

## Publius

### OVERVIEW

**T**HIS PART TRACES the historical taproots of American dualism to the Founding. To follow dualism to its source, we must learn to see the Founders as they saw themselves: as successful revolutionaries who had managed, time and time again, to lead their fellow citizens in public-spirited collective action, even at great personal cost. So far as the Founders were concerned, these revolutionary acts of mobilized citizenship gave their public life a special quality—far removed from the pushings-and-shovings of normal life.

In charting their constitutional future, the Founders did not turn their back on their revolutionary past. They recognized that much of American politics would lack the quality of mobilized public deliberation they associated with the spirit of the Revolution. Much of their Constitution was elaborated with the pathologies of normal politics in mind. But not all of it. The Founders recognized that their new constitutional machine could not operate indefinitely without further exercises in mobilized deliberation by the people at large. Thus, their constitutional text inaugurates the American experiment in dualism by defining a higher lawmaking process through which future generations might concentrate their political energies to make fundamental law in the name of We the People of the United States.

My first aim is to place these Founding dualisms in historical context—exploring the remarkable way our eighteenth-century predecessors grappled with the problem of constitutionalizing their experience of the American Revolution. My second aim is different, though not (I hope) inconsistent. I propose to use the Founding as the beginning of a dialogue between past and present which will serve as our central technique for constitutional discovery. I mean

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to ask whether the Founding still remains a meaningful act for us today.

The very question conjures up the enormous chasm that separates us from the spokesmen for a million or so white male planters and merchants, farmers and mechanics, who spoke in the name of the People of 1787. What can hundreds of millions of men and women living in a postindustrial and polyglot America learn about governing a world power from these imperfectly liberated Englishmen of long ago?

The problem transcends the obvious social, economic, and political gap separating an agrarian republic on the European fringe from a continental powerhouse at the center of the world political economy—though these differences make meaningful communication hard enough. The deepest difficulty, as always, involves values. The Founders compromised with slavery and religious intolerance; many were positively enthusiastic about sexism and economic inequality. It is easy to use these, and many other, moral disagreements as excuses for refusing to engage them in serious dialogue, to treat these gentlemen in funny clothes as if they had no more intimate connection to our political identity than Martians. What can we possibly learn from such arrogantly self-satisfied Anglo-chauvinist folk?

This moralizing dismissal of dialectical engagement is curiously abetted by a different kind of estrangement. This has its source in the small, but devoted, band of professional historians who give their lives to the study of the American past. These academicians are so intent on elaborating the vast gulf separating 1787 from 1987 that they verge on condemning as unhistorical any suggestion that modern Americans may have something to learn about themselves by establishing a meaningful relationship to the Founding. From this professionalistic point of view, the effort to learn from the Founding is just a fancy kind of shadowboxing—the world of 1787 is so distant from our own that the “Founders” we discover are entirely our own creation. There is just nothing that Americans living two centuries apart have in common, except a few scraps of paper whose meaning has been divorced from their originating contexts. If this be so, the very exercise in dialectical engagement can seem historically flawed no less than morally suspect.

And yet, the fact is that today’s constitutional language and prac-

tice can be traced back to the Founding. Americans will lose a vital resource for political self-understanding if we estrange ourselves from these origins. The challenge is clear enough: can we recognize the historical and moral ways in which *we* are different from *them* and nonetheless work out points of dialectical contact that genuinely illuminate our continuing connection to our origins?

This chapter invites you to reread the *Federalist Papers* with this question in mind. I have focused on these essays by Hamilton, Madison, and Jay—writing under the evocative pseudonym Publius—because they represent the Founders’ most reflective effort to convince their fellow Americans that the Constitution is worthy of “reflection and choice.”<sup>1</sup> From the very beginning, the *Federalist* has served as a dialectical mirror through which Americans have glimpsed their constitutional identities. For now I won’t describe the path of interpretation over the centuries, or locate the Papers in the larger field of late-eighteenth-century thought—deferring these questions to the next chapter. I propose to plunge into the Papers at once, searching for commonalities that may remain after we have bracketed the more obvious moral differences that separate us. In confronting *Federalist* No. 10, I shall not be focusing on Publius’s impassioned diatribe against the “rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project.”<sup>2</sup> Whatever Publius may have thought, we know that the constitutionalization of paper money was one of the achievements of Republican Reconstruction;<sup>3</sup> the legitimization of the welfare state, the triumph of New Deal Democracy. Similarly, the *Federalist*’s embarrassed apology for the Constitution’s compromise with slavery<sup>4</sup> can only serve to remind us how much more struggle remains before blacks, women, and other subordinated groups can become full citizens of the country they inhabit. The question is not whether the Founding Federalists are to be put on a pedestal, but whether we can still learn something from them that might illuminate our search for constitutional self-definition.

#### CONSTITUTION AND REVOLUTION

“We the People of the United States . . .” Begin with the remarkable act involved in writing these opening words. Only six years before, all thirteen states had unanimously agreed on the Articles of Con-

federation, which they solemnly proclaimed the basis of "perpetual Union." Now, after a short summer of secret meetings, thirty-nine "patriots"\* at the Convention were not only proposing to destroy this initial hard-won effort. They were also claiming authority, in the name of the People, to ignore the rules that the Articles themselves laid out to govern their own revision. The Articles explicitly required the agreement of all thirteen states before any constitutional change was enacted;<sup>5</sup> yet the Founders declared that their new Constitution spoke for "We the People" if only nine states give their assent. This revolutionary redefinition of the rules of the game extended further—to the manner in which the nine states were to signify their approval. As the Convention looked ahead to the struggle over ratification, it refused to permit existing state governments to veto its authority to speak for the People. Only special "constitutional conventions" would be allowed to determine the fate of the new Constitution.<sup>6</sup> What justified the Federalists in asserting that this end run around legal forms gave them a *better* claim to represent the People than the standing governments of the day?

I begin with Publius's answer to this question—not only because the struggle to establish one's own authority is always revealing; not only because this same answer has reverberated throughout our constitutional history; but also because it provides a distinctive perspective on a central puzzle of modern politics: the nature of revolution. Despite the hopes and fears the word conjures up, revolution has become one of the great banalities of late-twentieth-century life. We have seen the surging masses, the assertive slogans, the charismatic leaders, so many times before—if only on our television tubes. Indeed, modern revolutionaries often seem content to play out minor variations on scripts first written in Paris or Saint Petersburg or Peking. For all its proud talk of new beginnings, is there anything more familiar than revolution?

And yet, there was a time when all this was not so cut-and-dried.

\*There were fifty-five delegates dispatched to the Convention, but only thirty-nine stayed to sign the final proposal. Two of the three New Yorkers abandoned the Convention in response to its Federalist drift, leaving Hamilton alone to sign on behalf of the state. This was better than Rhode Island, which boycotted the Convention from the very beginning. See Max Farrand, *The Framing of the Constitution of the United States* 11–12 (1913).

By some uncanny accident, Washington, Madison, and the other American revolutionaries convening in Philadelphia chose the last possible moment at which their deliberations would be unaffected by the events that shook Paris, and the world, in 1789. Unlike their modern counterparts, they were incapable of viewing themselves as second-rate imitations of Robespierre or Napoleon, Lenin or Mao. They were obliged to think for themselves about the possibilities for political order opened up by the American Revolution. The result was the construction of a dualistic conception of government very different from the visions explored by later revolutionaries in Paris, Moscow, and Peking. We will not understand this achievement by reading history backwards: looking upon the Founding Federalists as if they were acting out one or another scene from the French or Russian revolutions.

Speaking broadly, this has been the fate of the Founding during the twentieth century. Many of our most brilliant historians have allowed images of later revolutions to shape their approach to the Federalists—sometimes blatantly, sometimes subtly.<sup>7</sup> This academic failure mirrors a general malaise. The French, Russian, and Chinese revolutions have had a profound impact on the popular, no less than the academic, mind. Because these revolutions failed to generate a vision of constitutional order that resembled the American type, their high visibility allowed modern Americans to lose sight of the revolutionary roots of their own Constitution.

To regain perspective, I will begin with a statement of the constitutional predicament encountered by all successful revolutionaries—a statement sufficiently general to cover the case of Peking no less than Philadelphia. Only in this way can we grasp the distinctiveness and creativity of the Federalist response.

### *The Problem of Revolutionary Legitimacy*

Turn your mind's eye to revolutionary scenes that have become, through endless repetition, a part of common consciousness. Do not begin at the climactic moment at which you and your fellow revolutionaries triumphantly explore the wreckage of the old regime. Start at a point when final victory seems more doubtful.

Time One. You are surrounded by an ongoing regime—people occupying government offices, declaring themselves rightful rulers of the territory; others plotting and scheming to replace the present incumbents; the masses looking on with resigned indifference: politics as usual.

All this, so far as you are concerned, stinks. Though the government says it represents the people, you think the opposite. Despite its undisputed mastery of established legal forms, you and your comrades—not the government—are the true representatives of the People. Now such a claim requires courage, no less spiritual than physical. After all, who do you think you are? The New Messiah?

Religious zealots might stop the conversation at this point. But for secular folk, things are more complicated. Predictably, political revolutionaries will respond to the question of their own legitimacy in three different ways. First, they will say that the established government is *subverting the public good*. This requires an ideology that specifies the public good that is being subverted. Second, they will portray themselves as possessing *special virtues* qualifying them as the People's true representatives over other applicants for the position. Third, the leadership's claims to legitimacy must be validated by the *concrete assent* of fellow citizens, who recognize them as the true representatives of the People despite their illegality. Without such validating conventions, you cannot be a revolutionary leader—only a leader in search of a revolution.

Time Two. The old regime has collapsed; established legalities have disintegrated. You and your comrades have seized the commanding heights and proceed with the business of government. Quite remarkably, you are now in control of the forms of legal authority. While this, in a way, was what the struggle was all about, victory brings its own embarrassments.

Revolution is a game any number can play. Just as you challenged established authority, so can the next fellow. He too can proclaim his superior virtue and your subversion of the public good before irregular conventions speaking in the People's name. Vigilance, and the effective use of force, is part of the successful revolutionary's answer to such rivals. But there is another part too—an explanation why it is wrong for others to usurp the usurper's crown.

### *Two Simple Solutions*

There are two obvious answers. The first is “permanent revolution.” Here, the revolutionary elite denies that anything really important has happened with its accession to legal authority. After all, the elite did not require legal forms earlier to declare themselves the People's true representatives. It was enough to present themselves to irregular assemblies as people of special virtue in pursuit of the public good. And the “revolutionary legality” that was good enough for those great times of glorious victory is certainly good enough today. So hip-hip-hooray: onward in the People's service. Anybody who stands in the way is a counterrevolutionary, who must be consigned to the past or reeducated for life in a brave new world.

The other obvious answer is “revolutionary amnesia.” Now that we have seized power, let us forget how we got here. The law is the law. If you do not like the law, try to change it through the (newly) established forms. Anybody who ignores the forms and violates the law is a criminal. Criminals belong in jail.

### READING THE *FEDERALIST*

Now the first reason the *Federalist* is worth reading—not merely by Americans but by all thinking people—is that it proposes a third way to solve the problem of revolutionary legitimacy. While rejecting the desirability of permanent revolution, it places a high value on public-regarding political activity involving citizen sacrifice of private interests to pursue the common good in transient and informal political assemblies. While rejecting revolutionary amnesia, it insists that mobilizational forms of mass engagement should dominate the constitutional stage only under certain well-defined historical situations. When these conditions do not apply, governmental officials should not be allowed to pretend that they speak with the full authority of the People. During periods of normal politics, they must be constrained by the constitutional forms imposed during rare periods of constitutional creativity, when the People mobilize and speak with a very different voice.

But if the People do not speak all the time, how to recognize the

rare moments when Americans have hammered out a considered political judgment? The *Federalist* draws its line with the aid of a dualistic theory of political life. Only one side of the dualism is familiar from everybody's class in high school civics. In *Federalist* No. 10, Publius presents a profound analysis of the politics of faction: "By a faction I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."<sup>8</sup> Though factional politics is naturally distasteful to a successful revolutionary, Publius thinks the cure will be worse than the disease. The only sure way to suppress faction is to force everybody to think alike. Such a destruction of liberty is inconsistent with everything for which the American Revolution stands. The best we can hope for is an amelioration of the evil consequences of faction. Here is where constitutional law comes in: By a clever manipulation of legal forms, we may play different factions off against one another so that they do relatively little damage to the rights of citizens and the permanent interests of the community.

For the moment, we need not analyze the substance of *Federalist* constitutional science. The important points go deeper. According to Publius, constitutional wisdom begins by recognizing that the future of American politics will not be one long glorious reenactment of the American Revolution. The *Federalist* constructs the foundations for a different kind of politics—where passion and interest will drive Americans apart rather than emphasize the permanent interests and fundamental rights they have in common. So far as this politics is concerned, the new constitutional forms should trump ordinary political outcomes.

Yet we cannot allow Publius's brilliant sketch of faction in No. 10 to blind us to the larger vision of political life displayed in the *Federalist* as a whole. This will deprive us of Publius's insights into the politics with which he is best acquainted: his own. Does he suppose the Constitutional Convention to be a factional assembly of the kind he condemns in No. 10? If so, why does he expect its constitutional proposals to gain the consent of his fellow Americans? If not, why not?

### *Constitutional Politics*

A key paper is No. 40, where Publius confronts the Convention's decision to rip up the Articles of Confederation and change the rules for constitutional ratification the Articles had established six short years previously—in ways that greatly enhanced the Federalists' prospects for success.

Publius launches a two-part defense. So far as the decision to new-model the constitutional order, he meets his critics head on. Taking up the relevant legal documents, he tries to persuade them that the Convention had the legal authority to propose sweeping changes in the preexisting system. These arguments have their share of problems, but it isn't necessary to examine them. It is more important to contrast this legalistic exercise with Publius's treatment of the Convention's end run around the rule requiring unanimous state consent for constitutional amendments. Here we have a flat confession: "In [this] one particular it is admitted that the Convention have departed from the tenor of their commission."<sup>9</sup>

This explicit confession of illegality motivates the Paper's remarkable reflections defining "how far considerations of duty . . . could have supplied any defect of regular authority."<sup>10</sup> The answer is worth pondering:

Let us view the ground on which the convention stood. . . . They must have reflected that in all great changes of established governments, forms ought to give way to substance; that a rigid adherence [to forms] would render . . . nugatory the transcendent and precious right of the people to "abolish or alter their governments . . .," since it is impossible for the people spontaneously and universally to move in concert . . .; it is therefore essential that such changes be instituted by some *informal and unauthorized propositions*, made by some patriotic and respectable . . . citizens. . . . [The Convention] must have recollected that it was by this irregular and assumed privilege of proposing to the people . . . that the States were first united against the danger with which they were threatened by their ancient government; . . . nor could it have been forgotten that no little ill-timed scruples, no zeal for adhering to ordinary forms, were anywhere seen, except in those who wished to indulge, under these masks, their secret enmity to the substance contended for. They must have borne in mind 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 forever; its approbation blot out antecedent errors and irregularities.<sup>11</sup>

Hear the voice of the successful revolutionary: the highest form of political expression is not found in formal assemblies arising under preexisting law, but through an “irregular and assumed privilege” of proposing “informal and unauthorized propositions.” If such proposals were accepted by irregular, but popularly elected, conventions, we are to understand that *the people themselves*—the words are italicized in the original<sup>12</sup>—had spoken; and if the People approved the revolutionary elite’s considered proposals, this could “blot out . . . errors and irregularities.”

Strong stuff. At present, I am less interested in evaluating Federalist theory than in recovering it from the dustbin of history. From this perspective, it is important to recognize that Publius is saying nothing here that his audience would have considered idiosyncratic. To the contrary, *the very meaning of “convention” was tied up with illegality in the eighteenth century*.<sup>13</sup> The Americans had appropriated the word from English constitutional practice—where “convention” was used to designate a legally defective parliament, most notably the convention that presided over the Glorious Revolution of 1688. This convention consisted of Lords and Commons, meeting without the King; and through it, on the Americans’ whiggish understanding, the people of England preserved their freedom by ousting a tyrannical king and imposing a Bill of Right on his successors. So far as the Americans were concerned, *this* legally imperfect convention represented a high point of English history. And it was only natural for them to use this word to denote their own revolutionary assemblies meeting in defiance of the King’s officials: just as the English people represented themselves in convention during the Glorious Revolution, so too would the Americans during their even more glorious revolution.

In borrowing the word “convention,” the Americans changed English practice in one crucial respect. Even though it might oust a tyrant-king and impose conditions on his successors, the 1688 convention’s legal defects haunted the participants.<sup>14</sup> As soon as William and Mary were seated in their proper place, the convention-turned-parliament reaffirmed the convention’s work in the form of a

“proper” statute.<sup>15</sup> For the seventeenth-century English, the legally defective status of the convention meant that its products were *legally inferior* to those of a proper parliament.<sup>16</sup>

The Americans transvalued this relationship. To them, the legally anomalous character of the “convention” was not a sign of defective legal status but of revolutionary possibility—that a group of patriots might speak for the People with *greater* political legitimacy than any assembly whose authority arose only from its legal form. Within their revolutionary setting, it made sense to deny that “mere” legislatures could legitimately revise constitutional law. As the revolutionary years moved on, Americans insisted that the People could deliberate on constitutional matters only in special bodies whose very name—“convention”—denied that legal forms could ultimately substitute for the engaged participation of citizens.<sup>17</sup>

It is precisely this revolutionary usage that Publius is self-consciously invoking to justify the Convention’s decision to take the law into its own hands. By conceding illegality, *Federalist* No. 40 was not undermining the Convention’s authority but, if anything, enhancing it—linking it to the institutional form that Publius’s contemporaries associated most intimately with We the People.\*

### *The Conditions for Constitutional Creativity*

For all this, Publius does not succumb to the self-intoxications of “permanent revolution.” He is clear that the Convention’s effort to

\*A bit more of No. 40, for those so inclined: “Had the Convention . . . taken the cold and sullen resolution of . . . sacrificing substance to forms, of committing the dearest interests of their country to the uncertainties of delay, and the hazard of events; let me ask the man, who can raise his mind to one elevated conception, who can awaken in his bosom one patriotic emotion, what judgment ought to have been pronounced by the impartial world, by the friends of mankind, by every virtuous citizen, on the conduct and character of this assembly? Or if there be a man whose propensity to condemn is susceptible of no control, let me then ask what sentence he has in reserve for the twelve States who *usurped the power* of sending deputies to the convention, a body utterly unknown to their constitutions; for Congress, who recommended the appointment of this body, equally unknown to the Confederation; and for the State of New York, in particular, which first urged and then complied with this unauthorized interposition?” *Federalist* No. 40, at 253–54 (J. Madison) (C. Rossiter ed. 1961). We shall find remarkably similar expressions at later constitutional turning points, most notably during Reconstruction and the New Deal. See volume 2, *Transformations*.

speak for the People can be credible only under very special conditions. The core of his analysis appears in an important paper explaining why all constitutional disputes shouldn't be submitted to the general public for resolution:

Notwithstanding the success which has attended the revisions of our established forms of government and which does so much honor to the virtue and intelligence of the people of America, it must be confessed that the experiments are of too ticklish a nature to be unnecessarily multiplied. We are to recollect that all the existing constitutions were formed in the midst of a danger which repressed the passions most unfriendly to order and concord; of an enthusiastic confidence of the people in their patriotic leaders, which stifled the ordinary diversity of opinions on great national questions; of a universal ardor for new and opposite forms produced by a universal resentment and indignation against the ancient government; and whilst no spirit of party connected with the changes to be made, or the abuses to be reformed, could mingle its leaven in the operation. The future situations in which we must expect to be usually placed do not present any equivalent security against the danger which is apprehended.<sup>18</sup>

A grim theory: Americans can be expected to transcend factional politics only "in the midst of a danger which repress[es] the passions." It is the old saw about the power of the hangman's rope to concentrate the mind, raised to the level of collective political consciousness.

In case the point was missed, Publius devotes the following Paper to important variations. Since a constant appeal to the People only permits the destruction of constitutional forms by selfish and passionate pressure groups, why not a regularized legal procedure under which the general public may undertake the task of constitutional review? Every seven years or so, a group of censors might be assembled to discover and sanction all violations of the Constitution that have occurred since the People last assembled.<sup>19</sup>

Publius's response is predictable but revealing in its comments upon the limitations of legal form. He derides the idea that a mobilized politics of citizenship will flourish on legal command. To the contrary: the spirit of self-interest will degrade the constitutional forms of censorship—with the most powerful factions manipulating their amplified power to speak in the name of the People. Instead

of using law to suggest that the People might regularly stand in judgment on their representatives, a collective effort to transcend faction should "be neither presumed nor desired; because an extinction of parties necessarily implies either a universal alarm for the public safety, or an absolute extinction of liberty."<sup>20</sup> The first possibility explains the success of the revolutionary generation; the second can be avoided only if Publius persuades his fellow citizens to use Federalist constitutional science to prevent some future faction from suppressing freedom.

For all this grim emphasis on the role of "universal alarm" in jolting Americans into civic activity,\* Publius refuses to learn the same lesson which Burke was to draw from the crowds of the French Revolution. Publius is aware that mass anxieties "for the public safety"<sup>21</sup> may precipitate paroxysms of extreme irrationality and brute oppression that make the pathologies of normal politics seem tame by comparison. Nonetheless, in a crucial move, he focuses on a more constructive possibility—the revolutionary experience of his generation has shown that public danger can "repress the passions most unfriendly to order and concord," not inflame them. Though it is a "ticklish" business, the American people have channeled mass energy into a deliberative politics that is *more* rational and public-spirited than the norm. For Publius, then, the image of a constitutional convention joins together four features in an altogether remarkable way: formal illegality, mass energy, public-spiritedness, and extraordinary rationality are fused in a combination fateful for the dualist enterprise.

Given its remarkable attributes, it is not surprising that the *Federalist* treats constitutional conventions as if they were perfect sub-

\*No. 46 is also important on this point. It describes the way the American people would respond if critics proved correct and the new national government became an engine for a centralizing tyranny at the expense of the states. Such "encroachments . . . would not excite the opposition of a single State, or of a few States only. They would be signals of general alarm." *Federalist* No. 46, at 298 (J. Madison) (C. Rossiter ed. 1961)—from which, as in No. 49, Publius expects salutary consequences. The passage continues: "Every Government would espouse the common cause. A correspondence would be opened. Plans of resistance would be concerted. One spirit would animate and conduct the whole. The same combination, in short, would result from an apprehension of the federal, as was produced by the dread of a foreign, yoke. . . ." *Id.* The entire scenario that follows is well worth reading.

stitutes for *the people themselves*. Consider Publius's description of the Convention's end run around the Articles' demand that all amendments gain unanimous state consent:

In one particular it is admitted that the convention have departed from the tenor of their commission. Instead of reporting a plan requiring the confirmation of *the Legislatures of all the States*, they have reported a plan which is to be confirmed by the *people*, and may be carried into effect by *nine States only*.<sup>22</sup>

But this is not what the constitutional text actually says. Article Seven stipulates that "The Ratification of the Conventions of nine States shall be sufficient . . ." Publius, who generally quotes accurately, sees no gap between the text's mention of "convention" and his own description of ratification by the "*people*." Given his revolutionary background, how could the People be represented better than through an illegal, public-spirited, deliberative body that successfully calls upon the engaged citizenship of those beyond the convention chamber?

Not that Publius is confident that his fellow Americans will respond in the good old revolutionary way to the call of the Convention from Philadelphia. The Papers are full of indications that the revolutionary impulse is on the wane—the English have gone and, with them, the anxiety for the public safety that fueled the rare mixture of mass energy and collective deliberation that could support a healthy constitutional politics. If this Convention fails, the Union will be torn apart by self-serving politicians and interest groups who will use the language of state sovereignty to advance their factional projects:

Was then the American Revolution effected, was the American confederacy formed, was the precious blood of thousands spilt, and the hard-earned substance of millions lavished, not that the people of America should enjoy peace, liberty and safety, but that the governments of the individual States . . . might enjoy a certain extent of power, and be arrayed with certain dignities and attributes of sovereignty? We have heard of the impious doctrine in the old world, that the people were made for kings, not kings for the people. Is the same doctrine to be revived in the new, in another shape—that the solid happiness of the people is to be sacrificed to the views of political institutions of a different

form? It is too early for politicians to presume on our forgetting that the public good, the real welfare of the great body of the people, is the supreme object to be pursued; and that no form of government whatever has any other value than as it may be fitted for the attainment of this object.<sup>23</sup>

"It is too early for politicians . . .": this is no rhetorical flourish. As No. 10 reminds, the normal situation is one in which factions *will* thrive. And a faction is defined precisely by its members choosing to "forget," as it were, that "the public good, the real welfare of the great body of the people, is the supreme object to be pursued."

Publius is engaged in a grim race against time. In the afterglow of the most successful revolution in world history, have the American people stored up a reserve of public-spirited rationality sufficient to support a culminating act of constitutional creation offered to them by their revolutionary leaders?

Even if the answer is yes, Publius does not suppose that his generation has spoken the last word in the name of the People. At the same time he emphasizes the naivete implicit in constant or formalized efforts to place constitutional issues at the tender mercies of factionalized politics, he recognizes "that a constitutional road to the decision of the people ought to be marked out and kept open, for certain great and extraordinary occasions."<sup>24</sup> There will be future crises, new calls by future statesmen to put aside the pettiness of factional politics. It is to be hoped that the People will, in their irregular way, prove equal to the challenge.

But this, understandably, was not Publius's first concern. His more immediate preoccupation was the politics of faction—which, precisely because of the Revolution's success in expelling the British, seemed inevitably on the rise.

#### REPRESENTING THE PEOPLE

Of course, it was always possible for Washington, Madison, and the rest to do nothing after the British left the scene. The successful revolutionaries might remain passive as they were engulfed by the tide of faction. But Publius is no fatalist. He is a legal activist—through the reflective use of constitutional law, the Revolutionary



generation may channel the flow of normal politics in ways consistent with revolutionary principle.<sup>25</sup>

Yet Publius is no Pangloss. Almost everything he knows suggests that he will fail. America is a country of imperial dimension. Already there are millions of inhabitants; especially if the new Constitution is "successful," the nation's population will, in half a century, rival the largest countries of the Old World. This prospect does not bode well: the kingdoms of Europe are hothouses of despotism.<sup>26</sup> The *Federalist*, moreover, is refreshingly free of any claim that Americans will be exempt from the moral diseases afflicting the rest of mankind.<sup>27</sup>

When Publius turns from the monarchical present to the classical past, the lesson is different, but no less disconcerting. Republican government is a creation of the Greek polis, a micro-state so small that citizens could meet together and discuss their political future in face-to-face assemblies. These city-states were transparently unequal to the military and economic challenges of aggressive empires.<sup>28</sup> Their efforts at confederacy were pathetic failures; heroic victories at Thermopylae, precisely because they were miraculous, could not compensate for this failure in political organization.<sup>29</sup> Worse yet, when Publius inspects the democratic politics of the polis, he can reach only more despairing conclusions. These micro-polities were notoriously unstable—constantly degenerating into turmoil and despotism as each group tried to seize exclusive power to oppress the others. And even when the democratic forms were maintained, the outcomes were offensive to the principles of the American Revolution. The democratic polis was hardly a steady friend of individual freedom: Athens killed Socrates, after all.<sup>30</sup>

In trying to channel the flow of normal politics, Publius does not suppose he can adapt a blueprint that has succeeded elsewhere. There is no effort to recapture a golden age; no notion that somebody else has built a better mousetrap. The closest model is England and we all know how corrupt it has become.<sup>31</sup> Upon considering the materials at hand, the soberest political scientist of the age, Montesquieu, concluded that republican government could not survive without constant calls upon its citizenry's public virtue.<sup>32</sup> Yet the *Federalist* is very clear that this appeal to public virtue could not, and should not, serve as the exclusive resource in constructing a tolerable normal politics.

### *The Problematics of Representation*

Against all these reasons for despair, the *Federalist* can place only one weighty factor in the balance: the peculiarly modern institution of political representation. It was this invention, not any increase in the quantity of human virtue, which permitted the rational hope that Americans might succeed where the ancients failed.<sup>33</sup> Representative institutions will permit us to establish a regime encompassing millions of people, with different religious and economic interests. Though each interest would gladly use political power to subordinate the others, their multiplicity permits the constitutional architect a new kind of political freedom. Rather than suppress faction at the cost of individual liberty, one may hope to neutralize the worst consequences of faction by playing each interest group off against the others. Hence, the supreme importance of constitutional law. By manipulating the forms of constitutional representation, Publius hopes to drive normal politics into directions that do not endanger the principles of the American Revolution—principles elucidated by the irregular methods of constitutional politics.<sup>34</sup>

How to preserve the principles of the Revolution? This is the master question of constitutional design. Only one thing is clear—disappointment awaits all who fail to understand the distinctive character of representative institutions and strive to create a national government that resembles, as much as possible, the face-to-face democracies of the ancient past.<sup>35</sup> The temptation is strong to simulate the ancient polis by calling together a few hundred people to "re-present" the whole and reenact the ancient ritual of direct democracy. They, not us, will gather together in one place, discuss the pros and cons, count heads, and declare the majority to be winner in our name. The rhetoricians have a name for this solution to the problem of representation: synecdoche. In this figure of speech, the part (Congress) replaces the whole (the People of the United States): "The representatives of the people, in a popular assembly, seem to fancy that they are the people themselves and betray strong symptoms of impatience and disgust at the least sign of opposition from any quarter. . . ."<sup>36</sup>

All is lost if we are captured by this naive synecdoche. If we mistake Congress for the People Assembled, and give it supreme power, it will act in a way that belies its populist rhetoric:

The concentrating of [all power] in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. One hundred and seventy-three despots would surely be as oppressive as one . . . As little will it avail us that they are chosen by ourselves. An *elective despotism* was not the government we fought for . . .<sup>37</sup>

Representation not only promises a solution to the ancient problem of democracy but provides the source of an entirely new problem—misplaced concreteness or reification. No institution of normal politics can be allowed to transubstantiate itself into the People of the United States.

Publius is most explicit about this in *Federalist* No. 63. He rejects the popular belief that the ancient world was ignorant of the institution of representative government; in doing so, he clarifies the distinctive conception of representation upon which the *Federalist* pins its hopes:

In the most pure democracies of Greece, many of the executive functions were performed, not by the people themselves, but by officers elected by the people, and *representing* the people in their *executive* capacity. . . . From these facts, to which many others might be added, it is clear that the principle of representation was neither unknown to the ancients nor wholly overlooked in their political constitutions. The true distinction between these and the American governments lies in the *total exclusion of the people in their collective capacity*, from any share in the *latter*, and not in the *total exclusion of the representatives of the people* from the administration of the *former*. The distinction, however, thus qualified, must be admitted to leave a most advantageous superiority in favor of the United States. But to insure to this advantage its full effect, we must be careful not to separate it from the other advantage, of an extensive territory. For it cannot be believed that any form of representative government could have succeeded within the narrow limits occupied by the democracies of Greece.<sup>38</sup>

This text contrasts with Publius's earlier emphasis. Before, we heard him explain how the "irregular and assumed" procedures of constitutional conventions provided access "to the people themselves."<sup>39</sup> Now he proudly declares that "*the total exclusion of the people in their collective capacity*" is the hallmark of the American Constitu-

tion—which, together with the country's large size, will permit the success of representative democracy during periods of normal politics. We must systematically reject the idea that Congress (or the President or the Court) speaks with the *genuine* voice of the American people. During periods of normal politics, the political will of the American people cannot be "represented" by such naive synecdoches.

Yet, at the same time, Publius insists that his constitutional creations—Congress, President, Court—*do* "represent" the People in some other, nonsynecdochical, way. If we are to understand the Federalists' hopes for American government, we must be clear about the sense of "representation" Publius has in mind.

#### *Beyond Mimesis*

Reflect more generally upon the idea of representation—the process by which one thing is made to "stand for" another. A thought experiment: Imagine you were planning a long and hazardous journey and wanted to commission a painting which would "represent" you to your loved ones in your absence. Two options are open. On the one hand, you may find somebody with photographic aspirations. Her effort at mimetic representation will have familiar advantages and disadvantages. Precisely because it tries to present a realistic copy of your appearance, it is easy for others to read at a glance. For the very same reason, the snapshot will be unsatisfactory. Perhaps an artist who self-consciously appreciates that he *cannot* reduce your living reality to a piece of paper, that he is *only* making a representation, will provide a portrait which, though less realistic, will convey a deeper meaning to its viewers. Call this semiotic representation, because it communicates by self-consciously exploiting its audience's recognition that the picture is only a symbol and not the thing the symbol symbolizes.\*

\*This paragraph has been written in a way that gives maximal credibility to the mimetic aspiration. By defining semiosis as requiring self-conscious exploitation of the "audience's recognition that the picture is only a symbol and not the thing which the symbol symbolizes," I have left open the possibility that mimetic representation does not involve a similar form of symbolic self-consciousness. Like many others, I do not believe that this naive mimetic claim can withstand scrutiny. See, for example, Arthur

Publius adopts the semiotic understanding in his effort to “represent” the people of the United States by means of a written text—the Constitution. There can be no hope of capturing the living reality of popular sovereignty during normal politics. The text does not aim for phony realism by allowing you to suppose that Congress *is* the People. It provides a picture of government which vigorously asserts that Congress is merely a “representation” of the People, not the real thing itself.

And what better way to do this than by proliferating the number and kind of “representative” institutions within the constitutional ensemble? Thus, the House “represents” the People in one way, by direct election of all citizens; the Senate “represents” the People in another, by giving the power of selection to state legislatures; the Presidency “represents” the People in yet another, by means of the Electoral College. By manipulating the term of office and constitutional function of each “representative,” the system endows each with virtues the others lack. Thus, the House will have an incentive to reflect every perturbation of popular opinion; the Senate will have a capacity for knowledgeable judgment; the President, energy and decisiveness. When these “representatives” disagree, each will predictably invoke its special virtues to support its claim to be acting for the public good.<sup>40</sup>

If, however, Publius is successful, the other “representatives” will not respond by ceding power to the assertive branch, but will resist and say that *they* speak for the People, and so forth. The result will be the opposite of each protagonist’s hopes. The exchange of claim and counterclaim between House, Senate, and President will only emphasize the problematic character of each branch’s effort to represent the People in some simplistic, synecdochical way. *No small group can ever be transubstantiated into the People by virtue of legal form. The constitutional forms are only a device to ameliorate the unavoidable evils of normal politics.* If normal political actors can

Danto, *The Transformation of the Commonplace* 1–32, 54–89 (1981). I think that mimesis is best defined as the effort to suppress the interpreter’s self-conscious recognition that the symbol is not really the thing symbolized, while semiosis conveys meaning by provoking the interpreter’s recognition of the symbol’s symbolic character. But it is not necessary to go this far to support the claims made in the text.

somehow be induced to undermine each other’s pretensions to speak in the commanding voice of the People, this would be the best way of representing the true state of affairs: “*the total exclusion of the people in their collective capacity*” during periods of normal politics.

But the rhetorical pattern of affirmation and negation exchanged in Washington, D.C., is only a part of a larger whole that includes the individual states. Federalism is another powerful technique for problematicizing representation. Consider Publius’s response to his opponents’ charge that he is not a “Federalist”<sup>41</sup> but a nationalist who aims for nothing less than the “*consolidation* of the States” into a single center.<sup>42</sup>

Publius does not respond by confessing his nationalism, nor by establishing that he is a federalist in the classic sense used by his opponents.<sup>43</sup> Instead, he urges us to look at his Constitution from multiple perspectives—beginning with the way it will be ratified; then observing how the House, Senate, and President will be selected; then considering how the center’s powers will be defined and administered; then glancing at the manner of constitutional amendment. This tour will show that it is impossible to say whether the whole is “really” national or federal. The matter depends entirely on one’s angle of vision. His triumphant conclusion:

The proposed Constitution . . . is in strictness neither a national nor a federal Constitution; but a composition of both. In its foundation it is federal, not national; in the sources from which the ordinary powers of the government are drawn, it is partly federal, and partly national; in the operation of these powers, it is national, not federal; in the extent of them, again, it is federal, not national; and finally in the authoritative mode of introducing amendments, it is neither wholly federal, nor wholly national.<sup>44</sup>

By multiplying perspectives, Publius deflates the claims of normal officials sitting either in Washington *or* in the states to speak for the People. Each official effort is just one of a number of competing representations. The People, in contrast, reveal themselves only through an amendment process that can best be categorized negatively—“neither wholly federal, nor wholly national.” Then, but only then, can we begin to hear the irregular, but public-spirited and

rational, voice of the citizenry, deliberating and deciding on fundamental principle as they did during the conventions of the Revolutionary era.

Yet, while Publius begins his sketch by emphasizing that government is normally only a representation of the People, he does not end there. After all, there are many ways of representing something—whether that something be an absent lover or an absent People. And Publius is determined to design a system that, given the available human materials, will do as good a job as possible in re-presenting the kind of public-spirited deliberation that the People themselves can attain only during rare constitutional crises that “repress the passions.” How, then, to proceed with this ambitious project in constitutional design?

#### CONSTITUTIONAL SCIENCE

Not by traveling down the path smoothed by so many other revolutionaries. All too often, the revolutionary vanguard has responded to the threat of faction by monopolizing power on a permanent basis. So far as they are concerned, *they* were the heroes who had risked their lives for the People when it really counted. If, then, one wishes to re-present these great moments of communal effort, why not authorize these heroes to rule forever on the basis of their past revolutionary virtue?

No, says Publius in No. 10, with an analysis that has won a permanent place in the annals of human freedom. Such authoritarian cures are “worse than the disease,” destroying the personal liberty that is one of the greatest achievements of the American Revolution. Rather than succumbing to the delusions of revolutionary elitism, the *Federalist* insists that all principal officials trace their authority, directly or indirectly, to a regular system of popular elections.<sup>45</sup> The crucial question is how to organize the electoral system so that, despite the realities of faction, winners may be encouraged to govern in the deliberative, public-spirited way exemplified by the People meeting in constitutional convention during their finest revolutionary hour.

#### *The Anatomy of Faction*

To make progress here, we must examine Publius’s theory of faction more closely. Thus far, I have been content to describe Publius’s concern in general terms: during normal times, groups will form on the basis of passion or interest to use state power at the expense of the rights of other citizens and the permanent interests of the community. It is time to make some necessary distinctions.<sup>46</sup> In Publius’s description, factions acting out of “passion” look different from those acting out of “interest.”

As No. 10 explains, “passionate” factions come in two basic varieties:

A zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice; an attachment to different leaders ambitiously contending for pre-eminence and power; or to persons of other descriptions whose fortunes have been interesting to the human passions, have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good.<sup>47</sup>

Adapting today’s usage, I will call the factions described in the first clause *ideological* and the ones described subsequently *charismatic*.\*

Though these two may look very different from one another, they have one important similarity: “passionate” factions won’t have much staying power. Publius’s point is not that passions are intermittently

\*Of course, nothing prevents a faction from being ideological and charismatic at the same time, since the first term describes a group’s program and the second, its leaders. Indeed, such an ideological/charismatic combine begins to look similar to the one Publius represents: are not the Federalists themselves a group who are proposing, with Washington at their head, a “different opinion concerning Government”?

See how tightly Publius’s famous arguments in No. 10 interlock with the themes we have explored previously. Since the Federalists have a novel political program and many attractive leaders, Publius’s argument requires him to explain why they are not merely trying to “inflamm” their fellow citizens “with mutual animosity.” Though Publius doesn’t try to do this within the short space of No. 10, the other Papers we have explored demonstrate that he is very much aware of the need to do so; and that his effort yields a dualistic theory of political life.

expressed in politics. Indeed, when “no substantial occasion presents itself, the most frivolous and fanciful distinctions have been sufficient to kindle their [the citizenry’s] unfriendly passions and exercise their most violent conflicts.”<sup>48</sup> His point is that particular passionate factions will have a short half-life—popular leaders will die, ideological zeal will ebb as well as flow. This will prove important later on<sup>49</sup>—it helps explain the importance Publius gives to the separation of powers. Checking and balancing will take time, bursting many factional bubbles in the process.

In contrast, factions grounded in “interest” will be more durable: these are based on the “various and unequal distributions of property.”<sup>50</sup> Once again, Publius divides this category into two: those emphasizing the “variety” of economic interests and those emphasizing economic “inequality.” The first look like the interest groups of modern pluralism: landowners, manufacturers, merchants, bankers, and the rest compete with one another to use government power for their narrow advantage. The second sort of faction looks like our modern egalitarians—championing the interests of the poor against the propertied. Publius thinks both are bad—he is neither a proto-pluralist nor a proto-redistributionist. He is a successful revolutionary with an eighteenth-century, not a twentieth-century, agenda. Whatever modern Americans may think, *he* speaks for a People of white male merchants and planters, farmers and mechanics who fought a Revolution for life, liberty, and property—but not for the end of slavery or the triumph of the welfare state.

At a later point, these differences in constitutional values will be crucial.<sup>51</sup> For now, I want to bracket them in search of remaining commonalities: though many of Publius’s constitutional values are different from ours, we can still learn from his anxiety at the prospect that factions will endanger the principles that prior generations had put into higher law after so much public-spirited effort. How, then, to use the Constitution to prevent faction from subverting the will of the People?

### *Transcending Faction*

Here is where No. 10’s famous challenge to Montesquieu enters. The great political scientist thought republics should be small.

Publius thinks they should be big—because deliberative and public-spirited representative government is more likely in the large republic.

For two reasons. The first is that revolutionary heroes, and men like them, will be more likely to win popular elections in big republics.<sup>52</sup> Since deliberative assemblies can’t get too large, a big republic implies big election districts. This puts people like Publius at a relative advantage. In small districts, factional types will find it easier to mix bribery, friendship, and narrow appeals to local prejudice and interest to gain victory. With big districts, voters will be obliged to look beyond their immediate neighborhood; their gaze will be “more likely to center on men who possess the most attractive merit, and the most diffusive and established characters.”<sup>53</sup> If things work as Publius hopes, the large-district system will operate “to 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 and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.”<sup>54</sup>

Publius doesn’t let his hopes get in the way of his head. He is perfectly aware that bigness is only one of a host of factors that will affect the quality of representatives—hence the probabilistic way in which he makes his point: the voters are “more likely to center” on the best and the brightest patriots in bigger districts. Prospects look a bit brighter when one recalls that “[i]f a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote.”<sup>55</sup>

Nonetheless, Publius places more weight on a second argument in praise of bigness:

Extend the sphere, and 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. Besides other impediments, it may be remarked that, where there is a consciousness of unjust or dishonorable purposes, communication is always checked by distrust in proportion to the number whose concurrence is necessary.<sup>56</sup>

Passion against interest, interest against interest, passion against . . . —in numberless combination. Notice that Publius does *not* favor big government because he wants it to express the shifting balance of passion and interest in the polity. To the contrary: the proliferation of factions will allow the constitutional architect to make creative use of the old tactic of divide and conquer. While each faction will wish to oppress citizens outside its particular orbit of concern, different factions will be pushing the government in competing, and mutually inconsistent, directions. This may give elected representatives maneuvering room to transcend faction, rather than mimic it—that is, if Publius’s first argument is working, and bigness is operating to get enough public-spirited candidates into power. In later Papers, Publius also tries to show how the different institutional perspectives supplied by House, Senate, President, and Court enable the deliberative whole to be more reflective and public-spirited than any one of its parts.<sup>57</sup>

When things are going well, then, Americans will not see their representatives mimicking the shifting balance of power amongst the competing factions. Instead of mimesis, there will be semiosis. Despite the factions swirling around the periphery, the center of the stage will present a picture of We the People in action: a group of public-spirited representatives engaging in the kind of deliberation that the people themselves can achieve only in rare circumstances which “suppress the passions.”

#### *Fail-safe Mechanisms*

But, as Publius is well aware, things will not always go well. Even at his most triumphant, he cannot suppose that the separation of powers will inexorably achieve its intended aim:

In the extended republic of the United States, and among the great variety of interests, parties and sects which it embraces, a coalition of the majority of the whole society could *seldom* take place on any other principles than those of justice and the general good . . . [Emphasis supplied]<sup>58</sup>

Seldom is not never. The artful distribution of lawmaking powers between House and Senate, Congress and the President is no guarantee of public-spirited deliberation. Surely, then, it is best to design

some back-up mechanisms into the system? Even when factional strife is on the rise, the separation of powers may provide a more modest, but crucial function. At least each branch may check the factional aims of the others:

[T]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defence must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place, oblige it to control itself. A dependence on the people is no doubt the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.<sup>59</sup>

Do not overread this great dark passage. Publius is serious in describing the checking role of the separation of powers as “auxiliary.” Indeed, this famous passage comes at the end of the very argument in which Publius earlier recognized that “a constitutional road to the people, ought to be marked out, and kept open, for certain great and extraordinary occasions.”<sup>60</sup> It is only after emphasizing, for reasons we have canvassed,<sup>61</sup> why “the people” cannot plausibly be expected to transcend faction under *normal* conditions that Publius brings in the separation of powers as an “auxiliary precaution.” However important checks and balances may be, the system ultimately relies on the People’s capacity to organize themselves in times of crisis for mobilized deliberation and decision.

#### *Judicial Review*

But is there a final “precaution” that might strengthen the constitutional forms at moments of factional vulnerability? Can’t we design

an institution that gives incentives to its incumbents to intervene on the side of the Revolutionary generation when factional leaders assault the People's earlier constitutional achievements?

Here is where the judges enter. When Publius takes up the Supreme Court late in the series of Papers, he treats it for what it is—just another institutional implication of the general theory of dualistic politics that has been developed throughout. When factional politicians break through constitutional constraints, the judges should invalidate their proposed statutes and expose them for what they are: mere stand-ins for *"the people themselves."* Only the People can change the Constitution, and the judges must prevent Congress from making basic changes unilaterally:

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both, and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people declared in the Constitution, the judges ought to be governed by the latter rather than the former.<sup>62</sup>

The problem with this argument is obvious enough. What is to prevent the Court from abusing its power to interpret the Constitution? Rather than seeking to preserve the achievements of the Revolutionary generation, why won't the Justices use their power to further one or another factional interest?

Publius's optimism is based on a realistic assessment of the Court's position: "beyond comparison the weakest of the three departments of power."<sup>63</sup> Without control over "the sword or the purse," it must "depend upon the aid of the executive arm even for the efficacy of its judgments."<sup>64</sup> Given these facts, he thinks it silly to suppose that the Justices could successfully endanger "the general liberty of the people." The danger is just the reverse: despite their life tenure, they will be unduly timid when a master politician somehow induces our so-called representatives to betray the People's constitutional commands. In elaborating this danger, Publius invites us to reflect again on the dualistic foundations of his entire enterprise. Despite the fame of Publius's treatment of judicial review, this passage is rarely treated with the attention it deserves:

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humours which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community. Though I trust the friends of the proposed constitution will never concur with its enemies in questioning that fundamental principle of republican government which admits the right of the people to alter or abolish the established Constitution whenever they find it inconsistent with their happiness; yet it is not to be inferred from this principle that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents incompatible with the provisions in the existing constitution, would, on that account, be justifiable in a violation of those provisions; or that the courts would be under a greater obligation to connive at infractions in this shape than when they had proceeded wholly from the cabals of the representative body. Until the people by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge of their sentiments, can warrant their representatives in a departure from it prior to such an act. But it is easy to see that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community.<sup>65</sup>

This passage provides a wonderful summary of all the themes we have rehearsed: Publius's dualistic understanding of the People, his semiotic concept of representation, and his complex analysis of faction interact to yield a distinctive view of the Court's responsibilities. Thus, such texts will seem utterly antidemocratic to those who fail to recognize that, for Publius, the People convene only under rare circumstances that "repress the passions."<sup>66</sup> Since these monistic democrats<sup>67</sup> fail to make qualitative judgments about popular will formation, they will read Publius's concession that "the legislative invasions . . . had been instigated by the major voice of the community" as fatal to the democratic exercise of judicial review.

In contrast, we have seen that Publius emphasizes that the Constitution is trying to re-present a People which normally does not

exist—a People both mobilized and capable of sober deliberation. Given this semiotic understanding, it is not undemocratic to recognize that officials *fail* to represent the People when they yield to those “ill humors” which, “though they speedily give place to better information and more deliberate reflection, have a tendency in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.”

Further, Publius’s analysis of faction in No. 10 provides the political science needed to motivate the belief that some “ill humors” will indeed be temporary. Recall that, in addition to the “durable” factions based on economic interest, No. 10 suggests that factions based on “passion”—those I called charismatic or ideological—will often have little staying power. Hence Publius’s call to the Court to resist “the arts of designing men, or the influence of particular conjunctures” is hardly a piece of *ad hoc*-ery. He has already provided reason to believe that, if the public is given adequate opportunity for reflection, some factional coalitions will fail to sustain popular support.

Yet, for all this, Publius has no inclination whatever to deny that there will be times when the People can and should get into the act. To the contrary: the very point of his Papers is to establish that one such time is NOW. Thus, the same text that emphasizes the need for sober second thought also twits his Anti-Federalist opponents for “questioning the fundamental principle . . . which admits the right of the people to alter or abolish the established constitution whenever they find it inconsistent with their happiness.” In making this remark, Publius is building on more elaborate foundations developed earlier. Recall his explicit vindication of the Convention’s authority to violate “the established constitution” by taking an end run around the existing legislatures and proposing ratification by nine of thirteen state conventions. Rather than denying the possibility of popular sovereignty, he is proudly insisting that the Federalists have *earned* the authority to call the People to act decisively in convention to safeguard their great revolutionary achievements before they are eroded by the passions and interests of normal politics.

Even if Publius turns out to be successful, the passage once again emphasizes that the Federalists have not spoken the final word on behalf of the People. In speculating about the future of constitutional

politics, Publius’s advice to the judges is cautious: be skeptical when “representatives” claim to know that the People support their projects in constitutional transformation; continue to resist “[u]ntil the people have by some solemn and authoritative act annulled or changed the established form.”

“Solemn and authoritative.” Note the absence of a very important word: legal. Publius does not say that the judges should resist until the transformative movement satisfies all the *legal rules* for constitutional amendment that are contained in his new Constitution. He leaves open the relationship between these new rules and the kinds of “solemn and authoritative” action that should convince the judges. This failure to insist on strict legality makes sense, of course, given Publius’s own frank confessions that the Philadelphia Convention’s own actions are illegal.<sup>68</sup>

We will have abundant reason to recall Publius’s silence on this score as we investigate the great constitutional achievements of later generations of Americans. During both Reconstruction and the New Deal, the Court recognized that the People had spoken even though their political leaders refused to follow the technical legalities regulating constitutional amendment.<sup>69</sup> Legalities aside, Publius expresses a deeper concern. He is doubtful that the judges will prove steadfast enough to oppose factional leaders who demand constitutional change in the absence of deep and considered support among the People. Instead of awaiting “solemn and authoritative” actions that evidence considered popular support, the judges may cave in too quickly: “it is easy to see that it would require an uncommon portion of fortitude . . .” Only time would tell whether Publius’s anxieties were justified.

#### SOME CONCLUDING QUESTIONS

We have come full circle: from Publius’s description of the special character of his generation’s exercise in constitutional politics, to his effort to shape the future of normal politics through constitutional science, to his advice to the Court as he contemplates future efforts to mobilize the People for authoritative acts of constitutional creation. Now that we have glimpsed the course of a Publian life cycle, a few questions may help prepare the way for further exploration.



### *The Causal Question*

Begin with Publius as prophet. Though the *Federalist* is littered with predictions that have been falsified by history, Publius's grim theory of constitutional transformations isn't one of them. The two most sweeping in our history have indeed occurred "in the midst of danger" that raised the "general alarm." The Reconstruction Republicans won the constitutional authority to break with the *Federalist* past only after a war of unprecedented sacrifice; the New Deal Democrats gained a comparable authority only after an economic disaster of unprecedented intensity and duration. At least at the level of regime change, there is something to Publius's point: wrenching social crisis has been instrumental in leading masses of Americans to support efforts to move beyond normal politics and articulate new principles of constitutional identity.

If we turn to constitutional movements that have had an important, but somewhat less sweeping, impact on constitutional values and structures, the causal story is richer. The civil rights movement of the modern republic, the women's suffrage movement of the middle republic, the Jeffersonian and Jacksonian "revolutions" of the early republic all serve as important examples of successful constitutional politics. None was precipitated by crises on the scale of the Civil War or Great Depression. We must surely move beyond Publius's "crisis" theory to gain an adequate understanding of the causes of American constitutional politics.

### *The Translation Question*

Lots of people since Publius have noticed that modern political life is characterized by bursts of popular involvement. Publius is distinctive, however, in the way his response eludes familiar dichotomies. On the one hand, he is no hard-line conservative. He denies that these intermittent infusions of mass energy need fuel a nightmare politics in which demagogic elites cynically compete to channel mass irrationality to achieve evil and selfish ends. He sees these episodes of revolutionary engagement as the moments of great constitutional achievement—our higher law.

On the other hand, Publius is no knee-jerk partisan of the mob. His theory of faction emphasizes the possibility of mass irrational-

ity—where people get carried away by charisma or ideology, or both, to do serious damage to the community as a whole or to minority rights. Rather than glorifying the fluidity and excitement of the revolutionary moment as an end in itself, he is a rationalist: "it is the reason, alone, of the public, that ought to control and regulate the government. The passions ought to be controlled and regulated by the government."<sup>70</sup>

This joint commitment to reason *and* popular mobilization<sup>71</sup> leads Publius to emphasize the role of institutions in separating the demagogue from the statesman, the mob from the People. We saw him urging the Supreme Court to resist initial assaults on received constitutional principles so as to give the People time to collect their thoughts and energies for the "solemn and authoritative" act appropriate for a considered change in constitutional fundamentals. More generally, he insists that "a constitutional road to the people, ought to be marked out, and kept open, for certain great and extraordinary occasions."<sup>72</sup> It is this road, and what has and may become of it, which will be an abiding concern here: How to organize a process of public reasoning between the mass of Americans and their political representatives so as to identify those occasions when a movement has *earned* the authority to speak in the higher lawmaking voice of We the People?

Call this the *translation question*—since it inquires into the appropriate conditions under which American institutions have translated, and should translate, the excited rhetoric of constitutional politics into the considered judgments of constitutional law. What kind of institutional tests should Americans impose on a political movement before it is conceded higher lawmaking authority? Why should the achievements of constitutional politics have a special place in our political arrangements?

I will take up each of these questions in turn in later chapters.<sup>73</sup>

### *Deliberation and Preservation*

But it is important to remember that there is another side to the neo-Federalist story: normal politics. In his approach to this subject, Publius is an unashamed partisan of public-spirited deliberation. Just as he hopes to marry mass energy with reasoned deliberation in constitutional politics, so too he aims to encourage a deliberative

spirit in the more factional environment of normal politics. To borrow Cass Sunstein's happy formula,<sup>74</sup> the maximal goal here should be *deliberative democracy*: try to design a system that both encourages the election of "enlightened statesmen" and gives them incentives to govern according to their conscientious definition of the public interest.

Publius is, however, appropriately cautious in his expectations. He has a minimal goal that falls far short of his maximum. Here the aim is *preservationist*. "[E]nlightened statesmen will not always be at the helm":<sup>75</sup> let's make it tough for factionalists to undermine the constitutional solutions already reached in the name of the People. How successfully has the Constitution discharged these goals—both maximal and minimal—over two centuries of transformation?

This too is a question that deserves a chapter of its own.<sup>76</sup>

### *The Economy of Virtue*

Consider, finally, the single theme that unites the diverse aspects of the Publian enterprise, as we have come to understand it. In response to the perception that public-regarding deliberation is in short supply, the *Federalist* proposes a democratic constitution *that tries to economize on virtue*.

The first great economy is, of course, purchased by the distinction between constitutional and normal politics. The second is gained by a scheme of representation that gives each popularly elected official incentives to engage in public-spirited deliberation despite the proliferation of faction. The third seeks to provide fail-safe mechanisms by encouraging each representative to undercut the claim of the others to speak for the People during normal politics. The fourth economy establishes judicial review to uphold the integrity of earlier constitutional judgments against the centrifugal forces of faction.

In proposing a constitutional economy of virtue, Publius does not take a simple Hobbesian view of the human condition. His entire enterprise supposes a dualistic psychology:

The supposition of universal venality in human nature is little less an error in political reasoning than the supposition of universal rectitude. The institution of delegated power implies that there is a portion of

virtue and honor among mankind, which may be a reasonable foundation of confidence.<sup>77</sup>

The task is to economize on virtue, not do without it altogether; to create a constitutional structure that will permit Americans, in both normal and extraordinary times, to make the most of the public spirit we have. Our success in continuing the conversation begun by Publius is ultimately to be measured by our success in pursuing this objective under very different historical circumstances. But not so different that the entire enterprise has lost its meaning?