

# A THEORY OF DEMOCRACY FOR THE ADMINISTRATIVE STATE

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## I. Defining Democracy

A discussion of democracy should begin with a definition of the term so that the scope of the discussion is clear. Because democracy, whatever else it may be, is certainly a type of state, or government, it would seem that it will be necessary to move backward and define “state” before proceeding. This does not move back quite far enough, however. Before defining either state or democracy, it is necessary to define “define.” The point may seem abstruse, but it bears directly on any discussion of the subject. One of the many ways in which we no longer inhabit Aristotle’s world is that we do not engage in his discussion about whether the rule of the one, the few or the many is the best form of governance. Instead, virtually everyone agrees that the rule of the many is the best, or indeed the only proper form of government, and that we will refer to that form as a democracy. While there is a great deal of insightful scholarship dealing with autocracy and aristocracy these days, normative debate about government is generally limited to determining the preferable type of democracy. In other words, the debate proceeds within the boundaries of this single term, and we therefore need to understand the process by which the meaning of this horizon-setting term is established.

Wittgenstein argues convincingly that language is neither logical nor precise, but rather “part of an activity, or a form of life.”<sup>1</sup> His well-known example is the word “game.” What is the definition of a game, he asks, the characteristic that everything we call a game must possess. “Don’t say: ‘There *must* be something in common or they would not be called ‘games’ -- but *look and see* whether there is anything common to all.”<sup>2</sup> What you will find, says Wittgenstein, is “a complicated network of similarities overlapping and criss-crossing” – no common element but rather a set of “family resemblances.”<sup>3</sup> Note that this applies to literal usages of the term, even before we reach metaphorical versions, such as odes by Santana or Wayne Fontana and the Mindbenders to “The Game of Love.” Daniel Rodgers provides an elaboration of Wittgenstein’s general point in the context of political discourse with his discussion of “contested truths.”<sup>4</sup> This

is certainly useful in understanding ordinary language, but it highlights a problem for any analysis that is trying to achieve conceptual clarity and pragmatic results. If policy analysts want to argue that games should be taxed, they will need to decide what sorts of games are included in the category in order to articulate a convincing rationale. If the tax on games is enacted into law, managerial officials will need to make precise determinations.

There is also a more specific problem that arises when defining a term such as democracy. Children playing ring-a-ring-a-roses, or adults playing chess (Wittgenstein's examples) may not care very much whether the ordinary language usage of the word game includes their activity, but democracy has acquired such normative force in the modern world that virtually everybody wants to claim it. Communist dictatorships have always been particularly enamored of the term. The nation that Economist Intelligence considers the most authoritarian on Earth and Freedom House ranks in its bottom category calls itself the Democratic Republic of North Korea.<sup>5</sup> The quondam Zaire, now renamed the Democratic Republic of the Congo, ranks fifth from the bottom on the Economist list and in the second worst category of Freedom House. Perhaps the only thing that saves this regime from the very bottom is its incompetence in exercising its oppressive control. For example, an effort by the World Health Organization to bring vaccines into North Kivu province after an outbreak of Ebola virus was thwarted when a group of machete-armed insurgents emerged from the forest in broad daylight, dragged off sixteen people, and later hacked fourteen of them to death. The name of the insurgent group was the Allied Democratic Forces.<sup>6</sup>

It is relatively easy for a critical observer to reject the claims of North Korea, Congo, or the North Kivu insurgents, but the allure of the term democracy affects scholarly discourse as well, where it is common to find definitions of democracy that include such virtues as the protection of human rights, the equal treatment of citizens, or an independent judiciary. That is arguing by verbal fiat, the academic equivalent of making friends with the schoolyard bully. It attempts to support a contestable proposition by allying it with one whose strength is unchallenged. Doing so creates at least three problems. First, it leaves us without a convenient label for regimes that are generally called democracies but do not meet the asserted standards. Second, it sanitizes the concept of democracy by establishing, as a matter of definition, the truth of a proposition such as "democracy always protects human rights." This can provide unjustified reassurance to proponents of regimes that are called democracies in ordinary language but do not meet those standards. Third, it turns "democracy" from a word used for the purpose of communication into some sort of Platonic archetype, whose in-dwelling features can be discerned by contemplation. That might be a valid methodology, but it must be argued for and not assumed, just as the normative virtues of democracy must be argued for and not assumed.

On the basis of these considerations, two criteria can be identified for defining a term such as democracy. First, the definition should be as inclusive as possible, establishing a

boundary at the outer limit of ordinary language, and excluding only idiosyncratic or tendentious usages that most critical observers will reject. Second, it should be minimalist, in the sense that it restricts itself to assertions necessary to establish this inclusive boundary and does not add features that should be established by argument rather than by fiat. This is close to an ordinary language or Wittgensteinian definition in that it includes most members of the loosely connected family. For reasons just stated, it differs in identifying precisely what Wittgenstein says does not exist, which is “something in common.” But it approximates ordinary language by excluding as few usages as possible.

With these criteria for a definition in mind, we can proceed to the term state or government. Max Weber famously defines a state as “a human community that (successfully) claims the *monopoly of the legitimate use of physical force* within a given territory.”<sup>7</sup> Hardheaded and incisive though it may be, this definition does not meet the proposed criteria. First, it is not sufficiently inclusive. Weber’s contemporary Emile Durkheim observed that many pre-modern societies leave the enforcement of offenses against private persons to the victims, with state authority limited to enforcing religious violations.<sup>8</sup> In the Early Middle Ages, for example, crimes such as murder, rape and theft were punished by bloodfeud. The leader of a clan or an extended family was expected to retaliate for any wrong that was inflicted on him or his followers, and needed to do so in order to maintain their loyalty and his prestige.<sup>9</sup> The royal government only intervened when one of these leaders engaged in what was regarded as disproportionate retaliation. The centralizing monarchies of the High Middle Ages and Reformation eras suppressed the bloodfeud, but England’s reliance on the hue and cry, where private citizens apprehended suspects – by force if necessary – is a partial continuation of legitimated private enforcement of the law.<sup>10</sup> Moreover, we need not look back to the misty past, or outward to tribal societies in remote locations, to observe this process at work. As described in Chapter One, lynching African-Americans in the South was an exercise of legitimate force by private parties. While the written law at both the federal and state level assumed a state monopoly of force, lynching was regularly used to enforce a well-defined code of conduct, and was legitimated by the complete absence of any punishment or possibility of punishment for the people who carried it out.

Second, Weber’s definition is insufficiently minimalist as well as insufficiently inclusive. It depends on the term legitimacy, which is at least as challenging and uncertain as the term that it is being used to define. As I have argued previously,<sup>11</sup> legitimacy, when applied to the state, derives from the Christian conception of monarchy. It addressed the problem of succession by granting primacy to the eldest child, usually the eldest male child, that the king had fathered through a church-approved marriage, often with the effect of excluding literal bastards in favor of figurative ones. Extending it to other types of states requires complex arguments of one sort or another. Suppose a revolutionary regime displaces an existing government, but the displaced leaders, either in a regional stronghold or in exile, continue to be recognized by foreign powers?

Suppose a foreign power overthrows a government elected by the people and installs one that oppresses them and is regarded by most of its people with smoldering resentment – for example, the governments that the United States imposed in Iran, Guatemala and Chile during the Cold War.

When these non-inclusive and non-minimalist elements are stripped away from Weber's definition, a state or government can be defined as an institution that claims control of a given territory and constitutes the dominant physical force within that territory. The government of Arkansas during the period of the Elaine pogrom was the United States. It claimed control of a large territory that included Arkansas and unquestionably the dominant force within that territory. It was to this force that Governor Brough appealed when he heard that there was some sort of disruption in Phillips County. The federal troops that the United States placed under his command could certainly have suppressed the private posses which descended on Elaine. Instead, they made no effort to detain any of the posse members and, in fact, implicitly approved their actions by continuing the slaughter and then detaining and interrogating the victims. Thus, the United States, although functioning as the government of Arkansas according to the proposed definition, eludes Weber's definition because it did not assert a monopoly of legitimate force.

The proposed definition is too restrictive for Wittgenstein, but it comes close to satisfying his criteria. If we "*look and see,*" we will observe that an institution exists within Arkansas that everyone referred to as its government, and, indeed, as its "state government." This was not the government of Arkansas according to the definition, however. Its predecessor had tried to be independent -- or at least part of a different government -- during the Civil War and had been suppressed by the United States. But what is called the state government of Arkansas performs many of the functions that are generally associated with government, although not part of the definition, such as taxation, policing, and infrastructure maintenance. Still other functions are performed by institutions whose authority is limited to a locality such as a city or county, and that are also called governments in ordinary language. But it is understood, and also part of ordinary language, that these local governments are subsidiary to the Arkansas state government, and that the Arkansas state government is subsidiary to the United States. This is a distinction necessary for analysis, but its partial variation from ordinary language must be kept in mind. We use the terms state or government much more broadly than the proposed definition allows, but we also understand the principle of dominance that justifies the more restrictive usage of the term.

Using the proposed criteria, democracy can now be defined as a state or government whose leaders are regarded as representatives of its citizens because they are chosen by an election among a significant number of those citizens. This definition meets the test of inclusiveness. Any state that does not use elections to solve the problem of succession would simply not be considered a democracy by a critical observer. (Recall the basic meaning of this

term: would *you* consider it a democracy?) It also meets the test of minimalism, although this might not seem to be the case at first. Democracy might be defined with reference to elections alone, but representation is understood to be the meaning and purpose of elections. Without this element, the definition would include regimes that would not satisfy our ordinary understanding of democracy. Suppose, for example, a theocratic regime determined the succession by having some significant proportion of its members vote for the person who they thought was holiest, or a timocracy voted for the person they thought was wealthiest? The fact that such theoretical variations are not found among modern governments casts doubt upon the usefulness of this additional element, so that is a matter that needs to be tested in the course of the analysis.

In light of democratic theory and experience, a series of questions arise about whether the definition is overly inclusive, and permits overly easy entry into the charmed circle of democracy. First, and most obviously, must all adult citizens be entitled to vote in the elections? Second, how fair and free must the elections be? Third, is it sufficient to elect only a single leader, or must there be an elected assembly of some sort as well? Fourth, is it sufficient to elect only national leaders, or must the leaders of regional and local authorities (which we call governments in ordinary language) also be determined by election?

The size of the electorate is certainly one of the most contentious issues in democratic theory and practice. Currently, any nation that can be reasonably regarded as a democracy allows all adults to vote. For at least the first century of democratic regimes in the Western World, however, women were excluded. English settler societies – Australia, Canada, New Zealand and the United States -- excluded their native, non-white populations. The United States excluded all of its enslaved population and the majority of their descendants for 175 years, until passage of the Voting Rights Act of 1965. Prior to the Reform Act of 1832, British county constituencies were limited to those with 40 shillings worth of property and borough constituencies ranged from all freemen, to property holders of various kinds to a few dozen landowners. Even after furious agitation secured passage of the Reform Act, only about 650,000 men, perhaps one tenth of the adult population, were allowed to vote in parliamentary elections.<sup>12</sup>

The term democracy, however, cannot be limited to nations that meet the current standard of universal adult suffrage. That would violate ordinary language usage and leave us with no accepted designation for all the nineteenth century regimes that are typically described as democracies. The point can be made even more forcefully. American and French revolutionaries of the late Eighteenth Century referred to the regimes they championed as republics. It was not until the early Nineteenth Century that the term democracy came into general usage. At that time, the prime example of this newly acknowledged designation was the United States, an addition to ordinary language secured by Tocqueville's magisterial study of "Democracy in America." Thus, the original meaning of the term democracy, as used in the Western World as

opposed to Ancient Greece, was simply the form of government that exists in the United States. That government restricted the franchise to white males, at most about forty percent of the adult population, but it did not occur to anyone at the time to dispute the application of the term democracy on this basis. To do so now would incur all the previously described defects of arguing by verbal fiat.

If nations with highly restrictive franchises are nonetheless recognized as democracies, then what is the lower limit? At what point does the electorate become such a small percentage of the adult population that we would no longer be willing to describe the government in question as a democratic one? It is here that the element of representation in the definition proves useful: the electorate must be large enough so that the leaders who are chosen can be plausibly regarded as representatives of its citizens. From the Thirteenth or Fourteenth Century, the Holy Roman Emperor was chosen by an electoral college that consisted of three bishops and four leading noblemen (a king, a count, a duke and a margrave). No critical observer would describe this regime as a democracy, not only because the number of electors is so small, but also because their role in the election was conceived as a status connected to their office, not as a means of representing the citizens or subjects. The Holy Roman Empire may have evolved from a system where a relatively small force of German tribesmen who were occupying a large Roman province elected their leader. This arrangement, found in other historical settings as well, is not recognizable as a democracy either. The electorate may be larger, but the element of representation is absent.

To count a state as a democracy when the electorate constitutes a small proportion of the adult population, limited only by the principle of representation, gives credence to views we currently find offensive. The argument against including women in the electorate was the same that we currently apply to exclude children: that they themselves were incapable of making an informed decision and better represented by the male head of household. The justification excluding Afro-American slaves was also the same, and implicitly acknowledged in the original U.S. Constitution. This argument continued after the slaves were emancipated, and thus no longer viewed as members of a household. Governor Brough of Arkansas, who was highly educated and extremely intelligent, simultaneously argued that African-Americans were citizens “entitled to . . . the equal protection of our laws” and that they were an inferior race who should not be enfranchised.<sup>13</sup> He sustained this seeming contradiction with the belief that the white man was the African-Americans’ best friend, and would take good care of them because they themselves were an ignorant and superstitious “race of children, most of whom neither read nor write.”<sup>14</sup> When the Duke of Wellington, as Tory Prime Minister, spoke against the Reform Bill in 1830, he said: “I never read or heard of any measure . . . which in any degree satisfies my mind that the state of representation can be improved.. I am fully convinced that the country possesses at the present moment a legislature which answers all the good purposes of

legislation.”<sup>15</sup> In his view, the narrow class of property owners who constituted the electorate were the responsible citizens who should control the leadership and policy of the nation.

Recognizing arguments of this sort, even for the purpose of constructing an inclusive definition, may seem objectionable, but it would be a mistake to use our current values as a test of ordinary language use. At present, a number of American states place artificial restrictions on voting rights, generally to suppress the vote of minority group members and college students who are deemed likely to support the Democratic Party. The same or other states continue the pre-modern practice of social death by denying felons who are out of prison, and even felons who have completed their sentences, the right to vote.<sup>16</sup> These practices are also objectionable, yet Americans consider themselves, and are considered by others, to be citizens of a democracy. People in the future may look back with equivalent objection to the failure of many contemporary democracies to register citizens at birth and follow with various reminders, facilitations and encouragements for them to exercise their voting rights. They may feel the same way about the continuation, in virtually all modern democracies, of electoral methods developed before the discovery of electricity, such as in-person voting at designated locations. Voting could readily have been conducted by telephone for at least a century. At present, many enormous business firms derive most or all of their income from electronic payments, and more than a quadrillion dollars a year (yes, that’s fifteen zeros) or five trillion dollars a day, are transferred among financial institutions by purely electronic means. Surely, we could devise an acceptably secure system to allow people to vote by phone or personal computer and thereby increase participation rates. Yet we would object to a judgment of the future that we do not live in a democracy. The most we would accept is the view that we live in an unjust democracy, a view that a contemporary critical observer should recognize as a valid conclusion.

The next question is the extent to which elections must be fair and free in order for the nation that uses them to qualify as a democracy. The Soviet Union held regular elections. It granted universal adult suffrage from its early days, which is about the same time that most Western democracies instituted this same policy by enfranchising women. At various times, people with improper “social origins,” such as those whose parents who had owned businesses before the Revolution, were excluded. Such disenfranchisements were taken seriously, and people petitioned for their removal, often by renouncing their parents. In 1935, however, Stalin declared that “a son does not answer for his father,” the 1936 Soviet Constitution explicitly forbid exclusion on the basis of social origin, and a 1937 Politburo ruling demanded that such exclusions must end<sup>17</sup> – all of this about thirty years before the U.S. Voting Rights Act ended the disenfranchisement of African Americans in the South. Nonetheless, these elections were charades. Voters were presented with only a single candidate, and any criticism of that candidate or other expression of political opposition was met with savage punishment. Voting within the Communist party for local leaders – another seemingly democratic practice – was also limited to a list promulgated by higher authorities. When no list was provided for the 1937 party elections,

the response was not a sense of freedom but of terror, because party members could not tell who was going to be sent to Siberia – incumbents, as part of the ongoing purges of the time, or party members who dared to criticize them and suggest an alternate candidate.<sup>18</sup>

Based on this example, it is relatively easy to identify the essential features of a free and fair election. There must be at least two rival candidates for leadership positions, no official punishment or officially endorsed private punishment for choosing one or the other, and no official or officially endorsed punishment for speech expressing any political views relevant to the election. Like all rules, these are subject to various exceptions and boundary conditions. Two American Presidents, George Washington and James Monroe, were elected without opposition, but no one at the time or subsequently regards this as casting doubt on the democratic nature of the nation. Aside from limits on electioneering speech, which will be discussed in Chapter Three, various restrictions have been imposed on speech deemed treasonous, incendiary or obscene by nations that are nonetheless viewed as democratic. Samuel Huntington's proposal that a nation should not be considered a democracy unless the party in power has relinquished power after an electoral defeat at least twice is too demanding;<sup>19</sup> as Ian Shapiro notes, it would exclude the United States before 1840 and Japan before 2009.<sup>20</sup> Other matters, such as whether a bill of rights or an independent judiciary is required to ensure the freedom and fairness of elections, will be considered in Chapter Three.

There are, however, truly difficult cases, regimes where the party in power seems to have controlled the result despite the presence of opposition candidates and the absence of obvious punishment for dissenting views. These situations present the familiar problem of dividing a continuum into a dichotomy is strategic behavior, the fact that the observer is trying to categorize the actions of human beings who are equally conscious of those very categories. On the one hand, incumbents in genuinely democratic regimes will use the levers of governmental power to prop up their chance of re-election, an inclination that may be indistinguishable, even to themselves, from their duty to govern in the interests of the people. On the other hand, autocrats in genuinely undemocratic regimes will often stage elections, making concerted efforts to conceal their unfree and unfair character in order to benefit from the morality and cachet that currently attaches to democracy. When Vladimir Putin ran for re-election as President of the Soviet Union's successor in 2018, he had seven respectable-looking opponents from genuine political parties, and there were neither overt threats before the election or documented punishments after it for those who supported the opposing candidates. But the exclusion of Putin's most formidable opponent on a trumped-up criminal conviction, the harassment of his campaign workers, and the manipulation of voting results indicate that this election, although not obviously a charade, was nonetheless a façade. Donald Trump dutifully congratulated Putin for his pre-arranged success, and more reputable democratic leaders offered grudging acknowledgements of the result. Even so, reasonably defensible judgments can be made by critical observers. Neither of the widely-recognized political ranking institutions, Economist



Intelligence and Freedom House, has been fooled by Putin, and characterize his regime as “authoritarian” and “not free” respectively.

The questions of whether a nation must elect a legislature or the leaders of its principal political subdivisions to count as democracy are different in many ways, but can be considered together for present purposes. Would we be willing to regard as a democracy a nation that freely and fairly elected a single leader who then controlled all executive and legislative functions and appointed all other important officials? The answer would seem to be yes. Our discomfort with a system of this sort derives from the observation by Huntington, Robert Dahl and others, that a democracy’s stability depends more on its culture than its constitution. People who are committed to free and fair elections as a way to choose their leaders are likely to demand the opportunity to elect members of the primary legislating body and the major regional subdivisions of the nation. Elites chosen in this manner will often be committed to its continuation. In fact, these inclinations tend to scale down to the legislating body of the regional subdivisions, the executive leaders of region’s local subdivisions, and the legislating body of those local subdivisions. Such inclinations, moreover, are reinforced by the structural phenomenon that Walter Powell and Paul DiMaggio describe as institutional isomorphism – the tendency of different institutions in a society to adopt similar patterns over time.<sup>21</sup>

This reiteration of the democratic principal in the national legislature and the nation’s major political subdivisions is such an apparent and important extension of the representational process that it might plausibly be seen as definitional. But there are good reasons to treat it as merely typical, and not a necessary condition for placing a nation within the ambit of democracy. The most basic is simply that a nation that chooses its chief executive by free and fair elections seems to fit the general understanding of democratic regime, no matter what its other institutional arrangements. Moreover, adding requirements regarding a national legislature and regional governments raises complex questions about the scope of authority that these institutions should ideally or preferably possess. These are important issues for democratic theory to grapple with, and the analysis would be hobbled rather than advanced if some variations were to be banished from the theory’s area of inquiry. An extreme example of the problem is the contention of some proponents of federalism that political liberty is not possible unless subdivisions of the nation not only elect their leaders but possess some form of juridical independence from the central government, thereby implicitly declaring France, Japan and the Netherlands undemocratic.

In this connection, it is also worth noting that the members of most democratic legislatures are elected on a geographic basis; that is, the nation is divided into physical districts, and the members are chosen by the voters of each district and conceived as that district’s representatives. Regional and local elections are almost necessarily based on geography as well, that is, the electorate that chooses the regional or local leaders consists of people within a defined

physical area. Whatever additional voice these arrangements provide for citizens with dissenting views and whatever protection they afford minority groups thus depends, in large part, on whether the citizens or group in question are geographically concentrated or dispersed. If they are dispersed, then they will not prevail in either the legislative or the regional elections, and might be worse off than they would be with a single ruler who represents the entire population. Again, these are important considerations that democratic theory should confront, and the discussion will not be advanced by definitional exclusions.

## II. Management and Succession

With this capacious definition in mind, a discussion of the theoretical basis of democracy can proceed. In 1923, the Supreme Court held, in *Moore v. Dempsey*,<sup>22</sup> granted the habeas corpus petition of six African-American men who had been convicted of murder in Phillips County, Arkansas. The view of the defendants' African-American attorney, the newly-organized NAACP, and others who had fought so hard on their behalf, was that the unexpected reversal of the convictions was a component of democracy, perhaps democracy itself. In an article published in *The Crisis* entitled "Returning Soldiers," Du Bois famously declared: "We return from fighting. We return fighting. Make way for Democracy! We saved it in France and, by the Great Jehovah, we will save it in the United States of America. . ."<sup>23</sup> But it was the Phillips County trials that were democracy at work. Although the Supreme Court invalidated these trials by fitting them into its previous category of mob domination, there was no mass of howling whites gathered outside the county courthouse where the trials were held. In fact, the building was guarded by a troop of U.S. soldiers, and several African-Americans attended the trials, which would have been impossible if a lynch mob had been present.<sup>24</sup> What had occurred, as Justice Holmes recognized in the Supreme Court decision, is that the trials in question had proceeded in accordance with a solemn promise, made to a gathering of citizens repeated to various political and leaders of the community, and confirmed by subsequent statements by respected community groups, that the twelve defendants would be convicted and executed. In short, the determination to execute those who were accused reflected the clearly stated preferences of the citizenry.

To be sure, modern democracies do not base their decisions directly upon citizen preferences. Such preferences are transmitted to the governing authorities through various mechanisms, most significantly by voting. Criminal trials are conducted under the authority of the state, however and, had the matter been submitted to a vote in the State of Arkansas, the result would have been exactly what occurred in Phillips County. Of course, black citizens in Arkansas were unfairly prevented from voting at this time. But neither Arkansas in particular nor the United States in general can be excluded from the charmed circle of democracies on that basis. As stated in the preceding section, if we demand that our present norms of inclusivity determine the definition, there would have been no democracies in the world before the 1890s,

when women were first granted suffrage, and no democracy in the U.S. before the 1960s, when the Voting Rights Act of 1965<sup>25</sup> – recently eviscerated by the Supreme Court<sup>26</sup> – ended outright exclusion of black citizens from the franchise. That is simply not a proper use of language. In any event, the population of Arkansas in 1920 was 73 per cent white,<sup>27</sup> and there is no question how a state-wide vote would have turned out, even if blacks had been allowed to vote. Every candidate for governor during this period explicitly reassured the voters that he would continue the subjugation of blacks, even the relatively progressive governor who had participated in the agreement to convict. One of his predecessors, elected to three two-year terms between 1901 and 1907, was Jeff Davis, a blazing racist who was indeed named after the Confederate President. One of his successors, Tom Terral, made a specific point of joining the Ku Klux Klan before running for governor, and winning, in 1924.

Our prevailing rhetoric that the majority should rule. We question limits on its control of policy, such as independent decision making by constitutional courts or administrative agencies, as “anti-democratic.” But few people in this society think that criminal trials should be subject to the democratic process. Few people think that those accused of a crime should be convicted, as were all the defendants in the Phillips County prosecutions, if a majority of the voting citizens demands their guilt. This point is so well-accepted and seems so obvious that it demands further inquiry. Precisely why do we regard the democratic process as inappropriate for determining matters of guilt or innocence? The answer that will likely come to mind is that criminal trials, and indeed all trials, constitute the deployment of government power against individual citizens. In our society, there is another norm, separate from the norm of democratic governance, demanding that citizens should be treated fairly in these circumstances. Most citizens do not have the ability to protect themselves against a government’s exercise of power. When the government proposes action that might disadvantage corporate entities or relatively large groups of individuals – safety regulations for mining companies, restrictions on chiropractors, a tax on real estate agents – those entities or groups can mount an effective opposition. The success or failure of these efforts is determined by a public debate, or perhaps interest group competition, but both are widely recognized as the essence of democratic decision making. An individual who is accused or sued, however, has no such recourse, no guarantee that he or she will be treated fairly. That is true even for individuals who are members of the dominant majority. It is definitively true for those who belong to a despised and oppressed minority such as the Phillips County defendants.

The idea that trials are insulated from the democratic process because they are based on the independent norm of fairness to individuals is a good answer and, in fact, is a sufficient one. But it is not a complete answer. Consider the control of the money supply in the United States and most other developed countries. In 1913, a few years before the incidents in Phillips County, Congress passed the Federal Reserve Act in an effort to tame the obstreperous economy that had been subject to alternating booms and panics throughout the preceding century.<sup>28</sup> The

Act created a central bank, the Federal Reserve, or “Fed.” In place of the previous policy allowing privately-owned banks to issue notes that served as circulating currency, the Act provided that such currency could only be issued by the Federal Reserve Banks – the Federal Reserve notes that now constitute cash in the United States.

Private banks could still create money, however, by taking deposits and then issuing loans; each time they do so, the depositor continues to have usable funds that can be accessed by check or cash withdrawal, but the borrower also has usable funds in the form of bank credit. This multiplier effect of bank loans works well as long as the depositors do not lose confidence in the bank and try to withdraw their funds immediately. That is a bank run, and will create a crisis because the bank has loaned out the depositor’s money to the borrowers and cannot demand payment of the loan until it comes due. To avoid such a crisis, the Federal Reserve Act requires banks to keep a certain amount of money readily at hand. in the form of either federal reserve notes held in its vault, or funds deposited in an account (a non-interest bearing account, in fact) at one of the Federal Reserve Banks. The original version of the Act provided that the Federal Reserve’s Board of Governors would control the money supply by setting the amount of reserves that a bank is required to maintain. By decreasing the reserve requirement, from ten to nine percent of deposits for example, the Board could increase the amount of money in circulation because banks would be able to issue more loans on the same deposit base. By increasing the reserve requirement, the Board could decrease the money supply.<sup>29</sup>

As is often the case, the theory is sound but the practice is awkward. Even small adjustments of the reserve requirement produce large fluctuations in the money supply and a variety of other economic dislocations and inconveniences. During the 1920s, the New York Federal Reserve Bank developed a more elegant and precise means of control.<sup>30</sup> It was based on the realization that whenever the Fed makes a purchase on the open market –for office supplies for example – it can create money by simply entering an amount in the seller’s bank account. This entry is money because American money, whether in the form of physical cash or an account entry, is nothing more than a promise to pay issued by the Federal Reserve. Conversely, whenever the Fed sells something, it destroys money because the one place on Planet Earth where a promise by the Fed to pay has no value is within the walls of the Fed itself. In fact, when a Federal Reserve cash office receives worn out paper bills, it shreds them. Thus, the Fed can increase or decrease the money supply by simply buying or selling things. It can do so with absolute precision, down to a single dollar, and without requiring any bank to alter its lending practices or deposit base. Of course, buying and selling an actual product would produce dislocations in that product’s market as well as other inconveniences. If the Fed were buying office supplies, a typical increase in the money supply would leave it with a billion reams of paper, and these might be difficult to sell when it wanted to implement a corresponding decrease. Instead, the Fed buys government issued securities from banks, or sells these securities back to

banks. Physically, these financial instruments are simply account entries and the market for them is so humongous that it will not be disrupted by even a large purchase or sale.

The Federal Reserve is an administrative agency, headed by appointed rather than elected officials. In the U.S., many of the hundred or so important federal agencies are characterized as executive agencies. This means that they are subject to direct control by the President, who is an elected official of course. But many other agencies are independent, in the sense that the President can only appoint but cannot dismiss their leaders, and thus cannot exercise such direct control. The Federal Reserve is an independent agency; in fact, it has the highest level of independence in the federal system because it has a relatively large number of appointed leaders and they are each appointed for fourteen years, the longest term in the system.

The distinction between executive and independent agencies is essentially invisible to Congress, however, whose members are the other elected officials in the federal government. All the mechanisms by which Congress controls agencies – altering their authority, determining their budget, and supervising their activities through oversight hearings or delegated investigations – are equally applicable to any federal agency, executive or independent. But the Federal Reserve is an exception, most notably because Congress does not determine its budget. In the process of controlling the money supply through purchase and sale of government securities, the Fed winds up with large amounts of these securities in its possession at various times, and these securities pay interest. In recent years, the annual amount of this interest has approached 100 billion dollars. The Fed returns most of this money to the Treasury, but it keeps the change –several billion dollars – for its own operations. This means that it does not need an appropriation from the federal budget, and does not need to account to Congress for its expenditures in the way that is required for other federal agencies, executive or independent.<sup>31</sup> That is why the Philadelphia Federal Reserve Bank has a large Alexander Calder mobile in its lobby, why the Fed can hire top quality economists and perhaps why it has become the most highly regarded agency in the federal government. Congress can still exercise control over the Fed through oversight hearings or investigations, but has tended to be notably circumspect about this method of control as well.

Independent agencies, like judicial review and national parks, are a distinctly American contribution to modern government, but many other democratic nations that do not otherwise rely on this mechanism have granted a similar level of independence to their central banks. This policy cannot be motivated by the concern for the protection of individuals that partially explains the independence of the judicial process. It would be difficult to think of a worse way for the government to oppress an individual than to adjust the money supply. While the value of a person's U.S. currency can be decreased by increasing the money supply, the diminution is incremental and proportionately small for even the largest adjustment, and it affects the value of every dollar held by every person in the world. The usual explanation for central bank

independence is that a government in power could use its control of the money supply for short-term political advantage.<sup>32</sup> Having mismanaged the economy and caused a recession, the government could suddenly increase the money supply as the next election approached, lowering interest rates and producing an artificial and temporary economic upturn, sometimes described by economists as a dead-cat bounce.

Any effort to construct a theory of democratic governance is thus confronted with a dilemma. While the theory seems to suggest that the majority should be in control, either directly or through elected representatives, most people believe that judicial trials and monetary policy should be insulated from that process. These are hardly minor matters that can be ignored or minimized on the grounds that they involve idiosyncratic features. A theory would seem to require that we generalize from these cases and identify a general principle which would tell us when the majoritarian control that is central to our concept of democracy should prevail, and when it should be replaced by other methods of decision making.

Before concluding that any effort to identify this principle should focus on the disruptive effect of the political process, consider one further example – ordinary regulation of a technical area such as the use of pesticides. In the U.S., pesticide use is regulated by the Environmental Protection Agency (EPA).<sup>33</sup> As an executive agency, EPA is subject to presidential control, and as a federal agency in general, it is subject to congressional control. But the connection between this control by elected officials and the electoral process is tenuous at best. For some people, perhaps farmers, owners or executives of agricultural firms, and environmental activists, pesticide regulation might be a major issue, determining the way they vote. Most voters will not care as much and, more important, do not know anything about the issue. Perhaps it could be argued that pesticide policy is part of the more general subject of regulatory control, which has certainly been a salient issue in recent elections. Some people feel that government regulations are disrupting the free market and hampering American business firms, while others believe that more regulations are necessary to protect workers, consumers and the environment. Without detailed knowledge, however, these general attitudes cannot be readily translated into a specific field. Perhaps pesticides are an area which is currently over-regulated, unnecessarily impairing the level of food production, or perhaps it is under-regulated, allowing serious health hazards that most people would want to avoid. Perhaps the companies that currently dominate the pesticide market favor extensive regulation because it has the effect of excluding new competitors, or perhaps one producer with a dominant market position favors the regulation while other producers oppose it. Perhaps environmentalists oppose extensive regulation because restrictions on pesticides encourage the use of crops that are rendered pest-resistant by means of genetic modification.

The general principle that unites trials, politically sensitive regulation and technically complex regulation can be described as management. This is nothing less than the way that

government carries out its functions. Robert Post identifies it as a separate domain for determining the application and operation of constitutional rules.<sup>34</sup> As Post suggests, the term, admittedly somewhat broad and diffuse, can be brought into focus by contrasting it with another basic aspect of government: the way that the government determines the identity of the human beings who command it. This determination presents a problem that arises from the interplay between two obvious conditions: the social or cultural fact that people generally desire continuity in government and the biological fact that human beings are mortal. We can describe this as the problem of succession. The myriad difficulties that these humans, once selected, must confront, in carrying out the functions of the government that they command can be described as the problem of management.

As political theory has developed in the Western World, there has been an increasing emphasis on the problem of succession, and a complementary consignment of the problem of management to other disciplines. In the *Republic*, Plato addresses both issues, and in fact devotes more time to management, assuming that he is actually speaking about government in this Delphic book, and not exclusively about the human soul.<sup>35</sup> Aristotle, who is often confusing but rarely enigmatic, addresses both issues in constructing his classic taxonomy of governments in *The Politics*. He defines three types, each of which has a virtuous and perverted form. Rule by one person can be either virtuous monarchy or perverted tyranny and rule by a few can be either virtuous aristocracy or perverted oligarchy. The final category is the rule of the many. For the virtuous version of this last category, he uses the term *politea*, this being the only one of his terms that the Word program underlines in red, and, in fact, has not become a basic component of modern political discourse. For the perverted version, he uses the term democracy.<sup>36</sup>

By speaking in terms of rule, and distinguishing the virtuous from the perverted, Aristotle is addressing the problem of management. On the other hand, the distinction between the rule of the one, the few and the many directs attention to the problem of succession, since the number of rulers does not, by itself, say anything about the way they carry out their functions. Political theory in the Western World, although it developed in Aristotle's shadow and employed his terminology, has gradually shifted toward an emphasis on the problem of succession. Perhaps this is because, as Alasdair MacIntyre points out,<sup>37</sup> we have lost our faith in virtue, or perhaps we have become acclimated to perversion. We tend to distinguish one-person rule as either monarchy or dictatorship, depending on whether succession is determined by heredity or force, and recognize that either can be either benevolent or tyrannical. Similarly, we distinguish the ruling few as either an hereditary aristocracy or a self-perpetuating junta or politburo, each also capable of good or bad behavior.

The main concern in this book involves Aristotle's third category, the rule of the many. The ordinary meaning of *politea* in Ancient Greece seems to have been close to what we would call a constitution and is, in fact, the title of Plato's *Republic* in Greek. What Aristotle has in

mind when he uses the term as one component of his taxonomy is probably a government of the many that decides in favor of the common good, as opposed to a democracy -- the perverted form -- where the poor, who are typically the many, decide in favor of their own interests and oppress the wealthy.<sup>38</sup> He further distinguishes between democracies that are constrained by law and those where “not the law, but the multitude, have the supreme power, and supersede the law by decree.”<sup>39</sup> This latter case, apparently the worst of a perverted lot, is brought about by a demagogue in Aristotle’s view.

*Politics* became accessible to Western thinkers in the Thirteenth Century when it was translated into Latin,<sup>40</sup> and thereafter, most political theorists knew enough about the book to think of democracy in these terms. St. Thomas Aquinas, who knew a great deal about it, reiterates Aristotle’s tripartite categorization of government in terms of their succession rules, and thus treats the essence of democracy as the rule of the many.<sup>41</sup> But St. Thomas, together with other early Western political theorists like John of Salisbury,<sup>42</sup> lived in a distinctly different world. The decline of the independent Greek cities that served as the historical source material for the *Politics* began during Aristotle’s lifetime, when Philip of Macedon conquered much of the Greek world and his son Alexander –ironically Aristotle’s pupil -- conquered still more of it. The empires they established, and that suppressed the independence of the city-states, were then conquered by Rome, which conquered the remainder of the Greek city-states and suppressed everybody’s independence. Rome founded many cities in the West, but these were subordinate and monotonously uniform means of local governance, not independent political entities.

The Western World arose on the ruins of this Empire, and spent many centuries overlooking its demise or trying to restore it. The Holy Roman Empire, a loose and generally dysfunctional confederation of Central European states, stumbled along for a millennium until it was extinguished by Napoleon. By the time John and St. Thomas were writing, therefore, it was the Roman Empire that served as the model of authority and the subject of inquiry. Actual authority, to which the theorists sometimes paid attention, was increasingly exercised by the centralizing monarchies that would evolve into modern nation-states. There were independent cities in northern Italy and several other places at this time, and some had democratic elements. But with the notable exception of Venice, they did not survive as political entities. The cities that were founded in northern Europe as trade and industry revived were generally chartered by the kings, and were conceived as corporations, that is, a collective body of the king’s subjects.

Theories about democracy in the Western World, therefore, were conceived as modes of opposition to empire or monarchy. Rather than one alternative that a city-state could choose from a conceptually available, and even pragmatically achievable smorgasbord, democracy was seen as a modality that might replace existing regimes. This led to an emphasis on the question of succession; what distinguished democracy was that it chose the political leadership of the regime by election, not the way that it kept order or conducted foreign relations. The emphasis was amplified by the Western concern about the legitimacy of human governance in general, as



opposed to divine authority, a theme derived from Jewish and Christian thought. Social contract theory, the standard justification for governmental authority in modern Western thought, is concerned with that authority's extent and the residual rights of those who entered into the imagined contract, thus engaging management issues at a high level of abstraction. When it is invoked to justify democracy, however, it generally narrows its attention to the people's designation of the individuals who will exercise authority through the electoral process. Deliberative theory, which has recently displaced social contract as the favored view, might appear to move away from this emphasis on succession, since the populace might rationally discuss any governmental issue. The problem is that this rational deliberation is as imaginary as the social contract. The only real decision that the populace makes in a modern democracy is the choice of representatives. When the misty ideas of deliberative theory are translated into pragmatic recommendations, therefore, they generally congeal into modifications of the electoral process. Other theories of democracy, to be discussed in Chapter Two, display this same orientation.

Problems of succession, moreover, attract attention because they possess a dramatic quality that problems of management rarely equal. This was true in the era of monarchy of course when succession to the throne depended upon the king's choice of a spouse, which was often a subject of political intrigue, sometimes of salacious gossip and almost always of intense human interest. Once that drama was concluded, it would be followed by a scintillating set of questions about the queen's fertility and the king's sexual performance. After Louis XVI married Marie Antoinette, it turned out that he was unable to consummate his marriage due to a malformation of his penis. When Marie's brother, Joseph II of Austria – one of the last Holy Roman Emperors -- visited Paris, Louis consulted him about the problem. Joseph wrote to a correspondent: "Oh, if I could have been there just once. I would have set thing straight – he has to be kept erect and pushed, or beaten, to make him discharge his f\_\_\_\_, just like donkeys."<sup>43</sup> At the time, the government of France was being managed so incompetently that the nation was spiraling downward to financial ruin, the situation that ultimately led to the Revolution and the monarchy's demise. But how could any management problem possibly compete with Louis' bedtime difficulties?

A similar situation prevails in democracies. Both the contemporaneous attention of the citizens and the retrospective interest of historians and political scientists tend to be commanded by the pageantry and drama of the electoral process. Speeches, rallies, marches, banners, slogans, jingles, posters, debates and advertisements – first in newspapers then on radio, television and now the internet -- all combine into a readily recognizable and viscerally appealing body of contemporary experience and subsequently-available documentation. And even though biological reproduction is not an issue in the succession process of an electoral democracy, two of the past five American elections have seen the return of the penis as a further embellishment to the allure of electoral campaigns. This is certainly not surprising; the

essentially dramaturgical character of elections arises from deeply embedded pathways in the human psyche, and like ritual and ceremony, reiterate that appeal with each performance.

None of this is to say that management issues have been ignored in modern political science or public policy scholarship. The point is that they have been largely ignored in discussions of democratic theory. The management of the government – the process by which the government performs its functions—has been treated by theorists as external to the essential inquiry, something for a democracy, once justified and constituted, to contest with or control. As suggested above, the process by which political theory moved away from the management issues that figure prominently in Greco-Roman thought and toward a primary emphasis on succession began with the earliest development of Western political theory in the High Middle Ages. In the crucial category, that is, the rule of the many, this resulted in large part from the instantiation of such rule in a new device, the election of representatives to a national council or assembly. By the time proponents of representation were ready to embrace the previously suspect term “democracy,” they had become so fully enamored with the electoral process that they could only see this term as consummating their abiding fascination.

Democratic theory’s tendency to focus on the issue of succession has been greatly amplified by the advent of bureaucratic government. According to Max Weber’s classic definition, bureaucrats are hierarchically organized government officials, answerable to a superior official, who are appointed to their positions on the basis of their credentials in the specific substantive field that their particular agency addresses.<sup>44</sup> It would appear that nothing could be more distant from the model of a democratic legislature which is, also by definition, collegial rather than hierarchical, answerable only to the populace, elected rather than appointed and composed of generalists, not specialists. Thus, as the management functions of the modern state have been increasingly assumed by bureaucratic institutions, those management functions have been seen as increasingly alien to the democratic process. Management, and specifically bureaucratized management, is a beast to be tamed by democracy, not one member of the team that pulls its cart.

A common way that democratic theorists deal with the advent of bureaucratic or administrative government is to project values and strategies that emerge from elections, that is, from solutions to the problem of succession, onto bureaucratic institutions. The usual rationale for this approach is that it will render the otherwise discordant administrative process more “democratic.” Elections can be viewed as making government officials accountable to the populace, so bureaucratic officials should be accountable to the populace as well. Elections are a means by which citizens participate in determining the direction of the nation, so citizens should also be able to participate in determining the direction of bureaucratic institutions. The issues at stake in an election should be transparent to those citizens, so the issues that bureaucrats decide should be similarly transparent. These values of accountability, participation and transparency

are not necessarily wrong when applied to bureaucratic management, but neither are they necessarily right. Clothes designed to fit one person might fit another person as well, but making the assumption that they will does not carry a high probability of success. Procrustean approaches tend to be stretch, and will often cause one to lose one's footing.

What renders this remarkable lacuna in the scope of democratic theory still more remarkable is that democracy and bureaucratic governance developed in the Western World at precisely the same time. In France, the clearest case, democracy dates from the events of 1789 to 1792, when the traditional and still quasi-feudal National Assembly, convened by Louis XVI to raise taxes, ended royal absolutism and led to the election of a National Convention by universal manhood suffrage, which in its turn ended the monarchy and then the quondam monarch. Simultaneously, the Assembly swept aside the ingrown, imbricated administrative structure of the Ancien Regime and replaced it with now-familiar ministries, defined by subject area – Foreign Affairs, War, Navy, Interior, Justice and Finance – and staffed by credentialed, full-time public officials. Between 1787 and 1789, the United States, the product of a democratic revolution that had occurred a decade earlier, established a national government with similarly-defined and organized departments. Because the new nation had emerged from thirteen separately governed colonies, and lacked the centralized patterns of control that prevailed in France, the full development of national administration would take a century, but the pattern was clearly established. Britain presents a somewhat more diffuse picture. Its democracy developed gradually over the course of the century that preceded the 1780s. But a crucial turning point came in 1782, when the Prime Minister, Lord North– ironically as a result of Britain's defeat by the American revolutionaries. Three features distinguish this event from previous changes in leadership: first, Lord North was forced to resign by Parliament, rather than by the king; second, when he resigned, all the other ministers in the Cabinet resigned with him, thereby declaring themselves an elected government rather than a group of royal servants; and third, the Rockingham Whigs who replaced them insisted that the Cabinet could consider issues without the prior permission of the king.<sup>45</sup> In the three decades that followed, the continued evolution of democratic rule moved the monarchy from off the front page and into the gossip columns. At the same time, the government bought out the nobles who held public offices as property – often for large sums – and reorganized the government in the same subject area and professionalized pattern as in France and the United States.

To be sure, the administrative revolution of the late Eighteenth and early Nineteenth Centuries was not restricted to the new democracies. Joseph II of Austria, in addition to his role as sex counsellor, was an enthusiastic reformer. Although, as a Habsburg, he belonged to one of Europe's most venerable and traditional families,<sup>46</sup> he reorganized the Austrian government into the same modern set of departments, replaced the nobility with career officials, and demanded regular reports from them documenting their performance.<sup>47</sup> The Prussians followed two decades later, after Napoleon had taught them that they were not as efficient as they thought they

were. Under Stein and Hardenberg, they began a process of modernizing their governmental system that not only produced a highly bureaucratized structure but led to the earliest initiation of many modern social welfare programs.<sup>48</sup> But both these nations, although they certainly did not become democracies, moved decisively in that direction over the course of the Nineteenth Century, instituting parliaments that played an increasingly important role in setting public policy. Within the Western World, only Russia, which was partially outside the orbit of its culture, instituted bureaucratic government without a concomitant process of democratization.

However the relationship democratic and bureaucratic government in other nations is assessed, the simultaneity of their advent in the three regimes that led the modern world into democracy – Britain, the United States and France – is sufficient to raise a serious question that democratic theory must confront. Is there an organic relationship between these two momentous trends? Is an account of government that portrays democratic rule and the administrative state as two opposing forces truly viable when both came to fruition in the Western World during a single generation? And further, is it plausible that democracy should have proven as stable as it has in Britain and the U.S. since the 1780s, and in France after 1875, if it had been required to carry out its functions through a system that was foreign to its values? Could it truly live and flourish in such close association with the dangerous beast of anti-democratic administration? To develop a theory of democracy without taking modern administration into account can only be regarded as a form of alternate history, like novels that imagine what the world would be like if the Nazis had won World War II,<sup>49</sup> the Jews had taken refuge in Alaska after the War,<sup>50</sup> computers had been developed in the mid-Nineteenth Century<sup>51</sup> or the Black Death has prevented Europe's rise to dominance.<sup>52</sup> This is often regarded as a sub-genre of science fiction;<sup>53</sup> in any case, it is not political theory.

### III. Representation and Responsiveness

The goal of this book is to develop a theory of democracy that addresses both the problem of succession and the problem of management, with management treated in its modern, administrative or bureaucratic form. Obviously, the theory must incorporate the use of elections to solve the problem of succession, or it would not be recognizable as a theory of democracy. But to develop a comprehensive theory, it is also necessary to subordinate the electoral process to some larger principle, to treat elections as only a component of democratic governance rather than its essence. The place to seek this larger principle lies in the territory that the electoral process shares with bureaucratic or administrative management. That territory, historically and perhaps conceptually, is the modality of representation. Representation, in turn, rests upon an overarching norm, the belief that the purpose of government is to respond to the needs and desires of its citizens, that it should be a servant rather than a sovereign. This norm, not the use of elections to solve the problem of succession, is the essence of modern democracy.

One of several conceptual reversals that this book proposes involves our view of the Ancient Greek political philosophy, and specifically Aristotle. Instead of treating him as the progenitor of democratic theory, and then moving forward to our own historical experience, we can begin with our experience and look backward to see Aristotle in that light. From this perspective, his concept of democracy seems truly alien. To begin with, of course, it is what we call direct democracy, where the citizens meet in an assembly to debate and vote on basic policy decisions. This mode of governance is largely unknown in the Western world, although gestures toward it were made in the nasty little theocracies of Seventeenth Century New England, and are currently used by university administrators to slake faculty members' thirst for autonomy. Modern democracies sometimes use referenda to resolve major policy issues such as Britain's membership in the European Union and Ireland's abortion law, or more commonly to decide to some opaque, arcane question that an interest group has managed to place on the ballot in an American state. But these are delimited decisions, not general governance, and the decision process is more similar to a modern election of an official than to an open debate in an assembly. Second, Aristotle's concept of democracy requires that the public officials who carry out the assembly's instructions be selected by lot, so that each individual citizen is ruling and being ruled in turn. We use this mechanism to choose juries, as the Philips County trials exemplify, but again, this is a particularized function that is never extended to the officials who lead modern nations, or even carry out its more specific policies. The relationship between these mechanisms and modern democracy will be further explored in Chapter Two.

It is often said that the reason for the disjunction between ancient and modern theories of democracy is that contemporary polities are too populous and extensive to be ruled by assembly of the people. That same shift in the magnitude of the polity, plus the greater complexity of modern technological society, is given as the reason why we cannot choose our public officials by lot. But these observations, however valid they may be, are not the real explanation for the conceptual disconnect. That explanation is both simpler and more profound. Western democracy emerged from a set of medieval practices that were firmly anchored in feudal society and, although partially suggested by Roman civil law, had nothing to do with Greek theories of democracy. During the Thirteenth and Fourteenth centuries, only a handful of educated scholars were reading Aristotle, but everyone knew that the increasingly powerful monarchs of the leading kingdoms were struggling to raise the additional revenue they needed to support and advance their authority. While feudal law strictly limited the types of taxes and charges they could impose on their subjects, additional exactions were allowed if those subject to them agreed. It was easy enough to assemble the leading nobles of the realm, and even easier to consult the hierarchically organized Catholic Church. But the so-called third estate, that is, free commoners who lived in the royally chartered cities or owned the land they farmed, had been rapidly expanding with the revival of commerce. To an increasing extent, that was where the money was. But how was the consent of the large and disparate group to be obtained?

The solution that the Western monarchies developed was that these commoners were to meet in local groups and choose representatives to attend a council and approve the desired taxes. This process of representation may seem obvious to us, but it constitutes a tremendous conceptual advance. The Greeks and Romans never developed it, although they came close in a few instances; their failure to do so, as will be discussed in Chapter Two, may explain the decline and fall of the Roman Empire. From the moment this device was first employed, however, it was apparent that the manner in which the representatives were chosen was an essential issue. This is, clearly, a version of the problem of succession, but with the intensifying feature that it was not only essential in needing to be decided, but also essential in determining the essence of the office itself. When one speaks of succession for a king or an aristocrat, there is generally a pre-existing idea about the basic identity and function of these positions. But the process by which representatives are chosen determines, to a great extent, who they are and what they are supposed to do. In other words, for representatives, the problem of succession is not only pragmatic but conceptual. It demands a great deal of thought.

As time went on, the councils or – as they were often called – assemblies or parliaments withered in France and Spain but flourished in England. By the Seventeenth Century, the English Parliament became powerful enough to cut off the king's head and rule in his place. Parliamentary rule quickly led to a dictatorship, then a restoration of the monarchy, but Parliament reasserted itself and deposed the restored monarch's successor, James II. In 1713, the monarchy was inherited, again through the leadership of Parliament, by George I, a non-English speaking German prince of no particular distinction, followed by his son whose English was somewhat better and judgment somewhat worse. Often more concerned about their ancestral principality of Hanover than the complex world power that they ruled, both deferred to extremely talented Prime Ministers, first Robert Walpole, who made life convenient for both Georges by ruling in their place, and then William Pitt, who rescued the second one from the potential disastrous decision to start a war with France by winning it. As a result, the Power of Parliament expanded steadily. George III tried to reassert royal authority, thereby alienating the powerful forces that had become allied with Parliament's Whig majority. When the American colonies were lost to a democratic revolution, Lord North, the Prime Minister of his choice and virtually a family member, resigned. The rest of the cabinet resigned with him, thereby declaring themselves a government responsible to Parliament, rather than ministers of the king and marking a definitive transition to democracy in Britain.<sup>54</sup> William Pitt the Younger became Prime Minister and guided England ably through the Napoleonic War. In the first decades of the Nineteenth Century, George III, in the process of remaining king for 60 years, became and insane nonentity and his son, in the process of waiting for his death, became an inane voluptuary. The monarch was been reduced to a figurehead and the people's representatives in Parliament took full control.

Voltaire visited Britain during Walpole's period of leadership and sang its praises when he returned to France.<sup>55</sup> Montesquieu visited as well, and ensconced the balance of political forces that had been achieved in his three-branch theory of ideal governance.<sup>56</sup> When an incendiary mixture of political conflict, economic self-interest and Enlightenment ideas ignited the American Revolution, it was these sources, and this political experience, that guided and inspired the Revolution's leaders. Most of them knew Aristotle well enough, but they did not rally under the banner of "no taxation without a popular assembly and selection of government officers by lot." What they wanted was representation, first in the British Parliament and then, when that was not forthcoming, in an elected parliament of their own. After a short and troubled period when they attempted to rule the new nation entirely by this means, they realized that they needed a chief executive as well, in other words, that they needed to reproduce the balance of forces that Walpole had achieved and Montesquieu had championed. Having rejected the King, and with no desire for another one, they simply extended the electoral process by which legislative representatives were selected to the selection of the chief executive, and declared that person to be the representative of the entire populace.

In France, the long reign of the over-sexed and feckless Louis XV left a similar lacuna in the nation's governance. Condemned to live in the shadow of the Sun King, his predecessor and grandfather, Louis necessarily relinquished control to a regent (the Duke of Orleans) until he reached the age of thirteen, voluntarily relinquished control to another regent (his tutor, Archbishop Fleury), until he reached the age of thirty-three, and then scandalously relinquished control to his various mistresses (including the famous Madame Pompadour) until he died in 1770. His successor, the unfortunate Louis XVI, was a more conscientious ruler, but he lacked the force of personality to restore the prestige of the monarchy, and suffered in the early years of his reign from the one problem that was clearly worse, in France, than being over-sexed, which was his difficulty in consummating his marriage. Short of funds for having allowed rivalry to overcome ideology in supporting the American Revolution, hereconvened the long-disbanded representative assembly for the old medieval purpose of voting increased taxes. This being the end of the Eighteenth Century rather than the Thirteenth or Fourteenth, however, that assembly, following English ideas and English practice, cut off the King's head. Its resulting control also followed English practice in yielding quickly to a dictatorship, but the idea that an assembly of elected representatives should play at least some role in governing the nation had become established.

Although the term democracy gained increasingly familiarity as these momentous events proceeded, proponents of representative government tended to avoid it. Who wants to be called a pervert by Aristotle, after all? The French and the Americans preferred the term "republic" while the British simply referred to parliamentary rule. An alternative approach was to use the qualifier "representative" to dulcify "democracy," somewhat analogous to our usage of "benevolent dictatorship." This distinction between pure or true democracy and representative

democracy goes back at least to Spinoza. It was used by Madison in the Federalist Papers<sup>57</sup> and relied upon by Edmund Burke, both in championing the demands of the American colonists and excoriating the French revolutionaries. During the early decades of the Nineteenth Century, however, the unmodified term came into increasing use. In part, this was because scholars of ancient history had rehabilitated Athens, once regarded as mercurial and amoral, but now seen as the birthplace of liberty, philosophy, theater and realistic sculpture. More importantly, representative democracy had become so securely established as the only form of popular rule that any modifier could be dropped, the way we no longer bother saying Xerox copies and that Brooklynites stopped calling their baseball team the Trolley Dodgers. The political battles regarding popular rule occurred within the framework of representative democracy, and involved questions about the means of electing representatives: whether it should be done directly, like the U.S. House of Representatives or indirectly like the U.S. Senate, and how extensive suffrage should be. As Tocqueville confidently declares, in his classic work 1835 and 1840 work that is not titled “Representative Democracy in America,” American political institutions are not only “democratic in their principle, but also in the developments; thus the people name their representatives *directly*.”<sup>58</sup>

As this brief history suggests, representation did not develop in the Western World to implement democratic government, but rather as a means by which the centralizing monarchies could escape the constraints of the feudal system and increase their authority. Its connection to what we now view as democracy resulted from a major conceptual reversal in normative attitudes, a reversal that made representation as essential modality for addressing both the problem of succession and the problem of management. This concept is that the purpose of government is to respond to the needs and desires of the citizenry. Thus, instead of identifying the government with the monarch, and representation as a means by which the monarch could obtain the consent of his subjects, government is now identified with the populace, and representation become the means by which the voting public induces or compels the political leaders to serve the people’s individual needs and satisfy their individual desires. In other words, a massive conceptual shift occurred at the end of the Eighteenth Century, a shift in the way people viewed the purposes of political behavior and collective action. Representation, a mechanism that had evolved under the previous conception, and flourished only in limited areas, turned out to be an effective and convincing mechanism for instantiating this new conception.

The new conception of political behavior and collective action can be associated with the principle of popular sovereignty. Stated in positive terms, this principle is both grammatically and historically incoherent. Grammatically, people cannot rule themselves because the term “rule” implies command. Pragmatically, any effort to dispense with such command is inconceivable in a modern context, “modern” here referring to the period after the Agricultural, not the American Revolution. Stated negatively, however, the principle is transformative: the government is not a sovereign and so should not act in its own interest but should respond to the



people's needs and desires. This not only rejects the conceptual basis of pre-modern monarchies, but also rejects the transitional claim, championed by Rousseau and others, that one can salvage the sovereignty of government by asserting that it represents the people's "general will."<sup>59</sup> While not necessarily a bad idea, particularly as revived by modern theorists in the more amicable form of "the common good,"<sup>60</sup> this it is not the unifying principle of modern democracy and administration. Rather, that principle is that the government should be responsive to the people.

It is traditional in social theory to divide society into political, economic and civil realms.<sup>61</sup> The development of democracy through the mechanism of representation clearly belongs to the political realm of this tripartite classification. Understanding representation as a means of instantiating a responsive government provides an explanation for what otherwise appears as remarkable and mysterious coincidence, namely, the simultaneous advent of democratic government and the Industrial Revolution. The Industrial Revolution is the most significant and cataclysmic development in the history of the Western World. Nothing else compares with it. The Black Death ended the already-weakened institution of serfdom and stalled economic progress for a time, the Renaissance was a movement among intellectuals and artists, the Reformation shattered the unity of a church already suffering from the self-inflicted wounds of the Great Schism and the externally-imposed constraints by the centralizing monarchies. But the Industrial Revolution transformed the experience of life itself. It demolished the traditional village where most pre-modern Europeans lived and turned the land into an income maximizing agricultural asset ("But times are altered; trade's unfeeling train, Usurp the land and dispossess the swain"<sup>62</sup>). It chased and enticed people into the rapidly expanding cities, where they exchanged their cottages for tenements, their farms for factories, and their relative self-sufficiency for absolute dependency on managed systems that provided food, water and security. Most significantly, it stripped away the norms and structures on which ordinary people relied and subjected them to a regime unconstrained by traditional controls, a regime whose dynamism simultaneously promised prosperity and threatened oppression ("If to the city sped – What waits him there? To see profusion that he must not share").

In reaction to these dangers and dislocations, people sought protection from the dangers and dislocation that the Industrial Revolution had created. With the intermediate institutions to which they had relied-- the priesthood and the local nobility -- left behind or stripped away, the only superior authority to which they could appeal was the government. In traditional society, government had been remote, a group of officials in the national or provincial capital who raised taxes for personal indulgences or foreign adventures by farming out the collection process to private entrepreneurs. Now people, and specifically the people subject to the oppressions of modernity, were concentrated in the cities where they could readily communicate with one another and organize collective efforts. In effect, the populace was in direct contact with

governing authorities, and both induced and empowered by their new situation to make demands on those authorities. In other words, what they demanded was a responsive government.

The demands that people made upon their government as a result of these pragmatic and conceptual motivations elicited a variety of responses. In some cases, the monarchical rulers were able to remain in control, but they generally were required to make concessions to the people. It was Joseph II, acting on his own initiative, who declared that the purpose of government was to secure “the general good of the greatest number,” and began to reform the Austrian Empire along administrative lines.<sup>63</sup> Its Nineteenth Century emperors were generally more reluctant modernizers but gradually conceded power to elected officials while continuing to expand the state’s ability to provide services to the populace. Prussia, and then the united Germany it forged, went through a similar process of partial democratization, in part because its rulers wanted recruits for a citizen army. But the more striking and more relevant cases are the democracies or quasi democracies that emerged with such rapidity at the end of the Eighteenth and the beginning of the Nineteenth Century -- the United States and France, through revolution, Britain through constitutional reform, Sweden in 1809 and the Netherlands in 1815 through a combination of the two. People’s demands for governments that responded to their needs and desires led to the ascension of elected leaders who were beholden to the populace for their positions.

This theory enables us to explain one further historical conjunction – the simultaneous advent of democracy and bureaucratic government described above. It was not an accident or a coincidence; rather, it was a pragmatic political solution to the dislocations that occurred in the economic and social realms. Bureaucratic government is the only form of government that can ensure that people in the modern world are supplied with the necessities of life, protected from oppressive or debilitating demands by their employers, provided with the education and the health care that they needed for modern urban life and given parks and other recreational facilities to replace their long-lost open fields. This then is the organic relationship between democratic and administrative government, the reason they were instituted at the same time in many Western nations and ultimately became dominant in all of them.

The modality of representation secures governmental responsiveness for both succession and management issues, and thus serves as the basis of a comprehensive theory. We elect political leaders because this is the best way that we have found to represent people in policy making settings. Elections induce political leaders to respond to the people’s needs and desires, in part because the role is conceived this way, in part because those officials who fail to do so will not retain their positions. We appoint the bureaucrats or administrators in a modern state on the basis of their credentials because that is the best way to represent the people in the decision-making settings where the complex task of managing modern society occurs.<sup>64</sup> Bureaucrats are

not typically regarded as representatives, of course. But the structure of modern knowledge means that only officials with training and experience in a given field can act in place of ordinary people. Only experts can “re-present” the people in the decision-making settings of the administrative state because no one these days can know enough, or have time enough, to master the relevant complexities. It takes years of specialized training, and many more years of experience, to learn how to control the money supply. Having achieved that expertise, it will then be impossible to learn very much about pesticides.

Chapter Two of this book, as mentioned in the preceding discussion, will establish the parameters of the theory of responsive democracy that the book proposes. It begins by defining democracy, not to advance any substantive assertion, but merely to delineate the territory that the book will cover. It then canvasses existing theories of democracy and argues that a new theory is required. Chapter Three presents the theory. It expands on the approach presented in this section, and connects it with larger conceptual and pragmatic developments that were occurring outside the political sphere, most notably in the economic system and civil society. The argument is that democracy was the political manifestation of a larger trend that reached across all aspects of the Western World. This is generally described as individualism, but will be more specifically regarded here as the demand that the institutions of society satisfy the self-defined needs and desires of its members.

Chapter Four will discuss the representative aspect of elections, and Chapter Five will discuss the representative aspect of expert administration, deriving both from the general principle that a democratic government responds to the needs and desires of its citizens. Each chapter will also derive normative recommendations from this descriptive framework. Chapter Three will note that the representative mechanism we use to provide that political leaders respond to people’s needs and desires is the same mechanism that we use to solve the problem of succession. The point is obvious, but discussion reverses the typical ordering; rather than treating representation as a by-product of succession, succession through election will be treated as a by-product of representation. This is historically accurate as well as conceptually valid because, as just described, representation developed in the Western World long before elections were used to determine the nation’s political leadership.

One important consequence of this reversal is a more instrumental approach to elections. The problems with elections, as a means of determining succession and ensuring representation, are familiar. They include improper or corrupt campaign behavior, stratagems that deny citizens their right to vote, the gerrymandering of electoral districts, fraudulent internet practices such as robots masquerading as voters, and the excessive influence and impact of monetary contributions from special interest groups. It is amazing that a well-established, experienced democracy like the United States, has failed to solve these problems. In fact, they have become worse in recent years; the election of Donald Trump exemplifies every single one of them. Chapter Four

proposes that we regulate elections much more intensively, treating them as a mechanism that uses succession determinations as a means of ensuring representation, rather than as the unalloyed voice of the people or the embodiment of self-determination. This regulation should draw on the administrative capacities of the modern state. The Chapter will explore the way that an expert election commission, a managerial agency with constitutional status, could provide systematic solutions to many of the problems that have proven intractable thus far, both in the United States and in most other democratic nations.

Chapter Five will describe the ways expert administrative agencies represent the populace in the context of modern institutional and technological complexity, described by Jürgen Habermas as the colonization of the lifeworld.<sup>65</sup> This perspective will then be used to challenge the long-standing view that expertise is undemocratic and the more recent view that it is illusory or fraudulent as well. Motivated by these beliefs, modern governments have often sought to counterbalance expertise by broadening participation in the administrative process, rendering it more transparent and accessible to the general public. As stated above, however, this reflects an under-theorized belief that practices appropriate for solving the problem of succession are applicable to the problem of management. Any serious reflection on the structure of knowledge in our modern society is sufficient to reveal that many essential tasks of government simply cannot be performed by people without extensive training and experience. Moreover, planning and policy making in these areas, beyond the limits of general directives that can be provided by elected generalists, must be based on expertise as well; R & D is not an abbreviation for “Republicans and Democrats.” Chapter Four thus moves in the opposite direction from many contemporary recommendations. Instead of assimilating the allegedly alien process of administrative decision making into democratic government by extending inappropriate principles derived from the election of political leaders, it argues that administrative experts should be insulated from external pressures. It then argues that these experts should be given a more central role in government decision making, including the ability to compel elected officials to reconsider their decisions on grounds that these decisions will fail to achieve their stated goals.

Inquiries of the sort that Chapters Four and Five discuss have acquired a certain urgency in recent years, as the late Twentieth Century’s rolling tide of democratization has begun to ebb. Previously democratic nations such as Poland, Hungary, Venezuela and Turkey have moved toward authoritarianism, democratic stirrings in large autocracies such as Russia and China have been stilled, and the United States, under Trump, has been demoted to the status of a “flawed democracy” by independent ranking agencies.<sup>66</sup> These events have evoked a series of alarmist or apocalyptic accounts regarding democracy’s onrushing demise.<sup>67</sup> Like previous triumphalist or self-congratulatory discussions, they provide many insights but leave important issues unaddressed. What is needed at this juncture is an understanding about the true character of democratic government in modern administrative states, and prescriptions for resolving ongoing

and insistent problems that are based on such an understanding. This book argues that the true character of democratic governance is responsiveness to people's needs and desires, and that this basic norm is instantiated through representation by both elected political leaders and expert administrative agents.

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<sup>1</sup> Ludwig Wittgenstein, *Philosophical Investigations* (G.E.M. Anscombe, trans., 3<sup>rd</sup> ed.) (Englewood Cliffs, N.J. 1958), p. 11 (§ 23).

<sup>2</sup> *Id.*, p.31 (§ 66) (emphasis in original)

<sup>3</sup> *Id.*, p. 32 (§§ 66, 67)

<sup>4</sup> Daniel T. Rodgers, *Contested Truths: Keywords in American Politics Since Independence* (New York: Basic Books, 1987).

<sup>5</sup> Economist Intelligence Unit, *Democracy Index 2017: Free Speech Under Attack; Freedom House, Freedom in the World 2018: Table of Country Scores*. North Korea also placed last out of 180 countries on the Heritage Foundation's ranking for economic freedom, and the Republic of Congo placed fourth from last. Heritage Foundation, *Index of Economic Freedom*, 2018.

<sup>6</sup> "Battling Ebola in a War Zone, *The Economist*, Sept.1, 2018, pp.33-34. See "A Battle Within a Battle," *The Economist*, Dec. 1, 2018, p. 40

<sup>7</sup> Max Weber, *Politics as a Vocation*, in H.H. Gerth & C. Wright Mills, *From Max Weber: Essays in Sociology* (New York: Oxford Univ. 1958), p. 77, 78 (emphasis in original).

<sup>8</sup> Emile Durkheim, *The Division of Labor in Society* (W.D. Halls, trans.) (New York: Free Press 1984), pp. 44-52.

<sup>9</sup> Jacob Black-Michaud, *Feuding Societies* (Oxford, Eng.: Basil Blackwell 1973); M.I. Finley, *The World of Odysseus* (New York: Viking 1965); William Miller, *Bloodtaking and Peacemaking: Feud, Law and Society in Saga Iceland* (Chicago: Univ. of Chicago 1990); William Miller, *Eye for an Eye* (Cambridge, Eng.: Cambridge Univ. 2006)

<sup>10</sup> Statute of Winchester of 1285, 13 Edw. I chs. 1 and 4

<sup>11</sup> Edward L. Rubin, *Beyond Camelot: Rethinking Politics and Law for the Modern State* (Princeton, N.J.: Princeton Univ. 2005), pp. 144-78

<sup>12</sup> Winston Churchill, *A History of the English Speaking Peoples*, vol. 4: *The Great Democracies* (New York: Dodd, Mead & Co. 1958), pp. 43-50; G.M. Trevelyan, *History of England*, vol. III (Garden City, N.Y.: Doubleday & Co. 1952), pp. 172-79

<sup>13</sup> Robert Whitaker, *On the Laps of the Gods: The Red Summer of 1919 and the Struggle for Justice that Remade the Nation* (New York: Three Rivers 2008), pp. 104-05.

<sup>14</sup> Griff Stockley, *Blood in Their Eyes: The Elaine Race Massacres of 1919* (Fayetteville, Ark.: Univ. of Arkansas 2001), pp. 8-9, 15, 157; Whitaker, *supra* note xxx, pp. 134, 137-39.

<sup>15</sup> Churchill, *supra* note xxx, pp. 45-46

<sup>16</sup> See generally Orlando Patterson, *Slavery and Social Death: A Comparative Study* (Cambridge, Mass.: Harvard Univ. 1982).

<sup>17</sup> Sheila Fitzgerald, *Everyday Stalinism: Ordinary Life in Extraordinary Times: Soviet Russia in the 1930s* (New York: Oxford Univ.: 1999), pp. 130-31; Richard Sakwa, *Soviet Politics in Perspective*, 2<sup>nd</sup> ed. (London: Routledge 1998), pp. 135-38.

<sup>18</sup> *Id.*, pp. 200-01.

<sup>19</sup> Samuel Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Normal, Okla: Univ. of Oklahoma 1991)

<sup>20</sup> Ian Shapiro, *The State of Democratic Theory* (Princeton, N.J.: Princeton Univ. 2003), p. 59.

<sup>21</sup> Walter W. Powell & Paul J. DiMaggio, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality*, in Walter W. Powell & Paul J. DiMaggio, *The New Institutionalism in Organizational Analysis* (Chicago: Univ. of Chicago 1991), p. 63

<sup>22</sup> 261 U.S. 86 (1923).

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- <sup>23</sup> W.E.B. Du Bois, *Returning Soldiers* (The Crisis, May 1919), reprinted in W.E.B. Du Bois, *Writings* (Library of America, 1986), p. 1179, 1181.
- <sup>24</sup> Whitaker, *supra* note 1, p. 175
- <sup>25</sup> Pub. L. No. 89-110, 89 Stat. 437 (1965), codified at 52 U.S.C §§ 10101, 10301 et seq.
- <sup>26</sup> *Shelby County v. Holder*, 570 U.S. \_\_\_\_ (2013) (holding Section 4(b) unconstitutional as an improper burden on states).
- <sup>27</sup> United States Census, 1920.
- <sup>28</sup> 38 Stat. 251 (1913), codified at 12 U.S.C. §§ 221 to 522.
- <sup>29</sup> Peter Conti-Brown, *The Power and Independence of the Federal Reserve* (Princeton, N.J.: Princeton Univ. 2016), pp. 15-25
- <sup>30</sup> Conti-Brown, *supra* note 41, pp. 25-40; William Greider, *Secrets of the Temple: How the Federal Reserve Runs the Country* (New York: Touchstone 1987); Richard H. Timberlake, *Monetary Policy in the United States: An Intellectual and Institutional History* (Chicago: Univ. of Chicago 1993), pp. 261-63.
- <sup>31</sup> Conti-Brown, *supra* note 41, pp. 199-217; Edward Rubin, *Hyperdepoliticization*, 47 Wake Forest L. Rev. 631 (2012).
- <sup>32</sup> Stanley Fischer, *Central Bank Independence Revisited*, *American Economic Rev.* 85:201 (1995)
- <sup>33</sup> Under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), Pub. L. 61-152, 36 Stat. 331, codified at 7 U.S.C. § 136 et seq.
- <sup>34</sup> Robert C. Post, *Constitutional Domains: Democracy, Community, Management* (Cambridge, Mass.: Harvard Univ. 1995). See also Robert C. Post, *Democracy, Expertise and Academic Freedom* (New Haven, Conn.: Yale Univ. 2012), which is discussed further in Chapter Three.
- <sup>35</sup> Plato, *The Republic* (Alan Bloom, trans., 2<sup>nd</sup> ed.) (New York: Basic Books 1968).
- <sup>36</sup> Aristotle, *Politics* (Benjamin Jowett, trans.), in *The Works of Aristotle* (Encyclopedia Britannica 1952), pp. 1278-79 (Bk. III chs. 6-7); 1289-95 (Bk. IV chs. 2-10).
- <sup>37</sup> Alasdair MacIntyre, *After Virtue* (2<sup>nd</sup> ed.) (Notre Dame, Ind.: Univ. of Notre Dame 1984)
- <sup>38</sup> Aristotle, *supra* note 48, p. 1278 (Bk. III ch. 7) (“the citizens at large administer the state for the common interest”). The difficulty with Aristotle’s definitions is that he has at least two parallel criteria for categorization, one based on the number of rulers (the one, few or many) and the other based on the distribution of wealth, *id.*, p. 1279-80 (Bk. III ch. 8), a subject further discussed in Chapter Two.
- <sup>39</sup> *Id.*, p. 1292 (Bk. IV, ch. 4)
- <sup>40</sup> By William of Moerbeke. See R.B. Bolger, *The Classical Heritage and Its Beneficiaries* (Cambridge, Eng.: Cambridge Univ. 1954), pp. 508-11; Joseph Canning, *A History of Medieval Thought 300-1450* (London: Routledge 1996), pp. 125-26
- <sup>41</sup> St. Thomas Aquinas, *Summa Theologica* (Fathers of the English Dominican Province, trans.) (Notre Dame, Ind.: Christian Classics 1981) [1274], p. 1016 (I-II, Q. 95, art. 4).
- <sup>42</sup> John of Salisbury, *Policraticus: Of the Frivolities of Courtiers and the Footprints of Philosophers* (Cary J. Nederman, ed.) (Cambridge, Eng.: Cambridge Univ. 1990) [1159]. John is generally considered the first political theorist of the Western World. See Harold Berman, *Law and Revolution* (Cambridge, Mass.: Harvard Univ. 1983), pp. 276-77; Canning, *supra* note 52, p. 111; Reginald Poole, *Illustrations of the History of Medieval Thought and Learning*, 2<sup>nd</sup> ed. (New York: Dover 1960), p. 204.
- <sup>43</sup> Antoine de Balque, *The Body Politic: Corporeal Metaphor in Revolutionary France, 1770-1800* (Stanford, Cal.: Stanford Univ., 1993), pp. 42-44. See Simon Schama, *Citizens: A Chronicle of the French Revolution* (New York: Vintage, 1990), pp. 211-12.
- <sup>44</sup> Max Weber, *Economy and Society* (Guenther Roth & Claus Wittich, eds.) (Berkeley, Cal.: Univ. of California 1978), pp. 215-23, 958-63.
- <sup>45</sup> John P. Macintosh, *The British Cabinet* (London: Stevens and Sons, 1968), pp. 66-69. Regarding the difference between 1783 and an earlier (1743) case where the king felt compelled to accept the ministers as a group, Macintosh states: “This was not like Newcastle and Pelham using their scarcity value as governors to press the King into giving them precedence over their rivals.” *Id.* at 67.
- <sup>46</sup> Robert A. Kann, *A History of the Habsburg Empire, 1526-1918* (Berkeley, Cal.: Univ. of California 1974), pp. 1-101.
- <sup>47</sup> Derek Beales, *Joseph II, vols I & II* (Cambridge, Eng.: Cambridge Univ. 1987); T.C.W. Blanning, *Joseph II* (London: Longman 1994); Kann, *supra* note 57, pp. 183-99; Saul K. Padover, *The Revolutionary Emperor Joseph the Second* (New York: Robert O. Ballou 1934).
- <sup>48</sup> Christopher Clark, *Iron Kingdom: The Rise and Downfall of Prussia, 1600-1947* (Cambridge, Mass.: Belknap, 2006), pp. 312-44.

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- <sup>49</sup> Philip K. Dick, *The Man in the High Castle* (New York: Vintage, 1992); Robert Harris, *Fatherland* (New York: Random House 2006)
- <sup>50</sup> Michael Chabon, *The Yiddish Policeman's Union* (New York: HarperCollins, 2007)
- <sup>51</sup> William Gibson & Bruce Sterling, *The Difference Engine* (New York: Spectra, 1990)
- <sup>52</sup> Kim Stanley Robinson, *The Years of Rice and Salt* (New York: Bantam 2002)
- <sup>53</sup> All the authors in the preceding three notes except Harris are well-known science fiction writers. Dick, *supra* note 60, includes a discussion within the novel which concludes that alternate history is a form of science fiction.
- <sup>54</sup> Herbert Butterfield, *George III, Lord North and the People, 1779-80* (London: Russell and Russell 1968)
- <sup>55</sup> Voltaire, *Letters on England* (Leonard Tancock, trans.) (New York, Penguin, 1980) [1733]. Regarding the British government, see pp. 44-50 (Letters VIII & IX).
- <sup>56</sup> Montesquieu, *The Spirit of the Laws* (Anne Collier, Basia Miller & Harold Stone, trans.) (Cambridge, Eng.: Cambridge Univ. 1990), pp. 154-212.
- <sup>57</sup> See, e.g., Federalist X, in James Madison, Alexander Hamilton & John Jay, *The Federalist Papers* (Isaac Kramnick, ed) (New York: Penguin, 1987)[1788], p. 122, 126.
- <sup>58</sup> Alexis de Tocqueville, *Democracy in America* (Harvey C. Manfield & Deborah Winthrop, trans.) (Chicago: Univ. of Chicago Press, 2000), p. 165 (emphasis in original). The passage is somewhat confusing; Tocqueville was well aware that Senators were chosen indirectly, see *id.*, p. 113.
- <sup>59</sup> Jean-Jacques Rousseau, *The Social Contract* (Willmoore Kendall, trans.) (Chicago: Henry Regnary 1954) [1762].
- <sup>60</sup> E.g., David M. Estlund, *Democratic Authority: A Philosophic Framework* (Princeton, N.J.: Princeton Univ. 2008).
- <sup>61</sup> See, e.g., Jean L. Cohen & Andrew Arato, *Civil Society and Political Theory* (Cambridge, Mass: MIT Press, 1994); Jürgen Habermas, *The Theory of Communicative Action*, vol., 2: *Lifeworld and System: A Critique of Functional Reason* (Thomas McCarthy, trans.) (Boston: Beacon 1987), Niklas Luhmann, *The Differentiation of Society* (New York: Columbia Univ. Press, 1982) .
- <sup>62</sup> Oliver Goldsmith, *The Deserted Village* (1770)
- <sup>63</sup> Padover, *supra* note 58, p. 182. See Banning, *supra* note 58, pp. 58-59.
- <sup>64</sup> Cf. Ian Ayres & John Braithwaite, *Responsive Regulation* (New York: Oxford Univ. 1992), discussed further in Chapter Four.
- <sup>65</sup> Habermas, *supra* note 73, pp. 301-73.
- <sup>66</sup> Economist Intelligence Unit, *Democracy Index 2017: Free Speech Under Attack* (U.S. placed 21<sup>st</sup> on country listing, and in flawed democracy category, below most Western European and British settler nations as well as Uruguay, Mauritius and South Korea); Freedom House, *Freedom in the World 2018: Table of Country Scores* (U.S. placed in category 2 rather than 1 for political rights and given an aggregate score of 86, below all other Western European nations and British settler nations).
- <sup>67</sup> E.g., Christopher H. Achen & Larry Bartels, *Democracy for Realists: Why Elections Do Not Produce Responsible Government* (Princeton, N.J.: Princeton Univ. 2017); Rachel E. Bowen, *The Achilles Heel of Democracy* (Cambridge, Eng.: Cambridge Univ. 2017); Jason Brennan, *Against Democracy* (Princeton, N.J.: Princeton Univ. 2016); Christophe Buffin de Chosal, *The End of Democracy* (Arcadia, Cal: Tumblar 2017); Steven Levitsky & Daniel Ziblatt, *How Democracies Die* (New York: Crown 2018); David Runciman, *How Democracy Ends* (New York: Basic Books 2018); Yascha Mounk, *The People vs. Democracy: Why Our Freedom is in Danger and How to Save It* (Cambridge, Mass.: Harvard Univ. 2018)