

The Resilience of Participation: A Comment on Professor Hills

*Yishai Blank**

INTRODUCTION

The exclusion of private interests and passions from the political sphere has always been of great concern for philosophers, political theorists, and legal systems worldwide.¹ In *Corruption and Federalism: (When) Do Federal Criminal Prosecutions Improve Non-Federal Democracy?*,² Professor Hills presents a bold argument: This concern reflects the federal ("bureaucratic") version of democracy, which is antithetical to the "participatory" style of democracy prevalent in states and localities in the United States. Aggressively enforcing federal anti-corruption rules on non-federal public officials disregards this conceptual misfit and might lead to the disappearance of popular mass participation in politics. Hills is motivated by the idea that popular participation in government is a fragile achievement, and if we value the unique advantage it produces for the polity — an incomparable "schoolhouse for democracy" that breeds political knowledge in the citizenry — we need to oppose the heavy-handed implementation of federal anti-conflict-of-interest ("anti-COI") laws on non-federal politicians.

* Lecturer, Buchmann Faculty of Law, Tel Aviv University. The paper was originally presented at a conference on "The Role and Limits of Legal Regulation of Conflicts of Interest" held at the University of Pennsylvania Law School. I am grateful to Hanoch Dagan, Jerry Frug, Roy Kreitner, Dori Spivak, Talha Syed, and to the Conference participants for their helpful comments. Ayelet Oz provided excellent research assistance. The author wishes to thank Dana Rothman and the members of the editorial board of *Theoretical Inquiries in Law* for their diligent and careful work.

1 For a fascinating overview, see John T. Noonan, Jr., *Bribes* 1-135 (1984).

2 Roderick M. Hills, Jr., *Corruption and Federalism: (When) Do Federal Criminal Prosecutions Improve Non-Federal Democracy?*, 6 *Theoretical Inquiries L.* 113 (2004).

Hills' article does two important things. First, it convincingly shows that federal anti-corruption rules are far from being non-controversial or merely about clean government and the rule of law; rather, they reflect an ideology, a substantive idea about democracy and politics (albeit a "bureaucratic" one). Second, it offers a unique perspective on the nature of American federalism and on the essence of the political process. Refusing to revert to common justifications such as autonomy, efficiency, states' rights, and so on, Hills defends federalism as an optimal political structure that balances between the two aforementioned democratic visions.

Substantively, Hills offers a vindication of state and local autonomy that is based on these being forums of in-person and lay participation in government. However, beyond the difficulty of establishing this claim from an empirical or legal (constitutional or otherwise) perspective is the even greater difficulty of justifying it normatively, and on this account, Hills' article fails to lift the burden. This is so because he tries to hold too many sticks at both ends: he refuses to base his pro-state and pro-locality position on classical liberal values such as personal liberty and autonomy (the Nozickian position), but also seems to reject communitarian values (such as community self-determination or group identity) and other substantive values such as equality and freedom. And while he maintains the necessity of a distinction between the federal government and localities on the basis of the disparity in their sizes, he insists that localities and states can be equally participatory despite the formidable variance in their sizes. Thus, Hills is left with a highly formal and proceduralist conception of "participation" on which he tries, unsuccessfully I argue, to hang the heavy apparatus of American federalism. Hills' rosy picture of federalism ignores substantive discord between the various levels of government and the impossibility of bridging the profound discrepancy between the participatory vision and the bureaucratic vision by merely delegating them to different spheres.

My comment on Professor Hills' article progresses in five stages. First, I review his argument. I then proceed to critically examine what I label "the fragility of participation hypothesis," according to which local and state popular participation requires protection from federal intervention via anti-corruption prosecution. I argue that Hills overestimates the threat posed to participation by federal anti-COI laws and underestimates the harm that the corruption of local and state politics poses to participatory democracy. Third, I claim that Hills' stylized mapping of participatory populism onto state and local governments and of bureaucratic populism onto the federal level is descriptively inaccurate and normatively undesirable; it ignores various forms of participation that exist at all levels of government and creates an unnecessary split between the various political spheres in which people

operate. I then move to analyze the way in which Hills' argument is linked to a more basic debate about the legitimacy of representative democracies and the nature of the political process: Hills submits a radical critique of democracy and of the essence of politics, but his skepticism regarding the possibility and desirability of distinguishing private interests from public ones is insensitive to concrete situations in its application. Furthermore, Hills seems to advance a privatized notion of politics, according to which no public interest that transcends private interests can ever be formed and thus politics is always about competing private interests. While I embrace some of his intuitions regarding the shakiness of the public/private divide, I invoke a more dialectical understanding of the relationship among the various tiers of government in federal structures, one that rejects neat separations and dichotomous solutions. Under such a view, states and localities do not represent different visions of democracy, inherently mapped onto different spheres; nor should they be viewed as either fully public or private. Rather, they ought to be regarded as *hybrid entities* where various forms of populism and participation coexist and compete, where the private and the public are fused yet maintain some distinction, and where colliding substantive visions of politics and democracy exist. I end with a few concluding remarks.

I. HILLS' ARGUMENT

In this Part, I briefly present Hills' argument, focusing on the components that are most important to my analysis. Hills' description of the relationship between the nature of the federal government and that of non-federal levels of government in the United States (i.e., states and localities) is rather idiosyncratic, as he does not formulate it through the more common notion of state and locality rights, autonomy or immunity from federal intervention. By his account, the relationship between the federal government and the non-federal governments reflects an equilibrium between two legitimate — competing and complementary — visions of democracy.

The federal government represents the bureaucratic version of democracy ("bureaucratic populism"): it is based on a democratically-elected central body (Congress) that pronounces the general values of the nation and on appointed policy experts who implement these values. The impartial loyalty of the implementing bureaucrats to the values of the central legislature is crucial for maintaining the democratic legitimacy of a regime that routinely operates by way of non-elected officials. Only a clear separation between public goals and private interests would ensure the unbiased execution of

public policy (as decided upon by the elected body) by non-elected policy experts. Bureaucratic populism, Hills claims, is "a Jacobin invention."³

Lower-level governments, such as state and local government, in contrast, are where the participatory vision of democracy (entitled "participatory populism") is realized. This democratic form, argues Hills, rests on part-time elected officials and part-time executives who are laypeople, not experts. A mixture of elected politicians, part-time lay officials, and citizens with veto powers replaces the bureaucratic combination of a centrally-elected legislative body and full-time experts who implement its policies. This massive involvement of laypeople in public decision-making is made possible, in part, by the fact that officials in participatory regimes are underpaid (or unpaid altogether) and, therefore, have a varied range of private interests vested in their public roles.⁴ The outcome of this structure is a "promiscuous" mingling of public and private interests⁵ and a virtual impossibility of separating the two.

Hills assures us that both these forms are democratic and that neither is closer to the people or more democratic. However, each has its own advantages and weaknesses: while participatory populism is better at allowing many people effective access to decision-making processes ("access"), bureaucratic populism is better at galvanizing the attention of the people to issues that require their involvement and care ("salience"). And vice versa: while bureaucratic populism does poorly in letting untrained and relatively uneducated people practice government, participatory populism runs the risk of losing the attention and concern of the people due to the multitude of mundane, even boring, issues about which they are required to form an opinion.

It would seem, then, that both these democratic forms exist happily, side-by-side, in the United States: one at the federal level, the other in the states and localities. What, then, is the problem? Hills gives a clear answer to this question: as long as participatory and bureaucratic populism do, indeed, coexist, all is well; however, aggressive enforcement of federal anti-corruption laws on non-federal officials threatens to destroy this healthy coexistence by undermining non-federal participatory populism. Stringent federal enforcement of the "bureaucratic" private-public distinction might

3 Hills, *supra* note 2, at 115, 116, 124.

4 Strangely enough, the role of the smaller size of government, perceptions of more immediate impact on daily concerns, and increased proximity of the seat of power to citizenry in facilitating increased lay involvement almost do not factor in Hills' account.

5 Hills, *supra* note 2, at 115.

deter laypeople from participating in government and, as a consequence, could severely curb local and state participatory democracy. In particular, some trends in the current jurisprudence of anti-corruption laws (like the *Sawyer* case and the application of the Mail Fraud Act to prosecute non-federal agents for acts that are legal under state law) reflect a misunderstanding of the nature of participatory democracy, and this is why, unlike some other debates about federalism, this one is about the deep-rooted values of American democracy.

In order to convince us that it is important to protect participatory democracy from federal encroachment, Hills' argues that hands-on participation in politics is an established way to breed a much-desired "political class": citizens who read newspapers, who care about politics, who are curious, inquisitive, and argumentative.⁶ Left only with policy-expert bureaucrats, there is a good chance that our populace will become passive, disinterested, and oblivious to their political surroundings. This is why we should all care about curbing the power of the federal government to prosecute non-federal officials by using the misguided prophylactic anti-corruption laws.

In the end, Hills' normative suggestions are not all that radical. He does not argue that all prophylactic anti-COI rules should be quashed or abolished or that the federal government should never prosecute non-federal agents for corruption. Rather, he claims that there should be some limitations on such prosecutions. First, mail fraud prosecutions should be limited to conduct that violates the state law where it was perpetrated. Second, whenever such a federal anti-corruption indictment is served against a non-federal official, pre-approval by the Department of Justice should be required. This, Hills seems to suggest, would reinstate the right balance between the two forms of democracy that American federalism reflects.

In the following Parts, I outline my critique of Hills' descriptive and normative claims. I will begin by examining the main hypothesis that he submits.

II. THE FRAGILITY OF PARTICIPATION HYPOTHESIS

At the core of *Corruption and Federalism* lies a straightforward argument, which I refer to as the "fragility of participation" hypothesis:⁷ prosecuting

6 *Id.* at 135-37.

7 For an account of a different jurisprudence underlined by a suspicion of the "fragility" of an important human institution — not participation but democracy — see Richard

state and local officials using federal anti-corruption laws would deter laypeople from participating in government; this would destroy the healthy balance between the two democratic forms — the bureaucratic one and the participatory one — by preferring the former over the latter. The interesting and unique element in the hypothesis is that such "Jacobin" (federal) imperialism is a bad thing not because it infringes states'-rights or interferes with some originalist constitutional plan, but rather because participatory populism is the best schoolhouse for democracy and risking it would hurt democracy.

In this Part, I call into question the factual basis and normative grounding of the hypothesis, for two reasons: One, Hills provides no evidence that lay participation in politics would be meaningfully undermined by anti-COI rules. Two, even if we were willing to concede that some people might be deterred from participating in state and local politics as a result of such rules, it might actually be beneficial for the polity-at-large, for various reasons: it might save the public money; it might reduce "adverse selection" that currently causes the wrong people to run for office in states and localities; and it might actually induce the citizenry to be informed, knowledgeable, and involved in state and local politics. In other words, Hills' hypothesis is plagued by two problems: on the one hand, it *overestimates* the fragility of participatory populism and the threat posed to it by federal anti-corruption laws; on the other hand, it *underestimates* the current harm that is caused — especially to local government — by corruption of local and state officials.

As I shall demonstrate below, Hills' concerns reflect a conservative bias⁸ and represent a classical pro-states' rights position, not an empirically motivated analysis or a novel idea about the uniqueness of states and localities as schoolhouses for democracy. In spite of its ambition to avoid the worn-out pro-state and anti-centralist position, Hills' article does little more than reiterate the common suspicion of federal intervention with state and local autonomy, and it remains wholly speculative as regards the *actual* risks and dangers that the former poses to the latter in concrete situations.

H. Pildes, *Symposium: Bush v. Gore: Democracy and Disorder*, 68 U. Chi. L. Rev. 695 (2001).

8 I refer here mainly to the rhetorical moves that Hills makes in criticizing the "progressive" anti-corruption federal prosecution, by using the analytical tools offered by Hirschman. Progressive reforms, Hirschman shows, are routinely criticized by conservatives on three charges: that they are futile ("futility"); that they will actually cause the opposite result of their intention ("perversity"); and that they will endanger more fundamental values that we hold ("jeopardy"). Albert O. Hirschman, *The Rhetoric of Reaction: Perversity, Futility, Jeopardy* (1991).

A. Overestimating Risks

The fragility of participation hypothesis is based on a string of factual assumptions and logical deductions. First, Hills argues that most officials in localities and states work part-time and are poorly paid (if at all). Second, he speculates that people seek public office for material reasons, too, and thus they might be encouraged to pursue a political career (despite the miserable paycheck) by the accompanying "goodies": favoring one's relatives and friends in jobs and contracts; being wined-and-dined by lobbyists; and, more generally, mingling one's private interests with one's public duties and benefiting from the concoction. Third, Hills asserts that depriving local and state officials from such "perks" would be a disincentive for them to participate in government and would lead to a massive flight from non-federal politics. Fourth, scaring these people away from this sphere of politics through anti-corruption laws would, in essence, spell the destruction of American participatory populism.

A close examination of this chain of deductions reveals that Hills does very little to base them on facts or realities. It thus collapses both factually and logically.

To begin with, Hills fails to provide any — let alone convincing — data on the extent to which a significant number of local and state officials are, indeed, underpaid or unpaid. His claim that "[t]he elected legislators are often — indeed, usually — part-time [and] under-paid"⁹ is left unsubstantiated, and given its generality, it might, indeed, be false. In fact, state legislators are often paid quite generously, and there is a huge variance amongst states in this regard: a legislator's salary can be as low as \$10,000 a year in some states (e.g., Mississippi) and as high as \$99,000 a year in others (e.g., California).¹⁰

As for localities, Hills himself concedes that the situation is also more complicated than the crude claim that officials are unpaid or underpaid. In reality the facts are so much more complicated that they call into question

9 Hills, *supra* note 2, at 115.

10 See <http://floridatxwatch.org>. The variance is also manifested in the "compensation" schemes that states offer their elected officials. Some have only a per diem compensation, and some have only a high "salary," while others combine the two. Nine states (California, D.C., Illinois, Massachusetts, Michigan, New Jersey, New York, Ohio, and Pennsylvania) pay between \$99,000 and \$50,000 a year. Nine more pay between \$49,999 and \$30,000 (Colorado, Delaware, Hawaii, Maryland, Minnesota, Missouri, Oklahoma, Washington, and Wisconsin). The remaining thirty-three states pay less than \$29,999 a year, but some provide generous compensation schemes.

Hills' entire edifice. In large cities, officials are sometimes paid extremely generous salaries: council members often receive more than \$40,000 a year (even reaching \$90,000 to \$130,000 at times);¹¹ mayors regularly earn more than \$100,000 a year;¹² and it is not uncommon for city managers to get paid more than \$150,000 a year.¹³

In any event, even if only large cities and some (about twenty) states pay market-high salaries to their officials (both elected and appointed), there is reason to believe that a fair share of state and local officials are paid sums large enough to allow them financial independence and to create a strong incentive to be involved in state and local politics — even if deprived of the possibility to "mix and mingle" private and public interests. Indeed, the states and the cities that pay such high salaries are also those where a large number of Americans live and where many Americans participate in government. It seems irresponsible to dismiss them as mere exceptions to the rule.

In addition, though one should not be overly naïve and argue that people will enter politics and serve the public regardless of how much compensation they receive or how much they can benefit from public service, one should also refrain from Hills' crude perception that people enter politics only inasmuch as they can gain material goods for themselves or their relatives. People have diverse preferences, and they benefit from a wide range of activities. They participate in government for a variety of reasons, from narrow material self-interest to much more publicly-minded motivations. Some people are motivated by a desire to express their political being or to advance some public goal; others might be drawn to politics because they are bored and lonely. Some are personally obsessed with various issues and want to vent their frustrations in public meetings; other people derive gratification from the public acknowledgment and symbolic capital that (at least to some degree) accompany public office. People are sometimes drawn to "power" as an abstract matter and not as something that would give them material benefits; some hope that someday their investment will pay off

11 See <http://infoplease.com>. Such large cities include Austin (Tex.), Baltimore (Md.), Boston (Mass.), Chicago (Ill.), Cleveland (Ohio), Denver (Colo.), Detroit (Mich.), Fresno (Calif.), Honolulu (Hawaii), Houston (Tex.), Kansas City (Mo.), Las Vegas (Nev.), Los Angeles (Calif.), Milwaukee (Wis.), Minneapolis (Minn.), New Orleans (La.), New York (N.Y.), Oakland (Calif.), Philadelphia (Pa.), Portland (Ore.), San Diego (Calif.), San Jose (Calif.), and Seattle (Wash.).

12 *Id.*

13 *Id.*

— perhaps by meeting "the right people," perhaps merely by casting their bread upon the water.¹⁴

Thus, even if the law deprives them of the option to enjoy personal benefits, such as being wined-and-dined at the expense of large corporations¹⁵ or the ability to practice nepotism, there are good reasons to believe that people will still be attracted to participate in state and local politics. Participation might not be that fragile after all.

B. Underestimating Risks

Perhaps Professor Hills is convinced that states and localities in reality do not pay their officials (despite abundant evidence to the contrary) because he has a *theory* about the reason why they do not: "[l]ay officials in such a system must *necessarily* be unpaid to avoid a crushing burden of taxation."¹⁶ But not only is this claim factually untrue, as I have shown, it might also be logically misguided since it rests on the flawed notion that only formal salaries cost money to the public and only paychecks signed by the government are a cause of increased taxation.

Rather, bribes, nepotism, conflicting interests, and the like are also very expensive and cost money to the public as well; they, too, are a form of taxation. Economically speaking, if some local politician is getting kickbacks in return for hiring a certain, more expensive contractor, this is tantamount to the locality paying him a salary. Similarly, the actual cost to the public is obvious when some commissioner decides to ignore a citizen's complaint because the official's relatives are involved and some environmental harm is the result. That is to say, corruption is costly, and the cost ("tax") is often inflicted not so much on those who bribe the official but on the public as a whole.

Hills, of course, knows this quite well. His main claim is that these benefits are a crucial incentive for laypeople to participate in government, and therefore their deprivation — by imposing anti-COI rules — would cause people to withdraw from politics. So when he states that lay officials must be underpaid in order to avoid a "crushing burden of taxation," he is obviously referring to direct and overt taxation, since he assumes that

¹⁴ *Ecclesiastes* 10:18-11:6.

¹⁵ Some of these specific costs are often passed on to consumers. Then there are the more general social costs associated with private purchase of public power, which suggest that the benefits are also "at the expense" of whomever or whatever one thinks loses out when capture happens in the political process.

¹⁶ Hills, *supra* note 2, at 141 (emphasis added).

these lay officials are, nonetheless, paid, albeit covertly and indirectly. How, then, can Hills argue that bribes and nepotism are valuable (for lay officials) and, at the same time, valueless (since they do not amount to taxation)? Someone must be paying the price of these benefits. True, it is possible that private individuals, and not the public at large, pay some of the bribes. But it is actually the public that often pays the full price of the bribe, in the form of, for example, increased budgetary expenditures (for inefficient contracts), higher prices for goods and services (when the cost of bribes are passed on to consumers), the costs and distortions associated with economic oligopolies (since access to political levers may facilitate the concentration of economic power), and the increased burden borne by the public-at-large (or, perhaps, particular identifiable groups) of private costs that are no longer internalized (as a result of weakened regulation). Given this, there is even more justification to prohibit such covert payment: it is anti-competition, concealed, and unaccounted for. If the locality (or state) wishes to pay more money to its officials, it might as well know the exact price and not hide behind murky, under-the-table kickbacks that might seduce certain laypeople to run for office, but cost a lot to the public.

It follows that even if we qualify Hills' original hypothesis and apply it only to small localities and poor states (that do not pay their officials high salaries) or to commissions and boards across the country (that do not pay any compensation whatsoever), it is possible that the assortment of "private interests" — i.e., kickbacks, semi-bribes, and other perks — that their members unofficially enjoy actually cost a lot of money to the public; that, in reality, a system that allows its officials to mix private and public interests is imposing a "crushing burden of taxation" on the public.

In addition, offering such perks as a strategy to increase participation might result in adverse selection, where people with high financial stakes and a strong desire to "promiscuously mingle" their private interests with public ones would be drawn to local and state politics. Assuming that these people have better knowledge of the political process and more money to finance their campaigns, we can reasonably conclude that their participation in government is not necessarily a contribution to the schoolhouse for democracy and that it might not be such a good idea to award them immunity from federal anti-COI rules.

There is another harm that Hills ignores (besides the high financial (and social) costs and the problem of adverse selection of officials): the harm that is currently inflicted by the loose anti-COI rules in some states and localities. He misreads lack of salience as an inherent trait of local politics, rather than attributing it to local corruption. It is not implausible that public apathy to local politics is not a result of immutable traits of local issues

(boring, mundane, or highly accessible), but an outcome of the collusion (Hills might prefer to call it "promiscuous mingling") between politicians and private actors (such as local media and local businesses). As Mike Davis details in *City of Quartz*, the close relationship between the media (the *L.A. Times*) and the political system has had a devastating effect on local politics in Los Angeles.¹⁷ In other words, it is possible that what Hills regards as an exogenous and pre-legal fact — lack of salience in localities and states — is actually a result of the legal structure that allows a mixture of public and private interests. If we want to increase salience in localities and states, we need stricter anti-COI laws to disentangle this unhealthy bind, rather than less access or less federal prosecutions.

If I am correct in my criticism, there is no reason to adopt the position presented by Hills — that of the "risk-averse policy-maker"¹⁸ — and conclude that if we tinker with the *exact* current mixture of private and public interests that participation currently implies people will be meaningfully deterred from participating in state and local politics. In fact, it can be concluded that we actually might need *more* federal enforcement of anti-corruption laws in order to secure the same values that Hills supports: inducing people who regularly do not participate in government to be informed and involved; making local issues more salient; educating masses of people to govern their own affairs. What we should avoid is blind support of a regime (albeit participatory) in which only people with strong private interests, sufficient financial means, personal connections, and special knowledge actually participate in government.

Arguably, it may sometimes be a good idea to heed Hills' caveat. Where participation is, indeed, fragile, where cash is low, where the real costs of the private-public mixture are known and worthy, we should enforce anti-corruption laws with caution. However, as a general recommendation that splits between localities and states, on the one hand, and the federal government, on the other, the hypothesis remains speculative and ideologically biased. I will now progress, therefore, to a questioning of Hills' neat mapping of the bureaucratic and participatory populism democratic forms onto the federal government and the non-federal levels of government (i.e., states and localities), respectively. A critique of the implications of this problematic mapping will follow.

17 Mike Davis, *City of Quartz: Excavating the Future in Los Angeles* (1990).

18 Hills, *supra* note 2, at 136.

III. MAPPING DEMOCRACIES: THE FALSE OPPOSITION BETWEEN THE FEDERAL GOVERNMENT AND STATES AND LOCALITIES

As already noted, Hills is not interested in repealing all anti-corruption laws but only in softening (or at least qualifying and double-checking) them when applied to officials in localities and states. Thus, it is crucial for him to create a rather striking and uncommon projection, under which states and localities are grouped together as governments that are dominantly participatory and the federal government is opposed to states and localities as the sole forum of bureaucratic populism. The majority of this Part is devoted to criticism of this inaccurate mapping, which lies at the heart of Hills' democratic theory.

First, I will show that, as a matter of fact, at all three main levels of government in the United States — federal, state, and local — there is a mixture of participatory and bureaucratic mechanisms at work. And while it is true that certain localities and some states allow for more plebiscites and rely more on elections (even for administrative and judicial positions), a more nuanced understanding of participation reveals that laypeople participate in the federal government as well and that it is unclear whether states and localities do, indeed, allow for a more authentic form of participation. Second, I will claim that, as a normative theory, striking a stark line between bureaucratic and participatory populism and projecting each onto different layers of the U.S. political structure (federal, state, and local) are both unrealistic and unappealing.

A. The Mixture of Participation and Bureaucracy at All Three Levels of Government

It is imperative that we consider what is at stake when we try to measure the degree of participation in or bureaucratization of a government. The answer depends, of course, on the reasons for the classification in the first place. It is at times suggested that the more popular participation a government allows for, the more legitimate that government is; others suggest that it is bureaucracy that bestows legitimacy. But as I stated earlier, legitimacy does not motivate Hills' classification. For Hills, the bureaucratic/participatory (populism) dichotomy supposedly justifies a categorical distinction between federal and non-federal governments with respect to the implementation of prophylactic anti-corruption rules. Regimes that encourage the participation of ordinary people in government must, by definition, tolerate a "promiscuous" mingling of private and public interests and cannot demand from all its part-time officials to abide by the severe

standards that bureaucratic governments impose on their full-time experts. That is, Hills assures us that both democratic forms are equally legitimate, regardless of the degree of participation that they enable, and it is only for the sake of determining how much public-private mingling we should allow that we need to care about the level of lay participation at each governmental level.

In order to test the validity of this claim, we must first probe further into the definition of participatory populism and figure out why Hills concludes that it is "dominant" in states and localities in the United States.¹⁹ At no point strictly defined by Hills, the term "participatory populism" tries to capture the spirit of American "local" democracies and is supposed to reflect a sense of popular control of government. Hills therefore emphasizes that many officials in states and localities enjoy an independent popular mandate (due to the prevalence of elections for official positions there); that many of them are lay rather than experts; that plebiscites are held regularly that allow citizens to sit as a kind of "super-legislature."²⁰

Thus described, it becomes clear that, for Hills, participation in government has (at least) three distinct meanings: participation in person (many laypeople sitting on school boards, zoning appeals committees, drain commissions, etc.); participation by vote (through numerous plebiscites and ballots); and participation by proxy (through various elected representatives). Supposedly, the fact that all three forms of participation are more prevalent in states and localities than in the federal government renders the non-federal democracies more participatory in general and thus more prone — positively and normatively — to the private-public mingling.

This conclusion, however, seems to me misguided when we consider our primary concern. The question of corruption is (almost) never posed with respect to those who participate by vote or by proxy: neither the person who participated in a plebiscite nor the person who voted for a representative is charged with violating anti-corruption laws even if he voted for his father or even if she voted in a plebiscite in favor of a scheme that directly benefited her. (Clearly, if some politician bribed voters to induce them to vote for him, that would count as corrupt behavior, even according to Hills, and he would not object if such corruption were federally prohibited and enforced I assume. But these are not the situations that Hills is anyway interested in.) It is only the first sense of participation that bears any significance for issues of anti-corruption laws: when a layperson is elected (or appointed) to public

¹⁹ *Id.* at 120.

²⁰ *Id.* at 115.

office, he is expected, so we think, to separate his private interests from the public goal he is supposed to serve. Failing to do so will expose him to prosecution for violating anti-corruption laws. Arguably, only in such cases can Hills suggest that a different standard should apply to laypeople who participate in non-federal government, as opposed to people who participate in federal government. And if this is what Hills argues, perhaps it makes sense to distinguish between federal and non-federal governments, since lay participation in government (in the strict sense of in-person participation) is, indeed, prevalent only in the latter context (though Hills produces no data to support that claim).

But is that what Hills argues? Perhaps, but he also argues much more. Hills presents the case of *Sawyer*²¹ as an example of curbing desirable participation in state politics, which, in fact, involves an altogether different type of participation than the one discussed above.²² Sawyer was not a layperson participating in government in any sense of the term thus far mentioned (or in any other conventional sense, for that matter). He was a lobbyist for insurance companies and was accused of wooing certain Massachusetts state legislators with perks. Such activity — corporate lobbying in the legislature — is obviously not unique to the state or local level; it is common practice in Washington too. Thus, Hills' argument cannot be plausibly understood as claiming that Sawyer should have been exempt from federal prosecution since he was "participating" in government through his lobbying.

A more reasonable reading of Hills' stance is that legislatures should be held to a unique standard of anti-corruption, since legislators mingle (indeed, they ought to mingle, Hills would argue) private and public interests and should not be prosecuted when they do so (or the lobbyists who court them).²³ But if we accept Hills' argument about the different standard for legislators, there is no need whatsoever for his elaborate theoretical construction: legislators exist at all three levels of government, regardless of how many plebiscites are held and how many laypeople are appointed (or elected) to public office. Put differently, in bureaucratic as well as participatory populism, there are legislators who, perhaps by definition (if we accept Hills' argument for the moment), mix private interests with their public goals, and in both types of regime they need to have the same special leeway to enjoy this mixing.

Hence, if we are addressing primarily participation by proxy, Hills'

21 *Sawyer v. United States*, 239 F.3d 31 (1st Cir. 2001).

22 Hills, *supra* note 2, at 137-50.

23 *Id.* at 140.

mapping of participation onto non-federal tiers of government is wholly unfounded: there are no more legislative bodies — strictly speaking — in localities and states than in the federal government. However, if Hills' main argument addresses in-person participation (i.e., that laypeople should enjoy a special anti-corruption standard for various reasons, but primarily because they might be deterred from participating if subject to high scrutiny), then the mapping's accuracy is doubtful, but for a different reason: there is no evidence supporting his general statement that states allow for more lay participation than does the federal government, at least not in any significant way. With regard to localities, the generalization might be inexact in consideration of the many large cities that rely mainly on full-time, fully-paid professionals and less on lay participants in government.

As much as it is appealing to imagine that localities are much more participatory than, and not as bureaucratic as, the federal government, even Hills' favorable account cannot hide the fact that, unfortunately, cities and suburbs are also far from being direct Athenian democracies. Hills argues that the national scale of the federal government ensures that the vast majority of citizens participate "merely as onlookers and voters."²⁴ This might very well be the case, but it is also so for state and local government. The data that Hills brings to support his claim that many Americans participate in government where participatory populism prevails (3% have served on some sort of local government board) demonstrate that "the vast majority of citizens" (the remaining 97%) actually remain onlookers and silent voters even in the locus of participatory populism. Hence, depicting states and localities as forums of participation in government is, to put it mildly, an exaggeration.

The mapping that Hills builds upon is problematic also from the perspective of what counts as participation in the first place and, thus, which governments get to be labeled "participatory" and which "bureaucratic." As I previously demonstrated, we learn from Hills' examples that participation in government comprises (only) in-person, by vote, and by proxy participation. But what about other ways in which people can (and do) participate in government? At least two such forms come to mind: the first I call "administrative participation," the second, "societal participation." These forms of participation are not unique to non-federal governments and, in fact, might even be more prevalent at the federal level, thereby placing doubt on the bureaucratic characterization of the federal government.

Administrative participation includes various procedures that allow for citizens to express their views, interests, and ideas with regard to

24 *Id.* at 124.

policies, regulations, and decisions that the administration (be it in their state, local, or federal government) is considering. Such forms of public participation in administrative procedures have gained prominence over the past few decades, and they are practiced in planning hearings, legislative processes ("reg-neg" and notice-and-comment procedures), and various other administrative forums.²⁵ Hills acknowledges the existence of such modes of participation, but he questions the authenticity of the participation that they actually facilitate (he puts such federal schemes in scare quotes, calling them "public participation"²⁶ and dismisses them for failing to give any veto power to the public and for being "weakly enforced"²⁷). Furthermore, he claims that such procedures are used by people who mostly represent "overwhelmingly middle-class and upper-middle-class interests,"²⁸ and thus, they fail to increase the political education of the mass citizenry.

But Hills provides no evidence that, in localities (and states), those who "authentically" participate in government represent a wider range of interests; nor does he claim (or prove) that they belong to non-middle-class groups. Thus, his claim that non-federal governments are more participatory than the federal government (in the sense that they do better in educating or mobilizing the citizenry at large) is dubious: localities and states, much like the federal government, might in reality draw participants who represent only a sliver of the interests that actually exist out there, and they too might not school the entire citizenry for democracy.

Hills' belief that politicians are better than bureaucrats at exposing latent interests and mobilizing citizens might not be entirely unfounded (though definitely controversial). However, it remains mere speculation as to whether all (or even a significant number of) elected officials — including judges, drain commissioners, members of school boards, and the like — are indeed "politicians" in the sense that they have the skills necessary for the mass mobilization Hills believes they can achieve: "an ear for a catchy slogan, an eye for the next headline issue, a gift for gab []."29

The second form of participation that Hills ignores is what I call "societal participation," which includes lobbying, organizing in the form of civil society and voluntary associations, operating through NGOs, and

25 See, e.g., Ernest Gellhorn, *Public Participation in Administrative Proceedings*, 81 Yale L.J. 359 (1971); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. Rev. 1 (1997).

26 Hills, *supra* note 2, at 118.

27 *Id.*

28 *Id.* at 135.

29 *Id.* at 134.

so forth. A vocal and well-funded NGO participates in government (in Hills' sense) no less than a citizen who votes in a plebiscite and no less than a person who is elected to a local committee: it mobilizes, organizes, raises consciousness, and reveals latent interests. Indeed, one of the most obvious traits of American democracy is its vibrant and active civil society³⁰ and the way it functions vis-à-vis government(s); it is, in many ways, part and parcel of government itself. To my mind, it is highly questionable whether, as Hills suggests, sitting on a drain committee or even a zoning appeals board is a "deep, first-hand experience in the arts of government,"³¹ whereas campaigning, lobbying, arguing, writing briefs, and raising funds — a common experience of social activists and members of countless NGOs and identity groups — should be disregarded as though it were merely "cutting a check [] in return for a magazine or newsletter"³² and, thus, apparently, wholly bureaucratic.

The exclusion of these two important modes of participation from the definition of "participatory populism" renders Hills' argument both inconsistent and tautological. Thus, neatly mapping bureaucratic populism onto the federal level and participatory populism onto state and local government is truly puzzling.

But even if "common sense and intuition"³³ are guiding Hills rather than clear empirical evidence, it is nonetheless critical that we probe further into his normative-theoretical grounds. I do this in the following two sections.

B. The Normative Drive to Spatially Separate Bureaucracy from Participation

It could be argued that though Hills' mapping is empirically inaccurate (or unfounded) it is desirable, as a normative political theory, to construct a two-tiered political system, with each tier representing a different democratic "style": one level reflecting the Jacobin-bureaucratic model, the other representing the participatory vision. In other words, perhaps Hills' mapping should be regarded as a *prescription* for an ideal federation rather than as a *description* of the existing American one.

If this is indeed the case, then, to begin with, Hills does very little to justify

30 But see Robert Putnam's argument regarding the decline of American civil society (and social capital). Robert Putnam, *Bowling Alone: The Collapse and Revival of American Community* (2000).

31 Hills, *supra* note 2, at 124.

32 *Id.* at 135.

33 *Id.* at 136.

— normatively, historically, or legally — this ideal. Rather, he asserts that "federalism in the United States is best understood as a device to preserve two different styles of democracy."³⁴

Why is federalism in the United States best understood this way? Is it really a part of the American tradition (political, legal, and cultural) that states *and* localities are (or at least should be) more participatory than the federal government? Does this mean that the federal government is at all obliged to be "bureaucratic," while states and localities must aspire to be "participatory"? And is it really necessary that we neatly separate — as a structural, political, and spatial matter — bureaucratic populism from participatory populism? In other words, even if we accept the importance of the two democratic forms, must we also agree with Hills that we should envision state and local government as forums solely for participatory populism and the federal government as wholly bureaucratic?

A principal rationale Hills provides for his theory of the desired nature of American federalism is that states and localities are good schoolhouses for democracy. And schoolhouses for democracy are a good thing, not because substantively they are more democratic or promote equality, but because they breed "political knowledge" in the citizenry: the possibility for in-person participation in government and the multitude of elections, plebiscites, and politicians cause the masses to be involved in and informed about politics and acquire the art of government. Hills admits that this hypothesis is not sufficiently empirically based, but he attributes the lack of conclusive empirical findings to the "limits of statistical social science more than [to] the falsity of the theory: less-statistically-oriented empirical research provides some support for the view that political participation gives citizens a stronger sense of social equality and political confidence."³⁵

But even if we were to accept the "schoolhouse of democracy" hypothesis and concede that participation breeds political knowledge and inculcates democratic traits in the citizenry, Hills would still have to substantiate two further separate claims: first, that American federalism is, indeed, based on two democratic styles (participatory and bureaucratic), each of which is projected onto a different level of government; and second, that participation is more effective when it is restricted to a sphere "uncontaminated" by bureaucracy. Here, Hills fails.

The common analogy between federal-state relationships and state-local relationships³⁶ is generally conditioned on the understanding that the

34 *Id.* at 116-17.

35 *Id.* at 131.

36 *See, e.g.,* Frank Michelman, *States' Rights and States' Roles: Permutations of*

comparison is structural and that states and localities are distinct spheres: what is being analogized is the relationship between "big" and "small" political units and the importance to maintain an autonomous sphere for the smaller one. However Hills fails to maintain the distinction between states and localities: he instead *equates* them. In their relations with the federal government, he argues, both are — and, more importantly, should be — just as participatory, at least ideally. However, the major difficulty is that Hills fails to point to any significant factor that could explain why localities and states should be treated exactly the same in terms of anti-corruption rules, when it seems that there are so many relevant distinguishing factors between them.

Let me explain. Were Hills to insist that local governments — and only local governments — are unique creatures in that they have the potential to manifest a different type of democracy, more participatory and more authentically representative than parliamentary democracy (the currently accepted model of liberal democracies), it might have made sense. However, Hills groups together small townships, large cities, and huge states as though they are all molded of the same clay and claims they all *ought to be* locations for participatory populism (while the federal government *ought not* to be participatory but, rather, wholly bureaucratic).

What usually characterizes "localists" — those interested in empowering localities — is the attempt to single out localities and distinguish them from various other territorial-political units. This attempt is often based on facts such as size, common traditions and beliefs, technological means, psychological traits that determine human beings' capacity to connect with each other and engage one another, and so forth. Only in small-scale localities, it is thought, can people truly engage with each other politically, participate in-person in government meaningfully, maintain an interest in the exact workings of the polity, and effectively challenge and criticize their representatives. This tradition goes back to Plato and Aristotle,³⁷ who maintained that the size of the polis should be strictly limited, through to utopists like More and Fourier,³⁸ who tried to calculate the optimal size of a

"Sovereignty" in National League of Cities v. Usery, 86 Yale L.J. 1165 (1977); David Barron, *A Localist Critique of the New Federalism*, 51 Duke L.J. 377 (2001); William W. Bratton & Joseph A. McCahery, *The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second-Best World*, 86 Geo. L.J. 201 (1997).

37 See Plato, *The Republic* (G.M.A. Grube trans., Hackett Pub. 1992); Aristotle, *The Politics*, Book VII, 1330a1, p. 180 (Stephen Everson ed., Cambridge Univ. Press 1996).

38 See St. Thomas More, *Utopia* (George M. Logan & Robert M. Adams eds.,

polity, to current theoreticians such as Le Corbusier, Mumford, and Jacobs,³⁹ who argue that size is an important factor in planning the ideal city.

Elsewhere, in earlier work, it seemed that Hills aligned himself with this tradition.⁴⁰ While criticizing what he saw as a romantic vision of cities, he argued, "Big-city urbanity is undoubtedly a virtue but [] has little to do with *democratic participation*."⁴¹ Moreover, he made it clear that "the capacity of local governments to produce *transformative participation* in politics [] might depend on small size, economic and cultural homogeneity and obsession with real estate values []."⁴² In fact, there is good evidence that in-person participation is, indeed, dependent on small size and a limited number of participants. In a recent field study of police and school reform in Chicago, Archon Fung showed that neighborhoods and communities were used to increase popular mass participation in decision-making that resulted in real social change: safer streets and better public schools. However, this change was based on small-scale meetings of residents, where all voices were heard and both poor and rich residents deliberated with each other.⁴³

On the one hand, if small size and homogeneity are the linchpins of participation under this approach, it is unclear why Hills groups states and big cities with small localities rather than with the federal government. On the other hand, if Hills were willing to concede that participation can exist everywhere and is not related to size, we could conclude that he has now changed his mind and is willing to admit that big cities, states, and, perhaps, even the federal government can actually become — under certain conditions — locations for democratic participation. However, in this article, Hills clearly still attributes some importance to size, since he argues that only states and localities — and not the federal government — can be participatory.

As I suggested earlier, the main problem with Hills' normative ideal is that it is groundless, given American legal and political traditional thought.

Cambridge Univ. Press 1999) (1516); Charles Fourier, *The Utopian Vision of Charles Fourier* (Jonathan Beecher & Richard Bienvenu eds., 1971) (1808).

39 See Lewis Mumford, *The Culture of Cities* (1938); Jane Jacobs, *The Death and Life of Great American Cities* (1961); Le Corbusier, *The City of Tomorrow and Its Planning* (Frederick Etchells trans., Dover Publications, Inc. 1987) (1929).

40 Roderick M. Hills, Jr., *Romancing the Town: Why We (Still) Need a Democratic Defense of City Power*, 113 Harv. L. Rev. 2009 (2000).

41 *Id.* at 2029 (emphasis added).

42 Hills, *supra* note 40, at 2011 (emphasis added).

43 Archon Fung, *Empowered Participation: Reinventing Urban Democracy* (2004). Indeed, Fung attributed the success of Chicago's plan to the fact that power was devolved to the level of the neighborhoods, police stations, and schools.

His attempt to base his claim that American federalism should be best understood as an effort to strike a balance between two democratic styles on the political-governmental shift that occurred in the late nineteenth and early twentieth centuries, when the participatory model gave way to the bureaucratic one,⁴⁴ is hardly convincing. Hills' story is not supported by any legal doctrine, political theorist writings, or sociological data that would show that American federalism is a combination of participation at the state and local level and bureaucracy at the federal level, nor that it should be understood this way.

Indeed, if the true meaning of American federalism were that states and localities are schoolhouses for democracy and should be protected as *the loci* of participatory populism, we would expect not constitutional protection of states' rights and autonomy, but a constitutional provision mandating states' *duties* to enable large-scale participation in government and constitutional protection of the rights of local authorities. Obviously this is not the case, and if a state were to decide to abolish all plebiscites, for certain officials to be appointed rather than elected, and to hire only full-time and fully-paid experts (instead of part-time and underpaid laypeople), no federal constitutional valid claim could be made against the move. The same is true with regard to localities, which are considered "creatures of the state,"⁴⁵ and whether they are more participatory or more bureaucratic is up to the state to decide and — under current doctrine — not the business of the federal constitution or the federal government.

To be sure, as a matter of positive law, there is a stark difference between states and localities in terms of their respective constitutional statuses. While states are constituted and protected as the political building blocks of the American federation, localities are not even mentioned in the Constitution. The hallmark of American local government jurisprudence has always been that localities can be abolished by states at the latter's will and their powers strictly limited and closely controlled.⁴⁶ Academics, politicians, and political theorists have long argued that local authorities in the United States are weakened by current legal doctrine and suffer from a structural inferiority vis-à-vis the states.⁴⁷ Only recently did Frug, Barron, and Su show that even the famous "Home Rule" initiatives — various clauses in

44 Hills, *supra* note 2, at 130.

45 *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-79 (1907) (the Court held that states may modify or revoke, at will, all city powers).

46 *See id.*

47 *See, e.g.*, Gerald E. Frug, *The City as a Legal Concept*, 93 Harv. L. Rev. 1057 (1980).

state constitutions that grant localities some degree of (state) constitutional recognition and protection — have left cities and towns (in Massachusetts) with little discretion over taxes, fees, and borrowing and with only fragmented control over their public schools.⁴⁸

Thus, it seems that Hills is motivated by a stylized perception of both bureaucracy and participation, as though they are at such profound conceptual odds with one another that it is imperative to create a political as well as a spatial divide between them. It is therefore not enough to protect participation wherever it exists — be it a small town, a large city, a state, or the federal government; it is also crucial to maintain the difference between "participatory" polities (i.e., localities and states) and "bureaucratic" polities (i.e., the federal government).

More than anything else Hills' ideal federal structure reflects a profound fear of the federal "Jacobin" and "sclerotic" government, the idea that participation is so fragile that even a slight touch of "bureaucracy" might trigger its disappearance, and a desire to forge citizens with split personalities — one personality participatory, the other, bureaucratic — with each one projected onto a different layer of government. The outcome of this dichotomous projection is that the sphere onto which *one half* of the self is projected assumes the characteristics of that particular part alone and allows the self to function in that sphere as though it were purged of its other half. This means that the states and localities are infused only with participatory traits of the "self," and the federal government with the traits of the bureaucratic half of the self.

Such a dichotomous splitting has been identified by some scholars as characterizing the conceptual divide between cities and suburbs.⁴⁹ Historically, the suburb has been constructed as the location of the "intimate" self — warm, friendly, family-oriented, laid-back, natural, and leisurely — while the city has been characterized as the locus of the opposite personality traits: cold, blasé, calculating, competitive, businesslike, artificial, and rushed.⁵⁰ This binary projection neatly splits people into their suburban selves and their metropolitan selves, each existing as though the other does

48 Gerald E. Frug, David J. Barron & Rick T. Su, *Dispelling the Myth of Home Rule: The State of Home Rule in the Boston Metropolitan Region* (2003). For a recent and detailed account of the history, doctrine, and practice of Home Rule, see David J. Barron, *Reclaiming Home Rule*, 116 Harv. L. Rev. 2255 (2003).

49 See Robert Fishman, *Bourgeois Utopias: The Rise and Fall of Suburbia* (1987).

50 See, e.g., Louis Wirth, *Urbanism as a Way of Life*, in *The City Reader* 97 (Richard T. LeGates & Frederic Stout eds., 1996) (1938); Georg Simmel, *The Metropolis and Mental Life*, in *Rethinking Architecture* 69 (Neil Leach ed., 1997) (1903).

not.⁵¹ Their existences are separated into a sphere of cold-hearted urbanity and a zone of warm and friendly sub-urbanity.

Likewise, Hills' depiction of the ideal federalism separates human existence into a sphere of participation, political involvement, mingling of private and public interests, and informality and a zone of bureaucracy, detachment, strict separation of public and private dealings, and formality. The former sphere is that of states and of localities, the latter, of the federal government. Though these two zones are, in reality, dependent upon each other, it is their independence from each other and conflict with one another that are stressed by Hills. More concretely, he emphasizes the dangers that the latter poses to the former.

As I previously noted, what is primarily missing from Hills' argument is a reasoned discussion of the value of the dichotomy between the zones of participation and bureaucracy. It would have been helpful had Hills explained why it is not desirable to facilitate participation *wherever possible* — be it in states, localities, or the federal government. Offering no sufficient reason for his stance, he insists that participation can exist only in localities and states and dismisses federal schemes to encourage and enable participation without much explanation. Thus Hills hacks a schism unfounded in reality or theory, with the effect that forms of government not inherently conflicting are set in opposition.

One major outcome of this schism derives from Hills' labeling of the

51 Unger shows how such dichotomous structures work in contract law as well. He demonstrates it by comparing Venice and Belmont, the two competing cities in Shakespeare's *The Merchant of Venice*:

In Venice people make contracts; in Belmont they exchange wedding rings. In Venice they are held together by combinations of interests, in Belmont by mutual affection. The wealth and power of Venice depend upon the willingness of its courts to hold people to their contracts. The charm of Belmont is to provide its inhabitants with a community in which contracts remain for the most part superfluous. Venice is tolerable because its citizens can flee occasionally to Belmont and appeal from Venetian justice to Belmontine mercy. But the very existence of Belmont presupposes the prosperity of Venice, from which the citizens of Belmont gain their livelihood.

Roberto Mangabeira Unger, *The Critical Legal Studies Movement* 64 (1986). Unger is clearly drawing on ideas developed by Ludwig Feuerbach in his famous analysis of religion: Ludwig Feuerbach, *The Essence of Christianity* (Georg Eliot trans., 1989) (1841). Feuerbach's ideas were further developed and applied by Marx, who analyzed the way man, in capitalism, is split between the market (and civil society) and the family (and the state): in the former he is egotistic, competitive, aggressive, cold, and calculating, while in the latter he is altruistic, cooperating, gentle, warm, and benevolent.

two spheres of government as, respectively, participatory and bureaucratic. These labels are hardly neutral in terms of the connotations they invoke: while participation (i.e., localities and states) is good, bureaucracy (i.e., the federal government) is Jacobin. As an historical statement, this is, of course, not true. Jacobinism advocated centralization, anti-federalism, and purely bureaucratic administration, but was not the originator of anti-COI and anti-nepotism ideas. Concerns about conflicting interests (though not termed this way) and nepotism date back to ancient Athens and Rome.⁵² Indeed, the attempt to disconnect private interests from public matters is no more Jacobin than it is Jewish, Christian, indigenous American, or Athenian. In the next Part, I examine another radical idea that Hills puts forth: that public and private interests cannot be severed, at least not if we want to promote participation.

We can conclude, then, that insofar as his mapping is concerned, Hills' argument collapses: it is empirically unsubstantiated and normatively under-theorized and, to my mind, outright questionable.

IV. THE PUBLIC-PRIVATE DIVIDE AND RADICAL DEMOCRACY

To no less an extent than it is concerned with anti-COI laws, Hills' article is motivated by a desire to protect and preserve the federal structure of the United States and the balance between the federal level and the non-federal levels of government, since this structure manifests a unique combination of bureaucratic and participatory populism. Anti-corruption laws are important, Hills maintains, because they are far from merely technical: they have the potential to destroy a most valuable element of American democracy, namely, participatory populism. Regrettably, Hills does not acknowledge the fact that these rules also have the ability to *protect* the federal structure from the corruption that threatens to destroy the functioning of local and state politics and the desire of the masses to take part in those politics. However, what is unique about Hills' argument is that it distances itself

52 Consider, for example, the positions of Plato and Aristotle regarding property ownership by the rulers of the polis. While Plato claimed that the philosophers and guards should only possess communal property and thus be free from proprietary interests, Aristotle argued that private property would actually secure the rulers' independence. However, both agreed that a clear separation between private and public matters is imperative in all public dealings and even applied these to the voters themselves, forbidding them to vote on matters on which they are especially passionate. Plato, *supra* note 37; Aristotle, *supra* note 37, at 1330a1, 180.

from the regular terms of the federalist debate, namely, states' rights, the cultural and religious autonomy of various communities and minorities, and the efficiency that springs from decentralization. In their stead, Hills promotes "political knowledge," the salience of public issues, and mass access to political decision-making.

These latter concerns reveal a more profound aspect to Hills' theory, since they arise from two important theoretical components thereof, one implicit, the other explicit. The first component is Hills' critique of parliamentary democracy. Though Hills does not make explicit use of these terms, his article suggests that participation through representation is extremely limited and should be augmented by other participatory schemes. This is why improving existing representative parliamentarism is not what Hills is advocating; rather, to him, a more radical measure must be taken to induce massive participation in collective decision-making. The second theoretical element is a fundamental meditation on the nature of the political. Hills reveals a highly procedural, formal, and privatized conception of politics, rather than a substantive and public one. By definition, he argues, the realm of politics requires a mingling of private interests with public affairs. Therefore, a demand for a clear separation between private interests and public interests is both undesirable and futile.

The combination of these two components renders Hills' theory much more radical than it appears to be at first glance. Its radicalism, however, is underdeveloped and under-theorized and stops at a random point instead of facing the full spectrum of its ramifications.

A. Hills' Critique of Centrist Parliamentary Democracy

During the past century parliamentary democracy was criticized for various reasons. Due to space constraints, I shall only briefly review some of the points of criticism in order to explain what Hills' critique has in common with them. Unlike contemporary critics, who focus on the "democratic deficit" that the *administrative* democratic state suffers from,⁵³ earlier critics of modern democracy challenged *parliamentary* democracy: the very concept of a parliament (comprised of elected representatives) that is supposed to embody the will of the people. To numerous political theorists, the idea that a few hundred people could truly represent millions of people seemed utterly absurd.⁵⁴ Moreover, they argued that democratic parliaments are not

53 See, e.g., Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245 (2001); Gellhorn, *supra* note 25; Freeman, *supra* note 25.

54 Indeed, the notion that collectives could have a will that can be articulated and

all that different from dictatorships, the only difference being in degree and not kind, since in both regimes the power to represent the will of "the people" was given to a select few.⁵⁵

There are, of course, various strands of the critique of parliamentary democracy. Some critics stress different reasons for corruption in the political process, such as the asymmetric ability of different groups and individuals to organize themselves and affect the political arena;⁵⁶ others tend to emphasize inherent problems in the nature of representation of groups of people that cause incongruence between the interests of the represented and those of the representatives.⁵⁷ Hills seems to share some of the concerns that these (and other) critics raise, but is mostly worried about the fact that centrist parliamentarism fails to produce citizens who are informed about the political decisions of their representatives, who care about the way their representatives behave, and who can act upon their views regarding these decisions.

Indeed, Hills reminds us that federalism should not be regarded as being merely about the federal-jurisdictional debate concerning states' rights versus federal control, nor should it be seen as being about substantive (ideological) issues — such as slavery, gay rights, or abortion — masked as federal-jurisdictional debates.⁵⁸ Rather, it ought to be seen as an attempt to

advanced (through, for example, legislation) has been harshly criticized since Rousseau formulated his ideas. But even for those who could accept the basic idea that such a will could be found, that a few hundred could represent this will was harder to accept. One prominent critic was political theorist Carl Schmitt, notorious for his enthusiastic support of the Nazi regime. This notwithstanding, he is widely acknowledged to be one of the most prominent political and legal philosophers of the Weimar Republic, seriously engaging and challenging most of the liberal thinkers of the period such as Hans Kelsen and Hans Morgentau. *See* Carl Schmitt, *The Crisis of Parliamentary Democracy* (Ellen Kennedy trans., 1988) (1923). Numerous recent works have been dedicated to a critical assessment of Schmitt's work and personal involvement with the Nazi regime. *See, e.g.,* David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (1997); *The Challenge of Carl Schmitt* (Chantal Mouffe ed., 1999).

- 55 Once we accept the idea that there is such a thing as a collective will or a public interest and that there is someone who can articulate it, the difference between one king, a group of a few dozen, and a group of a few hundred can be depicted as secondary. *See* Schmitt, *supra* note 54. Needless to say, this critique ignores the importance of routine elections for contemporary democratic regimes.
- 56 *See, e.g.,* Mancur Olson, *The Logic of Collective Action* (1965).
- 57 *See, e.g.,* Janet Halley, *Gay Rights and Identity Imitation: Issues in the Ethics of Representation*, in *The Politics of Law: A Progressive Critique* 115 (David Kaiyr's ed., 3d ed. 1997).
- 58 Duncan Kennedy, for example, claims that debates over federalism can be seen as a displacement of other, more substantive debates between liberals and conservatives

mitigate some of the criticism launched against parliament as an instrument of representation and democracy. If we have more parliaments — state parliaments, local parliaments, and so forth — then perhaps some of the problems, such as limited access, over-representation of certain constituents, and too little in-person decision-making, might be resolved. In other words, a multi-parliamentary system, whereby various sub-polities get to practice self-rule and elect their own representatives, might address some of the concerns of the anti-parliamentarist attack. Hills thus expands on the idea that federalism is a response to the anti-parliamentary critique by arguing that states and localities represent a different idea about democracy and this idea diverges from that of centralized parliamentary systems: it is about in-person participation as opposed to participation-by-representation.

But if in-person participation in government is the main goal, is it not true that at least high-ranking bureaucrats "participate" as well? In other words, at least some of those who are appointed — rather than elected — for public office also get to have "first-hand experience in the arts of government"⁵⁹ since they do much more than just passively obey their bosses' orders. Indeed, such bureaucrats probably experience the art of decision-making just as much as elected officials on a local drain commission do. The advantage that Hills sees, therefore, in the participatory — i.e., election-based — model of democracy is that elected officials, unlike appointed officials, need to run for office in order to assume a public position, and elections have some positive by-products for the polity at large. Elected officials, as opposed to bureaucrats, argues Hills, have to mobilize voters, and this mobilization makes the citizenry politically knowledgeable; they have to be "more entrepreneurial in putting innovative policies on the agenda, more

(on topics such as slavery, abortion, and women's rights) and that "institutional arguments" about federalism can be explained as resulting from contingent historical facts such as who is stronger on the federal level as opposed to who is stronger on the state level. Kennedy is well aware of the most obvious, yet potentially devastating critique: that it is possible that the "real" issue is not conservatism versus liberalism but, actually, federalism versus states' rights. This is why he argues that "there is nothing 'necessary' or 'inherent' about the apparent instrumentalization of policy by ideology. It *might* be the case that federalism versus states' rights is the 'real' issue, and liberalism versus conservatism just a sideshow ... there is no way to 'prove' instrumentalization empirically." The only way to make a compelling argument about the secondary nature of policy debates about local power versus central control is to rely on the particular history of concrete policy debates, to trace their origins and their bearers, and to track the way they unfolded and evolved. Duncan Kennedy, *A Critique of Adjudication: Fin de Siècle* 148-50 (1997).

59 Hills, *supra* note 2, at 124.

aggressive in organizing latent interests, and more willing to invoke abstract rhetoric of justice and policy for such purposes of constituent mobilization."⁶⁰ Thus, in-person participation schemes (more elections, primarily) are not a good in themselves nor are they desirable due to the fact that they better reflect the will of the people; their true value derives from the fact that they instigate a process in which people's latent interests are exposed and their political knowledge improved. By Hills' account, federalism's value is derived from the fact that it necessitates many more elections by the sheer fact that a federation, by definition, includes many sub-polities, each of which entails election schemes of sorts. Specifically, American federalism allows for many more elections because of the *practice* of states and localities to rely on elections for many public positions.

This is a fairly radical idea about federalism and participation, quite different from the more benign understanding that federalism protects states' rights and that participation is good because it allows people to "experience" government or because it allows them to better express their values, preferences, and wants. Hills seems to suspect what many critics (such as Lipmann, Rubin, and others) have argued and demonstrated, that the majority of people do not form opinions about important issues and that democracies too often assume that such opinions spontaneously emerge, despite people's lack of information and political energy.⁶¹ In other words, preferences and opinions about public matters are not wholly exogenous to the political process itself, and the main challenge of democratic regimes should be to generate such opinions. Participation does not only turn people's views into public policy but actually *creates* people's views; candidates for public office mobilize people, inform them, tap into their hidden interests, and thus shape their opinions.

In this sense Hills' critique can also be likened to that of such "radical democrats" as Ernesto Laclau and Chantal Mouffe,⁶² as well as Jerry Frug, who, following Hanna Arendt, supported local power for its potential to promote "public freedom."⁶³ For Hills is not concerned with the impact that participation has on the person who participates — the layperson who sits on some local or state board — but, rather, is motivated by his belief in the need to educate the masses. This shift from a concern with protecting the individual

60 *Id.* at 133-34.

61 *Id.* at 132-33.

62 Ernesto Laclau & Chantal Mouffe, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics* (1999); Chantal Mouffe, *Dimensions of Radical Democracy* (1992).

63 Frug, *supra* note 47, at 1068-73, 1150-54.

and her right to be fairly and accurately represented to the collective and the desire to instill in it political awareness, deliberation, and conversation renders Hills' critique somewhat radical and distinguishes him from the classic liberal criticism of the parliamentary political process.

And yet, this notwithstanding, Hills remains primarily focused on the individual, not the collective (or the community). Specifically, he is mostly interested in the negative impact that anti-COI rules might have on incentives for individuals to run for office and on the effects that such a disincentive could have on the political knowledge of individuals. While Arendt, Laclau, Mouffe, and Frug regard politics — especially local politics — as the means for building a community and expressing one's political being through public deliberation and collective decision-making, Hills seems to settle for more formal and individualist-oriented goals.

One problem with Hills' point of emphasis is its speculative nature. As Hills himself admits, it is not empirical evidence that leads him to put his faith in in-person participation as a means to achieve political knowledge, but, rather, "common sense [that] suggest[s] an intuitive connection between political participation and political knowledge."⁶⁴ True, there is some evidence that elections increase satisfaction and a feeling of control among citizens, but the substantive claims that Hills advances, principally that it is such formal participation — rather than, say, civil society organizations — that breeds political knowledge, are unsupported by evidence. There are no data that demonstrate the difference between local and state politics, on the one hand, and federal politics, on the other, insofar as the political knowledge of citizens is concerned. On the contrary, as Hills admits, the lack of salience of local and state issue leads to a lack of information for voters and apathy problems that are reflected in low turn-out rates in local elections and other participatory schemes. Indeed, if we care about these grave problems, decreasing federal anti-corruption intervention in local corruption seems like a bad place to begin. As I previously suggested, corruption often leads to lack of salience, and by fighting it vigorously, we could reasonably expect that more information and more knowledge would be available to voters and, thus, actual participation be increased.

But another problem warranting attention is that an individualistic focus such as Hills' misses the unique potential of at least some localities to produce collective identities, communities, and public forums of collective action and deliberation. Indeed, one of the most obvious characteristics of localities is their ability to create a different style of democracy not only because people

64 Hills, *supra* note 2, at 136.

formally participate more often and on more occasions in elections than in states, but also due to the fact that other, less formal elements evolve and emerge in some such communities. Daily encounters, shared experiences, informal relations, and unplanned interactions create communities and identities that far exceed the formal schemes of participation.⁶⁵ This is not to deny the importance of planned and formal rules that can induce such cooperative endeavors. On the contrary, there are good reasons to go beyond formal/procedural democratic schemes and allow for more collaboration and cooperation among citizens at all levels of government. Frug, for example, suggests looking at various services (such as education) as opportunities to create communities;⁶⁶ Fung shows how lay participation in education and policing results in better services and community empowerment.⁶⁷

Elsewhere, Hills seems to think that these unique traits of localities derive from their small size, homogeneity, and exclusion.⁶⁸ Perhaps this is why he has given up on the project to turn localities at large into places where collective identities can be forged and where communal endeavors can be ventured. Perhaps this is why localities and states alike — regardless of their size — are depicted by Hills as places of "participation" in the most formal sense of the word: forums of more elections. But if a more substantive version of participation and a more collective-oriented vision of politics are to be advanced, there is no reason to cling to election schemes and ignore the potential of various activities, regardless of their formal "affiliation" (whether to localities, states, or the federal government), to constitute an opportunity for group formation and collective deliberation. As I already pointed out, often even cities, let alone states, are too big to enable such transformative participation; thus it would be necessary for such participation to operate at the neighborhood level. Since most states and localities are, in any event, too vast for substantive participatory schemes, both federal and non-federal projects could be reformulated so as to include mass participation.

Hills' division between localities and states, on the one hand, and the federal government, on the other, excludes the possibility and ignores the need to conform local, state, and federal bureaucracies with substantive

65 See, e.g., Iris M. Young, *Justice and the Politics of Difference* (1990). Though Young's version of day-to-day life in the city might be seen as a somewhat romantic account of pluralist urbanism, it raises the challenge of looking at a different type of politics: a view based on difference and heterogeneity, rather than on sameness and homogeneity.

66 Gerald E. Frug, *City Services*, 73 N.Y.U. L. Rev. 23 (1998).

67 Fung, *supra* note 43.

68 Hills, *supra* note 40.

democratic requirements. This is not only theoretically regrettable, but also seems contrary to values Hills himself has advanced in the past. The importance that Hills places on creating a political space where people from different backgrounds, "natural" communities (ethnic, religious, or other), and classes are able to deliberate, debate, and decide about how to lead their shared lives — parallel to Habermas' "ideal speech situation," which Hills endorses⁶⁹ — mandates that participation be induced also in the federal government and not only in non-federal governments, when such participation is plausible in the given context. Nor should this "local" political space be protected merely by a negative trope such as "autonomy," meaning, in this context, protection for local officials from federal prosecution.

Indeed, Hills' challenge to contemporary democracies should be taken seriously: for those who care about participatory democracy and about radicalizing our democratic institutions, protecting dubious local officials seems like the wrong place to stop (or even to start, as I suggested earlier); protecting existing jurisdictions — state and local — from federal "intervention" sometimes, perhaps even often, curbs participation and could diminish people's motivation to become politically active. Since being able to influence is a primary requirement for involvement, local (and sometimes state) jurisdictions do not represent the reality of mutual influence and dependency. Especially in metropolitan areas, where jurisdictions are often arbitrary and random, political involvement and debates must be held across jurisdictions, and therefore a space of political deliberation must be opened up. In other words, rather than "shutting-out" jurisdictions from one another, in a reality of regional cooperation, dependency, and externalities (positive and negative), an opening-up of jurisdictions to one another is most needed. And sometimes federal involvement is the only way to achieve such cooperation.⁷⁰

To sum up, suggestions to promote participatory democracy by protecting the autonomy of localities and states — creating them as spheres with immunity from "external intervention" — must be complemented by a positive vision of how to encourage participation, popular involvement, and democracy. Hills' minimalist and negative approach ignores the acute social and structural problems that characterize contemporary American politics. Thus, it is crucial to transcend the regular opposition between local

69 "Thus, I endorse a theory of political legitimacy similar to Habermas' theory of communicative action, where norms of open debate define substantive values." Hills, *supra* note 2, at 128.

70 See Olson, *supra* note 56.

"autonomy" and federal "intervention" and see the central and the local as necessarily intertwined and potentially beneficial to one another rather than inherently oppositional. As I argued, federal enforcement of anti-COI rules on state and local officials could actually foster democracy and participation rather than diminish them.

B. Hills' Critique of the Public-Private Divide

The fact that Hills brings to the forefront of the debate over anti-corruption laws a concern for collective deliberation and public consciousness is praiseworthy and probably the most important contribution of his article. It is a much needed departure from the too-often technical discussion of "clean" governments, transparency, and the rule of law. Indeed, Hills reminds us that the rules that regulate our representatives' official conduct reflect how we think politics should operate and how democracy does operate — more specifically, that in politics we expect our representatives to make our private interests public affairs.

Hills not only doubts the ability to locate the public interest, to articulate it, or to translate it into concrete policies, he calls into question the very existence of such a public interest by suggesting that participation always requires the mixing of public and private interests: "In any system of lay participation in government such as elections, these motives [public and personal] will necessarily mingle."⁷¹ Hills seems to be suggesting that since politicians necessarily and always represent only a group of people and not the general public (and the paradigm of identity politics is a clear example of this logic), degree and not kind determines whether the interest that generated the position that an official took on a certain issue will be labeled private or public. And since it is only a matter of degree, we should doubt the whole attempt to clearly distinguish between private and public interests. In other words, Hills seems to argue that in politics there is (and should be) no such thing as a public interest — only private interests exist.⁷²

71 Hills, *supra* note 2, at 148. In fact, this assertion somewhat contradicts the fragility hypothesis, since instead of claiming that federal anti-COI prosecution would deter people from participating in government, it suggests that such a federal endeavor is futile: By nature, politics requires the mixing of private and public. Not only is it *unwise* to try and separate private and public interests, it is also *impossible*. But if it is, indeed, an impossibility, there is no need for us to be worried about federal imperialism, since it is doomed to fail.

72 Interestingly, Hills does not hold the same view about bureaucracy, where he claims that a strict separation of the public duty and private interests is possible, indeed necessary, for the legitimacy of bureaucratic regimes depends upon a strict adherence

Indeed, politics is the art of making public what is private, of making visible the invisible, of bringing to light that which was hidden in the darkness of the private sphere. As many of the political struggles over the past century and a half have shown, the most important political action is to make some private matter the business of the whole. Struggles in the work place since the nineteenth century have tried to achieve precisely this: to turn some areas of private law and private relations into matters of public law and public concern, to subjugate them to public regulation and scrutiny. Minimum wage laws and other labor relations' laws are, in essence, *political* in the sense that they turned private contracts (i.e., the private affairs) of individuals into a public matter. The same is true of feminist efforts to "politicize" gender relations, best reflected in the feminist mantra "The personal is the political," i.e., personal matters are — or, better yet, should become — public affairs. Feminists have insisted that gender hierarchies should not be regarded as a private matter (between husband and wife or employer and employee) but, rather, as a public problem that ought to be addressed by state action.

Moreover, one of the most important elements of legal realists' critique of the common understanding of private law was their claim that it is impossible to neatly and clearly separate private law from public law because private law is always contingent on some public definition of the original entitlements of the parties and of their "private" sphere, without which, various private interactions would have no meaning.⁷³ The realists

to non-entanglement of the private and public. Only where participation (i.e., representation) is involved is separating the two both impossible and undesirable. Presumably, Hills would attempt to escape this apparent inconsistency by arguing that the laws that bureaucrats administer are the product of legislative deliberation by legislators who always mingle public and private. Hence it is not that the federal sphere can somehow obtain a "pure (or genuine) public interest," but simply that one aspect of it, the bureaucracy, can be monitored strictly enough so that the private interests specific to it are kept out (at least to a minimum), but at a higher level, that of the legislature, there are always private interests already involved. I will demonstrate further on that this is yet another demonstration of Hills' privatized notion of the political.

73 For a discussion of this realist theme, see Joseph W. Singer, *Legal Realism Now*, 76 Calif. L. Rev. 476 (1988); Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, 15 Legal Stud. F. 327 (1991). For a typical example of a realist critique of the private-public divide, see, e.g., Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 Pol. Sci. Q. 470 (1923); Robert Hale, *Bargaining, Duress, and Economic Liberty*, 43 Colum. L. Rev. 603 (1943). Wesley Hohfeld's well-known analysis of rights is another example of this theme, since it demonstrates the inherent connection between legal concepts in the field of private law (rights, duties, privileges, etc.) and their ongoing elaboration and enforcement by public

insisted that what is regarded as a private matter is already embedded in a background of public norms that determine the power relations between the so-called private parties and the basic allocation of resources between them. Hence, what is seen as a purely private matter is both entwined in *and* actually determined by public regulation, public interests, and public decisions.⁷⁴

Anyone who is sympathetic to the realist critique should endorse Hills' argument vis-à-vis the inability to separate the personal from the public in politics. Conversely, any such advocate of the realist critique should reject Hills' implicit idea that there is no such thing as a public interest and that any official conduct is by definition merely the expression of a private interest (or whim). In fact, Hills takes the realist critique and turns it on its head: while the realists argued that what is seen as private is in fact public, Hills argues that what is seen as public is always merely private. In addition, accepting the fundamental realist insight does not entail Hills' denial of concrete differences between activities that benefit the individual politician (and perhaps some of her friends or family members) and activities that help a group of people that is represented by her. It seems that Hills endorses a position that can be characterized as "global skepticism," according to which any categorization, conceptualization, or sharp distinction should be critiqued and questioned. As true as it may be in the abstract that a general categorization distinguishing between what is public and what is private is untenable, concrete, ad-hoc distinctions can be made and should be made. Acknowledging the difficulty to draw a clear line between a private interest and a public interest does not logically prevent making a specific judgment call regarding the conduct of some public official.

Thus, the fact that Hills' abstract, conceptual critique lacks specificity and factual subtlety leads him to a blasé and cynical conclusion: nothing can really be done about the mingling of the private and the public in officials'

institutions (such as the courts), with such elaboration requiring (discretionary) judgments of "justice and policy" rather than mere deduction from higher-order norms. Wesley N. Hohfeld, *Fundamental Legal Conceptions As Applied to Legal Scholarship*, 23 Yale L.J. 13 (1913-1914).

74 Hills' theory is realist in this further sense, too: not only does he deconstruct the private-public divide, he is also sensitive to the various situations that law encounters, claiming that each such situation requires a different rule. Following the realists, Hills insists that we need to shape different anti-corruption laws, in accordance with the political unit in which we operate. But as I argue throughout, Hills' argument that the political unit is the proper stopping point for context-sensitivity is not compelling. For a thoughtful discussion of context-specific jurisprudence, see *American Legal Realism* (William W. Fisher III, Morton J. Horwitz & Thomas Reed eds., 1993).

conduct, and thus we need only worry about the federal government's "manipulation." If Hills were concerned also about the outcome of state prosecutors' manipulation of the impossibility to neatly distinguish between the two, it might have been easier to accept his critique. But Hills only warns against — and suggests the curbing of — *federal* enforcement of anti-corruption laws, insisting that *states'* standards are worthy and adequate. This he does without looking into the merits of states' anti-COI laws, and apparently instead bases his claim merely on the fact that he trusts states more than he trusts the federal government. This is unjustifiable by his own standards, since it has nothing to do with the basic idea that what anti-corruption rules do is either advance or crush participatory populism, regardless of who enforces them or who enacted them.

The main problem with Hills' radical critique is, therefore, that it is too abstract, too general, too "privatized" in its understanding of politics, and that it clings to procedural protections rather than checking the outcomes of the rules and their implementation. First, Hills' radical skepticism leads him to the notion that only "procedural" criteria can be used to examine the corruptness of an action: only if an action was entirely secret and not sanctioned by a vote (of a "reasonably representative sample of the citizenry") can it be deemed corrupt.⁷⁵ Of course, such criteria are far from being clear or uncontroversial. Not only are they seldom met (as Hills admits⁷⁶), they are also difficult to interpret and implement. Second, Hills ignores some substantive (not procedural) distinctions that can sometimes be made (and, more importantly, *should* be made) between actions that benefit only the public official and actions that — although perhaps not for the good of the public as a whole — clearly do not benefit the official personally (but perhaps her specific group or class). Even if such distinctions are often hard to make, ignoring them altogether means that we would have to give up on the hope of curbing our representatives' power and would have to submit to their claim that everything they do is for the good of the voters.

The fact that political participation and democratic representation are processes that entail some degree of a mixture of personal interests and collective ones does not mean that it is impossible to distinguish between levels of "personality" and "publicity" of the interests involved. Indeed, the task of this critique (and of critiques in general) is to expose not merely the impossibility of permanently fixing the meaning of various political (or other) activities or offering determinative criteria for such an endeavor, but

75 Hills, *supra* note 2, at 126.

76 *Id.* at 126-27.

to insist that such an endeavor is perpetual and worthwhile. It seems futile to replace one dubious test for another, no-less dubious test. If indeed federal officials have no special knowledge of what should count as corrupt, why assume that state and local officials possess such special knowledge?

If we take Hills' radical challenge seriously — and I think we should — it is imperative that we not settle for the mild "correction" that he offers (federal enforcement of anti-corruption laws is justified only when it clings to state rules or is submitted for scrutiny to the Department of Justice). A constant and perpetual examination (one that cannot cling to formal tests or mere prophylactic rules) of our representatives' claims to represent "our" interests rather than their own should be the answer to the corruption of the political process; and this scrutiny should not be limited to the federal government but also extend to localities and states. Hills explains why we should not base this scrutiny on the shaky and abstract distinction between private and public interests, and here he is partially right. Too often, public officials who claim to represent a group interest serve only some small fraction of that group; claims to represent the public interest are frequently mere rhetoric covering up personal or narrow group interests.

But contrary to what Hills argues, federal deference to state laws (or to the expertise of the Department of Justice) is not the solution, since federal standards or enforcement is not the entire problem. To be sure, federal bureaucracy is part of the problem. It is inaccessible, as Hills shows, and, worse still, has the power and means to influence and shape public consciousness and views about politics, corruption, and participation. Since lack of popular awareness and lack of information are, at least to some degree, the source of citizen apathy, we need to think of more radical measures that would counter the domination of a select few over the sources of information, such as the media and the central bureaucracy (which, according to Hills, is highly salient and manages to attract public attention). That is, the problem is not only related to federal standards that cripple local participation by actively oppressing local democracy but also to federal failure to encourage participation at *all levels of government* (local, state, or federal) and to counter capture and apathy wherever they exist. Transforming federal bureaucracy is thus crucial for increasing and strengthening *local* participation, and Hills' dichotomous vision that allocates participation to non-federal levels and bureaucracy to the federal sphere only sanctifies this deeply flawed status quo.

Lastly, I would like to comment on an element of Hills' critique of the public-private divide that delves deep into the nature of the human subject. Hills argues that since politics requires its participants to mingle

their private interests with the good of others (say, their voters or identity-group), prosecuting public officials who benefit themselves is ridiculous and anti-political: it misses the point that in politics the private and the public are fused. That the self in general (and not only in politics) is probably more fluid, de-centered, and lacking in clear boundaries (between itself and its family and/or community) than the classical liberal idea assumes has become a truism, well-accepted in many fields of human science. And though this insight suggests a blurry line also between self-interest and the interests of others — be they individuals or groups — it does not entail complete despair from judging what is good for oneself and what is good for others. Thus, Hills' gloom is a product, once again, of confusion between global critique and concrete critique: though it is true that the self is not entirely distinguishable from its surroundings, to ignore the separation between the self and the other (and, hence, also between self-interest and the interests of others) risks condoning manipulations of the self-other divide by those who claim to "represent" while actually promoting only themselves. Moreover, Hills' hopelessness is also a result of his extreme privatized conception of politics and public life, since according to his approach, no interest is ever truly public.

CONCLUSION

Several years ago, Hills argued that difficult choices have to be made between participatory democracy and inclusive democracy: if we want to advance participation we need to allow localities to include only a limited amount of people in their territories and condone local homogeneity and parochialism, and prohibiting such exclusionary practice would inevitably dilute participation.⁷⁷ In the present article, he implicitly suggests, however, that these difficult choices can be avoided: states and large cities, we know, are diverse and non-exclusive, and yet for Hills they remain as participatory as a small town at least in the sense that they deserve the same level of protection from federal anti-COI invasion. This contradiction is not a result of a profound shift in Hills' thinking. Rather, it reflects an ambivalence — shared by many other local government scholars — about the true value of localism: Community self-determination or economic efficiency? Protecting minorities or in-person participation? Does it depend on small size and

⁷⁷ Hills, *supra* note 40.

exclusion or, perhaps, on heterogeneity and autonomy vis-à-vis some larger political sphere?

Hills seems to offer a one-dimensional answer — grouping states and cities together — according to which participation (narrowly defined) is the main virtue of both types of sub-polities. However, in the absence of convincing empirical evidence and substantial normative grounds, it remains unclear why federal enforcement poses a threat to rather than assists in-person participation and, more importantly, the creation of an educated and involved citizenry. Focusing on a formal and crude criterion such as lay participation in politics rather than on more subtle and substantive considerations, such as participation of minorities and the poor in politics, the type of public position involved, and the important question of whether we want officials to mix their private interests with public ones, risks harming local democracy more than it would protect it.

Hills' article should be read as an attempt to contribute to the important debate as to whether — and in what way — sub-polities (such as states and localities) within a large polity contribute to the well-being of citizens. Curbing federal involvement might be, at times, a good vehicle for improving non-federal democracies, but justifying it by referring solely to the *belief* in in-person participation as the primary means for turning citizens into political creatures is a little farfetched. If we want to help non-federal democracies work and if we want our citizenry to be involved and political, we have to begin formulating more-affirmative instruments that can help localities (and states) regenerate their democracies.