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The Paradox of Democracy and the Sociology of Law

1.1   Political Democracy as Theory and as Fact

There are a number of deep historical misapprehensions surrounding the institutional consolidation of political democracy. Indeed, the actual emergence of democracy as a system of governance, centred around the exercise of participatory political rights by the citizens of a particular society, appears to be a particularly elusive historical phenomenon. When we examine the historical formation of democratic institutions, therefore, a certain amount of myth-breaking work is required.

1.1.1   Late Democracies

A striking fact in the development of political democracy is that it first became widespread considerably later than is usually indicated. In fact, typical analyses of democracy are marked by a peculiar blind spot when trying to identify the point at which democracy was commonly consolidated as a governance regime. Histories of modern democracy usually indicate that the central features of democracy, which were conceptually articulated in the late eighteenth century, became reality through the nineteenth century. By way of illustration, one recent book on Russian history, written by an eminent historian, begins with the following sentence: 'The model of the nation that emerged in Europe after the French Revolution and the Napoleonic Wars was founded on the principles of citizenship and civil rights' (Engelstein 2009: 1).[1] In this narrative, much of Western Europe already possessed a basic system of political inclusion in the earlier nineteenth century, and this is taken as a standard with which patterns of political development in Russian history, supposedly marked by a pathological delay in the formation of democratic institutions, need to be contrasted. One important historian has identified the beginning of

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[1] For a more nuanced account of the divergent evolutionary pathways of Russia and Western Europe, see Burbank (2003: 422–4).

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democracy at mid-century, describing the national uprisings of 1848 as the 'hour in which representative democracy was born in Western and Central Europe' (Best 1990: 13). One widely influential account of democratic formation has identified the period 1828–1926 as comprising a *first wave* of democratic consolidation, in the course of which, by 1900 in particular, a number of countries had developed democratic institutions (Huntington 1991: 13–16).[2] Similar ideas are evident in the works of distinguished sociologists, who date the advent of universal political citizenship, at least in countries seen as possessing strong democratic traditions, to the earlier nineteenth century.[3] Even more sceptical interpreters observe 1918 as the date at which, at least in progressive countries, democracy was generally instituted.[4]

It is difficult to be sure how such interpretations of modern political history have arisen, and why such assumptions are so widely accepted, even amongst otherwise excellent scholars and intellectuals. Perhaps, we might speculate, such assumptions result not from analysis of actual social or historical reality, but from a theoretically inflected construction of social reality, or from a tendency amongst historical interpreters to conflate socio-political reality and theoretical debates.

As discussed, the basic conceptual architecture of democracy was surely outlined in the revolutionary period at the end of the eighteenth century, especially in the USA and France. Central to the revolutionary construction of democracy was the claim that democracy enabled individual people to give legislative expression to basic freedoms, creating binding obligations on this foundation. After the revolutionary époque, then, the conceptual repertoire of democratic revolution retained defining importance, and it shaped theoretical reflection on politics in a number of ways.

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[2] Even more rigorous observers accept the idea of a first wave of democratization, occurring in the nineteenth century (Ziblatt 2006: 337).

[3] See the assertion, common amongst sociologists in the USA, that 'Britain gave citizenship to the workers in the early or mid-nineteenth century' in Lipset (1959: 93). Such exaggerated views seem to result from the assumption that core elements of American democracy were originally imported from Britain (see Lipset 1963: 93). However, inflationary constructions of British democracy are widespread amongst even the most admirable American scholars, often leading to absurd claims. See – as an egregious example – the assertion that, unlike in many post-colonial states in Africa, democracy survived in India after 1950 because 'Indian elites were often trained in Oxford and Cambridge during the colonial period, and may have imbibed commitments to democracy from the English' (Shapiro 2003: 87).

[4] For example, Dahl argues that the 'main centers of successful democratization' had created democracies by 1920 (1989: 216). More accurate is Parsons, who stated that the 'form of democratic association … was nowhere complete, if universal adult suffrage is a criterion, until well into the present century' (1964: 353).

In the earlier nineteenth century, first, the enactment of shared freedoms became a criterion of governmental legitimacy at most points on the political spectrum. Amongst advocates of revolutionary transformation, as discussed, it was widely argued that a government acquires legitimacy if it reflects the collective will of citizens, and that the legitimacy of law presupposes the maximization of personal freedom for as many people in society as possible. However, the protection of shared freedoms was also perceived as a core function of the state amongst more gradualist theories of socio-political change.[5] In this respect, the French Revolution instilled a deep caesura in political reflection. From this point onwards, early modern theories which, in paternalist fashion, had typically argued that the state or the prince acquired authority through the preservation of peace, order and security, lost traction. Instead, collective liberty became a key gauge of state legitimacy.[6] Throughout the nineteenth century, second, political controversy in Europe tended to polarize around reactions to the claims of the French Revolution, so that Conservative, Liberal and Radical lines of political reflection were all determined by a distinctive reaction – respectively, critical, cautiously affirmative or consolidating – to the theoretical legacy of the revolutionary era. Throughout the nineteenth century, political opinions were dominated by a memory of the French Revolution, and the conceptual caesura that marked the Revolution was recalled, either with horror or with enthusiasm, as the beginning of democracy. Tocqueville explained this accurately in 1835, stating: 'A great democratic revolution is occurring among us. All of us can see it, but not all judge it

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[5] This is exemplified by the thought of Hegel, who, although clearly not a radical, argued that law must be founded in the attempt to create a concrete institutional form for human freedom (1970 [1821]: 46). See semantic discussion of changes in the meaning of 'freedom' in the later eighteenth century in Schlumbohm (1975: 55, 66).

[6] The paternalist theory of the state became central to post-Reformation political thought. In fact, at the conceptual centre of the Reformation was the claim, against the scholastic natural-law theories imputed to Roman Catholicism, that government is merely the worldly regiment, which is fully distinct from the regiment of freedom and faith – order and freedom are thus quite separate. The world of government and the world of faith have entirely distinct functions: the state must take responsibility for maintaining 'external peace', and the church must help 'make people pious' and oversee spiritual well-being (Luther 1883a: 252). Above all, Luther argued the laws of the worldly regiment cannot bring freedom, and compliance with worldly law is not a path to freedom. A 'Christian person,' Luther explained, 'has enough in faith, so that he does not need works to be pious', and whoever has faith is 'delivered from all commandments and laws' (1883b: 25–6). Central to the revolutionary era, however, was a desire to reconnect freedom and law, and to reimagine the law as a sign of virtue. The legal theories of the French Revolution were much closer to Calvinism, which accorded law a more constitutive role on human salvation (see Calvin 1939 [1536]: 150).

in the same fashion'. Some people, he mused, think that democracy is new or even an accident and they 'still hope to stop it', whereas others think that it is 'irresistible' (1866 [1835]: 2). To this degree, the democratic ideals promoted in the revolutionary period obtained a certain enduring reality.

In fact, many leading thinkers who lived through the longer aftermath of the French Revolution appeared to be convinced that the evolving form of the nation state in nineteenth-century Europe was enduringly shaped by ideals of citizenship and civil rights. As a result, the perception that the early nineteenth century was an era defined by the emergence of democratic politics was quite widespread, even amongst contemporary observers. This perception was most clearly articulated, in alarmist fashion, on the more reactionary fringes of European political debate, where the idea of popular rule was a common spectre, giving rise to great anxiety. Conservative philosophers and social theorists of the earlier nineteenth century often painted an appalled picture of their societies. They implied that the democratic ideals of the revolutionaries in 1789 were approaching full implementation, and, as an alternative, they demanded a return to the inherited, purportedly natural, order of authority based in estates and religion.[7] In some respects, however, Radical social and political theorists shared aspects of this analysis, and they replicated some ideas of their reactionary adversaries. Naturally, these theorists argued that the principles of 1789 had provided insufficient emancipation for the societies in which they took shape. However, Radical theorists of the earlier nineteenth century opted for a historical standpoint that reflected more Conservative views, assuming that at least partial democratization had become a historical reality.

Such claims were expressed, for example, by Proudhon, who set out a critique of post-1789 social formation in Europe, claiming that it was based on a system of formal individual rights (1967 [1840]: 76), and dominated by centralized government under party-political institutions (1936 [1852]: 266). These claims were further emphasized by Karl Marx, who, in *The Jewish Question* and the *Manifesto of the Communist Party*, reflected in highly influential fashion on the contradictions inherent in

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[7] See for example Bonald (1843 [1796]: 118–19); De Maistre (1847 [1797]: 81); Gentz (1979 [1819]: 219). In this context, Bonald emerged as an important Conservative forerunner of legal-sociological theory, arguing both that legitimate law presupposes a religious foundation (1847 [1802]: 41), and that popular government leads to societal disaggregation 1847 [1802]: 51). He also claimed, like later sociologists, that a legitimate constitution is an 'intrinsic order' or the 'soul of society' (1847 [1802]: 161). After 1815, Chateaubriand famously declared that Europe was 'rushing towards democracy' (Hamerow 1983: 285).

early constitutional democracy. In these writings, he suggested that the national societies emerging after 1789 were defined by centralized state institutions and moderately elaborated patterns of democratic representation. Consequently, Marx indicated that the basic objectives of the revolutionary era, especially the demands for some form of political-democratic citizenship and some guarantee of legal protection for civil rights, had been widely instituted after 1815 (1956 [1844]: 364).

Whatever the legacy of the revolutionary era in theoretical debate, however, the image of accelerating democratization projected both by reactionary opponents of the French Revolution and by radical commentators on its legacy did not even come close to being a reality until after 1870. Even the most superficial survey of European societies in the decades after 1815 reveals that the prevalent model of statehood at this time showed little or no recognition of civil rights or political citizenship.

For instance, France did not have a fully competitive male franchise until after 1870. From 1851, France had continuous male suffrage, but electoral rights were initially exercised within a controlled, Bonapartist system. Great Britain began to move towards democracy in 1832. But it initially had a small property-based franchise, and, until 1918, its government was never elected by more than approximately 30% of the population (roughly 60% of men, and no women). Of course, many people have claimed that the UK was a democracy by 1900. Even some expert historians date the advent of mass democracy in Britain to the 1880s.[8] One commentator, without contradiction, reflects that it was commonplace in the early twentieth century to claim that Britain was 'the most stable and mature democracy in Europe' (Scally 1975: 10). In 1905, Dicey himself declared that it was impossible to doubt that 'the English constitution had been transformed into something like a democracy' (1962 [1905]: 48). Even critical observers stated that, by 1900, England, in terms of franchise membership, was 'practically a democracy' (Porritt 1899: 628).[9] However, the words 'something like' and 'practically' might be seen as having an operative

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[8] Rosanvallon, who is surely one of Europe's leading political historians, claims that, at least for men, 1884 brought the 'realization of political equality' in the UK (1992: 131). One author acknowledges that in the 1880s 'sizeable proportions of the male electorate' remained 'unenfranchised', yet this same author still claims that 'mass democracy was real enough' (Joyce 1994: 192). In their otherwise highly critical analysis of political liberties in the UK, Ewing and Gearty argue that the 'principle of universal suffrage' was established around 1900 (2000: 22).

[9] The leading early history of the British franchise also states that after 1885 the British electoral system was a 'democracy in its main lines' (Seymour 1915: 523). This misapprehension was seemingly widely shared. Prominent figures as unlike as Henry Maine and Kier Hardie

importance in these commentaries. Britain did not resemble a full democ-
racy until 1918.[10] Even the electoral reforms of 1867 and 1884, which
extended the male franchise in Britain, merely established, not the single
democratic (male) citizen, but a patriarchal model of the household as the
basic source of political legitimacy and as the primary unit of social inter-
action with government.[11]

Comparably, Prussia had no national representative body until 1847.
Thereafter, under the constitutional order established in 1849/50, Prussia
possessed a restrictive, weighted electoral system, in which voting rights
were allocated to separate fiscal classes on the basis of their contribution
to public revenue. After 1871, the German Empire (*Reich*) instituted uni-
versal suffrage for male citizens over 25 years of age, so that Germany
had a universal male franchise, and from 1918, a universal female fran-
chise, until 1933. Yet, although most of the male members of the German
population were allowed to vote, they could not vote for a parliamentary
assembly that was fully authorized to introduce legislation. Government
by a democratically elected legislature, was not established nationally in
Germany until 1919. The USA developed a selective democratic fran-
chise earlier than most European states; after all, unlike European states,
the American polity was expressly based in the concept of popular sov-
ereignty. However, the American Revolution did not lead to full man-
hood suffrage, either in the states or in the Republic as a whole, and it did
not separate political rights from socio-economic privilege. In the USA,
either partial or complete exclusion of black voters was almost universal

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considered Britain a democratic state after 1884 (see Maine 1886: 8; Hardie 1894: 375).
For an account of this widespread error, see McKibbin (1990: 68).

[10] Indicatively, in 1912, the Conservative Party headquarters calculated that the introduc-
tion of universal male suffrage would lead to the loss of 103 seats in England and Wales
(McCrillis 1998: 12). This fact alone demonstrates that, even in the consciousness of politi-
cal leaders, the UK was not a democracy at this point.

[11] For claims close to this view see Biagini (1992: 313). There is little truth in the assump-
tion, underpinning much American sociology of political evolution in the UK, that the
nineteenth-century reforms in Britain 'resulted in relatively early manhood suffrage and
the full attainment of parliamentary government' (Almond 1991: 473). Dicey himself
admitted this, describing household suffrage as a sign of the 'moderation' (which we might
take to mean incompleteness) of British democracy (1962 [1905]: 253–4). The fact that the
embellishment of the British tradition of 'democracy' is so common might be the result
of Marshall's evident overestimation of the extent of citizenship in nineteenth-century
Britain. Marshall's work contains a mixed message on political citizenship in the UK. Close
to the approach advanced in this book, he argues that until 1918 the franchise was a 'group
monopoly'. But he also argues 'that citizenship in this period was not politically meaning-
less' (1992 [1950]: 12–13).

through, and beyond, the nineteenth century, and it remained common in many states in the South until the 1960s. Many states, in both North and South, imposed generally discriminatory qualifications for the right to vote throughout the nineteenth century.[12] Moreover, even the exclusion of the most privileged stratum of the people (white men) from electoral participation was widespread until the 1820s.[13] Many states barred recipients of public assistance (known as *paupers*) from the franchise for the whole nineteenth century (see Steinfeld 1989: 335).

Overall, throughout the nineteenth century, democracy evolved, if at all, as a system of political administration that was strategically intended to demobilize core sectors of society, typically on grounds of class, ethnicity or national provenance. Of course, female suffrage was not widespread until after 1918, so most political systems automatically demobilized a large sector of society (50 per cent of the adult population) on gender grounds. Of all major states, France had the most democratic franchise for men in the nineteenth century. But France did not establish electoral participation for women until 1944. Democracy only existed in the nineteenth century, at most, in the *form of a rather crude, selective approximation*. In this condition, the basic inclusionary implications of democratic citizenship were selectively controlled and widely deactivated.

Although it obtained a preliminary conceptual definition in the late eighteenth century, therefore, democracy assumed concrete shape very slowly. Even in its most minimal definition, it did not take hold until after 1870. It was not broadly in evidence until after 1918, and it was not consolidated as a norm of governance until after 1945. In Europe, after 1815, the legacy of the political institutions briefly created in revolutionary France remained of marginal organizational significance for almost a century. Typically, as mentioned, the ideas of national self-legislation promoted in the revolutionary era were assimilated into very limited doctrines of political Liberalism, in which the rule of law, with guarantees for certain limited rights, was allowed to stand in for democracy.[14] A far more

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[12] One account claims that between 1889 and 1913 nine states outside the South imposed a literacy qualification for voting, thus excluding many blacks, poor whites and immigrants (Kousser 1974: 57–8). Between 1890 and 1904, seven ex-Confederate states imposed similar restrictions.

[13] One historian argues that in 1790 fewer than 50% of the original 13 states of the USA approached an electoral system based on equal manhood suffrage (i.e. without freehold qualifications) (Wilentz 2005: 27, 201). By the early 1820s, most states in the Union (now expanded) had at least partly separated electoral participation from property ownership. On the persistence of freehold qualifications, however, see Chute (1969: 301, 311).

[14] See above p. 35

important legacy of the revolutionary interlude was the fact that monetary rights, enabling free market practices, in contrast to political rights, enabling free electoral practices, obtained increased legal protection across large parts of Western Europe.[15] Indeed, for much of the nineteenth century, and in fact beyond, only private rights approached a condition of legal consolidation, and many states made relatively robust provisions for the general rule of law; for many observers, private rights remained the primary guarantor of human liberty.[16] This has led a number of sociologists, historians and legal theorists to observe that nineteenth-century Europe was dominated, in form, by the evolution of two strictly differentiated social spheres – a semi-autonomous domain of political administration and a semi-autonomous domain of early capitalist civil society, expressed legally in the freedoms of singular subjective rights holders.[17] In fact, however, in most nineteenth-century societies, the basic political apparatus was not strongly consolidated or constitutionally formalized. In the constitutional domain, the revolutionary concepts of political democracy had very limited impact until the final third of the nineteenth century, and it was only after circa 1870 that general political rights were widely exercised.

1.1.2   Unwanted Democracies

A second salient complication in the development of political democracy is that the actual process of its construction found very few unequivocal advocates, and it ultimately evolved in an institutional form that diverged greatly from its initial conception.

Democracy is now viewed as a general norm of political organization, and it is often depicted as the outcome of an almost teleological process of institutional development. Clearly, early models of political democracy grew on the foundation set by social contract theory, which saw the

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[15] Most states in Europe and the USA saw a widening of capitalist markets in the earlier part of the nineteenth century. In all cases, this was expressly based on the solidification of private rights of ownership, exchange, contract and movement.

[16] As late as the 1890s, Rudolf Sohm declared, in debates on the drafting of the German Civil Code (in force from 1900), that the 'Magna Carta of our public freedom resides in private law. What we call freedom is much more strongly tied to civil law than to the constitution of the state' (Mugdan 1899: 909). Earlier, Gerber also argued that public-law rights have private-law origins (1852:35). Most famously, Savigny had earlier claimed greater importance for private law than for public law, and he viewed private law as law in which the full subjectivity of the people found expression (1840a: 14, 22).

[17] See for varying descriptions of this Hegel (1970 [1821]: 343); Marx (1956 [1844]); Freyer (1935: 134); Menke (2015: 266–71).

formation of the modern state as the result of a collective rational demand for freedom under law. Underlying much contractarian theory of government is a conviction that freedom under law is an existential condition, in which human beings collectively enact laws to secure general freedoms that reflect a realization of their innate capacities: the contract appears as an act of rational voluntarism, in which laws are established that all people, individually, recognize as conditions of their reasonable liberty. This idea was clear in the thought of Rousseau, who saw the forming of the social contract as an act in which people separated themselves from their natural particularity, and enacted a pure will as the foundation for the polity.[18] Similarly, Kant argued that where human beings deduce categorically compelling laws, human reason assumes for itself the obligatory role originally ascribed to God: that is, to the 'highest legislator', whose 'will is the law for all people' (1977b: 334). On this account, a state based in collective self-legislation enacts the will of the *whole person*, giving expression to deeply constitutive human freedoms and correlated obligations.[19] Today, some contemporary theories still express similar claims in their accounts of democracy, viewing it as a political order that reflects an ingrained, *constitutively human* desire for emancipation, rational autonomy and collective freedom from coercion.[20] Even in less substantialist theories, the idea prevails that democratic government is not separable from inner processes of human self-realization.[21] Even empirical sociological analysis of democratic formation tends to imply that democratization is impelled by collective actors, motivated by collective demands for freedom and held back by entrenched, anti-emancipatory social forces.[22] Moreover, the rise

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[18] Rousseau stated that the will of the person, as a natural being, may well, in some instances, be 'contrary or dissimilar' to the collective contractual will by which the person is rationally bound in the polity (1966 [1762]: 246).

[19] On the connection between freedom and obligation in early democratic freedom see pp. 4–5 above.

[20] This idea is reflected in high-level theoretical sociology – for example, in Habermas (1968: 350); Touraine (1994: 306); Brunkhorst (2017: 128). This idea is reflected in some anthropological theory. For instance, Boehm argues that processes leading to modern democracy are shaped by anti-hierarchical emphases that are imprinted, through early evolutionary formation, in general human dispositions (2001: 4–5, 253). See similar claims in Knauft (1991: 395). For discussion, see Howell (2002: 226–8).

[21] See expressions of this idea in theories of deliberative democracy, for example Gutmann and Thompson (2004: 3); Fishkin (2009: 6); Goodin (2010: 209). In fact, even critiques of the rationalist preconditions of deliberative theory argue that people are collectively drawn to democracy because of its 'constitutive commitment to nondomination' (Shapiro 2003: 147).

[22] See notes 34 and 38 at pp. 51–2 below.

of political democracy is often linked to the formation of distinctively national societies, in which populations demand collective freedom and unification under shared systems of self-legislation. This condition is viewed, both nationally and in international law, as an immutable right.[23]

Throughout the early history of democracy, however, it is difficult to identify any universal propensity for democratic formation, and it is difficult to identify the emergence of democracy as the result of collective demands for political freedom. In many instances, democracy was created in highly contingent fashion, often quite strategically, for anti-democratic motives. On this basis, the elevation of democracy to the standing of a universal right is not founded in a historical process, and it does not derive from a collective demand for this right.

Tellingly, the earliest theorists of popular sovereignty, whose works stand at the origins of modern democracy, were hardly fervent advocates of democracy as a form of popular self-rule. As mentioned, the conceptual substructure of modern democracy was largely established in the late eighteenth century by theorists such as Rousseau, Sieyès and Madison. In different ways, these theorists argued that institutions assume legitimacy by expressing the will of the people, in appropriately rationalized, general form, and by ensuring that the popular will is channelled through acts of governmental legislation. However, these early architects of democracy were not democrats. Rousseau may have been the principal early theorist of democracy. But he was expressly hostile to democracy as practice (see Fralin 1978: 96). Sieyès, a leading author of two of the constitutions of revolutionary France, was only prepared to champion a very restricted, elite-led form of democracy (Lowenstein 1922: 215–16; Grandmaison 1992: 88). The government of the early American Republic, which provided a much more enduring basis for the evolution of democratic institutions than revolutionary France, was expressly devised as a political system that excluded the people from government functions.[24] It was conceived as a Republic, and, as such, it was sharply differentiated from a democracy. The normative dignity now widely accorded to democracy is not found amongst early democratic thinkers.

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[23] See discussion at p. 163 below.

[24] In *Federalist* 10, Madison described democracy as a form of government that endangers 'both the public good and the rights of other citizens'. He concluded that 'popular government' could only exist if governmental power was entrusted to popular representatives who were not the people. He advocated the 'delegation of the government … to a small number of citizens' (Madison, Hamilton and Jay 1987 [1787–88]: 125–6).

In the longer wake of 1789, then, Liberal thinkers and politicians of the nineteenth century normally expressed muted enthusiasm for some kind of popular inclusion. Many theorists, including – to some extent – Marx himself, have asserted that the Liberal bourgeoisie was a primary agent of democracy.[25] Yet few Liberals showed much support for fully inclusive democratic representation. Across the canon of Liberal inquiry, there were few endorsements of mass enfranchisement, and most theorists of a broadly Liberal persuasion in the nineteenth century were not willing to sanction the degree of popular integration required by democracy.[26]

In many cases, the commitment of Liberal theorists to the introduction of political democracy, as far as it existed, was driven by the fact that they saw mass-political integration as a key to successful and efficient economic expansion or imperialism: full political inclusion of the proletariat appeared to provide a basis for concerted national economic mobilization and external colonization.[27] Just as the need for military mobilization underpinned the extension of citizenship in the late Enlightenment, the need to mobilize members of society for foreign wars and for economic

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[25] This idea has its origins in Aristotle's thought. See prominent variants on this claim in Lipset (1959); Moore (1973 [1966]: 413); Marx and Engels (1987 [1848]); Habermas (1990 [1962]: 115).

[26] Much early nineteenth-century Liberalism was dedicated, strategically, *to not being democratic*. Indicatively, the tone for anti-democratic elements of Liberal theory was consolidated in post-1815 France, where Guizot eventually defined the 'sovereignty of reason' as an alternative to the sovereignty of the people (Rosanvallon 1985: 88). See also the distinction between popular sovereignty and national sovereignty in Sismondi's thought (1836: 66). For discussion of reticence about democracy or 'anti-egalitarianism' amongst German Liberals in the mid-nineteenth century see Backes (2000: 5000). In the UK, Mill was of course relatively enthusiastic about franchise reform. However, paradoxically, he claimed both that it is unjustifiable that there should be 'any arrangement of the suffrage' in which 'any person or class is peremptorily excluded' and that some type of 'plural voting' should be established to ensure a 'counterpoise to the numerical weight of the least educated class' (1861: 1559–60, 171). He also notoriously stated: 'As soon as any idea of equality enters the mind of an ordinary English working man, his head is turned by it. When he ceases to be servile, he becomes insolent' (1864: 149). As discussed below, Weber, Germany's leading Liberal intellectual, endorsed parliamentary democracy in very uncertain terms.

[27] In the UK, such ideas are often associated with Joseph Chamberlain (see Searle 1995: 50). But social reform and imperialism were quite diffusely combined in Liberal politics. See for discussion Semmel (1960: 13, 90); Matthew (1973: 236); Scally (1975: 26). On similar tendencies in Germany, see Winkler (1964: 77); Wehler (1969: 492; 1973: 176); Mommsen (1975: 128, 137); Schnorr (1990: 148). For examples of social-liberal imperialism in different European countries, see Naumann (1990: 65), claiming that 'political-economic democracy' creates stable governmental systems, promoting national expansion; Weber, advocating parliamentarization in Germany as a means for training national leadership elites for external expansion (1921: 343).

expansion overseas had a similar impact in the nineteenth century.[28] Affirmation of political democracy amongst Liberals was thus, in key respects, closely linked to the pragmatics of inter-state economic rivalry, and the evolution of democracy in Europe was usually accelerated in societies in a process of, or aspiring to, imperial expansion. Even in the early twentieth century, partly in consequence, many European societies found themselves without a strong democratic political bloc that was fully committed to the implementation of comprehensive democratic reform.[29] In many cases, in fact, democratic systems of representation were institutionalized not by Liberals, but by Conservatives, and the establishment of democracy was often shaped by the designs of Conservative politicians, which were only marginally related to the endorsement of democracy as a normative institutional order. In some instances, mass-enfranchisement was effected to promote a clearly anti-Liberal strategy, and it was conceived, often successfully, as a means to shore up support for Conservative policies.[30] Notably, in the UK, the 1867 Reform Act, rightly or wrong regarded by many as 'the most important single step in the establishment of British democracy' (Herrick 1948: 175), was crafted by the Tory Party. While helping to engineer the 1867 Reform Act, Prime Minister Disraeli declared that it would 'never be the fate of the country to live under a democracy'.[31] In Germany, a mass franchise was introduced by Bismarck, who saw the creation of a semi-Bonapartist variant on democracy as a means for securing Conservative dominance in the newly founded Empire.[32] Significantly,

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[28] Notably, Bismarck granted universal suffrage during the wars of German unification, evidently to mobilize support for the emerging national state. Later, the linkage between citizenship and imperialism became more programmatic. On democracy and imperialism in France, see Freeman and Snidal (1982: 324). Most notably, Giolitti established something close to full male suffrage in Italy in 1912, to consolidate support for the annexation of Libya.

[29] See for example Bollmeyer (2007: 69, 315–16).

[30] Analysis of this phenomenon is central to the recent, very noteworthy interventions in Ziblatt (2017: 109–110). One key claim in Ziblatt's work is that the emergence of an organized Conservative Party, able to link its prerogatives to the democratic system, was a common precondition for democratic stability (2017: 358).

[31] See for analysis Saunders (2011: 9). Gladstone himself, like other Liberals around him, was hardly a fully converted democrat. Gladstone portrayed himself as an 'inequalitarian', who rejected the demand 'either for manhood suffrage or for household suffrage' (Vincent 1976: 224–26). For further discussion of Liberal reticence about reform prior to 1867, see Himmelfarb (1966: 135). One account, with which I agree, argues that it was not until the franchise reform of 1918 that an expressly 'democratic, as distinct from merely increasingly popular' agenda became dominant in the UK (Garrard 2002: 69). Even in 1918, the UK fell well short of democratic government. See discussion below p. 328.

[32] See Anderson (2000: 401). Most Liberals in Imperial Germany, at least in the earlier decades, showed strong support for the more reactionary anti-democratic parts of the

female suffrage was often instituted by Conservative politicians, and, as is well documented, it often led to a reinforcement of the position of Conservative parties.[33]

Additionally, amongst social groups in the nineteenth century who seemingly had the most to gain from the introduction of full political democracy, enthusiasm for democratic institutions was not unequivocal. Evidently, the early European labour movement possessed an official ideology that claimed that it possessed unified interests, and it was capable of promoting these within democratic institutions.[34] Moreover, many theorists have defined the working class as the driving force behind democratization.[35] Practically, however, the political parties representing organized labour in Europe were originally marked by a deep scepticism in face of political democracy.

First, theorists of the radical Left, whether Communist or Anarchist, were typically driven by their conflict-based theory of politics to deny that the institutions of liberal democracy could provide anything but selective representation, cementing the prerogatives of a dominant economic class, and they refused to work within existing representative institutions.[36]

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constitution, notably the weighted franchise in Prussia (see Gagel 1958: 104). The accusation of Bonapartism is often directed at Bismarck (see Wehler 1969: 459–60). However, this description is often rejected (see Gall 1976: 631).

[33] In Europe, full female suffrage was introduced in the UK by Baldwin, in France by De Gaulle, and in the USA by Wilson. Naturally, many Conservatives may well have seen propertied women as a solid source of political protection against the male working class. For example, there was clear Conservative support for selective female suffrage in the UK (see Auchterlonie 2007: 83). Notably, in most countries, female enfranchisement did not lead to a shift to the Left. One analysis calculates that it often led to a decline in left mobilization (Bartolini 2000: 231). In the USA, famously, the female suffrage movement was, by the late 1860s, 'deeply tinged with racism' (Dudden 2011: 9), and its leaders saw black enfranchisement as a threat to its own success. One observer argues that in the Civil War era 'some key woman suffrage activists embraced racism as a political tool' (Free 2015: 6). Woodrow Wilson introduced the Nineteenth Amendment against firm opposition from some states. However, Wilson's national-integrationist attitude to government did not extend to black Americans, and he even encouraged federal segregation (see Wohlgemuth 1959: 163). One excellent analysis states that Wilson's policies 'undermined the claims to citizenship and economic security of all African Americans' (Yellin 2013: 4).

[34] In their classical programme for the Communist Party, Marx and Engels argued that the labour force had been unified in its interests by conflict with the bourgeoisie, and that the proletariat had become organized as a class and as a party. On this basis, they claimed that the proletariat was called upon to assume 'political domination' by 'conquering democracy' (1987 [1848]: 42, 52).

[35] See note 38 below.

[36] This attitude stretched from anarchism, to Bolshevism, to Sorelian syndicalism, and ultimately to fascism, the last major theoretical offshoot of Marxist conflict theory.

Second, the more moderate leadership cadres of organized labour, even when sympathetic towards democratic reformism, were often unsure about the ways in which they should position their organizations within established governance systems. For this reason, leaders of organized labour habitually lacked confidence in their ability to manage existing institutional structures, often preferring to work in tandem with more established elite groups (Miller 1964: 37). This ambiguity is distilled in the thought of Ferdinand Lassalle, a leading figure in the early German labour movement. Lassalle viewed the constitutional order of high-capitalist society as a mere expression of given power relations (1892 [1862]: 19). However, he also stressed the need for constructive accommodation with the existing legal/political order. Throughout the nineteenth century, therefore, the early labour movement did not converge around a clear political subject.[37] In fact, it is highly debatable whether the organized working class was a leading actor in the creation of democratic governance systems.[38] Notably, in most of Europe, the working class only became a potent political factor after armistice in 1918, and, once incorporated in the political system, many members of the working class soon turned against democracy.

On these grounds, it is difficult to see the historical formation of democracy as a process involving the triumph of a formal idea, or even of a widely held desire for collective freedom and self-determination. Although, in Europe at least, some rudimentary elements of democracy were gradually institutionalized through the late nineteenth century and the early twentieth century, its realization was, in most instances, not impelled either by powerful organized forces or by powerful ideologies. It is difficult to identify a major European democracy that was constructed on the basis of a powerful ideological consensus or a simple and generalized demand for political self-determination. Importantly, as mentioned, procedures for democratic representation only began to become widespread in Europe around 1870. This process, however, was normally underpinned by the promotion of positivist constitutional theories, whose primary

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[37] Eley's culturalist account of the European Left generates an impressively articulated account of the working class as a transnational collective sovereign, acting with 'collectivist élan' and born from a 'shared working class experience' (2002: 85).

[38] This is of course a disputed point. But, in agreement with my assertion, see the claim in Collier that 'democracy has hardly been a "popular" victory in the sense that the lower classes were responsible for bringing it about' (1999:191). More emphatic in claiming a formative role for working-class movements in creating democracy are Aminzade (1993: 19); Przeworski (2008: 313). Rueschemeyer, Stephens and Stephens claim that the working class was 'the most consistently pro-democratic force' (1992: 8).

exponents gave only very muted recognition to popular sovereignty and democratic legitimacy, and who wished to create democratic institutions not expressly legitimated by collective will formation.[39]

Tellingly, the French Third Republic, legally founded in 1875, which was much the most democratic major state in Europe until 1918, was strongly shaped by positivist outlooks, and it was based on a few briefly worded and undemonstrative constitutional laws (Nicolet 1982: 1965). The constitutional laws of the Third Republic grafted provisions for universal male suffrage onto an existing system of limited parliamentarism, but they did not express a full commitment to popular sovereignty, and the institutional structure of the polity remained partly based in earlier monarchical ideals.[40] Leading spokespersons for the Republic tended to downplay the importance of democratic mobilization for the legitimacy of the polity, and they opted for a sharply reduced positivist idea of citizenship.[41] Indeed, one core claim in positivist thinking was that the citizen expected to underpin the political system *did not actually exist*, and citizens needed to be educated to assume the practical functions that the legitimational function of democratic citizenship presupposed (see Garrigou 2002: 109).[42] During the foundation of the German *Reich* in 1870–1, analogously, general man-

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[39] This is exemplified in German positivism by Gerber. On the importance of positivism in the founding of the Third Republic in France see Nicolet (1982: 156).

[40] See for this view Esmein (1903: 464); Barthélemy (1904: 1); Deslandres (1937: 447); Mayeur (1984: 57); Rosanvallon (1994: 11; 2000: 248–49). On the 'modest beginnings' of the Third Republic, see Bury (1973: 227).

[41] See for example Esmein (1903: 248–49). Duguit saw national citizenship as a condition of solidarity to which persons pertain by virtue of complex memberships in orders, professional groups, etc., but he rejected the idea that a nation, or a nation of citizens, could possess a simple 'national will' (1923b: 10, 16). On the impact of positivism on the founding of the Third Republic see Ponteil (1968: 397); Aminzade (1993: 51).

[42] Indicatively, Émile Littré was one of the leading positivists at the foundation of the Third Republic, and he accounted for the legitimacy of the Republic on a thin theoretical basis. Citing positivist sociology as a premise for his political views, he advocated Republican government as a pattern of elite-led polity, in which government 'must belong to the enlightened', and in which due regard must be shown for the 'slowness with which public spirit is transformed, the danger of metaphysical and absolute concepts in social questions' (1880: 144, 388). Tellingly, Littré was also a prominent educationalist. In different settings, the education of citizens to be citizens assumed central significance in the growth of democracy. This was already implied in the works of Rousseau and Condorcet. It also assumed central importance in societies in Latin America, where centralized nation states had to be created through the nineteenth century – here the linkage of education and nation building was very strong. See the discussion of the pedagogy of the 'imagined nation' in Colombia (Márquez Estrada 2012: 309). See more recent sociological analyses that stress the role of mass schooling in creating and integrating national citizens in Boli (1989: 44); Meyer, Ramirez and Soysal (1992); Ramirez and Moon (2012: 191).

hood suffrage was introduced by the constituent parliament (*Reichstag*) of the North German Federation in almost casual fashion, despite a lack of advocates for its implementation.[43]

This absence of a unifying normative commitment to popular sovereignty meant that democracy, as it slowly became reality, diverged strikingly from its first conceptual design. As discussed, democracy was originally projected as a system of collective self-legislation, in which citizens channelled acts of collective volition through constitutionally ordered legislatures. The primacy of the legislature was an almost universal article of faith amongst early democrats, both in the USA and in France. Early state constitutions in post-1776 America accorded high authority to legislatures, a tendency which was weakened before the drafting of the Federal Constitution (Lutz 1980: 68). In revolutionary France, as mentioned, the primacy of the legislature was almost a sacred matter of doctrine, and executive institutions were conceived as subsidiary organs of the legislature (Troper 1973: 35; Jaume 1989: 19–20; Rosanvallon 2008: 196). As democracy took shape, however, it became clear that it was not the legislature but the executive that would form the dominant branch of democratic government, and, as a general norm, the larger the franchise represented through the governmental system, the more preponderant the executive would become.

Indicatively, the early rise of democratic institutions often owed more to Bonapartism than to more classical liberal-democratic ideals, and early democracy developed on a distinctively authoritarian, executive-led pattern, hardly embodying a collective demand for freedom (Rosanvallon 2000: 200). In its original design, the French Empire created by Napoleon Bonaparte contained some democratic elements, and, in its first conception, it cannot be classified as fully authoritarian. Initially, Bonapartism was established as a political regime type that selectively utilized some aspects of constitutionalism as instruments to consolidate the power of the state and to centralize the state administration (Thiry 1949: 105; Kirsch 1999: 212). Later, the Second Empire in France established one of the first enduring mass male franchises in Europe, albeit for a legislature with limited competences, and for elections that were only semi-competitive.[44] Arguably, in fact, a full franchise was established in the

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[43] In parliamentary debates on this question, the introduction of general manhood suffrage in Germany had only two vocal supporters (Meyer 1901: 239–40). The *Reichstag* of the North German Federation was itself elected by universal manhood suffrage.

[44] See discussion of the authoritarian constitution, the legislature incapable of political action, and controlled electoral processes in the Second Empire, in Berton (1900: 83); Price (2001: 42, 54).

Second Empire precisely because it provided support for a counter-revolutionary imperial regime (see Freeman and Snidal 1982: 324). Male democracy was eventually consolidated in France after 1870 in a system that rejected Bonapartism. However, Bonapartism played a central role in establishing the bedrock for popular government in France, and it was under a Bonapartist regime that broad electoral participation was first institutionalized. As mentioned, similarly, in Imperial Germany the first mass franchise was incorporated in a political system with, arguably, a semi-Caesaristic executive (Stürmer 1973: 473). Switzerland introduced universal male voting in 1848. However, the two major European states which first enduringly institutionalized universal male voting were France and Germany, and, in both these cases, mass-electoral engagement was integrally linked to the institutionalization of governance structures centred around powerful executives.

Ultimately, as political systems with mass-democratic characteristics became more widespread, legislatures were rapidly displaced as the leading branch of government, and core legislative functions migrated to the executive. By the end of the nineteenth century, it was widely noted by political theorists and sociologists that progressive democratization had led not to the creation of popular legislatures, but to executive-dominated governance.[45] Robert Michels eventually concluded that 'democracy leads to oligarchy' and that 'democracy has an inherent preference for the authoritarian resolution of important questions' (1911: viii, 363). By World War I, even observers who supported democracy observed parliamentary institutions as mere training grounds for executive elites.[46] Even in societies marked by particular hostility to executive rule, the executive slowly became the dominant political organ.[47] This means, simply, that legislatures were originally conceived as the institutions with responsibility for expressing democratic impulses, and for giving reality to democratic freedoms. Yet, as soon as democracy approached consolidation, legislatures lost influence.[48]

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[45] Representing this view in different national settings, see Godkin (1903: 11). Weber (1921/22: 862); Michels (1911: 363), Low (1904: 6); Bryce (1923: 374)

[46] See below p. 92.

[47] See the excellent analysis in Roussellier (2015: 43). Roussellier states that the Third Republic was founded in a spirit of 'fierce hatred' towards the executive, but that parliamentary organs eventually, by the 1920s, entered deep decline (544).

[48] See the claim in Woodhouse that the British parliament, supposedly a strong legislature in a stable democracy, was losing its position as the fulcrum of political life by circa 1900 (1994: 17). See observations on this process in both the USA and the UK in Craig (1990: 168). In such cases, the causal connection between the *growth of democracy* and the *decreasing*

On balance, positivism and Bonapartism, as much as any normative demand for collective freedom, underpinned the slow factual emergence of democratic government. The material form of early democracy in Europe had little relation to the normative constructions that appeared in theoretical reflections expressed in the French Revolution.

1.1.3   Misunderstood Democracies

A third striking fact in the development of democracy is that its primary ideological basis resides in a historical misconstruction. It is commonly argued – indeed, it has almost become part of a myth of democracy – that the early constitutional form of representative democracy was created as part of a popular reaction against a political system characterized as *absolutism*.[49] This view of course widely replicates the self-comprehension of eighteenth-century revolutionaries on both sides of the Atlantic, who considered themselves engaged in revolt against absolutistic policies, and who saw their pursuit of freedom as a pursuit of freedom from absolutistic rule – or despotism.[50] On this account, early democratic constitutions were designed by increasingly unified national populations as they sought to impose restrictions on excessively powerful monarchical executives, and so to maximize opportunities for collective self-determination.

In fact, however, the first incipient rise of democracy was not primarily shaped by a movement against monarchy, and it was certainly not driven by a rejection of an already existing, over-powerful order of state. More realistically, the early growth of political democracy should be seen as directed against *corporatism*. It was not the monarchical features of government but the corporations and semi-autonomous intermediary institutions standing between citizens and monarchical institutions in European societies, which were superseded by the first emergence of elements of political democracy. Corporations, of course, had a long tradition in Europe, reaching back to the medieval period. Through the first emergence of modern state-like

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influence of primary democratic organs (legislatures) is commonly observed (see Craig 1983: 94).

[49] See for example Böckenförde (1958: 20); Schmitt (1969: 88); Grimm (1972: 491); Rosanvallon (1992: 71; 2000: 14); Markoff (1999a: 665); Alexander (2006: 228). For nuanced discussion, though still seeing Absolutism as the prime cause of the revolutionary crisis, see Guerra (1992: 23).

[50] The Declaration of Independence in 1776 was designed to secure liberation of the American states from 'absolute Despotism'. Thomas Paine saw himself fighting against 'hereditary despotism' (2003 [1791]: 145). Robespierre declared that 'human reason marches … against thrones' (1794c: 3).

institutions, corporations were positioned between the state and the citizen, providing, in some cases even well into the nineteenth century, a semipolitical administrative structure, in which many questions and conflicts of day-to-day politics were regulated and adjudicated (Neuburg 1880: 5). Originally, many corporations contained elements that would now be seen as democratic, at least in localized form, and they allowed some popular participation in decision making regarding matters of public concern, especially relating to economic organization.[51] To some degree, corporations permitted modes of sectoral citizenship, in which persons exercised private and public rights in specific functional domains. Ultimately, however, the expansion in the power of national political institutions, originally promoted by central monarchies, led to the erosion, and eventually the abolition, of such intermediary institutions. In this respect, the initial appearance of national democracy as a governance system was usually rooted in the same developmental processes that had previously defined and created monarchical government, which was also focused on eradicating corporatist institutions. Rather than uprooting the institutional order of monarchy, early democratic institutions typically accelerated and intensified the formative trajectories, designed to eliminate corporations, which had previously underpinned the rise of monarchical rule.

This was clear enough in the French Revolution. The French Revolution was partly caused by the failed endeavours of the Bourbon monarchy to suppress the remnants of medieval corporations that still persisted in French society. Notably, the last decades before 1789 had seen repeated attempts on the part of the monarchy to abolish or at least to weaken guilds and corporations. Such policies were intended, in particular, to intensify the government's powers of fiscal extraction, and to impose a uniform, centralized legal order across society. Ultimately, however, these policies proved unsuccessful, and guilds and corporations were able to preserve some of their functional independence.[52] The fact that the monarchy failed in these policies meant that its already chronic fiscal weakness was exacerbated, and it was vulnerable to sabotage both by antagonized representatives of older corporations and by newly radicalized political groups. Indeed, a coalition between traditional holders of corporate privilege and new political elites was at the causal centre of the revolution of 1789 (see

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[51] See the discussion of guilds as representative organs of public legal formation in Najemy (1979: 59).

[52] Most importantly, the French monarchy attempted to abolish corporations in 1776, but it was not able to do so. In many respects the French monarchy was itself merely one corporation among others (Sewell 2008: 37).

Egret 1970: 89). However, far from negating the centralizing policies of the monarchy, the revolutionaries of 1789 immediately continued and reinforced the anti-corporatist strategies that had marked the *ancien régime*. Laws prohibiting corporations were introduced in the early months of the revolution and reinforced in subsequent constitutions.[53] In fact, the revolutionaries promoted a far more stringent centralization of government and a far more efficient system of fiscal extraction than their monarchical predecessors. One description of this process has stated how the Revolution, in causing the 'destruction of orders and corporations', suppressed 'everything that placed material limits on the exercise of sovereign power', creating a 'society of legally equal individuals' who were directly 'exposed to the immediate action of the state' (Gueniffey 2000: 59). Charles Tilly, tellingly, has described the French Revolution as 'the most sensational move' towards political centralization in modern history (1990: 107).

At an obvious level, the growth of early democratic institutions led to the abolition, or at least to a dramatic weakening, of corporations. The emergence of early democratic polities meant that, as the state claimed to extract legitimacy from all members of society, state institutions acquired an increasing monopoly of social and legal power, and local and status-defined obligations embedded in corporations lost social purchase. At a more submerged level, however, it was the monarchical suppression of corporations that in itself caused the first expansion of democracy in the eighteenth century. The slow decline of corporations in early modern Europe meant that the local judicial and administrative structures, in which many social questions had been adjudicated and regulated, disappeared. Moreover, the decline of corporations was flanked by a broader individualization of society, in which persons were released from local and personal structures of authority and forced to act as autonomous agents, especially in economic interactions.[54] In this situation, centralized monarchies were not able, on their own, to sustain the regulatory functions required by increasingly expansive societies. Monarchies, in fact, were originally in themselves little more than corporations, and, once positioned at the centre of their societal environments, they usually lacked the infrastructural authority required to impose a legal order across all social

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[53] See the account of the assault on guilds as bastions of 'disgraceful privileges' in the Revolution in Vardi (1988: 717).

[54] One account states that in pre-1789 France social interaction was defined by 'corporate identity' and the 'individual had essentially no standing' (Fitzsimmons 1987: 270). A different interpreter argues that the global *ancien régime* was a societal condition in which there were 'corporations and estates instead of individuals' (Guerra 1992: 25).

fields, marked by rising levels of individualization.[55] In consequence, political democracy, based in socially generalized constructions of political authority and reliant on some idea of national citizenship, first began to take shape as part of a societal order created by monarchies. In fact, democracy first emerged as a system of regulatory administration that performed functions required by monarchical societies and necessitated by the rise of monarchies, which monarchical institutions, in themselves, were not able to perform adequately.

In other words, democracy first began to emerge as a political system in which broadly mandated institutions replaced localized corporations as the dominant centres of societal inclusion and regulation. For the first time in modern history, early political democracy instituted an organizational form for governmental institutions, in which they were able to produce laws, which could be justified and enforced across all domains of society, above the sectoral partitions in society's structure, which had originally been created and entrenched by medieval corporations. The idea of the single person as a citizen, voluntarily conferring authority to rule on national institutions, formed a core term of inclusion for societies marked by simultaneous processes of economic and geographical expansion and social individualization. Far from reducing the power of established states, however, the system of early democracy constructed a political order that penetrated more deeply into society and that was much more effective than monarchies in establishing central authority and reasonably uniform legislative control within the national societies in which they were located (Bendix 1996: 113). Indeed, in many settings, controlled experiments in democratization were encouraged by sitting elites as techniques for managing society after the dissolution of the traditional social order, and for forcing social agents, released from local power structures, into convergence around state institutions, thus solidifying central political authority.[56] In key respects, therefore, democracy evolved through a bundle of processes, linking patterns of elite-initiated societal administration, strategies of national centralization, and structured institutional differentiation. The reaction against political authoritarianism possessed limited importance in these processes.

Democracy is usually observed, normatively, as the result of the demands of national populations in the exercise of their sovereignty. However, it is

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[55] On the general weakness of early modern monarchies see Lousse (1958: 92); Gueniffey (2000: 59).
[56] See on this Rokkan (1961: 138; 1975: 572); Caramani (2004: 2).

more historically accurate to see democracy as a legal artefact that was used to galvanize the nations from which democratic political institutions purported to extract legitimacy. Democracy emerged as an administrative form that expanded the power of the political system through national society, occupying and regulating the social domains once filled by local or corporatistic structures of authority. One brilliant analysis of early democracy explains how the institutionalization of political elections was used mainly to promote social integration of different groups and different classes, to establish a national frame of reference for political order and to consolidate organs of national regimentation (Kühne 1994: 34–7).[57] The formation of early democratic institutions was thus driven by a transpersonal logic of political centralization. If viewed systemically, this process marked, in many respects, a continuation and intensification of the centralizing functions of monarchical polities. Not surprisingly, Weber placed great emphasis on the centralizing impact of democratic mobilization, which he saw as forming a stark counterpoint to feudal or patrimonial patterns of social integration (1921/2: 862).

In these respects, the founding concepts of democracy, and, in particular, the underlying idea that democratic institutions extract their legitimacy from their original authorization by citizens, should not be taken literally. In fact, these concepts were intrinsically interwoven with the deep-lying processes of social formation discussed above. The early rise of democratic concepts coincided closely with a process of societal nationalization, in which societies and their institutions expanded beyond their historical local and professional structures. At a manifest level, the concepts of democracy spelled out a basic normative model for the legitimization of political authority. This model is generally reproduced in more contemporary theory: it reflects the idea that a *chain of legitimation*, running from the people (or nation), acting as citizens, through the constitution, transfusing organs of state, and returning to the people in the form of positive laws, is the condition of all political legitimacy.[58] At the same time, however, these concepts did not spell out a normative model of democratic governance in which existing political subjects obtained representation. They served, more vitally, to create the national political system and even the modern nation itself. Functionally, these concepts acted to estab-

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[57] See also Gironda (2010: 70). This is corroborated in Caramani (2003: 436). For early theoretical comment on the deep link between citizenship practices, especially voting, and the nationalization of the political system, see Ariel (1964: 35).

[58] See the articulation of this theory in Böckenförde (1991: 299).

lish a distinctive political domain in society, in which political interactions were clearly abstracted against the privatistic patterns of local/corporate power that characterized early modern social order, and by means of which political actors were able to exercise expanded control of society as a whole. Although the early democratic imagination placed emphasis on concepts of *popular sovereignty*, *citizenship*, *participation* and *collective freedom*, these concepts were not reflections of factual subjects or factual demands for freedom. In their most essential dimensions, these concepts formed a normative apparatus through which the modern political system began to elaborate itself, through which a system of essentially public order was solidified in society, and through which national society was itself created. In many respects, in fact, the primary concepts of national democracy came into being before the putative subject of national democracy (the people, acting as citizens) actually existed. When these concepts first emerged, the people did not exist as a collective subject, bound by the laws of repressive monarchies; people existed in diffuse pre-national locations, bound by multiple, patchwork legal orders. The original subject of national democracy was, in short, a fiction, which *generated itself* through the doctrine of national democracy.[59] Most importantly, this process of democratic self-imagination did not contradict preceding, typically monarchical, patterns of political-systemic formation. It established an alternative, more effective foundation for the consolidation of the national, centralized political system.

The early rise of democracy, in sum, was centred on a deep paradox.

As discussed, the concept of democracy has undergone many transformations. However, at the core both of classical democratic theory and of classical democratic institutional practice is the assumption that democracy is a political system in which laws are created and acknowledged as legitimate by a collective political subject. According to classical democratic theory, this subject acts prior to law, and the law acquires obligatory force as it reflects the choices and reasonable freedoms of this subject – usually circumscribed as the *people*, the *nation* or, more properly, the *citizen*. On this basis, early democratic theory contained a clear monopolistic claim, indicating that law that is not supported by the will of sovereign citizens cannot claim legitimacy. Originally, this idea underpinned proto-democratic contractual theories,[60] and it was given full expression during

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[59] On the 'founding fiction' of democracy see Rosanvallon (2008: 11).

[60] Rousseau did not actually argue that the citizens stand prior to and create the state. But his theory of contractual legitimacy, stating that the government destroys its authority

the revolutions in France and America.[61] Later, this idea assumed central importance in democratic reflection, as it became more pervasive and diffuse in the twentieth century. To be sure, recent thinking about democracy has weakened the association of the people with a territorial nation, and rights of participation in political processes are not now invariably attached to national membership.[62] Yet, as discussed, an essential principle that underlies all democratic theory is that citizens, often observed simply as *society*, stand outside the legal-institutional form of the polity, and they construct this form, in accordance with collectively demanded or acceded norms, in order to establish conditions for their freedom and self-determination. In contemporary democratic thought, the people are still configured as an active self-legislating aggregate of persons, demanding particular political freedoms, and acting prior to the legal form of their public order.[63]

Despite such global theoretical consensus, however, the actual development of political democracy appears not as the result of a deliberate collective choice by a collective subject, but as an essentially contingent occurrence. As a historical phenomenon, the rise of democracy was linked to certain deep-lying social processes, and it facilitated the deepening extension of the political system into national society. But it was not constructed or propelled by any obvious necessity, rational design, moral-theoretical consensus, collective mode of agency or shared demands for freedom. Only rarely did democracies result from a collective push for emancipation by agents within national societies. The growth of democracy was in fact deeply enmeshed in the processes of institutional centralization that pre-existed the first emergence of democratic institutions, and to which early democratic practice was – in its overt normative self-conception – opposed. Moreover, the conceptual subjects whose freedoms were used to give normative support to early democracy did not possess a material existence, and, in many cases, they only acquired reality

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wherever it derogates from the terms set in the 'primitive act' of contract formation, can easily look like a theory of constitution-making (1966 [1762]: 53). Similarly, Kant did not argue that the social contract is a real constitutional object, which citizens agree before they create the state. He argued that the process of constitution-making is a moral process in which not the practical organization of government power, but the idea of the social contract, acquires a regulative function, as a 'mere idea of reason' (1977c: 153). However, this view has a certain analogy to constitutional theory.

[61] Thomas Paine claimed that all hereditary government is 'a species of slavery', while 'representative Government is freedom' (2003 [1791] 312).

[62] See below p. 414.

[63] See for instance Habermas (1992: 607); Bellamy (2007: 154); Webber (2009: 19).

subsequent to their normative construction. It is widely noted, historically, that reasonably uniform national peoples only came into being a long time after their first construction as the original authors of democratic polities.[64] In many cases, as discussed in Chapter 4 below, the ideal of democratic citizenship only came close to material realization through long processes of social construction, often with little foundation in democratic agency. Overall, the basic assumption that democratic law originates in reflexive acts of existing societal constituencies can only be very partially substantiated. Democratic government was not primarily created for reasons that we would now recognize as democratic.

1.2   The Sociology of Democracy

1.2.1   Early Social Theory

The contingent nature of democracy was not reflected in the classical self-explanations, or the classical critiques, of democratic polities. As discussed, much early democratic theory in the eighteenth century was marked by a literal approach to democracy, and it actively promoted the fictitious concepts around which democracy was paradoxically cemented. In some respects, however, certain lines of political reflection that gained momentum during the nineteenth century showed appreciation of the paradoxical asymmetry between the ideas of national self-legislation promoted in the Enlightenment and the factual realities of emergent post-revolutionary polities. In varying ideological guises, many theorists expressed the suspicion that early democratic ideas projected a fictitious reality, which was not linked to factual patterns of agency, and which could not become a material political form. Running through some lines of theory in the nineteenth century, in fact, was a pervasive sense that the revolutions of the eighteenth century had attempted to create a political system whose content, substance and legitimacy had only been simplistically articulated by its advocates. Throughout the nineteenth century, early democratic theory was recurrently exposed to the criticism that it reposed on a sequence of societal fictions, and it was incapable of establishing enduring and objectively legitimate institutions.

To illustrate this, first, through the earlier nineteenth century, the group of theorists now known as *historicists* argued that the experiments in revolutionary-democratic constitutionalism in France had proved

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[64] See important pronouncements on the fictionality of nationhood in Dahl (1989: 3); Linz (1993: 361); Beetham (1999: 82).

short-lived because constitutions created at this time were founded in a fictional construction of the sovereign people. In particular, historicists claimed that, in the early democratic revolutions, legal orders had been abstractly implanted in society, and they were not able to presuppose historically embedded motivations amongst their populations.[65] This perception was initially reflected in the works of Burke, who dismissed the idea that formally imposed institutions could secure political legitimacy, and he emphasized instead the historical, organic premises of political obligation (1910 [1790]: 58). This critique was visible in the writings of Savigny, who rejected rational or contractual constructions of law, and implied that law acquired authority through its attachment to local customs and affectual norms. Savigny especially accentuated the 'organic connection of the law with the essence and character of the people'. He claimed that law guaranteeing freedom is law that proceeds 'from the innermost essence of the nation itself and its history' (1850: 113), and he saw in the reception of Roman law in the German states a vital enactment of traditional freedoms (1840b: 11). Underlying the historicist approach was the basic claim that members of a national population could not be separated from their local historical form, and the construction of the people as a single rational agent, able electively to transform and legitimate society's political structure, was always projective. At the origins of historicism, tellingly, Gustav Hugo argued that the 'legal truths' of a particular people cannot be defined *a priori* as 'pure, general, or necessary'.[66] Instead, he explained, valid laws can only 'be learned historically, from facts' (1823: 19); they are 'empirical', and they are 'different depending on time and place' (1823: 55).

Second, over a longer period, the group of theorists now categorized as *positivists*, many of whom were initially close to historicism, also opposed the voluntaristic theories of state legitimacy and legal authority espoused by early democrats. Positivists broadly accepted the defining moral-philosophical claim of the Enlightenment that the modern state must operate under formally binding law, and they rejected the more obviously reactionary constructions of the state as a legally unbound actor, acting in analogy to a private person (see Albrecht 1837: 1496). To this degree, most early positivists were located in the more Conservative margins of

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[65] See for example Ranke (1833: 794); Savigny (1850: 113). Historicism was not intrinsically Conservative. Its critique of constitutional rationalism in the name of historically integrative experience was central to later patterns of liberal constitutionalism. To illustrate this, see Droysen (1846: 426).

[66] Gustav Hugo might in certain respects be viewed as the precursor of both historicism and positivism (Eichengrün 1935: 113–14).

early constitutionalism. From Hugo, to Puchta, to Gerber, to Laband, to Jellinek, the positivists argued that the modern state necessarily required a legal form, and the basic legitimacy of the state could only be conceived in legal/constitutionalist terms. However, unlike more mainstream theorists of the Enlightenment, positivists were resistant to the idea that the laws of state could be produced through acts of popular-rational legislation, or through any external patterns of will formation. Indeed, they indicated that this idea originated in metaphysical constructions of the state as a collective person, which could not provide a reliable foundation for political order.[67] As a result, the positivists observed the formation of the law of the state as a simple positive exercise, engendered either through legislative acts, or, at most, through societal processes of institutional evolution (see Jellinek 1900: 323, 392).

On one hand, the positivist outlook gave rise to quasi-Hobbesian constructions of legal authority that defined the law as a simple structure of command. This idea was first spelled out in English positivism, and it then migrated into German positivism, where legal authority was eventually construed, in principles derived from Roman private law, as the manifestation of the sovereign volitional power of the state, acting as a formal legal person.[68] By the middle of the nineteenth century, the leading exponent of German positivism defined the state as the 'highest juridical personality', defined by the attribute of the 'power to command' (Gerber 1865: 3). On the other hand, however, the positivist outlook gave rise to formalistic constructions of the law, claiming that, once created, the law possesses free-standing obligatory force, and that questions of legal validity and political legitimacy need to be resolved through purely legal analysis, without reference to external factors, be these political, sociological or normative.[69] These two lines of thinking were not categorically distinct,

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[67] See Kelsen's argument that positivism is defined by its 'conscious opposition to metaphysical speculation' (1962: 316). See the additional claim in Ott that legal positivism is determined in its essence by 'the refusal to take recourse to metaphysical presumptions' (1976: 104).

[68] For the English theory see the following claim in Austin: 'Every positive law, or every law simply and strictly so called, is set, directly or indirectly, by a sovereign person or body, to a member or members of the independent political society, wherein that person or body is sovereign or supreme' (1832: 267–8). For important historical commentary on Germany see Schönberger (1997: 52).

[69] This principle was fundamental to positivism. This culminated in Kelsen's claim that law is simply *pure law*: it is a 'logically closed complex of norms', and these norms regulate legal questions and dilemmas without any external direction (1920: 114). In consequence, Kelsen explained, 'juridical knowledge' need concern itself with 'legal norms' and nothing else (1920: 109).

and they flowed together in the thought of most positivists. Generally, positivists argued that the state first makes the law, but is then bound by it. Laband, for example, who was widely regarded as the proponent of the most baldly statist version of positivism, defined the constitutional order of the state as the result of an 'act of will of the state', but he still imputed to the constitution a 'binding force', which even state agencies could not easily ignore (1911: 39).

On this foundation, positivists opted for a largely apolitical concept of law, and they endeavoured to account for law's authority by isolating the law against political forces and specific acts of volition in society (Böckenförde 1958: 211–12). Above all, positivists argued that the legal foundations of the state should be interpreted in a purely formalist perspective, and they should not be confused with collective demands or rationally articulated moral objectives.[70] As a result, although positivists typically favoured some pattern of constitutionalism as a model of legal/ political order, they did not endorse expansive ideals of citizenship, imagining democracy as the self-enactment of popular visions of freedom or autonomy. In particular, they rejected the idea that the political system could derive its legitimacy from a manifestly political, external will, expressed by actors in society at large. Instead of this, they claimed that the political system obtains its legitimacy through a circular relation with the law, in which the law, of itself, imposes constraints on the use of political power, and the law internalizes and satisfies the demands for legitimacy directed towards the political system (see Häfelin 1959: 95).

The line of positivist reflection eventually culminated in the works of Hans Kelsen, who both transformed positivist ideas, and developed these ideas to a high degree of refinement. Notably, Kelsen argued that law should be examined as a pure system of norms, occluded against all extra-legal factors, and that analysis of law is distorted by theories which dualistically separate the source of law's authority from the law itself. For example, he claimed that natural-law arguments falsely bind the law to a realm of ontological facts or subjective values; they originate in a 'solipsistic epistemology', which mistakenly presumes that particular value-deductions can form a reliable foundation for objective legal norms (1925: 37). Similarly, he asserted that contractarian claims that the law must express agreements of principle, which then provide a scheme for

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[70] For example, the young Jhering argued that legal principles are 'abstracted from observation of the conditions of life' (1852: 25). In his later work, he turned categorically against this view and opted for a utilitarian construction of law.

the 'legitimation of the state', make both the law and the state dependent on external values or moral notions, which the law cannot meaningfully articulate (1934: 128). Further, he insisted that questions of legal validity should be categorically detached from all material sociological analysis of law's authority and efficacy (1911a: 10). In particular, he concluded that the sources of legal authority cannot be founded in distinct acts of the state. For Kelsen, there is no voluntaristic foundation for law, and law possesses no source of volitional authority outside itself. Even the norms contained in a constitution, he observed, should not be construed as outcomes of collective-voluntaristic decisions about the order of state. The constitution, although authorizing law, is merely an objective fact or a self-reference of the law, which law creates *for itself*: it is an original norm, or a 'point of departure for a procedure', and its sole function is to create a normative frame of reference, in which legal questions can be formally processed, and in which law can refer to objective principles to regulate the exercise of political power (1934: 64).

On this basis, Kelsen argued that theories of democratic legitimacy premised in substantial/material or voluntaristic processes of norm formation should be viewed as expressing a metaphysically contaminated account of the law. To be sure, Kelsen was a committed democrat, and one reason for his hostility to political voluntarism was that he perceived this as a source of anti-democratic thinking.[71] However, he viewed democracy, in essence, as a normative order in which not the people or the demos, but the constitution on its own determines formal principles of legitimacy for the polity. In consequence, he concluded that the classical-democratic idea that the people could act as an immediate presence in government was a 'meta-political illusion', resulting from a misguided understanding of the foundations of legal-constitutional validity (1929: 21–2). In this respect, Kelsen brought to a pithy conclusion the longstanding line of argument amongst positivists, who, through the nineteenth century, had implied that attempts to legitimize the modern democratic state through reference to collective political subjects rested on unreliable and chimerical metaphysical principles.

Such cautious responses to early democratic theories became especially evident amongst theorists in the nineteenth century who examined the politics of early democracy from a more *sociological* angle. Of course, sociological thinking did not develop in a vacuum, and many sociologists

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[71] Kelsen saw metaphysical legal thinking, premised on the idea of extra-legal substance, as inherently authoritarian (1933: 25).

have perceived their methods as deeply indebted to theorists working during the Enlightenment, notably Montesquieu, Adam Smith and David Hume.[72] In the nineteenth-century context, however, sociology evolved as a conceptual lineage which reflected deep democratic scepticism, and it combined elements of historicism and positivism, galvanizing these to enunciate a distinctive critical account of early democratic ideas found in the Enlightenment.[73] To be sure, sociology eventually differed from early historicism and positivism in that it accepted democracy as a reality – even as a necessary reality. Gradually, sociologists sought not to suggest counter-models to the democratic state, but to explain the grounds for the emergence of democracy, and to interpret its distinctive benefits. Sociology thus slowly staked out a particular position in a wider endeavour, in Pierre Rosanvallon's words, to 'give flesh to democracy' (1998: 133), and to place democracy on more adequate conceptual foundations. However, the attitude of early sociology to democracy was always ambiguous. In particular, early sociological thinking was distinctively defined by a concept of society that separated societal dynamics from the conscious lives and interests of individual human agents, and which observed society as a phenomenon *sui generis*. This *discovery of society*, which was formative of sociology as an intellectual orientation, created the basis for a sharp reaction against formal-rational, formal-individualist or simply voluntaristic comprehensions of political subjectivity in early democratic thinking (see Bouglé 1896: 119; Gauchet 2007: 156).

The early growth of sociological theory was, in general, very closely linked to the early rise of democratic ideals of freedom and equality, and the academic discipline which we now understand as sociology evolved, in some respects, as a commentary on the first emergence of democracy as a form of political organization. Tellingly, Siegfried Landshut observed in a very important work that early sociology constructed its basic unit of analysis – society itself – by examining the impact of the 'ideas of freedom and equality' on the 'demands and expectations' of human beings (1969: 85). In particular, early sociology placed its primary focus on structural questions relating to the transformation of political order after the collapse of the *ancien régime*. The most important theorists who contributed

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[72] Durkheim saw Montesquieu as a founder of modern sociology (1953). In similar spirit, see Duguit (1889: 492); Esmein (1903: 44–5); Gurvitch (1939: 625). On the origins of sociology in the Scottish Enlightenment see Small (1907); Lehmann (1930).

[73] Both early positivism and historicism contained clear sociological assumptions about the grounds of legal validity. See for example Puchta (1828: 141). For comment see Brockmöller (1997: 58, 116).

to the first emergence of sociology sought to comprehend the dynamic forces underlying the formal abstraction of the modern state, and the correlated growth of an individualized market-based civil society, in which social agents increasingly laid claim to distinct economic and civil rights. In the earlier twentieth century, tellingly, Hans Freyer argued that sociology in its entirety evolved as a discipline that was engaged with the 'history of civil society', and that the 'dissolution of society from the state' formed the primary and abiding 'object of sociology' (1935: 134). As a result of this emphasis, early sociology was deeply concerned with the normative foundations of the modern state, as its position in relation to societal actors and organizations was reconfigured. In consequence, sociology first took shape as a discipline that examined the lines of articulation between centralized political institutions and diffuse agents through society, and which endeavoured to explain the motivations that linked these institutions to different societal domains. In contrast to more classical philosophical inquiries, however, early sociology promoted an analysis of the emergent modern state, which tried to account for the collective preconditions of institutional legitimacy and the social and motivational grounds for acceptance of laws in modern society without reliance on rational or individualistic ideas of human self-legislation. Notably, sociological theory approached these themes in a spirit of tentative relativism, sceptically interrogating the foundations of public authority and observing the claims for collective rationality and collective freedom that shaped early democratic institutions with interpretive semi-positivistic caution.

In the first instance, many thinkers who might now be grouped together as forerunners of sociology analysed the formation of early democratic institutions in harshly critical fashion. For all their great differences, many early sociologists were united by a rejection of the notion, identified with the French Revolution, that democratic political institutions could simply be grafted onto the existing structure of society, or that appeals to formal or universal principles of freedom could provide adequate *motivational* or *obligational* support for these institutions. In this respect, most specifically, early sociological theorists questioned the assumption that a rationalized aggregate of persons known simply as 'society' could be objectively isolated from the state as a source of legitimate law, and that this society could rationally organize itself as a distinct constituent power, giving expression to simple, universal ideas of freedom, to be transmitted through the state. As an alternative, early sociologists began to develop the idea that the increasingly differentiated form of the state was not simply detached from society, but in fact obtained its legitimacy

through complex, embedded social phenomena, which connected it, in fundamental ways, to underlying processes in society as a whole. On this basis, in effect, early sociological theorists denied the existence of the people as *an aggregate of contract-forming subjects*, standing opposite the state as a collective rational actor, and they rejected the assumption that a society could be centred in one single mode of rational or contractual subjectivity, or one single vision of collective freedom, reflected through the political body of the state. On this account, rational ideas of freedom could not produce adequate motivational force to stabilize the position of government in society and to legitimize government in face of those subject to its power. Instead, early sociologists gradually formulated the idea that a political system is always legitimated by complex, half-submerged motivations, many of which evade rational analysis, and which can only be disclosed through contextually refined interpretation. To this degree, early sociology was clearly hostile to the idea that the political domain could be seen as a discrete, volitionally constructed part of society, enshrining formal liberties for all persons. The sociological challenge to early democratic reflection was expressed from a perspective that accused early democratic theory of being inattentive to the intricately formed social foundations of political legitimacy and of failing to recognize the socially diffuse, often subliminal, impulses that move different agents to show compliance with political directives.

To illustrate this, for example, Bentham set out an early sociological critique of the normative principles that supported democratic ideals in revolutionary France (2002: 30). Likewise, Burke ridiculed the 'metaphysic rights' championed by the revolutionaries of 1789, preferring instead the 'real rights of men', based in civil society and convention, as the premises of political order (1910 [1790]: 56–8). The sociological critique of early democracy, phrased as an analysis of the consequences of the French Revolution, was then later expanded in the works of Tocqueville. Tocqueville viewed democracy as an inherently fragile political form, whose factual reality depended not on the collective exercise of sovereign powers, but on socially distinctive behaviours. He argued that the 'democratic revolution' of 1789 had only occurred in the material dimension of society, and it needed to produce a transformation in the 'laws, ideas, habits and customs' of the people to become real and useful (1866 [1835]: 10). Similarly, Comte viewed both the 'dogma of universal law' and the 'dogma of the sovereignty of the people' expressed in the revolution as performing an 'indispensable' function in terminating the decadence of the *ancien régime*. Yet he also observed these concepts as the results of 'revolutionary

metaphysics', and so as incapable of stabilizing an enduringly balanced social order (1975: 28–32). Analogously, Saint Simon argued that revolutionary democratic principles had been founded in 'vague and undefined desires', determined, importantly, by the fact that revolutionaries had been 'ignorant of politics' (1966: 158). Overall, theorists in the early lineage of sociological reflection proposed a way of thinking about the claims of democracy which insisted that governmental orders presuppose more than subjectively rational institutions to prove enduring and legitimate. In particular, they argued that institutions need to be deeply correlated with societal structure.

This early sociological critique of ideas of democratic freedom found its most important articulation in the works of Hegel. Vitally, Hegel accepted the basic legitimational principle of the French Revolution. One leading commentator has argued that the French Revolution forms the defining 'event' in Hegel's philosophy (Ritter 1957: 15). Above all, his political thought was centred around the principle that modern society presupposes the existence of a state, embodying rational freedoms able to penetrate across society. He thus clearly endorsed the Rousseauian claim that a legitimate state is a public-legal order, enabling rational social freedoms for all members of society.[74] To be sure, Hegel argued against popular government, and he claimed, instead, that general freedom could be most effectively realized under a constitutional monarchy, supported by an enlightened and educated civil service (1970 [1830]: 468–9, 473). However, he strictly rejected all reactionary ideals of state power, and he insisted that a state is only legitimate if it creates public-legal conditions for the realization of the consciousness of liberty and the exercise of social freedom.

In defending the rational state, however, Hegel opted for an approach that expressed a distinctive sociological caution about the core principles of early democratic theory, and he opposed both individualism and the voluntarism of classical democratic reflection.

First, Hegel rejected the claim that a rational state could be created through simple acts of popular foundation, on terms dictated by the formal or contractual will of the people.[75] In fact, he rejected the claim that laws with claim to generalized authority could be imputed to reflex-

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[74] Hegel described the legal system as the 'realm of realized freedom', or, like Kant and Rousseau, as the domain of 'second nature' (1970 [1821]: 46), giving material expression to otherwise only inchoate rational human freedoms.

[75] Hegel was always critical of the contract as a form of agreement, seeing it as an expression of particular wills and particular interests, without a substantial ethical content (1970 [1821]: 172, 400).

ive acts of a simply formed political subject – *the people*, *the nation* or *the citizens*. Crucially, he argued that the power 'to make a constitution' is not an abstract or volitional power, to be exercised by a self-designated constituent body (1970 [1830]: 336). The freedoms enshrined in a constitution cannot be seen as the results of simple choices or rational decisions, emanating from articulated interests in society. On the contrary, he stated that constitutional freedoms only become meaningful if they are underscored and sustained by robust positive institutions, which provide an integrating bedrock for the particular freedoms exercised in society. All subjective freedoms, for Hegel, presuppose the presence of positive institutions, capable of casting a consolidated rational form for society, on the foundation of which single freedoms can be exercised. Ideas of freedom that are simply imposed on society always contain the risk of causing a fragmentation of society, and of undermining the positive institutions that freedom requires for its enjoyment. In fact, institutions ensuring freedom necessarily pre-exist and determine the rationality of subjects claiming constitutional freedoms. Accordingly, he indicated that legitimate institutions reflect an encompassing condition of society, which is embedded in the historically formed 'spirit of the people' (1970 [1830]: 336), and their authority is constructed through objective processes of legal norm formation and rationalization.

Second, Hegel claimed that agents in modern society were not able immediately to construct an idea of their freedoms capable of sustaining a fully legitimate state. Central to Hegel's work was the insistence that modern society had become irreversibly differentiated into a plurality of legal-normative spheres, each reflecting distinct experiences and distinct legal constructions of freedom.[76] Modern society, he explained, contains a 'great breadth' of liberties, of both public and private nature (1970 [1830]: 333).

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[76] Notably, Hegel argued that the modern economy distils certain ideas of freedom, based in the self-interest of individual parties (1970 [1821]: 340). These freedoms have substantial value and need to be protected, but, as they are based in formal, unilateral freedoms, they cannot establish the obligatory basis of government. Moreover, he argued that the human being as a whole could be divided into distinct characters, with distinct needs and ideas of freedom, depending on the societal sphere in which they operate. These characters were 'person' (in law); 'subject' (in morality); 'family member' (in the family); 'bourgeois' (in the economy). In each of these substantiations, the human being necessarily pursues different needs, and it cannot arrive at a comprehensive experience of freedom (1970 [1821]: 348–9). Freedom must incorporate, yet also be distinct from, such functionally selective freedoms, and it can only be guaranteed by the state. Even within the state, Hegel argued that different ideas of freedom needed to be institutionalized, and he viewed the state as a total entity comprising a number of 'particular spheres' (1970 [1821]: 477). These spheres included corporations, civil service, representative organs and, of course, executive and legislature.

In particular, modern society was increasingly dominated by formal freedoms engendered in the emergent capitalist economy, or civil society. However, he argued that such freedoms were only ever partial freedoms, pertaining to a particular set of intrinsically instrumental social interactions, with an intrinsically instrumental nature. Owing to the differentiation of society, individual people ordered their lives around selective, sectorally determined ideas of freedom, and they could not extract all-embracing ideas of freedom from their own singular interests. Notably, Hegel viewed freedoms 'in the European sense', as sanctioned by the French Revolution, as freedoms of the 'subjective will', the will of isolated individuals, which cannot amount to a conclusive experience of freedom (1970 [1830]: 312). Modern society, therefore, could not be forced to converge around the dictates of simply formed collective subjects, or around simply constructed ideas of rationality, freedom and institutional legitimacy. Democratic doctrines suggesting that a people, at a given moment in history, could project universal rational norms of governmental legitimacy, entailed, for Hegel, a deep simplification of the motivational, functional and historical structure of society. Indeed, such doctrines resulted from simplified constructions of reason, which were ill-adapted to society in its complex existing form.[77]

For Hegel, in consequence, it was illusory to think that the people might appear in society as identical citizens, with simply generalized ideas of freedom and equality. All citizens, he indicated, may be free and equal at a level of formal abstraction (1970 [1830]: 332). In concrete reality, however, citizens appear in society in many roles and many functions, each of which may entail rather different, often multiple, ideas and experiences of freedom. Importantly, moreover, individual persons may hold dear experiences of freedom that cannot be easily generalized across different parts of society, and which pertain to particular social histories and locations. In fact, individual persons may be alarmed by the formal freedoms created through the processes of social differentiation and economic individualization that shape their lives. For Hegel, therefore, a government able to produce deep obligational force for law needs to encompass, to moderate and to protect the multiple rationalities and the multiple freedoms that modern society contains. In fact, a legitimate government might need

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The idea of freedom, thus, could only appear through the institutionalization of a wide range of particular claims to liberty.

[77] Hegel described the concept of the 'people' as an 'inorganic totality', which could not, in immediate form, bring legitimacy to a state (1970 [1821]: 473).

to combine many different legal institutions, proportioned to different spheres of social interaction, permitting, within certain rational constraints, the exercise and the institutionalization of a plurality of individual liberties across society.[78] For this reason, Hegel argued that some institutions of the *ancien régime*, especially corporations and estates, retained an important function in modern societies. Most especially, he claimed that such institutions have a role in mediating between the economy and the polity, in obviating the excessive dominance of the prerogatives of particular sectoral interests, and, to some degree, in shielding people from the consequences of individualistic economic freedoms.[79]

   Overall, in asserting that there is no one simple subject in society from which state institutions can claim legitimacy, Hegel placed himself squarely against revolutionary individualism and rational natural-law theory (see Riedel 1982: 93, 114). As stated, he centred his political philosophy around the claim that the state needs to embody a higher rationality or a higher consciousness of freedom for society. However, this rationality might only appear in perspectivally differentiated form, meaning different things to different people in different social locations, functions and institutions.[80] For Hegel, the legitimacy of government institutions depends on their ability, not blankly to impose generalized ideas of freedom, but to uphold, to balance and to secure a variety of societal liberties, within an overarching construction of a free rational society. For Hegel, it is not the case that all persons in a society governed by a legitimate state will be free in the same way, or that they will experience their freedoms in identical fashion. Indeed, crucially, a legitimate state, intricately enmeshed in society's own structure, will promote the balanced legal institutionalization of a range of freedoms. In such a state, the provision of institutional security quite different freedoms, as much as any formal constitutional declaration of freedom, will act as the source of governmental legitimacy. In this latter respect, Hegel struck a note that remained vital for subsequent sociological reflection.[81] His suggestion that legitimate government presupposes the

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[78] A legitimate state for Hegel is 'the reality of the substantial will', in which freedom obtains its highest expression (1970 [1821]: 399). This state cannot be confused with the particularized interests that determine interaction in 'civil society' (the economy).

[79] For Hegel, estates and corporations form a 'mediating organ' between the government and the people, who are factually 'split up into particular spheres and individuals' (1970 [1821]: 471].

[80] For Hegel, the state is a 'living spirit' differentiated into 'particular modes of efficacy' (1970 [1830]: 331).

[81] Close to my account, Jonas argues that questions concerning the exercise of free will and the process of institutional formation are not separable for Hegel (1980: 156). For other

measured institutionalization of a range of freedoms, often preventing the volatile revolutionary expression of simple emancipatory claims, became a core characteristic of sociological reflection. In this respect, Hegel implied, in a claim with far-reaching sociological implications, that, in a legitimate state, freedom must be seen as the freedom of real people, and freedom is only freedom if people actually desire it for themselves. This implies that there may exist many experiences of freedom, each of which may require distinct modes of institutionalization.[82] Underlying this claim is the sense that in a modern, pluralistically formed society the law is not legitimated by the freedoms of simple citizens, and the law acquires a partly autonomous role in establishing social conditions of constrained pluralism.

After Hegel, a more strictly sociological critique of democracy emerged in more radical sociological theories. For example, this critique is visible in the works of Proudhon, who argued that the rational individualism of early democratic theory had eradicated more authentic, substantial patterns of liberty from society (1966 [1840]: 225).[83] In particular, Proudhon condemned the processes of institutional centralization linked to early majoritarian democracy, which he saw as reflecting a violation of essential human liberties (1927 [1861]: 40). This critique is also visible in the works of Karl Marx. To be sure, Marx was not an anti-democratic theorist; he clearly supported a Rousseauian construction of the legitimate political system as an expression of collective freedom (species being), self-legislation and citizenship. Yet Marx proposed a political critique of democracy which indicated that early representative democracy had been abstractly imposed on society, and it failed to establish basic liberties that pierced deeply into society or that meaningfully emancipated social agents (1956 [1844]: 364, 366). For Marx, modern democracy was constructed in a spirit of blindness towards existing objective relations in society, and the early architects of modern democracy were uninterested in creating a condition of genuine equality – or genuine citizenship – to support their institutions. In fact, Marx's

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accounts of Hegel as a sociologist, see Willke (1992: 20); Zalten (2006: 225). Very importantly, Freyer argued – in my view, entirely accurately – that Hegel's philosophy of law was the 'origin of German sociology' (1930: 213).

[82] Notably, one account has argued that the Jacobin period of the French Revolution witnessed a 'deinstitutionalization of politics' (Rosanvallon 2000: 74).

[83] Proudhon clearly belongs to the class of early sociologists. His work had the distinctive sociological feature that he observed society as possessing a reality distinct from the single agents that it contains; tellingly, he viewed the triumph of individuated property ownership as 'suicide of society' (1966 [1840]: 307). On Proudhon as a sociologist, see Gurvitch (1940: 58); Bouglé (1910); Hall (1971: 35).

critique centrally addressed the concept of the citizen in early democracy. He argued that the model of the citizen formalized in most post-1789 legal orders expressed an idea of citizenship based in a thin stratum of generalized atomistic liberties, focused on the realization of economic prerogatives, and it actually obstructed the genuine fulfilment of the ideals of equality first attached to revolutionary doctrines of citizenship. He claimed that, in early democracies, legal citizenship had been established as an instrument for preserving existing property relations, so that, far from realizing a condition of substantial equality, the citizen became 'a servant' of the capitalist economy. This meant that the 'bourgeois' replaced the 'citoyen' as the essential focus of society's legal/political structure (1956 [1844]: 366).

For Marx, modern constitutional democracies were always afflicted by a deep contradiction: they purported to offer general legal freedoms to their citizens, yet in fact they only offered economic freedoms, which could only benefit a small sector of society. Existing democratic systems presupposed that the claim to general freedom, from which they derived their formal legitimacy, remained at the surface level of society, and that it did not penetrate deeply into societal interaction, inducing demands for equal material and economic freedom. Early democracy, in other words, always presupposed that its founding normative principles did not become sociologically real. Marx argued that if citizens exercised their democratic rights in a deep sociological dimension, this would jeopardize existing economic relations, and, as backlash, democratic institutions would inevitably assume authoritarian features; elite groups would utilize the apparatus of democracy not to establish general freedoms, but to protect their select economic privileges (1960 [1852]: 194–6). Consequently, Marx concluded that political democracy could only acquire full legitimacy if it possessed a sociologically effective constitution, establishing rights and freedoms for the citizen as a *completely societal agent*, in the totality of its relations, including rights of socio-material equality. In this respect, Marx expanded the implication of early democratic theory, to claim that government is only democratically legitimated if citizens are able to live in material conditions in which they recognize their freedoms, not only in their laws, but in their *labour*: legitimacy, thus, presupposes equality in law and equality in labour at the same time (see 1962 [1932]: 568).

Overall, many of the classic texts in which sociology began to assume methodological shape as a distinct way of examining modern society were based on the claim, implicitly, that the modes of proto-democratic political organization resulting from the French Revolution and the American

Revolution were undermined by *an absence of society*.[84] That is to say, these texts indicated that the institutional design projected in early democratic theory was not correlated with *objectively manifest* social conditions, or with an *objectively visible* social agent. In particular, the argument was common amongst early sociologists that the democratic ideal of the modern state was based on the positing of a simplified distinction between state and society, in which the state was formally counter-posed to the collective will of subjects in society, from which the state was expected to extract its legitimacy. Sociology reflected a deep sense of the fictionality of common concepts of political subjectivity, and it implied that democracy was only able to proclaim legitimacy by falsifying the subjects to which it imputed its legitimacy. For the early sociological outlook, the subjects conferring legitimate obligatory force on legal and political institutions could not simply be projected in the form of an abstract collective singular personality (a nation of citizens), and acts of rational self-legislation, imputed in like manner to all persons, could only provide a fictitious, simplified point of attribution for the legitimization of public authority. On this account, the *forgetfulness of society* in the early democratic state had produced a deeply reductive model of political agency and political subjectivity to support its claims to legitimacy. Central to such sociological critiques was the claim that early theorists of democracy had constructed their models of the legitimate state on dualistic premises, borrowed from the *rationalist metaphysics* of the early Enlightenment, which posited *absolute rationality*, singularly incarnated in the subjects of individual citizens, as the basic principle of legitimate law. Underlying the early sociological attitude to the modern state was a deep scepticism concerning *political metaphysics*, and critical reactions to early democratic ideals tended to question democracy, not only because of its sociological vacuity, but because it substituted *metaphysical subjects* for *material/historical subjects* in attempting to articulate the sources of legal freedom and legal obligation in modern society.

The sociological apprehension about the metaphysical subjectivism underpinning the ideas of freedom in the modern democratic state was evidently not without justification. In placing the identity of government and collective freedom at the centre of political legitimacy, early theories of democracy clearly took recourse, in part, to metaphysical ideas of authority, which used residually metaphysical concepts to conceive the inner

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[84] For this reason, some commentators on the theoretical beginnings of sociology argued that it 'arose in the first instance as a deeply conservative movement' (Nisbet 1943: 161). See also Strasser (1976: 27).

legitimational connection between order and freedom.[85] In particular, these theories utilized ideas of political subjectivity inherited from classical metaphysics, and they viewed the institutional order of democracy as legitimated not by its realization of the freedoms of given persons, but by its realization of freedoms inhering generically in human nature – that is, *species freedoms*. For this reason, early democratic theory made extensive use of natural-law theory, and it constructed the human subject of democracy in categories derived, at least implicitly, from classical natural law. In fact, for many early democrats, the realization of abstract or natural freedom appeared more important than the practical institutionalization of democratic government.

To illustrate this, Rousseau's idea of the general will was manifestly extracted from a tradition of religious thinking, which identified the will of *virtuous citizens* as the foundation for legitimate government. His theory of the social contract premised political legitimacy in a purified construction of the human will and human freedom: the will underpinning legitimate government, he argued, was the will, not of factually existing citizens, but of citizens as rationalized metaphysical abstractions of their existing subjectivity.[86] Citizenship appeared to Rousseau as a moral condition, reflecting a 'remarkable change' in the human spirit, in which all agents in society are placed under and protected by a binding civil law (1966 [1762]: 55–6). Citizenship, on this account, is a moral choice, a calling, which elevates the political community into a transfigured ethical state (Rosenblatt 1997: 246). Famously, therefore, Rousseau concluded that a political system acquires legitimacy partly through its pedagogic functions in educating people to be citizens: that is, in separating them from their natural selves – in forcing them to be free. On this account, the political system was required, circularly, to create the virtuous citizens that it presupposed for its legitimacy as an institution guaranteeing collective liberty (1966 [1762]: 54). During the French Revolution, Condorcet followed Rousseau in opting for a pedagogic account of citizenship (1994 [1791]: 81). Indeed, Condorcet argued that there is a 'large gap between the rights which the law recognizes in citizens and the rights of which they have real enjoyment': this gap had to be bridged by education (1797 [1795]: 344).

At the beginning of the French Revolution (before France had become a Republic), similarly, Robespierre declared his objective to 'guide men towards happiness by virtue, and towards virtue by legislation founded on

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[85] See p. 96 below.
[86] See relevant discussion in Riley (1986: 62); Urbinati (2006: 91).

the immutable principles of universal morality' (Hamel 1865: 80). Later, he argued that a democracy is a type of polity, in which the 'citizen is subordinate to the judge, the judge to the people, and the people to justice'. On this basis, he declared: 'In our country, we want to replace egotism with morality … the tyranny of fashion with the rule of reason … vanity with magnanimity' (1793b: 4). Ultimately, he observed legitimate government not as a state of practical order, but as a condition of shared virtue, in which people, as citizens, are severed from their factual dispositions and factual motivations, and brought under the simple law of virtue. He stated simply that the 'soul of the Republic is virtue' (1794: 7). He added to this the claim that the 'mainspring of popular government in peace is virtue', but 'the mainspring of popular government in revolution is, simultaneously, *virtue and terror*': without terror 'virtue has no power' (1794: 13).[87]

Both Rousseau and Robespierre founded their idea of the citizen in a radical dichotomy between inner virtue and outer depravity. They assumed that a government could only assume legitimacy if it reflected the condition of virtue inherent in the interior moral life of the species, and, where needed, if it deployed terror to give expression to such virtue (Blum 1986: 241). Terror, thus, was essential for making people virtuous, and for ennobling them into a state of democratic freedom and citizenship. By implication, in fact, both Rousseau and Robespierre suggested, real people may feel terror in face of the virtues and freedoms which they are supposed to experience as free citizens in a democratic Republic. In these respects, classical theories of democracy were marked by a metaphysical resentment towards the actual material subjects of democracy. They defined democracy as legitimated by its realization, not of freedoms that people wanted for themselves, but of prior, necessary, virtuous freedoms: the realization of genuine freedom appeared more important than the factual experience of freedom. Like earlier natural-law theories, moreover, early democratic theorists were prepared to endorse intense authoritarianism as a path to freedom.[88] This metaphysical construction of freedom

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[87]   One important commentary has explained how the Jacobins understood 'virtue' as a condition of elevated freedom and justice, forming a strict bond of 'solidarity' between people and government (Jaume 1989: 322).

[88]   Leibniz, Wolff and, to some degree, Kant, had all expressed respect for rational authoritarianism. Wolff distinguished quite clearly between monarchy and tyranny, but, within the minimal constraints of natural law, he saw subjects of monarchies as persons who had pledged to 'allow the will of persons in authority to be their own will' (1756: 173–4). He also argued that obedience is still necessary when laws are unjust (1756: 424): 'subjects have to obey persons in authority' because 'subjects are not always able to judge what is in their interest' (1756: 460).

did not end with the end of the French Revolution. As mentioned, after the French Revolution, Kant argued that valid laws had their origins in divine intelligence, close to divine reason, through which human subjects elevated themselves above their natural-material lives (1977b [1797]: 334).[89]

Across the spectrum of early democratic thinking, therefore, democratic legitimacy and metaphysical constructions of human subjectivity were closely connected. Laws able to obtain and command legitimacy were usually imputed to acts of rationality and concepts of liberty standing above human agents in their factually given reality, which may inspire terror in merely material human beings. As a result of this, the leading legal and political theorists of the late Enlightenment placed particular emphasis on the claim that laws assuming validity for one state must also necessarily assume validity for a number of states, and each legitimate state must be subject to *the same laws*. Early theorists of democracy tended to express enthusiasm for international law, and they developed a notion of the democratic subject which encompassed many peoples and many nations at the same time.[90] Moreover, the metaphysical emphasis of early democratic theory was reflected in the fact that its exponents generally saw democracy as a *total condition*, identifying collective self-legislation as the sole and

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[89] This analysis revolves around an anthropological recasting of the legal metaphysics proposed by Leibniz. Leibniz asserted that legitimate law is defined by teleological reference to an ideal political order, or to a condition of human perfection: to the City of God. For Leibniz, law deserving to be called natural is not based in anthropological observation. It is law that is identical with the 'laws of the best republic', and which guides human society towards the 'idea' of unity with God's own law: that is, with laws which God might freely give to himself (1885: 6). Leibniz thus saw natural law as constitutive of and deducible from a condition of human perfectibility, and he saw human perfectibility as a condition of possible likeness between humanity and God. Similarly, Wolff argued that order and perfection are internally correlated, concluding that rationally ordered government is a sign of perfectiblity (1751: 448).

[90] Kant was an early theorist of international law, endorsing an idea of transnational moral 'federality' (1977b [1797]: 211). In the French Revolution, as mentioned, Abbé Grégoire also drafted a Declaration of the Rights of Nations, which was presented in the National Convention in June 1793, at almost the same time as the Jacobin Constitution. This document tied the theory of national sovereignty to a rights-based construction of international society. It insisted that only governments 'based in equality and liberty' had claim to legitimacy (Art 8), and that constituent actors were bound to create constitutions in conformity with international law (Grewe 1988: 660–61). In 1793, Robespierre compared international abuse of rights by states to the exercise of private violence by brigands and bandits (see Redslob 1916: 286). The reciprocity between national rights and international rights was also central to the thought of Condorcet (1847: 527). In the USA at the same time, the Supreme Court stated in *Chisholm v. Georgia* (1793) that the 'national judiciary' had in part been designed to supervise the 'conduct of each state, relative to the laws of nations' (*Chisholm v. Georgia* 2 U.S. 419 (1793)).

necessarily exclusive form of human freedom. This principle was formu-
lated by Rousseau (1966 [1762]: 54), who saw political freedom as entail-
ing a total transformation of the human being. This was also expressed
in the 1789 Declaration of the Rights of Man, stating that a society that
does not guarantee general laws does not have a constitution. However,
Robespierre expressed this most clearly, stating that the Revolution did
not 'recognize any other legitimate government' and it rejected all polities
not 'founded on liberty and equality' (1793a: 30).

In contrast to such ideas, the more sociologically oriented theorists,
whose work evolved, diffusely, in the wake of 1789, began to elaborate the
principle, albeit on very divergent foundations, that obligatory authori-
zation for law must be engendered through the acts of real political sub-
jects, formed by determinate patterns of social interaction, and seeking
concretely embedded liberties. The basic impetus towards the growth of
sociology as a discipline came from the idea that the generic, absolute
freedoms envisioned in the Enlightenment had to be translated into real,
experienced freedoms, into the freedoms of real subjects, in order to pro-
vide a foundation for political order. If freedom and social order were to
be closely linked, social order needed to offer freedoms with an objectively
identifiable core. More Conservative opponents of classical democracy,
such as Burke and Savigny, viewed the historically existing people, defined
by ancient customs and traditions, as the primary political subject, whose
motivations and desires for freedom needed to be reflected as legitimate
law. From a less overtly Conservative perspective, Hegel argued that the
laws of the legitimate state needed to reflect ideas of liberty discretely
embodied in all separate spheres of society. From a Radical standpoint,
Marx accepted Rousseau's claim that legitimate laws reflect total freedoms.
However, he rejected the belief that such laws could be created by simple
rational subjects. He saw the collective subject of the human species, freed
from economic self-estrangement, as the necessary substrate of political
order (1962: 593–4).

Across the great ideological distinctions between these outlooks, early
sociological criticism of revolutionary democracy converged around the
claim that, at least under current conditions, society could not authorize
its laws in simply unitary form. For the sociological outlook, the exist-
ing subject of society inevitably assumed a complex, historically con-
structed shape, and its interests and liberties could not easily be distilled
into single subjects or simply binding or universally generalizable norm-
giving acts. On this account, any attempt to construct a unitary subject
to support society's laws relied on simplified metaphysical preconditions.

As a result, early sociological theorists implied that the institutional form of early democracy should be observed as a work of legal artifice, lacking deep-lying obligatory force, and the universalized laws of the democratic state could not be expected to find genuine compliance amongst factually existing human subjects.[91] The core sociological challenge to early democracy was that, instead of proclaiming absolute formal freedoms, it needed to find and then to institutionalize real freedoms.

1.2.2 Classical Sociology

Similar approaches to early democratic theory and early democratic institutions appeared, later, in the primary works of classical sociology, written as sociology was becoming established as an academic discipline. These works were also shaped by the idea that standard accounts of democratic government possessed only precarious social foundations. In the classical era of sociology, between circa 1880 and 1920, sociologists began to articulate the claim, inchoate in earlier social theories, that the subject of democracy could not be formally separated from society, and democracy assumed value only as it provided freedoms that reflected not metaphysical capacities, but genuinely desired societal experiences. Sociology thus coalesced around an attempt to separate human society from the formal projection of human species, and to account for society and its freedoms without relying on abstracted constructs of liberty.

The sociologists of the classical epoque also proposed a sceptical interpretation of political democracy and its legal apparatus. However, sociologists of the classical period tended to revise the more critical aspects of earlier social theorists. On one hand, sociologists of the classical era retained a broadly relativistic approach to democracy, and they insisted that the legitimating potentials of political democracy could only be explained through analysis of their multiple, contingent social foundations. On the other hand, however, such sociologists recognized that democracy was gradually emerging as an enduring system of mass integration, which reflected deep transformative processes in society. While proto-sociological theorists in post-revolutionary Europe had rejected the claim that democracy and democratic laws possessed strong sociological foundations, classical sociologists began to probe in more nuanced, affirmative fashion at the social bases of democratic law, and the freedoms which such laws articulated. As a result, classical sociologists eventually

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[91] This view is distilled in Marx (1956 [1844]).

proposed theories of democracy that, despite their underlying relativism, clearly acknowledged the emancipatory forces in democratic politics. Combining these two impulses, classical sociologists began to account for the rise of the modern state by reconstructing democracy as a political form that afforded and institutionalized qualified liberties for social agents, yet which had developed through submerged, non-rational historical processes, and which produced freedoms and obligations in ways that lacked hard normative or rational necessity. At the core of classical sociology, in fact, was a memory of the terror of freedom in the French Revolution. Following Hegel's path, classical sociologists attempted to graft together the recognition of subjective freedom as a core element of modern society created by democracy and the attempt institutionally to insulate persons against the anxieties – the terror – which they often felt in face of this freedom. In particular, legal sociology evolved around a concept of modern law, and especially the rights contained in modern law, that observed the law as a medium for the promotion of human freedom and social integration, yet which separated the law from the strict normative demands of revolutionary thinking. Early sociology thus endorsed democracy as the political form of subjective freedom, but rejected monopolistic claims to freedom contained in much earlier democratic theory.

This fragile, contingent endorsement of democracy is apparent in the works of Durkheim.[92] Famously, Durkheim interpreted the development of the modern liberal-democratic state, accompanied by the rise of a rights-based democratic legal order, as a process caused by underlying trajectories of social differentiation. This process, he argued, was shaped by an incremental division of labour in society, and it reflected the emergence of a societal order determined by contractually constructed patterns of integration, reflecting a condition of *organic solidarity*. In this respect, Durkheim argued that the legal form of democracy was established through the incremental diminution of vertical, coercive structures of political authority; by the growing reliance of political institutions on relatively autonomous, contractual legal norms; and by the increasing moral individualization of social agents subject to the power of political institutions (1902: 28–9). He viewed the rise of the modern state and the simultaneous emergence of the individual person as a holder of rights of personal dignity and equality as correlated evolutionary characteristics of modern society (1928: 93–4).

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[92] On the critique of Enlightenment in Durkheim see Horowitz (1982: 354).

The modern state, Durkheim argued, had been constructed through the emergence of the contractual patterns of integration that typify modern society more widely. The modern state evolved as a set of institutions that, no longer based in vertical authority or repressive patterns of collectivity, necessarily engaged with and constructed persons in society as holders of contractual rights, and it was not strictly separable from the patterns of lateral contractual engagement that defined interpersonal interactions in society as a whole. As a result, the state necessarily generated a legal order that acknowledged all persons subject to power as holders of distinct rights and that facilitated individual exchange between persons and government bodies.[93] In this regard, democracy appears not as a simply realized political order, but as an ongoing *process of integration*, in which the form of the state is closely linked to, and shaped by, the autonomous differentiated functions of the legal system and the autonomous patterns of integration in society more generally. The rights-based, relatively uncoercive legal order of the early democratic state had developed through a historical process, in which the impetus of functional differentiation had made the centration of society around mechanical patterns of solidarity and coercive authority improbable, and in which the state was only able to function by interacting with persons on premises implying their recognition as rights holders. In each respect, Durkheim argued that the political order of modern society was formed by the fact that the law acted as a relatively informal medium of integration, and, in both their private-societal and public-political interactions, citizens were integrated in society through the exercise of legal rights, generated spontaneously by the underlying transformation of society.

Importantly, to be sure, Durkheim's functional-evolutionary account of the state did not entail any devaluation of the ethical content of the modern democratic order, and it manifestly did not imply that democratic institutions were not legitimated by broad-based societal motivations. Durkheim's thought may have been critical of the methodological rationalism that shaped the earlier revolutionary conception of democracy. Yet, as one important commentary has observed, his analysis of democracy reflected a decisive and affirmative 'sociologization of the principles of 1789', designed to place the formal-rational demands for autonomy expressed in revolutionary France in a more sociologically plausible perspective

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[93] This is reflected in Durkheim's sociological view of administrative law, which he viewed as typical of societies that belong to a 'more elevated type' (1902: 200).

(König 2002: 37).[94] He observed the rise of democracy as the result of a
process of common deliberation, in which governmental organs are linked
to and legitimated by the common consciousness of individual agents
through society. He acknowledged this discursive aspect of democracy
quite clearly. He argued that the democratic state 'communicates by full
necessity' with 'the mass of the nation', such that democracy 'appears as
the political form by means of which society obtains a purer consciousness
of itself' (1950: 123). In this respect, he distinguished the collective con-
sciousness of modern society from the collective consciousness of less dif-
ferentiated societies, and he claimed that modern democracy rests on the
presence of a refined reflexive moral consciousness in society, able perhaps
to balance out dysfunctional patterns of individualization and institution-
ally to preserve individualism as a source of moral integration (Cotterrell
1977: 248). As a result, he concluded, a 'society is more democratic to the
degree that deliberation, reflection and critical intelligence play a more
considerable role in the course of public affairs' (1950: 123). Indeed, he
argued that the 'true characteristic of democracy' is twofold: it is based in
'the greatest extension of governmental consciousness', and in the 'closest
communications between that consciousness' and the people as a whole
(1950: 122). In these respects, he demonstrated a deep commitment
to democracy as a source of moral order. Indicatively, he argued that
modern society is defined by two deep emancipatory processes, which
together form a 'double movement'. These processes are the formation of
a 'strongly constituted' state and the growth of individualism (1928: 93).
Although he viewed the institutionalization of individual freedoms pri-
marily as an autonomous function of the law, he concluded that the law
alone could not complete this process, and government was required to
promote elevated patterns of solidarity.

   At the same time, however, Durkheim's theory of the state was based in
the conviction that the people only became the subject of democratic gov-
ernance, not through direct demands for freedom, but through longer pro-
cesses of reflection, collective consciousness formation and transpersonal
social evolution. Democracy, he explained, could not be simply conceived
as a 'discovery', which had occurred or taken shape in the nineteenth cen-
tury. On the contrary, democracy could only be made explicable through

[94] Close in spirit to Durkheim, see the argument in Ferneuil that 'the influence of metaphysi-
cal principles' on the French Revolution had blinded its protagonists to the foundations
of legitimate government and valid law (1889: 20). In a review of this book, Durkheim
affirmed its attempt to explain the revolutionary principles as social facts (1890). Durkheim's
critique of metaphysics is set out in Durkheim and Fauconnet (1903: 466).

analysis of its deep, socio-reflexive foundations (1950: 123). The processes underlying the rise of democracy, he concluded, were linked to embedded structural conditions – to the widening of society through the decline of feudalism, to the rise of monarchy, to the emergence of moral individualism as the dominant interactive pattern, and ultimately to the penetration of moral ideas across all society (1950: 122).

Important in this respect, in particular, is the fact that Durkheim claimed that the legal rights and liberties acquired by single persons in democratic societies had evolved as the relatively incidental results of wider processes of individualization and political differentiation, which had little to do with formulated collective interests, demands or rational constructions of freedom (1902: 403; 1950: 92). The construction of persons as rights holders was connected to the differentiation of the political system, and the liberties that arose through this construction were liberties of transpersonal nature, and they were not willed through single acts or choices. For Durkheim, to be sure, citizens have an important role to play in society, which they discharge in performing voluntary duties and in assuming individual offices in intermediary organizations and institutions (1950: 76, 87, 116). However, citizens do not necessarily appear as agents demanding or effectively giving rise to abstract general liberties, and individual persons do not assume primary responsibility for setting the basic political form of society, or for legislating broad conditions of moral order. On the contrary, citizens are likely to assume their functions in relatively localized moral-contractual settings, and they are not expected to project macro-structural liberties for all society.[95] At times, in fact, individual persons may experience alarm and alienation in face of the general rights and liberties which modern society has attributed to them. In some cases, consequently, citizens may require institutional protection for the singular life spheres in which their own particular liberties are located, and these life spheres may require specific, variable patterns of institutionalization to protect them. Like Hegel, Durkheim insisted that the corporatistic institutional residues of pre-democratic society still had an important role to play in preserving social cohesion.[96] He viewed corporations and professional groups as bodies that could cushion the subjects of democratic society against unmitigated exposure to the consequences of individualism (i.e. unmitigated economic competition), and which

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[95] See p. 97 below.
[96] For analysis of the relation between Durkheim and Hegel close to my own see Colliot-Thélène (2010a: 82).

facilitated communication between state and society (Gautier 1994: 839). Indeed, he suggested that in modern society corporations might need to be integrated within the political system (1902: xxxi).

A similar tone of equivocating scepticism regarding democratic formation is audible in the political-sociological works of Weber. Like Durkheim, Weber focused the legal and political aspects of his sociology on examining broad processes of centralization, differentiation and individualization, triggered by the socio-economic transformations of the eighteenth century. To an even greater extent than Durkheim, however, Weber condensed his political sociology around core questions of democratic legitimacy formulated in the Enlightenment. Accordingly, he sought to explain first, why democratic institutions had developed; second, how these institutions secured legitimacy to sustain the transmission of laws across society and third, how these institutions and their legitimacy might prove to be enduring. To each of these questions, however, Weber provided somewhat ambivalent answers, reflecting a distinctive sociological construction of democratic politics.

In assessing the reasons why democratic institutions had developed, first, Weber explained that democracy had become prevalent, in part, because of demands for mass incorporation in the political system. Owing to the growth of the modern capitalist economy, the closely related dissolution of the local estate-based structure of European society and the resultant individualization of personal life horizons, modern society was marked by a deep need for institutions able to integrate diffuse, geographically expansive populations.[97] It was in this context, Weber argued, that the modern democratic state had developed. The modern state had emerged, initially, as a collective association whose formally rationalized structure meant that it was able to apply political power in a consistent, apersonal manner across society, and whose extensive bureaucratic apparatus and uniform legal order allowed it to perform integrational functions for political communities detached from their traditional historical locations (1921/2: 825). In this process, the formalization of the law played a core role in promoting integration in the state, and the emergence of a depersonalized legal system underpinned the societal expansion of state power. Ultimately, the growing institutionalization of the bureaucratic state had also led to the emergence of democracy as a pattern of government.

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[97] For Weber, democratization and the formation of bureaucracy are always closely linked (1921/22: 567). Both processes occur as a result of the decline of estates as governance structures (1921/22: 129).

As a polity type whose institutions were able to draw together populations across large social and geographical divisions, democracy showed a particular adequacy to the extended form of modern society.[98] Indeed, parliamentary institutions, based in recognition of personal legal equality, rational uniformity and official professionalization, were distinctively proportioned to the structure of modern society, and they were able to conduct processes of social integration at an appropriately high level of abstraction and geographical extension.

For Weber, consequently, the development of parliamentary institutions was inseparably connected with the increasing bureaucratic organization of the state, and democracy usually took hold in contexts in which social integration presupposed a differentiated system of formal law and impersonal administrative rule (1921/2: 571).[99] Notably, Weber viewed the prevalence of general subjective rights that support modern democracies as linked to the bureaucratic expansion of government, and he examined subjective rights as institutions that underpin political orders in settings in which individual status claims and personal privileges have lost purchase as sources of political power. The basic construction of persons as holders of rights had been caused by the administrative expansion of the state and the depersonalization of society's political structure (1921/2: 419).[100] Overall, Weber indicated that modern society had evolved in a fashion that presupposed the existence of relatively free-standing political/administrative institutions, able to construct motivations for and uniformly to integrate society in its extended, materially divided structure. Democracy generally developed as a system of legitimation and as a pattern of organization for institutions of this kind.

Despite this acceptance of the necessary correlation between modernity and democracy, however, Weber claimed that the factual foundations of the institutions of modern democracy were often obscured by normative theoretical illusions. Indeed, his description of democracy as a mode of administration adapted to mass society did not reflect a full

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[98] Democracy is associated with mass mobilization through parties and with integrative appeals of powerful leaders, both modes of integration typical of geographically and economically expansive societies (1921/22: 568).

[99] Bureaucratic institutions, Weber argued, are produced by the reduction of economic differences in society (1921/22: 567). Both democracy and bureaucracy are linked to the rise of capitalism (1921/22: 142).

[100] Weber wrote quite extensively about the intellectual origins of basic rights, which he associated with natural-law doctrines (see 1921/22: 498–501). But the material cause of basic subjective rights lies in the inclusionary expansion of government and the diminution in the significance of social variations in the use of government power.

affirmation of democracy. To be sure, Weber saw some practical benefits in parliamentary democracy. One benefit that he identified in constitutional democratization, clearly, was that it provided a relatively stable integrated apparatus for the ordered development of social forces. One further benefit was that, in institutionalizing mass-political participation, it helped to prevent revolutionary overthrow of government.[101] Yet Weber was also clear that democracy had evolved through processes that had little to do with the demands for shared liberty usually associated with democracy.

As a functional response to pressures of societal integration, democracy, for Weber, did not imply a form of government that presupposed the rational engagement or the meaningful participation of citizens in political processes. On the contrary, he claimed that 'the modern concept of the citizen' had been created by the 'inescapable domination of the state bureaucracy' (1921: 266–8). That is to say, persons had been legally constructed as citizens because this legal form facilitated their interaction with the state administration, and it simplified the integrational processes that had brought the state into being. Moreover, he argued that 'modern parliaments' had developed primarily because they help to generate and demonstrate the 'minimum of internal agreement' amongst persons who are 'dominated by the instruments of bureaucracy' (1921/2: 851). In both respects, he viewed the political form of democracy not as a focus of collective freedom, but as an effective instrument of social coordination, defined primarily by administrative functions. Consequently, he claimed that the legal obligations imposed by democratic institutions are not to be seen as expressions of shared liberties or rational reflection.[102] He observed the growth of parliamentary institutions as part of a wider formalistic pathology of social rationalization, which actually eradicated experiences of particular freedom and autonomy. He construed the condition of 'rational life-conduct', which he associated with modern democracy, as an experience, not of elected liberty, but rather of fateful subjection (1920: 203). Contra the basic normative emphases of democratic theory, therefore, Weber suggested that democratic institutions had evolved without a deep foundation in deliberated human interests or in an articulated human will. Moreover, the legitimacy of democratic institutions was of a fragile nature, and the claim of democracy to protect common freedoms

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[101] He saw the threat of the 'democracy of the street' arising in situations where parties are weak and weakly rationalized (1921/22: 868).

[102] For Weber, modern law is integrally connected with capitalism, and it creates a legal order that satisfies needs for legal security in a widening monetary system (1921/22: 506).

and to generate substantially binding legal obligations was illusory. Above all, therefore, the primary association of democracy and collective freedom was not sociologically tenable.

In discussing how democratic institutions secure legitimacy for laws, second, Weber claimed that laws obtain legitimacy in democratic systems primarily because of the rise of rule-determined rationalism, which he viewed as expressed, most prominently, through the consolidation of formalized legal systems and the expansion of the bureaucratic apparatus of modern states (1921: 339). Modern parliaments, he claimed, are able to presume legitimacy for the laws that they impose because they are created and implemented in highly formalized procedures, on tightly regulated foundations, which means that, at different locations in society, persons subject to law can be persuaded that these laws are formally authoritative.[103] In this respect, however, Weber also identified a deep paradox in the structure of parliamentary democracy.

On one hand, as discussed, he argued that parliamentary democracy first developed because of the fact that modern mass societies depend on institutions capable of integrating populations in environments in which the local and intermediary institutions of premodern societies have disappeared (1921/2: 519). Accordingly, parliamentary democracy had stabilized itself by producing a formal system of legality, in which laws were legitimated by technical procedures and professionalized judiciaries, that did not rely on personal chains of command. As a technical, impersonal order, parliamentary democracy was able to secure motivations for the economically disparate classes and regionally diffuse groups whose emergence characterized modern social order. In fact, Weber claimed that the 'belief in legality', separate from local, familial or personal loyalties and affiliations, and compliance with procedurally correct statutes, constituted the 'most frequent form of legitimacy' in modern society, and this pattern of legitimacy was reflected in the growth of parliamentary democracy (1921/2: 19).[104] Parliamentary democracy, in sum, distils the wider rationality of modern society, and it cements a formal, depersonalized legal order as the basis of its legitimacy. As a result, the formalization of the law plays a key role in the institutionalization of the political system.

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[103] On the essentially bureaucratic nature of parliamentary representation see Weber (1921/22: 330, 339).

[104] As Andreas Anter has observed, 'the belief in legality' underscores the rise of modern political institutions, and the confidence of members of society in legal institutions is foundational for the stability of modern social order (1995: 95).

On the other hand, Weber was always sceptical about the capacity of formalized democratic procedures to integrate complex, materially divided modern societies. He argued that the formal techniques used in parliamentary democracies for generating and legitimating laws were, in some circumstances, insufficiently robust to draw together the polarized classes and factions that modern society contains.

First, Weber claimed that the integrational power of formal law itself is always subject to certain limits. Notably, law does not originate in formal procedures. It is only in relatively recent historical periods that law has been created by rational, professional means (1921/2: 505). In fact, although crucial to the legitimacy of modern society, formal law can be seen as reflecting a diminished mode of social association, in which individual agents are forced into compliance with insubstantial normative imperatives and trapped in cycles of purposive action that are not inherently valuable. The legitimacy of formal law is always a necessary but depleted mode of legitimacy, in which human action is structured by instrumental purposes and more authentic expressions of human autonomy and human freedom are suppressed (1921/2: 439). Moreover, in periods of social upheaval, refoundation or normative uncertainty, formal law alone is unlikely to construct a cohesive integrational order for society. In such situations, Weber indicated, alternative patterns of legal formation are likely to evolve, implanting stronger, affectual motivations into law (1921/2: 497). Despite the central importance of rational positive law for modern society, the law cannot entirely renounce all reliance on personal substances, and in some situations the law requires immediate personal authorization. Although democracy had evolved as a mode of integration distinctive of modern societies, it could not always rely on its own apersonal formalism to perform its inclusionary functions.

Second, Weber argued quite generally that the institutions of parliamentary democracy were always overstrained by the legitimational/ integrative demands channelled towards them from the complexly fissured societies, in which they were situated, and whose inhabitants they were expected to integrate and to unify (Anter 1995: 74). For Weber, as discussed, the primary function of parliamentary institutions lay in the fact that they were required to integrate large societal constituencies. As a result, in parliamentary polities, political parties necessarily assumed particular importance as organizations for incorporating society into the political system. Parties, in fact, first developed in parliamentary systems as core organs for solidifying broad support for the political system, and for linking social agents to the political centre of society. Indeed,

wherever an elected parliament became the focus of social integration, political parties acquired new dimensions and new obligations, and they were transformed into large-scale mechanisms for producing electoral results, for recruiting support for governments, and for coordinating exchanges between state and society as a whole. For Weber, the shift from the patronage-based party to the modern political party, acting as a highly mobilized electoral 'machine', was central to the rise of the modern political system (1921/2: 862). As parties assumed more expansive integrational functions, however, the formal-legal order of parliamentary institutions lost some of its force as a primary system of integration. In fact, as they expanded, party-political organizations relied increasingly on strong leaders to mobilize support, and they always tended towards the promotion of 'plebiscitary democracy', so that purely parliamentary bodies and parliamentary procedures assumed a more secondary position in the overall integration of society. Weber argued that such leadership was exemplified by Gladstone in England, who, during the franchise reforms of the late nineteenth century, appeared as a 'dictator of the electoral battlefield', able to maintain support in his party by winning votes across the country (1921/2: 843–5).

On this basis, Weber expressed a deep scepticism about modern democracy. He concluded that the essential functions of mass-integration that are accorded to parliamentary organs necessarily mean that parliamentary democracy generates functional demands that its institutions are unable to satisfy, and it inevitably assumes authoritarian, Caesaristic characteristics (1921/2: 862). Indeed, he stated that, in modern parliamentary democracies, parliamentary institutions do not form the centre of the political system, and their primary function is not the immediate democratic representation of social actors. On the contrary, the main function of parliamentary institutions is to provide a forum in which political leadership elites can be trained, and it is such elites, not parliament itself, that assume the pivotal role in integrating society as a whole. If parliament is to fulfil its integration functions, in short, it must be oriented towards the formation of national political elites, able to reach out to constituencies in society and to integrate different social actors through qualities of leadership. Consequently, the formation of elites must be the primary objective of parliamentary institutions, so that the representative responsibilities of parliament lose emphasis. Eventually, in his direct interventions in constitutional debate, Weber expressed great enthusiasm for presidential democracy, and he viewed the office of President as assuming vital integrational functions for society as a whole (1921: 468, 482).

Overall, Weber identified two reasons why parliamentary democracy did not possess adequate inclusionary power for modern society. First, he claimed that parliamentary institutions could not always satisfy the legitimational demands and the requirements for cohesion that characterized rapidly evolving, increasingly pluralistic and differentiated mass societies. Ultimately, he implied, parliaments only played on a secondary role in integrating their populations, and they contributed to this process, primarily, through elite formation. Second, he claimed that the formal legal order of democracy was itself too weak to galvanize entire populations, and it needed to be supplemented by more vital patterns of obligation, command and motivation. The impersonality of modern law resulted from the fact that it was required to secure integrative motivations for large, extensive societies. But, in some conditions, this objective could only be achieved by law that was suffused with a deeply personal, mobilizing appeal (1921: 508). In this second respect, Weber reiterated the long-standing sociological critique of democracy – namely, that laws produced in democratic states do not have a strong obligatory power, that the legitimacy of democratic law is always rather fictionalized and abstracted, and that it is illusory to think that democratic laws reflect the interests of actually existing societies, or factually manifest collective subjects. In fact, he concluded, the legal order of parliamentary democracy was unable to capture and fully to express the complex claims of factually existing populations, whose will it was supposed to represent. For Weber, the legal order of democracy was produced by social pressures caused by the original differentiation of modern society. Yet, in some circumstances, this legal order was unable to incorporate the multiple sectors existing in mass society in one unifying, integrational structure.

In considering the question of how democratic institutions might endure, third, Weber claimed that, if democracy were to survive, it required stronger foundations of legitimacy than those created solely by parliamentary bodies, by typical democratic procedures and by formal legal systems. For democracy to become fully solidified, it was essential for democratic institutions to supplement formally abstracted resources of legitimacy by promoting deeper, more visceral or affectual appeals than those produced through rationalized or rule-determined legal procedures. The functions of legitimation and integration attached to democratic institutions, including legal institutions, could only be accomplished if they were governed by powerful charismatic leaders, capable of embodying *charismatic rationality* – that is, leaders who possessed the ethical responsibility required to identify the long-term interests of the polity, and to motivate

diverse societal actors to pursue these interests (1921: 554, 558).[105] On this account, the democratic political system could only cement its integrative position in society to the extent that its legitimacy was sustained by motivations based not in the primary norms of democratic procedure, but in the extraordinary appeals of charismatic leaders (1921/2: 140). In this respect, Weber implied that the charismatic rationality of leading politicians can generate collectively recognized purposes, which possess higher, more categorical value than the formal, instrumental purposes on which the rationality of parliament is founded.

In each aspect of his analysis of democracy, Weber came to an aporetic conclusion. He argued that democracy was not constructed on the basis of deep-lying human emphases or demands for freedom. On the contrary, it evolved as an order of integration, through the relatively autonomous expansion of the political system, caused by the underlying transformation of society more widely. However, he also argued that the political system of democracy was inherently unstable, and it relied on affectual, non-rational, at times intensely politicized motivations in order to perform its basic integrational functions.

The two great classical sociologists arrived at some rather similar conclusions about democracy. Both argued that democracy is a mode of political-systemic organization, which has evolved as the consequence of deep-lying formative dynamics in society, and which resides on fragile foundations. Durkheim was significantly more affirmative about democracy than Weber, and he argued that democracy reflected a morally elevated pattern of social integration (see Prager 1981: 938). Self-evidently, however, both perceived very distinctive advantages in democracy, and both saw democracy as a necessary response to wider patterns of individualization and social transformation. Neither showed strong affection for theoretical positions that obviously rejected democracy. Nonetheless, both Durkheim and Weber indicated that parliamentary democracy was a highly uncertain political order, which evolved for reasons that had little to do with conceptual constructions of human freedom, and both saw the democratic ideal of governance by acts of a subjectivized popular will as illusory.

It is no coincidence, in consequence, that many sociologists who followed Durkheim and Weber accentuated their sociological scepticism in the face of democracy. Notably, the main backbone of sociological reflection from the late nineteenth century up to 1945 intensified the more

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[105] See for comment Breuer (1991: 175).

critical components of classical sociological reflections on democracy. Subsequent theorists concluded that modern democracy was incapable of making good on its promises of human freedom, and that it did not provide stable foundations for social cohesion and legitimacy. These ideas resonated through the thought of Michels, Freyer and Gehlen.[106] As discussed below, it was only after 1945 that sociological theorists began to adopt a less sceptical attitude to democratic formation.

1.3   Legal Sociology and Analysis of Democracy: How Was It Different?

From the aftermath of the French Revolution onwards, sociology evolved as a discipline with certain common attitudes to the rise of democracy, and with certain common claims concerning the social premises of law's legitimacy and obligatory power. In fact, it is possible to identify an outlook close to a distinctive legal-sociological approach to the early democratic state, elements of which can be found at all points across the political spectrum.

First, earlier sociological analysis of democracy usually approached democratic political systems from a perspective that was sceptical about formally generalized claims regarding legal validity and formally generalized concepts of political legitimacy. Inherent in the earlier sociological approach to democracy was the sense that societies obtain integrity, and political institutions obtain legitimacy, through complexly structured motivations, and that, consequently, laws can acquire and presume legitimacy in a multiplicity of ways: there is no categorically binding, essentially rational source for law's obligatory force. For early sociologists, the idea that the law is supported by a unitary citizen, seeking unified and general freedoms, always appeared improbable and fictitious. On the sociological view, the primary indicator of the legitimacy of a law is not the extent to which it enshrines rationally acceded collective liberties, but the extent to which, in a given conjuncture, it generates sustainably cohesive

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[106] As discussed, Michels argued that democracy necessarily had a tendency to create oligarchy. Gehlen claimed that the bureaucratic character of the state undermined its claim to consensual legitimacy and forced it to extract legitimacy from pure economic strategy – the 'dictatorship of the standard of living' (1963: 262). Freyer concluded that democracy should be seen as a condition, not 'of government of people by people' but rather of 'the administration of things' (1955: 101). He also argued that the rational constitutional formation of political power in the sense of modern democracy destroys political legitimacy (1955: 68).

social structures, which usually results from law's function as a *medium of normative integration*. As a result, thinkers in a recognizably sociological lineage proposed a theory of legitimacy in law and governance that was deeply committed to the *idea of contingency*: that is, such theories indicated that the legitimacy of laws is always contextual, dependent on broader societal circumstances, lacking fully binding foundations, and also inherently precarious. For this reason, classical sociology converged around the claim that law acts on its own as a primary source of democratic formation. Across a range of early sociological perspectives, the law appeared not as the expression of collectively reflected freedoms, but as a relatively autonomous, differentiated sphere of society. From this perspective, modern society relied on law for positive functions of social integration, which drove the construction of democratic institutions. The positive autonomy of law thus emerged as a core element in sociological analyses of early democracy.

Second, earlier sociological analysis of democracy commonly implied that the obligatory force of law is the result, in part, of the experiential aspect of human society. On this perspective, law acquires legitimacy through its interwovenness with dimensions of lived historical consciousness, which cannot be captured in simple normative formulae. Indeed, one implication of the sociological approach is that law can construct liberties in many different ways, and freedom in law can be experienced very differently by different agents, at different times and in different places. There is no one citizen whose freedoms provide a basis for all legitimate laws, and, above all, it cannot be assumed that freedoms are rationally prior to the actual experience of them. For early sociology, freedom lies not in the compliance with a pre-existing norm, but in the experience of freedom – freedom must be an experience that people *actually want* and freedoms must be freedoms that people *actually wish to exercise*: in this respect, early sociology reacted critically against metaphysical thinking and early democratic thinking at the same time. Early sociological understandings of democracy often implied that democracy's claim to possess a monopoly of legitimacy, excluding alternative accounts of human liberty, could itself be seen as authoritarian, or at least as unreflectingly oppressive.

As exemplified by Durkheim and Weber, sociological theories of democracy have widely indicated that the formation of democratic society might release freedoms that members of society may easily, in some settings, find *unbearable*. For this reason, the inhabitants of societies in a process of democratic formation may require some institutional protection from the experiences of atomized liberty and customary

disintegration generated through, or in conjunction with, the rise of the democratic state (see Durkheim 1930 [1897]: 439). The governmental system has an obligation to secure the institutionalization of individual liberty, which is just as powerful as any obligation to secure liberty itself. In fact, liberty only becomes liberty through its institutionalization: for much early sociology, it is not the abstract collective manifestation but the stable institutional organization of liberty that forms the primary indicator of governmental legitimacy. Durkheim, in particular, made this point emphatically clear in claiming that the institutionalization of singular spheres of liberty, within localized parts of society, is of the most vital importance in modern differentiated societies. This was reflected in his analysis of professions, and the patterns of contractual institutionalization that, he argued, characterize professional associations in societies marked by highly developed organic solidarity (1902: 206). This was also articulated in his assertion that social liberties are most adequately realized when individuals take steps 'to concentrate and to specialize' their freedoms, and to seek realization of freedoms within a small organizational horizon: such specialization of freedom becomes necessarily more refined the more elevated and differentiated society becomes (1902: 396–7). For Durkheim, consequently, one core function of the state is to ensure that individual liberties are given adequate institutional support and protection (1950: 99).

For these reasons, classical sociology was strongly committed to the avoidance of revolutionary conflicts unleashed by the growth of individualistic economies, polarized societies, and categorical constructions of freedom. Tellingly, Durkheim was clear that individualistic patterns of association do not always have beneficial outcomes. He argued that sociology needed to concern itself with finding 'moral brakes' to 'regulate economic life' (1928: 267).[107] Similarly, Weber was deeply preoccupied with

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[107] See the correlation between individualization, economic pressure, and despair in Durkheim's analysis of suicide (1930 [1897]: 283). On the function of organized corporations in palliating individual exposure to economic pathologies, see Durkheim (1902: vii, xvii). In this respect, Durkheim showed great enthusiasm for a corporatist variant on classical parliamentary democracy. He implied that it was necessary to reinforce the role of intermediary organizations, such as corporations and professional bodies, located 'outside the state, but submitted to its actions', in order to provide robust institutional protection for persons in a state of individual economy freedom (1930 [1897]: 437–9). Consequently, he saw a widening of the organizational periphery of the state as a means of institutionalizing individual liberty. See comment on the sociology of loneliness in Schluchter (1979: 251). In similar spirit, Freyer argued that 'alienation' was the 'secret concept of the nineteenth century', around which social theory evolved. Freyer saw charismatic legitimacy as the quality

finding ways to soften the antagonisms of modern society. Indeed, his idea of democracy as a system of elite-led integration was intended, in part, to ensure that democracy did not assume radicalized revolutionary form. Importantly, he observed charismatic leadership as possessing a distinctive revolutionary quality, standing outside and subverting established legal orders and helping to preserve social integration in settings in which formal law did not exist (1921/2: 142). He thus viewed the creation of plebiscitary government as a means both to preserve the vital, motivational force of charisma, yet also to reduce its revolutionary volatility, using revolutionary legitimacy to instil integrational powers in the political system that might help avert revolution (1921/2: 156–7).[108] Both Durkheim and Weber implied that extreme societal unrest could only be avoided if the government, aided by sociology, showed full regard for the experiential realities of those subject to its power. Weber, in particular, claimed that the legal order of democracy could only perform its integrational functions if sustained by non-legal, affectual sources of integrative power.

On this basis, third, the early sociological analysis of democracy implied that democracy is always a rather improbable form. From the standpoint of classical sociology, the legal foundations of democracy had developed through essentially contingent processes, and there is no absolutely compelling subjective reason to presume that the institutional order of democracy must remain unchanging. For this perspective, democracy developed through the differentiated geographical and functional widening of society, deeply linked to the differentiation and expansion of the modern economy, and concepts of democratic rule evolved to stabilize society in its extended form. However, this outlook implied that there is a strong likelihood that, if democracy persists as a generalized mode of social organization, its actual institutional structure will be subject to variation. It is no coincidence, for example, that the theories of democracy proposed by classical sociologists, notably Durkheim and Weber, endorsed a system of democratic rule whose organizational pattern differed markedly from classical parliamentary or representative systems. As discussed, Durkheim retained a strong corporatistic element in his preferred model of the democratic polity.[109] As discussed, similarly, Weber incorporated a pronounced symbolic dimension in his theory of democracy. In each

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of a political system in which social integration occurred through archaic, deeply affectual appeals, able to establish more solid structures of inclusion than rationally driven integration processes (1976 [1957]: 206).

[108] In agreement see Breuer (1994: 145).

[109] See p. 86.

instance, the variance from a more standard template of democracy was due to the fact that both Durkheim and Weber showed concern for the lived experiences of persons and the conditions of institutionalization under democracy. In each respect, they suggested that the human subject of democracy could not be captured or represented in standardized legal norms, and it may necessitate atypical institutions and atypical patterns of inclusion.

In addition to these points, classical sociological accounts of democracy contained a further distinctive feature, which was less expressly or intentionally formulated, but which throws very important light on the rise of democratic institutions. As discussed, the constitutional doctrines of the Enlightenment were normally supported by the principle, formalized most paradigmatically by Rousseau and Kant, that, as an aggregate of citizens, *the nation* is the essential foundation of legitimate rule, and that a polity acquires legitimacy if it is founded in laws that a nation gives to itself. On this model, a polity becomes legitimate if persons (citizens) in a given society (nation) recognize the law as law which, if they adequately exercised their moral and rational faculties, they would be inclined to give to themselves: if those persons to whom laws are applied can rationally identify their own subjective freedoms in these laws. As mentioned, this idea was reconstructed as constitutional doctrine by Sieyès, and other early constitutionalists who claimed that a legitimate polity must be founded immediately in the rational will of the nation, and that the laws of this polity must translate the will of the people into objectively binding norms.[110]

Quite fundamentally, however, the discipline of sociology evolved as a body of inquiry that challenged the *societal abstraction* of the ideas of collective political subjectivity in classical models of democracy. Early sociology expressly refuted the idea that human freedoms could be concentrated around the form of the nation, defined as a simply existing collective subject. In this regard, sociology fixed squarely on the central paradox in the conception of national democracy.

On one hand, for example, Durkheim argued that democratic political systems, defined by collective inclusion in government and distribution of legal rights through society, began to emerge as a legal-political form as societies were released from relatively authoritarian, pre-modern organizational structures. To this extent, Durkheim identified a close correlation between the formation of democracies and the formation of nations. Indeed, he saw the figure of the citizen as a figure that promoted

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[110] See pp. 17–8.

the expansion of national society, separating the governmental consciousness of society from local or sectoral particularities.[111] Simultaneously, however, Durkheim argued that the rise of democratic legal and political institutions should not be seen, in some classical normative fashion, as the result of acts in which persons in society collectively laid claim to rights and freedoms, to which they possessed inherent shared entitlements. On the contrary, he described the growth of democratic institutional forms as the result of a progressive functional expansion of the political system, shaped by the growing autonomy of law, in which the political system constructed the persons affected by its functions in less coercive terms.[112] The expansion of the political system, thus, was causally prior to the formation of nations and national citizens, and the political subject of democracy developed as the political system extended its functions into society, linked to more general processes of institutionalization. The growth of democracy was in fact, in part, a result of the evolutionary dimensions of the political system itself. Of course, Durkheim possessed a distinctive confidence in modern society, and he observed the emergence of democratic institutions as sustained and necessitated by wider processes of moral integration. Nonetheless, the growth of a society based on liberal social and political values could not be conceived as the outcome of deliberately determined processes (1918: 143). In consequence, Durkheim argued that *the people*, supposedly the central agent in democratic order and the central producer of democratic freedom, was not a strongly implicated actor in the actual rise of democracy. On the contrary, the national people often figured as a relatively marginal apparition in the emergence of democratic society, which was created by deep-lying functional processes.

This complex dialectic of national democracy is still more visible in the works of Weber.

First, Weber was quite evidently a nationalist. He manifestly viewed the formation of nations, in which social agents structured their actions outside local environments and organizations, as a defining hallmark of a modern society, integrally linked to the emergence of integrated exchange economies. Moreover, he identified affiliation to a given nation as a (if not *the*) defining source of motivation in modern society, clearly assuming greater force than affiliation to any other social grouping characteristic

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[111] For Durkheim, the fact that citizens take part 'from afar' in political deliberations and government measures is the fact that 'truly constitutes democracy' (1950: 120).

[112] He argued that democracy and individual rights develop in parallel as the state experiences a 'growing extension of its responsibilities' (1950: 99).

of modern society (including economic class), or than any other source of social obligation.[113] In fact, to the extent that he felt a strong sympathy for democracy, he advocated an expansion of democratic institutions, and particularly of democratic constitutional norms, because he viewed this process as vital for reinforcing the unity of the nation and for drawing members of national societies into more immediate experiences of cohesion.[114] He thus saw the integration of the nation as the basic function of the law. Indicatively, for example, in late-Imperial Germany, Weber declared strong support for the political integration of the German people through internal democratic reforms (1921: 247). He did this for many reasons, some ethical, some more functional. One vital reason for this, however, was that he perceived such integration as a precondition for the consolidation and reinforcement of the German nation in the system of global political-economic competition: internal political integration appeared as a crucial precondition for external political and economic expansion.[115] To this extent, Weber clearly shared common ground with earlier theorists of classical democracy, and he proposed a functionalist theory of popular sovereignty, viewing a political system in which members of the national people are able to express their most dynamic forces as an ideal system.

At the same time, however, Weber indicated that the system of national cohesion created by parliamentary democracy was not very strong, and parliamentary democracies could not always generate enduring obligations amongst national citizens. Structurally, as discussed, he argued that democracy was often undermined by its failure to bind together the populations of national societies in robustly constructed identities. Importantly, at the very core of Weber's work is the implication that modern society itself does not of itself actually exist as a unified structural order: for Weber, there is no material reality that can simply be defined as *society* – society

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[113] At one level, Weber's idea of the politician, endowed with strong integrative characteristics, is intended as a figure with nationally unifying force. Generally, Weber made no secret of his nationalism (1921: 25). However, he took pains very strictly to differentiate national belonging from ethnic belonging (1921/22: 528).

[114] Repeatedly, for example, Weber expressed concern about the fact that in Germany the process of nation-making, linked to the rise of the middle class as a dominant social group, was being held up by the undemocratic political system. Democratization was needed, therefore, as part of a nation-making process, enabling the 'bourgeois classes' to assume their rightful position as 'bearers of the national political interests' (1921: 23).

[115] Weber often associated democratization and democratic culture with reinforcement of Germany's status as a world power (1921: 23). In particular, this was why the role of parliament as a training ground for elites, which could promote Germany's interests in the international arena, seemed so important to him (1921: 475).

only exists as a set of dispositions in the minds of the distinct subjects who, individually, constitute society.[116] There are of course, he indicated, certain commonly observable tendencies in society, revealed for example in patterns of nation building, institutional consolidation and political centralization. However, society does not exist as a collective/material entity, with a collective/material structure. As a result, society is originally and essentially founded, and it can only gain cohesion in, individual subjective motivations, and it only assumes perceptible structural form as the motivations of diverse subjects converge in coordinated expectations, in shared patterns of action and in overarching institutions, commonly recognized as legitimate (1921/2: 19).[117]

On this basis, Weber concluded that the legitimacy of a political system depends on its ability to solidify shared integrational motivations in the minds of persons at different positions across society. Democracy is only formed as a distinct social phenomenon under circumstances in which members of society, subjectively, are prepared to recognize the laws of democratic institutions as binding (see Anter 1995: 154). Indeed, democracy only evolves as it solidifies a particular set of motivations in the minds of social actors, binding them together in democratic patterns of political behaviour. However, as discussed, Weber was always of the view that parliamentary democracy was undermined by its inability to produce an arresting mass of motivations for the factionalized populations of modern society. In consequence, he advocated that a system of democracy should be established in which a strong presidential executive stands alongside parliamentary institutions, and in which supplementary functions of integration are performed by particularly selected leadership elites. As discussed, he observed the democratic parliament, primarily, as a school for training national elites, who, on acceding to high-ranking offices, would be responsible for integrating the nation domestically and for securing and advancing the interests of the nation in international politics (1921: 343). The most distinguished members of such elites would be figures in possession of distinct *charismatic* qualities, able to instil cohesion in, and to mobilize, national populations by appealing to and shaping their motivations at an affectual, deeply emotional level.

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[116] This radical subjectivism is at the methodological core of Weber's sociology (1921/22: 16–17). See discussion of the implications of this in Gurvitch (1940: 19); Tyrell (1994).

[117] For Weber, sociology is the science of correlated social action. Social action only occurs through the 'comprehensible orientation' of the behaviour of one or more 'individual persons' (1921/22: 6).

On this foundation, Weber interpreted parliamentary democracy as a fundamentally paradoxical political system. On one hand, he indicated, democracy had been born as societies assumed the form of nations, and its integrational functions were determined by this context. On the other hand, however, he implied that parliamentary democracy could not actually presuppose the prior material existence of a people, acting in nationally unified form. In appealing to the classical ideas of national self-legislation resulting from the philosophical traditions of the Enlightenment, democracy could only fabricate a very artificial account of itself. In fact, the primary function of democratic institutions, for Weber, was not to translate the demands of an existing national people, or an existing group of citizens, into a unified system of law, but rather *to create the people*, and to imprint onto post-traditional society a powerfully unifying and integrative ethic of nationhood (Weichlein 2007: 107). He perceived democracy as a political system, not of *collective self-legislation*, but of *collective integration*, which is itself required to engender the people – the nation – through acts of visceral, charismatic motivation.

In this respect, like Durkheim, Weber inverted the classical ideal of national democracy: instead of endorsing a system in which the people, as sovereign citizens, construct their own representative institutions, he endorsed a system in which representative institutions construct the people from which they extract their legitimacy. In diametrical opposition to early democratic theory, he argued that democracy cannot be formed by a pre-existing people, acting as the primary law-giving subject of the political system. The people can only provide legitimacy for the political system in a socio-psychological dimension, which is specifically not expressed in collective acts of rational self-legislation, and which must be strategically generated, by charismatic leaders, within the political system. On Weber's view, parliamentary democracy always remained deficient, and it failed to bind together members of the nation as a solidly unified subject. It was only as a machine for establishing charismatic leadership elites that democracy could fulfil its integrative functions. In effect, Weber argued that democracy could only become real if its subjective foundation were created by collectively constructed, partly affectual, non-democratic motivations: democratic society could only become real if its laws were sustained, in part, by unreflected experiences of subjective unity, and the basic function of democracy was to sustain such experiences of unity. Democracy, in short, is not legitimated by the people – *it is legitimated by its construction of the people*.

In the key positions of classical sociology, in sum, the idea of democracy as a reflected condition of national-subjective self-legislation was

dismissed, or at least strongly relativized. Most particularly, these outlooks converged around the claim that the essential normative core of democracy – the idea of the people as a body of self-legislating citizens, seeking shared liberties – is not an objectively given presence in modern society, and modern society necessarily contains many peoples, with often sharply counterposed political interests, that cannot be condensed into a unitary model of citizenship. To be sure, classical sociologists admitted the presence of the citizen as a legally protected construct, engaging in some public practices.[118] But the leading outlooks in classical sociology observed that most democracies developed without or before the people, and they were required either to fictionalize the existence of the people, or even to address the *absence of the people* as their most fundamental problem.[119] On this basis, early sociological theory appreciated, at least intuitively, that the normative apparatus of democracy was not a reflection of a factual reality, and that democratic norms of governance such as national sovereignty and participatory citizenship appeared as formulae that sustained the emergence of the national political system, yet which were not correlated with a given societal condition. Over a longer period of time, it became a commonplace in political sociology and in more sociologically reflected lines of constitutional theory that modern parliamentary democracy was centred around a fiction, an *absent people*, and the primary obligation of democratic institutions was to translate this *absence* into a material form.[120]

1.4   Legal Sociology and the Paradoxes of Democracy

In many respects, sociological analysis of democracy proved far more accurate in its accounts of democratic institutional formation than earlier or concurrent normative discussions of the early democratic state. In

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[118] As mentioned, Durkheim argued that the citizen has an important role to play in different institutions, for example of a professional or educational nature, which allow citizens to participate in governmental deliberations, and link the citizen to governmental consciousness (1950: 76, 116, 120). Marshall clearly perceived the importance of the active aspect of citizenship – which he saw as including the 'right to participate in the exercise of political power' (1992 [1950]: 8). However, this aspect was not in the forefront of his inquiry, and he conceived the citizen more generally as part of a process of social integration (28). Parsons accentuated the importance of political rights of citizens as elements of social integration (1965).

[119] See recent reiteration of this view in Colliot-Thélène (2010b: 162).

[120] For example, Duguit described the idea of the state as a 'sovereign collective person' as a construct based 'in worthless metaphysical concepts' (1923: 49). At the same time, Schmitt argued that parliamentary governments were sustained by fictitious, metaphysical constructions of their citizens as harmonious collectives (1923: 45).

fact, analyses of democracy in classical sociology came close to grasping the basic historical paradoxes of democracy set out above. Clearly, both Durkheim and Weber intuitively perceived that the evolution of democracy was necessarily a slow process, and it could not be made reality in a single historical event, based in some collective voluntaristic act. Moreover, both Durkheim and Weber were aware that democracy was not a political system whose realization could be propelled by single political theories, or which could be sustained by static, rational normative designs. Both argued, quite expressly, that classical theories of democracy, assuming that constitutional democracy reflected generalized ideas of liberty, were simplified and misguided, and that much of the legitimating substance of democracy was concentrated at a socially submerged, non-articulated level. In addition, both Durkheim and Weber claimed that most accounts of the rise of democracy, which tended to construe democracy as a strategy for restricting the authority of monarchical states, were historically erroneous. Central to their comprehension of the modern democratic state was the claim that democracy had evolved as a legal/political order that intensified an already pervasive process of socio-political centralization, which manifestly heightened the authority of political institutions,[121] and which replaced the localized, acentric, corporatistic structure of early modern society. For both theorists, the rise of democracy was part of a broader process of functional differentiation, in which the political system cemented itself above the functionally diffuse conditions of pre-modern order. In each respect, classical sociological theories perceived the essential contingency of democracy, and this insight clearly provided a paradigm for comprehension of the actual emergence of democratic institutions.

The importance of classical legal sociology for capturing the rise of democracy became most visible in its appreciation of the deepest paradox of democracy – the fact that democracy is defined as government by the people, but it in fact assumed material form largely in the absence of the people, or through its own systemic construction of the people. This insight was central to the basic emergence of sociology as an interpretive method, standing against the more deductive reflections of the Enlightenment. As sociology reacted against the formal constructions of the Enlightenment, it necessarily began to perceive that the most central political assumption

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[121] Notably, Durkheim claimed repeatedly that the rise of democracy, and the emergence of constitutional rights structures attached to democracy, greatly increased the power of state institutions (1950: 93). By this, he implied that state power expanded as it interacted with persons in society on a complexly articulated, contractual basis. Obviously, Weber's theory of the convergence of democracy and Caesarism has parallel implications.

of the Enlightenment – the idea of the national people as a self-legislating body of citizens – was projected in chimerical fashion, and that it relied on an essentially metaphysical reduction of the people in its factual-historical form. At the centre of classical sociology was a denial that legitimate normative order can radiate from a universally imputed human consciousness, concentrated around the single idea of the citizen. Instead, normative order appeared as the result of relatively autonomous legal functions. The citizen appears in the sociological lineage as a paradoxical fictional construct, which the governing order invariably presupposes, yet which is actually materialized by the governing order itself.

Nonetheless, if early sociological theory was defined by its intuitive appreciation of the paradoxical elements in the modern democratic state, sociological inquiry itself also evolved, quite centrally, around a series of unusual and enduring paradoxes. In fact, sociology took shape as a discipline that, in the final analysis, shied away from the implications of its most central definitional insights and intuitions. In its key formulations, classical sociology was ultimately marked by the decision to accept and to re-articulate the constructions whose fictitious formality it had identified. Strikingly, classical sociology itself finally reaffirmed many of the core fictions of democratic political order.

1.4.1   The Dream of Political Society

At an obvious level, as early sociology repudiated many of the claims of the Enlightenment, it rejected the principle that the modern state was created by simple acts of popular authority. As a result, it dismissed the semi-metaphysical construction of the state as a dominant centre of rational liberty. In particular, early sociological reflection tended to reject the volitional-universalist conception of political system as a primary focus of social freedom, and it accentuated ways in which freedoms were linked to formative processes outside politics, in different social spheres.

In this respect, however, early sociology itself reflected and re-articulated a persistent paradox. This paradox was manifest in the fact that, despite its own intuitions, sociology was not willing to renounce the central position accorded to the political system in society. Despite interpreting the historical formation of the state on the basis of a theory of differentiation, early sociologists usually ascribed a particular societal dominance to the political system, and they typically viewed modern society as a distinctively *political society*. Of course, there are exceptions to this amongst classical and post-classical sociologists. For example, Proudhon

was clearly not a statist theorist. Eugen Ehrlich set out a sociology of law that expressly relativized the importance of the state as a source of law (1989 [1913]: 124). Very importantly, later, Georges Gurvitch imagined a democratic order in which the rule of law penetrated into society through pluralistic organizational forms, situated in different sectors of societal exchange and production (1929: 420–22). More generally, however, early sociology retained a clear and often emphatic *political* focus. Most notably, early sociology retained the idea that the political system was supported by patterns of political experience, motivation and compliance that were relatively constant across different societal domains, suggesting that all parts of society depended on the political system for their cohesion. Moreover, early sociology argued that law acquires legitimacy as it is infused with political content. In fact, early sociologists even echoed the classical claim that a democratic polity has the particular distinction that it can promote social cohesion and social freedom more effectively than other types of polity: that a democracy possesses an eminently political substance, and its integrational force is heightened by this fact.

This emphatic political dimension in classical sociology was closely linked to the relation between early sociology and positivism. As mentioned, alongside its opposition to early democratic theory, classical sociology was marked, methodologically, by an equally intense opposition to the legal and political implications of positivism. Of course, early sociology was itself close to positivism, and Durkheim in particular is usually placed in the positivist category (see Durkheim 1928: 132). However, both Durkheim and Weber rejected the idea, specific to legal positivism, that governmental legitimacy could be seen as the mere result of a formal system of legal rules. Both dismissed the claim that legal analysis could, in pure form, produce legitimacy for the exercise of political functions. In fact, classical sociologists generally asserted that law could only obtain legitimacy through its correlation with embedded societal reflexivities, and, albeit in a fashion distinct from that typical of the Enlightenment, they insisted that law's legitimacy presupposed a social conjuncture in which the legal system was bound to a broad political will, existing in society at large. As a result, early legal-sociological theory was centrally marked by a quite distinct *political attitude*. This attitude relativized the moral power of the state. Yet this attitude nonetheless saw the state as a central focus of human liberty in society, founding an overarching system of public law, and formed through a deep articulation between the political system and wider processes of social volition and collective patterns of motivation.

This emphatic political dimension in sociology was clear enough in the pre-sociological works addressed above. For example, although he framed his analysis of the modern political system within an empirical theory of social differentiation, Hegel perceived the state as an aggregate of institutions required to radiate and secure universal ideas of liberty across all parts of society.[122] Hegel argued that the modern state forms a rational ethical order on which other liberties in society, be these the market-proportioned liberties of early civil society or the distinctive status-defined liberties of familial or professional life, are structurally reliant: no rights or liberties can exist outside the objective-rational order of the state.[123] Consequently, he claimed that the modern state must be correlated with a complexly constructed societal-political will, and it draws its legitimacy from its ability to balance different societal freedoms and to protect the most generalized, rationally necessary freedoms against merely particular unilateral interests and prerogatives. Notably, he concluded that in a legitimate state a constitution reflects 'the spirit of the entire people', and, although it enshrines particular liberties, it gives strict expression to the freedoms of the people in 'self-consciousness of their rationality', and it cements preconditions for higher-order liberties across the separate, differentiated spheres of freedom that society incorporates (1970 [1830]: 336). The state, consequently, stands at the centre of society, and all social liberties are finally underpinned by the generalized rationality embodied in the state.

As discussed, later, Durkheim concluded that the modern democratic state derives its legitimacy from its refined embodiment of the collective moral consciousness of society, and, on this basis, it assumes a clear ethical, public-legal authority in relation to other societal domains.[124] He argued that the state is 'a special organ which is required to elaborate certain representations which are valid for all people' (1950: 87). It has the duty to

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[122] For Hegel, the state cannot be 'confused with civil society', and it provides for rational freedoms that cannot be restricted to protective economic rights (1970 [1821]: 399–403).

[123] He followed Rousseau's idea of the social contract in accepting that the state is founded on an absolutely general will. Yet, he rejected the principle underlying contract theory that collective freedoms are authorized by persons on an individualist basis, seeking freedoms for particular motives (1970 [1821]: 400).

[124] Durkheim argued that the modern state acts as a point of crystallization for collective beliefs and collective representations, and democratic institutions obtain legitimacy by consolidating general moral order and reflexivity in society (see Marx 1974: 340–2; Sintomer 2011). As a result, the state is able to exercise a distinctive directional power for all society, overseeing and providing for the integration of otherwise fragmented, laterally contractual processes of social integration (Lacroix 1981: 240).

guide citizens 'towards the sentiment of common solidarity' (1902: 207), at times protecting citizens from extreme pressures of individualization and contractual differentiation. Like Hegel, in fact, Durkheim supported a political order capable of binding the contemporary ethics of individualism to an objective system of 'moral unity', based in the restriction of personal egotism (1898: 8).

In some ways, Weber proposed an essentially materialist, instrumental theory of the state, closely related to Marx's idea of the state as pure superstructure.[125] Yet, equally clearly, he argued that the state is legitimized by its functions of national integration, and it owes its legitimacy to its ability, as a focus of public law, to hold together the otherwise intensely polarized groups that national mass democracy releases, producing compelling motivations across the functional domains that modern society comprises. Distinctively, Weber defined the state as a set of institutions that, uniquely, can claim a *monopoly of legitimate power* in society, or which even act as the 'final source of all legitimate physical violence', imposing directional authority on all social domains (1921/2: 519). In fact, Weber claimed that politics itself is an anthropologically privileged domain of human exchange and volitional interaction, which, as it is focused on a contest over the means of *legitimate violence*, possesses a particular distinction and primacy *vis-à-vis* other patterns of interaction (1921: 556).[126] In this context, Weber's preference for democracy over other polity types becomes explicable; he saw democracy as a polity that institutionalizes inter-party competition, breeding tough-minded and integrative politicians, which ensures that those who gain access to the means of legitimate coercion are equipped to deploy them for the national interest (1921: 558). As a result, he came close to explaining the legitimacy of the modern political system as defined by distinctive attributes of rational voluntarism, which, in their more conventional normative formulation, he rejected as simplistic.

Although born from an anti-universalist attitude towards the state, therefore, sociology soon developed as a singularly statist mode of social analysis, which attached very distinct, socially encompassing objectives to the modern political system. In many cases, in fact, classical sociology moved close to the ideas of the Enlightenment, which it otherwise

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[125] He argued that the development of the modern bureaucratic state is integrally connected to 'modern capitalist development', and the modern state sustains legal conditions that promote 'the strictly rational organization of labour', which defines capitalism (1921/22: 826).

[126] For expert comment see Zängle (1988: 5); Kalyvas (2008: 39).

criticized, and it interpreted the political system as a guarantor of over-arching liberties, even species liberties, underwriting patterns of cohesion for all members of society. Above all, sociology developed as a discipline that observed the political system as a *dominant system of inclusion*, which was able to absorb conflicts triggered by the emergence of mass society, and to preserve a basic overarching structure of societal integration. At the centre of this idea was the principle that the political system can be correlated, albeit contingently, with the materialized political will of society, and, in refracting this will, it assumes the power to resolve or at least palliate conflicts created by wider processes of social differentiation. Although early sociology might easily be seen, in its entirety, as a *science of social differentiation*, its exponents generally refused to accept the political implications of this scientific outlook, and they preserved what was at core a mono-rational account of modern society's political domain.[127] Indeed, early sociologists widely perceived the political system, although itself constructed through differentiation, as an antidote to societal pressures caused by society's wider functional disaggregation and geographical extension, and by the problems of class tension, individualization and despair induced by this process.

Of particular significance in this regard is the fact that early sociological theory opted for a sharply critical view of the possible differentiation of politics and law. Indeed, although they based their models of democratic formation around the idea that the law supports democracy as a relatively autonomous and differentiated medium of integration, classical sociologists also argued that law's integrational functions are never completely autonomous, and these functions presuppose simultaneous acts of categorically political integration.

At one level, both Durkheim and Weber examined the evolution of modern law as a process of differentiation, implying that modern law, separate from religious and other substantial residues, could be examined as a simple medium of positive social integration. For Weber, modern law was a system of positive norms produced by overarching patterns of rationalization, integrating society because of its formal rational content. For Durkheim, modern law was a relatively autonomous, pluralistic system of norms, reflecting the growing fluidity of social exchanges and the rise of organic solidarity, integrating society on a lateral, contractual basis.[128] In

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[127] See similar claims in Gephart (1993: 109).

[128] Modern law is based in contract, and contract is a 'basic norm' that can act to sustain multiple legal arrangements (1902: 192).

both cases, positive law is formative of democracy, and the rise of democratic institutions depends on the integration of social agents through law, separate from strictly political imperatives.

Ultimately, however, neither Durkheim nor Weber accepted the full implications of this approach to modern law. Both concluded that, in a legitimate political order, the law must be suffused with, and then societally transmit, a distinctive political ethic, such that the law gains authority from the fact that it is linked to the political system and to the integrational values and motivations that are concentrated in the political system. On both accounts, the political system is required to imprint higher norms within the law to support its integrational functions. As discussed, Weber proposed an account of modern law in which law on its own, as a system of differentiated positive norms, is unable to meet the demands for legitimacy in modern secular society. Law, thus, presupposes a personal or an expressly *non-legal* political residue to sustain its obligatory, integrational force.[129] Similarly, Durkheim argued that both politics and law perform universal ethical functions for society, and the legal order of a society based in organic solidarity, founded in non-coercive norms and subjective rights, is correlated with the expansion of state power, the extension of governmental consciousness and the broadening of ethical authority. To be sure, Durkheim insisted that the powers of the state are always limited, especially in the regulation of 'economic tasks', which are 'too specialized' for political regulation (1902: xxxvi). However, he also concluded that, as society becomes more differentiated, the 'points at which we are in contact' with the state multiply, and the 'dependence' of people on the state as an organ that elevates them to a consciousness of their solidarity necessarily increases (1902: 207). Despite emphasizing the essentially differentiated form of modern society, therefore, Durkheim reserved a particular importance for the general moral functions of the state and the integrative force of governmental consciousness, implying that the state may embody a principle of moral order above the contractual organizations in society at large.

The theories of democracy proposed by classical sociological theorists, in sum, were marked by a disposition that evaded some core implications of their own sociological insights. At one level, early sociologists argued

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[129] For Weber, the charismatically integrated community is close to the religious commune, *Gemeinde* or *Ekklesia* (1921/22: 141). It closely mirrors Sohm's account of the inspired or organically integrated religious community, which, tellingly, Sohm viewed as a community defined and constituted by *non-legal* means (1892: 22).

that the political system was not founded in acts of collective human self-legislation and experiences of rational freedom, and it could not presuppose that its power was authorized by identical agents in different parts of society. However, they also accorded to the political system a dominant position in society. At a different level, they observed modern society as structured by a pervasive logic of differentiation, bearing in particular on the systems of politics and law and requiring the law to perform core functions of integration. Yet they also concluded that law acquires its highest legitimacy through its distinct capacity for transmitting powerfully integrative ethical-political substances through society. Indeed, it was a characteristic attitude of many early sociologists that they claimed that legitimate law presupposes a distinctively *political* content, and it is only as law refracts interests defined by a clearly political will, and as it connects different wills across society, that it acquires genuine legitimacy, distinct from the mere formal laws propagated in the Enlightenment.[130] Classical *legal* sociology was, in essence, *political* sociology, and it constructed the social functions of law by examining them in relation to politics. In these respects, sociological theories of democracy clearly retained aspects of the deep political voluntarism which characterized early democratic theory, and they construed the legitimate political system as a *correlated aggregate of societal wills*.[131] In fact, these theories echoed the view that democracy is sustained by collective subjective freedoms, of a higher order than the partial freedoms selected by persons in their singular natural lives.

1.4.2   *Re-imagining the People*

This paradox in classical legal sociology persisted into more contemporary legal sociology. In fact, the legacy of classical legal sociology is deeply reflected in the fact that recent legal sociology has retained a core focus on political substances, and it still preserves a certain proximity to the political-philosophical ideas of the Enlightenment.

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[130] Weber elevated politics to a distinctive anthropological position. He asserted that the political is a dominant realm of human practice in society, formed by human conflict (1921: 340), and that societies marked by a weak sense of the political suffer low levels of political integration and dynamism (1921: 309). Later, Schmitt argued that the integrity of society as a whole depends on its ability to secure a strong political ethic, also based in conflict (1932a: 28–9).

[131] Leading sociologists have of course argued that sociology results from a resolute critique of the Enlightenment. See, most famously, Luhmann (1967).

Notably, after 1945, when political democracy became more globally widespread as a realized governance system, legal-sociological theory tended to abandon its original sceptical attitude towards democratic norm construction. Broadly, most post-1945 legal-sociological accounts of democracy have endeavoured to perpetuate and to re-formulate the ideals of democracy and citizenship promoted in the Enlightenment. Indeed, the leading positions in more contemporary lineages in the sociology of law and democracy remain, in essence, attempts to identify how the people, as a mass of citizens, can be made present within institutions in which public authority is vested, so that persons, as citizens, can envision themselves, however remotely, as authors of the laws that are applied to them. In particular, legal-sociological accounts of democracy promoted after 1945 have usually attempted to imagine distinctive models of democratic subjectivity, reflecting, on one hand, the societal conditions that shape the construction of democratic law, yet insisting also that democratic legitimacy presupposes some degree of rational-subjective consensus. As a result, many prominent legal-sociological theories of democracy that developed after 1945 sought to establish a synthesis between classical sociological ideas and more classical philosophical models of democratic will formation. Overall, the main positions in the sociology of law that acquired influence after 1945 have tended to cross the boundary that originally separated normative and sociological thinking, and they have disavowed many of the more critical impulses of classical legal and political sociology. A deep rapprochement with political philosophy underlies much legal sociology after 1945.

To be sure, some lines of legal-sociological research after 1945 remained close to classical sociological analyses of democratic institutions. Even such theories, however, tended to opt for an expressly normative approach to the political system.

For example, Talcott Parsons clearly assumed a position close to Durkheim in his analysis of democracy. Like Durkheim, Parsons saw the question of democracy primarily as a question of normative integration, concerning the secure institutionalization of the patterns of individualism that characterize modern society.[132] In this respect, he viewed the law as a core medium in the processes of institutional integration on which

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[132] On the centrality of the concept of institutionalized individualism in Parsons see Parsons (1977: 53). In his earlier work, he argued that the question of the 'legitimacy of institutional norms' depends on a 'common value system', capable of sustaining the 'integration of individuals' (1949 [1937]: 768). For comment see Mayhew (1984: 1290). For an important account of Parsons's sociology, explaining it as an attempt to combine 'the objectivity

modern society relies, acting to incorporate individual persons as participants in the wider democratic society. Like Durkheim, further, although he was optimistic about the capacity of democracy for integrating individual persons in an ordered society, he did not link democratic formation to specific social demands, or to concrete acts of collective self-legislation. Instead, he centred his reflections on the claim that, owing to their internal functional pressures and exigencies, modern differentiated societies will tend to gravitate towards democratic patterns of political interaction and organic norm formation.

In the first instance, Parsons claimed that the emergence of democracy was linked to the fact that modern geographically expansive societies, containing large populations, are required to produce and dispose of political power in flexible organizational forms, at a high degree of generalization. Any complex system of organizational coordination, he explained, relies on the abstraction of political power, not as a source of immediate coercion, but as a 'symbolically generalized and legitimized' resource, with symbolic functions akin to those of money in the economy (1969: 366). For Parsons, such abstraction of political power is not possible in societies in which political organization does not possess a 'consensual element', based in 'structured participation in the selection of leaders' (1964: 255). As a consequence, he concluded that only polities with an 'institutional form' close to 'the democratic association' are able to 'legitimize authority and power in the most general sense' and to 'mediate consensus in its exercise by particular persons and groups' (1964: 355–6). Only democracies, in other words, can generate power in a form that can be generally legitimated in modern society. On this account, democracy is a political system that is produced through an evolutionary logic of equilibration in society, in which the utilization of political power can be supported by complex consensus, such that it is distilled into a form that can be easily mediated and recognized across differentiated societal domains (1969: 371). A democratic polity is defined by the relative depersonalization of power, and accordingly it has the distinction that it is able to ensure that society contains sufficient power to promote collective and commonly beneficial services.[133] As power is granted to leaders through a generalized mandate, all society is implicated in the production and deployment of power, enhancing the 'totality of commitments made by the collectivity as a whole' (1969:

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of order' and the 'activity of individuals' in a theory of institutional individualism, see Bourricaud (1977: 22).

[133] On the critique of zero–sum models of power in Parsons see Bourricaud (1977: 164).

390): through democracy, society acquires more power, and it is able to accomplish more with this power. On this basis, democracy appears as the institutionalized form likely to be assumed by the political system in a balanced differentiated society.

Throughout his work, Parsons argued that the construction of a separate and universally oriented legal system, with professionalized judicial institutions, is vital for the evolution of advanced democracies. Generally, he implied that the primary functions of law are not intrinsically linked to the political system. Instead, he placed the role of law in the functional domain of 'social integration' (1977: 52), at least partly separate from the directional actions of the political system. In this respect, he argued that democracy depends on the fact that social agents are connected with the wider societal community through the law, or through rights that are generated within the law, and the exercise of legal rights is central to the overall integration and the functional balance of democratic society in its entirety. In this respect, he concurred deeply with Durkheim in indicating that individual agents are integrated in society through autonomously constructed, often informal, legal rights. Notably, he saw the informal institutionalization of the law as most effectively realized in the 'development of English Common Law, with its adoption and further development in the overseas English-speaking world'. He observed the Common Law as 'probably decisive for the modern world' and 'the most important single hallmark of modern society' (1964: 353).[134] The distinctive importance of the Common Law in the evolution of democratic institutions is attached to the fact that it provides an independent normative system that connects individuals in their particular life settings to the societal community more widely, and it constantly promotes effective integration by facilitating the informal exercise of legal rights.[135]

Parsons added to this analysis the claim that democratic governance performs distinctive integrational functions in modern society, especially in societies with pluralistic national populations, containing multiple 'subcollectivities within the societal community' (1965: 1015).[136] In this respect, he argued along lines close to those traced out by Durkheim and Weber, defining the legitimational value of democracy through its contribution to social integration (1949 [1937]: 768). Indeed, he claimed that it

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[134] Parsons thus insisted on the 'analytical distinctness of the legal from the political', and he concluded that the functions of the legal system have a decentralized nature (1962: 563).

[135] For comment see Rocher (1989: 150); Gephart (1993: 243–4).

[136] See also Parsons (1970: 33).

is particular to democracies that they permit the simultaneous integration of many sub-national groups within the political system (1965: 1014), and they open rights of citizenship to a range of socially affiliated collectives in pluralistic, non-exclusive fashion. To this degree, Parsons followed T.H. Marshall in proposing an integrational theory of citizenship. He claimed that democracy has the legitimating benefit that it institutionalizes multiple domains of citizenship, in which social actors can claim rights of citizenship in the general political sphere without forfeiting other sectoral identities or group affiliations, thus allowing a society to preserve cohesion but to maintain sectoral pluralism at the same time.[137] Accordingly, he argued that democratic institutions are sustained by complex, non-hierarchical patterns of inclusion, and, as a result, they generate multiple layers of rights, in which different social constituencies are integrated more evenly in the political system. In this regard, notably, Parsons ascribed distinctive importance to the role of civil rights in the constitutional order of democratic society. He claimed that rights form core media of inclusion for the national community, and the spread of rights through society leads to an 'emancipation of individuals of all categories' from 'diffuse particularistic solidarities', facilitating their integration in national society as a whole (1965: 1039). For Parsons, thus, in addition to its character as a system that effectively produces political power, democracy needs to be seen as a system of pluralistic legal inclusion, capable of integrating the multiple constituencies of a national society. In this regard, he again emphasized the importance of the law in promoting the patterns of integration required in a democracy, and he implied that formative democratic processes take place as individuals exercise rights that are informally allocated through law. The non-coercive form of democratic government is closely linked to the fact that the law provides access to rights as autonomous instruments of social integration. Indeed, strong democracies are clearly defined by the fact that the law – relatively informally – facilitates pluralistic, organic patterns of rights-based inclusion. In each respect, democracy is defined as a political system that institutionalizes a plurality of freedoms.

Despite this emphasis on law's informal quality, Parsons also indicated that a distinct legal structure is essential to the political system of a democracy. In his early writings, he emphasized the claim that effective use of

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[137] Parsons argued that there are different particular collectivities within society, but full citizenship creates a system of integration that allows people to exist in single collectivities, with particular expressive contents, while claiming equality at an overarching level (1951: 77–8). See the comments on this in Lechner (1998: 182, 185).

power presupposes the institution of 'a rational-legal system of authority and democracy' (1942: 155). Eventually, he arrived at the conclusion that a 'highly generalized universalistic legal order is in all likelihood a necessary prerequisite for the development of the … democratic association with elective leadership and fully enfranchised membership' (1964: 353). Moreover, he argued that advanced collective organizations necessarily require laws of a constitutional nature, based on the principle of 'equality before the law', which preclude the exercise of authority by informal means, and which contribute to the maximization of the resources of power available to society (1969: 377). Importantly, he claimed that the effective production of power presupposes a 'firm institutionalization of the normative order', in which the distribution and allocation of power to particular persons are always subject to formal constraint and the 'legality of actual uses of power can be tested' (1969: 371). On these grounds, Parsons approached a description of democracy based in a theory of organic legal norm formation, arguing that evolutionary processes in society, driving the political system towards maximum inclusion and most effective goal attainment, impose a distinct normative (i.e. constitutional) shape on the political system.

In this affirmation of democracy, Parsons was clear that analysis of democratic formation could not explain democracy through reference to the simple choices and decisions of the members of national populations. On the contrary, he argued that inclusive democracy is a social condition that typifies highly evolved, balanced societies, marked by distinctive patterns of differentiation and normative integration. The function of a democracy, thus, is not to encapsulate overarching ideals of liberty, but rather objectively to institutionalize freedoms for individual social agents, and integratively to equilibrate the freedoms pursued by different social groups. Law plays a key integrational role in realizing this condition. In this context, the citizen is accommodated in the political system not as rational author of laws, but as a pluralistically institutionalized actor. In this respect, Parsons reiterated sociological principles first enunciated by Hegel, Durkheim and Weber, arguing that adequately proportioned institutionalization is the core precondition of democracy.

At the same time, however, the theory of democracy outlined by Parsons clearly contains a very strong normative dimension, and he came close to proposing a categorical model of the legitimate political system. This aspect of his theory sits uneasily alongside the more informal construction of law's role in democratic formation. In effect, he implied that modern society depends on a specific polity type for its equilibrium, and that

a political system not assuming a relatively generalized normative form, with a differentiated legal system and protected basic rights, is likely to lack the 'political and integrative capacity' to perform its functions (1964: 356). On this basis, Parsons effectively postulated a universalized concept of societal evolution to explain the rise of democracy, substituting the evolutionary propensities of society as a whole for the political species freedoms of human agents as the basic paradigm for explaining democracy. As a result, he also moved close to classical, normative theories of democracy. In this account, the people do not form a simple subject of democracy. However, society itself, in its evolutionary processes, creates a democratic system in which people acquire and recognize general freedoms under generalized rational laws. The people thus re-enters democracy as a political subject, whose social integration presupposes certain norms and is tied to a political system with a relatively uniform normative order. As a result, the informal integrative power of law relies on the fact that it is underpinned by a strictly defined normative model of the state.

More typically, the period after 1945 saw a shift amongst legal/political sociologists towards clearly neo-classical theories of democracy.

This shift can be observed, first, in the critical sociological theory that developed in the Federal Republic of Germany (FRG) after 1949, especially from the early 1960s onwards, which engaged closely with the contradictions of modern democracy. This line of sociology, formed through a fusion of Marxist anti-capitalism and Rousseauian republicanism, was first articulated in the works of Franz Neumann and Wolfgang Abendroth.[138] Subsequently, it culminated in the works of Jürgen Habermas.

In his earlier works, Habermas set out a theory of democracy that approached in spirit the ideals of the high Enlightenment, and which reproduced classical convictions concerning the rational content of legitimate laws. Central to Habermas's theory, in its initial formulation, was the claim that in a fully legitimate democracy laws are established that create conditions of freedom, in which citizens recognize in law the possibility of exercising their personal autonomy in a rational, generalized fashion, and thus accept legal obligation on that foundation. For this reason, he explained, democracy presupposes the existence of a public sphere, arising from the separation of state and society in the eighteenth century, in which

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[138] See the seminal critique of the formalization of social liberties in late-capitalist legal systems in Neumann (1937: 553). Abendroth supported a radical social-democratic conception of democratic constitutionalism, envisaging the constitutionalization of all society on the basis of the social rights contained in the constitution of the FRG (1967: 113–14, 133).

members of different social groups can freely engage in public communication, and discursively mediate separate interests into publicly acceptable laws (1990 [1962]: 152–3, 327). For the early Habermas, consequently, democracy depends on a deep correlation between the public sphere and the law, and, in an evolved democracy, agents in the public sphere transmit discursively formed agreements into the political system, where they acquire legal form, constituting the foundations for objectively recognized collective liberties and obligations. In this regard, he viewed the positivization of the law as a central precondition of modern democracy, and he saw democracy as caused and eventually defined by the opening of the law to discursively formed, positively contingent social agreements. In an ideal democracy, the citizen acquires a central position as a focus of critique, discursive mediation and legal justification, and justificatory interactions between free citizens establish premises for universally obligatory laws (1973: 138). Later, Habermas paid great attention to law's instrumental functions, and he argued that the modern legal system acquires regulatory functions that close it to consensual orientations in society. However, he retained the claim that the rise of modern law cannot be separated from processes of justification that underpin rational social integration more widely. Throughout his work, he stated that society depends for its cohesion on the rational integration of social agents, and this function is performed and reflected, in part, by law, or by the system of legal liberties (rights) contained in a democracy (1976: 266–7). Like Parsons, he argued that the legal institutions of society are connected with broader patterns of social integration, and the law reflects the more informal discursive processes required to integrate persons, as citizens, in the societal community underpinning democracy (1976: 267).

Against this ideal-typical model, Habermas claimed that European democracies created after 1945 were founded in a primary distortion, or even a depoliticization, of the public sphere (1973: 55). As a result, the essential function of democracy in engendering shared legal freedoms had been deeply undermined. On one hand, he argued, the welfare states of post-1945 Europe constructed their legitimacy through the mediatization of social agents in structured interest-based organizations, so that state and society were fused together, and free discursive exchange between citizens was necessarily limited. The welfare state, of necessity, generated legitimacy not by reflecting communicative agreements regarding deep-lying conflicts, but by allocating resources to materially disadvantaged groups to pacify them and to prevent communication about social divisions. As a result, the welfare state suppressed the public sphere, and it stabilized the

political system around select material interests and processes of strategic compensation (1990 [1962]: 336). Moreover, post-1945 states relied on instruments of mass manipulation to control public opinion, and, in this respect too they greatly eroded the functions the public sphere. As a result of these factors, the states of post-1945 Europe had established political institutions with little democratic legitimacy, and their legal components typically reflected the prerogatives of dominant organized groups in society (1990 [1962]: 275; 311–12). Above all, Habermas argued, the legal order of such states had been severed from its deep legitimating connection with the democratic people (citizens), and law had been deprived of its primary role as a transmitter of societal values, agreements and rational freedoms from society into the political system. In contemporary democracy, he concluded, it had become possible to have 'affluence without freedom'. But the 'fundamental interest' that citizens have in 'self-determination and participation' had been suppressed, and the democratic idea of 'political equality' involving the 'equal distribution of political power' and the actual opportunity to exercise power had been renounced. 'Elite pluralism' had replaced 'the self-determination of the people' as the basis substructure of democracy (1973: 170). In such societies further, the law had been widely transformed into a mere medium of social steering and control, designed not to articulate freedoms in the public sphere, but externally to stabilize and to regiment social interactions. As a result, Habermas concluded that modern law possesses a dual function, acting both as a medium for discursive social integration and for constructing collective freedoms and as an instrument of 'systemic rationality' (1976: 265), serving to stabilize the instrumental basis for the economic system and the administrative system in society.[139]

In this respect, Habermas centred his theory of democracy, on one hand, around the claim that, in contemporary society, the people are always strategically excluded from democratic government, which, as a result, is inevitably supported by compensatory or ideological functions. On this account, the rational-integrational functions of law are deeply suppressed in contemporary society, and the political system sustains its position through strategic control of the law, closing itself against the normative residues contained in discursive processes of integration. On the

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[139] In his earlier works, Habermas paid more attention to the repressive or systemic functions of law. His later works were strongly concerned with the possible configuration between law and 'communicative power' (1992: 182).

other hand, he implied that the ideal of discursive will formation should be used as the normative premise for a critique of contemporary democracy. Sociological reflection on democracy, thus, has the deepest responsibility for examining the reasons why the people remain absent in modern political systems, and how this can be rectified (1973: 196). Sociological reflection on law has the primary responsibility to mobilize the law as a bearer of rational liberty.

Ultimately, this neo-classical shift in legal sociology became visible in the rise of *procedularist* theories of democratic legitimation and democratic law production in the 1960s and 1970s. These theories accepted a basic sociological account of the differentiated, pluralistic design of democratic society, and, contra more classical normative theories, they centred their analyses on the precondition that the will of the people cannot simply be articulated as a foundation for legitimate political institutions. Rather than dismissing the normative claims of democracy, however, such theories developed the claim that, in the complexly structured conditions of modern society, democratic will formation must necessarily occur in multi-centric fashion. Accordingly, democracy relies on the presence of *multiple procedures* to construct the popular will of citizens, and, objectively, to transmit this will, through the political system, into general legal form.

The turn towards proceduralist theories of democracy became visible, first, in more classical normative analyses of national democracies. Outside the field of sociological research, for example, this turn can be seen in the works of Lon Fuller, who identified a series of procedures required to produce validity for law (1969: 39). This turn can also be seen in the thought of John Rawls, who viewed the establishment of fair procedures, within a counterfactually constructed reasonable community, as a precondition for defining the objectives of government, and as a constituent source of law's binding authority (1971: 86, 136). However, the proceduralist model of democratic legitimation acquired particular importance for sociological inquiry in the works of Habermas.

Like Rawls, Habermas tried to devise a theory of proceduralization in order to revitalize classical-democratic doctrines of collective self-legislation in contemporary society. Centrally, he proceeded from the precondition that, in complex differentiated societies, it is not possible to presume either final justification for laws, or unified patterns of subjective will formation to legitimate the practices of government (see Sciulli 1988: 385). Indeed, both the law and the subject of law are highly contingent

and socially constructed. Consequently, he argued that the establishment of deliberative democratic procedures, open to all citizens in equal manner, is essential for creating formal rational consensus to inform and bring legitimacy to legislation, and it is only in procedural form that the popular will can be articulated. On this basis, Habermas opted for a theory of deliberative procedure as a means of securing 'the rationally motivated recognition' of legal norms, which, he claimed, was required to support the generally legitimized use of public power (1973: 148). He eventually concluded that the doctrine of popular sovereignty itself should be reconstructed as a theory of a multifocal political subject, generating legitimacy for laws in multiple acentric discursive procedures (1992: 649). The sovereign people, he explained, should be observed as a mass of proceduralized communication processes, no longer 'concretely concentrated in the people', but institutionalized as a source of political legitimacy through the diffuse 'communication network of political public spheres' (1992: 362–5). In consequence, he indicated, citizens could only become subjects of democracy as participants in discursive procedures, in which not the establishment of absolute values or categorically binding norms, but rational consensus between equally entitled fellow communicative actors, forms the primary foundation for legitimate law.

In this respect, Habermas's work stands as an attempt to combine the essential sociological insight into the underlying reality of differentiated pluralism in modern society with the essential philosophical endeavour to explain the normative principles presupposed by valid democratic law. In attempting this theoretical synthesis, on one hand, he clearly held closely to the classical philosophical view that legitimate laws produced by the political system need to be seen as containing and communicating rationally generalizable freedoms and obligations for all members of society. On the other hand, he held closely to the classical sociological view that laws acquire legitimacy when they generate motivations for persons in positive fashion, in their factually given societal conditions. Notably, he observed engagement in deliberative procedure as a distinctive, and relatively informal mode of citizenship practice, able to produce rationally generalized norms in locally embedded contexts, and, in consequence, creating a personally reinforced motivation for the acceptance of such norms (1992: 169). In this respect, he clearly followed the core sociological claim that law performs functions of integration as a positive medium, largely decoupled from the political system, reflecting more widely given patterns of social integration. In this respect, in fact, he constructed the figure of the citizen in a form designed to mediate between

philosophical and sociological views of democracy. He argued that, as law is tied to the deliberative acts of citizens, law's positive embeddedness in society actually heightens its force as a rational medium, so that law is able to function both as an informal and as a rational means of integration. Accordingly, he viewed legitimate government as integrally linked to participatory citizenship practices, in which legislation is legitimated by the fact that laws are distilled from the vital 'communicative power' of citizens, constructed through deliberative procedures across different societal locations (1992: 182). In this perspective, citizens produce laws through discursive political practices, and they recognize the general validity of the laws because these laws express a rationality articulated through quite diffuse acts of factual engagement (1992: 187). In a legitimate polity, in other words, the rationally binding dimensions of law are not easily separated from the positive processes of law's formation. On the contrary, law assumes rational form through the participatory practices of political citizenship, and it acquires full integrational force through the same practices.

Despite this attempt at methodological synthesis, Habermas's theory clearly privileged the philosophical construction of legitimacy over the sociological construction of legitimacy. His definition of legitimacy rearticulated, albeit with sociological nuance, the classical principle that rational universality or rational volition acts as an indicator of legitimate law. In this respect, crucially, Habermas's thought on democratic legitimacy traced the most extreme contours of the paradox of legal sociology. He insisted, on one hand, that legitimate laws cannot be simply dictated by a rational democratic subject, and that the legitimacy of laws must be interpreted as a result of multiple societal practices, located deep in the life horizons of social agents. There is no factual sovereign subject that can simply authorize laws. Like Hegel, however, he argued that, even in its societal dispersal, it is possible to reconstruct the rational democratic subject of democracy, which appears as a diffuse, multi-local, yet ultimately also generically constructed source of legitimate legislation, underpinning the validity of all democratic functions. He thus insisted that the layers of social determination and even communicative distortion that have formed modern society cannot fully obscure the presence of a socially generalized political subject, seeking socially generalized freedoms. Society is always able to converge around the norm-generative acts of the democratic people, whose rationality is expressed in communicative acts of consensus production. Implicitly, moreover, the political system is able to connect itself with rational processes of integration

in society, which are expressed through law. The integrative function of law depends thus, ultimately, on the presence of a rational political subject, expressed through a rational political system, to inform its content. Despite his earlier emphasis on the repressive functions of the state and the informal rationality of law, he ultimately arrived at the more positive assessment that the political system is able to integrate society on the basis of rational legal norms.

As an alternative to more obviously neo-classical theories of democracy, Niklas Luhmann also developed a legal-sociological theory to account for the growth of democracy and the nature of democratic legitimacy in contemporary society.

At the heart of Luhmann's political reflection is the claim that modern society is not determined in its entirety by any simple form of reason, imputable to obviously identifiable human subjects. Instead, modern society is shaped by a radically pervasive logic of functional differentiation, which means that society is divided into a series of distinct social systems, all of which conform to their own internal mode of rationalization. In consequence of this, society consists of multiple systems and multiple patterns of *systemic rationality*, each of which is expressed in a particular internal code: for example, the system of law is coded *lawful/non-lawful*; the system of politics is coded *subject to power/not-subject-to-power*; the system of the economy is coded *payment/non-payment*. Amongst these systems, no one rationality can be privileged above others as a bearer of particularly elevated values, and no rationality can be generalized across society, *trans-systemically*, as a source of universally applicable norms or freedoms (1993: 416). As a result, for Luhmann, the rationality of society is not the shared rationality of persons, extracted from some universal substrate of human interest, reason or will. Society is multi-rational, and each of its rationalities is a rationality of a particular system.

For this reason, Luhmann's work forms the most radical critique of the political humanism of the Enlightenment, and he squarely rejected universal subjectivistic constructions of rationality as outmoded residues of metaphysical thinking (1993b: 255). For Luhmann, the people, as a set of rational actors, cannot be identified as the central focus of society – society is a mass of systemic communications, which are not distinctively human. For this reason, further, Luhmann suggested that it is sociologically untenable to define the political system as a rational centre of society, expressing principles of generalized freedom or consensual volition, and it is improbable to imagine that laws passed by the political system assume legitimacy

through their correlation with factual human subjects, acting, across all society, as rational authors, or rational addressees, of law. The political system has responsibility for producing *collectively binding decisions* for society, but such decisions originate in highly contingent inner-systemic communications. In fact, Luhmann claimed that society in its modern differentiated form cannot converge around, or assume defining imperatives from, its political system, and the legitimization of the political system is not a process that entails the establishment of legal or political norms that are recognized as obligatory for all actions in society. On the contrary, the rationality of the political system is merely one mode of systemic rationality among others, with no claim to any primacy for society as a whole, so that the legitimacy of the political system does not depend upon its projection of general values or general liberties for all members of society. In this sense, Luhmann warned against constructions of society that conceptually inflate the power of the political system. Generally, he claimed that political systems that promote normative or programmatic ideals for society in its entirety, such as socialist states or even Keynesian welfare states, are prone to assume unmanageable responsibilities, and they even threaten the differentiated fabric of modern society as a whole (1981b: 48). In this respect, he stated that the 'use of politics for purposes of the shaping of society' is likely to give rise to 'ineffective decisions' (1981a: 82–3). Consequently, he implied that the legitimacy of politics depends, not on the representation of encompassing norms in all parts of society, but on the self-restriction of political functions, recognizing that politics is simply one differentiated system amongst others, in the context of an acentric society. As a result, he concluded emphatically that it is not possible to 'centre a functionally differentiated society on politics without destroying it' (1981b: 22–3).

On this basis, Luhmann claimed that it is not plausible to presume that the democratic political institutions of modern society have been created and legitimized by simple acts of rational selection or reasoned self-reflection. On the contrary, like Durkheim and Parsons before him, he argued that the rise of democracy had been caused by a broader process of functional differentiation, in which different social systems had become focused on quite distinct spheres of societal exchange. In this context, democracy had emerged as a prevalent pattern of political-systemic formation because the democratic organization of the political system allowed society's political functions to acquire a form that was adequate to the wider reality of functional differentiation in which the political system

was located.[140] Democracy, in other words, evolved as the institutional form of the adequately differentiated political system.

In this respect, in particular, Luhmann placed great emphasis on the increasing autonomy of the law in the emergence of democracy. He explained that democracy had developed as the prevalent type of political system because of the *positivization of the law*, such that the formation of democratic politics was in part observable as the result of a process of transformation *within the law*.[141]

In modern society, Luhmann explained, the differentiation of the law as a social system means that the rationality of law is necessarily detached from substantial values, and it is founded in positive decisions and placed on highly contingent foundations. On this basis, the law obtains a key role in modern society as a medium that can easily be altered, that permits adaptive systemic reactions to rapidly changing circumstances, and that allows other systems to authorize their functions in positive, contingent fashion. The positivization of law, its adaptation to contingent societal realities, is fundamental to modern society as a whole, and it makes it possible for society's different systems to reproduce themselves in their highly uncertain environments. Indeed, the evolution of the modern legal system as a simple system of positive norms, whose function is to stabilize sequences of legal expectation, plays a vital role in allowing society as a whole to secure itself against the extreme contingent occurrences that it contains.

For Luhmann, this significance of legal positivization has particular implications for the rise of democracy. Democracy evolves as a political system that is distinctively legitimated by the fact that it can adapt to its unpredictable environments, and which is able to produce and authorize political decisions in highly contingent, positive fashion. It owes this character to the fact that it is able to assimilate and utilize the positive form of modern law to conduct its exchanges, deploying positive law to generate flexible forms its functions and to translate its decisions easily into a socially adequate medium of exchange. Democracy, in other words, can

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[140] Luhmann argued that democracy is a form of politics that reflects the nature of modern society – a 'society without a centre'. In its ability to generate flexible reserves of power, democracy avoids the destructive tendency to force society into convergence around the political system (1981b: 23).

[141] In Luhmann's earlier work, the claim appears that 'the actual impetus' to the growth of democracy was the positivization of law: that is, the 'full positivization of the normative premises of collectively binding decision making', in which 'law is released from residual religious and natural-legal attachments' (1971: 37).

only exist because of the positivization of law, and democratic politics constantly reflects and augments the essentially positive form of modern law. Democracy results from an evolutionary process in which both law and power respond, adaptively, to the need for uncertain decision making, and law and politics interlock as a systemic order for generating authoritative decisions in highly insecure social contexts, in a highly differentiated society. Like other legal-sociological theories, therefore, Luhmann viewed democracy as integrally linked to the transformation of the legal system, and the structures of democracy emerge as the political system adapts to the contingent reality of modern society by ordering itself around law's positive form.

At an intentional level, Luhmann set out a hyper-contingent theory of democracy. He argued that democracy cannot be conflated with substantial values, acts of will formation or rationally selected processes. Indeed, even the basic idea that democracy can be tied to particular human interests, human demands or human subjects should be viewed as deeply misconstructed and reductively metaphysical. For Luhmann, democracy is simply driven by the positivization of law, and it evolves as a political system that is adapted to the contingent nature of society. In this respect, Luhmann showed deep awareness of the fictionality of the figures of legitimacy proposed by classical democratic theorists. He conceived the idea of the collectively self-legislating people as a mere *semantic form*, which allows the political system to project a grounding for its functions, but which cannot be attached to a concrete set of agents in society (1984a: 102; 2000: 319–71). Elsewhere, he defined the central constitutional-democratic principles of basic norms, natural rights, democratic consensus, collective freedom, popular will-formation and national sovereignty as mere *hyper-fictitious self-descriptions*, which a political system generates and utilizes to underpin its inner coherence, yet which cannot be attached to real social subjects (1990: 184–5, 191). In fact, he even viewed the basic principle that a political system presupposes legitimacy as an inner fiction of the political system, serving to bring symbolic plausibility to otherwise contingent political communications (2000: 123). Above all, he claimed, the reality of democracy cannot be extracted from the idea of a citizen claiming distinct shared freedoms or acting as the origin and source of legitimacy for laws. For Luhmann, democracy may well generate certain freedoms for social agents, and it is probable that it will institutionalize political practices associated with citizenship. But these freedoms are contingent outcomes of the evolutionary processes underlying democracy, and they cannot be statically defined as the deliberate outcomes of democratic design. Like

Helmut Schelsky, he implied that democracy only guarantees freedoms in society if it is allowed to evolve in a relatively unstrained, limited and balanced fashion, permitting the plural exercise of freedoms in other systemic dimensions.[142] If democracy is conceived as a mechanism for the imposition of general freedoms, perhaps including far-reaching participatory freedoms or even material freedoms (welfare), through society, it is likely to lose efficacy as a guarantee of freedom (1994: 157).

In this respect, Luhmann took up a most advanced position in the legal-sociological critique of democracy, implying that the core constructs around which democracy is stabilized are fabricated to simplify systemic functions.

Despite this emphasis on political contingency, however, Luhmann also offered some more concrete-institutional descriptions of the democratic political order, and the processes through which it generates legitimacy. In this dimension of his theory, his account of modern democracy still moved, persistently, within the terrain of classical theories of democracy. Indeed, he resisted the conclusive implications of his own thought.

First, Luhmann argued that democracy involves the triadic sub-differentiation of the political system into three institutional sub-systems, *politics*, *administration* and *public*, all of which interact with each other to create and legitimate legislation (1971: 62). The interactions between these components of the political system take place through a circular mass of political-systemic procedures (for instance, elections, parliamentary recruitment processes, policy hearings, lobbying negotiations, civil-service briefings, public debates, grass-roots consultation, legislative drafting), through which the political system tests and constructs legitimacy for its legislative outputs. Each point in this triadic order obstructs the excessive concentration of power in any other part of the political system, and each point forms a source of counter-power, recursively checking the power stored in other elements of the political system. This three-cornered institutionalization of political power allows the effective production of power as a societally communicable form, and it maximizes the chances that power will find compliance in the processes of its societal distribution (1981b: 45–7). Like Parsons, Luhmann claimed that complex societies need to generate political power as an expansionary, fluid, yet also generalized, medium of exchange, serving to facilitate the multiple patterns of inclusion that these societies, in their differentiation, contain,

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[142] During the social-democratic experiments of the 1970s, Schelsky argued that it was necessary to choose whether to pursue 'more democracy or more freedom' (1973: 47, 63–4).

presuppose and necessitate (1981b: 44–5; 1988: 68). To generate power in this fashion, modern societies depend on the construction of a political system that is able to avoid the excessive concentration of political power in one set of institutions, and which can construct many different procedures for distributing power through society. As a result, modern societies tend to evolve a political system that produces power through a process of *recursive circularization*: that is, through procedures in which the transmission of power is always checked by institutions able to exercise counter-power, so that the simple build-up of power at one point in the political system becomes improbable. In such systems, the reserves of power that society can use and make available for its exchanges are necessarily augmented, expanded and internally differentiated – society acquires *more power*. Democracy, thus, evolves as a type of political system that is able effectively to produce power for a modern society.

In explaining this, Luhmann argued that the internally differentiated construction of the democratic political system is determined by the fact that the political system presupposes a running exchange with the legal system, so that political decisions can be procedurally translated into law. In fact, he claimed that the democratic organization of the political system should be construed as a mass of inter-institutional arrangements for establishing a 'mutual dependency' between law and politics, making it possible for political decisions to be distilled into positive legal form, so that they can be reliably and consistently mediated across society (1981c: 164). In the triadic order of the political system, legislation is concentrated in the administration, and other parts of the system form articulations with the administration to transpose rough political exchanges into legal form. As a result, the political system is always likely to evolve in a form which increases its compatibility with the legal system. The inner triadic structure of the democratic political system thus reflects an adaptive intelligence within the system itself, which facilitates its articulation with the law.

On these grounds, second, Luhmann claimed that it is only where power can be proportioned to, or configured around, generalized legal criteria, that it can presume effective compliance amongst its addressees. It is only through its 'self-referential juridification' that power can be transmitted through society (1997: 357). In explaining the relation of power to law, in fact, Luhmann stated repeatedly that, for its effective transmission, power must be *coded as law*, and law must imprint a distinct normative code into the structure of power. In its inclusionary transmission through society, he claimed, the power conserved and produced by the political system needs to be constructed through the binary code: *lawful/non-lawful*. The 'pure

code of power' is insufficient for the effective distribution of power, and power only becomes usable – that is, it undergoes an 'enormous expansion' – if it is translated into the code of law (1984b: 41).

What this means is that, in order to generate and circulate power through society, the political system is obliged to code its inner communications *twice*: once for itself (as *subject-to-power/not-subject-power*), and once for those exchanges subject to power in society (as *lawful/non-lawful*). For Luhmann, politics relies integrally on law: collectively binding decisions formed in the political system cannot be radiated across society without utilizing the normative apparatus of law as a *generalized medium of inclusion*. For this reason, Luhmann indicated that, while other social systems contain entirely distinct codes by which they reproduce their functions, law and politics exist in a relation of *second coding* (1997: 357). In consequence, the political system is likely to accept legal self-restriction as a condition of its societal transmission, and, to simplify its effective mediation, it is likely to acknowledge legal checks on the use of coercion. Above all, the political system is likely to promote recognition of persons as holders of general legal rights, so that persons cannot be included in simply coercive fashion within its communications (1965: 25). The person as general rights holder appears, for Luhmann, as a core form for the effective transfusion of political power through society, and recognition of power's addressees as rights holders is central to the legitimation of the inclusionary functions of the political system.

On this basis, Luhmann retreated from the deepest implications of his own democratic theory. Although he proposed an avowedly contingent or hyper-sociological theory of democratic order, he implied, ultimately, that the political system is shaped by a particular inner, evolutionary reflexivity, which orients its communications towards a specific legal/normative form. On Luhmann's account, political power relies on the presence of a systemically (not reflexively) generalized rationality to perform its functions through society, and general compliance with political decisions, although not normatively determined, is likely to depend on the ordering of power in a legally generalized form. The legitimacy of political power, therefore, requires the construction of a distinctive, adaptive intelligence in the political system, and this intelligence expresses itself in the distribution of political power in rationalized legal form. Luhmann eventually expanded this theory of second coding to incorporate a theory of the modern political system as operating necessarily as a *legal state* or as a *constitutional state*. He concluded that the political system can only effectively generate power if it is internally checked by a constitution, which

transforms (i.e. *second-codes*) political power into legal power (power coded as lawful/non-lawful) (1990: 201; 1993a: 426). Indeed, he explained the organization of the political system as a legal-constitutional state leads to an 'increase in the freedom' of both the legal system and the political system at the same time (2000: 391). Although based in positive law and reflective of deeply contingent societal premises, therefore, the democratic state necessarily assumes a particular normative shape, and it condenses a broad rationality into legal/political form.

In these respects, Luhmann moved from a radically sociological perspective towards a semi-classical theory of political democracy. Overall, he attempted to construct a model of democratic legitimacy without a political subject and without recourse to any static humanistic notion of legal authority. However, both at an institutional and at a normative level, he adopted a quite standard model of the democratic political system. Ultimately, he came very close to the original democratic claim that the legitimate political system is the legislative embodiment of a rational will that condenses society's political power into an overarching order, which persons across society are likely to recognize as generally valid, obligatory and even as likely to secure relative social liberty (lack of vertical coercion). Central to the emergence of democracy, for Luhmann, is the fact that national political systems acquired legitimacy by adaptively configuring their reserves of power with the law, and, in so doing, by acquiring a medium of communication proportioned to a differentiated society. The political system, consequently, obtains legitimacy as it is correlated with the differentiated structure of society as a whole, and it articulates this correlation in a particular normative order: *society's differentiated form becomes the subject of the political system*. In proposing this theory, to be sure, Luhmann did not see the legitimate political system as an embodiment of constitutive human freedoms, and self-evidently he did not see the legitimate political system as a reflection of human rationality. But he did see the legitimate political system as an embodiment of a societal rationality, permitting the collective exercise of liberty through society. He implied that democracy is legitimated by the fact that it translates power into a limited, socially transmissible form, which society as a whole, in its differentiated structure, is likely to recognize as legitimate, for which the political system presupposes a particular normative grammar and a particular medial form, or a particular medial rationality. The rationality of the political system is articulated through the distillation of power into law, and the legitimate political system is always oriented towards legally codified democracy.

1.5 Conclusion

Legal sociology has a very distinctive qualification for examining the character and preconditions of modern democracy. As discussed, classical legal sociology first unmasked the contingency of democratic formation, which it observed as driven by wider societal processes of differentiation. Generally, both early social theorists and classical sociologists argued that the legitimation of the modern political system was caused not by the generalized demands of citizens, but by intricately formative patterns of social construction. On this basis, early legal sociology articulated the core insight that the legal form of democracy is the outcome, not of collective demands for self-legislation, but of systemic differentiation. In particular, the law plays a vital role in promoting the processes of integration that underpin democracy. *Democracy, thus, is produced through a process of spontaneous apersonal integration and institutionalization. The primary outcome of such differentiated political institutionalization is the preservation of partial, particular liberties.* On this account, democracy is not a finally realized political condition, but a continuing process of integration, closely linked to the autonomous functions of the law.

Despite its eminent qualifications for examining the realities of democracy, legal sociology always struggled to consolidate and even to accept the implications of its own essential intuitions. As stated, in the classical period, sociologists of law retained the idea, contrary to their deep theoretical impulses, that the political system is the dominant system of integration in society, that the political system assumes founding significance for the legitimacy of law, and that the political system is articulated with a generalized subjective substructure through society. Central to these assumptions is the idea that legislation is the core political function, and that, in its legislative actions, the political system produces legitimacy by condensing aspects of society's basic self-comprehension. Moreover, early legal sociologists repeatedly looked for collective sources of political agency, experience, motivation and *embedded voluntarism* to sustain the functions of the political system and the legal system. Although early legal sociology identified the fictional character of the claims of classical democratic theory, sociologists persisted in looking for the popular will, or the trans-systemically manifest citizen, as the source of law's authority. Much classical legal sociology devoted itself, however awkwardly, to projecting a recentralization of society around categories of political experience and norm formation, and it viewed the legitimacy of law as the consequence of law's collective-volitional, essentially political character. This resulted

primarily from the classical sociological critique of positivism, which imputed a simple circular relation between law and politics as the legitimational premise of the political system.

After 1945, then, legal sociology widely aligned itself to more conventional normative or rational-volitional theories of democratic law, persistently imagining law as the expression of general political freedom. Most contemporary legal sociology still imagines the people as the subject of political order, and it has not yet fully digested the paradoxical perspective which appears in the works of Durkheim and Weber. Even in theories, such as that proposed by Luhmann, that programmatically disavow the idea of politics as a system of rationally determined human action, some aspects of classical democratic theory persist, often in rather curious, oblique fashion. Overall, sociological analysis has struggled to outline the societal substructure of the differentiated political system (democracy), and it still looks for an underlying rational order with which democracy must be correlated.

This book is an attempt to re-examine the development of modern democracy by using a framework based on the deepest, primary conceptual insights of legal sociology. In particular, it takes very seriously the recurrent (and recurrently ignored) intuition in legal sociology that democracy is only a contingent, incidental occurrence, whose reality is only obliquely linked to the ideals of rational generalized freedom and external will formation, in which its common normative justifications are articulated. Moreover, this book argues that, empirically, the original insights of classical legal sociology are deeply and distinctively corroborated in contemporary society, and it views the emergent legal form of democracy as the result of positive processes of legal integration that have little to do with democratic rationality. On this basis, the book examines how the rise of democracy has been driven by deeply contingent factors, that are most effectively interpreted by the sociology of law – *if* the sociology of law holds true to its own founding insights. The book tries to show that democracy is most accurately understood if we abandon constructions of democracy as a condition of realized human self-legislation or realized citizenship, and if we decisively renounce constructions of the political system as a dominant system of integration and legitimation. *The sociology of law holds the key to explaining democracy if it thinks not as the sociology of politics, but as the sociology of law: if it accepts the insight that law acts as a free-standing medium of integration.* On this basis, therefore, this book takes the core perceptions of classical legal sociology as the foundation for a global sociological analysis of contemporary democracy.