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The People, the Constitution, and the Idea of Representation

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5.1 INTRODUCTION

Modern constitutions are presented as a declaration by the people as to how they are to be governed. By “the people” I mean the members of a society as a collective entity. In accordance with classic republican ideas, society consists of free men and women, where being free entails being self-governing. The concept of the people needs further elaboration and may not be as straightforward as I make it sound, but the definition is enough for the purpose of this essay, which is concerned with how the people, as distinct from the notion of individual persons, are presented in constitutions. Although constitutions vary from one nation to another, a study of a wide selection shows a recurring pattern in their general structure and in the way the people are depicted. Constitutions create the institutions of government, prescribe the process for appointing officials, specify their powers, and define their limits. Constitutions normally go on to dictate the relationship between the organs of government and individual persons and groups, sometimes expressing the relationship in terms of rights, at other times simply as limits on government. The people typically make three appearances in the constitution: (1) to declare that the constitution has been made by the people; (2) to provide for the election of representatives; and (3) in some cases to vote on amendments to the constitution.¹ Having created government and defined its powers, the people leave the conduct of government to their representatives and to officials appointed by the representatives, although some constitutions allow for direct action by the people.

The people generally retain for themselves no constitutional role in the conduct of government or in supervising government to ensure it acts in their best interests.

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¹ For a detailed analysis of sixty constitutions, being the constitutions of nations toward the democratic end of a scale from democratic to autocratic, see Galligan (2013b).

It is not as if this is the only imaginable form, as if the imperatives of liberty, democracy, and rights, as well as effective government or any other factors, necessarily result in the people being presented in this way. Why, we might ask, do the people's constitutions not confer on the people more power, more engagement in government, more control over government? If all political power derives from the people, why do they hand it over to legislators, executives, and administrators, even judges, who, once in power, are beyond their control? Why have we come to accept that delegating power to others, whether elected representatives or appointed officials, is the only way to gain effective government? Robert Dahl contends that it was perfectly obvious to the Framers of the U.S. constitution, as well as to us, that a republican government would have to be a *representative* government (Dahl 2001). But surely it is not so obvious. Representative government is not simply a practical means for dealing with a technical problem, a compromise of stronger forms of democracy in order to ensure effective government. On the contrary, representative government derives from, and is central to, a definite and distinct form of constitutionalism, which is the product of ideas and events in certain societies, England, France, and the United States especially. Social factors, ways of understanding the world, and ideals and visions for the future combine to produce a very particular understanding of the nature of government, and of how a nation can best govern itself, from which follows a view of constitutions, their purposes, and their contents.

The aim of this essay is to explain this paradigm of modern constitutions and the place of the people within them. My assumption is that, in understanding the social world and the role of law within it, the constitution matters, matters in the sense that it influences actions. It follows that how the people are presented in the constitution, the place assigned to them, also matters. It is enough for my purposes that they matter, even if how much they matter is uncertain. This essay is part of a program of research and discussion whose purpose is to examine the connections between constitutions and their social and political foundations. Since the place of the people sketched earlier is common to modern constitutions – in fact, is among their distinguishing features – then its investigation should reveal something of interest about constitutions and their social foundations. A social account of the people in constitutions has three parts: (1) what constitutions say about the people; (2) the ideas that support and make sense of those provisions; and (3) the social context from which the ideas emerge. The emphasis in this essay is on the second part, the ideas, whereas the first and third parts are considered at length in a forthcoming study.² By ideas I mean the way the main actors at various times think about constitutions, how they understand their nature and content, the ideals and visions

² The fuller study is in the process of completion and proceeds under the working title: *The Hidden Constitution of the People* (completion, 2014).

of what constitutions should be – in short, their *mentalité*. In analyzing the ideas behind modern constitutions, I draw on historical events, but by way of illustration rather than systematic historical explanation. I am not putting forward a normative claim about the place the people should have in the constitution, despite the tendency to assume that anyone writing about the subject must have an ideal in mind, a view about what that place should be. That may or may not be the case, and it is not the case here, my purpose being to identify, understand, and explain the place of the people, not to prescribe what it should be. The comparisons I make between representative government and more direct forms of democracy are to illuminate different positions rather than to argue for one or the other.

5.2 THE PEOPLE IN THE CONSTITUTION

The people appear in the constitution in four main ways. They declare the constitution to be theirs, created by them in the exercise of their authority. The constitutions of the United States, Japan, India, and many others begin with the words “We the People,” while the Act to constitute the Commonwealth of Australia refers to the agreement of the people of the states to unite in a Federal Commonwealth.³ The Fundamental Law of the Republic of Hungary is made in the name of “the members of the Hungarian nation” who declare that all power belongs to the people, who exercise sovereignty through elected representatives or “in exceptional circumstances directly.”⁴ That the constitution is the act of the people, in some sense belongs to them, is a common theme of these and many other constitutions.⁵ The people often, but not invariably, make a second appearance in affirming the representative character of government and stating how representatives are to be elected. The Australian Constitution, in line with many others, states that the two Houses of Parliament shall be “directly chosen by the people,” while in many other constitutions no express reference is made to the election of representatives, although the assumption is that they will be, leaving such matters to be provided for elsewhere.⁶ Once elected, representatives are rarely subject to processes of accountability to the people other than the final power to vote them out of office. The third reference to the people occurs in provisions for amending the constitution. The people in a few cases are able to initiate constitutional change,⁷ but

³ Commonwealth of Australia Constitution Act 1900, Preamble.

⁴ Constitution of the Republic of Hungary 2011, Article 2.2.

⁵ Some constitutions vest sovereignty in representatives rather than the people: the constitutions of Argentina and Brazil are examples; other constitutions are based on parliament rather than the people: United Kingdom, Australia, and Canada are examples.

⁶ Thirty-five percent of the cohort of sixty provide expressly for election of representatives; the other 65% make no reference.

⁷ Seven constitutions in the cohort allow the people to initiate a referendum for constitutional change, but only under very restrictive conditions.

more often they are asked to consider changes proposed by government; even then only half the constitutions in the cohort provide for a confirmatory referendum, often at the discretion of parliament, the other half allowing change by special parliamentary majorities without reference to the people. The fourth and final appearance of the people relates to direct action that takes several forms, the most common being voting on a referendum to amend the constitution or initiating a referendum to propose a new law or abrogating an existing one.⁸

Beyond these points of reference, and occasional exhortations that government be conducted for the good of the people, constitutions say little about the people. The result is a constitutional structure in which the people have a significant but limited role. Although constitutions often declare the people's sovereignty or supremacy, the extent to which they are involved in making the constitution or even ratifying it is highly variable and often more a case of acquiescence than positive consent. And as we have just seen, their presence in the constitution is limited and narrowly defined. The high-sounding declarations of the sovereignty and supremacy of the people are important symbolically but do not translate into a vigorous engagement in government. The authority to amend the constitution, where it exists, is by no means insignificant, yet amendments, being exceptional, do not engage the people in constitutional affairs on a regular or frequent basis. That leaves the authority to elect representatives, mainly legislative, sometimes executive. The election of representatives is fundamental to even the leanest notion of democracy, and there is a world of difference between having the right to elect and not. Nevertheless, to confine the constitutional role of the people to the election of representatives is to opt for a very particular constitutional scheme. It is a scheme in which the people have no constitutional authority to involve themselves in government, by which I mean in the formulation of policy and the making of law; nor in the executive, administrative, and even judicial aspects of government; nor do the people have, as a matter of constitutional right, direct power of supervision or control over government.

An immediate objection might be made that the people have ample opportunities to influence and guide the conduct of government through political action. Quite apart from how true that is in practice, which varies from place to place and group to group, the focus here is on the constitution, not on the political process. The question is about the place the people have in the constitution, which is quite different from questions about the way the people conduct themselves in politics. Another objection, the one voiced by Dahl noted earlier, is that constitutions reflect the realities of modern societies, where the idea of a more positive role for the people in the

⁸ It was noted earlier that half the constitutions in the cohort provide for confirmatory referenda on constitutional amendments, while in seven cases the people may take the initiative. Seventeen constitutions in the cohort of sixty provide for initiatives of the people, which in practice, in general, are not easy to mount and are not often used.

constitutional scheme, however attractive in principle, is ruled out as impracticable. The appeal is to common sense: government is large and complex, and must be conducted by a select few, who act on the advice of experts and professionals. Whatever the merits of the argument, it does not end the enquiry, for implicit in it are empirical claims about the nature of modern societies and government, which, to be plausible, would need to be broken down into a multitude of different issues and closely examined. Only then would it be possible to determine whether a modern government requires such wholesale delegation of authority to officials and necessarily excludes the people from being involved in a range of ways. In the absence of any such analysis, the general claim based on the necessities of modern government is rather weak and should not deter further investigation into the role of the people in the constitution.⁹

The Constitution of the United States occupies a special place in constitutional development. It is the outcome of extensive debate by intelligent men dedicated to creating a new constitutional order, some of whom, like James Madison, were well-versed in the history, the rise and fall, of countless constitutional orders. The U.S. Constitution is backward-looking in embracing the fundamental constitutional understandings of the English of the time, while forward-looking as a point of reference for the future – the paradigm, some think, of what a constitution should be. How it fits within the scheme outlined earlier is well put by J. G. A. Pocock, who writes that, for the Federalists, the “crucial revision [of competing democratic theories] was that of the concept of the people” (Pocock 1975: 517). He continues: “There was a distinction between the exercise of power in government, and the power of designating representatives to exercise it; and it could be argued both that all government was the people’s and that the people had withdrawn from government altogether” (*ibid.*). If this is the culmination of a course of history, the summit of constitutional endeavor, as I think it must be regarded, then we may ask: how did it come about? What social factors made it not just possible but seemingly inevitable, the natural and necessary accommodation of two competing notions: the people as masters of their own destiny and the practical needs of government? Claims to either naturalness or necessity as to the form of social institutions are usually suspect, and this case is no exception. From the premise that the people are free and self-governing, and yet have to find a way of living together, a way of governing and being governed, from that premise different conclusions may be drawn, different forms of government and constitution devised.

An obvious alternative, one that casts its spell over centuries of constitutional thought, is contained in a tradition with its origins in Greek and Roman history, finds its expression in the Roman Republic and Roman Law, and was the foundation

⁹ An assessment of the arguments from practicality is made in the larger study referred to earlier.

of the Italian republics. This republican approach, despite the term “republican” now having been emptied of much of its original meaning, has at its core the question of how free men – where being free entails being self-governing – could enter into association with others, could consent to government, and yet remain free. The answer, despite many variations and complications, in turn has at its core the notion of direct participation and involvement in government. Government is seen not only as a necessity but also as a good, and engagement by its citizens a source of virtue. How that should be expressed in practice is also open to interpretation and local variation, but the idea in its simplest form remains constant. Polybius, the Greek historian of the third century, whose text stands out from an abundance of texts for its clarity, simplicity, and influence, expresses the perfect constitution as one that combines the three elements of monarchy, aristocracy, and democracy, each checking and balancing the other (Polybius, 1979). That is not so extraordinary in itself, for even Charles I of England, in *His Majesties Answer to the Nineteen Propositions of Both Houses of Parliament* put to him in June 1642, could propound a similar constitutional scheme (Kenyon, 1986: 21–23).

Everything turns on the third element: democracy. For Polybius and the tradition he represents, democracy means active engagement of the people in the affairs of government. This is not what Charles I had in mind. He did use, surprisingly, the word “democracy,” which, to a seventeenth-century Englishman, normally meant anarchy. He was referring, however, to the House of Commons as the democratic part of Parliament, which represented the people, although its members were elected by only a small percentage of them. The House of Commons might be “an excellent conservor of liberty,” Charles concedes, but it is a representative house where the elected members are actually present, the people only notionally so. The institutional structure, the balancing of the three estates, fits the form of the republican tradition, but the substance is crucially different, for the idea of the people as active participants in government is absent. The people, as real persons with needs, interests, and aspirations, are replaced by a corporate notion of “the people” capable of expressing itself only through representatives, who, as representatives of the corporate whole, should not and need not be too closely tied to interests or localities.

Somewhere down the historical line, a major transformation has taken place: the old issue of how to reconcile the people as free and self-governing with the demands of effective government has been resolved by redefining the people in such a way that they speak only through representatives, and so are rendered distant from government. Government is a matter for king, aristocracy, and commons, who collectively constitute the sovereign authority, who act for and in the name of the people, and who are the only ones capable of so acting. The transformation took place for reasons internal to the constitutional affairs of the medieval and early modern English nation, but its significance is universal. That government should

be, can only effectively be, conducted by representatives is the premise on which James Madison designed the Constitution of the United States, from where it found its way into practically every constitution of the modern world. At almost the same time and on the same basic premise, Abbé Emmanuel Sieyès, in the ferment of the French Revolution, was attempting to put the study of constitutions on a more scientific footing and to provide practical guidance in their design. I shall return to Sieyès's ideas shortly.

5.3 ON THE NATURE OF CONSTITUTIONS

Chief Justice Marshall of the U.S. Supreme Court, writing in 1803, states concisely one view of modern constitutions: "Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation."¹⁰ Marshall here gives expression to an idea gradually emerging but until then imperfectly formed: that the fundamental law of a nation is found in the written constitution, and that there is no sense of fundamental law outside the written document. Fundamental law, the rules of government, and the constitution merge into one written document. That in turn gives birth to other ideas: that the constitution defines the relationship between government and the people in terms of the rights of individual persons, and that the authoritative interpretation of the constitution is the domain of the courts. These are two of the distinctive features of modern constitutions.

"Constitution" came only recently to be viewed in this way. In the seventeenth century it meant something different, an account of which, and how it changed, will help in unravelling the place of the people (Stourzh 1988). In the seventeenth century, especially the period around the English Civil War, men of affairs spoke in language now strange. They spoke of the "body politic" by analogy to the body natural and of "constitution" as the state of health and well-being of the body politic. The health and well-being of the body politic consists of those features essential to its nature and well-functioning. The Parliamentary complaint was that, during twelve years of Personal Rule of King Charles I, the body politic was of poor constitution and needed to be restored to health. The purpose of Parliament's criticism of the king and its proposals for reform was restoration of the body politic to good constitution. In a speech in the House of Commons in 1642, Stephen Marshall spoke of Parliament's purpose in its contest with the king being "to restore the nation" to "the fundamental and vital liberties, the propriety of our goods, and freedom of our persons" (Judson 1949: 353). To violate those qualities, as the king was accused of doing, was to ruin the health of the nation and hence its constitution; restoration

¹⁰ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

meant bringing government into line with those qualities and so restoring the nation's constitution. Parliament becomes the "Physician" whose task is to care for the "Patient" and restore it to health. If the "body be distempered," Parliament is best suited to restore it to health. When the Levellers enter the scene in the mid-1640s, they accuse Parliament, now ruling, of failing in its duty, of perpetuating the ills rather than curing them. They then set out to find another route to good health (Galligan 2013b).

Law, more than anything else, was essential to the health of the nation. Men of the seventeenth century, writes Margaret Judson, a historian of the constitutional crisis of the 1640s, "held a profound belief in the importance of law" (Judson 1949: 44). Edward Sexby, a Leveller branded a dangerous radical, was one of those men. He explains the law as being essential to social life and that we achieve social life only by subjection to the law. "Laws," he writes, drawing on the image of a body and its health, "are the nerves or sinews of every society or commonwealth, without which they must necessarily dissolve and fall asunder" (Sexby 1986: 371).¹¹ Why is law so basic to the health of the nation, why are laws "things of constitution," as an unnamed author wrote, which constitution is "written in the very heart of the Republique" (unnamed author 1643: 3–4)? The answer is that laws are not just instruments to ends; they constitute the society in the sense that they define the rights and duties of the people and relations between the people and the Crown. If the first duty of the king is to govern for the welfare and safety of the people, the *salus populi* – an ancient idea invoked in Parliament's attack on the king, and later in the Levellers' attack on Parliament – then laws express the *salus populi* and define the welfare and safety of the people. Being a law-based constitution, the English constitution is a constitution of rights, a feature often neglected; and we might add in passing how salient a feature that is in comparison with the classic republican constitution, which was one of active civic engagement rather than law and rights. The English constitution was not based on civic engagement of the people, indeed the opposite: the constitution allowed no room for general civic engagement.¹² It relied instead on the wisdom of king, lords, and commons governing for the good of the people, governing that is in accordance with law and respecting the rights created

¹¹ In their search for fundamental law, the Levellers went back to a pre-Norman England to an idealized vision of Anglo-Saxon England; that proving not to be entirely satisfactory, they finally concluded that fundamental law is right reason: see further, Galligan (2013b). Very similar bodily imagery had been used two centuries earlier by John Fortescue, a seasoned judge who survived the Wars of the Roses; he wrote: "The law ... resembles the sinews of the physical body, for, just as the body is held together by the sinews, so this body mystical is bound together and preserved as one by the law"; Fortescue (1997).

¹² Although the people were excluded from civic engagement, they held the ultimate extra-constitutional power to withdraw their acquiescence, the threat of which is a constant theme in early modern English history. Civic engagement did occur at the local and shire levels; see, for instance, Hindle (2000).

under law, from which all the people benefited. Within this perfect constitutional order, as it was often proclaimed to be and not only by Englishmen, there was neither constitutional need nor constitutional space for an active citizenry. This was the inheritance of early Americans, who, although rebelling against tainted implementation of the English constitution, based their own on similar foundations: good and wise government guided by law and rights. They had to concede a wider franchise, but that, as we shall see, did not ruin the foundations.

The connection between law and constitution and the health of the nation is now established. Law is pivotal, yet it has a special and rather elusive sense. It is more than statutes and common law, although both are part of it. When men of the seventeenth century spoke of law, invoked law in their cause, they meant more than what we would now call positive law. What they had in mind is not always clear, but includes a notion of fundamental principles, which are to be found not only in such public declarations as Magna Carta,¹³ but appear also in the conventions, understandings, and practices that constitute the body politic, at whose heart lay the rights and duties of freeborn Englishmen. Conventions, understandings, and practices they may be, but, as that anonymous author writes, they are things of constitution, the things “written in the very heart of the Republique, far firmlier than can be by pen and paper” (unnamed author, *ibid.*).

The rules and institutions of government have a place but are only part, and not the most important part, of a constitution. They are, in a way, instruments for sustaining fundamental law, and so the welfare and safety of the people, and in turn the health of the nation. They are also more than instruments, for the understanding was that a certain pattern of rules and institutions of government is closely tied to the nation’s welfare. In his last significant statement on the constitution, through his advisers Culpeper and Hyde, in *His Majesties Answer to the Nineteen Propositions of Both Houses of Parliament*, King Charles I affirms that laws are made by king, lords, and commons, and that government is trusted to the king. He then states that authority in the king “is necessary to preserve the laws in their force, and the subjects in their liberties and properties.” The House of Commons, he goes on to explain, “is an excellent conservator of liberty, but never intended for any share in government, or the choosing of them that should govern. – The power presently placed in both houses is more than sufficient to prevent and restrain the power of tyranny” (Wootton 1986: 171). The good of the nation is, in the king’s view, inseparable from the institutions of government, a view from which few seventeenth-century men, at least before 1642, could dissent. By 1642 it was too late: Parliamentarians were now ambitious for a greater share in government, which in turn required changes to the balance between Parliament and the king. And while this meant changing an

¹³ For an analysis of Magna Carta, see Holt (1992).

element of the constitution, it concerned changes at the institutional level, leaving the fundamentals intact.

We might think of the organic constitution as consisting of several layers around a core. The core is the welfare and safety of the people, part of which, indeed a crucial part, consists of certain rights and liberties, which are wrapped in fundamental law, around which an institutional structure is built. The layers are interconnected to make an organic whole. Adjustments and modifications can be accommodated, although drastic change to one layer may threaten the whole. Changes to the institutional structure are the easiest to cope with, but even the core idea of the safety and welfare of the people and the standards of fundamental law can be reformulated. This idea of a constitution as an organic whole, as an expression of the well-being of the nation, is strikingly different from the notion expressed by Chief Justice Marshall. An obvious difference is the absence of a single document stating the fundamental law. Even more salient, fundamental law is less concerned with the institutions of government than with the understandings on which the society is based and which are expressed and reexpressed in practical actions. Another difference follows, for now the very idea of law suggests not so much rules or even definite standards, but something less tangible, something more amorphous, something more in the nature of understandings, assumptions, and expectations. These were the basis for Parliament's indictment of the king in 1642 and a few years later the Levellers' indictment of Parliament, the claim being that both were violating the fundamental law.

5.4 THE PEOPLE AND THEIR REPRESENTATION

Most important of all, the organic constitution is inseparable from – indeed, is another way of describing – the social structure. The nation is in good health when its many parts and its different layers come together in a harmonious whole. To know what constitutes a harmonious whole, one looks to the social order. The image of well-being of the body politic, with the king at its head and lords and commons combining to constitute the sovereign body, directly reflects and reproduces at the constitutional level the structure of society. That structure is clear and settled, and, just as property and status determine the social order, they also identify those, the few, who should govern, who are fit to govern. The people, the many, know their place in the social order and, however much they resent it, only rarely raise a voice in protest. One case occurred during the New Model Army debates in Putney Church in October 1647, when Colonel Rainsborough argued with haunting simplicity the case for soldiers, the ordinary men who had fought for Parliament in the Civil War, having a say in electing the government. But just as the possession of property and social status secure the place of the higher orders in political affairs, its lack serves

equally well to exclude the lower orders. Without property or commercial endeavor, the people lack that “permanent interest” in the nation, which Henry Ireton invoked in order to reject their pleas (Galligan 2013b). Only those with property and status have sufficient interest to sustain a social order that turns on property and status; to allow the vote to those without would put the social order at risk. In Ireton’s own words: “the most fundamental civil constitution of this kingdom . . . is, above all, the constitution by which I have my property.”¹⁴ Oliver Cromwell adds another reason: widening the franchise “tends to anarchy, must end in anarchy; for where is there any bound or limit set if you take away this limit, that men that have no interest but the interest of breathing shall have no voice in elections” (*ibid.*).

Yet the constitution of the seventeenth century, in common with the constitution of earlier centuries, was celebrated for requiring government with the consent of all and for the safety and welfare of all. King, lords, and commons all accepted that the authority of government derives from the people, that the people must in some sense consent to government, and that the powers of government should be used for their safety and welfare. The Coronation Oath expresses the bond between the people and the king, for as Margaret Kelly writes: “[T]he basis of the oath is the willingness of the people or peoples to accept the person about to take the oath as king” (Kelly 1998: 165). The sovereign body, the King-in-Parliament, also depends on the people, as Charles I states in his *His Majesties Answer*: “In this kingdom the laws are made jointly by a king, by a house of peers, and by a house of commons chosen directly by the people, all having free votes and particular privileges” (Wootton 1986: 171). Since neither king nor peers were elected by the people, and the House of Commons by a small portion of the people, in what sense was government based on the consent of the people?¹⁵

The answer lies in *representation*. Representation is a complex notion, open to a range of meanings.¹⁶ The proclamation accompanying the succession of James I to the English throne explains one sense of representation, a sense at the center of early constitutional thought, with brevity and clarity: “[I]n this High Court of Parliament, where the whole body of the realm, and every particular member thereof, either in person or by representation . . . are by the laws of this realm deemed to be personally present” (Kelly 1998: 126). The idea is both powerful and remarkable: the whole realm comes together in Parliament, the people are *deemed to be personally present*. When Parliament, in the sense of the King-in-Parliament, decides, the nation decides. Since the people are present in Parliament, there can be no gap between them and Parliament. It is not a matter of Parliament deciding and then seeking the

¹⁴ *Putney Debates*, p. 37.

¹⁵ Roughly one-fifth of the adult male population had the vote; see Kishlansky (1986).

¹⁶ See further, Pitkin (1967) and Manin (1997).

consent of the people: the decisions of Parliament are the decisions of the people. “Every Englishman is entitled to there be present,” wrote Thomas Smith in 1628, and “the consent of Parliament is taken to be everie man’s consent” (Judson 1949).

In order to understand this notion of the people being present through their representatives, we must put aside two pillars of modern constitutional thought. One is the modern idea that election by the people is the normal and legitimate way of appointing government, from which it follows that consent of the people means consent positively displayed through elections.¹⁷ Things were seen differently in the seventeenth century. We noticed earlier why popular election had no place in a nation based on property and status. Even the Commons had its origins in members being selected by the King and only later came to be the elected chamber (Maddicott 2010). Vital to this way of thought is the notion that good government depends on the quality of those who govern, not on how they are selected. The other feature of seventeenth-century thought at odds with modern ideas is that “the people” constitute a corporation, a *universitas*, which has a legal identity separate and distinct from its members, in the same way that a modern corporation has legal identity separate and distinct from its shareholders. The idea is inherent in the very word “people,” which can be singular or plural depending on that to which it refers: the welfare of the people, singular, is then the welfare of the corporation, the people as a whole, and what constitutes the welfare of the corporation of the people is determined by those who represent it. The modern tendency is to repudiate or at least much diminish the sense of the people as a corporation (although vestiges remain) in favor of the people, plural, as a collection of individual persons with different ideas and interests.

The sense of the people as a corporation is at the heart of the seventeenth-century constitution. It was taken for granted; it was the way men of affairs thought, the notion they had in mind when they spoke of the people, made claims on the people’s behalf, or wielded power in their name. The people as *universitas* has its origins in Roman Law, was imported into medieval Canon Law in order to solve problems of government within the Church, and from there made its way into secular constitutional thought (Tierney 1982; Monahan 1987). Once the “people” is understood in the corporate sense, some of the puzzles of seventeenth-century constitutional thought dissolve. The corporation of the people, being an entity distinct from its members, acts only through its representatives, who are appointed according to the rules of the corporation. Acts of the representatives are therefore acts of the people. The king’s claim that his authority derives from the people and that he in turn

¹⁷ On the nature of popular consent and its origins, see Monahan, A. P. *Consent, Coercion and Limit: The Medieval Origins of Parliamentary Democracy* (Kingston: McGill-Queens University Press, 1987) and Clarke, M. V. *Medieval Representation and Consent* (New York: Russell & Russell, 1964).

represents them now makes sense; the king acts for and on behalf of the people as a distinct entity. The fact that he was not elected by the people is not relevant.¹⁸ The narrow electoral base of the commons is unimportant, because the commons represents the people as a corporate entity rather than as individuals or groups, and for that the object is to have able representatives rather than elected ones. Perhaps most importantly, the notion of the people as a corporate entity enables us to understand parliamentary sovereignty. When king, lords, and commons come together as King-in-Parliament, they represent the corporation of the people, and are the only ones with authority to represent it, and their actions are the actions of the corporation. And if we add the strange idea that the people are also there assembled, Parliament's claim to sovereignty is complete.

Although the notion of the people as a corporation explains much about early modern constitutional thought, it is unstable. Why should the real people accept a fiction, which, no matter how rich in history and pregnant in symbol, precludes their presence in the constitution and the political process authorized by the constitution? If the ordinary people tended to accept their constitutional exclusion as mere "breathers," to borrow Cromwell's term, it is because that was their place in the social order, of which the constitution was the mirror image. Despite the exclusion of the people, various rebellions and disturbances over the centuries had influenced the constitutional order,¹⁹ but it was not until the upheavals of the 1640s that one stream of social rebellion in the form of the Leveller movement paved the way for a constitutional revolution that would have pierced the corporate veil to reveal the real people. But the moment passed and the Leveller movement came to nothing. After eleven years of a turbulent commonwealth, the monarchy was restored on terms favorable to lords and commons, while keeping intact the corporate identity of the people. It took the very different social order that grew up in the American colonies to enable the real people to emerge, to proclaim the constitution as theirs, and to secure the right to elect their representatives. Sovereignty moved from the Queen-in-Parliament in England to the people in the American colonies, and a wedge was driven between the two, so that government is of the people with only such powers as the people confer, from which it follows both that the people may change the terms of the conferral and that government must be chosen by the people.

¹⁸ There was a body of opinion that the king was elected by the people: that was John Fortescue's view, a view recently endorsed by Margaret Kelly (Fortescue 1997; Kelly 1998). This must be regarded as election in a special sense; for an analysis of consent and its relation to election, see Monahan (1987).

¹⁹ For an account of the impact the people had in shaping events and constitutional ideas, see Rollison, D. *A Commonwealth of the People: Popular Politics and England's Long Social Revolution, 1066–1649* (Cambridge: Cambridge University Press, 2010) and Watts J. *Henry VI and the Politics of Kingship* (Cambridge: Cambridge University Press, 1996).

That the people are able to take control of the constitution and elect their representatives are major advances on the seventeenth-century English constitution. Yet features of the old order remain. In the first place, the veil was pierced but not destroyed, so that the corporate notion of “We the People” lives on side by side with the people as real people with local and particular needs and interests.²⁰ Modern constitutions retain elements of both, with representatives sometimes acting for the corporate sense of the people and at other times for local and particular interests. Secondly, although the constitution is the people’s constitution, the old notion survives according to which the people act only through their representatives. The constitutional role of the people is confined to the choice from time to time of who should represent them, with the result that the main focus of political action is influencing representatives.²¹ The republican spirit of self-governing citizens, where self-government not only protects liberty but has positive virtue for those engaging in it, is not dead but much weakened. That weakening has led to a strengthening of another feature of the old constitutional order, the peculiarly English notion that liberty depends on law, not virtue, a notion that assumes a prominent place in the new order through the constitutional enunciation of rights and leads over time to the transfer of final authority to the courts.

5.5 REPRESENTATION AS THE FOUNDATION OF MODERN CONSTITUTIONS

That early modern ideas of constitution and government, themselves a direct expression of the social order of the time, should have persisted to become the foundation of modern constitutions suggests they contain something universal. Universal, that is, in relations between the people and the government, something transcending time and place, something to be confronted in any constitutional order. The voice that tried to move beyond the particular to the universal, to identify a sociological truth common to all systems of government, which should be credited with providing a foundation for modern constitutions, is that of the Abbé Emmanuel Sieyès (1748–1836). Described as “a theoretical architect of the French Revolution” of 1789, Sieyès, while writing of those events, intended also to advance a general account of constitutions (Sieyès 2003: vii).

In a pamphlet published in 1791, entitled *Qu’est-ce que le tiers état?*, Sieyès argues that to understand constitutions we must first consider the formation of political society, which has three stages. At the first stage, individual persons unite to form a nation, which consists of the combination of individual wills, or in Sieyès’s words, “a

²⁰ For further discussion of the corporate aspects of modern constitutions, see Galligan (2013b).

²¹ Max Weber’s analysis of modern democracy proceeds along this line; see Weber (1978: 983 ff).

body of associates living under a *common* law, represented by the same legislature” (Siey  s 2003: 97). They then coordinate their activities and agree on common needs and how to achieve them, which marks the change from a coming together of individual wills to the formation of a common will, a progression essential to a nation’s existence. The third stage is the crucial one: it marks the creation of a constitutional order and system of government, consisting of the delegation by the community to its representatives. Only at this stage can the common will of the community be identified and developed, and only then is a mature political society realized. But at this stage, says Siey  s, “it is no longer a *real* common will that acts, but a *representative* common will” (Siey  s 2003: 135). So, in a mature political society, relations between the people, the government as their representatives, and the constitution, are made plain: the people as a nation are the *constituent* power, the government is the *constituted* power, and the terms on which it functions are the *constitution*.

Siey  s’s approach is that of the social scientist describing a constitution as a necessary element of a modern nation, an element whose properties and functions can be analyzed and generalized. The central ideas are simply stated. Firstly, the people as a nation needs government in order to achieve its common goals, for government can organize and coordinate the nation more effectively than the people acting as a collection of individuals. Secondly, the people *are* the nation, but the people *is* the constituent or sovereign authority, which expresses its wishes only through representatives. Thirdly, the people adopt a constitution that delegates powers to a group of officials as representatives, the constituted authority, which has only those powers so conferred. From this it follows that the affairs of government are left to the representatives as the constituted authority without involvement or interference from the people, first, because, as a practical matter, involvement or interference would threaten the point of delegating authority to government, and second, because government officials as representatives of the people act for and on behalf of the people and in its name. The authority of government is never more than a delegated authority that is held subject to the terms of the constitution and that government may not alter. The people retain the constituent power, from which they cannot be divested and with which they may alter the constitution. Siey  s goes on to explain that the drafting of a constitution and its later amendment should be entrusted to a second type of representative, *extraordinary* representatives, who are appointed by the nation for that purpose and who act on its behalf (Siey  s 2003: 142).

Siey  s’s account of constitutions, proposed in the late eighteenth century, in the heat of revolution, purports to be a sociological account of general application and fits well with modern constitutions. Gone is nostalgia for the past, for restoring what was lost, and in its place is optimism for a new constitutional order based on reason and utility. Constitutions are no longer tied to notions of bringing the body politic back to good health, but are instead practical means to serve the ends of a political

society. The task is to understand the structure of political society and then to devise a suitable constitution to serve its ends. The people, the Third Estate, now constitutes the nation, is the constituent power, the bearer of sovereignty (a term Siey  s does not use but which would be apt).²² Unless the people as an undifferentiated collective is acknowledged as the nation, as the source of government authority, a genuine political society cannot form. In such a society there is no place for privileged orders, so that failure of the English to grasp this basic idea renders its constitution a “monument to gothic superstition” (Siey  s 2003:131). But the nation can act only through its representatives. This is the most salient feature of Siey  s’s account and the most contentious. The medieval notion of the people as a corporation also has long since gone, yet its work in shaping constitutional history has been done, for here in modern dress, at the very center of the constitution, is the same old idea: the nation has a distinct identity that is separate from its individual members and that can be expressed only through representatives. The people do not govern themselves but are governed by their representatives. There are major differences between the premodern and the modern: one is that in the modern constitution the people choose the representatives; the other that the powers of the representatives are limited by the constitution. As important as these two factors are to the nature of modern constitutions and in recognizing the ultimate authority of the people, they do not touch the more basic notion that the nation acts through and only through its representatives.

5.6 REPRESENTATION, DEMOCRACY, AND RIGHTS

The English constitution of the seventeenth century and the theoretical account of Abb   Siey  s of the late eighteenth century both have at their center the people, and yet neither is dependent on or in any necessary way linked to democracy. Whereas today we could not imagine discussing the place of the people in political society in terms other than democracy, in seventeenth-century England and eighteenth-century France, democracy was not part of the discourse. Ideas of the people and their representation had different origins and a different logic. The English notion of the people as a corporate entity kept at a distance the real people, who were a threat to the social order, while Siey  s’s account of political society, constitution, and government depends on the people but not on democracy. The people are governed through their representatives, but who should be representatives and how they should be selected are open to different approaches. Popular election is not ruled

²² Siey  s’s criticism of the English constitution, although meriting admiration for its continuity, is severe: “this much-vaunted masterpiece,” he writes, “cannot withstand an impartial examination based on the principles of a genuine political order” (Siey  s 2003: 131).

out, but Siey  s, in debate with Thomas Paine, argued strenuously for a monarch as the supreme representative, even in some circumstances justifying a hereditary one (Siey  s 2003).

By the time of the American Revolution, and the working out of the federal constitution, the people had gained a foothold in political affairs that could not be denied in the constitution. James Madison, the dominating presence in constitutional affairs, after adverting to the need to control the “violence of factions” that inevitably results from popular government, asks in *Federalist* 1 whether the form of government has to be republican. His answer is plain: “no other form would be reconcilable with the genius of the people of America” (Madison 1971). By that Madison meant the right of the people, albeit only adult males, to engage in the political process to the extent of voting for representatives. That, for Madison, is the key difference between republicanism and monarchy. What the Levellers in England had advocated in vain more than a century before was now achieved in the American states, so successfully that it became a basic premise of American constitutionalism and its repudiation unthinkable: the people were now entitled to choose their representatives. Beyond that, the new constitution inherited and naturalized the English notion that government be conducted through representatives and that the people have no part in government other than choosing who its members should be.

In *Federalist* 10, Madison’s fear of the people, of the “interested and overbearing majority,” leads him to draw even more deeply on the foundations implicit in the English constitution. The “great object” of the new constitution, he states, is to secure two competing ends: on the one hand, the protection of the public interest and in particular private property, and, on the other hand, “the spirit and form of popular government.” The solution is a representative republic, where views held in society are passed “through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations” (Madison 1971). It may be that the voice of the people, “pronounced by the representatives” of the people, will be “more consonant to the public good than if pronounced by the people themselves” (*ibid.*).²³ The tide of support for republican government is unstoppable, but, by confining it to representative republicanism, the risks to the social order are reduced and made manageable. Just as king, lords, and commons represent the people and could be relied on to protect the English social order, well-chosen representatives are likely to be the kind of persons who do likewise for American society.

²³ For a catalog of restrictions on the majority under the original federal constitution, see Dahl (2001: 15 ff).

Fifty years later, some of that mistrust had dissipated and the mature Madison was less sure that majorities would unite to threaten the common good (Dahl 2001: 33 ff.). By 1821, the right to vote “is a fundamental Article of the Republican Constitution” and should not be tied to ownership of freehold property. To restrict the right to vote in this way “violates the vital principle of free government that those who are bound by laws, ought to have a voice in making them” (Dahl 2001: 35). Rainsborough’s plea in Putney Church nearly two centuries before is at last vindicated in a foreign land. Majority rule of course has its dangers, but of all forms of government, adds Madison: “The recommendation of a Republican form is that the danger of abuse is less than any other” (Madison 1953: 46). Despite Madison’s changing opinion as to the place of the people in a Republic, it was too late; the federal constitution was already based on the more cautious version of republicanism, some of whose features were later altered, but whose basic structure remains.²⁴

The point of present interest is that both the Constitution and the ideas behind it are situated within a model of representative government in which the representatives know how best to govern and should be left to govern without intervention by the people. Madison devoted much time to explaining republicanism and showing how it differed from other forms of government. But the form of republicanism he settled on is not that of the classical tradition; it is rather a form of government with its roots firmly in the English constitution, into which Madison inserts wider voting rights. Republicanism in the classic sense embraces a quite different role for the people: it is based on the citizen actively participating in government, not merely in choosing government and delegating authority to it. How active citizenship is to be realized, and what form participation takes, are variables dependent on the circumstances. But the premise is plain: republican government is government by the active engagement of the people and does not countenance a handing-over of authority to representatives. Republican government in the classic sense had a place in the discourse of the eighteenth century, and was even experimented with in some states, vestiges of which are still visible.²⁵ But the idea was short-lived and deemed a failure. One reason was its impracticability: the choice of representative government was the response of practical men to the impossibility of the citizens of thirteen states assembling to enact laws.²⁶

A more important reason, I suggest, is that those practical men thought and worked within a frame of reference in which the nature of constitutions, government, and the place of the people was settled. The English constitution contained truths about the nature of society and social relations, which the Americans had no

²⁴ For an account of the changes, see Dahl (2001: *ibid*).

²⁵ For a historical account, see Wood (1968) and Manin (1997).

²⁶ Dahl considers this the decisive reason; see Dahl (2001: 160).

reason to question. Madison's views at the time of the federal constitution on the purposes of government, on who is fit to govern, and on the need to keep the people out of government occurred within that frame of reference, which had matured over centuries in English constitutional thought. Representative government is the form of government that best fits the frame of reference, which offers the best resolution of the dilemma that government is the government of the people, and yet government must be conducted by those who know how to govern for the common good. That such ideas had their origins in English constitutional thought would not have been enough to secure their passage into a new and in some respects revolutionary order; indeed, the opposite, for some central aspects of the English constitution, the monarchy and the lords, for instance, could be discarded as unsuitable. But while the monarchy and the lords are mere institutions of government rather than organs of good constitution, the same cannot be said of the place of the people, for that is a matter of the very essence of good constitution and the social order sustaining it, which is fixed and permanent and oblivious to time and place. Madison was not alone in coming to the realization that one had to distinguish between those parts of the constitution that were fixed and permanent because they reflected and protected the social order and those parts that were impermanent and mutable. We must remember that at the time Madison was designing a constitution for the new United States, Abbé Sieyès was formulating a general social science of constitutions and reaching substantially the same conclusions.

The tension between the two competing ends of government and the constitution – the public interest and private property on the one hand and the spirit and form of popular government on the other – shows itself more plainly in the debate on whether to include a bill of rights in the federal constitution. The initial opposition of Madison, Hamilton, and others could have been taken from the English debates of the 1640s, namely that liberty is at the heart of good government and liberty depends on the government acting for the good of the people, for liberty and the good of the people go together – in essence, they are different ways of saying the same thing. Public opinion and “the general spirit of the people,” urges Hamilton, “would afford a better recognition of popular rights than volumes of those aphorisms” that fill bills of rights (Madison 1971: no. 84). Charles Stuart would have agreed for, in his view, king, lords, and commons embodied the spirit of the people and were the protectors of liberty and the laws on which liberties depend. Hamilton's argument would also have appealed to that anonymous writer of the seventeenth century referred to earlier, for whom the rights and liberties of freeborn Englishmen depend on “a Law held forth with more evidence, and written in the very heart of the Republique, far firmler than can be pen and paper.” Since in the American context the general spirit of the people favored liberty, a bill of rights was held unnecessary, “even denigrating to the people” (Ketchum 1993: 91). The reasons

against did not prevail and, for other reasons, a bill of rights finally was included in the constitution.

To the Americans, the English constitution ran into trouble partly because king, lords, and commons collectively had lost sight of its fundamental principles, and partly because the people were excluded. The American case would be different because sovereignty lay in the people, who would be active and vigilant in ensuring that government pursued the common good. But notice how two different modes of discourse, two different models of a constitution, are now in play: one is that of an active and engaged citizenry, the discourse of classic republicanism; the other is that of representative government, the inheritance of the English constitution, in which the role of the people is confined. That nature and scope of that role is defined by the logic and structure of each model: one assumes the active citizen of classic republicanism, whose image Madison and others invoke; the other assumes the represented citizen, kept at the margins. Madison the architect of the constitution valued both but had already opted for security over active citizenship. The later Madison might have chosen otherwise, but by then the more cautious approach was entrenched in the constitution. Whether active citizenship has emerged and prevailed despite the constitutional odds against it, whether the foundation of the American nation and its government is the general spirit of the people, whether history has proved Madison and Hamilton right about the spirit of the people are questions beyond my present purposes. Writing of early America, de Tocqueville praised the engagement of the people at many levels of government (Wolin 2003). Whether that was an accurate account at the time is arguable; whether it has been maintained in the manner or to the extent envisaged by the architects of the constitution is questionable.

One final attempt to keep at the heart of the constitution that older republican tradition comes perhaps unexpectedly from a 1943 judgment of Justice Felix Frankfurter, in which he refused to rule invalid a law of the state of Virginia, which he considered foolish and unjust, requiring the children of Jehovah Witnesses to salute the flag, despite their strong religious objections and the imposition of severe sanctions.²⁷ For the court to invalidate the law, he argued, would be to undermine the fundamental premise of a self-governing society, for such a society depends on the vitality of the people and their active engagement in preserving liberal values. Look, he urged, not to the consequences of the law, unfortunate though they be; look instead to its origins in the elected government.²⁸ Elected government is accountable to the people and it is up to the people to ensure their representatives do not pass laws infringing rights and liberties. To rely on the courts to intervene,

²⁷ *West Virginia State Board of Education v. Barnette* (1943) 319 US 624.

²⁸ The ideas are well expressed in Ketchum (1993: 113 ff).

to correct the mistakes of representatives, would diminish the responsibility of the people for their own government. The tendency to regard the law “as all right if it is constitutional” is described as “a great enemy of liberty.” Frankfurter continues: “Reliance for the most precious interests of civilization, therefore, must be found outside of their vindication in courts of law. Only a persistent positive translation of the faith of a free society into the convictions and habits and actions of a community is the ultimate reliance against unabated temptations to fetter the human spirit.”²⁹

In defending this vision of the role of the people, a vision with which the mature Madison and Hamilton would have been at ease, Frankfurter was a minority of one against declaring the Virginia law unconstitutional. His words have about them the air of elegy, a last call for the virtues of the classic republic and the image of the free man as a self-governing citizen. Alas, it was too late: for just as the republic of active citizenship had long before been displaced by a constitution of representation, law, and rights, so its language became ill-suited to the new order. The rest is history. What Frankfurter feared has come to pass, and the courts are now central to political life. Few would charge the courts with being a “great enemy of liberty,” but what is plain is that, as the courts ascend the peaks of public life, the role of political action and hence of the people declines. The mantle of the enemy of liberty has passed to the executive and administration, which have moved to the center of power, a position conceded without resistance from the people or their representatives. That, however, is another story; how to account for the people not meeting the expectations of the mature Madison and the reflective Frankfurter, how to explain the reliance on the courts to decide the great issues of the nation, are complex matters. Part of the explanation is likely to be the rift between what is expected of an active people and the constitutional structure imposed on them.

In conclusion, this essay is prompted by the strikingly consistent way that the people are presented in modern constitutions despite the diversity of the societies for which they are written. This way of presenting the people is made to appear compelling, both theoretically and practically, as a universal answer to a universal problem of how a people can both govern itself and have effective government. While allowing that both parts of the answer, the theoretical and the practical, have merit, they must be seen in the social and historical setting at different formative periods of constitutional history. There we see the relations between society and the constitution, filtered through the prevailing pattern of social and legal relations; through the way leaders thought about and understood the social world, and in turn the nature of government and constitutions; and through the aspirations and ideals the leaders of the new world had of the future, of a better constitutional order than that they left behind, yet at the same time being, if not in thrall to, strongly influenced by, the old order.

²⁹ Justice Felix Frankfurter in: *West Virginia State Board of Education v. Barnette* 319 U.S. 624 (1943).

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