Tyranny and Faction in *The Federalist*

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In his 1878 essay “Kin Beyond Sea,” Gladstone distinguished between the English and American Constitutions, noting that “The one is a thing grown, the other is a thing made.” He was at least partly wrong, but he did capture the founders’ exhilarating sense of making new discoveries in political theory prompted by their experiences as English colonists and as citizens of the Confederation, their sense, that is, of having to improvise new institutions on the basis of principles they had had to invent for themselves when the assumptions they brought to politics failed them in practice. Their experiences required them to analyze their political institutions in fresh terms, giving them, as Gordon Wood has pointed out, a new understanding of the relationship of the structure of a government to the structure of the society it is intended to govern. Their new understanding properly deserves to be called revolutionary even as one recognizes that that revolutionary understanding has been obscured—until the last few years perhaps—by the far different course of subsequent revolutions elsewhere.  

This sense of having to invent new institutions accounts for the differences Bernard Bailyn has noticed between English and American understandings of the word “Constitution.” The British Constitution is finally an ethnic tradition, a lucky accident such as a person’s having a “healthy constitution.” The American Constitution, no less than the British one, takes its origin in ethnic history, and frequently falls back upon ethnic history when it suspects that its governing abstractions may mislead it. Further, the American Constitution—unlike, say, the revolutionary French ones—does not claim to descend from political first principles but from a tradition of worldly wisdom which it can only partly subject to explicit review and analysis, and thus cannot claim, as the French Constitutions did, a universality which completely transcends ethnicity. Yet whether they were exploiting their ethnic traditions, reflecting upon their recent history, deducing maxims from first principles, or even cobbling together nakedly expedient compromises, the federalists nevertheless correctly felt themselves to be making political discoveries which they expected to apply to other nations. The American Constitution, this is to say, finally remains not simply an ethnic tradition but a chosen thing deliberately adopted, the product of an attempt to build a government, although perhaps not a society, from the ground up. It is the consequence of an ethnic lucky hit, but it is not intended to be an ethnic property. It is not the limiting expression of Anglo-American ethnic history but the origin of a new kind of ethnicity in which political values stand in the place of cultural traditions.2

Whether this new kind of ethnicity has been successfully established in the United States is a subject of hot dispute. Even now it is an open question whether

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2I am tempted to speculate that this difference between the sense of an inherited politics and a made one also extends to the difference between an inherited nationality and a made one, and to the difference between the commitments of American literature’s romantic texts to abstraction rather than to the concrete cultural traditions embodied in English fiction.
“American-ness” inheres in a specific ethnic history or merely in allegiance to certain political values. But it is not an open question anywhere else. Indeed, only in the United States is the proposition that a nation’s political traditions strongly reflect its ethnic history felt to be vaguely embarrassing. Only the United States presents itself as a culture–as opposed to a state– which can be joined by an act of will, and only the United States would be ashamed of its failure to be such a culture. It is as if shame about the necessary limitations imposed by concepts of ethnic rootedness were the characteristic fact about American ethnicity, a shame felt both by immigrant populations on the brink of assimilation and by the dominant culture whenever it attempts to take its political ideals seriously. This shame is a consequence and a measure of America’s ambition to make, rather than to inherit, its political institutions.

To cross the Atlantic is to move from the world of custom–which is always finally a world of compulsion–into the world of the deliberately considered and chosen. As Alexander Hamilton announced in the opening lines of Federalist #1:

It has been frequently remarked that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.

The idea that one might be able to lay the foundations of a polity through reason and through reflection upon experience is of course directly in the mainstream of Enlightenment thought. What is perhaps less in that mainstream is the doubt that shadows Hamilton’s lines. What worries Hamilton’s Publius is whether any nation is capable of the detachment necessary to found a polity from reflection, whether all nations are too caught up in their internal conflicts (or in their traditional resentments) to create a stable or just or free government.3

3Even the English constitution was, to its most passionate American admirers, still the work of accident and force, although accident fortunately and intelligently exploited, and the separation of powers embodied in the implicit British Constitution represented in the divisions of the British government a social structure vastly simpler than that the founders imagined would prevail in the United States. The British system embodied in its government the conflict of three institutions—the people, the aristocracy, and the king. The American Constitution, only accidentally bearing some resemblance in its three divisions to the British one, was meant to mediate as yet unimagined social contradictions which could not simply be reproduced in the structure of its deliberative bodies in the straightforward ways adopted by the British.
If one is to design a government from reflection and choice, one must be detached enough from accident and force to engage in fair deliberation. If one cannot achieve detachment—detachment from need, desire, and interest—one cannot achieve freedom, for then one is the prisoner of accident and force. One must also, in the name of freedom, partly detach one’s self from one’s traditional allegiances, which are likewise at least in part the work of accident and force. Those who design and ratify Constitutions must act circumspectly, in reflective detachment from their own urgencies. The government they design must institutionalize a similar detachment and circumspection in the internal and external tensions of its deliberative bodies. And the political culture that government serves must encourage habits of detached citizenship.

Publius models this detachment and circumspection in his own person, as Albert Furtwangler and Robert Ferguson have argued. Publius is not an abstract citizen with no interests or desires, however, and he does not imagine that either those who design Constitutions or those who expect to live under their rule are such abstractions either. The citizen-identity which Publius requires from us, and models in his own right, is neither selfless nor wholly characterized by its interests, needs, and aims. Hamilton’s Publius, the detached judge of public institutions, is not quite Hamilton, the ambitious bastard son of a Nevis planter. But that vision of Hamilton—the interested manipulator with many axes to grind—is not quite Hamilton either, and what that vision leaves out is Hamilton’s capacity to think like Publius. Publius is characterized by, but not imprisoned by, his interests; he is also characterized, but not imprisoned by, his traditions, and the particular slant he gives his governing values.

When we hear of the division between values and interests, between a private identity, which finds itself in a world of need and desire, and a public identity, which finds itself in a world of duty and fairness, we expect that the account that is to follow will require the citizen to purify away his private interests and to subject his private to his public self. We further expect that the public self will be able to give law to itself and its culture from first principles, from absolute grounds. But in #1 Hamilton does not require this: he only requires that the citizen not be so completely the prisoner of his own needs, desires, and views as to be unable to make a fair bargain with people whose interests and aims differ.

Publius’ authority in #1 arises not from his protestations of virtue and candor or from access to controlling absolutes, but from the impersonal, worldly commonplaces which all sides in a public dispute can be counted upon to accept, the shared beliefs in whose terms one side mounts its case against the other, the agreements in whose terms all disagreements of consequence must be phrased.
Publius’s worldliness consists of his ability to describe his opponents’ interests and convictions in terms which those opponents will recognize as doing justice to their own sense of them. He speaks neither as an interested special pleader, nor as a pure vehicle of transcendental justice, but as a fairminded party to a deal. His persuasive power arises not from his purity but from his understanding of how worldly people go about disagreeing with each other.

The worldly agreements which shape disagreements include both shared intuitions about how interests function and shared values which run deeper than the struggles over interest (but do not always trump them). In tying Publius’ authority to those shared values by means of which people of opposing views hope to make their claims tell against each other, I am trying to treat these values neither as ethnic traditions nor as first principles. If they are merely ethnic traditions, they only bind those who share a particular history, and derive their claim to respect from no authority higher than custom. If they are first principles, they bind everybody and derive their claim to respect from the highest warrants. But they also, if their claim to priority is secure, tend to deprave political practice on account of their abstraction from lived experience. (And if their claim to priority is flawed, they tend to become only a more vehement form of custom.) Publius’ authority derives neither from custom nor from first principles, but from political worldliness, from scrupulous but never systematic reflections upon political experience which reveal truths which are deeper than mere custom but not so deep as first principles, truths which are contingent but not arbitrary. It was this kind of authority which John Dickinson had in mind when he claimed at the Constitutional Convention that experience must be the founders’ guide because theory may mislead.  

Traditionally, one says that political thinkers of Publius’ type value process over morality, freedom over virtue, that having despaired of discovering the kingdom of ends, they rule only about the agreed-upon means. Abandoning the attempt to order society on the basis of the good, such thinkers choose instead merely to arbitrate people’s quarrels over interests fairly. If quarrels over values matter, they matter only in the way that quarrels over interests do, and they are resolved not by seeking some controlling principle or some rational consensus but merely by balancing the pressures which those with value interests can bring.

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4Morton White argues that this remark only refers to the 18th century distinction between empirical and deductive knowledge. I think White’s argument accounts for Dickinson’s sense of what he said, but not for what moved him to say what he said, which was an awareness of the depth and perplexity of the enterprise they were involved in, an enterprise which rendered their philosophical language of experience and deduction obsolete even as it rendered the political vocabulary they had inherited from the generation of 1776 obsolete.
to bear upon the political process. This view somewhat underestimates the moral force of Publius’ worldliness, since he does not desire to rule questions of value out of politics but rather to require those in moral conflict with each other to engage in fairminded resort to the agreements and commonplaces whose terms they hope to bring to bear against each other. The fairness Publius seeks is not intended to write moral views out of politics and replace them only with negotiations over interests but to require people to make the same kinds of detached bargains concerning their values that they can make concerning their desires, either through the achievement of rational consensus or through the cutting of expedient deals. Whether even this is possible, however, remains an open question.

In choosing not to place moral issues wholly outside of politics but rather to require moral disputants to make fair use of shared values Publius does better justice both to morality and to process as political arbiters than might at first appear. One sometimes wants to define an absolutist tyranny as a government in which morality wholly displaces process and suppresses all disagreement about the acceptable ends of social life. But a government which no vision of the good can rule is also a tyranny, for in treating ethical issues as undecidable (or as unreal, as cat’s paws for money interests) such a government represses serious consideration of moral conflicts as moral, and chooses to see such conflicts only as competitions among pressure groups with different interests and resources.

By insisting that moral conflicts are outside the domain of politics, a government which refuses to legislate moral issues also rules out moral reformation as a political end and requires those with moral aims to submit tamely to complicity in acts which morally outrage them. Those with moral aims correctly describe such a policy as not the consequence of a morally neutral commitment to process but as a hidden commitment to a specific and reprehensible moral end, a commitment which is treated as a consequence of the deeper allegiance to process only because that process has been defined in such a way as to load the dice in favor of that outcome.

Such a politics also tends to invest its vision of fair process with exactly the kind of transcendental force it denies to ends: freedom becomes a non-negotiable value rather like morality, even under circumstances where freedom does not obviously have the trumping claim over morality. Whether freedom trumps morality or vice versa is something that polities are not, on this view, given freedom to decide.

Publius’ views on this issue are not developed explicitly, but are implicit in his habit of argument: moral aims are both inside the polis-world, in that political persuasion requires us discover common grounds of appeal and elaborate visions
of political ends which we hope will win the assent of others, and outside of
the polis-world, in that we are not allowed to specify in advance which particular
moral aims trump all others and can be disagreed about only at the risk of violence.
In doing this Publius perhaps avoids both versions of tyranny, at the price of being
unable to specify exactly where the outer limits of political life lie.

One consequence of this hedging was to set off an increasingly vitriolic argu-
ment, from the 1830’s to the 1850’s, about just where those limits are to be drawn:
either the continuance of slavery was something about which reasonable persons
could disagree within the context of other generally shared values, or it was an
evil so far outside the pale of reasonable differences that one could not share a
political life with those who adhered to it. (The case was somewhat different if
one took the view shared by Jefferson, Clay, and Lincoln, that the problem was
not about the morality of slavery but about the difficulty of abolishing it without
causing the nation to become unglued in ways which would make it ripe for an
even worse tyranny than that from which it suffered.)

The broader the area of acceptable outcomes becomes, the more one treats
one’s values as not only contingent but arbitrary, and the more the temptation
to substitute negotiations over interests for disputes over values. Those who de-
fine the area of acceptable outcomes broadly are also vulnerable to being backed
into corners by those with more sharply focused political agendas. Figures like
Stephen Douglas, who wished to remain impartial on the subject of slavery, would
forever be driven back by those for whom slavery was a positive good which re-
quired and deserved federal protection, for these latter would be more willing to
make an issue of it if it came to the sticking point, and they would also always
have the stronger rhetorical hand if all that opposed them were arguments favor-
ing impartiality and process. When in 1858 Lincoln made this argument against
Douglas, he of course did not point out that the strong-minded antislavery position
will also drive impartiality and non-intervention to the wall in precisely the same
way: by arguing that those who are not with it are against it, and that impartiality
is in fact indifference (at best) or covert partiality (at worst). Those for whom a
particular outcome does not matter will rarely prevail against those for whom it
matters intensely.

The narrower the range of acceptable outcomes becomes, on the other hand,
the more necessary it becomes to rely upon value commitments which are not the
simple consequences of the most general moral rules but which are the lessons
of a particular shared history, and the greater the temptation to draw moral lines
which require enforcement through violence. This tension between a view of pol-
itics as a mere equilibrium of interests and a view of politics as an equilibrium of
claims upon the same values is characteristic of American political culture in the
north before 1860. Broadly speaking, the northern Democrats, tending towards
the former view, were able to avoid nativism and to settle dangerous political
quarrels through dealmaking, but in the same gesture committed themselves to a
policy of expediency which attempted to describe all conflicts as conflicts over
money and power. Particularly in the policies associated with Stephen Douglas,
northern Democrats sought an impartiality about moral conflicts which is some-
times difficult to distinguish from indifference to moral issues. (This ambiguity
is exacerbated by Douglas’ desire to argue that things like rainfall and economics
have already decided the major issue—whether there will be slavery in the western
Territories—and that therefore the moral argument, at least as far as the Territories
are concerned, need not even be made by those who believe it.) The northern
Whigs, and later the Republicans, were able to advance certain kinds of moral
claim (their actual conduct is a different matter, of course), but they advanced
these claims only at the price of nativism, and their resort to such claims, particu-
larly during the political crisis of the 1850’s, so raised the moral stakes of political
conflicts as to render them incapable of solution without bloodshed.

The political culture of the Federalist is characterized not by an indifference
to issues of value, only by the recognition that one cannot predict with any preci-
sion how unfolding disagreements about the meaning and consequences of shared
values will develop (which is not to say that the train of consequences can include
just anything or that all outcomes are equally indifferent). The Federalist is not
value-neutral, it is merely not value-certain. It is informed by a habit of argument
that recognizes that deductive reasoning is not a sufficient moral or political arbiter
for all questions, and that only lived moral experience in a culture of persuasion
makes clear the meaning of moral commitments. But it is also a world in which
value commitments are not made completely at random. There is a tangled but
palpable link between, to use Dworkin’s phrase, one’s governing concepts and the
particular conceptions one constructs of them under specific circumstances, even
if one cannot say in advance what kinds of moral claim are beyond the limits of
negotiation and concession (and what kinds of moral claim are not negotiable and
therefore require bloodshed).

Some value claims clearly are beyond the limits of negotiation and concession,
and it is to limit disputes about such claims (without specifying them exhaustively
in advance) that Publius ties the hopes for republican government to the contin-
uuity of particular sorts of tradition: only certain kinds of society are capable of
maintaining republican government, and among people who do not share Pub-
lius’s fundamental intuitions republicanism will not survive. This is why Publius
promises to subject political institutions to reason without promising in the same breath to derive them from first principles; he promises only to derive them from assumptions sufficiently general as to be held in common by him with those with whom he is at the moment in dispute and with those with whom he reasonably expects to be in dispute later. As Publius is not an abstract citizen, so his society is not a first-principles society, and both of these facts are at once limitations (in that Publius’ lessons may not be of perfect generality and may only ratify what likeminded people were already thinking) and sources of sanity (in that through reliance upon worldliness and tradition Publius is able to draw limits to political life which political theory itself cannot draw, but which politics must have if it is not to descend either into amorality or into highly morally charged bloodshed).

In requiring of himself and of others sufficient circumspection to deliberate fairly, Publius does not require anybody to be virtuous through and through. All he requires is the detachment to imagine how the world may look through the eyes of those with other needs, or, more precisely, the detachment to imagine what one would want of a polity in which one cannot be sure that one will always be the strongest. Like John Rawls, Publius asks us to imagine the society we would design if we knew we were creatures with interests and values but stood behind a “veil of ignorance” which prevents us from predicting in advance just where all of our interests will lie or what versions of those values will prevail.5

We need not have no interests to be circumspect. We need not, when we cross behind Publius’ version of the Rawlsian veil of ignorance, give up all identity. We are only required to recognize that we are not completely to be accounted for by what we already know about our identities and our interests. Whatever we know we are, there is more to us, and it is because there is more to us than we can exhaust with theories about ourselves that we are capable of being fair. What we finally imagine behind the veil of ignorance is not a reduced and abstracted version of ourselves devoid of all of those telling limitations, social allegiances, and visions of the good which make for identity, but that part of ourselves which is still always potential, that part of ourselves whose story is not already over. What is behind the veil of ignorance is what we sense when we sense there is more to us than we are able to give a psychological or cultural or political account of, a part of ourselves which is capable, despite everything, of giving law to itself and searching for a determining ground upon which to persuade others, with different views, of the justice of that law.6

5see John Rawls, A Theory of Justice (Cambridge, MA: Harvard University Press, 1971)
6What I say about Publius here I think really applies to Rawls as well. For another view, see
Publius, also like Rawls, looks for some way to bring the ethical subject, which stands above its world to judge it, into the place of the psychological and political subject, which is so entangled in that world as perhaps to be only a piece of it. He seeks through worldly circumspection to use wholly this-worldly means to free us from enslavement to accident and force, need and desire. This aim of creating through reflective detachment (rather than through prophetic inspiration, say) a space of fairness, freedom, and superiority to all merely organic life is another version of the federalists’ desire to examine their ethnic history in order to reveal political principles that transcend that history. Whether they or anyone else can do this is a question upon which not only American democracy but all democracy hangs, for if one’s principles are so strongly constituted by one’s conditions that people of different allegiances and interests cannot hold themselves to common rules, then all politics whatsoever can only be the products of accident and force, and reflection and choice, persuasion and freedom, are only illusions, illusions which perhaps embody accidents and serve the ends of force.

Part of the drama of Federalist #1 is Publius’ attempt to detach himself from his own interests. Even as he makes it very clear which side he favors, Hamilton’s Publius is deeply aware of the temptations to vindictiveness to which each side will be subject:

An enlightened zeal for the energy and efficiency of government will be stigmatized as the offspring of a temper fond of despotic power and hostile to the principles of liberty. An over-scrupulous jealousy of danger to the rights of the people, which is more commonly the fault of the head than of the heart, will be represented as mere pretense and artifice, the stale bait for popularity at the expense of public good. It will be forgotten, on the one hand, that jealousy is the usual concomitant of violent love, and that the noble enthusiasm of liberty is too apt to be infected with a spirit of narrow and illiberal distrust. On the other hand, it will be equally forgotten that the vigor of government is essential to the security of liberty; that, in the contemplation of a sound and well-informed judgment, their interests can never be separated; and that a dangerous ambition more often lurks behind the specious mask of zeal for the rights of the people than under the forbidding appearance of zeal for the firmness and efficiency of government.

Publius admits candidly that the motives of many of his opponents are upright and that the motives of many of his allies are not. He even goes so far as to imply that many of his own motives may not be pure. But what is striking about all this is the ease with which he makes the whole question of motive irrelevant:

I shall not, however, multiply professions on this head. My motives must remain in the depository of my own breast. My arguments will be open to all and may be judged by all. They shall at least be offered in a spirit which will not disgrace the cause of truth.

Publius’ logic here is quite simple. What he means is that if his arguments are sound and if his sense of human nature accords upon reflection with the reader’s own experience of it, then his motives are strictly irrelevant. But how hard it is to imagine any public figure of succeeding generations making a similar statement! For sincerity, as Arendt argues in On Revolution, has long since replaced fairness as the central datum of political experience. If with Arendt’s Rousseau we wish to replace the circumspect but still desiring self with the pure citizen, to replace fairness with sincerity, we do not purify the self but madden it. For we transform a political argument between people with different views of what the right is to an argument between those who are pure and those who are impure. The consequence of this transformation is that we cannot imagine opposition to us springing from any source but corruption, so that finally we cannot argue with our opponents but must suppress them. And if we cannot imagine our convictions as flowing from any source other than our purity of spirit we must, with Shakespeare’s Angelo, become ever more ruthless in the service of a spirit we obscurely already know is less pure than we hope. To recognize a division between the world of duty and the world of desire is to perceive human folly and in some measure to transcend it. To attempt to unite them is to turn even our wisdom into the service of folly and to make our principles stalking horses for our wishes.

As Madison remarks in a famous passage from #51:

8It may be that Wills, in emphasizing Madison’s dependence upon the Scottish Common Sense school, paints a rather too rosy picture of Madison’s view of human nature. At the same time I don’t precisely agree with McDonald’s derivation of #51 from Mandeville, since if Madison really believed Mandeville he could not ask the people to reflect upon The Federalist but would look for some way to ensnare them by their vices into the service of a virtue only he has the secret of.
9Arendt is not alone in making this argument. For more on the relationship between sincerity and bloodthirstiness, see Lionel Trilling, Sincerity and Authenticity (Cambridge, MA: Harvard University Press, 1971) pp. 68-72. See also my discussion of this problem in Robert Penn Warren and American Idealism (New Haven: Yale University Press, 1988).
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.

Governments are for people who are liable to folly, and who cannot predict in advance just where their follies will lie, but who are not so foolish as not to be able to provide for cases of folly. To the extent that it provides a tradition of worldly wisdom designed to save us from the pitfalls of our common nature (to use Hannah Arendt’s words) the necessity of government is not only a testimony to human fallenness but also a testimony to prudence.

Madison more than once offers this oblique praise of the skeptical worldliness he depends upon in his audience, finding in the very circumstances from which Hobbes, say, would draw opposite conclusions, evidence of a capacity for good faith which persists despite and in the midst of folly. Here, for instance, is how he defends the creation of a U.S. Senate, which he does not see (as other federalists did) as a substitute for a House of Lords, but as a body chosen by the people for a longer time scale than they chose their representatives for and who are therefore responsible for the longer view of the national interest:10

To a people as little blinded by prejudice or corrupted by flattery as those whom I address, I shall not scruple to add that such an institution [a Senate] may be sometimes necessary as a defense to the people against their own temporary errors and delusions. As

10McDonald argues that Madison, following John Dickinson, did indeed see the Senate as a House of Lords. I argue that there is a subtle difference between Madison’s view of the matter and that of many of the other Federalists. Like the House of Lords and like the Spartan Ephori, the Senate is to be an upper chamber, but it is of course no less representative of the people than the House is—and hasn’t in fact been any more aristocratic in flavor than the House, as a rule. It derives its “upperness” not from its ability to explicitly represent the interests of a hereditary class or even of an economic class but solely from its method of election and from the length of its term. When Madison compares it to the House of Lords, he chiefly does so in order to show that it would be no more able to overbear the will of the House than the Lords are able to overbear the Commons.
the cool and deliberate sense of the community ought, in all govern-
ments, and actually will, in all free governments, ultimately prevail
over the views of its rulers; so there are particular moments in pub-
lic affairs when the people, stimulated by some irregular passion, or
some illicit advantage, or misled by the artful misrepresentations of
interested men, may call for measures which they themselves will af-
terwards be the most ready to lament and condemn. In these critical
moments, how salutary will be the interference of some temperate
and respectable body of citizens, in order to check the misguided ca-
reer and to suspend the blow meditated by the people against them-
selves, until reason, justice, and truth can regain their authority over
the public mind? What bitter anguish would not the people of Athens
have often escaped if their government had contained so provident a
safeguard against the tyranny of their own passions? Popular liberty
might then have escaped the indelible reproach of decreeing to the
same citizens the hemlock on one day and statues the next. (#63)

This necessity of both individual and collective circumspection was taught the
federalists by the experience under the Confederation of a slightly but tellingly
different theory of government. The Whig theory of politics which guided the
Founders through the Revolution, but which failed them under the Confederation,
depended upon two claims. First, as Forrest McDonald has shown, it assumed
that public virtue must be safeguarded by purifying the culture of corrupting aris-
tocratic tendencies. 11 Second, it argued that work of government is to allow
citizens to engage in public discussion to determine what they are collectively to
will, and to put those determinations into effect in the form of law and policy.
Law and policy, in turn, do not differ in kind, but are merely more and less firm

11 The locus classicus on this subject is J.G.A. Pocock, *The Machiavellian Moment* (Princeton: Princeton University Press, 1975). In the northern colonies, according to McDonald, this meant encouraging habits of frugality and continence which were assumed to be the characteristic habits of republican Rome. In the southern colonies this meant safeguarding the economic and political independence which seemed to the founders to inhere in the way of life of small freeholders pursuing agriculture. The common opinions about Republican virtue owed something to Machiavelli, but, as in different ways Furtwangler and McDonald have pointed out, may have owed as much to Addison’s *Cato* as to Machiavelli. McDonald goes so far as to say that the common picture of the state of nature derived more from Robinson Crusoe than from Locke’s *Second Treatise* and that the sense of the instability of republics derived not only from Machiavelli’s *Discourses*, Thucy-
dides, and commonly known Italian, Dutch, and German history, but also and perhaps chiefly from Otway’s *Venice Preserved*. 

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expressions of popular will. The task of government is to put into action the collective will of virtuous citizens. The dangers of government are the risks that the transmission of power from the citizens through policy into the future course of the body politic may be disordered or blocked by the corruption of the citizenry or the frustration of their aims by their ostensible representatives.

The Whig thinkers, Gordon Wood argues, proposed a theory of power which did not derive it from a superior source—the authority of God or King, say—but which redefined it in a way which the federalists inherited and modified. Power, they argued, is to a public body, what will is to a private person: the ability to determine through reflection upon a course of action and set that course of action in motion. The public will which is to empower the government is to be expressed not just intermittently through the ballot box but continuously through instruction of representatives and through impeachment. Further, those who represent this public will are not to represent the interests of the nation as a whole—they are not the “virtual representatives” the colonists already had in Parliament, at least according to the Tories—but are instead to represent the actual wishes of their actual constituents as they directly express them. Representatives are to be conduits of information, reporters of what their constituents have come to considered opinions about rather than people who engage in forming considered opinions of their own.

It is easy to see how this theory of government is a consequence of the colonists’ experience as English citizens of the long struggle with the House of Stuart, and with the corruptions of the Parliamentary leadership under the House of Hanover, but crucial experiences under the Confederation caused them to modify their convictions.12

That the popular will is unstable and heterogeneous is perhaps no recent discovery. There seems to be a strict analogy between the motivations and consequences of the desire for strict personal sincerity and the motivations and consequences of belief that the unmediated popular will ought to govern, for in both cases circumspection comes to appear to be a species of fraud and in both cases the impossibility of circumspection renders the proceedings somehow deficient in the sense of reality. Wood describes the consequences of this vividly in the case of Pennsylvania, whose unicameral constitution of 1776 perhaps went farthest in putting the Whig program into practice. The representatives’ obligations

12This whole account of the Confederation is disputed by Merrill Jensen in The New Nation: America under the Articles of Confederation (details). I am essentially following accounts of the Confederation given by Wood, Bowen, and McDonald.
to actually rather than virtually represent their constituents tied them to instructions which continually changed and made what the people wanted and where one went to find that out a subject of ever increasing mystery. Where did one go? To the angriest people? To the ones who last presented one with a binding petition? And how did one enforce a law which more and more took on the character of a non-binding recommendation subject to instant repeal rather than the binding will of the republic? Popular power, conceived of in this way, retreats beyond every understanding, becoming finally a sort of *elan vital* about which no particular manifestation is ever at all telling.

The will of the people also exists at several incompatible scales. The commitment to actual representation rather than virtual representation, and the further commitment of the Articles of Confederation to the sovereignty of the individual states, meant that representation was always representation of the most local and most particular. But the interests of the republic as a whole are not obviously the summation of the interests of its constituent parts. The Confederation, for instance, lacked the power to impose taxes, and depended for its support upon requisitions from the state governments. It was clearly in the interest of no state to pay taxes to the Congress and the result of this was that Congress was always at the brink of bankruptcy for lack of the funds to pay its expenses.

Finally, what the people wished turned out frequently to be unfair. The most famous example of this is the attempt of Rhode Island to expropriate its creditors by issuing a worthless paper currency which it would compel them to accept. Equally famous is the attempt embodied in New York’s Trespass Act to expropriate ex-Tories, an act in explicit violation not only of common-law tradition but also of the Treaty of Paris which had ended the War for Independence. The courts were not entirely powerless to cope with this problem—the New York law, for instance, was overturned by the courts in the case of Rutgers v. Waddington, argued by none other than Alexander Hamilton. But the courts were subject to continuous harassment. Rhode Island, for instance, after the case of Trevett v. Weeden had overturned its legal tender act, simply removed the judges and created a more complaisant court.\(^\text{13}\)

\(^{13}\)See McDonald 156-7. For a vivid account of the Rutgers case see Richard B. Morris, *Witness at the Creation* (New York: Holt, Rinehart, and Winston, 1985). The subject of judicial review is of course too vexed for me to deal with here. The idea that a court can overturn an inequitable law originates with Coke in the Bonham case. James Otis had attempted a similar attack in the writs of assistance case in 1761, but he also argued on grounds of equity rather than of unconstitutionality. *The Federalist Papers* themselves, perhaps aware of hostility to “Mansfieldism” and to judicial supremacy generally, are cagey on the subject. For a lively discussion of how John Marshall used
The federalists derived a few lessons from these experiences which can be summed up in two related maxims whose language I borrow from Arendt. The first is: “Law and power must derive from different sources.” The second is “The political problem must be distinguished from the social problem.” Both of these derive, in turn, from what Garry Wills correctly argues to be the governing maxim of *The Federalist*: “One should not be a judge in one’s own case.” The separation of powers derives ultimately from this maxim, and it is through separation of powers that law and power, politics and society, are to be held apart, institutionalizing circumspection in the interest of justice.

In order to derive these maxims, the federalists had to come to a new understanding of what is meant by the term “tyranny.” Madison’s Publius argues in *Federalist* #47 “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.” I read this passage with Garry Wills as a definition of tyranny, and not, with most other readers, as a mere rhetorical exaggeration intended to emphasize how important the separation of powers is. 14 For Madison’s Publius seems to have gotten to the heart here of what’s really wrong with tyranny and why it is that the temptation to resort to tyranny—especially under emergency conditions—is at once so beguiling and so dangerous. The point is not that without separation of powers governments tend to become oppressive but that without separation of powers they are already tyrannies whether they have begun to oppress or not, because without the separation of powers they are incapable of examining their own motives and all of their proceedings must inevitably become unreal.

How is one to require decisions to be made by referring them to some determining ground? Not, of course, by declaring in the Constitution that they must be so referred. Such a declaration could conceivably have force in a Constitution like the English one, which is a contract between two separate parties, the King and the People, and which in making such declaration gives one party grounds of appeal against the other. But the American Constitution is an agreement among the people, not between the people and somebody else, and therefore the only way the Bonham case to make a case for judicial review of unconstitutional laws see Kammen. See also Furtwangler’s chapter on Marshall in *American Silhouettes*.

14 In context, indeed, Madison is explaining why he favors certain features of the Constitution, such as the veto, which appear to compromise the separation of powers. His claim is that the weapons which allow the weaker branches to stave off the encroachments of the stronger branches are necessary for separation of powers to be anything more than the pious wish it became when stated in the preambles to the state Constitutions.
to secure a such a requirement is to embody it in the workings of the government the document creates.

Since the Constitution is an agreement among the people a mere declaration will not give the people any ground of appeal against themselves, for the people will not necessarily be conscious of their own errors, and it is the people’s self-consciousness more even than their morality which is in question. In a Constitution that establishes a contract between two parties those parties are presumably capable of looking out for their own interests. But in a Constitution that is a mutual promise among the people the intention of good behavior is no more capable of producing good behavior than tying a string around your finger is capable of making you really remember whatever it is you want to remember. (If I wished to get up at six tomorrow, I might want to tell myself again and again that I want to get up at six, but I’d probably do better to set my alarm.)

Instead of fine words about the ends and means of government, then, the Founders found it necessary to design conflicting institutions whose natural interactions would produce the effect of those fine words. This explains their initial hostility to a Bill of Rights. If the Constitution really does secure rights, Hamilton argues in Federalist #84, it does so by setting different deliberative bodies against each other rather than by making fine but in practice unenforceable proclamations. The legal obsession with the Bill of Rights ever since 1790 has perhaps proved Hamilton wrong, but maybe it does so only because Hamilton was wrong about how long the government would remain sensibly the product of an agreement among the people rather than an institution with a separate vitality and a separate agenda.\footnote{The Federalist insists that the real protection against abuse is to be found not in any limitation of the government’s powers but in the government’s \textit{structure}, in how it is ‘modeled’,” (Epstein, p.45).}

A government which has not properly institutionalized circumspection cannot defend itself against becoming the instrument of unexamined compulsions. The use of separation of powers as a curb on arbitrary authority was understood long before 1787. That division of sovereignty, however, was no solecism in politics but the ground for respecting political decisions, was a discovery of the founders’ generation: they learned that under divided sovereignty no party can be required to make, in Becker’s phase, a fatal sacrifice of vital interests, and each party has a stake in the success of the arrangement they have agreed upon. Perhaps the furthest development of this view is Calhoun’s later theory of Concurrent Majorities, which not only requires formal separation of powers, but also requires that each
major interest to sign onto a political agreement individually.

Government turns on the solutions to two quite separate problems: the problem of fairness of persuasion (the problem of how to work out a habit of life with people with whom one is likely to be in some continuous disagreement) and the problem of fairness of distribution (the problem of what is the best way to divide up the goods any society has to distribute). These might be called the political and the social problems, respectively. The discovery of the federalists is that these are two separate problems. Their second discovery is that how a society solves one of them has profound effects on how it solves the other. The government that seeks to solve the social problem without paying attention to the political problem rapidly loses its grip upon reality and degenerates into a tyranny. The government that seeks to solve the political problem without addressing the social one rapidly becomes an arena of pointless words. If the social problem is an especially urgent one the constraints imposed by solving the political problem at the same time rapidly come to look like obstructions and special pleading, and the kind-of-heart are easily lead to believe that attention to the political problem is a sign of weakness of sympathy with human suffering. Yet to ignore the political problem, is to cause even those institutions which are to respond to suffering to come apart. (This is why Hannah Arendt insists that tyranny is the special vice of kindness.)

When one faces the social problem, one faces two frightening facts, both of them only partly capable of being faced down. First, one faces the world of desire and need, a world whose demands are urgent and which responds with destructive force when those demands are unmet. The world of need and desire is finally a private, not a public world, because our needs tend to be non-negotiable, not something we reason with others about. Need and desire participate in the public world only in opportunistic ways (only, that is, as a way of getting what they require), and they see the public arena only as an instrument of a private satisfaction. Second, when one faces the social problem one faces the world of nature, of whose metabolism desire and need is a part but which also is a source of compulsions which frustrate desire and need, the expedients one designs to answer desire and need, and the methods one adopts to ensure fairness.

The heart of The Federalist is its attempt to avoid tyranny by forcing the republic to face the social and the political problems together. If a tyranny is any government in which power is incapable of imagining the demands of persuasion and of fair disagreement, then a government which is not tyrannical must be able to measure its desires against some scale not itself derived from power, must derive power and law from different sources, must institutionalize circumspection.

The Constitution was intended to provide several sorts of institutional circum-
spection, several arenas where power and law could be held against each other. When one seeks to make power answerable to law, one imagines one’s self as subjecting politics to the review of a moral absolute, the kind of thing American romantics called a “higher law.” The federalists, however, did not derive the law to which power was to be answerable from any transcendent source. They derived their sense of what fairness would require from their own awareness of the temptations to unfairness which they themselves suffered.

The debates at the Constitutional Convention, to characterize them broadly, rarely turned upon abstract issues or even upon ethical questions, mostly I think because the delegates held so many of their assumptions in common, and also I think because they were seasoned Constitution makers, having either participated in the drafting of the Articles of Confederation or in the drafting of their state Constitutions. The larger issues to which I have devoted the last few pages were matters of implicit conviction with them. But these larger issues did shape the speculations about the course political disagreement would take in the United States, the conflicts between the states or between the classes whose ins and outs they attempted to imagine.16

The federalists imagined themselves as part of a heterogeneous body politic subject to the conflicts and manifest injustices all bodies politic suffer. Although they could predict some of the conflicts in which they would be involved, some of them (such as the debate over slavery) breaking out in fact during the course of their deliberations at the Constitutional Convention, the delegates also knew that they could not predict in advance how these conflicts would develop, which sides would have the advantages of numbers or passion or power, or how the entanglements of other conflicts running across the lines of those they were able to imagine would affect the outcome.

Because they knew they could not predict with certainty the outcome of future political conflicts, they chose to design institutions which others who also did not know how those conflicts would develop would willingly choose to enter. Their chief concern was how to weigh majority and minority rights against each other, and this was not only because the delegates represented particular economic minorities but also because, as Morton White has argued, even those who represented majority factions at the convention could imagine circumstances under which they would be in the minority.17

16White notes that Publius is generally concerned with empirical political science rather than with deductive political philosophy, but he also notes that their observations are conditioned by a philosophy which they take almost for granted.

17See Morton White’s discussion of this aspect of their deliberations in Philosophy, the Feder-
By deriving their understanding of what fairness would require from a circum-
spect examination of their own temptations to be unfair they were able to evade
one of the vexing problems which always inheres in the attempt to derive a con-
trolling principle or a determining ground from some higher region. That higher
region frequently, as Marx reminds us, turns out to be a reflected version of what
we need to secure what we desire, just as the God one imagines so frequently
turns out to be one’s self with a louder voice. When one wishes to bring down
a law from above in this way one always provokes the telling objection, “Whose
law is it that you have brought down?” And indeed such a law often does turn
out to be somebody’s law and, not coincidentally, serves that somebody’s inter-
ests. By reflecting upon their own temptations the federalists were able to turn
this question back upon its askers: “Whose law? The law you’d want to appeal
to if I were unfair to you!” And as it happens, when we are treated unfairly we
never do doubt that there is such a thing as fairness. We only doubt whether there
is such a thing when we propose to treat other people unfairly and wish to sweep
away their objections unexamined.

Most of the methods they adopted depended upon the notion of separation of
powers. They were the discoverers of the notion that division of sovereignty was
not only not a “solecism in politics” but a source of political stability. Much of
what they adopted they claimed to derive from Montesquieu, but in their deliber-
ations they had to straighten out matters Montesquieu had left confused, such as
the distinction between mixed government (a government simultaneously demo-
cratic, aristocratic, and monarchical, such as the English one) and separation of
powers (a government divided into legislative, executive, and judicial branches).
They also felt the need of combining two opposed political tendencies, for they
felt that mere separation of powers in law would not ensure separation of powers
in fact unless what they assumed would be the weaker branches of the government
were allowed to defend themselves by encroaching a bit upon the functions of the
stronger branches.\footnote{alast, and the Constitution, pp.27-8.}

The particulars of the methods they adopted are well known: judicial inde-
pendence, division of powers between the states and the nation, and the division
of the legislature into a short-term, directly elected, census-apportioned branch
designed to reflect the immediate desires of the people and a long-term, indirectly
elected, state-apportioned branch designed to reflect (depending upon whom you
\footnote{Madison’s #47 is largely an elegant reconciliation of the contradictory notions of separation
of powers and checks and balances.}
asked about it) the long-term interests of the populace, the sense of national identity, the accumulated wisdom of experience, or the interests of monied people. It is particularly interesting as an indication of the founders’ habit of thought, how the Senate served several contradictory purposes. Dickinson and Hamilton seem to have seen it as representing a monied class interest; Gouvernor Morris saw it not as representing that interest so much as quarantining it, providing a separate place for a class which would otherwise dominate the House; and Madison, noting that only its indirect elections, its small numbers, and its state equality, and its long, overlapping terms distinguished it from the House, saw it as a body sensitive to the opinion and status of the United States in the world and as a repository of practical wisdom. In fact, only Roger Sherman, the author of the “Connecticut Compromise,” which provided for equality of representation of the states in the Senate, seems to have seen what the Senate has in fact turned out to be, a bastion of the power of the states, and a last line of defense for the minority political party.

The most interesting features of federalist thought have to do with the suppression of “faction,” by which they seem to mean a propensity to the tyranny of interest or the desire of a group of representatives, whether a majority or a minority, to circumvent or pervert the process of public persuasion and negotiation. Hamilton notes, for instance, that the superior weight of the federal government may be brought to bear against state legislatures dominated by factions, and his thought on the matter generally turns upon the reflection of the power of the whole back upon the power of the fractious parts. Madison’s thought is far more interesting, for it reveals telling things about the federalist picture of human nature, a picture that within a decade would already become obsolete.

Madison’s theory of faction in *Federalist #10* culminates a great deal of speculation on the subject of faction running through his speeches at the Constitutional Convention—especially his famous speeches of June 6 and August 10—his correspondence with Thomas Jefferson—especially a very telling letter of October 24, 1787. His treatment of faction, in turn, draws from many sources, most importantly, as Douglass Adair noticed many years ago, from Hume’s essay “Of Parties in General,” but also from his lifelong concern with the struggles between the different religions in the Virginia Legislature.¹⁹

¹⁹Hostility to organized religion and fear that religious passions would divide the nation are among the deepest constants of Madison’s thought, from his early “Memorial and Remonstrance” through “Vices of the Political System of the United States,” which he published on the eve of the Constitutional Convention, to his criticism of encroachments upon the barrier between church and state in his old age. The subject of the danger of religion, unlike the subject of slavery or the subject of unionism, is one of the few subjects about which Madison’s opinions are obviously
In #10, Madison’s Publius defines faction with some precision:

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 of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.

Faction takes its origin from the division of the human mind into what is capable of entering into the public world of reason and persuasion and what is not. What leads us into faction is passion, which is the ability of feeling to overwhelm thought, and interest, which is the ability of need and desire to overwhelm thought. Faction produces two quite separate effects. First, in directing the public will to its most momentary and temporary concerns, it risks doing damage to its interests over the long term, and in so doing does things which one needs only an enlightened prudence to condemn. A momentarily infatuated public, like a drunken but not alcoholic man, will do things against its own interest. Second, faction may lead the public will to do things which are in the public interest but which are unfair, things which an enlightened prudence would recommend but which justice condemns. In distinguishing between justice and prudence Publius distinguishes his own position from that we have come to call Utilitarianism and moves in the direction of that position John Rawls calls “justice as fairness.”

It is crucial to note right at the outset—because it points out the devastating error upon which Publius’s political thought founders—that he conceives of the dangers of faction as arising from comparatively shallow parts of the human personality, from transient passions and from venal interests. In a letter to Jefferson of October 24, 1787, Madison remarks, with more asperity than he allowed himself as Publius, that artificial distinctions founded “on accidental differences in political, religious, and other opinions, or an attachment to the persons of leading individuals, ” have led people into fratricidal struggle: “However erroneous or ridiculous these grounds of dissension and faction, may appear to the enlightened Statesman, or the benevolent Philosopher, the bulk of mankind who are neither Statesmen nor Philosophers, will continue to view them in a different light.”

Madison follows Hume in deriving faction from the vicissitudes of human nature, and, like Hume, he considers some of the most devastating factions to be the products of comparatively trivial causes. (Hume takes as an example of consistent throughout his life.

20See White, p. 76, for a discussion of this letter.
the latter the ancient equivalent of soccer riots.) Madison’s Publius goes so far as to link these essentially accidental and adventitious differences to those which arise out of differences of opinion, and he does so, it is worth noting, because he considers differences of opinion to be no more based in any underlying stratum of reality than differences among soccer fans. Differences of opinion cause faction not because people really are divided by deep questions about how they view the world or by incompatible ideologies, but because human vanity prevents us from seeing that our opinions are contingent, and because differences of opinion stir up angry self-love.

As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. As long as the connection subsists between his reason and his self-love, his opinions and his passions will have a reciprocal influence on each other and the former will be objects to which the latter will attach themselves.

Madison includes, daringly, but also perhaps mistakenly, differences of religious conviction among these essentially shallow and accidental causes of faction:

The latent causes of faction are thus sown in the nature of man; and we see them everywhere brought into different degrees of activity, according to the different circumstances of civil society. 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. So strong is this propensity of mankind to fall into mutual animosities that where no substantial occasion presents itself the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions and excite their most violent conflicts.

Speaking at the Constitutional Convention on June 6, 1787, Madison allowed himself to include even racial prejudice among these shallow but potent illusions (writing as Publius he did not allow himself to be so daring): “We have seen the
mere distinction of colour made in the most enlightened period of time, a ground of the most oppressive dominion ever exercised by man over man.”

In addition to these shallow but potent sources of faction are other sources which arise out of real differences of interest. Charles Beard found in Madison’s analysis of economic factions a precursor of Marx’s analysis. Both in *Federalist* #10 and in his speeches of June 6 and June 26 Madison sounds a note which if not Marxian is at least Beardian:

> But the most common and durable source of factions has been the various and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views.

Most readers since Beard do not find Marx in this passage. For one thing, property is the most common and durable but not the only source of faction. For another thing, although different economic interests lead people to have different political opinions, an economic faction is simply an economic interest. Publius has no theory which links the other aspects of culture—art, belief, law, and so on—to economic interests. Publius thinks of a faction as simply a group of people excited about something. Economics isn’t the only thing that excites people, and some of the things which excite people, religion, for instance, do not map onto class in any simple way, at least not in America. For another thing, even economic factions are not necessarily deep and long-lived things the way Marxian classes are, for economic factions include not only different classes but also different sectors of the economy, and sometimes when sectors of any economy behave like factions

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21 Madison’s opinions on the slavery question are as vexed as those of the other Virginians, who, despite their own dependence upon slavery, were consistently the severest critics of slavery at the Constitutional Convention. Madison describes the slaveholders as a faction wielding unjust power over their slaves, and even goes so far to say that no slaveholding country can really be a republic. At the same time he is unwilling to sacrifice the union over slavery, and, biting the bullet, argues for measures that he thinks will increase the power of slaveholding states, offers them the inducement of federal help in putting down slave insurrections, and defends the three-fifths compromise itself as a grudging recognition that if slaves are not citizens they are at least human beings. (See for instance his argument in *Federalist* #54.) Late in life, at the time of the Nullification Crisis, he found himself defending the Union and recanting the states-rights position he had set forth in the Virginia Resolutions of 1798.
they cut across differences of class. All of the different levels of the manufacturing interest, Hamilton’s Publius argues, for instance, will make common cause against all of the different levels of the mercantile and agricultural interests on the tariff issue. Factions, as Publius imagines them, are heterogeneous in unstable and unpredictable ways.

It is precisely this heterogeneity and instability which provides Publius with the remedy for faction he proposes in #10. Unable to forestall the proliferation of faction, Publius proposes the establishment of relatively large electoral districts as its remedy. “Enlarging the sphere” seems an odd–and rather unphilosophical–way to answer the problem of faction, and to see how it works we will have to adopt some of Publius’ assumptions. Chiefly, we have to adopt the assumption that what moves us to faction is transitory and shallow, and that the interests about which we are tempted to be unfair are immediate to us, are things of which we have direct and intimate acquaintance. Good empiricist that Publius is, he assumes that the immediate is the local and that the conflicts which we know well enough to become enraged about are local conflicts. Larger concerns, such as the national well-being, are more abstract to us and to that extent less real and less capable of becoming objects of faction. (Publius speaks here as someone who has seen the effect of direct representation, who has seen the ability of local issues to dominate national discussions.)

Large deliberative bodies also become steadily less honorable as they become larger, because responsibility for that body’s action becomes diffused among more and more members and thus becomes insensible to any particular member. As Madison’s Publius acidly remarks in Federalist #55: “In all very numerous assemblies, of whatever characters composed, passion never fails to wrest the scepter from reason. Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob.” Now if electoral districts are large, there will naturally be a larger number of “fit characters” competing for a smaller number of offices. Further, a small representative body can hold its members responsible in ways that a large one cannot. But the real work done by enlarging the sphere is by changing the character of the election itself by ensuring that the districts that they represent are heterogeneous.

Consider the case of religious factions in state politics (which many scholars think was what Madison had particularly in mind). If the state is small it is likely to contain few sects and thus more likely to have one which has the means and the inclination to lord it over the others. If the state is large it is more likely to have many competing sects, in which case it will be to each sect’s interest to support religious freedom because each sect will be a minority (relative to the others taken
together) in need of the protection of religious freedom. (Madison’s theory treats virtues with the same caution with which it treats vices, and assumes that those who want to advance their ideas of virtue will use the same circumspection and prudence that those who wish to advance their money interests would use. Madison’s theory fatally underestimates the magnetizing power of religious ideas; his theory of religious conflict is one which only a man untouched by enthusiasm could entertain. It fails also in the face of other passionately held convictions which have a religious force.)

Applied to politics the idea of “enlarging the sphere” seems to lead one back to the theory of virtual representation, whereby the representative speaks not for a particular constituency but for the nation as a whole. But there is a crucial difference: the virtual representative takes the large view simply because that is the job he or she is supposed to do. The Madisonian representative takes the large view because he or she cannot get the job in the first place otherwise.

By attending to the heterogeneity and instability of the electorate, Publius is able to define a variety of representation which is neither direct nor virtual. The question of representation finally boils down to this: How are the desires of a heterogeneous people to be reflected in policy? Not, presumably, by discovering a Will of the People. Better to establish a polity in which people with compelling interests cannot serve those interests except by striking deals with competing interests.

A large district will be one in which a majority will not feel passionately about one’s own issue. Such a district may hold one responsible if one is unfair, if one is the prisoner of factional interests they don’t all share. Those who are passionate about other issues may feel poorly served by a representative who invests himself or herself wholly in a particular factional agenda, not only because such a representative may neglect their interests, but also because such a representative must often alienate crucial allies. If I alienate Jones because I disagree with him about issue X, those who do not care about X but need Jones’ support for issue Y, which I don’t care about, will have reason to complain about how I am representing them. Factional interests are costly in heterogeneous constituencies, and the political interests of ambitious people who wish to represent such constituencies can only be served by circumspection about factional interests and by attempting to seek some fair bargain among the different interests.

If I care deeply about an issue about which most of my constituents are indifferent, there will also be issues about which I feel indifferent which excite the factional passions of a significant minority of my constituents. Some of these passionate minorities will be in conflict with each other, and it will be in my interest
to propose a fair bargain between them if I am to win their support. Here again, the ambitious representative is required by prudence to seek some fair bargain among the partisans of different factions.  

The federalists did not, of course, envision the American party system, in which the parties are heterogeneous, ideologically incoherent coalitions. But the incoherence of American political parties, as Martin Van Buren noted early on (and as Seymour Martin Lipset noted far more recently), unifies American political culture by requiring each party to seek consensus among its factions or risk political defeat: political struggles in America usually happen within rather than between the parties, and the successful party is the one that has been best able to compose its internal discords. This kind of heterogeneity is precisely what Madison had in mind when he called for “enlarging the sphere” of representation. (When in 1858 Stephen Douglas accused the Republican party of not being “national” he did not merely mean—as Lincoln took him to mean—that it did not have southern supporters. He meant that Republican politicians did not have to strike a bargain with southerners to be nominated and that therefore the South had reason to fear that a Republican president would be utterly indifferent to their concerns, particularly if a Republican president were to be elected, as Lincoln later was, without winning a single southern electoral vote, or even a single popular vote in many southern states. “Logical parties,” as Robert Penn Warren remarked of the election of 1860, “lead to logical shooting.”)

The representative will be further constrained to fairness because interests are unstable over time: one must be fair to those who oppose one over position X, because they may be one’s crucially necessary allies when position Y becomes important next week, so that striving and agreeing are always going on simultaneously. This awareness that interests are unstable over time will tend also to foster a certain detachment about one’s interests, making one willing to trade small interests for larger ones, or willing to lose a fight today in order to win a different fight tomorrow.

The representative is thus not merely responsible to a majority, for that majority may be tyrannous. Nor is the representative simply responsible to an inward sense of right, for that may be tyrannous too, since its demands have a way of being non-negotiable. But the representative is responsible to political life itself, to an ongoing process of persuasion by which people with different interests work out a common existence.

To say that a representative is responsible to an ongoing process of persuasion

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22For a very similar argument about the meaning of Federalist #10, see White, p. 164
is precisely not to say that a representative is responsible to a Public Interest or a General Will. There are things which are genuinely in the interest of the nation as a whole, but there is not a Public Interest. Publius does not adopt the notion that there is a public interest to which all private interests are or ought to be subservient. Instead, he argues that there is a public sphere in which people reason with each other about things which include their private interests. We remain attached to private interests in Publius’ view, but we are not the creatures of either a public or a private interest.23

Publius’ worldliness, even his cynicism, turns out to be lucky. For let us imagine what follows from the assumption that to enter public life is to submit a private will to a public one. In the first place, a General Will almost always turns out to be an enlarged version of somebody’s private interest. In the second place, the notion of a General Will transforms all disagreements over policy into conflicts of virtue and vice, for it is the pure of heart who have access to the public good, and the private good remains the exclusive interest of the corrupt.24

To see policy as a matter of conflicts between a general will and private wills is in effect to attribute organic evil to one’s opponents. It does not find genetic evil per se in the corrupted (“They’ve been made so by conditions! Their wickedness is socially constructed!”) but it does de facto attribute organic evil to them insofar as it accounts for their beliefs and interests in a way to which they themselves do not have articulate access—we, but not they, can reflect in good faith and detachment upon how they lost the freedom to so reflect. They believe what they believe, and they want what they want, because they are corrupt, and whatever the origins of that corruption, they are so implicated in it that they are incapable of believing otherwise and incapable of arguing in good faith for what they believe. They may have chosen to become what they have become, but having so chosen they can no longer choose anything else in freedom, enslaved as they are by their corruption.

Robespierre is the chief exponent of this view. It is worth noting that it is precisely his belief in human perfectibility and the power of circumstance which makes the evidence of human evil so maddening to him, which in fact makes him evil in his very efforts to extirpate evil. A true Calvinist might be capable of more detachment. For both believe that we are fated to good or to evil, but the moral perfectionist is able to hide his determinism from himself because it is only the wicked who are utterly subject to fate. If we are all sinners then we might as

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23 Epstein argues that engaging in public life is itself a kind of interest, and that the act of public deliberation is a primary good. See p.124

24 Epstein makes a particularly strong discrimination between justice and the public good. See p. 87
well bear with each other. But if only those who have indulged their vices at the behest of a corrupting civilization are sinners, then they, but not we, are the only ones who are no longer capable of deliberating and choosing in good faith. The moral perfectionist believes he lives in the worldly world of vice and virtue but in fact lives in a theological world of good and evil. He is incapable of inoculating himself against the inherent dangers of theological views of politics because he is unaware that his view of things is theological.

Madison’s chief distinction is not that between a public good and a private good, for the public good always seems to be an intensely private thing—some non-negotiable demand made upon my conscience. What the representative is responsible to is fairness, not a General Will, and such a representative must always value the fair over the good, must always choose a course which does not imperil the course of continuing principled disagreements over even the most desirable project, for to value the good over the fair is always the project of tyranny.

The answer to tyranny, and the only guarantor of fairness, is, to put it bluntly, a species of hypocrisy. For in order to be fair one must not think of one’s self as being quite the same all the way through but must be aware that one’s private and public selves are always engaged with each other but distinct from each other and that each role must be taken seriously even in its opposition to the other roles we may be called upon to play. The different roles we play in the public world (as representatives of people who don’t agree with each other and allies of people with whom one expects tomorrow to be in profound disagreement) are the guarantors of our fairness, for if we insisted on being absolutely true to ourselves we would never persuade. We are capable of fairness only if we are not fully invested in what we want, or in what we believe, which is to say that we must think of even the deepest or most identity-making facts about ourselves as somehow contingent, as somehow not the real truth about ourselves. To claim that our most strongly held beliefs are contingent in this way forces us to see even those allegiances in which we have most at stake as negotiable, for we discover our identity not in what we know about ourselves but in that reservoir of potential which keeps every case about ourselves open despite everything and which remains the final reservoir of our sense of freedom. That there are allegiances, which we cannot specify in advance, which are non-negotiable to us, we cannot deny, but the price of the entrance of such allegiances into the political world is a war whose outcome will always be uncertain to us, and resort to such allegiances, particularly if they are not shared, must be made with extreme care.

In the political world of The Federalist we put our identity into being not when we impose our beliefs upon the world but when we engage in the world in that con-
tinual process of negotiation and refinement which reveals to us how our different commitments work themselves out against each other. But this is a position we can only take if we remain in some way detached even from what is most important to us and if we see that detachment as a source of sanity rather than of human weakness. For the enthusiast, or for anybody who wishes to ground allegiances in a deep and certain source, the thought that commitments are contingent is a rebuke, and the only way to answer that rebuke is with an ever more nervous and rigid fanaticism. Even the pragmatist, however, can be driven to this same wall once he discovers moral differences which do not lend themselves to pragmatic compromise.

The downfall of Publius’ theory is its assumption that what tempts us to be unfair is shallow, and that the deep truth about ourselves is that we are worldly and detached players of multiple roles. Only if we make that assumption can we treat our values as negotiable, can we desire to trade off one value against another. Only if we are capable of worldliness can we bargain with those with whom we are in disagreement, for only in that case are we capable of enough detachment about our values to be able to see that opposition to them is not necessarily depraved. Publius’ crucial belief is that the compromises we make to advance our values are like those we make in order to advance our well-being and are subject to the same kind of detailed negotiation prudence is. Even more than this, he believes that our values are most real to us as they are developed in the public world of negotiation and concession. For only such a belief can make possible the further belief that we are able to value the fair over the good even when the good’s demands violate the requirements of the fair and even when the demands of the good seem to be absolute. Whether this is a correct belief, however, remains still open to question, not settled even by the Civil War we fought ostensibly to settle it.

Empiricist that he is, Publius assumes that factions form over concrete issues. Publius also assumes that factions in practice are the work of locally interested people in concert—a faction as he sees it is the cousin-german of a conspiracy. The very next decade was to demonstrate the fallacy of both of these assumptions, to demonstrate that the things which most bloodily stir human passions are abstractions which we hold so deeply that they displace everything else we might know about our identities, and that a faction is not a cabal of interested people but the mobilized force of a mass in which the individuality of its constituents is obliterated.