REPRESENTATION AND THE INTERESTS OF POLITICAL MINORITIES

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ABSTRACT

It was not uncommon to hear North Carolinians say, “Jesse Helms does not represent me.” Yet, for thirty years Jesse Helms was a duly elected senator from that state. So, in some sense, he did represent the citizens of North Carolina. How can this be true? How can a representative system of government, working precisely according to the specification of the law, leave a large group of those who are so governed finding themselves to be unrepresented?

I use a two-pronged strategy to approach the problem. First, I focus on the aims of representative government and whether being in the minority undermines the goals of representative systems. I argue that it does, and that consequently, we must rethink the morality of representative systems, especially those in which the same people consistently lose. Representative government is a means through which the state can achieve its ends without requiring every citizen to be active in reaching every decision. Citizens have interests, and these interests often compete with one another. So, citizens have (or should have) a stake in who represents them.

Second, I focus on political minorities. The mere fact of losing elections is not sufficient warrant for state intervention on behalf of minorities. Building on the work of John Stuart Mill and Lani Guinier, I offer conditions that would need to be satisfied in order to warrant such intervention. If we take seriously the aims of representative government, then we should be deeply concerned about protecting political minorities in societies where the fact of political minority status is fixed, the groups are consistently social and political minorities, and the differences in power between the majority and minorities permeate the society.
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INTRODUCTION

My project is the problem of political minorities in deliberative democracies. I use the term political minorities to refer to those groups of individuals who always find themselves outvoted, particularly in strict majoritarian systems. Strict majoritarian systems are those political systems where a candidate wins an election or an issue passes with at least 51% of the vote. However, I am not concerned with numerical minorities. I distinguish what I call political minorities from those who are merely numerical minorities. Numerical minorities are groups of individuals that constitute a minority of the population of a society. They may, however, consistently win political elections and, therefore, constitute an overwhelming majority of the legislature. Thus, for example, although white men constitute a minority of the US population, they routinely win most of the political elections in society. Political minorities more often than not find themselves outside of the political process, regardless of how much of the population they occupy. Political minorities are faced with a lack of equal access to the political process and political power.

Generally, political minorities carry the vestiges of a history of oppression and exclusion from the political process. Sometimes one of the vestiges of this history is an ongoing perception that political minorities are not capable of participating in governing. In some instances, those who are numerically in the majority can count as political minorities due to their historical exclusion and ongoing lack of access to the political process. Women are a notable example of political minorities that, in many cases, comprise a numerical
majority. Another striking example of political minorities who comprise a numerical majority is blacks in apartheid South Africa.

Generally, what are known as minority groups have their status as such because they either possess or lack some characteristics or combination of characteristics that distinguishes them from those in power. Thus, minority groups are often defined by their difference -- not their difference as individuals, but their collective difference from those in power.¹ Although no one would deny that there are individual members of minority groups, it is their similarity to one another that makes them “minority.” Their minority status is not easily tradable; it is more permanent.²

Political minorities are often minority groups in this general sense, but they need not be. Political minorities, like women, often have distinguishing features that mark them as “different.” However, the salient feature that distinguishes a political minority from a minority in the more general sense is the lack of equal access to political power, either due to historical exclusion or a continuing perception that political minorities are not fit to govern.

In sum, there are four conditions that minority groups must meet in order to count as political

¹ Interestingly enough, [even] within liberal cultures, minorities (as a category) are defined in terms of their difference from the majority. To this extent, the majority is a group, too. The majority becomes the reference point. This is not a trivial point. Those who argue against minority rights as opposed to liberal individualism fail to see (or less charitably, fail to concede) that membership in the majority is also group membership. Furthermore, members of the majority assert and protect their interests as a group. However, one “perk” of being a member of a liberal majority is not having to think of one’s self as a member of a group (unless of course, one chooses to). An example is how arguments of affirmative action have shifted over the years. One of the early criticisms against affirmative action was that it failed to reward individual effort or merit. White women and people of color were being unfairly advantaged due to their memberships in their respective groups, an advantage that most of them would not have received had they been evaluated solely on the basis of their individual performance (which is the way that white men are presumably evaluated). An assumption of this argument is that group membership is a morally repugnant way to dole out benefits in a liberal society. Although this argument is still in the background, a more recent argument against affirmative action is that it unfairly disadvantages white men as a group!

² I do not mean to suggest that minority status is completely static; I simply mean that the characteristics that determine minority status are less commutable than many other characteristics that a person may possess. It is also the case that over time, which characteristics are salient can change such that even though one may keep the same characteristics, their significance may lessen.
minorities on my account: (1) There must be patterns of social and political inequality that are structured along the lines of group membership; (2) Membership in the group is not usually voluntary; (3) Membership in the group is not usually mutable; (4) Generally, negative meaning is assigned to the group by the society or dominant culture.\(^3\)

Although I offer more specific conditions under which groups of individuals will count as political minorities, my initial intuitions would include cultural, national, and racial minority groups as well as the women, the disabled, and homosexuals as political minorities. These are divergent populations, and although some of the justifications for special considerations of these groups will apply to the others, albeit in different forms, I will focus on racial minority groups and women. I am interested in investigating how these political minorities can be more fully integrated into the deliberative process.

The Problem of Representation

Before I can give an adequate account of the specific problems that arise for political minorities under representative schemes, it is important to raise some of the general problems that arise under representative schemes. Shedding light on general problems can help us understand how these problems become more acute when they impact political minorities.

Thomas Hobbes, John Locke, and Jean-Jacques Rousseau engage in thought experiments that appeal to some version of a social contract in order to show how governments arise, and they each ultimately support some sort of representative and/or electoral system that sustains government. Governments arise in order to resolve some of the difficulties that exist in pre-civil society, particularly those difficulties that threaten

individual rights.⁴ The unifying theme of social contract theory is the idea that governments are legitimate insofar as they represent the people and the people consent to be represented by them. Hobbes argues that once the people have consented to their representatives, the consent cannot be revoked. Locke and Rousseau argue that if the representative proves to be tyrannical, the people can revoke their consent.

In addition to the Enlightenment scholars, James Madison, the other Federalists, and the Anti-Federalists have been concerned with the role and nature of representative government. Contemporary theorists like Lani Guinier and Iris Marion Young have also been deeply concerned with representative government. However, it is not immediately clear that everyone who writes on representation is writing about the same idea. In her important book, *The Concept of Representation*, Hannah Pitkin attempts to nail down a precise understanding of what representation in government is supposed to accomplish. I take her work, particularly her use of Hobbes as a springboard for my own basic understanding of representation.

Hobbes can also be thought of in the tradition of those concerned with representative government insofar as, for Hobbes, the sovereign is charged with not only protecting the people, but representing them. So, the people are to abandon their judgment in favor of that of the sovereign’s. The social contract that the people make with one another is to allow the sovereign to make decisions on the kinds of matters that they would have decided for themselves prior to an agreement to enter into civil society. However, the sovereign is also vested with enforcement powers. The hope is that life under a sovereign will be more secure than life in the state of nature. In other words, “Men create a commonwealth by contracting

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⁴ I am aware that for Hobbes, only freedom rights exist in the state of nature. Claim rights, such as property rights, only come about with the advent of civil society.
Hobbes argues,

A commonwealth is said to be instituted, when a multitude of men do agree, and covenant, every one with every one, that to whatsoever man or assembly of men, shall be given by the major part, the right to present the person of them all, that is to say, to be their representative; ever one… shall authorize all the actions and judgments, of that man, or assembly of men, in the same manner, as if they were his own.5

The people vest the authority of representation in the sovereign. This is the nature of representation for Hobbes. This authority is granted into perpetuity.

Representative government is one way in which the aims of government can be achieved more efficiently than by requiring every citizen to be active in reaching every decision. However, even under the best representative systems of government, the question arises whether the representatives are to represent the will of the people, or if the representatives are to use their judgment to make decisions for the people. For Hobbes, the answer seems to be the latter because on the Hobbesian model, the people authorize the sovereign to act on their behalf.6 For Rousseau, the answer is which of these we think of as the appropriate response will partly inform how we think representatives ought be selected and the role of the rest of the citizenry under a representative form of government.

Another important idea to keep in mind is that who represents the citizenry and how this representation is carried out are not neutral issues for the citizenry. The members of the citizenry have interests, and these interests often compete with one another. So, citizens have (or should have) a stake in who represents them. Yet, the reality of competing interests leads

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to potential conflicts, not only between citizens, but also between the citizens and the
government. That is, the citizens compete with one another in order to have their interests
prevail. Additionally, the citizens may clash with the government if they feel that the
government fails to accommodate their interests.

Three important ideas come out of this first part: (1) Those who are represented
authorize the representative to act on their behalf. Yet, I will show that this authority is not
unconstrained, nor should it be.\footnote{Hobbes does not argue that this acting is unconstrained, either. He argues that the sovereign is still bound by the laws of nature. However, beyond this, the sovereign has tremendous latitude in what actions are permissible.} (2) Representatives have to be understood as \textit{either} acting in accordance with the will of the people they represent \textit{or} as entitled to make what they feel are the best decisions for the people. Rousseau argued for the former; Hobbes argued for the latter. (3) Who represents whom is not a neutral question, politically or morally. Even under ideal conditions, the question of the “right” way to decide on the proper form of representative model is a contentious one.

\textbf{What Is At Stake? Representation and Political Minorities}

Heretofore, I have only hinted at what is at stake for political minorities, regardless of
whether they are racial minorities, women, or other minorities who deserve protection. A
representative system works ostensibly because citizens are allowed to select other citizens
who act with the authority of the voters on behalf of the whole. Although it is unsettled
whether representatives are chosen in order to perform according to the will of the people or
to use their own judgment in making decisions for the people, the underlying idea of a
representative scheme is that the citizens and their interests are represented.

If groups of individuals lack representation, their members will also lack the ability to
have anyone act as advocates on their behalf. Representatives are supposed to act on behalf
of and in the interest of those who they represent. In representative systems, only those with adequate representation get their voices heard and become eligible to shape government practices. Even if some groups of individuals do not have the strongest representative, having a relatively weak representative (as long as she or he is not completely ineffectual) gives them more political leverage than not having any representative at all. Once there is agreement that political minorities should have representation, and that justice demands that society make provisions so that they will be able to secure representation of their choosing at least some of the time, the question of how to bring this about remains. Mill and Guinier each propose voting schemes in an attempt to answer this question. I will discuss those voting schemes later.

At least two additional questions remain if we are to take seriously the importance of representation for political minorities. The first question is whether effective representatives must look like those they represent. The second question is whether procedural safeguards should be implemented in order to guarantee that those who represent political minorities are truly in a position to represent them. The first question strikes me as epistemological. It is an attempt to resolve whether members of a group and only members of that group have some special insight into what the group’s needs are, or if anyone who is appropriately sensitive and concerned can effectively understand the needs of a particular group, regardless of whether one is a member of that group. The second question is an important question of application, although perhaps less significant than the other applied question. That is, once political minorities secure representation, what, as a practical matter should we do in order to ensure that these representatives will achieve some measure of effectiveness?
Whether one has to be a member of a political minority group in order to offer effective representation of that minority group is a question that has been answered poorly and uncritically both affirmatively and negatively. The uncritical affirmative response is that those and only those who are minorities can adequately represent those minorities. A corollary of the uncritical response is that any member of the group is preferable as a representative to a nonmember. I understand the desire to have one who shares one’s group identity to act as a representative on behalf of its members. The underlying assumption is that group members will have a degree of understanding of the needs of the group in a way that nonmembers cannot or will not. This is a concern about epistemology. There are some aspects of membership in a minority group that are only available to the members of that group, despite the best intentions of outsiders. Additionally, political minorities have certain desires (including the desire to see “one of their own” in a position of prominence) that can only be met by one of their own.

This response is uncritical because it rests on a false premise. It is empirically false that all political minorities will have the relevant experiences and knowledge, regardless of how committed they are to their fellow minorities, and regardless of how cohesive and insular the group is. At best, we can claim that there may be some rituals, customs, and cultural particularities that are unique to group insiders, but it does not follow that all members will share (or care to share) this specialized knowledge. Furthermore, outsiders may find themselves acculturated by members of a political minority, either through happenstance or as a matter of conscious choice. While I do not think this confers on the outsider any kind of “honorary” status as a minority, I do think that this person may possess the requisite amount of understanding and sensitivity to be an effective representative.
Another troubling case is that of the person who rejects any affiliation with his or her minority status. While it may not be possible to shed one’s status as a member of a minority, it is often possible to create an identity that excludes any rituals, customs, or cultural particularities associated with the minority. This person may go so far as to criticize those who choose to maintain strong ties with their group. If this person finds herself in a position to serve as a representative, one may wonder whether this is the person minorities should support, even if there is someone available who has shown repeated dedication to the plight of this minority although he is not a minority. The uncritical affirmative response would be “yes.” The uncritical affirmative position is that group membership trumps all else. The membership-as-trump position is problematic because it puts minorities in a position of supporting and accepting people as representatives who have no interest in their well-being.

A tension made apparent by the person who chooses to reject her group membership is the tension between individual autonomy and group membership. This tension comes out in the disagreement between John Rawls and Michael Sandel specifically and liberals and communitarians generally. The standard liberal view is that individuals ought to be free to define their identities without encumbrances. Each individual should be free to define themselves without reference to group membership except as legally mandated. Obligations to a group that are not freely consented to or incurred are oppressive to the extent that they severely and unfairly curtail individual autonomy. The communitarian view is that group memberships and identities (even those that we do not freely choose) help us to develop as people. Our respective communities provide nurturance, and they help foster healthy identities because we are able to see ourselves as part of something rather than as isolated and alienated. The question that comes to mind especially when considering the plight of
disadvantaged groups is whether they can impose obligations on their members to support group goals. If so, to what extent can these obligations be imposed before they become violations of individual autonomy? If not, should not a group’s right to self-preservation accommodate such an obligation? How to reconcile these two, potentially irreconcilable positions is especially important for political minorities.

There is also an uncritical negative response to the question of whether one has to be a member of a political minority group in order to be an effective representative of those minorities. Those who subscribe to this view argue that anyone with good intentions can effectively represent anyone else. There is nothing about membership in a group that yields any particular insight into the inner workings of the group, and certainly there are no aspects of a particular group that could not be figured out through a bit of observation. Perhaps observation would not even be required; perhaps one could understand other groups of people simply by extrapolating that one’s own experiences are analogous to those of the other group. This response offers a very different kind of epistemic claim than the positive response. According to this view, there is nothing mysterious about minorities. An implicit assumption of this view is that it does not require a tremendous amount of effort to understand the needs of minorities because there are no substantial differences that need to be explored and understood.

This view is problematic because it does not take the inner workings of minority groups seriously enough. It also smacks of a bit of cultural arrogance in that outsiders fail to acknowledge that minority groups have their own complexities, and that outsiders who have had little or no contact with minority groups are in the same position as insiders to make determinations about the needs, goals, and desires of the members. Even when those who
hold this view have good (as opposed to nefarious or paternalistic) intentions, failure to realize the impact that their outsider status has on the interaction between themselves and the minorities they represent points to a failure to truly recognize what is at stake for minorities.

The Problem of Participation

Humans have competing interests. Rawls attempts to minimize the impact of competing interests through the veil of ignorance. The veil of ignorance is a heuristic device through which citizens are not allowed to know any identifying information about themselves – their age, race, sex, or position they hold in society. The thought is that by abstracting away from these elements, citizens will be in a better position to adopt principles that everyone could reasonably agree with and be committed to without bias. The Rawlsian veil of ignorance is but one way that citizens engage in political participation, albeit as members in a thought experiment deciding how best to arrive at principles that should regulate society.  

The veil of ignorance provides a mechanism through which to formulate the basic questions of justice in society. But, substantive principles are made in the absence of a veil of ignorance. Deliberation then proceeds with full knowledge of one’s station in life and the possibility of bias. Proponents of deliberative democracy are confident in the deliberative process. Their confidence lies in the fact that they see deliberation as the opportunity to address and remove bias. Thus, good decisions can be made. I contend that this only works when various viewpoints are represented within the deliberative body. Even the best intentioned deliberators may not be in a position to recognize their own bias or to address the

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8 One criticism of this thought experiment is that it is not an accurate example of the social contract tradition because the members do not have any differences between them so their preference, desires, and objectives will be the same. Presumably agents involved in creating a social contract do so through compromise and negotiation because they all have different preferences, desires, and objectives.
needs of those who have historically been excluded (like political minorities). This failure need not be malicious. However, it needs to be addressed. Deliberation at this beginning stage is an example of political participation as a means to an end. In the beginning, the end is the establishment of basic governing principles.

Yet political participation is important not only at the beginning stages of formulating government, but also throughout the existence of a government. The idea of political participation as a virtuous activity dates back at least to Aristotle. We see this resurface particularly in the thought of Rousseau and contemporary theorist Michael Sandel. However, it is important to note that Aristotle and Jean-Jacques Rousseau differ from Sandel with regards to what constitutes appropriate political participation. For Aristotle and Rousseau, it is only through direct participation that political participation is virtuous. Direct participation offers an exercise of freedom that is not available to those who allow themselves to be represented. Sandel approves of representative government. For Sandel the act of participation is still virtuous even if one’s participation is limited to choosing representatives who will make substantive decisions about how the political system will operate.

In addition to the belief that political participation has intrinsic value, there are practical benefits to be gained when the citizenry participates in the political process. When citizens engage in high levels of political participation, they are more invested in having a good government, or so the thought goes. They take the success of their government personally. Furthermore, political participation is an avenue through which the citizens can express themselves as free and equal citizens. For Rousseau, successful political participation requires a prior condition. There must be a state of rough, but not necessarily absolute economic equality. That is, “no citizen shall be rich enough to buy another and
none so poor as to be forced to sell himself.” Rousseau held the belief that gross economic inequality would lead to conditions of political inequality. The value of political participation comes among equals; the value is lost in the face of gross economic inequality. Citizens could not exercise their freedom, nor feel a sense of “belonging” if political inequality were to prevail.

One way that citizens are able to participate in government is through the process of voting. In a nonrepresentative system, the citizens vote directly for policy; in a representative system, citizens vote for representatives who will make policy decisions. Through voting, citizens get to express their preferences, show their investment in the government, and make decisions that will hopefully be beneficial to the whole. However, problems arise when inequalities permeate the society. Under those circumstances, it becomes impossible to achieve the level of political participation or the good that comes out of political participation. This is why Rousseau is committed to the view that true political participation could only occur in conditions of rough equality between citizens – including roughly equal knowledge. He thought that in order to maintain this equality, the society had to be small and homogenous. When these conditions obtain, the citizens are more likely to be motivated by their concern for the general will rather than their own self interest.

Madison had less faith in the citizens’ abilities to constrain their self-interest for the good of the whole, or the general will.⁹ At the very least, Madison had less faith in the wisdom and justice of the measure Rousseau was willing to implement in order to constrain self-interest. For Madison, political inequalities would develop through the emergence of factions as long as individuals were free. Factions are not just interest groups, but they are interest groups that develop interests that incline them to violate others’ rights. If left

⁹ See generally, Madison, The Federalist Papers, “Federalist 10” and “Federalist 51.”
unchecked, some factions would become sufficiently strong to overcome others, and the citizens would not have the opportunity to participate as free and equal citizens. They would instead be subject to the desires of the most powerful factions. Madison thought that this dilemma could be resolved in one of three ways. The first way that factions would be resolved would be to remove their cause. However, Madison thought that this would not be possible, mainly for the reasons that I indicated earlier. People have different, often competing interests and are inclined to unite with others who have similar interests. The second way to resolve the problem raised by factions would be to take away the liberty of the citizenry to form factions. However, Madison thought that this solution would be worse than the problem. The third way was to minimize the impact of factions by having so many that none would be able to dominate the others. In other words, numerous factions could not be so unequal in power that the inequalities between them create conditions of political inequality. Additionally, if the factions were spread across a wide geographical area, they would not be able to communicate efficiently with one another. So they would never be organized enough to dominate the society. Madison thought of the third option as the best. The third strategy would still enable people to participate fully while still acting according to their interests. However, it would also force the citizens to recognize their interdependence on one another. That is, no one would be able to advance his or her interests without the support of others.

Even though Rousseau and Madison anticipated some of the problems inherent in participatory governments, their solutions still rested on the assumption that strict majoritarianism was the appropriate way to resolve disagreements. Many political theorists have also failed to challenge this assumption. In Rousseau’s defense, he sets forth strict
conditions under which participatory government should work. Given his conditions, strict majoritarianism may have its virtues. Yet, since many contemporary societies are not of the kind that Rousseau has in mind, a different kind of problem emerges when we follow the principle of majority rule. It is a problem that we must take seriously if we are committed to the idea that the political participation of the citizenry is necessary to create and maintain the best society.

A further result of political participation is political education. By educating the citizenry about the inner workings of the political system, the political system and the individual citizens benefit. The citizenry is in a position to make informed choices. The psychological impact of political participation is that the citizens have a greater investment in their society than they otherwise would because the citizens are given a sense of belonging. The citizens’ investment in and sense of belonging to the political system makes them more inclined to believe that the political system works. Even when citizens are in disagreement with policies instituted by their political system, their faith in its overall legitimacy enables them to continue to participate without feeling discouraged. Additionally, the fact that citizens will sometimes “win” political disagreements allows them to remain encouraged.

However, this is often not the case for political minorities under conditions of strict majoritarianism. Political minorities may find themselves attempting to participate fully in the political system. Like other citizens, political minorities may believe that participation is both intrinsically and instrumentally good because the act itself is virtuous and it allows them to achieve their political interests. They become invested in political education as the means to learn how to make the best decisions for society. But, the psychological impact of political participation for political minorities is often the opposite of the citizens in the
majority. This is because despite their willingness to participate in the society’s political culture, and their belief that the process works, political minorities often do not receive the kind of pay-off that other citizens receive for their participation. This is the case because even when citizens in the majority lose some of the time, they are assured as a matter of sheer numerical probability that they will win some of the time. So, their occasional position as losers does nothing to undermine their faith in political society.

In the absence of the occasional, fragile coalition, political minorities will always find themselves on the losing side of political disagreement. This constant state of losing makes the psychological impact of being on the losing side of a disagreement more pronounced than it would be if losses were simply occasional. The continual losses begin to take their toll. With good reason, political minorities begin to question whether the political system will ever work in their favor. This raises serious questions about why political minorities should continue to participate in a political system that will never offer any rewards to them regardless of how dedicated their participation. Under these conditions, it makes sense to ask whether political minorities should opt-out of political society altogether. At the very least, constant losses should raise doubts in the minds of political minorities about the legitimacy of a political system that while purporting to give everyone a reasonable chance of winning at least some of the time, manages to consistently disadvantage the same groups of people most of the time. Not only does strict majoritarianism fail to build the same degree of civic pride in the citizens who are political minorities, strict majoritarianism may in fact breed cynicism within minority groups.
The Problem of Strict Majoritarianism and Political Minorities

Allowing the majority will to settle disputes seems at first blush to be the most reasonable means of resolution. Rousseau is so invested in the idea of following the will of the majority that he argues that once the majority makes a decision, those in the minority not only have to comply with the decision, but they have to admit that their own views were mistaken.\textsuperscript{10}

As a result of their status in society, political minorities will rarely find themselves in the deliberative body. Consequently, they will have little or no means to assert their will on the citizenry. In other words, political minorities, by the sheer fact of their status in society will never be on the decision-making end of disagreements, debates, votes, or other elements of political culture that we think of as important.\textsuperscript{11} They do not have any real chance of ever “winning.” Their status as political minorities also makes them de facto political losers.

The problem of constant losses raises other questions about the nature of participation and the impact that such losses have on participation. Under strict majoritarian schemes, political minorities will lose much of the time. Continual losses have a negative impact on political minorities, not only in the instrumental sense that when one loses one does not get to exercise one’s will, but a significant pattern of losses has an impact on the esteem of minorities and also raises questions regarding the fairness of the process. This is not necessarily a question of procedural fairness. That is, the fairness question is not tied to whether the rules of the process are followed – although this may be an issue. The question

\textsuperscript{10} Of course, this decision can only be legitimate under the strict conditions that Rousseau lists, including rough equality and equal information.

\textsuperscript{11} I am not ruling out the possibility of coalition-building, either with other political minorities or with the majority.
of fairness is situated elsewhere, perhaps in terms of whether the rules chosen to govern the process are ones that are fair.

Consider the example given by Charles Beitz. In the Beitz case, there is a committee of three members. Each member has one vote. Decisions are made by majority rule. Members A and B agree with one another 80% of the time. The remaining 20% of the time, A and B are equally likely to agree or disagree with C. So, on any given question, the likelihood of C prevailing is less than 20%. Should we be concerned that given a set of issues that the committee has to decide, C will lose more than 80% of the time? If so, where does the process go wrong? It is not the case that A and B are failing to behave according to the outlined decision-making process. The problem is with the process itself. Strict majoritarian schemes in societies where political minorities exist run into this kind of problem.

Lani Guinier and Racial Minorities

Some democracies have attempted to protect political minorities by guaranteeing certain protections in their national constitutions. Even a numerical majority cannot override protected minority rights, regardless of whether such rights accrue to political minorities, like Native Americans, or whether such rights protect those who are merely part of a numerical minority (such as residents of states with small populations). The US Constitution is an example of a constitution that attempts to safeguard these different types of minorities. It contains protections designed to shield citizens in states with small populations from

exploitation by citizens in states with large populations.\textsuperscript{13} Also, the US Constitution recognizes the trade rights Native American populations by restricting to Congress the right to regulate commerce with Native Americans. These are strategies to ensure protection of minority rights, both for some numerical minorities and for the kinds of minorities who are the subject of this project, political minorities. However, some democracies are more resistant to this practice than others.\textsuperscript{14}

Lani Guinier is concerned primarily with the plight of racial minorities who find themselves also marked as political minorities in liberal society. Her focus is on those groups of racial minorities who are attempting to be included in the dominant society, rather than those who live within their own geographically and politically distinct nations (such as US Amerindian populations living as sovereign nations).

Guinier argues that in a racially divided society like the United States, those who are racial minorities often find themselves at a disadvantage in attempting to pursue their political ends. Three states of affairs exacerbate this problem: (1) the fixed nature of racial designation and categorization, (2) strict majoritarianism, or “winner-take-all” systems of decision-making, and (3) extreme self-interest.

Racial designations and categorizations are, for the most part, fixed.\textsuperscript{15} People do not shift in and out of racial groups. When racial groups operate under different conditions of

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\textsuperscript{13} Again the mere fact of being a numerical minority does not entitle one to governmental protections on my view. However, the example of the US Constitution is but one example of how minority protections can be written into a national constitution.

\textsuperscript{14} This resistance may take two forms. First, governments may resist amending the constitution to protect any minority groups. Other governments may not resist extending constitutional protections to minority groups in principle, but they take issue with providing these protections to particular groups.

\textsuperscript{15} There is debate about how fixed racial designations and categorizations are, a debate driven as much by increasing numbers of self-identified “multiracial” people as by proponents of colorblindness. I also acknowledge that racial categorizations shift over time, but this tends to be a very slow process. For most of us, our racial designations are fixed.
power and status within a society, those who find themselves in the minority are not treated as social or political equals. Since racial group membership is not mutable, those who are minorities are consistently minorities. In societies that are more homogenous, or even perhaps, if racial designation were more fluid, the same people would not operate politically in society as minorities. Sometimes they would find themselves in the minority; other times they would be in the majority. This problem is not always a problem of procedural unfairness. That is, the political minority status held by racial minorities is not always (or even usually) a problem of rule-breaking on the part of the majority. However, racial minorities are often political minorities, even under conditions that are prima facie fair (in that everyone follows the rules) because we fail to evaluate whether the rules themselves are fair.\textsuperscript{16} We end the inquiry at procedural fairness, and do not spend adequate time evaluating the substantive fairness of the rules. For Guinier, strict majoritarianism is an example of a practice that is prima facie fair, but upon closer inspection, grossly unfair.

The winner-take-all political system, a form of majoritarianism, has not been the subject of as much careful critique as other aspects of political theory. In winner-take-all systems, the individual or party with the most votes receives all of the political power. It has often been assumed with very little argument to be the fairest way to make political decisions.

Rousseau, who was much more egalitarian than many liberal theorists, was so invested in majoritarianism that he argued that the losers should not only capitulate to the

\textsuperscript{16} The question regarding procedural fairness is limited to the question of whether the rules are followed or violated. The question about the nature of the rules we adopt is a question about substantive fairness.
will of the majority, but they should acknowledge the wrongness of their position. Of course, this would not be the case every time, but for the most part, it would be.17

Madison was one of the early theorists to be concerned by the winner-take-all system. For Madison, elective systems that rely on this kind of majority rule can be just as oppressive as those systems that rely on a single monarch. Guinier’s arguments follow Madison. The danger of the majority is that the majority will not concern itself with the interests of those who are minorities. Under winner-take-all systems, the majority has little incentive to care about minorities. Presumably, the majority would not want to ignore those in the minority, lest the majority’s neglect tempt defectors who are sympathetic to the minorities’ plight. However, this is unlikely to happen in a racially divided society. So, the majority has very little to worry about, even though it is aware that its will is not the will of everyone.

Guinier and Madison both concede that in a homogeneous society, the minority’s interests will not usually be too far off from the interests of the majority, but we should be deeply concerned about protecting minority interests in societies where the fact of minority groups is fixed, the minority groups are politically social and political minorities, and the differences in power between the majority and minorities permeates the society. In these cases, the majority may be indifferent to or even have nefarious intentions towards

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17 To be charitable to Rousseau, Rousseau imagined a fairly homogenous society. He also argued for several preconditions: (1) the citizens would have to be roughly materially, socially, and politically equal, (2) the society would have a civil religion to unify the citizenry, (3) there would also be devices built in to the society to encourage political participation. With all of these safeguards in place, Rousseau thought that there would be no factions. Therefore, the citizens would be in a position to determine the general will. Although Rousseau anticipated that some problems would emerge in heterogeneous societies, I do not know if he thought about the kinds of problems that have emerged. Thus, I have to concede that the citizenry of contemporary liberal states exists in conditions far from those that Rousseau envisioned. Furthermore, the “winner-take-all” system is more likely to exist in representative systems. Even if we could correct for these problems, Guinier (and Madison) might still have legitimate worries about a tyrannical majority.
minorities. In a society with a poor track record of its dealings with a variety of racial minorities, it is important to understand how rules governing political involvement that appear prima facie to be fair actually preserve and reproduce inequality.

It will be difficult for racial minorities to make their case because they lack the numbers, and they lack the political power. One might suggest racial minorities adopt the strategy of building coalitions with other minorities or build coalitions with part of the majority as a way of having their interests realized. This may work in some contexts, but Guinier sees most groups, especially members of the majority, as so motivated by self-interest that strong, sustained coalitions are not likely to form. Only if the majority can see itself as having a personal stake in seeing minorities flourish will there be opportunities for coalitions. These coalitions will be motivated by self-interest rather than a genuine concern for the welfare of minorities. As such, these coalitions will be fragile at best because the majority will quickly dissolve the coalition once it is no longer in the majority’s interest to maintain the coalition. Thus, self-interest will keep the majority from entering most coalitions, particularly when their position as the majority is firmly entrenched and secure. When self-interest demands that the majority entertain coalition politics, these coalitions are usually unstable. Additionally, minorities who are aware of the self-interested motivations of the majority may be inclined to greet the overtures of the majority with suspicion. If they opt to go forward with such a coalition, they will find themselves at a disadvantage, and if they fail to attain what was promised, they will still be powerless to assert themselves.

18 Theoretically, pernicious practices towards minorities on the part of the majority would be ruled out by principles of justice and/or principles of respect for persons.

19 In Black Power, Stokely Carmichael argues that coalitions should not be made between the powerful and the powerless for this reason. The powerless have more at stake, but the powerful can dissolve the coalition at any time.
John Stuart Mill and the Intellectual Elite

John Stuart Mill is concerned with a radically different kind of minority than either Guinier or Madison. Mill is concerned with the minority status of the intellectual elite. In *Considerations on Representative Government*, Mill argues that there are at least two dangers of strict majoritarianism. The first is the danger of the government being plagued by “a low level of intelligence” comprising the representative body. Second, Mill is concerned that the legislative body will only contain people of the same class, thereby leading to class bias in legislation. These two dangers would contribute to mediocrity in the government.

Mill is not arguing that special protections should be offered to those who find themselves “intellectual minorities” – that is, members of the intellectual elite who are unfairly burdened by the stupidity of the rest of the populace.\(^{20}\) Mill’s case is interesting because he is just as concerned with the potential tyranny of the majority as Guinier and Madison are, and he proposes several safeguards to protect the minority. His suggestions, which I will take up in a later section, might work for other kinds of minorities.

Remedies Offered by Mill and Guinier

Mill and Guinier offer similar proposals to ameliorate the disadvantaged position in which political minorities find themselves. Both of their proposals take up the practice of voting in liberal states. The proposal that Mill and Guinier both offer is the option of preference voting. The system of preference voting advocated by Mill is the Hare system. Under the Hare system, voters rank their preferences from among a list of candidates. Candidates “win” by receiving a set number of votes. Votes for a second or third preference candidate may be shift to that candidate if a voter’s first preference has already attained the

\(^{20}\) Even if Mill were arguing for this kind of protection, I do not think it could be justified. It certainly would not have the same kind of importance as protecting cultural and racial minorities.
requisite number of votes to win. Guinier proposes a system of cumulative voting. Cumulative voting systems give voters multiple votes to cast on candidates. Voters may cast all of their votes for one candidate (indicating a strong preference) or voters may distribute their votes among many candidates.

When citizens gather to vote on issues or for representation under the winner-take-all system, who- or whatever wins the majority wins everything. It is a zero sum game. Preference voting could combat the inherent disadvantage faced by minorities. Instead of allowing one vote per person, preference voting would allow citizens to vote more than once while ranking their preferences for several different options. Political minorities could reduce their numerical disadvantage by having all the members of a minority group (or a coalition of minority groups) to pool their votes and cast them for one person or issue.

Guinier offers another suggestion that would give minorities an opportunity to compete fairly with the majority citizens in a society. She proposes that voting districts should be made larger and that districts should be represented by multiple representatives, rather than by the single representative who is selected in winner take all systems.21 When multiple representatives are selected to represent a district, there is a greater opportunity for minority concerns to be addressed. For Guinier, the combination of preference voting and multimember districts offer the best opportunity for political minorities to participate fully in the political culture.

A question that arose in an earlier section is whether the presence of political minorities in legislative bodies is sufficient to ensure adequate representation of minority

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21 While the multiple member voting district is conceptually distinct from the preference voting system, Guinier (and to a lesser extent, Mill) is committed to the idea that multiple member districts work best in conjunction with systems that allow for preference voting.
interests. Mill and Guinier disagree.\textsuperscript{22} Mill argues that the mere presence of intellectuals in
the legislature will raise the level of discussion. Better discussion will necessarily lead to
better results. Guinier is less optimistic that minorities will fare so well. She argues that
even if minorities make it into the legislative body, their relative powerlessness will only be
reproduced in this forum unless procedural safeguards are implanted to make sure that they
are protected. One such safeguard would be a supermajority requirement. A supermajority
could be as little as 66\% or as much as 80\%. Requiring a supermajority before major
decisions could be implemented would force those in the majority to negotiate with
minorities. Even powerful majorities will generally not have the numerical strength to
accomplish a supermajority by themselves. The supermajority requirement guarantees that
there is agreement among the strong and weak within a society before policies can enacted; it
prevents the majority population from riding roughshod over its minorities.

How Has This Been Resolved?

So far solutions to the problems of political minorities have fallen into two main
categories: (1) altering the society or (2) altering the voting process. Rousseau and Madison
can be thought of as advocates of the first strategy, while Mill and Guinier advocate the
second.\textsuperscript{23} Rousseau’s solution is to keep societies small, homogenous, and roughly equal.
Societies of this kind will not give rise to the conditions that lead to political minorities.

\textsuperscript{22} Some of this disagreement may stem from the fact that Mill and Guinier have different kinds of minorities in
mind when they make their arguments.

\textsuperscript{23} Although Rousseau, Madison, Mill, nor Guinier ever use the term “political minority,” it is my contention
that their concern about overbearing majorities could extend to those I refer to as political minorities. For
Rousseau, those who would most likely be abused by those in power are the poor who are dependent on the
wealthy for their livelihoods. See generally, The Social Contract. Madison’s discussion of factions could be
understood through the lens of the political minority. See generally, “Federalist 10” and “Federalist 51.” Mill,
although concerned about the intellectual elite in Considerations on Representative Government, he explicitly
states that his analysis could be extended to others. He concerns himself with the plight of women (a group I
deem a political minority) in The Subjection of Women. Finally, Guinier’s concern for blacks and Latinos
(other groups I consider to be political minorities) in The Tyranny of the Majority.
Madison did not think that the conditions leading to political minorities, or factions (as Madison calls them), could be quelled. Madison instead advocates creating a society that is as large and heterogeneous as possible so that no single faction could overtake and oppress everyone else. Taking measures like outlawing divergent opinion in an attempt to eliminate the source of factions would be, on Madison’s views, worse than allowing factions to exist.

Mill and Guinier, proponents of solution two, are convinced that making changes to the electoral process is the best way to protect political minorities. Mill advocates proportional representation as the best means to protect the interests of those minorities who may find themselves overrun by a dominant majority. Guinier is committed to a two-part strategy. She argues that the electoral process should be changed through cumulative voting, a system by which voters are allowed several votes to distribute as they see fit. However, she also believes that protections of minorities should extend to the deliberative body. An example of these protections would be supermajority voting. Supermajority voting would force members of the deliberative body to work together.

My own view is a hybrid of these two strategies. I think that it is important to ensure that the electoral process is fair and inclusive for everyone. I am not convinced that the electoral process is the only place where changes need to be made in order to ensure that this is the case. Amending the electoral process without being mindful of the aspects of society that gave rise to political minorities in the first place will only grow resentment on the part of the majority, who due to electoral changes may feel slighted and disempowered. So, the society at large needs adjustment.

Rousseau’s view that societies should be small and homogeneous in order to achieve fairness for everyone is a view that still has traction in some circles. The view that
homogeneity is the best option in which societies can flourish is motivated by the belief that members of homogeneous societies are more likely to trust one another, are more sympathetic to one another, and are less likely to take advantage of one another. Additionally, homogeneity is preferred on the grounds that the members of a homogeneous society will share a particular world view. The Amish are an example of a society that prefers to remain small and homogeneous.

I reject the view that societies should be small and homogeneous on the grounds that, even if desirable, it is impractical in the contemporary US. Of course, there are cases where small collections of people either opt out of the larger society or operate on the fringes of the larger society. The Amish have chosen the latter route. I support the right of people to choose to opt out or exist on the fringes. However, it could not be the case that the entire Untied States could suddenly become small and homogeneous. So, part of the goal is to figure out how to operate, given the heterogeneity of the US.

Madison concedes that the US is diverse, and he thinks that it is a good thing for the US to be geographically large. However, Madison proposes using the diversity of the population in order to ensure that no faction can dominate others. While this seems to be a worthy goal, Madison’s means for achieving his goal is to encourage a degree of chaos within the populace. His idea is to limit communication among the citizenry by making sure that people are as widely dispersed as possible. Additionally, Madison wants societies to be as diverse as possible so that no one faction can become cohesive enough to dominate others. According to Madison,

\[\text{extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more}\]
difficult for all who feel it to discover their own strength, and to act in unison with each other.\textsuperscript{24}

However, Madison’s strategy rests on an assumption that divergent populations will necessarily be at odds with one another. This need not be the case. Divergent populations who choose to coalesce around their points of commonality do not always operate with an eye to dominating others. Nor do these populations necessarily have to fight with one another. It could (and should) be the case that divergent populations can, at minimum, peacefully coexist. Those populations who do operate with the desire to dominate or oppress others in the society should be the exception, rather than the rule.

Diverse populations within a society can add to the richness of the society as a whole. Encouraging these people with differing views and experiences to participate in the deliberative body can make the discussion more inclusive. These different perspectives can enable everyone to feel included in the political process. Rather than thinking of these divergent populations as in need to containment, I advocate allowing them to flourish. The ultimate aim is to make sure that political minorities do not become permanently excluded.

Mill and Guinier propose altering the voting process in order to ensure that political minorities are protected. Their concern is to create safeguards so that no one is overrun by those with political power. They see the electoral process as the place to implement these safeguards.

I support changing the electoral process in order to protect political minorities. If it is the case that the current winner take all system consistently leaves political minorities in a position of disempowerment, then this needs correction. Perhaps something like a scheme of

proportional representation or cumulative voting will alleviate the problem. I am not committed to a particular response at this stage.

Chapter One: Hobbes and the Concept of Representation

Chapter One begins with Hobbes. I begin with Hobbes because he is the first theorist to give a systematic account of representation in English. Hobbes does not concern himself with minorities of any kind. Hobbes’s the focus is the preservation of peace through the creation of civil society. This is what motivates his account of the nature and purpose of representation.

However, his account of representation raises questions about the concept of representation, broadly speaking. Two important questions coming out of the Hobbesian account. First, what exactly do a representative do? That is, what precisely are we committing ourselves to when we consent to be “represented”? Hobbes’s response is that we agree to submit to the judgment of the sovereign. But, this cannot be the end of the story. Second, how do we go about selecting the person(s) who will represent us? I turn to these questions in order to get a stronger understanding of the nature of the general problem of representation.

Chapter Two: Rousseau’s Ambivalence Regarding Representation

In Chapter Two, the chapter on Rousseau, I take on Rousseau’s skepticism about representation. Rousseau is skeptical about the utility of representation because he is committed to the general will. The general will is not the will of the majority. Instead, the general will is that will that reflects the best for the whole. On Rousseau’s account, it is important for the citizens to deliberate together in order to discover the general will.
Common deliberation is so important that representation, or the allowing of others to deliberate for the citizens, is inadequate.

However, because actual societies are larger and more widely dispersed than Rousseau’s ideal society, Rousseau ultimately capitulates to the necessity of representation in actual political systems. In *Considerations on the Government of Poland*, Rousseau shows how representation can work. However, he never completely abandons his skepticism. Rousseau offers very strict conditions under which he thinks a representative schema can work. The most important condition is that the representatives are duty-bound to only act in accordance with the will of those who are being represented. This is an important shift from Hobbes, whose representative relies solely on her own judgment in making decision for the people. Rousseau also begins to articulate a specific problem with representation – that some people consistently fare better. In Rousseau we find early thoughts about minorities in general under systems of representation and whether representative schemas are inherently detrimental to those who find themselves as minorities.

**Chapter Three: The Federalist/Anti-Federalist Debate Over Representation**

Chapter Three addresses representation through a uniquely American lens. I address the debate between the Federalists and the Anti-Federalists about how representation should work in the newly formed United States. Both the Federalists and the Anti-Federalists were explicitly concerned with minorities being overrun by the majority. The Federalists responded to this concern by advocating a small body of elite representatives to make decisions for the nation. The Anti-Federalists advocated a large deliberative body that could only act in accordance with the wishes of their constituents. The consequences of the Anti-Federalists’ loss still impacts that status of minorities in the political system. Both the
Federalists and the Anti-Federalists thought that Constitutional protections could keep minorities from being overrun. However, they differed on the nature and extent of those protections.

Chapter Four: John Stuart Mill: Proportional Representation and the Intellectual Elite

John Stuart Mill and his support of a proportional scheme of representation is the focus of Chapter Four. Mill was concerned that a “low grade of intelligence” would dominate the deliberative body, effectively rendering the intellectual elite powerless. Mill thought that the remedy for the problem of vulnerable minorities lay in modifying voting practices. He advocated a scheme of voting, the Hare system, that would ensure minorities at least some seats in the deliberative body. Ideally, the Hare system would yield proportional representation. He argued that the mere presence of these minorities would alter the tone of discussion, and possibly, deliberative outcomes.

Chapter Five: Lani Guinier and the Case for Representation of Racial Minorities

Lani Guinier thinks that Mill’s proposal does not go far enough. In Chapter Five, Guinier, the only 20th century theorist on whose work I focus, argues that the mere presence of minorities in the deliberative body guarantees nothing unless the majority is forced to work with the minority. Among Guinier’s proposals for protecting the minority is the supermajority vote. By requiring supermajority votes (66% or higher) in order to make decisions, the powerful majority is forced to take minority concerns seriously and build consensus.

The Guinier chapter is where the problem of specific political minorities is most salient. For Guinier, those who are political minorities are so disadvantaged that radical solutions have to be undertaken. Guinier is primarily concerned with racial minorities the
contemporary US, but I use her analysis to draw parallels with women in the contemporary US.

Chapter Six: Conclusion

I revisit Madison, Mill, and Guinier. I conclude that altering both the society and the electoral process would be the best strategy for protecting political minorities.
CHAPTER ONE

Hobbes and the Concept of Representation

Political questions involve how we must conduct our society. One of these political questions involves the nature of political representation. Political representation is the most important feature of representative democracies. In our system of representative government, the citizenry secures social and political goods through the political process. In her important work on representation, Hanna Pitkin reminds us,

Political life is not merely the making of arbitrary choices, nor merely the resultant bargaining between separate, private wants. It is always a combination of bargaining and compromise where there are irresolute and conflicting commitments, and common deliberation about public policy, to which facts and rational arguments are relevant.\(^{25}\)

The national mythology about the political process consists of two important principles: “one person, one vote” and “majority rule.” Yet, it may be the case that these two principles are deeply flawed. Their flaws lie in perpetuating the false belief that voting and participation have decisive influence on political outcomes.\(^{26}\) The perpetuation of this belief
is particularly insidious because there are groups of people within the citizenry whose participation will never have any significant impact on political outcomes. This is a moral issue because our system of representative democracy depends on conceptions of justice and fairness that are inextricably tied to the right of citizens to make important decisions about their government. Not the least of these decisions is who will represent the citizenry and on what terms. When entire segments of the population are excluded from this process, we fail to live up to our ideals. If we are going to exclude portions of the citizenry, then we should be able to justify this exclusion with reasons that are not inconsistent with the principles of justice and fairness that we have adopted as first principles. Otherwise, when faced with the realization that we as a society have made such a mistake (by unintentionally excluding some), we should be willing to take the necessary steps to correct this mistake. Or we should be willing to bite the bullet and admit that we are living with an inconsistency.

My aim is to show why the issue of political representation is a moral issue. Hopefully it will challenge some assumptions about representative democracy as it is practiced. I will offer some initial comments on political representation as understood by Thomas Hobbes, the first modern theorist to offer a systematic account of political representation. Hobbes’s discussion raises further questions about the concept of representation and how the concept has morphed over time. I will then turn to a discussion of the general concept of representation in order to address these changes.

Much of the discussion of political representation occurs without any prior discussion on what is meant by representation. Some of the disagreement lies in the fact that when people talk about representation, they are appealing to different conceptions. I will highlight some of these distinctions. Understanding these distinctions will also help illuminate the
nature of the problems with representation that later theorists like John Stuart Mill, the Federalists and Anti-Federalists, and Jean-Jacques Rousseau attempted to resolve.

**Thomas Hobbes**

Thomas Hobbes was the first modern philosopher to offer a systematic working analysis of political representation in English. Much of Hobbes’s discussion of political representation is concentrated in Chapter 16 of *Leviathan*. Although the general theme of *Leviathan* is political authority, it is Chapter 16 where Hobbes offers his understanding of how the sovereign comes to act as the representative of the citizenry.

Initially in *Leviathan*, Hobbes offers an account of life in pre-civil society. In pre-civil society, or the state of nature, life is not secure and there is no such thing as private property. There are, however, laws of nature. For Enlightenment theorists like Hobbes and Locke, laws of nature are laws handed down from God. They exist prior to civil society, and laws created within civil society should be in accordance with laws of nature. Some examples of laws of nature on Hobbes’s account include preserving one’s own life whenever possible, seeking peace whenever possible, and abiding by covenants. Because people face constant scarcity and lack of safety, they become motivated to leave these conditions behind in order to enter civil society. Civil society promises property that can be protected and life that is more secure. With the introduction of the commonwealth, or civil society, people have to restrain their behavior as they did not in the state of nature. Such restraint is contrary to people, for people “naturally love liberty and dominion over others.”

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27 Pitkin, 1.

28 An interesting difference between Hobbes and Locke is that for Hobbes, the law of nature requires that one preserve one’s own life whenever possible. Whereas for Locke, the law of nature requires the general preservation of live whenever possible.

In Chapter 18, Hobbes tells us how the commonwealth comes to be formed and how
the sovereign’s authority is established:

A commonwealth is said to be instituted, when a multitude of men do agree and
covenant, every one with every one, that to whatsoever man or assembly of men shall
be given by the major part the right to present the person of them all (that is to say, to
be their representative) every one, as well he that voted for it as he that voted against
it, shall authorize all the actions and judgments of that man or assembly of men, in the
same manner as if they were his own, to the end, to live peaceably amongst
themselves and be protected against other men.\textsuperscript{30}

As a condition of creating civil society, the people agree to subordinate their own
judgments for the judgment of the sovereign. The sovereign \textit{represents} the people in that the
sovereign acts on behalf of the citizenry, with their authorization. The Hobbesian transition
into civil society relies on both a notion of the social contract (consent of the people to enter
into civil society) and a notion of representation (in the sovereign). The sovereign may attain
power in two ways: voluntarily and through natural force.\textsuperscript{31} The sovereign attains power
voluntarily when people agree among themselves to submit, voluntarily, in exchange for the
protection of the sovereign. The sovereign uses natural force to attain power when the
sovereign threatens to destroy those who refuse to submit, or the sovereign may during war
time allow the defeated to submit in exchange for sparing their lives. It is worth noting that
on the Hobbesian account, even when people enter civil society under duress, the state is still
a legitimate one. It is the fact that the people authorize the sovereign to act on their behalves
that is relevant, not how or why the people come to give this authorization. Later theorists,
like John Locke, will argue the political legitimacy only comes from the consent of the
governed.

\textsuperscript{30} Hobbes, \textit{Leviathan}, 110.

\textsuperscript{31} Hobbes, \textit{Leviathan}, 110.
In Chapter 16 of *Leviathan*, “Of Persons, Authors, and Things Personated,” Hobbes gives his systematic account of representation. The account begins with a definition of a person. For Hobbes, a person is,

one whose words or actions are considered either as his own, or as representing the words or actions of another man, or of any other thing to whom they are attributed, whether truly or by fiction.\(^{32}\)

In Hobbesian parlance, a person is not necessarily a human being.\(^{33}\) This becomes clearer once Hobbes makes his distinction between natural and artificial persons. A natural person is one whose words or actions are considered one’s own. An artificial person is one whose words or actions are considered as representing the words and actions of another.\(^{34}\) Hobbes’s distinction between natural and artificial persons is different from how we might understand such a distinction contemporarily. Pitkin offers a nice example:

If the treasurer of a corporation, acting in his official capacity, makes out a check, we would regard him as a natural person, and the corporation as an artificial one responsible for his action. But for Hobbes the treasurer would be an artificial person, his actions “owned” by the corporation.\(^{35}\)

In modern legal terminology the “fictive” element is the idea that a group of people “associated by a legal agreement” are like a human being, but for Hobbes, the “fictive” element is that the actions performed by the artificial person are not his own, “but those of someone else.”\(^{36}\)

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33 Pitkin, 15.


35 Hobbes, 16.

36 Pitkin, 16.
Although Hobbes uses natural and artificial person differently than we would understand the terms, his usage is not entirely counterintuitive. For example, when one recites lines from a play, we might say the words being uttered “belong” to the playwright. To say that an artificial person can represent “truly or by fiction,” is to note that an artificial person can be authorized to represent (representing truly) or the artificial person takes it upon himself to represent (representing by fiction). Examples of “unauthorized artificial persons” would be frauds or swindlers. Examples of legitimate artificial persons would include guardians, and stage actors. Another case of legitimate artificial persons would include representatives (as in legislators or the sovereign).

Some artificial persons have their actions owned by those they represent. The actions of the sovereign are “owned” by the people she represents. Hobbes elucidates the point by introducing author/actor distinction. The people serve as author of the sovereign’s actions. They create, or own (hence, “authorize”) the action of the sovereign. As the authors, the people are held accountable even though they themselves are not performing the actions. The sovereign, who is now the representative of the people, is the actor. The actor is the one whose words or actions are owned. The sovereign is the one who acts, or performs the actions, for which the people will be held accountable. Hobbes explains further,

From hence it followeth that when the actor maketh a covenant by authority, he bindeth thereby the author (emphasis mine), no less than if he had made it himself, and no less subjecteth him to all the consequences (emphasis mine) of the same. And therefore all that hath been said formerly of the nature of covenants between man and man in their natural capacity is also true when they are made by their actors, representers, or procurators, that have authority from them so far forth as is in their commission, but no further. And therefore, he that maketh a covenant with

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37 Pitkin, 23.
38 Pitkin, 15.
the actor, representer, not knowing the authority he has, doth it at his own peril. For no man is obliged by a covenant whereof he is not author, nor consequently by a covenant made against or beside the authority he gave.\textsuperscript{40}

The author is held accountable for the actions of the actor, as if she, not the actor had performed the actions. Hobbes warns that one should be aware of the extent of the authority that the actor has. Failure to gain this awareness will not excuse the author from being held accountable for what the actor does.

Two aspects of authority are revealed: (1) the right to perform the action (or to authorize someone else to perform the action in your name, and (2) responsibility for the action.\textsuperscript{41} On this account it seems that the “rights and privileges accrue to the one who is authorized” while the “obligations and responsibilities” accrue to the “one who authorizes.”\textsuperscript{42} Even in cases when the actor violates the laws of nature by authority of the author, it is the author, not the actor who violates the law of nature. The actor is bound by covenant to be obedient because it is against the law of nature to breach a covenant.\textsuperscript{43}

There are cases when something can be represented, “personated” is the term that Hobbes uses, without authors. Inanimate objects, “fooles, children, and mad-men” lack reason, and thereby cannot be authors and cannot authorize. Since the authority cannot come directly from them, it has to come from elsewhere.\textsuperscript{44} In the case of “children, fooles, and mad-men,” whoever governs them may give authority to a guardian. This authority can only be granted within civil society because it is only in civil society that some persons can have

\textsuperscript{40} Hobbes, 101-102.
\textsuperscript{41} Pitkin, 19.
\textsuperscript{42} Pitkin, 19.
\textsuperscript{43} Hobbes, 102.
\textsuperscript{44} Pitkin, 21.
dominion over others. Inanimate things such as churches, hospitals, and bridges can be represented by a rector, master, or overseer. But, inanimate things cannot be authors. Yet, actors have the authority to “procure their maintenance given them by those that are owners or governors of those things.” Like the case of children and fools [sic], the representing of inanimate things can only occur within civil society. This is because, in the case of inanimate things, property rights only exist in civil society. On the Hobbesian account, even God can be personated. The two examples Hobbes gives are Moses and Jesus. Moses governed the Israelites, who were the people of God, not the people of Moses. Likewise, when Jesus came to induce people into the Kingdom of God, he did so as one sent by God.

By her action, the sovereign represents the people. As the actor, the sovereign’s subjects have authorized in advance all the sovereign does. The subjects can have no complaint against anything the sovereign does. They have agreed that the sovereign’s actions shall be binding and regarded as their own. The Hobbesian representative cannot have duties qua representative. The sovereign has duties, but not to the subjects. Since the sovereign has contracted with no one, the sovereign’s only duty is to obey the law of nature. Additionally, the sovereign does not represent each individual in civil society. The sovereign represents the single, public person. Hobbes explains how this happens:

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45 Hobbes, 103.
46 Hobbes, 103.
47 Hobbes, 103.
48 Pitkin, 31-32.
49 Pitkin, 33.
50 Pitkin, 30.
A multitude of men are made one person, when they are by one man, or one person, represented so that it be done with the consent of every one of that multitude in particular. 51

The sovereign is able to represent the single, public person by the unanimous decision of the multitude. If the sovereign is comprised of multiple people, a tribunal, for example, the sovereign must still function as a singular persona in order to represent the subjects effectively. Hobbes offers guidance on this matter:

And if the representative [the sovereign] consist of many men, the voice of the greater number must be considered as the voice of them all. For if the lesser number pronounce (for example) in the affirmative, and the greater in the negative, there will be negatives more than enough to destroy the affirmatives; and thereby the excess of negatives, standing uncontradicted, are the only voice the representative hath. 52

A sovereign that consists of several people uses majority rule in order to find its public voice.

The Hobbesian account brings to us three salient facts about political representation: authorization, acting on behalf of, and accountability or responsibility for the outcome of the representative’s actions. On the Hobbesian account, the sovereign represents the people. In other words, the sovereign acts as the representative of the state. This account of representation functions analogously to how attorneys represent clients. The client authorizes the lawyer to act on her behalf. The lawyer has the power to make decisions for the client as though the client made those decisions herself. Finally, the client is bound by the actions of the lawyer. For example, in a criminal trial a client hires a lawyer (or has one provided for her) (authorization). The lawyer is the client’s voice during the criminal proceedings – offering opening statements, examining witnesses, presenting evidence, etc. (acting on her behalf). The lawyer enters pleas and accepts or rejects plea bargains for the

51 Hobbes, 104.
52 Hobbes, 104.
client (decision-making). Once the lawyer accepts a plea for a client, for example, the client is bound by the terms of the plea agreement.

However, there are some important differences between the Hobbesian sovereign case and the attorney/client case. In the Hobbesian case, the sovereign’s power is absolute and irrevocable.53 Once the people submit to a sovereign, the sovereign may do as he or she pleases and the people have little recourse.54 In the attorney/client case, the attorney’s power is limited. Attorneys cannot do anything they please, even if they feel it is in the best interest in the client. Furthermore, the attorney presumably acts in consultation with the client. Even though the attorney has expertise, attorneys must consult with their clients and get explicit permission before rejecting plea offers, for example. Additionally, the attorney’s power is revocable. The client may decide that the attorney will no longer represent her, and in most cases, the attorney must abide by the client’s desire and step aside.

Still an important question remains: what does it mean for one thing to represent another? The Hobbesian case and the attorney/client case give us an interesting starting point. Yet, it also shows significant differences in how we understand the concept of representation. Both cases are cases of representation, and they each reflect the salient features of representation (authorization, acting on behalf of, and accepting responsibility for the representative’s actions). However, each case reflects a different understanding of the limits of the representative’s authority and power, how much input the represented has in the

53 On Hobbes’s account, every government is a representative government in that it (through the sovereign) represents its subjects. According to such a conception, even a totalitarian regime is a representative one (Pitkin, 4).

54 Hobbes allows for two important caveats: the sovereign would be imprudent violate the laws of nature and the people are entitled to defend their lives against immediate threat from the sovereign.
decision-making process, and under what circumstances (if any) the represented can revoke the representative’s power.

It is important to note that Hobbes is particularly concerned with the sovereign as representative of the subjects. In this sense, Hobbes’s conception of representation is comparable to what we mean when we say that a president or prime minister represents her nation. To a lesser extent, this conception also operates similarly to what we mean when we say that an ambassador represents his country. Although representation of the subjects by the sovereign is important, it will not be the kind of representation that preoccupies many later theorists. The kind of representation that concerns theorists like Locke, Mill, and Rousseau is the kind of representation that occurs in representative bodies, specifically the role of the legislative, or deliberative law-making body. The primary concern is how (or whether) and under what conditions representative democracy is possible. In this case, representatives are the members of the legislative body. The focus of this chapter and the remaining chapters will be representatives as members of a legislative body.

Representation, Generally Speaking

These uncertainties highlight an ambiguity in the term “represent” or “representation.” It seems that “representation” may mean different things depending on sense or context. Some of the confusion about the nature of representation may be due to the fact that people may be referring to different activities when they discuss representation.

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55 Hobbes, Rousseau, and Locke each use the term “sovereign” differently. Hobbes uses “sovereign” to refer to the maker and executor of the law. Rousseau uses “sovereign” to refer to the people acting in their capacity as lawmakers.

56 Hobbes remains important to any discussion of representation because of the elegance of his systematic account.

57 Pitkin, 5.
While people use the word ambiguously, further confusion arises because people disagree about the facts.\textsuperscript{58} This can happen because people may define representation differently. Or, when a definition is settled, they may disagree about whether a particular case meets the criteria to count as representation. In light of all the confusion and disagreement, there are two observations that can be made: (1) the same person rarely offers different meanings of representation at the same time, and (2) people can often defend their use of the term by clear example even if they cannot articulate a clear definition. Perhaps it is the case that “representation,” like “prudence” or “rationality” describes “different phenomena,” while possessing a “unifying thread in meaning.”\textsuperscript{59}

Griffiths and Wollheim distinguish four types of representation: (1) descriptive, (2) symbolic, (3) ascriptive, and (4) representation of interests.\textsuperscript{60} Sometimes a person may perform more than one of these types of representation simultaneously. However, it is important to recognize that the person is performing different actions even though these actions may all properly be called “representation.” Failure to distinguish these different types of representation leads to some of the confusions in the concept.

Descriptive representation occurs when one person “represents another by being sufficiently like him.”\textsuperscript{61} In this sense, one may complain that poor people do not have any representation in the Senate because no Senators are poor. Conversely, we might say that the poor are overrepresented in prison because so many members of the prison population are

\textsuperscript{58} Griffiths and Wollheim, 188.
\textsuperscript{59} Rogowski, 396.
\textsuperscript{60} Griffiths and Wollheim, 190.
\textsuperscript{61} Griffiths and Wollheim, 190.
poor. Symbolic representation occurs when “for some reason or for none” an individual is “chosen as a focus of attitudes thought appropriate to something other than himself.” We might say, for example, that Salvador Dali represents the surrealist tradition of painting or that the Mustang represents the finest in American muscle cars. Representation is ascriptive when “what the representative does or says commits his client.” The representative commits the client to something “whatever the facts may be about what he himself is willing or not willing to do.” The lawyer/client example is a good example of ascriptive representation. Representation of interests occurs when one has commitments and concerns with particular interests or sets of interests against any other. These interests or sets of interests may extend to some class of persons. For example, a member of Congress may concern herself with the teachers’ union or the National Rifle Association.

**Trustee (or Independence) versus Delegate (or Mandate) Conceptions**

A problem with the Hobbesian sovereign as representative and the Hobbesian conception of representation is becoming more apparent. The Hobbesian sovereign has complete power into perpetuity and the citizens have no grounds to object. Additionally, the sovereign seems to do little more than commit his subjects. In light of further discussion, it seems that one would want more of one’s representative. To borrow from Pitkin, “We read the *Leviathan* and feel that somehow we’ve been tricked!”

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62 This case of being “overrepresented” relies on an assumption about proportional representation. That is, that groups are or should be represented according to their numbers in the overall population.

63 Griffiths and Wollheim, 190.

64 Griffiths and Wollheim, 190.

65 Griffiths and Wollheim, 189.

66 Griffiths and Wollheim note that only ascriptive representation and representation of interests are done exclusively by persons (191).
Decisions must be made regarding what is to be represented and whether this is objectively determinable.\textsuperscript{67} A further question that must be resolved centers on what is to be understood as the relationship between the representative and his or her constituents. We must ask whether we want the representatives to be bound by mandate from the constituents, or we must ask whether we want the representatives to have the freedom to use their judgment in order to act in (what they believe is) the best interest of their constituents.\textsuperscript{68} There are two seemingly incompatible views regarding this relationship.

The first view (a la Hobbes) is that once authorized, a representative can do whatever she pleases in the name of the people she represents. The representative is allowed to supplant her judgment for the judgment of the people. Ideally, the representative will use her judgment to make the best decision for her constituents. The Federalists, who will be discussed in greater detail later, believed that the most virtuous people should be representatives so that they can use their superior judgment to make decisions for the people. This view is known as the trustee, or independence, conception of representation. Representation is a trust, and the representative has a fiduciary responsibility to those who are represented. Additionally, the trustee theorist believes that the representative must be able to act, not merely to carry out orders. The trustee theorist sees representing as an activity that requires some degree of autonomy.\textsuperscript{69} Otherwise, there is no representation. The people can be said to be acting for themselves.\textsuperscript{70}

\textsuperscript{67} Pitkin, 214.
\textsuperscript{68} Pitkin, 145.
\textsuperscript{69} Pitkin, 152.
\textsuperscript{70} Pitkin, 153.
Even if we grant trustee theorist’s argument that representing requires autonomy, it would not be unreasonable for constituents to expect that the decisions the representatives come to have some resemblance to what the constituents would want for themselves. It seems that representatives should be required to offer some rationale for acting contrary to the wishes of the constituents.\textsuperscript{71}

The second view is that the representative must do what the constituents want. This is known as the delegate, or mandate, conception.\textsuperscript{72} Delegate theorists believe that the constituents must be able to see themselves in the decision-making of the representative.\textsuperscript{73} The representative’s role is to find out what the constituents want done, and then do only that. The delegate theorists believe that their obligation lies in making the constituents “present” when they are not literally present.\textsuperscript{74} On this view, the people are still bound by the actions of the representatives, but the representatives are bound by the will of the people. The representative does wrong by not doing what the people want. The delegate view of representation is what the Anti-Federalists and Rousseau in \textit{Considerations on the Government of Poland} advocate.

However, the framing of the trustee-delegate conceptions makes these conceptions seem mutually exclusive. The framing encourages binary, either/or thinking when in actuality, solutions to this problem will often occur on a continuum between the two. We find one of the most extreme versions of the delegate conception in Rousseau’s \textit{Considerations on the Government of Poland}. In this essay, Rousseau suggests that the

\begin{enumerate}
  \item Pitkin, 164.
  \item Pitkin, 4.
  \item Pitkin, 153.
  \item Pitkin, 152.
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A less extreme version of the delegate conception allows the representative some discretion, but would require the representative to consult with constituents before performing any new action.\textsuperscript{75} 

According to the most extreme versions of the trustee conception, the representative cannot be bound to act. The representative is completely free to use his own judgment. The Hobbesian sovereign would be an example of this. More moderate views allow the representative to use her judgment unless bound by her election platform or explicitly forbidden by the constituents.\textsuperscript{76} We see that there are many ways a representative can promote the interests of her constituents.\textsuperscript{77} In both the delegate and trustee conceptions, the representative commits those who are represented. So they are both cases of ascriptive representation. The debate between the delegate and the trustee conceptions is in regard to on what grounds the representative can commit the represented.

**Filter versus Mirror Conceptions**

Whereas the trustee and delegate conceptions of representation broadly define how the representatives are supposed to reach decisions, two other seemingly incompatible views, the filter and the mirror, determine how the legislative body should be comprised. According to the filter view of representation, the representative body is comprised of the best of the citizenry. The representative selection process is designed to distill, or filter out, the worst of the lot until the citizens are left with the best – the most intelligent, virtuous, noble people – representing them.

\textsuperscript{75} Pitkin, 146.

\textsuperscript{76} Pitkin, 146.

\textsuperscript{77} Pitkin, 166.
The mirror conception places greater emphasis on creating a representative body that looks like, or mirrors, the people who are being represented. If a given society is comprised of merchants, lawyers, farmers, and nurses, then the representative body should reflect this diversity. Descriptive representation can be thought of as akin to the mirror conception of representation in that on the descriptive view, the representative “looks like” the thing being represented. Those who hold the mirror conception of representation are concerned that anything short is reflecting the citizenry will lead to tyranny because having a representative body that does not reflect the citizenry will allow the representative body to be insensitive to the needs of those who are not reflected. This insensitivity need not be deliberate, it may merely be born of ignorance. But proponents of the mirror view find the fact of this insensitivity dangerous, regardless of the cause.

Finally, the citizenry must decide the nature of the issues that the representative must decide.\textsuperscript{78} The citizenry may decide that it wants its representatives to resolve issues of taxation, treaty-making, when to go to war, or some or none of the above. The general idea is that representative government is an attempt to resolve some problems of coordination, cooperation, and efficiency that would arise in a direct democracy, especially in a large society. Furthermore, representation is a substantive activity when the decisions that need to be made involve value commitments, deliberation and reason are relevant, and there is no arbitrary choice.\textsuperscript{79} The citizens are invested in the outcome.

A proper understanding of these conceptions of representation underscores why it simultaneously makes sense and raises an eyebrow when one says, for example, “The

\textsuperscript{78} Pitkin, 214.

\textsuperscript{79} Pitkin, 212.
Dixiecrats did not represent the South.” It is apparent that Jesse Helms and Strom Thurmond (to pick two) did represent the South. There is a historical fact of the matter. Ostensibly, as members of Congress, they represented their entire constituencies, and not just the people who voted for them. So, in the ascriptive sense, the citizen of North Carolina who said (at any time from 1973 until 2003), “Jesse Helms does not represent me,” would have been talking crazy talk. But in another sense, the citizen who disavowed Jesse Helms would not have been insane or mistaken. This person would have been appealing to a different sense of “represent.” And this sense requires something more robust than mere office-holding. Perhaps, it requires descriptive representation or representation of interests. Regardless of what is required, the “crazy talk” case is worth taking seriously precisely because it highlights an ambiguity in two equally plausible intuitions about political representation.

This more robust sense of representation implicitly requires the consideration of the preferences of every member and subgroup in a given group, such as the group of North Carolina citizens. Such a robust conception of representation requires that group members’ preferences have some weight. Otherwise, members whose ideal preferences fail to impact outcomes “cannot be distinguished analytically from” nonmembers. Rogowski tells us that,

Under a perfectly fair system of representation, the members’ ideal preferences are reflected by the representative person or institution. Furthermore, the representative is chosen by a socially agreed upon decision function. No group has sole, or overwhelming, decision-making power, and no group has overwhelming influence. Additionally, Rogowski tells us that,

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80 In a broader sense, as holders of national office, they represented the US.

81 Rogowski, 398.

82 Rogowski, 399.
…the method of aggregating individual into group preferences must be accepted, at
least in broad terms, by all members. Groups that do not agree about the relative
weight that various members’ ideal preferences should have will inevitably disagree
about the propriety of actual decisions.83

For the purposes of social harmony, how we reach a decision is as important as the fact that
we reach a decision. In understanding the nature of representative democracy, it is also
important to note that citizens under a system of representative democracy are not given a
choice between being represented or acting for oneself. Rather, the choice is between being
represented and not acting for oneself or not being represented and not acting for oneself.84

Given the actual choice that citizens are faced with, the moral importance of political
representation becomes all the more clear. One’s political agency is constrained such that
obtaining political representation becomes the most important means of securing political
goods. Representative democracies are created and maintained in such a way that we
generally cannot secure political goods for ourselves. Instead, we rely on our representatives
to act on our behalf.

When groups are systematically excluded from the political process, their very
survival, or the survival of their members, is threatened. Their access to political goods is
unfairly limited, while others unfairly benefit. When groups are given the opportunity to
participate in the political process but have no real opportunity to affect the outcome, the
consequence is the same as being excluded. In fact, participation with no impact may be
worse than outright exclusion because participants may feel worse than they would had they
not participated at all.

83 Rogowski, 398.

84 Griffiths and Wollheim, 203.
I used Hobbes to open this project, despite the fact that he has nothing to say about political minorities, because Hobbes offers the first systematic account of representation in English. Hobbes offers his account of representation as a way to show how political authority emerges. In addition to offering an account of political authority, and consequently political obligation, arises, Hobbes sees the aim of government as maintaining peace between the people in society.

The Hobbesian sovereign is granted a tremendous amount of authority over the citizens because sovereign authority that is not absolute is not sovereign. By definition, the sovereign’s authority has to be absolute. The idea of absolute authority is distasteful to many. In the next chapter, “Rousseau’s Ambivalence Regarding Representation,” we will see how Rousseau reconciles this discomfort with a recognition that representation is a practical, if not perfect, solution to the problem of political authority. It is also in the Rousseau chapter that we will begin to see the first inkling of a different kind of problem with representation – that some people fare better under representation than others.
CHAPTER TWO
Rousseau’s Ambivalence Regarding Representation

Unlike Hobbes who saw some type of representation as a necessity, Jean-Jacques Rousseau was ambivalent about political representation. He thought that the only way to reign in the government and ensure against government abuses was for the people to directly participate in deliberation and law-giving. The problem of political minorities arises in Rousseau’s work. Rousseau is concerned with the plight of those who are so poor that they may be beholden to the wealthy. Rousseau envisions a society where such gross disparities do not emerge. It is for this reason that Rousseau limits property rights in The Social Contract. As a condition of the “right of first occupier,” or the right that people have to settle previously unoccupied land, the potential settler can only take what one needs.\textsuperscript{85}

But, Rousseau’s ideas about the obligations between the people and their government highlight why he was suspicious of representation. His main suspicions, that those who are wealthy will deny access to those who are not wealthy (of that those who are not wealthy will become beholden to those who are, will resurface in subsequent chapters as the plight of political minorities becomes more explicit. Even though Rousseau begrudgingly accepts representation as a practical solution to governing larger states, he never fully abandons his worries. The tight restrictions Rousseau places on representative government, including the

requirement that representatives can only do what they have explicitly been authorized to do by their constituents, are attempts to address these worries.

Rousseau anticipated a different set of problems regarding the practice of political representation than Hobbes or Locke. Part of Rousseau’s worry was that if some people controlled the government as representatives, part of the government would oppress the other citizens. This is why Rousseau appeals to the concept of the general will and why he believed that a small state with economic equality is so important. More importantly, Rousseau thought that it was morally required that we participate in making the laws that we must obey. For Rousseau, anything less would be slavery. However, Rousseau is aware that what one might want in principle might not be what one is able to attain in practice. Therefore, in Considerations on the Government of Poland in particular, Rousseau advocates a version of the delegate conception of representation. For Rousseau the delegate, or mandate, conception of representation comes closest to direct participation by the citizenry.

In this chapter, I offer Rousseau’s account of the transition from the state of nature to civil society and how Rousseau reconciles his mistrust of a representative structure of government with the practical need for political representation. In both the Discourse on the Origin of Inequality and The Social Contract, Rousseau discusses how we come to live in civil society and what features a legitimate state ought to have. In the Discourse on Political Economy and Considerations on the Government of Poland, Rousseau gives greater detail on the features of a legitimate state. Rousseau wanted people to be both free and autonomous,
but he believed that people lacked the moral courage to be free – partly because people were governed by their passions, rather than their conscience. For Rousseau, conscience is necessary but not sufficient to lead humans to the ideal state. Conscience is not sufficient because the conscience is not strong enough to override the passions. Rousseau is forced to resort to a variety of mechanisms – the lawgiver, censorship, and citizenship – in order to overcome the inadequacy of conscience.  

Transition from the State of Nature

Like Hobbes and Locke, Rousseau employs the technique of pre-civil humans in order to show what the ideal society ought to come to be. This pre-civil time is often referred to as “the state of nature.” Unlike Hobbes, Rousseau posits an account of the state of nature where humans are simple, solitary, not terribly aggressive, and basically good. On Rousseau’s account, “good” is less a substantive moral judgment than a descriptive account of humans as simple and naive. They do no evil, not because they are moral, but because the lack any appetite or passions that might incline them to do evil. Among other criticisms of the Hobbesian account, Rousseau asks how “one of the most beautiful geniuses who ever existed” could have so grossly misunderstood human nature. It is these two vastly different understandings of human nature that contributed to equally vastly different conclusions on the questions of political authority and obligation. Whereas Hobbes’s sense of human nature as fundamentally selfish leads him to endorse a totalitarian regime where citizens have little recourse to protest actions of the sovereign, Rousseau’s vision of humans in a state of nature as free leads him to endorse a civil society that enhances this freedom as much as possible.

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This freedom can only be enhanced with appropriate social institutions. An important aspect of Rousseau’s account is the malleability of human nature. Humans can easily adapt to being in civil society for this reason. On the Hobbesian account, the people give themselves over completely to the sovereign. Rousseau’s criticism is that there is “no possible *quid pro quo* that a people can receive in exchange for giving themselves to a master… [T]o renounce one’s freedom is equivalent to renouncing one’s very humanity.”  

It is important to understand the three senses of freedom to which Rousseau appeals at different points of the discussion: (1) negative liberty involves the absence of obstacles, (2) liberty in the state refers to the laws that protect people through civic institutions, and (3) moral liberty refers to individual autonomy.

Although on Rousseau’s model, people in the state of nature are not vicious, the state of nature does not enable people to flourish. He tells us in the *Discourse on the Origin of Inequality*,”

It appears, at first view, that men in a state of nature, having no moral relations or determinate obligations one with another, could not be either good or bad, virtuous or vicious…”  

Rousseau is offering an account of substantive morality where moral judgments like “good” or “vicious” can only exist within the context of society. Humans in the state of nature are naïve, lack imagination, and are preoccupied with self-preservation in the present. They lack the imagination necessary to motivate them to plan for their self-preservation in the future. Additionally, the savage, as Rousseau imagines him, has few desires. This lack of foresight is so pronounced that Rousseau is lead to claim, “Such, even at present, is the

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88 Fralin, 77.

extent of the native Caribbean’s foresight: he will improvidently sell you his cotton-bed in the morning, and come crying in the evening to buy it again, not having foreseen he would want it again the next night.”⁹⁰ However, such preoccupation with the present does not lead them to behave the way humans behave on the Hobbesian account. Rousseau portrays the Hobbesian account as one where people are vicious and greedy, and their desire to preserve themselves extends beyond meeting immediate needs. Rousseau claims, “Hobbes contends that man is naturally intrepid, and is intent only upon attacking and fighting.”⁹¹ According to Rousseau, in the Hobbesian state of nature, people attempt to meet their basic needs, and they are under constant threat of having their possessions or their lives taken. It is possible that Rousseau is being deliberately uncharitable to Hobbes’s view of the state of nature in order to strengthen the appearance of his own view. Rousseau continues,

Above all, let us not conclude, with Hobbes, that because man has no idea of goodness, he must be naturally wicked; that he is vicious because he does not know virtue; that he always refuses to do his fellow-creatures services which he does not think they have a right to demand; or that by virtue of the right he justly claims to all he needs, he foolishly imagines himself the sole proprietor of the whole universe.⁹²

A fairer reading of the Hobbesian state of nature is one where people are so concerned with the preservation of themselves and their possessions that they behave selfishly, and often violently. Furthermore, even those who might be inclined to live peacefully among their fellow humans are forced to defend themselves against the selfishness of others. But even though the state of nature Hobbes imagines is rife with violence, or as Hobbes famously states, “the state of nature is a state of war,” the people who live in the Hobbesian state of

⁹⁰ Rousseau, *Discourse on Inequality*, 62.
⁹¹ Rousseau, *Discourse on Inequality*, 54.
⁹² Rousseau, *Discourse on Inequality*, 72.
nature are not inherently wicked or sadistic. That is, they do not commit violent acts for the sake of violence.

Rousseau distinguishes his account by claiming that although people care about meeting their basic needs, there is plenty to satisfy the needs of everyone because people are widely dispersed and their needs are very simple. This is another important difference between Rousseau’s account and Hobbes’s. The Hobbesian state of nature is characterized by a scarcity that motivates people to fight for their survival. In Rousseau’s state of nature, the land is bountiful and provides all that the people need – partly because Rousseau concedes that “natural man” as Rousseau imagines him does not need or want much. The few wants natural man has are filled completely by nature, making natural man independent of other humans. Additionally, humans in Rousseau’s state of nature feel pity for one another. He writes in the *Discourse on Inequality* that “innate repugnance at seeing a fellow-creature suffer… tempers man’s behavior in pursuing his welfare.” And he continues that “natural compassion… will always prevent a sturdy savage from robbing a weak child or feeble old man of the sustenance they may have with pain and difficulty acquired.” This sentiment constrains any malicious behavior.

A major criticism that Rousseau has of Hobbes’s account is that the people in Hobbes’s state of nature are not truly in a natural state. That is, the people on Hobbes’s account are already socialized. People only become vicious after they have interacted with one another over time and as a result, acquire the characteristics Hobbes’s account relies on. It is only through human to human contact that people become savvy enough to connive

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94 Rousseau, *Discourse on Inequality*, 73.

95 Rousseau, *Discourse on Inequality*, 76.
against one another and their sense of pity for their fellow human diminishes. Rousseau’s natural man is “an equal stranger to war and all ties, neither standing in need of his fellow-creatures nor having any desire to hurt them, and perhaps not even distinguishing them one from another.” Hobbes would deny that the people on his account are fundamentally wicked. He would concede that they are selfish and smart, perhaps even cunning. But, these skills are necessary for survival and not necessarily a reflection of fundamental human nature.

Only in society can people flourish. Like the Hobbesian and Lockean models, it is necessary to create civil society in order to protect their lives and possessions. As people in the state of nature interact with one another more frequently, they become sophisticated enough to begin to recognize the need to unite with one another. On Rousseau’s account, this recognition leads to a transitional stage between the state of nature and the formation of civil society:

Taught by experience that the love of well-being is the sole motive of human actions, [natural man] found himself in a position to distinguish the few cases, in which mutual interest might justify him in relying on the assistance of his fellows; and also the still fewer cases in which a conflict of interests might give cause to suspect them. In the former case, he joined in the same herd with them, or at most in some kind of loose association, that laid no restraint on its members, and lasted no longer than the transitory occasion that formed it. In the latter case, everyone sought his own private advantage, either by open force, if he thought himself strong enough, or by address and cunning, if he felt himself the weaker.

Rousseau gives two kinds of accounts to explain how civil society comes into being. The first account he offers is a private property account. This account is summarized in the famous passage from the *Discourse on the Origin of Inequality*:

96 Rousseau, *Discourse on Inequality*, 79.

97 Rousseau, *Discourse on Inequality*, 86.
The first man who, having enclosed a piece of ground, bethought himself of saying ‘This is mine,’ and found people simple enough to believe him, was the real founder of civil society.\textsuperscript{98}

But, before we take Rousseau’s assertion literally, it appears that this statement is a rhetorical device to enable Rousseau’s reader to understand his disdain for the more sophisticated human who replaces natural man. Natural man would not have had occasion to say of anything, “This is mine,” because (a) his wants were simple, (b) his wants were completely accommodated by nature, and (c) he lacked the foresight to desire possessions or property. That eventually someone arises among the noble savages to lay claim to something in nature, is for Rousseau, the beginning of the end. It is the beginning of civil society, and the end of the innocent, self-sufficient savage.

Rousseau offers another account that is compatible with the first. On this account Rousseau understands the entrance into civil society to be a matter of convenience, a practical matter. Natural man does not have an innate need for human company and companionship.\textsuperscript{99} Instead, people recognize that they can accomplish more by banding together in order to achieve goals that would be difficult for one person to achieve alone. To borrow Rousseau’s example from the \textit{Discourse on the Origin of Inequality}, it would make sense for people in the state of nature to join together in order to hunt a deer. The deer hunt requires the cooperation of several people working together to achieve the goal. The end result is that everyone gets to share in the spoils of the capture. As soon as the deer is captured and the spoils are divided among the participants, the alliance dissolves. This kind of cooperation can and does exist in the absence of private property. Over time, people realize that there are many goals that can better be achieved if humans form a more

\textsuperscript{98} Rousseau, \textit{Discourse on Inequality}, 84.

\textsuperscript{99} Aristotle is one who holds the view that humans are naturally social creatures.
permanent association with one another. Simultaneously, as people become more sophisticated, they realize that not every one in their number can be trusted. In this case, they may form loose associations with one another in order to band against the untrustworthy. Or people may rely on their individual skills, be it physical force or cunning, to protect themselves from the untrustworthy. At some point, the people in the transitional state realize that it behooves them to make their temporary alliances more permanent. At this stage it is apparent to humans that they can neither return to the state of nature as it was because through their repeated interaction with one another and increasing sophistication, the state of nature is now abandoned. Nor can humans escape the need to form a civil society. In order to regain some approximation of the freedom they had in the state of nature, humans must form a community. The transitional state is too unstable, and hence, untenable.

**Entrance into Civil Society**

The objective of *The Social Contract* is to detail the transition from the state of nature into civil society and to give a picture of the ideal civil society. Two necessary features of this transition are deliberation and consent. In fact, Rousseau’s criticism of Grotius in Book I of *The Social Contract* turns on what Rousseau perceives as a lack of deliberation and consent in Grotius’s political theory. According to Rousseau, Grotius argues that a people can give themselves to a king. But, this presupposes “a people” before there is any deliberation or consent. The people do not emerge as a political unit until after the deliberative process. Otherwise, there will be no grounds on which political authority is

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100 Froese, 582.
101 Froese, 579.
legitimate. On Rousseau’s account, legitimate political authority only comes into being after deliberation and consent have been obtained. Still, there are limits on what kind of society the people can consent to create. For example, the people could not legitimately consent to an absolute ruler, as they do on the Hobbesian account – even if this consent were unanimous. Consent to an absolute ruler would impose an unfair burden on the citizenry that would be irrational for the people to accept. Rousseau offers,

> It would also be no easy matter to prove the validity of a contract binding on only one of the parties, where all the risk is on one side, and one on the other; so that no one could suffer but he who bound himself.”103

That is to say, on the Hobbesian model of consent and political authority, the people give up everything in the hopes that their ruler will protect them and be concerned with their best interest. But, since the ruler’s authority is absolute, the people have no recourse if the ruler turns out to be a tyrant. Yet, the [potential] ruler sacrifices almost nothing. Regardless of whether the ruler is a benevolent ruler or a tyrant, the ruler does not suffer.

Rousseau sees the potential suffering of the citizenry as so significant that he contends that giving oneself (even unanimously) to an absolute ruler would not be to form a legitimate government. This is one of the problems one has to address in finding a legitimate form of government. In Book I, Chapter 6 of *The Social Contract*, he tells us,

> The problem is to find a form of association which will defend and protect with the whold common force the person and goods of each associate, and in which each, while uniting himself with all, may still obey himself alone, and remain as free as before. This is the fundamental problem of which the social contract provides the solution.104

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103 Rousseau, *Discourse on Inequality*, 104.

It is important to note that on Rousseau’s account, the members who form the social contract only obey themselves. This means that Rousseau has to create a mechanism through which each signatory to the social contract can be said to have made the laws, even the ones she voted against.\textsuperscript{105} Otherwise, she can be said to obey someone other than herself. The goal of such a mechanism would be to ensure a society in which all members have a stake in the community. To say that one obeys only herself even when abiding by laws she voted against is to acknowledge that membership in the state exists on more than one level. There is the individual self and the self as member of the political community. One can still be said to obey only himself because he agrees at the outset to be a member of this community and to abide by laws as they are passed. This is the will of the self as member of the community.

The model of the ideal civil society that Rousseau presents in \textit{The Social Contract} is based on the government of Geneva, even though Rousseau readily admits that Geneva is imperfect. He opted to base his ideal civil society on an actual society rather than completely relying on a thought experiment in order to avoid the criticism in the \textit{Social Contract} that historical texts like Plato’s \textit{Republic} previously received.\textsuperscript{106} That is, texts like the \textit{Republic} have been criticized for being merely utopian with no practical importance or significance.

The initial transition into society and the creation of the sovereign require unanimity. However, after the society is created, laws are created (the general will is determined) by majority rule. The agreement to abide by majority rule occurs at the creation of the society. The complete implementation of civil society occurs in two stages: (1) There is the initial transition into civil society, and (2) Once the citizens have formed a society, they must

\textsuperscript{105} Gopal Sreenivasan, “What is the General Will?” in \textit{The Philosophical Review}. Volume 109, Number 4, October 200, 550.

\textsuperscript{106} Fralin, 138.
govern themselves according to the general will. Later I shall offer further discussion of the general will and the role it plays in ideal civil society. In the meantime, it is sufficient to note that membership in the community forces individuals to transcend their selfish interests, but it is those selfish interests that ensure individual’s participation in the political process.\textsuperscript{107}

The political community cannot function at its best unless people are willing to act in the best interest of the society. At the same time, it is our desire to have at least some of these selfish interests addressed that motivates individuals to participate in the political process.

Like Hobbes and Locke, Rousseau offers the patriarchal family as a model through which to discuss the development and function of the ideal state. Unlike Locke, who traces the development of civil society from the evolution of the patriarchal family, Rousseau uses the model of the patriarchal family as merely a device through which to distinguish between the role of the father and the head of the state. Rousseau does not believe that civil society evolves out of the patriarchal family. In fact, Rousseau suggests that the opposite is true:

Instead of saying that civil society is derived from paternal authority, we ought to say rather that the latter derives its principal force from the former. No individual was ever acknowledged as the father of many, till his sons and daughters remained settled around him.\textsuperscript{108}

So, the father can only “rule” if his children decide to remain with him. If his children reach maturity and leave, as is the case in the state of nature, the father cannot be acknowledged as “the father of many,” and the family cannot be said to be a stable unit. The leader of the family, the father, has independent motivation and incentive to take care of his family. In addition to the love that the father has for his family, the family’s survival

\textsuperscript{107} Froese, 592.

\textsuperscript{108} Rousseau, \textit{Discourse on Inequality}, 103.
depends on the leadership ability of the father. Even if the father were motivated to behave completely selfishly, ideally these two aspects will temper paternal rule over the family.

Unlike in the family where the father’s love for his family and the immediate threat to survival may constrain any temptation he has to indulge selfish interests, the leaders of a state do not have these natural restrictions on their behavior. Consent occupies the space in the state that natural affinity occupies in the family. The leader is supposed to follow the law, rather than her likes, dislikes, or interests. When the personal interests of the leaders are allowed to flow unchecked, there are devastating consequences for the state. Even if the state can survive such behavior by its leaders, political authority ceases to be legitimate.

It does not matter if the state is led by one person or several, the citizens will be more vulnerable to the abuses of the leadership when it consists of many people. This can happen because in addition to the danger of having one leader abuse the citizens, other abuses may come about when a leadership class fights among themselves. When the leadership fights among themselves, they are not devoting the time that they should to governing. So the leadership divides political spoils while the people suffer. Rousseau argues in *Political Economy*,

> If you have but one leader, you are at the discretion of a master who has no reason to love you; if you have several, you must endure both their tyranny and their quarrels. In a word, abuses are inevitable and their consequences disastrous in every society in which the public interest and the laws have no natural force and are constantly attacked by the personal interest and the passions of the leader and the members.¹⁰⁹

**The Ideal State**

Additional aspects of Rousseau’s ideal state are beginning to emerge. First,

deliberation and consent are not one shot interactions between the people as the state is being

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created. Rousseau expects that these interactions will continue for the duration of the state. Second, continued deliberation among the people is the best way to determine public interest and make laws. Finally, the people have to consent to the law before the law can bind them. Rousseau notes that the law of nature does not permit the law to bind anyone who has not voted on them, either directly or through their representative.\textsuperscript{110} It is voluntarism that makes the state legitimate, but the mere fact of voluntarism does not give any indication regarding the intrinsic goodness of what is willed.\textsuperscript{111}

In order to clarify these principles and how they relate to Rousseau’s ideas about representation, it will be useful to offer a brief discussion of the general will. In Book II, Chapter 3 of \textit{The Social Contract}, Rousseau explicitly states that the general will is not the synonymous with the will of all. The general will considers the common interest only, while the will of all takes private interests into account. The will of all is “no more than the sum of particular wills.”\textsuperscript{112} If people did not have these particular wills that could potentially dominate other citizens, there would be no need for the general will. However, the success of the general will depends on the cooperation of the citizenry. That is, the citizens have to be able to generalize, and they must possess a disposition to will generally.\textsuperscript{113} Rousseau appeals to the general will in order to combat the potential dominance of the particular wills of members of the society,


\textsuperscript{111} Patrick Riley, “A Possible Explanation of Rousseau’s General Will,” in \textit{The American Political Science Review}, Volume 64, Number 1 (March 1970), 86-97.

\textsuperscript{112} Rousseau, \textit{The Social Contract}, 203.

\textsuperscript{113} Christopher Kelly, “‘To Persuade Without Convincing’: The Language of Rousseau’s Legislator,” in \textit{American Journal of Political Science}, Volume 31, Number 2 (May 1987), 323.
In fact, each individual, as a man, may have a particular will contrary or dissimilar to the general will which he has as a citizen. His particular interest may speak to him quite differently from the common interest: his absolute and naturally independent existence may make him look upon what he owes to the common cause as a gratuitous contribution, the loss of which will do less harm to others than the payment of it is burdensome to himself...114

Whereas we each have individual interests (particular wills) which may be different from the common interest (general will), we are still obligated to strive to attain the general will. Rousseau believes that the benefits that we will receive from abiding by the general will outweigh any inconvenience of not being able to indulge our particular wills. The general will arises out of the existence of particular wills.115 But, to reiterate, the general will is not simply the sum of particular wills. That would be the will of all. The general will is the common decision made upon the deliberation of the citizens. Rousseau is very clear in Book II, Chapter 2 of *The Social Contract* that the “will either is, or is not, general; it is the will either of the body of the people, or only of a part of it,” and that only in the first case is the will “an act of Sovereignty” which “constitutes laws.”116 Additionally, it is not clear whether the particular will is what people want privately for themselves or whether the particular will is the will of a particular individual.117 My inclination is that the particular will is what people want privately for themselves. Evidence to support my view can be found in Chapter 3 of *The Social Contract* when Rousseau notes, “Our will is always for our own good.”118 Furthermore, Rousseau thinks that the citizens’ ability to understand the

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115 Froese, 592.
117 I thank Tom Hill for this insight.
general will breaks down when “in every heart the social bond is broken.”\textsuperscript{119} This suggests to me how important it is to Rousseau that citizens will with an eye to the social good. The social bond is what will ensure that the will of the citizens manifests itself in this way, thereby causing citizens to subvert their private desires for the public good.

Still, at this point Rousseau is unclear exactly how the particular will and the general will relate to one another. At various places in \textit{The Social Contract}, it seems that we are supposed to subvert our particular will for the common good. Yet, at other points in \textit{The Social Contract}, Rousseau seems to speak less of the common good, and more of reconciling our particular wills into a general will.\textsuperscript{120} All the while, Rousseau is clear that general will is not simply a sum of our particular wills. His statement in \textit{Political Economy} seems to give credence to the idea that the general will is a reconciliation of particular wills, rather than a subversion of them:

\begin{quote}
Do you want the general will to be carried out? Make certain that all particular wills are in accord with it, and, since virtue is only this conformity of the particular will with the general, to say the same thing in a word, make virtue reign.\textsuperscript{121}
\end{quote}

Rousseau is so committed to the ability of the people to discern the general will under the proper conditions, that he argues that those who find themselves in the minority should admit that they were wrong. In other words, when the body comes together in order to deliberate, Rousseau is convinced that given the appropriate constraints (similar knowledge, no outside discussion), the deliberative body will come to discover the general will. Here it seems that the general will is more than an ideal. If the general will were merely an ideal, the citizens could fall short of this ideal and still be properly said to act in accordance with the

\textsuperscript{119} Rousseau, \textit{The Social Contract}, 275.

\textsuperscript{120} Riley, 93.

\textsuperscript{121} Rousseau, 67.
general will. However, at this stage Rousseau seems to be making a stronger claim. The stronger requirement for the general will would be to meet all the conditions. Falling short of these conditions means that the citizens are not acting in accordance with the general will. Achieving the general will does not require unanimity, and determining the general will is one area of political life where Rousseau is quite comfortable with majority rule. In fact, in the case of the general will, Rousseau endorses a Condorcet-type understanding of how majorities operate. That is, Rousseau believes that the greater the majority, the greater the likelihood that the majority is correct, supposing they all have the same information. In that case, those who find themselves in the minority do not merely have to go along with the will of the majority, they have to admit that they were wrong. He uses majority rule in this instance to, as Froese puts it, “force outliers into the fold.”\textsuperscript{122} This is a more stringent requirement than Rousseau imposes on other aspects of political life. This stringency shows how important Rousseau thinks the general will is. For Rousseau, in a good government, the general will is to be followed above all. In \textit{Political Economy}, he writes,

\begin{quote}
The first and most important maxim of legitimate or popular government, in other words, of a government whose aim is the good of the people, is therefore, as I have said, to follow the general will in all things, but, to follow it, it is necessary to know it, and above all, to distinguish it clearly from the particular will, starting with oneself. This distinction is always extremely difficult to make, and only the most sublime virtue is capable of shedding light on it.\textsuperscript{123}
\end{quote}

Anything short of following the general will leads to an illegitimate government. When the people bow to an illegitimate government, their fate is worse than if they sold themselves into slavery. Rousseau also notes in Book I, Chapter 4 of \textit{The Social Contract} that what the people get in return is less.

\textsuperscript{122} Froese, 597.

\textsuperscript{123} Rousseau, \textit{Political Economy}, 63.
Now, a man who becomes the slave of another does not give himself, he sells himself, at least for his subsistence: but for what does a people sell itself? A king is so far from furnishing his subjects with their subsistence that he gets his own only from them…\引用

In the master/slave relationship (which Rousseau views as an inherently illegitimate relationship), the slave at least gets subsistence from her master in exchange for complete subservience. However, in the case where the people give themselves completely to a king, the king not only fails to provide subsistence to the people, but the king draws his own subsistence from the people. The people must retain responsibility for themselves in their own hands. The idea is that the government where people do not retain enough autonomy to participate in the political process through deliberation and consent cannot be legitimate. Metaphorically, the people who give themselves completely to a sovereign (a la the Hobbesian model) find themselves in a position worse than the slave.

Even though Rousseau cannot stress enough the importance of deliberation and participation in making the law, Rousseau would designate any legitimate state a “Republic” regardless of the form of government. In Book II, Chapter 6 of *The Social Contract*, Rousseau gives the conditions for a state to be a republic: (1) the state has to be governed by law; (2) the law must unite the universality of will, which will in turn, unite the public; (3) the state must be governed by public interest.\footnote{Rousseau, *The Social Contract*, 212.} Although Rousseau had his preferences for which form of government would best meet these conditions, it is possible that an aristocracy could meet the condition of direct participation in making the law if the aristocracy is a state in which the aristocrats are the executive that obeys the general will. Rousseau’s point is that a republic is any state in which an executive obeys the general will which is expressed in the

\footnote{Rousseau, *The Social Contract*, 185.}
laws made by the people. In this sense, every legitimate state is a republic. That Rousseau is willing to admit that a variety of forms of government can be legitimate shows, as Fralin notes, “Rousseau himself was far from being a radical democrat...” The tendency to see Rousseau as such perhaps stems from his insistence on the participation of the people. But, for Rousseau, a pure democracy would not be a legitimate state because in a democracy, the people who form the sovereign also form the government. Rousseau defines government as “legitimate exercise of executive power.” The executive only exercises power legitimately when he executes the laws made by the people. I think it is correct to note that few forms of government by definition preclude the participation of the citizenry.

Yet, lack of formal participation does not rule out informal input. An example of this informal participation would be the king who, although he makes laws of his own accord, has his ear to the ground in order to find out what the people think and desire in order to shape his edicts accordingly. But, this informal way of participation is not sufficient on Rousseau’s account to ensure that the people have a voice. Some forms of government – oligarchies and hereditary monarchies, for example – make it easier for those in charge to indulge any selfish interests that may cause them to exclude the people. The sovereign cannot apply itself to particular cases, as Rousseau notes in Book III, Chapter 1 of *The Social Contract*. The sovereign can only act according to the most general of principles.

For this reason, Rousseau notes in Book III, Chapter 1 of *The Social Contract*, that there should be a magistrate, or prince who is entrusted with the administration of the

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126 Fralin, 96.

This person should be one who can be trusted to not allow selfish motives to overtake her, but one who will administer government in a manner that is consistent with the public will. The magistrate is distinct from the sovereign and, “has only executive power and can only obligate private individuals.”

The magistrate, or executive, can execute law but does not have the power to force people to obey laws. The power to obligate “the very body of the nation” lies with the legislative power (the law) and comes from the government (comprised of the people). This system of checks and balances is undergirded by Rousseau’s stance in Book III, Chapter 1 of *The Social Contract* where he states, “Government gets from [the] sovereign the orders it gives to the people.”

The general will arises from the body politic. Rousseau conceives the body politic as a distinct “moral being” that has its own will. This is the general will. The general will tends to the conservation and welfare of the whole, and each part is a source of law. The body politic, which is comprised of citizens, expresses the general will. Not every member of society will be a citizen. Rousseau distinguishes between citizens, who participate in making laws, and subjects, who simply obey laws enacted by others. Citizens must be able to participate in the decision-making process. This rules out children and those who are severely mentally impaired. Although Rousseau was a proponent of citizen participation, he was ambivalent about the capacity of individual citizens to make good decisions. Rousseau

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133 Fralin, 16.
variously praises the “good sense of the common man” and warns against the “danger of mob violence by the unsophisticated masses.”

Thus, the means for discovering the general will is not foolproof. Even when one restricts the class of persons who can be citizens, the citizenry may still be plagued with people who lack the political aptitude to make help discern the general will. This is not simply a matter of lack of sophistication, which Rousseau thinks is, to some extent, desirable. Because a citizenry that is overly sophisticated is likely to be corrupt, Rousseau thinks that it is good for the citizenry not to be overrun with professional politicians. Yet, Rousseau is aware that the citizenry should possess a baseline of intelligence in order to make the best decisions about the general will. When the citizenry lacks minimal intelligence, there is danger that they will not know the general will regardless of how much time is devoted to deliberation.

Additionally, the citizens must keep in mind that the general will is supposed to benefit the whole. This requires that the citizens must keep in the mind the distinction between their private selves with private interests (l’homme naturel) and the interests of the whole (l’homme social). Rousseau outlines three conditions in order to minimize the potential problems with the capacity of the citizenry to determine the general will: equality between the citizens, minimal geographic area of the state, and a homogenous citizenry. For Rousseau, “equality” does not mean that each member has to have the exact number of material goods relative to one another. Additionally, the people must engage in limited deliberation beforehand to ensure that they all have access to the same information. Limiting

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134 Fralin, 6.
135 Fralin, 7.
prior deliberation is also a means to discourage the formation of factions. Rousseau viewed
the presence of factions as antithetical to discovering the general will. In Book II, Chapter
11 of *The Social Contract*, Rousseau explains,

> not that the degrees of power and riches are to be absolutely identical for everybody; but that power shall never be great enough for violence, and shall always be exercised by virtue of rank and law; and that, in respect of riches, no citizen shall ever be wealthy enough to buy another, and none poor enough to be forced to sell himself; which implies… moderation in avarice and covetousness.\(^{136}\)

The admonition that in a just state none should be “wealthy enough to buy another, and none poor enough to be forced to sell himself” is a well-known claim of Rousseau’s and one that best characterizes his conception of equality. Rousseau thinks this admonition implies “moderation in avarice and covetousness,” but it seems that such moderation would have to also be a prior condition. That is, only when the citizens are moderate in their material desires, and this moderation is viewed as necessary to discover the general will, can there be a society where this greed is not allowed to run rampant. It also seems that the society must be committed to creating circumstances where those citizens who lack the requisite sense of moderation are not allowed to act out of greed in acquiring material goods. To that end, Rousseau suggests that in addition to economic equality, the citizenry must possess liberty and virtue.\(^{137}\)

Rousseau’s second condition for the ideal state – the culturally homogenous society – is an attempt to minimize dissent based on differing customs. It important to Rousseau that no one is above the law; the law must be applicable to everyone. Yet, he is also sensitive to the reality that cultural differences matter to people. If laws conflict with their fundamental


\(^{137}\) Rousseau, *Political Economy*, 72.
cultural commitments, the people will be less likely to see those laws as relevant to their lives. Consequently, they will not feel that the laws apply to them, or people may begrudgingly abide by the laws but become increasingly alienated from the state. Such alienation would defeat the purpose for entering the state – a life better and more secure than one could have had in the state of nature. Rather than propose a scheme to accommodate a multicultural society, Rousseau instead argues that societies function better when they are culturally homogenous and mostly self-sufficient. It is curious that Rousseau does not anticipate a means for multicultural harmony within one state. Yet, this failure may be explained. Recall that Rousseau used Geneva as a model for his ideal society, and, at the time of Rousseau’s writing, Geneva was a fairly homogenous place. Rousseau may have been limited in his ability to imagine a place with all the necessary components of an ideal state, while successfully integrating citizens of different cultural backgrounds. Perhaps this was a complication Rousseau was not prepared to address. It may also be the case that multicultural harmony could not be possible because there could be no general will in a multicultural society. Or perhaps Rousseau thinks that the possibility of a multicultural society is so hopeless that he gives up on the idea before seriously considering it. But this could only be a plausible explanation on Rousseau’s account if people of radically different cultural backgrounds are attempting to coexist.

The third condition necessary for the ideal state is a limited geographic area. The geographic area should be small in order to avoid the problems inherent in attempting to manage a large state. Even small states that are not republics tend to function better by virtue of their size:

138 I would like to thank Jan Boxill for this insight.
Almost all small States, republics as well as monarchies, prosper simply because they are small, because their citizens know and watch one another, because the chiefs can see for themselves the evil being done, the good they have to do; and because their orders are carried out within their sight.139

Additionally, a large state is more impersonal than a small state. This impersonality means that the citizens will find it much more difficult to develop the bonds of affinity with one another necessary to constrain self interest. It does not seem that the citizenry’s investment in discovering the general will should depend on whether the citizens are personally attached to one another because the general will is supposed to supersede any private interest. Yet, Rousseau is committed to this psychological motivation among people. A more plausible explanation of the limited geographic region requirement is that a smaller state is less likely to become entangled in a large bureaucracy. Large states can become “crushed by their own mass” or crushed under the weight or the “subordinate oppressors which a necessary devolution forces Kings to set over them” because “only God can govern the world.”140

Rousseau also thinks, perhaps mistakenly, that a smaller state is less likely to develop factions. A large state would have to be sustained by numerous agencies and employees which can make problem solving cumbersome. Additionally, it would be expensive to maintain a large state, which means that the citizens would have a heavier tax burden.

In Book I, Chapter 6 of *The Social Contract*, Rousseau offers the essence of the social contract, “Each of us puts his person and all his power in common under the supreme direction of the general will, and, in our corporate capacity, we receive each member as an indivisible part of the whole.”141 Becoming part of a whole subject to the general will might

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139 Rousseau, *Poland*, 193.
not strike one as enough incentive to opt for civil society over the state of nature, and Rousseau acknowledges the trade-off. Ultimately he thinks that the benefits of entering the social contract outweigh any losses one suffers as a result of leaving the state of nature, “What man loses by the social contract is his natural liberty and an unlimited right to everything he tries to get and succeeds in getting; what he gains is civil liberty and the proprietorship of all he possesses.”¹⁴²

Civil liberty and outright ownership of one’s possessions are supposed to be sufficient enticements into the social contract. Among the responsibilities one gains by participating in the social contract is participation in the legislative process. Rousseau thought that citizens should take an active role in the process of approving legislation. Because he recognized that popular assemblies were unsuitable for large states, Rousseau’s solution was to opt for smaller states. However, even in small states, Rousseau conceded that popular assemblies might be inconvenient. Yet, the inconveniences are not sufficient to favor a representative schema.¹⁴³ The value of participation in legislating for the state is so important that the people must decide law for themselves. Despite the fact that Rousseau doubted whether most ordinary citizens had the capacity for leadership, he thought that the ordinary citizen was competent to approve or disprove legislation.

Poland

Here is where the paradox emerges. As adamant as Rousseau is about the importance of direct participation, and he goes to great lengths to ensure that direct participation can happen, Rousseau concedes that some schemes of representation can work. When called

¹⁴³ Fralin, 20.
upon to offer thoughts on the government of Poland for its reorganization, he advocates that Poland adopt what amounts to a mandate conception of representation.\textsuperscript{144} Rousseau clearly thinks that representation can work as an effective means for approving or disapproving legislation, even in a place like Poland about which he marvels how “so oddly constituted a State could have survived so long.”\textsuperscript{145} Rousseau is hopeful about Poland’s future because despite being a “depopulated, devastated, and oppressed region,” Poland “still displays all the fire of youth.”\textsuperscript{146}

Even though Rousseau advances a mandate conception of representation for the people of Poland, he is so hostile to the idea of a “representative” operating on behalf of the people that he refuses to uses the term. In Rousseau’s mind, representatives attempt to present the feelings of the people for the people. His understanding of the role and function of a representative is limited to a trustee conception of a representative. The trustee conception of representation allows the representative to supplant her own judgment for that of the people, which means that an essential feature of lawmaking, the participation of the people, is minimized. This explains Rousseau’s hostility to the word “representation” even though his understanding of the role of the deputy is akin to the mandate conception of representation. Rousseau insists that he allows for the people to have “deputies” make decisions on the citizens’ behalf. In actuality, these “deputies” operate exactly as a representative acting in accordance with a mandate, or delegate, conception of representation would act. The deputies act within the Diet, the formal assembly for discussing formal affairs. The deputies are bound to do exactly what the people tell them to do to the extent

\textsuperscript{144} Fralin, 20.

\textsuperscript{145} Rousseau, \textit{Poland}, 177.

\textsuperscript{146} Rousseau, \textit{Poland}, 178.
that the deputies should have to “render a strict account of their conduct in the Diet to their constituents.” Rousseau lays out explicit grounds under which the deputies are to act: (1) deputies are to be given strict instructions regarding agenda topics and needs of the State and Province, (2) a copy of these instructions is to be signed and placed in the official record of the Dietine, and (3) the report given to the constituents should be based in the initial instructions.

Rousseau sees the situation thus,

The Deputy must, with every word he speaks in the Diet, with every action he takes, anticipate himself under the scrutiny of his constituents, and sense the influence their judgment will have on his projects for advancement as well as on the esteem of his fellow citizens, which is indispensable for the realization of these projects of his.

He continues,

Even if it did entail some inconvenience to keep the Deputies thus subordinated to their instructions, there would still be no comparison between it and the immense advantage of never having the law be anything but the real expression of the nation’s wills.

Willingness to adopt a scheme of deputies/mandate representation as a viable alternative to popular assembly overcomes one reason for the small geographic state condition. Recall the Rousseau argued that states should remain geographically small so that the citizens could participate. Even though he later conceded that even in a small state, popular participation might be inconvenient, the small state would still afford the citizens the ability to participate. But, if Rousseau allows representatives to gather at the appointed place and time to enter into approve of legislation, the state could be larger. At this point it might

147 Rousseau, *Poland*, 201.
be argued that Rousseau’s other reasons for desiring to maintain a small state still stand. That is, Rousseau was concerned with the impersonality and the unmitigated greed that can arise once the state gets too large.

It seems that once Rousseau allows for representatives within the state, he has already allowed the citizens to have a less personal stake in the outcome of the legislative process. I am certain that Rousseau would reject this characterization of his view. So, either the personal stake that comes from participation is so important that allowing representatives to enact these decisions will not do, or the personal stake of the citizens is not as high as Rousseau would have had us initially believe. Rousseau might respond that he advocates a mandate conception of representation in order to keep the citizenry involved in the process and to constrain the behavior of the representatives. The mandate conception is an attempt to make sure that representatives are not tempted by greed or their own self-interest, but instead remain committed to the wishes of the citizens. Rousseau is so confident in the importance of remaining committed to the wishes of the citizens that he does not believe the deputies will face reprobation from the citizenry in the event of unforeseen negative consequences.\footnote{Rousseau, \textit{Poland}, 202.}

A further step Rousseau endorses to ensure that the representatives represent the will of the entire citizenry rather than one segment of the population is to reject any privileged status for nobility or any other group of citizens. The nobility would not be allowed access to representatives that anyone else could not also have. Additionally, Rousseau was ambivalent about requiring property ownership for suffrage.\footnote{Fralin, 20.} Rousseau might have understood that those who had at least a little property were likely to be better educated and easier to inform,
and this would make deliberation more productive. Furthermore, those who owned no
property might not be able to make independent choices, not due to lack of intellectual
capacity, but because they most likely relied on others for their subsistence. The fear of
angering those who provided sustenance would negatively impact their ability express candid
opinions during the deliberative process. Rousseau wanted the deputies to be answerable
only to their constituents, without having others who provide sustenance having undue
influence. Rousseau was also leery of the undue influence that may be held by charismatic
members of the Diet. For this reason, he advocated voting in the Diet by voice rather than by
ballot so that “no one can invoke the others as an excuse” and to keep the “innocent and the
guilty” from being confused.153

At the same time, to exclude the propertyless from the deliberative process would
effectively mean leaving them open to potential abuse and exploitation. Even if there was no
malice on the part of those who were engaged in deliberation, the propertyless might be
exploited as a result of the ignorance of the other citizens about the plight of the propertyless.

Although Rousseau does not settle on the question, the care with which he raises the
questions of representation and suffrage shows that he is attempting to resolve the problem in
a comprehensive model of the ideal state. Perhaps this is why Rousseau argues that rough
material equality is a necessity in the ideal picture even though he concedes the usefulness of
a representative schema in actuality. Fralin address this apparent contradiction,

Rousseau himself was far from being a radical democrat, and in his own writings he
moderated the radicalism of his abstract theories by an acceptance of institutions that
perpetuated the inequality that seemed to him an inevitable feature of the human
condition.154


154 Fralin, 96.
I submit that part of what radicalizes Rousseau was his willingness to at least grapple with the problem.

Rousseau is thinking about what it means to be a part of the political community. He explicitly states in Book I, Chapter 6 of *The Social Contract* that by entering into the social contract, each associate gives himself to the community. Rousseau’s line of reasoning is that by making the conditions of living within the political community “the same for all,” no one will make conditions that are too burdensome for the others. Implicit in this idea is that people might still be tempted by self interest, but knowing that they will also be subject to any laws they pass will constrain self interest. I also think that there is a communitarian argument to be found in this passage. The members of the political community develop obligations to one another and become responsible for one another. There is something inherent in the social contract that not only imposes political obligation to the state, but also formulates obligation to other members of the political community as members. A lot has been made of Rousseau’s assertion that man is naturally good and that the social contract is a means of protecting that autonomy. At the same time, the very idea of the general will and committing oneself to the political community suggests that Rousseau saw the need to balance the ideals of autonomy and community.

I have shown why Rousseau is ambivalent about representation. Although he does not explicitly address the plight of political minorities, he is concerned that under a system of representation citizens will find themselves oppressed by the government. Specifically, those who are poor will find themselves at the mercy of both the government and those whom they depend upon for their livelihood. It is interesting to note that although Rousseau is

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preoccupied with political authority and ensuring that the government does not oppress its citizens, Rousseau does not grant women the vote. In the ideal world of Rousseau, the way to resolve this problem is to require a condition of rough equality. In practical terms, the problem is resolved with strict constraints on the role of the representatives. In the next chapter, “The Federalist/Anti-Federalist Debate Over Representation,” the role of representatives becomes even clearer. Additionally, the vulnerabilities of particular minorities is made explicit.
CHAPTER THREE

The Federalist/Anti-Federalist Debate Over Representation

The Federalists and Anti-Federalists found themselves at odds with one another as both groups attempted to determine whether or how representative government could best serve the needs of the new Union. Whereas Rousseau only begins to offer consideration for those who may not fare as well under representative government, the debate between the Federalists and the Anti-Federalists places this concern at its center. Both the Federalists and the Anti-Federalists were concerned with how minorities would fare when left at the mercy of a ruthless majority. They differed on whether and to what extent procedural safeguards should be put in place to protect the minorities with whom they were concerned.

Despite the difficulties in resolving the new Constitution, James Madison, a committed Federalist thought that Jean-Jacques Rousseau would have been proud of the new Union – that Rousseau would “find a rich enjoyment in the scene before him.” Madison took his role in establishing a strong centralized government in order to protect the Union against internal and external threats. The republican form of government was also a way to arrive at a public voice. The public voice was not merely the voice of the public, but of a “chosen body of citizens.” The public voice was to be an improvement upon, rather than simply reiterating the “actual (unfiltered) voice of the public.”


The best way to do this, Madison thought, was not through a democracy, but through a republic. Madison conceived of democracy as government where all of the people participated in the decision making process, a system we would today describe as direct democracy. Democracies are necessarily limited in size of geographic area and size of population because it becomes unfeasible to have large numbers of people making decisions across vast stretches of geography. In a republic, political decisions are made by a representative body. A republic could be expanded to include a greater number of citizens.\footnote{James Madison, \textit{Federalist 10}, in \textit{American State Papers}, ed. Mortimer J. Adler, (Chicago: Encyclopedia Britannica, Inc., 1952), 51-52.} Republics could grow in population and geography because it would be easier to modify the deliberative process in order to accommodate new growth. For example, one could simply increase the number of members in the deliberative body in order to reflect population growth. Additionally, a democracy, by making everyone nominally equal would create the expectation that everyone should be alike in opinion and sentiment. This supposition could lead to strife within the citizenry. Madison cautions against the expectations of pure democracy:

\begin{quote}
Theoretic politicians, who have patronized this species of government [pure democracy] have erroneously supposed that by reducing mankind to a perfect equality in their political rights, they would, at the same time, be perfectly equalized and assimilated in their possessions, their opinions, and their passions.\footnote{Madison, \textit{Federalist 10}, 51.}
\end{quote}

Despite Madison’s lofty ideals, Madison and the Federalists found themselves in tension with the Anti-Federalists. The \textit{Federalist Papers}, authored by James Madison, Alexander Hamilton, and John Jay, can be thought of as a dialogue with the Anti-Federalists. Although the Anti-Federalists, which included Robert Yates and Patrick Henry, wrote
articles expressing their vision of how the new Union should function, their writings were not collected until after the debates.

The Anti-Federalists saw two major problems with the proposed Constitution: (1) They believed that as written, the federal Constitution would not allow ordinary men to elect their best representatives due to the small size of the proposed deliberative body, and (2) The Anti-Federalists desired leaders who mirrored their constituency and wanted to use elections to achieve this reflection.160

The battle between the Federalists and the Anti-Federalists was a general dispute about the make-up of the new Union. However, two major themes get repeated in the discussion between the two. The first theme that I will address in this chapter is the problem of factions, or interest groups. The Federalists sought to neutralize the influence of factions. Meanwhile, the Anti-Federalists thought that the different interests operating in society should be respected and accommodated.

The second theme I will address in the Federalist and Anti-Federalist dispute was about the nature of representation. The solution to the questions about representation is connected to how each group understood factions. The Federalists thought that by electing intellectual elites into a small deliberative body, they could both diminish the influence of factions and protect the public good. Intellectual elites could overcome the problem of factions because they would not be easily swayed, and they would be able to make dispassionate choices. A small deliberative body would ensure that only the best of the best would be elected. They also believed that the representatives could function best if they were allowed to consult their own expertise in the decision-making process, rather than obeying

the wishes of constituents. Hence, the Federalists held conceptions of representation that were both filter and trustee, or independence.

The Anti-Federalists took the opposite view of representation. The Anti-Federalists preferred direct democracy, but saw representation as a reasonable alternative given the size of the newly formed nation. However, to the extent that they were willing to allow representatives, the Anti-Federalists thought that representatives should reflect the population as much as possible. Every portion of the population, including sizeable minorities should be assured that they would be represented in the deliberative body. One way to ensure representation of minorities would be to increase the size of a deliberative body. This increase in size served two functions: (1) it increased the likelihood that minorities would be represented, since there would be more possible seats in the deliberative body, and (2) it made the representatives more responsive because a larger deliberative body meant smaller individual districts. With smaller districts, the representatives would be better able to get to know their constituents, and make sure that the constituents’ wishes were being followed. Hence, the Anti-Federalists held conceptions of representation that were both mirror and delegate, or mandate.

The Problem of Factions

Factions are thought to come about as a result of the “diversity in human nature.” This diversity comes from two sources. The first source is the “fallibility in man’s reason.” That is, humans are sometimes mistaken about the right thing to do. The second source is the “diversity in the faculties of man from which rights of property originate.”161 That is, people are given different natural talents. Their ability to use these talents to own property creates

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class divisions, which in turn, form factions. The Federalists are preoccupied with the problem of factions, their view of factions was clearly influenced by the work of David Hume. Hume wrote of factions,

Factions subvert Government; render Laws impotent, and beget the fiercest Animosities among Men of the same Nation, who ought to give mutual Assistance and Protection to each other. And what shou’d render the Founders of Factions more odious is the Difficulty of extirpating Factions, when once they have taken rise in any State. They naturally propagate themselves for many Centuries, and seldom end but by the total Dissolution of that Government, in which they are planted.¹⁶²

Factions create chaos in the government and make laws less effective because the factions are constantly warring with one another and trying to twist the law to meet the needs of the individual factions. For Hume, factions are particularly odious because the very people who are supposed to have fraternal feelings for one another (the citizens) are against one another. The strife that arises from factions can last for centuries. Madison agreed with Hume’s characterization that factions introduce “instability, injustice and confusion” in the “public councils.”¹⁶³ The factions may introduce chaos in the government, but the factions themselves are often fairly organized around their common cause. Madison defines faction as:

a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens or to the permanent and aggregate interests of community.¹⁶⁴

Neither Hume nor the Federalists allow for the possibility that factions might be benign. For these two theorists, factions are necessarily selfish and destructive. They do not think that


¹⁶³ Madison, Federalist 10, 49.

¹⁶⁴ Madison, Federalist 10, 50.
factions might be useful for promoting a healthy self-interest for different groups of citizens. The interests that get promoted are likely to conflict with the welfare of the nation.\footnote{Hanna F. Pitkin, \textit{The Concept of Representation}, (Berkeley: University of California Press, 1967), 192.}

Factions wreak havoc as a result of the fighting among one another. Factions also cause damage when the members of a strong faction oppress the weak, a “condition of anarchy” similar to “a state of nature.”\footnote{Madison, \textit{Federalist}, 51.} The weaker faction needs protection against the stronger. The Federalists see protection of the weak factions against the strong a duty of the government. They also think that gradually the stronger factions will come to see the utility of having a government that protects everyone.\footnote{Madison, \textit{Federalist}, 51.}

The differences that lead to the formation of factions are significant. The differences that lead to factions can be “real or apparent, trivial or material.” Regardless of the nature of the factions, there is “always found to be a great deal of personal Animosity or Affection.”\footnote{Hume, “Essays,” 108.} Factions do not emerge where everyone feels similarly. However, Madison sees one cause of factions as the most common and longstanding – unequal property distribution.\footnote{Madison, \textit{Federalist 10}, 50.} Despite the Federalists’ recognition of the role that economic stratification played in the development of factions, and despite the Federalists’ contention that factions were among the greater dangers in society, the Federalists were not inclined to redistribute property. To do so would have been contrary to what the Federalists saw as among the important functions of government, that is, protection of property rights and protection of the freedom that enables some to accrue property. The Federalists were concerned with preventing the class and

\begin{footnotesize}
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\item[166] Madison, \textit{Federalist}, 51.
\item[167] Madison, \textit{Federalist}, 51.
\item[169] Madison, \textit{Federalist 10}, 50.
\end{itemize}
\end{footnotesize}
wealth distinctions from becoming the overwhelming feature of political life, but not by suppressing inequalities of wealth.\textsuperscript{170} The Federalists did not want either group, the rich or the poor, violating the rights of others.

Furthermore, even if class stratification could be resolved, other causes of faction would remain. In the \textit{Federalist 10}, Madison notes, “The latent causes of faction are thus sown in the nature of men.”\textsuperscript{171} People are naturally inclined to “fall into mutual animosities” and use the “most frivolous and fanciful distinctions… to kindle their unfriendly passions and excite their most violent conflicts.”\textsuperscript{172} Some of these differences that excite violent conflicts include different opinions on religion, different opinions on government, and attachments to ambitious leaders who make their fortunes by inciting people.\textsuperscript{173} So, the natural inclinations of people, coupled with their passions, also contribute to a climate where factions can flourish. Hume identifies another cause of faction. In addition to class jealousy and dissidence, factions can also be formed on the basis of friendship.\textsuperscript{174} People may come together and form bonds around their commonalities and mutual interests. Hume also acknowledges that factions can be formed with a mixture of dissidence and commonality.\textsuperscript{175} Whereas Madison thought that factions based on property were natural, he thought that factions growing on other sources were artificial because they are “founded on accidental

\textsuperscript{170} Erler, “Public Good,” 657.

\textsuperscript{171} Madison, \textit{Federalist 10}, 50.

\textsuperscript{172} Madison, \textit{Federalist}, 50.

\textsuperscript{173} Erler, “Public Good,” 656.

\textsuperscript{174} Hume, “Essays,” 107-108.

\textsuperscript{175} Hume, “Essays,” 107-108.
Hume also thought that some sources of faction were more worthy than others. Of factions that formed from interest versus factions that formed as a result of affect, the factions forming from interest were “the most reasonable and the most excusable.” In a possible explanation why Hume felt this way, Erler offers,

Those factions based on interest are more reasonable because they manifest a more immediate and predictable reflection of self-interest than do those factions based on principle (what we might loosely today describe as ideology) or affection – those factions Madison characterized as arising from attachments to ambitious leaders or “persons of other descriptions.”

In addition to the causes of faction found naturally among people, the form of government can also contribute both to the formation of factions and their continued ability to trouble the state. The Federalists saw pure democracy as one form of government that was powerless to contain either the formation of factions or the damage that they could do. Madison wrote that pure democracies could “admit of no cure for the mischiefs of faction.” Democracy is powerless to prevent faction because communication is easy between the citizens which could lead to the rise of a common majority. There is nothing to check the behavior of the majority. Madison was concerned that the good and virtuous citizens would succumb to the “superior force of an interested and overbearing majority.”

In 1781, Madison expressed concern about the overbearing majority in a letter to Thomas

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177 Hume, “Essays,” 111.
178 Erler, “Public Good,” 656.
179 Madison, Federalist 10, 51.
180 Madison, Federalist 10, 51.
181 Madison, Federalist 10, 49.
Jefferson, “What is to protect the Southern States, and for many years to come, against the insults and aggressions of their northern brethren?”182

Republics are better equipped to contain factions because the deliberative body is comprised of representatives who can set the topics of discussion for the country. Yet, small republics are susceptible to the dangers of factions because, in small republics, “every domestic quarrel becomes an affair of state.”183 The Federalists seem to agree with this assessment. Hence, their contention that just as a republic is better able to contain the dangers of faction, a large republic is better than a small one.184 The nuisances of faction are less pronounced in a large republic. A large republic was also more likely to be heterogeneous and scattered. In Federalist 51, Madison envisions a society that is broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority will be in little danger from interested combinations of the majority.185

These differences would prevent citizens from organizing themselves into factions.

The discussion in the Federalist 10 is a discussion of the “failure of the American constitutions to control the violence of faction” along with the solutions to be found in the proposed Constitution.186 In Federalist 10, Madison considers two possible solutions for removing the causes of factions. The first solution is to destroy liberty. Madison notes, “Liberty is to faction what air is to fire, an ailment without which it instantly expires.”187

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184 Madison, Federalist 10, 52.

185 Madison, Federalist 51, 164.

186 Morgan, “Madison’s Theory,” 858.

187 Madison, Federalist 10, 50.
However, Madison saw this possible cure as worse than the disease because he thought that one of the primary purposes of government was to protect liberty. The second possible solution is to give everyone the same opinions, passions, and interests. Madison saw this as impracticable because people will form different opinions “as long as the reason of man continues to be fallible.”¹⁸⁸ Ultimately, Madison decides that a better strategy is to control the effects of faction. This can be done by adopting a scheme of representation. A scheme of representation “promises the cure for [faction] which we are seeking.”¹⁸⁹ Representation has to occur within a large republic in order to hinder the ability to communicate and carry out “schemes of oppression.”¹⁹⁰ The success of representation would be dependent on having a structure of representation that is strong enough and flexible enough to control the struggle of opposing interests.¹⁹¹

Although Madison realized that factions were here to stay, he thought that the proper schema of representation could keep factions under control. He also thought that selecting the best representatives could contain the potential damage of factions. For this reason, the representative should be one who is not easily swayed and who can remain impartial toward the factions in his district. This enlightened statesman, like Rousseau’s legislator, could understand the passions of the people without being influenced by them.¹⁹² The Federalists sought to replace institutionalized factions with the idea of public virtue.¹⁹³

¹⁸⁸ Madison, Federalist 10, 50.
¹⁸⁹ Morgan, “Madison’s Theory,” 852.
¹⁹⁰ Madison, Federalist 10, 50-51.
¹⁹² Erler, “Public Good,” 661.
¹⁹³ Erler, “Problem of Public Good,” 650.
The Problem of Representation

The Federalists and Anti-Federalists both had to confront the challenges of establishing the best representative system for the Union. They both needed to take into account the complexities inherent in trying to manage a large-scale society. Some of these complexities include the desires of the constituents, what specific roles the representatives will play regarding the constituents (delegate? trustee?), how the representatives will interact with one another (as colleagues? as adversaries?) Pitkin makes the point that defines the system of representation is not,

any single action by any one participant, but the overall structure and functioning of the system, the patterns emerging from the multiple activities of many people.194

The Anti-Federalists writer Federal Farmer notes,

[T]hough no feature in government can be more important, perhaps, no one has been less understood, and no one that has received so imperfect a consideration by political writers.195

Both the Federalists and Anti-Federalists recognized that among the duties of representatives included advancing the common good. The worry for both groups is how best to bring about the common good. The political representative has to remember that she represents a constituency rather than a single principal, and the representative has to be responsive to her entire constituency.196 The Federalists and Anti-Federalists were especially sensitive to the role of the representative after having suffered the disenfranchisement of

194 Pitkin, 222.


196 Pitkin, 215.
virtual representation under British rule. Madison explained the problem of creating an appropriate means of representation while guaranteeing that the government did not overstep its authority:

In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

To safeguard against the lack of control in the government, the Federalists thought that a small deliberative assembly would be best. In addition to being comprised of elite characters, it would be easier to maintain order in a small assembly. Madison notes that even when the most fit characters are involved, when assemblies become too large, “passion never fails to wrest the scepter from reason.” However, the Anti-Federalists saw a different problem. Writing in November 1787, the Anti-Federalist, Brutus (Robert Yates), expressed the belief that small bodies were more susceptible to corruption. Whereas both the Federalists and the Anti-Federalists thought that the representatives should be of good character, the Federalists thought that the superior virtue of the representatives coupled with the checks and balances of the proposed Constitution would be sufficient to minimize any corruption. The Anti-Federalists did not think the Constitution held enough checks and balances to maintain the virtue of the representatives. Finally, the Federalists saw representation as a means to improve upon direct democracy by selecting the best men to

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197 Jean Yarbrough, “Thoughts on The Federalist’s View of Representation,” *Polity*, Volume 12, Number 1 (Autumn 1979), 71.


201 Frohnen, *Anti-Federalists*, xxii.
“sift and weigh” the wishes of their constituents.\textsuperscript{202} Meanwhile, the Anti-Federalists, while preferring direct democracy, saw representation as a matter of expediency.\textsuperscript{203} The Anti-Federalist, Maryland Farmer, was so mistrustful of representation that he expressed his admiration for the Swiss as having a better form of government in that every Swiss farmer is by birth a legislator, and the fundamental law of the Swiss is to never trust representatives.\textsuperscript{204}

Bruce Frohnen provides a nice summary of the conflict over representation that faced the Federalists and the Anti-Federalists:

\textit{It has often been remarked that Federalists viewed representation as a kind of filter that would sort out those with the greatest virtue and wisdom for public service. Anti-Federalists, on the other hand, saw representation as a kind of mirror reflecting as closely as possible the experience and interests of the people as a whole… Anti-Federalists’ fear of political elites and aristocracies of any kind (including aristocracies of talent) led them to reject the Federalist model, in which the people, \textit{incapable of ruling themselves, were deemed capable of choosing rulers who in turn would serve the people well} (italics mine).}\textsuperscript{205}

Frohnen raises an interesting paradox. The Federalists did not offer a clear explanation of how citizens, the masses of whom were not sophisticated enough to be representatives on the Federalists’ view, were sophisticated enough to select the best people to represent them. The Federalists view of representation may shed some light.

\textbf{The Federalists: Filter and Trustee}

\begin{quote}
Madison and Hamilton thought that unbridled democratic rule was problematic. As such, they did not think that representation should mimic pure democracy.\textsuperscript{206} Representation should be an improvement on direct democracy. Representatives are supposed to serve the
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\textsuperscript{202} Yarbrough, “Thoughts,” 72.
\textsuperscript{203} Lee, “Brutus-Publius,” 1081.
\textsuperscript{204} Frohnen, \textit{Anti-Federalists}, 602-3.
\textsuperscript{205} Frohnen, \textit{Anti-Federalists}, xxvii.
\textsuperscript{206} Yarbrough, “Thoughts,” 67.
role of refining public opinion. The role of the representatives is clarified in *Federalist 10*.

The effect of representation is,

> to refine and enlarge the public views, by passing them 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 least likely to sacrifice it to temporary or partial considerations.\(^{207}\)

One quality the citizens should seek in their representative is that of enlightened statesman. The enlightened statesman will be in the best position to discern the interests of the country as a whole. The enlightened statesman will be governed by the desire to do what is best for the country because this person exhibits a unique sense of patriotism and duty.

Although the enlightened statesman is the ideal, Madison is clear that we will not always have a deliberative body comprised solely of enlightened statesmen. However, Madison is convinced that most of the time the deliberative body will be so comprised. Also, on the occasions that the best representatives are present in the deliberative body, these representatives will inspire the less enlightened. Furthermore, Madison is aware that the primary role of the government is to provide stability, not to enforce virtue.\(^{208}\) He thought that a well formed republic could minimize the damage that could be done by those who did not have the best interests of the republic at heart. The structure of the Union would be such that, for the vain, “ambition would counteract ambition.” Although, Alexander Hamilton also hoped to attract the most enlightened citizens to public office, he was more pragmatic in his hopes. Hamilton thought that what would keep “even the best men faithful to their trust” was the dependence on their constituents for reelection.\(^{209}\)

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\(^{207}\) Madison, *Federalist 10*, 52.

\(^{208}\) Johnson, *Anti-Federalist*, 660.

\(^{209}\) Yarbrough, “Thoughts,” 78.
as “virtuous” and “enlightened” may have been a nice carrot to motivate proper behavior within the deliberative body. But, just in case, the threat of not being reelected should have been an effective stick.

Together, Madison and Hamilton viewed the process of representation as one of “refinement.” This refinement occurs in two ways: (1) The representatives themselves are refined because they consist of only the most eminent citizens, and (2) This select group of enlightened citizens filters the particular views of the constituents, thereby creating policies that are best for the entire country, rather than provincial interests. Thus, the refinement, or “filtering” can refer both to the representatives and the act of representing in which they engage.

Because the representatives are from the elite class and presumably have access to information that others lack, Hamilton saw it as “unwise” for the representative to bow to his constituents’ wishes. Those who saw the representative’s role as one where the representative exercised his judgment to make decisions for the populace were not intent on ruling for the love of glory. They saw it as a duty. Explained Edmund Burke,

Your Representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion.

Burke’s language is strong and unmistakable. On the trustee conception, the representative is not merely permitted to exercise her judgment; she does wrong in her role as representative if she fails to exercise her judgment. She is elected by the citizenry with the expectation that she will exercise her judgment.

\[210\] Yarbrough, “Thoughts,” 69.

\[211\] Johnson, Anti-Federalists, 659.

\[212\] Johnson, Anti-Federalists, 659.
Even with the most enlightened statesman who takes his trustee duty seriously, another way to protect the country against potential abuse is to create a large republic. The republic has to be large enough to guard against the cabals of the few, but not so large as to bring confusion into the republic.\textsuperscript{213} The proportion of the most virtuous citizens available to fill public office would also increase, and because the electorate is larger, those who get elected would be less susceptible to corruption. Conversely, the greater number of voters makes it more difficult for the candidate to swindle voters.\textsuperscript{214}

Unlike the Anti-Federalists, the Federalists do not believe that the public good consists in reconciling and reflecting claims of competing interest groups.\textsuperscript{215} For the Federalists, public good is independent of private interest. This is why the Federalists are able to reject the idea of the mirror conception of representation. The Federalists think that representatives will be naturally connected and sympathetic to their constituents.\textsuperscript{216} The Anti-Federalists find this view unsatisfactory. The Anti-Federalists argue that if the representatives are truly the representatives of the people, then the representatives should have some similarity to the people.\textsuperscript{217} The Anti-Federalists are also concerned that they may be overrun by a strong majority or an unresponsive representative. The fact of voting would not address either of these potential problems.

\textsuperscript{213} Morgan, “Madison’s Theory,” 860.

\textsuperscript{214} Madison, \textit{Federalist 10}, 52.

\textsuperscript{215} Yarbrough, “Thoughts,” 81.

\textsuperscript{216} Yarbrough, “Thoughts,” 74.

\textsuperscript{217} Yarbrough, “Thoughts,” 67.
The Anti-Federalists: Mirror and Mandate

The Anti-Federalists find representation to be only a substitute for direct participation. Representation enables decisions to be made where it would be impossible or impractical to gather the entire populace to make decisions. However, the Anti-Federalists were still leery of representation; they never embraced it with the zealousness of the Federalists. The Anti-Federalists believed that even if the most virtuous people were elected to be representatives, those virtuous souls were no less incorruptible than anyone else.218 As a result, any representative schema has to have safeguards against abuse by the representatives jeopardizes freedom for everyone.

To the degree that the Anti-Federalists were willing to tolerate representation, they wanted the representatives to reflect the wishes and interests of the population, much like a random sample would.219 It is only when the representatives mirror the population that the representatives can truly have the requisite knowledge about their constituents to properly perform the job of representing. In an essay published on November 15, 1787, Brutus, the Anti-Federalist explains:

The very term, representative, implies, that the person or body chosen for this purpose, should resemble those who appoint them – a representation of the people of America, if it be a true one, must be like the people. It ought to be so constituted, that a person, who is a stranger to the country, might be able to form a just idea of their character, by knowing that of their representatives. They are the sign – the people are the thing signified. It is absurd to speak of one thing being the representative of another, upon any other principle.220

218 Johnson, Anti-Federalists, 651.
219 Johnson, Anti-Federalists, 657.
220 Frohnen, Anti-Federalists, 395.
For the Anti-Federalists it is not merely ideal that the representative reflect the citizens in the society, it is the very definition of what it means to have a representative. Being sufficiently like the people being represented is a necessary condition for representation. More than a similarity of taste and sensibility, the representative who closely resembles those who she represents possesses a certain \textit{je ne sais quoi}s that will enable her to connect with her constituents. This feature is lacking in those who do not share this similarity, regardless how sincerely motivated a different representative may be. The Anti-Federalists would agree that, “Even an exemplary blue triangle will never adequately signify what it means to be a red circle.”\textsuperscript{221}

The Anti-Federalists are concerned with ensuring that each class of citizen in society is reflected, or at the very least, has a reasonable chance of electing their candidates. But, perhaps the Anti-Federalists are over-reliant on the mirror conception of representation to protect the minority. It seems that once in the deliberative body, those in the minority still run the risk of having their interests ignored.\textsuperscript{222} So the problem remains; it is simply pushed back a level. The Anti-Federalists need an additional mechanism to ensure that minorities are protected. John Stuart Mill anticipated this problem. For Mill, the fact of the presence of minorities in the deliberative body would raise the level of discussion and introduce issues that otherwise might not have been considered. For this reason, the presence of minorities in the deliberative body has an impact. The Anti-Federalist do not make any such claim, but given the emphasis they place on being visible in the legislature, they might have shared Mill’s belief that presence in the legislature would be sufficient to have impact.


\textsuperscript{222} Yarbrough, “Thoughts,” 81.
Lest there are too many interests to be represented in the deliberative body without confusion, the Anti-Federalists advocate a small, homogenous government to maintain a system of representation of interests.\(^{223}\) In a similar vein as Rousseau’s recommendation in *The Social Contract*, societies that are small and homogenous will not have to grapple with as many competing interests as societies that are large and heterogeneous. Small societies have the added benefit of containing people who know one another and are more willing to protect one another and approach deliberation with a different degree of openness than they would have if they were deliberating with strangers. Diversity destroys republican virtues because in a society that is diverse, governments turn to “force or despotism” as an “expedient” means for ruling because the people have no common bonds or interests to unite the citizenry.\(^{224}\) While the Anti-Federalists are willing to represent the interests of the different elements of the citizenry, they do not want the citizens to be radically different from one another.

The diversity that the Anti-Federalists were most concerned with was class diversity, with the Anti-Federalists not wanting the wealthy to take advantage of the rest. The Anti-Federalists felt that if the wealthy had a disproportionate presence in the deliberative body, they would only care about their own interests. A few merchants, those who are outgoing and “ambitious” might be able to gain the attention of the wealthy, but most merchants would not be heard. Even fewer yeomen would have a place. The wealthy would be completely ignorant of the concerns of the “middling class.”\(^{225}\)

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\(^{224}\) Erler, “Public Good,” 655.

\(^{225}\) Frohnen, *Anti-Federalists*, 396.
This worry about being taken advantage of by wealthy interests is, in part, what motivated the Anti-Federalist, Brutus, to protest the Southern states’ desire to count their slaves for the purposes of apportioning representatives by population. This would allow the Southern states to gain an unreasonable share of the government. Additionally, by being counted, the slaves would not receive any additional “strength, protection, nor defence,” but the contrary.\textsuperscript{226} Brutus asked, “If they have no share in government, why is the number of members to be increased on their account?” Besides, their continued bondage was in defiance of “every idea of benevolence, justice and religion, and contrary to all the principles of liberty, which have been publicly avowed in the late glorious revolution?”\textsuperscript{227}

The citizens could be protected from domination by the wealthy within the deliberative body by expanding the deliberative body. A small body would lend itself to favoring the wealthy because there would be fewer seats to potentially win, and the wealthy would have undue influence in guaranteeing wins for themselves. They would essentially be in a position to buy their seats. A smaller body would also make it more difficult for the minority to participate by virtue of the minority’s small size.

The responsiveness of the representative is also of primary concern for the Anti-Federalists. For the Anti-Federalist, responsiveness entails not only listening to constituents’ concerns, but also abiding by the wishes of the constituents. The Anti-Federalists held a strong mandate conception of representation. Expanding the deliberative body would better equip the representative to respond to his constituents. The Federal Farmer explains it thus,

\textsuperscript{226} Frohnen, \textit{Anti-Federalists}, 394.

\textsuperscript{227} Frohnen, \textit{Anti-Federalists}, 393.
Where there is but one representative to 30,000 or 40,000 inhabitants, it appears to me, he can only mix, and be acquainted with a few respectable characters among his constituents.\textsuperscript{228}

The Anti-Federalists expected that government was the mechanism through which the citizens could exercise their wills.\textsuperscript{229} Hence, it becomes clearer why it was important for the Anti-Federalists to create an environment where the representatives could easily be responsive.

The desire for representatives to act only on the mandate of the citizens would be undergirded by the constant vigilance of the citizens. The Anti-Federalists believed that even the most virtuous of representatives would be tempted by “gilded bait” to become corrupt.\textsuperscript{230} The Anti-Federalist, Centinel, writes,

\begin{quote}
The annals of mankind demonstrate the precarious tenure of privileges and property dependent upon the will and pleasure of rulers; these illustrate the fatal danger of relying upon the moderation and self-denial of men exposed to the temptations that the Congress under the new constitution will be…. Therefore, liberty is only to be preserved by a due responsibility in the government, and by the constant attention of the people.\textsuperscript{231}
\end{quote}

To summarize, the safeguards that the Anti-Federalists advocate to protect the minority (and everyone else) include a tight reign on government, the constant vigilance of the citizens, a large deliberative body, frequent elections, and a deliberative body that both reflects and accepts the mandates of the citizens.

The debate between the Federalists and the Anti-Federalists highlights important disagreements in how the concept of representation and the role of the representative are understood. Descriptive representation and the delegate/trustee conceptions of

\textsuperscript{228} Frohnen, \textit{Anti-Federalists}, 203.

\textsuperscript{229} Frohnen, \textit{Anti-Federalists}, xxix.

\textsuperscript{230} Frohnen, \textit{Anti-Federalists}, 84.

\textsuperscript{231} Frohnen, \textit{Anti-Federalists}, 86.
representation, concepts that were briefly introduced in Chapter One, are more clearly articulated in this debate. The appeal of descriptive representation will be even more clearly articulated in Chapter Four, “John Stuart Mill: Proportional Representation and the Intellectual Elite.” Also in Chapter Four, we will see the first preoccupation with a particular kind of minority and whether representative government can protect specific minorities.
CHAPTER FOUR

John Stuart Mill: Proportional Representation and the Intellectual Elite

Many discussions on the history of political philosophy and representative government focus almost exclusively on Hobbes, Locke, and Rousseau, and to a lesser extent, Thomas Jefferson, James Madison, and Alexis de Tocqueville. All of these theorists have interesting things to say about representative government—especially Rousseau (who took a dim view of representative government in favor of direct participation) and Madison (who thought that factional interests would be so unstable as to cancel out one another). Each of them anticipated and attempted to resolve different potential problems with representative government. I have chosen to focus this chapter on John Stuart Mill because he devotes considerable time to my particular interest—how minorities fare under schemes of representative democracy.

In Considerations on Representative Government, Mill makes the case for representative democracy as the ideal form of government. Mill used “representative government” and “representative democracy” interchangeably, although I am aware that a representative government need not be a democratic one and that a democracy need to be representative. I will give an exposition of Mill’s thoughts on representative democracy, and then I will raise and evaluate two objections to Mill’s view.

Mill makes his case for representative democracy by considering the weaknesses of despotic rule. Unlike Hobbes, who views the despot as a central figure in civil society, Mill is concerned with allowing the people to be more involved in how their government operates. Mill does not assume that a despot has to be cruel or uninterested in the needs or his (or her) subjects for despotism to be a poor form of government. Even under the best possible scenario, where the despot is deeply concerned about his subjects and refrains from oppressing them, this form of government is still inadequate.233 Focus on the behavior of the despot mislocates what Mill sees as the most substantial problem with despotism. For Mill, the essential problem with despotism is that the people do not think for themselves. That is, even the consideration of the collective interest is done by the despot and not by the people. It is this “abdication of their own energies” that is the tragic flaw of despotism.234 Under such an arrangement, the citizenry becomes singularly concerned with having its material needs met. Only those who are naturally intellectually curious and who understand the intrinsic value of political “speculation” will care about how the government operates.235 It is important to understand that one significant aspect of the political process is the opportunity that it affords the citizenry to become educated. The educative aspect is an intrinsic good of political participation. So, the flaw of despotism is not just that the people do not make their own decisions, but also that the process of becoming educated about the political system does not occur.

That Mill would view lack of interest in the fundamental workings of government as a significant flaw of despotism reveals one of Mill’s important assumptions about the ideal


234 Mill, CRG, 59.

235 Mill, CRG, 59.
form of government. The ideal form of government must have a component that requires citizens to have and express an interest in how the government runs. Additionally, the ideally best form of government will be the one with the greatest amount of “beneficial consequences” for the citizenry. For him, this is representative democracy. However, Mill is willing to claim that representative democracy is not going to be practical everywhere. One prior condition for representative democracy is going to be a sufficient state of civilization. People in (what Mill deems as) inferior or backwards societies will not be in a position to appreciate the complexities of a representative democracy, nor would they be able to conduct one properly.

Protection of the Minority

Once the civilization condition is met, Mill believes that societies will be in a position to achieve representative government. Yet, even societies that claim to have representative democracies are far from ideal. This is because, according to Mill, democracy as practiced is unequal in favor of the dominant class. This danger of domination by one class over all others is not unique to democracy. All forms of government are susceptible to it, yet representative democracies are in the best position to overcome this danger. For Mill, the dominant class is that class which comprises the numerical majority. The numerical majority is so strong that it possesses practically the only voice in the state. The numerical majority is going to be a mostly fixed group. This will not be a population that is unstable (a la Madison’s account). Recall that Madison believes that people have a variety of interests. So,

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236 Actually, Mill sees representative as a second best option. Direct democracy is actually a better option, but it is impractical in all but the smallest locales.

237 Mill, CRG, 64.

238 Mill, CRG, 141.

239 Mill, CRG, 145.
the composition of the majority will depend on the specific issue at hand. Mill thinks that since the majority will be largely class-based (and class status is a more permanent condition), the group that comprises the majority will be fixed. The Millian view is that with little variance, the majority will be comprised of the same people in a given society. Even though Mill concedes that the minority should have a lesser voice than the majority, he is adamant in pointing out that “lesser voice” does not mean “no voice.”

Furthermore, Mill sees an ambiguity in what is understood as “democracy. Two distinct concepts, the “pure idea of democracy” and “democracy as practiced” are confounded as democracy. The difference between these two concepts lies in how representation is understood. The pure idea of democracy is a government of the whole people, with everyone represented. That is, person for person, everyone is effectively represented because everyone’s needs are taken into account. Of course, taking everyone’s needs into account is a condition of the deliberative process on Mill’s view. This does not mean that everyone’s needs will be satisfied. Yet, it ensures that we will have all the relevant facts before making a decision.

The best way to achieve this ideal is through proportional representation. Under a scheme of proportional representation, the citizenry is understood as a collection of groups with a variety of, often incommensurable, interests. For Mill, one role of the representative is the representation of interests. Each group would have representation in proportion to their numbers. The purpose of this scheme is two-fold: (1) it ensures that all groups will have a voice in the deliberative process, and (2) it keeps the majority from monopolizing the representative body. By adopting a proportional model, Mill is appealing to a mirror

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240 Mill, CRG, 146.
conception of representation. Later, I shall discuss how Mill thinks proportional representation achieves this end.

Democracy as practiced involves government of the whole by a mere majority, exclusively represented.\textsuperscript{241} That is, the majority chooses the representatives, and the representatives act in such a way that the majority’s needs are the needs most likely to be considered during deliberation of the representative body. This is the mode of representation that occurs where the citizenry elects representatives by strict majoritarianism. The selection of representatives by strict majoritarianism means that at any given time, up to 49% of the citizenry may strongly disagree with the representative. It also means that up to 49% of the constituency’s needs may not be met. There need not be any malevolent intent on the part of the representative – this failure to address adequately the needs of minorities could be attributed to malevolence, but it could also be ignorance about the needs of minorities. Mill tells us,

\textit{We need not suppose that when the power resides in an exclusive class, that class will knowingly and deliberately sacrifice the other classes to themselves: it suffices that, in the absence of its natural defenders, the interest of the excluded is always in danger of being overlooked; and, when looked at, is seen with very different eyes from those of the persons whom it directly concerns.}\textsuperscript{242}

Any group excluded from the political process is not likely to have its needs and interests accurately represented by others.\textsuperscript{243} Under systems of democracy as it is actually practiced, it is not just the minority who suffers, but democracy itself fails to achieve its ideal.\textsuperscript{244}

\begin{flushleft}
\textsuperscript{241} Mill, \textit{CRG}, 145.
\textsuperscript{242} Mill, \textit{CRG}, 66.
\textsuperscript{243} Thompson, 19.
\textsuperscript{244} Mill, \textit{CRG}, 147.
\end{flushleft}
When the practice of democracy is reduced to the actions of the numerical majority, democracy becomes a reflection of sectional or class interests, which leads to different conduct than there would be if there were instead “impartial regard for the interest of all.”

Although the ascendancy of the numerical majority may be less unjust than many other forms of government, rule by numerical majority is still subject to the same kinds of dangers. In fact, rule by numerical majority may be more unjust in that when government lies in the hands of one or a few, the majority may be strong enough to protest. But when the majority rules, the minorities left in its wake are often not powerful enough to resist.

Ultimately, Mill thinks, the aim of representative democracy is for the citizenry to be able to come together and make social policy based on the general interest, rather than mere individualized or small group interests. People have both selfish, private interests and shared public ones. However, in civil society, the true interest is public. Pursuit of private interest is misguided. In Mill’s conception, the general interest operates similarly to Rousseau’s general will. It is the idea of what is best for society overall, rather than what may be best for particular individuals or segments of society. Both Mill and Rousseau favor civic education as a means for citizens to discover the general will. Education gives “the national form.” Governments should direct [the citizens’] tastes and opinions that they will be patriotic by inclination, passion, and necessity.

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245 Mill, CRG, 133.

246 Mill, CRG, 164.


be good and solid unless the law rules the citizens’ hearts. So long as the legislative force
does not reach that deep, the laws will invariably be evaded.”

Rousseau thinks that civic minded people will do this best (and that people are
roughly equal, so the mere fact of being more learned will not earn one substantial
advantage.) However, Mill thinks that inegalitarian recognition of superior intelligence
will best achieve this. Although Mill recognizes that our individual interests will often be
varied and incommensurable, he thinks that there is a (discoverable) general interest that the
citizenry should try to know and implement. The general interest will be that which is best
for the whole. Individuals and small groups need not abandon their interests. However, their
interests are but one variable in determining what is best for the whole.

Nevertheless, people are generally either too self-interested or too unsophisticated to
think in terms of the general interest. Mill is aware that loyalty towards one’s group or
faction will often prevail against the general interest. The way to resolve this difficulty is
not to attempt to remove the interests that people have, but to opt for a scheme of
proportional representation, rather than representation by strict majority. Contra Madison,
Mill does not think that merely balancing factions is sufficient because, by itself, balancing
factions does not yield policies that are in the general interest. This is because the factions
will still exist, and either (1) attempt to override the rest or (2) the infighting will produce
gridlock that will make it nearly impossible to create policies. For Mill, anything less than
proportional representation is not equal government, but a government of “inequality and

249 Rousseau, *Poland*, 179.

250 Thompson, 45-7, *en passant*

251 Thompson, 16.

252 Thompson, 70.
privilege,” which is “contrary to the principle of democracy, which professes equality as its very root and foundation."\textsuperscript{253} Rulers and citizens alike are likely to pursue self-interest. Even benevolent leaders who genuinely attempt to act according to citizens’ interests cannot fully know what those interests are unless citizens have an opportunity to express them.\textsuperscript{254}

Proportional representation serves as the means by which citizens protect their interests. The justification for proportional representation is that, “human beings are only secure from evil at the hands of others in proportion as they have the power of being and are self-protecting.”\textsuperscript{255} Proportional representation also constrains power so that no one group can become so powerful as to render all others “politically insignificant”.\textsuperscript{256}

That the minority must yield to the majority, the smaller number to the greater, is a familiar idea; and accordingly, men think there is no necessity for using their minds any further, and it does not occur to them that there is any medium between allowing the smaller number to be equally powerful with the greater, and blotting out the smaller number altogether.\textsuperscript{257}

Proportional representation is an attempt to find the medium that heretofore people have lacked the imagination to seek. Presumably, each faction’s representative will advocate for the interests of his or her respective group.

This is a short term goal of proportional representation. In the long run, the deliberative body will continue to be proportionally represented, but the representatives will become sophisticated enough to weigh all of the relevant interests and glean the general interest from all the relevant interests. The representatives do not abandon the interests of

\textsuperscript{253} Mill, \textit{CRG}, 146.

\textsuperscript{254} Thompson, 18.

\textsuperscript{255} Mill, \textit{CRG}, 65.

\textsuperscript{256} Mill, \textit{CRG}, 170.

\textsuperscript{257} Mill, \textit{CRG}, 145.
those whom they represent. Rather, they are able to understand those interests in the context of doing what is best for the whole. This is one reason that Mill endorsed a trustee conception of representation, rather than a delegate conception of representation. Even though the representative should mirror the population, the representative should consider all problems in context of the whole, and consequently, needs to be able to act according to his best judgment. In this regard, the mirror conception of representation is compatible with the trustee conception of representation.

Although the representatives are to remain vested in the needs of those they represent, representatives are also supposed to understand this higher calling. Additionally, potential representatives are supposed to have the capacity to have a “more extended sense of sympathy or concern for the general interest” which requires “a greater appreciation of the more remote consequences of actions and a more highly developed imagination.” These are qualities that Mill thought only existed among the most educated, not due to any innate characteristics of the educated, but the fact of education would lead to the ability of the citizenry to make choices that reflected the general interest, rather than mere individualized interest. This political goal is one purpose of education. Mill thought that education should be available to all so that everyone would have the opportunity to become the best possible citizens.

As the entire citizenry becomes more educated, voters get to be in a better position to consider the public (or general) interest, rather than their private interests. However, Mill concedes that it is inevitable and even sometimes desirable that citizens’ opinions about their

258 Thompson, 17.
259 Thompson, 97.
own interests and substantive political issues influence their choice of representatives. But, education would improve the quality of those opinions.\textsuperscript{260}

Mill specifically addresses two dangers inherent in representative democracy that proportional representation is supposed to rectify: (1) the danger of a low grade of intelligence in the representative body and in the popular opinion which controls it, and (2) the danger of class legislation on the part of the numerical majority, since the numerical majority is likely to be comprised of the same class.\textsuperscript{261} The principle of competence is Mill’s solution to the problem of a low grade of intelligence in the representative body. According to the principle of competence, “democracy should give as much weight as possible to superior intelligence and virtue in the political process”. Those of superior intelligence are supposed to be granted additional weight because, as representatives, they are in the best position to promote the true interests of the citizenry. In general citizens remain unaware of their true political interests because they are distracted by immediate gain.\textsuperscript{262}

The natural tendency of (strict majoritarian) representative democracy is toward collective mediocrity.\textsuperscript{263} This is because due to its structure, the goal of strict majoritarianism is to get the most votes (in order to win), \textit{not} to put the most competent person in office. In order to get the most votes, candidates must be as unobtrusive and inoffensive as possible. So, strict majoritarian representative democracy forces us to select from a pool of potential candidates who tend not to make strong decisions or display capacity for strong leadership. This problem becomes more acute in larger locales.

\textsuperscript{260} Thompson, 21.

\textsuperscript{261} Mill, \textit{CRG}, 144.

\textsuperscript{262} Pitkin, 205.

\textsuperscript{263} Mill, \textit{CRG}, 160.
The Hare System

There are two distinct kinds of competence that Mill employs: (1) instrumental competence and moral competence. Instrumental competence is the “ability to discover the best means to certain ends and the ability to identify ends that satisfy individuals’ interests as they perceive them. Moral competence is the “ability to discern ends that are intrinsically superior for individuals and society.”264 One example of the use of instrumental competence is voting behavior. In addition to supporting political education for the citizenry, Mill proposed plural voting and personal representation, or the Hare system, as means to ensure that the votes of the competent were decisive. According to Mill’s plural voting scheme, instead of “one person, one vote,” the number of votes a person potentially could have would be determined by individual intelligence. Mill suggested allocating votes according to occupation on the assumption that occupation was a reflection of intellect. In order to ensure fairness in the procedure, Mill advocated equal access to education so that if one failed to achieve, it would be one’s own fault.

The Hare system of proportional representation was developed by Thomas Hare. Mill wrote of the Hare system,

[It is] a scheme which has the almost unparalleled merit of carrying out a great principle of government in a manner approaching to ideal perfection as regards the special object in view, while it attains incidentally several other ends of scarcely inferior importance.265

Mill was so convinced of the superiority of the Hare system that he noted,

264 Thompson, 54-55.
265 Mill, CRG, 153.
Had a plan like Mr. Hare’s by good fortune suggested itself to the enlightened and disinterested founders of the American Republic,… democracy would have been spared its greatest reproach and one of its most formidable evils.\textsuperscript{266}

According to the Hare system, citizens would be allowed to rank preferences. Representatives would be chosen based on the total number of votes divided by the total number of seats. Any representative garnering the appropriate number of votes (the quota) would be awarded a seat until all seats were filled. The ballots would not be restricted to the local candidates. Any elector could vote for any candidate so that those electors who did not want to be represented by any of the local candidates would still have a chance at being represented. Votes would be counted according to the preferences of the voters, even though generally only the first preference would be counted. However, names further down on the voters’ list of preferences could be counted if their first choice did not make the quota.

Mill sees numerous benefits of adopting a scheme like the Hare system: (1) Proportional representation becomes more secure. In many representative systems, representation is only secure for the major political parties. Sometimes if there is a large enough concentration of a minority in a locale, they can ensure representation for themselves. However, those outside of the major party system and minorities who find themselves scattered among the population or whose numbers are too small to make a difference even if they voted as a bloc, often find themselves without adequate representation. (2) No elector would be represented by someone she had not chosen. Being able to rank preferences among many candidate greatly increases the odds that at least one candidate on a voter’s list could reach the requisite quota. (3) Every member of the legislative body would represent a unanimous constituency selected from the country as a whole, not merely from “the

\textsuperscript{266} Mill, CRG, 160.
assortment of two or three perhaps rotten oranges.” (4) Minorities would get candidates because they could look beyond their locales. For example, the intellectuals in a given district would be protected from total lack of representation because they would be able to fill their ballot with national figures. (5) The intellectual qualifications of the representatives would be more secure. “Hundreds of able men of independent thought, who would have no chance whatever of being chosen by the majority of any constituency” would now have a chance being elected because these candidates could cobble together enough votes from each district to make the quota. (6) The standard for representatives would generally be raised, even among the majority. The majority would now be forced to put forth their best candidates so that the majority candidates would be able to compete. (7) Representatives who are morally competent would have a better chance at winning for the same reasons that intellectually stronger candidates would have a better chance at winning. Morally competent leaders would be able to resist the sinister influences in government and in the numerical majority.  

Critics of the Hare system lament the loss of the “local character of representation,” to which Mill raises the question why localities seem to be the only means for arranging the national body.  

The Intellectual Elite  

The other danger, the danger of class legislation by a homogenous numerical majority, is another important concern for Mill. Critics of Mill charge him with preferring proportional representation in order to protect the rights of the wealthy against a poorer

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267 Mill, CRG, 156-159, *en passant*.

268 Mill, CRG, 167.
majority.\textsuperscript{269} However, although Mill is concerned with the class interests of the wealthy and the intelligentsia (these are the cases he discusses most thoroughly), he is willing to extend his analysis to any minorities who find themselves similarly situated. That is, minorities who would be powerless and politically irrelevant under a scheme of strict majoritarianism. Mill understands that political tyranny by the majority can also take the form of racial, religious, geographic, or gender minorities. The constituencies to which these minorities belong are under-represented, misrepresented, or not represented at all.\textsuperscript{270} Mill takes the view that, in a true democracy, minorities should be represented.\textsuperscript{271}

One benefit of ensuring that minorities are represented is that in addition to increased participation, which Mill sees as a good in itself, minorities will have an increased investment in the process. They will feel ownership over the process. These ideas come out most clearly in Mill’s discussion of suffrage for women:

\begin{quote}
Give the woman a vote, and she comes under the operation of the political point of honor. She learns to look on politics as a thing on which she is allowed to have an opinion, and in which, if one has an opinion, it ought to be acted upon.\textsuperscript{272}
\end{quote}

Knowing that one has an opinion that “ought to be acted upon” increases the likelihood that one will want their rights of representation to be protected. Men and women do not need political rights in order to govern, but “in order that they not be misgoverned.”\textsuperscript{273} To the response that women do not need the vote because their political opinions will only be reiterations of the opinions of their male relations, Mill replies:

\begin{flushright}
\textsuperscript{269} Thompson, 69.\\
\textsuperscript{270} Mill, \textit{CRG}, 149.\\
\textsuperscript{271} Mill, \textit{CRG}, 152.\\
\textsuperscript{272} Mill, \textit{CRG}, 193-194.\\
\textsuperscript{273} Mill, \textit{CRG}, 192.
\end{flushright}
If it be so, so let it be. If they think for themselves, great good will be done; and if they do not, no harm. It is a benefit to human beings to take off their fetters, even if they do not desire to walk.\textsuperscript{274}

Mill is committed to removing obstacles that prevent minorities, in this case women, from being able to participate in the political process. That one may opt not to fully participate in the political process does not diminish participation as an intrinsic good. The fact that Mill thinks we should remove obstacles to participation emphasizes just how important participation is on his account.

Under a scheme of proportional representation, the majority of the citizenry would always have a majority of the representatives. But the majority would never have \textit{all} of the representatives. Minority groups would always be present in some percentage of the representative body. Additionally although minorities \textit{could} be outvoted consistently, the presence of minorities in the deliberative body would influence the tone of deliberations, even though their perspective might be outside of popular sentiment.\textsuperscript{275} They could educate the others, and by presenting new perspectives, they could move the deliberative body closer to discovering the general interest. Minorities who are proportionally represented would always,

\begin{quote}
in the actual voting, count only for their numbers, but as a moral power they would count for much more, in virtue of their knowledge, and of the influence it would give them over the rest.\textsuperscript{276}
\end{quote}

Proportional representation would address both political tyranny and social tyranny. Political tyranny is the practice through which the majority of the electorate or the legislature enacts laws or adopts policies against the general interest, or fails to act against individuals or

\textsuperscript{274} Mill, \textit{CRG}, 192.  

\textsuperscript{275} Mill, \textit{CRG}, 161.  

\textsuperscript{276} Mill, \textit{CRG}, 165.
groups who threaten the general interest. Social tyranny is the practice through which the majority acts through public opinion to impose their beliefs and values on the entire society.\textsuperscript{277}

One problem with Mill’s view of proportional representation that I do not think can be overcome is the problem of who would count as a minority in the relevant sense. His willingness to extend proportional representation to any minority group that would find itself rendered politically insignificant under a scheme of strict majoritarianism leads to potentially (morally) undesirable groups, such as neo-Nazis, garnering institutionalized political representation under a scheme of proportional representation. Mill might respond that utilitarian principles would rule out such an event, but I am not sure how this would be the case. A stronger response from Mill would be to appeal to the deliberative function in the legislature. Mill could argue that the neo-Nazi representatives would find themselves surrounded by more enlightened colleagues. Through discussion and deliberation, the enlightened colleagues would be able to educate the neo-Nazis, thus persuading them that their views are erroneous.

Another problem for Mill’s account, although potentially not as disastrous, is the reality that individual people have multiple interests and societal roles that sometimes compete. For example, the policies that I may find politically desirable as a parent may be in direct conflict with my role as a professional. Or my desire to create equal opportunity for all may be in direct conflict with commitments that I have as an individual who believes strongly in individual achievement. There are at least two strategies that Mill can take in response to this problem. The first strategy is to opt for a Hare-type system of voting over a plural voting scheme. That way, individuals could rank preferences according to their

\textsuperscript{277} Thompson, 69.
commitments, interests, and beliefs about how best to attain the general interest. Mill seems to lean towards this solution by the end of *Considerations on Representative Government*.

The second strategy is to embrace the tension that comes from having multiple commitments, and use these conflicts as springboards for political discussion. In fact, I think Mill would appreciate bringing these different experiences to bear on the political process. These two strategies are not mutually exclusive. One or both could be employed.

**Additional Considerations on Representative Government**

While I am not fully committed to proportional representation, I think it offers a good starting point if we take seriously the need to protect minorities against majority tyranny. It may be worth exploring as a means to safeguard those who would otherwise be powerless under a majoritarian scheme of representative democracy.

Considering something like a scheme of proportional representation would show that we take seriously the needs of the consistently un- or under-represented. I think that consistency in carrying out the political process and respect for the political process and its [would-be] participants necessitates rectifying the plight of perpetual minorities.

Mill is deeply concerned with the propertied elite. As I stated earlier, he is consistent in his willingness to extend the potential protections offered by proportional representation to other groups who find themselves similarly situated. That is, other groups who occupy a minority position that is largely static and whose position as minorities impacts their ability to affect the political process.

One objection to a proposal of a proportional scheme of representation is that it is impractical. The idea of dividing people into groups seems quite taxing and potentially confusing. However, a scheme of proportional representation need not require the overt
categorizing of people. One hallmark of the liberal tradition is that people should be free to choose their own ends and their own conceptions of the good. A scheme of proportional representation could allow people to act according to their interests, while ensuring that they would have a voice in the deliberative process. However, such a schema does require the populace to be more sophisticated. Having a voice in the deliberative process changes the tone of discussions. It can also bring to light problems that the representative body may not have considered before. For example, in the United State Congress, issues such as childcare and family leave became regular issues for discussion only when women began to win seats in Congress.

Another possible problem with adopting proportional representation is the potential resistance by majority interests. I accept that, “any strengthening of minority representation increases the risk of the majority party’s being outvoted,”278 and that majorities will fight tooth and nail to maintain the status quo. Yet, resistance on the part of a majority is not sufficient reason to abandon a principle, particularly if that principle will bring about a more just state of affairs. Fair political systems should prioritize justice over happiness of majorities. In liberal democratic states, justice is construed in part as having access and efficacy in the political process.

Mill argues for abandoning the geographical requirement of representative democracy as it is practiced. According to Mill, the carving out of districts by geography is arbitrary at best. Furthermore, the creation of districts in this way ignores the reality that many residing within a geographic district may have less in common with one another than they do with people who reside elsewhere. For example, citizens who care deeply about the environment may find themselves isolated in cities and surrounded by vast areas of polluting industrialists.

278 Griffiths and Wollheim, 217.
Under a geographical scheme, these environmentalists would find themselves consistently in the minority. However, if the geographically-based districts were abandoned in favor of, for example, a scheme that allowed for those with similar interests to form a voting bloc, then the environmentalists would have a greater chance at representation.

I would suggest a weaker version of this argument. While I agree that geographical boundaries are often arbitrary, there may be political decisions that can best be made by taking into account the concerns of members as geographically situated. Land use questions have this feature. At the same time, minorities often find themselves isolated in geographically-drawn districts. Furthermore, practices like gerrymandering work to ensure that minorities will remain politically irrelevant. So, the opportunity to form blocs with those who have similar interests (or who are at least sympathetic to minority interests) would offer some protection. Perhaps a two-tiered strategy could be adopted. This strategy would be sensitive to geographical particulars while strengthening the power of fragile minorities.

I have offered some preliminary considerations on why political representation is morally significant. I have thought about political representation in light of a particular kind of case, the case of minorities in strict majoritarian representative schemes. Morality demands that we take seriously some of the shortcomings of representative democracy. John Stuart Mill chose to focus on the intellectual elite. This group might often find themselves outvoted in the deliberative body. However, most would not consider the intellectual elite oppressed in any deep sense of the term. Chapter Five, “Lani Guinier and the Case for Representation of Racial Minorities,” focuses on those minorities who operate within a context of historical oppression. In this chapter, I am concerned with racial minorities and the category of gender in the contemporary US.
CHAPTER FIVE

Lani Guinier and the Case for Representation of Racial Minorities

Like the theorists whose work I explored in earlier chapters, Lani Guinier is also concerned with how minorities fare under representative schemes. In this chapter, the specific challenge faced by political minorities becomes crystallized. Guinier's approach to the problems of how minorities are potentially disadvantaged in representative governments and how minorities should be protected has much in common with the discussions between the Federalists and Anti-Federalists. Guinier's strategy of addressing minority interests in the electoral process is reminiscent of John Stuart Mill's proposed solution. Guinier adds an additional requirement of addressing interests of political minorities. The minorities she finds herself most preoccupied with are racial minorities, particularly blacks and Latinos in the US. However, she concedes that much of her analysis could be extrapolated to different minorities in other systems.

Guinier is concerned that strict majoritarian, winner-take-all systems have especially miserable consequences for racial minorities. Strict majoritarian systems are systems where a candidate is elected with 51% of the vote. In winner-take-all systems, the candidate who receives the most votes wins and all others automatically lose. In some winner-take-all schemas, the winner can receive significantly fewer than 50% of votes cast, depending on how many candidates run. Yet, the winner receives all the spoils of victory: the winner gets to decide which issues get pursued, the winner helps set parameters for discussion, etc. Such a system may test the faith of minorities:
Guinier thinks that many citizens are disadvantaged under such a system. However, she thinks that due to geographic and cultural isolation, lack of complete access to participate in the political process, and a history of discrimination, racial minorities fare especially poorly in winner-take-all systems.

This lack of access has consequences for what occurs within the deliberative body. If minorities are shut out of the democratic process at the electoral stage, then they will not have adequate representation inside the deliberative body. Guinier is operating on two assumptions. Her first assumption is that descriptive representatives generally will be the best representatives for minorities. Second, Guinier is committed to exploring forms of representation that will ensure that minority representatives will have influence, as opposed to mere presence, in deliberative bodies. She explores, among other ideas, proportional representation, multi-member districts, and supermajority votes in order to bring about minority influence. I will explore each of these ideas in greater depth later.

The major premise of Guinier’s argument is that racial minorities operate within a history of racial discrimination and oppression. This racial history places minorities at a disadvantage in the context of the political process. Furthermore, the political process is structured such that at best there is silence, and at worst, complicity in the continued lack of access. Political minorities find themselves discouraged to the point that they no longer want to participate in a political process in which they have little chance of ever coming out as


280 Recall from Chapter One that a descriptive representative is one who represents another by being sufficiently like him. I will expound more on descriptive representation later in this chapter.
winners. Guinier concludes that if we are serious about fairness in the political process, the plight of minorities has to be addressed, even if addressing the problem means restructuring our political system.

One difficulty in addressing the problems faced by racial minorities in the political system lies in the way that we conceptualize the deliberative process. Discussions about the deliberative process generally occur under ideal conditions. That is, these discussions begin with the assumption that the deliberators are rational, free, and equal. Deliberative theory is largely unequipped to facilitate thinking about how deliberation occurs under conditions of inequality in social power and a history of prejudice and discrimination.281 Some have addressed deliberation in plural contexts. Recall that the Anti-Federalists and Rousseau explicitly thought that societies should be homogenous in order to avoid cultural and economic clashes. In fact, contemporary deliberative theory’s282 “claim to neutrality” is undercut once one takes seriously that race, gender, oppression, and inequality exist within the political context.283

**Historical Framework**

In order to take seriously the role that race plays in the political process, it is important to understand the historical background. Guinier points to three generations in the struggle for voting rights. The first generation of struggle for voting rights was the struggle

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283 Williams, “Uneasy,” 125.
for suffrage, which ended in 1965 with the passage of the Voting Rights Act. The Voting Rights Act strengthened the 15th Amendment, ratified in 1870, that forbade the denial of suffrage rights on account of “race, color, or previous condition of servitude.” The 15th Amendment nominally gave black men the right to vote. The right to vote would not be nominally extended to black women until 1920, with the passage of the 19th Amendment extending suffrage to women.

However, despite the passage of the 15th and 19th Amendments, many states, particularly in the South, found ways to limit voting access for blacks. It was not until the 1965 Voting Rights Act outlawed the various hurdles created to restrict black suffrage that blacks were allowed to exercise their Constitutionally granted right to vote. Some of these hurdles included literacy tests, poll taxes, and grandfather clauses.

Again, Guinier is clear that her analysis can be extended to others who find themselves similarly situated. Literacy tests and poll taxes are examples of policies designed to disenfranchise blacks, but such policies also had the effect of sometimes disenfranchising poor whites. Thus, in jurisdictions where poor whites were subject to literacy tests and poll taxes, they too, found themselves disenfranchised. Though the Voting Rights Act was enacted in order to shield blacks from unfair restrictions on suffrage, it had the effect of protecting the suffrage rights of poor whites, too.

In the absence of practices that encouraged the candidates of minorities’ choice having a real chance at membership in the deliberative body, the practice of “surrogate” representation emerged. Surrogate representation is a de facto, rather than institutionalized occurrence. Constituents who appeal to surrogate representation see themselves as

represented by a representative in another district. The late Mickey Leland, who was a black representative from Texas explained how surrogate representation works,

What people don’t understand is that Mickey Leland must be the [Black] Congressman for the entire Southwest.285

The late Adam Clayton Powell Jr., who represented New York’s district in Harlem from 1945-1972, found himself in a similar position. Adam Clayton Powell Jr. was the only African American member of Congress for decades, and many African Americans relied on Powell to advocate for their concerns, especially in the face of lack of responsiveness from their own representatives. Powell’s presence in the House of Representatives allowed many blacks to feel comfortable to contact a member of Congress, when otherwise the might not have. African Americans often saw Powell as “their” representative, regardless of where they lived.

Surrogate representation is one way minorities have attempted to grapple with lack of representation where they live and the lack of responsiveness from the representatives who supposedly represent everyone in the district. Mill’s proposal of national tickets elected through the Hare system is an attempt to address the problem of representation for minorities who find themselves geographically isolated in small, unfriendly districts. In a sense, the Hare system would institutionalize the informal practice of surrogate representation. Under the Hare system, those who are geographically isolated in unfriendly districts would not simply act as if a “friendlier” representative were their representative; the friendlier representative would actually be their representative.

Whereas the Voting Rights Act ended the overt restrictions on suffrage targeting blacks, the second generation in the struggle for voting rights involved ending what Guinier

calls “qualitative vote dilution.” Qualitative vote dilution involves the creation of policies that diminish the strength of minority votes. For example, after the passage of the Voting Rights Act, some locales shifted how elections were conducted to select their local boards. Instead of maintaining a local council comprised of councilpeople elected from geographically-distinct districts, these locales reconfigured their boards so that the council would be chosen in city-wide elections. The effect of this was to force minorities to compete city-wide against whites who had incentive to band together and vote against the minority candidates. Had these geographic districts been maintained, minority candidates would have had a better chance at getting elected, given segregated housing patterns.

Guinier does not advocate segregated housing. She thinks that, given the reality of its existence, the voting power of political minority groups can be protected via geographic districts. However, Guinier does not support the creation of majority black districts if the districts are created with boundaries that are not sensible. But, the strategy adopted to combat minority vote dilution was to create minority districts that could most charitably be described as gerrymandered. Districts were created to herd minorities into one or two voting districts at the local, state, and federal levels. The argument given to justify these actions was that by ensuring a sufficient minority population, minorities were guaranteed to elect a representative, be it a city council member or a state or federal representative. Some problems that emerged with this strategy center around the ethics of separating minorities into one or two districts and the negative response of other community members regarding gerrymandered districts. I will discuss these problems in greater detail later.

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Guinier sees the third generation in the struggle for voting rights as involving the role of blacks in the legislature. According to Guinier, it is not enough to elect black legislators, but the legislative rules need to be altered to ensure that the minority presence in the legislature has impact.\textsuperscript{287} Here Guinier differs from Mill, who believes that minority presence in the legislature is sufficient to raise the level of discussion in the deliberative body.\textsuperscript{288} It is important to keep in mind that Mill has a very specific minority group, the intellectual elite, in mind.

This is the historical context operating in which Guinier believes that blacks are “still the pariah group.”\textsuperscript{289} Yet, in order for minorities to have influence within the deliberative process, minorities have to be recognized as reasonable, full participants.\textsuperscript{290} Acquiring this recognition can be difficult given that those in the majority may have incentives to maintain the status quo. The history of dominance and subordination between minorities and those in the majority can also breed distrust in those who have found themselves subordinated and arrogance on the part of those who have been dominant.\textsuperscript{291} The fact that the deliberative process has been so restricted requires correction. This correction is grounded in backward-looking arguments, or arguments about prior historic injustice. These arguments can combat a legacy of historical exclusion based on the belief that the excluded were unfit to participate.

\textsuperscript{287} Guinier, \textit{Tyranny}, 8.
\textsuperscript{288} Guinier thinks minority presence in the legislature is necessary but not sufficient.
\textsuperscript{290} Williams, “Uneasy,” 139.
in governing. An objection to the backward-looking argument is that focusing on historical inequality may reinforce the sense of inequality in the present, which can undermine the goal of full acceptance of minorities. At a minimum, it is worth understanding the historical context at work in creating a polity where minorities can fully participate.

The Problem as Guinier Sees It

Guinier sees herself as taking up where James Madison left off on the problem of factions. Madison’s proposal is to create an environment where factions are so numerous and widely dispersed that their impact is neutralized. Madison thinks that the sheer number of factions will cause them to cancel out one another. He also thinks that by spreading the population across wide geographic territory will make it difficult for members of factions to communicate with one another. Of course, Madison could not have anticipated modern technology!

A key feature of the Madison’s vision of how to handle factions is that Madison anticipates that factions will be numerous and unstable. Due to their sheer number, they will not be able to become entrenched. Factions and the people who comprise them will shift, which in turn, leads to a degree of fluidity in the composition of the majority on any given issue. Therefore, there will not be one static, dominant majority. In addition to believing that under the proper circumstances factions would cancel out one another, Madison also thought that there were enough procedural safeguards within the proposed Constitution to prevent the creation of an entrenched majority that is tyrannical over everyone else. Guinier

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293 Mansbridge, “What Does a Representative Do?” 120.
uses the term “Madisonian majority” to describe “a majority that rules but does not dominate.”

When majorities dominate, they can operate without fear of reprisal because they do not have to worry about defectors.

Madisonian majorities are constantly shifting due to the citizens’ continual defection between factions, resulting in cooperation among everyone. The people have incentive to cooperate with one another because they realize that there is mutual benefit to cooperation. Important for Guinier’s argument, is that the shifting nature of the majority ensures that everyone will get to “win” some time.

The problem of majority tyranny arises when majorities fail to shift. When the majority becomes fixed and self-interested with no worries about defectors, it has little incentive to cooperate. In these cases the majority becomes overbearing. The minority left in its wake lacks any mechanism to hold the majority accountable or force it to listen to minority concerns. The disparity in power does not promote deliberation or consensus. Moreover, those who find themselves consistently in the position of losers may begin to perceive the political process as unfair and decide, en masse, to opt out of participating. Guinier sees this mass opting-out as a threat to political stability. Minorities have to believe that the political system is fair so that they will continue to participate.

The problem is exacerbated by strict majoritarianism. Strict majoritarianism reinforces the strength of those who are already in the majority. Guinier offers three conditions under which she thinks there should be an alternative to strict majoritarianism: (1)

294 Guinier, _Tyranny_, 4.
295 Guinier, _Tyranny_, 4.
296 Guinier, _Tyranny_, 9.
297 Guinier, _Tyranny_, 9.
the minority is treated unfairly, (2) that unfairness is not resolved through traditional majority rule, and (3) the fixed majority refuses to cooperate with the minority. In this case, the minority is comprised of racial minorities. Given their history of exclusion and continued outsider status, racial minorities meet each of the three conditions. A similar claim can be made for women as minorities, who despite being numerically in the majority, experienced historical exclusion from the political process and continue to experience sexism in society. The still extant prejudice against minorities inhibits their admission into the dominant majority, ensuring a “strategically weak position” for the minority.

One solution for this problem is to create an environment where candidates that minorities would like to see elected have a real chance of getting elected. Because Guinier is committed to a version of descriptive representation, in many cases the candidates favored by minorities will also be minorities. Greater presence of minority representatives can increase the perception that the political process is legitimate. This can in turn, increase minority voter turnout – especially when the candidate has a real chance of winning. For example, seeing more women in the deliberative body may make women feel actively represented, thereby increasing women’s participation in the political process.

Creating an environment that is more hospitable to the possibility of increased minority presence in the deliberative body creates a challenge for deliberative theory in the form of greater demands on the process. It takes time and effort to have a deliberative

298 Guinier, Tyranny, 5.
299 Guinier, Tyranny, 64.
300 Guinier, Tyranny, 35.
process that is sensitive to social difference. Guinier would argue that the demand needs to be met. Deliberative models that make room for social diversity do so on the grounds that good social and political policy depends on the introduction of new voices into the deliberative body. This contributes not only to the deliberative process, but also to society at large. The introduction of new voices can lead to increased justice in social and political arrangements, generally. Of course, those who are in positions of privilege also have to become disposed to accept the reasonableness of minority perspectives when those perspectives differ from the majority’s. The strategy of creating more opportunities for minority participation is a positive-sum solution. Under this solution, minorities would no longer be fixed, and everyone involved would be encouraged to share power and listen to different perspectives beyond those of the traditional majority. This solution would come closer to achieving a Madisonian majority, or a majority that does not dominate everyone else.

The solution favored by many who have struggled for increased black representation is black electoral success theory. Black electoral success theory has emerged as the dominant theory to address lack of black political participation. According to black electoral success theory, representation of black people by black legislators [is] “the ultimate empowerment goal of structured reform legislation and litigation.” In this case, black political participation is measured solely by the number of black representatives.

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302 Williams, “Uneasy,” 134.
303 Williams, “Uneasy,” 132.
304 Williams, “Uneasy,” 132.
305 Guinier, Tyranny, 7.
306 Guinier, Tyranny, 54.
Black electoral success theory focuses on racial bloc voting and is, therefore, a voting strategy.\(^{308}\) In order for black electoral success theory to be viable, there has to be a large enough black population to make a difference in the electoral outcome. It also depends on a particular, fixed conception of blackness and “black interests.” These are two of the many reasons that Guinier thinks black electoral success theory fails. Black electoral success theory depends on African Americans seeing their interests as unified and voting together for representatives. Black electoral success theory is not conducive to building coalitions and can lead to the marginalization of blacks within the deliberative body. At best black electoral success theory can provide only “token” representation.\(^{309}\) That is, black electoral success theory yields a few black representatives who, due to their marginalization, are ineffective. Furthermore, because the focus is on electing black representatives, rather than focusing on electing the best representatives to champion minority interests within the deliberative body, success is measured incorrectly. Success is measured by body count, rather than responsiveness to constituents. Because the representative is black, constituents are more likely to mistakenly assume that their interests are being represented, regardless of whether their interests actually are represented.

Guinier sees cumulative voting as a better voting strategy. Under a scheme of cumulative voting, “voters get the same number of votes as there are seats or options to vote for, and they can then distribute their votes in any combination to reflect their

\(^{307}\) Guinier, *Tyranny*, 49.

\(^{308}\) Guinier, *Tyranny*, 51.

Cumulative voting enables like-minded voters to vote as a solid bloc, as voters would under black electoral success theory. So it could be the case that the problem of black electoral success theory is simply replicated under a cumulative voting scheme. But, Guinier thinks that given the option, political minority groups will be more likely to form coalitions with others. Cumulative voting is more conducive to doing this. All voters, not just political minority groups could gain mutual benefits through the formation of coalitions with one another. Like the Hare system, cumulative voting systems can have the effect of generating a proportional reflection of the populace. In fact, because cumulative voting is conducive to creating proportional representation, cumulative voting seems to be a nice way to build coalitions. Coalition building can reduce the potential for black representatives to be marginalized within the deliberative body, thereby increasing their effectiveness. Coalition building raises the possibility for minority voices to be heard, a feat that cannot be accomplished by mere seat-holding. A cumulative voting strategy is preferable to black electoral success theory not only because it encourages coalition building, but also because it enables voters to self-select their identities. It does not depend on a single, rigid conception of black identity or black interests.

Why Minority Presence in the Deliberative Body is Not Sufficient

To review, whereas Mill argues that the presence of minorities in the deliberative body is sufficient to both raise the level of discussion and effect change, Guinier does not believe that the mere presence of blacks in the deliberative body ensures deliberation in a cooperative environment. Perhaps Mill can afford to be more optimistic in his view of how
minority presence would impact the deliberative body. After all, the intellectual elite that Mill is preoccupied with did not experience exclusion and oppression. Guinier argues that in light of the historical reality facing racial minorities, at minimum racial minorities need allies.\textsuperscript{312} Otherwise, minorities will remain susceptible to the same vulnerabilities that caused their exclusion in the first place. That is, the perception that minorities are not capable of governing and their smaller numbers are among the issues that will merely be reproduced within the deliberative body absent additional remedy.

Allies can provide solidarity in the deliberative body, and allies may be predisposed to be sympathetic to the position of minorities when others in the deliberative body might be less sympathetic. Allies might also help buffer any misunderstandings that occur between the majority and minorities. In order for marginalized groups to have any impact within the deliberative body, listeners must be willing to see when their practices are oppressive and be willing to make changes, even when such changes occur at a cost to the listeners.\textsuperscript{313} Allies can help facilitate this understanding.

In addition to the need for allies, Guinier argues that the rules adopted within the deliberative body should reflect a desire to ensure the inclusion of minorities. Minority presence within the deliberative body means little if those minorities are going to find themselves as outsiders with no influence. So the rules that govern the deliberative body need to be amended so that minorities can have success within the legislature just as they have managed to have electoral success.\textsuperscript{314}

\textsuperscript{312} Guinier, \textit{Tyranny}, 61.

\textsuperscript{313} Williams, "Uneasy," 133.

\textsuperscript{314} Kennedy, 3.
Guinier is not opposed to the majority having the majority of the power – either at the electoral stage or within the deliberative body. She is opposed to the majority wielding a degree of power disproportionate to their share of the electorate to the extent that this disproportionate share of power highlights the powerlessness of the minority. The powerlessness manifests itself because it could be the case that 51% of the deliberative body get to make all of the decisions. At any given time, up to 49% of the deliberative body is in opposition. The decision-making within the body should reflect this. This powerlessness can be so discouraging that minorities no longer see the deliberative body as legitimate:

If minorities are to accept Parliament, they must adequately be represented in Parliament. It is not even meaningful to offer the consolation, ‘your turn will come,’ which sustains parties in a system where two great coalitions (Conservatives and Whigs) alternate in the government. Members of a minority may have no chance of ever forming a government, and even if they had, what they want is not the opportunity to run things their way every ten or twenty years, but the opportunity to participate in the decision-making now and every year.

Minorities know that it is not enough to sit in the deliberative body. They want a share in the decision-making.

Moreover, Guinier does not think that minorities need to compete for power. Rather she envisions minorities and the majority engaging in power sharing. A competitive decision-making process can only be disadvantageous for minorities because the minority will always be able to overpower and ignore those in the minority.

Assuming that the majority is open to the plight of minorities within the deliberative body, it seems that in theory, minority viewpoints could be represented with only one or two representatives. In practice, those who are disadvantaged do better with a critical mass of

315 Kennedy, 4.
316 Lewis, 11.
representatives. This critical mass serves to support one another as views are presented and to convince others (including allies) that their views are widely shared among members. 318 This critical mass can be achieved through proportional representation, a solution also put forth by Mill.

Proportional representation has its benefits. First, because proportional representation necessarily calls for several representatives to be members of the minority, proportional representation can be used to reflect the internal diversity of the minority. 319 Relying on one or two representatives to secure the interests of the minority may present a false picture of issues that those in the minority care about, but a proportional number can highlight how broad minority perspectives are. Additionally, proportional representation can provide a certain synergy within the deliberative body. 320 More perspectives within the deliberative body can yield more insight, and hopefully, better results.

Furthermore, proportional representation will provide a sufficient number of representatives to serve on committees and subcommittees within the deliberative body. 321 Thus, the synergy and internal diversity achieved in the larger deliberative body can be reflected and dispersed throughout the body at all stages of deliberation. Finally, proportional representation can alter how minorities are perceived. Instead of being viewed as pariahs, having significant numbers of minorities present in the deliberative body sends the message that minorities are seen as valuable contributors to the process of governing. 322

320 Mansbridge, “What Does a Representative Do?” 104.
322 Mansbridge, “What Does a Representative Do?” 100.
Seeing minority representatives can boost the sense of legitimacy with which other minorities regard the political process.

While proportional representation will guarantee that minorities will have some presence within the deliberative body, unless rules governing the deliberative process within the body are more amenable to minority presence, minorities will not be able to fully flourish within the body. This is not to say that proportional representation and the active seeking-out and assistance of allies will not go a long way to protect minorities within the deliberative body. However, more can be done. What needs to happen next is tied to the nature of the deliberative body itself.

The normative principles governing deliberative bodies may not be the most conducive to understanding some of the concerns of those who are marginalized. The three most common normative principles of deliberative theory are: (1) Political decisions ought be made by processes that bring all parties to the table to deliberate. (2) Principles ought to appeal to justice. (3) Arguments must be framed in terms that others can accept.\(^{323}\) The third constraint, the appeal to reasons other can accept, seems fine on its face. This constraint rules out, for example, revealed religion, on the grounds that not everyone will share the same religious views.\(^{324}\) In fact, some reasonable people will not have any religious views at all. So, reasons must be aimed at what is common, rather than what is particular to some.

A challenge arises with the third constraint because those in the majority may not accept reasons offered by minorities for taking a particular action as reasons everyone can share. Whether those in the majority can accept reasons offered by minorities as reasons for

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\(^{324}\) Williams, “Uneasy,” 127.
everyone is a contingent matter.\textsuperscript{325} It may be the case that by automatically labeling minority viewpoints as “unreasonable,” members of the majority are engaging in “power plays” to rule out alternative viewpoints and questions about existing institutions.\textsuperscript{326} Still, those in the majority need not be fueled by prejudice or overt hostility. Even under the best, most hospitable conditions, those in the majority may be unable to sympathize with the plight of minorities. The focus on shared, rather than particular interests, can further erode understanding between minorities and those in the majority because there may be circumstances when it is only by focusing on differences and particularities that issues become salient.\textsuperscript{327} For example, it is only by speaking of vulnerabilities that are unique to women that one can make sense of sexual harassment. The norms of deliberation can be altered to accommodate this reality.\textsuperscript{328}

\textbf{Two Stages of Deliberation Reviewed}

Heretofore, I have only hinted at the two stages of deliberation – deliberation in the electoral process and deliberation within the deliberative body. Both Guinier and Mill distinguish these two stages. Even though Mill is concerned primarily with the first stage, Guinier is concerned with both stages. Guinier does not think that minorities can be equal participants in the political process unless minorities are able to participate at all stages.\textsuperscript{329}

\begin{itemize}
\item[325] Williams, “Uneasy,” 134.
\item[326] Young, “Activist Challenges,” 675-676.
\item[327] Williams, “Uneasy,” 134.
\item[328] Williams, “Uneasy,” 144.
\item[329] Guinier, \textit{Tyranny}, 36.
\end{itemize}
To review, the two reforms favored by Guinier are changing the rules on how representatives are elected and changing the rules governing decision-making within the legislature.\textsuperscript{330}

So, there are two axes of deliberation. The vertical axis operates between the (potential) representative and (potential) constituents, and the horizontal axis operates inside the deliberative body between representatives.\textsuperscript{331} The vertical axis is the site of the electoral process, and the site of post-election communication between representatives and constituents. Cumulative voting and the procedure of electing representatives proportionally occur along the vertical axis. This is where Guinier’s calls for electoral reforms have impact.

The horizontal axis focuses on what occurs within the deliberative body. Guinier is particularly concerned with what occurs along the horizontal axis because the actual decision-making occurs here. Reform of the vertical axis without ensuring minority participation along the horizontal axis may simply replicate the alienation that minorities have historically experienced in the electoral process.\textsuperscript{332} It is along the horizontal axis that one’s position as a minority may come into play. In an environment of open communication between representatives, minority representatives may draw on their experiences to facilitate conversation with the rest of the deliberative body. One’s membership in a minority population may produce an “internal commitment” so when issues require more than mere vote-casting, the representative may be more willing to throw oneself “into the fray.”\textsuperscript{333} The role of personal experiences is not just salient for racial minorities. Representatives who are

\textsuperscript{330} Kennedy, 5.

\textsuperscript{331} Mansbridge, “Should Blacks Represent Blacks?” 629.

\textsuperscript{332} Guinier, Tyranny, 61.

\textsuperscript{333} Mansbridge, “Should,” 635.
smokers are more likely to vote against taxes on tobacco, while evangelicals are more likely to support faith-based initiatives and oppose stem-cell research.  

**Descriptive Representation Revisited**

Recall that a descriptive representative is an individual who shares the background of, or mirrors, “the more frequent experiences and outward manifestations of belonging” to the individual’s constituents. Descriptive representatives are “in their own persons and lives” somehow typical of those they represent. The grounds upon which the representative is descriptive may depend on shared experiences, visible characteristics (such as skin color or gender), or a combination of both. It is reasonable to assume that descriptive representatives will exhibit these traits to varying degrees.

The extent to which these characteristics may be exhibited may depend on any number of variables, including the expectations of the constituents. While some women constituents might be satisfied with a woman representative who is mildly sympathetic to feminist issues, another group of constituents might require some exhibition of “cultural and psychic authenticity” that is reflected in any number of cues to the constituents, such as body language, food, manner of speech, geography, skin color, world view, and so forth. Guinier seems to appeal to this stronger form of descriptive representation for racial minorities when she says that black representatives should not just be physically black, but should enjoy a “cultural and psychic linkage that cuts across class lines.” As appealing as some might find descriptive representation, it is not a sufficient criterion for adequately representing a

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constituency. The sharing of descriptive features is but one characteristic among many that makes a strong representative.\textsuperscript{338} Other features may include competence and expertise in matters that will come before the deliberative body.

Still, there are contexts in which descriptive representation may be preferable because it can improve either the quality of deliberation or it can promote other goods that are not directly related to deliberation. Descriptive representatives can improve the quality of deliberation in contexts of historical mistrust or in contexts of uncrystallized, not fully articulated interests.\textsuperscript{339} Descriptive representatives can also create social meaning for those who have been historically marginalized, and they can create an air of “de facto legitimacy” for those who have faced discrimination.

When there is historical mistrust, the descriptive representative can serve as a buffer between the representative’s constituents and those who are in the majority. Descriptive representatives are in a unique position to present the perspectives of their constituents. As members of the deliberative body, descriptive representatives have an audience in the majority representatives. The can give voice to those who are in the minority, and advocate for them.

Uncrystallized issues are those issues that were not discussed during the election season, but come up during the deliberative session. In the case of uncrystallized issues, descriptive representatives may be in a position to explain what is at stake.\textsuperscript{340} When these issues appear unexpectedly,

\textsuperscript{338} Mansbridge, “What Does a Representative Do?”

\textsuperscript{339} Mansbridge, “Should Blacks Represent Blacks?” 628.

\textsuperscript{340} Mansbridge, “What Do Representatives Do?” 100.
a voter can expect the representative to react more or less the way the voter would have done, on the basis of descriptive similarity. The original geographic representation of voters in the United States was undoubtedly intended in part to capture this form of descriptive representation.341

The descriptive representative can face unexpected issues and not be thrown by them. She is in a position to handle these issues in the way that best serves her constituents because she can, within the deliberative body, use her unique experience as a descriptive representative to make her case to the rest of the membership. Her constituents can be assured that she will be sympathetic to their perspectives because she is like them. This does not mean that she will always reach the exact same conclusions that they would reach. Of course, sometimes she will reach the same conclusions that her constituents would have reached had they been in the position to make the decision for themselves. But, it means that given the similar perspective that she shares with her constituents, coupled with her expertise as a legislator, she will be able to reach a decision that leaves her constituents feeling listened to and respected.

Descriptive representation can serve another purpose that is not directly related to the deliberative process but might be just as important. Descriptive representation can have social meaning for the representative’s constituents and the society at large. Increased presence of minorities within the deliberative body may combat the assumption that minorities are not capable or not interested in governing. For example, a greater number of women in the deliberative body can get rid of the notion that politics is a “male domain.”342 Girls and women may look at women representatives and think of entering politics as a

possibility that had not previously been considered. Men may broaden their understanding of women’s capabilities.

Additionally, minority presence in the deliberative body creates living, embodied symbols of increasingly equal opportunity for everyone. Descriptive representatives ameliorate the paradox of representative government in which “all citizens are equal, but some are more equal than others.” This broader social meaning continues in that the presence of descriptive representatives lends an air of *de facto* legitimacy to the deliberative body. Everyone may feel more involved in the political process, as opposed to viewing the political process as something alien and unwelcoming. Constituents may feel more comfortable contacting their representatives with concerns. For example, data shows that African Americans who are represented by African Americans are more likely to contact their representatives than those who are represented by whites. Of course, this is not always the case. Women are not more likely to contact women representatives. The value of social meaning for descriptive representation should not be underestimated.

At this point a problem arises for proponents of descriptive representation that arose for Mill’s proposal for proportional representation. Just as in the Mill case, one legitimately asks how or whether those who are generally regarded as malevolent should be proportionally represented (recall the neo-Nazi case), the case for descriptive raises a similar kind of question. The larger question implied by the neo-Nazi case is how to decide who gets to be represented in these special ways. Both descriptive and proportional representation have failed to gain traction, in part, due to this worry. As normative theorist Pennock

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quipped, “No one would argue that morons should be represented by morons.”346 This worry can be addressed by distinguishing two forms of descriptive representation: microcosmic and selective.

Those who advocate a microcosm form of descriptive representation believe that the deliberative body should be a microcosm of the population.347 Every facet of the population should be represented in the deliberative body. Recall that the Anti-Federalists held a similar view. The Anti-Federalists limited their sense of who should be represented to citizens. For the Anti-Federalists, a stranger should be able to enter the deliberative body and get a sense of the make-up of the nation’s citizens. The Anti-Federalists stopped short of arguing that this representation should occur in proportion to the numbers of those who are represented, but they were clear that every facet of the citizenry should have a place in the deliberative body.

However, under selective descriptive representation,

institutional design gives selected groups greater descriptive representation that they would achieve in existing electoral systems in order to bring the proportions of those groups in the legislature closer to their percentages in the population.348

An example of selective descriptive representation would be the drawing of voting districts. The process of drawing voting districts would require some criterion by which districts can be drawn. This will rule out the possibility of every type of minority being granted descriptive remedy within the deliberative body. The neo-Nazi problem does not get off the ground. The purpose of selective descriptive representation, then, is not to replicate every facet of the population, but to think carefully about and establish criteria for who should be represented.

descriptively represented. Neo-Nazis might be able to secure an electoral victory under a scheme of selective descriptive representation, just as they might be able to under other schemes of representation. The difference is that selective descriptive representation is a strategy designed to ensure that some minorities can secure electoral victory, and the neo-Nazis would be ruled out from receiving the particular kind of protection that selective descriptive representation ensures. To clarify, it is not the case that selective descriptive representation would forbid the neo-Nazi from running from office, but selective descriptive representation could rule out offering special protection to neo-Nazis to ensure that they receive representation in the deliberative body.

Whatever strategy is employed in selective descriptive representation needs to take into account the goal of ensuring this type of representation. One might draw voting districts in a way to reflect geographic similarities and protect minorities in a particular region. Or, one might draw voting districts and set aside a number of seats for specific minorities – women, Catholics, French speakers, etc.349 Some data suggests that women fare slightly better in proportional representation systems or multi-member districts.350

The neo-Nazi problem is not the only problem for descriptive representation. As viable an option as descriptive representation may be, securing representatives who look like them is not the aim of representation, nor should it be the goal of minorities who find themselves outside the political process. The purpose of representation is to engage in deliberation to make the best decisions for the populace. Descriptive representatives must be able to fill this function. If non-descriptive representatives can fill this function for their


constituents as well as or better than a descriptive representative could, this seems to be an argument against descriptive representation.\textsuperscript{351}

Beyond arguments about social meaning, it may be difficult, then to defend the advantage of descriptive representation. Descriptive representation may have other problems depending on how rigidly a conception of descriptive representation one wants to defend. Sometimes those who advocate descriptive representation hold a very strong conception of what that should entail. The claim, “It is impossible for men to represent women,” is one example. However, this claim yields two undesirable implications.

First, the claim “It is impossible for men to represent women” invites the retort, “It is impossible for women to represent men.”\textsuperscript{352} I am not sure that is a claim to which most people would want to be committed. Of course, one is free to respond to such a retort by explaining that the history of oppression faced by women might make them well suited to represent men because women have had to learn how to navigate a male dominated world. So, women have an insight into men that is not reciprocated. Since men have not had to navigate a world dominated by women, they have not had to learn about women to the same extent that women have had to learn about men.

A second problem with the claim, “It is impossible for men to represent women,” is the implication that only women can represent women. This implication might lead some to take the further step and suggest that any woman can represent “women” regardless of her race, class, sexual orientation, etc. and regardless of her beliefs about these characteristics. For example, it would be unreasonable to believe that a homophobic woman can represent

\textsuperscript{351} Mansbridge, “Should Blacks Represent Blacks?” 630.

\textsuperscript{352} Mansbridge, “Should Blacks Represent Blacks?” 638.
“women,” when presumably some of those she is called to represent will be lesbians. Both of these problems can be resolved by weakening the conception of who a descriptive representative can be. For instance, instead of holding fast to the belief that “Men can never represent women,” one might amend the claim to instead express the desirability or preferability of descriptive representation.

Those who are generally hostile to the idea of descriptive representation instead advocate (in the case of race-based descriptive representation) virtual representation. In these instances blacks could be assured that their concerns would be taken into account even in the absence of descriptive representatives. Virtual representation has long been rejected as a viable form of representation. Both the Federalists and the Anti-Federalists were insulted by the British suggestion that the colonists were virtually represented in the British Parliament. The Federalists and Anti-Federalists found the British claims of virtual representation for the American colonists to be a cheap ploy that denied the seriousness of the colonists’ grievances. Guinier has a similar response to the suggestion that blacks are or can be virtually represented in the deliberative body. Such a suggestion denies both the historical context and the continuing circumstances that lead to the marginalization of blacks in the political process.

The proposal for color-blind, virtual representation might be motivated by a concern that focusing on so-called sub-identity may weaken national ties. That is, if people are preoccupied with their race, gender, or class status, they may be less invested developing or protecting their national identity. But this does not follow. Acknowledging one’s


membership in a racial category or a gender does not necessarily lead one to diminish one’s capacity to be a good citizen of the nation. The fact of being a woman, for example, is not incompatible with being an American. In fact, one could argue that concern for how minorities can best flourish within the political system is motivated by a desire to make minorities feel more connected to their role as members of a nation by making them feel more included in the political process.

Descriptive representation faces other challenges. One challenge is that drawing electoral maps in order to create homogenous districts may weaken their influence in other districts. The creation of a fairly homogeneous district will undoubtedly leave some minorities isolated within majority districts. Not only might a minority be neglected by the majority if they are isolated in a majority opposition district, but minorities might also be neglected by their own party if reaching out to these minorities is perceived as a lost cause (and therefore a waste of time and resources). A partisan example of this phenomenon would be if the Republican Party decided not to campaign in Berkeley. Those conservatives in Berkeley might feel isolated and alone surrounded by a liberal majority. But, this is less a challenge to descriptive representation and more a challenge to a particular means for attaining descriptive representation.

Of course, creating homogeneous districts is a strategy only available for certain types of descriptive representatives. Given housing patterns segregated along racial and economic lines, the creation of homogenous districts would only be a strategy available to racial, ethnic, cultural minorities and those who are poor or working-class. Women would not be candidates for selecting descriptive representatives based on the drawing of district


356 Lewis, 12.
lines. There are other strategies that could bring descriptive representatives into the deliberative bodies. Some of these – the Hare system, cumulative voting, setting aside seats in the deliberative body – have been discussed previously.

**The Problem of Essentialism**

But a remaining problem for descriptive representation that needs to be addressed more thoroughly is the danger of essentialism. Essentialism is,

> Assuming a single or essential trait, or nature, that binds every member of a descriptive group together, giving them common interests that, in the most extreme versions of the idea, transcend the interests that divide them.\(^{357}\)

Descriptive representation can emphasize the worst features of essentialism.\(^{358}\) Insisting that representatives share certain features with their constituents suggests that some quality about those features is unique to the people who share them to the exclusion of anyone else. Essentialist beliefs reinforce stereotypes, trap individual members into images generally held about that group, impose rigid identities on the members, and de-emphasize divisions among the minorities. Essentialism is especially problematic when,

> facets of identity assumed to bind the group together have biological markers, such as sexual organs or skin color, because such markers encourage others to see whatever commonalities are assumed central to the group as biological, not historical.\(^{359}\)

Essentialism denies the historical link that binds many minorities, instead opting to view the connection that some minorities have for one another as an immutable, biological trait. Belief in essentialism diminishes the importance of differences that occur within minority populations, either by denying that these differences are (or can be) significant or by

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\(^{359}\) Mansbridge, “Should Blacks Represent Blacks?” 638.
claiming that these differences (even if significant) should be sublimated for the sake of unity within the minority ranks.

Refusal to address these differences for the sake of unity can have several consequences. First, it can replicate relationships of domination. So, when women participating in anti-racist movements experience sexism, although racism is being combated the dominant gender relationships are simply being repeated. When nonwhite women experience racism within feminist movements, patterns of racial domination are being repeated at the same time that sexism is being fought. This behavior can lead to marginalization of some minorities within the context of their own movements. Second, unity-based denials of difference give the false impression that minorities are monolithic. This impression can give way to members of the majority asking a minority for “the gay perspective” or “the woman’s perspective.”

The fear of essentialism cannot lead us to abandon the project of protecting minorities. There has to be a meaningful way that we can think about minorities and avoid the trap of essentialism. Iris Marion Young writes,

On the one hand, without some sense in which “woman” is the name of a social collective, there is nothing specific to feminist politics. On the other hand, any effort to identify the attributes of that collective appears to undermine feminist politics by leaving out some women whom feminists ought to include.360

A possible way to think of minority status in terms that are not essentialist is by thinking of traits like gender as relational, rather than essential concepts. So, a characteristic like gender identity is going to depend partly according to other concepts like class, religion, race, or

sexual orientation. A relational concept of gender identity highlights the fact that not all women experience oppression the same way. These differences may lead to opposing gender identities. Some women are in positions to oppress other women and even some men. For example, aspects of gender may be viewed differently by lesbian and heterosexual women. In some contexts heterosexual women are in a position to oppress lesbian women.

Thinking of characteristics like gender in these terms allows us to accommodate difference without dispensing with the concept. This is also a way to acknowledge, for example, that not all men are in the same position to oppress women. Understanding gender, race, sexual orientation, and the like as relational concepts is but one way to minimize the possibility of essentialism, and responding to the objection that descriptive representation merely reinforces essentialism. To further minimize the impact of essentialism, it is important to emphasize the historical, nonessential ties that bind minorities.

One problem with the relational concept of gender is the presumption that categories like class or race are stable categories. The categories that impact gender identity are not simply a matter of “piling on” additional aspects of identity. Gender is more complex. However, the relational concept of gender gives a good starting point to think about the ways in which identity is experienced, particularly for political minority groups.

The Problem of Intersectionality

Another strategy for combating essentialism that is related to thinking of categories like gender as relational is to understand these categories as intersecting one another.

Intersectionality is grounded in the recognition that these categories are not mutually

361 Young, “Gender as Seriality,” 719.

362 Mansbridge, “Quota,” 622.
exclusive, but operate and interact with one another simultaneously. The idea of intersectionality may be difficult to accept given contemporary liberal sentiments against accepting categories like race and gender as organizing principles. Yet, implicit in many racial liberation and feminist movements, for example, is the belief that understanding how racial and gender oppression work can be the source of “social empowerment and reconstruction.” Furthermore, the individualist model of liberal theory fails to adequately capture how the oppression that minorities face is often systematic and institutional.

Acknowledging the systematic nature of oppression does not yet get us to intersectionality. Intersectionality is the conscious recognition of the internal diversity of minorities. Ignoring the differences within minority populations can lead to tension within and among minority populations and potentially leads to alienation of those who are excluded. For example, to speak of women or people of color marginalizes women of color, a sentiment cleverly captured in Barbara Smith’s 1982 anthology, *All the Women are White, All the Blacks are Men*.

This marginalization occurs as minorities set their agendas to fight oppression. Agenda-setting is the opportunity to be inclusive of different aspects of minority status:

- Racism as experienced by people who are a particular gender – male – tends to determine the parameters of antiracist strategies, just as sexism as experienced by

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365 Young, “Gender,” 718.

366 Crenshaw, “Mapping the Margins,” 357.
women who are a particular race – white – tends to ground the women’s movement.\textsuperscript{367}

This kind of agenda-setting tends to foreground those minorities who are otherwise privileged. Thus, antiracist politics tend to focus on the concerns of (often) middle-class men, and feminist politics tend to focus on the concerns of middle-class white women.\textsuperscript{368}

The consequence for descriptive representation is that in selecting those who will descriptively represent minorities, minorities themselves must be mindful of how failure to recognize internal diversity can replicate the kinds of oppression they are attempting to combat. So, a highly-educated, middle-class white woman elected to represent “women’s issues” will be like other women in some ways and unlike other women in other ways.\textsuperscript{369}

But, unless intersectionality is understood, establishing separate quotas for women or African Americans could result in no African American women being elected. In the case of women of color, they are failed by not acknowledging the additional issue of racism or sexism, and also by the failure to understand that women of color sometimes experience racism and sexism differently than either white women or men of color.\textsuperscript{370} To that extent, these movements fail on their own criteria by not being inclusive.

The problem exists to the extent that minorities fail to recognize their own internal diversity. The struggle intensifies when those caught “in the middle” find themselves

\textsuperscript{367} Crenshaw, “Mapping the Margins,” 360.

\textsuperscript{368} Two examples come to mind. First, antiracist campaigns at the beginning of the 20\textsuperscript{th} century focused heavily on the lynching of black men. Much less attention was paid to the sexual vulnerability that black women domestic workers faced. When such attention was given, it was often in the context of black men not being able to fully protect “their” women. Second, contemporary feminist discussions about “mommy tracking” ignore the reality that the mommy track is not even an option for most women, given educational and economic constraints, limited job prospects, and marital status. A more inclusive discussion might center on how to improve educational and career prospects for all women.

\textsuperscript{369} Mansbridge, “Quota,” 634.

\textsuperscript{370} Crenshaw, “Mapping the Margins,” 360.
expending their political energies among multiple, sometimes opposing minority movements. Thus, an additional feature of intersectionality disempowers women of color (as an example) in a way that white women and men of color seldom have to confront. Those who are unsympathetic to intersectionality should recognize the absurdity of trying to isolate one’s gender from race or class by asking an individual woman whether she can distinguish “the woman part” of herself from “the white part” or “the Jewish part.”

Coalition, Balkanization, or Isolation?

Talk of intersectionality and descriptive representation leads some to argue that the focus on difference, far from being helpful, raises antagonisms between people. Even Guinier reminds us that political struggles are not just between people and rulers but among the people. The question remains whether focusing the kind of differences that Guinier wants to focus on have a deleterious impact on everyone.

Ultimately, Guinier is arguing for a version of a plural society in which everyone affected by a decision get the opportunity to participate in making the decision. While a clear benefit of pluralism is that everyone gets to participate, pluralism improves deliberation because analyzing differing viewpoints allow the strengths and weaknesses of those viewpoints to be understood better than if everyone held the same opinion. Pluralism opens the door for reasonable disagreement among people. There is an implicit acknowledgment that far from having one public interest to be pursued, on any given

372 Young, “Gender,” 714.
373 Guinier, Tyranny, 4.
374 Lewis, 11.
375 Williams, “Uneasy,” 132.
controversy, there may be many public interests.\textsuperscript{376} The public interest in environmental protection and the public interest in economic development are two interests that may need to be weighed before building a new subdivision. The existence of the two public interests in this example does not mean that one automatically has to lose to the other. However, it means that any deliberation on the matter needs to account for how the relevant parties can hold differing viewpoints and still be concerned about the overall good.

The concern is that everyone might sincerely care about what is good for the whole, but under conditions of a fixed majority, some of the minority voices get drowned out of the discussion. Guinier’s final proposal, supermajority voting, is an attempt to force coalition between the majority and minorities when the majority would otherwise have little incentive to compromise or when the minority feels deep mistrust towards the majority. Supermajority voting occurs when a percentage significantly greater than 51\%, perhaps 66\% or even 75\%, is required for a vote to pass. The supermajority is an example of amending the rules so that those in the minority can be heard.

Generally, supermajority rules would govern the deliberative body. Supermajority voting modifies the winner-take-all majority rule by requiring more than a bare majority to take action.\textsuperscript{377} Unless a majority comprises an overwhelming proportion of the population, those in the majority will have to work with those in the minority. Otherwise, the majority would not have enough support to pass their agenda items. The goal is to promote coalition; the effect of supermajority is similar to the filibuster, whereby the minority uses the rules to


\textsuperscript{377} Guinier, \textit{Tyranny}, 16-17.
assert itself and force a hearing on an issue about which the minority would be otherwise outvoted. The minority is then granted input.

A virtue of supermajority voting is not just that it benefits minorities who may find themselves alienated from the political process, but also that supermajority voting forces both those in the majority and the minority to work together. Although Guinier (along with Rousseau, the Federalists and Anti-Federalists, and Mill) is primarily concerned with the plight of minorities in representative governments, those in the majority sometimes approach the political process with a sense of mistrust, also. It matters to Guinier that racial minorities sometimes get short shrift. She thinks that this can be remedied through the strategies I have discussed and that such remedy will make the country better. I think Guinier would also care about data that suggests that whites with black representatives are less likely to vote than similarly situated whites with white representatives. These whites are also less likely to think that their representative will be responsive, to name what the representative has done for the district, or to approve of how the representative handles his job.378

Guinier does not call her project pluralism. As I have understood it, I think pluralism is an appropriate label, especially once one extrapolates her concerns about racial minorities to others who find themselves similarly situated within the political process. I also think that a more explicit emphasis on coalitions and a more keen awareness of the dangers of essentialism and the reality of intersectionality will make her project less vulnerable to two remaining objections.

First, Guinier is not always clear on the distinction between “critical minority issues” versus “issues of importance to the majority” versus “issues that would be critical to all

378 Mansbridge, “Quota,” 627.
voters.” These three types of issues do not always pull apart neatly. It would be a mistake to seek a representative with the expectation that any representative could make these distinctions. Even in the most congenial deliberative body that is proportionally represented, where at least some of the representatives could be said to descriptively represent their constituents, it is not apparent what the representatives are expected to do with regards to these differing kinds of issues. Additionally, the problems of essentialism and intersectionality complicate the matter.

Second, Guinier cannot (and should not) always attribute differences in preferred outcomes to racism. There are times when those in the majority, as a result of conscious or unconscious racism, will be resistant to proposals in the deliberative body that come from minorities. Similarly, there are times when those in the majority, due to conscious or unconscious sexism, homophobia, or religious bigotry, will be resistant to proposals in the deliberative body that come from any or all of those minorities.

Yet, a hallmark of liberal tradition is the understanding that reasonable people will sometimes disagree on the best approach to governing. Once people have a vested interest in the outcome, the possibilities for reasonable disagreement increase. The reason Rawls wants his rational deliberators behind the veil of ignorance is so that individuals will not be biased in their preferences. But, that is not how real people behave, and I hope I have offered at least some preliminary thoughts on why people should be embrace elements of their identities that traditional liberal theorists would just as soon ignore.

One issue that breaks along racial lines is job security in the government. African Americans tend to think that the government should provide more security for its workers, whereas whites do not. One might attribute this difference to racism, but a reasonable

379 Kennedy, 5.
reading of the circumstance is that it reflects a difference in vested interests. While 53.5% of African Americans in professional or managerial positions work for the government, only 27.5% of whites do.\textsuperscript{380} A greater opportunity for coalition work might uncover these underlying reasons. Continued marginalization would allow these differences to be more entrenched.

Guinier’s project gives us a good starting point for a contemporary strategy that protects minorities and allows everyone to feel included in the political process.

\textsuperscript{380} Kennedy, 5.
CHAPTER SIX
CONCLUSION

This project has traced the development of the concept of political representation. Earlier theorists were preoccupied with political representation as a means of securing the political authority of the state. Their discussions of political representation reflected a concern with maintaining order and peace within civil society. However, as representative government became tied to democracy, the specific problem of majorities and minorities became explicit. Majorities elected most of the members of the legislature, and the legislature made laws that were in the interest of the majorities but often not in the interest of the minorities. I have analyzed the transition from the general problem of political representation to the specific problems of minorities under representative schemas.

This project can be described as an attempt to reconcile the different approaches adopted by Madison, Mill, and Guinier to resolve the problem of political minorities. Madison's attempt to resolve the problem was to keep the society large and heterogeneous. For Madison, because factions are rooted in difference and animosity, members of factions are "much more disposed to vex and oppress each other than to cooperate for their common good."381 This is because people who possess different opinions about religion, culture, the role of government, etc., will be so invested in their positions that they will not desire to cooperate with one another. Sometimes these opinions will be framed in such a way to preclude cooperation with others. For example, some might hold religious views that require them to view nonbelievers as inferior and, therefore, deserving of inferior treatment.

Madison is correct to anticipate these kinds of tensions between members of factions. His solution is to guarantee that the factions are so numerous as to cancel out one another. This canceling out of one another rules out the possibility of coalitions. Madison would view this as a good thing because if members of factions build coalitions with one another, they could become strong enough to overtake and dominate the others.

Madison’s view of factions can be extrapolated to political minorities because some of the issues that motivate the creation of factions also motivate the desires of political minorities, even when those political minorities do not organize themselves into specific factions. For Madison, some of the main causes of factions include differences in opinion and economic jealousies. The characteristics that define political minorities are not mutable in the way that opinions and sentiments often are. As I noted in the introduction, political minorities always (or almost always) find themselves outvoted, particularly in strict majoritarian systems. This is not true of factions, for their membership changes as people change religions, opinions, and economic class. Political minorities are, however, marked by distinguishing features that enable them to be picked out as different. Furthermore, political minorities often lack access to political power due to historical exclusion or a perception that they are not fit to govern. Still, Madison’s larger point is that factions are mistrustful of one another. This mistrust leads to the strife that factions experience with one another. Likewise, political minorities often find themselves in conditions of mistrust – both between political minorities and those in power and between different groups of political minorities.

But, even when political minority groups are factions, they are not only or merely factions. Because of their unique histories of exclusion, oppression, and struggle, political
minorities have ideas and unique perspectives that can contribute to and enrich deliberative discussion.

Madison is not particularly concerned with creating a space for those divergent populations to make contributions in the deliberative body. This lack of concern can be attributed to Madison’s belief in both the filter and the trustee conceptions of representation. Madison holds the filter view of representation in that he believes that the electoral process that he recommends serves to weed out those who would be less than desirable in the deliberative body. Because that process is designed to require that successful candidates for office appeal to a wide variety of factions he believes that such candidates will not be simply the mouthpieces of particular factions, but fair-minded and dedicated to serve more general interests.

In other words, Madison’s assumption is that the electoral process will act as a filter that only allows the most virtuous to be elevated into the deliberative body. However, his understanding of what constitutes virtue does not show any consideration about whether the electoral process is itself fair. Madison’s commitment to the trustee conception of representation comes through in his belief that the representative’s decision-making in the deliberative body should be guided by her judgment. This combination of virtue and independent judgment is sufficient, on Madison’s view, for a legitimate deliberative body. He does not consider that his filter might exclude candidates from political minority groups with unique insights. Madison is not worried about political minorities, and he has no reason to think that they have any special contribution to make to the deliberative process.

Contra Madison, Mill stresses that idea that groups may have unique contributions to make in the deliberative body. Although in his most thorough treatment of representation,
Considerations on Representative Government, Mill is preoccupied with the intellectual elite, he is very clear that his analysis could be extended to others. His concern for women’s equality in “The Subjection of Women” and his arguments for the emancipation of West Indian ex-slaves from perpetual apprenticeships in “The Negro Question” emphasize this point.382

In “The Subjection of Women,” Mill notes,

[T]he principle which regulates the existing social relations between the two sexes – the legal subordination of one sex to the other is wrong in itself.383

He continues that the “disabilities” inflicted on women that limit rights to equal citizenship with men and also their educational and employment opportunities should be removed.384 In the case of the black ex-slave in the West Indies, Mill writes, “The Negro Question,” as a reply to Thomas Carlyle. Carlyle takes the position that he “does not wish to see” the black ex-slaves returned to slavery, but Carlyle argues that they “will have to be servants” to the whites, even if it means that blacks must be “compelled to labor.”385

Mill takes umbrage with Carlyle’s view by noting that according to Carlyle, “The whole West Indies belongs to the whites: the negroes have no claim there, to either land or food, but by their suffrance [sic].”386 Mill’s response to Carlyle is that even if whites were superior to blacks,

382 In “The Negro Question,” Mill is advocating emancipation, not representation in the deliberative body. However, Mill’s stance is radical for the 1840’s Britain. A detailed discussion is beyond the scope. However, the point I am making is that Mill attempts to grapple with those I call political minorities.


and competent by nature to instruct and advise them, it would not be the less monstrous to assert that they had therefore a right either to subdue them by force, or circumvent them by superior skill; to throw upon them the toils and hardships of life, reserving for themselves, under the misapplied name of work, its agreeable excitements.387

So, Mill is willing to consider the plight of political minorities. Although Mill does not specifically advocate suffrage rights to blacks in the West Indies, he does think that impediments to suffrage should be removed for [white] women. Presumably, extending the full citizenship rights to women that men enjoy would carry over into the deliberative body.

Mill views the deliberative body not as simply a group of individuals who have survived Madison’s filter, but as a space for people with different viewpoints to exchange ideas in order to reach the best decisions. The most effective deliberation can only occur when the differing perspectives of the citizenry have a voice within the deliberative body. This is why Mill is committed to a voting scheme that generates proportional representation. This is also why Mill is committed to a mirror conception of representation. He is attempting to create a deliberative body that mirrors the larger population. For Mill, the Hare system of voting is the most efficient means for achieving such a deliberative body.

Mill rightly believes that having different voices in the deliberative body changes the type of discussion that occurs. Far from being a conversation among members of one segment of the population, the deliberative body as Mill envisions it is one where a variety of voices and viewpoints give as much information as possible so that the best, most informed decision can be reached. In fact, the mere presence of these different people, in Mill’s specific case, the intellectual elite, raises the level of discussion. It is Mill’s hope that the presence of the intellectual elite will broaden the minds of everyone else in the deliberative body. Similarly, it is my hope that the presence of political minorities in the deliberative

body will broaden the minds and raise the level of discussion that occurs. With the level of discussion so raised, the legislature will be more able and disposed to make changes in the society to ameliorate the deep rooted problem of political minorities. This could happen if, for example, the deliberative body decides to take steps to reduce inequalities. The family leave policies that only emerged once more women entered the deliberative body are an example of changes in society that are initiated through the deliberative body. These policies have helped to reduce the inequalities in employment faced by many women who attempt to balance work obligations with family commitments.

Guinier is less optimistic about the impact that the mere presence of political minorities in the deliberative body will have. Her lack of optimism lies in her focus on the historical and continuing oppression and exclusion faced by African Americans in the political process. She thinks that once inside the deliberative body, African Americans can still be rendered ineffective if their concerns are not taken seriously. Far from believing that the mere presence of African Americans in the deliberative body will raise or broaden the level of discussion in the deliberative body, Guinier sees the deliberative body as a microcosm of the larger society. That is, the same biases that historically prevented African Americans’ participation in the political process, and continues to impede African Americans’ participation in the political process, gets replicated in the deliberative body.

She advocates taking an additional step, supermajority voting, within the deliberative body to protect African Americans. Supermajority voting requires a percentage significantly greater than 51% in order to pass an issue. Often this number might be 66% or 75%. This additional step is an attempt to make guarantee that everyone is allowed to

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388 Like Mill, although Guinier appeals to a particular case, the case of African Americans, Guinier’s analysis could also be extended to others.
participate in the decision-making of the deliberative body. Guinier’s extra step is a safeguard. It is wonderful if people want to deliberate together in good faith, but just in case they do not want to, the supermajority rule ensures that they have to.

The question that remains is whether the discussion gets changed enough to make a difference deliberative process. Guinier’s additional measure is appealing because she has a plan to address the possibility that resistance to change, residual prejudice, or some other issue will hamper the willingness of everyone to deliberate together as equals. Mill is correct: the mere presence of different voices changes the discussion.
REFERENCES


