

***American Politics***

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## **Part 1: What were the goals of the Constitution's Framers and how did the proposed structures and processes fit them?**

The clearest articulation of the framer's goals is found in the preamble of the Constitution; formation of a more perfect Union, the establishment of justice, insurance of domestic tranquility, provision of common defense, promotion of general welfare, and securement of liberty for themselves and future generations. The Federalist Papers are a seminal volume of political philosophy and provide an in-depth theoretical explanation of the principles upon which the Constitution is predicated. Additionally, the rhetoric presented by the Federalists (Hamilton, Madison, and Jay) enables contemporary readers to depict the intricacies of the conflicting values and political tensions surrounding the time, of which the Federalists were obligated to mediate if the agenda for a new Constitution was to transpire into a new set of governing rules for the Union.

Focusing on the "defects" of the Confederation, the Federalists presented a scathing critique of the insufficiency, inherent of the Articles, to insuring preservation of the Union. Hamilton's statement in paper No. 15, essentially stating that the Union had reached "the last stage of national humiliation", is the embodiment of their contemptuous sentiment toward the Confederation. With elegant political precision, the Federalist papers confront the "defects" of the Articles as a point of departure from which the central commensurate argument is developed, necessitating the urgent formation of "a more perfect Union". In other words, The Federalists' brilliantly cloak their self-interests by framing the Confederation's deficiencies as opportunities for progress, and they offer the new Constitution as the ultimate solution.

The Framers' goals, or solutions, are directly linked to the "defects" of the Confederation. For example, they sought the establishment of justice in response to what they viewed as a disparate system of locally-based, democratic, popular lawmaking

by communities. This system of law was vague and inconsistent, and posed numerous problems. The citizenry had no central reference documenting legal codes, and the Framers' feared that popular whims would encroach on individual liberties at the expense of minority groups (i.e. property owners, such as debtors) (Hall, McGuire, Nelson, pgs. 5-8). In the pursuit of establishing justice, and, as outlined in No. 22, the "want of judiciary power" was a "defect" of the Confederation. They created a Supreme Court to serve as the ultimate legal authority of the land, the "last resort a uniform role of civil justice" (Federalist Paper No. 22).

The Framers sought to insure "domestic tranquility", provide for the "general welfare", and secure "liberty" for themselves and future generations. They held these goals contingent upon the creation of an enduring system that could effectively mediate competing interests by breaking and controlling the violence of faction, which they posited as adverse to liberty (Federalist Paper No. 10). The Federalists vehemently proselytized against popular democracies, pointing to the "men who have overturned the liberties of republics" as demagogues appealing to the masses and evolving into "tyrants" (Federalist Paper No. 1). They believed majoritarian politics consistently spiraled into the eventual demise of democratic societies. In No. 10, Madison defines the concept of faction and then theorizes two methods for its cure; abolishing its roots or controlling its effects. Poetically detailing the absurdness of abolishing the causes, Madison identifies "mutual animosities" as the nature of man, which therefore necessitates a system that anticipates faction and controls its effects. He illustrates that the "most common" source of faction is "the unequal distribution of property" that divides society into different classes with competing interests. Madison held that

“justice ought to hold the balance” between creditors and debtors (Federalist Paper No. 10).

The Federalists’ are consistent in their embrace of an anti-democratic philosophy, even though they conceded that the new government would find its fundamental legitimacy in the people’s popular acceptance. Responding to the question of legitimacy, they built concessions into the system to acknowledge the delicate balance. An example is the protocol for Constitutional conventions, as discussed in Paper No. 49 that were reserved for “extraordinary occasions”. This appears to be an apparatus for majority input on major questions. However, their proclamation of recognizing the people as the “legitimate fountain of power” is questionable. The Federalists seemed to be placating the opposition’s fears and paying lip service to respecting the body politic, simply to realize their own elite agenda. Madison was clearly appealing to a like-minded audience in No. 54, when he glorified the ability of “an opulent citizen” (even though he would have only a single vote) to use his affluence as a vehicle for the promotion of special interests by guiding the vote choices of others. Additionally, anti-democratic principles guided the Framers, and the new government was engineered as a republic in order to obstruct and prevent the domination of majoritarian passions.

The Federalists advocated for centralized, federal governmental authority. In No. 15, Hamilton calls for a means of enforcing the powers allotted to the national government, something of which the Articles denies. He outlines that under the articles, the federal government can request men and money but that there is no follow up means of enforcement, and that the states were poor at providing for the collective defense and also at regulating commerce. Another point he makes is that there is still foreign occupation of land in the US, specifically, Spain was blocking the Union’s access

to the Mississippi River. In No. 21, Hamilton speaks of the Confederation's "total want of sanction to its laws". He also criticizes the oppressive nature of applying a blanket tax quota to all member states because their productive capacities differ and all states are not created equally. Hamilton concludes that a common measure for taxation can not be uniformly applied.

In No. 22, Hamilton continues with the topic of "defects", leading into the "want of power to regulate commerce", which "no object...more strongly demands a federal superintendent". The dual responsibility of states to contribute money and men to the Union dangerously teeters on eminent state faction and competitive races. If the national government is dealing with competition between states in relation to commerce, there could be a threat of faction leading to civil war under the pretenses of taxation, debt collection, and/or the unequal distribution of wealth. If the government is dealing with state competition in relation to supplying men for the common defense, there is the serious threat of unchecked foreign aggression, due to the lack of soldiers and the inability of the Union to legally enforce the extraction of men from the states.

No. 42 outlines what the new federal government will be able to do under its second-class powers; regulate commerce between the US and foreign nations, define and punish piracies and felonies committed on the high seas and offenses against the laws of nations, and regulate foreign commerce (including the power to prohibit slave importation after 1808 and to tax at \$10 per head to discourage the practice). In relation to the power of punishment for offenses against nations, Madison asserts that states under the Confederation were essentially left to their own unilateral discretion and could instigate conflict with foreign nations that might entangle the entire Union.

Madison details underlying needs in relation to the regulation of commerce (Federalist Paper No. 42):

- Between states and with Indian tribes
- The value of currency (foreign and domestic)
- Punishment for counterfeiting currency and securities
- Establishing a standard for weights and measures
- Establish the uniform rule of naturalization and laws of bankruptcy
- Prescribe the manner for which public acts, records, and judicial proceedings were to be proved
- Establish post offices and roads

The Federalists made clear their distaste for the institution and practice of slavery. In No. 54, Madison refers to slaves as being “debased by servitude”, which regarded slaves not as men, but as 2/5 of man. Recognizing slavery as one of the main cleavages between the North and the South, the Federalists realized the immediate need for compromise on the issue. Article 1, Section 2 of the Constitution, the 3/5 clause, represents the middle ground, or compromise, reached between the North and the South. Paper No. 54 provides the accompanying commentary for the 3/5 clause, providing important insights into the rationale behind it. Since the slaves were conveniently viewed as property by the South, they were therefore allowed to treat them as slaves under that law. However, when the dichotomous questions of ‘taxation based on property’ and ‘apportionment of representation based on population’ surfaced, the debate was that slaves deserved representation because they were allotted protections of their lives under the law. The dual nature of this issue induced the creation of the 3/5 clause.

Article 1, Section 9 of the Constitution also deals with slavery. The wording in the Constitution does not prohibit slavery. Rather, it prohibits the federal government from banning slave importation until 1808. Yet, Federalist No. 42 rephrases this statement, not as prohibiting the federal government from banning the practice, but

rather giving the Federal government the power to prohibit and discourage slave importation after 1808. This overt discrepancy in the framing of the issue highlights the political language used in each document. The wording used in the Constitution was less offensive to the South, which was conducive to the North gaining their essential buy-in on the new Constitution. However, the Federalists made it clear that their intention was to ban the practice, and in No. 42, Madison ironically challenges the South to follow a *popular* example of the states not engaging in the practice.

The proposed structures and processes of the Constitution were designed with the end (goals) in mind; the protection of liberty was the main emphasis in the the papers. The separation of powers (executive, legislative, and judicial), as outlined in No. 47, were intended to distribute and blend, to destroy symmetry and expose the parts to danger of encroachment by the others. The Framers knew there was the danger of tyranny and dictatorship if all power accumulated in one branch. A helpful analogy to understanding the separation of powers is found in the phrase “two’s company, three’s a crowd”. The system is designed to provoke conflict. While the branches are separated by function, they are integrated via “Constitutional means” or powers to check, control, and defend themselves against each other. Each branch depends on the others for various types of backup and support. For example, the executive branch enforces legislative decisions and judicial findings; the legislative branch controls the purse for the executive and judiciary branches; the judiciary decides legislative and executive acts are Constitutional, etc...

No. 48 discusses the concept of parchment barriers as being ineffective protection against the encroaching nature of power, and this paper clearly spells out the fear of the legislative branch (absence of deliberation, fueled by faction and passions).

Therefore, in No. 51, the solution presented is to embrace the desire for institutional power seeking. Each branch is empowered to pursue power, which comes at the expense of some other branch's power. This inter-governmental rivalry is what initiates a check and balance, and also results in the government governing itself. Their "mutual relations" keep them in their proper places.

The legislative branch was designed to intentionally faction the majority. There are two separate chambers, the lower being the House of Representatives directly elected by popular election, and the higher being the Senate indirectly elected by state legislative bodies. The equal representation of states in the Senate was engineered to provide a check on state-to-state encroachment, or as explained in No. 62, to preserve state sovereignty, which would be in danger of usurpation if representational apportionment of the Senate relied on a purely proportional scheme. In No. 63, Madison discusses the Senate construction in relation to the House, and upholds the "temperate and respectable" Senate "as a defense to the people against their own temporary errors and delusions". Yet, he concedes that if the Senate were to gradually accumulate enough power to transform itself into an aristocratic body, then "...the House of Representatives, with the people on their sides" would snap the Senate back into its proper Constitutional position.

In a balancing response to the fractured, pluralistic structure of the legislative branch, the executive was designed to hold unified, centralized power in order to execute the task of effectively administering the public's business. In Paper No. 70, Hamilton praises the aspect of "energy" in the executive, to protect the country against foreign invasion, administer laws, protect property, and secure liberty from assaults of ambition, faction, and anarchy. He rules out the possibility of a plural division of

executive power (that would link it closer to the people), pointing to the legislative branch as the proper body for facilitating the deliberation of majoritarian politics, and the hierarchical executive as the body for execution. However, even though the Federalists succeeded in this area, the tensions between them and their opponents who feared a remote national government and preferred a locally oriented, supervised government, still linger today (Aberbach and Peterson, pgs. XXI-XXIII).

The Federalists viewed the Judiciary as the least dangerous branch (Hamilton in Paper No. 78), specifically because the court retains no enforcement powers. The judiciary is said to have “neither force nor will, but merely judgment”. It depends on the legislature for its fiscal capacity, and on the executive for enforcement, and on both the executive and legislative for appointments. The judges are appointed by the executive to insulate them from “the ill humors in society” and prevent unjust and impartial law making that could occur due to popular whims. Hamilton speaks of the judiciary as the mediator between the people and the legislature, and that it will prevent legislative tyranny by holding unconstitutional legislation that essentially violates individual liberties (even though there is no mention of this specific power in Article 3 of the Constitution). However, today this provision is used to afford rights to ethnic minority groups and other marginalized members of society, such as homosexuals.

**Part 2: Since the founding, how/where has American political and institutional development both conformed to, and deviated from, their vision?**

There are many examples of American political and institutional development both conforming to and deviating from the Framers' visions, as explored in the first part of this paper. The second part of this paper will explore substantial cases of change relating to each of the three branches of the federal government; *Brown v. the Board of Education* (Judiciary), Jacksonian Presidential Authority (Executive), and the rise of

national political parties (Legislative). Additionally, the issue of representation and how it fits into American political and institutional life is explored.

*Brown v. The Board of Education* marks "the turning point" in the court's activist pursuit of personal rights, as it overturned the precedent of *Plessy*, and ignited "a large-scale process of social reform" (Hall, McGuire, Sunstein, pgs. 48-50). The era of the 20<sup>th</sup> Century, as noted in class discussion, was marked by a Federal assault on state sovereignty. The 14<sup>th</sup> Amendment incorporates states under federal jurisdiction concerning the civil rights of citizens of the United States, which was used in the case of *Brown*. As we saw in "Eyes on the Prize", the battle became a contest for states rights versus Federal authority. In the end, we see the executive branch, under Kennedy, stepping in to enforce and uphold the Supreme Court's ruling by using military power (Eyes on the Prize, Episode 2, "Fighting Back"). Protection of personal liberty, federal power over state authority, and the enforcement mechanism of the divided powers (the Executive backing the Judiciary) are examples of how political and institutional development has been consistent with the Framers's intentions.

On the other side of the equation, however, they intended for the Executive, and especially the Judiciary, to be insulated from the passions of the popular opinion. The *Brown* decision was pro-majoritarian in the sense that the majority of the country, except for the South, wanted integration. However, it was counter-majoritarian (as the Framers intended) in that it upheld personal liberties over majority (i.e. Southern or white) popular passion and prohibited states from violating civil liberties (Hall, McGuire, Sunstein, pgs. 48-50). Additionally, *Brown* deviated from the view the Federalists held regarding the Judiciary as incapable of legislation. Activist Supreme Court decisions are in fact legislation. They are the final legal authority of the land.

Extensive change and evolution can be seen in the Executive branch when exploring the impact of Jackson's presidency. Tensions surrounding Congress's re-chartering of the Bank of the United States lead Jackson to use the veto power in 1832, marking the first occasion in history that a president had used his veto power based on personal discretion (Aberbach, Peterson, James, pgs. 10-11). This power move asserted the president as the chief legislative authority, and meant that Congress must consider presidential prerogatives. Jackson set a standard for the chief executive to no longer be constitutionally bound in a subordinate position to the legislative process (Aberbach, Peterson, James, pgs. 11-12). Jackson's transformative veto was a deviation from the framer's intentions regarding the separation of power, as the legislative function was not intended to be intermingled with the executive functions. In paper No. 47, Madison explains that the executive "can not of himself make a law". The executive was vested the authority of the veto as an apparatus to check the feared legislative power. Jackson however, used it as a loophole to transform the president into America's chief legislative officer.

Next, Jackson appealed directly to the electorate for support, in an attempt to legitimize his policy involvement (Aberbach, Peterson, James, p. 12). Direct appeal to popular public opinion was also a new precedent (Aberbach, Peterson, James, p. 12). Going one step further again setting Executive precedent in yet another realm, Jackson subordinated all cabinet officers directly under his authority (Aberbach, Peterson, James, p. 13). This move found its Constitutional basis under Jackson's obligation to faithfully execute the laws. This allowed for unity and "universal compliance" in the executive branch, giving the President authority to remove cabinet officers not conforming to Presidential administrative directives (Aberbach, Peterson, James, pgs. 13-14).

Jackson's presidency no doubt shaped the course for the development of presidential power. Consistent with the Federalists blessings, the Presidency carved out an enormous degree of executive authority, as the Constitutional basis of this power (Article II) was left intentionally vague so as not to limit the executive's pursuit (Aberbach, Peterson, James, p. 5). The unity the Federalists intended for this branch, as outlined by Hamilton in No. 70, is indeed consistent with his expectations. The Bush presidency is replete of Hamilton's desires even today, in terms of the overall unity, presidential loyalty, and overwhelming reticence that characterizes the administration. Hamilton's hostility toward "dissent in the executive department" which "...serve[s] to embarrass and weaken the execution of the plan or measure to which they relate" is dually shared by those at the top under the leadership of George W. (Federalist Paper, No. 70). The Executive has control over his cabinet and the administration acts in unison, even though Congress attempts to inject some authority via budgetary provisions, hearings, etc....

Hamilton did, however, warn against the danger of collusion between the branches (Federalist Paper, No. 70). We have witnessed, especially in the case of FEMA and Hurricane Katrina, the "scandalous appointments to important offices" that have been made by the Executive, with the approval of Congress. Hamilton, in speaking against the plural Executive, points to the importance of the body politic being able to clearly judge misbehaviors of the elected in order to remove them from office, and also points to the personal responsibility and accountability bestowed under the single executive structure (Federalist Paper, No. 70). Hamilton goes further to state that "multiplication of the executive is rather dangerous than friendly to liberty" (Federalist Paper, No. 70). The current state of the presidency is a massive deviation from these

principles. As the executive branch (bureaucracy) has expanded and multiplied since the founding, accountability has been obscured and blame has been shifted from person to person until it seems as if no one is really in charge (especially evident in the torture scandals).

The rise of national political parties was a substantial deviation from the Framers' intentions. They engineered the legislative branch in a way that dispersed its powers and was intended to faction factions, as described by Madison in Paper No. 10. The rise of parties, especially the Democratic Party in pursuit of Jackson's election, politically maneuvered around those obstacles set up by the Constitution by suppressing local and regional issues and coordinating electoral efforts (Quirk, Binder, Stewart, pgs. 3-13). States were deprived of the Constitutional mechanism to strip Senators from power. Realizing their insubordinate positions, Senators began directly appealing to their own political base. Parties coordinated slates of state legislative representatives that promised to follow through in the election of the preferred Senatorial candidate, which resulted in the eventual transition from indirect elections to direct popular election of the Senate (Quirk, Binder, Stewart, pgs. 14-15). Jackson's bold move of placing himself in the position as chief legislator paved the way for the partisan process of legislative jockeying, forcing Congressional members to forge partisan alignments with the executive in order to make policy advancements, and resulting in a diminution of the legislative branch's overall power (Quirk, Binder, Stewart, pgs. 3-7). On the surface, it appears that the Senate (engineered by equal representation in order to preserve state sovereignty) failed to fulfill its original intention (Federalist No. 63; Quirk, Binder, Stewart, pgs. 15-16). However, as demonstrated in the articles assigned for class reading regarding local pork for Louisville, UofL, and Alaska, etc..., the Senate does still

hold a balance allowing smaller, disadvantaged states to achieve a higher degree of participation.

Madison's notion of a republic form of government was based on a scheme of representation that would enable the facilitation of governance over a larger population and make feasible the management of a greater breadth of spatial territory (Madison, Federalist Paper No. 10; Quirk, Binder, Schickler p. 50). Considering the Federalists fear of popular majorities, and the discussions regarding the legislative branch, it is consistently implied that the House of Representatives was the national institution with the closest link to the people. It follows that it was assumed by the Framers that the House would be representative of the population which elected it directly by popular vote. This assumption led to the creation of the Senate, which was based on an equal number of representatives indirectly elected by state legislative bodies. In essence, the Senate was a protective measure to guard against the impending popular passions of the House. Since, at that time, participation in the electoral process was the sole privilege of men from European descent, it is doubtful that the Framers considered "representation" in the context in which it is discussed today.

There is no evidence in the Constitution or the Federalist Papers that the Framers aspired for diversity (ethnic, gender, or other characteristics commonly associated as qualifiers when referring to descriptive representation) in America's political institutions. They engineered a system based on representation that was specifically set up to prevent minority groups (i.e. property owners) from being excluded or overrun by the majority. However, today those mechanisms for minority inclusion have been used to protect and include society's marginalized groups.

Representation as a concept is extremely complex and intricate. The assigned article by Mansbridge explores descriptive representation, referring to how closely the elected reflects the various aspects of the electorate (ethnicity, gender, profession, economic class, etc...). She states that normative theorists traditionally reject the concept predicated on the basis that simply because the legislators have shared characteristics with particular groups does not guarantee or obligate their performance to be reflective of the group's interests (Mansbridge, pgs. 629 – 630). However, Mansbridge goes on to point out that descriptive representation is important in deliberation because groups can achieve synergy and critical mass. As well, the dispersion of influence and the range of views presented are good for the whole of society (Mansbridge, pgs. 633 – 635). Similarly, Canon adds that the central cleavage is the opposing perception of the politics of difference versus politics of commonality, and he advocates for a balancing perspective (Quirk, Binder, Canon, pgs. 173 – 174). Under the balancing perspective, descriptive representation is not necessarily a requirement for substantive representation, but it raises the empirical question of how a candidate's race or gender effects how they represent their constituents (Quirk, Binder, Canon, p. 174). Canon marshals a following presentation of empirical evidence that blacks are indeed found to better represent blacks (Quirk, Binder, Canon, pgs. 174 – 179).

The legislative branch has been transformed into a body that primarily provides descriptive representation for the two competing national political ideologies in the U.S. (conservatives or Republicans, and liberals or Democrats). As well, the collective body of legislators serves as descriptive representatives to their locality (city, state, district, etc...) (Quirk, Binder, Jacobson, pgs. 113 – 114; pgs. 129 – 156). National political parties use the mechanism of gerrymandering as a means of partisan manipulation of

the electoral system to achieve descriptive representation, which has been deemed legal by the Supreme Court if used for partisan purposes (Quirk, Binder, Jacobson, pgs. 111-112). In the past, candidate-centered elections drew public attention toward candidate pork projects and constituent work to increase the odds of reelection, meaning the candidates had a substantial incentive to represent the local interests of their electoral base (Quirk, Binder, Jacobson, pgs. 111-114). However, locality-based descriptive representation is being challenged and even weakened by the heavy-handed approach of national parties that are moving toward centralized control of campaigning.

The story of Republican candidate Bob Beauprez's 2002 race for the 7<sup>th</sup> district house seat in the state of Colorado provides a clear picture of how the national parties are using pecuniary measures to gain centralized control over elections, thus reducing state party control and candidate autonomy. This, in turn, is leading to a decrease in responsiveness to constituents (Quirk, Binder, Jacobson, p. 129). Additionally, the trend is polarizing the legislative branch across both chambers, an effect which decreases the number of centrists that make bi-partisan cooperation possible. The polarized government of today, as empirically demonstrated in the Jacobson chapter, is an extremely divided government in which more stalemates are occurring (Quirk, Binder, Jacobson, pgs. 129, 153-154, 155-156, 161-164). Due to the remote nature of national party politics in the two-party system of polar opposites, intuition says this form of descriptive representation is far removed from the actual interests of the individuals that comprise the electorate. It will be interesting to see how this scenario unfolds in the next few years, and to see if parties end up fracturing into effective, yet smaller, more representative subgroups such as the "democratic socialists" or the "republican libertarians".

Another tool at the disposal of marginalized groups in pursuit of increased access to participation in the American political system is that of litigation in the court systems. The 20<sup>th</sup> century saw major movements on rights issues that sprang up through the courts, specifically the civil rights movement followed by the women's rights movement (Hall, McGuire, Epp, pgs. 349 – 366). The courts prefer to stall on making major rights decisions until after a sufficient amount of legal mobilization (broad litigation) has been mounted in the lower courts, a process referred to as "percolation" (Hall, McGuire, Epp, p. 349). After the civil rights movement (NAACP) won in the case of *Brown*, other movements began to develop similar legal approaches to achieving representation and rights through the judicial process (Hall, McGuire, Epp, pgs. 350 – 366). Infrastructures were developed to fight rights issues through the court systems, which is a process that requires substantial financial resources and legal experts (Hall, McGuire, Epp, p. 350). In addition to the gains made by African Americans during this period, women also saw sweeping successes in the areas of discrimination and birth control rights (*Merritor Savings Bank v. Vinson; Roe v. Wade; Griswold v. Connecticut*) (Hall, McGuire, Epp, pgs. 350 – 366).

Representation in its contemporary conception is likely something the Framers would have found to be quite fascinating. The entirety of the American political experiment in self-government has grown in such massive and multidimensional ways since its inception, that the Framers could never have possibly predicted its current state. The Framers were, indeed, endowed with a special vision and political philosophy that lead to the creation of an enduring governmental system. They had the foresight to create a representational scheme that anticipated and could effectively govern the substantial increase in population and territory that lie in the future. While there are

many aspects of the current system that deviate from the Framers' initial intentions, there is no doubt that if they were to visit us now, they'd clearly recognize the underpinning skeleton as their own creation, the U.S. Constitution of 1787 which is still mitigating the conflicting tensions and holding the balance for American society today.