

SYMPOSIUM

PANEL I: PHILOSOPHICAL FOUNDATIONS OF *THE FEDERALIST*: THE NATURE OF LAW AND THE NATURE OF MAN

THE FEDERALIST PAPERS: THE FRAMERS CONSTRUCT AN ORRERY

HAROLD H. BRUFF*

In a museum in Philadelphia, you can still see an object that the Framers regarded with wonder and awe.¹ It is called an orrery—a mechanical model of the solar system that made the principles of Newtonian physics concrete.² An orrery aptly symbolizes the development of *The Federalist Papers* in three respects. First, it symbolizes the symmetry of *The Federalist Papers* themselves, crafted as they were to provide a coherent theory for what actually was the product of a rather rowdy democratic process of collective choice. Second, it symbolizes the delicate balances of the government the Framers constructed. Third, and most importantly, it symbolizes the legal adjustment of centripetal and centrifugal forces that the Framers perceived within the nature of man.

Just as they understood the orrery, the Framers saw human nature as both ultimately balanced and quite complex. As for balance, Madison famously remarked that people are not angels and, therefore, need government.³ Likewise, Hamilton

* Rothschild Research Professor of Law, George Washington University National Law Center. B.A. 1965, Williams; J.D. 1968, Harvard University.

1. Thomas Jefferson wrote to David Rittenhouse, the inventor of the orrery, saying "The amazing mechanical representation of the solar system which you conceived and executed, has never been surpassed by any but the work of which it is a copy." GARRY WILLS, *INVENTING AMERICA* 100 (1978)(quoting 2 *THE PAPERS OF THOMAS JEFFERSON* 203 (Julian P. Boyd et al. eds., 1950)).

2. WILLS, *INVENTING AMERICA*, *supra* note 1, at 100; *see also* GARRY WILLS, *EXPLAINING AMERICA* 7 (1981)(referring to the orrery as a "philosophical apparatus").

3. *THE FEDERALIST* No. 51, at 322 (James Madison)(Clinton Rossiter ed., 1961). Madison stated:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

often quoted an aphorism of Hume that in constructing government we must suppose each person a "knave."⁴ And yet, at the same time, the concept of public virtue was very real to the Framers. They could, without any sign of embarrassment, sculpt their heroes in togas. They thought that the process of government could elevate the best characters to serve as our governors: after all, both the Continental Congress and the Constitutional Convention had done so. The Framers also had waiting for ratification the man who would be twice unanimous in the electoral college, so there was reason for optimism about the character of future leaders as well.

In *The Federalist Number 76*, Hamilton captured the essence of the Framers' view of human nature by saying that suppositions of "universal venality" in people are as wrong as suppositions of "universal rectitude."⁵ The Framers saw the Constitution as a means of social mechanics. They believed that the institutions they were creating could elicit the best from people as long as there were "auxiliary precautions" to "supply the defect of better motives."⁶ In other words, hope for the best, but provide safeguards to make life "easier for the preacher."

The Federalist Papers stress two basic devices designed to harness human behavior—the nature of representation and the structure of the federal government. In *The Federalist Number 10*, Madison argued that the nature of representation could control the hazardous effects of faction and personal interests.⁷

The essential thesis of *The Federalist Number 10* stands the philosophy of Montesquieu on its head by arguing that the large

4. DAVID HUME, 1 ESSAYS MORAL, POLITICAL, AND LITERARY 117-19 (T.H. Green & T.H. Grose eds., London, Longmans, Green 1882), quoted in WILLS, EXPLAINING AMERICA, *supra* note 2, at 190 ("It is, therefore, a just political maxim, that every man must be supposed a knave: Though at the same time, it appears somewhat strange, that a maxim should be true in politics which is false in fact.").

5. THE FEDERALIST No. 76, at 458 (Alexander Hamilton)(Clinton Rossiter ed., 1961). Hamilton stated, "The supposition of universal venality in human nature is little less an error in political reasoning than the supposition of universal rectitude. The institution of delegated power implies that there is a portion of virtue and honor among mankind, which may be a reasonable foundation of confidence."

6. THE FEDERALIST No. 51, *supra* note 3, at 322. Madison stated:

A dependence on people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public.

7. THE FEDERALIST No. 10, at 77-84 (James Madison)(Clinton Rossiter ed., 1961).

size of our country would aid the formation of a sound republic, rather than hamper it.⁸ Madison believed that the greater variety of interests would prove self-canceling and that even where a majority was reached, the larger numbers required to compose it would be less capable of orchestrating oppressive plans.⁹

Madison stressed that the mechanics of representation would help government transcend special interests. He thought that a representative government would avoid the conflict-of-interest problem that direct democracies face, namely that every person ultimately seeks to be the judge in his own cause.¹⁰ Publius saw that factious *majorities* were frequently at the heart of problems under the revolutionary state governments.¹¹ Those uncontrolled legislatures had produced the kinds of “wicked” (leveling) legislation that Madison refers to in *The Federalist Number 10*: paper money, abolition of debt, and the equal division of property.¹² He believed that representatives drawn from large

8. MONTESQUIEU, *THE SPIRIT OF LAWS*, Book VIII Chapter 16 (Thomas Nugent trans., David W. Carrithers ed., University of California Press 1977)(1750). Montesquieu premised the stability of a republic on its size:

In a large republic the public good is sacrificed to a thousand views; it is subordinate to exceptions; and depends on accidents. In a small one, the interest of the public is easier perceived, better understood, and more within the reach of every citizen; abuses have a lesser extent, and of course are less protected.

9. *THE FEDERALIST* No. 10, *supra* note 7, at 82-83. Madison stated:

The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other.

Id. at 83.

10. *THE FEDERALIST* No. 10, *supra* note 7, at 82. Madison argued that representation would “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.” See also WILLS, *EXPLAINING AMERICA*, *supra* note 2, at 258 (“Majority factions pose the great problem.”).

11. GORDON S. WOOD, *CREATION OF THE AMERICAN REPUBLIC 1776-87*, 502 (1969)(“Indeed, it was this factious majoritarianism, an anomalous and frightening conception for republican government, grounded as it was on majority rule, that was at the center of the Federalist perception of politics.”).

12. *THE FEDERALIST* No. 10, *supra* note 7, at 84. Madison stated:

The influence of factious leaders may kindle a flame within their particular States but will be unable to spread a general conflagration through the other

districts could stand as disinterested arbiters among competing claims, thus preventing oppressive legislation.¹³

Publius argued that the other main technique for harnessing behavior lay in the structure of government. Because everyone assumed that separation of powers was beneficial, Madison could simply invoke the oracle Montesquieu.¹⁴ He then, however, moved quickly to more controversial ground—the system of checks and balances. By blending some fundamental powers, checks and balances controverted the prevailing view of governmental structure. In *The Federalist Numbers 47 through 51*, Madison faced the need to find a new basis for checks and balances. He found that basis in the perceptions of human nature that he shared with the other Framers. Older theories, such as mixture-government theories, had found checks in competing social classes—the aristocracy versus the monarchy, for example.¹⁵ The revolutionary state governments, lacking such social strata, included strong constitutional requirements for separated powers, yet the legislatures actually dominated the public sphere. Madison correctly thought that this experience proved that the Framers could not rely on mere “parchment barriers”

States. . . . A rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it, in the same proportion as such a malady is more likely to taint a particular county or district than an entire State.

13. At the Constitutional Convention, when Madison rehearsed these two arguments, Hamilton's reaction was, “There is truth in both these principles but they do not conclude so strongly as he supposes.” WILLS, *EXPLAINING AMERICA*, *supra* note 2, at 263 (quoting 4 ALEXANDER HAMILTON, *THE PAPERS OF ALEXANDER HAMILTON* 165-66 (Harold C. Syrett et al. eds., 1961)). However, by the time they wrote together as Publius, Hamilton agreed with Madison. See *THE FEDERALIST* No. 60 (Alexander Hamilton)(asserting the difficulty of forming factions in such a large republic); *THE FEDERALIST* No. 68 (Alexander Hamilton)(extolling the virtues of elections).

14. *THE FEDERALIST* No. 47, at 301 (James Madison)(Clinton Rossiter ed., 1961). Madison stated:

[L]iberty requires that the three great departments of power should be separate and distinct.

The oracle who is always consulted and cited on this subject is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying and recommending it most effectually to the attention of mankind.

15. For example, Publius notes the ownership of property as a source of division. *THE FEDERALIST* No. 10, *supra* note 7, at 79 (“But the most common and durable source of factions has been the various [sic] and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society.”). For a general discussion of mixture-government theories, see generally Wood, *supra* note 11, at 151.

to maintain the separation of the branches.¹⁶

The Federalist Papers set forth three basic ways that a combination of separation of powers and checks and balances would promote the public interest. First, multiple representation would force repeated consideration of proposals by the House of Representatives, the Senate, and the President. This would weed out passion, weaken the House, and assure mature consideration of public issues.¹⁷ Second, Publius argued that the separation of powers would strengthen those parts of government associated with reason—the judiciary, the executive, and the senate—and would correspondingly weaken those parts associated with passion—the House of Representatives and the state assemblies.¹⁸ Finally, to these advantages the Framers added checks and balances to ensure that no one part could gain too much power and, consequently, become too self-interested.

Publius believed that the private interests of competing office holders would ultimately be a “sentinel over the public rights.”¹⁹ By setting selfish private motives against each other,

16. THE FEDERALIST No. 48, at 308-09 (James Madison)(Clinton Rossiter ed., 1961). Madison argued:

Will it be sufficient to mark, with precision, the boundaries of these departments in the constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power? This is the security which appears to have been principally relied on by the compilers of most of the American constitutions. But experience assures us that the efficacy of the provision has been greatly overrated; and that some more adequate defense is indispensably necessary for the more feeble against the more powerful members of the government.

17. THE FEDERALIST No. 73, at 443 (Alexander Hamilton)(Clinton Rossiter ed., 1961). Hamilton believed that multiple representation would constrain governmental actors:

It establishes a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good which may happen to influence a majority of that body. . . . The primary inducement to conferring the power in question upon the Executive is to enable him to defend himself; the secondary one is to increase the chances in favor of the community against the passing of bad laws, through haste, inadvertence, or design.

18. THE FEDERALIST No. 48, *supra* note 16, at 309. Madison stated:

[W]here the legislative power is exercised by an assembly, which is inspired by a supposed influence over the people with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions by means which reason prescribes; it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions.

See also THE FEDERALIST No. 49, at 316-317 (James Madison)(Clinton Rossiter ed., 1961).

19. THE FEDERALIST No. 51, *supra* note 3, at 322.

the Constitution would convert the personal ambitions of government officers into protections for the rights of the public.²⁰ An example of this phenomenon is the career politician who must appeal to his constituency in order to move up the ranks of government service.

How could Publius have thought that a fractured government in a fractured society would produce the kinds of civic virtue and service of the public interest that he desired? Perhaps the answer lies in a final consideration of the orrery. When you first see it, everything is spinning, some parts slow, some fast, seemingly out of control. But when you look more closely, you see that every part is securely in its orbit.²¹

20. *Id.*

21. Hamilton himself marveled at the "ENLARGEMENT of the ORBIT within which such [governmental] systems are to revolve . . ." THE FEDERALIST No. 9, at 73 (Alexander Hamilton)(Clinton Rossiter ed., 1961).