

- **Federalist Papers: Institutions, policy-making, and the public interest**

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## Key Questions

- What does it mean to say, "Institutions matter"?
- What design do policy-making institutions have in the U.S.?
- Where did this design come from?
- How should we understand the interplay between institutions and policy-making?

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2

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## Organization

- Were the Federalists right? Do they continue to be relevant?
- Examine and understand Federalist's design and its implications.
- Does this design produce good public policy?
  - Kelman's critique.
  - Time for reform?

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3

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### Quick review: key features

- Address dangers and shortcomings of “pure democracy.”
- Secure private liberty [rights] and public good against the “mischiefs of faction.”
- “Preserve the spirit and form of popular government.”
- Design a set of institutions:
  - Compound republic: “great and aggregate interests” to federal “local and particular” to states
  - Representative government.
  - Divided powers and agency.

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4

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### Contemporary Federalists: How would Madison and Hamilton read today's news?

- California recall
- Campaign finance reform
- Congressional oversight of judges
- Gay marriage

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5

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### Step back: Federalist Debate

- 85 essays by Hamilton, Jay, Madison
- Published anonymously (Publius) in *New York Packet* and *Independent Journal* between October, 1787 and May, 1788
- Address “insufficiency of the present Confederation to preserve the union.”
- Urge New Yorkers to ratify
- “Anti-Federalist papers” weaknesses of proposal against tyranny. Bill of Rights partial response.

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6

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## Established federal institution: Articles of Confederation

- Followed ratification of Declaration of Independence.
- Effort by Continental Congress to provide enforceable framework for union.
- "Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."
- No executive or judicial branches of government. Only a committee of delegates (Congress) representing each state.
- Congress' responsibilities: resolve disputes among states, manage foreign affairs, declare war or peace, national defense.
- Congress denied the power to collect taxes, regulate interstate commerce and enforce laws.

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7

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## Federalist #10 - Design Problem: design a set of democratic institutions that can:

- "preserve the spirit and the form of popular government."
- "secure the public good and private rights against the danger of faction."
- Address historical experience: unsteady nature and short life of pure democracies.

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8

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## Core problem: "Mischiefs of faction"

- Faction: "a number of citizens [majority or minority] 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 interest of the community."
- Effect: popular governments are often too "unsteady" and unjust.
- The "public good is disregarded in conflicts of rival parties."
- Issues and problems are decided "not according to the rules of justice and rights of minority, but according to the superior force of majority."

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9

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## 2 general designs to consider

- remove its causes
  - destroy liberty essential to its existence:
    - worse than the disease
  - Give everyone same opinions, passion, interests.
    - Impracticable: free operation of human reason
- curb its effects
  - Direct “pure” democracy won’t work
  - Republican organization is answer

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10

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## What makes the republican design work? (in Madison’s view)

- **“Representation ‘refine(s) and enlarge[s] 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.’ Nice but unreliable.**
- **Tie representation to a diverse body of interests: “a greater variety of parties and interests . . . make[s] it less probable that a majority of the whole will have a common motive to invade the rights of other citizens;” and more difficult [if exists] for faction “to discover their own strength and to act in unison with each other.” Also checks spread.**

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11

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## Federalist Nos 47 & 51 Design Problem:

- Relate the branches of federal government
- Avoid risks of tyranny posed by consolidation of powers in one branch of government
- How can we provide institutional design (“constitutional means and personal motives”) to resist encroachment?
- How can we constitute branches so that each department has a will of its own and so that members of each have as little agency as possible in the appointment of members of others?

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12

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## Madison's response in #47

- Differentiate complete consolidation from partial agency
- Problem is not that one part of government has partial agency in other powers, but that the "whole power of one department is exercised by the same hands that have the whole power of another department."

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13

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## Response in #51

- Ambition must be made to counteract ambition. Correct "by opposite and rival interests the defect of better motives."
- Cannot curb the predominance of the legislature so divide it into two houses with different modes of election. Power of veto for executive.
- Compound republic. State and federal each granted powers. Authorization of both is required for amending the Constitution
- Break into many parts and interests to minimize the possibility for tyrannical faction. In an extended republic with "a great variety of interests, parties,, and sects" a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good. "

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14

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## #78 - Design of Judiciary

- Least dangerous to political rights (no control sword/purse; ability to direct strength/will)
- Role is to bring judgment and discretion to government: enforce Constitutional limits on power (legislature and executive) and prevent illegitimate intrusions on the rights of minorities.
- To accomplish this judiciary need:
  - Independence -> permanent tenure
  - Standard of good behavior

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15

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### Key features of Federalist analysis

- Society is characterized by diverse interests.
- These interests are primarily sectarian and pursued by groups that amplify these tendencies.
- Cannot rely on virtue.
- The diversity that creates the risk of faction also provides the solution.
- Key is an institutional design that provides what individuals and groups cannot be depended on to supply (popular government, judgment, respect for liberty and limits on power).
- There is a tie between behavior and the institutional conditions in which it is expressed.

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16

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### Key features of Federalist design

- Never rests on one feature but on relationship among a group of principles and actions.
- Corrects "by opposite and rival interests the defect of better motives."
- Use representative and make them accountable (through regular free elections) to diverse interests
- Divide power: between states and federal government; between branches of government.
- Prevent usurpation of power and agency among branches.
- Ensure respect of limits on authority.

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17

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### What does this mean for policy-making?

- These design questions about institutions are not settled. Played out in debates about policy.
- System is good at securing liberty and avoiding bad policy: multiple checks and points of access.
- Ensures that significant policies are limited to instances where there are broad shared interests.
- Inefficient. Difficult to get anything done quickly.
- Does it produce good policy?

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18

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### Kelman's critique

- Federalist institutions good for protecting negative liberties, less good at providing positive liberties.
- Cast "too wide a net" to ensure this.
- Path to good policy too circuitous: "If we don't aim at the public good we won't hit it." (J. Cohen)
- Institutions shape behavior by providing cues.
- Psychology marked by altruism and social norms as well as the pursuit of self-interest.
- Must recognize and embrace possibility of altruism and norms of "public spirit:" 'Do the right thing.'
- Such behavior can snowball.

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19

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### What did the Federalists fail to anticipate?

- Growth of the agenda.
- Administrative state.
- Development of technology.
- Globalization.
- ????
- How do these influence our sense of the appropriateness of the Federalists' institutional design?

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20

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