

Democracy and Difference: Reflections on the Metapolitics of Lyotard and Derrida*

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I. THE DEMOCRATIC MOMENT

IN his 1848 Preface to *Democracy in America*, Alexis de Tocqueville wrote,

However sudden and momentous be the events which have just taken place so swiftly, the author of this book can claim that they have not taken him by surprise. This work was written fifteen years ago with a mind constantly preoccupied by a single thought: the thought of the approaching irresistible and universal spread of democracy throughout the world. On reading it again, one finds on every page a solemn warning that society is changing shape, that mankind lives under changing conditions, and new destinies are impending.¹

In view of the momentous transformations which have occurred in the countries of Central and Eastern Europe and the former Soviet Union since 1989, and even prior to them, with the transition from dictatorships to democracy in the Philippines, Argentina, Chile, and Brazil, “the thought of the approaching irresistible and universal spread of democracy throughout the world” sounds more true today than ever. Yet, as Tocqueville also reminds us, “It is not force alone, but rather good laws, which make a new government secure. After the battle

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¹ Alexis de Tocqueville, *Democracy in America*, trans. by George Lawrence and ed. by J. P. Mayer (New York: Doubleday and Co., 1969), p. xiii.

comes the lawgiver. The one destroys; the other builds up. Each has his function.”² When we watch the aftermath of these bloodless peoples’ revolutions, with their wonderful sensual images of the velvet and the carnations, in cases like Poland, Hungary, Czechoslovakia and the Philippines, we observe their colors fading and their scent diminishing as the routine of everyday as opposed to revolutionary politics settles in; in others like the new Commonwealth of Independent Republics of the former Soviet Union and in the former Yugoslavia civil war conditions, violent upheavals, social chaos and nuclear perils darken the future.

These momentous transformations have caught the political thought of the present breathless and adrift. With very few exceptions, neither empirical nor normative political theory was prepared to deal with the magnitude of these issues with the self-confidence of Tocqueville.³ This may not necessarily be lamentable; perhaps the “owl of Minerva” truly flies at dusk and reflective thought can only paint its “grey on grey.” It is my deep sense, however, that the lack of orientation in political theory in view of the transformations of the present is not due to the inevitable gap between political action and political reflection alone. There is a profound lack of simultaneity between the time of theory and the time of political action of such magnitude that Ernst Bloch’s phrase of “non-simultaneous simultaneities” (“ungleichzeitige Gleichzeitigkeiten”)⁴ strikes me as being quite apt to capture the mood of the present. While almost all so-called western industrial capitalist democracies are caught in the throes of this sense of being at the end of something—consider some of the bewildering array of theoretical prefixes which have come to dominate our intellectual and cultural lives, postmodern, postindustrial, post-fordist, post-Keynesian, post-histoire, post-feminist—the efforts of the countries of Central and Eastern Europe appear as “nachholende” revolutions⁵, as revolutions which are at the beginning, which are catching up with or making good for processes that others have already been through. For normative political theory, this unusual concatenation of historical circumstances has meant that the postmodernist

² *ibid.*, p. xiv.

³ The only research paradigm which was attuned to transformations taking place in these societies throughout the seventies and the eighties was the “civil society” paradigm. Here too it is possible to distinguish between Alain Touraine’s work on the “self-organization of society,” and a second civil society paradigm, inspired by East European dissidents, but developed within a framework indebted to the social theory of Jürgen Habermas. For the first see Alain Touraine et al., *Solidarity. Poland 1980–1981* (Cambridge, England: Cambridge University Press, 1983); for the second, Jean Cohen and Andrew Arato, *Civil Society and Political Theory* (Cambridge, Massachusetts: MIT Press, 1992). Andrew Arato gives a helpful and comprehensive overview of the general literature in “Interpreting 1989” (unpublished ms., New York, 1991).

⁴ Ernst Bloch, *Erbschaft dieser Zeit* (Frankfurt: Suhrkamp, 1973; first published 1935), pp. 110 ff.

⁵ See J. Habermas, “Die Nachholende Revolution,” *Die Nachholende Revolution* (Frankfurt/Main: Suhrkamp Verlag, 1990); an English version has appeared as “The Rectifying Revolution,” *New Left Review*, No. 183 (September–October 1990).

critique of western democracy with which we have become so familiar in the last two decades and the Central and Eastern European as well as Latin American *aspirations to democracy* coexist in the same intellectual and political space. Postmodernist skepticism toward “really existing western democracies,” and at times the naively apologetic confirmation of western capitalism and democracy by their new aspirants are contemporaries of our current political and cultural horizon. It is this proximity and distance which is so disorienting as well as explosive.

In the present article I want to explore this question: what, if anything, has the postmodernist critique of normative thinking contributed to the current task of understanding and reconstructing democracy on a world-scale? My argument is that although the problem or set of issues suggested by the vague terminology of “difference,” “otherness,” “heterogeneity” or “le differend” are crucial for the ethos of contemporary democratic communities, theorists of difference have not indicated where the line is to be drawn between forms of difference which foster democracy and forms of difference which reflect anti-democratic aspirations. In the transformed world political context of today, it is more essential than ever that the critique of democracy in the name of difference developed by oppositional intellectuals be formulated so carefully that these thoughts cannot be exploited for nationalist, tribalist, and xenophobic purposes. It is imperative that the politics of the “differend” not be settled beyond and at the margins of democratic politics.

In a recent article entitled “The Other Heading: Reflections on Today’s Europe,” Jacques Derrida voices the concerns and fears which motivate my reflections here. Derrida writes:

Hope, fear, and trembling are commensurate with the signs that are coming to us from everywhere in Europe, where, precisely, in the name of identity, be it cultural or not, the worst violences, those that we recognize all too well without yet having thought them through, the crimes of xenophobia, racism, anti-Semitism, religious or national fanaticism, are being unleashed, mixed up, mixed up with each other, but also, and there is nothing fortuitous in this, mixed in with the breath, with the respiration, with the very “spirit” of the promise.⁶

The question though is whether the “meta-politics” which follow from certain theories of “difference,” Derrida’s not excluded, and in particular their undermining of the universalist premises of liberal-democratic theory, do not reduce such concerns about xenophobia, racism, anti-Semitism to good moral and political intentions which cannot be supported by philosophical arguments and

⁶ Jacques Derrida, “The Other Heading: Memories, Responses, and Responsibilities,” *The Other Heading: Reflections on Today’s Europe*, trans. Pascale-Anne Brault and Michael B. Naas (Bloomington: Indiana University Press, 1992), p. 6.

strong reasons.⁷ May it be that the critique of the universalist political tradition, developed by Jean-François Lyotard and Jacques Derrida, is so radical that it undermines the rational defensibility of these ideals and reduces them to sheer existential choices for which we cannot give reasons with good grounds? May it also be that this critique claims to be radical but is, in effect, curiously powerless to deal with the radical power of history and the historicity of political modernity since the American and the French Revolutions? May it be that the price of a certain kind of hyper-radicalism is an aloofness of institutional and social critique?⁸

Let me be very clear what my questions are not intended to imply. I am not suggesting that there is any deductive or conceptual link between certain philosophical positions and political practices and movements which we may consider objectionable.⁹ To put it bluntly, theorists of difference are not responsible for

⁷ In his thoughtful book, *Political Theory and Postmodernism* (Cambridge: Cambridge University Press, 1991), p.133, Stephen K. White writes: "No postmodern thinkers I know of would give blanket endorsement to the explosions of violence associated with, say, the resurgence of ethnic group nationalism in the Soviet Union or with the growth of street gangs in Los Angeles. And yet it is not at all clear that they have a normative discourse available to condemn such violence." I think this statement expresses very well the sense of misgiving which some of us share about the "metapolitics" of postmodernism, as distinguished from the personal political positions of the thinkers involved. On the whole, I think that White's sensitive and subtle analysis also underplays the "decisionistic" streak in postmodern political thought which I will discuss below.

⁸ Thomas McCarthy explores some of the deeper conceptual reasons why Derrida's philosophy in particular does not permit a social theory of institutions which is historically differentiated enough in: "The Politics of the Ineffable: Derrida's Deconstructionism," *Ideals and Illusions: On Reconstruction and Deconstruction in Contemporary Critical Theory* (Cambridge, Mass.: MIT Press, 1991), pp. 97-120.

⁹ Of course, in the current climate of continuing and at times bitter debate about Martin Heidegger's involvement with National Socialism, the place of Heidegger's philosophy for contemporary French thought in general is being questioned, re-examined and re-analyzed. Jean-François Lyotard, *Heidegger and the "Jews"*, trans. by Andreas Michel and Mark Roberts (Minneapolis: University of Minnesota Press, 1990) and Jacques Derrida, *Of Spirit: Heidegger and the Question* (Chicago: University of Chicago Press, 1989) have each addressed these issues. I will be addressing the question of the relation of politics and philosophy in Martin Heidegger's work in a different context in *The Reluctant Modernism of Hannah Arendt* (Berkeley, Calif.: Sage, forthcoming 1994). My suggestion in section 4 of this paper that certain formulations of Derrida and Lyotard bring them into the company of "decisionist" political theory does not mean that the political consequences of their philosophy would support reactionary, conservative thought. "Decisionism," of which I see Carl Schmitt's political philosophy as the prime example, is not National Socialism; it is a political philosophy which says that true political sovereignty is only revealed in the moment of the "emergency" (*Ausnahmestand*), and that it is neither reason nor morality but the capacity of the sovereign to set itself through via its power that legitimizes all law and politics. See Schmitt, *Political Theology and The Concept of the Political*.

There can be "left" as well as "right" wing variants of political decisionism. Walter Benjamin and Otto Kirchheimer, members of the Frankfurt School, were very influenced by Carl Schmitt's political philosophy in their critique of the Weimar Republic. Kirchheimer eventually developed a penetrating critique of Carl Schmitt himself; of course, Walter Benjamin's life came to a sudden and tragic end before the entire political mischief which Carl Schmitt got involved in with the Third Reich could lie before his eyes. An excellent treatment of the influence of Carl Schmitt on early members of the Frankfurt School, and in particular on Otto Kirchheimer and Franz Neumann, is given by Bill Scheuerman, *Radicalism and the Rule of Law: The Frankfurt School and the Crisis of Contemporary Law* (unpublished PhD thesis, Harvard University, 1992). Cf. also, Ellen Kennedy, "Carl Schmitt and the Frankfurt School: A Rejoinder," *Telos*, 73 (Fall 1987), and the articles by Martin Jay, Ulrich

the degenerate form of the politics of difference pursued at the present in Bosnia-Herzegovina for example and it would be tendentious to suggest so. One cannot criticize philosophical positions for their imputed, real or imaginary, political consequences in the hands of others. Neither am I suggesting that we should judge, evaluate, or question the commitment of theorists of difference to democratic ideals and aspirations. What I will be arguing instead is that Jean-François Lyotard and, to some extent, Jacques Derrida, privilege in their writings on the political *a certain perspective, a certain angle, a certain heuristic framework*, which itself has deep and ultimately, I think, misleading consequences for understanding the rational foundations of the democratic form of government. They attempt to illuminate political phenomena through an experience which is a limit condition: an extraordinary and foundational moment. In doing so, they repeat an epistemic and ultimately meta-political problem which Richard Wolin has very aptly characterized with reference to another group of thinkers, at a different time:

. . . a general fascination with 'limit situations' (Grenzsituationen) and extremes; an interest in transposing the fundamental experiences of aesthetic modernity—shock, disruption, experiential immediacy; an infatuation with the sinister and the forbidden, with the “flowers of evil”—to the plane of everyday life, thereby injecting an element of enthusiasm and vitality in what had otherwise become a rigid and lifeless mechanism.¹⁰

It is this fascination with the “limit situation” in republican politics that I want to document in the writings of Lyotard and Derrida, and which I wish to criticize for its inadequacy for understanding democratic politics.

II. THE SITE OF LE DIFFEREND: THE REPUBLICAN ACT OF FOUNDATION IN LYOTARD'S AND DERRIDA'S RECENT WRITINGS

In Jean-François Lyotard's writings on politics¹¹ and in Jacques Derrida's recent essays repeatedly, a theme, a *problematique*, returns. This is the preoccupation with the *originary* or *foundational* political act. From Derrida's writings cele-

Preuss and Alfons Soellner in “Special Section on Carl Schmitt and the Frankfurt School,” *Telos*, 71 (Spring 1987).

¹⁰ See Richard Wolin, *The Politics of Being: The Political Thought of Martin Heidegger* (New York: Columbia University Press, 1990), p. 30. Richard Wolin is referring to the influence of Carl Schmitt and Ernst Juenger upon the political thought of Martin Heidegger. Just as there is a conservative, right wing variant of the politics of the limit, there is a left-romantic, radical, variant of it as well. Thinkers like Walter Benjamin, Otto Kirchheimer, and Franz Neumann were all at some point in their lives very influenced by the meta-politics of the limit. Is it “par hazard” then that the legal and political philosophy of Walter Benjamin occupies such a prominent place in Jacques Derrida's recent musings on the law?

¹¹ Jean-François Lyotard, *The Differend: Phrases in Dispute*, trans. Georges Van Den Abbeele, (University of Minnesota Press: Minneapolis, 1988). The French edition, *Le Differend*, appeared in 1983. All page numbers in parentheses in my text refer to this English edition.

brating the bicentenary of the American Constitution¹² to Lyotard's linguistic analysis of republicanism in *Le Differend* and to the reflections of both on Pascal and the "foundations of law,"¹³ a fascination with the paradoxes and aporias of the foundational moment in republican politics is apparent.

For Lyotard the paradoxes of republican foundationalism, as for Derrida, become the event, the moment, when the differend is revealed in politics, when in fact politics is revealed as "le differend." Lyotard writes:

In a republic, the pronoun of the first-person plural is in effect the linchpin of the discourse of authorization. Substitutable for a proper name, We, the French people . . . , it is supposedly able to link prescriptions (such as articles in codes, court rulings, laws, decrees, ordinances, circulars, and commandos) onto their legitimation "in a suitable way." . . . [T]he republican regimen's principle of legitimacy is that the addressor of the norm, y, and the addressee of the obligation, x, are the same. The legislator ought not to be exempt from the obligation he or she norms. And the obligated one is able to promulgate the law that obligates him or her . . . *We decree as a norm that it is an obligation for us to carry out act a.* This is the principle of autonomy.¹⁴

Lyotard analyzes the paradoxical aspect of these foundational formulations: the puzzle emerges with the supposed "identity" of the two "we's" invoked, one in the normative which constitutes the act of founding, as in "we the people decree as a norm that"; the second as in the case of the "we" that is the addressee of the obligation. The "we" of the normative, "we the people," and the "we" of the declarative, "we ought to obey the laws," are not and may not be the same. There is a suspicion that the one who speaks the law and the one to whom the law applies are not the same. The logic of republican identity here covers up an important political asymmetry, namely the asymmetry between the law-givers and the constituents to whom the law applies.

This republican formula of autonomy disguises the "differend" in politics, insofar as what is heterogeneous, incommensurable, other and irreducible to a common denominator is here tied together via a formula of identity. What are absolutely heterogeneous are the two moments of the "we": the we who promulgates the law, and the we to whom the law applies. The formula of republican politics, "we, the people declare that we shall obey x," makes the "differend" disappear by reducing it to bland commensurability and identity.

Politics for Lyotard, in its authentic rather than the run-of-the-mill version, which he attributes to intellectuals and politicians, resides in the problem of

¹² Jacques Derrida, "Declarations of Independence," *New Political Science*, 15 (1986), 7-15.

¹³ See Lyotard, *The Differend*, pp. 118ff., 145 ff. See Jacques Derrida, "Force of Law: The 'Mystical Foundation of Authority,'" *Cardozo Law Review* (Special issue on "Deconstruction and the Possibility of Justice"), 11 (July-August 1990), 919-1047.

¹⁴ Lyotard, *The Differend*, p. 98.

“linkage.”¹⁵ The politics of language as well as the language of politics are the sites where what is heterogeneous, other, different, incongruent, unfamiliar is rendered homogeneous, the same, identical, congruent and familiar—“heimisch.” To uncover and unmask this logic which homogenizes and which imposes sameness over difference is the task of philosophical politics; but, and this is the crux of the matter, this process of rendering homogeneous, compatible, congruent, the same, is due to an absolute spontaneity; it just “happens.” Lyotard here refers to Heidegger:

No matter what its regimen, every phrase is in principle what is at stake in a differend between genres of discourse. This differend proceeds from the question, which accompanies any phrase, of how to link onto it. And this question proceeds from the nothingness that “separates” one phrase from the “following.” There are differends because, or like, there is *Ereignis*. But that’s forgotten as much as possible: genres of discourse are modes of forgetting the occurrence, they fill the void between the phrases. This “nothingness” is, nevertheless, what opens up the possibility of finalities proper to the genres . . .¹⁶

Spontaneity, arbitrariness, linkage, the happening, heterogeneity, and the power that links, that binds, that organizes and moulds: this is the site of the civil war of language as well as of the language of politics.¹⁷

¹⁵ In the Preface to *Le Differend* Lyotard states precisely the connection he is establishing between a certain view of language and a certain politics. “By showing that the linking of one phrase onto another is problematic and that this problem is the problem of politics, to set up a philosophical politics apart from the politics of ‘intellectuals’ and of politicians. To bear witness to the differend” (p. xiii). This puzzling claim tying together the status of linguistic phrases with politics is repeated even more forcefully in the following passage: “Were politics a genre and were that genre to pretend to that supreme status, its vanity would be quickly revealed. Politics, however, is the threat of the differend. It is not a genre, it is the multiplicity of genres, the diversity of ends, and par excellence the question of linkage” (p. 138).

¹⁶ *ibid.*, p. 138.

¹⁷ Yet there is something remarkably brief, impatient, almost staccato in these formulations. The premise of the absolute heterogeneity and incommensurability of regimens and discourses is never argued for; it is simply posited. It corresponds to what Richard Bernstein has called a “pervasive amorphous mood.” “It is a mood of deconstruction, destabilization, rupture and fracture—of resistance to all forms of *abstract* totality, universalism and rationalism.” See R. J. Bernstein, “Incommensurability and Otherness Revisited,” *The New Constellation* (London: Polity Press, 1991), p. 57 (emphasis in the original). Moods cannot replace arguments. Lyotard nowhere distinguishes between incommensurability, heterogeneity, incompatibility and untranslatability. Cf. the following remark: “Incommensurability, in the sense of the heterogeneity of phrase regimens and the impossibility of subjecting them to a single law (except by neutralizing them), also marks the relation between either cognitives or prescriptives and interrogatives, performatives, exhaustives . . . For each of these regimens, there corresponds a mode of presenting a universe, and one mode is not translatable into another” (p. 128). Incommensurability is the central epistemic premise of Lyotard’s philosophy of language as well as politics, and also its weakest. Lyotard here assembles under one heading a range of meanings extending from radical untranslatability in language to the sense of unfairness or injustice experienced when the language of the victor is imposed to describe the wounds of the vanquished. The thesis of radical untranslatability of genres of discourse and phrase regimens is no more meaningful than the thesis of the radical incommensurability of conceptual frameworks. For, if frameworks, linguistic, conceptual or otherwise are so radically incommensurable with each other, then we would not be able to know this; for our ability to describe a framework as a framework in the first place rests upon the possibility of being able to identify, select and specify certain features

In his reflections on "Declarations of Independence," Jacques Derrida likewise drives home the arbitrariness of all republican beginnings via the use of linguistic means of analysis. The statements of the American Declaration of Independence, "We hold these truths to be self-evident: that all men are created equal; that they are endowed by their creator with certain inalienable Rights . . ." indicate, according to Derrida, a confusion of the "constative" with the "performative."¹⁸ The signatories of the Declaration speak in the name of "the laws of Nature and Nature's God." Thus, they understand themselves to be stating a constative; whereas the "we hold these truths to be self-evident" is a performative. It establishes the validity of the principles to which the adverb "self-evident" refers in the very act of formulating them. For Derrida, revolutionary acts of foundations confuse their own performativity via appeals to the constative; for Lyotard revolutionary acts present the performative in the form of a constative. The point is quite the same: Derrida sees revolutionary acts of foundation as concealing their own arbitrariness, their own lack of foundations by false hypostatization; Lyotard maintains that revolutionary acts of foundation hide the differend, that is the moment of spontaneity and creativity when the "gap," the "hiatus" in language is bridged.

Lyotard and Derrida return here to the problem of republican and revolutionary justice which Hegel had first brilliantly analyzed in *The Phenomenology of Spirit* in the section on "Absolute Freedom and Terror."¹⁹ If freedom meant accepting as legitimate only those principles and institutions which the will could have given to itself, argued Hegel, then there were no possible constraints on the content of that which the will could legislate as being legitimate. Neither the dictates of reason, nor the dictates of existing institutions and tradition could constrain the striving of the will toward absolute autonomy. Absolute, meaning unconditional freedom, could only end in terror; for any content which the will

of these other conceptual networks as being sufficiently like ours such that they can be characterized as conceptual activities in the first place. This argument, which is usually deployed in the context of epistemic and cultural-relativism debates, is no less applicable in this case. See Donald Davidson, "On the Very Idea of a Conceptual Scheme," *Inquiries into Truth and Interpretation* (Oxford: Clarendon Press, 1985), pp. 183–99; W. V. Quine, "Ontological Relativity" and "Speaking of Objects," *Ontological Relativity and Other Essays* (New York: Columbia University Press, 1966). Also, Hilary Putnam, "Two Conceptions of Rationality," *Reason, Truth and History* (Cambridge: Cambridge University Press, 1981), pp. 103–27. If phrase regimens and genres of discourse were so radically heterogeneous, disparate, untranslatable, then indeed it would be impossible to account for one of the most usual competencies of language users: namely that in the course of the same conversation, we can move from teaching to advertising, from informing to seducing, from judging to ironizing. As competent users of a language we can negotiate these nuances of meaning, shifts of style, suggestions of innuendo, playfulness, and irony. But if ordinary language use and performance suggest that phrase regimens and genres of discourse are not insular and unbridgeable units, what becomes of the thesis of their absolute heterogeneity?

¹⁸ Jacques Derrida, "Declarations of Independence," p. 11.

¹⁹ See G.W.F. Hegel, *Phaenomenologie des Geistes*, Philosophische Bibliothek, Bd. 114, ed. by J. Hoffmeister (Hamburg: Felix Meiner, 1952), 6th edition, pp. 413ff.; this appears in English as *Hegel's Phenomenology of Spirit*, trans. A.V. Miller (Oxford: Clarendon Press, 1977), pp. 355ff.

would give itself, and any institutional specification which it would establish could always be subject to further criticism. The consequence was perpetual destruction, denunciation and dismantling of the existent. Absolute freedom could not institutionalize itself; the revolution must devour its children. In her reflections on revolution, Hannah Arendt gave these perplexities of revolutionary legitimacy noted by Hegel their sharpest formulation.²⁰ Recalling her analysis will also suggest a different manner of thinking through the linguistico-political puzzles of revolutionary justice set up by Lyotard and Derrida.

III. HANNAH ARENDT AND THE ANTINOMIES OF REVOLUTIONARY ACTS OF BEGINNING

According to Arendt "the need for an absolute," for an absolute source of authority and legitimacy, manifests itself in the political sphere in two ways. The invocation of an absolute is needed "to break two vicious circles, the one apparently inherent in human law-making, and the other inherent in the *petitio principii* which attends every new beginning, that is, politically speaking, in the very task of foundation."²¹ The first of these needs expresses the puzzle of the legitimacy of law: the source of authority of all human-made laws is thought to reside in an instance outside them, bestowing legitimacy upon them. Legality and legitimacy are distinguishable; the promulgated law does not automatically carry its source of legitimacy within it. Hence this legitimacy is located in a source beyond the human-made law, be it in God, the Holy Scripture, in Nature or even Reason. The second need reflected in this search for an absolute in the political realm derives from the circularity of the foundational act or of every new beginning. If the will of the people united is the source of all legitimacy, then whence does this people derive its authority? If it is the constitution which a united people gives itself that forms and declares it as a body politic, whence does the constitution itself derive its authority? The act of foundation seems to send us around in a circle: the revolutionary will of the people is said to be the foundational act which lends legitimacy to the constitution; on the other hand the will of the people is declared the highest law of the land because the constitution legitimizes it to bear this authority. Abbé Sieyès's distinction between *pouvoir constituant* and *pouvoir constitué* was an attempt to solve this paradox of foundational republicanism; the *pouvoir constitué*, constituted power, would have to derive its authority from the constituent power, *le pouvoir constituant*; but this constituting power was no other than the will of the nation, "which itself remained outside and above all governments and all laws."²²

²⁰ Hannah Arendt, *On Revolution* (New York: The Viking Press, 1969), 7th printing, pp. 153 ff.

²¹ *ibid.*, p. 160.

²² *ibid.*, p. 162.

Hannah Arendt's reflections on these perplexities of revolution lead her to draw a distinction between the legitimacy of power and the legitimacy of the law.²³ It is the mark of successful revolutions, as opposed to those which enter the perpetual dialectic of the erection and destruction of freedom, that they stabilize themselves by acts of constitution giving. Through these acts the "government of laws replaces that of men." The legitimacy of laws can now be traced back to their being grounded in the constitution; whereas the legitimacy of the constitution itself remains an open issue: particularly for those nations who are not fortunate enough to have retained some form of political organization prior to the moment of revolutionary upheaval, the mystery of the political act at the beginning remains. Arendt's diagnosis here is that whereas none of the constituent assemblies of the French Revolution could command enough authority to lay down the law of the land, in the case of the American colonies it was otherwise because the Constitutional Assembly owed its authority to the already existing political self-organization of the thirteen colonies.

IV. ANTINOMIES OF REVOLUTIONARY FOUNDATIONS IN LYOTARD AND DERRIDA

Let me return to Lyotard's politics of "le differend" in the light of Arendt's analysis in *On Revolution*. Lyotard maintains that the "we" of the normative, as in "we, the people," and the "we" of the declarative, as in "all residents of the Thirteen colonies," may not be the same. Through a series of reductions to identity, the moment of difference which is politically significant is covered over. To speak with Adorno, the logic of identity does violence to those whose otherness places them beyond the homogenizing logic of the "we." This violence at the origin, this violent exclusion is concealed in every republican foundation, but returns in the form of the disjunction between those who speak in the name of the "we" and those who are spoken about. Republican justice is based on this disjunction. This insight appears to me absolutely fundamental. Every act of foundation and every act of constitution of a polity may conceal a moment of exclusionary violence which constitutes, defines, and excludes the other. In the case of the American Declaration of Independence, this moment of exclusion corresponds most prominently to the erasure of the Black American slave population of the colonies and the native American Indian population of the New World from the constituting "we." Their presence is included in the second "we," in the we to whom the law of the land applies, but they have no voice in the articulation of the law of the land. The subsequent history of the United States of America has shown that this moment of exclusion, this moment of violence to otherness, has never been completely obliterated: the violence of the

²³ *ibid.*, pp. 165 ff.

beginning returns in the Civil War, when the status of the “other” beyond the “we” splits the republican community of citizens around the issue of the abolition of slavery. For the Native American Indian peoples the republican “we” is the voice of a strange, alien law that decimates their own communities, disregards their tribal practices, confiscates their lands, and ultimately subjugates and conquers them. The question –“who is the we?”– is a fundamental political question—in the name of whom do you speak and for whom do you think you are entitled to speak? Since every act of identity entails one of difference and differentiation, we can also concede that there may be no act of republican founding that does not carry its own violence and exclusion within.

Yet to leave matters here would be to tell less than half the story. For Derrida this “sin” at the origin indicates an absolute lack, an absence, at the center of republican, and perhaps all, politics which always needs to be filled.²⁴ For Lyotard this original sin reveals the moment of spontaneity and freedom when *le differend* can appear. This obsession with the origin, with the act of foundation, however, is also exceedingly formalistic. The very use of completely formal terms of linguistic analysis like the performative, the constative and the normative already indicates the problem. Nothing is said about the content of the acts of declaration and independence; it is as if the content of the American Declaration of Independence for Derrida and the content of the French declaration of the “*Droits de l’Homme et du Citoyen*” for Lyotard were fully irrelevant to the formal logic of the problem of authority and legitimacy. But they are not. In the first place, only from within a secular and rationalistic natural law tradition can we understand that the equivocation between “the laws of nature” and the “self-evident moral truths” which the American Founding Fathers write of is not simply a linguistic, categorical confusion, but expresses the beginnings of an intellectual process when modern conceptions of democratic legitimacy emanci-

²⁴ In her provocative piece, “Declarations of Independence: Arendt and Derrida On the Problem of Founding a Republic,” *American Political Science Review*, 85 (1991), 97–113, Bonnie Honig uses the distinction between “constative” and “performative” utterances to criticize Hannah Arendt and to defend Derrida’s thesis of the ultimate arbitrariness of all power. She writes: “Derrida’s point, like Nietzsche’s, is that in every system (every practice), whether linguistic, cultural, or political, there is a moment or place that the system cannot account for” (p. 106). Arendt is taken to task for not seeing that for the revolutionaries every performative is also a constative. Despite Honig’s provocative perspective, I feel that a linguistic distinction that originates in the context of ordinary language philosophy in J. L. Austin’s thought is being used here to carry an enormous systematic burden, ultimately obfuscating questions of normative validity and justification. If problems of political legitimation, legal validity, the moral foundations of the law, and the justification of moral and social norms could be solved by declaring them to be simply performatives which we mistakenly think to be in need of validation by constatives and other normatives, then indeed much of moral and political theory would rest on a category mistake. Declarations of category mistakes, however, are always deceptive in their simplicity. Just as Prichard’s article “Does Moral Philosophy Rest on a Mistake?” did not prevent the flourishing and development of moral theory and normative thinking in the forty odd years after which it was published, I doubt that the Austinian distinction between “constatives” and “performatives” will help us solve problems of political legitimacy and questions concerning the moral foundations of the law.

pate themselves from earlier theological and cosmological underpinnings in a philosophy of nature.²⁵ To reduce this complex problem of the emergence of democratic conceptions of legitimation out of the natural law tradition to a linguistic mistake is to reduce the flesh and blood of history to a series of cruel jokes. This method of analysis is not only formalistic, but it is also sterile for it does not allow us to come to grips with political thought in its historical context.

Perhaps even more significant is a second problem. The content of the declarative, to use Lyotard's language, which obliges us to obey certain kinds of principles is by no means insignificant. For between the formal structure of the original act of identity constitution and exclusion and the normative content of the declarative which obliges us to obey certain laws a contradiction exists. Although it is "we", the white, propertied, Christian, North American male heads of household, who hold these truths to be self-evident, "that all men are created equal," and "endowed by the law of nature with the rights of life, liberty, and the pursuit of happiness," between our contingent historical identity which affirms these truths and the content of these truths a tension, a dialectic of momentous historical proportions exists.²⁶ The Abolitionists were to ask, "If all men are created equal, how come the black slaves who labor for you, whom you whip, who raise your children, whom you rape are not also human?" Subsequently the Suffragettes would ask, "If you could contemplate that your own black slaves were humans like you, how could you not contemplate the full citizenship of the women whom you pledge to honour, love, and cherish, who run your homes, bear your children and take care of your body?" To paraphrase George Orwell, the paradox of modern democratic politics is that "all pigs are equal; but some are more equal than others." It is the ethos of democratic

²⁵ Would Lyotard's and Derrida's critique be obviated and lose their object if they were to focus on the Constitution of the United States in place of the Declaration of Independence? Since the Constitution is remarkably silent on the seat of ultimate authority, would this be proof of its performativity? I think one has to see how anachronistic this mode of questioning is, distinguishing as it does so sharply between constatives and performatives, for the Age of the Enlightenment. For Jefferson there was no contradiction between the formulations, "We hold these truths to be self-evident," and that it was "the Laws of Nature" and "Nature's God" that prescribed the inalienable rights of all men, for one held these truths to be self-evident, because "the opinions and beliefs of men [which] depend not on their own will, but follow involuntarily the evidence proposed to their minds" (Thomas Jefferson, Draft Preamble to the Virginia Bill for Establishing Religious Freedom as cited by Hannah Arendt, *On Revolution*, pp. 193, 314). Furthermore, in the case of the Constitution, the "Union of the People of the United States," is also being presupposed as a political and historical fact; it is in the name of this authority that the representatives act. By September 17, 1787 when the Constitution was declared, the Union was not merely a "fact to create," so to speak, but had historical reality, although it was an "imperfect union." For the text of the Declaration of Independence and the Constitution of the United States, I have consulted the editions contained in Edmund S. Morgan, *The Birth of the Republic 1763-89* (Chicago: University of Chicago Press, 1977), revised edition. I thank Alan Wolfe for bringing the problem of the disparity between the Declaration and the Constitution to my attention.

²⁶ See Joan B. Landes, *Women and the Public Sphere in the Age of the French Revolution* (Ithaca, N.Y.: Cornell University Press, 1988) and Linda Kerber, *Women of the Republic: Intellect and Ideology in Revolutionary America* (New York: Norton, 1986) for works dealing with the dialectic of revolutionary inclusion and exclusion in the case of women.

politics that the privilege of being counted among the pigs is always contested and essentially contestable. The American and French Declarations of Independence for the first time introduce a logic of universalist legitimation into history, and this logic subverts the exclusions and identity reductions posited by the revolutionaries themselves. Potentially there is a tension between the revolutionary constitution of the “we” and the moral and political content of the revolutionary declarations which transcend the historical specificity of these declarations themselves.

The constitution of collective identity is indeed the site of the appearance of the “differend” in history.²⁷ All great social movements of modernity, from the anti-Slavery movements to the Suffragette movement, the socialist movement, and the anti-imperialist movements have not only pleaded for the formal inclusion of previously excluded groups under the “we”; they have also suggested other modes of being, thinking, acting, and doing which have at times clashed with and contested the republican-democratic conception of the citizen as the warrior-hero or the *paterfamilias*.

If one recalls Derrida’s thesis in his early works about the “dissemination” of meaning,²⁸ and the impossibility of ever fixing multivocality in language, then my point that a dialectic would exist between the historically given meaning horizon of a text like the Constitution, for example, and its subsequent interpretations could be seen as perfectly compatible with this position. The difficulty, however, lies in Derrida’s hyperbolic vacillations between an ethical hermeneutic of the law and politics, on the one hand, and a political decisionism which entails a form of legal positivism on the other. According to the first view, Derrida’s position would be that the meaning of justice always transcends and must transcend as an ethical imperative the individual acts of legislation, cases of judgment, and codification of the law encountered in history. Furthermore, none of these acts of legislation, justice and codification could once and for all “fix” their meaning; their meaning and the justice that would ensue from them would reside in the ever new appropriation of these principles. Derrida writes

This “fresh judgment” can very well—must very well—conform to pre-existing law, but the reinstituting, reinventive and freely decisive interpretation, the responsible interpretation of the judge requires that his “justice” not just consist in conformity, in the conservative and reproductive act of judgment. In short, for a decision to be just and responsible, it must, in its proper moment if there is one, be both regulated

²⁷ Contemporary theorists of democracy have been paying increasing attention to this issue, see Iris Marion Young, *Justice and the Politics of Difference* (Princeton, N. J.: Princeton University Press, 1990).

²⁸ See Jacques Derrida, “White Mythologies,” *Margins of Philosophy*, trans. A. Bass (Chicago: University of Chicago Press, 1982) and Jacques Derrida, *Writing and Difference*, trans. and intro. by Alan Bass (Chicago: University of Chicago Press, 1978).

and without regulation: it must conserve the law and also destroy it or suspend it enough to have to reinvent it in each case . . . ²⁹

Compare now this passage with the following where the slip into political decisionism and legal positivism becomes visible:

A constative can be *juste* (right), in the sense of *justesse*, never in the sense of justice. But as a performative cannot be *just*, in the sense of justice [justice in French S.B.], except by founding itself on conventions and so on other anterior performatives, buried or not, it always maintains within itself some irruptive violence, it no longer responds to the demands of theoretical rationality [my emphasis S.B.]. Since every constative utterance itself relies, at least implicitly, on a performative structure . . . , the dimension of *justesse* or truth of the theoretico-constative utterance (in all domains, particularly in the domain of the theory of law) always thus presupposes the dimension of justice ["justice" in French S.B.] of the performative utterances, that is to say their essential precipitation, which never proceeds without a certain dissymetry and some quality of violence.³⁰

Whereas in the first set of considerations Derrida is addressing the hermeneutic problem of how, in the absence of clearly articulable and codifiable rules, rule-governed activity can result, in the second passage cited there is a transition to the view of the "irruptive violence" of the performative. But the "creative hermeneutic" which all legal understanding and interpretation displays is sharply distinguished from the "irruptive violence" which "no longer responds to the demands of theoretical rationality" but to which all constatives ultimately lead. One has to ask: in what does this violence consist? In Derrida's prioritizing of the performative is there not a regression to a thinking of origins, to the thought that there is a "first" convention which precedes all conventions and from which performatives derive their power? Is not Derrida suggesting that behind the law stands a moment of decision, a moment of sheer power, a moment of violent positing which "no longer responds to the demands of theoretical rationality"? What is it that we are asked to remember in remembering this moment of "originary," "foundational" violence? What is it about politics and the political that this reflection upon the possible "irruptive violence" at the beginning is supposed to reveal?

To deny the presence of violence, conquest, defeat, brute power, and subjugation in political history would be more than naive. So, Derrida's point cannot be that simple. Rather, this analysis of the ultimate, "non-rational," conventionality of the performative on which every constative "relies," is supposed to reveal something about the "metaphysical abyss," the "metaphysical beginning," *das Ereignis*, in Heideggerian language, across which and over which the mantle of law, legality, legitimacy, and consensual political power is thrown. But, suggests

²⁹ Jacques Derrida, "Force of Law. The Mystical Foundation of Authority," *Cardozo Law Review*, Special issue on "Deconstruction and the Possibility of Justice," 11 (July–August 1990), p. 961.

³⁰ *ibid.*, p. 969.

Derrida, it is only when we focus on this limit case of revolutionary beginning that we can confront the arbitrariness, the sheer "wilfulness" of all power, which "no longer repends to the demands of theoretical rationality."

It is in their methodological fixation upon the "arbitrariness" of the beginning in republican politics, that Lyotard as well as Derrida ultimately reduce the historical and socio-cultural problems of revolutionary violence, modern constitutionalism and nation-building to a set of metaphysical puzzles. The issue is not the philosophical interpretation of the political per se, but rather those philosophical presuppositions themselves in the light of which politics is thought about. On the one hand, both share the premises of a legal positivism which is not even so much argued for; it is simply posited that the law, as a performative grammatical enunciation, must also bear the metaphysical fate of all performatives, that is, either of resting itself upon another performative, thus leading to an infinite regress, or of establishing the conditions of its own performativity through a sheer act of positing. In terms of legal theory this means that either the legitimacy of the law rests with the law itself alone or with a moment of "revolutionary," and ultimately arbitrary positing to which the law refers back. This means that it is illicit to question the law in the name of any normative instance, like morality or even rationality, which lies beyond the law. *Auctoritas facit legem*; "And Covenants, without the Sword, are but Words, and of no strength to secure a man at all" as Thomas Hobbes has told us.³¹ But how convincing is this "performative" philosophy of the law which recycles the old theses of legal positivism in the garb of Austinian language analysis?

More significantly, what really follows for our understanding of democratic politics from this meta-critique of revolutionary foundations in the hands of Lyotard and Derrida? What have we gained through their perspective? I want to suggest that ultimately at a formal level of analysis there is indeed no solution to the paradox of the constitution of revolutionary authority; yet there are both historical and institutional ways of thinking about these issues which lead to a more fertile path than those followed by Lyotard and Derrida. Arendt can be our guide here: for Arendt, as faulty as her comparative analysis of the two Revolutions was, the crucial historical question was what had allowed the stabilization of the Constitution to become the supreme law of the land in the case of the United States and why, in the case of the French Revolution, constitutionalism could not become a tradition but was displaced by revolutionary republicanism. Unlike Lyotard and Derrida, Arendt translates the puzzle of the search for "absolutes" in politics into a historical question concerning constitutional traditions.³²

³¹ Thomas Hobbes, *Leviathan*, ed. C.B. Macpherson (London: Penguin Books, 1980; originally published 1651), p. 223.

³² See H. Arendt, *On Revolution*, pp. 167 ff. Richard Bernstein has pointed out to me in conversation that there may be more affinity between Lyotard and Derrida on the one hand and Hannah

While this translation is not altogether satisfactory, it allows us to think differently about issues which Lyotard and Derrida also pose. By maintaining that the performative entailed in the statement "We the French People," "We the American People," pretends to be a constative or a declarative, they seem to suggest that it is best to realize that the legitimacy of the law is always arbitrary. There is no instance behind the act of will which posits the authority which makes the law.

Yet even if the aporia of foundational authority may be formally insoluble, democracies have developed a series of institutional mechanisms for controlling and self-correcting the arbitrariness of original positings of authority. In a constitutional democracy, there is no final seat of sovereignty. If the land has adopted a constitution, a Basic Law, the will of the legislature is itself subject to interpretation and analysis in light of the constitution. The legislature or Congress may promulgate a law but the procedure of "constitutional review" allows a further instance to judge the "will of the people" in the light of the principles of the constitution. This mechanism of interplay between the legislature and an independent judicial instance with respect to interpretations of the constitution may ultimately be the sole guarantee preventing the democratic "we's" of many nations from reverting back to the originary violence of their moments of birth as nations, thus excluding the "other" from their polity.³³ Lyotard and Derrida disregard the institutional mechanisms whereby constitutional traditions enable democracies to correct, to limit and to ameliorate moments of unbridled majority

Arendt on the other, insofar as Arendt as well focuses on the "new" and the "unprecedented" as the hallmark of authentic political action. Of course it is possible to read Lyotard's concept of "le differend" and Derrida's concept of "irruptive violence" as kindred concepts to Arendt's emphasis upon the new. I think that an adequate discussion of this issue would have to involve a thorough analysis of the various concepts of action and interpretation in the work of the three thinkers mentioned; however, on a more basic level, we should note that for Arendt the experience of the "new" in politics is confined to action *within the city, once its walls have been established*. Acts of constitution-giving for her are more like acts of art, and thus fall under the concept of "work," rather than of action. Law-giving is an art; Arendt often cites the Greek and Roman perspective of the legislator as a "divine presence." This sharp distinction between "constitution-making" and political action in Arendt's work is to be understood in the light of her own profound sense of the potential arbitrariness and danger lurking in every beginning. Rather than revel in this "danger," Arendt, like most political theorists of the tradition (Jean-Jacques Rousseau in particular comes to mind here with his call for a "divine law-giver"), seeks to contain it by "housing" it in the city. For the distinction between political action and constitution-making or law-giving, see Hannah Arendt, *On Revolution*, pp. 189 ff. and *The Human Condition*, pp. 194 ff., where she both explicates the distinction and criticizes the Greeks for trying to make all political action like law-giving, a craft.

³³ The world-wide phenomena of emigrations and immigrations, ranging from economic and political refugees to refugees of wars and religious and ethnic persecution, is a good example to illustrate this point. In many European countries, for example contemporary Germany, immigration law may become a battleground between the political will of the legislatures and democratic majorities on the one hand, and Constitutional instances, like the "Verfassungsgericht," on the other. Of course, in all democratic countries, elected representatives and democratic majorities can ultimately change the Constitution; however, the very fact that even the will of the majority to change the constitution can be tested with respect to its constitutionality shows how complex, interdependent and hermeneutically circular this process is.

rule, exclusionary positings of identity, and the arbitrary formation of normatives.

Contrary to what attracts thinkers like Lyotard, Derrida and Carl Schmitt before them to revolutionary "limit situations,"³⁴ constitutional democratic politics is not mere humbug, mere routine. There is an aspect of rationality in the interlocking and self-correcting institutional cycle between legislatures and constitutional instances. Constitutional democratic politics means that no instance is supreme; that although the people are nominally sovereign, even the will of the people must submit itself to, and accept to bind itself by, a set of rules which are constantly interpreted, reappropriated and contested.³⁵ This is the historical and institutional solution to Hegel's critique of the revolutionary will and to Abbé Sieyès's disjunction between the "pouvoir constituant" and the "pouvoir constitué." If the Supreme Court is the "constitution in session," then democratic politics is the process whereby the meaning, the scope, and the prerogative of the interpretations delivered in this session are constantly challenged.

Certainly the closed circuit of institutional democratic politics can stifle the differend, it can even make it disappear. Perhaps, though, there is a form of democratic politics which lets the differend appear and which does not oppress and stifle it. Must such politics be located at the origin, at the margins, at the limits and extremes of the process alone? Can we conceive in everyday politics a process of the transfiguration of the commonplace? Let me suggest a few candidates of such processes from recent memory: think of the peace movements which nearly a decade ago swept across the face of Europe and the United States and which expressed loudly and clearly that the use of nuclear weapons among nations was morally and politically abhorrent; think of the Argentinian movement of the mothers, the "Desaparecidos," who with their pots and pans and tenacity, courage and imagination kept alive the meaning of human rights under the dictatorship; think, of course, of Nelson Mandela and the recent historic vote in South Africa for an end to apartheid. And most recently, think of the manner in which Anita Hill's charges of sexual harassment against Justice Clarence Thomas thrust the "differend"—in all senses of the word from the literal to the metaphorical—onto the nearly all male and white political scene of Washington, D.C.

Yet there is an important objection to this list as well. Although South Africa is abolishing apartheid, all across Europe a new form of apartheid against political refugees, economic refugees and foreigners is emerging. Eastern Europe

³⁴ See Carl Schmitt, *The Crisis of Parliamentary Democracy*, trans. Ellen Kennedy (Cambridge, Mass.: MIT Press, 1985; originally published 1923) and C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (Cambridge, Mass.: MIT Press, 1988).

³⁵ For an excellent and creative analysis of foundational politics and constitutional interpretation, and the concept of "jurisgenerative politics," see Frank Michelman, "Law's Republic," *Yale Law Journal*, 97 (1988), pp. 1493–1537.

did not only produce Vaclav Havel and Solidarnosc but also the civil war in Yugoslavia and the ethnic massacres in Armenia and Azerbaijan. What conceptual means do we have for sorting out different instances of “le differend”? In conclusion I want to summarize in the form of three epistemico-political theses the conceptual shift from republican foundationalism to a deliberative model of democracy which is needed in political theory in order to enable us to think through some of these issues.

V. FROM REPUBLICAN FOUNDATIONALISM TO A DELIBERATIVE MODEL OF DEMOCRACY

IDENTITY VS SOVEREIGNTY

I would like to call the perspective from which Lyotard and Derrida illuminate political phenomena in their recent writings, that of “republican foundationalism.” Methodologically they choose to focus on one aspect of modern politics more than any other, precisely because the act and the event of founding a body politic seems to them to highlight the paradoxes and aporias at the heart of all political life. The republican act of foundation is not considered the *exception*, rather it becomes the *norm* in the light of which to judge all political life. This focus on the act of foundation is extremely distorting for it ignores the institutional and historical learning processes which “really existing democracies” have gone through.

The first contrast which I would like to establish between the perspectives of republican foundationalism and a deliberative model of democracy is around the problem of sovereignty in the body politic. For the foundationalist republicans, beginning with Jean-Jacques Rousseau, the act of sovereignty is that moment in which the political identity of the community is formed and its highest seat of authority posited. The metaphor of the “body politic,” of the “body of the people” suggests here a conflation of two distinct processes: the constitution of the political community as a unit on the one hand, and the form of authority according to which this political community will be governed on the other. To separate the formation of identity from the constitutional and institutional issue of the seat of sovereign authority is essential for the following reasons: the identity of a body politic refers not only, and not primarily, to the political process through which it is governed but rather to other criteria like linguistic, ethnic, racial, and religious homogeneity. The concept of the “nation” and the phenomenon of “nationalism” have allowed the silent and historically disastrous identification of these two processes with each other, since the nation is thought to be not only the self-identical and homogeneous body politic but also to be the source of all sovereign authority.³⁶

³⁶ See Stanley Hoffman’s thoughtful analysis for untangling some of the complex issues involved

Against this perspective, the deliberative democratic model distinguishes between the *ethnos* and the *demos*, between the ethnic, cultural, linguistic, and religious identity of a people, and the political constitution of the people as an organized, self-governing body. A *demos* can consist of more than one *ethnos*; the sovereign political community may encompass and usually does encompass more than one ethnic, religious, and linguistic community. What makes such an ethnically diverse body politic one is not some mystical act of sovereign will-formation, but the constitutional and institutional principles through which such a people enter into the world-historical arena and demand recognition from others. No nation is the seat of an ultimate, mystical sovereignty. Democracies are not formed through the mystical sovereignty of nations but through the constitutional principles which peoples adopt to govern themselves by and the institutional arrangements which they set into motion. Perhaps the events of recent history in the heart of Europe will have taught us how disastrous it is to conflate the aspirations of different groups to cultural and ethnic self-expression with the issue of political sovereignty.

SOVEREIGNTY VS DEMOCRATIC LEGITIMATION

How can this distinction between sovereignty and identity be sustained? Neither Lyotard's philosophy nor Derrida's method of deconstruction have the conceptual resources to allow us to set the terms of the problem correctly. Yet if in the American and French Declarations of Independence one does not see the mere conflation of the performative with the constative and the normative, but one also recognizes these events as ushering a new form of political legitimation into political history, then a first step will have been made in this direction. It is the hallmark of political modernity that the legitimation of laws no longer derives from a theologically or cosmologically grounded *Weltanschauung*. The modern natural right and natural law traditions are hybrid conceptual movements of thought which, through paradoxical appeals to the concept of nature, legitimize a secular and ultimately man-made form of political authority. The loss of absolute and fundamental points of recourse in the political and ethical sphere always calls forth the question of legitimation. Modernized, secular societies repeatedly pose the question of political legitimacy and attempt to answer this under conditions of a postmetaphysical universe.

The American and the French Revolutions, despite their different paths and fortunes, introduced into history the idea that the source of all legitimation is the will of the people insofar as this people adopts a set of universal moral and legal precepts guaranteeing it a set of inalienable rights. But between the belief in the sovereignty of the nation and the belief that this nation is sovereign only

in quests for national self-determination and sovereignty. Stanley Hoffman, "The Delusion of World Order," *The New York Review of Books*, 39, No. 7 (April 5, 1992), pp. 37 ff.

insofar as it chooses to abide by certain principles, a clash, a tension exists, which subsequently unfolds in history.

The question which subsequently arose was: what is the legitimacy of the sovereignty of the nation? From within a secular political context the only answer to this question can be: it is the set of universalist moral and legal principles which constitute moral imperatives transcending specific political-constitutional acts that legitimize an act of popular sovereignty. This is what Kant had called the idea of a "republican constitution from a cosmopolitan point of view."³⁷ For Lyotard and Derrida the metaphysical baggage of these appeals to humanity and morality appear so big and indefensible that they demystify the cosmopolitan point of view to be an illusory perspective as well.

In his reflections on today's Europe entitled "The Other Heading," Derrida expresses concern about nationalism and the mystificatory claims to identity on which it rests. "No cultural identity," he writes, "presents itself as the opaque body of an untranslatable idiom, but always, on the contrary, as the irreplaceable *inscription* of the universal in the singular, the *unique testimony* to the human essence and to what is proper to man."³⁸ Derrida observes that all claims to cultural and national identity have a homogenizing logic, that they level out differences, create imaginary and purified forms of identities, and eliminate the non-identical and the differend from their midst. But the "inscription of the universal in the singular," which accompanied the various declarations of the rights of man during the time of the bourgeois revolutions, can mean two very different kinds of claims: on the one hand, this can refer to the homogenizing logic of cultural identity mentioned above; on the other hand, it is also the paradox of these modern revolutions that they take place in the name of another universal, that is, humanity and human rights. Like Hannah Arendt, I see between the claims of nationalism and those of the universalistic declaration of human rights the tragic conflict between *ethnos* and *demos*. By not distinguishing between national and cultural searches for purity in the name of a "universal human essence" and the universalistic claims of bourgeois revolutions, as encoded in their human rights declarations, Derrida assimilates both to one problem, namely "the inscription of the universal in the singular." This, in his view of course, is the illicit move toward essentialism which must be deconstructed. Yet the only institutional and conceptual way to criticize nationalism and claims of cultural purity is in the name of universalistic human rights. If there is another conceptual and institutional strategy, certainly neither Derrida (nor Lyotard) have so far told us what this could be. Derrida cannot have it both ways: on the one hand he criticizes and condemns nationalism, racism, xenophobia and anti-

³⁷ Kant, "Idea for a Universal History From a Cosmopolitan Point of View" [1784] in *On History*, ed. Lewis White Beck (New York: The Bobbs-Merrill Company, 1963), pp. 11–27.

³⁸ Jacques Derrida, "The Other Heading," p. 73.

Semitism, and, on the other hand, he undermines the conceptual bases for holding on to those universalistic moral and political principles in the name of which alone such critique can be carried out. The famous "double gesture" of deconstruction, which parasitically feeds upon what it deconstructs, faces us here as well.

By contrast, from the perspective of deliberative democratic politics the issue is how to articulate the normative bases of cosmopolitan republicanism in an increasingly decentered, fragmented and anti-metaphysical universe. The increasing globalization of world-economies, legal systems, cultures and communication networks are now creating a world-wide political public sphere, such that the cosmopolitical point of view has ceased to be an ideal of reason alone and has become, in however distorted a fashion, a politically actual possibility. We need a new *jus gentium* for a new world; for "the common opinion of mankind," that fictional posit of eighteenth century political thought, is still the only instance which can transcend the self-centered narcissism of nations and force them into recognizing the rights of others like them.

DEMOCRATIC LEGITIMACY AND THE PUBLIC SPHERE

Modern collective political identities in a disenchanted universe are fragile achievements, constantly prone to crises. To maintain a democratic constitutional form of government in the face of the combined pressures of the capitalist economic market, the challenges of new forms of social modernization, the ever-growing fluidity of cultural traditions is an extremely difficult task. To even have a chance of succeeding at this task, it is essential that polities allow in their midst the formation of an independent public sphere in which questions of identity, legitimacy and sovereignty can be perpetually debated and discussed. Only through the perpetual asking and answering of the relevant questions through publicly accessible channels can new identities come to the fore, delegitimization processes be aired and the meaning of sovereignty be re-established.

Of course, what is meant here is not a free-for-all constitutional discussion and even convention. Participation in the public sphere has its own rules; even challenging these rules, which may be and often are exclusionary and distortive, requires first respecting them.³⁹ The democratic public sphere is like Otto Neurath's boat: you cannot throw all the planks into the water and hope to be able to stay afloat; at any one time, you can only throw some planks overboard and still continue to float. Likewise, you cannot participate in the democratic public sphere if you do not respect universal civil and political rights; as a participant,

³⁹ See Kenneth Baynes's cogent analysis of some of the problems of circularity and conversational constraints, *The Normative Grounds of Social Criticism: Kant, Rawls and Habermas* (New York: SUNY Press, 1992), pp. 167 ff., and "The Liberal/Communitarian Controversy and Communicative Ethics," *Philosophy and Social Criticism*, 14 (1988), 293-313.

however, you can challenge the very meaning, scope and legitimacy of rights which have allowed the process to unroll.⁴⁰

The ability of citizens of modern democratic polities to participate in such processes requires us to think of their linguistic and epistemic capacities in a manner quite differently than that proposed by Jean-François Lyotard.⁴¹ Such participation in the democratic public sphere demands certain hermeneutic skills which can indeed yield "lawfulness without the law" ("Gesetzmassigkeit ohne Gesetz"). Individuals must be able to move through various levels of communication with fluidity, they must be able to shift levels of discursive reflection, they must be able to challenge, to ironize, to play with, and to subvert established meanings and modes of speech. The differend in politics does not just happen; only playful, resourceful and creative selves, who can also challenge and argue

⁴⁰ See Claude Lefort, *Democracy and Political Theory*, trans. David Macey (Minneapolis: University of Minnesota Press, 1988), pp. 9 ff.

⁴¹ In an illuminating analysis, Wolfgang Iser has dealt in depth with Lyotard's philosophy of language and has named it Lyotard's "Sprachobjektivismus" ("linguistic objectivism"), see W. Iser, *Unsere postmoderne Moderne* (Weinheim: Acta Humaniora, 1988), pp. 250 ff. This is the view that the linkage of phrases in language just happens; that genres of discourse occur; they fill the void. The source of multiplicity, plurality, the play of meaning in language are not language users—they are part of an anthropomorphic illusion. All this takes place beyond the exercise of spontaneity and phronesis by individual actors. The following passage from *The Differend* is remarkable in this respect: "Our 'intentions' are tensions (to link in a certain way) exerted by genres upon the addressors and addressees of phrases, upon their referents, and upon their senses . . . There is no reason to call these tensions intentions or wills, except for the vanity of ascribing to our account what is due to occurrence (das Ereignis) and to the differend it arouses between ways of linking unto it" (p. 136).

It is hard to make sense of this self-effacing objectivism that attributes all creativity in language to a quasi-metaphysical category of happening (das Ereignis) while robbing language-in-use of that dimension of play, meaning creation, experimentation and cross-contextual signification. We may not want to reduce all that "happens" in language to the intentions of the speakers; undoubtedly in language intentions are rediscovered, recovered and constituted. The intentional act of a rational agent does not stand behind every language act; for that speech act may be the very process through which the language user discovers, uncovers, recovers her intentionality in the first place. The dichotomy with which Lyotard confronts us is wrong: either the "subjectless" Ereignis of language or the Cartesian myth of a perfectly self-transparent subject. Precisely though if we want to account for those phenomena in language which Lyotard also focuses upon—the new creation of meaning; the forcing down of established idioms; the articulation of new modes of saying and doing things with words—we must move to a different view of subjectivity and of the subject and language user. Wolfgang Iser puts this very well: "Lyotard's linguistic objectivism and his anti-anthropological position . . . prove to be untenable, as soon as we consider not static but dynamic phenomena, as soon as we try to decide not among available claims but we try to build new linguistic forms. Such phenomena are not to be grasped on the basis of any kind of objectivism. What we need here is a theory in which humans are not viewed merely as carrying out already assigned positions in a game; what we need is a theory that views humans as inventors of new games (which does not mean: as creators ex nihilo)" (W. Iser, *Unsere postmoderne Moderne*, p. 251). Between Lyotard's metaphysics of power and his late Heideggerian objectivism an irresolvable conflict exists: whichever side of the dilemma one grasps, either the thesis of the absolute heterogeneity of language games or the thesis of the absolute irrelevance of anthropocentrism to account for language must be sacrificed. If Lyotard wants so much as to retain the plurality, multiplicity and diversity of phrase regimens and genres of discourse, he will have to attribute to language users more spontaneity, imagination, and the creative exercise of judgment than he is wont to do; if he retains his thesis of "Sprachobjektivismus" then he will have to give up the multiplicity, plurality, and irreducibility of language games which he also wants to hold onto.

for principles from a hypothetical moral point of view, can operate in the public sphere and utilize its capacities.

The democratic public sphere and processes of deliberation and contestation which occur in them are doubly contingent: on the one hand, it is a historically contingent process of development which allows the formation of such a sphere in some polities and not in others; secondly, it is also contingent whether individuals in a polity have the cultural and moral resources to become full participants of a discursive or deliberative public sphere. No matter how counterfactual and contingent these processes may be, without the institutionalization of some form of free public sphere successful democracies are inconceivable. For in a world without metaphysics, identity-formation, constitutional sovereignty and democratic legitimacy require processes and channels of deliberation, contestation, argument and subversion which only the interlocking net of many public spheres can allow.

I agree with Jean-François Lyotard that the task of philosophical politics today is the conceptualization of new forms of association which will let the "differend" appear in their midst. For reasons which I have outlined in this article I consider the deliberative democracy⁴² approach to be more suited for this task than the double gesture which affirms and deconstructs "republican foundationalism."

⁴² I have pursued aspects of the deliberative democracy model in "Deliberative Rationality and Models of Democratic Legitimacy," delivered to the American Philosophical Association Annual Meetings, Washington, DC, September 1992.