

## Reviews

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# The New – Unimproved – Federalist Papers

ALAN BRINKLEY, NELSON W. POLSBY, KATHLEEN M. SULLIVAN  
*THE NEW FEDERALIST PAPERS: ESSAYS IN DEFENSE OF THE CONSTITUTION*  
TWENTIETH CENTURY FUND 1997

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**B**Y ITS TITLE, *The New Federalist Papers* (NFP) promises much – because the old Federalist Papers delivered such abundant treasures. NFP is a collection of essays, commissioned by the Twentieth Century Fund. The writers are three highly regarded academics, Alan Brinkley (History Professor, Columbia), Nelson Polsby (Professor of Political Science, Berkeley), and Kathleen Sullivan (Law Professor, Stanford). Their essays undertake to provide a contemporary rationale for the governmental structure that the Constitution's framers devised. The outlines of that structure are familiar enough – a republican government, not a direct democracy; authority divided between one national government and the several state governments; national power in turn separated between the legislative, executive, and judicial branches. NFP sets out to renew our national commitment to this structure and to repel attacks against it by those who would question

the present scope of national power, wonder whether government actually serves the people, suggest returning significant amounts of power to the states, think that on some issues direct democracy might render a trustworthy account of the popular will, or wish to discipline the electorate and its representatives by such devices as the line-item veto, term limits, and the balanced budget amendment.

In general, the essays in NFP repel such attacks with a celebration of the institutional status quo combined with the plea that we have more faith in our political leaders and “introduce ... into political discourse habits of reasoned reflection, making it an activity we can take seriously as an intellectual endeavor.” (Brinkley, NFP 135) More specifically, the essays reject each of the current efforts to put structural reforms on the national agenda as unwarranted “assaults on government.” (Preface, NFP vii) The federal government is not too large because it is more competent

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than state governments, plays a “crucial role” in constraining factionalism, (Sullivan, NFP 10) and has no greater present scope than that which comports with the original design. Direct democracy is not preferable to legislative representation because initiatives and referenda promote emotion and prejudice over reason and good will. Congress should not be subjected to term limits and the line item veto because these would inadvisably reduce Congressional power vis-à-vis the President and squander the experience of seasoned legislators. A balanced budget amendment is neither necessary nor desirable because “ordinary politics” is a sufficient check on Congressional extravagance, and the limitation of legislative discretion would be “bad for democracy ... [and even] worse fiscal policy.” (Sullivan, NFP 76, 78)

The essays also touch on assorted other topics such as campaign finance reform, the Internet, racial minorities, and the media’s role in democracy. One essay proposes that the government “relegitimize” itself by engaging in a kind of public relations campaign to remind the public of the things that government does well, make a positive case for government programs, elevate the calling of public service, and make “public leadership a search not just for power but also for knowledge.” (Brinkley, NFP 123) Another essay describes the American party system. Yet another compares our Presidential elections to British Parliamentary ones, though without describing the effect of the different governmental structures on the substance of what gets done or on the way policy is made. The final essay posits several criteria, all of them procedural instead of substantive, for judging whether American democracy works. Applying the criteria, the essay concludes that, indeed, it does.

Every educated American knows why the original *Federalist Papers* were written. And it is obvious why they have endured. Their pseudonymous authors advocated a clearly

defined agenda. They wrote in unambiguous defense of a bold experiment and in response to opponents whom they considered worthy and whose arguments they took seriously. On the political fate of the Constitution each believed his own fortune, as well as that of the new nation, turned. Each understood that they were not fighting merely for short-term advantage, that they were engaged in no mere partisan squabble. Most important, the essays themselves are masterful: they demonstrate the remarkable combination of political wisdom, foresight, and penetrating institutional analysis that was the Founding generation’s gift. Reading them today one cannot but be struck with how astute the Founders were, despite being novices, when designing our government. One cannot but marvel at how much they knew about human beings. And one cannot but learn much about the very enterprise of institutional design and about the tensions and contradictions that a government’s structure must accommodate if it is to remain viable.

Few educated Americans, alas, would be able to form a clear idea of exactly why these *New Federalist Papers* were written, or to whom they are addressed. They proclaim themselves to be “an effort to stimulate public debate on some of the issues now before us” (Introduction, NFP 3), but their intended audience – the putative debaters – never comes into focus. The book’s apparent agenda is to deploy structural principles to champion the present institutional status quo. In particular, the authors seek to enlist the implicit support of the original Federalists in defending strong national government *in principle* against the current wave of proposals that would devolve power back to the states. They seek to demonstrate that their opposition to such proposals as term limits and the balanced budget amendment is impelled not by their own political sympathies but by their respect for the *Founders’* original design.

But the Preface, written by Twentieth Century Fund President Richard C. Leone, makes plain that the book's pervasive rhetoric in praise of serious inquiry, reasoned reflection, and dispassionate discussion masks a partisan objective. Mr. Leone refers with obvious loathing to "raving[] ... right wing talk show hosts" who supposedly "revel in unfettered markets" (Preface, NFP vi); he disparages the cruel "zealots" who allegedly think that damaging those "who depend on the public sector for schooling, food, shelter, and medical care and protection ... is a small price to pay for reestablishing 'American values.'" (Preface, NFP vii) Gratuitously insulting those who embrace different views from the ones espoused by the Twentieth Century Fund would have been an odd way to introduce the book if its purpose were in fact to help "bring about a reasoned consideration" of the public issues of our time.

Yet the evident partisanship is not NFP's most disturbing characteristic. Nor is its seemingly reflexive commitment to the *idea* of government. The book's fundamental weakness – a most surprising one – is that it commits precisely that sin of which it accuses "our politics": it "fl[ies] ... from knowledge" and cultivates "ignorance – ignorance of the real nature of our problems, of the predictable consequences of our actions." (Brinkley, NFP 135) For NFP almost completely ignores the most important theoretical work of the last several decades – some of it of Nobel-prize winning quality – bearing upon exactly those

issues which it claims to address, namely constitution making, and the systematic human frailties that complicate the search for stable collective judgments about policy outcomes.<sup>1</sup> This is public choice theory. Widely regarded for its ability to shed light on "the real nature of our problems ... [and] the predictable consequences of our actions," it suggests that *all* human beings (and not just one's political opponents) are likely to be self-interested, and therefore questions whether the concept of "public interest" is even a meaningful one. It invites us to consider the design of our public institutions in terms of the incentives of the individuals who wield public power or who want to influence policy for private, possibly wholly self-interested, reasons. It identifies grounds to wonder about how we can control government when collective action problems pervade our efforts to teach, to learn and even to care about it. It thus encourages us to think carefully and with less optimism about what we should ask government – at any level – to do, and requires that we consider either reassigning certain tasks to the private sector or designing government programs so as more closely to mimic the incentives that systematically confront private actors.

Of course public choice theory does not generate universally satisfying answers to all the issues that confront us. Many thoughtful analysts reject the public choice methodology altogether, believing its policy implications are perverse, its view of human nature unacceptably bleak, its vision of the potential for good

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1 See, e.g., Kenneth J. Arrow, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (1951); James M. Buchanan & Gordon Tullock, *THE CALCULUS OF CONSENT* (1962); Mancur Olson, Jr., *THE LOGIC OF COLLECTIVE ACTION* (1965). See also Daniel A. Farber & Philip P. Frickey, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991). Polsby refers to Arrow's theorem, but only in the context of addressing why a two-party system is better than three or more, Polsby, NFP 38-39; Sullivan acknowledges a possibility that most public choice theorists believe is a fact, namely that "the conditions necessary to control factionalism have disappeared in modern life," Sullivan, NFP 9; and Brinkley pays lip service to the notion, embraced by many public choice analysts, that there may in fact be no such thing as the "public interest." Brinkley, NFP 26.

in our collective life unnecessarily dismal.<sup>2</sup> And many who find public choice methodology useful as a way of understanding government decision-making would, at the end of the day, endorse the general thrust of NFP's conclusions.<sup>3</sup> But any work which reaches such conclusions by ignoring public choice theory, as does NFP, forfeits its claim to intellectual respect.

With the exception of the present system of campaign finance, NFP stoutly defends the institutional status quo. It exhibits extravagant and rather touching faith in the benign potential of a strong national government and in the inherent trustworthiness of incumbent legislators. Its imputation of base motives to "raving radical-conservative zealots" who entertain more cynical, less flattering views of bureaucrats and legislators is gratuitous and hardly deserves mention. If the book had not undermined the persuasive power of its conclusions by failing to acknowledge the legitimacy and intellectual power of more skeptical competing visions, one could more easily have ignored its dismissively arrogant tone. As it is, since one cannot help noticing how many arguments the book fails to address, and how dated and shallow so much of the analysis is rendered by reason of these failures, one finds its self-righteousness particularly grating.

Take, for example, the problem of faction, which Madison brilliantly addressed in *Federalist* #10. Faction, he says, is

a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights

of other citizens, or to the permanent and aggregate interests of the community.<sup>4</sup>

The authors of NFP are hardly alone in believing that "the framers' ingenious ... solution to the problem of faction was ... to build a strong national government that would combine the twin virtues of indirect democracy and extended sphere." (Sullivan, NFP 8) NFP sees the federal government as "the *only* device anyone has come up with in our political history for keeping factionalism under control," (Sullivan, NFP 9) (emphasis added) and "history has proved Madison right about the crucial role of the federal government in *constraining* factionalism." (Sullivan, NFP 10) (emphasis added) More skeptical analysts, though, prodded by public choice theory, think that "[t]here is no reason to conclude that the federal government is less vulnerable to faction once the factors that" formerly permitted virtuous legislators to operate without being unduly influenced by the self-interest of their constituents no longer obtain.<sup>5</sup>

Private interest legislation is common today, much more so than in 1787, and more common at the national level than among the states – the opposite of Madison's belief about what would happen. This predictive failure can be explained as the result of a variety of factors well known to public choice theory: limits on representatives' freedom from factions' influence; increased specialization in production; free rider obstacles to political participation; the considerable advantages to interest groups of obtaining national legislation; and the failure of collective virtue.<sup>6</sup>

2 See, e.g., Abner J. Mikva, *Foreword: Symposium on the Theory of Public Choice*, 74 VA. L. REV. 167 (1988).

3 See, e.g., Jerry L. Mashaw, *GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW* (1997).

4 THE FEDERALIST #10, at 78 (James Madison) (Clinton Rossiter, ed. 1961).

5 Frank H. Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1337 (1994) (hereafter Easterbrook, *Madison's Vision*).

6 *Id.* at 1333.

Also to the point, many scholars implicitly dispute NFP's claim that the national government is the *only* device for controlling faction. These scholars look hard instead at institutional competition, at the various tasks government is asked to perform, and at how the drawing of jurisdictional boundaries actually impacts decision-making.<sup>7</sup> Rather than stopping in their analytical tracks when they confront the obvious fact that it is easy to "overrate the virtues of contemporary states," (Sullivan, NFP 10) they recognize and try to come to grips with the fact that

governments provide a variety of goods and services, and that the ideal boundaries for any service provider should reflect the objective that the provider is trying to accomplish. If the objective of government is to solve collective action problems in the provision of a public good, then governmental boundaries should coincide with the geographical scope of the benefits generated by governmental provision or production of that good. If the function of government is to solve coordination problems ... or to solve prisoner's dilemmas among entities that might otherwise seek to exploit each other ... then the jurisdiction of the government should reach all parties that would benefit from cooperation. If the function of government is to avoid generating externalities, then the government should have jurisdiction of both the regulated actor and all parties that would be adversely affected by the activity that the government regulates. If its function is to achieve economies of scale, the government should be sovereign over a geographical area that can realize those economies. If its function is to foster self-governance, the government should be small enough to permit participation. And if its function is to redistribute wealth, the govern-

ment should be large enough to embrace persons of disparate income and to inhibit exit by those who might otherwise emigrate to avoid paying subsidies.<sup>8</sup>

Consider other examples: term limits and the line item veto. NFP disparages the line item veto because it would have the allegedly untoward effect of weakening Congress relative to the President. NFP also asserts that term limits are a bad idea because they would "reduce the influence of public deliberation by elected representatives," and thus the public would lose the benefits of the presumably invaluable substantive experience of long-term incumbents while suffering the cost of increased interest group influence. (Polsby, NFP ch 10 and pp 69-72) NFP claims in addition that the present organization of Congress has many advantages, not least of which is that it "allows committee specialists to acquire authority over the subject matter in their jurisdictions by learning over time about the substance of public policy." (Polsby, NFP 32) What NFP does not mention, much less respond to, is public choice analysts' very different assessment of the wisdom of weakening Congress and in particular of the effects of long-term committee chairmen's "expertise." The President has a national constituency and the ability to resist factional claims by adding items to the national agenda. Congressional committee chairmen, moreover, are not so much possessors of expertise as they are sitting ducks for factional pressure.<sup>9</sup>

NFP's failure to come to terms with perspectives such as these undermines its persuasiveness in no small part because NFP's

7 See, for example, the recent symposia in the *Journal of Law, Economics & Organization*, 6 J.L. ECON. & ORG. 1 (1990), and the *Virginia Law Review*, 83 VA. L. REV. 1275 (1997).

8 Clayton Gillette, *Trumps by Decentralized Governments*, 83 VA. L. REV. 1347, 1348-49 (1997).

9 Easterbrook, *Madison's Vision*, at 1334:

Congress itself has developed a structure that [makes it easier for factions to influence legislative behavior]. Members serve on committees, which as gatekeepers to the floor and as the principal drafting institutions are highly visible to factions. Interest groups can monitor the behavior of a few committee members much more closely than they can track all members of

project – to address contemporary public issues in terms of governmental structure – plainly demands that the structural analysis itself be brought up to date. The original *Federalist Papers* reveal their authors as men of stunning political acumen and astonishing foresight. As a description of one of the fundamental challenges of institutional design, for example, *Federalist* #10 could have been written yesterday. So as a frame of reference for thinking in structural terms about contemporary structural issues such as balanced budgets, term limits, line item vetoes and the like, the *Federalist Papers* continue to repay study. But the present configuration of governmental power – in particular the jurisdictional reach of the federal government – is, to put it mildly, rather different from that which the Founders contemplated. More to the point, there exist contemporary and analytically powerful ways of thinking about the structural issues that the Founders identified. Why ignore them?

Perhaps the sponsors of NFP would explain their lapse by claiming that they contem-

plated a book for a general audience, one comprised of educated persons to be sure but not of political economists or law professors. It is precisely the educated general audience that stands to benefit the most from encountering new theories. They might be tweaked into thinking more profoundly and caring more deeply about important public issues by being offered not tired nostrums calling on them to form habits of reasoned reflection and reminding them “of the many things government has done and continues to do well” (Brinkley, NFP 133), but analytical tools to help them reflect rigorously about how government institutions actually work. And these tools are hardly beyond the grasp of educated laymen. Cass Sunstein began a recent piece in the *New York Times Book Review*, for example, with a two-paragraph summary of public choice thinking that made its conceptual underpinnings both transparent and readily accessible.<sup>10</sup> What a pity that, on apparent account of their unshakable commitment to big government *in principle*, the NFP missed their opportunity to do the same. *JB*

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Congress. The small size of committees also permits the concentration of rewards, whether campaign contributions or other forms of political support. Once assigned to a committee, members rarely lose their places, and leadership on committees depends largely on seniority. These features enable committee members and factions to deal with one another on an enduring basis.

10 Cass R. Sunstein, N.Y. TIMES BOOK REV. 37 (Sept. 7, 1997) (reviewing Mashaw, GREED, CHAOS, AND GOVERNANCE).