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Legislative Delegation

The Erosion of Normative Limits in Modern Constitutionalism

Springer

Chapter 2
The Genealogy of the Concept of Delegation: Constitutional Presuppositions

The concept of legislative delegation is subordinated to the notion of legislation but, as the notion of legislation raises a congeries of parallel conceptual implications, this subordination is not a very strict one. To wit, in Henry Sumner Maine's analysis of the development of law, legislation appears as the last stage of legal evolution. Lon Fuller, commenting on Maine, identifies the defining feature of legislation as the "recognition of the simple fact that law can be brought into existence by explicit declarations of intent, incorporated in the words of legal enactments."[1] The emphasis is therefore on the intentionality, explicitness, and rationality of positive, self-consciously human-made law. To Jeremy Waldron, the contemporary theoretical champion of law-making by assembly, the definition of legislation is more properly associated with a "constitutional instinct (. . .) that if there is explicit law-making or law reform to be done in society, it should be done in or under the authority of a large representative assembly."[2] For him, the stress falls on deliberation, participation, and institutional setting.

This goes to show that the term is multifarious and any of its aspects and nuances can be privileged by an analytical definition, stressing either the desired qualities of the process (will or reason, deliberation or participation, ideal institutional setting, etc.) or of its product (e.g., intentionality, rationality, normativity). In what follows, it is assumed that, in order to have a clear understanding of the concept of delegation, an incursion into the theoretical history of legislative paradigms is inevitable. All public law notions develop in a polemical evolution, inextricably related to other concepts. Concrete mutations and theoretical accounts of major legal concepts do not exist free-floating in a temporal vacuum, but rather proceed—to paraphrase a Burkean metaphor—by "insensible degrees" of differentiation, which an a-historical analysis cannot understand and properly disentangle.

[1] Lon L. Fuller, *Anatomy of the Law* (Westport, CT: Greenwood Press, 1976 (1968)), pp. 49–54, at p. 54.

[2] Jeremy Waldron, "Speech: Legislation by Assembly," 46 *Loyola Law Review* 507 (2000), at p. 510.

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But in order to be useful to our conceptual quest, this inquiry into the historical evolution of legislation concepts has to have a constitutional dimension.

2.1 A Constitutional History of Legislation Concepts

Before we proceed with our actual historical account, it should first be explained what it means for practices to be underpinned by historically situated conceptual justifications and in what sense do conceptual justifications have a constitutional dimension.

Both differences as such between norms of different reach and subject-matter relevance and normative constraints on public rules go back to the Antiquity. For instance, in fourth-century Athens, the distinction between law and decree and the relative supremacy of the former were entrenched as a matter of practice and were safeguarded by a number of procedural and substantive checks. After the codification of 403/402 BC, an organic law was passed to define what would in the future count as legislation: "Law: magistrates must under no circumstances use unwritten law. No decree passed by the Council or the people may have higher validity than a law. No law may be passed that applies only to a single person. The same law shall apply to all Athenians, unless otherwise decided [in a meeting of the Assembly] with a quorum of 6000, by secret ballot."[3] *Nomoi* (laws, statutes) were thus limited to enactments of a more general and permanent nature, whereas through *psephismata* (decrees and resolutions) were taken individual decisions or adopted general norms of a more transient character.[4] The Assembly of the People (*ekklesia*) could only pass decrees, and a proposal to amend or abrogate an old

[3] Andokides, "On the Mysteries," in Mogens Herman Hansen, *The Athenian Democracy in the Age of Demosthenes*, J. A. Cook transl. (Oxford UK & Cambridge USA: Blackwell, 1991), p. 170.

[4] Mogens Herman Hansen, at 162: "*Nomos* meant a general norm without limit of duration, whereas *psephisma* meant an individual norm which, once carried out, was emptied of its content." *See*, same, for a chart, statistics, and discussion, pp. 170–175. An example of a *nomos* is provided at p. 171: "*Nomos eisangeltikos* against anyone who attempts to overthrow the democracy or to betray the Athenian armed forces or to speak to the people after taking bribes." [permanent and general nature] A decree (*psephisma*), conferring the title of *proxenos* and benefactor of Athens, for himself and all his descendants [permanent and individual nature] to a certain Macedonian who interceded with king Philip on behalf of Athens is reproduced in full at p. 148. A certain ambivalence should be pointed out, nonetheless. *See*, for instance, J. M. Kelly, *A Short History of Western Legal Theory* (Oxford: Clarendon Press, 1992), p. 11: "A further source of confusion was the unclear relationship of *psēphismata* (resolutions, decrees) to *nomoi*, statutes more strictly so called; the most that can be said is that *nomoi* were envisaged as permanent general dispositions, while *psēphismata* were *ad hoc* or supplementary or effectuating mesaures; though Aristotle uses the word in the sense of something which modifies a general law to meet the equity of a particular case, and *psēphismata* are occasionally themselves included in the category of *nomoi*."

law or make a new one would be passed on to a different body, the *Nomothetai*.[5] A new law would trump prior decrees. Furthermore, should a decree inconsistent with the body of legislation be carried through the Assembly, any citizen could initiate in the People's Court an invalidation procedure, *graphe paranomon* ("public prosecution for unconstitutional proposal of a decree")[6] and, if an incompatibility were found, have the initiator convicted and punished and the decree nullified and expunged from the public records.

The word "legislation" derives etymologically from Latin. *Lex* itself referred at first to codification of custom (*Lex Duodecim Tabularum,* the Law of XII Tables, about 451–449 BC), then to law-making proper. *Legis-latio* was the formal procedure by which the magistrate moved a law, after it had already been drafted, for approval before *comitiae* (*curiata, centuriata, tributa*)[7] and, following *Lex Hortensia de plebiscitis* (probably 287 BC), before the assembly of the plebs (*concilium plebis*). A magistrate who possessed *ius agendi cum populo*/*plebe* presented the bill and posed the question, to which the assemblies were expected to respond by clear-cut negation or affirmation. *Legis-latio* was taken, at least in the early usage of the term, to signify something clearly distinct from its antonym, *legis-datio*, which referred to the imposition of norms upon a *municipium* or new *coloniae*. According to Walter Ullmann, this procedure related therefore to an "ascending" conception or thesis of government.[8] One should however be cautious of anachronistic projections of similes. The crux of the issue in the procedure of

[5] These were bodies convened *ad-hoc* (when the need to make a new law or change or repeal an old one arose) and composed of citizens who had taken the Heliastic Oath (needed to be a juror, *dikastai*, in the People's Courts and administered on a yearly basis). The procedure was almost judicial in its nature, with parties arguing for or against a particular piece of legislation (or for/against the new/old law), and the *nomothetai* cast their votes for one or the other legislative "party."

[6] Mogens Herman Hansen, at p. 166, 174.

[7] *Curia* used to be an old religious, administrative, and military unit, roughly synonymous to 'clan,' which gradually lost importance during the Republic; laws submitted to the *curiae* were adopted almost exclusively in the domains of family and religion (for instance, adoptions, inheritance). Laws regarding political matters were submitted to the people assembled by *centuriae* (military and fiscal divisions). The *Comitia Tributa* (people assembled by tribes, territorial divisions) had essentially the same character as the *Concilium Plebis* (Assembly of the Plebs), except that from the latter patricians were excluded. After *Lex Hortensia* in 287 B.C., laws moved by the plebeian magistrates, the tribunes of the plebs, to the Plebeian Assembly, were made binding on the whole Roman People and *plebiscita* gained the same force as *leges*. *See* Bernard Manin, *The Principles of Representative Government* (Cambridge: Cambridge University Press, 1997), pp. 44–51.

[8] Walter Ullmann, *Principles of Government and Politics in the Middle Ages* (Frome and London: Butler & Tanner Ltd., 2nd ed., 1966). Mommsen describes however the whole evolution of the Roman state as a continuous struggle between the democratic and aristocratic elements, plebs and patricians, or –in his wording- the "Optimates" and the Populares" 'parties,' *see* Theodor Mommsen, *The History of Rome, An Account of Events and Persons from Carthage to the End of the Republic*, Dero Saunders and John A. Collins (Eds.) (Clinton, Mass.: Meridian Books, Inc., c1958).

rogatio was not deliberation by the citizenry, not even finding out what the people wanted but rather whether they approved of already arrived at rules. Therefore, the scope of participation was limited, taking into account the extent to which a popular assembly was conditioned by the limited reach of its task—giving or denying consent—and by the particular manner in which the magistrate chose to pose the question.

Moreover, legislation proper did certainly have a privileged place in the overall structure of the Roman legal order. A dictator could for instance dispense with most usual limitations (magisterial collegiality, intercession by the tribunes, the right of a citizen to appeal to the people in case of a death sentence) and could adopt decrees with legislative force on any subject but he could not initiate legislation proper.[9] This was however not a place analogous to modern understandings regarding systemic hierarchy and consistency of legal sources. *Leges* were used sparsely throughout the Republic; the edicts of the magistrates (*ius honorarium*) and the "advisory opinions" (*senatus consulta*) of the Senate were also original sources of law, an exemplification of the Roman constitution's "mixed nature."[10] Part of the answer for this clear procedural delimitation of functions and for the place of democratically validated law in the Roman legal framework can be found in the pragmatic Roman understanding of law.[11] Along with the Empire came a blurring of the distinctions and of the taxonomy, an increase in the pace of positive law as the main source of law, the necessity of uniform interpretation, and a growing need for codification. Ulpian's famous *dicta*, incorporated in Justinian's *Digest*, condense the new ("descending") thesis of government: "Princeps legibus solutus est."[12] and "Quod principi placuit, legis habet vigorem."[13] At that time, nonetheless, the

[9] Clinton Rossiter, *Constitutional Dictatorship-Crisis Government in the Modern Democracies* (Princeton: Princeton University Press, 1948), pp. 15–28, at 25.

[10] Polybius describes the Roman republic as a mixed constitution, an auspicious admixture of democratic (popular assemblies), aristocratic (Senate), and monarchic (consuls) elements (Polybius, *History*, Book VI, 11–18, et seq.).

[11] Hannah Arendt, *On Revolution* (New York: Viking Press, 1965), at p. 188: "Unlike the Greek νόμος, the Roman *lex* was not coeval with the foundation of the city and Roman legislation was not a pre-political activity. The original meaning of the word *lex* is 'intimate connection' or relationship, namely something which connects two things or two partners whom external circumstances have brought together." This pragmatic standpoint should not be understood as ignorance of substantive constraints on positive law. *Lex Duodecim Tabularum* contained a rule prohibiting the passing of laws aimed against specific individuals (in modern terms, a bill of attainder).

[12] Ulp. D. I, 3, 31. "The emperor is not subject to law." This sentence, extracted from the context of a commentary by Ulpian on *Lex Iulia et Papia*, was later interpreted to mean that the emperor (the king) was unrestricted by statutory law.

[13] "What pleases the emperor has the force of law." The entire paragraph from which the *dictum* is taken runs thus: Ulp. D. I. 4. I. (Inst. I, 2, 6) "Quod principi placuit legis habet vigorem: utpote cum lege regia, quae de imperio eius lata est, populus ei et in eum omne suum imperium et potestatem conferat." Taken later to mean that the emperor (in the Middle Ages, also the king) had absolute legislative power, by virtue of the fact that he had been *delegated* this power by the Roman people,

maxims never meant a full-fledged legal rubberstamp on naked imperial absolutism. Late imperial codifications were depicted as *ratio scripta*, literally written reason. Imperial power, legislation included, was supposed to be exercised for the public good, the emperor was in principle elected, whereas the Senate remained the repository of *auctoritas* and an independent check on imperial power. The formal procedure of *rogatio*, submission of bills to the people, was never specifically abolished. It rather fell into obsolescence towards the end of the Republic and the beginning of the Empire, whereas, as a legal fiction, the notion that indirect popular assent and legitimacy was conferred through the *lex de imperio* on the imperial decrees was maintained.[14]

Also to the Antiquity date back justifications of law and law-making that anticipate analytically most relevant modern discussions. The philosophical lineage of subordinating human law to a remedial project of virtue can be traced back to Plato's description of law as an ideal derived from moral verities, to which the human legislator should constantly strive. Plato's law-maker must target this ideal beyond the practicalities of particular arrangements and instrumental considerations, aiming always higher, "like an archer": "Where law is subject to some other authority and has none of its own, the collapse of the state is not far off; but if law is the master of the government and the government is its slave, then the situation is full of promise

which, through the *lex regia* (later *lex de imperio*), divested itself of its original *potestas* and *imperium*, bestowing them upon the emperor. In fact, the people never had any *imperium* to transfer since, in Roman public law, the notion of *imperium* pertained strictly to the magistrates and their sphere of jurisdiction. Throughout the Middle Ages, whereas the Church and the Empire used the maxim to legitimize claims of absolute power (on the argument that the delegation had in fact been an *irreversible abdication* of power in favor of the emperor), their opponents could point to the notion of *delegation* (which might imply the necessity of popular legitimization of secular power, an implicit proviso of exercise for the common good, or even Escheat or Reversion to the original delegator). *See*, for a discussion of Medieval theories related to the interpretation of the *lex regia*, Otto von Gierke, *Political Theories of the Middle Ages*, translated by Frederic William Maitland (Cambridge: Cambridge University Press, 1987 (1900)). Only Justinian and – much later- during the age of Absolutism, Frederick II, would advance the thesis that the *lex regia* bestowed on the ruler a legally unfettered power to make and change laws. Throughout the Middle Ages, the maxim was usually interpreted and understood in a more limited sense. Bracton cites it in a modified form and interprets it to mean that the king would be limited by the consent of the Council and the laws of the kingdom, thus limiting its reach to a meaning far remote from unfettered legislative authority. For a discussion of the relevant passage in Bracton and a presentation of a wealth of interpretations of Bracton's rendition of the maxim, *see* Ewart Lewis, "King Above Law? 'Quod Principi Placuit' in Bracton" 39 (2) *Speculum* 240 (April, 1964).

[14] Wolfgang Kunkel, *Roman Legal and Constitutional History*, J. M. Kelly transl. (Oxford: Oxford University Press, 1996), p. 119. *Lex regia* (*lex de imperio principis*) is sometimes considered apocryphal. A part of such a law, conferring additional powers, including the power to depart from old and make new law, on Vespasian (*lex de imperio Vespasiani, 69/70 A.D.*) was in fact preserved to our days and the bronze slab can still be seen at the Capitoline Museum. *See*, more generally, P.A. Brunt, "Lex de Imperio Vespasiani," 67 *The Journal of Roman Studies* 95 (1977).

and men enjoy all the blessings that the gods shower on a state." [15] A good state, it is argued, should actively foster virtuous living, since the aim of law and of the political community is moral perfection.[16]

The parallel philosophical tradition, of law viewed as a project of practical reason, goes back to Aristotelian arguments, in which the conceptual implications of most major distinctions that dominate contemporary debates are already laid out. The essential defense of participation in law-making can be found in the famous allegory of the banquet. A feast to which many guests contribute their due is said to be better than one catered by a single man. Likewise, a multitude is less corruptible ("like the greater quantity of water, which is less easily corruptible than a little") and wiser in its deliberations than a single sage: "Now any member of the assembly, taken separately, is certainly inferior to the wise man. But the state is made up of many individuals. And as a feast to which all the guests contribute is better than a banquet furnished by a single man, so a multitude is better judge of many things than any individual."[17] Parallel reasons prompt caution with respect to the role of "expertise" in public affairs. The multitude is the best judge in electing and calling to account administrators, not only because of the beneficial effects of pooling knowledge but, more importantly, since the authoritative judge of expertise is, in most cases, the user thereof. I am always more qualified than the cook or the builder to appreciate if the food is fine and the house is well built.[18]

Modern rule of law arguments, in their essential conceptual breakdown, are also foreshadowed in the *Politics*, since the epistemological and egalitarian arguments mentioned above are neither an unqualified endorsement of majority rule nor a proto-positivistic argument. That the many are better qualified than the few to pass judgment on public issues does not mean, by inference, that whatever judgment they pass can, simply by virtue of its being made by "the multitude," be dignified with the name of law, since "[r]ightly constituted laws should be the final sovereign; and personal rule, whenever it be exercised by a single person or a body of persons, should be sovereign only in those matters on which law is unable, owing to the difficulty of framing general rules for all contingencies, to make an exact pronouncement."[19] This disjunction between the general or universal (laws) and the particular (individual measures, decrees, and judgments according to law or equity)

[15] Plato, *The Laws*, (Trevor Saunders transl.) (Penguin Books edition), at p. 715.

[16] *Id.*, 707: "We do not hold the common view that a man's highest view is to survive and continue to exist. His highest good is to become as virtuous as possible and to continue to exist in that state as long as life lasts." More significantly, at 713–714: ". . .we should run our private and public life, our home and our cities, in obedience to what little spark of immortality lies in us, and dignify these edicts of reason with the name of 'law.'"

[17] *Politics*, Ernest Barker transl. (Oxford: Clarendon Press, 1948) III, 15, 1286a.

[18] III, 11, 1282a.

[19] III, 11, 1282b. (Barker) Translations differ slightly. The generality of law part of the argument in 1282b and 1269a appears, for instance, as "laws, *which must be universal*" in the 1986 Apostle-Gerson annotated edition (Grinnell, Iowa: The Peripatetic Press).

will resurface in natural law theory and in classical liberal accounts of the rule of law; it can be traced in different expositions to a vast array of sources, ranging from the Monarchomachs to Kant. Laws should be written and promulgated, general, and relatively stable since publicity, generality, and stability give the citizen what we nowadays call a "fair warning" and protect against arbitrariness.[20] Generality should be tempered by equity since a general rule, of necessity, cannot either foresee or accommodate in its procrustean command the richness of contingencies which arise in its actual application; excessive rigidity would do violence to *ex post*, contextual needs for justice in actual cases. Likewise, stability should be tempered by amendment, when change is dictated by necessity. To use a slightly anachronistic terminology, the supremacy of law is guaranteed by making structural provision for stability (laws should be difficult to change or amend)[21] and by rendering laws formally superior to concrete decrees or executive measures in the hierarchy of norms.

In Aristotle can also be found, albeit in inchoate form, the main strands of modern separation of powers arguments (the balance and mutual check of countervailing power centers and the distribution among these of distinct public functions). His "best" form of government, the polity[22] is not an unalloyed model but a mixture of two political forms, aristocracy and democracy, which partakes of the advantages and alleviates the peculiar downfalls of both: "The more perfect the admixture of political elements, the more lasting will be the constitution."[23] In practice, the law is sovereign when there is no sovereign in the sense of unfettered, absolute, despotic power. Consequently, care should be taken to mix political forms in the actual allocation of governmental functions.[24] Functionally, each government

[20] "The essence of a State is that men should live by known rules, which will enable them to recognize in advance the results of their action: the very savage clothes himself in the garb of custom." Sir Ernest Barker, *The Political Thought of Plato and Aristotle* (New York: Russell & Russell, 1959), p. 453.

[21] *See* the whole discussion at 1269a, of which I will reproduce a particularly relevant part: "It is evident from these facts, then, that at certain times some laws must be changed. On the other hand, if the situation is examined from a different point of view, one might think that great caution must be taken. For whenever the benefit is small, getting into the habit of changing laws readily is an evil."

[22] "Best" in pragmatic as opposed to ideal terms.

[23] IV, 12, 1297a (Jowett translation). This particular passage refers to the stabilizing importance of the middle class in a mixed polity. The middle class would serve as an arbitrator and counterpoising mean between extreme democracy (political domination by the poor) and oligarchy (domination by the wealthy, patrician classes in the city).

[24] This is probably the earliest separation and balance of powers argument (in the sense of mixed government or mixed constitution). In this respect, it matters but little that, for Aristotle, emphasis lay on achieving unity of the state through a union of classes rather than a limitation of the state through a balance and distribution of power among distinct power centers (a 'synthesis' and not an 'antithesis'). *See*, for a very interesting analysis and comparison, Barker 1959, "The Mixed Constitution," pp. 471–486, at p. 484 (*note* 4): "One may say that Aristotle desires a union of classes for the sake of equity; Polybius a union of constitutions for the sake of stability; and Montesquieu a division of powers for the sake of liberty."

comprises three essential elements (a deliberative part, magistracies, and a judicial part) and a wise legislator[25] will take into account divergences of political form in the attribution of magistracies and in the exercise of the "deliberative part" of government, for instance by mixing election (which favors merit, an aristocratic principle) and selection by lot (which corresponds perfectly to the notion of equality of the free-born, an essentially democratic concept).[26]

This introductory detour serves to point out that all sophisticated analytical inquiries into the nature of law arrived at atemporally mature conceptual grammars, pertinent to ensuing, indeed to contemporary quests. With respect to the major distinctions that structure thinking about law and law-making (types of equality, generality of norms and individual justice, meanings of justice, the value and appropriate place of deliberation in public affairs, etc.), the subsequent millennia have not brought stupendous improvements to the Aristotelian categories. Even leaving aside their influence on Aquinas, in fact on the entire High Middle Ages, it suffices to note that Hobbes, in his *Leviathan* defense of the newly emerging seventeenth-century concepts of state and sovereignty, still polemicized extensively with Aristotle's definitions of balanced powers and supremacy of law.[27] Nowadays, Jeremy Waldron builds his influential polemical defense of ideal law-making around an Aristotelian allegory (the banquet to which all guests contribute) and concept (*endoxa*, the wisdom of the multitude). At the same time and likewise, any legal order of a certain degree of complexity exhibits a measure of reflexivity

[25] Here the word 'legislator' is used in a pre-political sense. Aristotle uses the term 'legislation' both in the meaning of positive law (which needs to correspond to rule-of-law normative constraints) and in a sense close to the modern word 'constitution' (which needs to be directed towards the attainment of the proper political arrangement). A point which can be clarified-reinforced by the following short excerpt from the *Nicomachean Ethics*, H. Rackham translation (Cambridge, Mass., and London, England: Harvard University Press, 1994), VI. viii: "Of Prudence as regards the state, one kind, as supreme and directive, is called Legislative Science; the other, as dealing with particular occurrences, has the name Political Science, that really belongs to both kinds. The latter is concerned with actions and deliberation (for a parliamentary enactment is a thing to be done, being the last step in a deliberative process), and this is why it is only those persons who deal with particular facts that are spoken of as 'taking part in politics,' because it is only they who perform actions, like workmen in an industry."

[26] "What I mean is that it is regarded as democratic that magistracies should be assigned by lot, as oligarchic that they should be elective, as democratic that they should not depend on a property qualification, and as oligarchic that they should." (IV, 9, 1294b) The distinction is not necessarily archaic or anachronistic and hence not completely irrelevant today. That election (and therefore also modern representative government), as opposed to selection by lot, always includes, *sub rosa*, an aristocratic element, has been more recently pointed out by Bernard Manin in *The Principles of Representative Government* (Cambridge: Cambridge University Press, 1997).

[27] "It is men and arms, not words and promises, which make the power of the laws. And therefore this is another error of Aristotle's *Politics* that in a well-governed commonwealth not men should govern but the laws. What man that hath his natural senses, though he can neither write nor read, does not find himself governed by them he fears, and believes can kill or hurt him when he obeyeth not? Or believes that law can hurt him: that is, words and paper, without the hands and swords of men?" Thomas Hobbes, *Leviathan* (Oxford Edition, 1909 (1651)) Part IV, p. 533.

with respect to law-making and the relationships of different norms to one another, which can be in a loose sense characterized as constitutional. The more sophisticated the legal order, the greater the degree of reflexivity and differentiation among institutions, procedures, functions, and norms. More is however needed, for practices and conceptual orders to have a constitutional dimension, namely historical situation and structural interrelation of concepts and practices. The inquiry into the constitutional dimension of legislation concepts, in the sense relevant for this argument, must proceed at a later stage. We have to start our query at the beginnings of the Western legal tradition to which modern constitutional orders can be traced back. One needs to identify the emergence of systemic distinctions by virtue of which law-making arises as a function separated from other exercises of authority and embedded in an order that can be characterized as constitutional in a sense akin to the modern meaning of this term. This sense of constitution presupposes both (1) a relative systemic closeness, therefore a measure of autonomy and functional differentiation, of the institutions that exercise gradually more distinct kinds of authority; (2) a relative universality and coherence of legally relevant patterns of justifications, normative points of reference, and types of legally-relevant rationality; and (3) a symbiosis and mutual interaction between the two levels (of fundamental legality and legitimacy).

This process of gradually developing autonomy of fundamental legal institutions and relevant normative environments resulted eventually in the modern constitution, an "evolutionary achievement" that claims to control not only the reproduction of the legal system as such, by establishing conditions of validity for the production of subordinate norms (and even for the change of the constitution itself), but also the normative arguments within the system (the constitutionally-relevant legitimacy model).[28] This matter is of the highest relevance to our topic, given that a central implicit question of this book is whether and to what extent the modern normative constitution is in fact capable of fulfilling its "evolutionary" legal-systemic task of "regulating and restricting the delegation possibilities," by establishing to a substantial degree its own legal-rational conditions of the

[28] Niklas Luhmann, "Verfassung als evolutionäre Errungenschaft",9 *Rechtshistorisches Journal* 176 (1990), at p. 187: "Folglich ist die Verfassung diejenige Form, mit der das Rechtssystem auf die eigene Autonomie reagiert. Die Verfassung muß, mit anderen Worten, Außenanlehnungen, wie sie das Naturrecht postuliert hatte, ersetzen. Sie ersetzt sowohl das Naturrecht im älteren kosmologischen Verständnis als auch das Vernunftrecht mit seinen transzendentaltheoretischen Konzentrat der Selbstreferenz in der sich selbst beurteilenden Vernunft. An die Stelle tritt ein teilweise autologischer Text." ("The modern constitution is therefore the form through which the legal system reacts to its own autonomy. The constitution must, in other words, replace external references, as they had been postulated by natural law. The constitution replaces not only older natural right but also the rational natural law tradition with its transcendental self-referentiality anchored in the application of reason unto its operations. On their place appears a partly autological text.")

possibility.[29] A closely related, equally important inquiry, bears on whether the model of rationality on which the modern constitution relies is a purely procedural-formal one or requires a meta-textual, substantive dimension regarding the constitutionally presupposed concept of law and legislation.

Throughout the remainder of the chapter, this process of increasing rationalization and abstractization of the fundamental law is traced by identifying the succession of changes that lead to the legal and intellectual presuppositions of the modern normative constitution. These presuppositions, it shall be argued, shed light on the concept of delegation, explaining at the same time its legal and conceptual limitations. Paradigm shifts, in the sense in which they are under scrutiny here, represent "structural couplings"[30] incorporating the dominant practices with respect to law-making and the dominant model of justification against which the legitimacy of the practices was (at any particular time) legally assessed. Needless to say, this kind of exercise, like all ideal-typical reductions and all incursions into the parallel histories of ideas and institutions, takes upon itself a hefty burden of persuasion. In doing so, it exposes itself to a wide array of possible reservations. Given the historical time-span and the philosophical breadth of the matters at stake, the number of events unaccounted and authors not included may initially appear, to the historian and philosopher alike, legion. The customary leave should be therefore expressly requested in advance, that the relevance of the events and ideas incorporated in this theoretical-historical account should be judged against justificatory needs of the argument alone.

2.2 *God Himself as Law*: Law Between Faith and Tradition

> You are also aware, dear son, that while you are permitted honorably to rule over human kind, yet in things divine you bow your head humbly before the leaders of the clergy and await from their hands the means of your salvation.
>
> (Letter of Pope Gelasius to Emperor Anastasius, 494 AD)

> Ego sum Caesar, ego Imperator.[31]
>
> Pope Boniface VIII (1294–1303)

> We be informed by our Judges, that we at no time stand so highly in our estate Royal as in the time of Parliament; wherein we as Head, and you as Members, are conjoyned and knit together into one body politick.
>
> Henry VIII, 1525 Speech in Parliament, in relation to the case of Ferrers

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[29] *Id.*, at p. 190. For evidence that Luhmann's argument regarding the closeness of the constitution has a substantive, normative component, *see* discussion at pp. 205–208.

[30] This Luhmannian expression is borrowed without the whole social-scientific baggage of its theoretical context.

[31] "I am the king, I am the Emperor." In Ernst H. Kantorowicz, *Kaiser Friedrich der Zweite* (Stuttgart: Klett-Cotta, 1998), p. 36.

St. Augustine characterizes true nature as an antithesis to the reality of things directly accessible to our senses; the latter are, in a nowadays strikingly counter-intuitive portrayal, corrupted and hence not natural at all. True nature is extra-sensorial, discernible only by grace, revelation, and theological inquiry, and can be found only by an insight of faith, in the perfect state before the Fall. In the same way, positive law is innately devoid of justice,[32] law which is not just is not law, states without justice are nothing but great bands of robbers: *Remota justitia quid sunt regna nisi magna latrocinia*.[33] Earthly dominion (the *civitas terrena*) is possibly corrupt in itself, uninteresting as such for the true believer, thus relegated to the minimal role of maintaining peace and order. Meanwhile, as the argument runs further, true justice exists in the City of God, in the heavens. The secular ruler, emperor or king, is seen preeminently as an instrument, a tool, which cannot bring earthly felicity, yet should, and this is its preordained purview, punish the evil. The prince, as St. Paul had pointed out "beareth not the sword in vain."[34] Yet the City of God is represented on Earth by the community of the faithful, which in turn Augustine has a strong bent on identifying with the visible Church.[35] Two relevant issues can already be derived from this summation.

First, the Middle Ages knew, up until the Reformation, a unity of law in a higher, metaphysical sense, apparent in St. Augustine. Since the whole Christian realm was perceived in a sense as a *Respublica Christiana*, sharing in a super-imposed universal religion (and thus morality), the secular powers could not be the primary locus of legislation. Although the existence as such of the state in the Middle Ages still is under a fair amount of controversy, Meinecke was certainly right to assert in principle that "[t]he new universal religion set up at the same time a universal command, which even the State must obey, and turned the eyes of individual men on other-worldly values; thus all secular values, including heroism as the herald of power politics and *raison d'état*, were caused to give ground. . . The State certainly

[32] *See*, on St. Augustine's "legal" thinking, Carl J. Friedrich, *The Philosophy of Law in Historical Perspective*, 2nd ed. (Chicago and London: University of Chicago Press, 1968).

[33] "Without justice what are states but great bands of robbers." *City of God*, IV, 4.

[34] KJB, Romans 13: 3–4: "For rulers are not a terror to good works, but to the evil. (. . .) for he beareth not the sword in vain: for he is the minister of God, a revenger to execute wrath upon him that doeth evil."

[35] This identification and the *correct* interpretation of Saint Augustine (in the sense of what he actually meant) are, of course, open to debate. *See*, for instance, for a number of different readings, Frederick William Loetscher, "Saint Augustine's Conception of the State," 4 (1) *Church History* 16 (Mar., 1935), Rex Martin, "The Two Cities in Augustine's Political Philosophy," 33 (2) *Journal of the History of Ideas* 195 (Apr.-Jun. 1972), and Anton-Hermann Chroust, "The Philosophy of Law of Saint Augustine," 53 (2) *The Philosophical Review* 195 (Mar., 1944). This brief exposition is a plausible one and, much more importantly for our present purposes, it is the one that relates to medieval debates about law and legislation.

existed in the Middle Ages, but it did not rank supreme. Law was set above it; it was a means for enforcing the law."[36]

Law therefore and also thinking about the law acquired an unselfconscious quality, an almost prelapsarian innocence. This continuous orientation toward a higher law (according to the *Sachsenspiegel* "Law is dear to God, as God himself is law.") had meant that law-making could not be perceived and approached in an explicit and intentional key. The exemplary way of law-making was therefore law-finding, a judgment that would seek in past wisdom the just decision for an individual case.[37] True it is that, occasionally, more assertive rulers would clothe their claims in the stylistic garb of the Byzantine Emperors, asserting unfettered law-making power and the status of *lex animata* (living law). At the Diet of Roncaglia in 1158, the bishop of Milan addressed Friedrich Barbarossa thus, in portentous phrases redolent of the imperial principles in the *Digest*: "Know, that the entire law-making power of the people was transferred to you! Your will is law, as it stands written: What pleases the Prince, has the power of law, since the people have granted him such dominion and power. Whatever the Emperor establishes, decides, decrees, has the force of law!"[38] But behind the rhetorical flourishes, the reality of things was rather modest. In order to "make" new law, an Emperor or Prince needed to go through the usual judicialized procedure or secure unanimity; in the Imperial

[36] Friedrich Meinecke, *Machiavellism – The Doctrine of Raison d'Etat and Its Place in Modern History*, Douglas Scott transl. (New Haven: Yale University Press, 1957), p. 27. *Also* in von Gierke, *Political Theories*, at pp. 74–75: "The thought that State and Law exist by, for and under each other was foreign to the Middle Age. . ..however many disputes there might be touching the origin of Natural Law and the ground of its obligatory force, all were agreed that there was Natural Law, which, on the one hand, radiated from a principle transcending earthly power an, on the other hand, was true and perfectly binding Law."

[37] "Legislation was in fact part of the judicial procedure. Law was seen as the embodiment of the law of God in the custom of the community, and the actions of the King in his Council making formal statements of the law were seen as clarificatory acts. There could, therefore, be only one "function" of government- the judicial function; all acts of government were in some way justified as aspects of the application and interpretation of the law" M. J. C. Vile, *Constitutionalism and the Separation of Powers* (Oxford: Clarendon Press, 1967). A classical exposition and analysis of the shift of paradigm from the Medieval notion of law-declaring or law-finding to the modern conception of law-making can be found in Charles Howard McIlwain, *The High Court of Parliament and Its Supremacy – An Historical Essay of the Boundaries between Legislation and Adjudication in England* (New Haven: Yale University Press, 1910). According to McIlwain, the notion that Parliament is a law-making machine emerged in an incipient form with the Tudors and became an accepted idea only during the Civil War, with the Long Parliament: "England had seen practically for the first time a legislative assembly of the modern type,- no longer a mere law-declaring, but a law-making machine. . ..The great phases of the English Parliament have been its history as a court, then as a legislature, and finally as a government-making organ. Parliament definitely passed out the first of these stages at the first session of the Long Parliament." (at 93) *See also* Heinz Mohnhaupt, "Potestas legislatoria und Gesetzesbegriff im Ancien Régime" IV *Ius Commune* 188–239 (1972).

[38] In Wilhelm Ebel, *Geschichte der Gesetzgebung in Deutschland*, 2, erweiterte Auflage (Göttingen: Otto Schwartz & Co., 1958), at p. 43.

Diet, up until the end of the Holy Roman Empire, all decisions were taken unanimously.[39] Even the great imperial legislation meant to secure the peace of the land (*Landfrieden*, *contitutio pacis*) rested on consensus (acquiring in effect the character of a contract) and had limited duration. Unwritten trumped written law. Wilhelm Ebel mentions the interesting gloss on an article of the Norwegian twelfth century code *Gulathingslag*, to the effect that "if the written law should be unjust, one should go back to the rules, as they had been before, as the law-bearer Atle had recited them once before the people in Gule."[40] General yielded to particular and local norms. In this respect, the influence of the Middle Ages endured until relatively recent times. Paradoxically, a modern codification imbued with the rationalistic-contractarian spirit of the Enlightenment century, the 1794 *Allgemeines Landrecht für die preußischen Staaten*, still had in practice subsidiary character and stood therefore under a belated medieval spell.[41]

Second, the Augustinian imagery explains both the very important role of the papacy in maintaining this unity and, in turn, the place of faith in justifying its authority. Papal law is the epitome of the "descending" thesis of government in the Middle Ages and some of its self-portrayal runs along the otherworldly Augustinian argument. If earthly dominion is by nature corrupt and built on sin, then it is by self-evident consequence inferior to the Church and relegated to the execution of the Pope's commands. As an extreme but therefore all the more revealing example, to Pope Gregory VII kingship was quite simply "the invention of those who in ignorance of God, and by instigation of the Devil, have presumed to tyrannize over their equals." [42] By the same token, however, papal legislation rested its *raison d'être* and justification for intervening in mundane relationships on the building block of a very juristic argument.

I shall try to briefly explain why. First and foremost, the existence of a medieval man was not severed into the various independent domains in whose splintered, fractured partiality, we moderns perceive our selves and ascribe our memberships. Contrariwise, it was a claim of totality, since all actions of a Christian were meant to be directed at the attainment of eternal life. The Church itself was seen as a corporation of the faithful, *congregatio fidelium*, in which membership came from and through the act of baptism. The pope, head of this corporation, who admits of no equal and cannot be judged, derives his vicarious power from Saint Peter, who in turn received it from Christ.[43] Any pope is a continuation of the legal personality of Peter, acquiring title deed by means of inheritance, like in Roman *ab*

[39] *Id*., at p. 45.

[40] *Id*., at p. 19.

[41] Hermann Conrad, *Die geistigen Grundlagen des Allgemeinen Landrechts für die preußischen Staaten* (Köln und Opladen, Westdeutscher Verlag, 1958).

[42] (Epp., viii., 21) *In* William E. Brytenson, "Roman Law and Legislation in the Middle Ages," 41 (3) *Speculum* 420)). *Also see* von Gierke, *Political Theories*, at p. 10, note 10.

[43] "Christus ascende in coelum unum reliquit in terris vicarius, sic necesse est, ut ei omnium, qui Christiani esse cupiunt, subdantur capita populorum." (Pope Gregory IX).

intestat inheritance.[44] He can therefore bind and loose everything on earth, with effects in the afterlife. Binding, in turn, is *ligare*, a word with clear legal connotations (the word *lex,* law, was perceived to have derived from it). Since attainment of eternal life is the ultimate end of all actions and given that faith outside the monastic cell is not a matter to be pursued by the solitary individual, guidance needed to be given uniformly. Therefore, those who have *scientia* and *auctoritas*, the church and the pope, regulated punctually, even minutely, through emphatically legal instruments (decretals, encyclical letters, bulls, mandates, deposition and excommunication orders), denying constantly that a separation of the temporal and the spiritual can be maintained and consequently interfering in a myriad issues, from feudal relations to the application of Roman law in the British Isles. All this is a beautifully crafted, objection-proof, essentially juristic argument. There is nothing mystical about it, except perhaps the fact that the whole edifice rests on faith, and the entire argument stands or collapses with unquestioned belief in its validity. If we were to reason in familiarly post-Enlightenment categories, it is a rational legal argument backed by the irrational element of faith. The rational-legal aspect, and the practical attempts at securing a certain level of conformity of conduct and uniformity of interpretation entailed as an immediate effect positive law, a certain degree of codification, archival records of written documents, church bureaucracy and domination through knowledge, all of which Max Weber appositely characterized as "the bureaucratic rationalization of the church."[45] It is not coincidental that both the Medieval Catholic Church and the Holy Roman Empire made good use of legists trained in Roman law at the University of Bologna.

Transforming the Church into rationalized administration put a huge strain on religion and had perhaps, over time, a detrimental effect on faith. Be that as it may, it is important to point out that the future state mimetically learned some of its patterns of law-making and justification from church organization, to the same extent and in the same manner that the church itself borrowed the system and coherence of secular, Roman legal institutions: "The church borrowed secular ideas just as the state borrowed ecclesiastical ones; *the church had to become half a state before the state could become half a church*."[46] Institutional and procedural changes led inevitably to substantive rationalization of canon law; the most revealing example in this respect is the 1215 Fourth Lateran Council, forbidding priests to

[44] The basic principle, bestowal upon Peter of a general power to bind and loose authoritatively on earth with direct effects in the afterlife, is based upon the famous section in Matthew 16:18–19. Transmission of the Petrine commission by St. Peter to successive popes is ascribed to a letter by St. Clement I to St. James in Jerusalem, dating roughly in the end of the second century A.D. (*see*, more generally, Ullmann 1966, at pp. 32–114).

[45] Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, Guenther Roth and Claus Wittich, Eds. (Berkeley and Los Angeles: University of California Press, 1978), at p. 1172.

[46] Emphasis supplied. Brian Tierney, *Religion, Law, and the Growth of Constitutional Thought* (Cambridge: Cambridge University Press, 1982), at p. 12. *See also* von Gierke, *Political Theories*, at p. 36: "It was within the Church that the idea of Monarchical Omnicompetence first began to appear. It appeared in the shape of a *plenitudo potestatis* attributed to the Pope."

take part in ordeals. In time, it is precisely the formalization and rationalization of Church law throughout the High Middle Ages that would have a ratchet effect on secular law. Indeed, the category as such of secular law appears as a remote result of this process: the formation in the eleventh century of canon law as internally rational and consistent body of rules, reproducible according to its own internal logic and with a claim on universal validity, will in the end result in the creation of parallel interacting legal "systems" (of urban, feudal, mercantile, manorial, and royal law).[47] Once Pope Gregory VII asserted explicitly in his 1075 *Dictatus papae* exclusive power to legislate, make new laws ("condere novas leges"), other counterclaims would inevitably follow suit.[48]

A number of germane processes of rationalization evolve towards the eleventh and twelfth and eventually coagulate until the late thirteenth century. Joseph Strayer's thesis that already by the end of the thirteenth century many German and Italian princes and the French and English kings had powers approximating the modern understanding of sovereign prerogatives and—save for the inexistence of the concept as such—even thought of themselves in modern sovereign terms, can be considered too daring.[49] But the processes of building a central administration and increasing bureaucratization are unmistakable. They will prepare and eventually ease the later transition to sovereign statehood. The great treatises of English law by Glanvill and Bracton are written in the late twelfth and thirteenth century, whereas the procedure of common law courts begins to mature at roughly the same time. At the turn of the fourteenth century, the English central courts were already staffed with judges "as highly trained in the English common law as any professor at Bologna was trained in Roman law."[50]

Tendencies towards rationalization at the level of practices had conceptual counterparts, most evident in the revival of classical philosophy and particularly in the rediscovery of Aristotle. The corpus of Aristotelian writings, whose use at the University of Paris still stood partly under papal censorship in 1215, was already translated by 1225 and was widely available until the end of the century. Around 1260, William of Moerbeke turned the *Politics* into Latin, at the behest of St. Thomas Aquinas. The reevaluation of Aristotle by Aquinas is a Christian one but its secular implications and consequences can hardly be overemphasized:

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[47] Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Mass. *Etc*.: Harvard University Press, 1983).

[48] *Id*., at p. 535 and *passim*. *Also see*, Ernst-Wolfgang Böckenförde, "Die Entstehung des Staates als Vorgang der Säkularisation", in *Säkularisation und Utopie: Erbacher Studien. Ernst Forsthoff zum 65. Geburtstag* 75 (Stuttgart u.a.: Kohlhammer, 1967).

[49] Joseph R. Strayer, *On the Medieval Origins of the Modern State* (Princeton: Princeton University Press, 1970); "The Laicization of French and English Society in the Thirteenth Century," 15 *Speculum* 76 (January1940). *But cf*. Dieter Grimm, *Souveränität – Herkunft und Zukunft eines Schlüsselbegriffs* (Berlin: Berlin University Press, 2009), arguing that "sovereignty" in its medieval acception was relative not (as moderns perceive the concept) absolute, *see* criticism of Strayer, pp. 17–20.

[50] Strayer, *Medieval Origins*, p. 33.

"Thus entered the cognitive man (*erkennende Mensch*) into the picture, to displace the speculative individual, directed solely towards the contemplation of God and the inner experience of his own wisdom."[51] All but antithesis to both Augustinian idealism and to the unity of hierocratic domination by the papacy, Aristotelian-Thomistic thinking renders a more empirical, concrete order-oriented vision of law, most apparent in the concept of *duplex ordo* (demarcation between the knowledge of natural and supra-natural spheres), associated with an intense practical interest in secular government. The fact that Aquinas embodies a new tradition in Christian thinking is apparent if one considers his vision of the exception and the stark contrast and departure from Augustinianism that it represents: "[N]ecessity is not subject to law." [52] Even the inconsistencies of Saint Thomas's writings evidence this shift and clash of paradigms. *De Regno,* his unsent letter to the king of Cyprus, dwells on the perfectly orthodox statement that the ruler must be one, and the king is subject to the sole authority of the Holy Church. Yet the tone of the writing contradicts this foundation and the more general argument is replete with secular Aristotelian references, indefatigably advocating that living in common is ordained by the independent reason divinely planted in nature and mankind, that man is a political animal, an intelligent agent, and hence rationally acting in view of an end, by deliberation as to means: "Yet it is natural for man, more than for any other animal, to be a social and political animal, to live in a group."[53] For Aquinas, there is already reason and order in nature, divine grace only perfects them, and a political association is an "artificial thing," which should follow the dictates of the divinely-created nature, since "whatever is in accord with nature is best, for nature always does what is best."[54] Not unexpectedly, the revival of Aristotle had a direct and immediate impact on "populist" writers. Marsilian doctrine, the closest medieval argument to our modern understandings of legislation as the epitome of law and of legal validity as deriving from popular acquiescence is largely a variation on and extension of Aristotelian-Thomistic themes. Marsilius (Marsiglio) of Padua derives from reasoned human will a right of participation in making the law extended to all citizens since, for him, the imperial or royal imprimatur has already been reduced to

[51] Ernst Forsthoff, *Deutsche Verfassungsgeschichte der Neuzeit. Ein Abriss.* (Stutgart: Kohlhammer, 1961), p. 7.

[52] "Necessitas non habet legem." *Summa Theologica*, II, I, 96, 6 (end of *respondeo*).

[53] St. Thomas Aquinas, *On Kingship-To the King of Cyprus* (*De Regno-Ad Regem Cypri*), translated into English by Gerald E. Phelan (Under the Title *On the Governance of Rulers*), revised with an introduction and notes by I. Th. Eschmann, O. P. (Toronto, Canada: The Pontifical Institute of Medieval Studies, 1949), p. 4.

[54] *Id*., p. 12. In this sense, one could surmise that Aquinas's use of Aristotle anticipates what Gierke refers to as the "new antic-modern thought" for, when it is advanced that God has implanted independent reason in nature and an independent "political nature" in mankind, the eventual inference and consequence will be that: "however certain men might be that the Will of God was the ultimate cause of Politic Society, still this cause fell back into the position of a *causa remota* working through human agency. . ..More and more decisively was expressed the opinion that the very union of men in a political bond was an act of rational, human Will." (at p. 89).

a mere formality.[55] Marsilius deprives law of all metaphysical underpinnings; law is for him primarily recognizable by its enforceability, *praeceptum coactivum*,[56] thus "a-moralized" and "humanized." It pertains to the purview of *auctoritas humana*, it is—in one revealing metaphor—an "eye formed of many eyes. . .the considered comprehension of many comprehenders": *oculus ex multis oculis*.[57]

Aristotelian-Thomistic thinking had a counterpart in the actual, in pre-Renaissance political reality; powerful and influential ideas appear sometimes when circumstances are propitious. Throughout the thirteenth century, numerous corporations (*corpus, universitas, collegium, societas*) had already risen and now were beginning to be recognized the right to control their memberships and to adopt rules and regulations to that effect. By an analogy to the private Roman law on agency, they were also granted the right to be represented (as fictitious entities, as legal persons as we would say nowadays) in legal proceedings *ad agendum et respondendum,* by a *syndicus* or *procurator*. Pope Innocent III, at the very turn of the century, summons some of the chartered cities to appear before his *Curia* by representation. In 1245, for the first time, a papal bull addresses the four faculties of Paris as *universitas*.[58] Among chartered corporations, Italian cities by and large governed themselves, having already arrived at a rather high degree of autonomy from both the emperor and the pope. The emperor was theoretically supposed to have been their ultimate temporal sovereign, *dominus mundi*, and—as it stood written in the *Corpus iuris civilis*—the only proper source of written law. In practice, however, especially after 1250, the death of Frederick II, the last Hohenstaufen emperor exercising effective dominion in the peninsula, the primary sources of law in Florence, Venice, Siena, Lucca, Peruggia, were custom (*consuetudo*) and locally adopted statutes. The latter fitted squarely into the notion of legislation as positive law. The problem was how to overcome this apparent inconsistency and maintain the fiction of imperial sovereignty, while rendering

[55] This generous view of participation in law-making can be later found in Nicolaus Cusanus (Niklaus or Nicholas of Cues), who revives the notion that: "'quod omnes tangit, ab omnibus approbari debet' (that which affects everybody should be approved by everybody); the making of law ("legis latio") should be done by all those whom the law is to bind, or by the greatest part of them." Kelly 1992, at p. 173.

[56] Ullmann quips appropriately that Marsilian theory is the Middle Ages equivalent of Kelsen's *Reine Rechtslehre*.

[57] Marsilius of Padua, *The Defender of Peace* (vol. II: *The "Defensor Pacis"*), translated with an introduction by Alan Gewirth (New York: Columbia University Press, 1956), Chapter XI: "On the Necessity of Making Laws (Taken in Their Most Proper Sense); And That No Ruler, However Virtuous or Just, Should Rule Without Laws)," XI:9, at 40: "Since then the law is *an eye composed of many eyes, that is, the considered comprehension of many comprehenders* for avoiding error in civil judgment and for judging rightly, it is safer that these judgments be made according to law than according to the discretion of the judge." [emphasis supplied] A condensed, arguably more enjoyable rendition of Marsilian political and legal theory is offered by the main character in Umberto Eco's *The Name of the Rose,* the Franciscan friar William of Baskerville.

[58] *See*, more generally, Gaines Post, *Studies in Medieval Legal Thought – Public Law and the State*, *1100–1322* (Princeton, New Jersey: Princeton University Press, 1964), pp. 27–60.

a legally sound and factually accurate description of autonomous law-making in the Italian cities. How can the theoretically inferior exercise in practice what is theoretically the superior's prerogative, nay, monopoly? Early interpretations of Roman law, notably Accursian glosses, had dealt tersely with the issue, by qualifying local statutes as written custom (*consuetudo scripta*) and maintaining that they were in force precisely because the emperor acquiesced either expressly or tacitly. The Postglossator Bartolus of Sassoferrato, arrived by purely legal interpretation at an account of participative law-making much akin to that of Marsilius. Bartolus works his argument from custom, which was considered an acceptable legal source in the imperial codifications, arising unsystematically over time, from practice validated by unattached tacit consent. Yet statutes as well, he observes, are produced by consent, namely a form of it that is direct, express, and recognizable. Since the nature of both sources of law is consent, Bartolus set the poles together by equating the two types: *Tacitus et expressus consensus equiparantur et sunt paris potentiae*. Therefore, he reasoned, statute law does not need the approval of a superior. Logically, the demonstration is flawed, since it need not be true that tacit and express consent are one and the same thing as a matter of public law.[59] A precedent for self-government through written law was nonetheless set, and, shortly thereafter, Baldus of Ubaldis had to push his teacher's argument only a little further in order to derive a general duty of the emperor to act in view of the common good and a corresponding right to resistance of the cities in case he would be in dereliction of his obligations.[60]

Consent was also entailed by and embedded in lord-vassal relations, since the emperor (and by extension the king, *imperator in regno suo*),[61] even when trying to assert a purely theocratic, God-given authority, was also an overlord, bound by his feudal duties. But, while it must be stressed again that law in general and therefore even written legislation were generally perceived as something to be found rather than made, positive law was possible in emergencies for the defense of the realm. As a concern of the whole *universitas regni*, exceptional taxation, raising armies, legislation and adjudication for this purpose, touched all and therefore needed to be assented to by all (*quod omnes tangit ab omnibus approbari debet*).[62] It is in

[59] Bartolus, one of the most prominent Romanists of his time, was probably aware of the fact that only private Roman law, solely in its latter stages, when the level of formality had been already reduced, started to reason from express (the privileged form) to tacit consent: *Qui tacit consentire videtur*.

[60] Joseph Canning, *The Political Thought of Baldus de Ubaldis* (Cambridge: Cambridge University Press, 1987). *See, also*, Quentin Skinner, *The Foundations of Modern Political Thought*, Vol. I-*The Renaissance* (Cambridge: Cambridge University Press, 1978), pp. 3–12.

[61] The recognition in "law" (of what had already become true in fact) that the king of France admits of no temporal superior (is not subordinated to the Emperor of the Western/Holy Roman Empire, even though the Emperor could and did claim a moral pre-eminence), dates back to Innocent III's decree *Per venerabilem* of 1202.

[62] The principle can be traced to the *Codex Justiniani*, C.5, 59, 5: "ut quod omnes similiter tangit, ab omnibus comprobetur." *See*, on the relevance of the maxim in Medieval representation, Gaines

thirteenth-century England, by the accident of an auspicious course of events, that the notion of consent from the governed gains additional impetus, in the aftermath of John the Lackland's acceptance of *Magna Carta*. To be sure, *Magna Carta* was a *stabilimentum*; the idea of consent by the *communitas regni* encompassed initially only the magnates (barons) and high prelates, as tenants-in-chief of the king.[63] Moreover, this sort of consent had little to do with modern law-making or fiduciary participation: its primary role was to solidify and entrench the customary, feudal *status quo*. For instance, when Charles I sought in 1267 to impose a new tax in his newly acquired kingdom of Sicily, Pope Clement IV immediately reprimanded him: he had to summon first his barons, the clergy, and the town and discuss the circumstances and lawfulness of such endeavors.[64] Nonetheless, events gather over time new interpretations and trigger unintended consequences. The Charter of 1215 prompted from that moment onwards a steady growth of representation into constitutionalism and parliamentarism or—to echo Bracton—into a *Constitutio Libertatis*. To wit, the 1322 Statute of York already includes the knights of the shires and the burgesses—for purposes of taxation alone—into the *status regni, lestat du roialme*.[65]

At the end of the thirteenth century, therefore, one can already notice a number of clear, partly divergent but mutually reinforcing tendencies (hierocratic bureaucratization and "rationalization" of knowledge, centralization of secular power and fragmentation, and respectively demands for participation in it) towards the rationalization of thinking about the law and the individualization of law and law-making as autonomous practices. And yet all these evolutions could not be yet perceived as clear steps towards modern concepts of legislation and legislative practices. Pre-Reformation Europe could not envisage law as synonymous with explicit declarations of intent, not only due to the fact that the dominating model in legal thought and practice was that of finding the law. Moreover, given the diversity of overlapping concrete legal orders, statuses, and acquired rights, and the multiplicity of their sources, a uniform, intentional, and systematized manner of securing

Post, "A Roman Legal Theory of Consent, *Quod Omnes Tangit*, In Medieval Representation" 1950 *Wisconsin Law Review* 66 (1950).

[63] *Carta Baronum* conceded by John the Lackland at Runnymede in 1215, was designated *Magna* to differentiate it from a *Parva Carta* or *Carta Foresta* of 1217, *also* a *stabilimentum*, dealing with hunting privileges. The word *libertatum* seems to be a later, more recent, addition.

[64] Strayer 1970, p. 61, *note* 56. *Also*, *ibid*., "Existing usages, guaranteed by law, were a form of property. They could not be changed without due process, any more than property could be seized without due process.

[65] *See* Post 1964, Chapter VI, "Status Regni: Lestat du Roialme in the Statute of York, 1322" pp. 310–322, and Heinrich Mitteis, *The State in the Middle Ages-A Comparative Constitutional History of Feudal Europe*, translated by H. F. Orton (Amsterdam, Oxford: North-Holland Publishing Company, c1975), pp. 298–306.

compliance and coordinating action could not either exist in practice or be theoretically conceived. Throughout the Middle Ages, arguments present themselves in hybrid, composite forms, where theological theories meet feudal law and reinterpretations of Roman legislation are sometimes fused at the hip with organic conceptions of the political community. All claims to superior power are met by a multiplicity of equally plausible counter-claims.[66] Marsilian doctrine or the fleeting and eerily modernistic administrative reforms of the Norman kings of Sicily stand out as anachronistic oddities precisely because they evince a rational, unadulterated clarity and are built on the secularized foundation of a plenitude of power concentrated in one single point and unfettered by any legal limitations. But nothing was yet more foreign to the Middle Ages than, to use Gierke's apt and memorable words "a theoretical concentration of right and power in the highest and widest group on the one hand and the individual man on the other, at the cost of all intermediate groups."[67]

2.3 Legislation Between Will and Tradition

> Mais si l'on demande, si le Roy peut faire et publier tous ces changemens de Loix et d'Ordonnances, de sa seule auhorité, sans l'aduis de son Conseil, ny de ses Cours souveraines. A quoi l'on respond, que cela ne reçoit point de doute, pource que le Roy est seul Souverain dans son Royaume; et que la souveraineté n'est non plus divisible, que le poinct en la geometrie.
>
> Cardin Le Bret, *De la souverainete du Roy*, livre I, chapitre LX (1632)[68]

> Reason is too large. Find me a precedent and I will accept it.
>
> James I

2.3.1 Like the Point in Geometry*: Legislation and the Question of Sovereignty*

> The content of this plenitude needed no explanation, its substance was inalienable, impartible and proof against prescription, and all subordinate power was a mere delegation from it.
>
> Otto von Gierke, *Political Theories of the Middle Age*

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[66] This overlapping normative entanglement caused Weber to remark that the Middle Ages were also a form of *Rechtsstaat,* in the sense that they comprised of a "bundle of subjective rights."

[67] Meinecke 1957, at p. 87.

[68] "But if one should ask whether the king could make and publish all these changes of laws and ordinances, by his own authority, without asking for the opinion of his courts or Council, the answer is: undoubtedly yes. And that is so since the king is sovereign in his kingdom; and sovereignty is no more divisible than the point in geometry." In Mohnhaupt 1972, at p. 201.

Machiavelli already anticipates the logic of the modern state, by way of his technical manner of thinking about politics and the law: "the new scientific method."[69] His Prince is cautioned to act primarily in terms of empirical necessity and, while we are told that there are two ways of maintaining the subjects in obedience, one with laws, the other with force, one proper to humans, the other to beasts, they are equally inviting in case the state requires it.[70] Since people are innately bad, acquisitive, and selfish beasts, virtuous only by necessity (they "forget more easily the death of their fathers than the loss of their goods"), it seems to be the case that force and cruelty properly wielded, rather than laws, would be commonly needed. [71] A prince should lean on the *populo*, just because it is safer to do so, and then play it, with *astuzia fortunata*, against the *grandi*. Whereas, admittedly, his prince was not intended to be "Machiavellian" in the ominous sense this word was to acquire later on, the utilitarian manner of perceiving the state and people, and the "heathen" nature of the concepts around which his reasoning revolves were major breaks from all Medieval thinking. The conceptual age of Absolutism presupposes however more than just this technical-instrumental bent on perceiving the proper use of power. It needs the very idea of the State, which will appear in the wake of Reformation, together with the notion that the State alone is the only locus of law. With the disappearance of common presuppositions regarding content, locating legitimacy solely in the source of law seemed to be the readily apparent and only solution.[72]

[69] Meinecke 1957, at *supra* note 36, p. 39. *See also*, Carl Schmitt, *La Dictature* (*Die Dikatur*), transl. Mira Köller & Dominique Séglard (Paris: Éditions du Seuil, 2000), p. 29: "Du rationalisme de cette technicité dérive d'abord le fait que l'artiste constructeur d'État considère la masse des homes, qu'il faut organiser en État, comme un objet à mettre en forme, c'est à dire comme un matériau." *Also see*, at p. 31: "La convérgence de ces trois éléments-rationalisme, téchnicité et pouvoir exécutif-, en direction de la dictature (le terme dictature est ici employé au sens d'une sorte de commandement qui, par principe, est indépendent du consentement ou de la compréhension du destinataire et n'attend pas son approbation) marque les débuts de l'État moderne." *Also see* Gierke, *Political Theories*, at p. 86: "During the Middle Age we can hardly detect even the beginnings of that opinion which would free the Sovereign (whenever he is acting in the interest of the public weal) from the bonds of the Moral Law in general, and therefore from the bonds of the Law of Nature. Therefore when Machiavelli based his lesson for Princes upon this freedom from restraint, this seemed to the men of his time an unheard of innovation and also a monstrous crime."

[70] Niccolò Machiavelli, *Il Principe* (*E Pagine Dei "Discorsi" E Delle "Istorie"*) A Cura Di Luigi Russo, Tredicesima Edizione (Firenze: G.C. Sansoni, Editore., 1973), Cap. XVIII: 2. "Dovete adunque sapere come sono dua generazioni di combattere: l'uno con le leggi, l'altro con la forza; quel primo è proprio dello uomo, quell secondo è delle bestie; ma, perché il primo molte volte non basta, convienne ricorrere al secondo."

[71] When he advises the prince not to touch property, Machiavelli adds the reason, "perché uomini sdimenticano piú presto la morte del padre che la perdita del patrimonio." Cap. XVII: 3, 45–50.

[72] "Thus, it has sometimes been argued that legal positivism first emerged as a strategy for stabilizing the ship of state in the tumult of religious wars. This can certainly be said of Bodin's attempt to locate legitimacy in the easily identifiable source, rather than the infinitely disputable content, of law." Stephen Holmes, *Passions and Constraint – On the Theory of Liberal*

What arises is an idea of law that can be spelled out as a series of identifications. Law is located in the state, equals positive law, which in turn is equated with a command, that is, with the will of the absolute sovereign. Jean Bodin, who famously defined sovereignty as "the absolute and perpetual power of a Republic," is usually credited with the inauguration of this simple and clear equation.[73] In contradiction with the characteristically medieval idea of law-finding, the first mark of sovereignty is in his rendition precisely legislative power. Custom exists only "by sufferance," universal principles of jurisprudence based on Roman law, the obsolete rules of a dead society, are absurd, legislative power as exercised by the prince does not need to secure any consent from the governed, the idea of a right to resistance or appeal from *loi* to *droit* is unthinkable. It would be a crime of leze majesty to oppose Roman law to the "ordinance of your king."[74] And the "ordonnance de son prince" is the law itself, since: "law implies command: law is nothing else but the command of the sovereign in the exercise of his power."[75] Yet Bodin still thinks within a medieval template, and thus in a somewhat contradictory manner, limitations are placed on the prince's legislative power (the divine and natural laws, property, the laws of the kingdom).[76] His "republic" is thought of in an organic and naturalist Aristotelian fashion, as an assemblage of many households, "plusieurs ménages."[77] Bodin cannot conceive of a contract between the prince and his *franc sujets*, since the contractually grounded right to resistance of the Monarchomachs is what he seeks to rule out. Meanwhile, however, he shares with the latter a common resentment towards Machiavelli's "poisonous" and "erroneous" doctrine.[78]

Democracy (Chicago: The University of Chicago Press, 1995), p. 106. *See*, relevant, the chapters on Hobbes and Bodin.

[73] "la puissance absolue et perpetuelle d'une République, que les Romains appellaient *majestas*" *Six Livres de la République*, I, 8, p. 122.

[74] *See* Friedrich 1968b, at p. 72: "In consequence, the citizen, called by Bodin *le franc sujet*, is bound to absolute obedience, except for a very limited religious sphere. In this connection, Bodin develops a sharp distinction between the *droit* and the *loi*, and insists that the citizen must not appeal from the *loi* to the *droit*, from the positive law to the law of nature."

[75] "La loi emporte commandement: car la loi n'est autre que le commandement du souverain usant sa puissance." *Six Livres de la République*, I, 8, p.155.

[76] The inconsistency or contradiction can be explained by the fact that, for Bodin, these normative limitations are considered internal rather than–as was the case for the Monarchomachs—external.

[77] *Six Livres de la République*, I, 2, p. 10. For the opinion that this reading of Aristotle came with the later interpretation by St. Thomas Aquinas, which blurred the original Aristotelian distinction between realm of the household and the realm of the political, *oikos* and *polis*, *see* Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1958), *esp*. pp. 22–28.

[78] Bodin wrote at the peak of the Huguenot rebellion, and the book is intended to be both anti-Machiavelli and a reasoned defense of strong kingship, which could avert and keep in check both the Catholic League and the Huguenots. *See generally*, Quentin Skinner, *The Foundations of Modern Political Thought* (Vol. II-"The Age of Reformation") (Cambridge: Cambridge University Press, 1978), Chapter 8-"The Context of the Huguenot Revolution."

When, in 1632, Cardin Le Bret, the jurisprudent of Cardinal Richelieu, defines sovereignty as "no more divisible than the point of geometry,"[79] he synthesizes an absolutist logic come to ripeness. Conceptually, this presupposes a truly abstract reasoning, steeped in a paradigm dominated by voluntarism, rationalism, and a technical spirit, a cast of mind that finds its theoretical defense in Hobbes. The *Leviathan* can be seen as a point of ascription in a conceptual evolution of legislation. Hobbes sought, just like Bodin had attempted almost a century before him, to give a meaningful foundation for political and legal authority in the wake of the religious civil wars. His law is clearly a command and not "counsel," since "Auctoritas non Veritas, facit Legem." Reason could not possibly offer a solid mooring because any man has a different one, and Hobbes scoffs, in anticipation of Bentham's "nonsense upon stilts," at the notion of "Lawes of Nature" as unwritten law, "whereof wee see so many volumes published, and in them so many contradictions of one another, and of themselves."[80] Since law is command, all substantive limitations on legislation (the Rule of Law qualitative constraints which lie at the heart of constitutionalism, most notably generality) are dismissed cavalierly: "[e]very man seeth, that some lawes are addressed to all the subjects in general, some to particular Provinces, some to particular Vocations, and some to particular Men."[81] For Hobbes, if and when a statute is general, it presents this form by natural necessity or purely instrumental utility, when addressed to classes of persons, directing them to perform or refrain from performing kinds of actions.

Legal command is grounded in will. Will, a subjective state of mind, needs by inference to be undivided; it rejects a priori all normative limitations deriving from reason or truth, deliberation and considered consent. Custom only exists, just like in Bodin's account, because the sovereign permits it to continue, by tacit acquiescence. Hobbes is particularly explicit in exemplifying what he means with precision, so that no shade of doubt could subsist: "COMMAND is where a man saith, *Doe this*, or *Doe not this*, without expecting other reason than the Will of him that sayes it."[82] Law is positive law and the Legislator, "one Man" or "one Assembly of men" is "only the Soveraign. . .he that maketh the Law."[83] Himself, he would prefer

[79] In Mohnhaupt 1972, at p. 201.

[80] Thomas Hobbes, *Leviathan* (Everyman's Library edition, New York: E. P. Dutton and Company, Inc, London: J. M. Dent and Sons, Limited, 1950), Chap. XXVI, Of CIVILL LAWES, p. 147. In this sense, Gerald J. Postema, "Law as Command: The Model of Command in Modern Jurisprudence," 35 *Noûs* 470 (October 2001), at 471: "It is especially noteworthy that Hobbes made a special point of conceding that the Laws of Nature he defended (for example in Leviathan, chs. 14 and 15) are not *proper laws*, but 'only Conclusions, or Theoremes concerning what conduceth to the conservation and defence of [men].' They can be regarded properly as laws, he argued, only 'if we consider the same Theoremes, as delivered in the word of God, that by right commanded all things'" [emphasis in original] For Hobbes, even Divine Commands are only resting, ultimately, on God's "irresistible power." [*De Cive*, 15:5].

[81] *Id*., Chap. XXVI, Of CIVILL LAWES.

[82] *Ibid*., Chap. XXV, Of COUNSELL, p 134.

[83] *Ibid*., Chap. XXVI, Of CIVILL LAWES, pp. 140–141.

"one Man," since deliberation in making the law is not a positive occurrence in the least. It brings 'Inconstancy from the Number' and while "...a Monarch cannot disagree with himselfe, out of envy, or interest; [but] an Assembly may; and that to such a height, as may produce a Civill Warre."[84] But once there is no difference in principle between the sovereign and government, even though Hobbes was partial towards monarchy, it ultimately mattered very little, in the logic and future development of the argument, which the sovereign was.

Hobbes is the first to neatly and consistently divorce the state and law from a divine will or divine reason grounding and the first that could have truly stated what Grotius or Leibniz later entertained merely as a figure of style or purely theoretical hypothesis. His consistent system of thought can assess and justify law even if God did not exist.[85] God and theology become ancillary to the general argument or simple metaphors. They appear at most in the nature of remote causes of a man-made order that stands above all other orders, grounded in the absolute will of the sovereign and justified by the absolute survival interest of the individual. The commonwealth becomes thus an *animal artifficiale*, an *automaton* or a *machina machinarum,* the machine of all machines, animated by the sovereign-representative. In this sense, Hobbes is an unwilling forerunner of a modern rationalism that assumes the State "to be a mechanical contrivance, which may be taken to pieces and manufactured afresh by every Abbé Siéyès who arises."[86] Given the embryo of individualism and utilitarianism in the *Leviathan* (reason itself is, we are reminded, *Ratio*, *Addition* and *Subtraction*, mathematical calculation), he is also a forerunner of one type of modern rationalism that implies the future steps from his "mechanically contrived state of advantage and expediency" to the moment where the citizen becomes a consumer of the modern state.[87] His thought makes it easier to see from hindsight how law came to be regarded as representing either the product-command of an absolute will or, conversely, a rational tool, explicitly made, which can be intentionally used to effect discrete changes into the world.

Hobbes's account was undoubtedly influenced by the historical realization, during the struggle for supremacy between Charles I and the forces behind the Long Parliament, that laws are made by the sovereign and not found by a court.

[84] Chapter XIX, Of the severall Kinds of Common-wealth by Institution, and of Succession to the Soveraigne Power, p. 99.

[85] *See* Leo Strauss, *The Political Philosophy of Hobbes-Its Basis and Genesis*, transl. by Elsa M. Sinclair (Chicago and London: The University of Chicago Press, 1963), p. 129 ff.

[86] John Neville Figgis, *The Divine Right of Kings* (Gloucester, Mass.: Peter Smith, 1970), at p. 259.

[87] *See* Meinecke 1957, *supra* note 36, Chapter 8, "A Glance at Grotius, Hobbes and Spinoza," pp. 207–223.

Then, for the first time, the notion of legislative sovereignty struck men "with all the force of a discovery."[88] Legislation, as in fact all exercise of state power began to appear as a delegation-commission derived from this legally unfettered power. Yet the pure argument from sovereignty, namely that a normative limitation on positive law is logically absurd because a legal limitation on sovereignty is logically impossible, outstretched the confines of its historical context. Just a few decades before the Civil War, James I, that most "absolutist" of the Stuarts, was claiming in Parliament that the king could "cry up and downe" his loyal subjects, just "like men at the Chesse,"[89] and was admonishing the Courts not to question his prerogative by meddling with "the mysterie of the Kings power."[90] But, even as he strayed dangerously away from the characteristically medieval notions of kingship as office and king as the preeminent member of the body politic, he rested his authority solely on Divine Right and his own interpretation of tradition. Likewise, even after the Stuart Restoration, in 1660, the royalists summoned arguments similar to those later expounded in Sir Robert Filmer's *Patriarcha*, where kingship is presented as being paternal in nature and resting ultimately on divine ordinance. They regarded with just suspicion, and even hostility, a theory that legitimizes absolute, legally unfettered power solely on the basis of political abstractions. For the purpose of a better and more grounded understanding of this latter remark, pause should be briefly taken to illustrate with one example of actual public law history the transition we have been discussing thus far in point of theoretical developments.

[88] Figgis 1970, at p. 232.

[89] "Kings are justly called Gods, for they exercise a manner of resemblance of Diuine power upon earth: For if you consider the Attributes to God, you shall *see* how they agree in the person of a King. God hath power to create, or destroy, make, or unmake at his pleasure, to give life, or send death, to judge all, and to be judged nor accomptable no none, and to make things high low at his pleasure, and to God are both soule and body due. And the like power haue Kings. . ..They haue power to exalt low things, and abase high things, and make of their subjects like men at the Chesse: A pawne to take a bishop or a Knight, and to cry up or downe any of their subjects, as they do their money." "A Speach to the Lords and Commons of the Parliament at White-Hall, March 21, 1609," Works of James in Charles Howard McIlwain (ed.) *The Political Works of James I: Reprinted from the Edition of 1616* (Cambridge: Cambridge University Press, 1918), p. 529.

[90] "If there fall out a question that concernes my Prerogative or mysterie of State, deale not with it, till you consult with the King or his Counciell, or both: for they are transcendent matters. . ..That which concernes the mysterie of the Kings power, is not lawful to be disputed; for that is to wade into the weakness of Princes, and to take away the mysticall reverence, that belongs unto them that sit into the Throne of God." "A Speach in the Starre Chamber, The XX of June. Anno 1616," in McIlwain, *The Political Works of James I, supra* at pp. 332–333.

2.3.2 Rocher de Bronze*: A Historical Illustration*

> . . .ich komme zu meinen Zweg und stabiliere die Suverenitet und setze die Krone fest wie ein Rocher von Bronse und lasse die herren Junker den windt von Landt dahge.[91]
> Friedrich Wilhelm I

In France, the unitary, centralized administration gradually swept aside and rendered irrelevant all "intermediary powers," so that by the eve of the Revolution there was almost no institutional mediation between the subject and the irresistible power of the State. In contradistinction, some of the German principalities associated in the moribund Holy Roman Empire of German Nation preserved traces of legal medievalism as late as the beginning of the nineteenth century.[92]

The relationship between the territorial ruler of a given principality and his subjects was modeled on a medieval template by virtue of which the prince possessed, as a person,[93] the bundle of rights of superiority whose totality marked or constituted his territorial superiority (*Landeshoheit*).[94] All these rights and prerogatives extended until or were countered and limited by the validity of the legal just title presented in support of a given claim or pretension and the corresponding and opposed acquired rights (*jura quaesita*, *droits acquis*) of the subjects, just like in civil law the extension of a right finds its validity in the legal title presented to support it and the limit in the corresponding obligation and opposed right of another.[95] Even the prescription of rules of prospective applicability, legislation, was a prerogative of the given territorial ruler, limited in principle,

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[91] "I will achieve my purpose and stabilize sovereignty and establish the crown as solid as a rock of bronze and will leave the gentlemen Junkers only the wind of the Landtag." In Heinrich Otto Meisner, "Staats- und Regierungsformen in Deutschland seit dem 16. Jahrhundert", 77 (2/3) *AöR* 225, at p. 229 (note 9) (1951/1952).

[92] *See* Carl Schmitt, *Théorie de la Constitution,* "Naissance de la constitution," pp. 177–193 and the chapter on Wallenstein and the problem of sovereignty in the Holy Roman Empire in *La dictature*.

[93] In the sense that he exercises rights of territorial preeminence in his own name and not as the embodiment or representative of the State.

[94] Otto Mayer, *Le droit administratif allemand,* Édition française par l'auteur (Paris: V. Giard & E. Brière, 1903), Vol. I, pp. 26–27: "Ce n'est pas l'Etat qui se trouve en présence des sujets; cette notion abstraite ne fera son apparition que plus tard, pour produire alors tout de suite un effet puissant. . .. Ces droits ne sont pas les manifestations d'une plénitude de puissance dans le sens des droits de l'Etat, tel que nous les comprendrons aujourd'hui; ils sont acquis chacun séparément, l'un après l'autre, à des titres différents, aquis d'un côté vis-à-vis de l'Empire, comme démembrements de la puissance originaire de l'Empereur, acquis d'un autre côté vis-à-vis des *sujets, qui, en principe, sont reputes francs et libres de toute charge et ne sont soumis au prince qu'en tant qu'il peut produire contre eux un titre juridique*." [emphasis added].

[95] Acquired rights are not perceived as derivations from an originally unlimited natural liberty of the individual but as legal rights derived from special title: "non infringere liceat jus quaesitum, i.e., nifallor, quod speciali titulo acquiritur, non ex solo libertate naturaliter obtinet." (In Mayer, *supra*, FN 13, p. 32).

just like any other exercises of power.[96] In case of a conflict, after the exhaustion of internal remedies, one could appeal for a judicial decision on a given conflict to the two Imperial tribunals, constituted in 1495 and 1501, the *Reichskammergericht* and the *Reichshofrat*.[97]

In the late absolutist transition to the police state (whose well-known epitome is Prussia), the legal paradigm appears surrounded by a changed theoretical justification and attended by dissimilar practical consequences. The king is seen now more often as only the representative or the embodiment of a State that admits of no legal limitation.[98] As the final judge of the public interest or public utility, the king can, in principle and in theory, intervene in any domain by a direct exercise of an act of sovereignty: "C'est au prince qu'appartient en propre la tâche immense de poursuivre le but de l'Etat. Si la nature humaine le permettrait, seul il ferait tout. . ..Vis-à-vis des sujets, son pouvoir n'a pas de limites de droit; ce qu'il veut est obligatoire."[99] Even the existence of an autonomous private law appears, again at least in principle, as a self-imposed limitation from which derogations are possible at any time.[100] In what goes outside the purview of strictly private relationships between individuals and concerns directly the public relationship between State and citizen (e.g., taxation, military affairs, police regulations), there are, in Otto Mayer's concise description, public laws but there is no public law: "il n'y a pas de droit public."[101] A police ordinance was for all respects and purposes issued as an order. It was made public for purely instrumental reasons and not for considerations of justice and was only general since an order, when addressed and meant to be obeyed by a larger group of individuals, needs of natural necessity to embrace a general form. Since there is no legal limitation or remedy, public law appears in the form of a commission limited only internally (from the point of view of the administrative mechanism of enforcement) and unlimited

[96] *Id*., at p. 33, note 15: "Le droit acquis est une barrière pour la législation du prince aussi bien que pour ses actes individuels; la législation n'est pas, comme aujourd'hui, une manifestation spécialement caracterisé de la volonté souveraine; c'est l'exercise d'une prerogative comme les autres."

[97] *See Ibid*., pp. 15–42, for a number of qualifications to this account and an interesting list of excerpts from the jurisprudence of the *Reichskammergericht*. For instance, at p. 32, note 13, the example is given of a refusal by the government of Hanover to grant a residence permit, quashed for lack of reasons.

[98] *Ibid*, at p. 43: "L'idée de l'Etat apparaît au premier plan. Ce n'est pas pour soi-même ni en vertu d'une prerogative qui lui appartient, que le prince prétend à tout cela; c'est au nom de la personne idéale dont il est représentant."

[99] *Ibid*, at p. 44.

[100] In time, strictly financial disputes in which the State is a party will be incorporated into private law and submitted to the jurisdiction of the civil courts, by the means of a fiction, the "doctrine of the Fisc." In virtue of this doctrine, the State, in purely financial litigations, dealing with the mine and thine characteristic of the private law, becomes a different moral person, the Fisc, subordinated to and commanded by the State-as-Sovereign ("the political association, the moral person of public law") to submit to private litigation as a private person. (*see* Mayer, at pp. 55–63).

[101] Mayer, at p. 53.

externally (from the point of the view of the subjects, who, in this regard, appear purely as the objects of an exercise of public power).

And yet, justifications of paramount power need to be perceived in and cut down to their proper context. This is not just a matter of the technical possibilities of realization, related to the still sparing means by which power could in fact be exercised. Central bureaucratic organs certainly existed but the absolute state was still highly dependent, for the implementation of its decrees, on intermediary, non-state powers. For instance, in German principalities, the mandates, edicts, orders of the prince were publicized by means of having the local preachers read them from the pulpit, up until the 1800s.[102] It is primarily, and more importantly, an issue of conceptual context. The rationalism implicit in the newly emergent ideas of sovereignty and state was dampened until the late eighteenth and beginning of the nineteenth century by the lagging organicist way of perceiving law and the state. The primary meaning of police was until the late eighteenth century that of good order, meaning in most cases not externally imposed but the past, "natural" order or course of things. Many police orders duplicated in fact the status quo, by decreeing for instance the proper behavior during church attendance or the address of an apprentice toward the master, regulating the wearing of luxury clothing in order to maintain proper distinctions between the various estates, or curtailing the importation of such goods: "The new [administrative and police] state detached in time the individual from his local and social power structures; but it still thought in terms of closed social spheres. It replaced the bilateral process of law-creation [characteristic of the Middle Ages], in which law appears as a result of a struggle between partners, by the unilateral order of the prince. But it did not yet achieve the modern form of clearly dividing private and public law, in which the demands of the state and of the individual are settled so to speak against each other. It rather remained trapped within the dualisms of the older social structure (claim and power, right and duty)...in which a concrete status-oriented way of thinking subsisted."[103]

In other words: in order to change the world by legislative and administrative means, one has to be able to see, to imagine the law and administration as mechanisms, as rational tools fully exterior to their environment, rather than embedded in it. Such an external viewpoint was not proper to the age. The beginnings of a detachment and replacement of the old eudaemonistic primary meaning of police (promotion of good harmony and public welfare) by the fully modern one of prevention of future harms can be traced back in both practice and theories to 1770.[104] But "Police Science" (*Policeywissenschaft*) remained a science of "good policy" lodged in a practical philosophy partly indebted to medieval-

[102] Maier 1966, at p. 187 *note* 244 and associated text.

[103] *Id.*, at p. 94. *Also see* Franz-Ludwig Knemeyer, "Polizeibegriffe in Gesetzen des 15. bis 18. Jahrhunderts – Kritische Bemerkungen zur Literatur über die Entwicklung des Polizeibegriffs," 92 (2) *AöR* 153 (1967).

[104] *Ibid.,* at p. 198.

Aristotelian categories and incorporating in an amalgamated, indistinct form, philosophy, public law, administration proper, economy, and political science until much later. This conceptual syncretism subsisted up until the mid-nineteenth century, when it started to clash head-on with those now "value-free rationalized" and thus scientifically individualized new academic disciplines. Late echoes of this struggle can still be found in 1832, when Robert von Mohl expresses evident discomfort with the equation or reduction of police science (*Polizeiwissenschaft*) and police law (*Polizeirecht*): "Who would like to live in a state that only exercises justice but provides no police help?"[105]

This last remark is already anticipating too much the substance of later discussions. Suffice it to point out in the closing of this one, as exemplary for the way in which the power of facts lagged behind rational representations of power, the tense, ambivalent relation between the advancing Age of Reason and absolutism. On the one hand, an absolute monarch seemed to be the ideal executor of the dictates of reason: "Rationalization of the state and modernization on the one hand and the enlightenment optimistic ideology of progress on the other went together for a very long stretch."[106] But there was no guarantee that he would not intervene again in a newly created, "enlightened" order of affairs. This unease was not just an expression of the eternal constitutional problem (constituant-constituted power) but also a necessarily deepening rift between ontologically different kinds of rationality and perceptions of authority. When Frederick the Great, in spite of the solemn assurances in his *Political Testament* "never again to trouble the course of procedure" intervened swiftly with a *Machtspruch* in favor of the miller Arnold and quashed a judicial decision, the ensuing outcry and commotion among the finer classes of society was caused much more by the clashing orders of reason and essential representations of justice than by the actual merits of Friedrich's decision.[107]

2.4 Reason Unbound: Two Faces of the Enlightenment

> La condition meme de ces écrivains les préparait à goûter les theories générales et abstraites en matière de gouvernement et à s'y confier aveuglément. Dans l'éloignement presque infini où ils vivaient de la pratique, aucune expérience ne venaint tempérer les ardeurs de leur naturel. . .
>
> Alexis de Tocqueville, *L'Ancien Régime et la Révolution*

[105] *Ibid*. pp. 247–248.

[106] Barbara Stollberg-Rillinger, *Europa im Jahrhundert der Aufklärung* (Stuttgart: Reclam, 2000), p. 206.

[107] "je me suis résolu à ne jamais troubler le cours de la procedure: c'est dans les tribunaux où les lois doivent parler et où le souverain doit se taire." (in Schmitt, *La Dictature*, at p. 303, note 43). *See*, on the events surrounding the miller Arnold case, David M. Luebke, "Frederick the Great and the Celebrated Case of the Millers Arnold (1770–1779)-A Reappraisal," 32 (4) *Central European History* 379 (1999).

> I have become entangled in my own data, and my conclusions directly contradict my original premises. I started out with the idea of unrestricted freedom and I have arrived at unrestricted despotism. I must add, however, that any solution of the social problem other than mine is logically impossible.
>
> Shigalyov[108]

The Enlightenment is, to be sure, a very abused word, perhaps the biggest simultaneous synecdoche and metonymy of all times. One can refer to it in order to praise or scold almost everything under the sun since the germ of everything that is conspicuously modern, in thought and experience, can be found in that age; the dictatorship of absolute values in Leibniz as well as the empathetic fascination for the local particularity and the exotic at Bougainville; the fanatically optimistic visions of progress through science in Condorcet's *Historical Sketch* and the outlandish naturalism of progress-pessimism in Rousseau's *Discourse on Inequality*; the beginnings of a militant atheism as well as of purist versions of faith, radically averse to the Age of Reason; the adoration of science and of the lights of intellect (*les Lumières*) as well as the fetishizing of the secretive, esoteric, and occult. Sometimes one can note irreconcilable tensions within the work of the one and same author. Montesquieu exemplifies ideally this ambivalence, with his fine but fragile balance between the extraction of universals, of essences ("the spirit of laws") pertaining to a certain regime, on the one hand, and the constant about-faces toward the sociological determinations influencing a given order, on the other.

A careful account should therefore be given for the general reference and the selection to follow. The Enlightenment is a crucial crossroads in the history of legislation concepts, since only in that age did it become possible to think of law and legal systems in a purely abstract, deductive fashion, in a "mathematical" or "geometrical" way. The idea comes to full fruition, namely, that "what concerns law and justice *in themselves* cannot be derived from the experience."[109] More importantly, it becomes now possible to "manufacture" rationally the premises from which the line of deductions starts. This is primarily, but not only, due to the infinite uses to which the Enlightenment-specific concept of "nature" lent itself. What was "natural" for Hobbes (survival and the desire to preserve one's life by trading for social safety the natural freedom to live a "solitary, poor, nasty, brutish, and short" life in the wild, i.e., obedience in exchange for protection) still had an empirical kind of commonsensical anthropological concreteness, an almost palpably natural dimension attached to it. A century later, the state that is "natural" becomes a purely discretionary material by means of which the designer can

[108] One of the characters in Dostoyevsky's *The Possessed* (New York: Signet Classics, 1962 ed.), pp. 384–385.

[109] Emphasis supplied. Ernst Cassirer, *Die Philosophie der Aufklärung* (Hamburg: Felix Meiner, 2007), p. 248. *See also*, on law and "geometrical" thinking, M. H. Hoeflich, "Law & Geometry: Legal Science from Leibniz to Langdell," 30 (2) *The American Journal of Legal History* 95 (Apr., 1986).

build an entire legal and political system, like a demiurge. Thus, splinters of rationality grow from nothingness into complete rational worlds, against the mirror image of which the fundamental legal reality as such can already in imagination be created and recreated anew. Rousseau and Bentham illustrate this metamorphosis as conceptual epitomes. They hypostasize the two relevant extremes of reason unbound: the elated utopian redemption project in Rousseau and the detailed and obsessive dystopian outlook of social engineering in Bentham. These are only at a first and superficial glance distinct. In essence, nonetheless, the exaltation of lost virtues by Rousseau and the nitty-gritty Benthamite tendency towards regulating life into its furthest nooks and crannies are very much alike, Janus-faced examples of self-subverting rationality.

In France, the Absolutist state had, by the eighteenth century, reduced government to a highly effective royal administration, centralized in Paris and functioning through subordinated levels of jurisdiction (*Conseil du Roi*, *intendants*, *subdélégués*). Deliberation regarding public affairs, whose practical role in state administration had shrunk progressively, had by necessity been moved into the space of purely intellectual discussion, in the realm of the *République des Lettres*. By then, Medieval orders and in fact all intermediary orders had become almost devoid of any self-government functions and autonomous mediating influence, reduced to mere ceremonial and ornamental roles. Even the sphere of competence of the courts of law, the *parlements,* had come to be increasingly encroached upon by the administrative jurisdiction of the *Conseil* in Paris. For instance, by the 1720s, at the time when Montesquieu was a senior judge, one of the *Présidents à Mortier* of the Bordeaux Parliament, the few attempts made to exercise, through the procedure of the *remonstrance*, the control of the legality of royal ordinances, were motivated by narrow caste interests.[110] By the dawn of the French Revolution, the Estates-General had not been summoned for the better part of two centuries.[111]

All these factors resulted in a total lack of any practical sense of self-government, merged however with a deep belief in the independent task-solving capacity

[110] The *parlements*, sovereign medieval courts (by the seventeenth century, offices could be transmitted by inheritance or even sold; Montesquieu, for instances, inherited his judgeship from his great-uncle in 1716 and sold it in 1728) administered justice according to custom and positive law, i. e., properly registered royal ordinances (*ordonnances*). Registration was however not a mere formality and every now and again a *parlement* would exercise control of legality (*remonstrance*) and refuse to register an ordinance. Sometimes the issue would be submitted to the king, who would decide with finality on the matter (the procedure was called *lit de justice*) and sometimes—very often—their judgments were simply ignored by the *intendants* or the parliament's *exequendus* would be prevented from enforcing a court order by the royal officers. The issue went back and forth, yet with fewer and fewer attempts to assert the *droit de remonstrance* during the seventeenth and eighteenth century. Louis XIV, in the edict of Saint-Germain (1641) and then again in 1661 expressly forbade the Parliaments to touch on any matters "qui peuvent concerner l'Etat, administration et gouvernement d'icelui." *See* Mayer, at pp. 67–68. *See, also*, on pre-Revolutionary control of administration, François Bourdeau, *Histoire du droit administratif (de la Révolution au début des années 1970)* (Paris: Presses Universitaires de France, 1995), pp. 29–40.

[111] Since 1614, to be precise. Grimm, *Souveränität*, at p. 27.

of the State. In the telling phrase of one Physiocrat, Bodeau: "The state makes of people what it wishes."[112] Coupled with the adoration of the *Lumières* for capitalized Reason, this led to an unfathomable desire in Enlightenment thought to harness this might and efficiency of the State, and thereafter uses it vicariously through—how else?—"Enlightened" legislation. Power would need to be united and, since the "Gothic" architecture of the Medieval orders could only hamper effectiveness, past hindrances like tradition and intermediary orders (the *parlements,* for instance) needed to be eradicated with a clean sweep. In Tocqueville's words: "the diversity as such is hideous to them: they loved liberty into servitude. Everything that embarrasses their designs must be smashed. Contractes inspire little respect, private right none, but solely a public usefulness."[113] This way, the task of restoring lost virtue by recreating and perfecting the people would be easily fulfilled, through positive legislation enacted rationally according to one single plan, enforced dictatorially by the absolute state, now to be converted and made subservient to absolute reason: "There is no question about destroying this absolute power, it must only be converted. 'The state should govern according to the rules of the essential order,' says Mercier de la Rivière, 'and when it does so, then it must be omnipotent.'"[114] The problem of government is thus reduced to the matter of replacing the hideous tyrant, his *despotisme arbitraire*, with an enlightened despotism of the positive law, *le despotisme légal*.[115] In order to be effective in translating into reality eccentric schemes of custodial legislation, power needs to remain undivided. The issue is not legislation reflecting the people's interests, not political freedom and guaranteeing equal, active shares in the government, but educational redemption of the people from the corrupted state in which they were allegedly steeped. There is a huge cleavage of perception between a Montesquieu interested in the English art of safeguarding political liberty through pragmatic institutional arrangements of dividing power and his roughly contemporary compatriot Voltaire, who travels to England as well, admires Scottish empiricism, marvels at the London Chamber of Commerce, yet manages to write in his diary no word at all about the English Parliament.

This abstract-literary politics, the *politique abstraite et littéraire* that Tocqueville so insightfully describes and rightly abhors in his *Old Regime and the Revolution*

[112] "L'Etat fait des hommes tout ce qu'il veut." In Alexis de Tocqueville, *Oeuvres complètes*, Tome II, *L'Ancien Régime et la Révolution* (Paris: Librairie Gallimard, 1952), p. 212.

[113] ". . .la diversité même leur est odieuse: ils adoreraient l'égalité jusque dans la servitude. Ce qui les gêne dans leurs desseins n'est bon qu'à briser. Les contrats leur inspirent peu de respect; les droits privés, nuls égards; ou plutôt il n'y a déjà plus à leurs yeux, à bien parler, des droits privés, mais seulement une utilité publique." *Id*., p. 210. Public utility or the public interest is taken as something self-evident, an axiomatic value.

[114] "Il ne s'agit donc pas de détruire ce pouvoir absolu, mais de le convertir. 'Il faut que l'Etat gouverne suivant les règles de l'ordre essentiel', dit Mercier de la Rivière, 'et quand il en est ainsi, il faut qu'il soit tout-puissant.'" *Id*., p 212.

[115] Schmitt 2000, at p. 114, on Le Mercier de la Rivière: "*La théorie des contre-forces est une chimère*. Dicter des loi positives, c'est commander, et la force publique, sans laquelle toute législation est impuissante, est comprise dans cet acte." [emphasis supplied].

finds an extreme exemplification in Rousseau's vision of legislation. The *Social Contract* fuses at the hip all the Enlightenment idiosyncrasies with an irrationalism of absolute will already implicit in Hobbes.[116] Just like the absolute sovereign of Thomas Hobbes needed only recognition through a social contract of subjection, Rousseau's *general will* is solely grounded in a *contrat d'association*.[117] Liberal constitutionalism presupposes two merged contracts, one of association, by which society is created, another of subjection, by which the state is separated from society and limited in its scope. This type of argument is explicit in Locke, and its direct and logical consequence is a further limitation of state by some form of functional separation of powers. The artifice of obscuring the dual nature of the social contract and conflating it into the powerful yet fallacious fiction of one single form allows Rousseau (and Hobbes) to define sovereignty and its expression, legislation, on the template of one, undivided will. By way of consequence, Rousseau derides attempts to limit and break sovereign power both in principle and in object. In a telling paragraph, by means of a rather strange allegory, he compares theoretical endeavors to reconcile sovereignty with the separation of powers with the tricks of the "swindlers of Japan" who would allegedly cut a child into pieces, throw it in the air and then have it fall back on the ground "reassembled" again.[118]

In the writing of this romantic deist, just like the God of deism is omnipotent yet never actually intervenes, Rousseau's beloved people, apparently the main actor in his play, is turned into an abstraction that populates the whole book in a confusing and disquieting form of cloak-and-dagger drama, yet never materializes or is substantiated in any way. "The people" expresses itself by means of legislation, expression of the general will. Since this will, a subjective, unattached, fluctuating yet undivided state of mind, is by no means an aggregation of interests lodged in the individuals, Rousseau rules out the possibility of translating it through legislation enacted by representative assemblies. In a book otherwise replete with ambiguities and contradictions, the prohibition against representative government is explicitly spelled out. The English think they are free but their freedom is only real on Election Day, afterwards they are mere slaves, they become nothing.[119]

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[116] Leo Strauss is certainly right when pointing out that: "The holder of the sovereign power is not the 'head', that is, the capacity to deliberate and plan, but the 'soul' that is, the capacity to command, in the State. There is only a step from this to Rousseau's theory that the origin and seat of sovereignty is *la volonté générale*. Rousseau made completely clear the break with rationalism which Hobbes had instituted." Strauss 1963, at 160.

[117] Jean-Jacques Rousseau, *Du Contrat Social ou Principes du Droit Politique*, in *Oeuvres Choisies* (Paris: Éditions Garnier Frères, 1962), Chap. XVI, at 304: "Il n'y a qu'un contrat dans l'État, c'est celui de l'association: celui-là seul en exclut tout autre. On ne sauroit imaginer aucun contrat public qui ne fût une violation du premier."

[118] *Id*., Chap. II, at 251.

[119] "Les députés du people ne sont que ses commissaires; ils ne peuvent rien conclure définitivement. Toute loi que le peuple en personne n'a pas ratifiée est nulle; ce n'est point une loi. Le peuple anglois pense être libre, il se trompe fort; il ne l'est que durant l'éléction des membres du parlement: sitôt qu'ils sont élus, il est esclave, il n'est rien." *Ibid*., Chap. XV, at p. 302.

Perceiving Rousseau's *Social Contract* as a project of virtue rather than democracy dispels some of the confusion.[120] He identifies his model of legislation with Sparta, not Athens, and explicitly states that Corsica, a country less tainted by modern civilization, with simple morals, somewhat isolated from the continent, etc., would be the ideal place for concretizing the social contract. This virtue-oriented penchant also explains the peculiar choice for a Legislator, who poses the legislation that will redeem the people, transforming the pre-contractual human, "a stupid and limited animal," into "an intelligent being and a man."[121] In this reading, legislation becomes a rigid moral code, which would foster and preserve virtue, slowing down what Rousseau believed to have been an otherwise continuous process of moral degeneration. But in this way, Rousseau's democracy and legislation are turned perversely into justificatory abstractions, to be used by proxy and turned into the will and project of whoever can ably claim to concretize them and identify his particular model of intentionality and/or virtue with the people's general will. Little wonder that the book served, on the one hand, as the "Bible of the Jacobins" during the Terror and, on the other hand, gave Napoleon a reason to picture himself as the mythical Legislator.

If Rousseau turns the Hobbesian sovereign willfulness into the irrationality of a "mask of virtue," Bentham represents the twin face of distorted Enlightenment. He takes two intimations entertained by Hobbes and reverts their logic. If will was preeminent in Hobbes, because reason is detrimental, leaving too much place for dissimilar conceptions of the good, in Bentham reason is sublimated, reduced to extreme rationalism, utilitarian rational thinking, so that will becomes just a means to enforce it. Bentham fuses thus the model of law as command lodged in the will with the germ of calculative, instrumental rationality implicit albeit only latent and dimly visible in the *Leviathan*.[122] The result is another account of legislation that epitomizes and streamlines law-making into the "Procrustean form of individual intentionality."[123]

Benthamite studies do not exhibit the eerie penchant of the French *philosophes-economistes* (or Rousseau's) to discuss law and legislation in totally abstract, ungrounded terms. Contrariwise, he is very interested in the instrumentalities, in coherent drafting, promulgation, interpretation, spells out deficiencies in actual statutes, points to detail, makes minutely detailed proposals *de lege ferenda*. On more than one occasion, he actually takes statutes of the Hanoverian Parliaments

[120] Arendt, On Revolution, pp. 68–94, and Stephen Holmes, *Benjamin Constant and the Making of Modern Liberalism* (New Haven and London: Yale University Press, 1984), *esp*. chapter three, "Rousseau and the Masks of Virtue," pp. 79–103.

[121] *Ibid*., Chap. VIII, at 247.

[122] Henry Sumner Maine, *Lectures on the Early History of Institutions* (Whitefish, Mont.: Kessinger, 2004), p. 201: "No geniuses of an equally high order so completely divorced themselves from history as Hobbes and Bentham, or appear, to me at all events, so completely under the impression that the world has always been more or less as they saw it."

[123] Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999), at p. 43.

and sedulously shows how the ideally well-drafted legislation should look like. He is more than happy to have his reader see how a law on stealing sheep, for instance, can be cut down, logically, so that at the end, after he has weeded out redundant verbosity, one is left with forty-some articles out of the initial number of over 300. This meticulous, but somewhat exasperating, interest in legislative drafting and more generally in detail is probably what prompted Marx's contempt to 'the metaphysics of an English shopkeeper.' [124]Yet, while Marx's scorn is in form undeservedly harsh, if we try to see past the detailed legal-technical aspects, Jeremy Bentham's account of legislation is in fact primarily metaphysics. He exhibits the Enlightenment strand of thought antipodean to utopian exaltation, namely geometric thinking according to one unified rational plan. Instrumental rationalism is reason in the Hobbesian understanding, *Ratio*, mathematical calculation, *Addition*/*Subtraction*. Bentham grafts it onto the principle of utility.

He has built only on the foundation of utility, Bentham writes to Voltaire in 1776. This implies "setting out, in all the operations of the judgment, from the calculation or comparison of pains and pleasures, and in not allowing the interference of any other idea."[125] Legislation needs to be drafted starting from a point of ascription, the principle of utility, and then broken down into actual command-rules, through the method of "bifurcation." All laws are commands, and therefore, for him, each legal provision contains in itself two laws, one *principal* and *normative*, and, backing the former, explicitly or implicitly, a *punitive* law which sanctions disobedience to the normative command. It is crucial to translate the principle of utility into positive law, into legislation drafted and promulgated according to—and Bentham is relentless in stressing this—one unified plan, so that: "in a map of law executed upon such a plan there are no *terrae incognitae*, no blank spaces: nothing is at least omitted, nothing unprovided for."[126] Once we undertake this task, that is, once parliament understands the principle and legislates accordingly, all uncertainties will be solved. So far mankind has been wading cheerfully through the filth of confusion: badly drafted laws, conflicting, unclear legislation. Once his project is understood properly, salvation is at hand. Unsurprisingly, therefore, what Bentham resented the most was not parliamentary law-making (which as a matter of fact did exhibit in his time most of the evils he

[124] In addition to the primary sources, I am largely relying, in my interpretation of Bentham, on Gerald J. Postema, *Bentham and the Common Law Tradition* (Oxford: Clarendon Press, 1986), and David Lieberman, *The Province of Jurisprudence Determined-Legal Theory in Eighteenth-Century Britain* (Cambridge: Cambridge University Press, 1989).

[125] Jeremy Bentham, *Theory of Legislation* (London: Truebner & Co., MDCCCLXXI), at p. 3.

[126] Jeremy Bentham, *Limits of Jurisprudence Defined-Of Laws in General*, edited by H.L.A. Hart (London: University College of London, Athlone Press, 1970), at 246.

tried to eradicate). He was primarily opposed to the common law, because the common law, by its apparently unsystematic existence grounded in the past, is resistant to absolute prediction and evades the equation-like overall structure in which Bentham wanted to fit all law.[127] Common law literally irked him: it is the *irrational* prejudice and power of "Judge and Company," not a science at all. Historical-traditional accounts are more generally found repellent and Bentham is self-admittedly closer to Voltaire and Helvetius than to Coke or Blackstone. His interest lies in having Parliament disciplined and enacting his ideal model of what legislation should be, not in observing how the legislature came about in his own country, or under what conditions humans can adopt good laws for themselves through representative assemblies.

He never considered apparently that, perhaps, utility is not a given, fixed point of reference from which codes can stretch out into punctilious detail, but rather might fluctuate in a directly proportional manner with interests, individual or unattached, and thus it can only be assessed through the intermediary mechanism of representation. Gerald Postema cites an interesting passage in which Bentham, writing about the common law calls it "Dog law": "When your dog does anything you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way the judges make law for you and me. They won't tell a man beforehand what is it he *should not do*. . .they lie by till he has done something which they say he should not *have done*, and then hang him for it."[128] But then the *Pannomion* is as liberating as the *Panopticon*.[129] Bentham's own account of legislation, modeled on rational command, predicated upon the assumption of one enlightened mind, in spiteful neglect of individual volition, boils down to just a different form of (ostensibly milder, scientific, enlightened) "Dog Law."

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[127] One could draw an interesting analogy between the Benthamite paradigm and Roscoe Pound's later criticism of the common law in "Common Law and Legislation," Vol. XXI *Harvard Law Review* No. 6 (April, 1908), pp. 383–407.

[128] [emphasis in original] Cited by Postema 1986, at p. 277.

[129] What interested Bentham most, perhaps to the point of absurdity, was rational, coherent, gap-proof systematization of human conduct in positive law, hence his life-time obsession with "a law. . .meaning one entire but single law" (*Introduction to the Principle of Morals and Legislation,* Chapter XVII, 29), a complete code which he called, suggestively, *Pannomion*: hence his obsession with eliminating all things 'irrational,' most notably the common law. Gerald Postema notes that Bentham differs from other command theorists, to the extent that, in his account, the 'directive role' of positive law is supplemented by the "epistemic role of law in society. . .Law's fundamental task was to facilitate the coordination of social interaction." (at p. 493) That is true only to the extent that one takes into consideration the basic template of Bentham's narrative. For Bentham, law 'facilitates human interaction' only since and insofar as positive law is the product of a rational science, a directive or dictate of rationality translated into positive law.

2.5 Reason, Within Limits: Legislation in Constitutionalism and the Delegation Concept

> It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal: this being the place where that absolute despotic power, which must in all governments reside somewhere, is intrusted by the constitution of these kingdoms.
>
> Sir William Blackstone, *Commentaries on the Laws of England* (Bk. 1, Chapter 2: Of the Parliament)

> There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.
>
> Sir William Blackstone, *Commentaries on the Laws of England* (Bk. 2, Chapter 1: Of Property, in General)

Even though the "constitutionalist" idea of fettering the exercise of power by legal and institutional limitations largely predates the actual emergence of the concept, the term as such began to be used in the course of the nineteenth century, in reference to a new intellectual and practical reality: the modern normative constitution.[130] This late eighteenth century innovation differed from its older, descriptive counterpart, in that it was a legal document laden with considerable rationality requirements and charged with foundational tasks. The constitution had to literally constitute, *i.e.*, to predetermine and integrate, both the political life and the entire legal system underneath it; the modern fundamental law is one of the most daring and in retrospect successful achievements of the Age of Reason.[131] Yet this was from the beginning also a project of limited or bounded rationality, straddling two worlds: the newly found audacity in using the power of human thought to self-consciously shape reality and the older tradition of perceiving fundamental laws as embedded in an order perceived and premised as given, as natural. Both the existence as such of the constitution and the proper functioning of its legal limitations presupposed from the onset a number of clear distinctions deriving from this foundational dichotomy. The notion of legislative delegation is conceptually incidental to those distinctions, whereas constitutional and administrative practices associated with it are epiphenomenal to the existence and preservation of those

[130] András Sajó, *Limiting Government-An Introduction to Constitutionalism* (Budapest: Central European University Press, 1999), at p. 9: "At the beginning of the nineteenth century, when people began referring to this concept, constitutionalism was an intellectual trend that could be relatively well-defined; but it is clear that it did not have, nor will it have, an unambiguous schoolbook definition." For a historical study of the tradition of constitutionalism as a limitation on political power, *see* Charles Howard McIlwain's *Constitutionalism, Ancient and Modern* (Ithaca, NY: Cornell University Press, 1940).

[131] *See* Dieter Grimm, "The Constitution in the Process of Denationalization," 12 *Constellations* 447 (2005).

demarcations. And just as the original intellectual environment of the constitution reflects the notion of delegation, the concept of delegation illuminates the conditions of the possibility of post-Enlightenment constitutionalism.

As it was pointed out at the beginning of this book, delegation has a metaphorical character: it takes on different meanings, according to different understandings of legislation that proceed from a number of central constitutional concepts. The argument that, in the original understanding of constitutionalism, these different assumptions, whose delegation-related interpretations nowadays appear to yield a good measure of analytical circularity, had a coherent and consistent intellectual structure was also anticipated throughout this chapter. The theoretical assumptions that inform the notion of "legislative delegation" in constitutional theory must be therefore reiterated, before we proceed with the inquiry into how these merge with each other in relation to constitutional supremacy.

2.5.1 Representation

> The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of government. From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results; and from the influence of those on the sentiments and views of the respective proprietors, ensues a division of the society into different interests and parties.
>
> *The Federalist 10* (James Madison)

Although this nuance has long faded, the designation of magistrates or lawmakers by election was historically seen as an inherently aristocratic method of government (since it favors merit or wealth), in opposition to selection by lot, which was, conversely, regarded as the essence of democracy (since it is the best expression of equality, a democratic principle).[132] As late as 1748, Montesquieu was still able to perceive the ambivalence of representation, when he argued that: "[t]he suffrage by lot is natural to democracy; as that by choice is to aristocracy. The suffrage by lot is a way of selecting that offends no one; but it leaves to each citizen a reasonable expectation of serving his country."[133]

At the beginnings of constitutionalism, the essential question was whether parliamentary representation, which had evolved over centuries in English practice,

[132] Both Plato and Aristotle perceived and theoretically developed this difference. For Aristotle, as we have already seen, the best polity was one in which democracy and aristocracy as political forms (and—respectively—lot and election as methods of political selection) were so well commingled that the ensuing regime partook perfectly of the advantages and overcame best the disadvantages of them both, to the effect that an observer could define it as both democracy and aristocracy. . .and neither. For a study of representative government that developed most consistently this distinction in theory and practice up to its contemporary consequences *see* Bernard Manin 1997.

[133] *Spirit of Laws,* Book II, Ch. 2., p. 11 (Cosimo Classics 2007 ed.).

without any master plan, could be transplanted elsewhere or whether there was perhaps a constitutionally correct, higher and "essential" understanding of representation that could be extracted and directly implemented. The implementation had, moreover, to reconcile the aristocratic perils implicit in representation with the new dogma of popular sovereignty. This is by no means an analytically easy feat. Thus, enamored with the elated sort of sophistries of which the writings of Rousseau are emblematic and replete, the French revolutionists arrived for instance at the bafflingly hypocritical solution of combining a fairly restrictive electoral system with the arrogation of an unlimited competence for the legislative bodies, as representatives and custodians of the general will.[134]

The best tradition of constitutionalism, by contrast, perceived representation as both a bulwark against democracy and the best (most reasonable under the actual circumstances) modern expression thereof. Benjamin Constant famously countered the Rousseauian concept of people's democracy, showing that the "liberty of the ancients," which derived from active and constant participation in public affairs, is starkly different from the "liberty of the moderns," for whom being left alone to live their private lives unhindered by state meddling is a much more valued state of things. As Constant observed, from the vantage point of one who had lived through the Terror, practical attempts to force political virtue on people ("to force them to be free," in Rousseauian terms), can only degenerate into Jacobin educational dictatorships, by means of which an actual democracy is indefinitely suspended in the name of a true democracy yet to be created.[135] The political liberty of modern man could only be democracy by representation, under and within the limits of a constitution: "The representative system is a proxy given to a certain number of men by the mass of people who wish their interests to be defended and who nevertheless do not have time to defend them themselves (. . .) [T]he people who, in order to enjoy the liberty which suits them, resort to the representative system, must exercise an active and constant surveillance over their representatives, and reserve for themselves, at times which should not be separated by too lengthy intervals, the right to discard them if they betray their trust, and to revoke the powers which they might have abused."[136] Representation is for Constant a form of

[134] For a study of these tensions in French revolutionary history, *see* Patrice Gueniffey, *Le nombre et la raison-La Révolution française et les élections* (Paris: Éditions de l'École des Hautes Études en Sciences Sociales, 1993).

[135] I am paraphrasing Carl Schmitt, *The Crisis of Parliamentary Democracy* (1926 revised ed.), Ellen Kennedy transl. (Cambridge and London: MIT Press, 1988).

[136] Benjamin Constant, "The Liberty of the Ancients Compared with that of the Moderns," in *Political Writings,* translated and edited by Biancamaria Fontana (Cambridge: Cambridge University Press, 1993 (c1988)), at pp. 325–326. Yet, with the subtlety which characterizes his distinctions, Constant (like Tocqueville) was quick to notice the potential downfalls of "modern liberty": "The danger of modern liberty is that, absorbed in the enjoyment of our private independence, and in the pursuit of our particular interests, we should surrender our right to share in political power too easily." (at p. 326) For a comprehensive analysis of Benjamin Constant's political and constitutional thought, *see* Holmes 1984.

delegation where each elector (the delegator) has the possibility of controlling the delegate, between terms through the intermediary of public opinion and at regular intervals by casting a ballot. The two aspects are interrelated and mutually reinforcing, since public opinion and its pre-requisites (free speech, freedom of assembly, a free and independent press), make an informed election possible.

Such a procedural perception is perhaps inevitable and derives from the constitutional nature of representation. There are of course conceptions of representation that seek to bridge institutionally the gap between democracy and representation.[137] Their best expression are the so-called "descriptive theories," such as John Adams's contention that a representative assembly "should be an exact portrait, in miniature, of the people at large, as it should think, feel, reason and act like them" or James Wilson's assertion that a legislative assembly should be a portrait of the people, whereas "the portrait is excellent in proportion to its being a good likeness."[138] The entire theoretical strain of descriptive representation revolves around a bevy of related metaphors, which resemble the legislature with a mirror, a portrait, a map, a photograph, a "condensation" of the whole, etc. Nonetheless, even in point of pure theory, there are serious pitfalls in this perception, since it is unclear whether there is anything fixed or set in a society that can be "captured" faithfully. And then any society changes rapidly: anything fixed in it, assuming as a cognitive premise that a fixed something existed, quickly varies. A faithful map (or, for that matter, portrait or mirror) would therefore need to include a map of a map of a map, with a legend of a legend of a legend and so on, *ad infinitum*. Moreover, the practical application of this perception is unclear; it would perhaps require either a selection by lot of representatives or a corporatist solution with the possibility of recall, whereby the legislature would be composed of representatives of all classes and interests in society.

Once election is brought in, descriptive representation has to yield and Constant's argument is forcefully brought back in. Liberal constitutionalism does not perceive representation as solely a project of democracy. Actual people are being represented, and their concrete interests and wishes are being substantiated in the process of law-making, through deliberation and decision on concrete measures. The by-product of deliberation equates the public interest to the extent that it constitutes the best aggregation possible, arrived at through a process that streamlines discussion and facilitates decision, while reducing factionalism (the capture of the public will by private interests). Through the intermediary of representation, the people make laws and impose burdens on themselves. Yet in

[137] *See* Hanna Fenichel Pitkin, *The Concept of Representation* (Berkeley, Los Angeles, London: University of California Press, 1967), *esp*. "'Standing For': Descriptive Representation", pp. 60–92.

[138] *Id*., Pitkin traces the notion of descriptive representation as early back as the Monarchomachs: "The idea of a representative assembly should be a condensation of the whole nation is a venerable one, appearing as early as the Monarchomachs, whose ideal legislature was an *epitome regni, regni quasi epitome*." (at p. 73).

what manner a representative assembly should make these laws, in order for it to have fulfilled its constitutional and electoral mandate, cannot be answered in the abstract. Conceptions of representation change over time, in suitable lockstep with transformations of the representative system. At the end of the eighteenth century Burke could think of Parliament as essentially a gentlemen's debating club. If an interest were represented by at least one of the honorable members, then it already found enough parliamentary support, since the viewpoint could be cogently aired in debates. Gentlemen listen to the each other's arguments and opinions with all proper decorum and thoughtful consideration. But only three decades after the Reform Act, Mill could already offer a much more sobering view. The proper tasks of a representative assembly were those of controlling the government and of *enacting* laws which could just as well be drafted by an expert government body. Representation supplied an "element of will" and legitimacy to the "element of intelligence" provided by an expert Commission of Legislation and the true value of Parliament resided not in being primarily a *legislative* body but rather in its constituting "the nation's Committee of Grievances and its Congress of Opinions": "But it is equally true, though only of late and slowly beginning to be acknowledged, that a numerous assembly is as little fitted for the direct business of legislation as for that of administration. . .. Instead of the function of governing, for which it is radically unfit, the proper office of a representative assembly is to watch and control the government. . ."[139]

This brings us to the representation/delegation dilemma. On the one hand, it seems to be intuitively the case that, inasmuch as we elect legislatures to make laws and they delegate their law-making function to the executive or the administration, democracy is subverted and this collective mandate is not fulfilled. For, if my representatives do not make clear choices, how can I be expected to bring them to book at the polls? Once the legislature is legally limited in its competence by the text of the constitution, this intuition seems to revert into a constitutional problem. On the other hand, representation is not pure democracy[140] and the representative is not a delegate in the sense of private law. The public law mandate is a free mandate and the democratic check on this mandate is brought in only as a veto, at the moment of choosing the representative or in the "court of public opinion."

[139] John Stuart Mill, *Considerations on Representative Government* (Buffalo, N.Y.: Prometheus Books, 1991), at pp. 109–115.

[140] For a long time representative democracy was perceived to be the exact opposite of direct democracy, to the effect that, in early American state constitutional law, a number of laws whose application was made contingent by the legislature on local option or whose promulgation was made dependent on a state referendum were declared unconstitutional on nondelegation grounds (e.g., Rice v. Foster 4 Harr. 479 (Del. 1847), Barto v. Himrod 8 NY 483 (153)).

2.5.2 *Separation of Powers: Balance and Function*

> This seemeth One Reason, why our Ancestors did so willingly follow the Voyce of *Nature*; in placing the Power *Legislative, Iudiciall, & Executive*, in 3 distinct Estates; (as in *Animals, Aerials, Etherials,* or *Celestials*, 3 regions; and 3 Principles in *Naturals*:) that so, they might be forced to Consult Often and Much, in All they did.
>
> John Sadler, *Rights of the Kingdom; or Customs of Our Ancestors* (London, 1649)

> A Commonwealth swerveth not by principle but by institution. A Commonwealth rightly instituted never swerveth.
>
> John Harrington, *The Commonwealth of Oceana* (London, 1656)

Separation of powers is itself a metaphor, referring to wildly diverse ideas and historical contingencies. Two conceptual strands stand apart, one interested in analytical distinctions between functions, the other in the balance and counterpoise of powers or institutions. The balance argument originates in the theory of the mixed constitution. Its classical early account is Polybius's description of the Roman Republic; the Greek historian declared that what made the greatness of republican Rome was a blend of monarchical, aristocratic, and democratic elements, as embodied in the institutions of the consulate, the Senate, and the popular assemblies, respectively, and as evidenced by the coordinate exercise of different attributions of state power (the Senate proposes laws, which the popular assemblies can reject or approve, the consuls have control over the deployment of troops and command in the field, the Senate controls all expenditures, while the people alone decide with finality over war and peace, etc.). The emphasis is on the fragmentation of power by institutional design and mutual checks. At no point is the sum-total of state power fully concentrated and the various exercises thereof never go unchecked.[141]

This argument resurfaces during the struggles for political supremacy in seventeenth century England, where its concrete and contextual nature is evidenced by an intensely polemical use. In 1642, Charles I resorts to "mixed monarchy," in an address to the Long Parliament, to chastize what he perceived to be the latter's extravagant assertions of monolithic power: "There being three kinds of government amongst men, absolute monarchy, aristocracy, and democracy, and all these having their particular conveniences and inconveniences. The experience and wisdom of your ancestors hath so moulded this [government] out of a mixture of these, as to give this kingdom (as far as humane prudence can provide) the

[141] Histories, VI, II: "All the three types of government which I have mentioned before were found together in the Roman Republic. In fact they were so equally and harmoniously balanced, both in the structure of the political system and in the way in which it functioned in everyday practice, that even a native could not have determined definitely whether the state as a whole was an aristocracy, a democracy, or a monarchy. This is indeed quite natural. For if we fix our attention on the power of the consuls the government appears quite monarchic and seems to resemble kingship. If we look upon the power of the Senate, it seems to be aristocratic, and, finally, if one regards the power of the people, it seems clearly a democracy." In Kurt von Fritz, *The Theory of the Mixed Constitution in Antiquity: A Critical Analysis of Polybius' Political Ideas* (New York: Columbia University Press, 1954), Appendix I, Excerpts, p. 367.

convenience of all three, without the inconvenience of any one, as long as the balance hangs even between the three estates, and they run jointly on their proper channel (begetting verdure and fertility in the meadows on both sides) and the overflowing of either on either side raise no deluge or inundation. . .."[142] The notion of "mixed" government, as antithesis to despotism, "pure," unchecked power could be likewise wielded to counter all assertion of absolutism, be it that of the Stuarts, the Long Parliament, the Lord Protector or the Commons. In the course of the XVIII century, Bolingbroke was to praise the values of "mixed and well-tempered government," writing against the ministerial system and the "corruption" of the House of Commons by Sir Robert Walpole.

The theoretical defense of separation of powers that influenced the most modern constitutionalism can be found in Chapter VI, Book XI ("On the Constitution of England") of Montesquieu's *Spirit of Laws*. Montesquieu departs from the characteristically antic-mediaeval notion of balance of classes (understood as political forms of government) and extracts the modern essence, the main principle. Political liberty is best safeguarded from despotism in "moderate governments," where "by the disposition of things" power is always balanced and checked by countervailing power.[143] The starting point of his analysis is a pragmatic concern with unchecked

[142] *See generally*, Michael Mendle, *Dangerous Positions-Mixed Government, the Estates of the Realm, and the Answer to the xix propositions* (Alabama: University of Alabama Press, 1985). A history of the concept, with taxonomies and thorough distinctions is provided in the classical separation of powers studies in the English language, M. J. C. Vile, *Constitutionalism and the Separation of Powers* (Oxford: Clarendon Press, 1967) and W. G. Gwyn, *The Meaning of the Separation of Powers* (New Orleans: Tulane University Press, 1965). The latter work focuses more specifically on English developments and draws more clearly the distinction between the balance and normative/rule of law separation of powers theories.

[143] *See* Schmitt, *La Dictature*, at pp. 107–108: "Pour illustrer sa construction, Montesquieu emploie l'image de la '*balance*', qui était utilisée aux XVIIe et XVIIIe siècles pour n'importe quelle type d'harmonie veritable (dans l'univers, dans la politique intérieure et extérieure, dans la morale et l'économie politique), image qui ne devait pas nécessairement être une abstraction rationnelle. Ce qu'on appelle la théorie de la separation des pouvoirs est incomprehensible tant qu'on s'en tient au terme de 'séparation plutôt qu'à celui de '*balance*.' (. . .) L'image de la balance, en revanche, désigne une unité réalisée par voie de l'équilibre. C'est la raison pour laquelle ce qu'on appelle la séparation des pouvoirs est tout sauf un schème doctrinal. Elle concerne toujours des situations politiques concrètes, et entraîne avec elle le fait que l'usage de l'image s'oppose toujours à celui qui dérange ou qui, par ses prétentions unilatérales au pouvoir, par sa dictature, fait obstacle à l'équilibre resultant d'une entente." [emphases in original]

De Lolme will also describe the essence and virtues of the English constitution in terms of balance: "There might be danger, that if, the Parliament should ever exercise their privilege to its full extent, the prince, reduced to despair might resort to fatal extremities; or that the Constitution, which subsists only by virtue of its equilibrium, might in the end be subverted." J. L. De Lolme, *The Constitution of England or An Account of the English Government In which it is compared, both with the REPUBLICAN form of GOVERNMENT, and the other Monarchies in EUROPE*, The Fourth Edition, Corrected and Enlarged (London: G. Robinson and J. Murray, MDCCLXXXIV), at pp. 78. Blackstone himself would later give a similar description in his *Commentaries*: "But the constitutional government of this island is so admirably tempered and compounded, that nothing can endanger or hurt it, but destroying the equilibrium of power between one branch of the

power and its natural tendency to be abused. The foundational moderate and pragmatic anthropological skepticism ("Who would think it? Virtue itself is in need of limits."), together with the analytical detachment of the notion of balance from its older association with social classes and its application to institutions, rightfully make Montesquieu one of the founders of modern constitutionalism.[144] But Montesquieu never uses the term "separation."[145] In his story, the balance argument and a functionalist account are analytically independent. The tendency of modern commentators to conflate the issues arises to a certain extent from terminology (Montesquieu uses the term "power" to refer both to state functions and to actual state powers) and from the related fact that he treats in the economy of the same chapter both variants of the separation of powers, the rule of law-oriented functionalist and checks and balances version, respectively.

Yet the two maters can be distinguished. At the beginning of the chapter, he enumerates three "powers" and renders a functional-rule-of-law analysis of their interrelations. The three "powers" enumerated at this juncture are: (1) legislative (the expression of the general will of the state), (2) "Executive power over the things depending on the right of nations" ("the executive power of the state"),[146] (3) and "executive power over the things depending on civil right" ("the power of judging"). Here, Montesquieu separates functions analytically, with an eye to the

legislature and the rest. For if ever should happen that the independence of any of the branches should be lost, or that it should become subservient to the views of either of the other two, there would soon be an end of our constitution." William Blackstone, *Commentaries on the Laws of England* (New York: W. E. Dean Printer & Publisher, 1845 (1765)), pp. 34–35.

[144] Charles Louis –Secondat, Baron de la Brède et de Montesquieu, *De L'Esprit des Lois* (Esprit des Lois par Montesquieu Avec Les Notes de l'Auteur et un Choix des Observations par De Dupin, Crevier, Voltaire, Mably, La Harpe, Servan, *etc*., Librairie de Paris, Firmin-Didot et Cie, Imprimeurs-Éditeurs, Paris, 1849), at 128: "La liberté politique ne se trouve que dans les gouvernements modérés. Mais elle n'est pas toujours dans les États modérés: elle n'y est que lorsqu'on n'abuse pas pas du pouvoir; mais c'est une expérience éternelle, que tout homme qui a du pouvoir est porté à en abuser; il va jusqu'à ce qu'il trouve des limites. Qui le dirait! La vertu meme a besoin de limites. Pour qu'on ne puisse abuser du pouvoir, il faut que, par la disposition des choses, le pouvoir arête le pouvoir." It is interesting to note, in passing, that a skeptical approach to the historically proven human tendency to abuse political power needs neither the abstract assumption of an absolute anthropological profession of faith nor a counterfactually constructed premise. This moderate foundational skepticism is shared by the Founding Fathers of the American Constitution: "The supposition of universal venality in human nature is little less an error in political reasoning than the supposition of universal rectitude." *The Federalist,* No. 76 (Alexander Hamilton). Madison wrote that while ". . .there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust, so there are other qualities in human nature, which justify a certain portion of esteem and confidence." *The Federalist,* No. 55 (James Madison).

[145] As this was aptly put by Ernst Cassirer: "His eye for the particular and his love of detail protected him, even in his purely theoretical works, from any one-sided doctrinairism. He always successfully resisted any merely schematic presentation, any reduction of the variety of forms to an absolutely rigid pattern." In Ernst Cassirer, *The Philosophy of the Enlightenment*, Fritz C. A. Koellin and James P. Petergrove transl. (Princeton, N.J.: Princeton University Press, c1951), at p. 215.

[146] Synonymous with Locke's "federative power." Montesquieu assumed it to be "executive" of the laws of nations.

problem of discretion. Among them, the "power of judging" is considered "so terrible among men" and must be "separated," since the judiciary applies the law to particular individuals in particular circumstances and thus poses the biggest dangers of abuse. Later on, in the course of the discussion related to the prevention of tyranny, the powers considered are those that present a political problem (aggrandizement, tendency towards despotism), the legislature and the executive. Here, the essential argument is that mutual checks and institutional divisions will produce balance (a state of "rest or inaction" in his own words). When unity in action will be needed, all branches of power will "move in concert" "by the necessary motion of things." In this part of the argument, the judiciary is not taken into account as a "power." Montesquieu presents the judge now as innocuous, "solely the mouthpiece of the law." The irrelevance of the judiciary at this juncture derives from the fact that it is politically neutral.

The two aspects (balance of powers and separation of functions) cannot be reconciled in a doctrinaire fashion. In post-revolutionary America, state constitutions hastened to embrace the maxim of separation of powers, which was already widely known at the time, primarily through the intermediary of Polybius, Montesquieu, and Blackstone, and would later on become more popular as a result of John Adams's well-known tract on the topic.[147] Since, as a matter of constitutional design, the principle was at the beginning concretized along purely functional lines, and faith in its observance rested with the democratically-elected state legislatures, post-colonial experience quickly delivered the lesson that a democratically elected body could turn out to be just as whimsical or tyrannical as the former royal governors.[148] A related reproof taught by early state constitutional experiences was that precatory functional admonitions in the constitution could not be relied upon to cure the evils of

[147] Six constitutions expressly endorsed the doctrine (Georgia, Maryland, Massachusetts, New Hampshire, North Carolina, and Virginia). Art. XXX of the Massachusetts Bill of Rights of 1780 is probably the most 'enthusiastic' endorsement: "In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative or executive powers, or either of them: to the end it may be a government of laws and not of men." In *Constitutions That Made History*, Albert P. Blaustein, Jay A. Sigler, Eds. (New York: Paragon House Publishers, 1988), at 48. For purposes of contrast, *see* the moderate and sober instantiation in the text of the New Hampshire Constitution (1784), Art. 37, Bill of Rights: "In the government of this state, the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of unity and amity."

[148] The body of literature is enormous. For survey of the various intellectual influences on the American understanding of separation of powers, *see* Malcolm Sharp, "The Classical American Doctrine of 'The Separation of Powers'" 2 *University of Chicago Law Review* 385 (1934–1935). On the influence of colonial and post-colonial experience with legislative abuses *see*, for instance, Wright, "The Origin of the Separation of Powers in America," 13 *Economica* 169 (1933); for an interesting survey of "adjudication" by a pre- revolutionary provincial legislature, "Judicial Action by the Provincial Legislature of Massachusetts," (Note) 15 *Harvard Law Review* 208 (1901).

unchecked power. The best check on political power is always power itself. As a direct result, the debates during the Constitutional Convention in Philadelphia centered on very pragmatic issues pertaining to institutional mechanisms that would best ensure the autonomy and interdependence of the branches. The few interventions regarding supposedly "orthodox" functional delineations were brushed aside without much ceremony.[149] The same pragmatic approach can be later observed in James Madison's rebuffs to Anti-Federalist concerns regarding an allegedly unorthodox application of the theory in the new constitution. Reviewing Montesquieu, the British constitutional system his theory envisaged, and the provisions on separation of powers in several state constitutions, Madison states that political liberty is best safeguarded when a concentration of power in the same department is prevented, rather than when a rigid delineation is ordained between branches exercising functions analytically different in quality: "His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted."[150] (emphasis in original) Even more revelatory is the discussion in *The Federalist*, No. 51, of the "expedient. . .for maintaining in practice the necessary partition of power among the several departments as laid down in the Constitution."[151] The answer is trenchant and completely pragmatic: what is of the utmost concern is always the proper

[149] Surprisingly enough, one such intervention came from Madison, during the session of Friday, June 1st 1787, when he moved to insert in what would become Art. II, a phrase which provided, in pertinent part "that a national Executive ought to be instituted. . .to execute such other powers *('not Legislative nor Judiciary in their nature.')* as may from time to time be delegated by the national Legislature." (emphasis added) This part of Madison's motion was only seconded by one other member (Edmund Randolph) and struck out (partly as a result of Charles Pinkney's commonsensical observation that they were redundant, since implied in "the power to carry into effect the national laws," an early version of the future Take Care Clause). *See* Max Farrand, *The Records of the Federal Convention of 1787* (New Haven, Ct., London, Engl.: Yale University Press, 1974(c1966)), at pp. 66–68.

[150] *The Federalist Papers* (N.Y.: Mentor Books, 1961), Clinton Rossiter, Ed., No. 47 (Madison), at pp. 302–303.

[151] *The Federalist*, No. 51 (Madison), at 320: "The only answer that can be given is that as all these exterior provisions are found to be inadequate the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places." *See also* the particularly interesting observation, in *The Federalist*, No. 48, on the long-term efficacy of purely *legal* limitations on tyranny (of course, with the proviso that, as is well-known, in light of the above-mentioned post-colonial experiences, legislative rather than executive tyranny was the main concern of the Framers): "Will it be sufficient to mark, with precision, the boundaries of these departments in the constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power? This is the security which appears to have been principally relied on by the compilers of most of the American constitutions. But experience assures us that the efficacy of the provision is has been greatly overrated; and that some more adequate defense is indispensable necessary for the more feeble against the more powerful branches of the government." (Rossiter edition, at pp. 308–309).

arrangement (mode of election, financial independence, mutual checks) for best ensuring that "each department should have a will of its own."[152]

Contrariwise, proceeding upon the unwarrantable constitution-making premise of an indivisible sovereignty, and following the dubious constitution-drafting methodology of logical deductions from an *a priori* principle, the French Constitutional Assembly of 1791 sought consistently to completely distinguish in practice, as in thought, adjudication, legislation, and execution as mutually independent fractions of delegated sovereignty.[153] What resulted was by and large an attempt to reiterate in a practical setting a misunderstanding of Rousseau's abstract aphorisms, with all the deleterious practical consequences inevitably invited by like undertakings. Even though the members of the *Assemblée nationale* were well acquainted with the descriptions of the English constitution in Montesquieu and De Lolme, concrete examples derived from history and contemporary foreign practices were dismissed as parochial peculiarities. These were "English prejudices" which, since of no overarching consequence, should give way to the pure doctrinal "principle."[154] Mounier's intervention during the opening of the debates is particularly indicative of the general tenor of the discussions: "We have to prevent the reunion of powers; the National Assembly must not confuse the legislative and executive powers. . .we have to pose sacred limits to each of them."[155] As a direct consequence, not only is the executive refused the power to initiate or veto legislation but even an original and residual executive decree-making power (*pouvoir réglementaire*) is considered inadmissible, since, following from this absurdly dogmatic understanding, "only the legislative power has the right to make and interpret laws."[156] In a discourse on the 21st of September 1789, Robespierre would

[152] *Id.,* at 321.

[153] "Dominée par l'esprit classique, pasionnée pour les formules générales et abstraites, amoureuse des theories de métaphysque politique, l'Assemblée nationale voit dans la séparation des pouvoirs une division de la souveraineté en divers éléments, souveraineté qui reste qui reste une e indivisible malgré l'existence des divers éléments qui la constituent, chacun de ces éléments étant délégué par représentation à un organe distinct, qui logiquement sera indépendent et souverain dans la sphere de souveraineté qui lui est atribuée par représentation." *Traité de droit constitutionnel*, 3e éd., 5 vols., (Paris: Fontemoing, 1928), vol. 2, at p. 668.

[154] "Et n'avons-nous pas sur l'Angleterre, le précieux avantage de pouvoir ordonner en meme temps toutes les parties de notre Constitution, tandis que la sienne a été faite à différentes époques et à différentes reprises? Les Anglais eux-mêmes ont été obligés de composer avec préjuges, et nous n'avons aujourd'hui que les droits et les intérêts du peuple. . . Il suit de là que c'est moins les exemples que les principes qu'il faut consulter." Intervention by constitutionnaire Alexandre de Lameth, in *Archives parlementaires*, 1re série, t. VIII, p. 417 (12 août 1789).

[155] [emphasis supplied] In Léon Duguit, "La séparation des pouvoirs et l'Assemblée nationale de 1789," in three parts, *Revue d'Économie Pollitique*, Vol. VII (1893), pp. 99–132, 336–372, and 567–615.

[156] Intervention by Pétion de Villeneuve, *Archives parlementaires*, 1re série, t. IX, p. 219. The debates will result in the final form of Art. 6 (Section I, Chapter IV, Title III) of the 1791 Constitution: "Le pouvoir exécutif ne peut faire aucune loi, même provisoire, mais seulement des proclamations conformes aux lois, pour en ordonner ou en rappeller l'exécution." The principle had already been established by the law of 15–20 October 1789, which forbade the

likewise state, commenting on the veto power, that: "he who claims that an individual has a right to oppose the law says that the will of one is above the will of all. If he adds that such a right belongs to the man exercising the executive power, he says that the man established by the Nation has the right to negative and enchain the will of the nation."[157] Also revealing is the debate on the pardon power of the king. To give the executive the *droit de grâce* would not only be an impressible blending of executive and judicial "powers" but, more importantly, such empowerment would necessarily render a "private will above the general will."[158]

It stands to reason that a measure of functional division of powers should accompany institutional separation (this is after all the essence of the separation-derived delegation argument). But, in the abstract, the balance aspect, with its pragmatic-institutional and descriptive-polemic nature, and functional delineations based on dogmatic definitions of state attributions cannot be reconciled. A normative reconciliation is however necessary and implicit in the idea of a written, enforceable constitution.

2.5.3 *Legislation as a Rule of Law: Separation and Delegation*

In point of theory, the conceptual solution to this analytical quandary is achieved by Locke's argument in the *Second Treatise*. For Locke, writing on the assumption of a legally bound government, all the limitations on the exercise of state power are normative rather than constitutive and present themselves consistently in adjudicatory form. Since the state appears as a sum of limited competences, his question is always "Who will be the judge?" in case of a trespass or misuse of public power. The key concern is always arbitrariness and not tyranny or despotism writ large or, rather, tyranny as a concrete problem related to the actual possibility of aggrandizement to unlimited power becomes arbitrariness as a systemic, justice-related concern of the discrete individual.[159] Institutionally, what the normative

Conseil du roi to make any original decree ("arrêt de propre mouvement"). (*See* discussion in François Bourdeau, *Histoire du droit administratif (de la Révolution au début des années 1970)* (Paris: Presses Universitaires de France, 1995), pp 42 et sequitur.) The confusion resulting from the very doctrinaire understanding of separation of powers is also perceptible in the curious terminological uncertainty which marks the interchangeable use of "loi" and "décret" during the debates regarding the name which should be given to the acts of the legislative body.

[157] In Michel Troper, *La séparation des pouvoirs et l'histoire constitutionnelle française* (Paris: LGDJ, 1973), at p. 32.

[158] Pétion de Villeneuve and Goupil de Préfeln, *Archives parlementaires*, 1re série, t. XXVI, p. 734 (4 juin 1791). The abolition of the pardon power finally PT found its way in a provision of the Penal Code of 1791, not in the text of the Constitution itself. *See* discussion in Duguit 1893, pp. 596–598.

[159] "Absolute Arbitrary Power" is defined as the "Governing *without settled standing Laws*." John Locke, *Second Treatise of Civil Government* (Indianapolis: Hackett Publishing, 1980 (1690)) C.B. Macpherson, Ed., Par. 137.

understanding of the separation of powers doctrine presupposes is an impartial (and therefore independent) judiciary.[160] The fact that Locke looks at state functions through this legalistic, analytical, and judicialized prism makes him the father of modern constitutionalism.

Functional distinctions are understood in a normative sense: their interrelation unfolds starting from the premise of a concept of legislation. Four "powers" are thus distinguished. The "legislative" is the power to prescribe "settled standing laws. . .stated rules of right and property."[161] Material limits are crucial since, while Locke's legislature is the "supreme power of the commonwealth. . .sacred and unalterable in the hands where the community have once placed it,"[162] its supremacy is bound by the normative limitations placed on it.[163] A law loses its character once enacted in particularized or constitutive (non-normative) form. The distinction between "established, promulgated, standing laws" and "arbitrary, extemporary dictates and resolutions" is ubiquitously re-stated throughout the entire work.

The executive power appears as the mere subsumption of general rules to particular cases, a "*ministerial* and subordinate power."[164] [emphasis supplied] The distinction is, again, purely analytical: Locke is adamant in stressing throughout the book that "be the thing understood, [he is] indifferent as to the name" of the functions. What is meant by executive is analogous to our contemporary understandings of "non-discretionary administration of the law" and "adjudication," *i.e.*, once the law is a clear, general, non-discretionary rule, its implementation ("execution") will be relatively unproblematic. In "moderate monarchies," he notes in passing, it is necessary that "the legislative power and executive power [be] in distinct hands."[165] But this apportionment of functions among distinct branches or organs is not predicated

[160] *See* Gwyn 1965, more generally, on the rule of law (in his taxonomy, "impartiality") version of the separation of powers. An interesting development of this understanding of the separation of power and its consequences in constitutional law is provided by Paul R. Verkuil in "The American Constitutional Tradition of Shared and Separated Powers: Separation of Powers, the Rule of Law and the Idea of Independence," 30 *William and Mary Law Review* 301 (Winter, 1989). This is the form that the separation of powers finds in British jurisdictions, where the Parliament is legally sovereign (*see*, for instance, W. Jethro Brown, "The Separation of Powers in British Jurisdictions," 31 *Yale Law Journal* 24 (1921–1922)). Historically, the independence of the judiciary was first recognized during Charles I, who accepted in 1642, however reluctantly, to respect the appointment of judges "during good behavior" (*quamdiu se bene gesserint*). During the Glorious Revolution, William and Mary accepted judicial independence as a condition for their accession to the throne (in the Heads of Grievances the issue is itemized as "making judges' commissions quamdiu se bene gesserint, and for ascertaining and establishing their salaries, to be paid out of the public revenue only; and for preventing their being removed and suspended from the execution of their offices, unless by due course of law." These practices are finally raised to statutory-constitutional status, being enacted in the Act of Settlement 12& 13 W. II, c. 2 (1701).

[161] Par. 137.

[162] Par. 137.

[163] Vile 1967, at 63: "The legislative authority is the authority *to act in a particular way*."

[164] Par. 152.

[165] Par. 159.

upon the necessity of fragmenting power institutionally, rather proceeds on the assumption that legislation, given the limited trust that the government is, constitutes *an exceptional activity* and therefore, when the legislature is not in session, there is a need for a "power always in being." Put simply, there is no need for continuous law-making yet the laws, once made, need naturally to be always enforced.[166]

The further functional breakdown is, conceptually, also indebted to and revolves around the normativity-generality version of the rule of law which pervades and dominates the logic of the entire work. The federative and prerogative "powers" are the result of Locke's insightful observation that the exercise of political power will inevitably bear on issues that cannot, *by their very nature,* be predetermined by legal rules (especially once legislative rules have been restricted to a specific object and form). Since the body politic as a whole is still in the state of nature in its relation to other commonwealths, what foreigners do cannot be accurately predicted or effectively regulated and thus "their actions and the variations of designs and interests" cannot be normatively encompassed by a rule of conduct. Therefore, the federative power is functionally distinguished from performance of ministerial or administrative tasks (the executive proper).[167] The power of prerogative is also analytically and functionally dependent on the notion of legislation, qualitatively defined, since prerogative is nothing more than "[the] power to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it."[168]

The first and most specific articulation of the principle that the legislature cannot delegate its law-making function can be found in Locke and is the correlative of all these distinctions. The relevant passage must be quoted at length:

> *Fourthly*, The *Legislative cannot transfer the Power of Making Laws* to any other hands. For it being but a delegated Power from the People, they, who have it, cannot pass it over to

[166] Par. 153: "It is not necessary, no, nor so much as convenient, that the legislative should be always in being; but absolutely necessary that the executive power should, because there is not always need of new laws to be made, but always need of execution of the laws that are made."

[167] Pars. 145–148. For our purposes, the following citation from Par. 147 is of particular interest: "And though this federative power in the well or ill management of it be of great moment to the common-wealth, yet it is much less capable to be directed by antecedent, standing, positive laws, than the executive; and so must necessarily be left to the prudence and wisdom of those, whose hands it is in, to be managed for the public good: for the laws that concern subjects one amongst another, being to direct their actions, may well enough precede them. But what is to be done in reference to foreigners, depending much upon their actions, and the variations of designs and interests, must be left in great part to the prudence of those, who have this power committed to them, to be managed by the best of their skill, for the advantage of the commonwealth."

[168] Locke's prerogative is an admixture of emergency powers (sometimes dispatch in the actions of government is needed when the legislative is not in session or the executive must act in respect to "things … which the law can by no means provide for") and equity (a restatement and the equivalent of the Aristotelian notion of equity: the inflexibility and occasional severity of rules must be mitigated and particularized for considerations of justice in individual cases, a rule, precisely as a consequence of its very generality and impartiality, cannot foresee all future occurrences and thus exceptions and derogations or additions must be made to the law, in favor of the law itself). Chapter XIV-*Of Prerogative*.

> others. The People alone can appoint the Form of the Commonwealth, which is by Constituting the Legislative and appointing in whose hands that shall be. And when the People have said, We will submit to rules and be govern'd by *Laws* made by such Men, and in such Forms, no Body else can say other Men shall make *Laws* for them; nor can the people be bound by any *Laws* but such as are enacted by those whom they have Chosen and Authorized to make *Laws* for them. The power of the *Legislative*, being derived from the people by a positive voluntary Grant and Institution, can be no other than what the positive Grant conveyed, which being only to make *Laws*, and not to make *Legislators*, the *Legislative* can have no power to transfer their Authority of making Laws, and place it in other hands.[169]

If a nondelegation limitation constrains the legislature, this proviso can only be understood as a consequence of the mandate by which the government itself is constrained and as an implication of the fact that there are normative limitations on legislation proper. Nondelegation is not essentially a democratic argument, since Locke's legislature is not just a transmission belt for momentary interests and desires. The people have already decided on the proper purview and the legal limitation on the government, namely through the social contract. The legislature cannot delegate the power to make laws, its legislative function, because it exercises it in trust and is itself legally bound to act in a certain way.[170] The legislature is bound so by virtue of the social contract and the foundational assumption that the only purpose of the government is to secure the natural rights of life, liberty, and property, whose equal use it must regulate but over which it has no right to dispose arbitrarily.

This results on the one hand in an intensely rationalized (meaning, legalized and predictable) field of state action and, on the other, in a number of state attributions that to a certain extent are viewed as "a-rational". These attributions should be exercised "for the public good" and Locke relentlessly stresses this qualification, lest it be understood that not being subject to law means full subjection to the irrationality of whim, to subjective, private caprice. Yet, albeit the "public good" proviso is repeatedly brought to the fore, there is in the analytical logic of argument no rational–legal way of assessing performance of duty in such cases and thus discretionary exercises of state authority are explicitly outside the range of the Lockean legal rationality. The nondelegation limitation is the logical corollary at the intersection of these distinctions.

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[169] Par. 141.

[170] To contrast, a nondelegation argument also appears in Rousseau, in a logic whose articulation is partly similar to Locke's (counterintuitive though it may be, the affinity was noted by Rousseau himself, who maintained that he had broached the *Contrat Social* on the same premises and principles, *see Lettres de la Montagne*, Letter VI in C. E. Vaughan (ed.) *The Political Writings of Jean-Jacques Rousseau* (Cambridge, 1915) Vol. II, pp. 205–206). Notwithstanding the similarities between the two accounts, given Rousseau's premise of undivided sovereignty, in the *Social Contract* the relationship between the legislative and the executive powers loses all pragmatic moorings. What in Locke formed a rule-of-law distinction purposes—related to considerations of individual justice—between general rules related to property and liberty (legislative) and their discretion-wise unproblematic enforcement (executive) is reduced in Rousseau to the metaphysical disjunction between *will* and *force*.