



UNLOCKING
THE
FEDERALIST PAPERS

Edited by
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We attempt in this volume to accomplish what the subtitle suggests: unlock the full wisdom, thought and power of the *Federalist Papers* to countless generations of young Americans.

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To Make Their Interests Coincide With Their Duty

How the Constitution Leads Public Officials to Make Good Decisions

by Robert T. Miller

Federalist Papers referenced in essay: #1, 3, 6, 10, 15, 39, 51, 57, 68, 72, 84

A. “*The true test of a good government is its aptitude and tendency to produce a good administration* (No. 68).” Like every sentence in the *Federalist Papers*, this needs to be read carefully. You may think Hamilton means a *good government* is one in which public officials make wise and prudent decisions—that is, produces what he calls a *good administration*. If that is what you think, you missed his point. An absolute dictator may make wise and prudent decisions, if he happens to be wise and prudent and possesses a particularly virtuous character. The Roman emperor Marcus Aurelius was perhaps such a ruler. Human experience, which Hamilton calls the “*best oracle of wisdom*” (No. 15), has shown that dictators tend to be quite the opposite, inflicting misery and ruin on the peoples they rule. The possibility of good dictators doesn’t make dictatorship a good form of government. Hamilton does not mean a good government is one in which the rulers make good decisions; he means something more complicated. He implies a good government has an internal organization—a constitution—that tends to cause public officials to make good decisions.

B. A constitution that tends to cause public officials to make good decisions sounds simple. As Madison says:

The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold the public trust. (No. 57)

Like so many things, however, devising such a constitution is easier said than done. The brilliance of the American Constitution—the reason it has survived so long and been copied so often, becoming a model to the world—is that it largely solved this problem. It creates a system of procedures for selecting public officials and ordering how they make decisions that are in the best interests of society. How does it do that?

C. To answer that question, it helps to take a step back and see what the Founders thought about the origins and purposes of government and about human nature. In No. 15, Hamilton asks, “*Why has government been instituted at all? Because the passions of men will not conform to the dictates of reason and justice, without constraint.*” In other words, if not controlled by a superior force, people will violate the rights of others. As the Declaration of Independence says, “To secure these rights, Governments are instituted among Men.” That means a government, if it is to fulfill its essential function, must be powerful enough to protect its citizens against threats to their rights and interests, whether from foreign nations or homegrown wrongdoers. The constitution created by the Articles of Confederation proved far too weak in this regard, and was one reason the Framers met in Philadelphia in 1787—to propose to the American people changes that would make the federal government more powerful.

D. We need a government powerful enough to protect our rights. Solving this problem, however, immediately creates another and potentially even worse issue. For, as Madison famously puts it, “*If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary* (No. 51).” That is, if everyone always acted fairly and reasonably, there would be no wrongdoers for government to restrain, and so government would be unnecessary. Furthermore, if public officials always acted fairly and reasonably, the form of government would not matter, since such morally perfect government officials would never misuse the power of government. But humans do not always act fairly and reasonably. In fact, “*men are ambitious, vindictive, and rapacious*” (No. 6), and they often act out of pride, jealousy, greed, rage, sentiment, partisanship, and the love of power. This is as true of people chosen to be public officials as of any others. Hence, it is a dangerous thing to entrust humans with the power of government, for they can use the very powers granted to protect the rights of citizens to violate those rights. Madison continues,

In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. (No. 51)

E. You may think it is easy to prevent government officials from misusing their power. All you have to do is include in the constitution a bill of rights: a list of rights that the government may not violate. Our Constitution, as it currently exists, includes a bill of rights in its first ten amendments, but the original document drafted in Philadelphia in 1787 did not. The authors of the *Federalist* thought it was actually better that way (No. 84). This was not because they thought such rights were unimportant; on the contrary, they were extremely zealous to protect them. They

thought the mere recitation of such rights in a bill was not an effective method of protecting them. Hamilton wrote that security for our rights, “*whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government,*” which is “*the only solid basis of all our rights* (No. 84).” If there is a strong enough desire among the people and their public officials to violate someone’s rights, then a bill of rights protecting those rights is a mere “*parchment barrier* (No. 48)” and the government will violate the right, nonetheless.

F. Experience has largely confirmed this view. In *Plessy v. Ferguson* (1896), the Supreme Court held, without violating the Equal Protection Clause of the Fourteenth Amendment, a state could maintain “separate but equal” public facilities for black citizens and white citizens—a view that it would later reject in *Brown v. Board of Education* (1954). What changed between 1896 and 1954? Not the text of the Fourteenth Amendment— it is exactly the same. What changed was “public opinion” and “the general spirit of the people and of government,” which had come to regard racial discrimination as gravely unjust. What good were words on paper without individual citizens to remind us of them; without judges on the Supreme Court inclined to enforce them; without a man like President Eisenhower willing to use federal troops to carry the court’s decision into effect; and, most important of all, without an American public who, for the most part, supported President Eisenhower’s decision?

G. In the view of the Framers, the true safeguard of the rights of the people are not enumerations of these rights on paper, but systems of government that empower individuals inclined to respect them. And this brings us to our original problem: how do we organize government so the procedures whereby public officials are selected and their decisions will tend to result in

decisions that benefit the public? The answer to this question is one of the great insights embodied in the Constitution and explained in the *Federalist Papers*. As Hamilton puts it: “*The best security for the fidelity of mankind is to make their interests coincide with their duty* (No. 72).” In other words, given that humans are generally self-interested (and often ambitious, greedy, vain, and jealous), we should use these motives to protect the public interest by cleverly arranging the internal structure of the government so office holders will find it in their *self*-interest to make decisions that promote the *public* interest.

H. The first means of accomplishing this arises from the most basic structure of the government—that is, from its being a republic. “*We may define a republic,*” Madison writes, “*to be ... a government which derives all its powers directly or indirectly from the great body of the people*” and

[i]t is Sufficient for such a government that the persons administering it be appointed, either directly or indirectly, by the people; and that they hold their appointments” either “during pleasure, for a limited period, or during good behavior. (No. 39)

Public officials must have, Madison suggests, “*a dependence on the people* (No. 51).” The public officials must obtain, and retain, their offices only if the people generally are satisfied with them. Public officials must periodically stand for election and re-election, as do our senators, representatives, and presidents (in Madison’s terms, “direct” appointment by the people); or must be appointed or removed by such officials, as our cabinet secretaries, heads of administrative agencies, and judges (in Madison’s terms, “indirect” appointment by the people).

I. This idea seems simple, but it comes with important assumptions. Since we want public officials to make decisions that

benefit not just one class or group of people, but the public interest generally, it is essential the ultimate power to choose officials comes from “*the great body of society, not from an inconsiderable proportion, or a favored class of it* (No. 39).” If only one class of person determined who the public officials would be, we could expect public officials to make decisions favoring people in that class, not benefiting society as a whole.

J. Furthermore, it is easy to see how, if public officials depend on the people for getting and retaining office, they have an incentive to do what the people want. However, this is not the same as saying they have an incentive to do what’s in the public interest—what really contributes to the good of society. Thus, Jay writes, “*the people of any country (if, like the Americans, intelligent and well-informed) seldom adopt and steadily persevere for many years in an erroneous opinion respecting their interests* (No. 3).” It is a fundamental presupposition of the Constitution that, by and large, the American people are intelligent and informed enough to be the best judges of what is in their own interest.

K. That idea may sound trivial, but it has profound implications. For instance, some people think wealthy individuals, big corporations, and powerful unions are able to “buy” election results by tricking a majority of the people into electing representatives who will advance the financier’s interests instead of the public’s. These concerns may lead to calls for campaign finance reform, but the Framers would have had none of this. Madison asks,

What are we to say to the men who profess the most flaming zeal for republican government, yet boldly impeach the fundamental principle of it; who pretend to be champions for the right and the capacity of the people

to choose their own rulers, yet maintain that they will prefer those only who will immediately and infallibly betray the trust committed to them? (No. 57)

For the Framers, faith in the good sense of the people is the ultimate safeguard of liberty.

L. Although “*a dependence on the people is, no doubt, the primary control on government,*” nevertheless “*experience has taught mankind the necessity of auxiliary precautions* (No. 51).” How so? By creating within the same government “*opposite and rival interests*” so “*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 sentinel over the public rights* (No. 51).” This is the famous system of checks and balances. In this system, before the government can act, the Constitution generally requires the concurrence of many public officials, so, if some are embarking on a course of action that might benefit some people, but is nevertheless detrimental to the public interest, other officials will have an incentive to oppose or stop that action, alerting the public to the danger and hoping thereby to capture the goodwill of the public. Since all public officials are dependent, directly or indirectly, on the will of the people, if a measure is contrary to the best interests of the whole, any public official who exposes the measure as such is likely to be rewarded by the people, either by being retained in office or even promoted to higher office. Thus, the system makes “*their interest coincide with their duty* (No. 72).”

M. The legislative process is an obvious example of this principle. One of the most important functions of government is to make laws, and under the Constitution, all three branches of government must, in one way or another, agree in order to pass the law. Congress must pass the law, but, since the legislative branch

is the most powerful branch of government, the Constitution intentionally weakens it by dividing it into two houses and requiring the concurrence of both to make a law. The purpose of this is “*to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on society will admit* (No. 51).” So, if a law is popular in a large number of states, but not in states accounting for a majority of the population, it may pass in the Senate, but likely fail in the House of Representatives. Similarly, if a law is popular in states with a majority of the population but not in a majority of the states, it may pass in the House of Representatives, but fail in the Senate. Only if a law is both popular with a majority of the population as a whole and in a majority of states is it likely to pass both houses. After that, the president may veto the law (subject to the two-thirds congressional override) if he believes it is contrary to the public interest. Yet still, the courts may strike it down if they determine it is unconstitutional.

N. By requiring significant support across different constituencies in society, the Constitution makes passing laws very difficult. Some people complain about “gridlock” in Washington: the houses of Congress and the president cannot agree about what to do, and so little gets done. The Framers would likely have had little patience with this complaint. They intentionally wrote a constitution that requires the concurrence of many in order to ensure the tremendous power of government is used wisely in a way that a good majority of the people are likely to think wise—and that is the best guarantee that it really will be wise.

O. This system of pitting public official against public official and creating incentives so public officials will act in the public interest permeates the Constitution. “*In a single republic,*” Madison writes, “*all the power surrendered by the people is*

submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments,” - meaning the separation of powers in the legislative, executive, and judicial branches of government. In America however, power “*is first divided between two distinct governments,”* meaning the federal government and the states, “*and then the portion allotted to each [is] subdivided among distinct and separate departments (No. 51).”* The division of government power between the federal government and the state governments is known as the *vertical separation of powers*, and the division within each level of the legislative, executive, and judicial departments is known as the *horizontal separation of powers*. By using this dual separation, “*a double security arises to the rights of the people*” for the “*different governments will control each other, at the same time that each will be controlled by itself (No. 51).”*

P. In perhaps the most ingenious application of the principle, the Framers realized the larger the country, the better the principle will work. Public officials elected by different groups of people in different parts of a large country will inevitably represent the interests of those who elect them. “*What are the different classes of legislators but advocates and parties to the causes which they determine (No. 10)?”* In a large country like America, you “*extend the sphere, and you take in a greater variety of parties and interests,”* and in this way “*you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens (No. 10).”* In theory, for each special interest, there will be an opposed special interest, as well as a large population not likely to be biased one way or the other. This disinterested group can best judge which party’s position corresponds with the public interest and throw its support behind that group.

Q. The Securities Exchange Act of 1934 is a good example of the special interest principle in action. Under the provisions of this act, corporate executives can be sued for securities fraud if they misrepresent the status of their corporation's business. The executives don't like this, and are constantly lobbying Congress to restrict such lawsuits. They argue many of the suits brought are frivolous; the lawyers who bring them do so only to collect a fee, and the suits provide no real benefit to the corporation's shareholders. The lawyers who bring the suits, of course, see things quite differently: They say the government lacks resources to detect cases of securities fraud. Without the lawyers' efforts, corporate managers committing fraud would never be caught, thus the integrity of the marketplace ultimately depends on their efforts, which entitle them to the fees they earn.

R. So, here we have two special interests—corporate executives and trial lawyers—each with a personal stake in the matter, and both lobbying Congress about how best to deter securities fraud without overburdening companies with frivolous lawsuits. One special interest tends to balance out the other, and, in recent years, Congress has made changes to the securities laws that have reduced the number of frivolous lawsuits without allowing real fraudsters to go unpunished. It is a messy system, but, as the Framers envisioned, it tends to produce tolerably good results.

S. One final thought about why this should be important to you. As Benjamin Franklin was leaving the last meeting of the Philadelphia Convention, someone asked him what kind of government the convention had designed. He answered, "A republic—if you can keep it." He meant that, no matter what the Framers wrote on paper, the system would endure only if the American people remained intelligent, informed, interested in questions of the public good, and ready to participate in the processes of government. As Hamilton put it:

[I]t seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force. (No. 1)

That question has to be answered, again and again, by each generation of Americans. Over the course of your lifetime, the responsibility will be yours to ensure “government of the people, by the people, for the people, shall not perish from the earth.”