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Four faces of political legitimacy: An analytical framework

Netelenbos, B.

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Chapter 2

An Analytical Framework between Normative and Empirical Theory

While we might have a general understanding of what legitimacy entails – the subjective validity of objectively valid norms expressing a sense of ‘oughtness’ – and might we have a general understanding of what politics is as an object of analysis, an empirical analysis of political legitimacy necessitates a more concrete foundation. We need to move beyond these abstract pro-theoretical building blocks towards analytical theory. However, at this point we encounter a further problem. It seems that the way in which we understand the nature of legitimate politics impacts on how we understand or approach political legitimacy. As we are pursuing an *analytical framework* – and not a normative or empirical theory – we are confronted with the problem of how to determine the nature of legitimate politics *a priori*.

In this chapter I will show this problem by analysing the complicated relation between normative and empirical theory present in the liberal democratic tradition of political thought that lies at the basis of modern democracy and political theory. In the first part I try to show that the peculiar quality of political legitimacy in normative theory *prescribes* how we must understand the empirical form of political legitimacy. By discussing the theories of Locke, Rousseau, Hume, Madison and John Stuart Mill we can see that despite their normative differences they are in considerable agreement where it concerns empirics. Empirically politics is about domination, while legitimacy has to explain a duty of obedience towards the political order. Legitimacy is explained as a political ‘artifice’ located somewhere between reason and force. Despite this agreement about the *empirical form of political legitimacy*, they disagree about the *empirical nature of legitimate politics*. Indeed, many normative differences can be explained as a consequence of these different understandings that lie at the basis of their arguments. In the second part of this chapter I try to show that the way in which they understand the nature of legitimate politics – and, as such, how they construct their normative theories – is a consequence of how they understood the empirical political problems and questions of their time. In other words, I analyse how empirical theory affects normative theory – how theory is historically embedded.

If normative theory prescribes our empirical understanding of political legitimacy and if empirical theory influences how we understand the nature of legitimate politics, then any analytical framework must try to deal with these dialectics. We should neither fall into the trap of cryptonormativism nor of transcendental or a-historical essentialism.

2.1 Between Normative and Empirical Theory

Even though the five classic liberal democratic theorists we will discuss in this chapter provide very different normative accounts of political legitimacy, when they turn their attention to the empirics, to political practice, their concerns are similar. They are all preoccupied with the problem of order. The reason for this is not mere coincidence, but can be explained by looking at the fabric of the traditional normative project. This normative project was first and foremost a project of morality in which political legitimacy is understood as the link between the material political order and the immaterial norms of moral justice. Morality, secondly, concerns transcending, conquering or controlling 'lower' and conflicting motives, attitudes, interests or passions. As a consequence, thirdly, political legitimacy has to deal with fundamental oppositions. Legitimacy, in this tradition, is about the paradoxical merger of opposites – of 'freedom and unfreedom', as Marcuse has already stated (2008 [1936]:7). Finally, this inherent paradoxical nature of the normative project of political legitimacy explains the primacy of the *empirical* problem of stability. Empirically, political legitimacy must foremost explain political order and stability.

Let us shortly look at how this general scheme can be perceived in the theories of Locke, Rousseau, Hume, Madison and Mill. Obviously, this will only be a general and schematic analysis of these stimulating thinkers. But the goal of this chapter does not necessitate, as well as the limited space available does not allow us, to discuss them in more detail.

2.1.1 Locke and the Political Enforcement of the Law of Nature

Locke, writing in the natural law tradition, tries to found the concept of legitimacy in the deontological origins of the political order or the 'common wealth'.¹ Locke argues how unfreedom in a legitimate political order – the 'bonds of civil society' – can be deduced from a pre-social freedom – the natural state. The only reason for abandoning one's 'natural liberty', according to Locke, "is by agreement with other men to join and unite into a community, for their comfortable, safe, and peaceable living one amongst another, in a secure enjoyment of their properties" (II.VIII.83).² The political order is a solution to a collective action problem, i.e. the inability to effectuate the moral law in the natural state.

The political order is necessary especially because morality is not innate in human nature. The 'innate practical principles' of human nature concerns men's "desire of happiness and an aversion to misery" (Locke 1995 [1689]:I.2.3). But these "inclinations of the appetite" are different

¹ From our modern perspective it is comforting to understand Locke's theory as a 'deontological' theory – i.e. as a hypothetical construct for a reasoned deduction of a legitimate political order – but it is clear that in Locke's work both deontological and ontological perspectives intermingle. The explicit recognition of these two perspectives is of a later date.

² All references point to Locke (1798 [1690]): book, chapter, section, unless indicated differently.

from moral principles (Yolton 1958:489). Even though Locke tries to ameliorate this classical religious duality between virtues and the vices of human passion by claiming that self-preservation is part of God's ordered moral duty ultimately leading to the right of individual freedom and property, God nevertheless also obliges us to protect his creation or humanity in general (II.II.6). From these two fundamental moral premises – self-preservation and the preservation of humanity – Locke tries to deduce the rights of individual freedom, the right of (formal) equality, the right to private property and to advance the negative moral duty of the liberal Golden Rule: “no one ought to harm another in his life, health, liberty, or possession” (II.II.5-6).³

Locke's natural state, in sharp contrast to Hobbes, is therefore not an amoral state where only self-love is significant. Morality exists prior to the political community and man in the natural state possessed the right to enforce this moral law of nature, the right to judge transgressors and to impose punishment (II.II.8). The problem with the natural state, however, is that individual man may possess these rights, but whether he is actually able to enforce them depends upon his private power. Furthermore, not only is the execution of the natural law uncertain, it is difficult and 'unreasonable' to be the judge in one's own case. 'Self-love', 'ill nature, passion and revenge' “will make men partial to themselves” (II.II.13). It is difficult to punish and 'retribute' with 'calm reason' and true to one's 'conscience' (II.II.7). In short, Locke not only points to the problem of the enforcement of natural law, but also to our weakness of will and innate human nature.

Political order, for Locke, is a *solution* for the ineffectiveness of justice. Therefore, we can be truly free when we bind ourselves to the collective bonds of the commonwealth as it guarantees the moral order already present in the state of nature. The political sovereign acquires from the community the authority to enforce, judge, and punish transgressors of the natural law, while the right of life, of liberty and property stay firmly with the individual member of community (II.VII.72). With this *contractual* transference of rights the individuals give up “the equality, liberty, and executive power they had in the state of nature into the hands of the society ... yet it being only with an intention in every one the better to preserve himself, his liberty and property” (II.IX.114). The political order enforces the natural law as well as forces us to be free against our weakness of will. In short, in a legitimate political system we find *freedom in unfreedom*.

In his normative account Locke tries to show why we ought to accept his idea of legitimate politics, by arguing how we can find freedom in unfreedom. But as soon as Locke tries to conceive of the

³ This duty is indeed *negative*: men are in “a *state of perfect freedom*, to order their actions, and dispose of their possessions and persons, as they think fit, within the bounds of the law of nature” (II.II.4). On the other hand, Tuckness notes that Locke's claim that “the starving have a moral claim on the food of the rich is evidence that we have not *fully* discharged our duty to preserve others by not directly injuring them” (2002:293).

political order in empirical terms he is confronted with the problem of order. First of all, the political order is a solution in relation to the state of nature because the legitimate order is able to *enforce* the natural law – that is, to make the natural law positive. It is important to recognise that the positive (natural) law can conflict with our preferences – i.e. with our innate human motivation towards happiness – and is a limit upon our right to freedom. As such, the empirical problem of order surfaces precisely because it is unclear why we are motivated to obey positive law. Locke's main solution is the external guarantee of force, i.e. reward or punishment "that is not the natural product and consequence of the action itself" (Locke 1995:II.28.6). If man does not grasp the moral law, then he must be directed 'to his proper interest'. But Locke cannot really hold that in political practice we are only motivated to obey positive law because we are forced to – out of fear. He cannot because he explicitly tries to justify politics upon a different foundation and not as a "product only of force and violence" (II.I.2).⁴ More importantly, as Locke is especially concerned that the power of the sovereign encroaches upon the freedom of the individual – not least upon his private property – force cannot be the ultimate answer. Indeed, Locke's theory is radical in the sense that people have a right to resist government if positive laws violate the natural law.⁵

If not by force, Locke might expect that *Reason* itself is enough to assure a moral duty to obey positive law. The duty to be moral, in Locke's work, is related to God's will. And only if we perceive God as the ultimate and, especially, rational legislator of natural law is it possible at all for reason to discover its content.⁶ Only then can we ask what 'would be reasonable for God to enact' (Tuckness 2002:291-292; Tuckness 1999; Yolton 1958). Although reason is necessary for the law of nature to be universal, God is necessary to provide reason with authority.⁷ However, despite this authority of reason, a political order is precisely necessary because of our weakness of will. Locke clearly recognises that Reason is not always enough and that people have to be forced to be free.

⁴ Although he is talking about a different 'origin' of political power here - "another rise of government, another original of political power" – it seems that if force and violence is what sustains an existing political order, Locke's project becomes somewhat paradoxical.

⁵ This does not mean that individuals can withdraw their consent at any time. Indeed we might read Locke's emphasis on force and order as an explicit assurance that the right of resistance will not lead to anarchy. This tension between the right to resist and the fear of disorder seems to confuse Locke's writings. Locke argues, for example, that the people have 'no power to act' – i.e., right to act – as long as government stands (II.XIII.140). While at other times this right to resistance seems to be a collective right, to begin with, as the right of resistance "operates not, till the inconvenience is so great, that the majority feel it, and are weary of it, and find a necessity to have it amended" (II.XIV.151). But then again, Locke also argues: "Those who were forced to submit to the yoke of a government by constraint, have always a right to shake it off, and free themselves from the usurpation or tyranny which the sword hath brought in upon them" (II.II.169-70).

⁶ It is this relation between the unknowable God and human reason that links Locke – and the natural right tradition in general – to Protestantism.

⁷ Reason *must* be the means towards truth, according to Locke: how would people who are not familiar with the true revelation of God – e.g. in the newly discovered continents – otherwise be able to know the law of nature? Some scholars argue that Locke derives his moral principles from the assumption of equality (see for example Forde 2001) but that, it seems to me, is a mistaken 'modern' reading.

But between duty arising from moral reasoning and obligation arising from political force, Locke recognises different empirical practices that explain *commitment* towards the political order. Precisely because the right to enforce justice is transferred to government Locke allows the possibility that people are not obliged to obey in terms of morality based upon reason – the philosopher’s way – but that obligation and duty is directed to positive laws only. Although there should not really be a difference between the natural and positive law, Locke is not very clear on the issue.⁸ In any case, by descending from obligations of moral reason to the more mundane obligations of positive law Locke allows other solutions for the problem of order.

Locke perceives the nature of legitimate politics in terms of a contractual relation between the individual (or society) and the political sovereign. As such, if the individual consents to this contract he has the inherent duty to obey it. For Locke, this idea of consent and obligation is on the one hand a *normative* argumentation why we ought to obey legitimate government, i.e. he argues that if you have consented explicitly or implicitly you have the duty to obey the laws of the commonwealth. But on the other hand, it entails the *empirical* argument that *because* we voluntarily consent we feel a duty to obey. Admittedly this latter argument is only latently present in Locke’s work, especially in his notion of ‘express consent’ where Locke explains how an individual becomes a full member of society through “actually entering into it by positive engagement, and express promise and compact” (II.VIII.109).⁹ This act of voluntary promise not only expresses ‘trust’ in the political power, but seems inherently to constitute feelings of duty (II.XV.152). In contrast, Locke also recognises the role of deference to patriarchal authority. Such deference concerns not so much express consent constituting a contract (II.VI.62) as a ‘voluntary submission’ that is “easy, and almost natural for children, by tacit, and scarce avoidable consent” (II.VI.65). Locke thus clearly recognises the function of tradition and inherited authority in relation to the problem of order. A final source of obligation Locke proposes is divine revelation. Locke tells us that “the greatest part of mankind, by the necessity of their condition, [is] subjected to unavoidable ignorance” (Locke 1995:IV.20.3). And

⁸ There are multiple problems, but most confusing is that the original social contract is not based upon consensus but upon majority voting as Locke thinks it unrealistic to expect that everybody would be able to consent as some may be sick or away on business, and because of “the variety of opinions, and contrariety of interests, which unavoidably happens in all collections of men”(II.VIII.87-89). Another major problem is his theory of private property as the distribution of property is more based upon convention and consent than on moral law (II.V.40). Locke emphasises more than once that without corruption the law of nature would be enough (II.IX.112). But as this corruption is in particular excessive self-interest, we might wonder, especially with the invention of money, to what extent positive laws are obliged to do more than just uphold natural law.

⁹ Locke’s notion of express consent is problematic. Not just because one can only refuse consent by leaving the commonwealth – voting with the feet – but also because consent is primarily expressed through inheritance. The right of inheritance of property is for Locke a natural right existing before the bonds of society (II.XVI.167). However, he does not provide a reasoned account of this right and it is hard to see how he could have done it. What is clear is that non-propertied classes are barred from giving express consent and as such are not genuine citizens.

because they “cannot know”, “they must believe” (Locke quoted in Forde 2001:406). In the end, the superior authority is not even that of government but of God directly. People are motivated to obey the laws that run counter to their self-interest because it is God’s will. With the help of God Locke is able to bring self-interest and ‘the perspective of the generality’ in harmony (Forde 2001:400; see also Tuckness 2002).

Legitimacy in its empirical guise has to explain why the political order remains stable, i.e. why people feel a duty towards the political order even though they might have motivations to the contrary. In other words, where Locke is able to transcend different oppositions in his normative account of morality and legitimacy – oppositions between vice and virtue, freedom and unfreedom, passion and reason – these oppositions resurface when he addresses politics in practice. It inevitably leads to an empirical understanding of political legitimacy that has to explain duty and is a function of social order. For Locke, legitimacy as an empirical phenomenon concerns those processes that explain a commitment, duty or obligation towards the political order between the extremes of pure moral reason and political violence; processes that in Locke’s account concern consent, deference to authority and a belief in divine revelation.

2.1.2 Rousseau and the Revelation of the Common Will

Rousseau’s project is to align legitimate politics with self-interest. “The problem is to find a form of association which will defend and protect with the whole common force the persons 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” (I.6).¹⁰ The goal of his normative project is to show how oppositions between the individual and collective, between freedom and unfreedom can be transcended.

Rousseau uses the natural law tradition to explain why the collective order is in our individual interest. As with Locke the natural state is insecure and in addition unpleasant. The only way to preserve oneself and indeed the ‘human race’ is through “the formation, by aggregation, of a sum of forces great enough to overcome the resistance” (I.6). By giving up all natural freedoms – including private possession – one gains in exchange the security of the collective. By abandoning one’s private possessions only sustained by force in the natural state, one gets it back as true property defended by law (I.9).¹¹ Even the rich and powerful have an interest to give themselves and their property to the collective, because it secures their interest in the force of the collective and, more importantly, in moral obligation. Consequently Rousseau explicitly argues that the collective is

¹⁰ All references concern Rousseau 1762 *The Social Contract or Principles of Political Right*: book, chapter

¹¹ But it would be wrong to argue that Rousseau is only concerned with securing property. Indeed, we also want to leave the natural state because only in society is a man able to cultivate his higher faculties and virtues. Society makes man’s perfection possible. The constitution of society is “the happy moment which ... instead of a stupid and unimaginative animal, made him an intelligent being and a man” (I.8).

not about ‘destroying natural inequality’, but about substituting it for “an equality that is moral and legitimate” (I.9).¹² Again we find freedom in unfreedom. Man loses “his natural liberty and an unlimited right to everything”, but gains “civil liberty” and “propriety” (I.8).

Society can guarantee our freedom not just because it possesses collective force, but because moral obligations and duties only arise in society in the first place. There is no morality in the state of nature. Although justice might derive from God directly (II.6) the only law of nature, according to Rousseau, is to provide for one’s own preservation (I.2). Only with the rise of the collective can morality exist at all. “The social order is a sacred right which is the basis of all other rights”, but which rests not upon ‘nature’ but upon ‘convention’ (I.1). The reason we leave the state of nature is purely based upon self-interest, not a solution for the ineffectiveness of natural moral law as we saw in Locke. But leaving the state of nature is, unlike Locke, not the cornerstone of Rousseau’s theory, it is only the foundation for his theory of legitimate politics – merely providing “the State a basis of its own to rest on” (IV.9). The main question for Rousseau is if a community exists how does a legitimate political order look like? Morality might be based upon convention, but it is not arbitrary.

Rousseau does not propose a *substantive* understanding of what moral justice entails – as promised by Locke¹³ – but he suggests an understanding of morality in terms of, what Habermas calls, a semantic form (Habermas 1986). Kant most famously elaborates this semantic form of morality in his categorical imperative, but it is also the foundation of Rousseau’s political theory. It expresses the idea if the laws of the collective address all and if the laws express interests shared by all, the individual cannot but find his private interest in the collective (II.4). As such, we do not only have an interest in the collective relative to the state of nature, but the collective can never contrast our self-interest. “Each man, in giving himself to all, gives himself to nobody; and as there is no associate over whom he does not acquire the same right as he yields others over himself, he gains an equivalent for everything he loses” (I.6). In short, “we cannot work for others without working for ourselves” (II.4). In this semantic form of morality – captured in the concept of the general will – private interests are inherently tied to the common interest.

When Rousseau reasons how a moral law ought to look like, he has to show how the general will can surface in political practice. As such, Rousseau turns to the *institutional* character of politics and the democratic *procedures* that ought to make the revelation of the general will possible. The exact form of these procedures and how they uncomfortably relate to his natural law argument

¹² And to warn the powerful who might think that force is enough: “[t]he strongest is never strong enough to be always the master, unless he transforms strength into right, and obedience into duty” (I.3).

¹³ Locke never really fulfilled his promise of a scientific deduction of a substantive moral law. Furthermore, his liberal Golden Rule can also be understood in terms of *form* instead *substance*. However, this is not how Locke intended it to be as for Locke morality is prior to social convention and ordained by God.

should not concern us now.¹⁴ What is interesting at this point is that there are two presumptions that must be fulfilled for this general will to surface. First, the *empirical* social conditions must be such that there actually is a common interest (II.1). Rousseau's general will, in contrast with Kant's moral theory, is neither universal in the sense that every community will find it, nor that it transcends the community itself. Second, whether the ideal of the general will surface depends upon the *moral virtues* of the people. This may sound strange as Rousseau bases his project upon the idea that self-interest and collective interest cannot diverge. However, self-interest must be properly understood. The revelation of the general will depends upon the individual's ability to reflectively detach from his self-love and passions and to think of what is good for all and *therefore* good for him. This relation should not be turned around, i.e. what is good for me must be good for all.¹⁵ Although "the general will is always right and tends to the public advantage; ... it does not follow that the deliberations of the people are always equally correct" (II.3). Corruption arises if people fail "to weigh the attractions of present ... against the danger of distant and hidden evils." (II.6).

This means that the formal quality of morality might transcend the opposition between individual and collective interests, but the relation between positive law and morality depends upon the ability of the people to recognise the 'true' common interest and not to be 'deceived' into partial interests. Political legitimacy, in short, depends upon the moral virtues of the people. Legislation, according to Rousseau, would be "at the highest possible point of perfection" the more completely the individual passions and interests are "annihilated" "so that each citizen is nothing and can do nothing without the rest" (II.7). This is often, and incorrectly, read as the end of the liberal individual. Rousseau, however, just tries to argue that the more people are able to detach from their individual short-sighted passions, the more people are capable of taking on the perspective of others, the more their will approaches the general will.¹⁶ It is not about the end of individual liberty, it is about how to reach most perfectly the general will.

In Rousseau's conception of a legitimate political order there exists therefore a tension between the ideal of the general will and the practice of its constitution, between morality and politics. A tension that arises because people lack moral virtue, fail to detach from their short-sighted passions and fail to give themselves totally to the collective. The collective will might therefore not just be easily corrupted, it also causes the empirical problem of order. Only morally virtuous people perceive that

¹⁴ Particularly problematic is the constitution of the executive out of the Sovereign, necessitating 'a sudden conversion' of the latter (III.17) as well as the need for an original Machiavellian legislator to make a legitimate constitution possible (II.7).

¹⁵ Although the negative duty of the liberal Golden Rule pertains that what is *not* good for me is *not* good for all, it runs the risk of degenerating exactly to such form of narcissism.

¹⁶ These reflexive qualities can also be clearly seen in the quasi-divine 'legislator' who understands and knows the passions of the people, without experiencing these himself (II.7).

the general laws are in their true individual interest.¹⁷ Rousseau, like Locke, argues that people might, therefore, be forced to be free (III.1). “Humanly speaking, in default of natural sanctions, the laws of justice are ineffective among men” (II.6). But force, even less than for Locke, cannot be a general solution for the problem of order as legitimate law depends upon active participation and moral virtue. ‘Repressive force’ can only have a function when somebody is misguided – not as the foundation of the political order in general.

Rousseau is realist enough to recognise that people are no saints. As such, between repressive force and morality Rousseau argues that the individual should be connected to the collective through artificial arousal of morality, or better yet, of the ‘social bond’. “[W]hen in every heart the social bond is broken, and the meanest interest brazenly lays hold of the sacred name of ‘public good,’ the general will becomes mute” (IV.1). Although people might learn moral virtues through active participation as members of the sovereign (III.15), the state can also actively stimulate the moral virtuousness of the citizen. The primary means to do so is by stimulating his love of the patrie, reinforcing a collective identity, inventing public spectacles, and by providing moral education and a civil religion “that will make him love his duty” (IV.8).¹⁸ The most important social laws, as Rousseau states, are “not graven on tablets of marble or brass, but on the hearts of the citizens. This forms the real constitution of the State ... keeps people in the ways in which it was meant to go, and insensibly replaces authority by the force of habit. I am speaking of [mores], of customs, above all of public opinion” (II.12). These may be slow to arise, but “form in the end its immovable keystone”.

Rousseau’s analysis shows once again how *empirical* practices explain a form of duty – falling between the obligation of moral reason and the obligation of force – necessary to overcome the oppositions merged in the *normative* conception of legitimacy – the opposition between individual and collective, self-interest and common interest, corruption and virtue, and even positive law and morality. Notwithstanding the profound differences between Locke and Rousseau, when they turn to empirical politics their understanding of political legitimacy takes on the same form.

2.1.3 Hume and the Coordination of Mutual Benefit

The tradition known as the Scottish Enlightenment – of which Hume, but also Adam Smith, is a prominent representative – was less concerned with the de-ontological origin of a legitimate social-

¹⁷ Do notice there is a fundamental difference between the lack of morality needed to realise the general will, and the lack of morality to *recognise* the connection between the general will and one’s own interest. This difference between the problem of validity and the problem of obedience is a problem Rousseau theory cannot really address.

¹⁸ Religion does not contribute to morality as “[t]rue Christians are made to be slaves” (IV.8). This does contrast with the specific role of religion in relation to the legislator who ‘compels to divine intervention’ (II.7).

political order, but more interested in understanding how such an order functions as it does. It is often said, therefore, that the Scot's were among the first sociologists, but this is, at least in the work of Hume, a somewhat anachronistic claim as empirical and normative arguments readily merge.¹⁹ It was Smith, in any case, who famously discovered an 'invisible hand' in civil society ensuring that the public good arises as an *unintended consequence* from actions of individuals pursuing their own private ends. This 'discovery' of the social mechanism of unintended consequences allows a change of perspective to the extent that the principle question is no longer what binds individuals to a social order as a distinct object, but rather how the social order arises as an aggregate *function* of individual actions. Indeed, to the extent that this order is in the common interest, justice can be disconnected from individual moral virtue. "It is not from the benevolence of the butcher, the brewer or the baker that we expect our dinner, but from their regard to their own interest. We address ourselves not to their humanity but to their self-love and never talk to them of our own necessities but of their advantages" (Smith quoted in Berry 1997:132). Notwithstanding the invisible hand, this social or economic order does need legal coordination, which both Hume and Smith recognised (Bellamy 1990:4). A legitimate political order thus has to coordinate and uphold the economic order in the mutual benefit of all. Hume's theory can be read as an attempt to understand this kind of political legitimacy.²⁰

For Hume it was clear that neither morality nor legitimate politics was based upon self-interest. Hume mocked the natural law contract theories trying to prove just that. Such theories might be 'useful fiction', but government is not based upon contract, consent or promise (Yellin 2000:385). Anticipating Nietzsche, Hume claims that justice cannot rise from the human convention of promise as a promise is 'altogether unintelligible' in the state of nature – it is an inherent part of that justice (II.II.Appendix III:274²¹; Pack & Schliesser 2006:50).²² What explains the force of promise is what explains society and not the other way around (Hampshire-Monk 1992:134). Hume also resists the idea that moral actions are motivated by self-interest. I am not your friend *because* it gives me pleasure, being your friend *gives* me pleasure (I.I.11:155). According to Hume, we cannot deduce "morals from self-love" (II.I.5:204).

¹⁹ Scholars accused of being the 'first sociologist' are so numerous that I will not even try to begin to judge the correctness of these claims.

²⁰ For sure, Hume's work is broad and extensive and he never presented a clear and concise political theory. Nevertheless, this interpretation seems to bind together several of his most important insights.

²¹ All references point to Hume (1992) *Essays. Moral, Political, and Literary*: Volume, Part, Section, Page.

²² Furthermore, the whole idea of consent is an absurdity. Hume asks, "Can we seriously say, that a poor peasant or artisan has a free choice to leave his country"? Hume compares this idea of consent to being on a vessel where one either has to 'consent' to the authority of the master of the ship or 'leap into the ocean, and perish' (I.II.12: 451). Hume seems to be ignoring the deontological function of natural law.

But where does the feeling of moral duty arise from, then, if not from self-interest? Morality, according to Hume, is not based upon Reason. Hume famously remarked that reason is and ought to be the slave of the passions. Human action is “guided by constitution and temper” and not by reason (I.I.18: 222).²³ This does not mean that we are irrational and that reason does not matter, rather, it just means that reason does not motivate as it gives no “desire or aversion” (II.I.1:171-72). The motivation to act morally against one’s interests, then, is neither based upon interest nor reason, but upon ‘moral sentiments’, especially ‘sympathy’. Sympathy, for Hume, is an ‘internal sense of feeling’ that is universally present in the ‘human species’ and concerns the human talent to imagine the pain or injustice another person suffers, our capability to take the perspective of the other. The closer the other is to us the more our sympathy works to counter our self-interest. The problem, according to Hume, is that the sheer size and anonymity of modern society and commercial market loosens the grip sympathy has over our self-love. For a modern social order, morality will not provide us enough *passion* to act, while reason cannot replace it. Modern society therefore necessitates the establishment of a “political society, in order to administer justice” (I.I.5:113). Government has the *function* to overcome the limited capability of man’s sympathy. The political order must compensate for our lack of moral passion by effectuating justice. For Hume, it is not so much about how moral virtues can sustain legitimate government, as with Rousseau, but rather how government finds its legitimate reason in sustaining morality where “customs have instilled little humanity or justice into the tempers of men” (I.I.3:106).

Politics has the function to administer justice which, for Hume, is historically contingent and concerns utility (II.I.2:176-78). Hume understands utility in terms of mutual benefit and especially in terms of *impartial solutions to coordination problems*. Hume gives the example of two men rowing a boat, each having one peddle. When they just start rowing the boat will probably make circles until, upon reflection and experience, a *convention* will arise that coordinates their mutual efforts.²⁴ For Hume, this mutual benefit argument concerns first and foremost the Hobbessian “necessity of justice to maintain peace and order” (I.I.5:114; see also II.I.4:197). “*Salus populi suprema Lex*” (I.II.13:461).²⁵ But it also, and importantly, concerns the mutual benefit of private property and commercial society. Indeed, “the *pleasures* of luxury and the *profits* of commerce” give men an interest in justice in terms of a stable market, the ultimate coordination problem government has to solve (I.II.1:294).

²³ Furthermore, “objects have absolutely no worth or value in themselves. They derive their worth merely from the passion” (ibid: 219).

²⁴ Of course, as Hampsher-Monk rightly argues, such coordination is only impartial if we assume the two men want to go in the same direction in the first place (1992:135).

²⁵ The safety (or health) of the people is the supreme law.

The primacy of utility does mean that justice is contingent. Through reflection upon utility moral rules change, are lost or invented. Hume, for example, complains that Christian religious morality – “the whole train of monkish virtues” – is no longer useful for modern society: “they serve to no manner of purpose” and must be “rejected by men of sense” (II.1.6:246-47). Although morality is historically contingent, its development is not irrational as human history, according to Hume, is progressive. We might understand the rational development of morality anachronistically in terms of social functional evolution.

When legitimate politics is to provide peace and order, the ‘ambition’ of government has to be checked and tied to the necessities of progressing society (I.1.2:97). Especially public opinion serves this function. Political power, Hume claims, is founded upon opinion in the first place (I.1.3:107). Without public support political power is not effective as “force is always on the side of the governed” (ibid.).²⁶ But the role of public opinion and the ‘free press’ is especially important because it unveils and arouses sympathy for humanity (II.1.9:251). In order to argue in public man must “[choose] a point of view, common to him with others: He must move some universal principle of the human frame, and to touch a string, to which all mankind have an accord and symphony” (II.1.9:248).²⁷ Indeed, Hume argues that language itself is geared to universal morality and that, as a consequence, public opinion is the objective standard of justice.²⁸ Hume recognises that public opinion and free press can become the tool of demagogues but sees no ‘suitable remedy’ for it (I.1.1:97-8).²⁹ Hume also acknowledges that “an appeal to the general opinion” may “be deemed unfair and inconclusive ...[but] there is really no other standard” (I.1.12:460). It is from social intercourse and experience that we are able to learn justice at all (II.1.4:197). Hume, as such, is a realist and a sceptic.³⁰ He readily admits that his analysis will not convince the ‘sensible knave’, but

²⁶ This seems quite a modern idea as it relates to the system theoretical idea that legitimate power is a symbolic media founded in confidence and trust (see chapter 5). For Hume, however, the three opinions upon which “all governments [are] founded, and all authority of the few over the many” concern authority (tradition), interest (general utility) and property rights (I.1.4:111).

²⁷ Next to public discourse, ‘love of fame’ also renders the view point of the other (II.1.9:251). Vanity and virtue are so closely connected that they almost presuppose each other (I.1.11:156).

²⁸ Morality, according to Hume, is both universal and present in ‘the very nature of language’ and we should find its system ‘on fact and observation’, not on hypotheses or general abstract principles” (II.1.1:173-74). It is tempting to read into Hume the whole contemporary debate on public discourse and Habermas’ communicative rationality (see chapter 7 of this book).

²⁹ Hume does think that demagogues have less chance in printed media because “a man reads a book or pamphlet alone and coolly. There is none present from whom he can catch the passion by contagion” (I.1.2:97-8). Furthermore, Hume concludes – a conclusion removed from later editions – that human experience shows that “the *people* are no such dangerous monster as they have been represented, and that it is in every respect better to guide them, like rational creatures, than to lead or drive them, like brute beasts” (ibid.).

³⁰ But he is no radical sceptic as not just any rule suffices. Justice has to connect to our moral passions. Morality or justice “cannot be wilfully created by shadowy politicians and implanted into the citizens’ mind” (Church 2007:171). What the specific rules are depends upon circumstances, ‘some constant, some arbitrary’, but ultimately it is about ‘the interest and happiness of human society’ (II.1.3:190)

philosophy alone cannot solve the problem of legitimacy. For the true sceptic, for someone “born of so perverse a frame of mind” there will be “no remedy in philosophy” (I.I.18:222).

Although Hume claims that legitimate rules and laws that coordinate society are, or ought to be, for the impartial benefit for all, the problem of order resurfaces with full strength. As justice is no longer tied to individual moral virtues, but merely a function of aggregated self-interested actions, social progress and social learning mechanisms, we must wonder why people accept legitimate government. The basis of government can neither be force nor self-interest. Not only does modern economy not function properly upon force alone, political force also depends upon opinion in the first place. And even though private interest and public interest are closely tied in the concept of mutual advantage, justice is not based upon self-love and can conflict with it.³¹ Reason, as we have seen, also does not stir up these passions. Reason, furthermore, “is so uncertain a guide that it will always be exposed to doubt and controversy” (I.II.14: 466). For Hume, the basis of government is therefore “not pure reason, but authority and precedent. Dissolve these ties, you break all the bonds of civil society” (I.II.14:466). When Hume claims that freedom is perfection, but authority essential (I.I.5:117), we once again find the paradoxical merger of freedom in unfreedom. Authority enables degrees of freedom into ever larger circles of the unfamiliar where our reason and moral sentiments break down (II.I.3:186).

What ultimately binds the people passionately to the legitimate order is the *artifice* of authority. “Obedience is a new duty that must be invented to support that of Justice” (I.I.5:114). Hume recognises three processes that account for such duty: socialisation, deference and tradition. First, man is not so much born free, as Rousseau and Locke argued, as “born in a family-society” (II.I.3:185). From birth we are acquainted with its moral rules and conventions that reverberate with our natural moral sentiments. Following these rules gives a pleasure in and of itself as it is coherent with our upbringing giving an “inward peace of mind”, a “consciousness of integrity” (II.II:257). Second, people obey authority out of sheer deference as “the love of dominion is so strong in the breast of man”.³² Finally, people attach to authority through habit and tradition (I.I.5:115). Especially tradition is the true sources of authority as “[t]he bulk of mankind never [attributes] authority to anything that has not the recommendation of antiquity” (I.II.16:480; see also I.I.4:110). Authority, Hume claims, is not founded upon consent; consent is founded upon the tradition of authority

³¹ Also Smith recognises that there is no necessary ‘harmony’ between “the people and the Sovereign” (quoted in Robertson 1990:15). Hume does claim that through ‘reflection and experience’ we might learn “that the interests of society are not ... entirely indifferent to us” engaging us to ‘sacrifice’ our passions to ‘the interests of public order’, (I.II.12:454-5; II.I.5:206; II.I.3:182). The ‘artifice’ of education in particular can enhance this reflection as it has a ‘powerful influence’ on moral sentiments (II.I.5:203; I.I.8:127).

³² It is interesting to note that also Smith emphasises this “habitual state of deference” as the principle of authority (quoted in Berry 1997:106).

(I.II.12:451).³³ Philosophical critiques and social experiments, Hume concludes, are quite dangerous as without these artificial ties, which can be easily destroyed by reason, people are not motivated towards justice. 'Improvements for the public good' must be adjusted to the 'ancient fabric' and preserve 'the chief pillars of the constitution' (I.II.16:480).³⁴

Hume's normative account of political legitimacy, we can conclude, differs profoundly from Locke or Rousseau, as his normative conception of legitimacy is inherently oriented towards empirical and contingent social conditions – to utility – and not to some deontological state of nature. He is able to do this because he replaces the problem of the genesis of a legitimate political order with a notion of social-functional historical development. Indeed, justice functionally arises as an unintended consequence from social development, learning and public opinion. The individual no longer has to be capable of being moral as social processes and history itself suffice to develop rational rules functional of justice. As such, the oppositions transcended in justice – oppositions between private and public interests and between freedom and unfreedom – no longer plague the individual conscience, but are transposed to the relation between individual and politics. This implies, however, that the empirical problem of order only becomes more problematic and has to be solved entirely with an *artificial tie* of traditional authority.

2.1.4 Madison and Countervailing Ambition

For Hume legitimate politics has the function of coordinating the social and economic order from which justice would unintentionally surface. Madison takes this idea another step forward by welcoming the invisible hand directly in politics itself. But Madison also presupposes many of the arguments that preoccupied Locke and Rousseau.³⁵ It is taken as a given that the goal of government is to secure life and freedom, and especially individual property rights (Kramnick 1987:73-74). Legitimate law, furthermore, is accepted to take the semantic form of moral law and to express the

³³ Similarly, Smith mocked Locke's theory of obligation and consent. For Smith, such account where "Kings are the servants of the people" is about "the doctrine of reason and philosophy" "not the doctrine of nature" (quoted in Berry 1997:106). Indeed, Smith argued that "it is natural to submit to kings for their own sake, 'to tremble and bow down before their exalted station'".

³⁴ By separating a normative account of justice and a sociological account of authority, Hume creates the problem that if justice is based upon reflection and utility, but authority is artificially upheld by passions, how are we to know what is utility and what passion; what is justice and what only artifice? Or, as Krause puts it, what if our artificial attachment run counter to utility? (Krause 2004:629).

³⁵ As *the Federalist Papers* were written as polemic essays in newspapers to ensure that the newly drafted constitution would be ratified, Madison, Hamilton and Jay could build upon ideas and truths that were already widespread among the public they intended to address. The papers deliberately tried to incorporate and transform different popular discourses to arouse enthusiasm. It carefully changed, for example, the "the true principles of republicanism" for it to incorporate representation and the idea that republicanism is also, or in particular, suitable for large countries (Hamilton I:89). The other main concept that was carefully transformed was federalism allowing it to replace the mistrusted notion of the central state. For an excellent account of this transformative discourse see Hampsher-Monk 1992, chapter V.

common good. Together with the notion that the people are sovereign, these suppositions form the basis from which Madison poses the question of how a legitimate government should be *institutionally organised*, i.e. how it is possible to secure a stable, non-arbitrary rule of law expressing the moral justice of the common good. The argument focuses especially on human nature and the complexity of society. Rousseau could uphold his legitimate republic only to the extent that citizens were morally virtuous and to the extent that social conditions did not obstruct a general interest. Madison's starting point, in contrast, is exactly what Rousseau feared: a passionate self-interested people inherently characterised by interest conflicts. Madison starts from a different *social condition*.

The 'mortal disease' of popular governments, Madison admits, is caused by the passionate nature of man (X:122).³⁶ Just as in Rousseau a duality is supposed between passion and reason.³⁷ "As long as the reason of man continues fallible" we must, according to Madison, expect differences of opinion especially as 'reason and self-love' have 'reciprocal influence' on each other and as 'passion' tends to attach itself to 'opinion' (X:123-124). What is to be feared the most is the passion of the majority as it can "sacrifice to its ruling passion or interest both the public good and the rights of other citizens" (X:125). This passion is especially problematic in relation to private property. Distributive conflicts are inherent to any society, Madison argues, because unequal distribution of private property reflects unequal distribution of talents and faculties.³⁸ Natural inequality will always form "an insuperable obstacle to a uniformity of interests" and the "first object of government" should be "the protection of these faculties" (X:124). But given these *pluralistic* and *passionate* social conditions Madison wonders how a legitimate politics can be possible without giving up 'liberty' and 'popular government' (X:123, 125).

When the people are not rational, government ought to be. "The principal task of modern legislation" should be the regulation of the "various and interfering interests" by "controlling its effects" and not, as with Rousseau, its causes (X:124-5). The quest is for an institutional organisation where not 'the *passions*' but where the "*reason* of the public would sit in judgment" (XLIX:315). The main institute for this purpose is representation. As Rousseau has already noted, elections produce a form of 'aristocracy' (Rousseau 1762:III.5) as it assures the rule of "men who possess most wisdom

³⁶ All references concern *The Federalist Papers* 1987 [1787-8]: author, article, page. If not indicated specifically the author is Madison.

³⁷ Passion is generally related to short-sightedness, self-interest, 'irregularity', 'illicit advantage', being 'mislead', and mutual animosity obstructing 'cooperation', while reason concerns reflection, 'exact impartiality', 'cool' detachment, wisdom, sacrifice, 'sense of community' and 'love for justice'.

³⁸ Madison argues that theorists proposing pure democracy mistakenly "supposed that by reducing mankind to a perfect equality in their political rights, they would at the same time be perfectly equalised and assimilated in their possessions, their opinions, and their passions" (X:126).

to discern, and most virtue to pursue, the common good" (LVII:343).³⁹ Representation forms a 'filter' – the favourite metaphor of the Federalists (Kramnick 1987:41) – between the passion of the people and justice based upon reason. Representation is 'the cure' of human nature (X:126).⁴⁰ The 'true distinction' between direct and representative government, Madison argues, lies "*in the total exclusion of the people in their collective capacity*" from any share in government (LXIII:373, original emphasis).⁴¹

Next to representation Madison emphasises the institutional design of politics in which "ambition must be made to counteract ambition" (LI:319). Based upon the republican tradition of mixed government – enlarged by the insights of de Montesquieu and the 'improvements of political science' (Hamilton IX:119) – the Federalist propose their famous institutional design of *checks and balances*. Mixed government, for the Federalists, becomes mixed electoral authorization.⁴² And like de Montesquieu, the three functions of political power must be constitutionally separated, but unlike de Montesquieu this separation is not exclusive as jurisdictions deliberately overlap (XLVII:303). It is not only about separating powers and institutionalising relations of accountability to avoid mutual usurpations of power (Madison LI:319). It is about institutionalising 'countervailing passions' (Hirschman 1977:29) – to guarantee a political process of institutional interest competition from which the common good arises as an *unintended consequence* (XLVIII: 308, 312). Even when the representatives are not virtuous and are not geared to 'love justice' as a motive in itself, the countervailing ambitions and 'private interests' prohibit anything but the common interest to rise from this process of mutual checks and institutional veto points (LI:320).

This idea of interest competition is also expected in society at large. When Rousseau emphasised homogeneous social conditions to ensure that interests are not too diverse to prevent a common interest, Madison argues that individualisation and interest fragmentation is constitutive of the common good. In exact opposition to Rousseau Madison writes: "Society itself will be 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" (LI:321). Indeed, if a democratic

³⁹ The relation between elections and the rise of the most capable and wise – and not 'men of factious temper, of local prejudices, or of sinister designs' – rests upon the claim that the people will "centre on men who possess the most attractive merit", chances of which are enlarged by the scale of the American republic (X:126-7; see also Jay III:95).

⁴⁰ Representation will "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 be least likely to sacrifice it to temporary or partial considerations. Under such a regulation it may well happen that the public voice, pronounced by the representative of the people, will be more consonant to the public good than if pronounced by the people themselves" (Madison X:126).

⁴¹ It should be noted that if Rousseau claimed that the sovereign cannot be represented he also claimed, just as Madison, that the sovereign should not govern.

⁴² As the new world lacked the traditional estates of Europe and as all authority springs from the people, the separated executive and legislative institutions gain their authority through separate elections.

majority can be mobilised under such prohibitive conditions of interest plurality and social fragmentation it likely represents “justice and the general good” (LI:322). Where Rousseau thinks that reflection upon collective interests ensures the common will to surface in majority voting, the Federalists think, in contrast, that fragmented non-reflexive interests ensure that the common good emerges as an unintended consequence. The majority vote will be more aligned to justice, the more interests are fragmented and the more difficult to mobilise these interests into a political faction.

With the right institutional design and the proper social conditions interest counters interest in horizontal political competition between citizens and between institutions from which justice surfaces as an unintended consequence, while additionally vertical representation functions as a filter between popular passions and the reason of justice. The Federalists were so convinced of this institutional design that they deemed a substantive liberal doctrine of individual rights to be unnecessary (Hamilton LXXXIV:476).

When Madison addresses one of the difficulties of Rousseau – how the general interest can be known if moral virtues are declining and conflicts of interests are rising in a complex society – this actually seems to aggravate the problem of order. Even in the normative account moral virtues are only presumed in the aristocracy of representatives but no longer in the republic at large. There, ambitions, passions and interests should reign in mutual competition from which justice arises unintentionally. This means that an inherent conflict between self-interest and legitimate politics is presupposed – a conflict not just between private and collective interests, but also between conscious passions and an unconscious justice. Nevertheless, the Federalists hardly address the problem of order explicitly. Part of the reason seems to be that the essays were a public argument to sell the newly drafted constitution and not a full-blown political theory. But partly the problem of order is also less prominent as interest or class fragmentation assures a lack of political efficacy. The problem of order seems to disappear because of the sheer *factuality* of the political system and the *powerlessness* of the isolated individual.

Nevertheless, the Federalists do implicitly address the problem of order. If force is once more a possible answer, moral reason is less so for obvious reasons.⁴³ However, between force and moral reason they point to other social processes. One of the most crucial relationships in representative democracy is between the electors and the elected. It is after all the representative that because of his superior qualities and talents can reason coolly and rationally about the ‘real’ interests of the electors. The representatives “feel all the passions” of the electorate but at the same

⁴³ To be fair, the metaphor of the ‘filter’ of representation is also thought of as a *temporary* mitigation: “to suspend the blow meditated by the people against themselves, until reason, justice, and truth can regain their authority over the public mind” (LXIII: 370).

time pursue “the objects of its passions by means which reason prescribes” (XLVIII: 309- 310). For the Federalists, the bond between the elected and the electors, a bond in which passion and reason are paradoxically merged, has no enforcement other than the motivations of the elected in terms of their interest in re-election, their sensibility of honour and their patriotism, while the electors are motivated only by the ‘personal influence’ of the elected (LII:323; LVII:344; Hamilton XXXV:235). It is, in short, foremost loyalty and trust that binds the people to their representatives.⁴⁴ Indeed, the legislative body “implies a personal influence among the people” through “connections of blood, of friendship, and of acquaintance” (XLIX:315).

But the Federalists were aware that this bond between representatives and citizens might not be enough. They clearly intended that the constitution itself and government in general should be a source of duty by giving it a *sacred status*. ‘In a nation of philosophers’ reason would be enough to arouse ‘a reverence for the laws’, but where “reason of man, like man himself, is timid and cautious when left alone” it “acquires firmness and confidence” in admiration (XLIX:314). It is advantageous for a ‘rational government’ “to have the prejudices of the community on its side”. Madison expects that through the venerating effect of time ‘attachment and reverence’ will fill “the hearts of the people towards a political system” (LXII: 368-9). Furthermore, notwithstanding his analysis of human nature, Madison trusted upon the ‘manly’ and ‘vigilant’ spirit of American patriotism and upon a shared “communion of interest and sympathy of sentiments” (LVII:345). Although the constitutional rules make justice possible, it ultimately depends, Madison argues, upon the virtue of the people (LV: 339). But just as for Rousseau, the virtue emphasised does not concern moral reason but its *artifice* of solidarity and patriotism.

In contrast to Locke and Rousseau, the opposition between passion and reason, between self-interest and common interest, are no longer solved through individual moral-virtues, but through institutionalised political processes. The common good arises as an unintended consequence from political competition between self-interested passionate people as long as interests are fragmented, the individual politically powerless and representatives morally responsible (or themselves caught up in interest competition). However, even Madison could not perceive a stable political order solely based upon the external guarantee of factuality and political inefficacy, but recommends practices and processes that ensure individual obligation to the political constitution and system – processes that point to trust, loyalty and the ‘prejudices’ of sanctity, reverence and patriotism.

⁴⁴ Also a kind of natural authority is presupposed between different social classes: because the merchant class is the ‘natural patron’ of the ‘mechanic and manufacturing arts’ the former will represent the latter (Hamilton XXXV:233-234).

2.1.5 John Stuart Mill and Utilitarian Administration

When Bentham is seen as the founding father of utilitarianism, J.S. Mill can be seen as the champion of modern liberalism with a somewhat complicated relation to utilitarianism. Schumpeter judged Mill's work as "stimulating discrepancies of doctrine" (quoted in Clark & Elliot 2001: 468). Indeed, tensions seem present between Mill's defence of liberty and his utilitarian beliefs. In what follows, I approach Mill's work mainly from the perspective of utilitarianism. The defining characteristic of utilitarianism in general is its inherent *consequentialism*. Just as in Hume, laws are evaluated in terms of their utility which makes legitimacy inherently contingent and historical. However, in contrast to Hume, utilitarianism is firmly rooted in the tradition of the radical enlightenment which means that everything that has no utility has to be eradicated from social and political life. Authority, duty and obligations are often nothing more than fictions, riddles, allegories, or remnants of 'feudal superstition' (Hampsher-Monk 1992:316; Kymlicka 2002:45). What counts is the utility of politics in terms of positive and empirical consequences (Clark & Elliot 2001:470).

Utilitarianism starts with the premise, similar to Locke's human nature, that human behaviour must be understood in terms of the pursuance of happiness and the avoidance of pain (U II:6).⁴⁵ Happiness is the *end* of all action. This specifically contrasts with Hume, who claims that because we are motivated to certain objects (or people) as ends in themselves these objects *consequently* give us pleasure (Hume 1992:I.I.11:155). Bentham's utilitarianism, however, claims that an object is solely a *means* to an end, i.e. to happiness (U II:6). But what makes utilitarianism a moral theory and not simply a (reductive) theory of human action is its collective perspective. Utilitarian morality is not about "the agent's own greatest happiness" but about the greatest happiness of the greatest number (U II:10).⁴⁶ Mill argues that happiness being "the end of human actions, is necessarily also the standard of morality" (U II:10). When this move from the perspective of strategic individual *action* to the perspective of a moral *legislator*, is an obvious leap of faith, Mill continues, that "to be incapable of proof by reasoning is common to all first principles" (U IV:32).

When utilitarianism formulates a standard of legitimacy in terms of the consequences of political decisions, institutions and laws, the calculability of this standard is fairly problematic. Bentham was already aware of this and proposed two solutions (Hampsher-Monk 1992:323). When it is difficult to measure, let alone increase, happiness, a solution might be to increase *generalised resources* as a proxy, resources such as money and liberty. Mill, however, problematises this 'resourcist solution' as Kymlicka calls it (2002:20). Mill argues that because an object is only a *means*

⁴⁵ All references of Mill point to Mill (1910) *Utilitarianism, Liberty, Representative Government*: Title of Original Book (U = Utilitarianism; L = On Liberty; RG = Considerations on Representative Government), Chapter, Page number.

⁴⁶ Kymlicka points out that this "common slogan is misleading" because the "double maximand" – the greatest happiness *and* the greatest number – easily leads to conflicts or an impasse (2002:50, footnote 1).

towards happiness, we cannot calculate happiness by looking at *objects* like money or property (UII:6). According to Mill we have to understand how people actually perceive those objects in relation to their subjective feelings of happiness.⁴⁷ Furthermore, Mill argues that not only the *quantity* of happiness but also its *quality* motivates people, as “some *kinds* of pleasure are more desirable and more valuable than others” (U II:6, original emphasis). If it is just about quantity, people would be satisfied to live as animals. However, people – or at least Mill – would rather choose to be an unhappy Socrates than ‘a fool satisfied’ (U II:9). Utility, we might say, is for Mill neither the hedonistic utilitarianism of Bentham in which only the experience of happiness counts, nor utility understood as subjective preference-satisfaction which can be served with money. Mill seems to claim that utility concerns preferences *worth* satisfying or *rational* preferences, i.e. the preferences we would have if we were fully informed (U II:8).⁴⁸

If money is a difficult proxy of utility, Mill does agree with the function of liberty.⁴⁹ Individuals know best how to pursue their interests. Indeed, government should not interfere with the individual because it is often wrong (OL IV:140). Furthermore, Mill claims that if individuals attend to their own private interests and the interests of the few people that are close to them this will be good for the collective most of the time (U II:17). Here we find an almost ‘natural’ connection between Smith’s invisible hand and Bentham’s utilitarianism, a connection which forms the foundation of modern welfare economics. Based upon this relation between utility, liberty and unintended consequences utilitarians tend to view democratic competition as a *means* towards utility (Bellamy 1990:5; Clark & Elliot 2001:470). Such understanding of competitive democracy differs from Madison, because where he understands the common good as a *shared* interest, the utilitarians perceive the common good as *aggregated* interests. Mill, however, seems to emphasise the *epistemic* dimension of liberty, especially in public debate. Free argumentative competition

⁴⁷ The subjective character of happiness points to the measurement problem known as the “interpersonal comparability of utility” (Kymlicka 2002:18).

⁴⁸ In contemporary debate preference satisfaction is likewise problematised to the extent that a) it does not always imply an increase in well-being; b) there is a conflict between current preferences and tomorrow’s disappointments; and c) there is a distorting relation between the preferences we desire and those we can achieve (the ‘sour grapes’ problem) (Kymlicka 2002:15).

⁴⁹ It would be inaccurate to argue that liberty was only a means for Mill. Indeed, it can be argued that liberty has a moral value in and of itself. Mill provides a defence of liberalism based upon human autonomy. Where Kant uses human autonomy as a deductive foundation for a substantive morality, Mill uses a ‘weak variant of autonomy’. This variant sees “the absence of external direction as good” while the Kantian strong version derives its principles from “the core value of autonomy” itself (Kelly 2002:119). The valuation of liberty as an object in itself and as a means to utility is therefore not necessarily contradictory and explains the attractiveness of Mill’s theory for liberals of all kinds. It does necessitate a delicate balance between private and public spheres (OL II 73-83).

forces one to reflect upon one's opinion and assures that public opinion approaches the rational truth as an unintended consequence (OL II:79-83).⁵⁰

Bentham committed to democracy only when the political elite, motivated by 'sinister interests', refused to listen to his rational ideas (Schofield 2009:91). It is fair to say that the utilitarianism of both Bentham and Mill also includes strong elitist notions – it is a scientific method suited for experts. In Bentham's famous proposals for the *Panopticum* as the most rational incarceration of delinquents it is easy to see that his expert knowledge is not based upon the happiness-principle but upon efficiency and effectiveness (Bentham 1995 [1787]:43-5). Utilitarianism collapses into mere instrumental rationality – a rationality *independent* of the goal (Bentham 1995:34). Mill's understanding of expert knowledge, however, is less instrumental and more geared towards 'human perfection' (Gibbins 1990:96). Mill argues, for example, that in order to improve the lives of the unfortunates and the 'least fitted' government ought to teach them a 'rational conduct' reaching deep into their private lives (OL:137-8; V:163). What a rational life entails, what a better or *happier* life is, is not left to the judgement of the unfortunates themselves but to elites, who have developed their faculties and who mastered their 'animal desires' (U II:8; Gibbins 1990:96). Utility should foremost be a consideration of legislators not of the masses (U II:17; V:58-9).⁵¹

However the problem of utility measurement is solved and independent of whether utilitarianism takes a democratic or expert perspective, the question surfaces why individuals would feel an obligation towards the legitimate political order. Bentham does not seem to care much about this question, focusing upon utilitarian laws to which people are obliged through the penal system (Hampsher-Monk 1992:317). Mill, however, does see the problem. Mill is foremost promoting a *political* and not a *personal* utilitarian morality. Indeed, personal "comprehensive moral utilitarianism" tends to be so 'alienating' that most utilitarians opt, like Mill, for political or 'rule-utilitarianism' (Kymlicka 2002:21-5).⁵² In other words, individuals do not have to act morally but

⁵⁰ Different from Hume, public argument is not so much about understanding the other, but rather about testing the factuality of argument in competition. It must be noted that Mill claims additional benefits of public argumentation as: a) people have an inherent need for an opinion as they are 'terrified at scepticism'; b) competition protects the meaning and vitality of ideas against the drudge and routine of daily life; and c) competing opinions ensure political moderation of natural antagonisms (OL II:99-100).

⁵¹ Mill's belief in truth, facts and expert knowledge may seem to contradict his famous warning for the 'fallibility' of reason, but this is only a contradiction in appearance in light of the epistemic dimension of public argumentation (OL II:79).

⁵² Rule-utilitarianism also allows for a more credible defence of minority rights. Nevertheless Mill, at times, does argue for a personal version of utilitarianism (see e.g. U II:16).

rules and laws have to ensure morality.⁵³ But if utility is only *indirectly* ensured, a conflict seems to rise between non-moral actions and moral-rules, between the people and government.

Mill tries to ameliorate the problem of order in two ways. First, differing from Hume, order is a necessary condition for any government, but not its object (RG:186). The object of government is 'progress' – the increase in 'the amount of good' – where order is merely "the preservation of all kinds and amounts of good which already exist" (RG:187). Mill argues that the conditions for order and progress "are not opposite, but the same." Government ought to increase happiness (progress) without losing what already exists (order). Mill, then, seems to restrict utilitarian legitimacy to win-win situations – or, anachronistically, Pareto-efficiency. It takes the sting out of utilitarianism as justice is not mere *aggregation* of preferences with winners and losers, but concerns a *shared interest* in increasing happiness, in 'social improvement' (U V:59).

This win-win interpretation of utilitarianism, obviously, does not solve the conflict between individual and collective interests. So, secondly, Mill hopefully states that there is no "inherent necessity that any human being should be a selfish egotist, devoid of every feeling or care" (U II: 14). "Genuine private affections, and a sincere interest in the public good, are possible ... to every rightly brought up human being" (ibid.). But Mill, who criticises Kant for providing only moral rules based upon their reasoned consequences and not upon motivation, is not convinced that this benevolence is enough (U: I:4). Between force and morality Mill therefore tries to solve the problem of order by means of *the authority of opinion*. Mill almost literally turns Kant's famous definition of the Enlightenment upside-down. Where Kant tried to escape the 'nonage' or 'tutelage' of authority, Mill wants to close the gap between individual and collective perspectives by "the authority of a received opinion" (OL:139).⁵⁴ Society has "absolute power" over 'human character' during "the whole period of childhood and nonage" in which a 'rational conduct in life' can be taught (U II:16; OL:139).

Finally, even the authority of opinion is not enough. The happiness of all should be 'consecrated' in a 'halo of custom', it should be enforced by the fear of God, by sympathy, fear of disapproval, by hope of favour of our fellow-creatures and by status and authority (U III:25). These social forces create our 'conscience', which ultimately explains the 'internal sanction of duty' (U III:26). And just as Hume, Mill is aware that these "moral associations which are wholly of *artificial creation* ... yield by degrees to the dissolving force of analysis" (U III:28-9, my emphasis). In short,

⁵³ Indeed, personal utilitarian morality, it can be shown, can decrease utility in general (Kymlicka 2002:28). In other words, utilitarian justice prescribes non-utilitarian action.

⁵⁴ This emphasis on the authority of opinion might be confusing as Mill famously discusses the relation between the authority of public opinion and the rationality of public debate (OL II). As we will discuss below, Mill explicitly takes over de Tocqueville's fear that public opinion is the most dominant power towering above the masses threatening to annul individuality. Mill's discussion of public opinion, then, must be read in this dual understanding of opinion as friend and foe – an understanding that is not without its contradictions.

utilitarian justice cannot cope without artificial 'social ties' that create 'collective identification' and obligation towards legitimate politics.

2.1.6 Conclusion –The Paradoxical Nature of Legitimacy

When the theorists discussed turn their attention from normative theories of moral justice and of legitimate politics towards empirical political theory, they are all confronted with one single problem: the problem of order. As their normative theories do not allow them to solve this problem in terms of force nor human moral virtue, all try to solve the problem with *artificial* ties that explain why subjects feel a duty to obey legitimate politics and law. In short, despite all the theoretical and normative differences, where it concerns empirical theory legitimate politics is explained in terms of *domination* – i.e. command-obedience relations – and legitimacy is explained in terms of internal *feelings of duty* as a function of order.

The problem we are confronted with, at this point, is the fact that this empirical understanding of political legitimacy is a consequence of the normative project itself. All theories formulate a notion of moral justice in which morality entails the transcendence of 'lower' motives, attitudes, interests or passions. Morality concerns the universal, the general, the collective the unconditional. Political legitimacy, subsequently, concerns the link between these *ideals* of morality and the *positive* political order. In political legitimacy the lower passions must not so much be transcended, the lower and higher virtues must merge. Legitimacy is the 'riddle of history' (Marx quoted in Hampsher-Monk 1992:510). Political legitimacy must merge fundamental oppositions between passion and reason, individual and collective, between present and future, history and truth, between private and public or self and other. In general we might say that legitimacy concerns the paradoxical merger of 'freedom and unfreedom' (Marcuse 2008:7). Although for Marcuse this liberal tradition of political legitimacy is inherently fraught, his depiction is insightful.⁵⁵ Legitimacy does not only concern freedom. The whole point of the classic normative theorists is to show that we are free *because* we are not. But if legitimacy is not only about freedom, it neither solely concerns unfreedom. The whole point of these classics is to determine, as Locke states, a different foundation of government not merely based upon coercion and violence. In the normative concept of political legitimacy freedom and unfreedom paradoxically find each other. Political legitimacy explains why we are free by binding ourselves.

⁵⁵ Marcuse, who addresses legitimacy in terms of authority, claims that this paradox between freedom and unfreedom in 'bourgeois theory' transposes the 'realm of freedom' to the inner life of the individual, while unfreedom concerns the 'external world' (2008:7-8). Marcuse traces this tradition back to Protestant and ascetic theories and tries to turn classic liberal thought upside down: not freedom is the basis for legitimate unfreedom, but *because* one is internally free, one can (and must) be externally unfree.

If we leave aside whether an answer to this 'riddle' can be found and, if so, whether it requires a notion of universal morality, then we can see how this paradoxical nature of political legitimacy in its *normative* form defines how we perceive political legitimacy in its *empirical* form. Because of this paradoxical nature of political legitimacy these theorists are preoccupied with the problem of order. As soon as they turn to empirical theory the oppositions so neatly merged in normative theory resurface with full force. The paradoxical nature of normative legitimacy forces the theorists to explain a citizen's obligation to the legitimate political order anywhere between sheer force and moral reason. Moral reason cannot be the answer as individuals are not expected to be moral, either because of their weakness of will (*Akrasia*) or because morality arises as public virtue out of private vices. Force, on the other hand, can be part of the answer, but it cannot be the sole answer as that defies the whole project of enlightened liberal democracy. As such, between force and moral reason social processes and practices have to explain *artificial* feelings of duty, obligation or commitment to the legitimate order *despite* conflicting passions and interests. In other words, from the normative tradition a specific empirical conception of political legitimacy emerges that tries to explain the feeling of duty to obey political rule despite motivations towards the contrary. Legitimacy concerns the inner-sanctioned duty to obey political domination.

The point is not so much that political legitimacy should *not* be understood in terms of an empirical theory of duty and obedience. Weber famously tried to provide such a theory of political legitimacy which proves, as we will see in the chapter that follows, to be very insightful. Rather, the normative tradition provides a solid mould which can only produce one particular form of empirical political legitimacy. The paradoxical nature of the normative tradition preloads the empirical project toward the problem of order and *therefore* towards legitimate political domination. The problem for an analytical theory of political legitimacy is that it should try to avoid such *cryptonormativism*.

2.2 Between Empirical and Normative Theory

If we want to avoid this cryptonormativism in our analytical framework it might be worth noticing that political domination and the duty to obey might explain the stability of political order, yet it remains – for all theorists discussed – an artificial form of legitimacy. This means that legitimate domination might be important to explain the stability of politics, legitimate politics cannot simply be reduced to domination. The classics discussed have distinct albeit different understandings of the *empirical nature of legitimate politics* that remain essential and independent of political domination. As such, there exists a profound rift between the empirical form of political legitimacy and the empirical nature of legitimate politics that is not bridged in classical theory.

The classics do not only suggest a specific empirical, but artificial form of political legitimacy, but they also, and independently, have distinct claims about the empirical nature of legitimate politics. These claims are important as this nature provides a *focus* on those social and political processes that are constitutive of legitimacy. With the risk of oversimplifying we can say that in Locke's theory the nature of legitimate politics concerns politics as a *contractual* relation; a specific understanding that explains his focus upon political consent, political output effectiveness (substantive rights), trust and reciprocity. The nature of legitimate politics in Rousseau's work, however, is profoundly different if we disregard his natural law foundation for a moment. For Rousseau, legitimate politics concerns processes and conditions that ensure consensus. It is this *consensual* perception of politics that explains his focus upon the epistemic quality of political practices of decision-making as well as its social preconditions in terms of solidarity and civic virtue. Hume's *coordinative* perception of legitimate politics explains his focus on social systems and their constitutive rules, his functional evolutionary perspective on social-economic necessities and social learning, and his functional perspective of politics in terms of output effectiveness (mutual benefit) and collective action problems. Madison, in distinction, entertains a *conflictive* perception of the nature of legitimate politics that explains his focus on the rationality of institutional processes in terms of competition, mutual accountability and control, on the one hand, and democratic-representation in terms of elections, trust and loyalty, on the other. For Mill, finally, the nature of legitimate politics is foremost *instrumental* which explains his focus upon political output effectiveness in terms of utility, expert knowledge, social welfare and interest aggregation.

The point is not, of course, that everything that Locke, Rousseau, Hume, Madison and Mill wrote fits neatly into these shorthand models. The point is neither that these different foci on legitimate politics are mutually exclusive. Rather, the way we understand the nature of legitimate politics matters, as it focuses our attention on specific empirical political processes, practices or objects above others – it *determines* empirical theory. The problem for our analytical perspective, then, is that if the empirical nature of legitimate politics matters and if we can understand this nature at least in terms of contract, consensus, coordination, conflict or exchange, it seems that we have to find the *essential* nature of legitimate politics.

In the remainder of the chapter, however, I will show that such essentialism is problematic by analysing the different normative theories in their historical social-political context. At one level we can say that the normative theories we have discussed are part of a larger cumulative history of thought. Indeed, up till today, theorists react on each other's work and errors with the hope of proposing new or improved theories. Without taking over the latent teleological assumptions of such position, it is more than reasonable to argue that we cannot understand contemporary

empirical theory without understanding its historical and normative origins. At another level, however, we can analyse these normative theories as attempts to *legitimise* specific historical social-political practices. From such a 'Marxist' position we might explain the legitimising function of normative theory in intentional, functional or structural terms. Gramsci, for example, proposed the term 'organic intellectuals' to underscore the functional (organic) relation between normative theory and the hegemonic social order (Gramsci 2006:87; V.d. Pijl 1992:2). Without a doubt, normative theory can often be (and has to be) unmasked as an intellectual apology for the status quo and its underlying social-political inequalities. However, it seems to me that we should not reduce normative theory to a mere function of class and hegemonic order. Although there is a strong relation between social conditions and normative theory, I rather want to understand this relation in terms of how politics is perceived *as a solution to specific social problems in specific historical contexts*.

Normative theories of legitimacy, I will argue, can be understood as answers to specific historical problems. More specifically, I argue that the way the theorist comprehends the nature of legitimate politics is inherently dependent upon what he perceives to be the principle social problem of his time. A complex interplay between political solutions and social fears is what drives the normative project. In what follows, I will sketch this relation between society and theory, threat and solution or *between empirical and normative theory* in the theories we have discussed. It must, however, remain a brief and, even more importantly, a rough sketch. I am well aware that its bluntness does not do justice to the complexities and subtleties of history.

2.2.1 The Rise of the Modern 'Secular' State

In general, 17th century natural law theories can be considered as a response to the scepticism that reigned during the Renaissance (Hampshire-Monk 1992:4; Haakonssen 1996:24). As the famous sceptic Michel de Montaigne wrote: "there is no desire more natural than that of knowledge (...) but truth is no great thing. (...) Reason has so many forms" (de Montaigne 1575: chapter XXI). Scepticism seemed almost inevitable as new worlds were discovered that refuted the scholastic idea of a universal natural order ordained by God with Europe as the centre of the world, while at the same time the European continent was characterised by the intense religious strife of the Reformation. Modern natural law can be perceived as an answer to both these problems as it tried to rescue reason from scepticism as well as from religious conflict.

Grotius – considered to be the founding father of modern natural law⁵⁶ – tried to formulate a moral order as an explicit response against scepticism, which could in principle also be valid for

⁵⁶ The *modern* natural law tradition is juxtaposed to the *scholastic* natural law tradition of Augustine.

atheists or heretics (Haakonsson 1996:24; Hampshire-Monk 1992:5). Likewise Hobbes famously searched for the normative foundations of politics that would not necessitate the authority of religion. The point is not that Grotius or Hobbes were atheists, the point was that they wanted to establish a legitimate social order that would not be threatened by the religious conflict of their days. The problem of social order and the need for religious toleration were the principle problems of this historical period. Hobbes explicitly states that his theory was “occasioned by the disorder of present time” (1985 [1651]:728 [395]). Especially Hobbes did not necessarily need the authority of any god because he founded his theory upon *human nature*, which at the same time allowed him to negate epistemic scepticism. If human nature – self-love – was universal, as Hobbes argued, it allowed the possibility of a genuine political science. Inspired by the modern science of Galileo – as Locke was inspired by Newton – the ‘nature of man’ allowed the idea that laws of human action might be discovered (Hirschman 1977:13).⁵⁷ As such, Hobbes is often seen as the first modern philosopher, not burdening his deductive science with any human sentiments save self-love and as the first “to give an account of politics within in a detailed and unified secular world” (Hampshire-Monk 1992: xii). However, this is somewhat anachronistic as he did not aim to justify a modern secular order based upon (economic) self-interest – something that pre-occupied Hume and Smith – rather he tried to solve the *historical problem* of a political and social order threatened by religious conflict which *forced* him to found his theory not upon religion but upon universal human nature.

Locke might seem less-modern than Hobbes as his theory is explicitly relying upon the authority of God. Locke, however, tried to address different social problems as the worries of his day concerned the security of private property against the power of the sovereign within in the context of religious strife. His political theory can therefore be seen as coping with the authority of “the emergent modern state” (Hampshire-Monk 1992:5). In Locke’s words: “what security, *what fence* is there, in such a state, *against the violence and oppression of this absolute ruler?*” (II.VII:79). In contrast to Hobbes, Locke had to argue that the power of the Sovereign has moral limits and can be *resisted* in certain circumstances. At the same time, Locke has to assure that such right of resistance does not end up in anarchy and the loss of order.

Both this radicalism vis-à-vis the power of the sovereign, as well as the assurance of order nonetheless, was solved through divine authority. Locke endowed reason with divine authority in order to establish a different basis of authority than of violence, tradition *or* religion, while chaos

⁵⁷ Hirschman argues that this ‘positivism’ was not just a reaction to modern science but also a reaction to the claims of Machiavelli, who argued that political theory should not be about “imaginary republics and monarchies that have never been seen nor have been known to exist” but rather be based upon “the effective truth of things” (Machiavelli quoted in Hirschman 1977:13). Spinoza, Hobbes, but also Rousseau took up this argument, to take man ‘as he really is’ - “men being taken as they are and law as they might be” (Rousseau 1762: book I).

and disorder was kept at bay by appealing to a supra-social authority to which one has to justify one's actions (II.XV:150). In other words, Hobbes *could* be 'modern' because his aim was rather conservative or counter-revolutionary, i.e. the justification of the absolute king. Locke, furthermore, did not appeal to the authority of religion but only to the authority of a rational God.⁵⁸ Such Deism gave historical breathing space for secular reason.⁵⁹ As Thomas Paine wrote, "in Deism our reason and our belief become happily united" (1795). On the other hand, precisely because the sovereign had moral limits and the people a right to resistance, Locke understands politics as a contractual relation. Locke therefore also appealed to a supra-social authority because without it he could not explain why one would feel an obligation to keep one's contractual promises. Indeed, "promises, covenants, and oaths, which are the bonds of human society, can have no hold upon an atheist. The taking away of God ... dissolves all" (Locke 1689). Paradoxically, without the *existence* of God religious tolerance was impossible as atheism fails to provide a foundation "whereupon to challenge the privilege of a toleration".⁶⁰

In sum, although Locke gave an influential justification of private property, it seems to me, that he should not so much be seen as an apologist for the rise of a new bourgeois economic order. This is the interpretation of those who are influenced by him in different ages, notably Smith and Marx (Hampshire-Monk 1992:93). Locke, on the other hand, was dealing with the rise of the modern central state and trying to define the limits of its powers within the context of religious strife. The rise of a new economic order was the topic of the next century.⁶¹

2.2.2 The Rise of Modern Capitalism

Much of 18th and early 19th century political theory can be seen as an attempt to come to grips with the rise of a new social order based upon commercial exchange – the rise of a social order based upon *interests* over against the traditional order based upon aristocratic or republican *virtue*

⁵⁸ Voltaire writes: "it was loudly exclaimed that Mr. Locke intended to destroy religion; nevertheless, religion had nothing to do in the affair, it being a question purely philosophical, altogether independent of faith and revelation" (Voltaire 1778).

⁵⁹ At the turn of the 18th century, for example, a dominant discussion concerned the question of whether morality was solely a natural order willed by God or whether people had moral obligations independent – but not contrary of course – of that divine will (Haakonssen 1996:6).

⁶⁰ Voltaire argued for religious toleration on similar grounds: "are we not all children of the same father and creatures of the same God?" (Voltaire 1763:chap.22). As an interesting side-note, even for Voltaire religion was a pragmatic necessity for social order. He called out to the 'logicians': "Alas! let's leave intact human belief in fear and hope". Indeed, "If God did not exist, it would be necessary to invent him" (Voltaire 1768).

⁶¹ Hardin, as such, separates between two kinds of liberalism: political and economic liberalism (1999a:41-2). The first concerns the attempt beginning in the 17th century to create a secular state tolerant of religious differences, while the second concerns the attempt to describe and justify capitalist society.

(Hirschman 1977:4; Pocock 1985:67-8).⁶² We might understand Rousseau's work as an early attempt to come to grips with this new commercial society he saw developing in the 18th century. For Rousseau, this modern society was foremost corrupt. But if morality only arises with society itself, as discussed, moral corruption must be due to society itself (Mautner 1997:491). Not human sin, but human history and human society have created the 'evils of the world'. Rousseau's celebration of the 'savage' man in his natural state was to show how civilized man lives in a state of slavery. As Rousseau writes, if one perceives "multitudes of entirely naked savages despising European pleasures and enduring hunger, fire, sword, and death merely to preserve their independence, I feel that it is not appropriate for slaves to reason about freedom" (1754). Civilized men "call the most miserable slavery peace" and no longer possess the *moral virtue* to fight for their freedom. Without doubt Rousseau perceived Europe as the highest stage of civilisation, but – not unlike Weber – this highest stage is also the end of freedom.⁶³ The only thing left under this new form of 'despotism' was the "virtue which remains for slaves" (Rousseau 1754).

This emphasis on corruption clearly reverberates with the republican tradition of citizenship and civic virtue (Berry 1997:136). The manners of modern commercial man, Rousseau worries, conflict with the virtues of active republican citizenship and political participation. Rousseau sketches how freedom decayed through the invention of money and commerce - "through the hustle of commerce and the arts, through the greedy self-interest of profit, and through softness and love of amenities" (III.15) – towards a corrupted and unequal society. Rousseau especially abhorred the idea that citizens pay off their public duties and 'personal services' with money and taxes. For Rousseau, it is not commercial exchange per se that contradicts the republican ideals of virtue, but the ability to buy off one's duties – not the rise of exchange relations, but *financial* relations corrupts society (Pocock 1985:110).⁶⁴ If men do not actively participate in the public cause, if they think "what does it matter to me?", Rousseau claims, "the State may be given up for lost" and they "will not be long without chains" (III.15, IV:7). The problem with commercial society, then, was that people were merely 'passive spectators of political dramas' (Mautner 1997:491).⁶⁵

⁶² Hirschman rightly argues that this does not mean we should see this rise of a new order necessarily in terms of its 'class character'. Indeed, we can question "the class character of the French Revolution" (Hirschman 1977:4; and see especially Doyle 1999:3-42; 2001: 1-43).

⁶³ Rousseau perceives a linear progressive development of mankind in relation to its industries with Europe at the highest level. In this development the agricultural and metallurgic revolutions in particular tend towards despotism – "lifting by degrees its hideous head and devouring everything which it had perceived as good and healthy in all sections of the state (...) establishing itself on the ruins of the republic" (Rousseau 1754).

⁶⁴ Rousseau even held that "enforced labour is less opposed to liberty than taxes" (III.15).

⁶⁵ Interestingly, Rousseau also points out that this new order geared towards self-interest is ultimately self-defeating. Different from self-love in the natural state (*amour de soi*) self-love in society (*amour propre*) is inherently dependent upon *social recognition* (Froese 2001:584). Where the savage 'breathes nothing but peace and liberty', civilized man is subjected to a 'multitude of new needs' and "above all, to his fellow men, to

Rousseau's normative project therefore can be understood as an attempt to explain how corruption in modern society ought to be solved. It clarifies his search for the social preconditions of political legitimacy – social conditions that are favourable to the rise of the common will and the moral virtue of man. Rousseau recommended a small community where “every member may be known by every other” (II.10), with fairly egalitarian social-economic conditions (III.4) and which consists of self-sufficient people with ‘simplicity of manners’ “bound by some unity of origin, interest, or convention”, but without ‘deeply ingrained customs or superstitions’ (II.10). Rousseau was sceptical whether such social conditions were possible at all in modern society – he thought Poland and Corsica had a fair chance – but also whether these conditions could be maintained. He grimly states that “the body politic, as well as the human body, begins to die as soon as it is born, and carries in itself the causes of its destruction” (III.11). Rousseau, as we have seen, tried to solve this problem through the artificial arousal of moral and public virtue. But Rousseau also advanced a different solution: an *individual escape* from corrupt society.

In *Emile, ou l'Education* Rousseau argues how it is possible to lead a virtuous and authentic life within modern corrupt society (Rousseau 1762-a). Emile is neither Saint nor Savage, neither social man nor citizen, rather Emile is a natural man, where “natural man is a whole for himself” (Rousseau quoted in Keohane 1978:473). Rousseau is therefore often considered to be the father of Romanticism, searching for unspoiled and authentic meaning as can also be seen in his use of the image of the *Noble Savage*. Romanticism emphasises uniqueness and distinction as opposed to the modernist notions of universal laws, generalisation and similarity. Rousseau's romanticism expresses that one has to be conscious of one's unique self with a unique destiny.⁶⁶

Rousseau tried to rescue morality and social virtue from corruption associated with the rise of a new commercial order – an attempt that asked for a transformation of society itself or else a flight into Romantic authenticity. Rousseau addressed a common worry of those days, the worry that “virtue is threatened” (Berry 1997:132). But 18th century worries were not limited to the relation between moral virtue and commercial society, it also included worries about the stability of this new order. After the Dutch Tulip crisis of 1637, the English Bank crisis of 1710, the French Mississippi Bubble and the South Sea Bubble of 1720 – accompanied by ‘widespread political corruption’ – the stability of the social and political order seemed to be “undermined by money” and “at the mercy of passion, fantasy and appetite”, but no longer limited by any moral sanction (Hirschman 1977:57; Pocock

whom he has, in a sense, become a slave, even in becoming their master’ (Rousseau 1754). If self-interest defeats self-interest this points to Rousseau's solution to find self-interest in the collective interest.

⁶⁶ This search for authentic individuality can be clearly seen in Rousseau's opening statement in *The Confessions*: “I know my heart, and have studied mankind; I am not made like any one I have been acquainted with, perhaps like no one in existence; if not better, I at least claim originality” (Rousseau 1782).

1985:112; Berry 1997:140). Both Smith and Hume recognised that the stability of an economic system depends upon confidence, upon *opinions* and *beliefs*. Indeed, the value of money “lies in the fact that *others believe* it to have value” (Smith quoted in Berry 1997:126). The commercial order requires ‘predictability and confidence’ while its core inherently entails ‘uncertainty and risks’. But a social order founded upon uncertainty and opinion seemed especially worrisome to many (Hirschman 1977:53). As Berry concludes, many “thought a commercial society fundamentally unsound since it seemingly rests on nothing more substantial than a tissue of beliefs” (1997:126).

What worried theorists like Rousseau was not ‘the cold rationality of economic man’, but rather the ‘hysteria’ of his uncontrolled passions. The traditional order based upon the aristocratic masculine virtues of commitment, steadfastness, and courage seemed increasingly to be ruled by unreliable “female goddesses of disorder as Fortune, Luxury, and ... Credit herself” (Pocock 1985:114; see also Berry 1997:140).⁶⁷ This celebration of ‘luxury’ not only clashed with traditional Christian ethics – Augustine taught that the ‘lust for money’ is one of the three sources of sin and that the fall of man is related to ‘self-indulgence and greed’ – but also with republican ethics – luxury is corruption, promoting ‘softness’ ‘unmanliness’ and uncourageousness, as Rousseau has already told us (Rousseau 1762 III:15; Hirschman 1977:9-10; Berry 1997:140). In short, this clash between feminine passions and manly virtues confirmed the frailty of the commercial order and was the historical background in which both Hume and Smith tried to understand and justify the new commercial social order.

If the new commercial order was not to be denounced, as in Rousseau, two main issues needed to be addressed. The first question concerned whether a social order based upon passion, self-love and uncertainty can be stable at all, and the second whether this new order inevitably leads to the corruption of man. Hume and Smith tried to address these problems not by explaining the moral man of Rousseau, but by explaining man as a social being, as a ‘social man’ (Pocock 1985:120; Berry 1997:24). The discovery of self-love and interests as the dominant motivation of social man allowed the possibility of a stable foundation of society as well as a genuine social science (Hirschman 1977:48-9). Different from Hobbes, it was not just about the universal essence of human nature, but about the motivation of man in his social context – social man allowed for *theories of society*. As such, social order could and should be established exactly by ‘harnessing the passions’ of social man (Hirschman 1977:20-23).

As we have seen, for Smith and Hume order and public interest rise as an unintended consequence in accordance with Mandeville’s dictum ‘private vice, public benefit’. Hume’s claim that government ought to provide justice means it should assure the institutional framework

⁶⁷ “Economic man as a masculine conquering hero is a fantasy of nineteenth-century industrialization” (Pocock 1985:114).

through which individual passions were harnessed for the public good – a stable framework of impartial rule of law making contracts between strangers possible. As Smith stated, if this justice is removed “the great, the immense fabric of human society ... must in a moment crumble into atoms” (quoted in Berry 1997:130). The ‘systems of rational egotism’ advanced by Smith and Hume therefore are not so much about *legitimizing* the self-love of commercial man, as rather “means of controlling his impulses” (Pocock 1985:112).⁶⁸

The Scots, however, not only had to show how the new commercial order could be stable, but also had to address the worrisome decline of moral and manly virtue. As such, they tried to show how commerce is inherently tied up with the historical *progress of civilization* and how it produces mild manners and politeness (Pocock 1985:115). De Montesquieu had already shown this relation between social manners and commerce in his *l'Esprit de Lois*: “it is almost a general rule that wherever the ways of man are gentle (*moeurs douces*) there is commerce; and wherever there is commerce, there the ways of men are gentle” (de Montesquieu 1748). This idea of the *commerce doux* was also present in the *natural history* of Smith. Smith claimed that the driving force of the ‘natural progress’ of humankind – passing through the four distinct states of “hunting, pasturage, farming and commerce” – was not the will of government, but underlying social changes such as manners and behaviour or human cognition and emotions (Bellamy 1990:3; Berry 1997:93-4).⁶⁹ For both Hume and Smith, morality and history were inherently intertwined, which made the claim possible that the rise of commercial society should be understood in terms of natural progress and civilisation (Haakonssen 1996:7). The progressive rise of commerce conversed “passion into opinion” and, in the words of contemporary Millar, stimulated virtues like “honesty and fair-dealing” (Pocock 1985:121, 138). The age of commerce, as a consequence, was not the era where moral virtue was lost, but it was, Hume claimed, the ‘happiest and most virtuous’ ‘age of refinement’, where ‘industry, knowledge and humanity are linked together by an indissoluble chain’ (Berry 1997:138-9).

Although the Scots judged the rise of the progressive evolutionary stage of commercial society better ‘on balance’ not all worries disappeared (Berry 1997:120). Where it concerned its stability they were especially worried about the increase in public debt. Public or governmental debt was seen as a *negative* unintended consequence of commercial society. Smith worried it to be the “probable ruin of all the great nations of Europe”, while Hume emphasised that “either the nation must destroy public credit or public credit will destroy the nation” (both quoted in Berry 1997:149).

⁶⁸ Smith often wrote dismissively about the passions that create the public good, labelling them as “vain and insatiable” based upon “natural selfishness and rapacity” (Berry 1997:45). Real happiness, for Smith, did not concern these ‘imagined satisfactions’ that drive “the industry of mankind” but rather the Stoic ideal of ‘peace of mind’ (Berry 1997:44).

⁶⁹ Smith did recognise that the rise of civil government in this historical process was motivated by the rich to protect themselves against the poor, but considered the whole process as ‘improvement’ as it developed towards ‘regular’ and ‘impartial’ government (Berry 1997: 105-6).

Furthermore, as already discussed, if stability depends upon justice provided by government, the idea of countervailing passions cannot really explain individual obligation towards legitimate government. The civility of the *commerce doux* did not take away all the worries concerning moral virtue. Commercial man “might be a social but he could never be a wholly political being” (Pocock 1985:121). Indeed, if Hume separated *private* sympathy and *public* justice it meant that political participation and involvement was no longer expected. His contemporary Ferguson especially worried about this devaluation of “active public life” (Berry 1997:135). Furthermore, emphasising *interdependent* social man, civilised or not, kept contrasting with the republican ideal of *autonomous* citizenship based upon material independence (Robertson 1990:16).⁷⁰ This worry of the loss of autonomy, only aggravated by the problems created by the modern division of labour (Hirschman 1977:105-6). Smith explicitly worried about man “whose whole life is spent in performing a few simple operations” to become “as stupid and ignorant as it is possible for a human creature to become” making him incapable “of forming any just judgement concerning many even of the ordinary duties of private life.” (Smith quoted in Berry 1997:144). As Berry argues, Smith worries about “the (sick) condition into which the ‘labouring part, that is, the great body of the people’ necessarily falls ‘unless government takes some pains to prevent it’” (Berry 1997:145).

The Federalists, as we have seen, incorporated many ideas of the Scots directly into politics itself. As Hamilton argued, modern political science provided the principles of perfect government – the principle of countervailing passions (Hamilton IX:119) and the public good as an unintended consequences. The institutional design argued for by Madison can itself be understood as a *solution* to the social-political situation that arose after American independence. The constitution written at the Philadelphia convention was foremost intended to counter specific problems in the post-war independent states. The Articles preceding the constitution were written in an anti-British and anti-imperial spirit and clearly assigned political power in the hands of the states, leaving the overarching federal structure rather powerless. At the same time, as the idea of representation was especially contested due to the war with Britain, political power within the states was, in traditional republican spirit, located in the legislative and thus in the hands of the people. This practice, according to the Federalists, was disastrous for individual (property) rights. There was no separation of powers, debts were annulled by majority vote, judiciary judgements were overruled, private property was not respected and there was a general spirit of ‘aggressive egalitarianism’ (Kramnick 1987:23). The main

⁷⁰ Smith and Hume argued in contrast that in commercial society autonomy actually increases. Instead of being personally dependent upon someone’s economic surplus, like subjects of an ‘African King’ are dependent upon his wealth, in a commercial society economic surplus is separated from personal dependency (Berry 1997:122-4). As such, economic *interdependency* also means *independency*.

problem for the Federalists was thus not the arbitrary power of the Prince, as in the tradition of European political theory, but rather the arbitrary power of the majority of the people. Individual rights, based upon reason and truth had to be defended against the passions and unreasonableness of the people. The solution of the new political science was to counter passion with passion.

It might be argued that the Federalists were more concerned about the traditional republican spirit which irrationality threatened the stability and coordination needed for a viable and rational commercial society – turning the worries of Rousseau and the Scots upside down. Furthermore, the Federalists addressed a whole different question that was only latently present in Smith's worry about the mental condition of the labour force and that especially seemed relevant in a society without traditional estates: the *class question*. Although the class question was more consciously elaborated in the next century, it did seem to threaten commercial society and the Federalists did propose a clear solution: interest fragmentation and, indeed, the fragmentation of *class consciousness*.

2.2.3 The Rise of Mass Society

Finally, if we turn to the 19th century the old order had definitely crumbled in the American and French Revolutions. Different issues and problems presented itself in this age – issues that J.S. Mill tried to address in his work. Mill was deeply influenced by the work of de Tocqueville stating that de Tocqueville had “changed the face of political philosophy” (quoted in Lakoff 1998:436). De Tocqueville had tried to analyse the consequences of the new democratic order, on the one hand, and the social problems that signalled the end of the comforting idea of the *commerce doux*, on the other. The problem with the French Revolution, according to de Tocqueville, was that citizens were perceived as an abstract “entity independent of any particular social order” and that its champions determined the “rights and duties of men in general” (AR Foreword:168).⁷¹ The Enlightenment writers wanted “to replace the complex of traditional customs governing the social order of the day by simple, elementary rules deriving from the exercise of the human reason and natural law” (AR III.1:216). Such universal reasoning, ‘*l’esprit de systeme*’, explains, according to de Tocqueville, its inherent appeal, but says nothing about its success. The actual empirical results are not determined by reasoning and cleverly designed constitutions, but by social conditions. Indeed, politics is not about ‘paper liberties’ it is about the social practices, habits, and traditions that actually ensure freedom (Stone & Mennell 1980:37). The primary worry of de Tocqueville, then, is that the *practice* of the modern democratic order produces a centralised and all-powerful state as a *new form of despotism* (DIA 4.3-5:361).

⁷¹ All references to Tocqueville are to de Tocqueville (1980): Work (DiA = *Democracy in America* (1840); AR = *L’Ancien Régime et la Révolution* (1865), Part, Chapter, Page.

De Tocqueville's argument of democratic despotism is quite complex and varied, but we might recognise four main arguments. First of all, de Tocqueville argues that the love for equality of democratic man can have perverse tendencies as it not only engenders the wish "to elevate the humble to the rank of the great", but also a 'depraved taste of equality' to lower 'the powerful' to the level of the weak (DIA I.3:52). This, it is argued, threatens the taste for liberty because the advantages of liberty are not equally distributed (DIA II.2.1:352). Democratic men, de Tocqueville claims, "prefer equality in slavery to inequality with freedom" (DIA I.3:52).

Second, the rise of democratic despotism is possible because of the decline of countervailing powers. As equality and the commercial order promotes a *middle class* that possesses some property and as meritocratic social mobility fills their minds, this class has an increasing interest in the stability the state provides (DIA II.3.21:355). This middle class, de Tocqueville argues, suffocates any passion for revolution. Its material ambition is the safeguard for despotism (OR Foreword:377) and explains why citizens are 'naturally disposed' to constantly "surrender additional rights to the central power" (DIA II.4.3,4 & 5:361).⁷² Furthermore, he claims, the democratic revolution not only demolished the injustice of the traditional institutions in the name of liberty and equality, but destroyed in the process also those institutions that were the traditional countervailing powers of central authority, i.e. it destroyed the aristocracy which is just not compatible with the idea of uniformity of universal law (DIA II.4.2:86; AR III.3:226).). But, de Tocqueville claims, in making everybody equal, individuals become impotent and powerless, while there is nothing that can really resist the tyranny of government (DIA I.5:64). Central government was not only resurrected after the revolution, it was 'more shockproof' and more pervasive.

Third, de Tocqueville argues that the democratic order has dislodged man from his traditional ties. The individualism that arises with democracy should therefore not be confused with self-love, but rather concerns man's withdrawal from society and from his 'fellow-creature' (DIA II.2.2:293). De Tocqueville recognises that equality makes sympathy for humanity possible in the first place – one only has to look at oneself and know the pain and suffering of everybody else (DIA II.3.1:105) – but at the same time such humanity becomes possible it loses strength because, in Humean fashion, it has become impersonal and thereby weaker. Separated from his traditional ties, the individual, de Tocqueville argues, withdraws from society into a 'little circle of his own' in an attempt to cope with the indistinctive mass (OR Foreword: 377). Modern democracy is no longer the age of the individual, but of the masses.

Finally, the main characteristic of such mass society for de Tocqueville is that beyond the crowd there is no authority than the collective itself – nothing "but the great and imposing image of

⁷² De Tocqueville recognises that democracies are not so much 'stationary' but that its 'perpetual stir' remains within the limits of 'what is fundamental', that is, of order (DIA II.3.21:385).

the people at large" (DIA II.4.2:86). This collective authority can especially be felt in public opinion.⁷³ The overwhelming authority of public opinion not even persuades the individual, but 'enforces' 'ready-made opinions' which relieve him from thinking for himself (DIA II.1.2:135-7).⁷⁴ But this tremendous force of collective authority, de Tocqueville argues, can also be government itself. Although their equality and independence fill citizens with pride, their sense of powerlessness together with a fear of downward mobility (OR Foreword:377) and the lack of moral obligations for mutual support (DIA II.2.5:112) causes them to look up to the state for assistance. Government therefore feels "responsible for the actions and private condition" of its subjects and easily invades the 'domain of private independence' (DIA II.4.3,4,5:367). Above all, such state assistance is increasingly necessary as democratic society champions equality, but mystifies its inherent *class relations* (DIA II.2.20:302).⁷⁵ Servants, de Tocqueville claims, might think of themselves as "the equals of their master" and might think that the relation with their master is based upon voluntary contract and consent, this does not correspond to the "real inequality of their condition" (DIA II.3.5:119-120). As such, equality is also perverse because in thinking that they are equal – an "imaginary equality" – servants no longer feel the need to resist the interests of the masters that are contrary to their own interests. It is a passion that 'subdues their will'.

In sum, de Tocqueville describes how this new *democratic mass society* – characterised by dislodged individualism, a distorted belief of equality and lacking countervailing powers – threatens to create a new form of despotism. Democratic nations, he claims, are "most exposed to fall beneath the yoke of a central administration" (DIA I.5:65), an "all-powerful bureaucracy" (AR III.3: 226). Traditional tyranny, de Tocqueville argues, ruled by being seen in its most naked and horrendous power – it crushed the few to install its authority in the neglected rest. Modern administration, however, is more gentle, but more pervasive – it "degrade[s] men without tormenting them" (DIA II.4.6:374). As to deny the promise of Enlightenment and Kant's dictum de Tocqueville writes that "[a]bove this race of men stands an immense and *tutelary power*, which takes upon itself alone to secure their gratifications, and to watch over their fate. That power is absolute, minute, regular, provident, and mild" (ibid.:375, my emphasis). The disturbing point is that it concerns a *democratic*

⁷³ Democratic man thinks himself equal to all others, which means he has 'no faith' in the opinion of another man, more than in his own (DIA II.1.2:135; II.4.2:86). But "when he comes to survey the totality of his fellows, and to place himself in contrast to so huge a body, he is instantly overwhelmed by the sense of his own insignificance and weakness." (DIA II.1.2:137).

⁷⁴ De Tocqueville recognises, however, that this 'enslavement of the mind' is not totally negative, as it might also force the individual to think novel thoughts.

⁷⁵ Although de Tocqueville is aware that commercialism creates new forms of inequality, a new form of aristocracy, and although he sees how the labour force is degraded, he is adverse to any form of public relief. De Tocqueville states in *Memoire sur le Paupérisme* (1835) that public relief would only degrade and humiliate the paupers more, be a recognition of their inferiority, lower their public moral, create a disincentive to work and would only encourage class conflict (Goldberg 2001:298-300).

despotism. The people think “government *ought* perpetually to act and interfere in everything that is done” while they do not think they are giving up their freedom (DIA II.4.2:87).

It might be argued that Mill tried to address some of the social problems that de Tocqueville signalled. Therefore we can understand Mill’s theory against the background of a nascent *mass society* characterised by central bureaucratic administration and industrial class-society. Mill worried, in almost similar terms as de Tocqueville, how both the increasing power of the administrative state and public opinion repress every form of individual autonomy, creativity and liberty (OL:131).⁷⁶ And without any countervailing power to champion non-conformity, Mill fears “a social tyranny more formidable than many kinds of political oppression, ... penetrating much more deeply into the details of life, and enslaving the soul itself” (OL I:68). Paradoxically, the utilitarian Mill claims that “the evil would be greater, the more efficiently and scientifically the administrative machinery was constructed” (OL V:165). The ‘more perfect’ the bureaucratic organisation, the better the organisation “of the nation into a disciplined body for the purpose of governing” (OL V:167).

To address this democratic despotism and to save the liberty and autonomy of *republican man* Mill proposes public opinion as a solution. Free competitive argumentation in public debate at least offered the possibility of new thoughts and reflection – a possibility of escaping the suffocating opinion of mediocrity and the pressures of conformity. Competition, Mill argued, was not so much the answer to revive as to protect human virtue – a defence of autonomy and individuality.⁷⁷ Not republican, but *liberal man* was his more modest goal. The individual, shielded from the oppression of public opinion, provides him the opportunity of ‘non-conformity’ – the possibility to avoid becoming a person with “no character, no more than a steam-engine has a character” (OL III:117).

Mill, however, not only tried to protect individual liberty and autonomy of liberal man against the bureaucratic state and public opinion in public argumentative competition, but also by trying to raise a solid legal boundary between *public and private spheres*; a boundary based upon a differentiation between self-regarding and other-regarding actions (OL I:74). Unfortunately for Mill, this boundary was not that solid in relation to that other 19th century problem: the living conditions of the masses. The seeds of class interest and class conflict that de Tocqueville signalled grew more and more to full stature in the 19th century. The gentle order of *commerce doux* increasingly conflicted with the harsh social conditions of the industrial order. The utilitarian project can be seen

⁷⁶ Mill favourably quotes de Tocqueville that “the faith in opinion becomes ... a species of religion and the majority is the prophet” (quoted in Hampsher-Monk 1992:352). This also means that the relation between government and public opinion is tightly knit (OL:131).

⁷⁷ Indeed, Mill often echoes the traditional republican fear of the loss of virtue as he claims that mass society produces ‘moral effeminacy’, ‘torpidity and cowardice’ and citizens that are ‘less heroic’ but obsessed with ‘money-getting’ (Bellamy 1990:6). Individuality, not to be confused with individualism, concerns the expression of the individual’s own nature “as it has been developed and modified by his own culture” (OL:118).

as an early answer to this hardship – the need for social improvement provided by the state. If England witnessed a ‘revolution in government’ by providing all kinds of social and public law, the influence of utilitarianism in this revolution concerned the dismantling of inefficient traditional institutions and the creation of rational ones under central authority (Conway 1990:71-3). It also means that Mill could hardly uphold the legal-moral boundary between public and private spheres. Indeed, for Mill the state ought to socially intervene in cases of gambling and drugs in order to protect ‘family’ and ‘creditors’ (OL:137-8) and even argued that in certain cases marriage and parenthood fall under the interests of society and state (OL V:163). Mill’s theory therefore remains utterly and ambivalently torn between protecting individual autonomy *against* the administrative state and raising the unfortunate *through* the state.

19th century social conditions stressed liberal theory. The blossoming of class conflict, *the rise of faction*, was a fear shared unanimously by the authors we have discussed. It is a fear deeply imbedded in the liberal tradition as faction and common interest can hardly be combined. Rousseau argued that factions are most detrimental for the general will as there should be “no partial society within the State” (II.3).⁷⁸ Madison’s whole institutional design was geared “to break and control the violence of faction”, “this dangerous vice” (Madison X:122).⁷⁹ Hume wrote about the ‘madness’ of factions that the founders of ideological political parties ‘must be hated’ as “the influence of a faction is directly contrary to that of laws” (I.I.8:127). De Tocqueville denounced political parties organised in military fashion aimed at fighting not at debating or persuading and which were centralised around “a small number of leaders” while the bulk of the members “profess the doctrine of passive obedience” (DIA I.12:84). Indeed, in the long classic tradition of democratic-liberal thought only Burke seemed to champion the rise of political parties, but merely as a means to fight parliamentary corruption (Burke 2007 [1770]). Even Burke made a difference between factions and parties, where factions possess a “narrow, bigoted, and proscriptive spirit” and “are apt to sink the idea of the general good in this circumscribed and partial interest”.

However, by the 1880s traditional liberalism emphasising a harmonious relation between individual and public interests and championing negative liberty was no longer feasible: depression, foreign competition, poverty, inequity, the rise professional bureaucratic corporations, all undermined the ideal of the liberal *commerce doux* (Bellamy 1990:10; Hirschman 1977:126). It became clear to many observers that the impoverished and the uprooted might become

⁷⁸ Rousseau writes: “when particular interests begin to make themselves felt and smaller societies to exercise an influence over the larger, the common interest changes and finds opponents: opinion is no longer unanimous; the general will ceases to be the will of all; contradictory views and debates arise; and the best advice is not taken without question” (IV.1).

⁷⁹ Madison defined a 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 the permanent and aggregate interests of the community” (X:123).

“passionately angry, fearful [and] resentful” (Hirschman 1977:126). Factions and class interests seemed to become a political reality in the 19th century. This rise of interest conflicts, in the true meaning of conflict, necessitated some form of compromise. As Chamberlain asked in 1885: “what ransom will property pay for the security it enjoys?” (quoted in Brebner 1948:67). The *commerce doux* and the liberal state turned out not to be the end of history, not the final ‘unfolding’ of the universal ‘World spirit’ as Hegel envisioned, but were increasingly ‘haunted’ by a ‘ghost’ (*Gespenst*) of interest conflict and opposition (Engels & Marx 2008 [1848]:20).⁸⁰ The 20th century needed to cope with a different social reality, with different conflicts and oppositions that had to be unified with different notions of legitimate politics. Mill’s utilitarian project of social progression and indeed social emancipation must be understood as a first answer to the class problem and the harsh social condition of industrial England while trying, at the same time, to protect individual liberty against the rise of the tutelary administrative state and mass opinion.

2.2.4 Conclusion – The historical dialectic

If, according to Kant, the whole project of the Enlightenment is “man’s emergence from his self-imposed tutelage (*Unmündigkeit*)”, i.e. the ability “to use one’s own faculties (*Verstandes*) without another’s guidance” (1784) – this emergence from traditional authority does seem to burden man’s moral talents. Indeed, the scholars discussed, seemed to perceive the rise of this new society – from the rise of the central ‘secular’ state in the 17th century, to the rise of modern capitalism in the 18th century, to the rise of industrial and mass society in the 19th century – with explicit ambivalence.

What must be clear from this all too short analysis is the direct link between perceived historical social conditions and problems, on the one hand, and the nature of legitimate politics, on the other. Locke’s contractual perspective seems directly tied to his fear of the arbitrary power of the sovereign secular state. Rousseau’s emphasis on consensus and political participation seems a direct consequence of his fear that commercial society would corrupt man’s moral and republican virtues. Hume’s perception of legitimate politics as coordination springs from fears concerning the stability of a feminine commercial society solely based upon opinions and passions. Madison’s conflictive perception of legitimate politics seems inherently tied to his fear of majority and class-interests threatening a rational commercial society. And finally, Mill’s ambivalent relation to the state seems to be a response to the social problems of industrial society in which legitimate politics is perceived as an instrument for both the protection of liberty as the emancipation of the masses.

⁸⁰ Hegel did recognise the class contradiction to be an irrational contradiction that threatened liberal civil society. However, he did not really have an answer to this problem except migration and colonization (Hampsher-Monk 1992:457-8).

We might say, then, that the way these theorists perceive the nature of legitimate politics is inherently tied to how they perceive the empirical social-political problems of their time. What legitimate politics *is*, is inherently caught up in empirical theories of society or, we might say, in modernity. Notwithstanding the fact that the normative theorist is trying to convince us that his conception of legitimacy is transcending history, aiming for universal morality, his theory is addressing specific historical problems. Between theory and history, then, there seems to exist a *dialectic* that problematises any attempt to formulate the *essential* nature of legitimate politics. Finally, if we agree that the way we understand the nature of legitimate politics matters to the extent that it *affects* any empirical (and normative) theory of political legitimacy, we must conclude that this historical dialectics forces us to give up any pretensions of *essentialism*.

2.3 Conclusion: Faces of Political Legitimacy

In this chapter I have tried to analyse the complex relations between normative and empirical theory. In the first part of the chapter we have seen how the *paradoxical nature* of legitimacy in normative theory forces us to a *singular empirical form* of political legitimacy, i.e. it forces us to analyse political legitimacy in terms of political domination and the duty of obedience. In the second part we have seen how an *historical dialectic* between theory and society explains *plural* understandings of the *empirical nature* of legitimate politics – understandings that structure any theory of political legitimacy as it provides a focus on those social and political processes that are constitutive of legitimacy.

When this thesis aims for an analytical framework of political legitimacy, we must forgo the *cryptonormativism* originating in the normative paradox and simultaneously forgo any presumption of *essentialism* as the historical dialectic shows us. It seems to me that an analytical framework cannot reduce its understanding of political legitimacy to one singular form *a priori*. As Edelman wrote: "There is no one 'real' political system. To people in different situations one or another facet is real, for the time being and for the issues that concern them. To define the system, all these perspectives must be taken into account" (1964:21). Empirically one perspective might be more relevant than another, but we cannot discard different analytical perspectives in advance. There is no one singular essential nature of legitimate politics and yet we cannot empirically perceive practices of legitimacy without some prior position on the nature of legitimate politics. An empirical theory of legitimacy needs to focus beyond the pro-theoretical claim that legitimacy concerns subjective validity and normative 'oughtness'.

In the second part of this book, then, I will analyse different *faces of political legitimacy* depending upon the underlying nature of legitimate politics. In chapter 3, I analyse politics as

domination as understood by Weber. In chapter 4, I analyse politics as conflict especially as understood by post-war democratic realists. In chapter 5 and 6, I will analyse politics as coordination as understood by Luhmann, while in chapter 7 and 8 I discuss politics as argumentation as developed especially by Habermas. As such, by departing from different natures of legitimate politics I will analyse how we can understand political legitimacy empirically.

The fact that political legitimacy might have multiple faces, however, does not mean that the difference between normative and empirical theory collapses again. Of course, if a scholar only emphasises one particular form of legitimate politics above others this choice might be normatively inspired (as it often is). Nevertheless, although this theory is not value free it might still be free of value judgments to the extent that it tries to explain political legitimacy from a specific perspective. More importantly, the specific nature of legitimate politics is not just a normative choice of the scholar. It is, as I have tried to argue, inherently tied up with an analysis of the social order and its problems. This means that every empirical theory of legitimacy is not so much normative as it is historical, caught up in the perceived problems, worries and political discussions of the time, on the one hand, and caught up in empirical processes of modernity, on the other. We must acknowledge that to a certain extent the prominence and importance of order is inevitable in any theory of legitimacy.

It is therefore easy to perceive that by moving from Weber, to post-war democratic realists, to Luhmann's system theory, to Habermas' lifeworld theory, we are still and inevitably caught up in the historical dialectic between theory and practice. It is reasonable to claim that where Weber wanted to understand the rise of *modern society*, the democratic realists wanted to understand *democratic stability* in face of the threats of Fascism and Communism, Luhmann's theory seems to be tied up with the rise of the *risk society* and Habermas tries to face the complexities of *late-modernity*. However, it would be wrong to argue that these historically situated theories cannot help us to understand political legitimacy in our own day and age or in the society of tomorrow. For that end, I will analyse in the remainder of the book *four faces of political legitimacy*.