The paper has three parts. First, from Hegel’s discussion of the question “Who is to frame a constitution?,” a distinction is introduced between two concepts of a social context for action, one atomistic and the other holistic or moral (geistig).

In the second part, the Hegelian notion of a “spirit of the nation” is explained by reference to Montesquieu, who introduced a social concept of institution, as opposed to a merely political one, when he has pointed out that legislators could establish laws, but that they could not establish manners and customs.

In the third part, the question is raised whether a group of individuals could establish an institution by an act of collective commitment. It is argued that the exercise of instituting powers requires that an institutional context is already given.
I. Social Forms of Life

1. “Who is to frame the constitution?”

Let’s start with comments made by Hegel on a classical topic of political philosophy. In a remark added to §273 of his Philosophy of Right, Hegel considers a question which has generated a lot of discussions among political theorists: “Who is to frame the constitution?”

As is well known, Hegel does not give any answer to that question, he just dismisses it as meaningless. His argument is couched in the form of a dilemma. Indeed, one can think of two possible situations in which such a question would seem to arise, depending on who is supposed to be given the constitution. In both cases, it will be shown that the question does not arise.

In the first situation, it would be a matter of framing a new constitution for a nation already existing in the form of a constitutional State. But, in that case, the answer to the question is already given in its present constitution. In order to get the answer, we just need to look at the section dealing with the constitutional means to modify or amend the constitution.

In the second situation, the task would be to give a constitution to people who, up to this day, did not have yet any kind of political organisation. These people are not yet members of a political body. Could they become citizens by receiving a constitution? Hegel thinks the question does not make sense. He thinks that you can’t give a constitution to a bunch of people, because these people are just an “atomistic heap of individuals” (ein bloßer atomistischer Haufen von Individuen), which means they don’t exist as a group.

So Hegel invites us to ask about the social life of these individuals who are to be given a constitution. What kind of social group is here the intended beneficiary of the gift? And then the question arises whether the people to be given a constitution do already have a collective identity or not. If they don’t, they are what the Scholastics would have called a multitud, a mere multiplicity, lacking any sort of moral unity. (I am taking “moral” in the sense of geistig, as in “moral sciences.”) But we suppose here that the multiplicity we are considering is deprived of any sort of unity: it cannot express itself, it cannot ask to be given a constitution and it cannot acknowledge that it has been given one. Hence there is no way one could frame a constitution for these individuals.
In other words, a people in the sense of a nation is already a \textit{constituted} entity, even if it is not yet a \textit{constitutional} state in the modern sense of a nation possessing a written constitution. Members of a nation already have their own \textit{politeia} insofar as they form a political community endowed with the means to express a common or general will. And this is why the question “Who is to frame the constitution?” is meaningless. Constitutions cannot be given from outside, they can only be amended or developed from inside the social life of a group. Hegel concludes a little further at §274: “every nation has the constitution appropriate to it.”

Hegel’s point about the giving of a constitution was of course loaded with many implications within the political context of his time. As a matter of fact, we know from the \textit{Zusatz} to §274 that he was thinking in particular of Napoleon trying to impose a “rational” constitution on the people of Spain. Now, behind the political point, there is also an insight in the ontology of social forms of life, as can be inferred from his description of people deprived of any kind of political unity as forming an “atomistic heap of individuals.” Hegel’s reasoning is based here on an important insight in social philosophy. I would put it like this: our use of the adjective “social” is often confusing because there is not just one notion of sociality—meaning just one notion of what it takes for an agent to act in a \textit{social} context. In Hegel’s terms, one should distinguish between an \textit{atomistic} conception of sociality and a \textit{geistig} one, or, as I will say, a \textit{moral} one.

According to one view predominant in modern philosophy, all it takes for a context to be social is that at least two individuals be present and somehow interact. Let’s call this notion of sociality the \textit{Hobbesian} or \textit{Weberian} form of sociality. I am thinking here of Max Weber’s example of two cyclists on a narrow track. They are heading for collision unless at least one of them gets out of the way of the other. If they collide by pure accident, we may consider it a natural event. If they avoid the collision by their cooperation, it is a \textit{social} event, since the behavior of each of them is to be understood as guided by a thought about the behavior to be expected from the other. On that view, one could say, an individual is acting or behaving in a social context as soon as he is aware of the presence of other individuals. Sociality means basically that the agent knows he is not alone. Social life begins with the intrusion of a second individual or, as a phenomenologist would say, with the \textit{Alter Ego}. Robinson Crusoe meets Friday: this is the paradigm of an emergent sociality.
What is striking about sociality conceived in the Weberian fashion as a relation of dependency between individuals resulting from their continuous interaction is that it does not require that societies as such exist. Individuals can have a social life without belonging to groups, let alone being aware that they share a collective identity with other people. According to Hegel, that is indeed the reason why they cannot give to their interaction the form of a political organisation. Let’s now turn to the Hegelian form of sociality. Hegel holds the view that plurality of individual agents plus interaction between them are not enough to yield the social life of a people (in the sense of a Volk). Something is still lacking, namely a moral unity. Political theorists who reflect on the task of making a constitution are not aware of that lack because they have, according to Hegel, an “abstract” way of thinking. What does that charge of abstract thinking amount to in our context?

Hegel insists on the fact that a constitution is not something to be made or manufactured. It should not be thought of as a construct or a product designed by somebody. Bringing together the two propositions 1° that a constitution cannot be given and 2° that it is not something made, one could explain the mistake made by a priori donators of constitution by pointing out that they believed they could identify the people to be given a constitution apart and independently of the constitution to be given. It would be so if the constitution were a mere device to be used by people in order to regulate their interactions. In that case, the relation between the group of people and its constitution would be instrumental. Hegel’s position is that the relation between the group and its political constitution is expressive: the constitution is not an instrument used by the people for political purposes, it is the very expression of the people, of what they think of themselves, of their self-consciousness.

(In speaking of an expressive relation between the group and its constitution, I am drawing of course on Charles Taylor’s presentation of Hegel as a spokesman for expressivism. Among the tenets of expressivism, I need only to mention what Taylor has called the “principle of embodiment.” According to the principle of embodiment, mental life is not something to be perceived by introspecting internal data, it is something we become aware of when we try to understand the way we express ourselves in various mediums. And it is very much to the point to observe here with Taylor that this activity of articulating our meanings “takes place, not only in concepts and symbols, but also in common institutions and practices.”)
No collective identity for a group without a common will. No common will without the expressive resources to manifest such a will. Therefore it is impossible to say to whom a constitution is to be given without referring to a group already in possession of the kind of constitution which is appropriate to it.

But at this point, we need to answer the charge that Hegel has only exchanged one mystery for another one. Hegel made fun at §273 of the idea of making a constitution for a bunch of individuals. But his argument seems to prove too much, since now it becomes impossible to understand how constitutions come into existence.

2. Hegel’s Paradox of the Transcendent Rule

Hegel writes in the same §273:

It is absolutely essential that the constitution should not be regarded as something made (als ein Gemachtes), even though it has come into being in time. It must be treated rather as something simply existent in and by itself, as divine therefore, and constant (als das Göttliche und Beharrende), and so as exalted above the sphere of things that are made (über der Sphäre dessen, was gemacht wird).

Is Hegel asking us to apply a double truth doctrine? On the one hand, we know that the constitution has been brought into existence by human beings. Historians can even tell us about the laborious preparatory works the constitution went through and the conflicts it gave rise to during the time of its gestation. On the other hand, we should not think of it as something we made, it would be the mark of a lack of respect. Or so Hegel seems to be saying when he calls the constitution “divine.” How are we supposed to treat the constitution as something transcendent (existent in and for itself, beyond time) while we know it has been made? How can the constitution be already there before having been brought into existence? This seems to require on our part a consent to a kind of self-inflicted delusion.

Now one could say that we should not be surprised to find intimations at mystification in Hegel’s Philosophy of Right. Is not the book well known for having given a mystified account of the State in its relation to society, as was argued by the young Marx?
Well, is Hegel telling us to forget the fact that constitutions are historical entities, that they have a date and a place of birth? Obviously not. His objection to the *a priori* framing of constitutions is precisely that nations have a history. So what is at stake here is not any desire to play down the historical dimension of political institutions. Then what is at stake? It is, I am going to argue, the kind of sociality that is needed in order to put any kind of explicit rule into effect.

I don’t want to deny that we have the *appearance of a paradox*. Indeed Hegel himself does not seem to be doing anything to avoid looking provocative in his speculative style. Nevertheless, I think the idea that a constitution comes into existence in time through human activities *without having been made* is both profound and illuminating. In the same line of thought, one is reminded of what Wittgenstein has written about the difficult task of giving a philosophical account of rules, how they exist and how they have a place in our lives:

> A rule *qua* rule is detached, it stands as it were alone in its glory; although what gives it importance is the facts of daily experience.

> What I have to do is something like describing the office of a king;—in doing which I must never fall into the error of explaining the kingly dignity (*Würde*) by the king’s usefulness, but I must leave neither his usefulness nor his dignity out of account.

Indeed, I am suggesting we could read Hegel’s argument about the making of a constitution as bearing on any kind of social rule, not just on constitutional rule. A social context is needed for people to have common rules, and a mere plurality of agents would not provide such a context.

3. **Hegel’s way out of the Paradox**

Hegel thinks he can overcome the contradiction of an entity like the constitution having both an immanent and a transcendent status by bringing in the concept of a *Volksgeist*: there is no *nation* without a *spirit of the nation*, no *Volk* without a *Volksgeist*.

At §274, Hegel explains why “every nation has the constitution appropriate to it.” He writes it is so because the state is “the mind or spirit of the nation” (*der Staat als Geist eines Volkes*). As such it has a dual ontology. First, it exists
as the law governing the political relationship between the parts of the state. Second, the state is also “the manners or customs and the consciousness” of the individuals belonging to it (die Sitte und das Bewußtsein seiner Individuen).

What are we to make of that explanation? I would like to argue, following a line suggested by the anthropologist Louis Dumont\(^5\), that Hegel is using the vocabulary of political philosophy to describe both the political institutions of a nation and the social preconditions for these particular institutions. The words “state” and “constitution” have a reasonably well defined use in political thinking. When they are so used, they have sharp criteria of application. For example, a constitution will be conceived as a written document stating the rules of a form of government. Either there is such a document organising the political relationships within the state, or there is not. Thus being a constitutional state is a matter of all-or-nothing.

Now Hegel is using the same words “state” and “constitution” in a broader sense. He maintains that any group with a genuine collective identity will have some degree of self-consciousness, since the unity of a group is a moral unity. Among human groups, constitutional states have the highest level of self-consciousness, since they are able to express it in the form of political statements. But what is expressed in the written constitution is precisely the “spirit of the nation,” something which exists also in “the manners or customs and the consciousness” of the individuals. The way a group expresses its general or common will might not be “constitutional” in the restricted sense of being in conformity with a written document called “the Constitution.” Nevertheless, such a group is able to make clear to other groups what it accepts or what it refuses, which implies it has the expressive resources to manifest a kind of sovereignty. Therefore, being a state and having a constitution become a matter of more or less. There will be degrees of constitutionality, as there are degrees of self-consciousness. So the people of Spain are not a constitutional State (in the sense of having a written Constitution), but they are not a bunch of individuals either, since they have the means to express a common will against the French invader and Napoléon’s will to bring them rationality from above. In this respect, they have a political unity, which is a matter of having common fundamental “laws” implicit in their common mores.
4. The Volksgeist

The characterisation of the state as being a Volksgeist will not explain anything if one takes the word “Volksgeist” to name an entity endowed with active powers, precisely those powers individuals are lacking. On such an interpretation, the Volksgeist would enter on the stage as the real maker of the constitution. Thus, when Hegel writes that the constitution is not something made, he would just mean: not made by people like us. In fact, the constitution would have a maker, although a superior one, both existing within our history (therefore immanent) and using individual agents to achieve its goals (therefore transcendent). But such a view of the Volksgeist as a superagent does not square with the explanation Hegel gives at §274: the state, as the spirit of a nation, is both the law and the customs. Neither the law nor the customs can be turned into an active agent.

At this point, it might be helpful to turn to another thinker, Montesquieu, who is of course one of the sources of the very notion of Volksgeist. Montesquieu’s work, wrote Hegel, is exemplary as an application of the general principle: the part should be considered in its relationship to the whole. But the relation between a state and its political constitution is precisely a whole/part relation: a global society finds its expression and its self-consciousness (or collective identity) in its laws or political institutions. And this is why it is in fact impossible to identify the group independently of its institutions, or the political institutions of a nation independently of the totality of its customs and established ways of acting.

II. The Concept of Institution

Book XIX of The Spirit of Laws is about the general spirit of a nation. The complete title goes like this: “Of laws in relation to the principles which form the general spirit, the morals, and customs, of a nation.”

What is the reason for bringing together these various items: laws, morals, customs? Montesquieu has given an illuminating answer to that question in his Defence of the Spirit of Laws. He wrote that Defence in order to defend himself against the accusation of being a dangerous writer because of his opinions about religious matters. Montesquieu made the point that he was not writing as a theologian. Rather, he was writing as a political writer.
Nevertheless, he had to include in his object of study religious rituals and beliefs precisely because he was considering nations in the totality of their established ways of acting and thinking. We might say today that he had adopted the point of view of a cultural anthropologist. This is how he describes the dimensions of his object of study:

[…] the objects of this work are the Laws, the various customs (coutumes), and manners (usages), of all the nations on earth. It may be said, that the subject is of prodigious extent, as it comprehends all the institutions received among mankind. (Defence of the Spirit of Laws)

And this is why he had to give an account for rituals, since religions are among the various institutions forming the “general spirit of a nation” (EL, XIX.4). This is particularly clear in his treatment of the Chinese institutions. In Book XIX, chapter 19, Montesquieu explains that the Chinese rituals, laws, morals (mœurs) and manners form a unity because they have the same finality. The point of Chinese laws, he says, is to keep the Empire peaceful and orderly. The Chinese way to achieve that goal is by inculcating respect for the older parents. So, writes Montesquieu, the Chinese legislators “established an infinite number of rites and ceremonies to do them honor when living, and after their death.” Actually, the respect for the parents after their death is the basis for all other kinds of respect: for the living parents, for the older, for the authorities, for the Emperor. Montesquieu points out that all these ceremonies and rituals are just but one code.

The ceremonies at the death of a father were more nearly related to religion; those for a living parent had a greater relation to the laws, morals (mœurs) and manners (manières): however, these were only parts of the same code (…) (EL, XIX.19)

I have quoted these passages about China in order to make a point about Montesquieu as a philosopher. He presents himself as a “political writer,” in other words as a political philosopher. Indeed, the political point of view he has adopted is manifest in the very title of his masterwork. A political philosopher deals with human affairs from the perspective of a legislator. But Montesquieu, like Hegel after him, is aware that legislating requires a social context in the sense of a moral or geistig context. And here the conceptual limitation of a purely political perspective becomes manifest. From the point of view of the philosopher as legislator, all varieties of social normativity are
to be subsumed under the heading of legislation. Therefore, it will be difficult to avoid the paradox of having to legislate on the preconditions for legislation itself.

When Montesquieu describes the spirit of Chinese laws, he speaks of the Chinese institutions as forming one single code devised by wise legislators. And that is precisely the way one is going to speak when seeing the matter from a political perspective. But of course the question “Who framed the Chinese code?” is meaningless. And Montesquieu is not really explaining the wisdom of the Chinese code by the wisdom of its makers. He is pointing out that all these institutions have a meaning, that they manifest a common intention or spirit, the same way written laws manifest an intention or a spirit. But the idea is not that all institutions are laws. It is that laws are just one kind of institutions among others.

Montesquieu distinguishes generally between three kinds of norms: the laws, the morals (mœurs) and the manners. The difference between them shows up in the way they have been established. Montesquieu writes:

Morals and manners are those habits (usages) which are not established by legislators, either because they were not able, or were not willing, to establish them (EL, XIX.16).

In some cases, legislators did not establish the morals and manners because they did not care about them. But, in other cases, they did not have the instituting power to establish anything in the domain of collective habits. So Montesquieu provides us with a criterion for differentiating the world of social norms: there cannot be a legislation without a legislator, but there are other kinds of norms that have been brought into existence in an impersonal way since no legislator would have been in a position to edict them.

Montesquieu draws a political lesson from his tripartition of institutions:

We have said that the laws were the particular and precise institutions of a legislator, and morals and manners the institutions of a nation in general. From hence it follows, that, when these morals and manners are to be changed, it ought not to be done by laws; this would have too much the air of tyranny: it would be better to change them by introducing other morals and other manners (EL XIX.14).
Hence this maxim: a prince should reform by law what is established by law, and change by custom what is settled by custom. Thus, and this is Montesquieu’s example, it was a mistake, on the part of Peter the Great, to edict laws against the traditional Russian dress: boyards were under the legal obligation to cut off their beards and to wear Western kinds of cloaks instead of the good old ones. Montesquieu says it would have been wiser and more efficient to change manners by the way of fashion.

One could express the distinction between a classical political account of institutions and a social account in the following way. The political perspective on laws and customs is a personalist one, since it is the point of view of the supreme legislator, whereas Montesquieu’s social approach is an impersonalist one. When we take the political point of view, we understand a social form of life by moving back from the meaning of the law to the intention of the legislator. But when we take the social point of view, we acknowledge a priority of “general institutions” such as customs over “particular and precise institutions” such as laws. In other words, we recognise that the impersonal or “objective” spirit (to use a Hegelian terminology) has a primacy over the personal or “subjective” spirit.

### III. Collective Identity

One could object to my whole argument that we are not stuck with an exclusive alternative between the personal way of a legislator and the impersonal way of “l’esprit général d’une nation.” Obviously, there is a third possibility, namely the collective intentionality of several individuals acting together. This seems to be the right way to reconcile the personal aspect of the act of legislation and its collective dimension.

Such a personalist account of institutions in terms of collective intentionality has been developed recently by John Searle, and I will now make some comments on it.

John Searle has drawn an ontological characterisation of institutions from an observation about the life span of rules. Sociologists have pointed out that institutions are not like material tools in respect of utilisation. Material objects get worn out as we use them. What about institutional objects such as banknotes? Here, one will have to distinguish between two possible ontological
categorisations of a bank-note. It is first a material object like any other. As such, it is a piece of paper and it has the natural powers of a bit of paper. The more we use it, the more it will deteriorate. As some point, it will be necessary to replace it by a new bit of paper. But the bank-note has also the institutional power of a monetary instrument. These powers do not result from the physics of the piece of paper, they are imposed by us upon the material object. The more people use bank-notes, the more they reinforce the institution of money. Thus Searle concludes that, since the institutional functions are a matter of convention, not a matter of natural powers, “each use of the institution is in a sense a renewal of that institution.” And it is a renewal of the institution because it is a “renewed expression of the commitment of the users to the institution.”

According to Searle, the fact that institutions get renewed by constant use confirms the validity of a thesis he wants to maintain concerning the ontology of institutional facts, namely that in this domain we have to acknowledge a priority of process over product or a primacy of the act over the object. That thesis is of course a strong assertion of the personalist outlook on institutions and rules. The institutions are depending for their existence upon the personal commitment of the users.

It is worth mentioning here that Searle has held successively two distinct theories of institutions, the first one in Speech Acts, the second one in The Construction of Social Reality.

In his first theory, Searle is interested in institutions as providing a context for speakers. Within the relevant context, producing a particular sequence of noises will amount to performing a particular act of speech, for example an act of commitment. Such contexts are institutional. As a paradigm of an institutional behavior, he mentions the ceremony of marriage. “It is only given the institution of marriage that certain forms of behavior constitute Mr Smith’s marrying Miss Jones” (p. 51). Drawing on Wittgenstein’s analogy of language games as defined by autonomous rules, Searle defines institutions as “systems of constitutive rules.” Then he gives the general formula of such constitutive rules: “X counts as Y in context C.” For instance, X will designate a bit of paper with the natural powers of a bit of paper, and Y will designate a bank-note with the conventional powers of a bank-note. The institution of
money makes it possible to use bits of paper produced by the monetary authorities as monetary means of payment.

In his book on speech acts, Searle does not give any account of the emergence of institutional contexts. They are taken as given. One might think there is here an unfinished business. The general form of constitutive rules does not say anything about their historical origin and their perpetuation: when and how did they come into effect?

That is no longer the case in his book on *The Construction of Social Reality*. Searle is now eager to demystify the ontology of institutional entities. Marriages, governments, bank-notes, languages are not self-sufficient entities like natural objects. They would not exist without us. But, as we already saw, they are not like material tools either. Books, hammers and houses would not exist without us in the sense that they don’t grow out of the soil by themselves. However, once produced, they are among the inhabitants of the material world, at least until their natural deconstruction. But institutions need to be *renewed* by people achieving their goals within the contexts they provide to these people.

The general formula for explaining institutions as constitutive rules is now a scheme for the *creation* of institutions. In his new account of institutions, Searle acknowledges the primacy of acts over objects. Therefore the formula he is offering now is a *personalist* one, I mean a formula in terms of personal powers (natural or conferred). There are just two possibilities. First, an agent called S can exercise natural powers, such as the physical power to lift a stone. Second, the agent S can exercise conventional or institutional powers such as the power to come into possession of our goods by giving small bits of paper in exchange: but he can do that if and only if we accept to take his bits of paper as having monetary powers, that is institutional powers. The general formula is then:

We collectively accept (S has power (S does A)).

In other words, S would not be able to buy our goods if we did not collectively renew our commitment to the institution of money. By accepting his money, we recreate the institution. Therefore the users of an institution are the real holders of the instituting power. And the question arises then: what is the identity of the “we” in “We collectively accept”? Who are the users?
What is the point of stressing the fact that our acceptance is collective? According to Searle, collective acceptance of a rule is a species of collective intentionality. As a matter of fact, the sociality of the “We intend” can be either distributive or collective. It is here a matter of disambiguating a sentence such as “Both of us have the same intention.” Suppose that the intention in question is to win the election in which you and I are in competition, then the meaning of “we” is distributive, since only one of us could be elected. Whereas our intention is collective when neither of us can have the intention without other members of the same group having not just a similar intention, but the very same intention. In such a case, we attribute the common intention to the group itself or to its members taken collectively.

The distributive “we” is the grammatical person we need to express interactions taking place within an atomistic form of sociality, provided that it makes room for intersubjective “conventions” (in the sense of David Lewis). For example, Max Weber’s cyclist A is able to anticipate the movements of cyclist B and to say to herself: unless I move to the right, we are going to collide.

The collective “we” is needed as soon as we mean the context of our action to be social in the moral or institutional sense. And Searle made clear that the generative formula he has offered requires the “we” of “we accept” to be the collective one. My query will be then: how can we conceive a collective subject as being an instituting subject, a subject exercising instituting powers?

One is reminded here of a story told by Herbert Hart in his book *The Concept of Law*. That story is intended to illustrate the fact that legislators and legal authorities are powerless when it comes to generate an institution in the sense of an established way of doing things involving standards of correctness. The story—perhaps apocryphal, says Hart—goes like this: “the headmaster of a new English public school announced that, as from the beginning of the next term, it would be a tradition of the school that senior boys should wear a certain dress.” Hart comments on the logic that lies behind the comic effect of the story: it is logically impossible to bring into existence a tradition by a mere *Fiat*. The headmaster is saying *in the future tense* what will be the traditions to be observed next term. And that is not supposed to be a prediction, but a choice. So the comic effect supposes an element of snobbery: the schoolboys will be required to observe a dress code as if their school were not a *new* public school but an old one, rich in traditions.
One could say: it is impossible to make a tradition, exactly in the sense in which Hegel maintains it is impossible to make a constitution. Traditions do not belong to the “sphere of things that are made” any more than political constitutions.

Now, Searle is not open to the charge of believing that institutions or traditions can be made by a Fiat! since he draws his formula from a scene of acceptance, not from a scene of authoritarian legislation. Thus, the instituting power does not belong to the headmaster, it belongs to the generations of schoolboys. But suppose now that one of the boys expresses his consciousness of partaking in the creation of a tradition in saying something along the formula:

We collectively accept (the headmaster has power (the headmaster legislates)).

What kind of collective identity is required for this “we” to be the instituting we? Linguists have pointed out an important distinction between two possible meanings of “we.” The person I am addressing may be included or excluded from the plural subject I am expressing by means of “we.” In some languages, there is a distinct form for expressing the so called exclusive “we,” as opposed to the inclusive one. The distinction in question is nicely illustrated by the anecdote of the missionary in Africa. That missionary is trying to address his audience in their language. But he is not aware these people have two words for the plural of the first person. And unfortunately, as he tries to convey to them the meaning of the English sentence: “We are all of us sinners, and we all need conversion,” he uses the word signifying “we and my people to the exclusion of you whom I am addressing,” which destroys the whole point of his preaching.13

Let’s consider whether the instituting “we” is the inclusive one or the exclusive one. From the point of view of a linguist, the question to be asked is how a single speaker will make up a “we” out of his (her) own person plus other persons. These other persons can be taken among the present participants in the collective act of speech—which will yield the inclusive “we.” Or they can be found outside the present audience.

Suppose now that the speaker tries to form an inclusive “we.” That would amount to making a proposal to the audience: do you accept to be included in the acceptance of the institution? Such a proposal of acceptance is restricted
to the persons present at the scene of the speech act, namely to the very persons who could disagree and express their refusal to be included in the “we.” Now, of course, we want the present acceptance of bank-notes to be a commitment to the future use of these pieces of paper. However the people who are using the inclusive “we” to express their “We accept” do not say anything about what will be accepted tomorrow. Will the bank-notes be accepted tomorrow? Will they be accepted within the whole community and not just by the present individuals? Will there exist tomorrow the same institution of money? That is not something we can decide right now by a collective act of legislation—unless we take for granted that the future users of the institution are already in agreement with us. In other words, we want the subject of the institution to enlist future users. And this is not possible when using the inclusive “we.”

By definition, the future users are not present with us to take part in the acceptance of the institution. Of course, the future generations are not present if they are still to be born. We, the living users of the institutions, have to speak for them, as we do for our dead ancestors. But, and this might be more important from a philosophical point of view, we are also speaking for ourselves in the sense of expressing in advance our future acts of acceptance and commitment, acts that are still to be performed by us. One could not argue here that the present protagonists can at least undertake commitments for themselves as to what they will accept in the future. Of course, we can commit ourselves, but we can do it given the appropriate institutional context. Otherwise, we would just express our intention to be committed in the future. But expressing the intention of being committed is not the same as committing oneself by the appropriate speech act. In order to commit ourselves as future users of the institution, we have to rely on the fact that we are provided with an instituting power by the institutional context of our customs.

And that gives me my conclusion: we cannot be exercising an instituting power without taking ourselves to have been instituted as a “we.” We cannot just institute ourselves into our instituting powers. Therefore, one has to acknowledge a primacy of the impersonal way of establishing institutions over the personal one. Or, to put it in Hegelian vocabulary, a primacy of the objective spirit over the subjective spirit.
Notes

1 Hegel explains that the French word “moral” is the equivalent of what the German mean by geistig (Enzyklopädie, §503).
6 Philosophy of Right, §261.
7 C. Montesquieu, De l’Esprit des lois (1748), quoted EL. I have used (and sometimes corrected) an English translation (1777) to be found on the Online Library of Liberty (Liberty Fund, Inc.).
9 Ibid., pp. 56–57.