



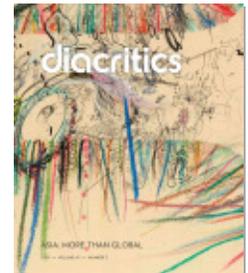
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“UNAUTHORIZED PROPOSITIONS”

THE FEDERALIST PAPERS AND CONSTITUENT POWER

JASON FRANK

The PEOPLE, who are the sovereigns of the State, possess a power to alter it when and in what way they please. To say otherwise is to make the thing created, greater than the power that created it.

—Anonymous, *Federal Gazette*, March 18, 1789

The we of the Constitution’s “We the People” was as much of an artificial construct as the Constitution itself, it was its creature, not its creator.

—Sheldon Wolin, *The Presence of the Past*

In *Federalist* No. 40, James Madison engaged the vexing question of whether the Philadelphia Convention of 1787 had been properly authorized “to frame and propose” the new Federal Constitution of the United States [83]. Madison explored there “the ground on which the Convention stood” [264], which he identified as the purportedly solid foundation of the people themselves [Morgan 272]. *Federalist* No. 40 offers a theoretically probing yet avowedly practical reflection on the availability of foundations and on dilemmas of popular authorization in times of constitutional crisis; it may be productively read as an exemplary eighteenth-century American reflection on a state of exception. As such, *Federalist* No. 40 provides helpful orientation to how the popular constitutionalism of the revolutionary and postrevolutionary years confronted and navigated—if never fully resolved—some of the most insistent paradoxes of modern democratic theory.

In No. 40, Madison was preoccupied with the theoretical and historical dilemmas surrounding the eighteenth-century American conception of the people’s constituent power—that is, the ultimate power of the people to alter fundamental law “when and in what way they please.”¹ However, in contrast to most contemporary theoretical approaches to constituent power—whether influenced by the political theology of Carl Schmitt or the immanentist optimism of Michael Hardt and Antonio Negri—Madison’s navigation of the attending dilemmas of popular authorization resisted the turn to metaphysical abstraction and the appeal to a transcendent or immanent absolute. In his approach to the problem of constituent power, Madison insisted on the productive irreducibility of institutional mediation and the performative elicitation of a retrospective authorization by the people. While accepting the *absence* of a firm ground of legal authorization (the unbroken authority of law), Madison also rejected a wholly extralegal or unmediated appeal to the people themselves (the transcendental appeal to spirit *beyond* the letter of the law). Instead, he endorsed a political navigation of these dilemmas *in medias res*. Confronting

1. On the problem of constituent power in contemporary democratic and constitutional theory, see Arato, “Carl Schmitt and the Revival of the Doctrine of Constituent Power in the United States”; Kalyvas, “Popular Sovereignty, Democracy, and the Constituent Power”; Loughlin and Walker; and Preuss.

the dilemma of constituency—how does the people give birth to itself as a self-authorizing subject?—Madison shifted the register of discourse away from the formal and juridical and toward the informally ethico-political. Doing so, he was able to affirm a rupture in law while simultaneously enlisting another register of normative continuity. This essay outlines Madison’s productive encounter with these dilemmas in *The Federalist*, and suggests the relevance of his example for recent debates in democratic theory, too often captivated by the formal rubrics of “norm” and “exception.”

1

The government which [the Federalists] are so enthusiastically fond of is as yet an ideal phantom, a chimera, a mere theory detested and execrated by every true friend to government.

—“One of the People,” *Carlisle Gazette*, January 9, 1788

Madison wrote *Federalist* No. 40 as a response to widespread and persuasive Anti-Federalist claims that the Philadelphia Convention had exceeded the mandate granted to it by the Annapolis Convention of 1786 and the Congressional Act of 1787, both of which authorized the meeting of the Philadelphia Convention “for the sole and express purpose of revising the Articles of Confederation” [259]. While the Philadelphia Convention was, in Bruce Ackerman’s words, “expressly subordinated to existing institutions and procedures” [Ackerman 43], it had nonetheless produced an entirely new constitutional text and—theoretically more problematic for Madison—an entirely new procedure for its popular ratification [see also Ackerman and Katyal]. Under Article 13 of the Articles of Confederation, constitutional reform could come about only through the unanimous assent of the thirteen state legislatures.² Under the Philadelphia Convention’s plan, the ratification of the proposed constitution would bypass the constituted power of the state legislatures and appeal instead to the constituent power of the people themselves as organized and represented in state ratifying conventions convened expressly for this purpose. The elections of these ratifying conventions, however, were to be organized by the individual state legislatures, thereby signaling the recognized continuity—albeit in diminished form—of their constituted authority. Ackerman and Neal Katyal describe this combined rejection of and reliance on existing constituted authorities as the “bootstrap process” of “our unconventional founding” [Ackerman and Katyal 477].

In the most dramatic break from the legal authority of the Articles, the Philadelphia Convention required the assent of only nine state conventions for successful ratification. It was, and is, widely accepted that the ratification of the Constitution of the United States would have been impossible without this change. The small state of Rhode Island alone had been a notorious spoiler under the Confederation and had refused even to send delegates to the Philadelphia Convention. New York lost two of its three delegates—John Lansing and Robert Yates—once it became clear that the Convention aimed at nothing short of a thoroughgoing revision of the Articles of Confederation and what they considered the abrogation of the constituted authority of the state legislatures. Getting to the heart of the legal matter, and invoking the uncertain vacillation between constituent and constituted power that characterized the debates over constitutional ratification, the Anti-Federalist Patrick Henry pointedly asked the delegates to the Virginia Ratifying

2. *The final provision of the Articles reads: “And the Articles of this confederation shall be inviolably observed by every state, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a congress of the United States, and be afterwards confirmed by the legislatures of every state.”*

Convention, “What right had they [in the Philadelphia Convention] to say, *We the people*? Who *authorized* them to speak the language of, *We the people*, instead of, *We the states*?” [930].

In the ensuing “great national discussion” between Federalists and Anti-Federalists, Madison and other Federalists (foremost among them the eminent early American legal theorist and future Associate Justice of the Supreme Court James Wilson)³ invoked the constituent power of the American people as a strategy for overcoming the constituted power of the sovereign states. In this way, Federalists declared themselves more deeply committed to revolutionary principles than their Anti-Federalist opponents, who, because of their appeal to the constituted authority of popularly elected state legislatures, were placed in the uncomfortable position of denying the superior authority of the people at large. By appealing to the people’s constituent power Federalists presented themselves as “champions of the people’s superiority to their government,” while framing their Anti-Federalist opposition as narrow, rule-bound proceduralists [Morgan 281]. As Steven Skowronek has recently put it, “disillusioned conservatives grasped hold of the concept of popular sovereignty—the most radical idea promulgated during the revolutionary era—to justify a Constitution designed to check the power of popularly elected legislatures” [387].

Gordon Wood and other historians have claimed, perhaps with some exaggeration, that the resulting eighteenth-century American idea that sovereignty is permanently located in the people at large marked “one of the most creative moments in the history of political thought” and was “the decisive achievement of the American political imagination.”⁴ This conceptual innovation, while prefigured in the work of seventeenth-century political theorists such as Thomas Hobbes, George Lawson, and John Locke, emerged slowly in postrevolutionary America from two decades of practical experiments and innovations in the “quasi-legal” politics of the “people out of doors,” the eighteenth-century phrase used to denote not only literal gatherings of crowds and mobs, but also “indoor” forms of political association that broke from the authority of constituted government (revolutionary conventions, committees, and congresses).⁵ The idea of the people as a constituent power,” R. R. Palmer writes, “developed unclearly, gradually, and sporadically during the American Revolution. . . . It emerged from the grassroots” [216, 222]. In their political struggles with Parliament and Crown over fundamental questions of constitutional interpretation, the colonists enshrined, first tacitly and then explicitly, the people as the ultimate locus of *interpretive* constitutional authority; this identification was the discursive precondition for the people being ultimately identified as an agency of constitution-making power, as a constituent power as generally understood. As Larry Kramer writes in his study of eighteenth-century American popular constitutionalism, “eighteenth-century Americans had an expansive image of popular constitutionalism. They took for granted the people’s responsibility not only for making, but also for interpreting and enforcing their constitutions—a background norm that was so widely shared and deeply engrained that specific textual expression in the constitution was unnecessary” [53].

Invoking this higher popular authority in No. 40, Madison argued that the Convention’s appeal beyond the constituted authority of the states to the constituent power of

3. *The most famous statement of Wilson’s argument, and one much discussed in the period, was his first address to the Pennsylvania Ratifying Convention [see Wilson]. See also Wills.*

4. Wood, *American Revolution* 159; Kloppenborg 30. *On the emergence of popular constituent power in revolutionary and postrevolutionary America, see Willi Paul Adams; Dippel; Palmer; and Wood, Creation of the American Republic, 1776–1787* 344–89. *For a discussion of the seventeenth-century Anglophone origins of the concept of popular constituent power, see Franklin.*

5. *For a detailed discussion of the “quasi-legal” politics of the “people out of doors” see Maier.*

“the people themselves,” as they were *represented* in the state ratifying conventions, would retrospectively authorize the preamble’s authoritative claim to speak on the people’s behalf: “We the People of the United States, in order to form a more perfect union. . . .” Without this prospective future assent, Madison wrote, the Constitution is “worth no more than the paper on which it is written”; it must be “stamped with the approbation of those to whom it is addressed” in order to become a living document [264]. In a stirring example of what Jacques Derrida characterizes as the “fabulous retroactivity” of instituting moments, whose full authorization always comes after the fact, the people, in Madison’s account, must come to recognize their own voice speaking through the preamble’s “We the People” in order for its claim to have authoritative effect [see Derrida]. Madison invoked this “nonsimultaneity of the people’s self-foundation” [Keenan 14], and its politicotheological resonance, in a speech he delivered as a Congressman from Virginia before the House of Representatives in April 1796. The Constitution, Madison claimed in that speech, “was nothing more than the draught of a plan, nothing but a dead letter, until life and validity were breathed into it, by the voice of the people, speaking through the several state conventions” [“Jay’s Treaty” 295–96]. The principal difficulty, however, with this retrospective authorization, this appeal to the enlivening “voice of the people,” was that the procedures and rules for bringing to articulation the people’s voice—the Convention’s changes in ratification procedure—were the invention of the very body whose work was to be given “life and validity” through them. The dead letter here begets the living spirit. To invoke a common eighteenth-century American trope, the Convention’s bold act of ventriloquism engenders the very voice ventriloquized. The authorizing people are enacted or elicited by the instituting text that claims to speak on their behalf.

This was, Madison concedes in No. 40, the “most plausible” Anti-Federalist objection to the Convention’s proceedings, but, contrary to Madison’s claims there, it was not “the least urged in the publications which have swarmed against the Convention” [263]. The Anti-Federalist “Portius,” for example, wrote that if the question of improper authorization in the ratification procedure “is not obviated, [it] cannot fail of over-throwing the whole structure, and reduce it to the situation of a baseless fabrick of nocturnal reverees” [217]. It was an objection that revealed a troubling performative dimension to the process of constitutional authorization, one structurally similar to the paradox of popular authorization that Derrida explores in his well-known essay on the Declaration of Independence. In that essay, Derrida writes that the “we” of the Declaration speaks “in the name of the people but this people does not yet exist. . . . If [the people] gives birth to itself, as a free and independent subject, as a possible signer, this can hold only in the act of signature. The signature invents the signer” [10]. Like Derrida’s reading of the Declaration, but in more institutionally or even procedurally specific terms, *Federalist* No. 40 reveals that the Philadelphia Convention’s change in the amendment procedure exemplifies how an instituting or constituent action “performatively produces the conditions that guarantee the validity of the performative” [10]. This paradoxical task is not only faced by actors in founding moments—by historical exemplifications of the great lawgiver (about which, more below)—but also persistently reiterated in the moments of democratic claims making that follow, in which actors, in Alan Keenan’s words, “make an appeal that sets the conditions for its own proper reception” [52], an appeal that cannot be fully authorized or justified through reference to already existing rules, procedures, and norms (at least not if rules are poorly understood as establishing the terms of their own application). These moments appear as occasions of groundless “decision” only if we are forced into a theoretical straitjacket of strictly opposing formal rule-governed to exceptional non-rule-governed behavior, if we posit an “absolute decision” in the purportedly normative void where rule-governed behavior (again, narrowly understood) gives out.



Street sign in Gentilly (2007)

Confronting this dilemma in the practical context of late eighteenth-century American debates over constitutional reform, *Federalist* No. 40 dwells on how deeply tenuous was the “boundary between authorized and usurped innovations, between that degree of change, which lies within the compass of alterations and further provisions, and that which amounts to a transmutation of the government” [261]. Madison’s paradoxical embrace of the people’s constituent power differs in illuminating ways from Carl Schmitt’s influential formulation of this concept, partly because of Madison’s insistence that popular voice be instituted or mediated through inherited procedures, even if those procedures are not unequivocally legal, are productively open to institutional improvisation, and are only fully authorized after the fact of their instituting (here the relevant historical question is Madison’s reliance on the broadly constitutionalist repertoires of the convention form).⁶ For Madison, the people’s voice, even as a constituent power, still is and must be institutionally mediated. For Schmitt, on the contrary, constituent power “is not bound by legal forms and procedures; it is always ‘in the state of nature,’ when it appears in this capacity” [*Constitutional Theory* 128]. He continues: “It is a part of the directness of this people’s will that it can be expressed independently of every prescribed procedure and every prescribed process” [131].⁷

There is no paradox in Schmitt’s conception of constituent power, because Schmitt’s constitutional theory relies on the presupposition of a manifest and unitary popular will as its comprehensive foundation. This has led some—most notably Stephen Holmes—to accuse Schmitt of “democratic mysticism.” “It is not obvious,” Holmes writes, “that the people can have anything like a coherent will prior to and apart from all constitutional procedures.” “Can citizens exercise their sovereign power outside all procedural mechanisms for aggregating their separate wills into one?” The people, Holmes summarizes, cannot act as an “amorphous blob” [148, 167]. Holmes nicely illuminates a questionable presupposition of Schmitt’s theory of constituent power, but he also loads the argument in his favor by presuming there is either a “coherent will” or none at all, and that this coherence must comprise formal procedures of aggregation (such as voting), which, of course, require preexisting formal rules. Constitutional self-binding mechanisms do not resolve the dilemmas of popular authorization that Madison explored in No. 40. Holmes and Schmitt are actually united in their all-or-nothing formalism, the one insisting on the democratic precondition of a formal proceduralism and the other on its complete suspension in dramatic moments of constituent willing. Neither theorist dwells, as does Madison in No. 40, on the dilemmas of representation and authorization that inhabit these claiming moments, instead positing a unified authorizing subject constituted by either formal rules or their exceptional rupture. Neither theorist engages constituent power as a *claim* that can only ever achieve a retrospective authorization from the authorizing entity on whose behalf it speaks.

“The theory of the people’s constituent power presupposes,” Schmitt writes, “the conscious willing of political existence, therefore, a nation.” It is significant that Schmitt prefers the language of nation to that more paradoxical and ambiguous language of the people. “The nation,” Schmitt writes, “is clearer and less prone to misunderstanding. It denotes the people as a unity capable of political action, with consciousness of its politi-

6. *On the revolutionary politics of the convention form, see Wood, Creation of the American Republic* 306–43.

7. *Emphasizing this immediacy, he argues that the “the natural form of the direct expression of a people’s will is the assembled multitudes’ declaration of their consent or disapproval” [131]. Even an assembled multitude, however, must be said to represent an entity larger than this empirical gathering of individuals: the people.*

cal distinctiveness and with the will to political existence” [*Constitutional Theory* 127].⁸ The “nation” substantializes the indeterminate identity of “the people.” Schmitt thereby resolves the paradoxes of collective self-unification in a theological affirmation of undivided and homogeneous national will. For Schmitt, this existential unity of will, the existence of “the nation” manifest in “concrete decision,” derives either from “unmediated self-identity” or through the idea that such unity is only brought about through representation [*Constitutional Theory* 239]. In neither instance, however, nor in his attention to their practical combination in different places and times, does Schmitt’s constitutional theory allow for productive ambiguity and ongoing political contestation over how this will is claimed through different acts of representation or institutional embodiment. The dilemmas of popular authorization that emerge from the paradox of the people can be resolved in the enactment of constituent power, as Schmitt suggests, but only for a time. Pierre Rosanvallon has clearly identified the dynamics of this *temporary* resolution:

The people as event can seem to resolve, for a time, the constitutive aporia of representation. In action, as indissociably lived and narrated, the people is given tangibility by what it makes happen . . . the visibility of the people as actor, whether in the tumult of the street or in the good behavior of the patriotic festivals, periodically allowed the possibility of postponing the conceptual and practical difficulties posed by the distance between the representatives and those they represented. [92]

In his theory of constituent power Schmitt seems to have in mind such revolutionary moments of self-evident popular will, and he cites Moscow in 1917, Berlin in 1918, and revolutionary France in this regard. In the French Revolution, Schmitt writes, “with complete awareness, a people took its destiny into its hands and reached a free decision on the type and form of political existence” [*Constitutional Theory* 127]. Such was not the case, according to his account, in revolutionary and postrevolutionary America, and this purported failure was an important basis of his disregard for the traditions of American constitutionalism.

With a few notable exceptions, like his qualified praise of Alexander Hamilton’s account of presidential prerogative in the *Crisis of Parliamentary Democracy* [45], Schmitt had little admiration for American constitutionalism in general, and for *The Federalist* in particular, believing that early Americans typically avoided the most fundamental questions of constitutional law, in particular the problem of constituent power. Thus, in his *Constitutional Theory*, Schmitt writes:

The American constitutions of the eighteenth century lacked a genuine constitutional theory. The most important historical source for the theoretical foundations of this constitution, The Federalist, offers insight for the most part into practical questions of organization. The people gives itself a constitution, without the covenant, founded by the general community and society, being differen-

8. *The historical relationship between popular sovereignty, with its impossible referent of the people’s will, and the emergence of identitarian nationalism has been explored by Bernard Yack. According to Yack, nationalism emerges in response to pressures internal to the discourse of popular sovereignty, particularly those engendered by the dilemma of identifying the people’s constituent power. “For if the people precede the establishment and survive the dissolution of political authority [constituted power], then they must share something beyond a relationship to that authority . . . the nation provides precisely what is lacking in the concept of the people: a sense of where to look for the prepolitical basis of the community” [524].*

tiated from every other act which constitutes a new political unity, or from the act of a free political decision about its own form of existence. [127]

This last sentence, in effect, denies that Americans directly confronted in the moment of constitutional founding the question of constituent power. I have suggested, to the contrary, that there is instead an attractive alternative theory of constituent power in *The Federalist*. Schmitt defines constituent power (*die verfassungsgebende Gewalt*) as “the political will, whose power or authority is capable of adopting the concrete comprehensive decision over the type and form of its own political existence” [125]. Constituent power is an unstructured “Urgrund,” or “das formlos Formende,” “an inexhaustible source of all forms without taking a form itself” [128–29]. It is an “absolute beginning, and the beginning . . . springs out of normative nothingness and from concrete disorder” [Schmitt, *Über die drei Arten* 23–24].⁹

For Schmitt, eighteenth-century revolutionary theories of constituent power (most notably, for Schmitt, that of the Abbé Sieyès), with their insistence on absolute beginning and willful self-creation, were living rebukes to Enlightenment rationalism. Their political rearticulation of a willful god capable of creating a world *ex nihilo*, capable of creating an order without being subject to it, was the paradigmatic modern instance of the pure “state of exception.” Schmitt believed the revolutionary slogan *vox populi, vox Dei* therefore powerfully exemplified the willful political theology that underwrote modern revolutions. As Schmitt made clear in many of his critical readings of modern constitutionalism, however, the very constitutional orders these revolutions founded quickly disavowed this originary power. This disavowal was, in fact, a central component of Schmitt’s critique of liberal constitutionalism, which he argued could not account for the legitimacy of the political will that brought it into being and was thereby incapable of recognizing how this extraconstitutional and normatively unjustified will subtends or haunts existing constitutional arrangements. Schmitt affirmed—as do some of his contemporary radical democratic admirers—the persistence of an extraconstitutional people—“above,” “beyond,” and “beside” the state—which exposes a gap in the legitimacy of liberal constitutionalism [*Constitutional Theory* 268–85].¹⁰ As William Sheuerman has written, for Schmitt “liberalism’s failure to take constituent power seriously, to look into its own troubled (normatively unjustified) origins is . . . its Achilles heel” [254].

This Schmittian theological insistence on normatively unbound but indivisibly unified will—the decision “in its absolute purity”—obscures for contemporary democratic theorists how constituent power was conceptualized and practiced in eighteenth-century America. Madison, in contrast to Schmitt, emphasized that the people can act (just as they can speak) only through representation or delegation. The people, while figured by Madison as the “only legitimate fountain of power” [339], can neither speak in their own voice nor act of their own accord. “It is impossible,” Madison writes, “for the people spontaneously and universally, to move in concert toward their object; it is therefore essential, that such changes [in fundamental law] be instituted by some *informal and unauthorized propositions*, made by some patriotic and respectable citizen or number of citizens” [265; emphasis in the original]. In this important passage, Madison relies first on a recognizably Hobbesian argument that, until unified through representation, the people can only ever be a disorganized multitude incapable of moving “spontaneously” or “universally” in concert toward their object (in this case, the creation of a new constitutional order). Without representation, the people remains forever latent; it is representation that gives the people concrete historical existence and a capacity for action, even if the people also

9. Andreas Kalyvas directed my attention to this passage.

10. See also Kalyvas, “Carl Schmitt and the Three Moments of Democracy.”

always exceeds representational capture.¹¹ But who is to say whether this representative claim is legitimate, if it is not secured by a preestablished and fully authorized procedure for determining the rules of representation in the first place (an electoral process, for example)? Wouldn't those rules also have to be popularly authorized? Here we glimpse the specter of a familiar infinite regress. Determining who constitutes the authorizing people is an inescapable yet democratically unanswerable dilemma; it is not a question the people can democratically decide because the very question subverts the premises of its resolution. Noting, as Madison does, that these propositions and claims undertaken in the people's name must be "*informal and unauthorized*" highlights their ungrounded and performative dimension, their break from the existing procedural norms of constituted authority. Just as quickly as Madison invokes the ungrounded and performative dimension of these "*informal and unauthorized*" claims, however, he attempts to contain this dimension through the invocation of another informal register of normativity—that is, by insisting on the "patriotic and respectable" character of their self-authorized citizen participants. This does not *resolve* the resulting dilemma of popular authorization, but neither does it plunge into the normative void of an absolute decision. Madison emphasized the importance of informal rules of normative continuity, not to command a predetermined course of action, but to offer a guideline through which the resulting controversy and disagreement could be politically debated and judged. The "great national discussion" between Federalists and Anti-Federalists was powerfully shaped by competing claims over the meaning and scope of the revolutionary inheritance.

2

They [the representatives] are the sign—the people are the thing signified.

—"Brutus," No. 3, *New York Journal*, November 15, 1787

In revolutionary and postrevolutionary America there was an acute cultural awareness of the political contestability that necessarily underwrites representational claims. The Imperial Crisis was, after all, characterized by disputes between the colonists and Parliament over what constituted legitimate political representation in the first place (would political representation be "virtual," encompassing the good of the entire realm, or "actual," accountable to the interests of different local constituencies?), and it was prefaced by accusations of misrepresentation leveled against colonial governors. As Wood writes, American politics in the revolutionary era had made "glaringly evident, that representation could never be virtual, never fully inclusive; it was acutely actual, and always tentative and partial" [*Creation of the American Republic* 600]. This evident partiality was made even more glaring in the wake of Independence. While "the revolution professedly made the collective people sovereign, . . . it did not settle how the public will should be institutionalized nor which representations of that will carried greatest weight" [Harris 203]. Postrevolutionary American politics were therefore frequently characterized by competing claims to speak in the people's name. The revolutionary and postrevolutionary American context was charged with a heightened political awareness and suspicion of representational claims, but it was also a period marked by the proliferation of institutions

11. *In the United States the authority of claims to speak in the people's name derives in part from a constitutive surplus inherited from the revolutionary era, from the fact that since the Revolution the people have always been at once enacted through representation and also in excess of any particular representation. This dilemma illuminates the significance and theological resonance of popular voice, with its continually reiterated but never fully realized or unmediated reference to the sovereign people beyond the law, the spirit beyond the letter, the Word beyond the words.*

making such claims. John Adams remarked on the early appearance of this dynamic in his *Dissertation on the Canon and Feudal Law* (1765). “This dread of representation,” Adams wrote, “has had for a long time, in this province, effects very similar to what the physicians call hydrophobia, or dread of water. It has made us delirious; and we have rushed headlong into the water, till we are almost drowned, out of simple or phrensical fear of it” [14]. Constituent power, as it came to be understood and practiced in postrevolutionary America, intensified these dilemmas attending political representation because it is the power that establishes the very rules and procedures through which legitimate political representation is to be construed in the first place. Like other repertoires of popular representation in the revolutionary and postrevolutionary years—the crowd, the committee, the congress—the representative status of the convention, its claim to speak in the people’s name, is not wholly secured by formal rules or fully authorized procedures (but, again, neither is it without inherited repertoires). It therefore brings the improvisational dynamics of political representation into public view. In the absence of fixed legal rules and procedures to navigate the dilemmas of authorization posed by the Philadelphia Convention, Madison appealed to another register of informal normativity in *Federalist* No. 40 to assess the legitimacy of those citizens claiming to speak in the people’s name—that is, those “respectable and patriotic” citizens who advance a series of needed “*informal and unauthorized*” propositions.

Without formal or procedural rules in place, how were the people to judge the “irregular and assumed” privilege of their self-proclaimed representatives? How will the eventual approbation by the people themselves come to, in Madison’s words, “blot out all antecedent errors and irregularities” [266]? Madison’s essay concludes with these questions as he counsels his public against “little ill-timed scruples” and a “zeal for adhering to ordinary forms,” in favor of a bold political experimentalism [265]. It is a bold experimentalism made necessary, Madison argues, by what he and other Federalists argued were the emergency conditions of the postrevolutionary years, the series of domestic and international political and economic crises suffered under the Articles of Confederation. Simply to abide by established legal procedures (and duly constituted authorities) in times of crisis, Madison writes, would be to sacrifice the “dearest interests of the country” to mere legal formalities. Confronting this sense of crisis and emergency required a change of government like that affected by the Revolution itself. “In all great changes of established governments,” Madison wrote, “forms ought to give way to substance” [265]. A rigid adherence to legal form and constituted authorities would “render nominal and nugatory the transcendent and precious right of the people [now quoting directly from the Declaration of Independence] ‘to abolish or alter their governments as to them shall seem most likely to effect their safety and happiness’” [265]. In this passage Madison established a clear continuity between the extralegality of the Philadelphia Convention’s action, and the people’s “transcendent and precious” right to revolution. He compares the Convention itself to the extralegal “committees and congresses” of the Revolution, thereby acknowledging that, as a later constitutional scholar notes, “in its origin and in its essential character, the Convention was a revolutionary assembly” [Jameson 130]; “illegality,” Ackerman writes, “was the leitmotif of the Convention from first to last” [49].

Madison ultimately concedes that participants to “the Convention were neither authorized by their commission, nor fully justified by circumstances” [267], but that they might be nonetheless retrospectively vindicated (if not justified) by a collective act of political judgment based on the quality of their proposals.¹² Overriding all ambivalence over full and uncontroversial legal authorization, Madison argues, should be “a manly confidence in their country” [266]. Time and again, Madison situates the trace of arbitrariness

12. For an elaboration of the importance of the difference between vindication and justification, see Honig, “Between Decision and Deliberation: Political Paradox in Democratic Theory.”

he invokes in his appeal to necessity—and that seems to resonate with Schmitt’s “state of exception”—within a broader field of normative continuity. “A manly confidence,” “considerations of duty,” and “patriotism” bridge the formal or legal legitimation deficit Madison confronts in No. 40 (which is thereby not to be equated with legitimacy *tout court*). This tactic does not resolve the dispute but simply shifts it to another register—from legality more narrowly conceived, we might say, to politics. For example, as suggested above, we can productively understand the debates between Federalists and Anti-Federalists as a patriotic competition over who could authoritatively claim to embody the “spirit of ’76” and the legacy of the Revolution. The appeal to the “respectable and patriotic” character of the participants in the Philadelphia Convention simply, but also significantly, shifts the locus of this contest and the terms under which it will be carried out, making it still controversial but no longer focused on questions of formal legality.

Throughout No. 40, Madison insists on both the continuity and the innovation of the Convention’s plan, basing his argument on a complex tapestry of their rule-following and rule-making activity, their attention to both formal and informal rules of popular representation. He invokes “considerations of duty,” for example, as a way of “supplying any defect of regular authority” [266]. Although the form of the Articles of Confederation is to be abandoned, he argues in another passage, their animating principles will be partly retained.¹³ The Philadelphia Convention obviously did not conceive of itself as existing in a kind of normative vacuum, or creating the Federal Constitution *ex nihilo*. “The truth is, that the great principles of the Constitution proposed by the convention may be considered less as absolutely new,” Madison writes, “than as the expansion of principles which are found in the articles of Confederation” [262].

This important aspect of Madison’s argument is dismissed by some constitutional scholars and neglected by others who translate the paradoxes of authorization explored in Madison’s text into narrowly formal or legal paradoxes alone [see, for example, Amar 497]. In No. 40 Madison is concerned with dilemmas of authorization that are larger and more encompassing than formal legal authorization. Even Ackerman, whose influential work has done the most to recover the democratic and political resources of Madison’s argument on popular sovereignty for constitutional moments of “higher lawmaking,” treats Madison’s arguments in No. 40 as preeminently questions of legality and illegality. Schmitt, for his part, dismisses such arguments as evasions of the fundamental question of constituent power’s anormativity. In contrast to these deflationary accounts, Madison’s arguments productively invoke broader political considerations that highlight the limitations of their animating legal formalism. In his invocation of the “patriotic and respectable” character of the Convention’s participants, Madison evinced a common eighteenth-century appeal to the ethical orientation of character, on the one hand, and patriotic duty on the other, a different set of principled concerns or guidelines to orient political debate and contest where legal rules give out, to navigate the ineliminable risks and underauthorization of democratic claims making in this instance of constitutional crisis. In No. 40 Madison therefore offers an exemplary enactment and navigation of a dilemma that has become a familiar touchstone in contemporary democratic theory, and that has its canonical expression in book 2, chapter 7 of Rousseau’s *Social Contract*.

13. On this point see Arato, *Civil Society, Constitution, and Legitimacy: principles “have the advantage of being able to draw on moral resources that have not been formalized and that are available when appeal to legal resources would inevitably turn circular at moments of foundation”* [333].

We ought to scrutinize the act by which a people becomes a people, for that act being necessarily antecedent to any other, is the real foundation of society.

—Jean-Jacques Rousseau, *The Social Contract*

The relevance of Rousseau's account of the lawgiver to this essay's focus on *The Federalist's* treatment of constituent power is not based in any discernible influence that *The Social Contract* had on American debates surrounding constitutional ratification, or on Madison in particular. While some of Rousseau's major works, most notably *Émile*, were widely read in postrevolutionary America, *The Social Contract* was little known, and even less approved [May 178].¹⁴ Nor do I mean to invoke the American founders' understanding of themselves as lawgivers in the Greco-Roman tradition.¹⁵ Rousseau's discussion of the lawgiver from *The Social Contract* models the dilemma of popular authorization explored above and thereby helps clarify American debates over constituent power and constitutional ratification. A different understanding of Rousseau's famous chapter than is usually offered by contemporary democratic theorists will also emerge from this discussion.

Rousseau's lawgiver is a productive and regularly recurring figure in contemporary democratic theory. Some, like Geoffrey Bennington, William Connolly, Bonnie Honig, and Alan Keenan, see the lawgiver as modeling, in different ways, how democratic autonomy invariably reaches for an outside heteronomic support to establish itself.¹⁶ Others, such as Seyla Benhabib, invoke the lawgiver as an instance of an idealized rationality that reconciles legality and legitimacy, rationality and democratic will [see Benhabib]. While I largely agree with those who see the lawgiver as a figure of heteronomic support—as, in Keenan's words, “a figure for those moments in democratic politics that prove necessary to the people's autonomy without being reducible to its logic” [50]—what is most important to this discussion is not the groundlessness of the lawgiver's actions: the lawgiver, Rousseau openly reminds his readers, has no authority to do what he sets out to achieve [R 86]. Instead, I am interested in how Rousseau figures the navigation of these dilemmas, or how the lawgiver's formative appeals to a people-that-is-not-yet taps into informal and even inarticulate registers of normativity that precede formal codification in law but without which, in Rousseau's account, no law can survive. Rousseau characterizes this other kind of law as “the most important [law] of all . . . which sustains a nation in the spirit of its institution and imperceptibly substitutes the force of habit for the force of authority” [R 99]. While this law is “unknown to our political theorists,” Rousseau writes, it “is the one on which the success of all the other laws depends; it is the feature on which the great lawgiver bestows his secret care” [R 99]. It is the register of law that shapes a people into the kind of people enabled to be at once the sovereign and the subject of law. Rousseau's lawgiver, in other words, is important not only for theoretically

14. Gary Wills claims, however, that Rousseau's *Social Contract* had a direct influence on James Wilson's conception of popular sovereignty and constituent power. “Wilson,” Wills writes, “had Rousseau's *Social Contract* at his elbow during the ratifying period” [100]. Aside from some less-than-definitive quote comparison, however, Wills offers no real evidence for this direct influence, and he does not consider that Wilson might have derived his ideas about constituent power and the political sovereignty of “the people at large” from a close and less canonical source: the practices and evolving repertoires of the revolution itself.

15. This approach has much to say for it, however, and has been explored by Douglas Adair in “Fame and the Founding Fathers.”

16. See Bennington; Connolly 137–40; Honig, *Democracy and the Foreigner* 18–25; and Keenan 50–58.

modeling recurrent dilemmas in democratic authorization, but also in revealing how attempts to navigate these dilemmas appeal to the “infrasensible” or the “visceral register” of ethicopolitical life.¹⁷ Like Madison, Rousseau does not posit a groundless moment of decision in his discussion of founding moments, but instead directs attention to the normative resources for navigating these dilemmas of popular authorization *in medias res*.

Rousseau famously invokes the lawgiver as a way of resolving the paradoxical origin through which a people becomes a people, a way of resolving what Bonnie Honig (following Paul Ricoeur) has recently called “the paradox of politics,” or what we might simply call the paradox of the people.¹⁸ How does a people give birth to itself as a collective subject? If a people is to itself be an artifact of human autonomy and consent, instead of an accident of history and force, how does it call itself into being? According to Rousseau, when previous political theorists (Grotius is his intended target) explored how a people gives itself a ruler and how they consent to being ruled by a sovereign authority, they invariably presumed that “a people is *a people*” [R 59]. They presuppose a “civil act” and “public deliberation” that cannot in fact be presumed. “We ought to scrutinize,” Rousseau writes, “the act by which a people becomes a people, for that act being necessarily antecedent to any other, is the real foundation of society” [R 59].

Rousseau’s understanding of the people unfolds gradually in *The Social Contract*. The people, for example, cannot promise to simply obey and still be a people. Once there is a master there can be no sovereign. A people simply *is* not, properly understood, if it does not rule itself. It might be an “ordered multitude” enslaved by a common master, or a “blind multitude” anarchically subject to no rule at all, but it cannot be a people. Since the people, properly understood, is subject to laws, the people ought to give birth to them. And this origin must be unanimous, since even majority rule relies on a prior rule or convention, and therefore only begs the question of its own formal authority (and, once again, the specter of infinite regress). Rousseau’s formulation of this problem resonates with Madison’s claim that the people cannot move “spontaneously and universally . . . in concert toward their object” [265], but need to rely instead on a set of “*informal and unauthorized propositions*”:

The right of laying down the rules of society belongs only to those who form the society; but how can they exercise it? Is it to be by common agreement, by a sudden inspiration? Has the body politic an organ to declare its will? Who is to give the foresight necessary to formulate enactments and proclaim them in advance, and how is it to announce them in the hour of need? How can a blind multitude, which often does not know what it wants, because it seldom knows what is good for it, undertake by itself an enterprise as vast and difficult as a system of legislation? [R 83]

How does a blind multitude transform itself into a self-legislating people? A familiar paradox appears here that the lawgiver is invoked to resolve:

For a newly formed people to understand wise principles of politics and to follow the basic rules of statecraft, the effect would have to become the cause; the social spirit which must be the product of social institutions would have to preside over the setting up of those institutions; men would have to have already become before the advent of law that which they become as a result of law. [R 87]

17. I take these phrases from the recent work of William Connolly.

18. Honig, “Between Decision and Deliberation”; Ricoeur, “The Political Paradox.”

Just as Sieyès later appealed to the constituent power of the nation to break the vicious circle of preconstitutional legitimacy in the months leading up to the French Revolution, so does Rousseau's lawgiver reflect, in Hannah Arendt's terms, the problem of the absolute.¹⁹ Rousseau himself invoked the theological dimensions of this appeal toward the opening of the lawgiver chapter when he writes that "Gods would be needed to give men laws" [R 84].

For this reason, Rousseau's lawgiver has sometimes been interpreted as a metaphysical or theological gesture to an absolute beginning, or point of origin. Schmitt's insistence on political theology looms here as well. Indeed, in *Legality and Legitimacy* Schmitt seems to invoke Rousseau's "extraordinary lawgiver" as the very model for the "pure will" of constituent power [37–83]. More recently, Geoffrey Bennington has given this reading a Derridean turn by insisting on the lawgiver's "absolute exteriority" and "violent illegality" [219]. Yet Rousseau explicitly distinguishes the act of the lawgiver, however heteronomous, from a simple act of formative and foundational violence. While Rousseau affirms that the lawgiver has "a task that is beyond human powers and a non-existent authority for its execution," he goes on to remark that the lawgiver "can employ neither force nor argument, *he must have recourse to an authority of another order*, one which can compel without violence and persuade without convincing" [R 87; my emphasis].

This invocation of "an authority of another order," while indicating a divine appeal, also opens up a grey area of normativity between force/will/violence, on the one hand, and deliberation/reason/conviction, on the other, or between decision and deliberation [see Honig, "Between Decision and Deliberation"]. This grey area is an explicitly aesthetic terrain, marked by Rousseau's appeal to the lawgiver's "sublime reasoning, which soars above the heads of the common people" [R 87]. Clearly this "authority of another order" does not provide hard and fast criteria for the people-that-is-not-yet to judge by, but it also does not leave the audience of its address wholly without orientation; it does not present them with, in Bennington's words, a moment of "radical undecidability." The locus of the decision, if we still want to call it that, is in the gathered people (that is not one yet) that are the object of the lawgiver's address. Rousseau emphasizes the careful consideration of what remains latent or "virtual" in the audience of the address; the people is here little more than a prophecy, but that is not nothing. The lawgiver, Rousseau writes, must pay close attention to "conventions," so that "natural relations and laws come to be in a harmony on all points, so that the law, shall we say, seems to only ensure, accompany, and correct what is natural" [R 88]. The lawgiver's productive unconcealing of latent popular dispositions—Kam Shapiro describes it as the virtuosic revelation of the virtual—is itself an artistic and transformative act, even if it "*seems* to only ensure, accompany, and correct what is natural": it does not simply represent what is passively given—the lawgiver is no mere "copyist" [R 90]—but elicits or enacts the people through mediation. As with Madison, the living voice of the people is called into being through this act of mediation itself. This aspect of Rousseau's political thought sits in productive tension with his familiar tendencies to reject the alienating mediation of representation, to privilege presence, immanence, and transparency. The chapters in *The Social Contract* that follow Rousseau's discussion of the lawgiver—three separate chapters on "the people"—elaborate on the conditions of receptivity and "ripeness" for a people that has not yet become "the people" properly understood, that has not yet responded to, or transformatively recognized itself in, the lawgiver's address.

Madison's dilemma differs in at least one important respect from the dilemmas made familiar to democratic theorists by Rousseau's lawgiver. Where the lawgiver claims to

19. For Arendt's account of the revolutionary problem of "the absolute," see Arendt, *On Revolution* 189–214.

anchor his extralegal authority in a transcendental appeal to a higher power (thereby posing the problem of whether he is a “prophet” or a “charlatan”), Madison’s extralegal appeal is to the very people to whom his discourse is addressed. How does the problem change when the “higher power” appealed to is not a deity, not a transcendental anchor, but the immanent voice of the *anticipated* people themselves? Alan Keenan has stated the dilemma succinctly:

To lay the conditions for the people to become a people, one must appeal to a sense of the people as a people; yet the success of that appeal depends on those conditions already being in place, or at the very least being imaginable. The paradoxical task of the legislator . . . is to make an appeal that sets the conditions for its own proper reception; one must appeal to the political community in such a way that its members will accept the regulations that will make them into the kind of (general) people able to “hear” such an appeal. [52]

The ensuing political problem revolves around how the people come to recognize the lawgiver’s voice as their own when there is no fixed rule or criteria to distinguish between its legitimate and illegitimate articulation or representation. (How could there be? The people in whose higher name the lawgiver speaks is not . . . yet.) This might be characterized as a constituent moment. Constituent moments enact felicitous claims to speak in the people’s name, even though those claims explicitly break from the authorized procedures or rules for representing popular voice. The dilemmas of authorization that spring from these moments appear in both the formal political settings of constitutional conventions and political associations as well as in the relatively informal political contexts of crowd actions, political oratory, and literature. These moments are not only enacted in dramatic moments of revolution and founding, but continually reiterated over a history of democratic claims making.

Conclusion

Who knows, but that on the lower frequencies I speak for you?

—Ralph Ellison, *Invisible Man*

Although Madison and Rousseau illuminate the everyday contours of judgment called upon to navigate the dilemmas of popular authorization associated with constituent moments, both also isolate the dilemmas faced by the lawgiver/founder to the quasi-mythical time of constitutional creation. Not long after writing *Federalist* No. 40, Madison wrote in No. 49 that he feared that the “public passions” elicited through regular appeals to the people’s constituent authority “would in great measure deprive the government of that veneration which time bestows on every thing, and without which perhaps the wisest and freest governments would not possess the requisite stability” [340]. Such “experiments are of too ticklish a nature to be unnecessarily multiplied,” he wrote, and should be reserved “for certain great and extraordinary occasions” [341, 339]. Democratic theorists typically agree that the dilemmas of authorization associated with constituent moments are limited to exceptional moments that usurp the reigning norm, rule, and authority. Perhaps the dilemmas surrounding unauthorized claims to speak in the people’s name cannot be so quickly contained in these exceptional moments, however, but instead reveal something about democratic claims-making practices more broadly understood. Returning to this founding dilemma, tapping its resources, may not simply reveal a beacon of “higher lawmaking” where, as Ackerman argues, formal illegality, mass energy, public-

spiritedness, and extraordinary rationality are united [179]. It may also reveal the extent to which democratic politics is always characterized by the risk of claims made without fully authorized grounds, by self-authorized claims to speak in the people's name. The mythology of founding and the appeal of our own great lawgivers may serve in fact to keep us enthralled or captivated by the extraordinary moments of the appearance of the people's constituent power, enthralled by the exception "in its absolute purity." In this, democratic theorists sometimes appear enthralled by the drama of the exception. "The exception," Carl Schmitt wrote in *Political Theology*, "is more interesting than the rule. The rule proves nothing; the exception proves everything. In the exception the power of real life breaks through the crust of a mechanism that has become torpid by repetition" [21]. Captivation by the exception obscures how the enactment of popular claims exemplified in founding moments is not reserved for such extraordinary moments and need not prioritize the sovereignty of the exceptional situation; it obscures how these enactments attend democratic claims made in seemingly everyday or ordinary political settings. This enthrallment threatens to blind us, or deaden us, to the extent to which the extraordinary inhabits and sustains the democratic ordinary, to the way these constituent capacities are continually elicited from within the midst of political life. Democratic theory would do well to attend to the nuances and contours of these small dramas of self-authorization. This may seem deflationary of "the democratic event" fashionably construed in dramatically fugitive or disruptive terms. But just as the "state of exception" is perhaps misdescribed as a dramatic "moment of madness" or as "normative nothingness," so too might the normal be misdescribed as the simple "crust of mechanism" or the "torpor of repetition."

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