

MORE SAIL THAN ANCHOR: UNDERSTANDING *THE FEDERALIST*

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I. INTRODUCTION

The Federalist, from the first, has been praised as more than an effective defense of the Constitution of 1787—it is considered a great work of political science.¹ Thomas Jefferson, for example, called it “the best commentary on the principles of government which ever was written.”² But what makes it great? Its greatness, one must keep in mind, cannot be separated from the greatness of the Constitution that the work explicates. Admirers of *The Federalist* commonly understand the innovative elements of the Framers’ new political science, including federalism, the separation of powers, and judicial review, as mechanisms designed to limit the exercise of power, thus preserving the authority of the states and competing branches. Rather than taking the Aristotelian, or positive, approach to constitutionalism in which a constitution affirmatively articulates and establishes the positive ends and social institutions of a society, in the words of Martin Diamond, “the American Constitution emphasizes the limiting aspect of constitutionalism.”³ Because of this emphasis, we tend to see the chief genius of the Constitution in how it limits the authority of public officers, not in how it empowers them.

In this essay, I contend that it is a mistake to understand the Constitution and *The Federalist* through the prism of the limitation of power. Publius is far more concerned with how to lure the most talented and virtuous to government service than how to check them. The principal purpose of the new political science was not to limit power but to attract and empower a new elite class of national political professionals with the ability, education, and character to make good use of a genuine government with genuine authority.

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¹ GEORGE CAREY, *THE FEDERALIST: DESIGN FOR A CONSTITUTIONAL REPUBLIC* xi (1994); GOTTFRIED DIETZE, *THE FEDERALIST: A CLASSIC ON FEDERALISM AND FREE GOVERNMENT* 3 (1960) (“It is the outstanding American contribution to the literature on constitutional democracy and federalism, a classic of Western political thought.”).

² Letter from Thomas Jefferson to James Madison (Nov. 18, 1788), in 14 *THE PAPERS OF THOMAS JEFFERSON* 187, 188 (Julian P. Boyd ed., 1958).

³ MARTIN DIAMOND, *THE FOUNDING OF THE DEMOCRATIC REPUBLIC* 99 (1981).

I will first describe, relying on his personal critique of the regime, James Madison's account of the chief flaws of the Articles of Confederation and the general features of a new regime he believed could avoid its errors. Not surprisingly, Madison's account of the design defects of the Confederation emphasizes the impotent foreign policy and the economically crippling interstate trade disputes engendered (or, at least, not resolved) by the Confederation government. Surprisingly, though, Madison does not stop with those policy areas that clearly involve more states than one. He also blames the Confederation government for the internal failures of the state government. Thus, Madison's ambitions for a new national government are quite grand—he aspires to a new constitution that will establish a government equipped to remedy the states' failure to protect the rights of their own citizens.

Next, I will show that both Madison and Publius attribute both the dysfunction of the Confederation government and that of the states to their designers' failure to take into account the reality of human nature. The Confederation and most of the early state governments, with their dominant legislatures and weak executives, could only succeed if the people of the states possessed a high degree of virtue. They particularly had to be willing to sacrifice the interests of their states for the benefit of the whole. As Publius demonstrates, this optimistic expectation about the virtue of the people as a whole is falsified by the reality of how human beings are. They are, in the words of Publius, "ambitious, vindictive, and rapacious."⁴ They are often ruled by self-love and naturally pursue their own interests, even at the expense of the whole.

Neither Madison nor Publius have any trouble demonstrating that the failures of the Confederation governments can be traced to the selfishness of human nature. The problem, though, for the proponents of the new Constitution is that a national government with sufficient authority to defend the nation against external and internal threats, conduct an effective foreign policy, keep open the channels of interstate trade and enterprise, and guarantee the people a state government that will protect their rights will require officials who have overcome the frailties of human nature and possess an unusual high degree of republican virtue. Publius must explain why and how, assuming these people even exist in great enough numbers to staff the new government, the virtuous will enter public service. Finding these people, I contend, is the most important challenge of the new Constitution.

⁴ THE FEDERALIST NO. 6, at 54 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

The primary purpose, then, of the Framers’ “new science of politics” is to attract the most capable and virtuous members of the society, provide them with the requisite power to carry out the necessary objectives of the national government, while providing sufficient checks on these ambitious officials to forestall any abuse of power. I will demonstrate that mechanisms such as representation and the extended republic, the separation of powers, and the enumeration of national legislative powers, work in concert to persuade what Publius calls “the best men” to agree to manage the nation’s economy, financial system, foreign policy, and national defense.⁵ I do not maintain, however, that the Framers did not care about limiting encroachment on state authority. Rather, they believed that confining the powers of the federal government to the few policy areas that interest “speculative” men would encourage these able officials to stick to issues of national scope.⁶ I conclude by showing that, while *The Federalist* anticipates which policy areas will most engage federal officials, it does not describe either the most optimal substance of these policies or the specific types of professionals that will be required to run the national government. These questions will be left to Madison, Hamilton, and the parties they founded.

II. THE FAILURE OF THE CONFEDERATION

When we examine and critique the Articles of Confederation, I have to remind my classes that, before we assume it was inevitable that the Confederation would fail, it embodied the governing structure that piloted the states through the American Revolution. But, in defense of those who thought the structure would never work, we have to recount some of the most problematic features of the Confederation. First of all, the Confederation was not a true national government—it far more resembled a league of sovereign states, similar to that established by the United Nations Charter.⁷ It consisted only of a one-house Congress, in which each state had one vote, and any action taken by that Congress governed the states as corporate entities, not individuals.⁸ As a standard rule, Congressional action required seven votes, a bare majority. The Confederation, however, required nine votes to exercise any of the key powers, including the power to declare war, to enter into treaties, to expand either the army or navy, or to

⁵ THE FEDERALIST NO. 3, *supra* note 4, at 43 (John Jay).

⁶ THE FEDERALIST NO. 17, *supra* note 4, at 120 (Alexander Hamilton).

⁷ ARTICLES OF CONFEDERATION of 1781, art. II.

⁸ *Id.* art. V, para. 4.

appoint the commander in chief.⁹ Most importantly, the Confederation did not afford Congress the authority to tax its citizens. It was authorized only to make a requisition from the states—it was up to states themselves to tax their people and turn over the money to satisfy the stated national need.¹⁰

In addition to lacking the power to tax, the Confederation Congress also lacked the power to regulate interstate commerce or even to prevent states from taxing or regulating trade with each other. Indeed, there was no effective way for Congress to compel states to do or refrain from doing anything. If this lack of power made it impossible for Congress to function, there was little hope of positive change—the Articles could only be amended if all states agreed.¹¹

How could such a union succeed? The Americans were fortunate to receive an answer from their leading citizen. George Washington, in a preview of his later and more famed presidential farewell address, upon resigning his command of the Continental Army in 1783, circulated a public message to his fellow Americans explaining what it would take to make the Articles of Confederation regime work. He articulated four indispensable elements for national success, which he called “the Pillars on which the glorious Fabrick of our Independency and National Character must be supported.”¹² First, he argued that Americans must maintain “An indissoluble Union of the States under one Federal Head.”¹³ He explained that Americans must afford Congress enough power to do its job, and the states must comply with the requests of Congress, especially the requisitions of revenue.¹⁴

Second, Americans must maintain “A Sacred regard to Public Justice.”¹⁵ To Washington, this pillar primarily meant Americans must pay their public and private debts, including compliance with Congressional requisitions.¹⁶ Third, Americans must maintain a strong military, which Washington called a Peace Establishment, the lack of which he also traced to the states’ failure to satisfy their requisitions.¹⁷ Finally, Americans must “forget their local prejudices and policies” and “sacrifice their individual

⁹ *Id.* art. IX, para. 6.

¹⁰ *Id.* art. VIII.

¹¹ *Id.* art. XIII, para. 1.

¹² George Washington, Circular to the States (1783), in *GEORGE WASHINGTON: A COLLECTION* 239, 242 (W.B. Allen ed., 1988).

¹³ *Id.*

¹⁴ *Id.* at 242–43.

¹⁵ *Id.* at 242.

¹⁶ *Id.* at 243–45.

¹⁷ *Id.* at 247–48.

advantages to the interest of the Community.”¹⁸ In other words, to make the Confederacy work, Americans must stop thinking of themselves as citizens of their states and instead develop a national character. The Confederation, with its supermajority rules and voluntary requisitions, could not work unless states put aside their selfish interests and agreed to work together in order to advance the national interest. In concluding, Washington prayed that God “would incline the hearts of the Citizens to cultivate a spirit of subordination and obedience to Government, to entertain a brotherly affection and love for one another [and] for their fellow Citizens of the United States at large.”¹⁹

As we are all aware, however, Americans did not meet Washington’s challenge. As James Madison explained in his concise account of the failure of the Confederation, which he entitled the *Vices of the Political System of the United States*, composed in April of 1787, the Americans failed to maintain every pillar.²⁰ First, they failed to “Comply with the Constitutional Requisitions[,]” which given the importance of a stable revenue to any government, was, by itself, “fatal to the object of the present system.”²¹ Second, the states committed a multitude of political sins that weakened the national authority and undermined national purposes, including what Madison called “Encroachment by the States on the National Authority[,]” “Violations of the Law of Nations and of Treaties,” “Trespasses of the States on the Rights of Each Other,” and “Want of Concert in Matters Where Common Interest Requires It.”²² All of these vices arose from the states’ refusal to put aside their own selfish interests and vindicate the interests of the nation.²³ The weakness of the national authority, described by Madison as “Want of Sanction to the Laws and of Coercion in the Government of the Confederacy,” made it impossible for Congress to either compel the states to fulfill their duties to the nation or to protect the people of the states from the depredations of their abusive neighbor states.²⁴ This failure to include any effective enforcement authority arose “[f]rom a mistaken confidence that the justice, the good faith, the honor, the sound policy of the several legislative assemblies would render superfluous any appeal to the ordinary motives by which the laws secure the obedience of

¹⁸ *Id.* at 242.

¹⁹ *Id.* at 249.

²⁰ James Madison, *Vices of the Political System of the United States* (1787), in *THE ESSENTIAL BILL OF RIGHTS* 246, 246–53 (Gordon Lloyd & Margie Lloyd, eds., 1998).

²¹ *Id.* at 247.

²² *Id.* at 247–48.

²³ *Id.* at 247–49.

²⁴ *Id.* at 248.

individuals.”²⁵ Government must command—it can never merely recommend.²⁶

These vices concern the purposes of any national government and, given the lack of power and resources afforded to the whole, do not surprise—they are the failures you would expect. But Madison also taxes the Confederacy with failures you might be surprised are relevant to the discussion of the national authority. He also holds the Confederation responsible for the internal governance problems of the states, including both the “Multiplicity” and “Mutability” of the laws of the states, and, most important, the “Injustice of the Laws of the States.”²⁷ The failure of the states to be the faithful “guardians both of public good and of private rights” calls into question whether republican government—government by the people—is a viable project.²⁸ Publius does not doubt that if the Americans must choose between liberty and republicanism, they will choose liberty.²⁹

Why did the Confederation fail? In his autopsy of the flaws of the Articles, Publius moves beyond the particular vices of the Americans and attributes the failure to the weakness of human nature. Publius founds his analysis on “certain fixed maxims of human nature,” including that human beings are “prone to pursue immediate self-interests at the expense of the common good [and] that they are neither perfect nor perfectible.”³⁰ Because human beings are by nature “ambitio[us], vindictive, and rapacious,” they are destined to compete against each other for advantage and favor.³¹ As Publius famously states:

The latent causes of faction are thus sown in the nature of man . . . 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.³²

²⁵ *Id.* at 249.

²⁶ DAVID F. EPSTEIN, *THE POLITICAL THEORY OF THE FEDERALIST* 37 (1984).

²⁷ Madison, *supra* note 20, at 250–53.

²⁸ *Id.* at 251.

²⁹ CAREY, *supra* note 1, at 8.

³⁰ *Id.* at 162.

³¹ THE FEDERALIST NO. 6, *supra* note 4, at 54 (Alexander Hamilton).

³² THE FEDERALIST NO. 10, *supra* note 4, at 79 (James Madison).

The architects of the Confederation, Publius believes, were naïve. They believed and told Americans “that breaches by the States of the regulations of the federal authority were not to be expected; that a sense of common interest would preside over the conduct of the respective members, and would beget a full compliance with all the constitutional requisitions of the Union.”³³ Americans unfortunately were disabused of this “wild” thought and “received further lessons from that best oracle of wisdom, experience.”³⁴ Publius asks us, “Why has government been instituted at all? Because the passions of men will not conform to the dictates of reason and justice without constraint.”³⁵ The lack of such constraint kept the ancient republics “in a state of perpetual vibration between the extremes of tyranny and anarchy.”³⁶ To avoid this fate, Americans must set aside their self-interest and establish a republican government that will adhere to the dictates of reason and justice.

III. THE NEW SCIENCE OF POLITICS AND “THE BEST MEN”

So how do we construct a republican government that will facilitate, if not require, the different parts of the nation to work together to pursue our national goals, especially national defense, the conduct of foreign affairs, and the development of a national economy? Beyond even this difficult task, Madison also aspires to establish a national government that will guarantee good government in the states. After he describes the vices of the Confederation (which one must recall is really Madison explaining his thoughts to himself), Madison muses that public injustice is not only caused by selfish and ambitious politicians who advance “base and selfish measures masked by pretexts of public good and apparent expediency.”³⁷ The fault also lies in the people themselves. They divide themselves into “different interests and factions” that commit, if not checked, “unjust violations of the rights and interests of the minorities, or of individuals.”³⁸ This desire to pursue one’s interests at the expense of others is so ingrained in human nature that, while it can be ameliorated to some degree, it cannot be cured by appealing to the common good, respect for character, or religion. One cannot hope, in other words, to change human nature.

³³ THE FEDERALIST NO. 15, *supra* note 4 at 110 (Alexander Hamilton).

³⁴ *Id.*

³⁵ *Id.*; CAREY, *supra* note 1, at xx–xxi.

³⁶ THE FEDERALIST NO. 9, *supra* note 4, at 71 (Alexander Hamilton).

³⁷ Madison, *supra* note 20, at 251.

³⁸ *Id.* at 251–52.

A solution to the problem of faction must be found in political science or constitutionalism. Madison contends:

The great desideratum in Government is such a modification of the sovereignty as will render it sufficiently neutral between the different interests and factions to controul one part of the society from invading the rights of another, and at the same time sufficiently controuled itself, from setting up an interest adverse to that of the whole.³⁹

In other words, one must design and establish a national government that will both arbitrate between and, if necessary, constrain the factions prevalent in the states. As David Epstein puts it, “[t]he principal task of modern legislation—regulating interfering interests—requires the legislature to act in effect as a judge.”⁴⁰ But to maintain this neutrality, this powerful institution must somehow be designed to control itself.

Publius explains that the primary purposes of the Union are to conduct “commerce, finance, negotiation, and war” for which “all the powers necessary ought in the first instance to be lodged in the national depository.”⁴¹ More concretely:

The principled purposes to answered by union are . . . the common defense of the members; the preservation of the public peace, as well as against internal convulsion as external attacks; the regulation of commerce with other nations and between the States; the superintendence of our intercourse, political and commercial, with foreign countries.⁴²

These purposes require “concert and unity of system” so that “one government, watching over the general and common interests and combining and directing all powers and resources of the whole” would be free from the “embarrassments” of factional disputes and “conduce far more to the safety of the people.”⁴³ Under the Confederation model, we “have reached almost the last stage of national humiliation” in which “the evils we experience do not proceed from minute or partial imperfections, but from fundamental errors in the structure of the building, which cannot be amended otherwise than by an alteration in the first principles and the main pillars of the fabric.”⁴⁴

³⁹ *Id.* at 253.

⁴⁰ EPSTEIN, *supra* note 26, at 81.

⁴¹ THE FEDERALIST NO. 17, *supra* note 4, at 118 (Alexander Hamilton).

⁴² THE FEDERALIST NO. 23, *supra* note 4, at 153 (Alexander Hamilton).

⁴³ THE FEDERALIST NO. 4, *supra* note 4, at 49 (John Jay).

⁴⁴ THE FEDERALIST NO. 15, *supra* note 4, at 106, 108 (Alexander Hamilton).

Publius does not shrink from what it means to build a new constitutional structure based on new first principles and pillars—one must establish a powerful national government without, contrary to the standard account, any formal limitation on the extent of its authority.⁴⁵ One never should have been surprised by the Washington Administration’s claims to broad national authority. Alexander Hamilton’s—which are largely John Marshall’s—arguments in defense of a generous construction of the powers of the national government are previewed in *The Federalist*.⁴⁶ As Publius explains, one cannot state any limit to the authority necessary to conduct national defense, including the raising, support, and directing of military forces, “because it is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them.”⁴⁷ The impossibility of drawing formal limits to the implied powers necessary to carry out the ends enumerated in the Constitution applies to all the great responsibilities of the national government. This argument “rests upon axioms as simple as they are universal, the *means* ought to be proportioned to the *end*, the persons from whose agency the attainment of *end* is expected ought to possess the *means* by which it is to be attained.”⁴⁸ Anyone who cannot accept this proposition must suffer “either from some disorder in the organs of perception, or from the influence of some strong interest, or passion.”⁴⁹ Everyone should understand that:

A government ought to contain in itself every power requisite to the full accomplishment of the objects committed to its care, and to the complete execution of the trusts for which it is responsible, free from every other control but a regard to the public good and to the sense of the people.⁵⁰

Thus, those advocates of a limited national government and strong emphasis on federalism who posit that the Constitution contains strong formal limitations on the powers of the national government are fooling themselves.⁵¹ Publius counsels looking elsewhere for how the Constitution

⁴⁵ EPSTEIN, *supra* note 26, at 35 (“Energetic government, according to *The Federalist*, requires the most impressive powers of government—the purse and the sword—be possessed in a most impressive degree: ‘without limitation.’”).

⁴⁶ See *McCulloch v. Maryland*, 17 U.S. 316 (1819).

⁴⁷ THE FEDERALIST NO. 23, *supra* note 4, at 153 (Alexander Hamilton) (emphasis in original).

⁴⁸ *Id.* (emphasis in original).

⁴⁹ THE FEDERALIST NO. 31, *supra* note 4, at 193 (Alexander Hamilton).

⁵⁰ *Id.* at 194.

⁵¹ CAREY, *supra* note 1, at xix (“Conservatives, for instance, who have come to regard federalism as one of the main pillars of our freedoms will find little support for this notion in *The Federalist*.”).

protects against the abuse of power. He tells us that “all observations founded upon the danger of usurpation ought to be referred to the composition of the structure of government, not to the nature or the extent of its powers.”⁵² It is “both unwise and dangerous to deny federal government an unconfined authority in respect to all those objects which are intrusted to its management.”⁵³ Those who opposed the Constitution should have “confined themselves to showing that the internal structure of the proposed government was such as to render it unworthy of the confidence of the people.”⁵⁴

The security for one’s rights, then, must be found in the well-designed structure of the national government, not in any formal limits on the powers of national government.⁵⁵ What matters, in other words, is the operation of the separation of powers, not federalism. How can we be confident that this new, in principle, all-powerful national government will be able to control itself? Because the architects of it were masters of what Publius describes as a new science of politics. He tells us that the science of politics has improved greatly:

The efficacy of various principles is now well understood, which were either not known at all, or imperfectly known to the ancients. The regular distribution of power into distinct departments; the introduction of legislative balances and checks; the institution of courts composed of judges holding their offices during good behavior; the representation of the people in the legislature by deputies of their own election: these are wholly new discoveries, or have made their principal progress toward perfection in modern times. They are means, and powerful means, by which the excellencies of republican government may be retained and its imperfections lessened or avoided.⁵⁶

Perhaps the best way to understand the new science of politics is to compare it to the science it displaced. The critics of the Constitution took their arguments from the writings of Montesquieu, the most respected authority on political science at the time. The Anti-Federalists argued that Montesquieu contends that republican government can only work in a

⁵² THE FEDERALIST NO. 31, *supra* note 4, at 196 (Alexander Hamilton); EPSTEIN, *supra* note 26, at 45.

⁵³ THE FEDERALIST NO. 23, *supra* note 4, at 156 (Alexander Hamilton).

⁵⁴ *Id.*

⁵⁵ CAREY, *supra* note 1, at 122.

⁵⁶ *Id.* at 6–7; THE FEDERALIST NO. 9, *supra* note 4, at 72–73 (Alexander Hamilton).

geographically small area in which the people share similar beliefs.⁵⁷ The animating principle of republican government, Montesquieu argues, is virtue, and only a small, homogenous community can supply the consensus view of virtue necessary to establish a stable republican government.⁵⁸

Publius argues that this argument has it exactly backwards—republican government has a better chance of survival in a large nation than in a small one.⁵⁹ As Publius remarks, it is the “enlargement of the orbit” of republican government, combined with the reliance on representative, not direct, democracy that may cure the ills of republican government.⁶⁰

How? One must first remember that the principal threat to any government—and particularly republican government—is the problem of faction, the desire of one group to benefit itself at the expense of others. The problem with small republics is that a faction may constitute the majority of the governing public. When a faction constitutes a majority, “the form of the popular government” empowers it “to sacrifice to its ruling passion or interest both the public good and the rights of other citizens.”⁶¹ Publius tells us, “To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed.”⁶²

If you establish a large republic, you reduce the probability that a destructive majority faction will form. The “greater number of citizens and extent of territory which may be brought within the compass of republican than of democratic government” makes it less likely a faction will win control.⁶³ On the other hand, “The smaller the society . . . the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and . . . the more easily will they concert and execute their plans of oppression.”⁶⁴ If you “[e]xtend the sphere,” you “take in a greater variety of parties and interests,” making it:

[L]ess probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it

⁵⁷ THE FEDERALIST NO. 9, *supra* note 4, at 73 (Alexander Hamilton).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ THE FEDERALIST NO. 10, *supra* note 4, at 80 (James Madison).

⁶² *Id.*

⁶³ *Id.* at 83.

⁶⁴ *Id.*

will be more difficult for all who feel it to discover their own strength and to act in unison with each other.⁶⁵

Publius's argument for the extended republic depends upon adopting republican, rather than democratic, government. Founding popular government on the concept of representation makes it possible to extend the sphere—democratic government, like that of ancient Athens, is feasible only in a small geographic unit like a city. But the importance of the principle of representation to the new science of politics is far greater than its role in thwarting the emergence of majority faction. The happy combination of representation and the extended republic is designed to accomplish an even more important design purpose—it makes possible the recruitment of the most able and virtuous members of society to staff the new, powerful national government.⁶⁶

When one combines, as does the Constitution, a relatively few number of representatives over a large continental nation, you, in Madison's words, will "establish a process of elections as will most certainly extract from the mass of society the purest and noblest characters which it contains."⁶⁷ Publius assures us that,

as each representative will be chosen by a greater number of citizens in the large than in the small republic, it will be more difficult for unworthy candidates to practice with success the vicious arts by which elections are too often carried; and the suffrages of the people being more free, will be more likely to center on men who possess the most attractive merit and the most diffusive and established characters.⁶⁸

The extended republic will "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."⁶⁹

But the extended republic is not the only structural element of the Constitution that is designed to bring the most capable and virtuous into government. I argue that the best way to understand the constitutional

⁶⁵ *Id.*; EPSTEIN, *supra* note 26, at 99–101.

⁶⁶ CAREY, *supra* note 1, at 22–23.

⁶⁷ Madison, *supra* note 20, at 253.

⁶⁸ THE FEDERALIST NO. 10, *supra* note 4, at 82–83 (James Madison).

⁶⁹ *Id.* at 82.

scheme as a whole, as explicated in *The Federalist*, is to see it as an engine for producing a capable and virtuous class of public servants who will have both the power and motives to govern effectively and protect the rights of their fellow citizens from any abuse of civil authority.⁷⁰ Government by society's best is not a happy product of the constitutional design—it is its purpose.

The necessity of government by the “best men” pervades every aspect of Publius's arguments from the beginning to the end of the work. In making his initial plea for an effective national government, for example, Publius states,

When once an efficient national government is established, the best men in the country will not only consent to serve, but also will generally be appointed to manage it . . . more general and extensive reputation for talents and other qualifications will be necessary to recommend men to office under the national government—especially as it will have the widest field for choice, and never experience that want of proper persons which is not uncommon in some of the States.⁷¹

As a result, “the administration, the political counsels, and the judicial decisions of the national government will be more wise, systematical, and judicious than those of individual States, and consequently more satisfactory with respect to other nations, as well as more *safe* with respect to us.”⁷²

After establishing the need for an unlimited number of means to accomplish the national government's great ends, Publius, in discussing the ideal profile of the representatives who will exercise this power, dismisses the notion that all classes should be represented in the national legislature, stating that such an idea is “altogether visionary.”⁷³ It will be more likely and desirable, for example, for the representatives to come from the “learned professions”, such as medicine or law.⁷⁴ These elites “truly form no distinct interest in society, and according to their situation and talents,

⁷⁰ EPSTEIN, *supra* note 26, at 94 (Madison “suggests that the public good is the concern of a kind of elite; wise representatives share this concern with enlightened statesmen and with the most considerate and virtuous citizens.”).

⁷¹ THE FEDERALIST NO. 3, *supra* note 4, at 43 (John Jay).

⁷² *Id.* (emphasis in original).

⁷³ THE FEDERALIST NO. 35, *supra* note 4, at 214 (Alexander Hamilton).

⁷⁴ *Id.* at 215.

will be indiscriminately the objects of the confidence and choice of each other and the other parts of the community.”⁷⁵

Despite Publius’s well-justified reputation as a skeptic regarding the good in human nature, he is confident both that the constitutional scheme will result in the selection of able and public-spirited public officials and that these eminent characters are necessary for the government to carry out its purposes. In expressing confidence about the probable virtue of those who will win office under the new Constitution, he states:

As there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust, so there are other qualities in human nature which justify a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree than any other form.⁷⁶

Publius leaves us with no doubt about the importance of finding the best people to serve the public:

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 their public trust.⁷⁷

IV. EXECUTING THE CHARGE

Publius unambiguously tells us that the first priority of constitutional design is to produce wise and virtuous government officials who will have the power and length of service to execute important, complex, and long-term projects of good governance.⁷⁸ Good government requires both energy and stability:

Energy in government is essential to that security against external and internal danger and to that prompt and salutary execution of the laws which enter into the very definition of good government. Stability in government is essential to national character and to the advantages

⁷⁵ *Id.*

⁷⁶ THE FEDERALIST NO. 55, *supra* note 4, at 346 (James Madison).

⁷⁷ THE FEDERALIST NO. 57, *supra* note 5, at 350 (James Madison).

⁷⁸ EPSTEIN, *supra* note 26, at 163.

annexed to it, as well as to that repose and confidence in the minds of the people, which are among the chief blessings of civil society.⁷⁹

But for Americans, one more element is necessary. Americans will not accept any government, no matter how effective, if it is not a popular government.⁸⁰ The form of any American government “must be strictly republican” because “no other form would be reconcilable with the genius of the people of America; with the fundamental principles of the Revolution; or with that honorable determination which animates every votary of freedom to rest all our political experiments on the capacity of mankind for self-government.”⁸¹

Thus, each of the principal parts of the American regime is designed, using the mode of selection, duration of term, powers, and support, to recruit and empower the most virtuous members of society to government. Each part of the constitutional regime provides its officials with sufficient energy and stability to attract the best people to public service, while providing sufficient popular control to maintain republican legitimacy.⁸²

A. *The “More Permanent” Branches*

Publius is deeply aware both that he must establish that each principal institution of the constitutional structure is strictly republican and that the elements of many of these institutions are, in fact, in tension with republican principles as commonly understood at the time of the framing of the Constitution. After all, as Publius acknowledges,

The genius of republican liberty seems to demand on one side not only that all power should be derived from the people, but that those intrusted with it should be kept in dependence on the people by a short duration of their appointments; and that even during this short period the trust should be placed not in a few, but a number of hands.⁸³

But a government run by many officials, all serving short terms and directly elected by the people, can never provide the energy and stability needed to both secure justice and pursue the common good. Stability, for example,

⁷⁹ *Id.* at 114 (“[People] want the blessing of living under stable laws on which they can depend; and this blessing partly depends on the energy by which a good government can defeat dangers to stability.”); THE FEDERALIST NO. 37, *supra* note 4, at 226 (James Madison).

⁸⁰ EPSTEIN, *supra* note 26, at 118.

⁸¹ THE FEDERALIST NO. 39, *supra* note 4, at 240 (James Madison).

⁸² CAREY, *supra* note 1, at 4.

⁸³ THE FEDERALIST NO. 37, *supra* note 4, at 227 (James Madison).

“requires that the hands in which power is lodged should continue for a length of time the same.”⁸⁴ Energy, on the other hand, “requires not only a certain duration of power, but the execution of it by a single hand.”⁸⁵

Past republican governments have failed because they did not possess the energy and stability necessary for good government. This Constitution compromises the republican principle in order to create institutions—the Presidency, Senate, and the Judiciary—that will infuse the regime with the energy and stability that is missing in a purer republican regime.⁸⁶ These institutions grant significant authority to few officials, none of whom are directly elected by the people, for long terms or even good behavior. Publius calls these institutions, in contrast to the House of Representatives, the “more permanent branches of the federal government.”⁸⁷

To be sure, Publius must, and does, argue that the members of these branches derive their authority from the people. But establishing the republican legitimacy of these institutions requires Publius to redefine the core principle of republican liberty. Instead of defining a republic as one in which numerous officials are directly elected by the people for short, defined terms, he must define a republic as “a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure for a limited period, or during good behavior.”⁸⁸ Publius’s significant redefinition, if not watering down, of the principle of republican liberty permits him to construct institutions that empower a few individuals or, in the case of the President, even a single person to exercise significant authority for long terms or even for life. These new institutions, assuming that the people accept their republican legitimacy, both enable, by vesting power in the few, the government to act energetically and, by providing officials long terms in office, the opportunity to devise and execute long-term governing projects, thus lending stability to public policy.⁸⁹

These more permanent branches, however, were designed to produce an even more profound effect on the quality of American governance. Establishing institutions in which officials, significantly insulated from the need for popular election or control, can effectively exercise wide-ranging power for long periods of time attracts the ambitious few to government.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ EPSTEIN, *supra* note 26, at 120.

⁸⁷ THE FEDERALIST NO. 52, *supra* note 4, at 330 (James Madison).

⁸⁸ THE FEDERALIST NO. 39, *supra* note 4, at 241 (James Madison).

⁸⁹ EPSTEIN, *supra* note 26, at 161 (The permanent branches are “designed to raise the quality of government.”).

Individuals of ability and skill, both of which are more likely to be found among the ambitious, seek posts in the more permanent branches because they are deliberately constructed to lure them into government service. An examination of the particular architecture of each of these branches demonstrates that their structure, mode of appointment, duration of tenure, support, and particular powers were devised to attract and empower the most accomplished individuals in the society to public service in order to establish a government of “positive merit.”⁹⁰

While for human beings, the securing of justice, which is defined by Publius as ensuring that all people are free to use their faculties, is a more fundamental—and indispensable—end of government, this government aspires to more than securing justice or safety. It aspires to be a good government, one of positive merit, as opposed to one that merely avoids being a negative force. It seeks to actively pursue the common good, the achievement of which requires the active attention of a good government.⁹¹ The permanent branches are the principal means to achieving the common good.

1. The Judiciary

The architecture of the judicial branch most obviously reveals the aspiration to attract the ambitious and able few to federal service. As David Epstein concludes, “Among the more permanent branches of the proposed government, the judiciary is clearly the most permanent.”⁹² Publius explains that the critical elements in the structure of the federal judiciary are the judges’ (1) mode of appointment; (2) tenure; (3) fixed provision of support; and (4) extent of authority.⁹³ The judges, first of all, are not elected. Their appointment is the joint product of the two permanent branches, the President and the Senate, and unlike the mode of selection of these branches, involves no popular vote at all. This insulation from the active will of the people is necessitated, in part, by the nature of the position: individuals selected for judicial positions are “selected for their knowledge of the laws, acquired by long and laborious study.”⁹⁴ It would make little sense, whether one looks to the voting public or the legislators, to subject

⁹⁰ *Id.*

⁹¹ *Id.* at 163.

⁹² *Id.* at 185.

⁹³ THE FEDERALIST NOS. 78–81, *supra* note 4 (Alexander Hamilton).

⁹⁴ THE FEDERALIST NO. 81, *supra* note 4, at 483 (Alexander Hamilton).

the judiciary “to the revision and control of men who, for the want of the same advantage, cannot but be deficient in that knowledge.”⁹⁵

More importantly, the nature of the judicial power requires that judges be independent of the reach of the other branches; indeed, Publius states that “[t]he complete independence of the courts of justice is peculiarly essential in a limited Constitution.”⁹⁶ Part of the necessity of the protection of the independence of the judiciary is its weakness, given the limits of its authority, compared to the other branches, which possess the more vigorous powers over lawmaking, the purse, and the sword. The judiciary, “which may be truly said to have neither FORCE nor WILL but merely judgment” is “in continual jeopardy of being over-powered, awed, or influenced by its co-ordinate branches.”⁹⁷ Fortunately, we Americans have discovered “one of the most valuable of the modern improvements in the practice of government,” the standard of good behavior for continuance in office.⁹⁸ Ensuring that judges remain independent of the political branches offers “the best expedient to secure steady, upright, and impartial administration of the laws,” without which liberty is impossible.⁹⁹

Next to life tenure, according to Publius, “nothing can contribute more to the independence of the judges than a fixed provision for their support.”¹⁰⁰ The Constitution helps secure judicial independence by providing that the salaries of the judges may not be diminished while they remain in office. The judicial insulation, then, from ordinary politics is largely complete. They are never subject to review or removal by voters, and, other than by impeachment, the political branches have few means for punishing judges who render decisions they do not like.

What makes the need for this independence acute is the breadth of the federal judicial power. Because “[t]he interpretation of the laws is the proper and peculiar province of the courts,” the courts must possess the power of judicial review, which requires the judiciary “to declare all acts contrary to the manifest tenor of the Constitution void.”¹⁰¹ The judges, therefore, have the responsibility and the power of having the last word about whether the acts of the other branches are legally permissible. Indeed, this authority does not only extend to the co-ordinate branches of the federal government. It is the function of the federal judiciary to also

⁹⁵ THE FEDERALIST NO. 81, *supra* note 4, at 483 (Alexander Hamilton).

⁹⁶ THE FEDERALIST NO. 78, *supra* note 4, at 466 (Alexander Hamilton).

⁹⁷ *Id.* at 465–66.

⁹⁸ *Id.*

⁹⁹ *Id.* at 465.

¹⁰⁰ *Id.* at 472.

¹⁰¹ *Id.* at 465–66.

supervise the work of the state tribunals, in order to ensure state compliance with federal law. Publius concludes that “the national and state systems are to be regarded as ONE WHOLE” so that state courts must be “natural auxiliaries to the execution of the laws of the Union, and an appeal from them will as naturally lie to that tribunal which is destined to unite and assimilate the principles of national justice and the rules of national decisions.”¹⁰²

The structure and powers of the federal judiciary, thus, combine to produce a deeply attractive opportunity for attorneys of high merit. The prospect of comprehensive authority over both the other branches and the states, combined with permanent tenure, provide ample opportunity for ambitious and distinguished lawyers to exercise significant influence over public affairs for many years.

2. The Executive

It is obviously not difficult to understand why the ambitious will be attracted to the Presidency. The importance of the executive to the success of the government could not be higher. Publius tells us that “[e]nergy in the executive is a leading character in the definition of good government[,]” so that “a government ill executed, whatever it may be in theory, must be, in practice, a bad government.”¹⁰³ The ingredients of this indispensable energy are: (1) unity; (2) duration of tenure; (3) adequate provision of support; and (4) competent powers.¹⁰⁴ The key to this recipe for energetic government is the construction of an office that will persuade individuals of the highest merit to seek the prize and, then, reliance on the extraordinary ambition that habitually accompanies individuals of this character to produce good results.

The ambitious cannot help but be attracted to the unique feature of the executive—its unity. The vesting of the executive power in one person is the principal fount of energy in the regime. Publius explains that “[d]ecision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number.”¹⁰⁵ Unlike the other branches, where one must cajole others to join you in order to act, a President may often act alone.

¹⁰² THE FEDERALIST NO. 82, *supra* note 4, at 494 (Alexander Hamilton).

¹⁰³ THE FEDERALIST NO. 70, *supra* note 4, at 423 (Alexander Hamilton).

¹⁰⁴ *Id.* at 424.

¹⁰⁵ *Id.*

The price, of course, for such personal authority is that executives are held responsible for their actions. But any reluctance or fear to act is ameliorated by, compared to the House of Representatives, the long duration of the President's term. An adequate duration enhances both "the personal firmness of the executive magistrate in the employment of his constitutional powers, and the stability of the system of administration which may have been adopted under his auspices."¹⁰⁶ A long term enables the executive to make necessary but unpopular decisions, while giving voters the "time and opportunity for more cool and sedate reflection."¹⁰⁷ At the end of the day, they may establish "lasting monuments of gratitude to the men who had courage and magnanimity enough to serve them at the peril of their displeasure."¹⁰⁸

Intimately related to the length of term is the re-eligibility for election. The opportunity to serve an additional term is a powerful inducement to good behavior and the effective execution of presidential duties because "the desire of reward is one of the strongest incentives of human conduct" and "the best security of the fidelity of mankind is to make their interest coincide with their duty."¹⁰⁹ If we want a President who aspires, rather than "the negative merit of doing no harm," to the "positive merit of doing good," we must not force him or her to "quit the scene before he could accomplish the work, and must commit that, together with his own reputation, to hands which may be unequal or unfriendly to the task."¹¹⁰

The opportunity to exercise executive authority, however, will not be of much value to the ambitious if that authority is unduly limited. The Constitution affords the executive with various powers that will interest those of an ambitious and "speculative" nature. Such individuals, one will recall, are particularly interested in the conduct of foreign affairs and war. As "the power of directing and employing the common strength forms a usual and essential part in the definition of the executive authority," the President, as Commander in Chief, must play the leading role in the conduct of war.¹¹¹ Similarly, the grant of authority to the President to make treaties and both receive and appoint ambassadors provides the foundation for the conduct of foreign policy. The executive virtues of decision, secrecy, and dispatch are "indispensable in the management of foreign negotiations"

¹⁰⁶ THE FEDERALIST NO. 71, *supra* note 4, at 431 (Alexander Hamilton).

¹⁰⁷ *Id.* at 432.

¹⁰⁸ *Id.* at 431–32.

¹⁰⁹ THE FEDERALIST NO. 72, *supra* note 4, at 437 (Alexander Hamilton).

¹¹⁰ *Id.*

¹¹¹ THE FEDERALIST NO. 74, *supra* note 4, at 447 (Alexander Hamilton).

and make “the executive the most fit agent in those transactions.”¹¹² In addition to the appointment of ambassadors, of course, is the President’s power to nominate all principal officers of the United States.¹¹³ Vesting the President with this “sole and undivided responsibility” in the distribution of offices and honors begets in the President “a livelier sense of duty and a more exact regard to reputation.”¹¹⁴ Indeed, in the exercise of all these powers, the President is the focus of the nation’s attention, which the ambitious find greatly attractive.

It is also important to note that, in addition to these positive powers, the architecture of the executive branch also provides the President with both structural protections and powerful means of self-defense. The Constitution, as with the judiciary, guarantees that Congress may not reduce or increase the President’s salary during the term of the incumbent. More significantly, the executive is granted a qualified veto over legislation in order to both provide “a constitutional and effectual power of self-defense” to guard against “the propensity of the legislative department to intrude upon the rights, and to absorb the powers of the other departments” and to furnish “an additional security against the enactment of improper laws.”¹¹⁵

The common purpose of all these design elements is to construct a Presidency that will spark “the love of fame, the ruling passion of the noblest minds” and inspire those noble minds to seek the office.¹¹⁶ The hope is that the Presidency’s unitary nature, long term, and array of important powers will prompt such individuals to “plan and undertake extensive and arduous enterprises for the public benefit.”¹¹⁷

3. The Senate

The last of the permanent branches is the one with the longest historic pedigree. As Publius remarks, “history informs us of no long-lived republic that has not had a Senate.”¹¹⁸ Publius, despite the republican prejudices of his society, does shrink from both describing and praising how these bodies check popular measures and passions. He bluntly avers that “such an institution may sometimes be necessary as a defense to the people against

¹¹² THE FEDERALIST NO. 75, *supra* note 4, at 451 (Alexander Hamilton).

¹¹³ U.S. CONST. art. II, § 2.

¹¹⁴ THE FEDERALIST NO. 76, *supra* note 4, at 455 (Alexander Hamilton).

¹¹⁵ THE FEDERALIST NO. 73, *supra* note 4, at 444–45 (Alexander Hamilton).

¹¹⁶ THE FEDERALIST NO. 72, *supra* note 4, at 437 (Alexander Hamilton).

¹¹⁷ *Id.*; EPSTEIN, *supra* note 26, at 184.

¹¹⁸ THE FEDERALIST NO. 63, *supra* note 4, at 386 (James Madison).

their own temporary errors and delusions.”¹¹⁹ Now, of course, these senates, like the British House of Lords, were grounded in an aristocracy that this nation does not possess. The Americans, therefore, rely on the science of politics to create, employing the materials of a republican society, a body that performs some of the functions and embodies some of the virtues of its aristocratic predecessors. As with the judicial and executive branches, the Senate is constructed out of the abstract materials of modern constitutionalism, including: (1) the stated qualifications; (2) the mode of appointment; (3) the size of the body and the length of terms; and (4) the particular powers of the body.¹²⁰

Publius, in his account of the structure and powers of the Senate, makes clear that the best way to understand the special nature of the body is to compare it to the House of Representatives. A House member must be at least twenty-five years old and a citizen for at least seven years; a Senator must be at least thirty and a citizen for a minimum of nine.¹²¹ These distinctions are explained “by the nature of the senatorial trust” which requires “greater extent of information and stability of character.”¹²² Senators must possess stable character because it is the purpose of the institution to provide stability to the government by embodying what Publius calls a “national character.”¹²³ The Senators, as well as the President, “will always be of the number of those who best understand our national interests, whether considered in relation to the several States or to foreign nations, who are best able to promote these interests, and whose reputation for integrity inspires and merits confidence.”¹²⁴

The Senate is deliberately designed to attract these esteemed and wise individuals to the national councils. The Senate’s indirect mode of election, in which the members of the body are chosen by state legislators who themselves are the “most enlightened and respectable citizens” of their states, ensures that the Senators they select are those who are “the most distinguished by their abilities and virtue, and in whom the people perceive just grounds for confidence.”¹²⁵

These accomplished individuals will seek election because its size, length of term, and powers make the Senate attractive to individuals of high aspiration and ambition. The Senate, compared to the House of

¹¹⁹ *Id.* at 384.

¹²⁰ THE FEDERALIST NO. 62, *supra* note 4, at 376 (James Madison).

¹²¹ *Id.*

¹²² *Id.*

¹²³ THE FEDERALIST NO. 63, *supra* note 4, at 382 (James Madison).

¹²⁴ THE FEDERALIST NO. 64, *supra* note 4, at 391 (John Jay).

¹²⁵ *Id.*

Representatives, is small, making it much easier for its members to distinguish themselves in public service. A large body of representatives serving short terms tends, on the hand, to attract individuals who are disproportionately drawn from private life and wish to return there. These people are “led by no permanent motive to devote the intervals of public occupation to a study of the laws, the affairs, and the comprehensive interests of their country,” leading them to commit “a variety of important errors in the exercise of their legislative trust.”¹²⁶ A numerous assembly also has the propensity “to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders into intemperate and pernicious resolutions.”¹²⁷ Laws made by such assemblies change frequently, making it difficult to both execute complex, long-term projects and to hold accountable those responsible for the failure to address serious problems.¹²⁸

The solution to these problems is creating a body which is “less numerous” and possesses “great firmness” derived from holding “its authority by tenure of considerable duration.”¹²⁹ While assemblies elected for a short duration are “unable to provide more than one or two links in a chain of measures, on which the general welfare may essentially depend,” an institution like the Senate “which having sufficient permanency to provide for such objects as require a continued attention, and a train of measures, may be justly and effectually answerable for the attainment of those objects.”¹³⁰ This “temperate and respectable body of citizens” can prevent the enactment of laws that harm the public “until reason, justice, and truth can regain their authority over the public mind.”¹³¹

These respectable citizens will also be attracted by the opportunity to exercise the particular powers entrusted to the Senate. In addition, while sharing the general legislative power with the House of Representatives, the Senate, like the President with whom they share these powers, has special authority over both the conduct of foreign policy and the appointment of federal officers. The power to ratify treaties and to confirm nominees for office will attract the most ambitious and able to government. It is the combination of who the Senators are and what the Constitution empowers them to do that results in an institution whose national character provides stability to national affairs.

¹²⁶ THE FEDERALIST NO. 62, *supra* note 4, at 379 (James Madison).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ THE FEDERALIST NO. 63, *supra* note 4, at 384 (James Madison); EPSTEIN, *supra* note 26, at 164.

¹³¹ THE FEDERALIST NO. 63, *supra* note 4, at 384 (James Madison).

B. *The People's House?*

Publius does not consider the House of Representatives one of the “permanent” branches—its role is different and more important.¹³² The House is the cornerstone of republican legitimacy, and the indispensable check on the abuse of power by the other less popular branches. Unlike the other branches, the House “should have an immediate dependence on, and an intimate sympathy with, the people.”¹³³ It is the only branch that is directly elected by the people, and particularly compared to the Senate, the necessary qualifications for eligibility are easily met.¹³⁴ A member of the House must be twenty-five years old and a citizen for seven years.¹³⁵ The only other qualifications are that a member reside in the state represented and hold no other office.¹³⁶ Publius tells us that “the door of this part of the federal government is open to merit of every description.”¹³⁷ These members are not elected only by the rich or the well-known; they are elected by “the great body of the people of the United States,” and “[n]o qualification of wealth, of birth, of religious faith, or of civil profession is permitted to fetter the judgment or disappoint the inclination of the people.”¹³⁸

Compared to the Senate members, House members serve short terms—two years instead of six.¹³⁹ The House is also considerably larger than the Senate, with an original size of sixty-five, compared to twenty-six in the Senate.¹⁴⁰ The more republican nature of the House is evident—it is both more representative of and dependent upon the people.

But as Publius takes great care to discuss, the opponents of the Constitution make numerous arguments intended to demonstrate that the House is insufficiently republican. He remarks that, “[s]carce any article, indeed, in the whole Constitution seems to be rendered more worthy of attention by the weight of character and the apparent force of argument with which it has been assailed.”¹⁴¹ The critics root their arguments on what

¹³² THE FEDERALIST NO. 52, *supra* note 4, at 330 (James Madison).

¹³³ *Id.* at 327.

¹³⁴ *Id.* at 326.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ THE FEDERALIST NO. 57, *supra* note 4, at 351 (James Madison).

¹³⁹ THE FEDERALIST NO. 52, *supra* note 4, at 326 (James Madison).

¹⁴⁰ THE FEDERALIST NO. 55, *supra* note 4, at 343 (James Madison).

¹⁴¹ *Id.* at 341.

Publius concedes is the common understanding of republican liberty—the House must be sufficiently large to adequately represent all the different walks of life of American society and the members must serve short terms so that they are constantly accountable to the people. They conclude that, on every count, the constitutional scheme is fatally flawed.¹⁴²

The opponents first argue that a two-year term is too long—they adhere, as Publius notes, to the principle “that where annual elections end, tyranny begins.”¹⁴³ They next contend, “so small a number of representatives will be an unsafe depository of the public interests.”¹⁴⁴ A small number of representatives will result in legislators who will be representing an excessive number of people. These representatives will lack “proper knowledge of the local circumstances of their numerous constituents” and, worse yet, because only the wealthy, powerful, or well-known can win elections in a large district, the representatives “will be taken from that class of citizens which will sympathize least with the feelings of the mass of the people and be most likely to aim at a permanent elevation of the few on the depression of the many.”¹⁴⁵ All this House is, the critics maintain, is another permanent branch with a republican façade.¹⁴⁶

To be sure, Publius defends the republican bona fides of the House. He notes that the states vary in the length of their legislative terms from six months to two years, and that liberty “is not confined to any single point of time, but lies within extremes, which afford sufficient latitude for all the variations which may be required by the various situations and circumstances of civil society.”¹⁴⁷ This defense of the constitutional scheme as a legitimate mean between extremes reappears in Publius’ defense of the size of the House. He comments: “Nothing can be more fallacious than to found our political calculations on arithmetical principles. Sixty or seventy men may be more properly trusted with a given degree of power than six or seven. But it does not follow that six or seven hundred would be proportionably a better depository.”¹⁴⁸ In fact, “[i]n all very numerous assemblies, of whatever characters composed, passion never fails to wrest

¹⁴² EPSTEIN, *supra* note 26, at 147 (“But the Anti-Federalists charge that two years and sixty-five pairs of hands are too long and too few . . .”).

¹⁴³ THE FEDERALIST NO. 53, *supra* note 4, at 330 (James Madison).

¹⁴⁴ THE FEDERALIST NO. 55, *supra* note 4, at 341 (James Madison).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ THE FEDERALIST NO. 53, *supra* note 4, at 330 (James Madison).

¹⁴⁸ THE FEDERALIST NO. 55, *supra* note 4, at 342 (James Madison).

the scepter from reason. Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob.”¹⁴⁹

But a close examination of Publius’ defense of the design of the House reveals that Publius does indeed hope that the members of the House will share some of the virtues of Senators and the other permanent branches, with the ultimate intention of attracting the most able to public service.¹⁵⁰ For example, in defending biennial terms, he argues, “[n]o man can be a competent legislator who does not add to an upright intention and a sound judgment a certain degree of knowledge of the subjects on which he is to legislate.”¹⁵¹ We must understand that “some knowledge of the affairs, and even of the laws, of all the States, ought to be possessed by the members from each of the States.”¹⁵²

What kind of people will possess this degree of knowledge? It will not be just anyone from any profession or background. In fact, Publius flatly states: “The idea of an actual representation of all classes of people by persons of each class is altogether visionary.”¹⁵³ The representatives will likely be drawn from three classes. Landowners will send their own to represent their interests; it does not matter much whether the person selected owns a small or large amount of land.¹⁵⁴ As for the commercial element of society, they will elect merchants, because others in commercial society, including mechanics and manufacturers, know both that “the merchant is their natural patron and friend” and that “their interests may be more effectively promoted by the merchant than by themselves.”¹⁵⁵ Merchants are more likely to possess “those acquired endowments, without which in a deliberative assembly the greatest natural abilities are for the most part useless.”¹⁵⁶ The merchants are “the natural representatives of all these classes in the community.”¹⁵⁷ As for the rest of the representatives, they will likely be members of the learned professions, including members of the bar.¹⁵⁸ They are good candidates for election because “they truly form

¹⁴⁹ *Id.*

¹⁵⁰ CAREY, *supra* note 1, at 34 (Publius “believes the extensiveness of the republic combined with a Congress of appropriate size will serve to place individuals with wisdom, knowledge, intelligence, and a sense of civic duty superior to that of the ordinary citizen in control of the predominant branch of the proposed system.”).

¹⁵¹ THE FEDERALIST NO. 53, *supra* note 4, at 332 (James Madison).

¹⁵² *Id.* at 333.

¹⁵³ THE FEDERALIST NO. 35, *supra* note 4, at 214 (Alexander Hamilton).

¹⁵⁴ *Id.* at 215.

¹⁵⁵ *Id.* at 214.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 215.

¹⁵⁸ *Id.*

no distinct interest in society, and according to their situation and talents, will be indiscriminately the objects of the confidence and choice of each other and of other parts of the community.”¹⁵⁹

It is evident, then, that, demonstrating admirable, albeit perhaps imprudent, candor, Publius does anticipate and welcome the development of a professional political class drawn from the most ambitious and able corners of society. He directly confronts the argument of his opponents that it is “necessary that all classes of citizens should have some of their number in the representative body in order that their feelings and interests may be the better understood and attended to.”¹⁶⁰ He bluntly avers that “this will never happen under any arrangement that leaves the votes of the people free.”¹⁶¹ They will prefer to elect the merchant or lawyer who knows more of the world than they do.¹⁶² The purpose of representation, particularly in a body of modest size representing a large republic, is not to represent one set of interests but to report to the larger body the varied needs of one’s diverse communities so that these representatives can act as the impartial arbiters of the common good.¹⁶³ The learned professions, especially, may produce enlightened representatives who, because they promise to have strong minds and represent no particular interests, understand and speak for the general interests of their district and larger society.¹⁶⁴ The people trust that these ambitious individuals will respect their rights and opinions because, first, the legislators depend upon their votes and, second, because the legislators themselves are bound by the laws they make.¹⁶⁵ But, whether that trust is vindicated or not, there is no doubt that our constitutional scheme places the instruments of power in the hands of the few.

V. CONCLUSION

It is sometimes difficult to read *The Federalist* without being influenced by our knowledge that the bitter party conflict between Madison’s Republicans and Hamilton’s Federalists will soon come. Because we know that Madison and Hamilton will passionately disagree about the

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² DIETZE, *supra* note 1, at 153 (“Being persons of good reputation—preferably proprietors of land, merchants, and members of the learned professions—the representatives in a large republic will be guided in their decisions by reason rather than passion.”).

¹⁶³ EPSTEIN, *supra* note 26, at 155.

¹⁶⁴ *Id.* at 158–59.

¹⁶⁵ *Id.* at 152.

constitutional limits on the power of both the national government and the President, we tend to understand *The Federalist* as a work that is primarily concerned with limits on authority.

But Publius—no matter which of the three authors speaks for him—is far more concerned about granting power than limiting it. The principal purpose of the Constitution is to establish a powerful national government, run by the most able and accomplished, that will conduct the nation's policies governing commerce, finance, foreign affairs, and war. This government, because its structure is “intended to place [officials] in situations where their qualities can contribute to the public good,” will be characterized by its “energy, stability, knowledge, lengthy projects and a reputable face to the world.”¹⁶⁶ The primary checks on the potential abuse of these powers will be provided by the officials themselves, operating through the separation of powers. Their ambitions will lead them to check the ambitious schemes of their colleagues—but the very structures that check and balance also empower the ambitious to positively employ their unequal faculties.

No matter their other differences, both Hamilton and Madison, at least when speaking as Publius, welcome and advocate the recruitment and development of this new political class. They will disagree about where in society we should draw these new leaders—the Jeffersonians dream of the yeoman republicans while the Federalists imagine an American version of Great Britain's bureaucratic and financial class. Their social theories divided them, but their political theories had more in common that they were willing to admit.

¹⁶⁶ *Id.* at 193.