

THE EMERGING INTERNATIONAL ARISTOCRACY

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I. INTRODUCTION

Our task is to perform the anatomy of a body politic, namely, of the body politic formerly known as liberal democracy—a body politic, a *corpus politicum*, which is also a *corpus delicti*, a victim. The operation is thus necessarily an anatomy of melancholy.¹ It will be a postmortem, a biopsy, and a birth. We must first endeavour to discover the cause of the death of the idea of liberal democracy. We must then analyse our experience of a postdemocratic social reality whose essential characteristic is oligarchy. Finally, we must face a new global social reality, the total social reality, a reality dominated by a new version of an age-old social phenomenon, an emerging international aristocracy, an oligarchy of oligarchies. It is a new reality that challenges us to bring into existence a new idea of the body politic.²

II. THE END OF DEMOCRACY

It will be interesting to learn the date that future historians will assign to the end of the idea of liberal democracy as a significant social force and to hear their explanation of its

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1. “Kingdoms, Provinces, and Politicke Bodies are likewise sensible and subject to this disease [melancholy].” ROBERT BURTON, 1 *THE ANATOMY OF MELANCHOLY* 66 (Thomas C. Faulkner et al. eds., Clarendon Press 1989) (1621).

2. The connection of the following discussion to the work of Thomas Franck is close but distant. Sharing a strategy of using the power of social and legal philosophy to improve the human world, we are led to propose plans of campaign that are radically distinct. The word “emerging” is used in the present essay as an acknowledgement of that part of Professor Franck’s work which is epitomised in a celebrated essay, Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46 (1992).

passing. They may attach particular significance to the fact that the idea lost its power at the very time when it seemed destined to have a new lease on life as a social force within the reconstituting of traditional societies all over the world, and even seemed destined to act as a social force in the reconstituting of superordinate international society. It may simply be a matter of coincidence, or else it may be the case that the potential universalising of the idea of liberal democracy revealed a weakness in the idea, a hidden fault that proved fatal under the strain of attempts to extrapolate it from the particular circumstances of national societies. What was wrong with the idea of democracy? What was its fatal flaw? We may consider five possible hypotheses.

A. *Not One Actualised Idea of Democracy*

A first possible explanation of the decline and fall of the idea of democracy is that there was no such thing as a single actualised form of the idea of liberal democracy, no single city on a hill.³ The remarkable diversity of supposedly liberal-democratic societies might be seen as variations on a theme. But the diversities are so substantial and so central to the supposed idea of liberal democracy that the common essence distilled from them can only be a patchwork thing, a portmanteau of portmanteaus. The quasi-monarchic, elitist-oligarchic, Jacobin-republican democracy of France. The legal-formalist, institutionalist, corporatist-federalist democracy of Germany. The conspiratorial, oligarcho-populist, monarcho-fantasiist democracy of Britain. The conspiratorial, oligarcho-populist, pragmatico-legalist, economico-corporatist, fantasiist, and federalist democracy of the United States of America. Discretion may restrain us from citing other still more exotic forms in other countries whose names appear on official lists of "democracies."⁴

3. This image has been much used, throughout American history, to express the idea that a given form of American society (pre- and post-Revolutionary) might be seen as a unique and exemplary model of social organisation. The phrase has a biblical origin. *See Matthew*, 5:14.

4. The list of those invited to the Second Ministerial Meeting of the Community of Democracies (Seoul, South Korea; Nov. 2002) contains the names of some 120 countries. *See Community of Democracies: List of Invitees to the Seoul Conference*, at <http://www.cd2002.go.kr/about/list.htm>.

B. *No Central Theory of Democracy*

A second possible explanation for the withering-away of the idea of democracy is that there never actually was such a thing. There was never anything that one could call the theory of democracy. The number of theories was larger than the number of theorists, and the theories were, on central issues, internally incoherent and mutually irreconcilable. Was Plato the implacable enemy of freedom and equality? Was Aristotle the prophet of liberalism or of socialism? Was Aquinas the first Whig? Was Hobbes a new kind of radical wearing the clothes of a reactionary? Was Locke the sinuous apologist of a vulnerable gentry or of an aspiring bourgeoisie? Was Montesquieu the protector of aristocracy in the face of the threat of democracy? Was Rousseau a populist or a fascist or both? Was Burke a conservative or a romantic? Was Jefferson a democrat or an aristocrat? Was Mill the apostle of social enlightenment or the defender of elitist rationalism? Has the relentless flood of twentieth-century writing about "liberal democracy" finally washed the idea clean of any worthwhile ascertainable substance?

It is of the nature of social theories to be either out-of-date or ahead of their time. To negate social theory is to help to make social theory. It is to play our part in society's never-ending self-contemplating and self-creating.⁵ In social and legal philosophy, as in religion, we inherit an intellectual conglomerate, an accretion of past states of the human mind and past states of social practice.⁶ Through the alchemy of the public mind, in which ideas and practice combine and react, we collectively rework the inherited conglomerate in the hope of making new and better social practice. In the case of the ideas collected together under the name of "democracy," a label that is already more than twenty-six centuries old, the humbling fact is that if our predecessors, however distant from us

Further information about the Community of Democracies may be found on the website of the U.S. Department of State, at <http://www.state.gov/>.

5. In this way, we participate in the process of society's "ideal" self-constituting, that is, its self-constituting in the dimension of ideas. See PHILIP ALLOTT, *EUNOMIA: NEW ORDER FOR A NEW WORLD* § 9.10, at 136 (1990) [hereinafter ALLOTT, *EUNOMIA*].

6. The idea of an "inherited conglomerate" of social consciousness is borrowed from GILBERT MURRAY, *GREEK STUDIES* 67 (1946). "Conglomerate" is a geological term for a composite form of rock.

in point of time, were with us here today, they would have no difficulty in joining the discussion. They might only be surprised to find that we are still discussing the very questions that they discussed, and in very much the same terms. But, even if our sceptical judgement can have no claim to originality, the time has come, at the beginning of the twenty-first century, to utter it yet again, to say that the lived reality of the social world changes and with it must change our most cherished ideas. The time has come to stop talking about democracy. The time has come to tell the people a new story.

C. *The Geography of Philosophy*

A third possible explanation for the demise of the idea of democracy is that, whatever it was, it was simply not a universalisable thing. We may recall Montesquieu's apparently quixotic idea that political ideas and institutions are conditioned by, or even determined by, climate:

In a nation [England] so distempered by the climate as to have a disrelish of everything, nay, even of life, it is plain that the government most suitable to the inhabitants is that in which they cannot lay their uneasiness to any single person's charge, and in which, being under the direction rather of the laws than of the prince, it is impossible for them to change the government without subverting the laws themselves.⁷

That is from Book XIV, whose title is *Of Laws in Relation to the Nature of the Climate*. He has another section in Book XXIV, under the title *The Inconvenience of Transplanting a Religion from One Country to Another*, which fits better, perhaps, with the problem of the universalising of democracy:

When the Christian religion, two centuries ago, became unhappily divided into Catholic and Protestant, the people of the North embraced the Protestant, and those of the South adhered still to the Catholic.

7. 1 BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS*, bk. XIV, at 231 (Thomas Nugent trans., Hafner Publ'g Co. 1949) (1748). One might rather have supposed that the British constitution is the actualising of fog. Nothing is quite what it seems. The observer sees apparently solid objects that evaporate when looked at more closely: the hereditary monarchy, the royal prerogative, the sovereignty of Parliament, the independence of the judiciary, and—a new presence-absence—human rights.

The reason is plain: the people of the north have, and will forever have, a spirit of liberty and independence, which the people of the south have not; and, therefore, a religion which has no visible head is more agreeable to the independence of the climate than that which has one.⁸

Did the religion of democracy reveal itself to be geographically contingent and hence unsuited to be one of the universal religions? Can it be that there is a geography of philosophy, that there are specific characteristics of the mental environment in particular parts of the world that determine the natural selection of philosophical species and hence of social theory and social practice? To practise democracy you must be the kind of person who can believe in the esoteric religion of democracy. It may simply be that not everyone everywhere is that kind of person.

D. *Capitalism—The Fatal Embrace*

A fourth possible explanation of the end of the idea of democracy is that it fell into bad company. To be a true believer in liberal democracy you must also believe in liberal capitalism. Democracy-capitalism proved to be an ideologically integrated system of absolutist social power constructed around the idea of freedom and its negation, the idea of equality and its negation, the idea of social solidarity and its negation.

Liberal democracy and industrial capitalism were fatally attracted.⁹ They were ideological cousins. The nineteenth-

8. 2 *id.*, bk. XXIV, at 30-31. Aristotle is, perhaps, the prime mover of this line of argument, noting, "Those who live in a cold climate and in [northern] Europe are full of spirit, but wanting in intelligence and skill; and therefore they keep their freedom, but have no political organization, and are incapable of ruling over others." *THE POLITICS OF ARISTOTLE*, bk. VII, at 175 (Benjamin Jowett trans., Colonial Press, rev. ed. 1900).

9. The Western cultural tradition, seemingly obsessed with fateful human couplings, from Phaedra and Hippolytus to Abélard and Héloïse, is teeming also with quasi-mythical hypostatic couplings—body and soul, body and mind, the ideal and the actual, the spiritual and the temporal, holy simplicity and ecclesiastical absolutism, civilisation and imperialism, war and peace, law and power, individualism and collectivism, totalitarianism and anarchism, elitism and populism, self-interest and common interest, democracy and capitalism.

century idea of Democracy was the unruly offspring of Power and Opinion—power of opinion, power over opinion, the collectivised other made to believe that it can be an empowered self.¹⁰ The nineteenth-century idea of Capitalism was the cold-hearted child of Labour and Property—unequal division of labour, unequal division of property, with the one inversely proportional to the other. But the ideas of Democracy and Capitalism shared an eighteenth-century ideal grandparent called Socialised Self-Interest, private vice generating public benefit through the social management of desire.¹¹ If tragedy is willed fate, the cruel predicament in which we choose to do precisely the very thing that is destined to destroy us, then the tragic end of the couple known as democracy-capitalism was contained in its common theoretical genome.

The fateful coupling of liberal democracy and industrial capitalism in social practice occurred in England in 1832, when the British industrial and commercial middle class took dominant power over the British political and lawmaking machine, with the self-interested connivance of the old landowning class and with the assistance of a new professional bureaucratic class. They then undertook a methodical root-and-branch revolution by due process of law.¹² And the new middle class, in Britain and then throughout Europe and across the world, took dominant power also over all aspects of the social machine, accepting the exceptional responsibility that

10. This term is borrowed irreverently from THOMAS M. FRANCK, *THE EMPOWERED SELF: LAW AND SOCIETY IN THE AGE OF INDIVIDUALISM* (1999).

11. The illuminating idea of the creative connection between private vice and public benefit (self-interest and common interest), an idea traditionally associated with the name of Bernard Mandeville (1670–1733), is at the heart of leading theories of both democracy (the social contract and the general will) and capitalism (the division of labour and the invisible hand). See E.J. Hundert, *Introduction to BERNARD MANDEVILLE, THE FABLE OF THE BEES AND OTHER WRITINGS*, at x, x-xix (E.J. Hundert ed., Hackett Publishing Co. 1997) (1723).

12. Perhaps England is best seen, not as “the mother of parliaments” as the admirable John Bright claimed, but rather as the mother of “revolution by due process of law,” in a fine phrase attributed to the Duke of Wellington. MATTHEW ARNOLD, *CULTURE AND ANARCHY* (1867–69), reprinted in *CULTURE AND ANARCHY AND OTHER WRITINGS* 53, 100 (Stefan Collini ed., Cambridge Univ. Press 1993). The Duke was the unlikely midwife (in the House of Lords) of the controlled “reform” of 1832 that somehow left the landowning class with surprisingly substantial economic power and the ruling class in general with greatly enhanced political power.

attaches to exceptional privilege—responsibility for thinking, teaching, and leading, and for making social systems of all kinds work as efficiently as possible, from the local to the national level, even to the global level.¹³ It was a colonising of national society, in the name of ideas and ideals that borrowed from the spirit of socialised religion the strange mixture of arrogant self-assurance and neurotic self-doubt that characterised the Victorian revolution in general. For a while, imperialism seemed to be a suitable vehicle not only for the globalising of the national economy but also for the globalising of current conceptions of “civilisation,” that is, the universalising of particular conceptions of the well-ordered body politic.¹⁴

But, in the twentieth century, the middle-class social empire fell apart. Democracy surrendered to capitalism, in war and in peace. Democracy-capitalism became capitalism-democracy, a nexus of economic and political power in which economic power became the engine of social change, national and global. The end of democracy’s capacity for internal revolution by due process of law is the end of the history of democracy. We Europeans, and our cousins-in-spirit the Americans, seem to have lost the intelligence and the spirit to make revolutions, even revolutions by due process of law. The end of democracy is the end of revolution, not by rational choice but by a failure of the human spirit and a weakness in the human mind.

13. Thus it is manifest that the best political community is formed by citizens of the middle class, and that those States are likely to be well administered, in which the middle class is large Great then is the good fortune of a State in which the citizens have a moderate and sufficient property; for where some possess much, and the others nothing, there may arise an extreme democracy, or a pure oligarchy.

THE POLITICS OF ARISTOTLE, *supra* note 8, bk. IV, at 103.

14. The material existence of England is based on commerce and industry, and the English have undertaken the weighty responsibility of being the missionaries of civilization to the world; for their commercial spirit urges them to traverse every sea and land, to form connections with barbarous peoples, to create wants and stimulate industry, and first and foremost to establish among them the conditions necessary to commerce, viz. the relinquishment of a life of lawless violence, respect for property, and civility to strangers.

GEORG WILHELM FRIEDRICH HEGEL, THE PHILOSOPHY OF HISTORY 455 (J. Sibree trans., Dover Publications 1956) (posthumous 1837).

E. *The Less-Than-Noble Lie*

A fifth possible explanation for the dark night of the idea of democracy is the most troubling of all. It is that the *ideal* of democracy may have been a reasonable, but controversial, theory for a brief moment in fifth-century Athens, but it has simply proved impossible to actualise the ideal in larger and less intelligent societies. In other words, "modern" societies have never actually been democratic within any ideal sense of that word. Experience of the practical application of the idea of liberal democracy has taught us that it contains contradictions that are evidently not accidental or aberrant. They are inherent and central. They relate to the ideal and the claim that liberal democracy is the people's self-governing.

Universal education and the development of the mass media of communication have had the unfortunate effect of giving to the mass of the people a basis of information on which they can form a realistic view of how they are governed. We and our predecessors, the privileged few who are the puppet-masters of social consciousness and who have invented the stories needed to convince most of the people most of the time, have sometimes even believed our own inventions. But the people who are supposed to be governing themselves—the long-suffering many—see democracy in social practice, in their daily lives. They can readily understand the claim that capitalism-democracy is the most efficient system for the improvement of the material conditions of human life that the human mind has been capable of inventing. But they may also see that capitalism-democracy is not, or not always, a lovely thing. Capitalism-democracy wears two masks, a smiling mask and a weeping mask—the mask of human benevolence and the mask of human corruption. If the people are supposed to be self-governing, they wonder if they could not govern themselves better.

Some people—not least Thomas Franck—have tried to rescue democracy from its contradictions by presenting the *ideal* of democracy, not as a priori dogma, but as if, in the spirit of Francis Bacon, it could be extracted as a necessary inference from democracy's best practice, as a "common sense" rational-

isation of the phenomenon of democracy.¹⁵ Franck has written very much in the spirit and tone of Aristotle discussing the nature of the good life or the nature of virtue, or the spirit and tone of Hume or Voltaire when they explore the redeeming, but unlikely, idea that one might imagine rational forms of religion, morality, and politics, despite all argument and evidence to the contrary.

But, even if one takes this most rationalistic approach, it is impossible to avoid the historical fact that the central systematic feature of the idea of democracy has come to seem to be both illusion and delusion, the less-than-noble lie. Democratic societies are ruled by a ruling class, as all societies always have been. The mass of the people know that they are subjects, more and less loyal, of a finite number of ultimate power-holders, as they always have been. If we believe that liberal democracy is destined to universalise itself ideally and practically, might it not be as well first to meet the challenge of its own contradictions, ideal and practical?

III. THE CONTRADICTIONS OF DEMOCRACY

Central to the ideal and the claim of the people's self-governing are the ideas of the general will and the separation of powers. The people participate in the exercise of public power. The separation of powers is a guarantee against the abuse of public power that has been delegated by the people to ultimate power-holders.

The idea of the general will was a worm in the bud of the mystical rose of democracy as conceived hypothetically by its prophets. The idea of the general will is a dialectical resolution of the age-old and fundamental opposition between indi-

15. We owe to the invincible rationalism of the Scottish Enlightenment—and especially to Thomas Reid (1710–1796)—the idea of “common sense” as a universal capacity of the human mind such that our knowledge of the external world is an immediate and reliable intuition, and not merely a secondary mental construction. See Knud Haakonssen, *Introduction to THOMAS REID, PRACTICAL ETHICS: BEING LECTURES AND PAPERS ON NATURAL RELIGION, SELF-GOVERNMENT, NATURAL JURISPRUDENCE, AND THE LAW OF NATIONS* 3, 42–46 (Knud Haakonssen ed., 1990). On this basis, a “realist” metaphysics of the world could be produced, especially following Baconian principles of induction.

vidualism and collectivism in the theorising of society.¹⁶ It depends on a series of interesting theoretical preconceptions, each of which has its own history within the history of social philosophy: (1) the idea of a society as a totality (as a corporation or *universitas*); (2) the idea of a society that is distinct from its members; (3) the idea of a society that is distinct from its formal representative(s)—monarch or assembly or council;¹⁷ (4) the idea of a society conceived as having organic characteristics analogous to those of a human being (mind, will, responsibility, etc.);¹⁸ (5) the idea of society itself as a social actor, not least as the source of law and of the authority of law.

For liberal democracy, the link between the citizen individual and this metaphysical or biological conception of society has been provided by the idea of “representation.”¹⁹ But

16. “The Sovereignty of the State and the Sovereignty of the Individual were steadily on their way towards becoming the two central axioms from which all theories of social structure would proceed, and whose relationship to each other would be the focus of all theoretical controversy.” OTTO GIERKE, *POLITICAL THEORIES OF THE MIDDLE AGE* 87 (Frederic William Maitland trans., Thoemmes Press, photo. reprint 1996) (1900). Maitland’s translation (with the celebrated “translator’s introduction”) was of *Die Publistischen Lehren des Mittelalters*, a section in volume 3 of Gierke’s (unfinished) *Das Deutsche Genossenschaftsrecht*. It may be said that the opposition referred to by Gierke had been central to social philosophy long before the waning of the Middle Ages, at least since the differences of opinion (and of worldview) between Plato and Aristotle.

17. “He who would inquire into the nature and various kinds of government must first of all determine ‘What is a State?’ At present this is a disputed question. Some say that the State has done a certain act; others, no, not the State, but the oligarchy or the tyrant.” *THE POLITICS OF ARISTOTLE*, *supra* note 8, bk. III, at 54. Hobbes noted:

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. For it is the *Unity* of the Representer, not the *Unity* of the Represented, that maketh the Person *One*.

THOMAS HOBBS, *LEVIATHAN* 85 (J.M. Dent & Sons Ltd. 1965) (1651).

18. “Again, the State may be compared to the living being” *THE POLITICS OF ARISTOTLE*, *supra* note 8, bk. III, at 58.

19. As in a country of liberty, every man who is supposed a free agent ought to be his own governor; the legislative power should reside in the whole body of people. But since this is impossible in large states, and in small ones is subject to many inconveniences, it is fit the people should transact by their representatives what they cannot transact by themselves.

the idea of representation is, and always has been, riddled with uncertainties. What is representation?²⁰ Who chooses the representatives? Who are the representatives?²¹ Do they represent the common interest of their electors or a class interest, say, the interest of the propertied class? Are citizens who do not have the vote, or who do not vote in a given election, “virtually” represented in representative bodies, especially the legislature?²² What is the responsibility of elected representatives to their electors? Do the elected or unelected holders of

1 MONTESQUIEU, *supra* note 7, bk. XI, at 154. Jefferson called it “the glorious right of representation.” THOMAS JEFFERSON, A SUMMARY VIEW OF THE RIGHTS OF BRITISH AMERICA (1774), *reprinted in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 293, 305 (Adrienne Koch & William Peden eds., 1944).

20. Looking at the origins of representation in the English parliaments of the thirteenth and fourteenth centuries, one may see another theory of representation, which we might label “reverse representation.” The chosen representatives of the people are deemed to have the authority to consent to taxation, etc. and thereby to bind legally the community they represent. See J.G. Edwards, *The Plena Potestas of English Parliamentary Representatives*, in 1 HISTORICAL STUDIES OF THE ENGLISH PARLIAMENT 136 (E.B. Fryde & Edward Miller eds., 1970). Thomas Hobbes embedded such an idea in his consensual theory of society, using a devastating play on the words “author” and “authority”:

[The people] confer all their power and strength upon one Man, or upon one Assembly of men, that may reduce all their Wills, by plurality of voices, unto one Will . . . and every one to own, and acknowledge himself to be the author of whatsoever he that so beareth their Person, shall Act, or cause to be Acted For by this Authority . . . , he is enabled to form the Wills of them all

HOBBS, *supra* note 17, at 89-90 (spelling modernised).

21. We have seen that the result of the observations to which the foregoing number has been principally devoted is that from the natural operation of the different interests and views of the various classes of the community, whether the representation of the people be more or less numerous, it will consist almost entirely of proprietors of land, of merchants, and of members of the learned professions

THE FEDERALIST NO. 36, at 217 (Alexander Hamilton) (Clinton Rossiter ed., 1961). In No. 60, Hamilton addresses the argument that the Senate will tend to be full of the “wealthy and the well-born.” THE FEDERALIST NO. 60, at 368 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

22. For his part, his idea of representation was this, that the members once chosen, and returned to parliament, were, in effect, the representatives of the people at large, as well as those who did not vote at all, or who, having voted, gave their votes against them, as of those by whose suffrages they were actually seated in the House.

ultimate public power, especially the executive branch of government, have an inherent representative function in seeking the common interest on behalf of society as a whole?²³

In the light of such uncertainties, it is not difficult to understand why the people may come to suppose that the problem of the connection between the will of the individual citizen and the general will of society is not resolved by the idea of representation.²⁴

The history of the idea of the separation of powers is the history of class struggle. Within the history of the idea of liberal democracy, the history of the idea of the separation of powers is the history of class struggle in Britain in the seventeenth century and in America from 1760 to 1787. The separation of powers has been treated, traditionally and reverentially, as providing a shield against tyrannical concentration of political power, a guarantee of political freedom. The idea of the separation of powers should rather be seen as something very different, namely, the dialectical negation of the idea of the sovereignty of the people.

Speech and Resolutions of Pitt in Favour of Parliamentary Reform, 1783 (May 7, 1783), in *THE EIGHTEENTH-CENTURY CONSTITUTION, 1688-1815*, at 218, 219 (E. Neville Williams ed., 1960). The argument of "virtual representation" was used by the British in response to the claim of the American colonists that they were being taxed by order of a parliament in which they were not represented. EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 240 (1988).

23. The representatives of the people, in a popular assembly, seem sometimes to fancy that they are the people themselves, and betray strong symptoms of impatience and disgust at the least sign of opposition from any other quarter; as if the exercise of its rights, by either the executive or judiciary, were a breach of their privilege and an outrage to their dignity.

THE FEDERALIST NO. 71, at 433 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

When occasions present themselves in which the interests of the people are at variance with their inclinations, it is the duty of the persons whom they have appointed to be guardians of those interests to withstand the temporary delusion in order to give them time and opportunity for more cool and sedate reflection.

Id. at 432.

24. "Is not representation an essential and fundamental departure from democracy? Is not every representative government in the universe an aristocracy? . . . Representation and democracy are a contradiction in terms." Letter from John Adams to John Taylor (Apr. 15, 1814), in 6 *THE WORKS OF JOHN ADAMS* 447, 462 (Boston, Charles C. Little and James Brown 1851).

In Britain and America, the disintegration of an existing structure of ultimate social authority led to profound and passionate debates about the ultimate source of power in society. In England, the execution of one king (1649) and the forced abdication of another (1688), not to speak of a short-lived experiment in republican government (1649–60), led to a perceived threat of direct democracy, in which the people might imagine that they were not only the “constituting power” (dictating the fundamentals of the constitution) but also the governors of the government, the continuing source of political and lawmaking authority.²⁵ In the United States, the rejection of the authority of the British King and of the British Parliament produced an agitated scene of ad hoc constitution making that faced the traditional colonial ruling class with the threat of direct democracy in town meetings and feverish ad hoc constitution making.²⁶

25. A fifth form of democracy . . . is that in which, not the law, but the multitude, have the supreme power, and supersede the law by their decrees And the people, who is now a monarch, and no longer under the control of law, seeks to exercise monarchical sway, and grows into a despot . . . this sort of democracy being relatively to other democracies what tyranny is to other forms of monarchy.

THE POLITICS OF ARISTOTLE, *supra* note 8, bk. IV, at 94. The Earl of Shaftesbury played the role that would later be played by the Duke of Wellington, telling the House of Lords (in 1675) what was necessary if England were to save itself “from tumbling down into a Democratical Republick.” MORGAN, *supra* note 22, at 103 (quoting *Notes Taken in Short-Hand of a Speech in the House of Lords* (Oct. 20, 1675) (London, 1679)).

26. The Massachusetts constitution of 1780 stated, “All power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents and are at all times accountable to them,” and further declared, “The people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good” and to “give instructions to their representatives.” MORGAN, *supra* note 22, at 213. The advocates of the federal constitution recognised “the consent of the people” as the constituting power. “The streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority.” THE FEDERALIST NO. 22, at 152 (Alexander Hamilton) (Clinton Rossiter ed., 1961). But they were equally clear that the American system was not a system of direct democracy. Madison defined a “pure democracy” as direct government by the people, as opposed to a republic, “in which the scheme of representation takes place.” THE FEDERALIST NO. 10, at 81 (James Madison) (Clinton Rossiter ed., 1961).

In both cases, the resulting constitutional settlement included a particular form of "separation of powers" which was really a newly formulated balancing of old powers.²⁷ 1689 and 1787, like 1215 and 1832, were rearrangements of power within the permanent class struggle through which societies constitute themselves from day to day.²⁸ Remarkably, after so much struggle and vigorous controversy, in the federal constitution of 1787 the United States reproduced the essential and traditional, and almost literally legendary, balance of powers of the English constitution: the President, the Senate, and the House of Representatives standing in for the King, the House of Lords, and the House of Commons,²⁹ with an unelected

27. A very droll spectacle it was in the last century to behold the impotent efforts of the English towards the establishment of democracy [T]he people, amazed at so many revolutions, in vain attempted to erect a commonwealth. At length, when the country had undergone the most violent shocks, they were obliged to have recourse to the very government which they had so wantonly proscribed.

1 MONTESQUIEU, *supra* note 7, bk. XXIII, at 20.

28. Montesquieu, who was in England in 1729 and 1730, and whose subsequent writings were often cited (not always with approval) by the makers of the American federal constitution, *see, e.g.*, THE FEDERALIST NO. 9, at 73 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *id.* No. 43, at 277 (James Madison); *id.* No. 47, at 302 (James Madison), consorted mainly with the Whig aristocracy who had been the true winners in the revolution of 1688–89, even if he was already able to observe the systematic corruption that would characterise eighteenth-century government and politics in England. *See* ROBERT SHACKLETON, MONTESQUIEU: A CRITICAL BIOGRAPHY 125–30 (1961); Paul A. Rahe, *Forms of Government: Structure, Principle, Object, and Aim*, in MONTESQUIEU'S SCIENCE OF POLITICS: ESSAYS ON *The Spirit of Laws* 69, 95–97 (David W. Carrithers et al. eds., 2001). The dangerous theory of popular sovereignty, which John Locke's *Two Treatises of Government* seemed to espouse, proved not to be the theory of a revolution that had left a new variant of the old balance of power as the basis of the constitution, with Parliament—not the people, not even the House of Commons, but the King in Parliament (King, Lords, Commons)—recognised as the true "constituting power" in England, able to determine the succession to the Crown, basic constitutional principles (the Bill of Rights, 1689), and its own powers and privileges. *See* RICHARD ASHCRAFT, REVOLUTIONARY POLITICS & LOCKE'S *Two Treatises of Government* 560–77 (1986).

29. James Madison defended the inclusion of a Senate in the American system with an argument that had been used as a defence of the House of Lords in England:

The people can never wilfully betray their own interests; but they may possibly be betrayed by the representatives of the people; and

federal judiciary whose constitutional role, in America as in England, was left to be determined through practical experience. Among the makers of the new constitution there was also a large measure of agreement that aristocracy would continue, preferably in the form of a republican "natural aristocracy" of merit rather than an "artificial aristocracy" of inheritance and property.³⁰

Indeed, the debates leading up to and surrounding the constitution of 1787 were remarkably similar to those which had taken place in England in the seventeenth century³¹ and

the danger will evidently be greater where the whole legislative trust is lodged in the hands of one body of men than where the concurrence of separate and dissimilar bodies is required in every public act.

THE FEDERALIST NO. 63, at 386 (James Madison) (Clinton Rossiter ed., 1961).

Alexander Hamilton defended the seemingly monarchical role of the proposed President of the United States on grounds remarkably similar to familiar European defences of constitutional monarchy, THE FEDERALIST Nos. 67-71 (Alexander Hamilton) (Clinton Rossiter ed., 1961), but rejected the idea of a "council," like the traditional royal council (or the governor's council in the American colonies), because it destroys the unity of the executive function and "tends to conceal faults and destroy responsibility" in the executive department. THE FEDERALIST NO. 70, at 424-25, 427 (Alexander Hamilton) (Clinton Rossiter ed., 1961). As a consequence, the United States would not develop "cabinet government" of the kind that emerged in Britain in the eighteenth century and that survives, in a presidentialised form, today.

30. John Adams offered definitions of aristocracy, natural aristocracy, and artificial aristocracy in his letter to John Taylor. Letter from John Adams to John Taylor, *supra* note 24, at 451. The writers of the *Federalist Papers*, and also Jefferson, believed in the natural aristocracy, which might be expected to assert itself in the government of the republic. "May we not even say, that that form of government is the best, which provides the most effectually for a pure selection of these natural aristoi into the offices of government?" Letter from Thomas Jefferson to John Adams (Oct. 28, 1813), in THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON, *supra* note 19, at 632, 633.

31. The American revolutionary ruling class was very familiar with the abundant English republican literature of the seventeenth century, which itself showed an easy familiarity with the story of the Italian polities, with Machiavelli, and with the social theory and practice of ancient Rome and Greece. In particular, the Americans knew the writing of James Harrington, an aristocrat and close friend of Charles I, whose *Oceana* was a utopian vision of an England transformed into a republic (with or without a king as chief magistrate). See JAMES HARRINGTON, THE OCEANA AND OTHER WORKS (Scienta Verlag Aalen, photo. reprint 1963) (1771). Harrington's influence

to the debates that had surrounded America's own first revolution (1689), an unsatisfactory revolution that had been a side-effect of the unsatisfactory revolution of 1688–89 in England.³² It was as if the removal of the British King from America was a virtual re-enactment of the execution and forced abdication of the two British kings in the seventeenth century. An underlying theme of the debates was the question of property.³³ In the minds of substantial property-owners (aristocratic and merchant-class), there was a fear not only of direct democracy but also of a legislature that might eventually come to be controlled by those without substantial property, exercising what Jefferson had called an "elective despotism."³⁴ The rights of minorities included the rights of an important minority, namely, the rich.³⁵ The debate among the support-

may, perhaps, be detected in a number of ideas central to the American constitutional settlement—a written constitution; bicameralism, including a "Senat" [sic]; a balancing of powers; the legitimate political power of property; natural aristocracy; the government of laws not of men. For other epitomes of Harrington's influence, see H.F. RUSSELL SMITH, HARRINGTON AND HIS OCEANA (1914), especially chapters seven and eight, and H.J. Laski, *Appendix A: The Influence of Harrington in America* of G.P. GOOCH, ENGLISH DEMOCRATIC IDEAS IN THE SEVENTEENTH CENTURY, at 305 (2d ed. 1927) (1898).

32. See generally DAVID S. LOVEJOY, THE GLORIOUS REVOLUTION IN AMERICA (1972); J.M. SOSIN, ENGLISH AMERICA AND THE REVOLUTION OF 1688 (1982).

33. "In the opinion of some, the regulation of property is the chief point of all, that being the question upon which all revolutions turn." THE POLITICS OF ARISTOTLE, *supra* note 8, bk. II, at 35.

34. An *elective despotism* was not the government we fought for, but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others.

THOMAS JEFFERSON, NOTES ON VIRGINIA (1787), *reprinted in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON, *supra* note 19, at 187, 237. He was criticising the Virginia constitution of 1776 in which the bicameral legislature (Delegates, Senate—both directly elected) had proved to be dominant. It may be that Edmund Burke's much quoted assertion in his Speech to the Electors of Bristol of November 3, 1774, that members of Parliament are not delegates of their constituents, but their representatives to a "*deliberative assembly of one nation*," is reflected in the title of the U.S. House of *Representatives* (not of Delegates). Edmund Burke, Speech to the Electors of Bristol (Nov. 3, 1774), in 2 THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE 159, 164-65 (1920).

35. [I]t must be remembered, that the rich are *people* as well as the poor; that they have rights as well as others; that they have as clear

ers of the federal constitution about whether or not to include a Bill of Rights included the argument that bills of rights, from Magna Carta onwards, had been wrested from monarchs and hence “have no application to constitutions, professedly founded upon the power of the people and executed by their immediate representatives and servants.”³⁶ But it was Jefferson who foresaw that, even under a republican constitution, it would be necessary to use higher law to control the abuse of public power, especially “the tyranny of the legislatures.”³⁷

and as *sacred* a right to their large property as others have to theirs which is smaller; that oppression to them is as possible and as wicked as to others

JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT IN THE UNITED STATES OF AMERICA (1787), *reprinted in* 6 THE WORKS OF JOHN ADAMS, *supra* note 24, at 3, 65 (emphasis in original). “In every society where property exists, there will ever be a struggle between rich and poor.” *Id.* at 68. Edmund Burke, like John Adams in so many ways, had said in 1770, “[P]roperty is power.” EDMUND BURKE, THOUGHTS ON THE CAUSE OF THE PRESENT DISCONTENTS (1770) [hereinafter BURKE, PRESENT DISCONTENTS], *reprinted in* 2 THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE, *supra* note 34, at 1, 22. (He cannot have forgotten that Francis Bacon had said that “knowledge . . . is . . . power” FRANCIS BACON, MEDITATIONES SACRÆ [SACRED MEDITATIONS] (2d ed. 1598), *reprinted in* A HARMONY OF THE ESSAYS, ETC. OF FRANCIS BACON 95, 128-29 (Edward Arber ed., English Reprints vol. 7, AMS Press 1966) (1871).) In 1791 he said, “That power goes with property is not universally true” EDMUND BURKE, THOUGHTS ON FRENCH AFFAIRS (1791) [hereinafter BURKE, FRENCH AFFAIRS], *reprinted in* 4 THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE, *supra* note 34, at 323, 353.

36. THE FEDERALIST NO. 84, at 513 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Hamilton also used an argument with prophetic significance, to the effect that a declaration of rights might paradoxically extend the powers of government by suggesting that it had implied powers (say, to control freedom of religion), which would then only be subject to the limit contained in such declaration. *Id.*

37. “The tyranny of the legislatures is the most formidable dread at present, and will be for many years. That of the executive will come in its turn; but it will be at a remote period.” Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), *in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON, *supra* note 19, at 462, 464; *cf.* JOHN ADAMS, THOUGHTS ON GOVERNMENT (1776), *reprinted in* 4 THE WORKS OF JOHN ADAMS, *supra* note 24, at 193, 194 (“[Harrington, Locke, Milton *et al.*] will convince any candid mind, that there is no good government but what is republican. That the only valuable part of the British constitution is so; because the very definition of a republic is ‘an empire of laws, and not of men.’”); *id.* at 204 (expressing the same idea in another formulation).

We the people. We the representatives of the people. We the government governing in the name of the people. We the government governing in the common interest. We the ruling class ruling in the general interest. The genetic contradictions of democracy—a general will that is also the will of the few; a separation of powers that is also a bulwark against the raw power of the people—mean that, despite all our obsessive talk in the twentieth century about “democracy,” the idea of democracy is no longer able to bridge the gap between the ideal of democracy and its social reality.

IV. POSTDEMOCRACY

The idea of postdemocracy reflects a search for a new realism in our idea of actual social reality, that is to say, the surpassing, in theory and in practice, of what has been called democracy. The challenge is urgent and crucial, given that we are no longer thinking the reality merely of this nation or that, but of a new global social reality, a social reality of all social realities, national and international, a reality far exceeding all previous social reality in complexity and diversity, and in its potentiality for good and evil.³⁸

What we can now see, two hundred years after the great constitutional transformations of Britain and America, is that the inherent republicanism of so-called democracy has revealed it as a form of oligarchy, namely, an oligarchy of oligarchies. Oligarchy is the rule of the few, the *oligoi*, as opposed to the rule of the citizens in general, the *polloi*.³⁹ Our experience

38. The ideally best form of government, it is scarcely necessary to say, does not mean one which is practicable or eligible in all states of civilisation, but the one which, in the circumstances in which it is practicable and eligible, is attended with the greatest amount of beneficial consequences, immediate and prospective.

J.S. MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* (1861), reprinted in *ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 109, 141 (R.B. McCallum ed., 1947).

The hypothesis of a new universal social reality is the central theme of the present author's books. See ALLOTT, *EUNOMIA*, *supra* note 5; PHILIP ALLOTT, *THE HEALTH OF NATIONS: SOCIETY AND LAW BEYOND THE STATE* (2002) [hereinafter ALLOTT, *THE HEALTH OF NATIONS*].

39. For polity or constitutional government may be described generally as a fusion of oligarchy and democracy; but the term is usually applied to those forms of government which incline towards democracy, and the term aristocracy to those which incline towards

of the social reality of liberal democracy is of permanent revolution, as the dialectical tension between the power of the people and the power of the oligarchies, and the struggle for power among the oligarchies, are expressed in an ever-changing balancing of the most general social powers. We may summarise, crudely but coldly, the present characteristics of that balance of power.

A. *The Royal Few*

Professional politicians are an oligarchy with a particular class-interest. When they, elected or unelected, form the executive branch of government, they are an oligarchy-within-an-oligarchy, acting as a collective monarchy. Democracy-as-oligarchy creates a temporary absolutism, hallowed by a sort of temporary divine right. You, the government, have been blessed by the many. When you are in power, you take what seems to be a legitimate power over the whole of the governmental machine because you are deemed to be acting in the name of the many. The royal few cannot be regarded as anything more than an artificial aristocracy because, although the government controls an enterprise of immense scope and complexity and power, no specific qualities or qualifications are required, other than personal ambition and an ability to win in the electoral game of chance played with the mass of the people. Their temporary possession of the mantle of absolute monarchy seems almost to compel them to indulge in the traditional temptations of monarchs—corruption, intrigue, patronage, cronyism, the vanity of public shows and public works, and war.

When democracy and capitalism became fused in a single constitutional system, the royal few came to include also the economic ruling class, those who take the most general industrial and commercial decisions, forming a bicephalous oligarchy of common interest with the ruling few of government. They are another artificial aristocracy, created by law and sustained by government. Like governmental politicians, whose overriding aim of reelection is deemed to be an integral part

oligarchy, because birth and education are commonly the accompaniments of wealth.

THE POLITICS OF ARISTOTLE, *supra* note 8, bk. IV, at 98. By “democracy,” Aristotle usually meant direct democracy, the rule of the people.

of their service of the general public interest, so the royal few of capitalism are hallowed by the high values of capitalism—enterprise, technical innovation, progress, profit, wealth creation—and are deemed to be serving, incidentally but necessarily, the general public interest.

The outcome is that postdemocracy is now also postpolitics. The essential task of government has been revealed nakedly as what it has really always been: the management of the economy. Society comes to see itself as a political economy. Where they are not simply an engine of absolute corruption, elections, the central ritual of the religion of representative democracy, have become nothing more than a more or less random choice between barely distinguishable management teams.

B. *The Rational Few*

The illusionary idea of popular democracy raised the awful prospect of government by the unfittest, a tyranny of the lowest common denominator in intellectual and moral terms, not to mention in aesthetic terms—an empire of bad ideas, bad behaviour, and bad taste.⁴⁰ What we have experienced in practice is a tyranny of the majority manipulated by a minority—not government *by* consent but the government *of* consent. But another historical development led democracy in another direction. Over the last two centuries, government became infinitely more complicated and difficult than earlier theorists of democracy could have imagined. This is due in large measure to the remarkable rise and the extraordinary success of capitalism.

The nineteenth century discovered that capitalism requires a vast system of law and government and administration to make it work. And nineteenth-century observers also saw, as Adam Smith had dimly foreseen, that capitalism also needed a great deal of social therapy to mitigate its cruelties and imper-

40. The natural tendency of representative government, as of modern civilisation, is towards collective mediocrity: and this tendency is increased by all reductions and extensions of the franchise, their effect being to place the principal power in the hands of classes more and more below the highest level of instruction in the community.

MILL, *supra* note 38, at 198.

fections. These also had to be provided by law, and by massive amounts of public decision making, using powers delegated by legislation and subject to interpretation and application by the courts.⁴¹ The greater part of the law today is the legal substance of the economy. So capitalism had need of democracy—government by the few in the name of the many—to provide the vast edifice of law and government and administration required to make capitalism work.

Nineteenth-century society duly produced from within itself a brilliant corrective to popular democracy. Popular democracy would be combined with Prussian bureaucracy, irrationality and rationality harnessed together as the engine of democracy-capitalism. Mass politics and laissez-faire capitalism are arenas of shameless self-interest. Let there be “public servants” whose task is to serve only the public interest, preferably, at least at the highest level, people of exceptional qualities of mind and character. And let there be “managers” whose task is to serve the highest interest of a given corporation and thereby, necessarily, also the general public interest. The royal few of democracy-capitalism would have the collusive assistance of the rational few of administration and management.⁴²

C. *The Fortunate Few*

The *cui bono* class. Aristotle and More and Smith simply referred to them as “the rich.” They are those who profit disproportionately from the functioning of democracy-capitalism. As the material conditions of life for the mass of the people are improved arithmetically, the material conditions of the rich are improved geometrically.⁴³ And it has turned out that

41. Robert Owen said (already in 1815) that the new industrialism “will produce the most lamentable and permanent evils, unless its tendency be counteracted by legislative interference and direction.” ROBERT OWEN, OBSERVATIONS ON THE EFFECT OF THE MANUFACTURING SYSTEM (1815), *reprinted in A NEW VIEW OF SOCIETY AND OTHER WRITINGS* 93, 94 (Gregory Claeys ed., Penguin Books 1991) (1927).

42. The seminal works on the bureaucratizing of business (as management of the corporation came to be separated from ownership of the corporation) are JAMES BURNHAM, THE MANAGERIAL REVOLUTION (Indiana Univ. Press 1960) (1941) and JOHN KENNETH GALBRAITH, THE NEW INDUSTRIAL STATE (2d rev. ed. 1971).

43. What is worse, the rich every day extort [*abradunt*] a part of their daily allowance from the poor not only by private fraud but by public law . . . and finally, by making laws, have palmed it off as justice.

the *royal few* who govern in the name of the people feel a close affinity and a common interest with the *fortunate few* who profit most from the increasing wealth of the nation.

It goes without saying that the fortunate few are not necessarily the happy few in any simple sense of that word. Personal misery is often the price of great wealth. But the rich are in a position to satisfy more of their desires than the poor, even if, as Aristotle says, "it is of the nature of desire not to be satisfied . . ."⁴⁴ And to be miserable in comfort is better than to be miserable in the midst of misery. But, above all, the rich can make disproportionate use of the possibilities made available by postdemocratic oligarchy, by buying and manipulating the powerful and their power.

D. *The Conscious Few*

Mind is power. Power over social consciousness is the ultimate political power. The fourth estate of the oligarchy of oligarchies is formed by the engineers of social consciousness, the masters of the public mind. Democracy and capitalism are immense idea-machines. They produce ideas about their own functioning (theories of democracy and capitalism), about what it is to be human, about the good life, ideas about ideas. They define desire and success.

Consequently, when I consider and turn over in my mind the state of all commonwealths flourishing anywhere today, so help me God, I can see nothing else than a kind of conspiracy of the rich, who are aiming at their own interests under the name and title of the commonwealth. They invent and devise all ways and means by which, first, they may keep without fear of loss all that they have amassed by evil practices and, secondly, they may then purchase as cheaply as possible and abuse the toil and labour of all the poor. These devices become law as soon as the rich have once decreed their observance in the name of the public—that is, of the poor also!

THOMAS MORE, *UTOPIA* (1516), *reprinted in* 4 *THE COMPLETE WORKS OF ST. THOMAS MORE* 217, 241 (Edward Surtz & J.H. Hexter eds., 1965).

Laws and government may be considered . . . as a combination of the rich to oppress the poor, and preserve to themselves the inequality of goods which would otherwise be soon destroyed by the attacks of the poor The government and laws . . . tell them they must either continue poor or acquire wealth in the same manner as they have done.

Lecture by Adam Smith (Feb. 22, 1763), *in* *LECTURES ON JURISPRUDENCE* 207, 208-09 (R.L. Meek et al. eds., 1978).

44. *THE POLITICS OF ARISTOTLE*, *supra* note 8, bk. II, at 37.

The mind-world of democracy is politics. The mind-world of capitalism is the marketplace. Social consciousness is collected in the collective thinking of subordinate political and economic societies, including pressure groups and interest groups with opinions to sell, and industrial and commercial corporations with products and services to sell. Social consciousness is manufactured and traded in the mass media of communication and the mass-entertainment industry. Social consciousness is formed and controlled through religion and education. And, linking them all is the mind-world of the natural sciences, with its new worldviews, the new human potentialities that it creates, the new miracles of technology that it makes available, modifying our behaviour, our expectations, and our desires. The struggle to control social consciousness is now a central focus of the social power, political and economic, that the few use to dominate the many.

The royal few. The rational few. The fortunate few. The conscious few. Such are the organs of the constitution of postdemocratic oligarchy. Such is the new artificial aristocracy of the new social reality. Separately, they are concentrations of great power. In collusion and combination, they are a new form of sovereignty, an ultimate form of absolutism, far beyond the redeeming power of old ideas of the sovereignty of the people, the general will, the separation of powers, or the government of laws.

V. INTERNATIONAL ARISTOCRACY

Into a formless international social reality, into an international vacuum of social philosophy, the externalising of national social reality is a natural temptation, not only the forms and institutions of national social reality but also their constituting ideas. A society's *ideal* constitution, its self-constituting in the form of ideas, may contain illusions about its *legal* constitution that are generated in its *real* constitution, that is to say, in the course of the day-to-day struggle of social power, including the struggle to control the public mind.⁴⁵ But globalised illusion is still illusion. Globalisation is also the globalising of

45. On the three dimensions of a society's self-constituting, see ALLOTT, *EUNOMIA*, *supra* note 5, at §§ 9.6-9.10, at 134-36.

constitutional illusions. The illusion of globalisation is also the globalisation of illusion.

A written constitution is an illusion from the moment it is written, a work of imagination produced within the public mind. It is the inscribing in legal form of agreed formulas reflecting radical disagreements among its makers, formulas that are open to unlimited possible interpretations but that, more importantly, are revised from day to day by the real constitution, reflecting the real and ever changing power relations in society.⁴⁶

Deep-seated illusions about the American written (legal) constitution have deluded almost everyone, including Americans, into supposing that it is a sacred text expressing the essential nature of American democracy, or even of democracy in general.⁴⁷ On the contrary, it was and is a republican con-

46. The laws reach but a very little way. Constitute government how you please, infinitely the greater part of it must depend upon the exercise of powers which are left at large to the prudence and uprightness of ministers of state. Even all the use and potency of the laws depends upon them. Without them, your commonwealth is no better than a scheme upon paper; and not a living, active, effective constitution.

BURKE, PRESENT DISCONTENTS, *supra* note 35, at 32. “[T]he real constitution (*wirkliche Verfassung*) of a country exists only in the true actual power relations that are present in the country; written constitutions thus only have worth and durability if they are an exact expression of the real power relations of society.” FERDINAND LASSALLE, *Über Verfassungswesen [On the Nature of Constitutions]*, in 2 GESAMMELTE REDEN UND SCHRIFTEN [COLLECTED SPEECHES AND WRITINGS] 7, 60 (Eduard Bernstein ed., 1919) (“[D]ie wirkliche Verfassung eines Landes existiert nur in den reellen tatsächlichen Machtverhältnissen, die in einem Lande bestehen; geschriebene Verfassungen sind nur dann von Wert und Dauer, wenn sie der genaue Ausdruck der wirklichen in der Gesellschaft bestehenden Machtverhältnisse sind . . .”) (present author’s translation).

47. Some men look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment. I knew that age well; I belonged to it, and labored with it. It deserved well of its country. It was very like the present, but without the experience of the present; and forty years of experience in government is worth a century of book-reading; and this they would say themselves, were they to rise from the dead.

Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON*, *supra* note 19, at 673, 674.

stitution, a republicanised monarchy. It creates a President who is a king-president reminiscent of pre-1689 monarchs in England, with the divine right that stems from the support of a bare majority of those who vote, in what is, in practice, a direct election, a President who shares in the legislative function with two representative bodies and is dependent on them for the financing of exceptional initiatives, but who is the master of an executive branch of government that is not politically accountable to the representative bodies and that consists of government departments and agencies, including the armed forces, that are fiefdoms under the authority of barons who are his personal appointees.⁴⁸

With prophetic clairvoyance, the makers of the American written constitution saw that a strong and relatively independent President would place a source of dynamic energy and leadership and decisiveness at the heart of American government.⁴⁹ They cannot have foreseen that the structure of power in the parliamentary monarchies of Europe (monarchical and presidential) would produce the opposite effect—normally incompetent and periodically disastrous executive government. And, in and beyond Europe, the structures of the American written constitution, when it is translated into the historical and social circumstances of other, very different

48. Hamilton argued the case for a President who is in sole control of a powerful executive branch, repudiating the comparison with the British monarchy. If such a comparison can be made, “there is not less a resemblance to the Grand Seignior, to the khan of Tartary, to the Man of the Seven Mountains, or to the governor of New York.” THE FEDERALIST NO. 69, at 415 (Alexander Hamilton) (Clinton Rossiter ed., 1961); see also THE FEDERALIST NO. 70 (Alexander Hamilton) (arguing strongly for a unitary executive). He might have added to the list the post of *dictator* in the later Roman republic, exemplified by Julius Caesar.

49. Hamilton rejected the argument that “a vigorous executive is inconsistent with the genius of republican government.” THE FEDERALIST NO. 70, at 423 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Those politicians and statesmen who have been the most celebrated for the soundness of their principles and for the justness of their views have declared in favor of a single executive and a numerous legislature. They have, with great propriety, considered energy as the most necessary qualification of the former . . . while they have, with equal propriety, considered the latter as best adapted to deliberation and wisdom, and best calculated to conciliate the confidence of the people and to secure their privileges and interests.

Id. at 424.

countries, can be a simple recipe for the corrupt and fraudulent democracies, ruled by king-presidents, that now litter the world.

Under the *real* American constitution, and in all constitutional systems that are derived from it, the president is the conductor of an orchestra of oligarchies. The unwritten constitution of international unsociety has been a system of diplomacy and war, that is, the continuation of diplomacy by other means, conducted by an externalised aristocracy.⁵⁰ In the remarkable constitutionalising of international society since 1945, postdemocratic oligarchy has been internationalised into a global orchestra of all orchestras of oligarchy.

The emergence of an international aristocracy from the age-old mists of shared illusion is no cause for surprise. The tendency of national oligarchies to externalise themselves is as old as recorded human history, as old as political and economic imperialism, as old as diplomacy, as old as war. The historical record suggests that the subjugation of foreign lands and foreign peoples is as natural to the holders of public power as the subjugation of their own lands and peoples. The fact that the ruled many are very many, and the ruling few are very few, has meant that the social fact of force has always had to be accompanied by the social force of ideas.⁵¹ From Hammourapi and Confucius to Washington and Napoleon, and beyond, the conscious few have helped the long-suffering many to submit mentally to the power of the royal few. And the extraterritorial projection of national power has been accompanied, again and again, by the extraterritorial projection of ideas. The era of the Cold War included an illusion-filled struggle within the *ideal* self-constituting of international society, a cold war of ideas. In the first years of the twenty-first century, a war of ideas on many fronts has become a global dialectic of ideas and violence—violence justified by ideas, ideas enforced by violence.

50. For additional support, see chapter 13 of ALLOTT, *THE HEALTH OF NATIONS*, *supra* note 38, at 380-98, where the oligarchies of diplomacy are referred to as the international *Hofmafia* (court-mafia).

51. “[A]s force is always on the side of the governed, the governors have nothing to support them but opinion. It is, therefore, on opinion only that government is founded” DAVID HUME, *On the First Principles of Government*, in *ESSAYS: MORAL, POLITICAL AND LITERARY* 29, 29 (Oxford Univ. Press 1963) (1741).

Empires of the mind are familiar features, and also the great survivors, of universal history. We think of the Hellenism that survived the fall of ancient Athens and the perennial philosophies stemming from the thinking of Confucius; the Roman ethos that survived the fall of the Roman Republic and Empire; the universal religions (Buddhism, Christianity, Islam) that surpassed the place and the time of their founding; the ethos of medieval Christendom that survived the decline of the social circumstances of its origin; the idea of natural law that survived (not least in the law of nations and the concept of human rights) the intellectual circumstances of its origin; the ethos of European imperialism that survived the end of the European empires. We think also of the intellectual empire of mathematics and the natural sciences that was, from the first, a universal empire of the mind.

Where there is externalising of ideas there is, as a necessary corollary, the internalising of ideas, as ideas from minds that are *there* take up residence in the minds that are *here*. It is possible to mount an invasion, to colonise foreign lands, to alter the course of another nation's history, to foment rebellion and revolution, without setting foot out of your own country and without resort to any physical violence. Where there is a universalising of ideas, religious or philosophical or practical, there may even be a modification, not merely of the history of this country or that, but of all human history. But any attempt to externalise and universalise ideas is also liable to meet resistance, because there are always other ideas in the world, religious and philosophical and political. A war of ideas can easily become a war of arms.⁵²

52. "The present revolution in France . . . is a revolution of doctrine and theoretic dogma The last revolution of doctrine and theory which has happened in Europe is the Reformation [The effect of the Reformation] was to introduce other interests into all countries than those which arose from their locality and natural circumstances." BURKE, FRENCH AFFAIRS, *supra* note 35, at 328 (emphasis in original). In 1792 the British Government responded to the decree of the French National Convention of November 19, "in the expressions of which all England saw the formal declaration of a design to extend universally the new principles of government adopted in France, and to encourage disorder and revolt in all countries, even in those which are neutral." Letter from Lord Grenville to M.F. Chauvelin (Dec. 31, 1792), reprinted in FOUNDATIONS OF BRITISH FOREIGN POLICY: FROM PITT (1792) TO SALISBURY (1902), at 3, 4 (Harold Temperley & Lillian M. Penson eds., 1938).

However, the formidable hazards attached to the externalising of ideas should not prevent thought about the global constitutional problem, if the global social situation demands new thinking and new practice. The current global social situation is full of the globalising of social evil monstrously magnified—public corruption, organised crime, violence, greed, aggression, humanity's alienation from its humanity in collective mindlessness and collective hallucination. Acute consciousness of social sickness may inspire a stoical acceptance of the perennial and natural imperfection of the human condition,⁵³ or it may be a spur to revolutionary social change.⁵⁴

The consoling Kantian myth that the republicanising of national constitutions will naturally produce a constitutionalising of international society, a patchwork cosmopolis, seems more improbable than ever. The U.N. Charter, an illusionary written constitution of international society, was and is merely the groundwork of an international oligarchy of oligarchies—not “We the Peoples of the United Nations,” but we, governments speaking in the name of states—with a Security Council that is a collective monarchy, but forming part of an interna-

53. Jeremy Bentham was fond of quoting a Spanish saying, “*Si hay remedio porque te apuras? Si no hay remedio porque te apuras?* [If there is a remedy, why worry? If there is no remedy, why worry?]” 11 THE WORKS OF JEREMY BENTHAM 79 n.* (John Bowring ed., Russell & Russell Inc. 1962) (1843). Voltaire identified optimism (“*l’opinion du meilleur des mondes possibles*”) as a philosophy of despair, because it treats the problem of finding the causes of evil and suffering as hopeless. DICTIONNAIRE PHILOSOPHIQUE (1764–69) 71, voc. “Bien (Tout est)” (R. Pomeau ed., GF-Flammarion 1964).

54. “When one looks at the scene of this world, one spends half one’s life laughing and the other half trembling.” Letter from Voltaire to Frederick II (King of Prussia) (Mar. 3, 1767), in CORRESPONDANCE CHOISIE 878, 879 (Jacqueline Hellegouarc’h ed., Librairie Générale Française 1990) (“Pour peu qu’on jette les yeux sur la scène de ce monde, on passe la moitié de sa vie à rire et l’autre moitié à frémir.”) (present author’s translation). “One day all will be well, that is our hope (*espérance*); everything is well today, that is our illusion.” VOLTAIRE, POÈME SUR LE DÉSASTRE DE LISBONNE (1756), reprinted in LA MUSE PHILOSOPHE: FLORILÈGE POÉTIQUE [THE PHILOSOPHER MUSE: POETIC ANTHOLOGY] 93, 100 (Jean Dagen ed., 2000) (“*Un jour tout sera bien, voilà notre espérance; Tout est bien aujourd’hui, voilà l’illusion.*”). Later, Voltaire inserted a question mark after the word *espérance*. THEODORE BESTERMAN, VOLTAIRE 369 n.19 (3d ed. 1976). In the *Confessions*, chapter IX, Rousseau, who claimed to be an optimist despite all his personal sufferings, described Voltaire as “this wretched man, overwhelmed by prosperity and glory but nevertheless bitterly declaiming against the miseries of life.” *Id.* at 399.

tional governmental system of the United Nations, its agencies, and other intergovernmental organisations, a system that reveals no trace of the world-changing energy of presidentialism. New-age talk about “governance” and “public ethics” is the self-deluding and other-deluding talk of the mixed governmental-economic oligarchies of the royal few.⁵⁵

The externalising of oligarchy in the form of an international aristocracy, and of republicanism as the theory of oligarchy, is affecting social systems everywhere and is liable to affect the future of international constitutional development.⁵⁶ Postdemocratic international constitutional theory may be expected to contain a republican view of the general will and the separation of powers, as considered above—the *general will* that is not something that produces government but something that is produced by the forces that manage the public mind, and that, having been so produced, then produces more or less conforming government; the *separation of powers* as a horizontal constitutional phenomenon affecting the power-struggle among oligarchies, but with a vertical component, as a means of controlling the public mind and binding the people to the decisions of government through what we have termed “reverse representation.”⁵⁷ Above all, in a world where religion is itself a primary cause of international social instability, the only remaining possibility of systematic social transcendence will be found in the perennial and universal phenomenon of *law*, and in the perennial and universal idea of constitutionalism, of the law that governs society as a law-making system.⁵⁸

We have to rediscover the self-transcending capacity of the human mind, the capacity to create better ideas than the

55. For support, see chapter 6 of ALLOTT, *THE HEALTH OF NATIONS*, *supra* note 38, at 161-81.

56. Nobody, I believe, will consider it merely as the language of spleen or disappointment, if I say that there is something particularly alarming in the present conjuncture When popular discontents have been very prevalent, it may well be affirmed and supported, that there has been generally something found amiss in the constitution, or in the conduct of government.

BURKE, *PRESENT DISCONTENTS*, *supra* note 35, at 1, 4-5, 7-8.

57. *See supra* note 20.

58. For further discussion of the history and theory of constitutionalism, see chapters 7 and 12 in ALLOTT, *THE HEALTH OF NATIONS*, *supra* note 38, at 182-228, 342-79.

ideas produced by social systems. Within the conscious few, there must surely remain the possibility of a conscientious few, not an aristocracy of privilege but an aristocracy of responsibility, moved by a moral responsibility to think a better world, still receptive to the idea of idealism. The extraordinary thing is that this oligarchy of the mind could be an aristocracy of the many, a revolutionary movement by the many to take power over the power of the few, ruling the few in the name of the many, a *general mind* taking power over the spurious *general will* of postdemocracy, a mind so general that it could encompass better ideas from all over the world, from all cultures and all traditions.⁵⁹ The intellectual regeneration of the human species need not wait for the moral regeneration of the human species; but the moral redeeming of the human species may not be possible without its intellectual regeneration. A first, great, and urgent task of that intellectual regeneration is the reimagining of a reborn body politic.⁶⁰

59. Even the practical American mind has been able to hear the call of idealism, not least in New England transcendentalism. "We aim above the mark, to hit the mark." 3 RALPH WALDO EMERSON, *Nature*, in *ESSAYS: SECOND SERIES* (1844), reprinted in *THE COLLECTED WORKS OF RALPH WALDO EMERSON* 97, 107 (Alfred R. Ferguson & Jean Ferguson Carr eds., 1983). Emerson spoke of a "universal mind" in which we all share and that contains all the thinking of the human race. 2 RALPH WALDO EMERSON, *History*, in *ESSAYS: FIRST SERIES* (1841), reprinted in *THE COLLECTED WORKS OF RALPH WALDO EMERSON*, *supra*, at 1, 3. Henry David Thoreau, Emersonian epigone, spoke of the thinkers who are "a natural and irresistible aristocracy in every society, and, more than kings or emperors, exert an influence on mankind." HENRY DAVID THOREAU, *WALDEN: OR LIFE IN THE WOODS* 91 (Avenel Books 1985) (1854). Compare the view of a leading figure of the French Enlightenment: "When I speak of the public voice, I do not mean that confused throng of people of all kinds I am speaking about that small group, of that invisible church which listens, watches, meditates, speaks quietly, and whose voice prevails in the long run and forms general opinion." Letter from Denis Diderot to P. Falconet (Sept. 1766), in 6 DENIS DIDEROT, *CORRESPONDANCE* 290, 306 (Georges Roth ed., 1961) ("Quand je parle de la voix publique, il ne s'agit pas de cette cohue mêlée de gens de toute espèce Je parle de ce petit troupeau, de cette église invisible qui écoute, qui regarde, qui médite, qui parle bas, et dont la voix prédomine à la longue et forme l'opinion générale.") (present author's translation).

60. "I will yet, to satisfie & please my selfe, make an *Utopia* of mine owne, a new *Atlantis*, a poetically commonwealth of mine owne, in which I will freely domineere, build Citties, make Lawes, Statutes, as I list my selfe. And why may I not?" BURTON, *supra* note 1, at 85.