# CONSTITUTIONAL ARCHITECTURE

JOHN S. BAKER, JR.*

As Russia and the other countries of the former Soviet empire struggle to reconcile liberty with order and central power with local autonomy, while balancing the many competing factions found in democracies, their citizens are turning for guidance to *The Federalist Papers*.[1] As these new readers familiarize themselves with the entire collection of *The Federalist*, they are gaining insight not only into the structure and operation of the United States government, but also into the elements necessary for any successful democratic government. Meanwhile, most Americans have never read anything from *The Federalist* and, not surprisingly, they often fail to understand the constitutional foundations of our own liberty which is so much taken for granted.[2]

The East European example should embarrass Americans into studying *The Federalist*. Given the current rage within academia for multiculturalism, however, the prospects are not promising for reviving interest in a work written by three "dead white males" (James Madison, Alexander Hamilton, and John Jay, writing under the collective pseudonym "Publius"). Moreover, the climate of opinion within modern academia limits the discussion of liberty to the language of rights and shuns the study of governmental structures, so much emphasized in *The Federalist*, as antiquarian and even *antidemocratic*.

Studying the Constitution as explained by *The Federalist* could prove to be as foreign to Americans as it would be to East Europeans. Reading *The Federalist* forces a shift in thinking

---

* Professor of Law, Louisiana State University Law Center. B.A., 1969, University of Dallas; J.D., 1972, University of Michigan. Copyright 1990 John S. Baker, Jr. The author grants permission for copies to be made for educational purposes.

1. *See James Madison: Call Your Agent*, TIME, Sept. 16, 1991, at 21:

> Who's the hottest author in Moscow? Right now, freshly minted democrats there are eagerly devouring the works of a guy named Publius. James Madison, Alexander Hamilton and John Jay adopted that pseudonym back in 1787 when they wrote the 85 essays known as *The Federalist*. Muscovites are asking the American embassy for Russian-language copies of the essays. Their favorite part: Madison's eloquent description of the proper way to balance local autonomy with central authority. Two hundred years ago, his reasoned arguments helped persuade the states to ratify the U.S. Constitution.

2. *See* RESEARCH AND FORECASTS, THE AMERICAN PUBLIC'S KNOWLEDGE OF THE U.S. CONSTITUTION (1987)(providing data on the low level of the public's knowledge of the Constitution).

about the Constitution. It explains the protection of liberty not in terms of rights listed on a piece of paper, but in terms of properly structured governmental institutions. *The Federalist* uses the features of what, at that time, was a newly created structure to redefine key political terms—federalism, republicanism, and democracy. In reading *The Federalist* we come to realize that this structure is partially, although only partially, responsible for the "gridlock government" that frustrates many voters, but that the Founders intended as the most basic barrier against the threats to liberty posed by an activist government.

## I.

Some critics of an originalist jurisprudence cite the central role *The Federalist* played in the struggle for ratification of the Constitution, in an effort to denigrate the essays as mere advocacy.[3] *The Federalist*, however, advances many arguments which aim not at persuading the present audience, but at educating posterity.[4] Publius begins by concentrating on the historic significance of "establishing good government from reflection and choice [rather than] accident and force."[5] The vision is rhetorically forceful precisely because it extends beyond the immediate practical problem of Constitutional ratification to the successful implementation of an experiment that will determine for all time whether it is possible to establish government on the basis of reasoned reflection.

Indeed, the rhetorical quality of *The Federalist* is a strength, not a weakness. Our constitutionalism does and must operate through a public rhetoric. The debate about the Constitution has persisted since the ratification struggle. The system of separated and divided powers fosters this debate by creating competing centers of power which continually contend with each other. As Madison wrote, "Ambition must be made to counteract ambition."[6]

---

3. Jacobus tenBroek, *Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction*, 27 CAL. L. REV. 157, 163 (1939).

4. *See* David Epstein, THE POLITICAL THEORY OF THE FEDERALIST 2 (1984).

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

6. THE FEDERALIST No. 51, at 321-22 (James Madison)(Clinton Rossiter ed., 1961). A more fulsome excerpt is as follows:

> But the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all

The desirability of a government premised on a system of conflict might appear questionable given the public's impatience with "gridlock government" and "political bickering." Of course, many citizens do not know that our constitutional structure requires a certain amount of gridlock. Of those who do know, many do not understand why. If more citizens understood that the structure is a necessary protection for liberty they might be more patient—at least with respect to certain causes of gridlock. On the other hand, to the extent that over time the public may have become unwilling to wage what the Founders envisioned as a continual contest for liberty, then to a similar extent the prospects for self-government have dimmed.

The American public's impatience, however, appears attributable more to the pettiness of political figures than to a weariness with constitutionalism. In one sense, as the truism goes, the people are getting the leaders they deserve. Given that Americans generally understand little about the workings of their own government—certainly less than Americans did in the nineteenth century[7]—it should come as no surprise if great statesmen are in short supply. At the same time, the American people may be longing for leaders who can rekindle a public rhetoric reminiscent of the Founders.

Recurring to the writings of the Founders is not merely an act of piety—often derided as such by critics of originalism; rather, it is an introduction to a worthy public rhetoric. Widely acknowledged to be a classic of political theory,[8] *The Federalist* nevertheless differs from the other classics by not addressing some of the ultimate political questions. *The Federalist* is a

---

> other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.... 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. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights.

7. In the Nineteenth Century, students studied "constitutional catechisms." Justice Joseph Story was largely responsible for this development with his text for high school students and adults, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES (1840), which was based on his treatise, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833). Justice Story also produced a primer for lower grades.

8. *See generally* SAVING THE REVOLUTION: THE FEDERALIST PAPERS AND THE AMERICAN FOUNDING (Charles R. Kesler ed., 1987).

blueprint, not of the absolutely best form of government, but of the best actual government available under the circumstances. In founding a government, the authors of *The Federalist* are participating in what other great political theorists could only dream of. *The Federalist* answers the Antifederalists' attack in a debate which would determine fundamentally, and maybe finally, the future of self-government. The Federalists' arguments are more satisfying than contemporary political argument because they do not merely try to secure political power or an economic agenda; they advocate a more comprehensive vision of how and why this proposed government will achieve the public good.

Good rhetoric in the classical sense involves not only elegance of language but a reasoning which is practical rather than abstract. Thus, *The Federalist* reasons practically about the Constitution, that is, in terms of the Constitution's ends. This type of reasoning which is proper to constitutionalism involves structural interpretation. The best example of such reasoning may be Chief Justice Marshall's opinion in *McCulloch v. Maryland.*[9]

As applied to reading *The Federalist* itself, a rhetorical approach requires reading more than short excerpts. For example, often one—and probably the only—part of *The Federalist* assigned by teachers of constitutional law to students is an excerpt from *The Federalist Number 78* in which Hamilton makes the classic argument for the doctrine of judicial review.[10] Stu-

9. 17 U.S. (4 Wheat.) 316 (1819). For a discussion of structural interpretation, including references to *McCulloch,* see CHARLES BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

10. The following excerpt from *The Federalist Number 78* is included in GERALD GUNTHER, CONSTITUTIONAL LAW 15 (12th ed. 1991)(emphasis added):

> [Whoever] attentively considers the different departments of power must perceive, that in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them. The judiciary [has] no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgement . . . .
>
> Some perplexity respecting the right of the courts to pronounce legislative acts void, because contrary to the constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the act of another void, must necessarily be superior to the one whose acts may be declared [void].
>
> *There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void.*

dents, however, rarely read *The Federalist Number 84,* in which Hamilton writes that a bill of rights is "not only unnecessary . . . but would even be dangerous."[11] The fact that Hamilton both thinks judicial review essential and a bill of rights dangerous should prompt a lively debate about the role of rights and judicial review. Reading only *The Federalist Number 78*, however, probably does not move many law students to question what they are taught to think about judicial review, namely that the doctrine amounts to judicial supremacy. Quite demonstrably, however, judicial supremacy conflicts with the doctrine of separation of powers. Indeed, Hamilton argues strenuously against that very charge made by the Antifederalist Brutus who claimed that the judges of the federal courts would become supreme

*No legislative act therefore contrary to the constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid.*

If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the constitution. It is not otherwise to be supposed that the constitution could intend to enable the representatives of the people to substitute their *will* to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. *The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be, regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought of course to be preferred*; or in other words, the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Nor does the conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental. . . .

It can be of no weight to say that the courts, on the pretence of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGEMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove any thing, would prove that there ought to be no judges distinct from that body.

11. THE FEDERALIST No. 84, at 513 (Alexander Hamilton)(Clinton Rossiter ed., 1961).

over the legislature.[12]

Ignoring or selectively reading *The Federalist* has fostered a misreading of the Constitution and some landmark cases based on the Constitution. From the beginning, some of the most troublesome issues of constitutional law have involved federalism and judicial review. Thus, "states' rights" advocates tried to use *The Federalist* to attack decisions of the Marshall Court and to give a reading to the Constitution other than that defended in *The Federalist*.[13] In fact, the jurisprudence of the Marshall Court cemented *The Federalist*'s view into place. Chief Justice Marshall's choice of language in *Marbury v. Madison*[14] was strikingly similar to that of Hamilton in *The Federalist Number 78*,[15] though the latter was not cited. Also, Marshall's argument in *McCulloch v. Maryland*[16] employed essentially the

---

12. *The Federalist Number 81* addresses the argument that

> The authority of the proposed Supreme Court of the United States, which is to be a separate and independent body, will be superior to that of the legislature. The power of construing the laws according to the spirit of the Constitution will enable that court to mould them into whatever shape it may think proper; . . .'
>
> In the first place, there is not a syllable in the plan under consideration which *directly* empowers the national courts to construe the laws according to the spirit of the Constitution, . . . .

THE FEDERALIST No. 81, at 482 (Alexander Hamilton)(Clinton Rossiter ed., 1961).

13. Thus southern commentators in the nineteenth century used selections from *The Federalist Papers* "In behalf of state sovereignty," Jack N. Rakove, *Early Uses of* THE FEDERALIST," *in* KESLER, SAVING THE REVOLUTION, *supra* note 8, at 243.

14. 5 U.S. (1 Cranch) 137 (1803).

15. Compare the following small excerpt from *Marbury* with the italicized parts of *The Federalist Number 78* quoted *supra* note 10:

> Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.
>
> This theory is essentially attached to a written constitution, and is, consequently, to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.
>
> If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.
>
> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

5 U.S. at 176.

16. 17 U.S. (4 Wheat.) 316 (1819).

same terminology of *The Federalist Number 23*.[17] Lest there be any doubt, Marshall's colleague and friend on the Court, Justice Story, formally incorporated *The Federalist* into his authoritative treatise, *Commentaries on the Constitution*, by way of footnotes to his explanation of the Marshall court decisions.[18]

## II.

Critics of originalism somehow suppose that following the intent of the Founders is simply a matter of choice. In fact, the constitutional structure forces even non-originalists to adhere in large part to the intent of the Founders. The very arguments of non-originalists depend upon the doctrine of judicial review announced in *Marbury v. Madison*. However much they have distorted the doctrine, they must assume its legitimacy, which itself depends on history and the intent of the Framers. The ultimate retort to arguments against originalism is to ask why judicial review, derived from such old sources, deserves respect and preservation.

Judicial review was essential to *The Federalist's* teaching about the structure of the Constitution, but only as a part of the structure of separated powers. President Jefferson unsuccessfully advanced a different view of separated powers which would have altered the role of the judiciary and given the political branches more power.[19] By the time of President Jackson, the

---

17. THE FEDERALIST No. 23, at 152-57 (Alexander Hamilton)(Clinton Rossiter ed., 1961). Like *McCulloch*, the essay addresses "means and ends" to determine the extent of federal powers.

18. Rakove, *supra* note 14, at 246:

> Joseph Story's COMMENTARIES ON THE CONSTITUTION, first published in three volumes in 1833. Readers of the COMMENTARIES have long recognized Story's extensive reliance on Publius, but only when one compares the two texts patiently and systematically does it become possible to confirm that Story had been telling the literal truth when, in June 1831, he informed Chancellor Kent that "I mean to embody in them the *whole substance* of the Federalist." It would barely stretch the point to suggest that Story's COMMENTARIES amounted almost to a updated revision of *The Federalist*. Time and again, Story took as his point of departure not only the arguments but the very language—sometimes mildly paraphrased, but more often simply regurgitated—with which Publius had defended the various clauses of the Constitution.

19. *See* Letter of Thomas Jefferson to Abigail Adams (Sept. 11, 1804) *in* 8 THE WRITINGS OF THOMAS JEFFERSON 49 (Paul L. Ford ed., 1897):

> Nothing in the Constitution has given them a right to decide for the Executive, more than to the Executive to decide for them. Both magistrates are equally independent in the sphere of action assigned to them. The judges, believing the law constitutional, had a right to pass a sentence of fine and imprisonment; because the power was placed in their hands by the Constitution. But the executive, believing the law to be unconstitutional, were bound

structure of separated powers was so well institutionalized that, as Professor Forrest McDonald has written, "it made little difference. The order was firmly established and self-maintaining: constitutional government had become part of the second nature of *homo politicus Americanus*."[20] Thus the intent of the Framers has survived not merely as a theory of how this government should work but as an explanation of how it does in fact work.

The intent of the Framers "works" because, unlike much constitutional theorizing today, it is grounded in a realistic understanding of human nature. As explained in *The Federalist Number 10*,[21] the passionate side of human nature, with its strong tendency towards self-interest, poses a perpetual threat to liberty. Accordingly, the Constitution creates controls over self-interest by channelling and refining the effects of passion through a complex structure which prevents simple majoritarianism. Successful legislation must pass by a majority in House and by a differently-constituted majority in the Senate (even a super-majority if the legislation faces a filibuster), then gain the approval of the President who was elected by still another majority, and possibly survive a constitutional challenge before a Supreme Court composed of justices some, and possibly all, of whom have been appointed by a president other than the incumbent. The design of this government, which slows the enactment of legislation, is inefficient only if lots of legislation is deemed desirable. If, however, the suspicion is that legislation poses a threat to the natural order of society, where liberty thrives best, then this constitutional architecture proves to be quite effective in safeguarding liberty.

This system certainly frustrates pure democrats. However, even pure democrats find themselves in the minority on some issues and, occasionally, they discover the virtues of a properly structured "inefficiency." Minority views find protection in procedures such as the filibuster, which may "persuade" the majority to be "more reasonable." By slowing the implementation of majority will, the structure tends to produce consensus. If today it seems that the structure still operates slowly but pro-

---

to remit the execution of it; because that power has been confided to them by the Constitution. That instrument meant that its co-ordinate branches should be checks on each other.

20. Forrest McDonald, Novus Ordo Seclorum: The Intellectual Origins of the Constitution 292 (1985).

21. The Federalist No. 10, at 77-84 (James Madison)(Clinton Rossiter ed., 1961).

duces consensus less often, it may be that much of the modern "gridlock" results from changes made by Congress and the federal courts without due regard for the structure actually created by the Constitution.

Current conventional wisdom simply attributes "gridlock government" and "political bickering" to the situation of one party holding the Presidency and the other party controlling Congress. Based on this diagnosis, some academic doctors and prominent public figures would heal the body politic by replacing its old constitutional heart with a new parliamentary heart.[22] With the leader of government, the prime minister, selected by the majority in the legislative body, a parliamentary system appears more efficient. In fact, some parliamentary governments, such as those in Italy, have proven to be quite inefficient as well as unstable and short-lived.

More importantly, the current conventional wisdom has departed from the collective wisdom of the Founders. Both the Federalists and the Antifederalists agreed that a system of separated powers was essential to the preservation of liberty. Both cited the French political philosopher Montesquieu for the proposition that the "accumulation of all powers, legislative, executive, and judiciary in the same hands, . . . may justly be pronounced the very definition of tyranny."[23] The authors of *The Federalist,* however, thought that separated powers did not effectively exist in the state governments despite provision for it by written state constitutions.[24] *The Federalist* rejected such "parchment barriers"[25] as inadequate and relied on the power of institutions backed by men of ambition so that one branch of government would block the overreaching of another branch. This version of separated powers did not involve complete independence among the branches—a point of criticism from the Antifederalists. By providing for a presidential veto which itself could be overridden, they created a system which forces com-

22. The Committee on the Constitutional System, chaired by Senator Nancy Kassebaum of Kansas and including C. Douglas Dillon, former Secretary of the Treasury and Undersecretary of State, and Lloyd Cutler, former Counsel to President Carter, recommends a number of changes in the present constitutional structure. These changes, supposedly aimed at avoiding deadlock in government, would in fact create a government closer to a parliamentary system. *See* Frederick Schauer, 1990 Supplement to GERALD GUNTHER, CONSTITUTIONAL LAW (11th ed. 1985), at 139.

23. THE FEDERALIST No. 47, at 301 (James Madison)(Clinton Rossiter ed., 1961).

24. *Id.* at 307-08.

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

promise and thereby restrains the ability of any one faction to dominate the entire government. The countervailing pressures toward independence and compromise have generally produced a well-functioning system of separated powers.

III.

One complaint against the Constitution is that the government established therein is "not really democratic," because it slows down the implementation of majority will. The statement assumes a definition of democracy which is certainly not reflected in the Constitution; under that definition, the selection of federal judges is not democratic if the only standard is popular election. In *The Federalist,* Publius redefines democracy to conform to the governmental structure embodied in the Constitution. In doing so, Publius also modifies other terms—"separation of powers," "checks and balances," and "federalism." Without proper attention to the meaning of these terms, debate about the Constitution often gets derailed because the advocates advance arguments based on false premises about the meaning of terms.

The terms "separation of powers" and "checks and balances" were redefined by design. Although both the Federalists and the Antifederalists agreed that without a separation of powers there would be tyranny, they disagreed as to the degree of separation. Whereas the Antifederalists believed that the presidential veto and the interplay among the branches were evidence of a lack of separation, the Federalists praised this structure as improving the operation of separation of powers.[26] Initially, *The Federalist* explained that the checks and balances referred to bicameralism in the legislature.[27] Later, *The Federalist* discussed the incomplete separation among the branches as a form of check initiated to curb the natural predominance of the legislature and to strengthen the other two branches.[28] In effect, the "checks and balances" of bicameralism, serving as an internal check on the legislature, became incorporated as a countervailing force within separation of powers.

26. *See* THE FEDERALIST No. 47, *supra* note 23, at 300-3; THE FEDERALIST No. 48, *supra* note 25, at 308-13.

27. THE FEDERALIST No. 9, at 72 (Alexander Hamilton)(Clinton Rossiter ed., 1961)(discussing "the introduction of legislative balances and checks").

28. THE FEDERALIST No. 49, at 313-17 (James Madison)(Clinton Rossiter ed., 1961).

As the separation of powers forces the branches apart, checks and balances force them back together. The common practice of referring only to the term "checks and balances" as a substitute for separation of powers, however, produces different results. By itself, the term "checks and balances" can mean any type of check on power. Thus, the emergence of the administrative state since the 1930's, an attempt to ignore separation of powers,[29] involves checks and balances. These checks often conflict with the doctrine of separation of powers because they merge executive, legislative, and judicial functions. Checks and balances alone will not protect liberty and can lead to tyranny as defined by the Founders.[30] Indeed, in the view of this writer, emphasizing checks and balances over separation of powers is itself a major cause of "gridlock."

While the separation of powers within the federal government provided certain safeguards, the Antifederalists were much more concerned that a newly energetic central government could infringe on the powers of the states and the liberties of its citizens. Since the beginning, therefore, much constitutional and political debate has centered on the meaning of federalism. The Constitutional Convention created a new form of "federalism" that clearly resulted from the great compromise.[31] The compromise did not correspond to the accepted definitions of the words "federation" and "confederation," which at the time had the same meaning.[32] Even before

29. *See* Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 968 (1983)(White, J., dissenting)("The legislative veto developed initially in response to the problems of reorganizing the sprawling government structure created in response to the Depression.").

30. As Professor Forrest McDonald has explained,

> Many American Patriots became disillusioned with the idea of checks and balances by reading a single, grand polemical tract, Thomas Paine's Common Sense. To say that the English constitution was a "union of three powers, reciprocally checking each other," Paine wrote, is "farcical." . . .
>
> . . . .
>
> After Paine's onslaught, Americans tended, by and large, to embrace the doctrine of separation of powers rather than the idea of checks and balances.

McDONALD, *supra* note 20, at 83-84.

31. The original compromise—that states were to be represented in the Senate—lost much of its effect when direct election of Senators was instituted by the Seventeenth Amendment in 1913.

32. *See* McDONALD, *supra* note 20, at 284:

> Both terms, however, with their variants, acquired new meanings upon the establishment of the Constitution. Earlier, *federal* — as well as *foederal, federation, federalist*—had been used in two principal ways in America, one being neutral and nonideological, the other expressing a political stance. The neutral usage was interchangeable with confederation; it was descriptive of a league of

the convention the terms had begun to diverge, because the Federalists were identified as those advocating greater powers for the central government, while their opponents adhered to the structures set forth in the Articles of Confederation.[33] *The Federalist* contended that the Constitution created a structure which was neither a national government nor a confederation, but rather a compound republic as explained in *The Federalist Number 39*:

> The proposed Constitution, therefore, . . . is, in strictness, neither a national nor a federal Constitution, but a composition of both. In its foundation it is federal, not national; in the sources from which the ordinary powers of the government are drawn, it is partly federal and partly national; in the operation of these powers, it is national, not federal; in the extent of them, again, it is federal, not national; and, finally in the authoritative mode of introducing amendments, it is neither wholly federal nor wholly national.[34]

The new government was certainly not to be a purely national, that is, consolidated, government. Rather, it involved a novel splitting of sovereign powers. This compound republic has become equated with the term federalism. As Madison assured his colleagues in proposing the Bill of Rights, nothing in it would alter the structure of the Constitution;[35] that is, the Constitution would not revert to a confederation. He was alluding specifically to what would become the Tenth Amendment, which did not limit the powers given the central government beyond the restrictions contained in the body of the Constitution.

Federalists and Antifederalists, while agreeing on the goal of protecting liberty, also disagreed on the size of government

---

> otherwise autonomous states for purposes of mutual defense, trade, or any other shared objective. The nonneutral usage was more or less interchangeable with *nationalist* or *continentalist* or *unionist*.
>
> 33. In that sense it was appropriate for champions of the Constitution to designate themselves as Federalists and to call their opponents anti-Federalists — though it was equally appropriate, in light of the neutral definition and of the transfers of power inherent in ratification of the Constitution, that some Anti-Federalists should insist that they were acting on "true foederal principles" and that Federalists might properly be called consolidationists. In any event, after the adoption of the Constitution, a federal system meant one in which sovereignty was divided; thenceforth, only *confederation* was used to describe a league of sovereign entities.

*Id.*

34. THE FEDERALIST No. 39, at 246 (James Madison)(Clinton Rossiter ed., 1961).
35. 1 ANNALS OF CONG. 431-33, 441 (Joseph Gales ed., 1789).

which could provide protection. The Antifederalists believed that liberty could best be maintained by a small republic, in which people knew one another and knew their representatives.[36] In these small communities, they believed, people would be relatively equal in economic terms and would naturally work hard, thus cultivating civic virtue. Only at the local level was effective self-government possible in the view of the Antifederalists.

In contrast, the Federalists thought that small republics could be oppressive. A more powerful centralized government was necessary to protect liberty against two separate foes: the internal dangers of faction and the external dangers of foreign aggression. *The Federalist* explained that it is possible to combine both the advantages of a small republic with the strengths of a monarchy, without sacrificing societal virtue in the process.[37] This combination resulted in a federal government in the form of an extended republic.[38]

In creating a system of separated powers within a compound republic, *The Federalist* also redefined "democracy" by mixing it with the term republic. They considered a redefinition necessary for the term to be redeemed from the historical opprobrium attached to the label democracy.[39] This new version of popular government in the form of a democratic republic—a representative system of government—was intended to be quite large. Its complexity of structure achieved a balance among the goals of preventing tyranny and maintaining state autonomy under a single body. However, this new model also created many practical difficulties in resolving questions of separation of powers and of federalism, particularly questions of federal jurisdiction with which we are still struggling.

## Conclusion

Our own appreciation of the Founders' achievements—and therefore the relevance of original intent—depends largely on our notions about human nature and liberty. Today, the reigning view addresses human behavior, rather than human nature, in the language of "value-free" social science and refers to lib-

36. *See* Herbert Storing, What the Anti-Federalists Were For 15-23 (1981).
37. The Federalist No. 9, *supra* note 27, at 73-76 (discussing Montesquieu).
38. The Federalist No. 51, *supra* note 6, at 320-25.
39. The Federalist No. 10, *supra* note 21, at 80-1.

erty in such individualistic terms as to conflict with the possibility of a common notion of good order. Such a view is largely responsible for the attitude that law is merely a process, with justice understood as nothing more than equality in dividing the economic pie. The Founders' view, on the other hand, considered seriously the tension between human nature's capability of reasoning and its strong inclination toward the passions. Accordingly, the Founders designed the structure of government and the expanded size of society to inhibit the natural tendency of the passions to override reason in ways inconsistent with justice.

> Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit. In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger; and as, in the latter state, even the stronger individuals are prompted, by the uncertainty of their condition, to submit to a government which may protect the weak as well as themselves; so, in the former state, will the more powerful factions or parties be gradually induced, by a like motive, to wish for a government which will protect all parties, the weaker as well as the more powerful. . . . In the extended republic of the United States, and among the great variety of interests, parties, and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good; whilst there being thus less danger to a minor from the will of a major party, there must be less pretext, also, to provide for the security of the former, by introducing into the government a will not dependent on the latter, or, in other words, a will independent of the society itself. It is no less certain than it is important, notwithstanding the contrary opinions which have been entertained, that the larger the society, provided it lie within a practicable sphere, the more duly capable it will be of self-government.[40]

The Founders, however, realized that civic virtue was ultimately necessary for the maintenance of liberty with justice. While the Antifederalists were more concerned about the issue of virtue, *The Federalist* also understood its necessity for good government. Thus, in matters not "necessary or proper" for

40. THE FEDERALIST No. 51, *supra* note 6, at 324-25.

the federal government, the Constitution left autonomy to the states and local governments. That the nurturing of virtue could best be done locally was reflected in the fact that, while the Constitution was being drafted, the Congress passed the Northwest Ordinance providing for the establishment of local schools together with the encouragement of religion.[41] Religious freedom and widespread education were deemed essential to the promotion of civic virtue, all to be cultivated at the local level.

The preservation, or possibly the rekindling, of virtue remains an issue today. Along with, and supporting the structure of, the Constitution itself, civic virtue restrains human passion and makes a political order characterized by liberty and justice possible. At a minimum civic virtue requires a widespread basic understanding of and adherence to the obligations of citizenship. Apropos of this subject, Justice Scalia has remarked:

> The Constitution will endure, . . . only to the extent that it endures in your understanding and affection. That is why I used to find it so upsetting, when I taught constitutional law, to learn how many law students in major universities—the best, and the brightest, and presumably those most interested in the law—had never read, cover to cover, such a basic part of our constitutional tradition as the Federalist Papers.[42]

41. The Northwest Ordinance itself, enacted July 13, 1787, provided in Article 3 that "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Ordinance of July 13, 1787, 1 Stat. 475, 479 (1815).

Then on July 23, 1787, acting pursuant to the Land Ordinance of 1785, Congress specified that a section of land would be used for purposes of religion: "The lot No. 16, in each township or fractional part of a township, to be given perpetually for the purposes contained in the said ordinance. *The lot No. 29,* in each township or fractional part of a township, to *be given perpetually for the purposes of religion.*" Powers to the Board of Treasury to contract for the sale of Western Territory, 1 Stat. 573 (1815)(emphasis added).

42. Antonin Scalia, Speech at the University of Georgia (Apr. 6, 1989), at 11.