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THE FEDERALIST PAPERS: FROM PRACTICAL POLITICS TO HIGH PRINCIPLE

RICHARD A. EPSTEIN*

Most political writers and legal thinkers regard *The Federalist Papers* as one of the great texts of political theory. While I do not disagree with that overall estimation, it is important to recall that *The Federalist Papers* was not a single document of systematic thought that represented years of struggling for a single coherent vision of constitutional law. It was a collection of essays hurriedly written under publication deadlines that would throw panic into the heart of any academic.¹ The saving grace for the authors of the paper was that they had a particular task in question: to persuade the worthy citizens of New York to ratify the Constitution whose provisions they sought to explicate. But I doubt that our three authors—Hamilton, Jay, and Madison—ever had time to reflect on the overarching task facing Publius, their collective *nom de plume*. Madison probably wrote *The Federalist Number 10* before he had any idea of what would be said, or by whom, in *The Federalist Number 51* or *The Federalist Number 78*. It is a great tribute to Publius that 200 years later *The Federalist Papers* have been transformed into a detached philosophical examination that transcends Publius's initial partisanship and that conceals all signs of the chaos of their creation. *The Federalist Papers* thus have a dual life that adds greatly to their influence and their charm.

How, then, does one account for the unity of vision that has allowed *The Federalist Papers* to transcend their immediate political origins? In part the answer lies in the ambition of the essays, which is to chart a line from the nature of man to the nature of political institutions. Hamilton sets out the basic challenge in *The Federalist Number 1* :

It has been frequently remarked that it seems to have been reserved to the people of this country, by their conduct and

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1. Clinton Rossiter, *Introduction to THE FEDERALIST PAPERS* at vii (Clinton Rossiter ed., 1961). The first 77 essays were published between October 27, 1787 and April 4, 1788.

example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.²

For Hamilton the answer is obviously the former,³ and his inclinations should immediately make us uneasy about his ambitions. By speaking of reflection and choice he has taken, in effect, the opposite position of such notables as David Hume, who praised the value of customs that endured and not the worth of contrived structures that often proved unequal to their task.⁴ Moreover, Hamilton's purposive creation of the United States government is in evident tension with the forms of spontaneous evolution that are so dear to the hearts of the admirers of Friedrich Hayek, myself included.⁵

Indeed, Hamilton was avowedly not a defender of a market economy in *The Federalist Papers*.⁶ Rather, his lofty ambition makes him a prominent early example of a central planner, with all the vices associated with that high office. His goal is to show that the sheer force of intellect can design a set of civil institutions that can weather the storms of politics.

The purposive creation of a new nation creates a dilemma that Hamilton never quite faces up to: Who are the people who can put this Constitution together? The only answer can be that they are the same sorts of people, or perhaps the same people, whose power a constitution, or at least this Constitution, seeks to constrain. Why, then, assume that individuals in their collective capacity have the level of wisdom and detachment needed to restrain their own individual selfish acts?

2. THE FEDERALIST No. 1, at 33 (Alexander Hamilton)(Clinton Rossiter ed., 1961).

3. *Id.* at 36.

4. 3 DAVID HUME, A TREATISE OF HUMAN NATURE §§ II, III (P.H. Nittich ed., Oxford Univ. Press 2d ed., 1978)(1740).

5. FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 54-62 (1960). Hayek champions theories of gradual evolution over those which depend on ostensible rational design.

6. The point is illustrated by Hamilton's defense of Congress's power over commerce with foreign nations: "By prohibitory regulations, extending, at the same time, throughout the States, we may oblige foreign countries to bid against each other, for the privileges of our markets." THE FEDERALIST No. 11, at 85 (Clinton Rossiter ed., 1961). Hamilton here does not consider the advantages of open markets, in which the bidding is conducted by citizens and not the states. Nor does he take into account the machinations on the domestic front to be sure that certain bids are not accepted, as is evident in the current tangle of our own protectionist trade policies. See, e.g., JAMES BOVARD, THE FAIR TRADE FRAUD (1991).

Worse still, the public at large can hardly be counted on to act in a responsible fashion. Yet, these are the very persons to whose detached intellect *The Federalist Papers* must appeal. So Hamilton must touch the lofty characteristics of persons who in some sense are often motivated by individual self-interest. How can he get them to exercise their reflection and choice in a manner that advances the common good? How can he get the citizens of New York to support his constitutional venture?

The difficulty is still more acute, for Hamilton understands that the creation of a new constitutional order will limit the power of key state officials who will lose from the expansion of federal power. He therefore must find a way to overcome their resistance, and suasion is his own answer. Indeed, by the time we get to Madison and *The Federalist Number 10*, the entire question of passion and faction is one that has to be faced head on. There is, then, a dual sense of human nature that runs throughout *The Federalist Papers*: the virtuous who know how to regulate and to support wise regulation, and the less than virtuous who will oppose all efforts to develop a sound constitutional order.⁷ At this point, the constitutional project undertaken in *The Federalist Papers* is one of enormous difficulty and delicacy. There are, I think, two strong reasons for the success of that undertaking. First, the Founders undertook the enterprise of creating a constitution, at least partially, behind a veil of ignorance. It is not that the people involved were suspended in time and space, for surely the delegates knew from whence they had come and to whom they were answerable. But the very generality of the constitutional scheme and the setting in which the deliberations took place made it difficult on many issues for delegates to identify partisan advantage in some of the key provisions of the document. Where they found such private advantage, they had to appeal to neutral principles in order to win over wary delegates from other states. The deliberations were thus one step removed from the debates of particular legislation with its known cast of winners and losers, and thus allowed for a more detached philosophical discussion of the issues at hand.⁸

This is not to say that all portions of the debate took this

7. See, e.g., THE FEDERALIST No. 1, *supra* note 2, at 34, where Hamilton describes the obstacles that self-interested local officials place in the path of the Constitution.

8. For the best account of the deliberations, my choice is still CATHERINE DRINKER BOWEN, A MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION, MAY TO SEPTEMBER 1787 (1966), which best captures the uneasy mix of high purpose

form: the grotesque construction of the Three-Fifths Clause was not the result of deliberation over first principles.⁹ It was an unhappy compromise over the question of slavery, an issue which threatened to scuttle the entire fragile convention. And it was an issue from which Publius distanced himself by indirection: in *The Federalist Number 54*, Madison does not offer his own confident defense of the provision. Rather, in quotations he develops at length a rhetorical defense “might one of our Southern brethren observe.”¹⁰ The gist of that defense is that slaves are regarded as having a mixed character of property and person, and both halves of their identity had to be respected: “Could it be reasonably expected that the Southern States would concur in a system which considered their slaves in some degree as men when burdens were to be imposed, but refused to consider them in the same light when advantages were to be conferred?”¹¹ But then he later limply concluded: “Such is the reasoning which an advocate of the Southern interests might employ on this subject; and although it may appear to be a little strained in some points, yet, on the whole I must confess that it fully reconciles me to the scale of representation which the convention have established.”¹²

The objectionable portions of the Constitutional solution had their social consequences, and with time, the Civil War and the Reconstruction Amendments have passed into history. It is the higher end of their deliberations that give *The Federalist Papers* their hold on the modern imagination. We must therefore see what Publius did that was right, and that in turn leads I think to the second reason for the continued influence of *The Federalist Papers*: Publius recognized that it was not wise to speak

and political compromise that dominated the Convention. In her preface to this work, she states:

The spirit behind [the Federal Convention] was the spirit of compromise, seemingly no very noble flag to rally round. Compromise can be an ugly word, signifying a pact with the devil, a chipping off of the best to suit the worst. Yet in the Constitutional Convention the spirit of compromise reigned in grace and glory; as Washington presided, it sat on his shoulder like the dove.

Id. at xiv.

9. The Three-Fifths Clause counted slaves as “three fifths of all other persons” in order to determine both the apportionment of representatives and direct taxes among the states. U.S. CONST. art. I, § 2, cl. 3. The Fourteenth Amendment eliminated this mode of apportionment by “counting the whole number of persons in each State, excluding Indians not taxed.” U.S. CONST. amend. XIV, § 2.

10. THE FEDERALIST No. 54, at 336-40 (James Madison) (Clinton Rossiter ed., 1961).

11. *Id.* at 337.

12. *Id.* at 340.

about the nature of man, writ large and in the abstract. Instead, it is more sensible to speak about the nature of men in the plural. By stating the inquiry in this form, Publius highlights the enormous variations in the talent, tastes, and proclivities of individuals. Some will be more virtuous than not; and others will be precisely the opposite. "If men were angels, no government would be necessary."¹³ But they aren't, at least all the time. The trick, therefore, is to find a way for a coalition of the virtuous individuals to create institutions that will bind those with lesser virtues, not to mention themselves.¹⁴

The Federalist Papers also recognized that the division of individuals between good and bad, virtuous and devious, is not something which is forever fixed in concrete, but is rather something which could vary, and perhaps substantially, with changing external events. The task, therefore, is to develop a system that improves the odds that good people will be able to survive in bad times and that enables them to flourish in good ones. There is no unerring secret to statecraft in so uncertain a world. No statesman can ever achieve perfection; incremental improvements are all that are obtainable.

The guarded view of human nature adopted in *The Federalist Papers* is what makes the constitutional inquiry worth undertaking. If we really believed that all individuals acted with the narrowest self-interest on all occasions, then there would be little reason to undertake the constitutional inquiry at all. We would quickly conclude that all purposive efforts at self-governance were doomed to fail because no one of vision could sustain them. The Hobbesian would be trapped either in a state of nature or in a state with a single, absolute sovereign. Similarly, if one assumed any kind of uniform benevolence, then the question of constitutional governance becomes rather trivial. (Recall Madison's point about men as angels.) Any structure would do, because no serious challenges to sound governance would arise. Only if the forces of virtue and vice are in competition with each other, with the outcome uncertain and the future insecure, does the question of constitutional structure come to the fore. Our uncertainty as to the relative constellation of

13. THE FEDERALIST No. 51, at 322 (James Madison)(Clinton Rossiter ed., 1961).

14. See *id.* Madison's argument for separation of powers rested on this observation: "Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place."

forces makes the choice of government structure critical to the overall success of the constitutional mission.

Some sense of this problem is evident in Madison's defense of the extended republic found in the now-legendary *The Federalist Number 10*. There Madison addressed the question of whether large or small states are more resilient to political pressures; he concluded that the extended republic was the form of government most impervious to the corrosive forces of passion and faction, the forces of self-interest that can spell death to any political order. He believed that prominent statesmen were more likely to emerge in the extended republic than in small states in constant conflict with each other. His argument was that individuals of good reputations were more likely to gain favor outside their home base than were individuals with no particular distinction.¹⁵ Thus Madison argued that in the extended republic

it will be more difficult for unworthy candidates to practice with success the vicious arts by which elections are too often carried; and in 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.¹⁶

Hence, he thought that the national government had a better chance of attracting the best political talent than did state or local governments.

The key objection to Madison's position is that his model is simply too weak to allow any confident predictions on the distribution of talent. On his chosen ground, the matter of reputation, it is possible that dubious characters, well-known in their own territories will be able to feign distinction when in distant communities: the relative speed of good and bad news is hard to calculate in the abstract. In addition, Madison's reputational point can be turned against him without any real embarrassment, and with some support, by looking at the hordes of undistinguished politicians of all stripes and persuasions in national service.

Nor is there any reason to believe, as Madison supposes, that the various factions will happily cancel each other out in the

15. THE FEDERALIST No. 10, at 82-88 (James Madison) (Clinton Rossiter ed., 1961).

16. *Id.* at 77.

large arena.¹⁷ The behavior of coalitions is very hard to predict in the abstract, and it is quite possible that several dubious coalitions will be able to put together a deal which allows them to reinforce the worst intentions all the groups involved. The success or failure of the extended republic on any account depends on more than size. Much will turn on the choice of voting rules and the scope of issues over which the parties can deliberate, or, if passion moves them, wheel and deal. Faction and self-interest—causes of the political problem—thus present obstacles so enormous that the conclusion is inescapable. Madison was unable to meet the challenge that he posed for himself in the first part of *The Federalist Number 10*.

The two sides of *The Federalist Papers* thus stand revealed. Madison, in *The Federalist Number 10*, gives a powerful and concise demonstration of the difficulties of governance that stem from the passions of human nature. But his own chosen remedy is not equal to the enormous task that he has set for it. Indeed, it is doubtful that Madison really believed that it would be. His discussion of faction and the extended republic took place at the conclusion of those introductory numbers of *The Federalist Papers* that were devoted to the issue of Union. The title of *The Federalist Number 10* is “Numerous Advantages of Union.” In this setting, it would have been rhetorical madness for Madison’s short-term political enterprise to preach the cause of Union in one breath and then to confess that the consequences of Union were indeterminate in the next. Madison’s articulation of the threats that factions pose to democratic government was a masterful stroke of political theory. Yet he also engaged in a bit of short-term legerdemain by arguing for the extended republic as a sufficient response to *the* long-term question of political governance. The great confidence and ostensible clarity found in *The Federalist Number 10* show that Madison the advocate and Madison the theorist were so closely entwined that it is often difficult to separate them.

The inadequate solution that is found in *The Federalist Number 10* becomes more evident when one looks to the remainder of *The Federalist Papers*. The discussion of the doctrine of enumerated powers, of the separation of powers, of judicial review, or

17. Thus Madison stated that “where there is a consciousness of unjust or dishonorable purposes, communication is always checked by distrust in proportion to the number whose concurrence is necessary.” *Id.* at 83. The “always” is too optimistic.

of voting rights all raise such urgent issues precisely because the extended republic is not a robust answer to the problem of faction. In an odd sense, two curious omissions from *The Federalist Papers* clinch the basic point. First, *The Federalist Number 84* overestimates the power of the extended republic, even with its enumerated powers, to control the risks of faction. The failure to recognize the case for any Bill of Rights remains one of the glaring features of the Federalist. It is hard to know whether this conclusion was dictated by the need to sell the proposed Constitution as it was, or whether it responded to some deeper understanding about the proper limits on government power.

Second, there is no hint in *The Federalist Papers* of the modern theme that federalism is a sound system of government because of the way in which it places state governments in competition with each other, by guaranteeing individuals the right of exit from their home states.¹⁸ Yet this omission of this exit theme makes far greater sense if the matter is looked at from a political instead of the theoretical point of view. When *The Federalist Papers* appeared the dominant sovereigns were the states, which had ceded some portion of their power to a distant central government. Attacking state sovereignty and state power was a touchy matter best done in connection with some particular grievance than in the round. Yet one strength of the exit option is that it offers a possible response to diffuse disorders that do not rise to the level of local scandal. The worthy citizens of New York would not be more likely to ratify the Constitution by learning that it would allow them to leave New York for greener pastures elsewhere. They would think that they deserve at least the presumption of in favor of the validity of state actions.

Yet, it is a mistake to be too critical of a document whose rising influence is testimony to the great intellectual powers of its authors. For in one happy sense *The Federalist Papers* are a bit like the Constitution itself. The Framers and Publius share an enormous confidence in the soundness of their institutional ar-

18. For discussion, see Richard A. Epstein, *Exit Rights Under Federalism*, 55 LAW & CONTEMP. PROBS. 147 (1992). Explanations for this omission are not easy to find. Perhaps it was because the exit right was of relatively little value in a society where substantial portions of wealth were tied up in land. Not all Americans were farmers, however, and even farmers could head for the frontier. For merchants, moreover, the power to exit should have been important enough to find a voice in contemporary political theory.

rangements. While modern constitutional scholars always talk about the importance of context as opposed to text, and always bemoan the indeterminacy of language and the elusive nature of intention,¹⁹ the Framers and Publius did not trouble themselves with trifles at the margin. Untouched by postmodern sensibilities, they would have found deconstruction incomprehensible. They had no doubts about the clarity of their language and the coherence of their mission. When they wrote that the powers of the federal government were divided into a legislative, an executive, and a judicial power, they were not plagued by doubts of overlapping powers.²⁰ They were confident that they had partitioned governmental powers in a way that made eminently good social sense and (to add just one editorial comment) that precluded the creation of administrative agencies independent of the executive branch.

We should thank the Framers and Publius for their joint linguistic naivete: if they had not had such great confidence in their own abilities to make institutional judgments and to embed them securely into language, then I think that their enterprise would have failed before it had started. No system of philosophical doubt will ever lead to the emergence of any useful constitutional structure, much less to its public ratification. It is on this score that we owe Publius our greatest debt of gratitude. His self-assurance was so great that his advocacy was almost invisible. He had the confidence and grace to present the Constitution as a coherent and self-reliant doctrine, and in so doing he was able to persuade a reluctant public to adopt it for the benefit of future generations.

19. See, e.g., Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983). I have given my critique of this position in Richard A. Epstein, *A Common Lawyer Looks at Constitutional Interpretation*, 73 B.U. L. REV. (forthcoming 1993).

20. See, e.g., THE FEDERALIST No. 47, at 301 (James Madison)(Clinton Rossiter ed., 1961).

