

WAS THE CONSTITUTION SUPPOSED TO BE DEMOCRATIC?

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ABSTRACT

To answer whether American democracy has eroded, one needs to ask to what extent American government was designed to be democratic. The Author argues that in some respects it was: No formal class system was established and the states, understood by the Constitution's Framers to be democratic, even excessively so, were allowed to retain many of their sovereign powers and were left with key roles to play, particularly in elections. But the Framers also intended the federal government to be republican as distinct from democratic, to be wholly representative, thinking this would better serve the interests of the people, taking that term, "the people," to include everyone, not only the majority. In short, to clarify Abraham Lincoln's famous phrase, they meant the government to be of the people and for the people, but not simply by the people, understanding that it could not be perfectly all three at once.

TABLE OF CONTENTS

I. Introduction	629
II. Government <i>of</i> the People	632
III. Government <i>by</i> the People	638
IV. Government <i>for</i> the People	639
V. Constitutional Erosion: Democracy, Oligarchy, or Tyranny	641

I. INTRODUCTION

"Was the Constitution supposed to be democratic?" This question needs to be addressed by anyone concerned with the erosion of democracy, if only to identify what constitutional democracy is or has been in the United States. No one doubts that the Constitution has become more democratic over the course of U.S. history. Almost every amendment since the Bill of Rights has advanced democracy in some way or another, often by extending

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the franchise, sometimes by extending the protection of rights.¹ Still, if the Constitution was not supposed to be democratic in the first place, one might wonder whether it contains some fatal flaw that cannot be corrected by piecemeal amendments, at least in the eyes of the advocates of democracy. Moreover, if the Constitution was never intended to be democratic, it would be surprising or misleading to speak of democratic *erosion*, as though there were some previous condition of genuine democracy that has since decayed. Modern democrats, then—if they find the Constitution was not intended to be democratic—might take aim at the Constitution itself as an obstacle to be removed and replaced, unless its drafters were sufficiently inept as to fail in their intention.² If America is a democracy, is it because of or in spite of its Constitution? Is democracy, to our minds if not to those of the Framers, a sufficient measure of justice and the common good?

What is democracy? For the purposes of this Article, let us use Abraham Lincoln's famous phrase, which, to be sure, he used without referencing the term, which was appropriated by his political opponents: Democracy is government "of the people, by the people, for the people."³ So defined, I think it might be said of the Constitution that it established the government *of* the people, for it forbade titles of nobility and did little to promote any permanent distinction among classes of men—leaving aside for the moment the question of slavery, unmentioned in the document until the Thirteenth Amendment abolished it, or the question of race, unmentioned until the Fifteenth Amendment forbade its use in restricting the franchise.⁴ Having been raised in a monarchical society and so accustomed to deference, the Framers may have supposed government would remain in the hands of the better educated and better off, but their republicanism restrained them from ensuring this by constitutional mechanism—for example, by property qualifications for voting or holding office, or by educational or religious establishments.⁵ So, as Gordon Wood explained, within a generation, the

1. U.S. CONST. amends. XIII (abolishing slavery), XIV (extending civil rights), XV (no denial of vote by race), XVII (voters elect senators), XIX (no denial of vote by sex), XXIII (D.C. voters allowed to vote for president), XXIV (no denial of vote for tax delinquency), XXVI (no denial of vote for age if over 18).

2. See, e.g., SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (Oxford Univ. Press 2006).

3. President Abraham Lincoln, Gettysburg Address (Nov. 19, 1863).

4. U.S. CONST. art. I, § 9, cl. 8; *id.* amends. XIII, XV.

5. See GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 110 (A.A. Knopf 1992).

government they made had become democratic, at least in the sense of welcoming all into its ranks.⁶

The Framers did not, however, intend government *by* the people, or did so only in a limited way.⁷ Instead, they constructed institutions, at least at the federal level, to temper majority rule even when majorities were represented by notables.⁸ Still, in guaranteeing to the states a republican form of government—and meaning by this to forbid monarchical, not democratic, government—they left ample room for the states to become democracies.⁹ And in fact, the Framers seemed to think they generally were already, and the longer-lived among the Framers saw the states become even more democratic by the third decade of the nineteenth century.¹⁰

Was the Constitution *for* the people? Scholars debate the matter, at least since Charles Beard's *Economic Interpretation of the Constitution*,¹¹ but perhaps the basic point to note is the ambiguity in the term “the people,” in particular whether it means the majority or all.¹² The Framers intended the latter, while acknowledging the key to constitutional government is to find ways to encourage the majority to attend to the good of all, not only their own. After all, in a country devoted to growth and change, as the United States was from the beginning, majorities were apt to alter. No one who was in the majority one day could be sure they still would be on the morrow, so to speak. Though no mechanism could ensure it, if people engaged in politics developed a way of thinking about the use of power that always kept in mind that whatever power they claimed for themselves while in office might be used by their opponents when the latter won the election—if rotation in office, a basic republican principle, were a recognized reality—then a “spirit of moderation” might be acquired that would promote, if not a perfect common good, at least an approximation.¹³ The Constitution, then, would

6. *Id.* at 234.

7. *Id.*

8. *Id.* at 243.

9. *Id.* at 305.

10. *Id.*

11. CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (Macmillan Co. 1914).

12. *Id.* at 17.

13. The phrase “spirit of moderation” appears in *The Federalist Papers*. See, e.g., THE FEDERALIST NO. 37, at 179 (James Madison) (George W. Carey & James McClellan eds., Liberty Fund 2001). Alexander Hamilton refers to a “lesson of moderation” in

achieve for all, or almost all, the best they might reasonably expect of government.

In short, I will argue that the Framers intended the government in general to be of, by, and for the people, but they thought this required a delicate balance, for a government *by* the people (that is, a majority) may not always act *for* the people (that is, all); indeed, majorities may not always act for their own interests, at least in the long term, much less those of minorities. The challenge was to ensure justice for all and a truly common good without relying on any social force that was not *of* the people, that is, on any establishment or aristocratic or priestly class.

II. GOVERNMENT *OF* THE PEOPLE

Did the Constitution establish a class system in the United States? Its terms forbid any formal class structure: Article I, Section Nine prohibits Congress from granting any titles of nobility, and the following section prohibits the states from doing the same.¹⁴ In guaranteeing to the states a republican form of government and defining a republic as a form of government “which derives all its powers directly or indirectly from the great body of the people,” the Framers would seem to have banished monarchy from America as irreconcilable “with the genius of the people of America; with the fundamental principles of the Revolution; or with that honorable determination which animates every votary of freedom, to rest all our political experiments on the capacity of mankind for self-government.”¹⁵ To be sure, the same author distinguishes a republic from a democracy, defining the former as “a government in which the scheme of representation takes place,” in contrast to the latter, “a society consisting of a small number of citizens, who assemble and administer the government in person”¹⁶ Actually, he calls the latter a “pure democracy.”¹⁷

Might we consider the republic established by the Constitution some other kind of democracy, say, a *representative* democracy, a term still in use

Federalist No. 1 and *No. 85*. See THE FEDERALIST NO. 1, *supra*, at 2 (Alexander Hamilton); THE FEDERALIST NO. 85, *supra*, at 457 (Alexander Hamilton). For the purposes of this Article, I will frequently refer to *The Federalist Papers* as indicative of the opinion of the Framers, recognizing, of course, that there were many variations in their views.

14. U.S. CONST. art. I, §§ 9–10.

15. THE FEDERALIST NO. 39, *supra* note 13, at 194 (James Madison).

16. THE FEDERALIST NO. 10, *supra* note 13, at 46 (James Madison).

17. *Id.*

today? Not according to the Anti-Federalists. When speaking rhetorically, they denounced the proponents of the new government and its likely incumbents as “lordly and high-minded men”¹⁸ bent upon establishing an aristocracy, and they saw in the presidency “the foetus of monarchy.”¹⁹ The most analytical account of the class issue in their numbers can be found in the *Letters from the Federal Farmer*, once thought to be written by Richard Henry Lee but now thought to have been by Melancton Smith or a member of his circle.²⁰ The Farmer explains there are natural classes in society, and if no balance is maintained among them through a proper representation in the legislature, one will gradually achieve an “undue ascendancy over the others[:]” “It is the first of all among the political balances, to preserve in its proper station each of these classes.”²¹ Though he initially suggests multiple classes—“aristocratic, democratic, mercantile, mechanic, etc.”—he soon enough settles on the first two.²² There are several forms of aristocracy: including a (1) constitutional one (as in Europe); a (2) “junto of unprincipled men” (usually the rich who conspire to promote their riches); and (3) the “natural aristocracy,” a “respectable order” comprising in the young United States at the time 4000–5000 men, namely the chief officeholders in government (governors, state senators, members of Congress), the principal military officers, the principal judges, the “most eminent professional men,” and finally “men of large property.”²³ The author has no doubt that these men will be well-represented in the new government, should it be established; it is, he suggests, their project, designed for their advantage.²⁴

The term “natural aristocracy” is familiar to students of American political thought at the time of the Founding, not least for its use in the writings and correspondence of Thomas Jefferson and John Adams, both of

18. See THE ADDRESS AND REASONS OF DISSENT OF THE MINORITY OF THE CONVENTION, OF THE STATE OF PENNSYLVANIA, TO THEIR CONSTITUENTS, PENNSYLVANIA CONVENTION (1787).

19. James Madison, *Madison Debates*, YALE L. SCH.: LILLIAN GOLDMAN L. LIBR., Avalon.law.yale.edu/18th_century/debates_601.asp [https://perma.cc/K5WB-425S].

20. John Burrows, *The Authorship of Two Sets of Anti-Federalist Papers: A Computational Approach*, in THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE 397, 397 (Michael P. Zuckert & Derek A. Webb, eds., Liberty Fund 2009).

21. *Letters from the Federal Farmer No. VII*, in THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE, *supra* note 20, at 19, 69.

22. *Id.* at 70.

23. *Id.* at 71.

24. *Id.*

whom were obviously among its members.²⁵ What is distinctive in the *Letters from the Federal Farmer* is the use of the parallel term “natural democracy.”²⁶ These are precisely the people who are represented in, indeed probably constitute the majority of, the lower houses of the state legislatures but who will be excluded from the new Congress, and would be absent even were its number doubled.²⁷ They are “the yeomanry, the subordinate officers, civil and military, the fishermen, mechanics and traders, many of the merchants and professional men.”²⁸ While the natural aristocrats “associate more extensively, have a high sense of honor, possess abilities, ambition, and general knowledge,” the natural democrats “are not so much used to combining great objects; they possess less ambition, and larger share of honesty; their dependence is principally on middling and small estates, industrious pursuits, and hard labor”²⁹ Their economic interests are different, and so are their passions and characters. The Farmer presents them impartially, insisting that both classes deserve representation in the government, but since only the former will effectively be represented at the federal level under the new scheme, that government would be fatally flawed.³⁰

Publius concedes that the kind of man who will serve in the federal government is likely to be—indeed, he hopes he will be—one who rises above the ordinary.³¹ In *The Federalist No. 10*, he explains that the election of representatives will “refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.”³²

The larger number of constituents assigned to each federal representative will make likely a greater proportion of “fit characters” to

25. Letter from John Adams to Thomas Jefferson (Sept. 2, 1813), in *THE ADAMS-JEFFERSON LETTERS* 370, 371 (Lester J. Cappon ed., Univ. N.C. Press 1988); Letter from Thomas Jefferson to John Adams (Oct. 28, 1813), in *THE ADAMS-JEFFERSON LETTERS*, *supra*, at 387, 388.

26. *Letters from the Federal Farmer No. VII*, in *THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE*, *supra* note 21, at 71.

27. *Id.* at 73.

28. *Id.* at 71.

29. *Id.* at 72.

30. *Id.*

31. *THE FEDERALIST NO. 10*, *supra* note 13 (James Madison).

32. *Id.* at 46.

hold office, and the challenge of coalescing an electoral majority among people with a variety of interests may not ensure “enlightened statesmen” but will require more than ordinary talents.³³ What Publius does not concede is that this distinctiveness reflects a class distinction, or at least a class division where the interests of the better able are at odds with the “natural democracy.”³⁴

In *The Federalist No. 35*, which first appeared in the New York papers six days after the *Letters from the Federal Farmers No. 7*,³⁵ Alexander Hamilton, in the context of discussing the federal taxation power, raises the objection that “the House of Representatives is not sufficiently numerous for the reception of all the different classes of citizens, in order to combine the interests and feelings of every part of the community, and to produce a due sympathy between the representative body and its constituents”—a position he labels, tellingly, “actual representation.”³⁶ This he dismisses as “altogether visionary,” but he adds as an argument his own analysis, not so much of the class structure of society, but of their interests, at least with regard to the question of taxation and, by implication, with regard to federal questions more generally.³⁷ Three types of men will likely be members of the legislature: merchants, lawyers, and landowners.³⁸ The first will win the votes of mechanics and manufacturers as well as their fellows, for their interests are coincident: the merchants sell what the others produce, and so in a way they already represent them in the marketplace.³⁹ All will desire low tariffs and thus would prefer a tax on land.⁴⁰ Landowners, large and small, will all prefer tariffs to a direct tax on land and at any rate would want to keep the latter low.⁴¹ If the large and the small landowners have divergent interests, Hamilton supposes that “moderate proprietors of land” will probably win

33. *Id.* at 45–47.

34. See *Letters from the Federal Farmer No. VII*, in *THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE*, *supra* note 21, at 71–72.

35. See *id.*; see also *The Federalist No. 35* [5 January 1788], NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Hamilton/01-04-02-0192#:~:text=Written%20in%201788.,on%20The%20Proclamation%20of%20Neutrality> [https://perma.cc/LN2M-Y239].

36. *THE FEDERALIST NO. 35*, *supra* note 13, at 169 (Alexander Hamilton).

37. *Id.* at 170–72.

38. *Id.*

39. *Id.* at 170.

40. *Id.*

41. *Id.*

election to Congress as they have in the assembly in New York.⁴² As for the lawyers, they represent people for a living in civil life, so it only stands to reason that they will frequently find themselves elected to office, serving either side or even serving as an “impartial arbiter,” as they have no distinct interest of their own.⁴³ Would the legislature ever mirror the people? No, writes Hamilton, at least if elections are free, for the people will rationally choose the person who will best advance their interest, who they might conclude is not someone just like themselves.⁴⁴ And representatives will be rational enough to inform themselves of their constituents’ interests and “allow them their proper degree of influence upon [their] conduct,” at least if they want to serve another term.⁴⁵

This view of representatives as chosen agents rather than exemplars of identity is reiterated by Madison in his papers on the House in *The Federalist No. 55*.⁴⁶ On the question of whether the House will have “due knowledge of the interests of its constituents,” Madison acknowledges that they ought to, but then recalls that, as the objects of federal legislation are limited, so are the demands for information placed upon them.⁴⁷ Since most representatives will likely have served in the legislatures of their states, they are likely already to be informed of the concerns of their communities and, importantly, of their laws.⁴⁸ Since most federal laws will relate to laws in the states, anyone well-informed of his own state’s laws will bring to national deliberations what others need to know; indeed, Madison almost imagines the role of the modern policy institute when he writes, “A skillful individual in his closet with all the local codes before him, might compile a law on some subjects of taxation for the whole union, without any aid from oral information. . . .”⁴⁹ The difficult thing for a federal representative will be to learn the affairs of the continent—the laws and practices and interests of those from other states—not the nuances of difference back home. For Madison, the Constitution’s emphasis on agency rather than identity is proven by the free choice left to the people in the selection of who will represent them: “No qualification of wealth, of birth, of religious faith, or of civil profession is permitted to fetter the judgment, or disappoint the

42. *Id.* at 170–71.

43. *Id.* at 171.

44. *Id.*

45. *Id.* at 171–72.

46. THE FEDERALIST NO. 55, *supra* note 13 (James Madison).

47. THE FEDERALIST NO. 56, *supra* note 13, at 291–92 (James Madison).

48. *Id.* at 292.

49. *Id.*

inclination of the people.”⁵⁰ This is not to say, of course, that the people cannot themselves consider these things alongside their economic interests, only that the Constitution, in implicit contrast to British practice, does not build such characteristics into its framework, trusting instead to the process of election, the quality of their character, and the incentives provided by the structure of government to keep representatives faithful to those they represent.

When Hamilton returns to the topic a few papers later, he remains as sanguine as Madison about the soundness of the plan, but adds a new twist, which ironically involves repeating Madison’s argument from *The Federalist No. 10* about the value of diversity in moderating class differences: “There is sufficient diversity in the state of property, in the genius, manners, and habits of the people of the different parts of the union, to occasion a material diversity of disposition in their representatives towards the different ranks and conditions in society.”⁵¹ Though the context is specific—why the Anti-Federalist worries about abuse of the “*times, places, and manner* of holding elections” clause are specious—his larger point is apposite: In the large republic of the United States, particularly given its general understanding of “the utility of commerce,” the differences are dramatic enough that bias and partiality will never gain easy majorities, instead encouraging compromise and insuring at least fidelity to the Constitution.⁵² As for “the wealthy and the well-born,” who Hamilton says are the ones the Anti-Federalists really complain of, they are, in an extended republic, sufficiently “scattered over the face of the country, as avarice or chance may have happened to cast their own lot or that of their predecessors” to be unable to form a cabal in the capital and reserve elections to themselves.⁵³

In short, Publius thinks that the federal government will be *of* the people, in the sense that its members will not be chosen from a constitutionally designated class but by an electoral process that directly (and of course also indirectly) involves popular vote.⁵⁴ How popular, of course, was left to the states, and probably not all the Founders were surprised or disappointed to see before their deaths the extension of the franchise to those with little property or none at all. The states, after all, had

50. THE FEDERALIST NO. 57, *supra* note 13, at 296 (James Madison).

51. THE FEDERALIST NO. 60, *supra* note 13, at 311 (Alexander Hamilton).

52. THE FEDERALIST NOS. 59, 60, *supra* note 13 (Alexander Hamilton).

53. THE FEDERALIST NO. 60, *supra* note 13, at 314 (Alexander Hamilton).

54. *See id.*

been democratic enough to demonstrate why limits on democracy made good democratic sense.⁵⁵

III. GOVERNMENT BY THE PEOPLE

That brings me to my next topic, which can be covered more quickly because it is more familiar: The Framers of the Constitution did not intend it to be democratic in the sense of government *by* the people.⁵⁶ Madison is explicit on the point: What distinguishes the ancient republics and democracies from American republics “lies in the total exclusion of the people, in their collective capacity, from any share in the latter, and not in the total exclusion of representatives of the people from the administration of the former.”⁵⁷ From the election of the Senate by the state legislatures, to the choice of the President through electors chosen by and voting in the states, to the appointment of judges on good behavior, the many departures from strict republicanism, not to mention from plebiscitary democratic rule, are well-known to any student of U.S. government.⁵⁸ These are the “auxiliary precautions”⁵⁹ Publius extols as designed to protect one part of society from another (that is, protect minorities against majority faction), and to set ambitious men to check one another so that society as a whole can at once make use of their talents and evade their domination.⁶⁰ Without now going into detail about each of these and how far they stray from true democracy, I want to note two things.

First, Madison insists that pure democracy is impossible except in small societies, where the people can actually gather in one another’s presence.⁶¹ He mentions this in *The Federalist No. 10*, but it features as well in the discussion of the proper size of an assembly.⁶² “Had every Athenian citizen been a Socrates,” he writes in *The Federalist No. 55*, “every Athenian assembly would still have been a mob”; 60 is enough “to secure the benefits of free consultation and discussion, and to guard against too easy a combination for improper purposes”; but 600 pushes the limit, and 6,000 puts you in Athens.⁶³ Moreover, he observes astutely a few papers later, “in all

55. *See id.*

56. *See* THE FEDERALIST NO. 63, *supra* note 13 (James Madison).

57. *Id.* at 329.

58. U.S. CONST. art. I, § 3; *id.* art. II, § 1; *id.* art. III, § 1.

59. THE FEDERALIST NO. 51, *supra* note 13, at 269 (James Madison).

60. *Id.*

61. THE FEDERALIST NO. 10, *supra* note 13 (James Madison).

62. *Id.*; THE FEDERALIST NO. 55, *supra* note 13 (James Madison).

63. THE FEDERALIST NO. 55, *supra* note 13, at 288 (James Madison).

legislative assemblies the greater the number composing them may be, the fewer will be the men who will in fact direct their proceedings.”⁶⁴ Democracy, in other words, is not even possible outside the township; to try to extend it brings anarchy, oligarchy, or tyranny.⁶⁵

Second, the problem for Madison’s total exclusion principle is the jury, guaranteed even in the original Constitution for criminal trials. To be sure, the jury represents, rather than actually is, the people in their collective capacity. Trial by jury is government *by* the people, at least for a single purpose and a single day or week.⁶⁶ Perhaps that is why Hamilton, writing as Publius, is careful to explain that the Constitution actually does anticipate that it will be limited,⁶⁷ and why the Anti-Federalists won the point in favor of its extension in Amendments VI and VII.⁶⁸

IV. GOVERNMENT *FOR* THE PEOPLE

The preamble to the Constitution makes it difficult to gainsay that the government was intended to serve the people.⁶⁹ Publius, too, makes clear, for instance in the famous definition of faction in *The Federalist No. 10*, that the end of government is to ensure “the rights of . . . citizens” and “the permanent and aggregate interests of the community,” or as he elsewhere puts it, “justice and the general good.”⁷⁰ A version of this formula permeates *The Federalist*, and even if one insists on limiting “justice” to the Lockean protection of property rights and “the general good” to peace and prosperity, it is hard to deny that they meant these would benefit the people as a whole or even the overwhelming majority.⁷¹ The Founders often enough distinguished natural or civil rights from political rights, accepting civil rights as the guarantee for equal justice under law, while treating political rights as instrumental to achievement of the former and able to be limited if limitation

64. THE FEDERALIST NO. 58, *supra* note 13, at 305 (James Madison).

65. *See id.*

66. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 287 (Henry Reeve trans., Penn. State Univ. 2002) (stating that the jury is empowered to represent society at large).

67. *See* THE FEDERALIST NO. 83, *supra* note 13 (Alexander Hamilton).

68. *See generally* PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788*, at 192–98, 443–54 (Simon & Schuster 2010).

69. U.S. CONST. pmbl.

70. THE FEDERALIST NO. 10, *supra* note 13, at 43 (James Madison); THE FEDERALIST NO. 51, *supra* note 13, at 271 (James Madison).

71. *See* JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* § 25 (2003) (ebook) (1690), <https://www.gutenberg.org/files/7370/7370-h/7370-h.htm> (discussing Lockean property rights); *see* THE FEDERALIST NO. 10, *supra* note 13 (James Madison).

promoted such achievement.⁷² By the Jacksonian era, and then quite explicitly in the campaign for women's rights from the *Declaration of Sentiments* forward, the right to vote was increasingly seen as necessary to secure justice and thus as a natural right itself.⁷³ Still, I think Publius could concede this while insisting that the "permanent and aggregate interests" of the people sometimes involved doing them good in ways they would not immediately understand. This appears in the discussion of all three major branches of government besides the people's House. Madison writes of the Senate that it meets the need for "the interference of some temperate and respectable body of citizens, in order to check the misguided career, and to suspend the blow meditated by the people against themselves, until reason, justice, and truth can regain their authority over the public mind."⁷⁴ Defending the length of the presidential term, Hamilton explains that "occasions present themselves, in which the interests of the people are at variance with their inclinations," requiring the "guardians of those interests, to withstand the temporary delusion," saving "the people from very fatal consequences of their own mistakes," and thus earning their gratitude.⁷⁵ And of course, the permanent tenure of federal judges is defended in part as necessary to

guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.⁷⁶

Government cannot be simply *by* the people precisely because it is ultimately *for* them.

Of course the great obstacle to taking Publius at his word is slavery, which all three authors of *The Federalist* recognized was unjust—it was left to Madison to suggest so, in an assumed voice—but which the Constitution,

72. See, e.g., THE FEDERALIST NO. 10, *supra* note 13 (James Madison).

73. See Donald Ratcliffe, *The Right to Vote and the Rise of Democracy, 1787–1828*, 33 J. EARLY REPUBLIC 219, 251–54 (2013) (discussing voting in Jacksonian era); see ELIZABETH CADY STANTON, A DECLARATION OF SENTIMENTS AND RESOLUTIONS (1848).

74. THE FEDERALIST NO. 63, *supra* note 13, at 327 (James Madison).

75. THE FEDERALIST NO. 71, *supra* note 13, at 371 (Alexander Hamilton).

76. THE FEDERALIST NO. 78, *supra* note 13, at 405 (Alexander Hamilton).

without naming it, protected.⁷⁷ When slavery was abolished by the Constitution and then a further amendment was added to ensure civil rights even against the states which had a primary responsibility for their protection, Congress was simultaneously accorded not only such powers as would be “necessary and proper” to enforce the novel provisions, but “appropriate” powers simply, an apparently more ambitious grant.⁷⁸ That Congress took a century to successfully put such powers into effect might be thought to show the problem of promoting government *for* the people without ensuring government *by* them. That would overlook the role in forcing the question of civil rights of the counter-majoritarian Court and of other men “who had [the] courage and magnanimity enough to serve [the people] at the peril of their displeasure.”⁷⁹

V. CONSTITUTIONAL EROSION: DEMOCRACY, OLIGARCHY, OR TYRANNY

Publius several times mentions or alludes to Plato, but not to Aristotle, even though Jefferson had ranked the *Politics* among the elementary books of political right that formed the public mind expressed in the Declaration.⁸⁰ Perhaps that is because Aristotle championed the mixed regime, while Publius interprets the American republics as “unmixed.”⁸¹ Nevertheless, leaving aside the question of size, Aristotle would surely have seen the U.S. Constitution, as established and as it is still in force today, as a mixed regime, one measure of which, after all, is that some consider it oligarchical and some democratic. Aristotle called that form of government the generic name, “politeia,” which is transliterated as “polity” and translated as “regime” or “republic” or simply “constitutional government.”⁸² Might I suggest that what plagues us today is not the erosion of democracy, but the erosion of constitutional government, which Aristotle would lead us to expect to result in tyranny, or oligarchy, or even in democracy.⁸³ Though the last he would have considered the best of the three bad regimes, he condemns it less in its better form, where the laws are respected, than in the extreme form towards

77. See THE FEDERALIST NO. 54, *supra* note 13 (James Madison).

78. See U.S. CONST. art. I, § 8; *id.* amend. XIII, § 2; *id.* amend. XIV, § 5.

79. THE FEDERALIST NO. 71, *supra* note 13, at 371 (Alexander Hamilton).

80. See THE FEDERALIST NO. 49, *supra* note 13, at 262 (James Madison); *From Thomas Jefferson to Henry Lee, 8 May 1825*, NAT'L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Jefferson/98-01-02-5212> [<https://perma.cc/MNN3-JA9X>].

81. THE FEDERALIST NO. 14, *supra* note 13 (James Madison).

82. ARISTOTLE, *POLITICS*, bk. IV, at 110–14 (Carnes Lord trans., Univ. Chi. Press 2d ed. 2013) (c. 350 B.C.E.).

83. See *id.*

which it tends, the form where the people lord it over the laws.⁸⁴ Since “to reform a regime is no less a task than to institute one from the beginning,” we ought to try to understand the form of government which has brought us many blessings before we undertake to change it, the consequences of which change we cannot know.⁸⁵

84. *Id.* at 98–99.

85. *Id.* at 98.