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Introduction

Abstract:

We are said to live in an age of democratic legitimacy. The rightfulness of a political and legal order is meant to reside in a widespread belief in the rightfulness of democracy. Contemporary democratic legitimacy is tied, among other things, to consent, to representation, to the identity of ruler and ruled, and, of course, to legality and the legal forms through which democracy is structured. The nation, its unity, and whatever democratic legitimacy its form of rule enjoys, become tangible and emerges as much in shared taste, in the pre-supposition and generation of aesthetic *con-sensus*, as in the formation or execution of a common will or the inculcation or reasoning of a common reason. This introduction presents the ten chapters of the edited volume, each of which engages with the intersection of aesthetics and law, and, more specifically with the question of how the nation – and its (fundamental) law – are ‘sensed’ by way of various aesthetic forms.

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We are said to live in an age of democratic legitimacy. The rightfulness of a political and legal order is meant to reside in a widespread belief in the rightfulness of democracy.¹ Contemporary democratic legitimacy is tied, among other things, to consent, to representation, to the identity of ruler and ruled, and, of course, to legality and the legal forms through which democracy is structured.² While this kind of conventional wisdom may be questioned, e.g. we may be seeing rescue displace democracy as what legitimates rule,³ our goal here is not to upend this conventional wisdom but to challenge and expand the ways in which we can understand and appreciate democratic legitimacy. If (democratic) communities are “imagined”,⁴ we argue that their “rightfulness” must be “sensed” – analogously to the need for justice not only to be done, but to be seen to be done.

Democracy and democratic legitimacy are not simply conceptual or rational achievements. As participants – subjects, citizens – of political and legal orders, we are not interpellated merely conceptually or rationally but also sensually and aesthetically. In this volume, we seek to draw attention to the aesthetics of democratic legitimacy and to the way democracy and law are sensed, felt, embodied, experienced.⁵ Chapters primarily focus on the sense of sight rather than engage with the full spectrum of the human sensorium.⁶ However, using the “visual” as an entrypoint into the “sensorial” and “sensual” more broadly leads us to discover the *con-sentirer* or *feeling together* at work in consent and consensus. It encourages us to interpret political and

¹ On legitimacy generally, see Weber, Max. 1946. Politics as a Vocation. In *From Max Weber: Essays in Sociology*, eds. Hans Gerth, and Charles Wright Mills. New York: Oxford University Press.

² Schmitt, Carl. 1992 (1923). *The Crisis of Parliamentary Democracy*. Trans. Ellen Kennedy. Studies in contemporary German social thought. Cambridge, MA: MIT press.

³ Meister, Robert. 2011. *After Evil: A Politics of Human Rights*. New York: Columbia University Press.

⁴ Anderson, Benedict R. 1991 (1983). *Imagined Communities: Reflections on the Origin and Spread of Nationalism*. London: Verso.

⁵ On (the culturally constructed nature of) sensing, see Howes, David, and Constance Classen. 2014. *Ways of Sensing: Understanding the Senses in Society*. London/New York: Routledge, in particular the chapters ‘The politics of perception: sensory and social ordering’ and ‘The feel of justice. Law and regulation of sensation’.

⁶ For a more general bibliography on the human sensorium, see Porcello, Thomas, Louise Meintjes, Ana Maria Ochoa, and David W. Samuels. 2010. The Reorganization of the Sensory World. *Annual Review of Anthropology* 39:51-66. For a recent compendium on law and the visual, see Wagner, Anne, and Richard K. Sherwin. 2014. *Law, Culture and Visual Studies*. London: Springer.

legal representations⁷ as always already aesthetic and bound up with modes of making present that are historically and culturally located and contingent. Likewise, it moves us to look into the practices of sensual identification that come along with the identity of ruler and ruled.

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The nation, its unity, and whatever democratic legitimacy its form of rule enjoys, become tangible and emerges as much in shared taste,⁸ in the pre-supposition and generation of aesthetic *con-sensus*, as in the formation or execution of a common will or the inculcation or reasoning of a common reason. In a like manner, representation answers the challenge of actualizing, making present (and therefore tangible) this *con-sensus*, and not simply such things as pre-existing “preferences” or “interests”. History provides us with diverse forms of national representation, themselves often tied to focal moments in which the nation is conceptualized, embodied, enlivened and forged through sensory means. These moments, as they involve understandings and enactments of order, power, and control, are properly understood as key *legal* moments, as matters of concern for legal historians and scholars.

This edited volume brings together ten essays, each of which engages with the intersection of aesthetics and law, and, more specifically with the question of how the nation – and its (fundamental) law – are ‘sensed’ by way of various aesthetic forms. They are written by scholars in law, political science, history, art history and philosophy, each of whom works in an inter-disciplinary fashion or with an inter-disciplinary sensibility. The main chronological focus is on the post-revolutionary period spanning from the late eighteenth and early nineteenth century’s age of revolution until our own age of contested democratic legitimacy, although several authors demonstrate how specific aesthetic forms feature much older roots, going back as far as early Christianity. The chapters engage with different parts of the so-called Western world, namely Europe, North America, and Australia and explore the rich contextualizations of law that happen in these places.

Part I, *Revolution, Constitution, Republic*, gathers three chapters, each of which grapples with the question of (republican) foundation and the sensing of the *res publica*. Within each chapter, the authors engage with the transition from revolution to constitution and the resulting republic and/or nation-state, as reflected in art works from the long nineteenth century and – more particularly – from the *age of revolution* as defined by Eric Hobsbawm.⁹

Mark Antaki & Catherine Le Guerrier treat Jacques-Louis David’s unfinished *Tennis Court Oath* as an attempt to capture the moment in which the new republican sovereign is presaged or emerges. Taking David’s “corporeal aesthetic” as their entry-point, Antaki and Le Guerrier present and examine three inter-related modes of engagement with or appreciation of the *Oath*. They consider the *Oath* in turn as Monument, as Portrait, and as Tableau in order to engage with some of the layers of sense and sensibility at work in the *Oath*. For instance, considering the *Oath* as Monument raises such questions as the liberties David took to immortalize liberty. Considering it as Portrait leads one to ask whether and how it participates in

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⁷ On representation, see generally Pitkin, Hanna Fenichel. 1972. *The Concept of Representation*. Berkeley: University of California Press.

⁸ See, e.g., Arendt, Hannah. 1982. *Lectures on Kant's Political Philosophy*. Trans. Ronald Beiner. Chicago: University of Chicago Press.

⁹ Hobsbawm, Eric. 1962. *The Age of Revolution: Europe 1789–1848*. London: Weidenfeld and Nicolson.

the political theological logic of incarnation that animates the King's Portrait. Considering it as Tableau leads one to ask about its ties to theatre and Diderot's aesthetics and to wonder whether it does away with representation as incarnation.

Stefan Huygebaert examines events and moments from constitutional history, their depiction and their relevance within the history of the nation and its fundamental law, the constitution, by way of the artistic device that he calls the Decisive Constitutional Moment. The meaning of this device lies in the interplay between monument and memory, between commemoration and communication, and between the moment of depiction and the depicted moment. Huygebaert treats different artistic media (painted, engraved, sculpted) and ends his chapter with an analysis of the competition entries for the Belgian constitutional monument known as the Congress Column, following the pan-European 1848 revolution.

Like Antaki and Le Guerrier's, Oliver Watts' chapter concerns a painting in France, a country with a long tradition of kings' portraits. Like Huygebaert's case study, it concerns the 1848 revolution and its aftermath. More specifically, it looks at the 1848 appropriation of the revolution of 1789. Watts extends H el ene Toussaint's iconological analysis of Gustave Courbet's famous *Allegory* (Paris, Louvre). In his chapter, Watts interprets the nude woman in the painting as an effigy of the republican Marianne, "the body of democratic France", and thus as an effigy, a portrait rather than an allegory. Using Lacanian theory, Watts explores the sovereignty within the painting and calls for attention to the notions of natural law and social contract. In the case of Courbet's *Allegory* as well, the moment of creation and the specific historical context of France in the aftermath of the 1848 revolution and imperial take-over prove vital for an understanding of the sensation of the nation. As opposed to the official visual rhetoric, which Huygebaert deals with for the Belgian case, Watts provides the reader with the means to grasp the subversive quality of a non-official work of art, and traces the representation of the French nation therein.

Part II, *The Aesthetic Constitution of Office*, continues one of the themes introduced in part one, namely the embodiment of the nation and its law (e.g. Watts writes about the "body of democratic France" during the Second Empire). The focus of part II, however, is on the embodiment of the nation and its law in "office" and in "official" representations or constructions thereof.¹⁰

Stefania Gialdroni writes about the Italian Supreme Court building as both a functional Palace of justice or an "office", and a national symbol of the Italian nation. Just like Stefan Huygebaert, she situates her specific focus within a broader pan-European discussion of the legal-national architecture of palaces of justice. Her treatment of the architecture of palaces of justice is tied to the seeing and sensing of justice, but it is also tied just as much to questions of national and legal unity and unification. Indeed, her chapter invites us to situate traditional moments of what we might call "legal nationalism", such as codification, within a much broader sensorial context.

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Just as the portrayal of the king's body in his portrait is meant to say something about and even constitute kingship itself, so too does the photograph of a president both comment and establish the office he occupies. Anne Wagner focuses on official presidential photographs of the Fifth Republic (1958-2012). She looks at presidents as office-holders, and scrutinizes how their representation leads us to understand the office itself and, at the very same time, national identity and unity. She interprets the (representation of the) body as a code, and deconstructs

¹⁰ On the notion of office see, e.g., McVeigh, Shaun. 2015. Afterword: Office and the Conduct of the Minor Jurisprudent. *UC Irvine Law Review* 5 (2):499-512.

the mechanism of coding (encoding; decoding). In so doing, she focuses on “visual elements” in terms of a “consensual symbolism” that contributes to the rhetorical power of images.

Whereas all chapters in the book obviously deal with time and temporality, Part III, *Untimely Reflections on the Nation's Law* invite us to consider more radically when and where we are – and do so in very different ways. Desmond Manderson turns to a key thinker on time, Walter Benjamin, and seeks to refine his thinking on the “here and now of the work of art” in such a work as *The Work of Art in the Age of its Mechanical Reproducibility* (1936). He locates this work in relation to the Mexican mural movement (1935) and the Paris Universal Exhibition (1937). In so doing, he wishes to better call into question the “ideological alliance between art and law”, an alliance we have seen explored in other chapters, so as to draw attention to art’s capacity not simply “to embody and unify the nation, but to disturb and critique it”.

In his chapter, Paolo Napoli proposes a hypothesis regarding the genealogy of the American national motto “In God We Trust”, found among other places, on American coinage and banknotes since 1864. Genealogies too involve a reconsideration of when and where, and therefore who, we are. Napoli’s efforts to understand “common identity through common trust” lead him to focus on the “deposit (of faith)” and its centrality to the “emergence of the Church as an institution”. He explores the relation and intersection of theological and legal rationalities. In so doing, he sheds light on the notions of office and institution, encouraging us to enrich our thinking about the institution of the nation-state as exemplified by the institution of the Church.

Part IV, *Out of Many, One* engages with the theme of national unity introduced in earlier chapters but with a particular focus on the transformation of plurality into unity, including the perpetual failure and violence of this transformation. In this way, the two chapters invite us to consider the dissensus in consensus. Both chapters treat what we might call the “everyday” and allow us to consider how ostensibly ordinary objects and actions are ripe for interpretation as sources of democratic legitimacy. Law may well need ordinary objects and actions to enliven it as commonsensical. As aesthetics of law, the examples of the coin and regional cuisine are two sources of ontological fodder that sustain or counter the legitimacy of a democracy.

Sarah Marusek’s chapter on American quarters examines the coin as a cultural text of law, an aesthetic which includes legal “statements” about pluralism (i.e. the literal flip side of the coin) as well as, and conversely, the ignoring of realities of conquest, obliteration and slavery (i.e. the figurative flip side: that which is *not* shown on the quarter, what is not part of the consensus). The design of this cultural

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text reminds the viewer of what is vital to the public memory. However, the design, as well as the final product (the coin), is a state-sponsored construction of national identity that is paradoxically rich with (un)intended perspectives and conflicted realities.

Richard Mohr & Nadirsyah Hosen examine food as symbolic and regulated, casting food choices as part of our self-definition. Food and the choice of what to eat offer views on citizenship and justice that exist between “authenticity” and “fusion”. “Our identity is negotiated in the terms of the norms we apply to the food we ingest” and in ways that reveal and reflect the internormative spectrum of gastronomically-determined democratic legitimacy. The heart, as well as the stomach, are keys to national identities that are themselves expanding in ways that generate new tastes.

Lastly, in Part V, *Consensus*, Angela Condello offers a tentative conclusion. Whereas all of the chapters refer to different aesthetic means of the representation of national identity producing democratic legitimacy, in this concluding chapter, Condello focuses on the interconnection between representation and the consensus on which legitimacy is based. This interconnection, she argues, originated with the birth of the modern state and with the creation of a fictional entity whose legitimacy and power are based on a consensus. Such a fictional entity, be it symbolically represented through a Biblical animal-monster or a Parliament, gains epistemic and ontological validity through different levels of agreement, among which the one constructed on the sensible perception of the rightfulness or validity of the institution plays a central role.

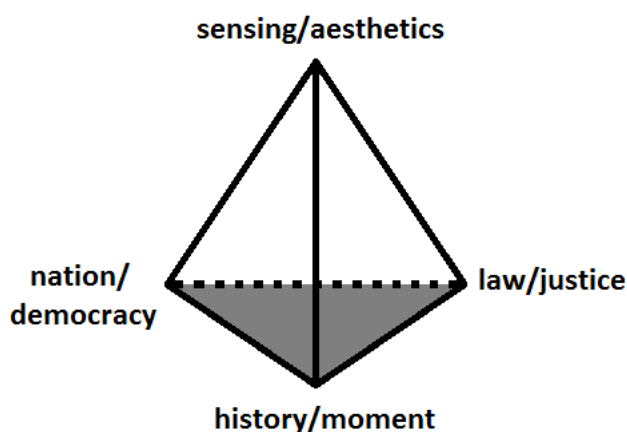


Fig. 1.1 schematic representation of the interdisciplinarity of *Sensing the Nation's Law*

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This collected volume can be situated within a triangular pyramid (fig. 1.1) with sensing, nation, history and law at its four corners. Part of what we aim to demonstrate in collecting these essays, is that the sensory or sensual is not only the tip of the pyramid or iceberg, but also part of the foundation of the edifice: democracy and the nation's law need sensory "expression" but, and in addition, sensory experience grounds or makes possible democracy and the nation's law.

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