Democratic Legitimacy

IMPARTIALITY, REFLEXIVITY, PROXIMITY

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CHAPTER SEVEN

Reflexive Democracy

Electoral-representative democracy is based on the axiom that the general will is fully and directly expressed through the electoral process. The ballot is supposed to express the will of the voters, the voters are supposed to be the sole "subject" of politics, and the moment of the vote is supposed to determine the temporality of the political process. This conception of democracy rests on three basic assumptions: the voters' choice is equated with the general will; the voters are equated with the people; and all subsequent political and legislative activity is assumed to flow continuously from the moment of the vote. That these are unrealistic hypotheses needs no demonstration: the fragility of the logic should be obvious.

What is reflexive democracy? It is democracy's attempt to correct and compensate for these three flawed assumptions. This gives rise to what I will call a generality of multiplication. In contrast to negative generality, which, as we have seen, depends on creating a new position from which the demand for unanimity can be satisfied, here the method is to multiply various more limited approaches so as to achieve a relatively comprehensive vision of the whole. The strategy is one of *pluralization* rather than detachment and has two components: adding complexity to democratic forms and subjects on the one hand and regulating the mechanisms of the majoritarian system on the other. To describe this reflexive effort of democracy on itself, we must first recognize that electoral-representative democracy is itself a disciplined and chastened version of what I earlier called "immediate democracy." Before describing the effects of multiplication, we must therefore take another look at immediacy.

Constituent Power, the Horizon of Immediate Democracy

Immediate democracy was the implicit standard against which government by the people was measured during the French Revolution. The basic hypothesis is that the concept of "the people" is unambiguous, with a clear referent. Whereas direct democracy rejects the idea of delegation, the principle that one person can speak and act in the name of others, immediate democracy rejects the interface, that is, the institution or proce-

dure whose function is to shape collective expression. Direct democracy seeks to eliminate the substitution of representative for represented, while immediate democracy rejects all reflexivity of the social, by which I mean that it does not accept the idea that formulating the social requires the reflexive intervention of some structuring medium or signal. This is the source of hostility to political parties and intermediary bodies, which are accused of corrupting the general will by their very nature, by their insidious tendency to distort the spontaneous (and therefore sole authentic) expression of the general will.

From this conception of immediate democracy came an idea that played a fundamental role in the French Revolution: that legitimate popular expression is a kind of "moral electricity," a natural and unanimous manifestation of the general will, which does not require lengthy discussion or reasoned debate to reveal itself. Indeed, many thought that to open the public forum to debate was to create an opening for the disturbing power of rhetoric, giving powerful individuals and demagogues a chance to abuse the people's common sense and lead them astray. Radicals and moderates found common cause in vague Rousseauist notions of this kind.

This way of looking at things was also closely related to the idea that popular sovereignty was structurally linked to the radical project of a self-instituted society. Any check on popular sovereignty was therefore vigorously rejected. People wanted to unburden themselves of the weight of tradition, for how could they create a new history for themselves if they remained prisoners of existing institutions? "History is not our law": this lapidary formula of Rabaut Saint-Etienne succinctly states the obsession of the age to be done with the monarchical heritage. Only the present was revolutionary, to put the same point another way. Here, the constituent power was the most faithful expression of the democratic ideal, for it alone was radically creative, the pure expression of an outpouring of will, of absolutely naked power unconditioned by the past. These were the characteristics that Sieyès singled out early in 1789 to justify his generation's project of breaking creatively with the past. With the constituent power, he remarked, "the reality is everything, the form nothing."[1] It is "the national will … which cannot be contained with any form or subject to any rule."[2] As one jurist has remarked, the constituent power is thus "the secularized version of the divine power to create

[1] Sieyès, *Qu'est-ce que le tiers état?* (1789), p. 71.

[2] Sieyès, "Quelques idées de constitution applicables à la ville de Paris," July 1789, p. 30. "The constituent power can do anything in this vein.… The Nation, which in such times exercises the greatest and most important of its powers, should, in this function, be free of all constraint and all forms other than those which it is pleased to adopt." "Préliminaire de la Constitution française," July 1789.

an order without being subject to it."[3] Sieyès distinguished this extraordinary power from constituted power, the routine exercise of collective sovereignty by elected representatives. In other words, he unambiguously recognized the superiority of constituting over constituted power.

During the French Revolution, constituent power remained the guiding light of a certain radicalism, which continued to see it as a vital and incandescent instrument for achieving the promise of democracy. It was linked to the immediate presence of a directly active people—a people that rejected any form of institutionalization that might have bridled it. Power thus freed from its "chains" could only be a direct revolutionary force, a sort of permanent insurrectional energy. Democracy was unthinkable in any framework other than a radical deinstitutionalization of politics. The Conventionnels of 1793 drew the logical conclusion: they suspended the Constitution which they had just drafted and ratified. When the Convention declared on October 10, 1793 (19 vendémiaire, Year II) that "the government of France is revolutionary until peace is restored," it legalized the enterprise, if one can put it that way. "Under the circumstances in which the Republic finds itself, the constitution cannot be established. It would be used to immolate itself," Saint-Just summed up.[4] Politics was understood at the time as pure action, the unmediated expression of a directly perceptible will. It was supposed to embody the spirit of the Revolution, in the sense in which Michelet described that spirit as "ignoring space and time," condensing all the energy of the universe as in a lightning bolt that reveals eternity in a fleeting instant. In those days the cult of insurrection hinged on such utopian imagery. No one expressed this burning desire better than Sade when he invited his compatriots to believe that "insurrection must be the permanent state of a republic."[5] It is easy to understand why the idea of a constituent power has continued to fascinate anyone who has ever dreamt of democracy freed from all constraints. From the Blanquist celebration of resurrection as the immediate politics of energy to the decisionism of Carl Schmitt, Sieyès's reflections on power without form have not lacked for radical admirers.

Power without form—constituent power—is in this sense the immediate and absolute expression of the living people. It appears as "revolution-

[3] Ulrich Preuss, quoted in Claude Klein, *Théorie et pratique de pouvoir constituant* (Paris: PUF, 1996), p. 4.

[4] Speech of October 10, 1793 (19 vendémiaire, Year II). On this point, see the illuminating article by Olivier Jouanjan, "La suspension de la Constitution de 1793," *Droits*, no. 17, 1993. See also the pages devoted to "the terror or the de-institutionalization of politics," in Pierre Rosanvallon, *La Démocratie inachevée,* (Paris: Gallimard, 2000), pp. 66–80.

[5] *La Philosophie dans le boudoir*, in *Œuvres du marquis de Sade* (Paris: Pauvert, 1986), vol. 3, p. 510.

ary expansion of the human capacity to make history," as a "fundamental act of innovation and therefore an absolute procedure."[6] Throughout the nineteenth century many saw insurrection—formless power's living shadow—as the manifestation of pure democracy. It was common to exalt popular uprisings for turning "the people" from an abstraction into a concrete, palpable reality, an incarnation of democracy. Insurrection cast the people in the role of creative power, an active force that somehow resolved the tension inherent in any institutionalization of the social. Indeed, the people were in a sense identified with insurrection: together, the political form and the social trope perfectly epitomized social generality. From 1830 on, a whole poetics of the barricade amplified this political and moral exaltation of insurrection.[7] With the barricade, insurrection took shape as it gathered strength, so to speak. It gave insurgents a goal as well as a legible identity. It established itself as a sort of moral power erected in the city under the auspices of a radically material protest. Louis Auguste Blanqui became the incarnation of this ideal for the nineteenth century, forcing the respect even of his adversaries with this idealization of politics as directly creative energy and life force. Early in the next century, Carl Schmitt's decisionism was rooted in a similar fascination with the constituent power. For the author of *Political Theology*, that power was again the direct manifestation of an existing entity whose decision expressed truth.[8] For Schmitt, as one commentator has rightly remarked, to decide meant first of all to decide one's own existence, because the will was nothing other than the unalienated manifestation of that existence.[9] "The constituent power is a political will, that is, a concrete political being," Schmitt wrote in describing his version of direct social power.

"Immediacy as horizon" was also the basis of the twentieth-century communist idea of a "state of all the people."[10] The claim to have empowered the whole of society and thus to have "eternalized" the constituting moment lay at the heart of totalitarian rhetoric. One early twentieth-century Marxist theoretician went so far as to allege that "in a capitalist

[6] Antonio Negri, *Le Pouvoir constituant: Essai sur les alternatives de la modernité* (Paris: PUF, 1997), p. 35. Negri also calls (p. 20) for "keeping open what legal thought would like to close down" and for "recovering the concept of constituent power as a matrix of democratic thought and practice."

[7] Alain Corbin and Jean-Marie Mayeur, *La Barricade* (Paris: Publications de la Sorbonne, 1997).

[8] See Carl Schmitt, *Théorie de la constitution* (Paris: PUF, 1993), chap. 8 of the final section: "Le pouvoir constitutant."

[9] On this point, see the persuasive argument of Bruno Bernardi, *Qu'est-ce qu'une décision politique?* (Paris: Vrin, 2003), pp. 86–100.

[10] Jean-Guy Collignon, *La Théorie de l'État du peuple tout entier en Union soviétique* (Paris: PUF, 1967). See also Achille Mestre and Philippe Guttinger, *Constitutionnalisme jacobin et constitutionnalisme soviétique* (Paris: PUF, 1971).

state, the people in the strict sense does not exist."[11] This became the justification of the one-party state, with the single party merely the "form" of an objectively homogeneous class and thus the perfect representative of social generality. Indeed, no distinction between direct and representative democracy was even possible in this situation. The founder of the French Communist Party thus maintained in an extraordinary statement that the Soviet regime was "the only known form of direct representation of the proletariat in its entirety."[12] It is striking, moreover, that even as communist regimes claimed to have established direct democracy, they also took great care to give the appearance of maintaining electoral democracy as well and thus achieving the ideal of unanimity by counting. Defenders of these regimes insisted that their representative procedures had been improved to the point where no substantial difference remained between direct and representative government. Propaganda emphasized the multiplication of meetings that involved virtually the entire population and also stressed the large size of representative assemblies.[13] Unsurprisingly, vote totals of 99 percent of the electorate only corroborated this reasoning. Political procedures supposedly coincided so perfectly with political substance that immediate democracy had become a reality.

The various images of immediacy described above define the broad outlines of one conception of the social power of generality. But a monistic vision of the political also survived in the more modest (and therefore less dangerous) form of a certain one-dimensional politics. This continues today in a kind of hyperelectoralism. Two perverse consequences have followed. First, a certain disillusionment with democracy has set in simply because utopian ideals have been given up in practice, while the mental universe from which they sprang remains intact. Second, aspirations toward a more robust democracy are viewed with suspicion and regarded as dangerous. This renunciation of utopian ideals and blindness to the possibility of a more ambitious democratic practice together help to sustain the narrow realism that is so common a feature of today's democratic systems.

[11] Max Adler, *Démocratie et conseils ouvriers* (1919; reprint Paris, 1967), p. 54. "Democracy in a capitalist state lacks the basic ingredient of self-determination, namely, *a homogeneous people"* (author's emphasis).

[12] Marcel Cachin, "Démocratie et soviétisme," *L'Humanité*, August 17, 1920.

[13] One work recounted the existence of 50,000 soviets, 2 million elected representatives at all levels, 300,000 commissions, and hundreds of thousands of reports, questions submitted, and meetings organized, all supporting the triumphant conclusion that "82 million people participated in the debate of the Soviet Communist Party platform." See M. Kroutogolov, "La participation du peuple soviétique à l'administration de l'État," in *Recueils de la Société Jean Bodin*, série *Gouvernés et gouvernants* (Brussels) (1965), vol. 27, p. 333. In the same vein see also, *Qu'est-ce que la démocratie soviétique?* (Moscow, 1978).

Condorcet and the Generality of Multiplication

Condorcet was the first to grasp the nature of this problem during the French Revolution. He clearly understood the illiberal impasse to which the monist view of immediate democracy led but did not resign himself to inaction as a result.[14] Condorcet stood at the opposite extreme from what twentieth-century theorists have called "the liberalism of fear." Although many of his contemporaries looked on representative government as a practical alternative to the difficulties of direct democracy, Condorcet transformed the question by asking what a "representative democracy" might look like (the expression gained currency early in 1793). His main idea was to allow for different forms of popular sovereignty. He proposed to increase the political role of the people not by having less representation but rather by introducing greater complexity and reflexivity. If immediate democracy was difficult or impossible to achieve, then sovereignty could be exercised in different ways. This was the fundamental idea behind the draft constitution that he presented in February 1793. At the time, many *conventionnels* were still looking for a simple, straightforward formula for turning the power of the people into a reality, but Condorcet urged them to establish what I propose to call "complex sovereignty," based on a diversification of the political calendar and forms of political expression.

Condorcet saw two kinds of complexity in the concept of the general will. In the first place, the general will was not something that existed prior to the political process; it was rather the result of constant interaction between the people and their representatives. He saw the ordinary structures of representative government as complementary to popular referendum and censure, for example. These were two distinct moments, two different forms of popular sovereignty. He also distinguished between nominating ballots and final ballots in elections. This was an extraordinary innovation at the time. It enabled Condorcet to transcend the opposition between Sieyès's view that the collective will does not exist until it is embodied by some organ (because the people does not exist as a political subject except through representation) and the view of the Paris sections, which could not imagine the people in any form other than a crowd gathered on the city's cobblestones. For Condorcet, popular sovereignty was a historical construct, even if it derived from an institutional interaction. It combined several different time scales: the short term (referendum, censure); the periodic (institutionalized elections); and

[14] He was the first person I know of to use the expression "immediate democracy." See his pamphlet "Aux amis de la liberté sur les moyens d'en assurer la durée," August 7, 1790, *in Œuvres de Condorcet*, vol. 10, pp. 178–179.

the long term (constitution). In each case, the expression of the will of the people was subject to completion, oversight, and control by other types of procedure. Only expressions of a different type were to be taken into account, not institutions opposed to the popular will. With this proposal Condorcet opened the way to a very profound reappraisal of the separation of powers. He did not see this separation in the traditional terms of balanced or shared powers. For him it was rather an instrument for achieving a deeper democracy, because it was the only way of giving embodiment to the real people—a complex entity with plural manifestations. In other words, for Condorcet "the people" always had a twofold or even threefold existence. It was too various to be "represented" adequately by just one of its manifestations.

Representative democracy as Condorcet conceived it was therefore not a synthesis or equilibrium of two contradictory principles. For him, it allowed a multiplication of temporalities, forms, and subjects of sovereignty and therefore offered a solution to the problem of defining a modern republic. It substituted the project of permanent, diffracted sovereignty for the problem of immediate, polarized democracy. The author of the *Esquisse d'un tableau des progrès de l'esprit humain* thus opened the way to a new understanding of democratic generality, in which he argued that the best way to approximate it was to multiply its partial expressions. He proposed to make social power more effective by pluralizing its sources and representatives. Such a complex view of sovereignty makes it possible to understand the relation between liberalism and democracy in a new way. With complex sovereignty, the multiplication of functional organs—which are often characterized as "liberal" because they limit the omnipotence of elected officials—becomes a positive way to increase the influence of society on the political progress. The control of each power taken separately guarantees that social generality is globally in command. To understand how this works in greater detail, we needed to examine the various modalities of generalization through multiplication in terms of their sociological basis, their temporal manifestations, and their styles of deliberation.

The Three Bodies of the People

Complex sovereignty can be defined as the most adequate political representation of the people because of its functional *and* material multiplicity. It is justified by the fact that the people, taken as a totality, in the singular, is "unlocatable" (*introuvable*). "The people" is not a monolith, whose unanimity is supposed to reveal some fundamental secret. It is rather a power that no single individual can possess or claim to incarnate. It

can only be perceived in three guises, as the *electoral people,* the *social people*, and *the people as principle*. Each of these exhibits only a part of the whole.

The electoral people is the easiest to perceive, since it takes on numerical reality at the ballot box. It is immediately manifest in the division between majority and minority. Yet it remains more difficult to grasp than this fundamental numerical definition might suggest. Electoral expression is often highly diverse, classifying "the people as public opinion" under a multiplicity of labels. Voting hardly gives a full representation of this diversity. Many people do not register or abstain from voting altogether, or they cast blank or spoiled ballots. Above all, the existence of the electoral people is fleeting. It appears whenever there is an election, briefly and sporadically. For all these reasons it is not at first sight an appropriate vehicle for expressing social generality. Yet it does have a claim on that role, for two reasons. First, it is in the nature of elections to put an end to controversy: the majority is the majority, and no one can argue with the fact of numerical superiority. Second, an election marks explicit recognition of a radical form of equality, since everyone has the right to vote. The result of the election may be divisive, but the underlying procedure unifies.

If the electoral people establishes a power that periodically takes the form of a majority, the social people can be seen as an uninterrupted succession of active or passive minorities. It is the sum total of a variety of protests and initiatives, which reveals realities that are affronts to a just order. It is the palpable manifestation of that which makes a common world possible or impossible. It is a people in flux, an historical people, the people as problem. The social people is the problematic truth of being-together, of its abysses and lies, its promises and unrealized goals. Its only unity is that of a vital force, a dynamic contradiction: thus it is what one might call *the* society, in the sense of a container filled with all these diverse elements and movements. In this guise it may be considered as a figure of social generality. What defines it as such is not the unity of an emotion but the interconnection of the fundamental questions raised by the social fabric it weaves. Its natural realm of expression is what I have elsewhere called the counterdemocratic continent.

The people as principle is not a substantive entity. It is constituted by equality, that is, by the general equivalence underlying the project of an all-inclusive polity. It is defined by a mode of composition of the common. To represent it is to bring this principle to life, to preserve that which constitutes the most fundamental structural good and the most obviously public good: basic rights. These rights are nonrival public goods in the strict sense of the term: everyone can enjoy them without depriving

anyone else.[15] The fundamental rights together constitute the citizenship of the individual as a form of membership in the collectivity and the humanity of the person, recognizing the irreducible singularity of each human being. The whole and the parts of society are perfectly integrated in the basic rights of individuals. If these rights are respected, all voices will be heard and all margins taken into account. The rights-bearing subject is therefore the basic figure of this people. This subject reduces the multiple determinations of the people to the essential. It is the incarnation of the people in a form with which everyone can identify. This political shift from the realm of sociology to that of law is felt to be necessary in today's world, all the more so in that the old descriptive social categories are no longer pertinent. Society is less and less constituted by stable identities: its nature is now determined primarily by *principles of composition*. "The people," writes Jean-François Lyotard, "is the name of a nebula of heterogeneous phrases that contradict one another and are tied together by their very contradictoriness."[16] This disillusioned observation, fundamental to the postmodern view of society, does not necessarily lead to relativism or skepticism. It points directly to something I have repeatedly emphasized, namely, that we need a new political concept of the people.

The rights-bearing subject is today the most concrete of human beings. He is the visible representative of all who are discriminated against, excluded, or forgotten. In other words, he is not an abstraction but rather the most obvious flesh-and-blood representation of the idea of a political community. It is also striking to find which representations that have lost their former evocative power: strong romantic images of the people as individual such as Michelet's "Christ of history," Proudhon's suffering proletariat, and Marx's working class are too vague for today's purposes. The old political opposition between "formal" and "real" has changed its meaning: the people as principle has become very real.

The foregoing consideration of various images of the people brings us back to the question of the general will. Each image of the people relates to the general will in a different way. The electoral people corresponds to the numerical definition of the general will. Generality is understood in a numeric sense, as a matter of counting. The people as principle refers to an inclusive, egalitarian idea of the general will, grounded in full

[15] A public good, according to economist Roger Guesnerie, who took his inspiration from what Victor Hugo said about the love of a mother for her children, is characterized by the fact that "each person has his share, yet everyone enjoys the whole thing." It is in this sense that a public good is a nonrival good, hence radically collective.

[16] Jean-François Lyotard, "La défection des grands récits," *Intervention*, no. 7, November–December 1983.

respect for the existence and dignity of each individual. To generalize then means to construct a polity that includes everyone unconditionally. Alongside the "expressive general will" of universal suffrage, understood as a result, we have the "integrative general will" that comes of society's effort to eliminate its own internal distinctions and barriers. Its horizon is not unanimity but the eradication of discrimination, the constitution of a truly common world. It defines a *quality* of society and in this way harks back to the original democratic ideal. Looked at globally, the institution of social generality therefore implies the superimposition of all three images of the people: electoral, social, and people as principle. None of the three can by itself claim to be an adequate incarnation of the democratic subject.

The Plural Temporalities of the Political

The temporalities of the political also need to be pluralized. The idea of the general will becomes incoherent if envisioned solely in terms of immediacy. That is why the constituent power understood as *direct existence* of popular sovereignty cannot be taken as a rule of democratic life. It can engender popular sovereignty in exceptional circumstances or define its limits, but it becomes a destructive force if it seeks to impose itself as a rule in ordinary times. The same thing can be said of a radical conception of direct democracy as permanent capacity to express the will of the people. Ernest Renan remarked that in this case, "The general will would be nothing more than every moment's whim."[17] The possibility of revising the general will at any time would paradoxically whittle it away: it would literally decompose as it was sliced up into an endless series of variations. Or, to put it another way, it would cease to be will and dissolve into a series of decisions that would ultimately turn out to be contradictory. One consequence of this logical paradox of immediacy is the notion that democracy acquires meaning only as a historical construct. It is a function of time. This qualification, a consequence of the logical impossibility of immediate democracy, is corroborated by sociology. The people, as collective political subject, is itself a figure of time. It *is* in substance a form of history. Democracy is therefore not only the system that enables a collectivity to govern itself but also a regime in which a common identity is constructed. Hence it is important to insist on the need for plural temporalities in democracy. Constructing a history, like managing the present, implies a need to articulate very different relations to social

[17] Ernest Renan, *La Monarchie constitutionnelle en France* (Paris, 1870), p. 127.

time. The vigilant time of memory, the long term of constitutional law, the limited time of a parliamentary mandate, and the short term of public opinion must constantly be juggled and adjusted so as to give substance to the democratic ideal. The various temporal expressions of the general will must be allowed to interact with one another in order to construct the general will.

Willing together is not simply a matter of choosing or deciding in common, as in an election. A choice or decision is complete when it is made. It defines a before and an after, as in the case of an election. This is a crucial aspect of democracy. But the expression of a collective will is more than that. An instantaneous choice (of individuals or policies) has to be related to a longer-term perspective defined by general values and goals linked to the type of society that people desire. The people set themselves the goal of defining the meaning and direction of things. Will is a complex disposition, which links these various elements. Hence it is a temporal construct, the fruit of experience and the expression of a projected future. It is a datum of existence rather than an immediate category of action.[18] The will is by definition associated with a narrative representation. Hence the pluralization of political temporalities is a second key dimension in the formation of a generality of multiplication.

The Registers of Deliberation

Democratic life depends on the existence of an open forum where important issues can be debated before voters or representatives make their decisions. But the reality of political life is far more complex. Debate and controversy unfold chaotically. There are many arenas of debate, scattered among various institutions and other social venues, and these discussions are very unevenly reported by the media, which themselves serve as filters and instigators. Confrontation takes place at many heterogeneous levels, moreover. There are huge gulfs between debates among experts and scientists, partisan attacks, personal invective, and political discussion among neighbors. Elections are a way of aggregating these disparate elements. Everything comes together in the ballot box. On the appointed day, the polling place becomes the forum that subsumes all the others, imposing a necessary simplification and reducing multiplicity to unity. The ballot itself plays a role in reducing the diversity of argu-

[18] It is "willing will," which is never exhausted by the partial realizations of the "willed will," to borrow the well-known categories set forth by Maurice Blondel in *L'Action* (Paris, 1893).

ments. It briefly endows each and every citizen with a common tongue, eliminating the infinite variety of motives for each individual vote. Each ballot counts exactly the same as the others, whether it is the result of a momentary whim or a carefully pondered choice. The legitimacy of universal suffrage does not stem solely from the fact that it gives a definitive answer to the question of which side is in the majority, putting a temporary end to countless disputes. It also provides everyone with a common language.

This aggregative function of elections is therefore at the heart of the democratic process. There is a periodic need to reduce diversity. But diversity does not disappear, and elections cannot eliminate it for long. It is therefore important to improve the *quality* of public debate. Concern with advancing "public reason" is therefore a key to democratic progress.[19] It is also essential that all voices be heard, and that dominant views do not drown out quieter and more reflective contributions to public debate. Here, too, there is a need for generality, in the sense of vital and informed public deliberation, which is another form of multiplication.

The Impossibility of Self-Foundation

The democratic imperative of reflexivity is not just one of the practical conditions for achieving a generality of multiplication. It also has a logical dimension: it is a consequence of the impossibility of a radical self-foundation of democracy. The idea of such a self-foundation lay behind the notion of a formless constituent power, which, as we have seen, was implicit in the concept of immediate democracy. But there is no such thing as an absolute beginning, a sudden emergence from nothingness. History is a matter of relativity: there is always rejection of or continuity with what went before. Revolution wants to see itself as invention and rupture, but it declares itself as denunciation of what exists and can only be understood as an historical sequence. A will exists only if fueled by a desire to put distance between itself and the past or, conversely, to assert fidelity to the past. Will needs a point of reference if it is to deploy itself in the form of energy. Without reflexivity, no subject can take form, and no history can be sketched. In order for an identity to be constituted or a project to be formed, there must also exist some distance or difference or disparity, some reflective third party. "One never witnesses the incep-

[19] The phrase *public reason* is of course due to John Rawls, but it has been taken up by any number of theorists of democratic deliberation.

tion of a rule," Paul Ricoeur suggestively remarks. "One can only move backward in time from institution to institution."[20]

In purely formal terms, the impossibility of self-foundation means that one cannot revise a rule by following a procedure that the rule itself defines.[21] Taking elections as an example, we see that there is no such thing as a "pure" democratic procedure. Every procedure is embedded in preexisting social and material facts, which shape or constrain it in various ways. If an election is to choose among candidates, one cannot avoid the issue of how democratic the selection of those candidates was. Hence there must be democracy within democracy, and there is no good reason why the chain of regression should stop at any particular point. In the nineteenth century there was considerable debate about the composition of the electoral committees whose function was to choose candidates to run in elections. In 1848, when the first election by universal male suffrage was held in France, there were calls for democratic choice of the candidates. But was the choice of universal suffrage itself democratic? That would have been impossible. In any election, the voters engage in a process that has already been shaped in various ways by third parties. Here, the democratic ideal is not to dream of an election that would somehow found itself,[22] but to multiply requirements and tests to ensure a more democratic choice. Reflexivity is therefore a logical constraint of democratic life.

If democracy cannot engender itself, neither can it monitor itself. This has always been a problem in validating election results. On the principle that it was only natural to impose democratic controls on democracy, parliaments themselves long assumed the power to validate the results of elections.[23] To say this was in effect to grant the majority the right to judge in such matters, with all the consequent possibilities of abuse (of which there were some celebrated cases in the nineteenth century). In France, the Constitution of 1958 put an end to this situation by granting the Constitutional Council the right to judge disputed elections of deputies and senators.[24] Today, other criteria of fairness such as the drawing of district boundaries and the establishment of electoral rules can also

[20] Quoted in François Ost, *Le Temps du droit* (Paris: Odile Jacob, 1999).

[21] For discussion of this paradox, see Claude Klein, *Théorie et pratique du pouvoir constituant*, pp. 124–131.

[22] This was the de facto goal during the French Revolution, which prohibited certain candidacies. On this issue, see Patrice Gueniffey, *Le Nombre et la raison: La Révolution française et les élections* (Paris: Éditions de l'EHESS, 1993).

[23] For France, see Eugène Pierre, *Traité de droit politique, électoral et parlementaire* (Paris, 1902), § 358 à 405.

[24] Article 59.

be challenged. Some countries have established independent electoral commissions for this purpose, in order to bolster citizen confidence in the fairness of elections.[25] Such practices recognize the fact that democracy has an inherent need for reflexive third parties if it is to establish itself fully.

[25] For example, Canada, India, and various developing countries in which election disputes have led to protests and violence. See Robert A. Pastor, "A Brief History of Electoral Commissions," in Diamond, Plattner, and Schedler, eds., *The Self-Restraining State*.

CHAPTER EIGHT

The Institutions of Reflexivity

In the nineteenth century the conquest of universal suffrage and the development of electoral-representative institutions were the key developments in the history of democracy. Parliaments, as protectors of liberty and voices for a variety of interests and opinions, symbolized the rupture with absolutism and the advent of popular sovereignty. To be sure, they soon came in for vigorous criticism themselves. They were accused of failing in their mission: their representation of society was highly imperfect, and political parties had taken them over. Yet these criticisms were intended merely to reform or rebalance them, to bring them closer to their original intent. They remained at the heart of the democratic imagination.

Since then, things have changed. Democratic regimes have evolved considerably and are much less one-dimensional and monist than they were originally. New institutions have been introduced into the democratic pantheon. Earlier in this book I pointed to the growing power of independent regulatory and oversight bodies. I now turn to the increasingly active role of constitutional courts. They have established themselves—not without reservations and challenges, to be sure—as an essential vector of the push for greater reflexivity. For a long time the United States, India, and the German Federal Republic stood out as exceptions because of their traditional emphasis on judicial review. Now, however, constitutional courts of one sort or another are at the heart of democratic government everywhere. Indeed, some scholars go so far as to discern a veritable "resurrection" of constitutional thought.[1]

Significantly, all the new democracies of Eastern Europe chose forms of government in which judicial review plays an important role, rejecting the British parliamentary model.[2] Judicial review has actually supplanted the original doctrine of separation of powers as a way of guaranteeing liberties and regulating majority rule. It is noteworthy that these new

[1] See Dominique Rousseau, "Une résurrection: la notion de constitution," *Revue du droit public*, January–February 1990.

[2] On this point see Vernon Bogdanor, *Power and the People: A Guide to Constitutional Reform* (London: V. Gollancz, 1997). On the recent popularity of constitutional courts, see C. Neal Tate and Torbjörn Vallinder, eds., *The Global Expansion of Judicial Power* (New York: New York University Press, 1997).

constitutional courts on the whole receive strong support from the public, as numerous comparative surveys have shown, and they count among the most legitimate of democratic institutions.[3]

The Three Models of Constitutional Oversight

To describe the role of constitutional courts in creating more decentralized democracies, it is important to distinguish between contemporary approaches to "countermajoritarian institutions" and earlier ideas about the role of constitutions (I am thinking primarily of the liberal and positivist approaches to constitutional law). Liberal constitutional thinking is well illustrated by the post-Thermidorian writings of Sieyès and Benjamin Constant. When Sieyès presented his famous proposal for a constitutional jury in Year III,[4] he conceived of it as a "salutary brake" whose purpose was "to limit each action to its specific mandate."[5] Here Sieyès was thinking explicitly in terms of limits on sovereignty.[6] His idea was to check legislative initiatives by a simple majority by invoking the "unanimous will" supposedly embodied in the constitutional text. A few years later, Constant also thought of applying the brakes to majority rule when he outlined the role of what he called a "preserving power," on the grounds that every constitution should be understood as a "contract of distrust."[7] Both of these authors saw constitutions as "limits on democracy."

Contrast their approach with that of Hans Kelsen, the father of the modern concept of constitutional oversight.[8] For Kelsen, a constitutional

[3] James L. Gibson, Gregory A. Caldeira, and Vanessa A. Baird, "On the Legitimacy of National High Courts," *American Political Science Review*, vol. 92, no. 2, June 1998. On the perceived legitimacy of the U.S. Supreme Court, see the work of Tom Tyler, which is discussed below.

[4] For three different approaches to Sieyès's idea of a constitutional jury, see Marco Fioravanti, *Annales historiques de la Révolution française*, no. 349, July–September 2007; Lucien Jaume, *Droits*, no. 36, 2002; and Michel Troper, in Michel Ameller, ed. *Mélanges en l'honneur de Pierre Avril* (Paris: Montchrestien, 2001).

[5] "Opinion de Sieyès sur les articles IV et V du projet de Constitution" (2 thermidor Year III), in *Réimpression du Moniteur*, vol. 25, p. 294.

[6] See his notes under this head, reproduced in Christine Fauré, ed., *Des Manuscrits de Sieyès, 1773–1799* (Paris: Honoré Champion, 1999), pp. 492–494.

[7] See chaps. 4 and 14 of his *Fragments d'un ouvrage abandonné sur la possibilité d'une constitution républicaine dans un grand pays* (Paris: Aubier, 1991).

[8] On Kelsen and constitutional oversight, see the contributions of Pasquale Pasquino, "Penser la démocratie : Kelsen à Weimar," and Michel Troper, "Kelsen et le contrôle de la constitutionnalité," in Carlos-Miguel Herrera, ed., *Le Droit, le politique: Autour de Max Weber, Hans Kelsen, Carl Schmitt* (Paris: L'Harmattan, 1995).

court is simply a "negative legislator."[9] However, he sets this function not in the context of liberalism versus democracy but rather in a normative hierarchy. For him, the primary purpose of constitutional oversight is the positivist one of organizing normative judgment. It is significant, moreover, that the starting point for his theory was his native Austria, a federal state. For Kelsen, the practical problem to be resolved was strictly procedural. It was a question of assigning jurisdiction in any particular case either to the provinces or to the confederation. Hence the constitutional judge was above all a "switchman," to borrow a formula from contemporary legal scholars.

The *reflexive democratic* concept of constitutional oversight differs from both of the foregoing models. Indeed, its purpose is not just to apply oversight but also indirectly to increase the power of citizens over institutions by establishing a "regime of competing expressions of the general will," to borrow Dominique Rousseau's suggestive formulation.[10] In America, Jefferson was the first to develop this idea. Whereas Madison, as a good liberal, worried mainly about the danger of exuberant popular majorities, Jefferson took the view that the main problem was "the tyranny of the legislatures."[11] In this perspective, judicial review could be seen as a form of popular resistance. In the same vein, Jefferson called for the adoption of a declaration of rights, which he understood as a way "to protect the people from the federal government." If the risk of oppression lay primarily with the government, anything that limited the government was therefore a way of reinforcing the power of citizens. The rule of law can thus be understood in this context as an equivalent of direct democracy.[12] In France in the spring of 1793, many projects involving something like a national jury were considered. For Hérault de Séchelles such a jury was to be not a check on popular power but "a way of protecting the people from the oppression of the legislature."[13] In this democratic con-

[9] Hans Kelsen, "La garantie juridictionnelle de la constitution," *Revue du droit public*, vol. 45, 1928, p. 226. See also his critique of Carl Schmitt, *Qui doit être le gardien de la Constitution?* (Paris, Michel Houdiard, 2006) (with a substantial introduction by Sandrine Baume).

[10] Dominique Rousseau, *Droit du contentieux constitutionnel*, 4th ed. (Paris: Montchrestien, 1995), p. 417.

[11] Letter to James Madison, March 15, 1789, in Thomas Jefferson, *Writings* (New York: Library of America, 1984), p. 944. The next quotation is taken from a letter dated July 31, 1788. On the contrast between these two visions of liberty and democracy, see Annie Léchenet, *Jefferson-Madison: un débat sur la République* (Paris, PUF, 2003).

[12] Frank Michelman suggests viewing constitutionalism as a combination of law-rule and self-rule: see "Law's Republic," *The Yale Law Journal*, vol. 97, no. 8, July 1988, pp. 1499–1503.

[13] This formula, which was included in the first draft of his proposed constitution, was rejected, and in the end a version of immediate democracy won out.

ception of constitutional oversight, the social power was seen as a sort of pincer holding government in its grip. The people chose those who were to govern directly and then installed constitutional judges to keep an eye on them. Elections and judges thus jointly imposed social control on the legislative power. Because judges are independent of the legislature, the legislative power is more subject to the will of the people.

These old ideas have gained new currency today. A number of scholars have recently done work in this area. In the United States, for example, there is Christopher Eisgruber, one of whose books is significantly entitled *Constitutional Self-Government*.[14] The work of Stephen Holmes takes a similar tack,[15] as does that of Larry Kramer.[16] In France, Dominique Rousseau has proposed the idea of continuous democracy,[17] while the German Gunther Teubner has done stimulating work on juridical reflexivity.[18] Here I want to build on and enter into dialogue with these works to interpret the reflexive role of the constitutional courts and their contribution to the project of generalizing democracy.

Constitutionalism and Reflexivity

As reflexive third parties, the primary function of the constitutional courts is social and political representation. They attest to the existence of the people as principle, the importance of which has steadily increased in the new world of singularity that I have been describing. This sociological revolution has transformed the relations between law and democracy and therefore between constitutional oversight and the majoritarian principle. It has become more important than ever before to affirm the existence of the people as principle. The constitutional courts are particularly well suited to this task, because their essential role is to make it clear that the sovereign is more than just the party that wins a majority on election day and that no definition of it is sufficient. The courts make this gap between the sovereign and the majority palpable, so that it has to

[14] Christopher Eisgruber, *Constitutional Self-Government* (Cambridge, MA: Harvard University Press, 2007).

[15] See the chapter "Precommitment and the Paradox of Democracy," in Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* (Chicago: University of Chicago Press, 1995).

[16] Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004).

[17] For a discussion of his ideas, see *La Démocratie continue* (Paris: LGDJ, 1995).

[18] Gunther Teubner, *Droit et réflexivité: L'auto-référence en droit et dans l'organisation* (Paris: LGDJ, 1996).

be taken into account. They establish a permanent confrontation among the various manifestations of "the people," and especially between the people of the ballot box and the people as principle. The courts do not merely judge and censure; they also help to enrich democratic deliberation by encouraging and establishing the conditions of being-together (*l'être-ensemble*).[19] At stake is a form of representation of the moral or functional order, structurally distinct from the immediate expression of opinions and interests, which is what elections are all about. The two conceptions are therefore not rivals. A certain hierarchy does nevertheless exist, since elections always have the last word in a democratic society. Yet electoral representation is not without its inherent paradoxes and insufficiencies, as this type of "adjacent" representation makes clear; at the same time it provides ways to reduce the ensuing tensions.

The distinction among several types of "people" should also be extended to the temporal dimension. For instance, the people that goes to the polls is always interpreted in terms of immediacy, whereas the people as principle has to be understood in a broader time frame. It is therefore natural to identify it with the nation. This is a point on which Sieyès placed great emphasis. "A political constitution is really concerned with the enduring nation," he wrote, "rather than with any particular passing generation. It is concerned with human nature, which everyone shares, rather than with individual differences."[20] As an abstraction of sovereignty, the nation becomes perceptible only by insisting on its basic principles and putting them into practice. It therefore needs a representative organ. That role is filled today by constitutional courts (whereas in the revolutionary period it was seen as the essential work of the parliament, as Carré de Malberg clearly demonstrated).

Because constitutional courts take a particular interest in fundamental rights and principles, they help to foster collective memory. Indeed, their vigilance in this regard endows them with a certain representative function. They represent memory so as to keep the fundamental values of democracy alive and give people an active understanding of their heritage.[21] In France, the Declaration of the Rights of Man and the Citizen (1789) strongly emphasized the importance of memory by pointing out that "*forgetfulness* of and contempt for the rights of man are the sole causes of public woes and the corruption of governments" and urging all mem-

[19] This is brought out well by Christopher Eisgruber in *Constitutional Self-Government* (see esp. his chapter on "Judicial Review and Democratic Flourishing").

[20] "Opinion de Sieyès sur les attributs du jury constitutionnaire" (18 thermidor an III), in *Réimpression du Moniteur*, vol. 25, p. 144.

[21] As Denis Salas points out in *Le Tiers pouvoir: vers une autre justice* (Paris: Hachette Littératures, 2000), pp. 189–190.

bers of society to keep the declaration "*constantly in mind* as a *never-ending reminder* of their rights and duties."[22] Vigilance and memory were explicitly designated as concrete political functions. Constitutional courts help to achieve these goals and to keep the organizing principles of society ever *present*. This is also the larger function of law, to which various agents, both direct and indirect, contribute: the courts are the guarantors of the promises that a community makes to itself.[23] Thus they preserve the identity of democracy over time.

In today's societies the need for plural temporalities in democracy is greater than ever. The tyranny of short-term thinking is a constant threat, which makes the representation of principles increasingly necessary. That is why constitutional courts have gained in legitimacy, while that of directly elected officials has declined. Hence courts and elected officials should be seen not as antagonistic powers or even, in a more positive sense, as checks on each other but rather as part of a unified framework. Constitutional law is associated with long-term democracy, whereas the decisions and statutes emanating from the executive and legislative branches are oriented more toward the shorter term. Hence norms that were once merely legislative enactments have since been "constitutionalized." For example, in 2007 France amended its Constitution to ban the death penalty. Abolished by statute in 1981, capital punishment had also been banned under the European Human Rights Convention, which was ratified in 1986. Strictly speaking, then, there was no real need for a constitutional amendment.[24] But the representatives of the nation were guided by the symbolic import of their decision and by the desire to emphasize the central importance of fundamental rights.

Parliaments and constitutional courts are thus elements of the pluralistic temporal structure of democracy. That structure is best understood in historical terms. In practice, political institutions cannot be understood in isolation from one another, as though each were created ex nihilo. The full significance of each institution becomes clear only when we are able to grasp how the various institutions that make up a political system interact with one another.[25] It is also important to understand the conflicts that arise between the different types of legitimacy associated with each temporal register, because these conflicts raise important questions about

[22] Emphasis added.

[23] I borrow this phrase from Antoine Garapon, *Le Gardien des promesses: Justice et démocratie* (Paris: Odile Jacob, 1996).

[24] Delphine Chalus, "Quel intérêt à l'abolition constitutionnelle de la peine capitale en France?" *Revue française de droit constitutionnel*, no. 71, July 2007.

[25] For a stimulating discussion of these points, see François Ost, *Le Temps du droit*, esp. pp. 56–66.

the nature and foundations of democracy.[26] Looked at in this way, the function of a constitution is to prevent the future from being foreclosed by the party that happens to be in the majority at a particular point in time. Majority power is limited by the principle that all citizens are equal in the face of the future. To deny this limitation would in effect disguise the nature of the majority by cloaking it in the virtues of unanimity. Constitutional courts thus bear witness to the fundamental fiction of democracy. Any regime based on universal suffrage suffers from the fundamental flaw of mistaking the majority for the whole, and it is the job of the courts to stand as a constant reminder of this. Judges must be vigilant observers as well as wise moderators. They have to be if the democratic process is to continue through time.[27] Reflexivity thus becomes an exercise in lucidity and a reminder of reality.

This intertemporal approach, which treats democracy as a living experiment in controversy, also leads to a reconsideration of the question of precommitment, that is, the idea that a constitution commits the legislature in advance to certain restrictions on what it may and may not do. In order to grasp the contemporary implications, we must first look at the history. The question of precommitment was a central concern of the men who drafted both the American and French constitutions. The constitution was to be the cornerstone of liberty, and therefore it should not become a fetter on future generations. That is why the question of constitutional amendment was so central in the French debates of 1791 and 1793. Writers such as François Xavier Lanthenas, Jacques-Pierre Brissot, and Condorcet, associated with the *Cercle social*, pondered the issue and debated it at length. In a pamphlet entitled *Des Conventions nationales,* Condorcet developed a generational theory of the constitutional pact.[28] If a majority counts as unanimity, then the significance of the constitutional convention gradually diminishes as society takes on new members: at some point, the initial majority is demographically submerged by younger citizens, whereupon "the law ceases to be legitimate."[29] The solution? For Condorcet, it was to revise the constitution every twenty

[26] On this point, François Ost writes that "it is important to note that it is not only people in power who invoke this novel idea of time in order to legitimate their rule; the governed also exhibit a propensity to characterize the rights that they claim as eternal in order to protect them from the powerful." See "Les multiples temps du droit," in *Le Droit et le futur* (Paris: PUF, 1985), p. 125.

[27] Dennis F. Thompson, "Democracy in Time: Popular Sovereignty and Temporal Representation," *Constellations*, vol. 12, no. 2, June 2005.

[28] Published version of a speech delivered on April 1, 1791, reproduced *in Œuvres de Condorcet*, vol. 10, pp. 189–222.

[29] Ibid., p. 193. "At that point, a new consent agreement is needed to restore to the constitution the character of a unanimously willed document."

years to ensure that it enjoyed the approval of those who were in fact subject to its terms: "No generation has the right to subjugate future generations."[30] The same argument was insistently urged in America. Thomas Paine made it the centerpiece of his plea for the rights of man. "There never did, there never will, and there never can exist a parliament or … generation of men, in any country, possessed of the right or power of binding and controlling posterity to the end of time.… Every generation is, and must be, competent to all the purposes which its occasions require."[31] At war against the earlier notion that people offer "tacit consent" to the existing order, he proclaimed that only living human beings can grant their consent. In a letter to Madison from revolutionary Paris in the fall of 1789, Thomas Jefferson used identical words to defend the right of each generation to choose its own preferred form of government, as if each generation formed an independent nation. "The earth belongs to the living and not the dead," he wrote, in a formula that has ever since been associated with his name.[32]

These perceptions of political time bore the hallmark of the revolutionary era: the need to break with an ancient model that had made a categorical imperative of the weight of tradition. It was therefore important to insist on a persistent (or at any rate generational) freedom to invent the future so that the free choice of one generation would not turn into an inexorable constraint for the next. In other words, democracy was able to establish itself only by asserting the supremacy of the present. Traces of this obsession can be found in a whole range of critiques of constitutionalism, as if there were an inherent danger that a handful of sages would usurp the place of the general will.

Today, however, there is a need to restore the temporal dimension of democracy in order to shore up the foundations. Indeed, the cult of presentism poses a greater threat to democracy than any imaginable legal fetters. Because society is more capable of self-government, new thinking about the temporal dimension of democracy is essential, and it is here that constitutional courts play a crucial role. These courts operate of necessity in a reflexive mode, and this contributes to the formation of a common will, as distinct from an immediate decision. Courts reconstruct

[30] Proposed declaration of rights of February 15, 1793, in *Œuvres de Condorcet*, vol. 12, p. 422. This formula was incorporated verbatim in Article 28 of the Declaration of Rights of the Constitution of June 24, 1793.

[31] Thomas Paine, *The Rights of Man* (New York: Prometheus, 1987), p. 9.

[32] On this point, see Lance Banning, *Jefferson and Madison: Three Conversations from the Founding* (Madison, WI: Madison House, 1995); Herbert Sloan, "The Earth Belongs in Usufruct to the Living," in Peter S. Onuf , ed., *Jeffersonian Legacies* (Charlottesville: University Press of Virginia, 1993); and Daniel Scott Smith, "Population and Political Ethics: Thomas Jefferson's Demography of Generations," *William and Mary Quarterly*, July 1999.

the history of the law. Like stereoptic viewers, which combine two images to create an illusion of three dimensions, constitutional courts give depth to democracy. They bestow meaning on democratic life.

Constitutional courts thus help to broaden and deepen the representative system. They play a positive role in structuring democracy. They create new modes of representation, and this is the key to a more faithful expression of the general will. This multiplication of modes of expression puts new faces on the people, affording citizens greater control over the powers of government. The relation between direct and representative democracy can therefore be looked at in a new way. Because representation is plural, its two forms are no longer pitted against each other in a zero-sum game. Indeed, the easiest way to achieve the objectives of direct democracy is to establish a system of *generalized representation*. Constitutional courts can not only correct the shortcomings of the representative system (by inviting representatives of the majority to heed earlier expressions of the general will and leave future options open) but also enhance the practice of democratic governance.

There is also a third way in which constitutional courts contribute to the vitality of democracy: they enhance the quality of political deliberation. This is especially true in cases such as that of France, where the constitutionality of statutes is judged ex ante. Under the constitutional reform of 1974, a qualified parliamentary minority (of sixty deputies or sixty senators) can call on the Constitutional Council to rule on the constitutionality of any statute. Representatives were quick to avail themselves of this opportunity.[33] The council thus became an essential arm of the opposition, affording the parliamentary minority an opportunity to reopen debate on any issue.[34] It thus served as a "distributor of normative flow" among the various avenues for creating laws, to borrow a phrase from Louis Favoreu.[35] More profoundly, it transformed the relationship between the majority and the opposition. By providing a means of rebalancing the two, it changed the nature of majoritarian democracy by allowing debate to take place in two distinct settings before any final resolution was reached. Parliamentary oversight and judicial review can thus be seen as complementary procedures for expressing the general will.

[33] Loïc Philip, "Bilan et effets de la saisine du Conseil constitutionnel," *Revue française de science politique*, vol. 34, nos. 4–5 (August–October 1984).

[34] For a summary (by a close associate of François Mitterrand) of the use of this procedure in the five years after its inception, see Michel Charasse, "Saisir le Conseil constitutionnel: La pratique du groupe socialiste de l'Assemblée nationale (1974–1979)," *Pouvoirs*, no. 13, 1980.

[35] Louis Favoreu, "De la démocratie à l'Etat de droit," *Le Débat*, no. 64, March–April 1991, p. 162.

The magnitude of the change can be gauged by the following obiter dictum of the Constitutional Council (1985): "A law passed by parliament expresses the general will only insofar as it respects the Constitution."[36] This judgment marked a sharp break with earlier understandings, which took a strictly parliamentary view of the law: only statutes passed by parliament were considered to be expressions of the general will. Although this earlier notion had come in for harsh criticism,[37] it had nevertheless continued to constitute the intellectual horizon of French democracy. An indication of its influence can be seen in the words that one Socialist deputy addressed to the opposition in 1981: "You are legally in the wrong because you are politically in the minority."[38] The council's 1985 statement thus reflected a significant change in the French understanding of democracy. At the same time, those who had been most outspoken in opposition to constitutional oversight became more discreet. To be sure, the periods of "cohabitation" (that is, periods in which the executive and legislative branches were controlled by different parties) in the 1980s contributed to this transformation by ensuring that judicial review would become a common recourse for those seeking to compensate for electoral defeat by appealing to the constitution.[39]

Constitutional oversight invariably involves reopening important political debates in order to introduce new forms of argument. Instead of political discussion per se, which is largely shaped by tactical and ideological considerations, judicial review is a more objective approach, which is constrained by the techniques of legal reasoning. In this respect, it is significant that Ronald Dworkin has described the U.S. Supreme Court as a "forum of principle."[40] Constitutional oversight thus results in an alternation between two ways of understanding and constructing the general will in a democracy. On the one hand, the logic of number gives priority to the immediately dominant opinion, but on the other hand, the logic of legal reasoning introduces a contestable constraint of justification. The diversification of temporalities and of images of the so-

[36] For a discussion of this "passing remark" in a decision of August 23, 1985, by Georges Vedel, see Philippe Blacher, *Contrôle de constitutionnalité et volonté générale* (Paris: PUF, 2001).

[37] For a critical analysis see Raymond Carré de Malberg, *La Loi, expression de la volonté générale: Étude sur le concept de la loi dans la Constitution de 1875* (1931; reprint Paris: Economica, 1984).

[38] The words are those of Socialist André Laignel, who in November 1981 addressed Jean Foyer, former minister of justice and speaker for the opposition during a debate over nationalizations.

[39] Bastien François, "La Perception du Conseil constitutionnel par la classe politique: les médias et l'opinion," *Pouvoirs*, no. 105, 2003.

[40] Ronald Dworkin, *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985) (cf. chap. "The Forum of Principle," pp. 33–71).

cial is thus matched in this realm by a duality in styles of argument, each associated with a specific definition of social generality.[41] The reflexivity introduced by constitutional judicial procedures multiplies the locations, modes, and times of public deliberation. It affords an opportunity to look at the issues from a different angle. It also imposes a period of delay for reflection. The resulting *deliberative scene* has a composite, reflexive character, which makes it possible to approach goals that would be difficult to attain by organizing public political debate according to the canons of "pure" deliberative theory. Indeed, "true" deliberation is quite demanding in terms of the required level of information, standards of argument, and maturity of reflection. It is difficult to imagine applying such rules to public life as a whole or to think of such deliberation replacing raw partisan confrontation and the clash of opinions in the short run. Indeed, the innovative experiments in public deliberation that we have seen have all been confined to small groups (citizen juries, consensus conferences, hybrid forums, and other types of participatory democracy) and extended over a relatively long period of time. Although it is right to insist on the need to improve the quality of democratic deliberation, this should not conceal the fact that what improvement we have seen has mainly been in a representative mode, in the interaction of political and judicial institutions *in the public eye*.

Finally, the essence of deliberative reflexivity is to diminish the gap between democracy defined as procedure and democracy defined as content. In the interchange between the political and the juridical, the two dimensions tend to become more deeply intertwined. The meaning of the clash between majority and minority also changes. It can no longer be understood simply in static terms as a confrontation between two constituted camps, with the only possibility of change being a reversal of position after each election. There is rather a constructive dialectic that obliges the majority to embrace new forms of reasoning and new arguments in response to simultaneous assault by the minority and the requirements of constitutional justice.[42] The three forms of reflexivity at work in constitutional courts thus help to bring out the texture of democratic life. They give democracy a multidimensional character that enables it to correct certain flaws and repair certain fundamental deficiencies.[43]

[41] Michel Troper, "Justice constitutionnelle et démocratie," *Revue française de droit constitutionnel*, no. 1, 1990.

[42] Note that this tends to validate the "majority-minority principle" as analyzed by Kelsen. See Hans Kelsen, *La Démocratie: Sa nature, sa valeur,* 2d ed. (1929; reprint Paris: Economica, 1988), chap. 6, "Le principe majoritaire."

[43] Christopher L. Eisgruber, "Dimensions of Democracy," *Fordham Law Review*, vol. 71, 2003.

Generalized Reflexivity

Although the courts are the embodiment of one essential dimension of reflexivity, there are many other ways of putting this function into play. It is by no means a monopoly of the constitutional courts. This is a very important point. Many civil society organizations also perform reflexive functions when they denounce discrepancies between the fundamental principles of democracy and the reality. Social movements also fulfill this function when they reintroduce the people as principle and the social people into the political arena. There are also many ways in which the "representation of knowledge" of a more scientific order contributes to reflexivity. Indeed, the critical work of the social sciences is fundamental in this regard. For example, democratic theory is essential for preventing governments from arrogantly wrapping themselves in the folds of electoral legitimacy alone. Indeed, the imperative of reflexivity has become all the more apparent in the democracies of the twenty-first century. This is first of all because the horizon of human action has changed: the long term is increasingly important (even if strong "presentist" tendencies remain dominant). In addition, greater uncertainty surrounds the issue of what constitutes a good political decision. Finally, the sociological factors we have been discussing play a part. Although scholars have only begun to explore the democratic functions of constitutional courts, we must also consider other ways of bringing reflexivity into politics.

Several areas of inquiry spring to mind. The issue of future generations has taken on increasing importance owing to the depletion of certain natural resources and to demographic change. This leads to the idea of a "transgenerational people," which is not very new in itself. This was already an important issue at the end of the nineteenth century. At that time it frequently took on an antidemocratic coloration in the work of traditionalist authors, who urged that the immediate popular will be curtailed in the name of the respect due to ancestors and especially to soldiers who died to preserve the freedom of the living.[44] But other, less-dominant voices such as Léon Bourgeois and Alfred Fouillée also insisted that we need to think of intergenerational relations in quasi-contractual terms. Today, we have every reason to pursue these insights. Hence the idea of the people needs to be broadened to incorporate yet another image, the people as humanity. More radically, this suggestion dissolves the distinction between a particular people and universal humankind.[45] The prob-

[44] The idea that the living and the dead form a single people was part of the monarchical perspective with its idea of social perpetuity.

[45] Sieyès saw an obstacle here, however. He acknowledged that "the Constitution of a people should include a 'principle of preservation and of life,'" but he refused to see this "as

lem here is not to complicate the definition of a particular people (as we did in distinguishing between the people as voters and the people as principle) but rather to broaden its scope. The question needs to be posed in terms of a broader representation of interests and rights. How are the rights of the absent—of citizens of the future—to be represented, especially when their interests are all but identified with the issue of the natural environment in which they will grow up? Some have suggested broadening our idea of a representative institution and even establishing a "parliament of objects." For example, Bruno Latour has boldly insisted on the need for a "new bicameralism."[46] In this case, however, the use of the notion of representation obviously cannot imply any sort of mandate or delegation. Nor can it be a matter of representation as figuration of that which does not yet exist. Hence the humans of the future can be represented only in the mode of knowledge or concern, where by "represented" I mean here *participating in present-day discussions*. To be sure, the future has no deputies, but it is absolutely essential to find systematic ways of incorporating the interests of the future into democratic debate.[47]

One way of doing this might be to establish "Academies of the Future." These would be made up of recognized experts, whose appointments would have to be justified. The academies would have the right to intervene and be consulted systematically on issues within their range of competence, and they would issue public opinions to which government officials would then have to respond. The idea of academies of experts has been discredited by too many past failures, but it might be wise to revisit the old ambition of establishing panels of learned individuals charged with the mission of serving society by keeping an "eye on the future," to borrow a phrase from the *Encyclopédie*.[48]

In the eighteenth and nineteenth centuries, there was no shortage of imaginative ideas for expanding representation in a variety of ways. The

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a chain of successive existences of individuals" and therefore as a "species" (his word): see "Opinion de Sieyès sur les attributs du jury constitutionnaire," p. 144.

[46] See the suggestive discussion in Bruno Latour, *Politiques de la nature: Comment faire entrer les sciences en démocratie* (Paris: La Découverte, 1999). Latour writes (p. 107): "Democracy is inconceivable unless it is possible to traverse freely the now dismantled boundary between science and politics in order to add new and hitherto inaudible voices to the discussion, even though their clamor might cover up all debate: I am speaking of *nonhuman voices*. To limit the discussion to humans—to their interests, their subjectivities, and their rights—will within a few years seem as strange as our having for so long denied the vote to slaves, paupers, and women."

[47] One implication of this is that we must constantly ask how far into the future our projections should go. If projections are extended to infinity, it follows that only a tyranny or theocracy can satisfy them.

[48] This formula can be found in one of the articles devoted to academies in the *Encyclopédie* of Diderot and d'Alembert (vol. 1, p. 244 of the quarto edition).

French Revolution alone spawned countless projects to supplement the regular legislative bodies with tribunates, foundations, juries, councils, and agencies of all kinds. In each case the mission was to maintain a watchful eye on some aspect of the public good. Later, Henri de Saint-Simon suggested adding a chamber of invention and a chamber of examination to the elected chamber of deputies. We need to recapture some of this inventiveness today and design bold new institutions to improve the political decision-making process and scrutinize the actions of government.

This idea makes democratic sense only if included in an expanded vision of citizen participation and public deliberation. Greater reflexivity cannot be achieved solely by expanding the scope of expert intervention. The uncertainties surrounding expert opinion also need to be taken into account. Indeed, experts must look beyond the limits of the realms in which they are expert. Hence there is a need for more hybrid forums in which scholars and citizens can meet to debate essential issues.[49] It can be useful to develop new ways in which citizens can express their views as well as new public institutions. Just as the people have their elected representatives and their public prosecutors, so, too, can they have trustees and syndics to argue on their behalf.[50] Evaluation of public policies is another area in which progress could be made. Public or citizen-oriented evaluation agencies could assess the value of laws as well as policies in order to compel governments to make their activities more transparent and justify their choices. It would be interesting if policymakers were forced to anticipate the future economic, social, environmental, and geopolitical consequences of their decisions.

We have only scratched the surface in thinking about the kinds of reflexive institutions that might develop in years to come. In the future, democracy will increasingly depend on how governments confront rival understandings of the world and move closer to the ideal: a world in which political institutions incorporate our knowledge of ourselves. The judicial reflexivity of constitutional courts is not enough. We also need institutions that will allow for cognitive and social reflexivity to develop in all areas of political action.

The Mirage of the Absolute Constitution

In a famous article, to which they owe their 2004 Nobel Prize in Economics, Finn Kydland and Edward Prescott sought to demonstrate that it is rational in many cases to limit the discretion of people in power in order

[49] See Yannick Barthe, Michel Callon, and Pierre Lascoumes, *Agir dans un monde incertain: Essai sur la démocratie technique* (Paris: Seuil, 2001).

[50] On this point see the interesting reflections of Dennis Thompson in "Democracy in Time."

to prevent them from making decisions in response to their own short-term self-interest (such as electoral gains) at the expense of the medium-term general interest.[51] In short, they argued for rules rather than discretion, taking the realm of monetary policy as their example. As ardent proponents of central bank independence, Kydland and Prescott figured prominently among the advocates of "economic constitutionalism." This is a radical notion, a distortion of the original idea of constitutionalism that ultimately undermines the dynamic of positive reflexivity, and for that reason it deserves a closer look.

Economic constitutionalism was an idea developed in the 1980s by neoliberal theorists eager to restrict the economic, monetary, and fiscal powers of governments, which in their view were unduly influenced by interest groups and too prompt to sacrifice the long term to the short (with the long term implicitly identified with the general interest and the short term with special interests).[52] Key work in this vein was done by James Buchanan, Milton Friedman, and Friedrich Hayek. What these economists had to say about fiscal intervention had the greatest influence. Their recommendation was to impose certain constitutional constraints on the actions of governments: budgets should be balanced, public expenditures should be limited to a certain percentage of gross national product, the rate of growth of the monetary base should be fixed, and so on. To be sure, these measures were part of an ideological package that was critical of the state and favorable to the market, but they were also staunchly defended on theoretical grounds. Hayek in particular linked economic constitutionalism to his theory of information and knowledge.[53] Given the limitations of the human mind, he argued, it cannot encompass the complexity of the world and of all the interactions that structure an economy or a society. As we have seen, this was the basis of his informational theory of the market, but it was also the basis of his argument for limiting the sphere of political decision. In his view, politicians were fundamentally incapable of rational economic management on both cognitive and informational grounds; in other words, they could not manage the economy for the benefit of all. Hence their freedom of action must be limited, and rules should be favored over discretion.

[51] Finn E. Kydland and Edward C. Prescott, "Rules Rather than Discretion: The Inconsistency of Optimal Plans," *Journal of Political Economy*, vol. 85, no. 3, June 1977.

[52] See the essays collected in the seminal work by Richard B. McKenzie, ed., *Constitutional Economics: Containing the Economic Powers of Government* (Lexington, MA: Lexington Books, 1984) (the book emerged from a seminar on the subject organized by the Heritage Foundation). See also James M. Buchanan, *Constitutional Economics* (Oxford: Basil Blackwell, 1991).

[53] See esp. Friedrich Hayek, *Individualism and Economic Order* (Chicago: University of Chicago Press, 1948).

These "neoliberal" thinkers did not extol the role of economic expertise in contemporary society. On the contrary, they constantly challenged the aspiration of economists to rule the world.[54] Even though Buchanan won the Nobel Prize for Economics in 1986, he has always been among those who criticized the pretensions of economic "science." In his view, it was not up to economists to define the common good. There was no point in hoping to define the common good in terms of classical welfare theorems invoking the notion of Pareto optimality and based on an analysis of costs and benefits (a functional equivalent of unanimity). For Buchanan, only social forms of consensus could express the general interest. Did this represent a return to politics? Yes and no. No, if by "politics" one means the rough and tumble of everyday politics. This is always an arena of partisan confrontation in which certain interests are privileged over others. Hence electoral-representative politics is in essence *discriminatory*, Buchanan argued.[55] It almost always leads to favoring one or more of the interest groups that constitute the various voter blocs. What, then, would a "nondiscriminatory politics" look like. In answering this question, the author of *The Calculus of Consent* agreed in some ways with John Rawls. The political principles chosen behind a veil of ignorance would prohibit any possibility of present or future discrimination.[56] But such principles cannot be stated positively, because unanimous agreement would be problematic. Agreement is possible only in a negative mode, that is, in the form of *general constraints*, or, to put it another way, in terms of principles of precaution.[57]

Looked at from this angle, economic constitutionalism leads to what Buchanan sees as a form of democratic progress. For him, more constitutionalism means more democracy. But to say this is to say that politics ultimately gives way to law and that the dissolution of politics is therefore its ultimate achievement. That is indeed the upshot of Buchanan's radical version of economic constitutionalism. Impartiality in the sense of nondiscrimination then becomes like Kantian morality: it rules an ut-

[54] See the incisive arguments in James M. Buchanan, *The Limits of Liberty: Between Anarchy and Leviathan* (Chicago: University of Chicago Press, 1975), and, in a similar vein, Richard B. McKenzie, *The Limits of Economic Science: Essays on Methodology* (Boston: Kluwever-Nijhoff, 1982).

[55] See James M. Buchanan and Robert D. Congleton, *Politics by Principle, not Interest: Toward Non-Discriminatory Democracy* (Cambridge: Cambridge University Press, 1998). See esp. chap. 1, "Generality, Law and Politics," and chap. 5, "Generality and the Political Agenda."

[56] Buchanan and Hayek join Rawls in arguing that a social order cannot be organized on the basis of a shared vision of ultimate ends. The only possible unanimity is procedural.

[57] Buchanan, *Politics by Principle, not Interest*, p. 58. See also Geoffrey Brennan and James M. Buchanan, *The Reason of Rules: Constitutionnal Political Economy* (Cambridge: Cambridge University Press, 1985).

terly *unreal* society. Paradoxically and disturbingly, the critique of partisan politics by Buchanan, Hayek, and others thus converges with Carl Schmitt's insistence that politics must be transcended by a radical form of decisionism based on a "hyperrealistic" world view.[58]

Hayek continues in this vein by calling for *demarchy* in place of democracy. In a democracy the collective will asserts its power through specific decisions, whereas in demarchy as Hayek conceives it the people only lay down general rules (the Greek *arché* refers to the idea of permanent order, as opposed to *kratos*). Only then can there be true democracy, in Hayek's view, meaning a genuine reign of generality. The problem is that the rules he calls for have to be quite abstract if they are to embody necessary and incontestable qualities of generality. In the end, for Hayek, only the rules of the market satisfy these formal requirements. Only they are fully capable of realizing the ambition of substituting an abstract and impartial mechanism for the ordinary political regime of will.[59] In contrast to Rawls, who asked the harder question of what principles of justice would be chosen behind a veil of ignorance, Hayek limits himself to an examination of general principles of order. Logically enough, his work therefore culminates in a vision of the type of equality that the rule of law and the marketplace is supposed to produce. For Hayek, a society ruled by law is nothing other than a market society. Economic constitutionalism thus comes down to a way of establishing the institutions of the market. The absolute constitution is the one that institutes the order deemed to be most natural: that of the invisible hand. The neologism *demarchy* thus serves only to hide the fact that in the end the democratic idea has been abandoned. Going to the opposite extreme from the monistic vision of the general will, Buchanan and Hayek reach a symmetric conclusion by idealizing the government of generality. It is important to keep this perverse reversal in mind in order to be perfectly clear about the vital need for reflexivity in a democratic society.

[58] William E. Scheuerman, "The Unholy Alliance of Carl Schmitt and Friedrich Hayek," *Constellations*, vol. 4, no. 2, 1997.

[59] When it comes to the transition from the realm of the will (the social contract) to the market (the invisible order yielding a natural harmony of interests), it is of course the work of Adam Smith that takes the decisive step. See my *Le Capitalisme utopique: Histoire de l'idée de marché* (Paris: Points-Seuil, 1999).

CHAPTER NINE

On the Importance of Not Being Elected

The Countermajoritarian Difficulty

Government by judges: the phrase was coined by the chief justice of the Supreme Court of North Carolina in 1914. Whether in this form or in the slightly modified "government by judiciary," it has been in constant use for nearly a century by Americans fearful that the fundamental principles of democracy might by perverted by one form or another of judicial power. The formula was imported into Europe in 1921 in the title of a French book, *Le Gouvernement des juges*.[1] It obtained a new lease on life in the 1980s, as the judicial powers and role of constitutional courts were expanding in nearly all democracies, especially where the legitimacy of parliaments and party systems was disintegrating (Italy being the most notorious example in Europe). The relation between constitutionalism and democracy has since then given rise to a torrent of publications. One central issue sums it all up: Is it democratic for a handful of unelected judges to be able to impose their views on the representatives of the people?

This issue, an inevitable consequence of constitutional review, came to be called "the countermajoritarian difficulty" in the 1960s.[2] It has attracted the interests of numerous historians and legal theorists.[3] There have been many critiques in the United States in particular, most notably those of Jeremy Waldron, Larry Kramer, Ran Hirschl, and Mark Tushnet.[4] All the arguments start from the simple idea that in a democracy,

[1] Édouard Lambert, *Le Gouvernement des juges et la lutte contre la législation sociale aux États-Unis* (1921; reprint Paris: Dalloz, 2005). On the pertinence of this notion, see Michel Troper and Otto Pfersmann, "Existe-t-il un concept de gouvernement des juges?" in Séverine Blondel et al., eds., *Gouvernement des juges et démocratie* (Paris: Publications de la Sorbonne, 2001).

[2] Alexander M. Bickel, *The Supreme Court at the Bar of Politics*, 2d ed. (1962; reprint New Haven: Yale University Press, 1986), was the first to treat it theoretically.

[3] See esp. the five major articles by Barry Friedman, "The History of the Countermajoritarian Difficulty," published in successive issues of two law reviews, starting with the *New York University Law Review*, vol. 73, no. 2, May 1998, for the first article, entitled "The Road to Judicial Supremacy" and ending in *Yale Law Journal*, vol. 112, no. 2, Nov. 2002, for the fifth article.

[4] Jeremy Waldron, *Law and Disagreement,* 2d ed. (New York: Oxford, 2001); Larry Kramer, *The People Themselves*; Ran Hirschl, *Towards Juristocracy* (Cambridge, MA: Harvard University Press, 2004); and Mark Tushnet, *Taking the Constitution away from the*

"the people are entitled to govern themselves by their own judgments" and that this basic right has been compromised by the decisions of the Supreme Court.[5] The critics argue that the defense of constitutional reasoning is little more than a revival of old liberal prejudices against the power of numbers and that those who wear the mask of the constitutional judge today are merely the offspring of yesterday's aristocratic and authoritarian liberals. In this debate, Jeremy Waldron has been the most vigorous champion of majoritarian reason and of the identification of democracy with parliamentarism.[6] Indeed, he goes so far as to argue that the Bill of Rights was an unacceptable limitation of the people's right to determine the laws by which it is to be governed.[7] These critiques therefore prompt us to reflect on how different things would look if the members of constitutional courts were elected.

The Election of Judges: Some Historical Facts

Constitutional courts exist because reflexivity is an essential part of democracy. They thus acquire a functional legitimacy. Must constitutional judges be elected in order for these courts to be fully legitimate? To answer this question, we can begin by considering a more general question: Should ordinary judges be elected? Indeed, the two types of judges are similar in many ways, so it will be useful to recall some of the major historical debates surrounding the election of judges. In most countries ordinary judges are today nominated by the executive. As judicial power has increased, the judiciary, too, has drawn criticism from many quarters for being unaccountable and undemocratic. Should the election of judges therefore be considered a way of shielding the judiciary from such attacks? Judges were popularly elected during the French Revolution, and in the United States today some states elect their magistrates. It is therefore important to consider these two examples before turning to the question of constitutional judges.

When the French judiciary was reformed in 1790, there was near unanimous support for the election of judges.[8] Although many other is-

Courts (Princeton, NJ: Princeton University Press, 1999). See also the pioneering work of John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980).

[5] The words are Jeremy Waldron's.

[6] See Jeremy Waldron, *The Dignity of Legislation* (Cambridge: Cambridge University Press, 1999).

[7] Recall that the need for a Bill of Rights was hotly debated when the ratification of the Constitution was under discussion.

[8] On this reform, Ernest Lebègue, *Thouret (1746–1794)* (Paris, 1910), and Adhémar Esmein, *Histoire de la procédure criminelle en France* (Paris, 1881), are still the standard references.

sues aroused bitter controversy in the debate over judicial reform, no one opposed the idea of choosing magistrates by popular election.[9] Why was this the case? First, because there was a sort of general enthusiasm for elections in revolutionary France. Elections were not merely procedures for choosing among candidates but had a symbolic significance as well. They evoked a range of customs and images that transcended the question of how to organize political representation. Elections were a means of legitimation, an expression of confidence, a system of nomination, a mechanism of control, a sign of communion, a purging technique, a representative procedure, a symbol of participation, and a sacrament of equality. In other words, elections expressed the rejection of the old order in a myriad of ways. Jacques Thouret, who led the reform of the judiciary, easily won the consent of the Assembly with the argument that electing judges was the only satisfactory way of marking a true break with the past.[10] Though a moderate, he therefore embraced the electoral method and persuaded others to follow him. At the time, everyone believed that this was the best way of banishing the memory of the much-reviled *parlements*. The revolutionary period was also a time of instinctive distrust of the executive, which would have been strengthened had it been entrusted with the power to appoint judges.

For all these reasons, everyone therefore embraced the principle that judges ought to be elected. In practice, however, the system drew serious criticism. As early as 1792, the Convention sought to assert greater control over the judiciary. Instead of challenging judicial elections directly, it chose to attack the system indirectly. For instance, the Committee of Public Safety invoked emergency conditions as grounds for filling judicial vacancies by direct appointment. Although the elective principle was reaffirmed after Thermidor, it soon became common for the Directory to manipulate the outcome of judicial elections. Practice no longer coincided with law. Hence when Bonaparte decided in 1802 to eliminate an electoral procedure that no longer reflected actual practice, no one protested.[11]

It is interesting to recall that French republicans in the nineteenth century would continue to defend the elective principle. After the July Revo-

[9] Note, however, that this was to be an election in two stages, as for representatives: the people elected a group of electors, who then chose judges.

[10] Speech of March 24, 1790, *Archives Parlementaires*, vol. 12, pp. 344–348. Recall that in the Ancien Régime the right to judge belonged to individuals and corps by inheritance or purchase of a judicial office.

[11] The Constitution of Year VIII had previously placed elective and nominative principles on a footing of equality. On the history of all these practices, see Guillaume Métairie, "L'électivité des magistrats judiciaires en France, entre Révolution et monarchies (1789–1814)," in Jacques Krynen, ed., *L'Élection des juges: Étude historique française et contemporaine* (Paris: PUF, 1999).

lution, patriotic societies included it in their programs (and the entire left had already hailed the elimination of the ban on removal of judges under the Charter of 1830). In Laurent-Antoine Pagnerre's great *Dictionnaire politique* of 1842, which expressed the views of the contemporary opposition, the election of judges was a key democratic goal. This step was not taken in 1848, however. Later, Léon Gambetta again took up the torch, arguing that "permanent tenure for judges is contrary to the principles of democracy."[12] After republicans finally consolidated their power in 1879, when Jules Grévy was elected president, they soon clashed with many judges who, protected by life tenure, refused to enforce the decrees of March 1880 expelling religious congregations from the schools.

The reform of judicial recruitment thus became once more a central topic of debate, and it was one of the main issues in the 1881 legislative elections. One of the leading figures of the Republican Party at the time spoke for his comrades when he said that the goal was to "conquer Moral Order's last bastion with the votes of the people." For him, "to bring the full tide of the democratic flood" into the judiciary promised to be a panacea.[13] The new Chamber of Deputies gave the issue top priority and on June 10, 1882, issued an unequivocal declaration: "Judges of all orders are elected by universal suffrage." Direct suffrage was rejected, however, in favor of election by a college of delegates who were themselves elected by universal suffrage—but the elective principle was indeed restored. Yet the principle was never put into practice: orders to implement it were never issued. The reason for this failure was purely political: the deputies quickly became frightened that royalist judges might be elected in the twenty-some *departments* still held by the antirepublican opposition.[14] Ultimately, a decision was made to abandon the project—and to begin a vast purge of the judiciary in 1883![15] Here was a clear indication that the democratic argument had been purely tactical. Electing judges was never again seriously proposed in France.

The American case was almost the exact opposite. At the federal level, the Constitution of 1787 had stipulated that federal judges were to be

[12] *Note pour les législatives de 1869*, citée par J. Gaillard, "Gambetta et le radicalisme entre l'élection de Belleville et celle Marseille," *Revue Historique*, no. 519, 1973, p. 82.

[13] Jérôme Langlois, quoted in Jacques Poumarède, "L'Élection des juges en débat sous la III^{e} République," in Krynen, ed., *L'Élection des juges*, p. 128.

[14] See the previously cited article by J. Poumarède, as well as his "La Magistrature et la République: le débat sur l'élection des juges en 1882," in *Mélanges offerts à Pierre Hébraud* (Toulouse: Université des Sciences Sociales de Toulouse, 1981).

[15] This was carried out after voting to suspend life tenure for a period of six months! Jean-Pierre Machelon, "L'Épuration républicaine, la loi du 30 août 1883," in *Les Épurations de la magistrature de la Révolution à la Libération: 150 ans d'histoire judiciaire* (Actes du colloque des 4–5 décembre 1992), *Histoire de la Justice*, no. 6, 1993. See also Paul Gerbod, ed., *Les Épurations administratives, XIX^{e} et XX^{e} siècles* (Geneva: Droz, 1977).

appointed for life by the president on the advice and consent of the Senate. The Founding Fathers had rejected the electoral system because they doubted the ability of the citizenry to choose qualified individuals for judicial and other positions. This was consistent with their liberal and aristocratic view of representative government. At the state level, however, things were different.[16] Several states (Vermont, Georgia, Indiana) led the way in opting fairly early on for election of judges in courts of first instance. This practice gained in popularity during the Jacksonian Era (1829–37). The new states that joined the Union were infused with the "frontier spirit" and suspicious of "eastern elites." Judges were among the targets of this hostility, especially since many of them belonged to the conservative Federalist Party and opposed the reforms backed by the newly elected Jacksonian Democrats.

Cultural and political factors thus contributed to an expansion of judicial elections. On the eve of the Civil War, judges were elected by the people in twenty-four of thirty-four states. This system soon drew hostile criticism, however. Partisan elections led to political manipulation that ultimately degraded the judicial institution, as the venal and corrupt practices then rampant in politics affected the judiciary as well. The hopes that had been invested in the election of judges gave way to disillusionment. By the late 1860s, Mississippi and Vermont had abandoned the practice, and the judicial elections began to decline in popularity. Today only a small number of states still cling to this method of choosing magistrates, and then only in certain cases. Some other states have opted for "nonpartisan elections." The idea is that candidates for the judiciary should run as "individuals" rather than members of a party in order to avoid the dubious practices associated with partisan campaigns. The results have been mixed. Abstention rates are high in both types of judicial election. The election of judges thus seems more like a ritual, a survival of the past, than a vital democratic exercise.

Starting in the 1940s, most states therefore shifted to a different method, known as the Merit Plan (or Missouri Plan, after the first state to choose this option). Although details vary from state to state, the general principle is to combine nomination based on qualifications with popular election. The first step involves a nominating commission made up of jurists and other qualified individuals, who are responsible for drawing up a list of competent candidates. An elected authority of one type or another (depending on the state) then selects judges from the list of qualified candidates. The selected judges must subsequently stand for election after a probationary period (called the confirming election) and again at

[16] For an overview of the history, see Laurent Mayali, "La sélection des juges aux États-Unis," in Krynen, ed., *L'Élection des juges*.

the end of each term (retention election). The key to this system is *non-competitive elections*. In the states that have adopted this system, it has been possible to achieve a balance between an electoral *principle*, which continues to be considered essential, and various *practical* methods of recognizing professional competence. So while a form of voting has been maintained, the nature and meaning of the vote have changed a good deal.[17] France and (at the state level) the United States thus have different systems, but both perpetuate the legacies of the past in the form of acquired political and cultural habits that no one would dream of challenging. Hence the fundamental question, that of the basis of the democratic legitimacy of the judiciary, is prudently set to one side.

On the Partisan Destruction of Institutions

In practice as well as in theoretical debate, judicial election has had to confront one central difficulty: the possibility of distinguishing between a "pure election" as a means of bestowing popular consecration upon authority and a "partisan election" involving a conflict of ideas or interests. The characterization of an institution as "democratic" often conflates these two dimensions. Tension between the two approaches has often been evident in the United States in particular. Yet the objective of each type of election is different. In a pure election, it is simply to show confidence in *a* person and therefore an institution. In a partisan election, it is to choose between *rival* individuals or *competing* points of view. The problem is that the pure election is in some sense utopian: it envisions a situation in which there is either only one candidate or else no candidates. If there is only one candidate, that candidate must somehow have been nominated (and how that is to be done remains unspecified). If there is no candidate, the assumption is that voters somehow decide "spontaneously" in favor of some member of the community (this was the predominant view during the French Revolution).[18] In that case, the "election" is at best a "confirmation."[19] If every true election is "partisan," in the sense of involving a choice between competing candidates, then it is problematic to have recourse to such a procedure when the point is simply to express confidence (especially when individuals are identified with institutions). Indeed, introducing a partisan election can destroy an institution by depriving it in practice of the defining charac-

[17] Although there are constant popular initiatives leading to referenda intended to bring more judges under the political control of voters. See "Voting for Judicial Independence," *The New York Times*, November 2, 2006.

[18] See above on pure elections.

[19] This is the direction taken in the United States under the Merit Plan.

teristic of generality. A judicial type of institution is neither a functionally pluralist representative chamber nor a structurally partisan government. It is intrinsically identified with a function, and therefore a structure, in which the individuals entrusted with the missions of the institutions must not exist qua individuals with differentiating characteristics of their own.

By studying cases of institutional collapse we can better understand how this destructive mechanism works. The abolition of the Council of Censors in the Pennsylvania constitution of 1776 is particularly instructive in this regard.[20] The purpose of the council was to make sure that the executive and legislative powers of the state properly discharged their responsibilities. It deliberated in public and could go to court if it found agents of the government to be derelict in their duty, and it could recommend the abrogation of laws it deemed contrary to the state constitution; it could also convene a Convention of Revision. In some respects these functions made the council similar to a constitutional court. But what distinguished the Council of Censors from today's constitutional courts was that it was elected by universal suffrage, just like the legislature. At the time, this idea was praised for its originality by democrats in Europe as well as America. Yet the institution was dissolved in 1790 when the state amended its constitution. Why? In part because nervous liberals had become wary of the democratic enthusiasm that gave rise to the council in the first place. But there were also deeper causes for the failure. In reality, it was a consequence of the way the institution worked. During its brief existence it never really proved its worth as an instrument of democracy. Because its members were elected, it simply rehearsed legislative conflicts and controversies. It therefore lost all credibility as a watchdog over the other institutions of government. Instead of being defined by its function, it merely reproduced the turbulence of political debate. Its mission therefore became hard to interpret and effectively impossible. Thus there was no longer any reason to defend it, and it was eliminated without opposition: not a single voice was raised in protest.

A few years later, the failure of the French Tribunate established by the Constitution of Year VIII illustrated a very similar process of partisan decomposition. The Tribunate was a third chamber that sat alongside the Senate and the Legislative Body. Suggested by Sieyès, it was an oversight institution of a sort that had been extensively discussed by political theorists. In size it was similar to a legislative assembly, and its members were elected, but it had no representative function in the strict sense. Without going into the very complex details of its operation as laid down by the Constitution of Year VIII, I will say simply that the purpose of the Tribu-

[20] On this council, see the references in my *Counter-Democracy* (Cambridge: Cambridge University Press, 2008), p. 76.

nate was threefold: normative regulation, administrative oversight, and constitutional intervention. Its work was soon impeded by Bonaparte, who was loath to permit any power to rival his own. The First Consul therefore accused the Tribunate of being nothing more than a bastion of opposition inhabited by politicians rather than objective guardians of the constitution. To be sure, two of its leading figures, Benjamin Constant and Roederer, were indeed leaders of the fight against Bonaparte, but their battle was one of principle, focused on the nature of institutions and of the regime itself. Still, the charges, by advancing a narrowly political interpretation of their position, embarrassed them and knocked them off balance. The tribunes failed to establish their legitimacy because they were unable to elaborate and clarify the distinction between partisan opposition and an essentially institutional role. Their functional legitimacy was weakened and ultimately undermined by the fact they were elected. Because the Tribune had been chosen as if it were a parliamentary assembly, Bonaparte was able to use this as a pretext for the coup in Year X (1802), when he made himself consul for life and brought all other institutions of government to heel.

The relation between electoral and functional legitimacy was still not very clearly understood at that time: witness Jefferson's proposal in 1820 to make the Supreme Court a third house of Congress. Even today, a theorist like Jeremy Waldron, who is a harsh critic of what he takes to be the exorbitant power of the U.S. Supreme Court, has argued that what judicial review really entails would be clearer if it were done by the equivalent of a modernized House of Lords.[21] If we look beyond their differences, these abortive experiments and untested proposals invite us to reconsider the link between elections and legitimacy in the case of institutions exercising a broadly judicial function. The problem, as we have seen, lies in the practical impossibility of separating "politicized elections" from "constitutive elections" (intended to bestow trust). If a judicial-type institution is to be the structural embodiment of a form of reflexivity and impartiality removed from partisan identification, such confusion is inadmissible. To elect the members of such a body could irremediably compromise its identification as an institution of functional generality.

How, then, is confidence in such an institution to be expressed, and how is its credibility to be established? If elections bestow legitimacy, institutions such as constitutional courts must establish themselves in society by demonstrating their qualities. The recent decline in Americans'

[21] See his critique of Eisgruber's *Constitutional Self-Government*: Jeremy Waldron, "Eisgruber's House of Lords," *University of San Francisco Law Review*, vol. 37, 2002, pp. 89–114.

confidence in their Supreme Court has nothing to do with its allegedly being an "aristocratic institution."[22] It stems solely from the feeling that the court has in recent years become less objective and more partisan and that the justices are more inclined to pursue ideological goals. In 1905, confidence in the Supreme Court was shaken by its decision in *Lochner v. New York* (when it ruled that a New York state law limiting the working hours of bakery workers was unconstitutional). To many people it seemed obvious that this was a "political" decision enacting a doctrinaire understanding of free enterprise and that it had nothing to do with protecting the freedom of contract (under the Fourteenth Amendment). It took the court a long time to recover from this blow to its reputation, and legal scholars who believed that the decision had no basis in law expended much effort to ensure that no such decision would be possible in the future.[23] In recent years the specter of the Lochner court has risen again in the United States as the number of judges appointed by ultraconservative presidents has increased. The transition from the Warren court of the 1960s and 1970s, which revolutionized American law, to the very conservative Rehnquist and later (since 2005) Roberts courts has diminished the court's capital of confidence. That is why many liberal legal scholars have changed their tune and taken positions that have been characterized as "populist."[24] Clearly, the problem cannot be solved by electing justices to the Supreme Court. What America needs if it is to lay its old demons to rest is first a revision of the Constitution, including a new bill of rights, and then a reconsideration of the criteria on which Supreme Court decisions are based (the doctrine of "original intent" raises too many problems).[25] Perhaps the way in which justices are appointed should also be changed, and their life tenure should be ended. Elections are not the issue, nor is representativeness in the usual sense. Indeed, what is crucial may be the fact that justices are not elected.[26] A constitutional

[22] Only 47 percent of Americans believe that the Supreme Court issues fair decisions, while 31 percent believe that it has moved too far to the right (*Washington Post* poll published July 29, 2007), compared with only 19 percent to hold that view in 2005.

[23] Barry Friedman, "The History of the Countermajoritarian Difficulty, Part 3: The Lesson of Lochner," *New York University Law Review*, vol. 76, Nov. 2001.

[24] See the works of Larry Kramer and Mark Tushnet cited above, as well as the evolution in Bruce Ackerman's position. "Judge-bashing" is back in fashion among liberals.

[25] See Dennis J. Goldford, *The American Constitution and the Debate over Originalism* (Cambridge: Cambridge University Press, 2005); and Leonard W. Levy, *Original Intent and the Framers Constitution* (New York: Macmillan, 1988).

[26] Eisgruber, in my view, takes the wrong line of defense when he argues that justices should not be elected because they should be consensus figures, representatives of the "mainstream" (as opposed to artists and intellectuals, whom he characterizes as more intrinsically nonconformist). See *Constitutional Self-Government*, p. 66.

court should be *structurally* constituted in such a way as to ensure its capacity for reflection and impartiality, a capacity that would be destroyed if it were to become a partisan institution.[27] The point is to *reduce* the politicization of such institutions by changing the way in which members are chosen (which is crucial in France as well as in the United States). It is important to emphasize at this stage of the argument that, under the right conditions, appointment of judges can bestow a legitimacy as great as, if not greater than, election. This is the case when there exists a certain unanimity, as evidenced by the absence of opposition (tacit consent) or validation of the nominees by third parties of one sort or another. In such cases, an appointment can be as good as a "trust-granting election."

The Two Requirements

From a more general point of view, the question of the legitimacy of reflexive institutions (and independent authorities) makes sense only in the context of the inescapable dualism of democracy. Democracy must respect two simultaneous requirements: it has to arrange for periodic choice among significantly different individuals and programs, and it must establish institutions that rise above those differences to promote the general interest. Democracy construed as a political regime thus relies to the fullest extent possible on the clash of political parties; it invites citizens to choose among the programs on offer and lays down the rules that determine which party emerges victorious from the contest. At the same time, democracy construed as a form of society depends on the development of reflexive or impartial institutions. It is dangerous to confound the two forms. It is therefore misleading to call for a transcending of the parties in the name of a consensus politics of "good intentions." But it is also misleading to seek to impose the rules of partisan choice on the realm of reflexive institutions and independent authorities. Institutionalized conflict and consensus institutions must coexist in a well-ordered democracy.

How, then, should we approach the question of the legitimacy of reflexive and impartial institutions? First, by acknowledging their representative character, as set forth above. But also by treating reflexivity and

[27] Note the sharp distinction between an electorally constituted (and therefore majoritarian) institution and an institution whose members are appointed but whose decision is then determined by a majority of its members. The vote in the latter case is not partisan, as it would be in the former case. It is simply a matter of ascertaining the opinions that exist on the matter in question without forming two distinct camps (this "proelection" argument, based on a system of majoritarian decision, was proposed by Jeremy Waldron).

impartiality as qualities that are constantly being tested by the public. Thus the legitimation procedures appropriate to each of the two spheres of democratic polities should be strengthened, but the two spheres must not be confused as a means to that end.

Who Will Guard the Guardians?

When Sieyès, after Thermidor, presented his proposal for constitutional juries, the idea was to institute a "political sentinel" that would play a regulatory role vis-à-vis the various powers of government in order to make sure that they respected the limits laid down by the Constitution. His suggestion first ran afoul of the monist, legicentric opinions of a majority of his colleagues, who could not imagine the sovereign people as anything other than united, undivided, and incapable of error. But it also faced logical objections: "If there really must be a power whose job it is to keep an eye on the others … I would then ask for oversight of that power as well," one *conventionnel* protested.[28] "If a guardian is placed above the public powers, he would assume the role of master and place them in chains in order to keep a better watch over them," another warned.[29] "Who will guard the guardians?" in other words. The question had no logical answer and raised the same formal difficulties as the notion of self-foundation. Benjamin Constant would explore it more deeply some years later, but only to confess his puzzlement.[30] "When guarantees against the abuse of a power are placed solely in the hands of another power, a guarantee against the latter is also needed," he acknowledged at the outset, only to concede at once that "this need for guarantees recurs constantly and has no limit."[31] In the end he concludes that "no guarantee can be given to the guarantee itself."[32] Yet Sieyès and Constant did offer fragmentary answers. Sieyès thought that public opinion could set de facto limits to the power of guardians. Constant outlined a more func-

[28] Intervention de Louvet, 24 thermidor Year III, *Réimpression du Moniteur*, vol. 25, p. 481.

[29] Intervention de Thibaudeau, Ibid., p. 488. "To put it another way," he continued, "the difficulty is only pushed back a step.… I would have every reason to ask that overseers be assigned to the jury, and so on *ad infinitum*. Thus in the Indies, it is said that there is a tribe that believes that the world rests on the back of an elephant, and that this elephant is standing on a tortoise. But when you ask what the tortoise is standing on, erudition has no answer." Ibid., p. 484.

[30] Benjamin Constant, *Fragments d'un ouvrage abandonné sur la possibilité d'une constitution républicaine dans un grand pays*, ed. Henri Grange (Paris: Aubier, 1991), see esp. chap. 15.

[31] Ibid., p. 441.

[32] Ibid., p. 451.

tional answer to the question, suggesting that a way ought to be found to align the mission of the institution with the interests of its members. Thus one suggested a metainstitutional solution, while the other proposed creating an "interest in disinterestedness." Both answers suffered from the lack of any constitutional translation. The response to the aporia of the guarantee could not be hierarchical, for then there would be no limit to the infinite regress in the search for a foundation. But this is not the case if the guarantee is understood reflexively. It then becomes tantamount to a delay for reflection, a procedural complication, a requirement of validation. In that case the constitutional guarantee is like a suspensive veto. But this was not understood at the time, perhaps because the weight of history worked against it.

Variable Legitimacy

A reflexive institution can actually carry out its mission only if it refrains from setting itself up as a genuine power. In the legal realm, the reflexive and technical dimension implicit in the idea of a hierarchy of norms must not be extrapolated to anything like a hierarchy of powers. In practice, moreover, the decision of a constitutional court is never final. A modification of the constitution can always lead to reconsideration of its judgments. This is not an insignificant detail. Constitutions are in fact far from static texts. In France, the Constitution of the Fifth Republic has been amended twenty-four times since it was first adopted in 1958. In the first few decades after the U.S. Constitution was drafted in Philadelphia in 1787, many amendments were added. Constitutional oversight is structurally reflexive, moreover. It is part of the process of elaborating norms, in which it never has the last word. One of the greatest French political writers of the twentieth century, Georges Vedel, who sat on the Constitutional Council, speaks of the ability to "set a direction" rather than "fix a position."[33] The expression "government by judges" is not appropriate for two reasons: the interpretive latitude of constitutional courts is limited, and they can only refer to existing texts (in the vast majority of cases).[34] What we find, then, is a relative-functional legitimacy

[33] Georges Vedel, "Le Conseil constitutionnel, gardien du droit positif ou défenseur de la transcendance des droits de l'homme?" *Pouvoirs*, no. 45, 1988, p. 151.

[34] Speaking of his own experience, Vedel notes: "We did not fall into the trap of becoming a 'government of judges.' Unlike what the United States Supreme Court used to do and that the German Constitutional Court sometimes does, we refused to invoke principles not found in the texts but stemming from the political or moral philosophy of the judges. The government of judges begins when judges do not limit themselves to applying or interpreting texts but impose norms that are in reality products of their own minds. On the whole, I

associated with a reflexive dimension that is not hierarchical in nature. Justice in this sense has powers without being a power.[35]

As individuals, constitutional judges must therefore subordinate themselves to their function. They can play their role to the full only by reviving the professional ethos of great seventeenth-century jurists such as d'Aguesseau, who were steeped in the ideals of civic humanism. But they must never consider themselves to be the owners of their function; they are only temporarily in possession. The "democratic" character of constitutional oversight thus turns out to be most tenuous in countries where judges are appointed for life, as in the United States. Beyond the perverse "demographic effects" that may result from this, and apart from the fact that the variable length of each such appointment is inherently inegalitarian, lifetime appointments suffer from the drawback of making the function "archaic" and making its actual basis less obvious and more difficult to interpret.

Finally, the legitimacy of constitutional judges and other reflexive powers cannot be understood in the terms that are applicable to the legitimation of sovereignty. It depends not only on *legitimacy of competence* in a narrow sense but also on the kind of legitimacy associated with authority understood as an invisible institution.[36] Like trust or authority, judicial legitimacy is an indirect power, the effects of which vary with a whole range of historical and practical factors such as social recognition, and intellectual and moral reputation deriving from the nature of the decisions taken. The idea of judicial restraint finds its place in this context: the self-restraint that judges exercise can be understood as an element of a strategy to bolster their own credibility by offering a guarantee of good democratic behavior. In a broader sense, the legitimacy of judges is a form of capital, which can grow but also shrink. In each country we find something like a market of relative legitimacies—a market whose practical function is to determine the degree of indirect power exercised by institutions such as constitutional courts.[37]

The more divided the partisan political sphere appears, the greater the legitimacy of a reflexive institution intervening in controversial is-

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do not think that we succumbed to this temptation." "Neuf ans au Conseil constitutionnel," *Le Débat*, no. 55, May-August 1989.

[35] On this point, cf. the analysis in the *Rapport de la commission de réflexion sur la justice* (Paris: La Documentation française, 1997), edited by Pierre Truche, at that time chief judge of the Cour de Cassation.

[36] The expression *invisible institution* comes from Kenneth Arrow, who used it to conceptualize the idea of trust. See *The Limits of Organization* (New York: Norton, 1974), p. 26.

[37] On the Indian case, see Bratap Bhanu Mehta, "India's Unlikely Democracy: The Rise of Judicial Sovereignty," *Journal of Democracy*, vol. 18, no. 2, April 2007.

sues. This is the finding that emerges clearly from major studies of the American case. One of these showed, for example, that support for the institution was relatively independent of the degree to which individuals agreed or disagreed with its decisions. Acceptance of the Supreme Court as nonpartisan made it easier to accept its decisions (even though the same positions were often vigorously contested when formulated by the government). This is clear, for instance, in the case of abortion, which has been particularly controversial in the United States.[38] The formidable legitimacy of the Supreme Court allowed it to resolve this and other issues that Congress had shown itself unable to consider without arousing passionate opposition and insuperable deadlock.

The legitimacy differential between the court and Congress explains why the court has increasingly assumed responsibility for the thorniest and most controversial issues, particularly social and ethical issues. The power of the court has grown steadily thanks to the public's readiness to grant it an additional measure of legitimacy. And Congress itself has tacitly honored that legitimacy by refraining from legislative intervention in these areas (and in particular by abstaining from laws that would overrule Supreme Court rulings). The importance of notions of legitimacy has been confirmed by other research regarding the image of the U.S. Congress and president. Although these are elective offices, they are less respected because they seem to be more partisan and less structurally concerned with the common good (with Congress enjoying the lowest level of respect). The most important of these empirical studies confirms Tyler's results.[39] But there is nothing fixed about the terms of this differential economy of legitimacy, as the American case shows quite clearly: in the early twenty-first century, the respect accorded to the Supreme Court has undeniably declined. Legitimacy of this type is always a variable quality and not a status that can be conferred by fiat.

[38] Tom R. Tyler and Gregory Mitchell, "Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights," *Duke Law Journal*, vol. 43, no. 4, February 1994. See also Tom R. Tyler, "The Psychology of Public Dissatisfaction," in John R. Hibbing and Elizabeth Theiss-Morse, *What Is It about Government that Americans Dislike?* (Cambridge: Cambridge University Press, 2001).

[39] John R. Hibbing and Elizabeth Theiss-Morse, *Congress as Public Enemy: Public Attitudes toward American Political Institutions* (Cambridge: Cambridge University Press, 1995). See also Tom R. Tyler, "Trust and Democratic Governance," in Valerie Braithwaite and Margaret Levi, eds., *Trust and Governance* (New York: Russell Sage Foundation, 1998).