, while Rousseau insisted that when citizens voted, they were not expressing their real opinion but only predicting what the general will might require.⁶² Other theorists asked us to imagine that prior to any real vote, there had been a referendum in which every individual had unanimously agreed to abide by the results of majority voting on future questions.⁶³ The awkwardness in these moves arises from their efforts to deal with the simple fact that the majority of a group is not the same as the whole of the group. In fact, the majority can do no more than act *on behalf of* the whole. The majority is a delegate for the sovereign rather than the sovereign itself. This means that a majority claiming that its wishes are sovereign is nothing more than a usurper.

With this point of view in mind, statements that are often taken to reveal the antidemocratic impulses of early liberals can be read in a different light. If we turn to the Americans, for example, we find James Madison writing to James Monroe that “there is no maxim, in my opinion which is more liable to be misapplied, and which therefore more needs elucidation than the current one that the interest of the majority is the political standard of right and wrong.” Madison need not be read

as opposing popular sovereignty. He could equally well be understood to be insisting, as I think he probably was, on the difference between popular sovereignty and government by the majority.⁶⁴ That is why he could speak of the majority as a “faction” in *Federalist* #10. Similarly, we can revisit Abraham Lincoln’s case against his rival Stephen Douglas’s principle of “popular sovereignty” in the mid-nineteenth century. Douglas had proposed allowing the citizens living in each territory to decide whether to accept slavery for themselves, and he had insisted that his solution illustrated the principle of “popular sovereignty.” If he was right in his description, then Lincoln’s stance against him would have to be read as undemocratic, as it often is by both admirers and critics.⁶⁵ But with the argument rehearsed above in mind, we could re-interpret the dispute between Lincoln and Douglas. It could be that the rule of the majority that Douglas supported was not an expression of popular sovereignty at all; instead it was a usurpation of it.⁶⁶ On this view, Lincoln’s most important point was not that black men deserved to be counted as men. That point was morally vital, but even had popular sovereignty as understood by Douglas allowed black men to vote, it would not necessarily have stopped the spread of slavery; African-Americans could have been a minority in the territories being discussed. The more important and far-reaching theoretical point was that majority rule could be a betrayal of democratic principle if it allowed a majority to present itself as the whole. Through the lens of Rousseau’s argument, the tyranny of the majority appears as just one example of the larger phenomenon of usurpation.

Later liberals such as Mill and Tocqueville were more likely than earlier liberals to describe the tyranny of the majority as a problem inherent to democracy. This may be partly because they were further in time and experience from the revolutions. They regarded democracy as having arrived definitively and they could argue for restraints on it without fearing that their words would be seized upon as a reason to reverse the revolutions entirely. The earlier generations of liberals, however, had lived through the time when the revolutions’ achievements must have seemed more

precarious; they had known people who proposed real alternatives to democracy. Constant faced those alternatives in the form of Bourbon monarchism and Napoleonic imperialism. And as his response to Lezay-Marnezia shows, this generation was concerned not to give fuel to counter-revolutionaries. They were therefore less likely to describe the tyrannical possibilities as ones inherently linked to the basic democratic principles themselves. They were more likely to frame their understanding of the problem in terms of usurpation rather than as doubts about democracy itself. They presented liberalism not as a check on democratic principle but as a way of translating democratic principle into a system of government.

The problem of democratic government

Putting usurpation rather than democracy at the center of our understanding of the Terror and tyranny of the majority is only important if it changes our sense of how to avoid these undesirable phenomena. The suggestion so far has been that liberals could deal with the problems that concerned them by avoiding usurpation rather than by attenuating their commitment to democratic sovereignty. But what if popular sovereignty were a principle that could *only* be realized through usurpation? In that case, the only way to limit usurpation would be to limit our devotion to the democratic principle. To show that this is not the case we need a theory of democratic *government* – a theory of how popular sovereignty can be translated into a form of government that does not collapse quickly into a cascade of usurpations. This was a problem that Rousseau himself had not adequately addressed, and it was a problem to which the liberals devoted their attention.

The difficulty of finding such a theory of democratic government is, I believe, what led Furet to equate Constant's worries with worries about democracy itself. When Furet examines Constant's

pamphlets of the 1790s, he frequently rephrases Constant's statements in such a way as to emphasize, more than Constant himself did, the thesis that democracy was to blame. When Constant wrote, for example, about the Terror as a set of "crimes that have sullied the most just of revolutions," Furet glossed the passage in this way: "It is that dissolution between the Revolution, calamitous, and its result, precious, which constitutes the fabric of his [Constant's] analysis and gives a sense of his combat against the reactionary writers."⁶⁷ In suggesting that Constant saw the revolution itself as "calamitous," Furet subtly pulls Constant a little bit towards the reactionary position Constant had actually been writing against. Constant had not called the revolution calamitous at all in this passage (or elsewhere). He had called it "the most just of revolutions." Constant did not make the distinction that Furet puts forward – the distinction between the revolution and its results. Instead he made a distinction between two separate events, the revolution and the Terror.

If this were an isolated misreading it could perhaps be ignored, but it is not. Later in the same article Furet quotes Constant writing that the Terror was "arbitrariness taken to the extreme." Once again Furet, in his gloss on Constant's words, associates that arbitrariness with the revolution itself. "The revolutionary government," writes Furet, "monstrous because it does not rest on any law, has necessarily led to the exercise of pure violence."⁶⁸ Constant's own position in the pamphlet was different. It was that the revolutionary government was the constitutional government inscribed in the constitution of 1791, and that the Terror was a separate and inferior government. Once again, Furet discards the careful distinctions that Constant made and pressed Constant towards the very point he was arguing against, the point that one could blame the revolution and its principles for the terror. The end of this particular article confirms the sense that Furet himself does not believe Constant's own distinction can stand. "The coup d'etat of the 18th of Fructidor," writes Furet, "demonstrated the impossibility of Constant's wish."⁶⁹ Furet is referring to the moment on

September 4, 1797 when the Directory, a body that had brought the Terror to an end and that had been trying to govern according to a constitution, had succumbed to the old revolutionary dynamic, purging itself of its conservative members and returning to many of the techniques that had been wielded during the Terror. Furet here treats the event as though it were fated, inherent in the democratic principles guiding the revolution as a whole. He thus reveals the gap between his own view and Constant's, a gap that arose from his unwillingness to grant much weight to the liberal hope that popular sovereignty could ever be shielded from the problem of usurpation.

Furet's wariness on this point is understandable. The liberals had to grapple with precisely the problem that he saw, the problem that popular sovereignty as Rousseau understood it seemed to be a principle that required and produced usurpation. How else could a people put its sovereignty into effect except to have some individuals act on behalf of the rest, and do so in a way that went beyond completing wholly defined tasks delegated by the people? Translating popular sovereignty into a government seemed to require allowing the particular people doing the governing to make judgments of their own that would have sovereign authority. So popular sovereignty seemed to both require and condemn usurpation. It therefore seemed a principle designed to lead to political confusion and chaos, to cycles of usurpation and revolution continuing into the future as far as one could see. And if that were the case, then the best way to combat these cycles of democratic usurpation would, in fact, be to temper our devotion to the principle that brought them into being.

French liberals such as Constant and Guizot seem to have been ambivalent about this possibility. While we have seen Constant insisting on a Rousseauian position in his early pamphlets, his later writings sometimes seem to shift in the other direction. In his famous speech on ancient and modern liberty Constant remarked about Rousseau that "this sublime genius, animated by the purest love of liberty, has nevertheless furnished deadly pretexts for more than one kind of tyranny."⁷⁰ Whenever the government wants to grab power, he wrote elsewhere,

...it quotes the imprescribable prerogative of the whole society...The government can do nothing, it says, but the nation can do everything. And soon the nation speaks. By this I mean that a few men, either low types or madmen, or hirelings, or men consumed with remorse, or terror-struck, set themselves up as its instruments at the same time as they silence it, and proclaim its omnipotence at the same time as they menace it. In this way, by an easy and swift maneuver, the government seizes the real and terrible power previously regarded as the abstract right of the whole society.⁷¹

On one hand, the passage reiterates the distinction between popular sovereignty and government, resolutely blaming the excesses on individuals who abused the democratic principle rather than on the principle itself. On the other hand, the passage might also be read to suggest that the principle actively *lends* itself to such abuse. The opening chapters of his *Principles of Politics* offer support to that second thought by suggesting that the very *idea* of absolute sovereignty of any kind, whether popular or not, cannot help but invite exploitation:

When you establish that the sovereignty of the people is unlimited, you create and toss at random into human society a degree of power which is too large in itself, and which is bound to constitute an evil, in whatever hands it is placed. Entrust it to one man, to several, to all, you will still find that it is equally an evil. You will think that it is the fault of the holders of such power and, according to the circumstances, you will accuse in turn monarchy, aristocracy, democracy, mixed governments or the representative system. You will be wrong: it is in fact the degree of force, not its holders, which must be denounced. It is against the weapon, not against the arm holding it, that it is necessary to strike ruthlessly. There are weights too heavy for the hand of man.⁷²

This thought led directly to Constant's assertion that sovereignty was never unlimited, that there were spheres of life that should always be protected from infringement by a strong set of rights. And it was this position, presumably, that Furet supported and that led him to portray Constant as someone who saw the problems with the fundamental principle of popular sovereignty itself.

As we have already noticed, however, Constant did not abandon the language of popular sovereignty. Just a page before the passage I have just quoted, he argued that the principle of popular sovereignty "cannot be contested." He again rebuffed reactionaries who blamed popular sovereignty for "the evils which were caused and the crimes which were committed on the *pretext* of enforcing the general will" (emphasis added). And he advanced on behalf of popular sovereignty a statement both concise and unequivocal: "There are only two sorts of power in the world: one, illegitimate, is force; the other, legitimate, is the general will."⁷³

Constant resolved the apparent tension between his defense of popular sovereignty and his worries about absolute sovereignty by simply arguing that popular sovereignty was not absolute. His solution was too easy, however. It set aside without much consideration the notion, articulated by Bodin and Hobbes, that sovereignty was not a coherent concept unless it was absolute. In an earlier version of the *Principles* Constant had devoted a brief chapter to arguing with Hobbes over this point, but his argument was weak. He had insisted that the sovereign had a right to punish only culpable actions, a right to wage war only when society was attacked, and a right to make laws only when they were necessary. But Constant had neglected to consider the question of who would decide which actions were culpable, what constituted an attack, and which laws were necessary. Hobbes's argument for unlimited sovereignty had rested precisely on the need to answer such questions as these authoritatively.⁷⁴ Constant was correct that Rousseau had adopted the position from Hobbes, but Rousseau had done so for good reason.

Constant's position about the limited nature of sovereignty was philosophically unsatisfactory, but he endorsed it because it was the only alternative he saw to the unsatisfactory argument that he found in Rousseau. Rousseau's strategy had been to insist on maintaining a conceptual distinction between sovereignty and government, so that no one would be able to use the language of popular sovereignty to justify their governing actions. His distinction was designed to prevent precisely the sort of abuse that Constant saw in the revolution. But Constant viewed Rousseau's conceptual distinction as a terrible failure. Not only did it fail to actually prevent usurpers from using the language of popular sovereignty to justify their acts. It also failed because, if taken seriously, it rendered popular sovereignty virtually impotent. After all, if even a majority vote of the entire population can be viewed as a usurpation of that sovereignty, then only a unanimous vote on matters wholly general in scope seems immune to criticism. A country cannot be ruled by unanimous voting on purely general matters. Rousseau readily admitted, therefore, that the sovereign could not do the work of governing, and he gave it the function only of passing laws, of which there would be very few. Constant regarded this outcome as wholly impractical. He argued that while Rousseau had seen the danger in giving complete ruling sovereignty to the people, the conceptual distinction that he used to address the danger served to eliminate entirely the practical meaning of popular sovereignty:

Rousseau himself was appalled by [the] consequences [of his theory]. Horror-struck at the immense social power which he had thus created, he did not know into whose hands to commit such monstrous force, and he could find no other protection against the danger inseparable from such sovereignty, than an expedient which made its exercise impossible. He declared that sovereignty could not be alienated, delegated or represented. This was equivalent to declaring, in other words, that it could not be

exercised. It meant in practice destroying the principle which he had just proclaimed.⁷⁵

Rousseau's distinction between sovereignty and government "destroyed" the principle of popular sovereignty because it made it impracticable – it undermined any effort to translate it into a real government.

Guizot made the same point in slightly different language. He noticed that if followed strictly, the idea that no one could be governed except by laws he has consented too makes almost all laws illegitimate. To actually do the work of governing, rulers are forced to violate the principle that they proclaim as the basis of their authority:

No one has ever understood the sovereignty of the people to mean, that after having consulted all opinions and all wills, the opinion and will of the greatest number constitutes the law, but that the minority would be free to disobey that which had been decided in opposition to its opinion and will. And yet this would be the necessary consequence of the pretended right attributed to each individual of being governed only by such laws as have received his individual assent. The absurdity of this consequence has not always induced its adherents to abandon the principle, but it has always obliged them to violate it.⁷⁶

Both Constant and Guizot asserted that whenever people try to put the principle of popular sovereignty into practice, they find themselves violating it.

Commentators have remarked that Rousseau himself seems to have demonstrated the unrealizable quality of popular sovereignty, since as soon as he turned to drafting an actual constitution for Poland he acknowledged the need to accept institutions of representation. He recommended reforming the Polish legislature, the Diet, but not eliminating it. His recommended reforms tightened the link between elected representative

and their constituents and so reinforced the idea that they were delegates rather than bearers of sovereignty. Representatives to the Diet were to be given narrow instructions about how to vote, to be subject to close scrutiny by local committees of constituents, and to face frequent referenda. But none of these cautionary measures could hide the fact that they were deputized to make laws. The most consistent construction that could be put on the Polish system was that many of the particular bills passed by the Diet would, strictly speaking, be classified as “decrees” rather than “laws” if we follow Rousseau’s own argument from the *Social Contract* – but not even he followed his argument to that extent. In truth, Rousseau never offered a convincing reply to the worry that popular sovereignty as he described it was not a principle that a people could really put into practice.

The absence of a good account of democratic *government* was a gaping whole in Rousseau’s theory of popular sovereignty, and it was a whole to which liberals attributed serious practical consequences. Indeed, the whole thrust of Constant’s, Guizot’s (and Furet’s) objections to popular sovereignty focused on this problem. Unlike reactionaries such as Maistre, they did not object to liberty. They objected instead to the lack of a viable theory for how to put popular sovereignty into practice in a way that would not unleash dangerous cycles of usurpation. Furet remarked on “democracy’s inability to follow its own theory in practice” and wrote that “democratic administration” was “a goal society had pursued in vain – because it was a contradiction in terms – ever since 1789.”⁷⁷ The question left after such an analysis is whether this inability was inherent to democracy itself or whether a remedy – a theory of democratic government – could be found. Finding a real theory of democratic government would require dealing with a fact that Rousseau knew but did not adequately confront, the fact that representation, and therefore usurpation, was unavoidable.

Why usurpation is unavoidable

The strong gravitational pull of usurpation was illustrated by the trajectory of Robespierre's career. During the debate about the royal veto in the summer of 1789, Robespierre endorsed a position opposite to that of Sieyès. While Sieyès had denied that the people could speak except through the representatives in the National Assembly, Robespierre took the side of the local assemblies and committees, championing their status as the truer voice of the people. Robespierre was on Rousseau's side of the argument. Yet when he came to power a few years later, he could not find a way of governing other than to make the bodies of which he was a part, the Jacobin Club and the Convention, the exclusive interpreters of the national will. And even within the Convention, where he was soon to have enemies, he found the temptation to justify his own positions as the authentically popular or national ones too great to resist. As the former royal finance minister Jacques Necker wrote to Robespierre, "They are always you, these representatives, and you with a perfect exactitude. Their interest and their will [are] yours...And it is always the word 'representative' that allows such a blind confidence!"⁷⁸ In this way the man who had once decried Sieyès's insistence on locating the national will in just one assembly found himself locating it in just one man – himself. "The staunch Rousseauist," wrote Furet about him, "was unfaithful to the *Social Contract* in one essential respect: he identified popular sovereignty with that of the Convention (from which he drew his own sovereignty)."⁷⁹ Driven thus to self-contradiction, Robespierre illustrated in human terms the difficulty of escaping the problem that comes from trying to translate popular sovereignty into a principle of government. Assume for Robespierre only the very best of motives; give him no desire other than the selfless one of giving agency to the people; still, we find him led by those democratic desires into an awful example of usurpation. ("Here," Furet remarks, "pure democracy came face to face with its own impracticability"⁸⁰) Nor was Robespierre's example

unique. Indeed, it seemed to confirm what the post-revolutionary liberals had seen in the revolutions and their aftermath more generally. The National Assembly, the Convention and the Consulate had all been efforts to give agency to the people, and yet all collapsed into usurpations.

Now, from a Rousseauian perspective we could object that usurpations arose only when the sovereign power had been permitted to be represented. If we imagine a situation in which the voice of the people could be heard directly, rather than through intermediaries, we might be able to avoid the danger of usurpation. This is the thought that lies behind a great deal of theorizing about participatory democracy. Those who accept this thought regard usurpation as a product of our falling away from direct democracy, and they try to remedy it by bringing our systems as close as possible to the ideal of directness.

The problem is that not even direct democracy avoids representation and usurpation, if we think about these terms carefully in the way that Rousseau suggested. To see why, it is necessary to begin by recalling exactly why Rousseau argued the sovereign general will could not be represented in the way that Hobbes, for example, thought it should be:

The Sovereign may indeed say: "I now will actually what this man wills, or at least what he says he wills"; but it cannot say: "What he wills tomorrow, I too shall will," because it is absurd for the will to bind itself for the future...If then the people promises simply to obey, by that very act it dissolves itself and loses what makes it a people.⁸¹

Why did Rousseau argue that "it is absurd for the will to bind itself for the future"? His reason was that the very essence of a will was always to be *free* at the present moment. A promise constrains our freedom in the future, so a will that makes a promise destroys itself. The implications of this view reach much further than Rousseau admitted. If we cannot allow present statements to impinge on future freedom, then even my own declaration of what I will cannot be taken as definitive evidence

for what I will, since my will may have changed in the moments since I made the declaration. The fact that I voted for a candidate in November does not indicate that he remains my choice today. My vote was merely a representation of my will, a snapshot of one moment in its existence. The same is true, then, of an entire nation's vote. Why should the will registered at the moment of referendum have special priority? Why should it dominate over the will as it exists later? Any snapshot of the will captured by a poll or referendum is only one representation of it. Nothing except a continuously updated expression of our wills can claim actual sovereignty. Any system that forced me to adhere to the votes I registered in the past would be open to complaint. With the temporal aspect of the will in mind, the concept of usurpation takes on a different dimension: The complaint arises that the representation of my will produced by any particular snapshot of it in the past can usurp the authority that rightfully belongs to my will at the current moment.

Thus the dream of escaping representation altogether is nothing more than a dream. We can hardly imagine, much less want, a system of government that responds at every instant to the new state of our wills.⁸² Not even an individual can govern himself in that way without risking the loss of his or her personality. The notion of a stable personality requires representing ourselves to ourselves. It requires making promises to ourselves, narrating a story to bring together the many momentary selves that we are, and so on. Rousseau was right that the essence of a will is to be free to choose at any moment in time, but the implication of this fact is that a will cannot have any lasting effect on the world except through solidifying itself into lasting representations. And since representation always introduces the potential for usurpation, it would seem that usurpation is unavoidable for anyone who wants to insure that our wills have agency in the world. Views of politics that give primacy to the will, then – including most theories of popular sovereignty – seem inextricably bound to the problems of representation and usurpation, the problems of democratic government. This

was the very deep problem to which post-revolutionary liberals addressed themselves when designing representative governments.

Usurpation in America

It is sometimes said that the political dynamic of disagreeing about the location of popular sovereignty was one peculiar to France and perhaps even to its revolutionary period. The history of the United States, in particular, has often been singled out as a welcome contrast to the disastrous course of the French revolution, not only by Burke but also by Hannah Arendt and more recent writers.⁸³ I do not want to deny differences, but I do want to point out that the question of how to give agency to a sovereign people, the question of democratic government, is not one that Americans have managed to avoid. (How could it be avoided?) Debates similar to those we have traced in France, complete with cascades of accusations about usurpation, can be found in our history too.

One obvious moment in which such questions were raised was the founding moment, when a constitutional convention acted on behalf of everyone. Like the delegates to the French National Assembly, delegates to the constitutional convention had been sent by their constituents with a much narrower understanding of what they were there to do – in this case, to revise the Articles of Confederation. It was the delegates themselves who decided to broaden their mandate and write a whole new constitution. And yet they began the preamble to the document with the now famous phrase, “We the people.” Opponents of the product of their deliberations were quick to paint this move as an example of usurpation. As much as the ratification procedure might soften the impact, the fundamental point that “we the people” had deliberated and spoken through the agency of a

small and elite set of actors could not be hidden from view, and it engendered a predictable set of objections and debates.

In responding to those debates in *Federalist #40*, Madison made a number of bold and clever arguments: First, he emphasized the priority of the ultimate goal, a happy and secure nation, over the means used to reach that goal. This was an argument that, while true, was also dangerous; it is familiar to anyone who has studied the rhetoric of populist demagogues and authoritarians. Second, Madison deployed an argument based on the ancient Sorites puzzle (in which we are asked questions such as how many grains of sand it takes to constitute a “pile”). Madison asked how many changes to a constitution it took to count as revolution rather than reform, to cross “the boundary between authorized and usurped innovations.” Such arguments are always meant to reveal the arbitrariness of the distinction they are employed against. Third, and most relevant to the problem of this chapter, Madison argued that there had simply been no alternative to usurpation because there had been no other way for the people to act to remedy the defects of the Articles of Confederation. About the delegates accused of usurpation, he wrote:

They must have reflected, that in all great changes of established governments, forms ought to give way to substance; that a rigid adherence in such cases to the former, would render nominal and nugatory the transcendent and precious right of the people to “abolish or alter their governments as to them shall seem most likely to effect their safety and happiness,” since it is impossible for the people spontaneously and universally to move in concert towards their object; and it is therefore essential that such changes be instituted by some INFORMAL AND UNAUTHORIZED PROPOSITIONS, made by some patriotic and respectable citizen or number of citizens.⁸⁴

In accepting the need for “unauthorized” actions by a few, Madison restated the problem of democratic government and took the position that usurpation was unavoidable if one wanted to give practical substance to the sovereignty of the people. The internal quotation he used in this passage was from the Declaration of Independence. In citing that document, Madison tacitly admitted the truth of the criticisms made against the delegates – that their action was analogous to the one taken by the revolutionaries on behalf of the nation. It is true that the convention did not claim the sole right to speak for the Nation as Sieyes had thought the National Assembly should do. But the delegates did insist upon a procedure for ascertaining the nation’s will which was different from the procedure mandated by the states, for it sent the document to be ratified by the people of each state rather than the state legislatures; it thus took a particular stand on the question of who spoke for the people. On this point, too, Madison openly admitted that the delegates had usurped authority that was not formally theirs.

Disputes over who speaks for the people were not confined to the founding alone. Recall that in the French case we found such disputes in a set of debates about whether or not to include a royal veto in the constitution. A similar set of debates took place in the U.S. on the question of the presidential veto. The debates did not occur during the constitutional convention, for at that time most delegates seem to have assumed that the presidential veto would rarely be used. But the veto became every bit as contentious as the royal veto in France had been just as soon as a president recognized its real power and tried to use it. Andrew Jackson did just that in his campaign against the Bank of the United States, and the debates that his use of the veto provoked follow the same rough patterns as the debates in France. They were debates about who rightfully spoke for the sovereign people and who was merely usurping its authority. To reveal the similarities, and thus provide evidence for the inescapability of the issue of usurpation, let me go into some detail here, drawing from the work of legal historians.⁸⁵ ...

Jackson vetoed the National Bank on July 10, 1832. In doing so, he challenged a policy that Congress thought it had settled over a relatively long period of sustained legislative action. In his veto message, he denied that he was obliged to defer to this legislative precedent. He depicted his veto as a way of sending the issue back to the people themselves: “A general discussion will now take place,” he wrote, “eliciting new light and settling important principles; and a new Congress, elected in the midst of such a discussion, and furnishing an equal representation of the people according to the last census, will bear to the Capitol the verdict of public opinion, and, I doubt not, bring this important question to a satisfactory result.”⁸⁶ Thus Jackson interpreted his use of the presidential veto in a manner analogous to the way in which Grégoire and Salle had interpreted the suspensive royal veto. As one commentator notes, he “recast the veto as an instrument to aid popular sovereignty.”⁸⁷ When Jackson and his party won the subsequent election, he interpreted his victory as a retrospective mandate for his actions. He promptly began to move deposits from the National Bank to state banks to prepare for its close, and he issued a report to his Cabinet stating that he considered his re-election to be a sign of a popular mandate against the bank. Jackson’s opponents in the Senate promptly criticized not only his decisions but also his justification of them. They called into question the idea that the veto could be used to send an issue back to the people and thus arrive at an understanding of the popular will with more legitimacy than the representation of it found in Congress...

...

...I have recounted this debate about the presidential veto in some detail so as to illustrate the similarities between it and the French debate about the royal veto. Both debates arose as contests about which institution could fairly claim to represent the will of the sovereign people, and both testify to the inescapability of such issues for systems of government based upon principles of

popular sovereignty. Each claim to represent the people was re-described by opponents as a usurpation.

Of course the issue arises not only with regard to the executive's legislative veto, but also with regard to other parts of the government. In the United States much of the contention that surrounded royal authority in France has come to surround the authority of the Supreme Court. It is worth noticing that the justification for judicial review given by Hamilton in the *Federalist* was one that again rested on the possibility of usurpation. In *Federalist* 78 Hamilton defended the Court's power to declare legislation unconstitutional in this way:

There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.⁸⁸

Hamilton's case rested on the inferiority of "delegated" powers, i.e. Congress, to the people themselves. Judicial review was, he argued, a way of insuring that Congress did not usurp the authority that rightfully belongs to the people themselves. "It is not otherwise to be supposed," he wrote, "that the Constitution could intend to enable the representatives of the people to substitute *their* will to that of their constituents." The Constitution was the will of the people, while ordinary laws were the view of Congress. Thus when the Courts insured that the Constitution should be preferred, it was only insisting that "the intention of the people [should be preferred] to the intention of their agents."⁸⁹

Hamilton highlighted the possibility of legislative usurpation to justify judicial review. A search for the term “usurpation” in today’s political discourse will find mostly articles making the opposite point – articles complaining that the Court usurps popular sovereignty whenever it strikes down laws passed by Congress.⁹⁰ A glance at our history reveals that this sort of charge has been used both by liberals (Felix Frankfurter defending the New Deal against the Court) and conservatives (Robert Bork attacking the legacy of the Warren Court). In general, it seems that the charge of usurpation can be caught by anyone on one side a controversy and thrown back at the one who raised it. Today as at the founding, debates about the authority of particular parts of government routinely take the form of debates about who best speaks for the one authority that everyone agrees is sovereign in principle; they are debates about who speaks for the people. In the United States as in France, the accusation of usurpation, if not always the term “usurpation” itself, remains central to constitutional debate and to democratic politics...

Chapter Three: Competing to speak for the people

The last chapter explored the problem of usurpation and showed how it complicates the effort to find a form of government that can remain true to the principle of popular sovereignty. In this chapter I examine the structure of representative government that was devised and defended by the post-revolutionary liberals and show how some of its characteristic features can be understood as efforts to address the problem of usurpation. Understanding the system in this way is an alternative to understanding it as an elitist or a “mixed” regime. It offers a fundamentally democratic way of explaining apparently elitist elements of the representative system. Those apparently elitist elements are designed to help place citizens in the position not of ruling or being ruled, but of judging. This distinctively liberal stance towards rule emerged as an effort to preserve some sense of popular sovereignty while acknowledging the depth of the problem that usurpation poses.

The features of representative governments that seem most out of place to many people today are those that seem to frustrate the government’s ability to express the popular will. In the United States, the Electoral College that still formally chooses the president stands out like a relic from another age, and no presidential election season goes by without serious arguments for abolishing it. But the Electoral College is only the most visible antidemocratic feature of the American constitutional system. On further reflection we can find a host of other ways that our system of government seems designed to frustrate effective translation of popular sentiment into law and policy. I do not mean simply the smallness of the Senate and the importance of unelected Supreme Court justices. There are also more fundamental features of representative government that need to be explained.

Elitist elements of representative government

James Madison pointed out that modern representative governments are distinct from ancient democracies not in their inclusion of representation, but in their exclusion of all opportunities for direct popular involvement in rule.⁹¹ The extensive “listening tours” that political candidates have made in recent election cycles only highlight the fact that there is no institution within government in which all citizens can participate directly. When political scientists write about “participation” they are often referring to participation in activities in civil society, such as campaigning or organizing. Campaigning is viewed as a relatively intense form of participation, but even campaigning is not participation in the actual work of governing or legislating. Voting might be a form of participating in governing, depending on how it is interpreted; I will return to the interpretation of voting later in this chapter. Aside from voting, it is hard to find ways that private citizens participate in the actual work of governing – in legislating or executing the law. Lobbyists providing statutory language to legislators may be one of the most common ways that this happens today.

The unavoidable fact about representative governments is that they produce a system in which most citizens, most of the time, do not participate in governing. Insofar as citizens engage with politics at all, the activities that they are most likely to participate in are watching or hearing about politicians, judging them, and communicating their judgments by voting in elections or by voicing their opinions to others. Citizens are spectators and judges much more often than they are governors. Yet much of democratic theory continues to revolve around efforts to make democratic citizenship more like participatory self-government. Since our governments seem prone to frustrating those efforts, democratic theorists find themselves in an uncomfortable relationship with the governments they are supposed to be explaining. At least since Carl Schmitt, theorists have been tempted to conclude that representative governments are experiencing a “crisis.”⁹²

In the Progressive era in the United States, it might have been possible to imagine that citizens were just on the brink of finally realizing the democratic potential in representative government. The various institutional experiments associated with Progressivism – the initiative, the recall and the referendum – all sought to put more direct governing power in the hands of the people. But looking back at the career of those reforms, it is hard not to conclude, as many observers have, that they served mainly to weaken one form of oligarchy – party organizations – without creating the conditions that would allow truly direct popular self-government.⁹³ The party organizations have been replaced by media-manipulators whose job it is to find or create cleavages in the electorate that individual candidates can exploit. The initiative in politics now, cynics say, seems to come from whoever has the money to hire public relations firms and to buy the necessary advertising. If ordinary citizens do not find that their interactions with their representatives must be filtered by party organizations, neither do they find the possibility of direct interaction. Instead, their contact with their representatives is mediated by...the media, and by the lobbyists who can manipulate it. At most, we have gained the illusion of more directness; we have not left behind the elitism of the system.

Bernard Manin's already-classic book recognizes these facts, but argues that they do not amount to a true crisis for representative government. He identifies with precision the distinctive features of that form of government, and he shows how they have remained constant even through changes as momentous as the arrival of universal suffrage. Throughout the whole course of their history, representative governments have involved (a) the periodic election of representatives who are (b) granted independence from any particular instructions or binding mandates. In addition, representative governments have (c) protected freedom of opinion and (d) encouraged public discussion in civil society.⁹⁴ Manin's traits come close to duplicating those identified by François Guizot in his treatment of the topic. Guizot defined representative governments with respect to

three traits: the division of powers, elections, and publicity.⁹⁵ So let's add to Manin's traits the first one that Guizot mentions, the one that Manin leaves out: (e) the division of government into competing powers. Once we have identified these features, we can look to see whether the historical changes that have occurred in our systems of government have eliminated any of them. Manin argues that the defining features remain intact in the system that we have now, in spite of the new influence of media consultants, polling organizations, and lobbyists. In addition, he notices that there was, at each stage in the history of representative governments, a relatively strong element of elitism. Thus the presence of elites in the practice of representative government today does not represent a departure from the norm but only a new version of it:

Representative government remains what it has been since its foundation, namely a governance of elites distinguished from the bulk of citizens by social standing, way of life, and education. What we are witnessing today is nothing more than *the rise of a new elite and the decline of another*.⁹⁶

Of course he acknowledges that the new elite has certain characteristics that influence the nature of governing; he identifies the new sort of government that has they have ushered in as "audience democracy." But he argues that the facts that there *is* an elite and that most citizens find themselves left in the non-participatory role of an "audience" do not *in themselves* present a crisis for representative government, for the simple reason that the system has always contained elitist elements as well as democratic ones.

Two of the traits listed above, in particular, might be singled out as potentially offensive to democratic tastes: the division of elected authority into multiple institutions that can check one another and thus stand in the way of executing the people's expressed will, and the absence of binding mandates linking representatives tightly to their constituents' opinions. Manin is certainly right, then, that the representative system has always included elitist elements that seem designed to

limit or complicate popular rule. The question that his analysis raises, then, is how we can best understand these elitist elements of our system.

Beyond the mixed-government interpretation

Manin argues that our astonishment at the presence of the elitist elements in our system will disappear if we give up the erroneous view that representative government is meant to approximate direct democracy as much as possible. In fact, he suggests, representative government is its own distinctive system of government, one that mixes oligarchic and democratic parts. It is liable to be mistaken for either a simple oligarchy or a simple democracy by observers who focus on only one part or another, but it is actually an amalgamation of the two. The normative question that Manin's book raises, but does not address directly, is how we would justify a mixed government today.

In the mixed governments described by Aristotle (to which Manin alludes in his book's final sentence), each of the different elements of a political regime comes with its own principled argument about why it deserves to be included.⁹⁷ The principle that the *demos* brings is one of equality, but the oligarchs too have a principle. Their argument is that they contribute more resources to the city, that they have more at stake in it, and that they therefore deserve a greater proportional role in governing it. When traditional mixed government combined institutions of democracy and oligarchy, it implicitly recognized the partial validity of each of these principled claims. The limitations on popular rule found an implicit justification in the idea that the wealthy or the privileged deserved a special role in seeing how their wealth will be used and protected. Consider how Montesquieu justified the existence of an upper house of the legislature:

In a state there are always persons distinguished by their birth, riches, or honors: but were they to be confounded with the common people, and to have only the weight of a single vote like the rest, the common liberty would be their slavery, and they would have no interest in supporting it, as most of the popular resolutions would be against them. The share they have therefore in the legislature ought to be proportioned to the other advantages they have in the state; which happens only when they form a body that has a right to put a stop to the enterprises of the people, as the people have a right to oppose any encroachment of theirs.

The legislative power is therefore committed to the body of the nobles and to the body chosen to represent the people, which have each their assemblies and deliberations apart, each their separate views and interests.⁹⁸

What principled claim is implicitly recognized when we permit the special influence of our elites? We might simply repeat Aristotle's or Montesquieu's arguments on behalf of our "nobles," but we would find them ill-received today. Imagine a debate about campaign-finance laws in which one side insisted that the special interests of the wealthy be protected. Furthermore, the new elites who are central to audience democracy – the media experts, for example – would have to discover a principle justifying *their* predominance, which is difficult to conceive. It is not clear that we are really ready to look for or accept non-democratic principles of legitimacy. After all, a major difference between classical mixed governments and our system is that in our system, even the least popular parts of government, the Supreme Court and the Senate, are justified with democratic principles.⁹⁹ No one defends these institutions as the rule of the landowners or the wealthy, much less of the wise or the virtuous. Our marriage to democratic principles is nowhere more evident than in the contortions that legal theorists put themselves into to show that the Court is democratically legitimate. But without an interest in mixing democratic with non-democratic principles of legitimacy, it will be hard

to reconcile ourselves to the mixing of democratic and non-democratic practices in our system of government. So: While seeing our system as a mixed government might help us to escape the idea that today's elitism is a new threat, it would not address the fundamental uneasiness that arises from the basic conflict between our democratic instincts and our mixed practices.

But the mixed-government model is not the only way of understanding the presence of the apparently elitist elements in representative government. I want to suggest a way of seeing how some of the apparently undemocratic features of the system might in fact be justified on democratic grounds. There is, in fact, a democratic response to the question of why we include in our system of government so many features that seem to frustrate popular rule and distance the people from their rulers. The key idea is one that Manin himself articulates in his discussion of the people's right to voice their opinions. He notices that by declining to give representatives binding mandates we leave the public free to voice its opinion itself rather than through its representatives. The representative system emphasizes the fact that our representatives are not to be taken as having an incontestable legitimacy – they are not to be mistaken as being the bearers of the citizens' sovereignty:

Representative government is...a system in which the representatives can never say with complete confidence and certainty "We the people."

Both popular self-government and absolute representation result in the abolition of the gap between those who govern and those who are governed, the former because it turns the governed into the governors, the latter because it substitutes representatives for those who are represented. Representative government on the other hand preserves that gap.¹⁰⁰

The essential liberal thought that I want to highlight is that preserving this gap between the representatives and the people they represent can be thought of as a deeply democratic thing to do.

It is democratic not because it allows us to rule through our representatives or to influence the way that they rule, but instead because it allows us to protect our sovereignty from usurpation by them.

To see the force of this argument, it will be necessary to leave behind the common insistence on viewing popular sovereignty as equivalent to popular government. This insistence often seeps into our understanding of representative government, allowing us to rest satisfied with what I will call the *simple model* of representation. The simple model is one in which representatives are supposed to act, with more or less discretion, as our agents. The simple model is not just another name for the traditional anti-Burkean position that representatives should be delegates rather than trustees, because many understandings of trusteeship also fall into the simple model; though they allow a representative more discretion, they still conceive of his or her task as one of acting on behalf of the people and in their stead. The key point about the simple model of representation is that it aims to show us how we can see the actions of politicians as being somehow our *own* actions, and so it aims to show us how we can think of representative government as a version of self-government.

The simple model founders so often on experience that it is difficult to see why we insist so determinedly on its viability. It seems to me that we strain to portray ourselves as indirect governors or rulers in part because we tend to make the following assumption: that if we are not ruling, we must be submitting to the rule of others. Not wanting to give up our freedom, we lean heavily on the simple model of representation to reconcile our apparent non-rule with our desire not to be ruled. But the truly distinctive liberal position was to challenge the basic assumption that we have no options other than ruling and being ruled. In rejecting the simple model as insufficient, the liberals were rejecting the option of “ruling.” The way that they did this was to criticize precisely the doctrine that they are so often credited with defending, the doctrine of the separation of powers.

Who will separate the powers?

Here we have to use language very carefully if we want to describe the structure of representative government accurately. We often speak of the “separation of powers” and “checks and balances” when describing our system, assuming that the two are the same or that they naturally accompany one another. In fact the two are almost opposites. The theory of the separation of powers was that it was possible to prevent a dangerous concentration of power from falling into the hands of one person or assembly by carefully distinguishing different parts of power itself, and giving each part to a different person or institution. If separated properly, none of these parts alone constituted “power” and so none could be abused as consolidated power could. As a teacher of mine once explained, we use this theory whenever we deal with two children who are about to quarrel over how to divide a cake: We say that one of them should cut the cake and the other should choose his or her piece. By separating cutting from choosing, we divide the power in such a way that no one of them can dominate the other.¹⁰¹ The analog in politics was to separate political power into legislating and executing (and sometimes judging) and put these parts of power into different hands. Even if the legislative power was most important, the holders of that power could not consolidate power dangerously because they relied on others to actually execute the laws they made.

The elegance of the separation of powers consists in the fact that it does *not* require any checking and balancing. If the doctrine is working well, the two children dividing the cake do not come into conflict, precisely because their powers have been separated in the right way. The distinction between the separation of powers on the one hand, and checks and balances on the other, was appreciated by some early critics of the American constitution, who objected to the fact that Madison and the other framers had allowed legislative and executive powers to touch one another too often. For example, the presidential veto gives the executive some legislative power,

while the “advise and consent” clause gives the legislature a share of the executive’s power to make appointments. The critics thought, correctly, that these opportunities for checking and balancing constituted departures from the pure doctrine of the separation of powers.

We have already seen an effort to think through the separation of powers in Rousseau. He insisted on a strict conceptual distinction between legislative and executive power, between sovereignty and government. It was only because the sovereign was insulated from the particularity that necessarily characterized executive power that it could be entirely general. That generality was what gave the sovereign will its special legitimacy. In a sense, then, the separation of powers was foundational to Rousseau’s entire theory of popular sovereignty; without it the general will was unthinkable. Of course it is true that Rousseau did not think that sovereignty could be divided, but this is entirely compatible with separating sovereignty from other aspects of political rule, which Rousseau did quite explicitly and insistently.

In the last chapter we saw how dissatisfied Constant and Guizot were with Rousseau’s political theory. What they were dissatisfied with was, in fact, Rousseau’s reliance on the separation of powers. They did not think that the legislative and executive powers could adequately be separated. Constant’s complaint was that Rousseau’s conceptual distinction did not prevent politicians from usurping democratic sovereignty in practice, and that if it were enforced it would render the sovereign people virtually impotent, since they could not execute their own will. In practice, the holders of the executive power tended to hold all the real power, since they were the ones who could act. Recall that in Rousseau’s terminology, the “executive power” included all the powers of government and that many of the legal statutes that we call “laws” would be “decrees” of the governing legislators rather than laws issued by the sovereign. Constant’s view was that the government would always act and would always claim to be acting as the agent of the legislative

power; it would always usurp legislative authority. Constant and other liberals thought the separation of powers could not be maintained in practice.

Rousseau himself had seen the problem, and the most interesting chapters of book three of the *Social Contract* are those in which he thought through various ways of addressing it. In general, he tried to address the problem by finding an additional, external authority outside the legislative and executive powers, an authority whose function would be to police the separated powers and prevent them from straying into one another's territory. If we look at various efforts to think through such a strategy, however, we find that none are really successful at solving the problem. The external power brought in to police the separation of the other powers too easily falls prey to the temptation to overstep its own authority and seize real power for itself. This was a real problem in the theory of the separation of powers. It recurs throughout discussions of the issue in various places, and draws together what might otherwise seem to be very different sorts of institutions. It arose, for example, in Rousseau's treatment of the Roman tribunate; in Constant's proposal for a "neutral" monarch; in various discussions of the U.S. Supreme Court; and in proposals for popular constitutional referenda or assemblies in Rousseau, Sieyes, and Jefferson.

Rousseau's Roman tribunate

Rousseau devoted an entire chapter of his *Social Contract* to the Roman republic's institution of popular tribunes. He treated the tribunate as an institution devised not to engage in rule itself, but to judge and check the rulers. But his account of its history emphasized how difficult it was to institutionalize such a power in a way that would preserve its independence.

According to Rousseau, the tribunes occupied a unique place in the Roman republic: "The tribunate is not a constituent part of the city, and should have no share in either legislative or executive power; but this very fact makes its own power the greater: for, while it can do nothing, it

can prevent anything from being done.”¹⁰² Ideally, then, he thought the tribunes would have a purely negative function. They would veto actions by the government and thereby prevent illegitimate exercises of authority. In practice, however, the tribunate could not maintain the delicate balance that it required to avoid becoming despotic itself. Rousseau compared the institution to that of the Ephors in Sparta, which had grown more and more powerful until it had overwhelmed the republic itself. Similarly, in Rome the tribunes had eventually grown so powerful that they had overwhelmed the rest of government. The growth of the tribunate was linked to the end of the empire, Rousseau argued, because it was through the tribunes that the emperors had protected themselves. Presumably Rousseau was referring to the Gracchi and to Augustus Caesar’s seizure of tribunal authority for himself.¹⁰³

To critics who do not regard the emperor’s usurpation of the tribunes’ authority as a compelling difficulty, Rousseau’s arguments will seem little more than efforts to weaken the power of the people.¹⁰⁴ But if we take usurpation seriously, Rousseau’s concerns may have more weight. The problem confronting the tribunate pointed to a more fundamental problem with trying to isolate the power to prevent usurpation from the power to usurp. Any institution given the power to do the former will, Rousseau suggested, inevitably do the latter.

Constant’s neutral monarch

In his *Principles of Politics Applicable to All Representative Governments* Constant reiterated the desideratum that had led Rousseau to consider the tribunate – the need for a power outside the regular governing powers that would keep each of them in its proper place. Just as Rousseau saw the need for a “peculiar magistracy” that was separate from the others and which had the role of maintaining the balance between legislative and executive, Constant too saw the need for an external guarantor to maintain the separation of powers:

The executive, legislative and judicial powers are three competences which must cooperate, each in their own sphere, in the general movement. When these competences, disturbed in their functions, cross, clash with and hinder one another, you need a power which can restore them to their proper place. This force cannot reside within one of these three competences, lest it should assist it in destroying the others. It must be external to it, and it must be in some sense neutral, so that its action might be necessarily applied whenever it is genuinely needed, and so that it may preserve and restore without being hostile.

Constitutional monarchy creates this neutral power in the person of the head of state. The true interest of the head of state is not that any of these powers should overthrow the others, but that all of them should support and understand one another and act in concert.¹⁰⁵

Notice how Constant portrayed the need for a neutral monarch – it was to *prevent* powers from crossing, clashing and hindering one another – to prevent them from checking and balancing one another. He argued that a constitutional monarch was well-suited to doing this, and that the very features of it that seemed objectionable to republican sentiment would make it unlikely to stray beyond its policing power. He located “the vice of almost all constitutions” in the failure to create such an independent neutral power. In the past, that power had been combined with one or the other of the regular constituted powers. When combined with the legislative power, he argued, it had led to the tyranny of England’s Long Parliament. When combined with the executive power, it had brought the tyranny of Rome’s dictatorship. (Constant’s use of “legislative” and “executive” mirrors our common use, not Rousseau’s use of those terms.) He showed that the dictatorship had served the patrician cause while the tribunate had served the plebian cause; neither institution, he argued, had been truly independent or neutral, and so both had become caught up with the powers

they were supposed to be policing and had only heightened and deepened the conflict between them.¹⁰⁶

Constant's solution, the novelty of which he trumpeted, was to insist upon the separation of royal from executive power, using England as a model. Giving the royal head of state only a non-active or "neutral" power was a way of insuring that the executive, the ministers of government, were visibly responsible to the nation for their actions. If the separation between the monarch's neutral power and the ministers' executive power were not maintained, he pointed out, then the executive would be thought to be executing the will of the monarch rather than acting on its own initiative; it would not be treated as a responsible agent of its own. The creation of a purely neutral power not only prevented the crown from becoming despotic, he argued; it also allowed the crown to enforce the separation of all the active powers without become tied to any of them. The monarch, because of his inviolability, "floats, so to speak, above human anxieties."¹⁰⁷ He would have no interest other than preserving order and liberty, according to Constant.

This idealization of monarchy is implausible, and also uncharacteristically utopian for Constant. For some reason he did not see that the very same problem the neutral monarch was meant to solve would haunt the separation between the monarch itself and the executive ministers: who would police *that* separation of powers? Constant asserted that hereditary power would not easily be confused with other powers because it was so obviously different from elective authority, but history would suggest that the separation between neutral monarchy and active executive would need as much policing as any other separation of powers.

Even if there was this weakness in his constitutional innovation, Constant's account nevertheless is useful for highlighting the problem that faced the separation of powers. He cited from the histories of many states – Crete, Carthage, Rome, Florence and England – to show that "in all these constitutions, the right to dismiss the executive power somewhat drifted at the mercy of

whoever seized it, and whoever actually seized it, used it not to destroy, but to exercise tyranny.”¹⁰⁸

He was driven to reconsider the potential benefits of constitutional monarchy out of a sense that no good republican remedy had been found for the need to keep separated powers in their place. This was the problem that had occupied Jacques Necker, the famous banker and finance minister for Louis XVI, in a book on executive power by which Constant was strongly influenced.¹⁰⁹ Both Necker and Constant sought a way of creating an external power that could prevent usurpation without becoming a usurper itself.

Neither, apparently, realized that James Madison had confronted precisely this problem just a few years earlier, and had suggested a wholly different remedy. But before turning to Madison’s approach we should notice that the impulse to find an external authority to police the separation of powers, the impulse behind Rousseau’s tribunate and Constant’s constitutional monarch, is not absent in more familiar contexts.

The U.S. Supreme Court

If Constant’s support of a neutral monarch seems far from the representative governments that we know, we can nevertheless notice that many of the issues he explored in his treatment of it are ones that are familiar to us in another guise. They anticipate the debates that surround the exercise of the Court’s authority. One of the strongest justifications for judicial review is that it can serve to prevent the legislative and executive branches from encroaching upon one another. That issue comes up more frequently than one might think. Consider, for example, the special prosecutors or “independent counsels” created by the Ethics in Government Act of 1978, passed in the wake of Watergate. Much of the legal controversy surrounding these prosecutors concerned the question of precisely which branch of government those prosecutors belonged to, the question of whether or not they fit into the separation of powers or whether they threatened that separation. Justice

Antonin Scalia, in dissenting from the Court's decision to permit the independent counsel in *Morrison v. Olson* (1988), warned that "without the separation of powers, the Bill of Rights is worthless." This case is just one example of the many that the Court hears in which it is called upon to police the separation of powers.¹¹⁰

Alexander Hamilton's familiar arguments about why it is not dangerous to give the Court this policing power – that the court had neither the purse nor the sword – echo Constant's reassurances about the hereditary monarch. The lifetime tenure of supreme court justices is meant to allow them to "float above human anxieties" to some extent and therefore to be unlikely to turn their negative powers into positive tyranny. But of course accusations of usurpation nevertheless surround and haunt the Court's actions. The Court, then, is just one in a long line of institutions that have been devised to exist outside the main powers of government to police the separation of those powers, guarding against usurpation. Like the tribunate and the neutral monarch, however, the court has not been able to avoid the suspicion that it sometimes crosses into usurpation itself.

Popular referenda and conventions

If the power that each of these institutions was thought to usurp was ultimately the people's, then an alternative to all of them was to let the people themselves play the role of preserving the separation of powers. This was the solution that Rousseau advocated in the series of chapters near the end of book three of the *Social Contract*, and it was the solution that Thomas Jefferson proposed when he suggested special constitutional conventions to be held once a generation. Sieyes allowed for a similar expedient when he explained that the ordinary representatives' actions could be challenged by the convening of an "extraordinary" convention designed specifically to examine questions that constituted powers could not themselves answer. This sort of solution gives up on finding an institution that can somehow be neither sovereign nor government. Since the main worry was

executive encroachment on legislative authority, why not simply allow the legislative power to protect itself? The legislative power lay in the people, so Rousseau recommended periodic appeals to the sovereign people as part of the constitutional structure.

The people, however, were actually not immune from the difficulties that plagued the other potential external enforcers of the separation of powers. The people, too, could easily be distracted from its policing function over the separate powers and lured into seizing one or more of those powers for itself. In fact, since on Rousseau's account the people was itself the legislative power, to ask them to enforce a separation of powers meant to ask them to restrain themselves from trying to exercise executive power. (The people can act as the executive, but at the moment it is doing so, it should not presume that its actions have the legitimacy that its sovereign acts have.) The people, that is, can easily fall into usurping its own sovereign authority.

This is why Rousseau, in spite of his radically democratic understanding of sovereignty, did not advocate direct democratic government. In fact he warned against it: "If there were a people of Gods, it would govern itself democratically. Such a perfect government is not suited to men," he wrote. And further:

In the strict sense of the term, a genuine Democracy never has existed, and never will exist. It is against the natural order that the greater number govern and the smaller number be governed. It is unimaginable that the people remain constantly assembled to attend to public affairs, and it is readily evident that it could not establish commissions to do so without the form of administration changing.¹¹¹

This passage might make it sound as if Rousseau's primary reason for warning against direct democratic government was practical. Later in the book, however, he explicitly argued against the view that in large modern states it is impossible for the people to gather together and vote on important questions. He pointed out that Rome, no small polity, routinely asked citizens to vote

directly on matters of importance, and he insisted that such regular meetings of the citizenry could be held in modern times as well.¹¹² Whether or not he was right, it is clear that his reason for opposing direct democratic government was not simply that it was impracticable to gather all the citizens in a large state together.

His deeper reason rested on the need to separate legislative from executive powers. The problem with direct democratic government was that it asked the same people to act as both sovereign and government. Now, in theory one person could play both roles without mixing them, but in practice it would be difficult to keep the two roles separate in one's mind. The people, while they were acting as a government, would tend to claim sovereign authority for their actions. We might think there is nothing really wrong with this, since the people themselves were, after all, the sovereign; if the people in their capacity as governors were usurping the authority of the sovereign, they were only usurping that authority from themselves. But Rousseau would insist that we consider this case more carefully: The party doing the usurping is "the people" acting in pursuit of particular interests or considerations. The party whose authority is being usurped is "the people" acting according to the general will. Rousseau's argument for the sovereignty of the democratic people applies only to the latter version of "the people." If this sovereign authority is replaced by a people acting instead according to particular interests – either private interests or the interests of a government – then its legitimacy disappears. Thus, to say that a direct democracy has usurped the sovereign authority of the people is another way of saying that the people have become corrupted by private concerns, that they are no longer exercising their will in a way that is general enough to be democratically legitimate. In the chapter on democracy Rousseau therefore articulated his reason for being suspicious of direct democratic government in this way:

It is not good that he who makes the laws execute them, nor that the body of the people turn its attention away from general considerations, to devote it to particular

objects. Nothing is more dangerous than the influence of private interests on public affairs, and abuse of the laws by Government is a lesser evil than the corruption of the Lawgiver [the sovereign], which is the inevitable consequence of particular considerations.¹¹³

Of course we might disagree with Rousseau's view that a popular will is only legitimately sovereign if it has a general or "uncorrupted" character. Then we would face the formidable task of explaining why a mere tally of votes should have any particular moral legitimacy, why accepting a majority vote as legitimate is not simply an example of might making right. Perhaps there are non-Rousseauian ways to make the case for democratic sovereignty, but the task is more difficult than it sounds. If we stick with Rousseau's argument for popular sovereignty, however, we need to take seriously his case against direct democratic government. Rousseau's argument was that usurpation was particularly likely in democratic governments, and that usurpation destroyed the conditions under which a people's will could rightfully be called sovereign. Therefore, even though he claimed that "the legislative power belongs to the people and can belong only to it" he just as firmly insisted that the executive power "cannot belong to the generality [of the people] in its Legislative or Sovereign capacity."¹¹⁴ His theory of sovereignty was democratic but his theory of government was not. The reason was that democratic government makes it more difficult for the people to play the role of preserving a separation between legislative and executive powers, and thus more difficult to preserve the special legitimacy of their own sovereign power.

In forms of government where the people did not govern themselves, the people acting as sovereign could check or slow the process of usurpation by expressing its judgment about the actions of the government. The most important practical recommendation of the third book of the *Social Contract* was that every form of government should be subject to periodic referenda in which all citizens could vote on two questions: whether the present form of government should continue,

and whether the present officeholders should continue in office.¹¹⁵ It is clear enough how this would work in an elective aristocracy: the people as a whole would vote on whether the few of them who had governmental offices should retain power. But in a direct democracy the people as a whole (as sovereign) would have to render judgment on themselves, the same people as a whole (as government). Again, the problem is that not this is conceptually impossible. Rousseau mentioned that the British House of Commons sometimes transformed itself into a committee of the whole to discuss a matter and then transformed back into itself to hear the recommendations of the committee, so the same group of individuals performed two distinct roles.¹¹⁶ But he did not think such an arrangement was to be recommended, for it required every citizen to be judge in his own case, dividing himself into sovereign citizen and governing citizen. Rousseau's argument suggested that usurpation was more easily avoided if this division were institutionalized in a distinction between the people and its government. He was arguing that the sovereign people's *distance* from the particular work of governing was precisely what enabled it to protect its own sovereignty and legitimacy. In the *Government of Poland* he referred to the expedient of having the sovereign people watch and judge the rulers as "the real secret" of preventing government from usurping the people's authority.¹¹⁷

Rousseau's famous opposition to "representation" must be understood in light of what has just been discussed. The relationship between sovereign and government was not one of "representation," as he most often used the term. Government did not represent the people in the sense of bearing their sovereign authority. Instead politicians were mere "deputies." Government officials held their power by "nothing but a commission, an office in which they, as mere officers of the Sovereign, exercise in its name the power it has vested in them, and which it can limit, modify, and resume..."¹¹⁸ Sovereign authority always remained with the people and could not be transferred to government; any effort by the governors to claim sovereign authority for themselves, by saying

that they represented the people, was nothing other than a form of usurpation.¹¹⁹ The key point – and the counterintuitive one – was that the distinction between sovereign and government, and the distance that it recommended between the people and the government, was wholly consistent with (and was in fact a consequence of) the impossibility of “representation” in Rousseau’s understanding of the word. In his terms, efforts to “represent” the sovereign people were efforts to usurp their authority, and separating the people from the work of governing was a means of undermining such efforts. Representation, for Rousseau, was usurpation, and both were *violations* of the separation of powers.

The danger of democratic government was therefore directly analogous to what happened to the tribunate in Rome – the power that was supposed to be independent would become a tool of one of the governing powers. In the case of the people, this meant that the people-acting-as-sovereign would become a tool of the people-acting-according-to-private-interests. This was precisely the danger that Madison cited when explaining why he opposed Jefferson’s suggestion to have regular referenda every generation. Madison wrote that such appeals would stir up deep partisan passions so that “the public decision...could never be expected to turn on the true merits of the question.” He pointed out that this is just what had happened when the state of Pennsylvania had implemented something close to Jefferson’s proposal by calling a Council of Censors in 1783-1784 to arbitrate disputes between the executive and legislative branches.¹²⁰ Rousseau would have described Madison’s worry as a concern that the people would become corrupt, and he would have endorsed it.

Rousseau, however, saw no real alternative to appealing to the people. He was ultimately pessimistic about the possibility of constructing a lasting constitutional republic, for while he thought that appeals to the people were a more reliable external police on the separation of powers than any other external institution, he did not hold out much hope for the lasting virtue that was

required to keep the people from falling into the trap that had plagued the Roman tribunate. Madison shared Rousseau's pessimism about leaving the people to police the separation of powers, but unlike Rousseau, he did see an alternative. In fact, he devised a new approach to the whole problem.

Multiple and competing representations

Madison asserted that the long history of looking for an external person or institution to police the separation of powers was not the only possible way of dealing with the problem. After having explained his opposition to Jefferson's proposed popular referenda in *Federalist* #49-50, he introduced in the first sentences of the justly famous #51 a new way of approaching the issue – an effort to find a way of preserving some separation of powers without resorting to *any* external policing power at all:

To what expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments, as laid down in the Constitution? The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.¹²¹

In rejecting the turn to “external provisions” and turning instead to “the interior structure of the government,” Madison made a key move in constructing a distinctive and original liberal theory of government. He allowed the government powers themselves to do the work of policing their own partial separation. This required a move away from the strict separation of powers, as he conceded

in *Federalist #47*, but it was a move that had been prefigured in Montesquieu. To give each power an ability to check the others, it was necessary to allow more overlap between powers than a strict separation would permit. The president could only check the legislature if it shared in legislative power, as it did with a veto. The separation of powers alone, which so elegantly avoided the need for conflict between powers, was thought to be unworkable because it relied on an external power to police the separation, an external power that would itself be tempted to usurp power. So Madison and the Federalists gave up on “exterior provisions” and turned instead to a new version of an old theory, checks and balances.

It is important to be clear about precisely why Madison’s checks and balances were new. The idea of giving different parts of government the power to check one another was not new. That idea could be found in the long tradition of political thought about the virtues of mixed government. In those theories, however, the contest between parts of government reflected the social cleavages in society and the different principles of legitimacy implicit in each party’s point of view. The legislature, or its lower house, was meant to represent the people, while the powers it contested with were meant to represent other parts of society. But after the democratic revolutions, those other parts of society lost their right to make corporate claims. The people’s claim, which in the past had had to contest against the nobles’ claim and the clergy’s claim (for example in the Estates General in France), now became the only acceptable claim. In Sieyès’s famous words, “What is the third estate? Everything.”¹²² One might think, therefore, that the need for checks and balances had disappeared – the people had won, and the parts of government representing the other parties had lost their *raison d’être*. It might seem that the legislature should simply predominate and enact the people’s will, finally without obstacles. That was the view of many on the left in France who advocated putting virtually all power in the National Assembly, and it was a view found among some anti-Federalists in the U.S. too, who opposed splitting the Congress into two.

When liberals in the U.S. and France recommended returning to something like the checks and balances of mixed government, therefore, they had to devise a new rationale for introducing those checks. At times they did slip back into the old sort of argument, as for example when they suggested that the Senate would represent a different part of society than the House of Representatives. But there was also a new argument, one that arose from emphasizing the uncertainty inherent in any claim to represent such an abstract entity as “the people.” The new argument was that the government should include more than one representation of the people at once. When the various powers checked one another, they would all be acting in the name of the *same* authority. All three branches, and also all levels of government, local, state and federal, were in some sense representations of the same sovereign entity. This did not eliminate the danger of usurpation – any one of those representations, and possibly all of them, were inaccurate in some way or another. But by having multiple simultaneous usurpations in government at once, each empowered to check the others, the effects of usurpation would be mitigated. The claim to represent the people could not be used to justify dangerous concentrations of power, since each of the other powers that opposed the would-be despot would have the same claim to authority behind it.

This crucial aspect of his argument is lost if we focus only on the idea that representative government is supposed to “refine and enlarge” public opinion by filtering it through deliberative institutions. That point alone might suggest that the most refined version of public opinion should wield final authority in representative government. But Madison would not have countenanced that conclusion, and the whole “interior structure” that he theorized was designed to resist it. He opposed giving sovereign authority even to the most refined version of public opinion. He did not, for instance, think that the Senate should have conclusive authority over the House of Representatives, even though he thought that the quality of deliberations would be higher there.

Instead, he favored having two separate institutional efforts to represent the popular will present in government at once. He also favored staggering elections in the Senate, so that the assembly would contain members who were elected at different times, and who thus reflected different snapshots of the popular will taken at different times. Each group of elected officials – each chamber of Congress, the winners from each election cycle – has a plausible case to make that they represent the popular will, and yet they may often disagree. What this means is that no group of representatives can plausibly insist that they are the only representation of the popular will; none can claim popular sovereignty without their claim being contested by others with at least as plausible a claim.¹²³

Sometimes Madison's position is explained as though it were motivated primarily by a fear of the people or of their representatives in the legislature. But in the 1790s his worries were centered on the executive and he turned to popular electoral politics as a remedy. The common thread in his various political positions over the years was not an opposition to popular politics, but a determination to resist allowing any one part of government to claim final sovereignty for itself.

In support of this position Madison quoted Thomas Jefferson, who had argued in his *Notes on the State of Virginia* that a concentration of power was despotic even if it was found in the most representative branch of government. Jefferson remarked that despotism arose not from the fact that power was given to one person rather than many, but from the fact that it was concentrated in one institution, unchecked by others:

It will be no alleviation [to despotism], that these powers will be exercised by a plurality of hands, and not by a single one. One hundred and seventy-three despots would surely be as oppressive as one. Let those who doubt it, turn their eyes on the republic of Venice. As little will it avail us, that they are chosen by ourselves. An *elective despotism* was not the government we fought for.¹²⁴

Jefferson went on to put forward a system of checks and balances, which is why Madison cited this passage at length in *Federalist #48* when defending the proposed Constitution. Jefferson's phrase, "elected despotism," was an early formulation of later liberal worries about plebiscitary despotism and could have been used to describe the usurpation of Napoleon. It was against the threat of usurpation that Madison devised the new rationale for checks and balances in a government that recognized only democratic claims to authority. The rationale depended on the very fact that made usurpation unavoidable – the fact that the gap between representations of the people and the people themselves could never be wholly eliminated.

The controversy that representative government facilitated was the controversy about who represented the people. In this way representative government took advantage of a peculiar feature of the concept of representation itself. As Hanna Pitkin and others have noticed, the concept of representation seems to be structured in a way that makes its complete realization impossible. A representation that is identical to the represented object in every way is nothing other than the object itself, which is therefore not re-presented but simply *present*. Representation implies the absence of what is being represented. Thus, political representation of the sovereign people implies that the people are not actually present themselves in government. The impossibility of fully and completely representing the people's will – the impossibility that Rousseau highlighted – was therefore integral to the concept of representation itself. Representative governments are those that recognize the conceptual impossibility of adequately representing the popular will.

We can put this view of representative government into dialogue with the worries about usurpation that we saw in the previous chapter, comparing the controversies that representative government are meant to facilitate with the debate about the royal veto in France. Recall Keith Baker's judgment that in choosing the suspensive veto at the end of the summer of 1789, the National Assembly had opted for the Terror because it had accepted the idea that the popular will

should be sovereign without settling the question of who had the final authority to speak for the people. Allowing the king to veto legislation and thereby send an issue back to the people for consideration by local committees and assemblies was viewed as a source of dangerous instability and a recipe for popular frustration. The striking thing about the scheme of representative government advanced by Madison was that it aimed to produce precisely this sort of uncertainty and instability *within* government. Constant, while he did succumb to the temptation to look for an external police for the separation of powers, also had some understanding of the benefits of bringing this sort of controversy into the structure of government. In the *Principles of Politics* he defended allowing a king to dissolve the assembly so as to send a set of laws back to the people. He invoked the danger of legislative usurpation: “An assembly, the power of which is unlimited, is more dangerous than the people...The dissolution of assemblies is by no means, as some have argued, an insult to the rights of the people.”¹²⁵ He presented the monarchical right to dissolve an assembly as a way of defending the people against their own representatives. On his plan, the monarch could not replace the representatives’ policy with his own will, but could only send the matter back for consideration by the next group of representatives to be elected. In exercising this power, the monarch was contesting the claim of the current representatives to be adequately representing the popular will. Precisely the sort of contest that Baker viewed as disastrous to the early French state was here invited into the heart of that state.

Constant and Madison each followed this path because they believed contention about the legislature’s claim to represent the people was unavoidable, and that if such contestation were not given constitutional form it would always threaten the government from the outside. Baker suggested that allowing the multiplication of claims about who spoke for the people helped to fuel the revolutionary dynamic, but the liberals did not think that dynamic could be avoided. Their interpretation of the instability that brought the Terror might well have been that the Charter did

not allow *enough* contestation, that the long waiting period required before taking up vetoed legislation for a second time made it too difficult to view the constitutional framework as one in which real disputes could be worked out. If the Jacobins had found it necessary to criticize the constitution from the outside, that was in part because they had not thought that their complaints could be heard from within. Certainly representative government cannot accommodate every sort of dispute. But the impulse of the liberals' theory was to try to tame and contain the contention about who spoke for the people rather than to end it. Representative government facilitated controversy rather than settling it.¹²⁶

From this perspective the various debates among political theorists and philosophers about what exactly political representation is, and the debates among political scientists about what sorts of institutions best reflect the will of the people, can be seen in a different light. These debates are precisely the kind that the system of representative government is designed to encourage and accommodate. Those who claim with Madison that public opinion must be refined and enlarged, such as contemporary proponents of deliberative democracy, will find within representative government a place for their views, but so will those who argue primarily for the representation of special interests or of unrefined, populist manifestations of public opinion. What no party will find sympathy for in the liberal theory of representative government is the idea that its particular interpretation of public opinion should be the final or authoritative interpretation.¹²⁷

Perhaps, if all three branches and all levels of government came to reflect a similar sentiment over a sustained period of time, then the government as a whole could be said to represent the popular will in a particularly authoritative way.¹²⁸ But at least in the ordinary course of politics, such agreement was not to be expected or even hoped for. In fact, the system was designed in part to resist registering any unified representation of the popular will. By striving to have multiple representations of the popular will present in government at the same time, the system aimed to

encourage contestation about what precisely it was that the people wanted. There is plenty of anecdotal evidence, at least, that the system achieves this goal. No trope of rhetoric is more omnipresent in American politics than the politician's claim to represent what the American people want or need, a claim made on every side of every issue by every sort of politician in almost every governmental institution.

The constant contestation over how the popular will should be interpreted gives political life in liberal democracies much of its vitality and energy. It drives politicians to explore different interpretations and to try to make their interpretations persuasive; representative government understood in this way aims to foster a politics of persuasion. It also fuels the media, which helps to multiply and amplify different iterations of the popular will, and which investigates any claim to represent that will and exposes its problems. It is no accident that the proponents of this vision of representative democracy were also great spokesmen for the importance of a free press.

Despite the elegance of this "interior structure of government," however, the last of those "exterior provisions" to police the separation of powers that were discussed earlier did not disappear entirely: popular voting remained a crucial part of the system. But in representative governments the regular elections ask only the second of the two questions that Rousseau thought should be put to the sovereign people. They ask whether officeholders should be changed, but not whether the offices themselves, the constitutional framework of government, should be changed. This, and other facts about how we vote, need to be considered when we ask what function our votes are meant to play.

How to think about voting

Political scientists often classify voting as one form of “political participation.” This formulation leaves open a crucial question: participation in what? The answer “politics” is ambiguous. When we vote, are we participating in the activity of ruling? Are we governing ourselves, albeit indirectly?

The case for answering yes to that question would be stronger if our vote came along with a set of instructions to our representatives about how they were supposed to act. But we do not give them such instructions. Contrast our practice with the one that Rousseau suggested to the Poles when they were reforming their constitution:

The instructions of the deputies should be drawn up with great care, not only on the subjects listed in the royal agenda, but also on the other current needs of the state or province; and this should be done by a committee presided over, if you will, by the marshal of the dietine [the local assembly], but otherwise composed of members chosen by majority vote; and the nobility should not disperse until these instructions have been read, debated and approved in plenary session. In addition to the original text of these instructions, handed to the deputies together with their patents of election, a copy signed by them should remain in the archives of the dietine. It is on the basis of these instructions that they ought, on their return, to report on their actions at a session of the dietine convened expressly for that purpose, a custom which must absolutely be revived; and it is on the basis of this report that they should either be excluded from all subsequent candidacy for the deputyship, or else declared eligible, if they have followed their instructions to the satisfaction of their

constituents. This examination is of the utmost importance; it would be impossible to pay too much attention to it, or to observe its results too carefully. With each word the deputy speaks in the diet, and with every move he makes, he must already see himself under the eyes of his constituents, and feel the future influence of their judgment both on his hopes of advancement, and on that good opinion of his compatriots which is indispensable to the realisation of those hopes; for, after all, it is not to express their own private sentiments, but to declare the will of the nation, that the nation sends deputies to the diet. This brake is absolutely necessary to hold them to their duty, and to prevent any sort of corruption from any source. Whatever may be said, I cannot see any disadvantage in this limitation, for the chamber of deputies, which does not, or should not, participate in the details of administration, can never have to deal with any unexpected matter; but if such a matter did arise, and a deputy did nothing contrary to the express will of his constituents, they would not blame him for having expressed his opinion, like a good citizen, on a matter they had not foreseen, and on which they had reached no decision. I will add, in conclusion, that if there were actually some disadvantage in holding the deputies thus bound by their instructions, it could not outweigh the immense advantage of preventing the law from ever being anything but the real expression of the will of the nation.¹²⁹

It is a striking fact that none of the representative governments in modern times has made any real effort to institutionalize anything like Rousseau's recommendation, as Manin points out. This was not always the case prior to the democratic revolutions. Montesquieu remarked in his *Spirit of the Laws* that representatives in German diets not only received general instructions from their constituents but had to wait to receive particular instructions on particular issues as they arose.¹³⁰ Not even Progressives who supported the recall in the early twentieth century recommended

anything close to this. The nearest that we come to enacting anything like Rousseau's recommendation is the informal interpretation of opinion polls to identify whether new officeholders have a "mandate" for any particular policy platform, but this practice is neither reliable nor binding. It is true that politicians are sometimes criticized for breaking campaign promises, but there are no formal procedures for responding to this, and in fact it is widely recognized that changing circumstances may very well require politicians to change their positions. The independence of representatives is widely assumed to be a necessary and legitimate feature of delegated rule.

The lack of instructions makes it more difficult to interpret voting as an act of rule on the part of the people, more difficult to call the speeches of our representatives the voice of the people.¹³¹ The prospective meaning of our vote is very uncertain, liable to many interpretations, and unenforceable; we cannot actually control the actions of our representatives. The much stronger and less ambiguous meaning of our vote is the retrospective one, the judgment on the past that we register when we decide whether or not to allow a current officeholder to serve again. Why does our system make the retrospective meaning of the vote so much more powerful than its prospective meaning? How should we interpret the weakness of the prospective, governing vote? It seems to indicate how weakly representative government supports the people's positive engagement in rule.¹³²

We can try to soften the antidemocratic implications of the lack of instructions by noticing, as Manin does, that officeholders often want to hold onto their office or win another office, and therefore they face *repeated* elections. This gives them incentive not only to try to read prospective intent into the votes that elect them, but even more importantly, to learn to act in such a way that future retrospective judgments will be favorable. The repeated character of elections does give to our votes more forward-looking control than it might seem from focusing on the lack of instructions itself, and makes a bit more plausible the idea that we rule ourselves through our

representatives. This argument goes some way towards supporting the usual view of popular sovereignty as self-rule. “Through their retrospective judgment,” Manin concludes, “the people enjoy genuinely sovereign power.”¹³³

But Manin’s solution is not the only way of reconciling our style of voting with popular sovereignty. Another way of interpreting the dominance of retrospective judgment in our method is to emphasize the importance of a *negative* sort of popular sovereignty. Positive popular sovereignty is the sort that gives the body of the people active power to create laws. This is the sort that most often comes to mind, and it is the sort most often associated with Rousseau’s political thought. But in fact close reading of the *Social Contract* reveals that Rousseau envisioned the sovereign people passing relatively few laws. We have already seen that much of what we today call “legislation” would count as an executive “decree” in Rousseau’s terminology, because it is not general enough in scope and application to satisfy his strict requirements for what counts as a law. The function of the sovereign people that Rousseau spent most time discussing in any practical way was their assembling and voting during the scheduled periodic referenda about whether or not the present form of government should continue and whether or not the current officeholders should continue. As we have seen, an important, if not central, role for the people was that of watching the government and judging it. Even in Rousseau, then, popular sovereignty had not only in a positive function but also a crucial negative one of removing officeholders. The negative function of popular sovereignty was to remind us that governing institutions and officers were *not* sovereign. Popular sovereignty understood in this way offered an argument to use against would-be usurpers. The force of saying that “the people” were sovereign was to instate that *only* “the people” were – that no particular official or assembly fully represented or embodied the popular will. When Constant turned to Rousseau’s theory, he distinguished carefully between the negative and positive sorts of popular sovereignty, accepting the first and condemning the second:

A careful distinction must be made between Rousseau's two principles. The first has to be accepted. All authority which does not issue from the general will is undoubtedly illegitimate. The second must be rejected. The authority which issues from the general will is not legitimate merely by virtue of this, whatever its extent may be and whatever objects it is exercised over. The first of these principles is the most salutary truth, the second the most dangerous of errors. The former is the basis of all freedom, the latter the justification of all despotism...

The body of all citizens is sovereign. This is to say that no individual, no group, no faction, can assume sovereignty except by delegation from that body.¹³⁴

And in Guizot's hands the need for elections arose directly from the need to prevent any particular ruler from mistaking himself for sovereign: "The introduction of an elective, that is, a moveable element, into government, is as necessary as a division of forces to prevent the sovereignty from degenerating in the hands of those who exercise it into a full and permanent sovereignty of inherent right."¹³⁵

With this negative sort of popular sovereignty in mind we can see another way of interpreting the weakness of the prospective vote, another way of explaining why the exclusion of binding mandates or instructions might be compatible with a sort of popular sovereignty: It is a way of preventing the government's actions from being taken as the sovereign's, a way of preventing usurpation. If the prospective vote were stronger – if representatives had less independence – then it would be much more difficult for us to blame *them* for the government's mistakes. The more accurately and undeniably the representatives hew to our already-expressed opinions, mandates or instructions, the more plausibly they can justify or excuse their actions by shifting the blame to us. The more closely tied they are to our prospective will, the more difficult it is for us to assert our independence from them. The relative independence of representatives in our system insures that

they themselves shoulder much of the responsibility for what government does. The principle is the same one that Constant invoked when he explained why government ministers could not be held responsible if they did not have independence from royal power. In both cases, independence is a prerequisite to responsibility. It permits ordinary citizens to see who is responsible and to judge accordingly. It permits us, that is, to deny that the government's claim that its potentially despotic actions are done in our name.

This negative sort of sovereignty will not satisfy those who want the people to be more directly involved in the creation of laws. But it is important to point out that it is not an inherently antidemocratic stance. For example, it is wholly compatible with a wish to increase popular involvement in elections. Constant himself took a democratic position against many of his more elitist colleagues when discussing the mode of electing representatives. He argued for direct elections rather than electoral colleges: "If some day we want to enjoy fully the advantages of representative government in France, we must adopt direct election," he wrote.¹³⁶ Writers such as Cabanis and Sieyès had advocated allowing higher assemblies to select the members of the lower ones. They justified their position by cast aspersions on the ability of the French people to judge well who should represent them. Constant argued against them. He remarked that it was a mistake to think voting had to be performed from a rarified or general point of view, insisting that the general interest should emerge organically from the negotiation among particular interests. Since no privileged point of view was needed, the people could be relied upon, for while they might not be adept with abstract arguments, they could be relied upon to be good judges about more particular matters closer to their experience.

On this point Constant cited passages from Montesquieu and Machiavelli. In Montesquieu's chapter on democratic suffrage in republics in *The Spirit of the Laws*, we are told that "the people are extremely well qualified for chusing those whom they are to intrust with part of their authority.

They can tell when a person has been often in battle, and has had particular success; they are therefore very capable of electing a general. They can tell when a judge is assiduous in his office, when he gives general satisfaction, and has never been charged with bribery. These are all facts of which they can have better information in a public forum, than a monarch in his palace. But are they able to manage an affair, to find out and make a proper use of places, occasions, moments? No, this is beyond their capacity.¹³⁷

Montesquieu went on to outline in more detail the reasons that the people were not fit to exercise executive power, mainly having to do with their inability to pace their actions properly; they tended to act too quickly or not quickly enough, he remarked. In chapter 47 of the first book of Machiavelli's *Discourses* we receive similar advice, starting with the chapter title: "However deceived in generalities, men are not deceived in particulars." Machiavelli defended that thesis through discussing three examples in which an assembled people had rendered admirable verdicts when presented with a choice between particular individuals whom they knew.¹³⁸

Both Montesquieu and Machiavelli suggested, however, that the people judged best when particular questions of the right kind were put to them. Thus they left a great deal of power in the hands of those who decided which questions the people were to vote on. In fact, the last paragraph of Montesquieu's section on democracy seemed to take away a lot of the lawmaking power that he had officially given to the people. While it was a fundamental principle of democracy for the people to have "the sole power to enact laws," he wrote, "there are a thousand occasions on which 'tis necessary the senate should have a power of decreeing." It seems, then, that much of the actual work of governing in democracies would be done by senate decree rather than popular law-making. In fact, Montesquieu went on to say that it was often appropriate to "make some trial of a law before it is established." He praised Athens and Rome for their practice of giving senate decrees the

force of law for the period of one year, after which they would have to be ratified by the people.¹³⁹ The mode of lawmaking that emerged was therefore that the elite senate would create laws and put them into effect, and the people could veto them after one year if they disapproved.

Voting, from this perspective, was not understood as a directive issued to representatives about what laws to pass. That question was too vague and abstract to be answered intelligently by the people as a whole. It required deliberation by an assembled group of legislators to answer well. But other questions, such as whether particular people would be good legislators or whether particular existing laws were good ones, were more concrete and thus better objects of judgment for the people as a whole, people who were not in a position to deliberate together for substantial periods of time. This kind of restriction on what the people vote on might be seen as an elitist one, but it might also be seen as an effort to preserve the integrity of the popular vote by restricting it to questions about which it is possible to vote meaningfully.

Voting understood as the ability to insist that the government's actions are not our own fit well with the introduction of multiple and competing representations of our will into government. Together these two fundamental features of representative government create a system that both draws the people into government and keeps them out. It does not allow us to imagine that we have nothing to do with ruling, because the rulers constantly claim that they are ruling in our name. But it also does not allow us to imagine that we are fully or completely represented by the rulers, first because different people in government invoke our name in support of different, often opposing, ideas, and also because the system so clearly gives us the ability to distance ourselves from any one of them by voting against them. Voting, in representative governments, is only a very imperfect means of inserting the people's will into government. But it is an excellent means of protecting the separation between sovereign and the government – an excellent means of addressing the problem of usurpation.

Carl Schmitt's misunderstanding

I have been describing representative government as a system that puts multiple representations of the people into government at the same time so as to prevent any one of them from claiming final uncontested authority. The system is best seen not as an effort to translate the popular will into law but instead as an effort to avoid plebiscitary despotism. Plebiscitary despotism, liberals insisted, was not a truly democratic form of politics.

Carl Schmitt's argument in *Crisis of Parliamentary Democracy* objected precisely to the obstacle that parliamentarism posed to plebiscitary leadership. He advanced a convoluted but devilishly brilliant argument to show why the rule of a dictator was perfectly compatible with democracy: The essence of democracy, he explained, was "the identity between law and the people's will."¹⁴⁰ This identity could be achieved in various ways; nothing in the "essence" of democracy required that the law always be adjusted to suit the people's will. The adjustment of the people's will could also create an identity between will and law. Moreover, no such thing as a unitary will existed for a diverse set of individuals. There were always some whose wills did not match the laws, some whose wills would have to be changed to achieve the necessary identity. But if changing people's wills was an acceptable strategy for achieving the identity between popular will and law that constituted democracy, and if there would always be some wills that needed to be changed, then the logic of democracy did not seem to rule out identifying the will of a minority, or even of an individual, as authoritative and then modifying the wills of the people to match it. Through this line of reasoning Schmitt reached his desired conclusion – that the logic of democracy did not rule out dictatorship.

The real political question at issue in democracy was, he argued, “the question of who has control over the means with which the will of the people is to be constructed.”¹⁴¹

Just as Schmitt reduced democracy to the “essence” of an identity between popular will and law, he sought to reduce parliamentarism, or representative government, to its essence. He rejected the often heard claim that parliament was just a practical concession to the fact that not everyone could be gathered in one place to make decisions. If the principle were simply that we needed a few to do the work of governing for us, he noticed, it could just as easily have justified allowing one person to do that work; it could have justified a dictatorship. But the plurality of representatives was an integral part of representative government. There must be another principle justifying that commitment, Schmitt argued, and he identified that principle as the liberal belief in the power of *discussion* to reach the truth. Discussion required more than one person, and so it was the implicit commitment to discussion that really explained why representative government required representative assemblies rather than representative individuals. Similarly, he argued, only the liberal belief in the idea that discussion could lead to truth could explain why representative government was so closely tied to the conditions that liberals thought were necessary for discussion to work in this way, conditions such as openness and the division of powers.

Having defined representative government (parliamentarism) in this way, Schmitt could then easily point to the simple fact that the practice of representative government in his time in Germany and elsewhere did not allow for true discussion to guide the decisions of representatives in parliament:

The situation of parliamentarism is critical today because the development of modern mass democracy has made argumentative public discussion an empty formality. Many norms of contemporary parliamentary law, above all provisions concerning the independence of representatives and the openness of sessions,

function as a result like a superfluous decoration, useless and even embarrassing, as though someone had painted the radiator of a modern central heating system with red flames in order to give the appearance of a blazing fire. The parties (which according to the text of the written constitution officially to not exist) do not face each other today discussing opinions, but as social or economic power-groups calculating their mutual interests and opportunities for power, and they actually agree compromises and coalitions on this basis. The masses are won over through a propaganda apparatus whose maximum effect relies on an appeal to immediate interests and passions. Argument in the real sense that is characteristic for genuine discussion ceases.¹⁴²

The striking metaphor of a modern heating system painted to look like a blazing fire captured Schmitt's point about parliamentarism. Arguing to protect parliamentarism because it produced government by discussion was akin to defending a modern heating system by talking about how nice the smell of burning wood was. Modern parliamentary politics was about the actions of party elites behind closed doors, not the debates of legislators on the floor of parliament. Talk of government by discussion was "moldy"; such discussions were "a mere façade," an "empty and trivial formality."¹⁴³ Having already given up on pursuing its original goal, parliamentarism was in a weak position to defend itself. This constituted its crisis, according to Schmitt.

Schmitt thus argued first, that democracy and parliamentarism were based on different and not always compatible principles, and second, that the current practice of parliamentarism did not realize the principles that justified it. The conclusion that was suggested by the conjunction of these arguments was that when circumstances required deciding between the will of the people and the will of the representatives, it was difficult to see why the former should not be preferred. The victory of democracy, combined with the argument that democracy was compatible with popular

dictatorship, left Schmitt free to endorse the terrible politics in Germany that he, in fact, did endorse.

It is possible to interrupt Schmitt's argument at several points, but here I want to focus on his understanding of the rationale for parliamentarism or representative government. Schmitt named Guizot several times, and he adopted Guizot's analysis of what the essential features of that sort of government were. Schmitt nowhere recognized that there might be a rationale for the multiplication of authorities other than its potential to stimulate government by discussion and the corresponding faith in discussion's ability to approach truth and justice. He was misled by his association of the *division* of powers with a theory of *balancing* powers. He may have been right to see in Guizot a "way of thinking that creates multiplicity everywhere so that an equilibrium created from the imminent dynamics of a system of negotiations replaces absolute unity."¹⁴⁴ Guizot, unlike Constant and Madison, had not been able to fully escape the impulse to place final and ultimate sovereignty in one entity. True, he made that entity abstract and ideal so that no individuals could actually embody it – "truth, reason and justice" were sovereign, he said. But in rationalizing the abstract locus of sovereignty he opened the door to approaching it through reason. He had displaced the bearer of sovereignty onto an entity that could never fully be inhabited by a particular individual, but he presumed that institutions which gathered together many people's best efforts at finding truth, reason and justice would approximate, as much as possible, a system that was in fact ruled by those qualities. He did not leave aside the ultimate goal of approaching the sovereignty of reason by making the people in government more reasonable. Guizot's argument for representative government left itself open to Schmitt's critique.

But Guizot's analysis was not the only or even the dominant rationale for the multiplication of authorities in representative government. The theory that we found in Madison and in Constant in no way relied on the idea that the different powers would coordinate or discuss issues so as to

arrive at truth or justice. Publicity and reaching truth through discussion were simply not important themes in *The Federalist*, nor were they central in Constant's political writings.¹⁴⁵ Madison may sometimes have expressed the vague hope that the goal of government would be justice, but his emphasis was, like Constant's, much more on avoiding certain obvious injustices through institutional design. In general, the theory of representative government that we have been elaborating in the post-revolutionary liberals was one that aimed at mitigating the effects of usurpation by providing alternative representations to contest any particular instantiation of the popular will. This negative function for popular sovereignty, more than a positive alignment of it with reason, was their overriding preoccupation.

Schmitt not only ignored the issue of usurpation; he actively dismissed it. "Normally a rather banal sentence is quoted, usually from Locke, to justify the balance of power theory," he remarked. He cited Locke's *Second Treatise* and summarized the sentence with some contempt: "It would be dangerous if the offices which make the laws were also to execute them; that would be too much temptation to the human desire for power."¹⁴⁶ Leaving aside his misidentification of the theory as one concerned with a "balance" of power (a formulation that elides the separation of powers and checks and balances), we should take notice of the way that he dismissed the warning about mixing legislation and execution, calling it "banal." This is the argument that he dismissed, from Locke:

And because it may be too great a temptation to human frailty, apt to grasp at power, for the same persons, who have the power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making, and execution, to their own private advantage, and thereby come to have a distinct interest from the rest of the community, contrary to the end of society and government: therefore in well ordered commonwealths, 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.

But because the laws, that are at once, and in a short time made, have a constant and lasting force, and need a perpetual execution, or an attendance thereunto; therefore it is necessary there should be a power always in being, which should see to the execution of the laws that are made, and remain in force. And thus the legislative and executive power come often to be separated.¹⁴⁷

This argument was echoed by Montesquieu and made even more central, as we have seen, by Rousseau.

Not only did this reasoning nowhere suggest that the purpose for which powers were separated was to facilitate discussion about truth, reason or justice. It also arguably mitigated against such discussion, since discussion would imply coordination between the holders of the different powers, and coordination would necessarily threaten the separation of functions that was meant to prevent dangerous concentrations of power. The only forms of implicit “discussion” that were permitted were the negative checks that one power could exercise on another, such as the executive veto of legislation. Montesquieu, the Federalists and Constant all agreed that this departure from the separation of powers was necessary to allow powers to check one another. They allowed the departure only because it made coordination between the powers *less* rather than more likely. Thus the “banal” argument was not simply immune to the line of criticism that Schmitt launched; it potentially offered a new reason for dissatisfaction with government by discussion. But the new reason was diametrically opposed to the one that Schmitt offered. The liberals’ implicit reason for

de-emphasizing discussion was that it might facilitate too *great* a centralization of decision-making power, while Schmitt's reason for doing so was that discussion *dispersed* decision-making power among more than one actor and so weakened it.

Schmitt's quick dismissal of Locke's argument points to the real source of his dissatisfaction with representative government, which was not the liberals' faith in discussion but their intolerance for concentrated power. Soon after dismissing Locke's warning, he pointed out, as if recounting a *reductio ad absurdum*, that Locke's argument would make concentrations of power inherently problematic and therefore rule out dictatorship everywhere and always. Schmitt did not regard usurpation as a threat; he dismissed the separation of powers designed to prevent usurpation as "banal." Any reader could be forgiven for thinking that his goal was to clear the way for a plebiscitary dictatorship.

Against cabinet government

While Schmitt's politics were terrible, the theoretical problem that he raised was not a trivial one. It takes us back to the fundamental question of how to deal with the fact that a thoroughgoing Rousseauian view of popular sovereignty confronts inevitable compromises when translated into practice. Schmitt's frustration with parliamentary democracy was rooted in its inability to govern in a decisive fashion. In that way his impatience was not fundamentally different from the impatience that can be seen in more innocent figures such as Woodrow Wilson and the whole tradition of twentieth-century political science that followed him in regarding the multiplication of authorities as an obstacle to effective governance and leadership.¹⁴⁸

The centrality of this position within mid-twentieth century political science can be seen in the special supplement to the *American Political Science Review* issued in 1950.¹⁴⁹ This was a report

warning about the need for more effective and more responsible parties. Parties were the institutions that had arisen to paper over the checks and balances and allow the different branches to work together to implement a coherent program. The authors of this report wanted parties to be stronger. They went so far as to entertain the possibility of seeking a constitutional amendment to institute cabinet government of the British kind in the United States. In the cabinet system (at least as it was idealized), a party that won election did not have to face opposition to implementing its program during the time before the next election. It claimed that it had the people's mandate, and it ruled unopposed until that mandate was withdrawn. While the report's authors concluded that there were disadvantages to trying to amend the U.S. Constitution to implement such a system, they nevertheless called for reforms designed to make the American system as much like the British model as possible. The dangers of inaction, they warned, were that without a government capable of acting more assuredly the people would likely give up on Congress and concede too much power to the presidency. They also might desert the parties altogether, or form more extreme parties out of frustration. In fact the turn to the presidency as a new source of energy and leadership was precisely the path that Woodrow Wilson had taken in his own intellectual development, as one can see by comparing his early book *Congressional Government* to his later one, *Constitutional Government*.¹⁵⁰ The emerging field of leadership studies, pioneered mid-century by scholars like James MacGregor Burns, also turned the presidency into the necessary remedy for the gridlock that the system of multiple authorities was thought to have created.¹⁵¹

These responses emerged from a diagnosis that representative government was not working well because it was failing to effectively translate popular will into coherent governmental action. There was truth in this diagnosis. The prediction about the growth of the presidency, in particular, seems to have been accurate. But there was also a danger in the understanding of representative government that it presumed. It assumed that once a party with a visible platform won an election, it

should have a clear mandate to implement its program without obstacles in government. Constant and Madison would both have seen in that position a real threat of usurpation. They would have thought the idea of a mandate was much exaggerated, that it presumed an interpretation of citizens' votes that was not, on the whole warranted. The *APSR* report's view emerged from a view that the only sort of worthwhile popular sovereignty was the positive kind, and it disregarded entirely the idea that a majority, or a party claiming to speak for a majority, might usurp the sovereignty that belongs only to the whole of the people.

To say that the political scientists were leading the country towards an acceptance of elective despotism – by a party or by a president – is much too strong. They identified a real problem that confronts representative government, the problem of how to extract energetic and coherent positive action from it. But it is true that they were not as sensitive to the danger of usurpation that lay behind the design of the American system as they might have been. They sought, through strengthened parties, to turn citizenship into a function that looked more like an indirect manner of ruling through the intermediary of the party. What they did not see or accept, we could say, is that citizens of liberal democracies can be sovereign even as (or, *because*) they are represented by multiple conflicting authorities.

The preference for cabinet government rests on an interpretation of representative government that competes with the one I have offered. This interpretation can be traced from chapter sixteen of Hobbes's *Leviathan*, through Sieyès, the architect of the first National Assembly during the Revolution in France, and straight through to a commonly invoked understanding of the state today. In this alternate story, the sovereign power of the people is inert unless it is given coherence and agency by being represented in one unified authority – a single ruler, a single assembly, or a government as a whole understood as having the mission of responding to one representative will. Hobbes was the crucial starting point for this story: he argued that a multitude

could only be considered as a *people*, in the sense of being one entity capable of action, if it was represented in a single sovereign: “For it is the *Unity* of the Representer, not the *Unity* of the Represented, that maketh the Person One.”¹⁵² And Sieyès, in spite of his many blueprints for institutions that would divide the government in various ways, insisted with Hobbes that a people or “nation” could not be a coherent entity except through a single representation. He opposed any effort to appeal past the representatives to the people themselves, viewing the suspensive royal veto, for example, as a compromise on the principle of representation; he insisted that the National Assembly was “the sole authorized interpreter of the general will.”¹⁵³ From the perspective outlined earlier, we might say that when the representatives of the Third Estate, inspired by Sieyès, gave themselves the name of “National Assembly” and then proceeded to govern, they thereby joined the people (the Nation) with the government (the State) in just the manner that Rousseau had warned against. Robespierre would, once in government, find himself unable to resist a similar act of usurpation. Insofar as we continue to think of ourselves as living in “nation-states” and ask only that the state reflect our will as accurately as possible, we treat our government as a more complex version of the National Assembly.¹⁵⁴ If we accept this view of our governments, we implicitly accept the usurpation reflected in the joining of nation and state. We may insist that the representative nation-state nevertheless respects popular sovereignty, but we can do so only by adopting a view of popular sovereignty closer to the account put forth by Hobbes and Sieyès than to the one we saw in Rousseau.

Thus there are at least two conceptions of representative government that might guide our thinking. One views representative government as a “liberal democracy” in the sense that I have tried to invoke by joining the democratic Rousseau with the liberal Constant; the other views this form of government as a “nation-state” in the way just described. It is true that liberal democracies are nation-states, and therefore that some degree of usurpation is all but inevitable, as we have

acknowledged. Still, the emphasis in the two views is quite different. The first view of representative government accents the negative function of popular sovereignty and tries to multiply usurpations so as to weaken them, while the second view pursues a governmental representation of positive popular sovereignty and does not regard usurpation as a grave threat. A choice between the two interpretations should be based on a thoughtful weighing of the costs and benefits of each, in the current situation. But too often it is based instead on our having forgotten entirely the liberal tradition that I am expounding here, and on our assumption that to be a sovereign citizen of a liberal democracy requires us to find a way of thinking about ourselves as indirect rulers. The alternative is to remember how to view ourselves as neither rulers nor ruled, but as something different and more difficult to understand – as citizens who are sovereign not because they rule, but because they can render judgment on the rulers.

Chapter Four: Being Represented

Chapter Two explored the problem of democratic usurpation and Chapter Three showed how some of the distinctive features of representative government responded to that problem. All of this work was necessary because without it, the peculiar situation of the citizen living under representative governments could not be seen accurately. Understanding that situation, and the stance towards authority that it presumed, is the ultimate purpose of this first half of the book, and in this chapter we are finally in a position to discuss that issue more directly.

When the citizen of a representative democracy confronts political authority, what does he or she actually confront? The government consists of multiple authorities, all claiming one form or another of democratic legitimacy, often disagreeing with one another. If there is, as is often suggested, a deeply rooted human desire to orient ourselves towards authority, to know where it lies so as to give ourselves a steady grasp of our place in the world – if this is true, then the confrontation with such a multiple and divided system of authority as that found in representative governments may be deeply unsettling. It may be as unsettling as it is for a small child to witness an argument between his parents.

In fact that analogy is apt. John Locke was among the most important inspirations for the liberals who devised representative government. The key move in Locke's case against Filmer's arguments for unified monarchical authority was a brilliantly simple observation about where authority was in the family. Filmer had made royal authority a form of paternal authority. Locke simply pointed out that mothers had authority too.¹⁵⁵ With that, the neat and unified model of

authority that supported paternal power in the *ancien regime* was dissolved, men were come of age, and the recipe for a more complex system was written.

What is the citizen's role in the complex system of representative government that has been described? I have already provided the outlines of the answer that I want to give: The citizen's role is to be *sovereign*, where being sovereign is understood to be something different from both ruling and being ruled. Sovereignty of this kind does not put citizens in an all-powerful political position akin to God's sovereignty over the world. If we ask what a sovereign citizenry looks like, we will not find the image of an enthroned people reigning over a realm. One cannot be father to oneself. Instead we will find a more familiar image – that of individuals who allow themselves to be ruled by people with whom they sometimes identify and on whom they periodically render judgment. Being sovereign in the context of representative government amounts to being represented. Of course, “being represented” sounds too passive for a sovereign. We will lessen that impression to some degree by emphasizing the importance of actively rendering judgment, but we will not be able to eliminate it altogether. The paradoxical sense of a sovereign passivity arises from the effort to have citizenship eschew ruling as well as being ruled.

...

Machiavelli famously made a distinction between two sorts of people – the princes, who want to rule, and the people, who want to avoid being ruled.¹⁵⁶ The status that I have called “being represented” is not one that will satisfy princes. But we the people do not have to become princes to avoid being subjects – that, at least, is the new and fundamental assertion implicit in the system of representative government that arose after the democratic revolutions in France and the U.S., and it is the assertion that the career of these governments continues to test.

...

Sources Cited

- Ackerman, Bruce A. *We the People: Foundations*. Cambridge, Mass.: Belknap Press of Harvard University Press, 1991.
- Arendt, Hannah. *On Revolution*. New York: Penguin Books, 1990.
- Baker, Keith Michael. *Inventing the French Revolution : Essays on French Political Culture in the Eighteenth Century*. Cambridge: Cambridge University Press, 1990.
- Beiner, Ronald. "Machiavelli, Hobbes, and Rousseau on Civil Religion." *The Review of Politics* 55, no. 4 (1993): 617-38.
- Broder, David S. . *Democracy Derailed: Initiative Campaigns and the Power of Money*. New York: Harcourt, 2000.
- Buonarotti, Phillippe. "Conspiration Pour L'égalité Dite De Babeuf Suivie Du Procès Auquel Elle Donna Lieu, Et Des Pièces Justificatives." *La Librairie romantique*, <http://galenet.galegroup.com/servlet/MOME?af=RN&ae=U107906164&srchtp=a&ste=14&locID=29002> Online book
- Burke, Edmund. *Reflections on the Revolution in France*. Edited by Frank M. Turner and Darrin M. McMahon. New Haven: Yale University Press, 2003.
- Burns, James MacGregor. *Leadership*. 1st ed. New York: Harper & Row, 1978.
- Burt, Robert A. *The Constitution in Conflict*. Cambridge: Harvard University Press, 1992.
- Cohen, Jean. "The Self-Institution of Society and Representative Government: Can the Circle Be Squared?" *Thesis Eleven* 80, no. 9 (2005): 9-37.
- A Compilation of the Messages and Papers of the Presidents*. Edited by James D. Richardson. New York: Bureau of national literature, inc., 1917.
- Constant, Benjamin. "Des Effets De La Terreur." In *Cours De Politique Constitutionnelle*. Genève-Paris: Slatkine, 1982 [1797].
- . "The Liberty of the Ancients Compared with That of the Moderns." In *Political Writings*, edited by Biancamaria Fontana, 309-28. Cambridge: Cambridge University Press, 1988.
- . *Political Writings*. Edited by Biancamaria Fontana. Cambridge: Cambridge University Press, 1988.
- . *Principles of Politics Applicable to All Governments*. Translated by Dennis O'Keeffe. Edited by Etienne Hofmann. Indianapolis: Liberty Fund, 2003.
- . *Principles of Politics Applicable to All Governments (1806)*. Translated by Dennis O'Keeffe. Edited by Etienne Hofmann. Indianapolis: Liberty Fund, 2003.
- . "Principles of Politics Applicable to All Representative Governments." In *Political Writings*, edited by Biancamaria Fontana. Cambridge: Cambridge University Press, 1988.
- Dahl, Robert. *A Preface to Democratic Theory*. Chicago: University of Chicago Press, 1956.
- Dunn, John. *Democracy: A History*. New York: Atlantic Monthly Press, 2005.
- Ferejohn, John. "Madisonian Separation of Powers." In *James Madison: The Theory and Practice of Republican Government*, 126-55. Stanford, Calif.: Stanford University Press, 2003.
- Forsyth, Murray. "Thomas Hobbes and the Constituent Power of the People." *Political Studies* 29, no. 2 (1981): 191-203.
- Furet, Francois. *Interpreting the French Revolution*. Translated by Elborg Forster. Cambridge: Cambridge University Press, 1981.
- . "Une Polémique Thermidorienne Sur La Terreur: Autour De Benjamin Constant." *Passé Présent* 2, (1983): 44-55.

- Garsten, Bryan. "Religion and Representation in Hobbes." In *Leviathan*, edited by Ian Shapiro. New Haven, Conn.: Yale University Press, 2010.
- . *Saving Persuasion : A Defense of Rhetoric and Judgment*. Cambridge, Mass.: Harvard University Press, 2006.
- Guizot, François. *Du Gouvernement De La France Depuis La Restauration Et Du Ministère Actuel*. Paris 1820.
- . *The History of the Origins of Representative Government in Europe*. Indianapolis, Ind.: Liberty Fund, 2002.
- Hamilton, Alexander, James Madison, and John Jay. *The Federalist Papers*. Edited by Clinton Lawrence Rossiter and Charles R. Kesler. New York, N.Y.: Signet Classic, 2003.
- Harvey, Warren Zev. "The Israelite Kingdom of God in Hobbes' Political Thought." *Hebraic Political Studies* 1, no. 3 (2006): 310-27.
- Hobbes, Thomas. *Leviathan*. Edited by Richard Tuck. Rev. student ed. Cambridge: Cambridge University Press, 1996.
- . *On the Citizen*. Translated by Michael Silverthorne. Edited by Richard Tuck. London: Cambridge University Press, 1998.
- Hont, Istvan. *Jealousy of Trade : International Competition and the Nation-State in Historical Perspective*. Cambridge, Mass.: Harvard University Press, 2005.
- . "The Permanent Crisis of a Divided Mankind: 'Contemporary Crisis of the Nation State' in Historical Perspective." *Political Studies* 42, no. s1 (1994): 166-231.
- Jefferson, Thomas. "Notes on the State of Virginia." In *Thomas Jefferson: Writings*, edited by M. D. Peterson. New York: Viking, 1984.
- Kymlicka, Will. *Multicultural Citizenship: A Liberal Theory of Minority Rights*. New York: Oxford University Press, 1995.
- Locke, John. "First Treatise of Government." In *Two Treatises of Government*, edited by Peter Laslett. Cambridge: Cambridge University Press, 1967.
- . "Second Treatise of Government." In *Two Treatises of Government*, edited by Peter Laslett. Cambridge: Cambridge University Press, 1967.
- Lublin, David. *The Paradox of Representation: Racial Gerrymandering and Minority Interests in Congress*. Princeton, NJ: Princeton University Press, 1999.
- Machiavelli, Niccolò. *Discourses on Livy*. Translated by Harvey C. Mansfield and Nathan Tarcov. Chicago: University of Chicago Press, 1996.
- . *The Prince*. Translated by Harvey C. Mansfield. Chicago: University of Chicago Press, 1985.
- Madison, James. "Virginia Resolutions." In *The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787*, edited by Jonathan Elliot, 528-29. New York: Burt Franklin, 1888.
- Magliocca, Gerard N. "Veto! The Jacksonian Revolution in Constitutional Law." *Nebraska Law Review* 78, (1999): 205-62.
- Manin, Bernard. *The Principles of Representative Government*. New York: Cambridge University Press, 1997.
- Mansfield, Harvey C. "Modern and Medieval Representation." In *Nomos: Representation*, edited by J. R. Pennock and J. Chapman, 55-82: Rand McNally, 1968.
- Marini, Frank. "Popular Sovereignty but Representative Government: The Other Rousseau." *Midwest Journal of Political Science* 11, no. 4 (1967): 451-70.
- Marx, Karl. "The Eighteenth Brumaire of Louis Bonaparte." In *The Marx-Engels Reader*, edited by Robert C. Tucker, 594-617. New York: W. W. Norton, 1978.
- McCormick, John. "Rousseau's Rome and the Repudiation of Populist Republicanism." *Critical Review of International Social and Political Philosophy* 10, no. 1 (2007): 3-27.

- Melzer, Arthur M. *The Natural Goodness of Man : On the System of Rousseau's Thought*. Chicago: University of Chicago Press, 1990.
- Michels, Roberto. *Political Parties*. Glencoe, Ill.: The Free Press, 1949.
- Montesquieu. *The Spirit of the Laws*. Berkeley, Calif.: University of California Press, 1748 (1978).
- Necker, Jacques. *Du Pouvoir Exécutif*.
- Pitkin, Hanna. *The Concept of Representation*. Berkeley: University of California Press, 1967.
- Pitkin, Hanna Fenichel. *The Concept of Representation*. Berkeley,: University of California Press, 1967.
- Richardson, James D. *A Compilation of the Messages and Papers of the Presidents*. New York: Bureau of national literature, inc., 1917.
- Rosanvallon, Pierre. *Democracy Past and Future*. Edited by Samuel Moyn. New York: Columbia University Press, 2006.
- . *Le Moment Guizot*. [Paris]: Gallimard, 1985.
- Rousseau, Jean-Jacques. *Considerations on the Government of Poland and on Its Proposed Reformation* 1772.
- . "The Social Contract " In *The Social Contract and Other Later Political Writings*, edited by Victor Gourevitch, liv, 341 p. Cambridge: Cambridge University Press, 1997.
- Sartori, Giovanni. *The Theory of Democracy Revisited*. Chatham: Chatham House Publishers, 1987.
- Schmitt, Carl. *The Crisis of Parliamentary Democracy*. Translated by Ellen Kennedy. Cambridge, Mass.: MIT Press, 1985 (1923).
- Schumpeter, Joseph A. *Capitalism, Socialism, and Democracy*. New York: Harper, 1962.
- Sieyès, Emmanuel Joseph. "Dire De L'abbé Sieyès Sur La Question Du Veto Royal." In *La Monarchie Républicaine: La Constitution De 1791*, edited by François Furet, 605 p. Paris: Fayard, 1996.
- Sieyès, Emmanuel Joseph. "Dire De L'abbé Sieyès Sur La Question Du Veto Royal." In *La Monarchie Républicaine : La Constitution De 1791*, edited by François Furet, 605 p. Paris: Fayard, 1996.
- . "What Is the Third Estate?" In *Political Writings*, edited by Michael Sonenscher, 92-162. Indianapolis, Ind.: Hackett Publishing Company, Inc., 2003.
- Skinner, Quentin. "The Empirical Theorists of Democracy and Their Critics: A Plague on Both Their Houses." *Political Theory* 1, no. 3 (1973): 287-306.
- Spitzer, Robert J. *The Presidential Veto : Touchstone of the American Presidency*. Albany, N.Y.: State University of New York Press, 1988.
- Talmon, J. L. *The Rise of Totalitarian Democracy*. Boston,: Beacon Press, 1952.
- Thomas, George. *The Madisonian Constitution*. Baltimore, Md.: Johns Hopkins University Press, 2008.
- Wilson, Woodrow. *Congressional Government: A Study in American Politics*. Boston: Houghton, Mifflin, 1885.
- . *Constitutional Government in the United States*. New York: The Columbia University Press, 1908.
- Wokler, Robert. "Ancient Postmodernism in the Philosophy of Rousseau." In *The Cambridge Companion to Rousseau*, edited by Patrick Riley, 418-43. Cambridge: Cambridge University Press, 2001.
- . "Contextualizing Hegel's Phenomenology of the French Revolution and the Terror." *Political Theory* 26, (1998).
- Wokler, Robert ed. *Rousseau and Liberty*. Manchester ; New York: Manchester University Press, 1995.
- Wolin, Sheldon S. "Norm and Form: The Constitutionalizing of Democracy." In *Athenian Political Thought and the Reconstruction of American Democracy*, edited by John Wallach Peter Euben, Josiah Ober. Ithaca, NY: Cornell University Press, 1994.
- . *Politics and Vision : Continuity and Innovation in Western Political Thought*. Expanded ed. Princeton, N.J.: Princeton University Press, 2004.
- Zakaria, Fareed. *The Future of Freedom : Illiberal Democracy at Home and Abroad*. New York: W. W. Norton & Co., 2003.

Zev Harvey, Warren. "The Israelite Kingdom of God in Hobbes' Political Thought." *Hebraic Political Studies* 1, no. 3 (2006): 310-27.

¹ François-René de Chateaubriand, *De Buonaparte et de Bourbons*. Ed. Pozzo di Borgo (Utrecht, 1966), p. 112.

² Aristotle, *Politics*, book 3.

³ Quentin Skinner, "The Empirical Theorists of Democracy and Their Critics: A Plague on Both Their Houses," *Political Theory* 1, no. 3 (1973). John Dunn, *Democracy: A History* (New York: Atlantic Monthly Press, 2005).

⁴ Joseph A. Schumpeter, *Capitalism, Socialism, and Democracy* (New York: Harper, 1962). Robert Dahl, *A Preface to Democratic Theory* (Chicago: University of Chicago Press, 1956). Giovanni Sartori, *The Theory of Democracy Revisited* (Chatham: Chatham House Publishers, 1987).

⁵ Hanna Pitkin makes the formal-substantive debate central to her book. Hanna Pitkin, *The concept of representation* (Berkeley: University of California Press, 1967).

⁶ For "mirror representation" see Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (New York: Oxford University Press, 1995). For the substantive-descriptive debate, see (among many others) David Lublin, *The Paradox of Representation: Racial Gerrymandering and Minority Interests in Congress* (Princeton, NJ: Princeton University Press, 1999).

⁷ Harvey C. Mansfield, "Modern and Medieval Representation," in *NOMOS: Representation*, ed. J. R. Pennock and J. Chapman (Rand McNally, 1968).

⁸ Hobbes, *Leviathan*,

⁹ Locke, *Second Treatise of Government*, chapter 10.

¹⁰ Rousseau, *Social Contract* 3.4.

¹¹ Rousseau, *Social Contract* 1.6.

¹² Rousseau, *Social Contract* 1.7: "Whence it is apparent that there neither is nor can be any type of fundamental law that is obligatory for the people as a body, not even the social contract." Cf. *Social Contract* 2.1: "it is absurd for the will to bind itself for the future."

¹³ Rousseau, *Social Contract* 3.18.

¹⁴ I know of only one source that gives this fact the prominence it deserves, brought to my attention by Teresa Bejan after I had already published a piece on it: Frank Marini, "Popular Sovereignty but Representative Government: The Other Rousseau," *Midwest Journal of Political Science* 11, no. 4 (1967).

¹⁵ Rousseau, *Social Contract* 4.3.

¹⁶ John Locke, *Second Treatise of Government*, section 241: "But every man is judge for himself, as in all other cases, so in this, whether another hath put himself into a state of war with him, and whether he should appeal to the Supreme Judge, as Jephtha did."

¹⁷ Locke, *Second Treatise*, section 240.

¹⁸ François Guizot, *Du gouvernement de la France depuis la Restauration et du ministère actuel* (Paris 1820), 201. Quoted in Pierre Rosanvallon, *Democracy Past and Future*, ed. Samuel Moyn (New York: Columbia University Press, 2006), 123.

¹⁹ Germaine de Staël, [add full cite]. See also Pierre Rosanvallon, *Le moment Guizot* ([Paris]: Gallimard, 1985), 16-25.

²⁰ François Furet, *Interpreting the French Revolution*, trans. Elborg Forster (Cambridge: Cambridge University Press, 1981), 78.

²¹ For a good account of this see Ronald Beiner, "Machiavelli, Hobbes, and Rousseau on Civil Religion," *The Review of Politics* 55, no. 4 (1993), Warren Zev Harvey, "The Israelite Kingdom of God in Hobbes' Political Thought," *Hebraic Political Studies* 1, no. 3 (2006).

²² Thomas Hobbes, *Leviathan*, ed. Richard Tuck, Rev. student ed. (Cambridge: Cambridge University Press, 1996), ch. 35.

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*, ch. 40.

²⁷ Zev Harvey tries to account for the apparent contradiction by arguing that the priests were sovereign in theory but not in practice. Warren Zev Harvey, "The Israelite Kingdom of God in Hobbes' Political Thought," *Hebraic Political Studies* 1, no. 3 (2006): 319-23. The question this raises is whether government by divine right can ever free itself in practice from the rule of priests and from the conflicts to which such rule gives rise. The problem of who speaks for God would seem to plague any effort to rule in his name wherever his will is not self-evident to all.

²⁸ Thomas Hobbes, *On the Citizen*, ed. Richard Tuck, trans. Michael Silverthorne (London: Cambridge University Press, 1998), 16.15: 198.

²⁹ Ibid.

³⁰ Hobbes, *Leviathan*, ch. 40.

³¹ Ibid., ch. 29.

³² Not even sovereigns could claim this, in spite of Hobbes's confusing talk of them being God's "representatives." Cf. Bryan Garsten, "Religion and Representation in Hobbes," in *Leviathan*, ed. Ian Shapiro (New Haven, Conn.: Yale University Press, 2010).

³³ Hobbes, *Leviathan*, ch. 40. See also ———, *On the Citizen*, 16.13, pp. 195-96.

³⁴ Hobbes, *Leviathan*, ch. 40. Quoting 1 Samuel 8.5.

³⁵ Ibid.

³⁶ ———, *On the Citizen*, 6.1, 12.8. ———, *Leviathan*, chs. 16, 18. See Garsten, "Religion and Representation in Hobbes."

³⁷ Keith Michael Baker, *Inventing the French Revolution : essays on French political culture in the eighteenth century* (Cambridge: Cambridge University Press, 1990), 289. *Archives parlementaires*, 567.

³⁸ Ibid., 249. Quoting Emmanuel Sieyès, *Ecrits politiques*, ed. R. Zapperi (Paris 1985), 234, 238.

³⁹ Ibid., 303.

⁴⁰ Ibid., 305.

⁴¹ Furet, *Interpreting the French Revolution*, 47-48.

⁴² Ibid., 48.

⁴³ Ibid., 49.

⁴⁴ Ibid., 190.

⁴⁵ Ibid., 170.

⁴⁶ Ibid., 78.

⁴⁷ Phillippe Buonarotti, "Conspiration pour l'égalité dite de Babeuf suivie du procès auquel elle donna lieu, et des pièces justificatives," La Librairie romantique,

<http://galenet.galegroup.com/servlet/MOME?af=RN&ae=U107906164&srchtp=a&ste=14&locID=29002>

Online book For a provocative consideration of Buonarotti's dichotomy, see Dunn, *Democracy: A History*,

124-25. Dunn uses the text to highlight just how dramatic the change in the meaning of “democracy” has been since Buonarrotti’s pamphlet.

⁴⁸ Karl Marx, "The Eighteenth Brumaire of Louis Bonaparte," in *The Marx-Engels Reader*, ed. Robert C. Tucker (New York: W. W. Norton, 1978), 595.

⁴⁹ An influential strain of Rousseau interpretation associated his thought with the Terror and with totalitarianism. See, for example, Lester G. Crocker’s chapter in Robert ed Wokler, *Rousseau and liberty* (Manchester ; New York: Manchester University Press, 1995). J. L. Talmon, *The rise of totalitarian democracy* (Boston,: Beacon Press, 1952). For a persuasive objection, see Robert Wokler, "Ancient Postmodernism in the Philosophy of Rousseau," in *The Cambridge Companion to Rousseau*, ed. Patrick Riley (Cambridge: Cambridge University Press, 2001), ———, "Contextualizing Hegel's Phenomenology of the French Revolution and the Terror," *Political Theory* 26 (1998).

⁵⁰ Jean-Jacques Rousseau, "The Social Contract " in *The Social Contract and other later political writings*, ed. Victor Gourevitch (Cambridge: Cambridge University Press, 1997), book 3.

⁵¹ Murray Forsyth, "Thomas Hobbes and the Constituent Power of the People," *Political Studies* 29, no. 2 (1981), Istvan Hont, "The Permanent Crisis of a Divided Mankind: 'Contemporary Crisis of the Nation State' in Historical Perspective," *Political Studies* 42, no. s1 (1994).

⁵² Arthur M. Melzer, *The natural goodness of man : on the system of Rousseau's thought* (Chicago: University of Chicago Press, 1990), 222-25.

⁵³ Rousseau, "Social Contract," 3.10n.

⁵⁴ Furet, *Interpreting the French Revolution*, 177, 90.

⁵⁵ Roberto Michels, *Political parties* (Glencoe, Ill.: The Free Press, 1949).

⁵⁶ As quoted in Francois Furet, "Une polémique thermidorienne sur la Terreur: Autour de Benjamin Constant," *Passé Présent* 2 (1983): 49-50. My translation.

⁵⁷ Benjamin Constant, "Des effets de la terreur," in *Cours de politique constitutionnelle* (Genève-Paris: Slatkine, 1982 [1797]), vol. 2, p. 64. My translation.

⁵⁸ Stephen Holmes makes the point persuasively, especially with regard to Constant’s stance on Rousseau. Stephen Holmes, *Benjamin Constant and the Making of Modern Liberalism* (New Haven: Yale University Press, 1984), ch. 3 and also p. 85: “His target was the pretext of popular sovereignty invoked by a small political elite to legitimate its oppression of the majority of citizens. By rhetorically identifying itself with the people, the revolutionary government had been able to avoid effective control by the people.”

-
- ⁵⁹ Constant, *The Spirit of Conquest and Usurpation*, in Constant, *Political Writings*, 44-169 at 158.
- ⁶⁰ Furet, *Interpreting the French Revolution*, 78.
- ⁶¹ For a recent example of this line of reasoning in popular journalism, see Fareed Zakaria, *The future of freedom : illiberal democracy at home and abroad* (New York: W. W. Norton & Co., 2003).
- ⁶² John Locke, "Second Treatise of Government," in *Two treatises of government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1967), section 96, Rousseau, "Social Contract," 1.7, 4.2.
- ⁶³ Hobbes, *On the Citizen*.
- ⁶⁴ James Madison to James Monroe, October 5, 1786, in Ralph Ketchum, ed., *Selected Writings of James Madison* (Indianapolis, Ind.: Hackett Publishing Company, 2006), 28.
- ⁶⁵ For example, George Thomas, *The Madisonian Constitution* (Baltimore, Md.: Johns Hopkins University Press, 2008), 42.
- ⁶⁶ This is essentially the argument put forward, in different language, in Robert A. Burt, *The Constitution in Conflict* (Cambridge: Harvard University Press, 1992).
- ⁶⁷ Furet, "Une polémique thermidorienne sur la Terreur." My translation.
- ⁶⁸ *Ibid.*: 48.
- ⁶⁹ *Ibid.*: 55.
- ⁷⁰ Benjamin Constant, "The liberty of the ancients compared with that of the moderns," in *Political Writings*, ed. Biancamaria Fontana (Cambridge: Cambridge University Press, 1988), 318.
- ⁷¹ ———, *Political writings*, ed. Biancamaria Fontana (Cambridge: Cambridge University Press, 1988).
- ⁷² ———, "Principles of Politics Applicable to All Representative Governments," in *Political Writings*, ed. Biancamaria Fontana (Cambridge: Cambridge University Press, 1988), 176.
- ⁷³ *Ibid.*, 175.
- ⁷⁴ ———, *Principles of Politics Applicable to All Governments (1806)*, ed. Etienne Hofmann, trans. Dennis O'Keefe (Indianapolis: Liberty Fund, 2003), 22.
- ⁷⁵ Constant, "Principles of Politics Applicable to All Representative Governments," 178.
- ⁷⁶ François Guizot, *The history of the origins of representative government in Europe* (Indianapolis, Ind.: Liberty Fund, 2002), lecture 7, p. 60.
- ⁷⁷ Furet, *Interpreting the French Revolution*, 32, 78.

⁷⁸ Rosanvallon, *Democracy Past and Future*, 264n47.

⁷⁹ François Furet, *Interpreting the French Revolution*, trans. Elborg Forster (Cambridge: Cambridge University Press, 1981), 60.

⁸⁰ Furet, *Interpreting the French Revolution*, 180.

⁸¹ Rousseau, "Social Contract," 2.1.

⁸² On this theme see Rosanvallon, *Democracy Past and Future*, 205-08.

⁸³ Edmund Burke, *Reflections on the Revolution in France*, ed. Frank M. Turner and Darrin M. McMahon (New Haven: Yale University Press, 2003). Hannah Arendt, *On Revolution* (New York: Penguin Books, 1990).

⁸⁴ Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, ed. Clinton Lawrence Rossiter and Charles R. Kesler (New York, N.Y.: Signet Classic, 2003), #40.

⁸⁵ I am relying here on the historical research from two works: Robert J. Spitzer, *The presidential veto : touchstone of the American presidency* (Albany, N.Y.: State University of New York Press, 1988). Gerard N. Magliocca, "Veto! The Jacksonian Revolution in Constitutional Law," *Nebraska Law Review* 78 (1999).

⁸⁶ Jackson, "Veto Message, July 10, 1832," in *A compilation of the messages and papers of the presidents*, ed. James D. Richardson (New York: Bureau of national literature, inc., 1917), James D. Richardson, *A compilation of the messages and papers of the presidents* (New York: Bureau of national literature, inc., 1917).

⁸⁷ Magliocca, "Veto! The Jacksonian Revolution in Constitutional Law," 234.

⁸⁸ Hamilton, Madison, and Jay, *The Federalist Papers*, #78.

⁸⁹ Ibid.

⁹⁰

⁹¹ Hamilton, Madison, and Jay, *The Federalist Papers*, #63.

⁹² Carl Schmitt, *The Crisis of Parliamentary Democracy*, trans. Ellen Kennedy (Cambridge, Mass.: MIT Press, 1985 (1923)).

⁹³ For a recent example, see David Broder's treatment of popular referenda in California: David S. Broder, *Democracy Derailed: initiative campaigns and the power of money* (New York: Harcourt, 2000).

⁹⁴ Bernard Manin, *The Principles of Representative Government* (New York: Cambridge University Press, 1997).

⁹⁵ Guizot, *The history of the origins of representative government in Europe*, lecture 8.

⁹⁶ Manin, *The Principles of Representative Government*, 232.

⁹⁷ The classic locations for ancient defenses of mixed government include Plato, *Laws* 691b-694a; Aristotle, *Politics*, 1293b20-1296b10; Polybius, *Histories*, book 6; Cicero, *Republic*, book 1.

⁹⁸ Montesquieu, *The Spirit of the Laws* (Berkeley, Calif.: University of California Press, 1748 (1978)), 11.6, p. 205-06.

⁹⁹ Hamilton, Madison, and Jay, *The Federalist Papers*, #39.

¹⁰⁰ Manin, *The Principles of Representative Government*, 174-75.

¹⁰¹ See Melzer, *The natural goodness of man : on the system of Rousseau's thought*, 206.

¹⁰² Rousseau, "Social Contract," 4.5.

¹⁰³ *Ibid.*, 3.15, 4.5.

¹⁰⁴ John McCormick, "Rousseau's Rome and the Repudiation of Populist Republicanism," *Critical Review of International Social and Political Philosophy* 10, no. 1 (2007).

¹⁰⁵ Constant, "Principles of Politics Applicable to All Representative Governments," 184.

¹⁰⁶ *Ibid.*, 186.

¹⁰⁷ *Ibid.*, 187.

¹⁰⁸ *Ibid.*, 188.

¹⁰⁹ Jacques Necker, *Du pouvoir executif*.

¹¹⁰ *Youngstown Sheet & Tube Co. v Sawyer* (1952), *Dames & Moore v Regan* (1981), *INS v Chadha* (1983), *Bowsher v Synar* (1986), *Morrison v Olson* (1988), *Mistretta v U. S.* (1989), *United States v Nixon* (1974), *Clinton v Jones* (1997), *Hutchinson v Proxmire* (1979), *Ex Parte McCordle* (1868).

¹¹¹ Rousseau, "Social Contract," 3.4.

¹¹² *Ibid.*, 3.12.

¹¹³ *Ibid.*, 3.4.

¹¹⁴ *Ibid.*, 3.1.

¹¹⁵ *Ibid.*, 3.12-14, 3.18.

¹¹⁶ *Ibid.*, 3.17.

¹¹⁷ Jean-Jacques Rousseau, *Considerations on the Government of Poland and on its proposed reformation* (1772), ch. 7.

¹¹⁸ Rousseau, "Social Contract," 3.1.

¹¹⁹ Rousseau did say that acts of the government should be presumed to be consonant with the sovereign general will so long as there was an opportunity for the sovereign to voice opposition and it did not do so (SC 2.1). But if the people did make its sovereign will known, no governmental authority had any standing at all to contest that will: "The instant the People is legitimately assembled as a Sovereign body, all jurisdiction of the Government ceases, the executive power is suspended, and the person of the last Citizen is as sacred and inviolable as that of the first Magistrate; because where the Represented is, there is no longer a Representative" (SC 3.14). In this passage Rousseau slipped into using the language of representation to describe the relation of government to sovereign, but the general point is clear: sovereign authority always remains with the people and is never taken over by their governors.

¹²⁰ Madison, *Federalist* 49, pp. 283-285 and *Federalist* 50, pp. 285-288.

¹²¹ Hamilton, Madison, and Jay, *The Federalist Papers*, #51.

¹²² Emmanuel Joseph Sieyès, "What is the Third Estate?," in *Political Writings*, ed. Michael Sonenscher (Indianapolis, Ind.: Hackett Publishing Company, Inc., 2003).

¹²³ Bruce A. Ackerman, *We the People: Foundations* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1991).

¹²⁴ Thomas Jefferson, "Notes on the State of Virginia," in *Thomas Jefferson: Writings*, ed. M. D. Peterson (New York: Viking, 1984).

¹²⁵ Constant, "Principles of Politics Applicable to All Representative Governments," 196-97.

¹²⁶ For an opposing view of liberalism, see Sheldon S. Wolin, "Norm and Form: The Constitutionalizing of Democracy," in *Athenian Political Thought and the Reconstruction of American Democracy*, ed. John Wallach Peter Euben, Josiah Ober (Ithaca, NY: Cornell University Press, 1994), ———, *Politics and vision: continuity and innovation in Western political thought*, Expanded ed. (Princeton, N.J.: Princeton University Press, 2004).

¹²⁷ A similar argument is made by Jean Cohen, "The Self-Institution of Society and Representative Government: Can the Circle be Squared?," *Thesis Eleven* 80, no. 9 (2005): 33.

¹²⁸ Ackerman, *We the People: Foundations*.

¹²⁹ Rousseau, *Government of Poland*, ch. 7.

¹³⁰ Montesquieu, *The Spirit of the Laws*, 11.6, p. 204.

¹³¹ Montesquieu, who did not favor instructions to delegates, nevertheless admitted that “by this way of proceeding, the speeches of the deputies might with greater propriety be called the voice of the nation.” Ibid.

¹³² Manin, *The Principles of Representative Government*, 170.: “the independence of the representatives is clearly a non-democratic feature of representative systems.”

¹³³ Ibid., 183.

¹³⁴ Constant, *Principles of Politics Applicable to All Governments (1806)*, 31.

¹³⁵ Guizot, *The history of the origins of representative government in Europe*, lecture 8, p. 69.

¹³⁶ Constant, "Principles of Politics Applicable to All Representative Governments," 202.

¹³⁷ Montesquieu, *The Spirit of the Laws*, 2.2.

¹³⁸ Niccolò Machiavelli, *Discourses on Livy*, trans. Harvey C. Mansfield and Nathan Tarcov (Chicago: University of Chicago Press, 1996), 1.47.

¹³⁹ Montesquieu, *The Spirit of the Laws*, 2.2.

¹⁴⁰ Schmitt, *The Crisis of Parliamentary Democracy*, 26.

¹⁴¹ Ibid., 29.

¹⁴² Ibid., 6-7.

¹⁴³ Ibid., 7, 49.

¹⁴⁴ Ibid., 41.

¹⁴⁵ Manin, *The Principles of Representative Government*, 183-92.

¹⁴⁶ Schmitt, *The Crisis of Parliamentary Democracy*, 41. Schmitt cites section 172 of Locke [check], which is a paragraph about despotism. In fact the “banal” statement occurs in section 143. Does he intentionally send his readers to read about despotism, or imply a dismissal of Locke’s worries about it?

¹⁴⁷ Locke, "Second Treatise of Government," sections 143-44.

¹⁴⁸ For a good discussion of the topic of this section, see Ackerman, *We the People: Foundations*, 251-65.

¹⁴⁹ *American Political Science Review* 44 No. 3, Part 2, Supplement (Sept. 1950).

¹⁵⁰ Woodrow Wilson, *Congressional government: a study in American politics* (Boston: Houghton, Mifflin, 1885), ———, *Constitutional government in the United States* (New York: The Columbia University Press, 1908).

¹⁵¹ James MacGregor Burns, *Leadership*, 1st ed. (New York: Harper & Row, 1978).

¹⁵² Hobbes, *Leviathan*, ch. 16.

¹⁵³ Emmanuel Joseph Sieyès, "Dire de l'abbé Sieyès sur la question du veto royal," in *La monarchie républicaine: la constitution de 1791*, ed. François Furet (Paris: Fayard, 1996).

¹⁵⁴ If the term "nation" is understood precisely as Sieyès understood it, i.e. as a state, then the phrase "nation-state" becomes a tautology, as Istvan Hont argues. Istvan Hont, *Jealousy of Trade : international competition and the nation-state in historical perspective* (Cambridge, Mass.: Harvard University Press, 2005).

¹⁵⁵ John Locke, "First Treatise of Government," in *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1967), section 55. See also Locke, "Second Treatise of Government," sections 79-83.

¹⁵⁶ Niccolò Machiavelli, *The prince*, trans. Harvey C. Mansfield (Chicago: University of Chicago Press, 1985), ch. 9.