PHILOSOPHICAL FOUNDATIONS OF *THE FEDERALIST PAPERS*: NATURE OF MAN AND NATURE OF LAW

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Scholarly discussion of the foundations of *The Federalist Papers* typically takes the form of speculation about the relative significance of a particular strand among its many and varied philosophical sources.[1] Neither Francis Fukuyama in *The End of History and the Last Man*[2] nor Thomas Pangle in *The Ennobling of Democracy: The Challenge of the Postmodern Age*,[3] however, tarries in the garden of influences. Fukuyama points to the grounding of *The Federalist Papers* in the new science of politics put forth by Hobbes, Locke, and Machiavelli.[4] Pangle similarly observes the writers as being influenced by Locke and Montesquieu.[5] Of particular relevance to *The Federalist Papers*' assumptions on the nature of man, both authors find *The Federalist Papers*' vision of human nature to be incomplete in certain key respects. For Fukuyama, it is the human desire for recognition that has been slighted; for Pangle, the erotic thirst for knowledge. Moreover, both authors trace the Framers' alleged neglect to the view of human nature elaborated in the principal foundational works from which the Framers drew.[6]

Fukuyama and Pangle view James Madison, Alexander Hamilton, and John Jay as accepting from Hobbes and Locke a conception of the human person as driven primarily by fear and desire, but enabled, through the faculty of reason, to escape from a precarious existence in the state of nature and to form societies with a modicum of order, liberty, and security.[7] Unlike the classical political philosophers, these early modern political theorists and statesmen understood "reason" simply as calcula-

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1. On the eclecticism of the Framers, see DAVID EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST (1984).

2. FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992).

3. THOMAS L. PANGLE, THE ENNOBLING OF DEMOCRACY: THE CHALLENGE OF THE POSTMODERN AGE (1992).

4. FUKUYAMA, *supra* note 2, at 153, 184-86.

5. PANGLE, *supra* note 3, at 73-74, 85.

6. *See, e.g.*, FUKUYAMA, *supra* note 2, at xviii; PANGLE, *supra* note 3, at 5, 155.

7. FUKUYAMA, *supra* note 2, at 184-186; PANGLE, *supra* note 3, at 136-38, 150.

tion in the service of self-preservation and self-interest.[8] Reason, on this understanding, is the servant of the passions, rather than the means through which the passions may on occasion be mastered.

Fukuyama contends that the image of the human person as a creature of appetite and aversion led the architects of American constitutionalism to underestimate the power of another aspect of human nature which frequently outweighs material self-interest and which is, therefore, a political force of no small consequence. This other "part of the soul," as Fukuyama (following Plato) describes it, is *thymos*.[9] *Thymos* is what Plato called "spiritedness," and what Fukuyama himself (following Hegel) calls the "desire for recognition"[10]—recognition of one's own worth and dignity as well as the worth of the persons and principles that one values.[11] Good *thymos*, with its associated sentiments of shame, honor, and righteous anger, is the source of political virtues like courage and public-spiritedness, while bad or frustrated *thymos* has been known to precipitate individuals and entire nations into the deepest of trouble.

Fukuyama does not claim that the authors of *The Federalist Papers* were unaware of *thymos*.[12] As he recognizes, Hamilton and Madison believed that it was the dangerous propensities of human nature, with pride and ambition prominent among them, that give rise to the need for government and pose a threat to peace and order.[13] To neutralize these passions, the Framers devised strategies for holding them in check, or channeling them into the private pursuit of wealth, comfort, and security.[14] Fukuyama's contention is that the Framers' timidity regarding pride and ambition prompted them to err on the side of caution in checking and countervailing the desire for recognition.[15] As a result, he argues that the Framers, in the Hobbes-Locke tradition, did not take full advantage of the opportunity

8. PANGLE, *supra* note 3, at 136-38.

9. FUKUYAMA, *supra* note 2, at 181-91; *see also id.* at 192-208 (discussing Hegelian antecedents).

10. *Id.* at xvi-xvii.

11. *Id.* at xix, 207.

12. *Id.* at 201, 204.

13. FUKUYAMA, *supra* note 2, at 187-88. Fukuyama refers in particular to THE FEDERALIST No. 72, at 437 (Alexander Hamilton)(Clinton Rossiter ed., 1961)(recognizing "the love of fame, the ruling passion of the noblest minds").

14. *See, e.g.*, THE FEDERALIST No. 6 (Alexander Hamilton); Nos. 49, 51 (James Madison).

15. *See* FUKUYAMA, *supra* note 2, at 185-86.

to harness the positive aspects of *thymos* in the service of the democratic experiment[16] and that they may even have increased the risk to the polity of the sentiments of anger and resentment that arise when *thymos* is not properly satisfied.[17] Even worse, their newfangled institutional contrivances to suppress the desire for recognition or to direct it away from public life may have helped to bring into being men and women like Nietzsche's "last men,"[18] fit only to be subjects rather than citizens.[19]

Fukuyama effectively exposes a paradox at the heart of the Anglo-American version of liberal democracy. The political theory on which the liberal state is founded provides no particular reason why talented people should choose public service over other pursuits, or why men and women in private life should perform community service, or even conduct themselves responsibly in everyday life.[20] Yet the success of liberal democratic experiments is crucially dependent on their ability to produce virtuous and public-spirited citizens and statesmen. To Fukuyama this leads to yet another paradox:

> Liberal democracies . . . are not self-sufficient: the community life on which they depend must ultimately come from a source different from liberalism itself. The men and women who made up American society at the time of the founding of the United States were not isolated, rational individuals calculating their self-interest. Rather, they were for the most part members of religious communities held together by a common moral code and belief in God. The rational liberalism that they eventually came to embrace was not a projection of that pre-existing culture, but existed in some tension with it. . . . [I]n the long run those liberal principles had a corrosive effect on the values predating liberalism necessary to sustain strong communities, and thereby on a liberal society's ability to be self-sustaining.[21]

In his book Pangle arrives at a strikingly similar conclusion: "Did not theorists like Hamilton . . . depend upon, and yet inadequately account or provide for, certain absolutely crucial moral and educational foundations of civic republican culture

16. *See id.* at 188.
17. *See id.* at xxiii, 328.
18. FRIEDRICH NIETZSCHE, THE WILL TO POWER 8 (W. Kaufmann & R.J. Hollingdale trans., 1968).
19. FUKUYAMA, *supra* note 2, at 187-89, 314.
20. *Id.* at 160.
21. *Id.* at 326-27; *see also id.* at 222, 334.

. . . ?"[22] Like Fukuyama, Pangle comes not to denigrate, but rather to shore up American constitutionalism. In that spirit, he is concerned about the tension between the philosophical foundations on which American constitutionalism was constructed and the cultural foundations that are necessary to sustain it. "[H]as modern theory," he asks, "in its successful attempt to clarify and satisfy the most basic legitimate demands of political life, obscured the clear view of human excellence that is required in order to shape a public life that reflects the whole of the common good?"[23] Pangle's thoughts then turn, as do Fukuyama's, to whether the liberal political vision could be strengthened by incorporating a fuller conception of the human person.[24]

Though Pangle's criticism of the anthropology of *The Federalist Papers* consists merely of a few passing observations in a book primarily devoted to the challenge of postmodernism, it provides an illuminating complement to the tack taken by Fukuyama. For Pangle, what was slighted in the Framers' understanding of human nature were the higher forms of reason and desire that enable us to master the lower passions, as well as the role of nurture and education in cultivating those higher faculties.[25] The desire for knowledge and the love of truth, Pangle argues, are particular forms of *eros*.[26] Those passions, he contends, not only could serve as the foundation for the firmest personal and political attachments, but also could undergird a sense of common humanity in our increasingly diverse society.[27] Like the positive aspects of *thymos*, though, the *eros* of the mind requires cultivation; and Pangle observes that the framework of American constitutionalism "makes very little provision for the inculcation, fostering, or even preservation of [the] crucial excellences of character" on which the Founders relied to keep unruly lower passions in check.[28]

Pangle and Fukuyama both fear that government structures, laws, and institutions designed a certain way will ultimately produce a certain kind of individual. Their common apprehen-

22. PANGLE, *supra* note 3, at 8.
23. *Id.* at 9.
24. *Id.* at 7.
25. *Id.* at 150.
26. *Id.* at 217.
27. *Id.*
28. *Id.* at 150.

sion is rooted in a shared belief that the culture the Founders helped to create may have paradoxically made it less likely that the Founders' descendants would be virtuous citizen-statesmen like themselves; instead, the descendants would produce fewer George Washingtons and more hollow men. To Fukuyama, contemporary preoccupation with private satisfactions evokes Nietzsche's "last men":

> Throwing themselves into essentially unpleasant or stultifying work with a view to the accumulation of greater material satisfactions and petty signs of prestige, . . . may not future generations of Americans lead increasingly fragmented and purposeless existences in a world of unprecedented materialism, desperate personal isolation, and inner psychological weakness verging on collapse?[29]

Pangle is prompted to wonder if the capacity for citizenship can be sustained:

> [T]he question that has bulked ever larger as our constitutional system has evolved . . . is whether and how the system provides for the moral and civic education of a people that becomes more fragmented in every sense even as it is given more and more power and responsibility.[30]

Both Fukuyama and Pangle render an important service to students of law and politics by forcing their readers to confront a fact vividly present to the authors of *The Federalist Papers*, yet often forgotten by modern Americans. This fact is that the regime explained and defended by Madison, Hamilton, and Jay was and remains an experiment, one that depends heavily on certain cultural foundations. The experiment, moreover, is a test of two great perennial questions about politics: (1) whether there can be a democratic republic in an extended territory with a heterogeneous population; and (2) whether, as Hamilton wrote, human beings are really capable of devising good governments by "reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force."[31]

Contrary to the arguments of Fukuyama and Pangle, the authors of *The Federalist Papers* did not overlook the higher forms of reason and desire. The forgetfulness of the classical, Bibli-

29. Fukuyama, *supra* note 2, at 153.
30. Pangle, *supra* note 3, at 151.
31. THE FEDERALIST No. 1, at 33 (Alexander Hamilton)(Clinton Rossiter ed., 1961).

cal, and republican strands of our heritage to which Fukuyama's *The End of History* and Pangle's *The Ennobling of Democracy* call attention seems to be more characteristic of our own times than of the cultural milieu of Eighteenth-Century America. The view of human nature in the pages of *The Federalist Papers* is a complex one, shaped not only by the new science of politics, but also by classical and Biblical ideas, as well as by antebellum notions of what a gentleman is and does.[32] If one merely canvasses the passages in *The Federalist Papers* where human nature is discussed, one does find the authors consistently presenting rather somber accounts of human nature: Human nature is a mixture of base and virtuous elements,[33] but one cannot count on the virtuous parts in times of crisis;[34] or it is precisely because men are not angels, that we need government.[35]

Suppose, though, that instead of simply asking what the text says about human nature, we ask other questions. For example, to what qualities of the reader do Madison, Hamilton, and Jay appeal in their effort to be persuasive? How do they have "Publius" present himself to his readers? What sort of relationship do they try to establish between Publius and the reader? The answers to these questions disclose a kind of "strange loop" in *The Federalist Papers*; that is, although Publius keeps insisting that it is unrealistic to rely on human reason,[36] the ultimate success of his argument depends to a considerable degree on the

32. See especially Jay on the way that honor, oaths, reputations, conscience, love of country, and family affections and attachments influence the human mind. THE FEDERALIST No. 64, at 395-96 (John Jay)(Clinton Rossiter ed., 1961).

33. James Madison noted the competing elements of virtue and vice within the human spirit:

> As there is a certain degree of depravity in human nature which requires a certain degree of circumspection and distrust, so there are other qualities in human nature which justify a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree than any other form.

THE FEDERALIST No. 55, at 346 (James Madison)(Clinton Rossiter ed., 1961); *see also* THE FEDERALIST No. 57, at 353 (James Madison)(Clinton Rossiter ed., 1961); THE FEDERALIST No. 76, at 458 (James Madison)(Clinton Rossiter ed., 1961); THE FEDERALIST No. 78, at 469-71 (Alexander Hamilton)(Clinton Rossiter ed., 1961).

34. *E.g.*, THE FEDERALIST No. 10, at 81 (James Madison)(Clinton Rossiter ed., 1961)("If the impulse and the opportunity be suffered to coincide, we well know that neither moral nor religious motives can be relied on as an adequate control."); *see also* THE FEDERALIST No. 34, at 208 (Alexander Hamilton)(Clinton Rossiter ed., 1961).

35. THE FEDERALIST No. 51, *supra* note 14, at 322.

36. *E.g.*, THE FEDERALIST No. 2, at 40 (John Jay)(Clinton Rossiter ed., 1961)("[I]t is more to be wished than expected" that the plan will receive dispassionate consideration.); *see also* THE FEDERALIST No. 1, *supra* note 31, at 33.

will and ability of the reader and other Americans to transcend the passions of the moment and to heed his exhortations to be an example to all nations. The success of the argument also depends on convincing the reader that Publius himself,[37] and the delegates to the convention,[38] were able to do this as well.

Publius continually appeals to the prideful qualities that Fukuyama calls *thymos* and to the disinterested form of reason that Pangle sees as grounded in a kind of *eros*.[39] *The Federalist Papers* are not just an appeal to reason over passion. They are also a shrewd appeal to certain kinds of passion. Much of their persuasive power comes from the way they speak directly to what Abraham Lincoln in his *First Inaugural* was to call "the better angels of our nature."[40] Consider the passage in which Madison describes his ideal readers: "These papers are not addressed to persons [who are biased or without a spirit of moderation]. They solicit the attention of those only who add to a sincere zeal for the happiness of their country, a temper favorable to a just estimate of the means of promoting it."[41] Though *The Federalist Papers*' authors repeatedly profess their skepticism about the ability of human reason to master passion, they frame their arguments to appeal to the human capacity to do precisely that. They call for "correct and unprejudiced minds,"[42] and they reach out to "sincere and disinterested ad-

37. "[*O*]*ur* choice," says Hamilton, "should be directed by a judicious estimate of our true interests, unperplexed and unbiased by considerations not connected with the public good." THE FEDERALIST No. 1, *supra* note 31, at 33.

38. Jay points out in *The Federalist Number 2* that the convention was composed of men whose patriotism, virtue, and wisdom had survived the most difficult tests. THE FEDERALIST No. 2, *supra* note 36, at 39. Madison similarly concludes in Number 37 that the members of the convention were either genuinely satisfied by the final draft of the Constitution or were induced to accede to it by a belief that personal philosophies should be sacrificed for the public good. THE FEDERALIST No. 37, at 231 (James Madison)(Clinton Rossiter ed., 1961).

39. *E.g.*, THE FEDERALIST No. 36, at 224 (Alexander Hamilton)(Clinton Rossiter ed., 1961)("Happy will it be for ourselves, and most honorable for human nature, if we have wisdom and virtue enough to set so glorious an example to mankind!"); *see also* THE FEDERALIST No. 1, *supra* note 31, at 36; THE FEDERALIST No. 14, at 104-05 (James Madison)(Clinton Rossiter ed., 1961).

40. ABRAHAM LINCOLN: SELECTED SPEECHES, MESSAGES, AND LETTERS 148 (T. Harry Williams ed., 1957).

41. THE FEDERALIST No. 37, *supra* note 38, at 225; *see also* THE FEDERALIST No. 77, at 464 (Alexander Hamilton)(Clinton Rossiter ed., 1961); THE FEDERALIST No. 78, *supra* note 33, at 470.

42. THE FEDERALIST No. 23, at 153 (Alexander Hamilton)(Clinton Rossiter ed., 1961); *see also* THE FEDERALIST No. 31, at 193 (Alexander Hamilton)(Clinton Rossiter ed., 1961).

vocate[s] for good government."[43]

The best evidence of this point is the structure and style of the papers themselves—the way they state the questions, weigh the evidence, and seriously consider arguments pro and con. The papers are a virtuoso performance of the exhortation in *The Federalist Number 71* to consider the ideas in all their aspects and to trace them out to all their consequences. Thus, the human person, as envisioned by Hamilton, Jay, and Madison, seems to be much more than just a rational calculator. He is also a knower and a chooser, the kind of person who might just possibly be capable of "establishing good government from reflection and choice."[44]

Both Fukuyama and Pangle might respond to the foregoing observations in this vein: "Naturally, the Framers, with their classical educations, *knew* about the higher forms of reason and desire, and no doubt they strategically deployed this knowledge in their argumentation. Our contention is that they did not sufficiently attend to these aspects of human nature in their design for government." But where does that response lead? Fukuyama is not very specific concerning what the Framers should have done to keep Americans from turning into the civic equivalent of 90-pound weaklings. It is true that our constitutional design for government includes a variety of devices meant to keep individual and group passions under control. Fukuyama seems to suggest that these checks have gone too far. Without some indication of what institutional corrections he proposes, however, the critique has a disconcerting resemblance to Roberto Unger's attack on checks and balances as inhibitors of "creative" social ferment.[45] Though Fukuyama would not join in Unger's call for governmental "ministries of destabilization," it is hard to know what to make of his apparent lament that Hegel was born too late to inspire the Founders.[46]

43. THE FEDERALIST No. 36, *supra* note 39, at 224; *see also* THE FEDERALIST No. 71, at 432-34 (Alexander Hamilton)(Clinton Rossiter ed., 1961).

44. THE FEDERALIST No. 1, *supra* note 31, at 33.

45. *See* ROBERTO M. UNGER, FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY 454-57 (1987).

46. "[I]s there a higher understanding of modern liberalism that tries to preserve the thymotic side of the human personality rather than exiling it from the realm of politics?" FUKUYAMA, *supra* note 2, at 191. According to Fukuyama, the answer is yes, and that higher understanding is Hegel's:

> Hegel gives us the opportunity to reinterpret modern liberal democracy in

Pangle's observation that the authors of *The Federalist Papers* depended upon, yet did not adequately provide for, certain moral and educational foundations seems well-grounded. The Framers, however, are not to be greatly faulted for this oversight. They were well aware that their enterprise required certain kinds of excellence on the part of both citizens and statesmen. Indeed, Madison specifically acknowledged that republican government required a higher degree of virtue in its citizens than any other form.[47] They knew that their experiment depended in crucial ways on "the general spirit of the people."[48] Accordingly, their federal design for government provided for and protected much free space within which they expected families, churches, and townships to enable citizens to learn the skills of cooperative living and self-government and to acquire the republican virtues of self-restraint and concern for the common good.[49] When one reflects on the social conditions of that time, it is hard to blame Eighteenth-Century statesmen for leaving such matters in local hands, and for devoting most of their energy and attention to problems that must have seemed much more urgent.

Nevertheless, Pangle is right to remind *contemporary* Americans that we ignore at our peril the classical teachings that a republic must attend to the conditions—especially nurture and education—that are required to produce the kind of citizens who can rise to the high demands of a republican form of government. Fukuyama may well be right to sound an early warning that the remarkable advance of liberal democracy in the world carries risks of a kind that would have been a luxury to contemplate in the years before the fall of communism.[50] However one evaluates the political theory of the Founders and their philosophical antecedents, the inescapable fact is that re-

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terms that are rather different from the Anglo-Saxon tradition of liberalism emanating from Hobbes and Locke. This Hegelian understanding of liberalism is at the same time a more noble vision of what liberalism represents, and a more accurate account of what people around the world mean when they say they want to live in a democracy.

Id. at 199-200.

47. THE FEDERALIST No. 55, *supra* note 33, at 346.

48. THE FEDERALIST No. 84, at 514 (Alexander Hamilton)(Clinton Rossiter ed., 1961); *see also* THE FEDERALIST No. 57, *supra* note 33, at 353.

49. *See generally* THE FEDERALIST No. 17 (Alexander Hamilton)(discussing how state and local governments within the federal system retain much power and influence over the people).

50. *See* FUKUYAMA, *supra* note 2, at 293-299.

sponsibility for the fate of their innovative political experiment has now devolved on their successors. Madison, aware of the changes that time might wreak, declined to predict what might become of the American project with the passage of the years and with increase in the size of the population.[51] That concern would be a problem left to the political imaginations of future generations. Pangle and Fukuyama, then, should not be taken as visiting the failings of the sons upon the fathers, but as inviting serious reflection by contemporary men and women on latent possibilities and perennial questions.

51. THE FEDERALIST No. 55, *supra* note 33, at 344.