

REMARKS ON *THE FEDERALIST* NUMBER 10

DAVID F. EPSTEIN*

Commentators well-disposed toward *The Federalist* are sometimes too forgiving, willing to overlook the inconsistencies, hastiness, and looseness of expression they find in the book. While this spirit of mercy is very admirable in a teacher and perhaps in a judge, it makes us less exacting readers. I believe that *The Federalist* is in fact a model of coherent thought and precise writing, and I will try to illustrate that by analyzing two distinctions Madison makes in *The Federalist Number 10*. I will conclude by contrasting *The Federalist's* view of these issues with views common today in American society and perhaps even in The Federalist Society.

The Federalist Number 10's definition of "faction" contains both of the distinctions I wish to speak about:

By a faction I understand 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.¹

Notice Madison's distinction between passion and interest. Notice also his distinction between the rights of other citizens and the permanent and aggregate interests of the community. This is not careless repetition or elegant variation; these are two fundamental distinctions. In the rest of *The Federalist Number 10* they appear repeatedly, in the same or similar words.

Madison says that the causes of faction are liberty, which allows men to divide themselves into groups, and diversity, which provokes them to do so.² One source of diversity is the fact that reason and passion influence each other, and opinion becomes the object of our passions. That is what makes one kind of faction: people getting passionate about their opinions. Now this behavior is so commonly observed that it evokes no wonder. But why do people become passionate about their

* Deputy Director of Net Assessment, Office of the Secretary of Defense; author, *THE POLITICAL THEORY OF THE FEDERALIST* (1984).

1. *THE FEDERALIST* No. 10, at 78 (James Madison)(Clinton Rossiter ed., 1961).

2. *See id.*

opinions? Why should I be angry if other people don't agree with me? If they understand my point, fine; if they don't, too bad for them; or maybe my point is doubtful or wrong. So why do we have heated arguments? Madison gives examples of this:

A zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice; an attachment to different leaders ambitiously contending for pre-eminence and power; or to persons of other descriptions whose fortunes have been interesting to the human passions, have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good. So strong is this propensity of mankind to fall into mutual animosities that where no substantial occasion presents itself the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions and excite their most violent conflicts.³

People with passionate opinions want to vex and oppress those who disagree with them. And if they don't have anything to disagree about they find something. These "frivolous and fanciful distinctions" were illustrated in *Gulliver's Travels* by the dispute between Big-Endians and Little-Endians over which end of an egg should be cracked.⁴ Like Swift, Madison is talking in part about religious doctrinal disputes. These disputes have their origin in man's belligerent spirit of self-assertion. This is really an attenuated form of political ambition; people do not necessarily insist on ruling, but they want their opinions to rule.

So much for passionate factions. Madison describes another kind of faction that is based on interest. It originates from the fact that the diverse faculties of human beings result in diverse kinds and degrees of property.⁵ Government's first object is to protect men's unequal faculties.⁶ Human faculties include living and breathing, and our abilities to labor and to think up ways of acquiring property. Government protects those faculties by protecting the fruits of their exercise.

Factions based on interest have a different character from factions based on passion. Interested factions are the most

3. *Id.* at 79.

4. See JONATHAN SWIFT, *GULLIVER'S TRAVELS* 29 (The Modern Library 1958)(1726).

5. THE FEDERALIST No. 10, *supra* note 1, at 79.

6. See *id.* at 80.

“common and durable”;⁷ passionate factions are intermittent. They arise, Madison says, “in turn.”⁸ So, successively, we have passionate factions divided over issues of Vietnam, Watergate, women’s liberation, nuclear war, abortion, and federal funding of performance art. But they don’t all happen at once. Passionate factions are more explosive; they like to “vex and oppress” their opponents.⁹ Interested factions are merely “interfering.”¹⁰ For labor to get more, management may have to get less, but interested factions do not vex and oppress each other just for the thrill of it the way passionate factions do.

Madison says that interested factions are so common that the regulation of these interests is the “principal task of modern legislation.”¹¹ Recall that the first object for any government is to protect human faculties. Modern government interprets that object as implying the task of regulating interests. Ancient and medieval governments had a different interpretation of man’s faculties. In *The Federalist Number 8*, Hamilton describes the ancient republics as nations of soldiers, where the important faculties were courage and virtue, not the ability to pursue economic gain.¹² Medieval governments judged that men’s crucial faculties were their eternal souls, and therefore sought to protect them.

Modern legislation hopes to avoid the explosive contention of passionate factions by making the protection of acquisitive faculties its principal task. But passionate factions arise anyway. Human beings divide themselves into passionately contentious groups even if no substantial occasion presents itself. It was this tendency that led the modern thinker Thomas Hobbes to conclude that men’s faculties were most likely to be protected if political liberty were abolished.¹³ Madison’s project is to defend a government that protects both the faculty of acquiring property—and, more generally, the exercise of “private rights”—and the faculty of opining or passionately opining, the faculty typically displayed in political life. I believe, but will not

7. *Id.* at 79.

8. *Id.* at 80.

9. *Id.*

10. *Id.*

11. *Id.*

12. See THE FEDERALIST No. 8, at 68-69 (Alexander Hamilton)(Clinton Rossiter ed., 1961).

13. See THOMAS HOBBS, LEVIATHAN chs. 13, 19 (C.B. Macpherson ed., Penguin Books 1968)(1651).

try to demonstrate here, that in Madison's view this passion is what justifies popular government.¹⁴ Human beings have a passionate wish to assert their own will, and popular government respects that wish. If democracy were understood not as an end in itself but only as a "check" on government, as Professor Macey suggests,¹⁵ England's government would suffice, because its one popular branch—The House of Commons—gives the people that check. But according to *The Federalist*, such a mixed government—partly, but not wholly, popular—is indefensible.¹⁶

Let me discuss more briefly the distinction between "the rights of other citizens" and "the permanent and aggregate interests of the community,"¹⁷ in other words between "justice" and "the public good." Each of these is described in *The Federalist* as the end of government. *The Federalist Number 51* says "[j]ustice is the end of government. It is the end of civil society."¹⁸ *The Federalist Number 45* says that "the public good . . . is the supreme object to be pursued" by government.¹⁹ This apparent contradiction should provoke further thought. *The Federalist* suggests a large degree of interdependence and harmony between the public good and private rights. Private rights depend on the existence of a public because our rights are not secure if foreigners can invade our country or criminals can attack us. Injustice tends to cause rebellion, which injures the public good. This makes respect for justice useful to the public good, as does the fact that protecting people's rights promotes economic prosperity.

Justice is the final, most fundamental object; that is why Madison calls it the "end of civil society."²⁰ The public good, however, is more commonly the object that government pursues. The Preamble to the Constitution makes this same dis-

14. See DAVID F. EPSTEIN, *THE POLITICAL THEORY OF THE FEDERALIST* chs. 3, 4, concl. (1984); David F. Epstein, *The Political Theory of the Constitution*, in *CONFRONTING THE CONSTITUTION: THE CHALLENGE TO LOCKE, MONTESQUIEU, JEFFERSON, AND THE FEDERALISTS FROM UTILITARIANISM, HISTORICISM, MARXISM, FREUDIANISM, PRAGMATISM, EXISTENTIALISM*. . . 130-38 (Allan Bloom ed., 1990).

15. Jonathan Macey, *Representative Democracy*, 16 HARV. J.L. & PUB. POL'Y 49, 51 (1993).

16. See *THE FEDERALIST* No. 39, at 240-41 (James Madison)(Clinton Rossiter ed., 1961).

17. *THE FEDERALIST* No. 10, *supra* note 1, at 78.

18. *THE FEDERALIST* No. 51, at 324 (James Madison)(Clinton Rossiter ed., 1961).

19. *THE FEDERALIST* No. 45, at 289 (James Madison)(Clinton Rossiter ed., 1961).

20. *THE FEDERALIST* No. 51, *supra* note 18, at 324.

inction when it says the Constitution is intended to “establish Justice” but to “promote the general Welfare.”²¹ Even though the creation of government should “establish” justice, in theory making its continuing promotion or pursuit unnecessary if the job has been done right, justice remains always at risk. As *The Federalist* Number 10 says, “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?”²² Legislation, properly understood, is judging. Far from saying that judges should legislate, Madison says legislators must judge. Rights are in danger not simply from “takings,” but from “regulation.” Any regulation may impinge on the exercise of human faculties. This means rights cannot be reduced to a set of rules, which is why *The Federalist* does not recommend a bill of rights as the security for justice, but rather recommends well-modeled political institutions and the social diversity of an extended sphere. Parchment definitions cannot encompass all of our rights if rights are understood as the protection of human faculties.

Let me conclude with two contrasts between *The Federalist* and contemporary thought. First, among those who discuss the protection of rights today, I find a preoccupation with the role of the courts and a neglect of the other parts of our constitutional structure. This change from *The Federalist*'s view is connected with a change in the understanding of the nature of rights. The authors of *The Federalist* saw natural rights as naturally attractive to human beings, so that a people not distracted by some impulse of passion or private interest would tend to support the protection of rights. If, on the contrary, we can only identify rights by considering rational beings in the abstract, if, as Rawls says, we must assume a “veil of ignorance” as to our particular circumstances in order to understand what is a just distribution of life's goods,²³ then we are less likely to think that actual as opposed to hypothetical human beings will be defenders of rights even in moments of calm.

A second contrast with contemporary thought concerns *The Federalist*'s “honorable determination” in favor of popular gov-

21. U.S. CONST. pmb1.

22. THE FEDERALIST No. 10, *supra* note 1, at 79.

23. JOHN RAWLS, A THEORY OF JUSTICE 12 (1971).

ernment.²⁴ Today, popular government is usually understood as simply a means to other ends, useful only in contrast to worse alternatives. Politics is understood as bargaining for private protection and advantage. For *The Federalist*, popular government is an end in itself that satisfies part of our human nature—the passionately opinionated or political part. If popular government is a means only, other means may seem more convenient or directly conducive to our real ends. The “honorable determination” for self-government that *The Federalist* ascribes to and shares with the American people is what animates the true “friend of popular governments.”²⁵

24. THE FEDERALIST No. 39, *supra* note 16, at 240.

25. THE FEDERALIST No. 10, *supra* note 1, at 77.