

**Majority Rule and the *Federalist Papers*:  
Democracy, Equality, and Constitutionalism**

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## I. Introduction

A constitution purporting to establish a limited government invites the question why the political power constituted should suffer any constraint. The *constitution* of the political order declares the legitimate method for focusing the will of the community into decision and action, while the *limitation* immediately undercuts the claim that this method necessarily renders legitimate those decisions and actions that follow. There may be any number of ways to reconcile these competing tendencies, but at least on the surface the limited constitution seems to be at war with itself.

The tensions between the claim for legitimate empowerment and legitimate limitation are easy enough to see when a constitution on its face forbids or conditions the actions of the political authorities it establishes. In contemporary American discourse, the tension has been highlighted most clearly in discussions of judicial review of the actions of elected officials.<sup>1</sup> But the tension would presumably remain even if there were no judicial review, for elected legislators chafing under self-policed constitutional limitations might still wonder why, to borrow Alexander Bickel's words, the "mystical" view that the constitution represents the "will of the people" should be held to constrain the "the will of representatives of the actual people of the here and now."<sup>2</sup> Thus it is not only judicial review, but limited government itself, that trammels the people's representatives, and to that extent is "a deviant institution in the American democracy."<sup>3</sup>

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<sup>1</sup> The classic statement of this problem remains, of course, ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16-23 (2d ed. 1986).

<sup>2</sup> *Id.* at 17.

<sup>3</sup> *Id.* at 18. This point is often characterized as a conflict between democracy and liberalism (the latter understood as a commitment to various rights against the government). The literature on this supposed conflict is enormous; for two influential philosophical discussions, see Jurgen Habermas, *Reconciliation through the Public Use of Reason*, in *THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY* 49 (1998); John Rawls, *Reply to Habermas*, in *POLITICAL LIBERALISM* 372 (2d ed. 1996).

Deviance requires a norm from which to deviate, and the suggestion of skeptics of judicial review (and, though they do not necessarily see themselves this way, of limited government) seems to be that the American political order has at its root a commitment to democracy expressed through majority rule. This commitment, after all, is what makes “the counter-majoritarian difficulty” difficult.<sup>4</sup> Thus the United States Constitution seems to embody a Manichean opposition between democracy (understood as majoritarianism) and constitutional limitation (counter-majoritarianism).

This view, and the odd conclusion it engenders that limited government is actually *deviant* in the American constitutional order, suffers from too uncritical a view of majority rule itself. For even when stripped of bicameral and inter-branch bells and whistles, majority rule is much more than an empty vessel for revealing the already extant “will of the people.” As we shall see, majority rule is itself a stylized representation of “the people,” a highly formal device that does not merely reflect the people, but disciplines and shapes it—or, less “mystically,” it shapes *them*. If elements of judicial review can be “counter-majoritarian,” so too may majority rule be “counter-demotic” in its own way.<sup>5</sup> In the terms laid out above, the *constitution* of the political order through majority rule is itself a particular *limitation* on the vitality and authority of the people. This remains true whether or not the constituent document includes any explicit limitations on how the political authorities may act. The point is not to disparage majority rule or electoral democracy, but rather to resist the idea that majority rule is the

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<sup>4</sup> *Id.* at 16.

<sup>5</sup> I use “counter-demotic” to emphasize restraint on popular political influence and participation. I use this somewhat ungainly term rather than, say, “counter-democratic,” to avoid as much as possible any pre-judgment about exactly which legal forms do or do not constitute the “rule of the people,” that is, democracy. As we shall see, it is a very open question how compatible “counter-demotic” tendencies may be with “democracy.”

pure or natural expression of democracy, and thus that any institution that runs against the grain of majoritarianism is to that extent anti-democratic. To use Bruce Ackerman's terminology, we should be highly skeptical of majoritarianism's "mimetic" aspirations to perfectly and unproblematically represent the people.<sup>6</sup> Majority rule, limited government, and judicial review are all of a piece, to the extent that they are all part of the same project of "constitutionalizing" the people: organizing them into political forms that both enable and constrain in the service of certain political values. None of this is to say that judicial review and limited government are free of the various difficulties that Bickel and others have so thoughtfully considered. But we should not found our criticisms on a complacent attitude towards majority rule itself. Majoritarianism and counter-majoritarianism should both have a share of our skepticism and our solicitude.

Faced with the immensely complicated task of formally instantiating the popular will, the framers of the United States Constitution had a particular appreciation for the fact that simple majority rule was an imperfect method of representing the people. Accordingly, this paper examines the *Federalist Papers*—perhaps the most extensive and thorough public justification of the Constitution by men involved in its writing—in order to recover the understanding that majority rule is one political technique among many for realizing popular sovereignty. The aim is not to score points against the Founders by portraying them as "anti-democratic" by contemporary lights, though the ways in which the constitutional order—importantly, including electoral majoritarianism—shapes and constrains popular political action will be an important focus. The primary purpose instead is to use the *Federalist* to remind ourselves that "majority rule" does not define a natural, uniquely privileged form of democracy: constituting government is an exercise

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<sup>6</sup> 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 183 (1991).

of political technique, and necessarily involves difficult political choices. These choices and techniques not only reflect the popular will, but define it, and inevitably constrain it in one way or another. The project of popular definition and constraint through constitutional form may have the most salutary consequences, but it surely demands justification. And justification, after all, is what the *Federalist* means to provide.

The representational techniques detailed in the *Federalist* involve artifice, with all the connotations of the creative, the productive, and the synthetic—the non-natural—that term implies. This point becomes the more clear when comparing the theories expressed in the *Federalist* to other conceptions of popular rule. To that end, this paper compares the representational techniques of the Federalists,<sup>7</sup> and in particular the Federalists' attitude towards majoritarianism, with some alternative theories and practices of democracy in ancient Athens, and post-Revolutionary America. I do not mean to present an intellectual history of the *Federalist*, nor to establish a line of influence running from Greek or Antifederalist thought to Madison and Hamilton, though surely some such connections do exist.<sup>8</sup> Instead, my aim is to use alternative visions of democracy to highlight the particular political choices of the *Federalist* and of American constitutionalism more generally. Revealing those choices to be particular, rather than natural or self-evident, may in turn help us understand the political and intellectual

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<sup>7</sup> In this paper, I use the term “Federalists” as a shorthand for the authors of the *Federalist Papers*, and particularly James Madison and Alexander Hamilton, rather than as a broader reference to the proponents of the Constitution or members of the Federalist political party. I think the term nicely connotes unity of authorial purpose without prejudging the possible significance of plural authorship.

<sup>8</sup> On the American Founders' attention to Athens, see Jennifer Roberts, *The Creation of Legacy: A Manufactured Crisis in Eighteenth-Century Thought*, in *ATHENIAN POLITICAL THOUGHT AND THE RECONSTRUCTION OF AMERICAN DEMOCRACY* 81 (J. Peter Euben et al., eds., 1994). On the intellectual debt of the Federalists to the Antifederalists, their Whig forbears, and American political thought more generally, see GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (2d. ed. 1998).

commitments behind those choices, and thus to better understand majority rule as a constitutional means of representing the people.

This paper first proceeds in Part II to illustrate the extent to which majority rule, with its pre-scheduled voting and orderly counting, is a highly formal, structured mechanism for representing the people. A “one person, one vote” rule—not to mention regular elections, bicameral legislatures with highly complex procedural rules, and so on—imposes a discipline on “the people” that is not logically mandated by a commitment to democracy.<sup>9</sup> This disciplining feature of majoritarianism may seem invisible to us (unlike, say, the disciplining features of judicial review or the Bill of Attainder Clause<sup>10</sup>) because we have forgotten the possibilities of relatively formless democratic politics, variations of which were very much present in both ancient Athens and eighteenth century America. The disciplinary functions of majority rule may have its virtues—for instance, in combating that ubiquitous bugbear of the *Federalist Papers*, democratic “turbulence” and instability<sup>11</sup>—but the ordering principle may come at the price of a dampening of popular political activity and engagement. Indeed this is a price that the Federalists may not have been entirely unhappy to pay.

As a formal technique of representation majority rule shapes “the people” as it purports to represent them. This paper in Part III next inquires into the nature of the

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<sup>9</sup> By “one person, one vote,” I do not mean to invoke the “reapportionment revolution” of the 1960s. *See, e.g., Baker v. Carr* 369 U.S. 186 (1962) (declaring malapportionment challenges justiciable); *Reynolds v. Sims*, 377 U.S. 533 (1964) (holding that the Equal Protection Clause requires states to construct legislative districts of equal population). While the reapportionment cases involved complicated questions regarding the drawing of district lines, I mean only to refer to the more basic decision to value each individual citizen’s vote as equivalent within any given electoral district—and, implicitly, to limit more spontaneous forms of popular action that are not amenable to such counting procedures. To borrow language from the philosopher Jonathan Still’s influential work on kinds of equality in election systems, I mean to emphasize “equal shares” of votes rather than “equal probabilities” of casting a decisive vote. *See* Jonathan Still, *Political Equality and Election Systems*. 91 *ETHICS* 375, 378, 380 (1981).

<sup>10</sup> U.S. CONST. art. I, § 9, cl. 3 (“No Bill of Attainder or ex post facto Law shall be passed.”).

<sup>11</sup> *See, e.g., THE FEDERALIST NO. 10*, at 61 (James Madison) (Jacob E. Cooke, ed., 1961).

majoritarian mold by examining the social and political commitments that allowed the Federalists to conceive of majority rule as an appropriate mechanism for representing the people. In order to see why a sanguine view of majoritarianism may not be self-evident, I introduce the classical concern that majority rule in practice amounts to little more than self-aggrandizing mob rule—the concession of rational politics to the forceful threat of superior numbers. This ancient view found prominence in the English theory of “mixed government,” wherein each branch of government (in the English case, the House of Commons, the House of Lords, and the Monarch) represented one of the constitutive classes of society (the many, the few, and the one). The English had exported mixed-government theory to their American colonies, where it preserved the venerable vision of majoritarianism as *inegalitarian* to the extent that it broke the political balance by awarding control to the many at the expense of the equally deserving upper classes.<sup>12</sup> Surveying this backdrop allows us to appreciate the remarkable innovations that led the Federalists (along with other Americans) to view majority rule as a fundamental principle of free government, while helping us to understand the simultaneous ambivalence toward popular majorities that permeates the *Federalist Papers*.

Federalist support for majority rule, however conditioned, was a major innovation in that it signified a vision of classless politics, and thus a basic, if highly formal, egalitarianism among *individuals*, rather than classes. Fifty commoners could now directly outvote ten landed elites, rather than each group garnering a separate and equal representation in a house of the legislature.<sup>13</sup> This formal, individualist egalitarianism

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<sup>12</sup> On the American development and transformation of mixed-government theory, see WOOD, *supra* note 8, at 197-255.

<sup>13</sup> No discussion of the relationship between egalitarianism and majority rule in the *Federalist* would be complete without recognition of widespread American disenfranchisement—in particular, of slaves,

appeared palatable to the Federalists because they replaced the English view of society as constituted by rigidly defined *classes* with Madison's strikingly modern view of society as constituted by highly differentiated and highly fluid *factions*.<sup>14</sup> Majoritarian American government thus could conceivably represent "the entire body of the people themselves."<sup>15</sup> At the same time, however, the fear of mobbish politics and majority force did not completely subside in the *Federalist*, and thus the Federalists' constitutional project is consumed with protecting rational, deliberative politics against "excesses in the majority."<sup>16</sup> Notably, this concern is visible throughout the *Federalist Papers*, and emerges long before any discussion of judicial review.

The Federalists do not see themselves as building a political system that, on one hand, uncritically reflects the will of popular majorities and, on the other hand, restrains those majorities through constitutional limitation and judicial review. The *Federalist* reveals that majority rule itself shares many of the aspects we intuitively associate with constitutional limitations (judicially enforced or otherwise) such as the Equal Protection

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women, and the poor. Indeed, proper recognition surely requires more than a passing footnote. I bracket the disenfranchisement problem for now in order to keep as simple as possible the basic point in the text that majority rule involves highly tendentious, and by no means self-evident, attitudes regarding equality and society. As we shall see, the problem of disenfranchisement—and slavery in particular—is by no means a mere footnote to this proposition, but on the contrary illustrates it powerfully. See *infra* notes 98, 196, 213-14 and surrounding text. It may be worth noting here, however, that the federal Constitution itself disenfranchised nobody. See, e.g., THE FEDERALIST NO. 57 (James Madison), *supra* note 11, at 385 ("Who are to be the electors of the Foederal Representatives? . . . The electors are to be the great body of the people of the United States."); *id.* NO. 60, at 408-09 (Alexander Hamilton) (noting that the power to establish property qualifications for voting "forms no part of the power to be conferred upon the national government"); see also *infra* note 98 and surrounding text. For a discussion of debates over suffrage in the Constitutional Convention, see ALEXANDER KEYSAR, THE RIGHT TO VOTE 21-24 (2000).

<sup>14</sup> See generally THE FEDERALIST NO. 10 (James Madison) (elaborating theory of factional politics).

<sup>15</sup> *Id.* NO. 63, at 431 (James Madison).

<sup>16</sup> *Id.* NO. 70, at 475 (Alexander Hamilton). This phrase occurs in the context of *legislative* majorities, but the Federalist concern was only amplified in the context of *popular* majorities. See, e.g., *id.* NO. 10, at 61 (James Madison) (outlining the dangerous tendencies of a "majority of the whole" in the context of "pure Democracy").

Clause.<sup>17</sup> Majority rule embodies a set of choices that constrain popular action in favor of basic political values, such as order and a kind of equality in determining the outcome of a collective decision.<sup>18</sup> Majority rule is best understood not simply as a foil for “counter-majoritarian” constitutional constraints, but rather as itself a core part of an American constitutional project that aims to enable, channel, and constrain popular action. This is true even of the legislative and executive branches where we today believe “the public voice pronounced.”<sup>19</sup> The authors of the *Federalist Papers* understood that pronouncing the public voice is always something of a ventriloquist act, whether performed by “the representatives of the people” or by “the people themselves convened for the purpose.”<sup>20</sup> Majoritarianism is one such act, and it may be a good one. But that is no reason not to examine the dummy’s mask; to appreciate its craft; to recognize its flaws; or to forget the other masks laid aside, themselves partaking in something of the beautiful and the grotesque. And surely it is no reason to imagine that there is no mask at all.

## **II. Form and Formlessness: Majority Rule as Constitutional Discipline**

### *A. The Political Heisenberg Principle and the Construction of the People*

As I have suggested, Alexander Bickel’s critique of the “deviant” judiciary gains significant purchase because of the contrast with the supposedly concrete democracy of electoral representation. Bickel responds with significant skepticism to the arguments of John Marshall and Alexander Hamilton that judges engaged in judicial review merely

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<sup>17</sup> U.S. CONST. amend. XIV, § 1 (“No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

<sup>18</sup> On the egalitarianism of majority rule, see, e.g., JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999); Still, *supra* note 9, at 383-84.

<sup>19</sup> *Id.* NO. 10, at 63 (James Madison).

<sup>20</sup> *Id.*

govern themselves by the “will of the people” rather than the “will of the legislature.”<sup>21</sup> While not dismissing the point out of hand, Bickel contrasts this “abstract[]” view of the people represented by the judiciary with the “actual people of the here and now” represented by the legislature.<sup>22</sup> Judicial review (and, I suggested, constitutional limitation generally) is suspect because its representational claims are highly abstract, whereas legislatures and presidents claim an immediate connection to the actual “votes of a majority of the individuals in the electorate.”<sup>23</sup> This connection to the real flesh and blood people, rather than the “mystic[al] . . . people in the past,” renders “the policy-making power of the representative institutions, born of the electoral process . . . the distinguishing characteristic of the system.”<sup>24</sup> Claims of representativeness gain their credibility to the extent that they connect institutions to the *actual* people, with a minimum of metaphor and the *virtual* advancement of interests whose possessors are not present—a minimum of what Bickel, indeed, calls the “nonrepresentational.”<sup>25</sup>

Bickel’s dichotomy has intuitive appeal, but that appeal rests on his relatively uncritical acceptance of the existence of an “actual” people to which representatives may be unproblematically connected through the electoral process.<sup>26</sup> But “the people” for political purposes does not exist as a referent exogenous to the political ideals that underlie the concept of “people.”<sup>27</sup> To be sure, in any polity there are real, living human

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<sup>21</sup> THE FEDERALIST NO. 78, at 525 (Alexander Hamilton) (Jacob E. Cooke, ed., 1961); *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

<sup>22</sup> BICKEL, *supra* note 1, at 16, 17.

<sup>23</sup> *Id.* at 19.

<sup>24</sup> *Id.* at 17-18.

<sup>25</sup> *Id.* at 16.

<sup>26</sup> To be fair, Bickel is not completely uncritical on this point. *See id.* at 18 (acknowledging imperfections in the representativeness of the legislature). But he nevertheless maintains a strong dichotomy between the virtual representation of the judiciary and the actual representation of the “political branches.” *Id.* at 19-20.

<sup>27</sup> This basic point is made on the first page of an influential election law casebook. *See* SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, THE LAW OF DEMOCRACY 1 (Rev. 2d ed. 2002).

beings, but the political “people” will always be something of an artifice—a product of political choices about decision-making institutions—that inevitably remains somewhat metaphorical and thus to some extent (in Bickel’s terms) “nonrepresentational.” The “people” is subject to a political Heisenberg principle: it has no unproblematic existence apart from the means we use to measure that existence. This is true for majoritarian politics as much as for the abstract democratic politics that undergirds Hamilton’s defense of judicial review.

This discussion may seem highly abstract and needlessly allusive. A few reflections—some commonplace, some less so—may help illustrate the point that even the most simple and stripped-down majority rule constitutes a problematic representation. First, the commonplace: any majoritarian system (even one involving merely involving “the making of decisions . . . by a show of hands,” to use Bickel’s paradigm of simple democracy<sup>28</sup>) must start with asking the highly political and often problematic question, “a majority of what?” The basic need for a denominator in the majoritarian fraction immediately opens difficult questions about the proper expanse of the polity as well as who within the polity qualifies to be counted in that denominator.<sup>29</sup> So long as suffrage is not made universally available to all individuals on earth, difficult and politically charged decisions must be made. Importantly, such decisions must be made *prior to* the deployment of majoritarian measuring techniques, for it is the very nature of the technique that is at issue.

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<sup>28</sup> BICKEL, *supra* note 1, at 17.

<sup>29</sup> For some good recent discussions of this issue, see David Miller, *Defining the Demos*. 37 PHIL. & PUB. AFFAIRS 201 (2009); Robert Goodin, *Enfranchising All Affected Interests, and Its Alternatives*. 35 PHIL. & PUB. AFFAIRS 40 (2007).

One may plausibly suggest that the urgency of this concern critique is at its lowest ebb in the American case. It may not apply with much force to the case of a relatively geographically discrete eighteenth-century American populace. Of course, even here, Americans faced troubling (or what ought to have been troubling) questions regarding female, Indian, and black suffrage, as well as the more commonly acknowledged problems of what majorities—national or state—mattered for what purposes. No matter how elegantly we think the American Founders dealt with these latter problems,<sup>30</sup> the point remains that they were hardly self-evident even in the context of simple majoritarianism. The “majority of what?” problem inevitably introduces political choices that will often veer away from the concrete and the actual, as they tend to require value-laden abstraction.

Living in the midst of an operating constitutional system with relatively well-defined boundaries, we may be impatient with such objections. The political Heisenberg principle does not only operate, however, on the boundaries of the polis. Perhaps less obviously, majoritarianism requires a shaping and disciplining of the people that renders the measuring principle artificial and somewhat virtual even in the context of a well-defined, closed polity. For the implementation of even simple majority rule requires the imposition of a kind of political-constitutional discipline on the raw political substance of individual citizens. This may be hard to remember in a society where constitutional tradition since 1787 has rendered electoral majoritarianism relatively natural and unremarkable. The next Section therefore aims to throw the formalism of majority rule into relief by reviewing more formless democratic possibilities, against some of which the *Federalist* directly sets itself.

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<sup>30</sup> See, e.g., Akhil Reed Amar, *Of Sovereignty and Federalism*. 96 YALE L. J. 1425 (1987).

*B. Formless Democracy in Athens and America*

Consider Sheldon Wolin's description of transition in ancient Athens from a "radical" democratic politics to "constitutional democracy":

The political challenge of the demos inevitably overflowed the customary and institutional boundaries within which elites were attempting to fix politics. Consequently, democratic politics appeared as revolutionary and excessive, irregular and spasmodic. The response of Greek constitutional theory was to attempt to suppress the eruptive character of democratic politics, but, if necessary, to incorporate it selectively as a preliminary to reconceptualizing the "problem" of politics as a contest involving competing claims to rule and conflicting notions of equality. The solution was "contained" in the pivotal notion of "form."<sup>31</sup>

By this light, even the most basic attempts to organize the political apparatus into legal form were "counter-demotic" to the extent that such formalization undermined democracy's "idea and practice of rational disorganization."<sup>32</sup>

The formalization process in ancient Athens was more than conceptual. Wolin, for example, points to the abolition of "[r]otation and lot, [which] both function to limit the effects of institutionalization: they are, paradoxically, institutions that subvert institutionalization. . . . The disruption in continuity of personnel injected an element of rational disorganization" which newer, more disciplined constitutional forms aimed to corral.<sup>33</sup> That the practices of rotation and lot were viewed as realistic political possibilities may render less strange to twenty-first century Americans what Josiah Ober describes as the Athenian view that "tended to regard elections as undemocratic."<sup>34</sup>

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<sup>31</sup> Sheldon S. Wolin, *Norm and Form: The Constitutionalizing of Democracy*, in *ATHENIAN THOUGHT AND THE RECONSTRUCTION OF AMERICAN DEMOCRACY*, *supra* note 8, at 29, 48.

<sup>32</sup> *Id.* at 37.

<sup>33</sup> *Id.* at 43.

<sup>34</sup> JOSIAH OBER, *MASS AND ELITE IN DEMOCRATIC ATHENS* 294 (1989). Note, however, that Ober questions the significance of rotation and lot in filling offices, claiming that "[m]ost of the officials held little real power in any case." *Id.* On the long-standing historical view that elections were oligarchic or aristocratic institutions, rather than democratic, see BERNARD MANIN, *PRINCIPLES OF REPRESENTATIVE GOVERNMENT* (1997).

(Among other things, elections tended to fill offices with rich, elite citizens.) Like Wolin, Ober suggests more broadly that what we might term as the “constitutional” project of legally ordering citizens’ relations had something of an anti-democratic flavor: “A detailed code of sovereign laws might be an advantage to the elites. . . . The more fully articulated the law code, the less leeway jurors would have in interpreting it. . . . [C]omplete articulation of the law was a denial of the collective wisdom of the masses.”<sup>35</sup> Ober inverts the contemporary “counter-majoritarian” concern: where “judicial review” as a mixed project of interpreting and applying laws was under the popular control of the jury, it was “activism” in judging that allowed the free-form rule of the demos, and the strict adherence to narrow legal mandates that was seen as the repressive force. Where Wolin describes the goal of “Greek constitutional theory” as developing the rule of law—including the definition of political forms—in order to regulate and constrain freewheeling popular action, Ober reveals the obverse view of the Athenian people, who “never bothered themselves with the notion that democracy and the rule of law were mutually exclusive. They saw that unrestrained popular will was dangerous, but they also saw that excessive constitutional checks and balances along with a fully articulated law code threatened the interests of the masses.”<sup>36</sup> Whereas a strict law code always involves the rule of the “dead hand” of past assemblies, easily revisable law and broad jury authority kept power in the living hands of the Athenian people.

These brief glimpses at Athenian practices of rotation, lot, and relatively free-form democratic revision of the laws through both popular assembly and jury should

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<sup>35</sup> OBER, *supra* note 34, at 303.

<sup>36</sup> *Id.* at 304. See also Melissa Schwartzberg, *Athenian Democracy and Legal Change*, 98 AM. POL. SCI. REV. 311, 313 (2004) (“[P]art of what the Athenians understand as democracy . . . is the freedom to be unbound by prior decisions and, given new information, to redirect.”).

underscore the extent to which electoral majoritarianism constrains popular political power relative to some other democratic possibilities. One need not accept Wolin's rather dour view of the ideological goals behind both ancient and modern constitutionalism<sup>37</sup> in order to appreciate the point that even primitive electoral forms shape and constrain the political landscape in ways that are not logically or historically required by a commitment to "democracy." Even highly inclusive political forms (generally non-existent, of course, in ancient Athens or in eighteenth-century America) limit popular engagement to the extent that they strictly regulate the timing and manner in which such engagement will be recognized as constitutionally relevant. Without diminishing the significance of informal channels of political influence—whether by mass assembly and protest, or by monetary donations and personal access to officials—we should not ignore the constraining effects of a system that for the most part only allows direct popular control over political decision-making at occasional and highly regulated intervals when the majority is formally measured. Primitive form is still form, and entails political choices that introduce a gap between representative and represented, as different choices can lead to substantial differences in both the inputs into, and outputs of, political decision-making procedures.

The disciplining nature of simple political forms may be nearly invisible to us today, living as we do in a complex and highly organized constitutional structure, but it was not so invisible the American Founders themselves. On the contrary, Revolution-era Americans were familiar with democratic action that, to borrow Wolin's phrase, "overflowed the customary and institutional boundaries within which elites were

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<sup>37</sup> See, e.g., Sheldon S. Wolin, *Democracy: Electoral and Athenian*. 26 PS: POL. SCI. & POL. 475, 476 (1993) ("The aim was not simply to check democracy but to discourage it by making it difficult for those who, historically, had almost no leisure time for politics, to achieve political goals.").

attempting to fix politics.”<sup>38</sup> Historian Gordon Wood has documented “the increasing difficulty Americans had in sustaining representative legislatures which could satisfactorily speak for the people. . . . [T]he American people came to rely more and more on their ability to organize themselves and to act ‘out-of-doors,’ whether as ‘mobs,’ as political clubs, or as conventions.”<sup>39</sup> With skepticism of representational forms leading them to believe that “the final and full embodiment of the people in the government was impossible,” radical Americans resisted the limitations of routinized political form, and demanded political recognition of their direct, if informal, action.<sup>40</sup> The mob, the club, and the convention are—unlike the legislature—political mechanisms easily formed and easily dissolved, and thus suited for the spontaneous and constant popular revision of the political and legal order. Where electoral representation requires popular control of politics to remain latent and indirect most of the time—rendering the demos, according to Wolin, “a sovereign who reigns but does not rule”<sup>41</sup>—informal, improvised politics seemed to offer wider scope for democratic politics. Thus it was that Noah Webster could declare that:

the word *Democrat* has been used as synonymous with the word *Jacobin* in France; and by an additional idea, which arose from the attempt to control our government by private popular associations, the word has come to signify a person who attempts an undue opposition to or influence over government by means of private clubs, secret intrigues, or by public popular meetings which are extraneous to the constitution.<sup>42</sup>

Webster’s critical tone should not obscure the significance of the connection between democracy and informal politics; a significance so widely acknowledged in late

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<sup>38</sup> See Wolin, *supra* note 31, at 48.

<sup>39</sup> WOOD, *supra* note 8, at 319.

<sup>40</sup> *Id.* at 323.

<sup>41</sup> Wolin, *supra* note 37, at 476.

<sup>42</sup> Letter from Noah Webster to Joseph Priestley, in THE LETTERS OF NOAH WEBSTER 208 (H.R. Warfel ed., 1953), *quoted in* Roberts, *supra* note 8, at 89.

eighteenth century America that, if Webster is to be trusted as to the meaning of words, the drive to resist political formalization was seen as definitive of democracy.

Whatever else we think of the informal thrust of radical democratic politics in post-Revolutionary America, it is hard to deny the charge that informalism tended to introduce instability into politics. Radical skepticism of institutional form seems conceptually to build instability into politics: popular political action would spontaneously coalesce into institutional form, but would then dissolve under the same suspicion that rendered the novel form necessary in the first place. As Wood puts it, “[t]he extreme actuality of representation being honed and extended in the decade after Independence, with its concomitant weakening of the binding character of law, was . . . tending to dissolve and render nugatory every civil compact.”<sup>43</sup> Or, as John Adams more scathingly put it, “[i]s this government, or the waves of the sea?”<sup>44</sup> Of course, the introduction of instability into politics may have been part of the very point: the ebb and flow of institutional forms may have been a viable strategy for resisting the *de facto* (and sometimes *de jure*) exclusion and elitism of more stable representational forms, including majoritarian electoral representation. Whatever our verdict as to the wisdom of informal democratic politics, it appeared as a real (if radical) possibility to the framers of the United States Constitution, who saw the resistance of instability through constitutional form as a core part of their mission.

### *C. Federalist Forms: Turbulence, Energy, and the Construction of the Assembly*

The authors of the *Federalist Papers* repeatedly and unashamedly insist that instability stood as the greatest political ill that their constitution meant to cure.

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<sup>43</sup> WOOD, *supra* note 8, at 368 (quotation omitted).

<sup>44</sup> John Adams, in 4 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 285 (Charles Francis Adams ed., 1856), *quoted in* Roberts, *supra* note 8, at 90.

Alexander Hamilton declared “the mischiefs of that inconstancy and mutability in the laws . . . the greatest blemish in the character and genius of our government,”<sup>45</sup> and James Madison suggested these blemishes were widely seen: “[t]he sober people of America are weary of the fluctuating policy which has directed the public councils.”<sup>46</sup> The Federalist concern with “turbulence and contention” is ubiquitous.<sup>47</sup> The Federalists identify turbulence as endemic both to their contemporary American republics<sup>48</sup> and to democracies and republics throughout history;<sup>49</sup> they describe it as a threat to national security (both of the United States and of individual states)<sup>50</sup> and to liberty<sup>51</sup>; they forecast its consequences as violent revolution<sup>52</sup> and elitist demagoguery<sup>53</sup>; and discuss its effects in the context of such various constitutional provisions as the executive veto and the Senate’s treaty power.<sup>54</sup> Disorder and its attendant weakness threatened not only bad governance but national catastrophe, and thus the development of an ordered popular government was a primary project of the new constitution.

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<sup>45</sup> THE FEDERALIST NO. 73, at 496 (Alexander Hamilton) (Jacob E. Cooke, ed., 1961).

<sup>46</sup> *Id.* NO. 44, at 301 (James Madison).

<sup>47</sup> *Id.* NO. 10, at 61 (James Madison).

<sup>48</sup> See *supra* notes 45-46 and surrounding text; see also *id.* NO. 10, at 57 (James Madison) (“Complaints are every where heard . . . that our governments are too unstable.”).

<sup>49</sup> See *id.* NO. 6, at 31-32 (Alexander Hamilton) (“impulses” of “popular assemblies”); *id.* NO. 9, at 50 (Alexander Hamilton) (“rapid succession of revolutions” in historical republics); *id.* NO. 10, at 56-57 (James Madison) (“The instability, injustice, and confusion introduced into the public councils, have in truth been the mortal diseases under which popular governments have every where perished.”); *id.* at 61 (“Democracies have ever been spectacles of turbulence and contention.”); *id.* NO. 14, at 81 (James Madison) (referring to “the turbulent democracies of ancient Greece and modern Italy”); *id.* . NO. 18, at 114 (James Madison) (describing ancient Greek popular governments as “tempestuous”).

<sup>50</sup> *Id.* NO. 6, at 31-32 (Alexander Hamilton) (rejecting suggestion that peace would obtain between disunited states given republican turbulence).

<sup>51</sup> *Id.* NO. 10, at 61 (James Madison) (discussing how democratic turbulence threatens “personal security” and “the rights of property”).

<sup>52</sup> *Id.* NO. 28, at 177 (Alexander Hamilton) (preferring to risk national army rather than “the unceasing agitations and frequent revolutions which are the continual scourges of petty republics”).

<sup>53</sup> *Id.* NO. 62, at 421 (James Madison) (“Another effect of public instability is the unreasonable advantage it gives to the sagacious, the enterprising and the moneyed few, over the industrious and uninformed mass of the people.”).

<sup>54</sup> *Id.* NO. 73, at 496 (Alexander Hamilton) (veto power); *id.* NO. 75, at 507 (Alexander Hamilton) (treaty power).

Complementing the need to discipline popular turbulence was, for the Federalists, the need to establish a government with sufficient “vigour” to ensure the rational administration of political affairs, both domestic and international.<sup>55</sup> Indeed, the central difficulty of the Constitutional Convention, according to Madison, was “combining the requisite stability and energy in Government, with the inviolable attention due to liberty, and to the Republican form.”<sup>56</sup> Democratic turbulence being inimical to both governmental energy and republican liberty, the Federalists had little difficulty in supporting a plan that would dampen popular political spontaneity and sublimate, through constitutional form, democratic energy into the energy of the state. The trade seemed a good one, given the entropic tendencies of informal democratic politics and the contrasting rationalism and stability of energetic government. As Hamilton put it in the context of the executive in particular:

Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks: It is not less essential to the steady administration of the laws, to the protection of property against those irregular and high handed combinations, which sometimes interrupt the ordinary course of justice, to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy.<sup>57</sup>

Proper constitutional form would thus both limit the disorderly tendencies of democracy and enable the government to rationalize politics. Thus could a republican form of government promote “[c]ivil power properly organized and exerted . . . capable of diffusing its force to a very great extent.”<sup>58</sup>

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<sup>55</sup> *Id.* No. 1, at 5 (Alexander Hamilton).

<sup>56</sup> *Id.* No. 37, at 233 (James Madison).

<sup>57</sup> *Id.* No. 70, at 471 (Alexander Hamilton).

<sup>58</sup> *Id.* No. 13, at 81 (Alexander Hamilton).

The dual rejection of disorganized formlessness and democratic turbulence was linked together in the Federalists' theory of assemblies. In any discussion of American majoritarianism, we should remember the simple but crucial fact that to the extent that majoritarianism has a hold on American democracy, it is not in the form of simple majoritarianism across individual citizens, but rather in the form of representation through electoral majoritarianism.<sup>59</sup> That is, generally speaking, majorities of individual citizens do not determine government policy, but rather elect officials who do. The point is crucial because the authors of the *Federalist Papers* were highly conscious of the different consequences of majority rule in different domains—that is, in different types of assemblies, ranging from relatively informal gatherings of individual citizens to highly formalized legislatures and committees. Majoritarianism was not a principle in the political ether, as it were, but, in the Federalists' eyes, had dramatically different political consequences in different institutional contexts. Federalist endorsement of majority rule, therefore, was conditioned on the constitutional forms that majoritarianism was to take. American majoritarianism thus cannot be separated from the broader concern for rational, ordered politics that drove the Federalist theory of assembly.<sup>60</sup>

The authors of the *Federalist Papers* quite explicitly place the search for *disciplined* majoritarianism at the center of their constitutional project. Madison saw

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<sup>59</sup> This distinction between representative and direct majoritarianism is obvious, but has substantial consequences for arguments about the egalitarian, democratic character (or otherwise) of majority rule. I discuss this point, versions of which the Federalists understood very well, at length in my Ph.D. dissertation. See James Lindley Wilson, *Finding Time for Democracy: A Theory of Political Equality* (unpublished manuscript, on file with author).

<sup>60</sup> Cf. Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*. 94 COLUM. L. REV. 457 (1994). Amar suggests that the Constitution contemplates amendment through “a majoritarian and populist mechanism akin to a national referendum,” *id.* at 457, in my terms a relatively “undisciplined” majority rule (though the reference to a referendum procedure does suggest some ordering). I agree with Amar at least to the extent that I share his sense that interpreters of the Constitution cannot ignore the Founders' commitment to action by “the people” to “alter or abolish” their governments. See *infra* notes 64–68 and surrounding text. Nevertheless it is worth acknowledging that the Federalists, at least, hoped that resort to such populist measures would be rare.

majority rule as so fundamental that he was willing to deem its operation “the republican principle,” but nevertheless in virtually the same breath declared majoritarian factionalism the primary threat to “the public good and the rights of other citizens.”<sup>61</sup> Protecting against majoritarian abuses while “preserv[ing] the spirit and form of popular government, is then the great object to which our enquiries are directed.”<sup>62</sup> A primary question was how majority rule was to be instantiated, and in *Federalist* No. 10 Madison quickly introduces the comparison between “pure Democracy” and representative republicanism<sup>63</sup>—a regularly recurring motif throughout the *Federalist Papers*—in order to illustrate the need for proper constitutional form to ensure propitious majority rule.

The Federalists were by no means inveterate enemies informal popular action. On the contrary, in defending the arguably extra-legal activities of the Constitutional Convention, Madison insisted that “as the plan to be framed and proposed, was to be submitted *to the people themselves*, the disapprobation of this supreme authority would destroy it for ever; its approbation blot out all antecedent errors and irregularities.”<sup>64</sup> To be sure, “the people themselves” were to provide authorization through conventions in the states, but this was seen not as disciplining institutional form, but rather a relatively formless popular alternative to the remote and highly formal legislatures.<sup>65</sup> Dismissing formalist objections to the ratification project, Madison recalled the then-recent revolutionary past of “irregular and unauthorized” political action, and suggested that “no little ill-timed scruples, no zeal for adhering to ordinary forms, were any where seen,

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<sup>61</sup> THE FEDERALIST NO. 10, at 60-61 (James Madison).

<sup>62</sup> *Id.* at 61.

<sup>63</sup> *Id.* at 61-62.

<sup>64</sup> THE FEDERALIST NO. 40, at 265-66 (James Madison).

<sup>65</sup> *See, e.g., supra*, notes 38-43 and surrounding text (discussing “conventions” as one of the spontaneous and relatively informal means of popular political action); *see also* WOOD, *supra* note 8, at 306-43 (discussing the American view of conventions as superior representations of the people in part because of their illegality and spontaneity).

except in those who wished to indulge under these masks, their secret enmity to the substance contended for.”<sup>66</sup> Moreover, Federalist support for radical popular action does not seem limited to the self-serving suggestion that action by “the people themselves” should be a kind of one-off affair unique to the ratification of their favored constitution. On the contrary, the Federalists recognize the “people themselves”—unmediated by institutional form—as a legitimate looming presence in politics. “[T]he people” were thus the “natural guardians of the constitution” who were expected to resolve standoffs between the federal and state governments,<sup>67</sup> and indeed were approvingly said to retain under the proposed constitutional order their “original right to self-defence” against usurping representatives and to use their “natural strength” to deter tyranny.<sup>68</sup>

For all that the Federalists acknowledged the unmediated people as a supreme authority and ultimate arbiter of political decisions, however, they nevertheless resisted the idea that “the people themselves” should ordinarily take an active role in politics. The people were authoritative, but this authority was generally best kept latent, lest politics take the shape of permanent revolution and mobbish turbulence.<sup>69</sup> Cases of revolution and constitutional emergency aside, the *Federalist Papers* are full of cautions against allowing the “people themselves,” unmediated by constitutional form, to take up the reins of more quotidian political power. These cautions center directly on the ways in which different institutional constructions of a popular majority produce political results of highly varying quality.

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<sup>66</sup> THE FEDERALIST NO. 40, at 265 (James Madison).

<sup>67</sup> *Id.* NO. 16, at 104 (Alexander Hamilton).

<sup>68</sup> *Id.* NO. 28, at 178, 179 (Alexander Hamilton). For further discussion on “the people” as an extra-legal source of possible political violence, see *infra* notes 168-172 and surrounding text.

<sup>69</sup> See *id.* NO. 9, at 50 (Alexander Hamilton) (exhibiting “horror and disgust . . . at the rapid succession of revolutions” in the “petty republics of Greece and Italy”); *id.* NO. 28, at 177 (Alexander Hamilton) (noting “frequent revolutions which are the continual scourges of petty republics”).

The Federalists consistently criticize “pure”—what we today would probably call “direct”—democracies where citizens “assemble and administer the Government in person.”<sup>70</sup> In the first place, the Federalists argue that the immediacy of political interactions between many individuals tends to promote irrational government by the “passions.” Without the restraint of constitutional forms, the Federalists paint a portrait of noise and tumult among the people assembled together that gives rise to “the tyranny of their own passions.”<sup>71</sup> Amid the general bedlam and “confusion of a multitude,”<sup>72</sup> the people have an almost total “incapacity for regular deliberation,”<sup>73</sup> and thus render themselves prone to irrational and turbulent politics. This incapacity of “the people themselves” for deliberative rationality and good government ostensibly stems not from any defect in the individuals themselves, but the institutional context (or lack thereof) entailed by direct democracy. Thus Madison could boldly claim that “[h]ad every Athenian citizen been a Socrates; every Athenian assembly would still have been a mob.”<sup>74</sup> The Federalists reveal themselves to be less majoritarians than *rationalist* majoritarians, admitting that “the cool and deliberate sense of the community ought in all governments, and actually will in all free government ultimately prevail over the views of

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<sup>70</sup> THE FEDERALIST NO. 10, at 61 (James Madison). *See also id.* NO. 48, at 333 (James Madison) (discussing “a democracy where a multitude of people exercise in person the legislative functions”); *id.* NO. 58, at 396 (James Madison) (discussing “the antient republics, where the whole body of the people assembled in person”).

<sup>71</sup> THE FEDERALIST NO. 63, at 425 (James Madison).

<sup>72</sup> *Id.* NO. 10, at 63 (James Madison).

<sup>73</sup> *Id.* NO. 48, at 333 (James Madison).

<sup>74</sup> *Id.* NO. 55, at 374 (James Madison). *Cf. id.* NO. 49, at 340 (James Madison) (“The reason of man, like man himself is timid and cautious, when left alone; and acquires firmness and confidence, in proportion to the number with which it is associated. . . . In a nation of philosophers, this consideration ought to be discarded.”) Though the judgment about the hypothetical “nation of philosophers” interestingly differs in the latter passage, the claim remains consistent that the “people themselves” tend toward poor collective judgments.

its rulers,”<sup>75</sup> but questioning whether the majority’s “cool and deliberate” views will emerge when undisciplined by appropriate constitutional form.<sup>76</sup>

The popular passions and the mechanics of the citizens’ assembly also, according to the Federalists, render action by “the people themselves” uniquely prone to manipulation and demagoguery. The incapacity for deliberation in the tumultuous multitude causes a kind of spontaneous order to emerge through the assumption of *de facto* control by a very few individuals. “In the antient republics, where the whole body of the people assembled in person, a single orator, or an artful statesman, was generally seen to rule with as compleat a sway, as if a scepter had been placed in his single hands.”<sup>77</sup> The freewheeling style of relatively informal government may admit greater popular energy and activity, but it also tends to lack the formal mechanisms to preserve basic norms of equality, as may be expressed in rules of debate, or the voting rules themselves. The mob may represent the people unshackled from constraining rules regulating access to political power, but it also acts free from the confining equality of

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<sup>75</sup> *Id.* NO. 63, at 425 (James Madison). See also *id.* NO. 49, at 343 (James Madison) (“[I]t is the reason of the public alone that ought to controul and regulate the government. The passions ought to be controuled and regulated by the government.”).

<sup>76</sup> On the propensity of the unmediated people for passionate politics, see also *id.* NO. 10, at 61 (James Madison) (arguing that in a “pure Democracy . . . [a] common passion or interest will, in almost every case, be felt by a majority of the whole”); *id.* NO. 63, at 425 (James Madison) (discussing need for restraint when “the people [are] stimulated by some irregular passion”); *id.* NO. 49, at 343 (James Madison) (rejecting regular resort to people to resolve constitutional issues in part because “the *passions* . . . not *the reason*, of the public, would sit in judgment”). Cf. *id.* NO. 78, at 527-28 (Alexander Hamilton) (approving of popular constitutional change only when pursuant to a “solemn and authoritative act” rather than a “momentary inclination”).

<sup>77</sup> *Id.* NO. 63, at 425 (James Madison). Ober seems to agree that something like this *de facto* rule of the artful orator did occur in democratic Athens, but unlike Madison, he suggests that such developments were infrequent and circumscribed. See OBER, *supra* note 34, at 325 (noting that in times of emergency, “the orator, normally playing a double role and balancing any elitist claims with egalitarian sentiments, stepped out of character . . . he shed his double mask of ‘equal but better’ and displayed himself to the audience as a superior being, worthy of rule. . . . The elevation in status from adviser to leader was always temporary, the people’s delegation of power always provisional.”).

even a “one-person, one-vote” rule.<sup>78</sup> Of course, in the context of direct democracy, it is perfectly possible to preserve a formal majority voting rule, but Madison suggests that in the practical reality of the multitudinous assembly, “[t]he countenance of the government may become more democratic; but the soul that animates it will be more oligarchic. The machine will be enlarged, but the fewer and often, the more secret will be the springs by which its motions are directed.”<sup>79</sup>

The Federalist’s constitutional project of establishing a free government that respected the “republican principle” of majority rule<sup>80</sup> was thus intimately connected with the task of constructing an institutional context channeling popular majorities in such a way as to allow the “cool and deliberate sense of the community . . . [to] ultimately prevail over the views of its rulers.”<sup>81</sup> This task not only manifested itself in “counter-majoritarian” institutions such as the judiciary, the Senate, or the President (elected not by popular majority but by an electoral college), but also in the construction of the most ostensibly “majoritarian” institution in the federal Constitution, the House of Representatives. As we have seen, the very decision to instantiate majority rule in a representative assembly rather than through more direct and informal meetings of citizens itself reflected the Federalists’ desire to harness popular energies to what they saw as more deliberative institutional forms. Similarly, the question of how to constitute the

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<sup>78</sup> Wood refers to similar criticisms of the popular veto of legislation under Pennsylvania’s 1776 Constitution. See WOOD, *supra* note 8, at 249 (“Such supposed discussion among the people would never truly express the sense of the people, since only the persons who frequented public houses where the laws were posted would participate.”).

<sup>79</sup> *Id.* NO. 58, at 396 (James Madison). See also *id.* NO. 6, at 32 (Alexander Hamilton) (noting that the determinations of “popular assemblies . . . are often governed by a few individuals, in whom they place confidence”); *id.* NO. 48, at 333 (James Madison) (arguing that in a democracy, the people “are continually exposed by their incapacity for regular deliberation and concerted measures, to the ambitious intrigues of their executive magistrates”).

<sup>80</sup> See *id.* NO. 10, at 61 (James Madison); see also *id.* NO. 22, at 139 (Alexander Hamilton) (describing as a “fundamental maxim of republican government” that “the sense of the majority should prevail”).

<sup>81</sup> *Id.* NO. 63, at 425 (James Madison).

representative assembly was guided by the desire to avoid replicating in the legislature the pathologies of the unmediated people. The Federalists explicitly warned against constructing a legislature that would act like unmediated popular majorities: “the more multitudinous a representative assembly may be rendered, the more it will partake of the infirmities incident to collective meetings of the people.”<sup>82</sup> In particular, numerous assemblies share the “infirmities” of vulnerability to passion and to demagogic manipulation:

[T]he more numerous any assembly may be, of whatever characters composed, the greater is known to be the ascendancy of passion over reason. In the next place, the greater will be the proportion of members of limited information and of weaker capacities. Now it is precisely on characters of this description that the eloquence and address of the few are known to act with all their force.<sup>83</sup>

These concerns were not merely academic or theoretical, but rather had direct relevance for the very practical question of how to apportion seats in the House of Representatives—that is, how to politically constitute America’s popular majority.<sup>84</sup> Thus the Federalists’ majoritarianism did not aim to passively reflect the basic, primitive desires and actions of “the people.” On the contrary, their construction of majority rule very consciously exploited what I called the political Heisenberg principle that constitutional form shapes popular political substance as it measures that substance. Majority rule in the particular assembly context developed by the United States

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<sup>82</sup> *Id.* NO. 58, at 396 (James Madison).

<sup>83</sup> *Id.* at 395-96 (James Madison). On the propensity for large assemblies to succumb to passion’s rule, see also *id.* NO. 10, at 62-63 (James Madison) (discussing need to limit size of legislature in order to “guard against the confusion of the multitude”); *id.* NO. 48, at 334 (James Madison) (arguing legislature in representative republic “sufficiently numerous to feel all the passions which actuate a multitude”); *id.* NO. 55, at 374 (James Madison) (“In all very numerous assemblies, of whatever characters composed, passion never fails to wrest the scepter from reason.”); *id.* NO. 62, at 418 (James Madison) (arguing that Senate was required given “the propensity of all single and numerous assemblies, to yield to the impulse of sudden and violent passions”). On the propensity for large assemblies to succumb to demagogues, see also *id.* (noting assemblies “seduced by factious leaders”).

<sup>84</sup> See *id.* NOS. 53-58 (James Madison) (discussing the House of Representatives).

Constitution would not just mirror popular will, but would shape it and change it into something more orderly and rational—and, in the Federalists’ eyes, so much the better.

This “rationalist” or “deliberative” majoritarianism laid out by the authors of the *Federalist Papers* unquestionably has an elitist tinge. To some extent this elitism emerges out of the basic “counter-demotic” tendencies of majority rule as a disciplining constitutional form that regulates popular access to politics.<sup>85</sup> But the Federalists’ elitism is also more direct and explicit. While Madison famously meant the Constitution to establish a ship of state that would sail smoothly even though “[e]nlightened statesmen will not always be at the helm,”<sup>86</sup> the Federalists were nevertheless very much concerned with placing political decision-making power in the hands of experts. Madison defended representative government itself, along with its particular instantiation in the Constitution, on the highly rationalist but not terribly populist grounds that the constitutional system would “refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country.”<sup>87</sup> Here, in the seminal defense of large representative republics in *Federalist* No. 10, Madison clearly lays out what in Bruce Ackerman’s terms is a “semiotic” rather than a “mimetic” view of representation<sup>88</sup>: even before considering any “counter-majoritarian” separation of powers, Madison understands majoritarianism itself to be a reconstructive rather than a reflective project. Majority rule in the United States Constitution would not serve as a passive conduit for the unmediated popular will, but would rather actively channel and even change that will. Representative majority rule

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<sup>85</sup> See *supra* Section II.B.

<sup>86</sup> THE FEDERALIST NO. 10, at 60 (James Madison).

<sup>87</sup> *Id.*, at 61.

<sup>88</sup> See 1 ACKERMAN, *supra* note 6, at 183.

admitted a separation between legislative and popular majorities, and while elections and other mechanisms undoubtedly limited that separation, the separation itself was not only accepted but celebrated.

The elite composition of the legislatures—particularly relative to the “people themselves”—stood as a central component of the Federalists’ rationalist representation. While the concern for deliberation among experts was general, and thus encompassed the construction of the House of Representatives,<sup>89</sup> this rationalist elitism was nowhere more pronounced than in the defense of the Senate. Of course, long before the Seventeenth Amendment, the members of the Senate were appointed not directly by “the people themselves” but by legislatures in the states.<sup>90</sup> National elites chosen by local elites, the Senators could thus provide “a defence to the people against their own temporary errors and delusions,” providing “the interference of some temperate and respectable body of citizens, in order to check the misguided career, and to suspend the blow mediated by the people against themselves, until reason, justice and truth, can regain their authority over the public mind.”<sup>91</sup> The Federalists thus suggested without the slightest embarrassment that the institution of majority rule in the United States Congress would not only “refine” popular majorities, but would occasionally actively deny them in order to save them.

That the Federalists hoped to institutionalize elite control of the legislatures may seem unsurprising given their general concern that “the people themselves” not exercise

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<sup>89</sup> See THE FEDERALIST NO. 10, at 63 (James Madison) (suggesting that large republic will produce more “fit characters” among its representatives); *id.* at 64 (arguing that large republic will have representatives with “enlightened views and virtuous sentiments”); *id.* NO. 27, at 172 (Alexander Hamilton) (predicting “greater knowledge and more extensive information” in the “national councils”); *id.* NO. 58, at 395-96 (James Madison) (exhibiting concern at the “members of limited information and of weaker capacities” in large assemblies as in “collective meetings of the people”).

<sup>90</sup> Compare U.S. CONST. art. I, § 3, cl. 1 (“The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof.”) with *id.* amend. XVII, § 1 (“The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof.”).

<sup>91</sup> *Id.* NO. 63, at 425 (James Madison).

regular operational control of government.<sup>92</sup> The rationalist elitism extends, however, even to the more radically democratic strands of the *Federalist Papers*. As we have seen, the Federalists vigorously endorsed the ultimate political authority of “the people themselves,” and translated this ideological commitment into practical reality to the extent that they sought popular approval of their own constitutional proposal in relatively informal and relatively inclusive conventions.<sup>93</sup> At the same time, the sanguinity with which Madison in particular viewed such popular action seemed to stem in no small part from the leading role played in that action by social and political elites. Madison’s defense of the questionably legal actions of the Constitutional Convention itself stemmed not only from the ultimate sanction to be given by the people, but also from the initial sanction of the elite members of the Convention. Thus in the exercise of “the transcendent and precious right of the people to ‘abolish or alter their governments as to them shall seem most likely to effect their safety and happiness,’” Madison observes that “it is impossible for the people spontaneously and universally, to move in concert towards their object; and it is therefore essential; that such changes be instituted by some *informal and unauthorized propositions*, made by some patriotic and respectable citizen or number of citizens.”<sup>94</sup> Here the defense of the Convention parallels the Federalists’ more general critique of “pure” democracy and populous assemblies: because the “people themselves” are too large and unruly to rationally and effectively deliberate and act, popular political action tends to require guidance by elites. The “respectable

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<sup>92</sup> See *supra* notes 69-79 and surrounding text.

<sup>93</sup> See *supra* notes 66-68 and surrounding text. On the uniquely inclusive, democratic credentials of the conventions, see AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 4 (2005); Amar, *supra* note 29, at 1459 & nn.146-50.

<sup>94</sup> THE FEDERALIST NO. 40, at 265 (James Madison) (quoting THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776)).

citizens” provide order where constitutional form does not.<sup>95</sup> Where Madison decried such informal ordering by elites in the legislative context as introducing an “oligarchic soul” into politics,<sup>96</sup> in the “ticklish” context of informal popular politics, Madison on the contrary seems quite grateful for the “enthusiastic confidence of the people in their patriotic leaders.”<sup>97</sup> The elites provide a steadying influence that maintains some semblance of rational, deliberative politics, and to that extent diminish the mobbishness of democratic action.

In describing the Federalists as elitist, I do not necessarily mean to castigate them for being “anti-democratic.” As the authors of the *Federalist Papers* vigorously and repeatedly reminded critics of the Constitution, nothing in that document restricted popular access either to the right of suffrage or to national office itself.<sup>98</sup> Even the vile Three-fifths Clause, defended (however half-heartedly) by Madison, did not disenfranchise slaves directly, but only failed to fully penalize slave states for

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<sup>95</sup> Josiah Ober presents a similar comparison in his discussion of ancient Athens between the informal ordering of elites among a democratic populace and the formal ordering of a constitutional system. OBER, *supra* note 34 at 325 (“By alluding in his speeches to his own attainments, and by pointing out his opponent’s lack of similar attainments, the orator demonstrated his ‘professional credentials’ as adviser and defender and tested the credentials of his opponent. This filtering process stood in place of the more formal systems of representation and elections that allow elites in modern democratic societies to take legitimate roles of political leadership.”).

<sup>96</sup> See THE FEDERALIST NO. 58, at 396 (James Madison); see also *supra* notes 77-82 and surrounding text.

<sup>97</sup> *Id.* NO. 49, at 341 (James Madison).

<sup>98</sup> See *id.* NO. 36, at 223 (Alexander Hamilton) (“There are strong minds in every walk of life that will rise superior to the disadvantages of situation, and will command the tribute due to their merit, not only from the classes to which they particularly belong, but from the society in general. The door ought to be equally open to all.”); *id.* NO. 41, at 274 (James Madison) (referring to “the Representatives of the United States, elected FREELY, by the WHOLE BODY of the people”); *id.* NO. 57, at 385 (James Madison) (“Let me ask whether every circumstance [of the Constitution] is not, on the contrary, strictly conformable to these principles [of republican government]; and scrupulously impartial to the rights and pretensions of every class and description of citizens?”); *id.* NO. 60, at 404 (Alexander Hamilton) (dismissing fears that the federal government would limit the suffrage of the poor); *id.* at 408-09 (emphasizing that the federal government would have no power to provide property qualifications for voters or for those standing for election); see also U.S. CONST. art. I, § 2, cl. 1 (“Electors [for the House of Representatives] in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”); *id.* art. I, § 3, cl. 1 (declaring Senators chosen by state legislatures); *id.* art. II, § 1, cl. 2 (giving state legislatures power to “appoint, in such manner as [they] may direct,” presidential electors).

disenfranchisement.<sup>99</sup> Thus, without forgetting the politically voiceless women, slaves, immigrants, paupers, and others disenfranchised by the states, it would be unfair to dismiss as sheer ideological double-talk Madison's sweeping claims that "[t]he electors are to be the great body of the people of the United States," and that "the objects of popular choice" are to be "[e]very citizen whose merit may recommend him to the esteem and confidence of his country,"<sup>100</sup> and it would ignore too much to view with pure cynicism Hamilton's bolder statement that American government "ought to rest on the solid basis of THE CONSENT OF THE PEOPLE. The streams of national power ought to flow immediately from that pure original fountain of all legitimate authority."<sup>101</sup> If the Federalists and their constitution limited and ordered the channels of access to political power, and if they did less to broaden them than we today would like, they nevertheless made no effort to close off those channels to whoever might successfully navigate them.

But if the Federalists' constitution did not have a formally oligarchic countenance, we should not close our eyes to the extent to which its soul was what we might call "natural-aristocratic." For if the constitutional system left politics open to stalwarts who transcended any "disadvantages of situation," the Federalists recognized without much regret that such morganatic marriages between poverty and power would comprise only "occasional instances."<sup>102</sup> And even the most brilliant and successful "men from Hope" do not guarantee the political significance of Hope's more ordinary population. The

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<sup>99</sup> U.S. CONST. art. I, § 2, cl. 3 (apportioning Representatives according to "the whole number of free persons . . . and . . . three fifths of all other persons"). On Madison's defense, see THE FEDERALIST NO. 54 (James Madison). On the half-heartedness, though not to say insincerity, of the defense, see *id.* at 371 (claiming to be laying out "the reasoning which an advocate for the southern interests might employ on this subject: And although it may appear to be a little strained in some points, yet on the whole I must confess, that it fully reconciles me to the scale of representation, which the Convention have established").

<sup>100</sup> THE FEDERALIST NO. 57, at 385 (James Madison).

<sup>101</sup> *Id.* NO. 22, at 146 (Alexander Hamilton).

<sup>102</sup> *Id.* NO. 36, at 223 (Alexander Hamilton).

alternative possibilities presented by rotation, lot, the lawmaking jury, the mob, the club, and the convention, promoting in their various ways the ordinary citizen's access to politics, should remind us of the extent to which the technical apparatus of electoral majority rule limits popular political activity even in the absence of explicit exclusions. The natural aristocrats who read and write such papers as this may see nothing untoward in such an arrangement, and indeed we have seen that disciplining the people through majoritarianism may serve many valuable purposes, combating as it does the disorder, the inefficiency, and even the inegalitarianism of formless, mobbish politics. But celebration of American majoritarianism, however justified, should not ignore the possibility that Madison's declaration that the Constitution ensures "*the total exclusion of the people in their collective capacity* from any share" in American government does not only represent a formal description of representative government, but also a substantive judgment regarding the wisdom of diffusing political power to the tumultuous, unruly, spontaneous, and altogether common people themselves.<sup>103</sup>

### **III. Class and Classlessness: Majoritarianism's Social Questions**

#### *A. Democracy and Equality: The Federalist Revision of Majority Rule*

If the Federalists' proposal for establishing electoral majority rule was explicitly motivated by a desire to limit direct popular control of politics, it nevertheless remains true that the Federalist constitution reflected a solidifying American consensus in favor of a kind of egalitarianism that we might fairly call democratic. The Federalists were elitists, but they were not "enemies of the people." For all the conditions and caveats with which the Federalists defended it, the "republican principle" of majority rule<sup>104</sup>

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<sup>103</sup> *Id.* NO. 63, at 428 (James Madison).

<sup>104</sup> THE FEDERALIST NO. 10, at 60 (James Madison).

represented a radical break from much prior European theory and practice. The embrace of a simple “one person, one vote” counting rule—abstracting for the moment from difficult questions regarding districting or the scope of the franchise—required a willingness to see poor and propertied votes as sufficiently similar entities that they could comprise together the denominator of the same majoritarian fraction. The constitutional vindication of this vision of individuals (and their votes) as commensurable across classes, and the accompanying view that the grant of political power to the majority of the homogenous class of “citizens” could conceivably be fair and just, was a significant democratic triumph.

The Federalists were by no means the inventors—nor necessarily the most committed proponents—of this broad majoritarian theory, which had more radical adherents in post-Revolutionary America.<sup>105</sup> But the Federalists were able to provide a convincing account of American society that made majoritarianism comprehensible as a just and legitimate political principle. At the same time, however, the Federalists did not break with the anti-majoritarian past completely. In embracing modern, egalitarian visions of majority rule, the Federalists refused to ignore what they saw as the risks of substantive inequality stemming from “an unjust combination of a majority of the whole.”<sup>106</sup> From the very beginning, therefore, the constitutional construction of majority rule was limited by concerns sounding in basic fairness and what we might

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<sup>105</sup> At the time of the Constitutional Convention, and indeed for a long time afterwards, many states retained either property or tax-paying requirements for voters. See KEYSSAR, *supra* note 13, at 8-52. In 1787, Madison himself did not necessarily support the abolition of property requirements and what I call the majoritarian idea of commensurability of individuals’ votes, though he later revised his views in a more democratic direction. See ROBERT DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* 31-37 (2001). Whatever Madison’s individual views, however, the views publicly expressed in the *Federalist* in support of the Constitution do importantly support the commensurability of individuals’ votes, as I hope to show in this Part.

<sup>106</sup> THE FEDERALIST NO. 51, at 351 (James Madison).

today call “minority rights.” To a great extent, the particular minority for which the Federalists feared was *the rich*—a group which twenty-first century democrats might think little need constitutional solicitude, but one which had on its side two thousand-year-old arguments suggesting the unfairness of majority rule. Such arguments still had some force in America in 1787, and caused the Federalists to condition their support for majority rule even as they gave majoritarianism the firm theoretical and constitutional foundation that destroyed the possibility of formal American oligarchy. Skeptics may see the Federalists’ adoption of egalitarian majority rule as a mere formalism in light of constitutional structures that trammled popular power and arguably helped preserve the *de facto*, if not always the *de jure*, rule of the rich. But formalisms need not be completely empty. The Federalists’ mix of formal majoritarian equality and substantive counter-majoritarian concern also laid the groundwork for future American constitutional developments that were far more than the tribute that oligarchy pays to democracy. Unsurprisingly, the Federalists did not resolve world-historic tensions between rich and poor, majority and minority. But they did, for better or worse, provide Americans with a constitutional and conceptual structure in which citizens could potentially negotiate those tensions without recourse to explicit class warfare.

In order to understand the significance and the subtlety of the Federalist revision of majority rule, in this Part I first discuss the English “mixed government” theory, which reflected long-received wisdom about social structure and fair representation suggesting that majority rule would inevitably be tyrannical. The English exported these views to their American colonies, and the theory—and American practice in light of the theory—thus provides an important context for the Federalists’ acceptance of a certain kind of

majoritarianism. I then turn to the Federalists' ultimate rejection of mixed government theory in favor of an egalitarian, individualist majority rule, as well as to the lingering fears that led the Federalists to establish a majority rule which—they hoped—would limit the mobbishness and disorder of democratic politics.

*B. Mixed Government and the English Class Legacy*

The continuity between today's American constitutional order and that of the eighteenth-century Founders can sometimes obscure the foreignness of the past, and the extent to which the Founders were required to respond to concerns very different from ours—or, perhaps more accurately, quite similar concerns, the force of which we can understand better when we see them differently articulated and differently framed. The Federalist Founders were firmly rooted in their intellectual and political traditions, but they were also transformative thinkers and politicians, and understanding their transformations requires understanding what they left behind. In the case of the Federalist transformation of majority rule, they left behind a venerable Anglo-American tradition linking class stratification and constitutional form that had in large part been justified on grounds of preventing majoritarian democratic excess. As we shall see, the Federalists did not completely abandon the concerns underpinning this tradition, but they had to address those concerns in a manner that spoke to the American social and political condition. This the pre-existing Anglo-American constitutional theory seemed incapable of doing.

The revolutionary era Americans inherited from England a theory of “mixed government” that attempted to structure government to secure an ideal balance between different orders of society. (This English view, in turn, was rooted in a long tradition of

European political thought stretching back to Polybius and Aristotle.<sup>107</sup>) In the English view, these orders were the one, the few, and the many—that is, the Monarch, the aristocracy, and the people, represented in Parliament by the Crown, the House of Lords, and the House of Commons.<sup>108</sup> Perhaps the most difficult aspect of this theory for modern democratic ears to comprehend is not the existence of a monarch or a nobility but rather the idea that “the people” were merely a proper subset of the citizenry, one part of the wider body politic. As were the Athenian *hoi polloi* or the Roman plebians, so were the English “people” understood as only one class among others—in the English case, as one of three separate social estates.<sup>109</sup> With society viewed as comprised of such incommensurable (and often mutually antagonistic) orders, it seemed not only comprehensible but ideal to seek constitutional forms that would preserve a balance between these orders, not only as a matter of fairness or justice between classes, but also as a means of harnessing in government the special virtues of each estate.<sup>110</sup> By the lights of such a theory, of course, simple majority rule across the citizenry would appear unjust, if not tyrannical, as the nobility and the Monarch could not be adequately represented by the socially alien “people” who would comprise any majority.

At the heart of this English anti-majoritarianism stood the tradition of bicameralism. Ignoring for the moment very real problems of highly restrictive suffrage (even among adult male citizens), rotten boroughs, and the like, the House of Commons,

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<sup>107</sup> For my own interpretation of Aristotle’s views of democracy, majority rule, and political “mixing,” see James Lindley Wilson, *Deliberation, Democracy, and the Rule of Reason in Aristotle’s Politics* (unpublished manuscript, on file with author).

<sup>108</sup> WOOD, *supra* note 8, at 197-200.

<sup>109</sup> See *id.* at 199; see also *id.* at 222 (“[D]emocracy meant government literally by the social estate of the people.”).

<sup>110</sup> See *id.* at 198 (“Each of these simple forms [of government placing all power in one class] possessed a certain quality of excellence: for monarchy, it was order or energy; for aristocracy, it was wisdom; and for democracy, it was honesty or goodness.”).

as its name suggested, could by the standards of the day reasonably claim to represent the majority of the English population. But while the “Westminster” model is today associated with unicameral assembly supremacy, in the eighteenth century—at least according to mixed-government theory—the Commons and the majority it ostensibly represented were decidedly *not* supreme, but were rather the political equals of the House of Lords and the tiny aristocratic minority it represented. English bicameralism was self-consciously anti-democratic in that it meant to deny the unmixed rule of the many and the “anarchy and tumult” thought to accompany popular supremacy.<sup>111</sup> (Of course, bicameralism was also anti-aristocratic and anti-monarchical in that it professed to protect against the perversions accompanying the rule of any single class.) Bicameralism was thus an institutional reflection of the political incommensurability of individuals in different social classes: each order required its own representative body, comprised by members of that order, who alone could satisfactorily represent the order’s interests. While majorities might rule within classes (and therefore within the House of Commons or the House of Lords), majority rule across the citizenry as a whole would have appeared to proponents of mixed-government theory to unbalance politics and effectively to disenfranchise two of the three constitutive orders of society.

While post-revolutionary Americans rejected the English institutions of monarchy and hereditary nobility, they did not immediately dispense with mixed-government theory.<sup>112</sup> Without the social apparatus of nobility, of course, it was not obvious in republican America what the distinct social orders were, nor how exactly to instantiate

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<sup>111</sup> *Id.* at 198.

<sup>112</sup> *See id.* at 200-06.

politically the “aristocratic” and “monarchical” elements.<sup>113</sup> One strategy, pursued in various ways by a number of states, was to separately represent the “people” and the “propertied.”<sup>114</sup> While the mixed-government theory typically presented “the few” as aristocratic rather than oligarchic—that is, “the few” were defined by their wisdom and virtue, rather than by any crass attachment to the economic interests of the rich—the use of property qualifications in place of a system of nobility made more explicit the bleeding between aristocratic and oligarchic elements that was presumably always present in mixed-government practice. While the conceptual separation of persons and property did at least provide a coherent distinction between the constituents of lower and upper houses, and thus a basis for continued “mixing” and attendant bicameralism, it also stood in some tension with revolutionary ideals of republican equality—and, arguably, mixed-government theory’s own emphasis on virtue rather than economic class solidarity.<sup>115</sup> Nevertheless, the concept of a politically separate propertied class revealed the continuing American commitment to mixed government, bicameralism, and, therefore, anti-majoritarianism.

Even in these most oligarchic, explicitly economic forms, American mixed-government theory may have been driven less by a direct sense of economic class interest than by an aristocratic elitism. Property was not just an interest, but a proxy for wisdom and virtue, a “criterion by which [Americans’] ‘senatorial part’ could be more rigidly

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<sup>113</sup> *Id.* at 207 (“[H]owever confident the [English] Commonwealthmen had been over the possibility of erecting a mixed republic, it was not to be a simple matter to realize in the American environment.”).

<sup>114</sup> *See id.* at 214 (discussing states with property qualifications for senatorial candidates and electors); *id.* at 215 (describing Thomas Jefferson’s recognition that “[i]n some of the states . . . the legislature was chosen so that the lower house represented persons and the upper house the property of the state”). Of course, these developments were not without their critics. *See id.* at 503 (“[T]he senates had become for some blatantly self-interested bodies representing the distinct concerns of the propertied or rich of the community set in opposition to the common good of ordinary people.”). On the states’ use of property requirements for voting at the time of the Constitutional Convention, see KEYSSAR, *supra* note 13, at 8-21.

<sup>115</sup> *Id.* at 221-22.

distinguished.”<sup>116</sup> The representation of property was just one aspect of the American quest to perfect mixed government by replacing the corrupt hereditary nobility with a natural aristocracy—an elite class rendered elite by their merit rather than by their birth.<sup>117</sup> But if American mixed-government theory substituted modern meritocracy for archaic feudal conceptions of virtue and social order, it did not thereby rid itself of class conflict or anti-majoritarianism. Even if the “natural aristocracy” was too broad and diffuse to constitute an integrated “class interest,” an institutional commitment to the rule of the “best men” inevitably favors the rich and the socially established—that is, the elite. (This is precisely why the Athenian people, as well as a long line of thinkers stretching back to Aristotle, saw elections as relatively undemocratic: they tended to leave offices in the hands of the “best persons” in contrast to rotation and lot, which virtually guaranteed that many offices would be controlled by the *hoi polloi*.<sup>118</sup>) If the natural-aristocratic upper house was not to be limited to feudal lords, neither would it likely be staffed by commons.

The propensity for aristocratic institutions (however “natural”) to exclude commoners was not lost on post-revolutionary Americans. On the contrary, the attempt to segregate an aristocratic element in the service of mixed-government bicameralism was only one aspect of a larger debate regarding the roles of the natural aristocracy and the common people in active political rule. Gordon Wood writes that Antifederalist

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<sup>116</sup> *Id.* at 217.

<sup>117</sup> *See, e.g., id.* at 237 (“Most American believers in the theory of mixed government in 1776, like Jefferson, had anticipated senates composed only of an aristocracy of talent . . . . Such senates were by no means to be a European aristocracy, a hereditary nobility artificially protected by law and distinguished by titles. The American aristocracy would be a natural one, made up of men of proven merit.”).

<sup>118</sup> *See supra* note 34 and surrounding text (noting the Athenian people’s skepticism regarding elections, and the long-standing view that elections were “aristocratic” or “oligarchic”).

critics of the Constitution were highly skeptical of the ability of the talented elite to represent the people:

Such constant admonitions to the people of the perils flowing from their too easy deference to the ‘*natural aristocracy*’ were necessary because the Antifederalists were convinced that these ‘men that had been delicately bred, and who were in affluent circumstances,’ these ‘men of the most exalted rank of life,’ were by their very conspicuousness irreparably cut off from the great body of the people and hence could never share in its concerns nor look after its interests.<sup>119</sup>

Such criticisms tended to adopt the premises of mixed-government theory at the same time that they invert its conclusions. Mixed-government theory drew its strength from the idea that there existed in society different classes or orders that each merited separate representation in government. Antifederalist critics of natural aristocracy implicitly accepted the idea that society was comprised of different classes separated by chasms that representation could not bridge,<sup>120</sup> but exhibited less concern for “mixing” in pursuing what they saw as their partisan affiliation with “the great body of the people.” Federalist defenders of natural-aristocratic government were thus pressured either to reject this democratic argument for popular supremacy or to reject the theory of social stratification that underpinned both mixed-government theory and the broader Antifederalist attack on elite representation.<sup>121</sup> In the class-based terms of mixed-government theory, even a “natural” aristocracy was anathema to democracy understood as unmixed rule of the common people.

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<sup>119</sup> WOOD, *supra* note 8, at 490.

<sup>120</sup> *See id.* at 491 (“Society was not an organic hierarchy composed of ranks and degrees indissolubly linked one to another; rather it was a heterogeneous mixture of many different classes or orders of people.”) (quotation omitted).

<sup>121</sup> As we shall see, the Federalists chose to endorse popular supremacy while denying the theory of social stratification, enabling them to see natural aristocracy as compatible with a certain kind of democracy. See *infra* Section III.C and in particular note 174.

The idea that natural aristocracy—that is, a system for selecting the most talented men (of whatever birth or wealth) for political office—could be seen as anti-democratic helps to reveal the anti-majoritarianism deeply embedded even in the American refinements to mixed-government theory. As made particularly evident in discussions of bicameralism, the aristocratic element of society was explicitly seen as separate from “the people,” separate if not by wealth at least by wisdom and virtue. Thus “the best men,” even if selected without formal property qualifications, were not necessarily “of the people”—remembering that “people” tended to refer not to the citizenry generally but to the commoners, the *hoi polloi*.<sup>122</sup> This stark separation of elite and masses made natural aristocracy (even within mixed government) suspicious from the perspective of democratic partisans, but the converse of this suspicion was the view that the *demos* was itself only one class among others, what we today might pejoratively call an “interest group.” As Wood puts it:

Many were prepared to conclude that the great danger to republicanism was not magisterial tyranny or aristocratic dominance but ‘faction, dissension, and consequent subjection of the minority to the caprice and arbitrary decisions of the majority, who instead of consulting the interest of the whole community collectively, attend sometimes to partial and local advantages.’<sup>123</sup>

Just as in the English system, with its monarch and its lords, majority rule in American mixed-government theory appeared to be a factious usurpation of government by the commoner class. Majoritarianism in the post-revolutionary period was thus the province of radical democrats who rejected mixed-government theory altogether.

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<sup>122</sup> See WOOD, *supra* note 8, at 516 (describing “the central issue the Constitution posed” as “whether a professedly popular government should actually be in the hands of, rather than simply derived from, common ordinary people”).

<sup>123</sup> *Id.* at 502; see also *id.* at 509 (discussing view that natural aristocracy “had to dominate public authority in order to prevent America from degenerating into democratic licentiousness”).

The radicalism of majority rule, and the anti-majoritarianism of mixed-government orthodoxy, can perhaps best be seen in the debates over Pennsylvania's unicameralism, one of the most majoritarian governmental regimes to appear in post-revolutionary America. In stark contrast to Massachusetts's bicameralism of persons and property that was explicitly defended as providing constitutional protection for the rich, in Pennsylvania the presence of an upper house was directly criticized for constitutionalizing inequality.<sup>124</sup> The Pennsylvanian democrats' view, which triumphed in the state constitutional convention of 1776, was that republican equality implied unmixed democracy in the form of a single assembly rather than a bicameral mixture. In the eyes of the democrats, "[t]he result of such a mixture was always a bitter struggle—a struggle that could be avoided only by the recognized presence of a single order in the community."<sup>125</sup> Once that single order—"the people," now understood as the entire citizenry—was recognized, there seemed little need for the aristocratic apparatus of bicameralism, which in its anti-majoritarianism could only serve to counter the common interests of the people as expressed by the people's assembly.<sup>126</sup> Opponents of the radical Pennsylvanian Constitution were quick to denounce it as an affront to mixed-government theory, which it was, and as an "execrable democracy."<sup>127</sup> The coherence of those criticisms, and the very rarity on the American continent of Pennsylvania's

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<sup>124</sup> Compare *id.* at 220 (documenting defense of Massachusetts's bicameral arrangement on grounds that "the rich must be specifically protected in the constitution") with *id.* at 230-31 (noting Pennsylvanian radicals' view that "[b]icameralism would only breed distinctions").

<sup>125</sup> *Id.* at 230.

<sup>126</sup> Interestingly, the Pennsylvania democrats were not quite unicameral parliamentary supremacists, but their suspicion of the assembly apparently stemmed less from any concern about unmixed democracy than from a general suspicion of formalized government and its separation from the people. Thus the constitutional checks placed on the assembly came not in the form of an upper house or strong executive but in the form of popular restraints such as a short term of office, the publication of all proposed laws, and the septennial Council of Censors, a popular body that was meant to judge whether the government had overstepped constitutional bounds. See *id.* at 231-32. The radical democrats were thus skeptical even of majority rule as a formal, and thus to some extent counter-demotic, constitutional principle.

<sup>127</sup> *Id.* at 233.

unicameral experiment, highlight just how anti-majoritarian mixed-government theory was, and how unremarkable that anti-majoritarianism seemed to what was then the American mainstream. At the same time, the democratic challenge to mixed-government theory and to bicameralism put pressure on this anti-majoritarianism and the theory of social stratification that underlay it. As long as the idea of narrow class-based representation persisted, defenders of bicameralism—and indeed any departures from majority rule—all too easily appeared to be enemies of the people.

To the extent that mixed-government theory reigned supreme, being designated an “enemy of the people” may not have been all that embarrassing. The whole point of the theory was to prevent government from being too “friendly” with any of the orders of society, including the common people. But by the time the U.S. Constitution was written in 1787, mixed-government theory in America was under severe strain. Democratic criticism, exemplified by the radical Pennsylvania unicameralists and the anti-aristocratic Antifederalists, exposed doubts as to whether mixed government was compatible with self-rule in a republic. Meanwhile, Federalists in search of efficient, good government sought to justify for the natural-aristocratic rule of the talented without denying the popular supremacy that increasingly appeared inseparable from republicanism. The solution was to reject the class-based social theory behind mixed-government theory. As the Pennsylvania democrats foreshadowed, this move made majority rule comprehensible as something other than lower-class tyranny. But the Federalists were not so sanguine as the Pennsylvania radicals about the actual rule of the common people, and not so quick to dispense with classical concerns about majority rule even as they helped usher in the social and political theory that made it desirable.

C. *Form, Faction, and Federalist Majority Rule*

James Madison was quite explicit in stating that the fundamental difficulty facing the framers of the United States Constitution was “combining the requisite stability and energy in Government, with the inviolable attention due to liberty, and to the Republican form.”<sup>128</sup> One element of this balancing act involved establishing a constitutional order promoting the rule of the “best men”—in Madison’s words, “men who possess the most attractive merit, and the most diffusive and established characters”<sup>129</sup>—without the concomitant “*total exclusion of the people in their collective capacity*”<sup>130</sup> obliterating the “spirit and form of popular government” to which the Federalists were genuinely

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<sup>128</sup> THE FEDERALIST NO. 37, at 233 (James Madison).

<sup>129</sup> *Id.* NO. 10, at 63 (James Madison). Note that “diffusive” here has what is today a slightly less common meaning of “dispensing or shedding widely or bountifully.” OXFORD ENGLISH DICTIONARY, s.v. “diffusive,” 1 (2d ed. 1989). Thus Madison implies that the men in question have characters that are both excellent and widely felt.

<sup>130</sup> THE FEDERALIST NO. 63, at 428 (James Madison). As I suggested at the end of Part II, this well-known defense of the “total exclusion of the people in their collective capacity” has something of a dual meaning. *See supra* note 101 and surrounding text. Most clearly and directly, the “exclusion of the people” has what I have called a formal element: it refers to the rejection of direct, formless democracy (rule of “the people”) in favor of representative republicanism (rule of the “representatives of the people”). But the “exclusion of the people” also has hints of a substantive element—that is, the exclusion from government of the lower classes, the people as *hoi polloi*. Notably, the discussion of popular exclusion comes in the context of a defense of the Senate as a “temperate and respectable body of citizens” protecting the people against their own “irregular passion” or the “artful misrepresentations of interested men.” *Id.* at 425 (James Madison). The Senate was explicitly defended as elitist, and indeed John Jay went so far as to praise the Senate (appointed by state legislatures) as having “vastly the advantage of elections by the people in their collective capacity, where the activity of party zeal taking advantage of the supineness, ignorance, and the hopes and fears of the unwary and interested, often places men in office by the votes of a small proportion of the electorate.” THE FEDERALIST NO. 64, at 432-33 (John Jay). (Note that here the “people in their collective capacity” are distrusted not only in relatively formless legislative deliberation but in the context of formal, representative electoral structures.) These “interested” men were apparently more likely to be on the side of the masses. *Cf. id.* NO. 10, at 57 (James Madison) (expressing concern about “the superior force of an interested and over-bearing majority”). Extending the size of the republic would make majorities likely to support not the “interested” but the elite, “established characters.” *Id.* at 63. Moreover, in the discussion of popular exclusion the Senate was contrasted with “the popular branch,” that is, the British House of Commons or other foreign counterparts to the American House of Representatives, a denomination that seems to be a holdover of mixed-government theory’s association of the lower house with the lower class. THE FEDERALIST NO. 63, at 430 (James Madison). Nevertheless, this “substantive” aspect of popular exclusion should not be overstated. Even in these passages, Madison emphasizes that both legislative houses are connected to the “entire body of the people themselves” (i.e., not just the people-as-lower-class), and that the Senate will never be an “aristocratic body.” *Id.* at 431. This Federalist ability to see themselves as elitist and yet un-aristocratic is precisely the subject of this Section.

dedicated.<sup>131</sup> That is, in terms of mixed-government theory, the Federalists needed to explain how the relatively natural-aristocratic regime they saw as so salutary, and indeed so necessary for national survival, could be understood as representative of the people and not simply the aristocratic estate. Of course, the Federalists could display their democratic credentials by emphasizing that the Constitution imposed no formal barriers to office-holding by men of humble origins.<sup>132</sup> But to the extent that the Constitution was explicitly understood as tending to select for a superior class of men (even if born poor), by the lights of mixed-government theory this appeared as simply a new means of identifying (and empowering) the separate aristocratic order in the American republic. The Federalists resoundingly rejected mixed-government theory and the idea that elite office-holding conflicted with mass sovereignty. In doing so, the Federalists thus helped establish majority rule as a fundamentally “republican principle,”<sup>133</sup> at the same time that they established a limited form of majoritarianism that very much protected against the rule of the common *demos*.

The Federalists implicitly rejected mixed-government theory’s class-based conception of representation by repeatedly emphasizing that each part of the proposed federal government represented the entire body politic. In an early discussion of representative government, Madison explicitly celebrated what he claimed was the American innovation in adapting European practices of representation to “unmixed and extensive republics.”<sup>134</sup> While that and other early essays in the *Federalist* tended to

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<sup>131</sup> THE FEDERALIST NO. 10, at 61 (James Madison).

<sup>132</sup> See *supra* notes 98-101 and surrounding text.

<sup>133</sup> THE FEDERALIST NO. 10, at 61 (James Madison).

<sup>134</sup> *Id.* NO. 14, at 84 (James Madison). Cf. WOOD, *supra* note 8, at 202-06 (discussing the post-revolutionary American efforts to conceptualize “mixed republics” in their effort to apply mixed-government theory to American states without monarchies or nobilities).

focus on the innovation in “extensiveness” which supported the development of a strong federal government, the Federalists often returned to the “unmixed” nature of the new government. Madison indeed boldly declared lack of “mixture” to be virtually definitive of republican government:

[W]e may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people . . . It is *essential* to such a government, that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it.<sup>135</sup>

Notably, *all* of the government’s powers are to be derived from “the great body of the people” rather than from any “favored class.” The “people” are neither limited to controlling a single branch of government, nor are they limited to existence as a “favored class,” (i.e., the lower class), but rather are equated with “the great body of society.” A republican government, argued the Federalists, acknowledged only one politically salient order of society: the people.

Unsurprisingly, the Federalists were clear that their proposed federal government was republican, and thus unmixed. Alexander Hamilton declared that “[t]he fabric of American Empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE. The streams of national power ought to flow immediately from that pure original fountain of all legitimate authority.”<sup>136</sup> Hamilton was satisfied that the Constitution met this requirement, rejecting fears of a national military in part on the grounds that “the whole power of the proposed government is to be in the hands of representatives of the

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<sup>135</sup> THE FEDERALIST NO. 39, at 251 (James Madison). Any alternative to unmixed popular government, suggested Madison, would effectively allow “a handful of tyrannical nobles” to rule. *Id.*

<sup>136</sup> *Id.* NO. 22, at 146 (Alexander Hamilton).

people.”<sup>137</sup> Madison used similar metaphor to reach a similar conclusion, noting that “the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived.”<sup>138</sup> Madison also pointed out that the House of Representatives was elected by the “WHOLE BODY of the people,”<sup>139</sup> suggesting that the House represented all of society rather than merely the common class while at the same time arguing that this fact *increased* the democratic credentials of the House relative to the British House of Commons, where “so great a proportion of the members are elected by so small a proportion of the people.”<sup>140</sup> Here as elsewhere, the Federalists use individual suffrage rather than class representation as the measure of popular control of government. More generally, Madison claimed that every branch of the federal government derived its power “directly or indirectly from the great body of the people,” rather than from separate classes.<sup>141</sup> While the federal government was to be divided, the source of each part’s power was similar—that is, each branch was popular—and so the Constitution was presented as establishing an unmixed republic for an unmixed society.

That society was “unmixed” and to that extent classless did not suggest any commitment to social egalitarianism. The Federalist rejection of class was hardly a proto-Marxian vision of economic equality. On the contrary, the Federalists saw

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<sup>137</sup> *Id.* NO. 28, at 178 (Alexander Hamilton). *See also id.* NO. 21, at 131 (Alexander Hamilton) (suggesting the view that the states were unmixed republics in arguing that federal Guarantee Clause power would be unlikely to be abused because “[w]here the whole power of the [state] government is in the hands of the people, there is the less pretence for the use of violent remedies”).

<sup>138</sup> *Id.* NO. 49, at 339 (James Madison). Strictly speaking, Madison is here summarizing the views expressed by Thomas Jefferson in his “Notes on the state of Virginia.” Madison goes on, however, to conclude that “[t]here is certainly great force in this reasoning,” and only disagrees with Jefferson’s particular proposals regarding procedures for constitutional amendment. *Id.*

<sup>139</sup> *Id.* NO. 41, at 274 (James Madison).

<sup>140</sup> *Id.* NO. 41, at 273 (James Madison).

<sup>141</sup> *Id.* NO. 39, at 251 (James Madison). For Madison’s explanation of how each branch meets this criterion, see *id.* at 252.

inequality as natural, inevitable, and more or less desirable. They offered, however, an interpretation of that inequality radically different from that offered by mixed-government theorists, and that interpretation had profound consequences for the American understanding of the link between society and constitutional form, including majority rule. The critical Federalist innovation for these purposes was the shift from “class” to “faction” in describing the different (and unequal) units into which society fractured. Replacing the relatively feudal class-based vision of inequality underpinning mixed-government theory with an arguably more modern perception of society as highly differentiated and mobile, the Federalists made comprehensible their equation of “the people” with society as a whole.<sup>142</sup> This equation made majority rule conceivable in a way that it could not have been under the suppositions of mixed-government theory, but it did not mean that majority rule was unproblematically just. The Federalists replaced the problem of “majority class”—the old mixed-government problem of majority rule enabling democratic tyranny, the exploitative rule of the *hoi polloi*—with the problem of “majority faction.” The Federalists thus did not eliminate anti-majoritarianism so much as change and update it.

Madison laid out his theory of inequality-as-faction in his first essay as Publius, the famous *Federalist* No. 10. In a forceful rejection of any republican notion of

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<sup>142</sup> The political sociologist Ernest Gellner has suggested that mobility and differentiation (in the form of complex division of labor) are essential characteristics of the modern society, in contrast to the highly rigid and stratified “agrarian” society. Gellner points out that the economic need for rapid adaptability encourages processes of common socialization that render individuals more standardized—and thus generally capable of moving interchangeably into different positions in the economy as changing circumstances demand. See ERNEST GELLNER, *NATIONS AND NATIONALISM* 19-38 (1983). Importantly for our purposes, Gellner suggests that this economic and social commensurability leads to a kind of egalitarianism: “Modern society is not mobile because it is egalitarian. It is egalitarian because it is mobile.” *Id.* at 24-25.

homogeneity of interests, Madison argues that “[t]he latent causes of faction are . . . sown in the nature of man”:

As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. . . . The diversity in the faculties of men from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. . . . [T]he possession of different degrees and kinds of property immediately results: and from the influence of these on the sentiments and views of the respective proprietors, ensues a division of the society into different interests and parties.<sup>143</sup>

The emphasis on property in this story of social differentiation may seem to replicate classical mixed-government theory in identifying the central social cleavage as being that between “persons” and “property.” Madison seems clear, however, that social differentiation is much more fine-grained than that one fault line might suggest. Though “the most common and durable source of factions, has been the various and unequal distribution of property,”<sup>144</sup> Madison gives a number of reasons to believe that we should not take this to mean that society splits only into two or three rigidly defined classes.

The first reason we should not take Madison’s theory of inequality to be old classist wine in new factional bottles is that Madison clearly identifies non-materialist causes of faction that divide society in ways that do not depend on property holdings. As we saw in the lengthy passage above, Madison identifies “different opinions” resulting from the fallibility of reason and liberty of conscience as a central divisive force.<sup>145</sup>

Similarly, he points to charismatic leaders and “the human passions” as means of

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<sup>143</sup> THE FEDERALIST NO. 10, at 58 (James Madison).

<sup>144</sup> *Id.* at 59.

<sup>145</sup> See also *id.* at 58 (identifying “zeal for different opinions concerning religion” as a major cause of faction”). More recently, John Rawls has made this connection between liberty and the exercise of reason, on one hand, and differentiation (Rawls calls it “pluralism”) on the other, the centerpiece of his political philosophy. See RAWLS, *supra* note 3, at xviii (“Political liberalism assumes that, for political purposes, a plurality of reasonable yet incompatible comprehensive doctrines is the normal result of the exercise of human reason within the framework of the free institutions of a constitutional democratic regime.”).

propelling “mankind to fall into mutual animosities . . . where no substantial occasion presents itself.”<sup>146</sup> Thus economic inequalities are not the sole determinants of social and political division. The second, and perhaps more important, reason to be confident that Madison’s theory of inequality does not reaffirm the classical vision of highly stratified class structure is that Madison viewed the economy itself as highly differentiated. As we saw above, Madison believed that the natural diversity of human faculties resulted in “the possession of different *degrees and kinds* of property.” “Property” is thus no longer understood as a monolithic interest, but something that itself is internally diverse. (More accurately, and as Madison recognizes, the *possessors* of property are diverse. Part of the shift from class to faction involved the refusal to reify “property” as an indivisible social and political entity.) This view is made more explicit by Madison in *Federalist* No. 51, where he points out that in the United States, “society will be broken into . . . many parts,” resulting in a “multiplicity of interests.”<sup>147</sup> Alexander Hamilton made a similar point in rejecting the possibility that the House of Representatives could be made so large as to accommodate the actual representation of “all classes of the people.”<sup>148</sup> Hamilton went on to propose what we might call a sectoral theory of economic faction, discussing the various interests of “mechanics,” manufacturers, artisans, merchants, “the learned professions,” and the “landed interest.”<sup>149</sup> While we might today be a bit skeptical of Hamilton’s political economy—for example, he takes the interests of the landed sector as “perfectly united from the wealthiest landlord to the poorest tenant”<sup>150</sup>—the point

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<sup>146</sup> THE FEDERALIST NO. 10, at 58-59 (James Madison).

<sup>147</sup> *Id.* NO. 51, at 351, 352 (James Madison).

<sup>148</sup> *Id.* NO. 35, at 219 (Alexander Hamilton) (arguing that such actual representation “would never take place in practice”).

<sup>149</sup> *Id.* at 219-20.

<sup>150</sup> *Id.* at 220. In fairness to Hamilton, some theories of political economy with a sectoral focus do live on today, for instance in explaining the relationship between domestic politics and international trade. *See*,

remains that the Federalist vision of society was one of substantial differentiation that went far beyond crude and broad class distinctions.<sup>151</sup>

The replacement of class with faction as the relevant unit of social and political “combination” allowed the Federalists to take a different view of majority rule than mixed-government theory seemed to permit.<sup>152</sup> In a mixed (that is, classed) society, the rule of a majority of individuals appeared as a surrender in the political class war and an unjustified concession to dominance by a mere part of the polity. In a mixed society, not all individual citizens were commensurable: the vote of a member of the “people” could not legitimately be compared with (or cancel out) the vote of a member of the rich and propertied class. (Alternatively, we could say that a majority of all individuals—effectively, given class polarization, the members of one class—could not represent the members of other classes.) Hence the need for institutional strategies of bicameralism and separation of powers in eighteenth-century England and America, in which policies required the support of each order of society. By contrast, in an unmixed society, individual citizens appeared politically commensurable: at least as far as the federal constitution was concerned, the votes of ten men without property could be compared with, and could cancel out, the votes of ten men with extensive property holdings.<sup>153</sup>

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*e.g.*, RONALD ROGOWSKI, *COMMERCE AND COALITIONS: HOW TRADE AFFECTS DOMESTIC POLITICAL ALIGNMENTS* (1989).

<sup>151</sup> The extent of potential social and economic differentiation in the Federalists’ eyes also becomes apparent in their repeated discussion of the theme that the national society was much more differentiated than the societies within individual states. *See, e.g.*, *THE FEDERALIST* NO. 56, at 382 (James Madison) (noting that “[f]ew of [the states] have made much progress in those branches of industry, which give a variety and complexity to the affairs of a nation”); *id.* NO. 60, at 406 (Alexander Hamilton) (arguing that national representation “will be an emanation from a greater variety of interests, and in much more various proportions, than are to be found in any single state”).

<sup>152</sup> The Federalists use “combination” to refer to alliances of avaricious or otherwise abusive social groups. *See, e.g.*, *id.* NO. 10, at 63 (James Madison); *id.* NO. 70, at 471 (Alexander Hamilton).

<sup>153</sup> This may not have been true in individual states, as the U.S. Constitution did not abolish property requirements for suffrage. The federal constitution, however, did not itself establish any such property restrictions, and thus, for instance viewed any member of the electorate for the state’s most populous house

(Alternatively, we could say that the views of a majority of individual citizens adequately represented all citizens.) Such commensurability seemed appropriate once those individuals were seen as all equally of “the people” or “the great body of society” rather than as members of highly stratified and highly antagonistic economic and political orders. Thus the Federalists could describe majority rule across all of society, as opposed to multiple majority rules within each order of society, as “the fundamental principle of free government.”<sup>154</sup>

The revision of society as unmixed rather than mixed thus naturally led to the elevation of majority rule. But one might wonder whether the shift from class to faction in the theory of social inequality is quite the same as a shift from a politically mixed to a politically unmixed society. Why wouldn't the presence of more different social groups make representation (by a majority or indeed by anything else) even more impossible? To put it another way, why doesn't the shift from class to faction imply, instead of a shift from a mixed to an unmixed polity, a shift to an ever-more-mixed polity? Instead of supporting majority rule, why wouldn't we need to support an ever-more-anti-majoritarian “multicameralism” giving separate representation to each sector or faction within society? The Federalists were well aware of at least one line of this reasoning, as

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as equivalent to any other member. U.S. CONST. art. 1, § 2, cl. 1 (“[T]he Electors [of the House of Representatives] in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”). *See also supra* note 14 (noting federal constitution's absence of restrictions on suffrage). The Federalists made one important exception to this general rule of individual commensurability: Madison defended the Three-Fifths Clause in large part on the basis of an argument (sounding in mixed-government theory) that property (i.e., slaves) demanded representation as well as persons. *See THE FEDERALIST NO. 54*, at 369-70 (James Madison). (Notice that the incommensurability which required justification for Madison was not that between free citizens and slaves, as that was taken for granted, but between individuals in free states and individuals in slave states, as the latter got representation disproportionate to their number of free persons.) Given the centrality of “unmixed” representation to the Federalist project, this defense seems particularly “strained,” as Madison himself said. *Id.* at 371.

<sup>154</sup> *THE FEDERALIST NO. 58*, at 397 (James Madison); *see also id.* *NO. 22*, at 139 (Alexander Hamilton) (acknowledging the “fundamental maxim of republican government, which requires that the sense of the majority should prevail”).

evidenced by Hamilton's firm rejection of the proposal that a federal assembly be enlarged so as to allow for the actual representation of each economic interest.<sup>155</sup> To some extent, the Federalists' refusal to see the theory of faction as undermining majority rule was a part of their general rejection of strict requirements of actual representation, which they (accurately) saw as linked to radicals' skepticism of all representation and those radicals' preference for formless democracy.<sup>156</sup> But it would be too quick to describe the Federalists' refusal to believe that factionalism undermined representation as a brute ideological preference for form, energy, and stability over formlessness, incompetence, and turbulence. Unlike the traditional theory of class, the theory of faction gave reason to believe that social inequality and differentiation could exist without permanent political antagonisms that rendered integrated representation (such as majority rule) impossible.

The first reason to think that social factionalism was compatible with a vision of a politically integrated "people" was that, unlike classes under the traditional view, factions were in constant flux. Whereas the old social orders were seen as relatively frozen (hence the ability to constitutionalize their political reflection), the Madisonian factions do not appear to remain so ossified. While there is no clear statement in the *Federalist* that factions experience rapid "turnover"—that is, rapid fluctuations in membership, size, and political power—there are good reasons to think that such fluidity was inherent in factions as the Federalists understood them. Madison consistently associated with factionalism the "turbulence" and instability that he saw as inflicting American politics. No doubt some of the "impulse" and "unsteadiness" of government in a world of factions

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<sup>155</sup> *Id.* NO. 35, at 218-22 (Alexander Hamilton).

<sup>156</sup> *See supra* Sections II.B-C (discussing radical skepticism of formal representation and the Federalist response).

stemmed from what the Federalists saw as the failures of relatively formless democracy and poorly constructed assemblies, and would have persisted in such an institutional context almost no matter the underlying substantive interests involved.<sup>157</sup> But political turbulence also seems to arise from the turbulence of the factions themselves: “[T]he superior force of an interested and overbearing majority” is not depicted as unjustly entrenching a stable and exploitative ruling coalition, but as contributing “instability” and “confusion.”<sup>158</sup> This is presumably not only because of the “passion” and capriciousness of any given majority,<sup>159</sup> but also because the coalition (that is, the faction or alliance of factions) constituting the majority is constantly changing.<sup>160</sup> The Federalist theory of faction was thus accompanied by an awareness of some social mobility.<sup>161</sup> The result was that factional society tended to promote turbulence and “fluctuating policy” rather than stasis and permanent lines of division.<sup>162</sup> In contrast to the classed society, individuals and groups in a world of differentiated faction were thus identical in their

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<sup>157</sup> THE FEDERALIST NO. 10, at 57 (James Madison). On the problem of turbulence and the Federalist response through the construction of a theory of disciplined assembly, see *supra* Section II.C. Of course, it is probably impossible to know (and probably irrelevant for the Federalists’ purposes and our own) exactly how much responsibility for political “turbulence” we can apportion to institutional forms and how much to shifts in the substance of social interests. The important point is that differentiated factionalism itself contributes in some degree to the instability of majorities, thus decreasing the risk of abusive majority entrenchment even as disciplining forms otherwise tamp down political turbulence.

<sup>158</sup> THE FEDERALIST NO. 10, at 57, 56 (James Madison).

<sup>159</sup> *Id.* at 57.

<sup>160</sup> Further evidence for this implicit connection between factionalism and turbulence occurs elsewhere in the *Federalist*. Madison argues that democracies’ propensity to become “spectacles of turbulence and contention” is linked to their susceptibility to capture by (presumably shifting) majority factions. *Id.*; see also *id.* NO. 63, at 425 (James Madison) (noting the democratic tendency for wild swings in policy, such as “decreeing to the same citizens, the hemlock on one day, and statues on the next”). Hamilton twice declares the House of Representatives too prone to “fluctuating” to be entrusted with the certain powers. *Id.* NO. 75, at 507 (Alexander Hamilton) (treaty power); *id.* NO. 77, at 519 (Alexander Hamilton) (appointments power). This fluctuation of the majoritarian house would not be anticipated if factions and alliances of interest were stable. Finally, the supposed difficulty of “combination” in the differentiated national republic, as discussed *infra* in the next paragraph of text, suggests that large factions or alliances of interests would not be able to keep themselves consistently in political line.

<sup>161</sup> *Cf.* WOOD, *supra* note 8, at 478-83 (discussing contemporary awareness of social mobility after the Revolution).

<sup>162</sup> THE FEDERALIST NO. 44, at 301 (James Madison).

propensity to be both in and out of prevailing majorities within relatively short timeframes.

The Federalists buttress the idea that majorities could represent “society” as a whole rather than a fixed class or stable alliance of factions by suggesting that in a highly differentiated society such alliances will tend to face insuperable problems of “combination.” Madison argued that:

[As] you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.<sup>163</sup>

Thus even if we were to assume an absence of mobility and a relatively stable constellation of underlying social interests, the extent of differentiation itself would make it difficult to translate that social stability into political stasis, entrenchment, and the accompanying threats to truly representative government. Anticipating what today is a truism of public choice theory, the Federalists suggested that political alliances made up of many small members are hard to keep together even if the members themselves are relatively unchanging. This inability of factions to create a frozen majority alliance opened up space, in Bruce Ackerman’s terms, for the Federalists’ government to “transcend faction rather than mimic it.”<sup>164</sup> As Madison put it, the hope was that “a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good.”<sup>165</sup> The difficulty of factional

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<sup>163</sup> *Id.* NO. 10, at 64 (James Madison); *see also id.* at 63 (discussing decreased risk of “factious combinations” in large, diverse society); *id.* at 61 (same).

<sup>164</sup> 1 ACKERMAN, *supra* note 6, at 190.

<sup>165</sup> THE FEDERALIST NO. 51, at 353 (James Madison).

“combination” thus made it conceivable that majority rule could genuinely represent “the people” understood as the entire polity.

The Federalist revision of social differentiation as a matter of faction rather than class thus enabled the political integration of “the people.” Federalist thinking allowed one to see society as something close enough to a collection of individuals that the principle of majority rule measured across all individual citizens appeared not only just but ideal.<sup>166</sup> The Federalists thus swept aside objections to majority rule as incurably partisan that had persisted since the time of Aristotle. But this did not lead them to view majority rule with complete sanguinity. On the contrary, as we have seen, Madison’s first *Federalist* essay attributes American political troubles to “interested and overbearing majorit[ies],” and declares that “[t]o secure the public good, and private rights, against the danger of such a [majority] faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our enquiries are directed.”<sup>167</sup> The problem of majority class had thus given way to the problem of majority faction. The Federalist re-vision of society had made the latter problem tractable even under majority rule in a way that the former problem was not, but the problem nevertheless persisted. Indeed, the Federalists retained something of the classical concern that majority rule often amounted to the rule of force and involved an

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<sup>166</sup> It may be a bit of an exaggeration to describe then-prevailing practices as reflecting majority rule across “all individual citizens,” given restrictions on suffrage, but many of these restrictions (such as those on women and children citizens) were justified with reference to various theories of virtual representation by adult male voters. See, e.g., Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*. 115 HARV. L. REV. 947, 981 (2002) (describing the “centuries-old” idea rejecting women’s suffrage on the basis of “the argument from virtual representation: women did not need the vote because they were already represented in the government by male heads of household”). Accordingly, a majority of adult male voters would indeed be seen to represent a majority of all individual citizens. The relevant development was that cross-class and cross-faction representation became to be seen as appropriate just as cross-sex and cross-age representation traditionally had been.

<sup>167</sup> THE FEDERALIST NO. 10, at 57, 61 (James Madison).

implicit threat of violence. Madison referred to majority factions as exerting rule through “superior force,”<sup>168</sup> and he rhetorically equated “the most numerous party” not exclusively with the common good but also with “the most powerful faction.”<sup>169</sup> The Federalists were also aware of the risk that majoritarian violence would explode constitutional forms, particularly where these forms rested on mass disenfranchisement. While Hamilton rather happily cited the prospect of democratic revolution as a security against disenfranchisement of the poor by the federal government,<sup>170</sup> Madison, in a much darker passage justifying the Guarantee Clause, emphasized that limited disenfranchisement and mass enslavement gave rise to a real threat of mobbish revolt, at least at the state level. In a passage with very close echoes of Aristotle, Madison cautioned:

Nothing can be more chimerical than to imagine that in a trial of actual force, victory may be calculated by the rules which prevail in a census of the inhabitants, or which determine the event of an election! May it not happen in fine that the minority of CITIZENS may become a majority of PERSONS, by the accession of alien residents, of a casual concourse of adventurers, or of those whom the Constitution of the State has not admitted to the rights of suffrage? I take no notice of an unhappy species of population abounding in some of the States, who during the calm of regular government are sunk below the level of men; but who in the tempestuous scenes of civil violence may emerge into the human character, and give a superiority of strength to any party with which they may associate themselves.<sup>171</sup>

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<sup>168</sup> *Id.* at 57. *Cf.* ARISTOTLE, THE POLITICS 100, \*1281a23 (Carnes Lord, trans., Univ. of Chicago Press 1984) (equating lawless democracy with rule of a tyrant: “he is superior and uses force, like the multitude with respect to the wealthy”).

<sup>169</sup> THE FEDERALIST NO. 10, at 60 (James Madison).

<sup>170</sup> *Id.* NO. 60, at 404 (Alexander Hamilton) (“The improbability of the attempt [at disenfranchisement of the poor] may be satisfactorily inferred from this single reflection, that it could never be made without causing an immediate revolt of the great body of the people.”). *Cf.* ARISTOTLE, *supra* note 168, at 112, \*1286b17-21 (noting that given the increased size of cities, and thus the military might of the multitudes, “it is perhaps no longer easy for any regime to arise other than a democracy”).

<sup>171</sup> THE FEDERALIST NO. 43, at 294 (James Madison). *Cf.* ARISTOTLE, *supra* note 168, at 219, \*1332b29-32 (noting the difficulty of wide disenfranchisement, since “the ruled citizens will have with them all those serfs in the countryside who want to subvert [the city], and it is impossible that those in the governing body will be numerous enough to be superior to all of these”).

These passages show that, for all the virtues the Federalists saw in majority rule, they never believed that political majorities (within or without the constitutional order) by necessity possessed legitimate representational claims. The Federalists thus saw the need to domesticate majorities even as they gave them free rein.<sup>172</sup>

None of this is (or was) meant to be esoteric. On the contrary, Madison laid out with great clarity the relationship between social structure, majority faction, and political form in one of his most well-known *Federalist* essays, No. 51. The relevant passage is worth quoting at great length for its acute synthesis of the relevant themes:

It is of great importance to a republic . . . to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure. There are but two methods of providing against this evil: The one by creating a will in the community independent of the majority, that is, of the society itself; the other by comprehending in the society so many separate descriptions of citizens, as will render an unjust combination of the whole, very improbable, if not impracticable. . . . The second method will be exemplified in the federal republic of the United States. Whilst all authority in it will be dependent on the society, the society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals or of the minority, will be in little danger from interested combinations of the majority.<sup>173</sup>

Madison rejects the mixed-government approach of recognizing an order “independent of . . . society” in favor of an unmixed solution wherein all political power is internal to society. But the unmixed approach will only work if society is sufficiently differentiated

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<sup>172</sup> Another example highlights the connection between the Federalists’ concern with majority force and their constitutional project of constructing more salutary (and more pacific) majorities. In arguing against retaining the “principle of legislation for States,” that is, the rule that the federal government could only pass laws directed at states rather than at individuals, Hamilton suggested that various centrifugal forces within the confederation would “open a wide field for the exercise of factious views, of partiality and oppression, in the majority that happened to prevail in the national council.” THE FEDERALIST NO. 16, at 99, 101 (Alexander Hamilton). As explained in Section II.C, *supra*, and in the remainder of this Section, *infra*, the Federalists believed that the strengthening of the federal government would prevent exactly this kind of majoritarian oppression (and resulting violence) from developing, even as national majorities were otherwise empowered.

<sup>173</sup> THE FEDERALIST NO. 51, at 351 (James Madison).

to render “unjust combination” difficult. This is the problem for the Constitution, and its vision of the “federal republic of the United States” to solve: how to keep political power entirely within the society or “the people” without sacrificing the smaller parts of society to the larger. Majorities needed to be at once empowered and contained.

We can now see the connection between the Federalist vision of social substance and their insistence on disciplined constitutional form. The idea of the classless society of commensurable individuals had radical democratic potential, but the Federalists wanted to pull back from what they saw as the anarchic abyss of turbulently careering majorities and formless populism. They aimed to deploy disciplining constitutional form within that classless society in such a way as to respect majority rule and to quell turbulence without guaranteeing the political entrenchment of any fixed set of interests. The forms familiar to us from the United States Constitution—the national republic, the principles of federalism and the separation of powers, the details of the federal assemblies—were thus designed not only to make it difficult, through checks and balances, for majorities to perpetrate tyranny, but also to produce systemic pressures encouraging the development of salubrious rather than factious majorities. The Federalists could thus portray their particular chosen majority rule as relatively egalitarian, fair, and deliberative, rather than partial, mobbish, and turbulent. At the same time, the Federalists could articulate how the natural-aristocratic elements of their forms were compatible with prevailing democratic sentiments: once society was understood as classless, rule “by the people” no longer required the actual participation in government by the common or those representing uniquely “commoner” interests.<sup>174</sup> There was one

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<sup>174</sup> This discussion should allow us to better understand Gordon Wood’s claim that, in using democratic rhetoric, the Federalists “appropriated and exploited the language that more rightfully belonged to their

particular social group that the Federalists were happy to explicitly favor: as Hamilton put it, “the learned professions . . . truly form no distinct interest in society; and according to their situation and talents will be indiscriminately the objects of the confidence and choice of each other and of other parts of the community.”<sup>175</sup> With a telling mix of meritocratic elitism and republican virtue, the Constitution could be relied on to promote the political integration of the many parts of the polity through the rule of the best men.

#### IV. Conclusion

What are we today to make of the Federalists’ view of majority rule? Legally speaking, what, if anything, does it imply about American constitutional democracy

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opponents.” WOOD, *supra* note 8, at 562. Bruce Ackerman criticizes Wood for what Ackerman sees as Wood’s “appeal to false consciousness” to explain the widespread popular support the Federalists managed to command for their constitutional proposal. 1 ACKERMAN, *supra* note 6, at 220. I agree that the “rightfully belonged” language is unfortunate, suggesting as it does that the concept of democracy is so narrow as to exclude the Federalists’ disciplined majoritarianism, and that there is some “true” popular interest apart from what the people choose. As I have tried to show, the Federalists’ claim to be democrats was not merely an ideological maneuver, but grew out of coherent and plausible (if certainly contestable) theories of social structure and political representation. Nevertheless, I think Ackerman misses much of Wood’s point when he says that Wood’s “Beardian suspicion of the Federalists’ substantive agenda blinded him to their success in providing Americans models of political behavior and constitutional concepts.” *Id.* at 221. As I understand Wood, his concern is not that the Federalists disguised an oligarchic agenda in democratic clothing in the sense of favoring the policies of the rich over those of the poor. Wood, of course, was well aware of that the disintegration of mixed-government theory made the concepts of “the rich” and “the poor” as political entities unhelpful. (Thus Ackerman’s attribution to Wood of the idea that “history is best understood as a process in which one social class gains hegemony over another in a fixed sequence,” *id.* at 220, strikes the wrong note.) Wood’s complaint was rather that the Federalist vision of classless society enabled them, by eliminating political distinctions between natural aristocrats and the *hoi polloi*, to justify as entirely democratic the rule of elites whose connection to common people was often remote and indirect, both socially and politically. This cut off, for example, the one possibly beneficial element of mixed-government theory, the ostensibly guaranteed participation of the common and those close to the people in one branch of government. (Wood expresses explicit concern that the Federalists’ theory of representation allowed them to effectively equate the democratic credentials of the House, Senate, presidency, and judiciary, and indeed does so immediately before the passage Ackerman criticizes. WOOD, *supra* note 8, at 550-51, 561-62.) Ackerman may yet be right to prefer what Wood laments as the Federalist decoupling of “differing ideas of politics” from “differing social interests,” *id.* at 562, and indeed I consider myself in common cause with Ackerman in questioning the simple view (which I have associated with Alexander Bickel, *see supra* notes 1-6 and surrounding text, and which Wood seems close to endorsing) that we can classify different branches of government as self-evidently “democratic” (“majoritarian”) or “anti-democratic” (“counter-majoritarian”). (Notice that Wood, unlike Bickel, identifies this view with *opponents* of the Constitution.) Nevertheless, we should not adopt Ackerman’s preference without acknowledging what Wood identifies as a real cost: the systematic exclusion of ordinary people from political rule. To identify that elitism (which of course also has its benefits) is not to endorse a stunted Marxist view of politics.

<sup>175</sup> THE FEDERALIST NO. 35, at 220 (Alexander Hamilton).

today? It is difficult to answer that question, for two reasons. First, the question leads us to complicated issues of how much we are bound by the Framers' (or ratifiers') political theory. Should we see the Federalist theory of majority rule, for instance, as something completely extraneous to the legal text they proposed, or as something that gives us access to the proper meaning of that text? (Proponents of the first answer should remember that Bickel's idea that judicial review's "counter-majoritarian" difficulty is a difficulty at all is something of a political theory itself, which Bickel uses to inform the meaning of the Constitution's provisions regarding judges.) This is just one species of the generally complex question of how much context one needs to isolate the meaning of the constitutional text, and I do not mean to provide any answers here. The second reason it is difficult to know what the Federalist theory of majority rule legally means for us today is that the Federalists and their contemporaries, of course, were not the only framers of our Constitution. Since 1787, the Constitution has seen many changes relevant to majority rule, including not only the Bill of Rights, but the dramatic expansion of suffrage, the introduction of the direct election of the Senate, the elimination of the oligarchic poll tax, and of course the Equal Protection Clause, which has been interpreted by courts and Congress in a variety of ways impinging on the construction and limitation of American majorities. Articulating a coherent theory of majority rule out of all these legal strands would be far from easy, though perhaps no more difficult than many other lawyer's tasks in making sense of centuries of constitutional tradition. That articulation must await another day. Nevertheless, we may still learn a few final lessons from the Federalists, even if we should remain aware that their words were never meant to be the

last, and that they fully expected American majorities to re-constitute themselves in different ways as they faced different social realities.

A commitment to majority rule is a complicated thing. Even if we begin with a high degree of consensus in favor of “democracy” over alternative political forms such as oligarchy or mixed government, it is far from self-evident exactly what institutional forms “majority rule” requires. As Akhil Amar has suggested,<sup>176</sup> it may require the latent political possibility that a majority of citizens can always amend any constitution—this is one possible interpretation of the basic Revolutionary principle, to which the Federalists were committed, that the “people themselves” always retain the right to “alter or abolish” their government. But even that relatively clear and bold majoritarianism leaves us with the question of how to instantiate majority rule in our more quotidian political existence. In the Constitution and in their public defense of it in the *Federalist Papers*, the Federalists developed one elaborate institutional apparatus which had a respectable claim, at least by contemporary standards, to observing majority rule. But that apparatus and that defense emerged from a number of highly contentious political choices about how best to construct majority rule and popular government more generally. Virtually all of these choices had significant consequences for the practice of democracy, the substance of American politics, and the nature of majorities and of majority rule. All of these choices thus had “majoritarian” and “counter-majoritarian,” or “demotic” and “counter-demotic” elements. Of course, this is not to say that all branches of government or all institutional systems are the same, morally or otherwise. Our commitment to democracy and to reflective self-rule demands that we carefully isolate the different political consequences of different constitutional forms. Exactly this kind of

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<sup>176</sup> See Amar, *supra* note 60.

criticism has been going on since the American Founding (and before) and it is this tradition to which Alexander Bickel, for instance, contributed his fine work. But it is worth constantly protecting ourselves against the temptation to hypostasize the “majoritarian” or “counter-majoritarian” elements of our constitutional order into separate and clearly distinct branches. We should take seriously the Federalists’ rejection of the old mixed-government trope that each branch of government has some easily identifiable social basis or political virtue which it reflects. Instead, each branch is both separated from and represents “the people,” or at least pretends to. This is not to encourage complacency about any branch (or the Constitution itself), but to remind us that each branch is complicated, differentiated, and perhaps even a bit unruly in its resistance to analysis—much like the people themselves.