

What Publius Knew and Didn't Know

James R. Stoner, Jr.
Louisiana State University
poston@lsu.edu

Prepared for a panel on "American Political Theory"
at the annual meeting of the Southern Political Science Association,
New Orleans, Louisiana
January 13, 2017

What Publius Knew and Didn't Know

Even the fondest admirers of *The Federalist* today—among whom I would be happily included—balk before claiming for the essays the encomium Thomas Jefferson immediately bestowed upon them in a letter to one of the authors: “...the best commentary on the principles of government which ever was written.”¹ Unlike Jefferson’s Declaration of Independence, *The Federalist* contains no statement of first principles: nothing on natural rights or on duties to God, only one mention of the law of nature, in the context of quoting the Declaration to justify the mode of ratification. The *Papers* were written for a practical end—to encourage ratification of the proposed Constitution—in dialogue through the newspapers with the plan’s opponents, over the course of several months and at an impressive clip. To be sure, their polemical edge is a part of their greatness, as the authors never lost focus and seldom digressed, exhibiting instead the depth of thought that went into the deliberations that produced the document and conveying the urgency of a right decision on the part of those to whom they are addressed. The suggestion in the first number that the choice facing the state conventions in 1787 and 1788 would settle for all mankind “the important question, whether societies of men are really capable or not, of establishing good government from reflection or choice, or whether they are forever destined to depend, for their political constitutions, on

¹ Thomas Jefferson to James Madison, November 18, 1788, available online at <https://founders.archives.gov/documents/Madison/01-11-02-0257>

accident and force”² might have seemed rhetorical exaggeration, but it has been vindicated by events. In a small coastal city on the edge of the frontier of European civilization, the American founders invented a polity that not only changed the world but altered the way that politics itself was to be understood. Principles are indeed referred to throughout *The Federalist*—a simple search for the word “principle” yields 211 occurrences—and while mention is often made of “principles of liberty” and especially “republican principles,” often the reference is more mundane: to principles of compromise, or of discharging the nation’s debt, or of navigation, or of policy, or simply, as Jefferson said, of government. As Michael Zuckert has argued and Harvey Mansfield has also explained, *The Federalist* is not a work of political philosophy, but instead of political science, or at least its arguments rest upon what its authors call the “science of politics.”³

For reasons too numerous and too fragile to receive due consideration here, most modern political scientists are not so impressed by the political science of the founders that they feel a need to engage it, whether to learn or to refute. In this paper, I do not share their indifference, but instead will confront several issues where it seems that Publius got it wrong, that is, where his political science did not adequately anticipate how the system would function. The first concerns the separation of powers and in particular the anticipation that the legislative branch would naturally predominate in a republican government. The second concerns the

² Alexander Hamilton, John Jay, James Madison, *The Federalist*, ed. George W. Carey and James McClellan (Indianapolis: Liberty Fund, 2001; orig. 1788), no. 1, p. 1.

³ Michael Zuckert, *The Natural Rights Republic* (South Bend, Ind.: University of Notre Dame Press, 1997); Harvey C. Mansfield, Jr., *America’s Constitutional Soul* (Baltimore: Johns Hopkins, 1991); *The Federalist*, no. 9, p. 38.

mechanism for the election of the president, popularly known as the Electoral College but defined in the document itself simply as the appointment of and voting by Electors. The third concerns the development of political parties, that is, organized and relatively stable coalitions of interests across the country, able to form governing majorities that enact and enforce their political program against all opposition. The fourth concerns the eventual dominance of the central government over the government of the states, undeterred by the limits implicit in the enumeration of powers. Finally, there is the question of the Supreme Court, which today often acts like that “will in the community independent of the majority, that is, of society itself,” that Publius warned against.⁴

Of course to speak of what Publius got “wrong” requires attention to what he claimed to get right. Here, despite the self-confidence exuded in the first number, one cannot help but be impressed by his caution and by the modesty of his claims. In *Federalist* no. 37, Madison writes at length about the uncertainty of all human knowledge, but particularly of knowledge about politics, identifying “three sources of vague and incorrect definitions; indistinctness of the object, imperfection of the organ of perception, inadequateness of the vehicle of ideas.”⁵ Later, in no. 82, Hamilton explains that, whatever can be determined at the moment of the founding, much remains to be worked out in the course of practice:

⁴ *The Federalist*, no. 51, p. 270. Other informative essays addressing the question of what Publius “didn’t know” include William Galston, “Constitutional Surprises: What James Madison Got Wrong,” in Benjamin Wittes and Pietro Nivola, eds., *What Would Madison Do? The Father of the Constitution Meets Modern American Politics* (Washington: Brookings, 2015), and Edward C. Banfield, “Was the Founding an Accident?,” in Charles Kesler, ed., *Saving the Revolution: The Federalist Papers and the American Founding* (New York: Free Press, 1987). Together the volumes are a good introduction to those political scientists who do take the political science of Publius seriously.

⁵ *The Federalist*, no. 37, p. 183.

The erection of a new government, whatever care or wisdom may distinguish the work, cannot fail to originate questions of intricacy and nicety; and these may, in a particular manner, be expected to flow from the establishment of a constitution founded upon the total or partial incorporation of a number of distinct sovereignties. Time only can mature and perfect so compound a system, liquidate the meaning of all the parts, and adjust them to each other in a harmonious and consistent WHOLE.⁶

Moreover, throughout *The Federalist*, literally from the first paper to the last, Publius indicates an awareness that partisan feelings are likely to distort or at least to color all political analysis, not excepting his own. Practically he counsels a “spirit of moderation” to those who undertake to argue about forms of government, not in most fields the mark of a scientific disposition. In short, whatever Publius knew was qualified by the obscurity of political principles, the mists of future choice, and the clouds of partisan passion. To find that he got something wrong would more likely arch his brow than bruise his ego.

Nevertheless, there is one difficulty in the argument that I want to show, and then I think I can indicate how the other consequences flow from it, directly or indirectly. This involves the legislative power of Congress and the character of federal representation. To understand the difficulty one needs first to recall the novelty of the form of government established by the Constitution. The model of the Confederation was simple enough: Each state had a government, formed of and by

⁶ *The Federalist*, no. 82, p. 426. This anticipates what political scientist Keith Whittington calls “constitutional construction,” in *Constitutional Construction: Divided Powers and Constitutional Meaning* (Cambridge: Harvard University Press, 2001).

the people, which possessed sovereign power and divided its functions among various institutions as it chose. These governments sent delegates to a gathering, a Congress, which had responsibility and authority for matters of external sovereignty—fighting wars, making treaties—but had no sovereign power domestically. Congress could not raise taxes, only requisition funds from the states, who alone had authority to tax. Congress had no executive authority and no courts, except an ad hoc tribunal designed to settle disputes among the states. As was discovered after the Revolution, even the enforcement of its treaties was subject to judicial determinations in the states. Strictly speaking, I do not believe the Articles Congress had legislative authority at all, unless ancillary to its foreign powers and in very tentative, restricted ways.

The Constitution meant to change all that. Now the central authority would be a general government, fully sovereign in the matters accorded to its care—republican, to be sure, like the states, only extended like an umbrella over top of them. This new general government would derive its power from the people (hence the importance of ratification by conventions in the states) and would be able to act directly upon the people, rather than only upon the states in their corporate capacity. It could tax; it would have its own courts; it would have an executive power headed by a commander-in-chief, an officer somewhere between a governor and a king. Its legislative branch would be clearly granted the power to make laws on a variety of subjects, as well as to tax and of course to borrow and spend money (the latter were things even the Articles Congress could do, until they ran their credit dry); not until the Committee of Detail issues its report to the Federal

Convention on August 6, 1787, is the name “Congress” revived to describe the new legislature, which had been simply called the National Legislature in the Virginia Plan. When the Anti-Federalists referred to a “solecism” in politics or the Federalists to the unexampled novelty of the form they had devised, they meant precisely this: That a central government with sovereign power was to be laid upon the preexisting state governments, with sovereignty divided as to areas of responsibility, not as to the degree of authority. Both were empowered to tax, to regulate, to punish, to settle conflicting claims, and to call forth the public force, at least within their spheres of responsibility. Naturally it was understood that the spheres would interface, that the laws of each would be raised in the courts of the other, but they trusted to the Supremacy Clause and to the logical capacities of the judiciaries, federal and state, to sort out the details. Imagine a feast with different service crews responsible for the food and the drink—or better, a simultaneous feast with thirteen separate kitchens preparing and serving the food, but a single sommelier and his team serving wine to all—and of course two tabs and two tips. There would of course be challenges in coordination, but nothing beyond American ingenuity, and the kitchens might even learn to compete for guests.

Would republican government writ large be the same as republican government in the familiar dimensions of a state? Is size an accident? Here is where Publius is, I think, deeply ambiguous and problematic. On the one hand, according to the familiar argument Madison makes in *Federalist* no. 10, size matters quite a lot: Government over an extended sphere breaks the violence of faction, by incorporating more interests and affinities and by making combination among them

in any scheme to oppress or to profit more difficult. “[A] coalition of a majority of the whole society could seldom take place upon any other principles than those of justice and the general good,” writes Madison confidently.⁷ This is not an automatic effect, but comes about in part because the federal government will attract a different sort of legislator than the states. In no. 10 he explains how “the proportion of fit characters” available for election will be greater in a large republic than a small, since the electorate increases in size more than the representative assembly possibly could, favoring the happier consequence of representation—“to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice, will be least likely to sacrifice it to temporary or partial considerations”—and discouraging the “inverted” triumph of factious politicians.⁸ Moreover, the tasks of legislation being different, he later explains, the kind of knowledge required for the job would be different as well. On the one hand, the knowledge of a federal legislator must be more extensive, justifying more than an annual term: He must know the laws and the circumstances of the several states, as well as foreign affairs and the laws of other nations. Some of this knowledge can be “acquired in a man’s closet,” Madison writes, but some depends on “a practical application to the subject, during the period of actual service in the legislature.”⁹ Several numbers later, however, Madison makes anew the case for closet knowledge. Explaining why it is safe for federal representatives to have only a

⁷ *The Federalist*, no. 51, p. 271.

⁸ *The Federalist*, no. 10, pp. 46-47.

⁹ *The Federalist*, no. 53, p. 280.

limited acquaintance with all the “interests and circumstances of his constituents,” Madison appeals to the limited purview of federal power, saying a representative’s knowledge need only be proportionate to his regulatory authority; for example, “A skillful individual in his closet, with all the local codes before him, might compile a law on some subjects of taxation for the whole union, without any aid from oral information.”¹⁰ To be sure, soon afterwards he appeals again to refinement and enlargement: It is likely, he writes, that members of Congress will have served in the legislatures of their states, enabling them to bring to Congress all the others need to know about their home states, even as it takes time for them to learn about the others.

In short, though congressmen may once have sat in the legislatures of their states, Madison anticipates that Congress will be a very different place than a state legislature. The Anti-Federalists complained that the general government could never be truly republican because the people could never be represented at such a distance; there are too few federal representatives to reflect the people in their fully variety and array, and they are too distant to be appraised of everyday concerns and to receive timely communication. Madison admits that federal representation will not be the same as state representation, that the connection of Congress to the people will not be organic and comprehensive as is, I think he supposes, representation in the states. He thinks this is in some respects a good thing; as the people’s agents for limited purposes, they are less apt to succumb to the factious ways of a body that more faithfully represents the multitude. It is at any rate not a

¹⁰ *The Federalist*, no. 56, p. 292-293.

bad thing; Congress is still republican because, at least in its popular branch, it is elected directly by the people, indeed by constitutional design the same electorate that chooses the popular branch of the legislature in the states. Nor is Madison alone in his thinking. In *Federalist* no. 35, Hamilton likewise makes it clear that the members of the federal legislature are likely to be a more select group than the full range of types to be found in the states, precisely by the voters' choice: Large landowners will be picked to represent all the landed interest, merchants to represent manufacturers as well as themselves, and lawyers will abound.

But here is the catch, or what I called above the ambiguity: Although Publius speaks of Congress as really different from the legislatures of the states when discussing the House of Representatives—and certainly the Senate, elected as it is by the state legislatures—and more generally when discussing the extended sphere, when treating the separation of powers Publius assumes the federal legislature will act the same way state legislatures do because they will draw on the same sympathy of the people:

In a representative republic, where the executive magistracy is carefully limited, both in the extent and the duration of its power; and where the legislative power is exercised by an assembly, which is inspired by a supposed influence over the people, with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude; yet not so numerous as to be incapable of pursuing the objects of its passions, by means which reason prescribes; it is against the enterprising

spirit of this department, that the people ought to indulge all their jealousy, and exhaust all their precautions.¹¹

The ambiguity is not in the matter of the size of the body; Madison explains very well in the papers on the House that there is an optimum size beyond which no house should go; that the larger the body is, the fewer are those who control it; and that there is a psychology of crowds that affects even the most rational man: “Had every Athenian citizen been a Socrates, the Athenian assembly would still have been a mob.”¹² Rather it is in the connection supposed with the people, the “intrepid confidence” that comes from shared identity. Why should this be supposed to exist in the Congress he describes, whose representatives tend to be scholars or to make use of scholars, whose class background is confined to the wealthier or better educated or at any rate the more ambitious, whose remoteness from the people, or at least the less refined among them, is seen as a virtue or a likely cause of or support for virtue? If Congress will be less unruly, then they have less need to be confined, or at any rate, they may not be the chief source of popular danger.

And that leads to my foreshortened conclusion: On the basis of Publius’ own understanding of representation in Congress, he ought to have feared the legislature less—and therefore, perhaps, the executive more. Contrary to most accounts of the system of Electors, Hamilton very clearly explains what Madison’s *Notes* also show, namely that the intention and effect of the system was to gather the will of the people in the choice of the president. Why wouldn’t that give him—as by the seventh president already it did—the “intrepid confidence” of carrying the people’s

¹¹ *The Federalist*, no. 48, p. 257.

¹² *The Federalist*, no. 55, p. 288.

voice? The party system, which organized Madison's factions into stable coalitions, not least through the efforts of Madison himself at the outset, arose precisely to form a coalition capable of electing a president and then allowing him effectively to govern. Whatever the initial intent of the framers regarding the formation of parties in presidential elections, the reworking of the system by the Twelfth Amendment clearly endorsed it, though its full effect would only later emerge. As the focus of the national people, a strong presidency naturally became a force for centralization of authority; energetic government for limited ends was always precarious, and in the hands of a Roosevelt (or two) and a Wilson, necessities could be found to endorse expansive presidential leadership that would address every problem the people's purported leaders could identify, leaving it to the lawyers to find a way around the Constitution, or rather, to explain its development. Could the Court tackle this behemoth? Perhaps at times it has forced a change of course, but why wouldn't it also take advantage of the weakness of Congress, a legislative body that forgets how to legislate on its own and within its own sphere and now finds fundamental law made—one almost wants to say, routinely made—by a panel of nine judges.

What, to this critique, would be Publius's response? Perhaps that the question has to do with the character of the people, the extent to which they become a national people or remain a people who, linked together for certain purposes, finds their basic political identity through the states. Precisely in the papers on the House Madison speculates about how over time the states will grow more assimilated in their interests: more differentiated within themselves, more similar

to one another.¹³ But if this is so, then doesn't that call into question the argument for the extended sphere, pointing to a Congress that will behave like the state legislatures and thus be more in need of a check? But how will the executive provide that check, if he has been all along the force of unity and thus of assimilation? Perhaps, in the spirit of moderation, Publius would draw our attention to the elements of balance: the fact that Congress represents the people in the states even as the president represents the people as a whole, and the fact that even the president is, through the system of Electors and thereby the whole system of presidential selection, selected by the people acting in their states and through their states, bringing their interests to national attention and giving weight not to mere numbers but to an articulated political community. As at the moment of the founding, Publius might explain to us that we don't lack republican government, but good government, and he might be more disappointed than surprised that we have apparently forgotten the difference between the two.

¹³ See especially *the Federalist*, no. 56, pp.293-294.