

REPRESENTATIVE DEMOCRACY

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The Federalist vision of representative democracy is a topic no less important today than it was in the days of the Framers. We all agree that we live in a representative democracy.¹ Modern political practitioners, however, draw the wrong inferences from this fact. The Federalist vision of representative democracy should actually be treated as two separate inquiries. The first asks, "What do representatives do?" and the response is embodied by the opposing pluralist and Burkean paradigms of the representative's role.² The second inquiry asks, "What is the role of democracy within our system of constitutional design?" and the response is that democracy should serve either to legitimize or to check government.³ The dominant contemporary response to these topics in the United States favors the idea that democracy serves a legitimizing function. That approach is ahistorical, inefficient, and intellectually impoverished.

Historians and political scientists have pointed to two competing paradigms of representation.⁴ The pluralist vision considers the representative an advocate for his particular constituency.⁵ This is both the dominant historical and current

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1. By "representative democracy" I refer to our constitutional system of government, whereby individuals elect fellow citizens to serve as their "representatives." I do not mean to approach the question of whether this system adequately represents the interests of all, a subject on which opinions may differ.

2. Of these paradigms, only pluralism can actually survive in practice. *See infra* notes 4-7 and accompanying text.

3. *See infra* notes 8-11 and accompanying text.

4. *See, e.g.*, BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 161-75 (1967). As regards the history of representation in America's representative democracy, Bailyn noted the following:

In England the practice of "virtual" representation provided reasonably well for the actual representation of the major interests of the society, and it raised no widespread objection. It was its opposite, the idea of representation as attorneyship, that was seen as "a new sort of political doctrine strenuously enforced by modern malcontents." But in the colonies the situation was reversed. There, where political experience had led to a different expectation of the process of representation and where the workings of virtual representation . . . were seen to be damaging, the English argument was met at once with flat and universal rejection, [and] ultimately with derision. . . . What count[ed] . . . was the extent to which representation worked to protect the interests of the people against the encroachments of government.

Id. at 167.

5. *See id.* at 162-75.

view. The other vision, of Burkean origin, holds that representatives are guardians, promoting neither their own narrow interests nor those of their constituents, but rather the broader interests of society as a whole.⁶

Two points must be made about these competing conceptions of representation. First, as a historical matter, the Framers—particularly the revolutionaries—soundly rejected the idea of guardianship in favor of the idea of advocacy.⁷ Second, and more important, the Burkean idea of representatives acting as paternalistic guardians not only lacks support from the Framers, but is incapable of establishing a stable equilibrium. Every political situation in a representative democracy entails two basic conditions: rivalrous competition for political office and an inherent conflict between the private interests of a politician's constituency and the interests of society in the aggregate. Given these conditions, the Burkean, other-regarding tradition lacks necessary survival characteristics and can yield at best a temporary equilibrium. Imagine, for example, that two people are running against one another for a political office. One says, "For the good of the republic, I'm going to do X, Y, and Z, but it will cost everyone, including the members of my constituency, five dollars." The other responds, "Forget the republic, I'm going to bring home the bacon to this constituency and it will profit them five dollars." Predictably, the second person will win the election. Thus, over time self-interested constituency promoters will dominate in competitions for political office.⁸ Representative democracy of the modern pluralist bring-

6. See *id.*; see also EDMUND BURKE, BURKE'S POLITICS 494-95 (Ross J.S. Hoffman & Paul Levack eds., 1949). Burke defined virtual representation as follows:

Virtual representation is that in which there is a communion of interests and a sympathy in feelings and desires between those who act in the name of any description of people and the people in whose name they act, though the trustees are not actually chosen by them.

Id. at 494.

7. Because the idea of guardianship led to the conclusion that the people of the United States could be represented by their English counterparts, "'virtual representation' anywhere, under any conditions, was 'too ridiculous to be regarded'" in the American colonies. BAILYN, *supra* note 4, at 169 (quoting John Dickinson, *An Essay on the Constitutional Power of Great Britain over the Colonies in America* (Philadelphia, 1774), reprinted in 3 PENNSYLVANIA ARCHIVES, 2d Ser., at 594).

8. See Eugene Hickok, Jr., *Congress, Representation and the Public Interest*, reprinted in THE NEW FEDERALIST PAPERS 114, 116 (J. Jackson Barlow et al. eds., 1988) (noting that improvement in communication technology has exacerbated the normal popular pressures on representatives, making it "virtually impossible for members of Congress to distance themselves from the heat of the political fray and to put issues in perspective").

home-the-bacon variety is not an anomaly, but an unavoidable result of evolutionary processes.

These evolutionary processes were no mystery to the Framers, but guided their conceptions of democracy.⁹ Yet the Framers' conception of representative democracy was vastly different from currently prevailing views. As Edward Banfield has pointed out, tucked away in the language of many elected representatives today is the idea that they epitomize *legitimacy* because they are *elected* representatives, and that it is the people—the voters—who rule.¹⁰ The Federalists' conception of representative democracy, however, rejected the idea that the purpose of majority rule and the election of representatives was to *legitimize* government and thereby to empower elected representatives. Rather, the Federalists saw democracy as a *check* on government because it allowed citizens to unseat incompetent rulers and thereby align the interests of governmental actors with those of the electorate.¹¹ This understanding of representative democracy was strongly influenced by John Locke, who believed that the purpose of democracy was to allow the people to *judge* their government.¹² The current idea that the people *rule* through democratic processes thus stands in stark contrast to Locke as well. The Framers' *idea* of a democracy in which people would sit not as rulers, but as *judges* able to check the legislature, has been lost in the United States.¹³

What is wrong with the notion that the people rule? The idea

9. See Joseph Bessette, *Deliberate Democracy: The Majority Principle in Government*, in *How Democratic is the Constitution?* 104, 104-09 (Robert Goldwin & William Schambra eds., 1980).

10. See generally EDWARD C. BANFIELD, *HERE THE PEOPLE RULE* 23-37 (2d ed. 1991)(arguing that the direct election of senators creates stronger links between the people and Washington, thus creating greater governmental legitimacy).

11. See THE FEDERALIST No. 10, at 82-83 (James Madison)(Clinton Rossiter ed., 1961):

As each representative will be chosen by a greater number of citizens in the large than in the small republic, it will be more difficult for unworthy candidates to practice with success the vicious arts by which elections are too often carried; and the suffrages of the people being more free, will be more likely to center on men who possess the most attractive merit and the most diffusive and established characters.

12. See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 330, 331-32 (Peter Laslett ed., student ed. 1988)(3d ed. 1698). Locke observed that every man "by consenting with others to make one Body Politick under one Government, puts himself under an Obligation to every one of that Society, to submit to the determination of the *majority*, and to be concluded by it" *Id.* at 332 (emphasis in original).

13. See *infra* note 21 and accompanying text.

is extremely popular in the United States. In the voting rights cases, for example, the Supreme Court noted that voting is important because it is a process by which people can protect their rights.¹⁴ In this interpretation the Court was misguided. The Federalists knew the dangers that accompanied the rule of the people and proposed instead a constitutional regime of checks and balances designed to prevent a majority, united by a common interest, from attempting to deprive members of a minority of their rights. The point is made throughout *The Federalist Papers* and is especially clear in *The Federalist Number 51*.¹⁵ Voting can simply be a method by which a majority imposes its will upon, and thereby denies the rights of, the minority.¹⁶ To this extent, the Supreme Court's endorsement of voting as a way to *protect* rights was at best overly optimistic, and at worst the realization of the fears of the Federalists. The notion that "the people rule" through democracy is a palliative fraught with peril for members of the minority. To view democracy as legitimating, then, is to reduce one's vigilance against abuses by the majority, which are best combatted through vigorous use of checking devices.

Another problem with the current notion that democracy serves a legitimating rather than a checking function is that, as the Supreme Court has pointed out, one of the goals of the Constitution was to preserve a common market among the states and thus to promote a market system.¹⁷ Yet markets can-

14. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) ("The right of suffrage is a fundamental matter in a free and democratic society. . . [that] is preservative of other basic civil and political rights. . .").

15. See THE FEDERALIST No. 51, at 323-24 (James Madison) (Clinton Rossiter ed., 1961):

It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure. . . . This view of the subject must particularly recommend a proper federal system to all the sincere and considerate friends of republican government, since it shows that in exact proportion as the territory of the Union may be formed into more circumscribed Confederacies, or States, oppressive combinations of a majority will be facilitated; the best security, under the republican forms, for the rights of every class of citizen, will be diminished; and consequently the stability and independence of some member of the government, the only other security, must be proportionally increased.

16. This is embodied, for example, by the post-Civil War "Jim Crow" laws which, through legislation backed by the white majority, oppressed the black minority in the South.

17. See, e.g., *United Bldg. & Constr. Trades Council v. Camden*, 465 U.S. 208, 218 (1984) (holding that the Privileges and Immunities Clause applies to discrimination by

not survive in a world of unfettered majority sovereignty for two reasons. First, the majority will attempt to redistribute wealth not only to increase the aggregate social welfare and promote some vision of justice, but also to serve the narrow purposes of particular interest groups.¹⁸ Second, and more importantly, economic success requires entrepreneurs and other venturesome people to make specialized investments of capital. These specialized investments, however, leave the investors open to political expropriation. As firms grow in investment size, regulators have an incentive to lower the firms' share of profits once the investment has taken place, thereby transferring wealth from the entrepreneurial minority to the consuming majority.¹⁹ The consequence of this increased risk, from the standpoint of aggregate social welfare, is that entrepreneurs become less willing to invest, which obviously imposes a tremendous social cost and impedes market operations.

In order to avoid these consequences, we should adopt the Framers' historical vision of representative democracy. This vision is one in which democracy serves a checking function rather than a legitimating function. The Framers provided a system of government that is rife with "checking" devices, such as judicial review, checks and balances, the separation of powers, and the executive veto. All of these devices were designed to reduce the efficacy of majoritarianism in a democratic system and to increase the decision costs of government. Yet if one looks at developments in the internal rules governing the post-revolutionary Congress—from the committee system to attempts at the legislative veto—the hallmark of the changes has been the reduction of these very decision costs.²⁰

municipalities against state workers because such policies undermine "interstate harmony"); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 621-3 (1978) (holding that "all objects of interstate trade" merit Commerce Clause protection); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824) (holding that Congress's interstate commerce power is "complete in itself . . . and acknowledges no limitations other than are prescribed in the Constitution").

18. See, e.g., James Madison, *Note to 7 August 1787 Speech* (1821), reprinted in *THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON* 503-04 (Marvin Meyers ed., 1973) (railing against "agrarian laws and other levelling schemes" intended to redistribute wealth and benefit the poor).

19. See, e.g., Cable Television Consumer Protection and Competition Act of 1992, Pub. Law No. 102-385, 106 Stat. 1460 (1992). Six years after deregulating cable communications to promote competition, Congress has now reregulated the industry for the benefit of consumers by enhancing the power of regulatory authorities to influence pricing, programming, consumer service, and distribution.

20. See, e.g., IRVING S. SHAPIRO, *AMERICA'S THIRD REVOLUTION* 71-92 (1984). "[I]n

While our government's anti-majoritarian superstructure has not been altered, its internal mechanisms have gradually been worn down by the current attitude that representative democracy serves to legitimate government. This empowers Congress by giving its actions a false aura of legitimacy and prompts it to act without concern for the thoughts of those who elected it in the first place. As a result, we have resurrected and perverted the "other-regarding" Burkean notion of representation: instead of disinterested guardians acting for the good of the nation regardless of their constituents' demands, we have created a battalion of self-interested career politicians who often act for personal gain regardless of their constituents' demands.²¹ We ought to move away from this problem in modern constitutional law, in which theorists wring their hands over the so-called countermajoritarian difficulty, and recognize the obvious. The idea of a countermajoritarian governmental structure was something the Framers considered and embraced wholly. Were we to embrace once again the notion that democracy serves a checking function best exercised by throwing the rascals out, we might take action against our sea of elected troubles, and by opposing, end them.

the past two decades, in a well-meant effort to make government more democratic, we have managed as a nation to fragment it to the point where it is strongly biased toward expedients and has lost most of its capacity to think in terms of durable policies." *Id.* at 72-73.

21. One need only look to the recent "check-kiting" and other "perk-of-office" scandals that have plagued Congress in the opinion polls for confirmation of this observation. See, e.g., Clarence Page, *House Bank Scandal Catches Congress With Its Ethics Down*, CHI. TRIB., Mar. 3, 1992, at 21; Art Pine, *Perks Turn House Into Cozy Home; The Notorious Bank of the Bad-Check Scandal Is Just One Congressional Privilege*, L.A. TIMES, Mar. 18, 1992, at A1. See generally SUZANNE GARMENT, SCANDAL: THE CULTURE OF MISTRUST IN AMERICAN POLITICS (1991) (discussing scandalous behavior by elected officials that has created a "culture of mistrust" among the exasperated and often disgusted electorate).