

# THOUGHTS ON THE FEDERALIST VISION OF REPRESENTATIVE DEMOCRACY AS VIEWED AT THE END OF THE TWENTIETH CENTURY: HOW HAVE WE USED THE LEGACY OF *THE FEDERALIST PAPERS*?

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## I. *THE FEDERALIST PAPERS* AND THE PROBLEMS OF REPRESENTATIVE DEMOCRACY

*The Federalist Papers* constitute a remarkable set of essays on the subject of representative democracy. Published without the luxury of flexible deadlines, and produced, to the best of our knowledge, without the benefit of law clerks, research assistants, or articles editors at some leading law review, *The Federalist Papers* were but first drafts.<sup>1</sup> In all likelihood, they were written without the realization that each sentence of the papers, indeed each word, would later be scrutinized and parsed to the extent to which they have been.<sup>2</sup>

Representative democracy, as envisioned by *The Federalist Pa-*

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1. One commentator on *The Federalist Papers* has pointed out the haste and informality with which *The Federalist Papers* were written:

The immense prestige of this work [*The Federalist*] seems especially remarkable when viewed in light of its origins. *The Federalist* is essentially a collection of eighty-five letters to the public over the pseudonym of Publius that appeared at short intervals in the newspapers of New York City beginning on October 27, 1787. . . . Conceived in the pressure of a great crisis in human events, written with a haste that often bordered on the frantic, printed and published as if it were the most perishable kind of daily news, *The Federalist* bore few marks of immortality at birth.

Clinton Rossiter, *Introduction to THE FEDERALIST PAPERS* at viii (Clinton Rossiter ed., 1961).

2. See *id.* at viii. On the same point, Rossiter stated:

[*The Federalist*] has always commanded widespread respect as the first and still most authoritative commentary on the Constitution of the United States. It has been searched minutely by lawyers for its analysis of the powers of Congress, quoted confidently by historians for its revelations of the hopes and fears of the framers of the Constitution, and cited magisterially by the Supreme Court for its arguments in behalf of judicial review, executive independence, and national supremacy. It would not be stretching the truth more than a few inches to say that *The Federalist* stands third only to the Declaration of Independence and the Constitution itself among all the sacred writings of American political history.

*Id.* at vii.

*pers*, refers to a "constitutional system of government, whereby individuals elect fellow citizens to serve as their representatives."<sup>3</sup> Ideally, these elected citizens represent the interests of all.<sup>4</sup>

As Jonathan Macey indicated,<sup>5</sup> we do live in a representative democracy. But what is the nature of American representative democracy? A few bipartisan vignettes should cause us to question the quality of our contemporary representative democracy both in terms of its electors (that is, ourselves) and its elected representatives.

First, one must question the quality of our representative democracy when the President of the United States, upon nominating Clarence Thomas to the Supreme Court, proclaimed that, after a nationwide search, Judge Thomas was the most qualified person in the country to serve on the Court and that race played no part in the selection process.<sup>6</sup> The President's statement was more than mere hyperbole; the President knew so, as did the American people. Nevertheless, Americans simply snickered while understanding that they were being fooled in some way.<sup>7</sup> Indeed, it would not even have been as great a tragedy if the public did *not* understand that it was being fooled.

Second, one must question the quality of our representative democracy when congressional leaders of the Democratic Party in both the Senate and the House of Representatives engage in a nearly-annual ritual of proudly announcing the enactment of a national budget although they have used smoke and mirrors to ignore their legal obligations. They probably joke among themselves that they have promulgated another mirage on the American people. Meanwhile, fully aware that Congress has acted contrary to its statutory charge,<sup>8</sup> its obligation to the people, and the national interest, the American public merely accepts this behavior. Coincidentally, during the 1992 presidential primary campaigns a national magazine concluded that

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3. Jonathan R. Macey, *Representative Democracy*, 16 HARV. J.L. & PUB. POL'Y 49 n. 1 (1992).

4. *See id.*

5. *See id.*

6. *See Excerpt from News Conference Announcing Court Nominee*, N.Y. TIMES, July 2, 1991, at A14.

7. *See Political Forecast; Will Thomas' Nomination Fight Damage the Court?*, L.A. TIMES, Oct. 20, 1991, at 1.

8. 2 U.S.C. § 621 (1992).

the only candidates telling the whole truth to the American people were Paul Tsongas and Pat Buchanan, but that these candidates could afford to be honest because they enjoyed no chance of being elected.<sup>9</sup> Unfortunately, *Newsweek's* reporting accurately portrayed the condition of our representative democracy.

These conditions do not arise from a lack of intelligence in our elected representatives. Indeed, most are highly talented men and women. Nor do these conditions result from our representatives being politically unresponsive. Indeed, in many ways their failure seems to be that they are too responsive: they do not act for what they, themselves, strongly believe to be in the public interest, nor do they act in accordance with what they think the majority of their constituents believe to be in the public interest. Instead, they do what they perceive to be the bidding of their most influential supporters: lobbies, special interest groups, and the like.<sup>10</sup>

Even when the political institutions of our government do respond, they are often ineffective in dealing with the serious problems confronting them. Our government only makes hard choices in crises. Take the case of energy, for example. Beginning as far back as the 1960's, commentators reported widely that the United States faced an energy crisis and that it could no longer continue to sell gasoline at bargain prices.<sup>11</sup> The government ignored the warning. It was not until the energy crisis of the 1970's, when consumers found they could only purchase gasoline on alternate days, that the United States reduced its enormous consumption and the government mobilized a variety of attempts to develop alternative energy sources and conservation measures.<sup>12</sup> When the crisis ended, however, Americans went back to their old ways. Now, in the 1990's, commentators again warn us that another energy crisis may well occur.<sup>13</sup> Again, we do nothing about it. What does this tell

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9. Larry Downing, *Nofziger: Why Bush Is in Trouble*, NEWSWEEK, Mar. 2, 1992, at 28.

10. See, e.g., Nicholas C. McBride, *Study Assails Speech Fees to Law-makers as Influence Buying*, CHRISTIAN SCI. MONITOR, Aug. 26, 1988, at 5.

11. RICHARD M. HIGHSMITH ET AL., CONSERVATION IN THE UNITED STATES 327 (2d ed. 1969) (opining that present reserves of natural resources are inadequate to meet projected needs).

12. See, e.g., *Tokyo Summit: Will it Solve the Energy Crisis?*, U.S. NEWS & WORLD REP., July 2, 1979, at 20.

13. See Margaret E. Kriz, *Joyriding on Oil*, NAT'L J., March 16, 1991, at 624.

us of the legacy of *The Federalist Papers*' prescription for representative democracy?

Third, one may examine both the capacity of representative democracy to be oppressive and its capacity to produce effective government. The ability of factions<sup>14</sup> to work their will in the national political process has increased.<sup>15</sup> Indeed, the more operationally ineffective our central government becomes, the easier it is for factions to serve their own interests. Factions have also successfully worked their will within state and local governments. After living for the past twenty-seven years in Berkeley, California, I can testify to the accuracy of Madison's observations about the ability of a faction that represents a narrow majority in a small governmental unit to be oppressive, extreme, and unresponsive to the interests of a substantial minority.<sup>16</sup> Two hundred years of history have shown that, although it may at times be blurred, a distinction can be made between a faction that serves its own interests and a faction that oppresses certain minority groups. The capacity to oppress is greater at the state and local levels than in Washington, D.C. If Madison's spirit is thinking about *The Federalist Number 10*, it should be squinting at the Berkeley City Council.

Fourth, one must examine the ability of a representative democracy to unseat those representatives whom the electors believe are failing to perform their duties. It is a great paradox of our democracy that Americans continually express dissatisfaction with the performance of their representatives, yet rarely

14. Madison defined factions to be "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." *THE FEDERALIST* No. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961).

15. See Richard B. Stewart, *Federalism & Rights*, 19 GA. L. REV. 917, 921 (1985).

16. In *The Federalist Number 10*, Madison analyzed the danger of factions as follows:

No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time; yet what are many of the most important acts of legislation but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens? And what are the different classes of legislators but advocates and parties to the causes which they determine? Is a law proposed concerning private debts? It is a question to which the creditors are parties on one side and the debtors on the other. Justice ought to hold the balance between them. Yet the parties are, and must be, themselves the judges; and the most numerous party, or in other words, the most powerful faction must be expected to prevail.

*THE FEDERALIST* No. 10, *supra* note 14, at 79-80.

fail to re-elect them.<sup>17</sup> Even before *glasnost*, the composition of the House of Representatives was probably more stable than that of the Central Committee of the Communist Party of the Soviet Union.

## II. CONSTITUTIONAL SOLUTIONS?

Are there solutions to these problems? When we began to celebrate the Bicentennial of the Constitution in 1987, a reporter asked me how the Constitution had stood the test of time and whether it needed some changes. While the Supreme Court has generated many extremely controversial decisions on issues such as abortion<sup>18</sup> and school prayer,<sup>19</sup> revising the Constitution is not the appropriate method to resolve these issues. Nevertheless, we might profitably examine some structural matters to determine whether the legacy of the Framers continues to serve the United States favorably.

Among these structural matters, Americans should first examine the lengths of the terms served by their governmental leaders. Americans should give serious consideration to the question of whether members of the House of Representatives should serve only for two-year terms. A longer term may be appropriate considering the time members spend campaigning<sup>20</sup>—time often spent to the detriment of good government. Americans should also give serious consideration to the questions of whether a four-year term is appropriate for the presidency and whether a president should be limited to but two full terms of office. Finally, Americans might even give consideration to what is plainly the most controversial of these questions: whether the term of office for members of the federal judiciary should be one for life. This is especially true for the Supreme Court justices in light of the policymaking role the Court has assumed in our system.<sup>21</sup>

Second, Americans should examine the campaign financing system. Both Congress and the Supreme Court have wrestled

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17. See *House Overview*, COOK POL. REP., March 27, 1992, at 6.

18. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973).

19. See, e.g., *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963).

20. See Stuart Taylor, *Citing Chronic Deadlock, Panel Urges Altering Political Structure*, N.Y. TIMES, Jan. 11, 1987, at A1.

21. See Larry W. Yackel, *Choosing Judges the Democratic Way*, 69 B.U. L. REV. 273, 284 (1989).

with this issue,<sup>22</sup> but neither body has found a solution that is either clearly correct or incorrect. Indeed, it is not clear that the Constitution permits effective solutions to this problem.

Third, though one risks one's credibility in making such a suggestion, Americans might well carefully reconsider the First Amendment freedom of the press.<sup>23</sup> The Framers in no way contemplated that the media would—or should—play the powerful role that they have come to occupy in the American system of representative democracy.<sup>24</sup> The Supreme Court decisions that have extended significant First Amendment protection to the media have, in the aggregate, been faithful to the text and broad philosophy of the constitutional provision.<sup>25</sup> Nonetheless, Americans ought to consider whether the media *should* have such unbounded freedom and influence.

The detailed explication of these questions, as well as of the problems of modern representative democracy that demand solutions, is a topic beyond the limited scope of this symposium on the legacy of *The Federalist Papers*. It makes one wonder, however, what answers Madison, Hamilton, and Jay, if alive today, might offer to a modern generation. Would their solutions be based wholly on the Constitution they so eloquently defended, or would they believe instead in the capacity of American democracy and its constitutional architecture to adapt to the changed circumstances of two hundred years of experience? The question is unanswerable, but the issues it frames

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22. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 23 (1976) (analyzing validity of the Federal Election Campaign Act under the First Amendment).

23. The First Amendment states in part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." U.S. CONST. amend. I.

24. Justice Story commented on the limits of the First Amendment:

That [the First A]mendment was intended to secure to every citizen an absolute right to speak, or write, or print, whatever he might please, without any responsibility, public or private, therefor, is a supposition too wild to be indulged by any rational man. . . . [T]he language of this amendment imports no more, than that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint, so always, that he does not thereby disturb the public peace, or attempt to subvert the government.

3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 993, at 703-704 (1833).

25. See, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (holding that the right of the media to attend criminal trials is implicit in the guarantees of the First Amendment). Regarding interpretation of the First Amendment, the Court stated: "[The First Amendment] must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." *Id.* at 576.

bear as much relevance for us today as similar questions bore for the Founding generation two centuries ago.

