The Philosophers' Government

Session VI: Feb. 28, 2013

The Federalist Papers; Our Philosophical Heritage and Contemporary Political Problems

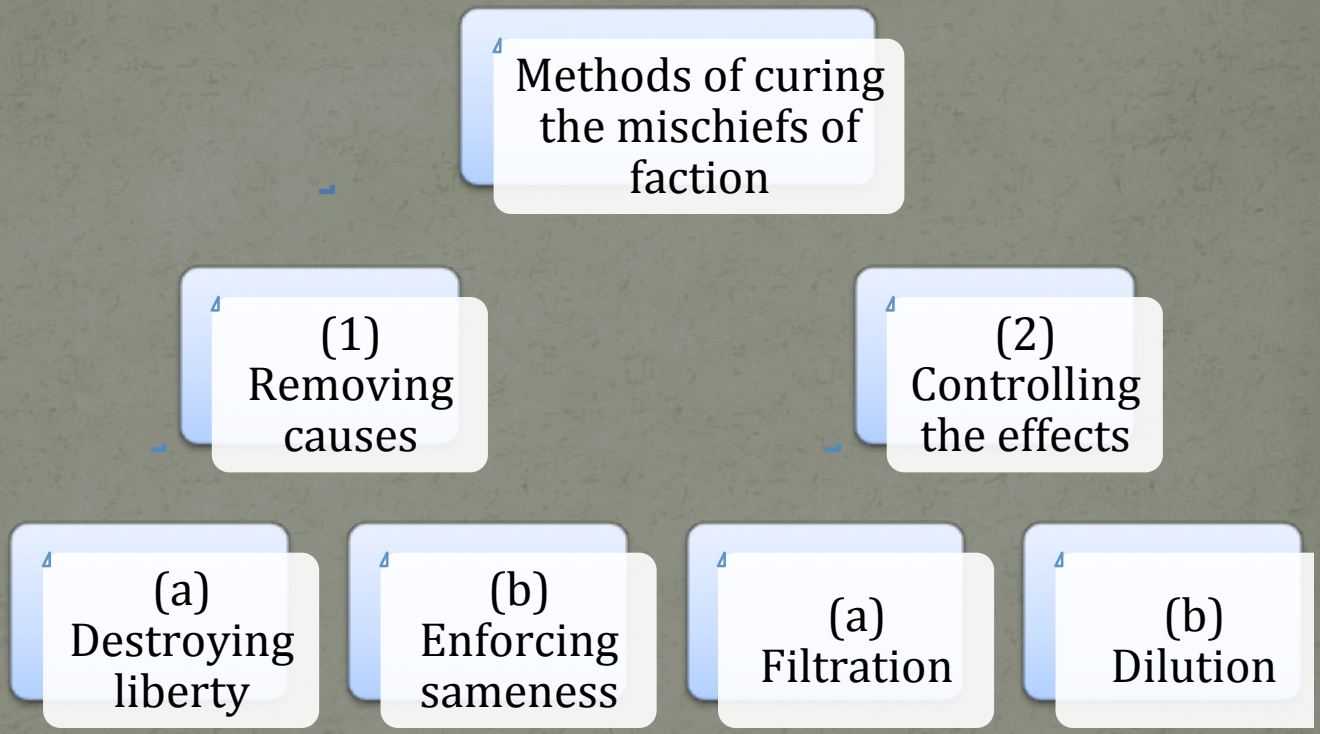
- The *Federalist Papers*.
  - The *Federalist Papers* (often referred to simply as *The Federalist*) was a series of newspaper columns in New York newspapers published during New York's ratification debates, 1788.
  - The authors were Alexander Hamilton (1757-1804), James Madison (1751-1836), and John Jay (1745-1829).
  - While the columns were signed with a pseudonym, 'Publius', we have now been able to identify the authorship of almost all of the numbers.
  - No. 1 (Hamilton).
    - His purpose is to frame the ratification debate in New York by placing the issue on a properly high plane.
    - "It has been frequently remarked…deserve to be considered as the general misfortune of mankind."

- The quality of the writing and the subtlety of the argument is striking, and characteristic of the papers as a whole.
- The evidence of the influence of Hume's *Essays* cannot be missed.
- We see, also, the reliance on history as a source of evidence from which general principles are inferred, another characteristic of the papers.

- No. 6 (Hamilton).
  - Hamilton argues that the present degree of autonomy of the states makes the country vulnerable to internal conflict.
  - Ironically, such conflict did ultimately occur less than 75 years after these papers appeared, conflict due, in part, to weaknesses in the Constitution itself.
  - "A man must be far gone in Utopian speculations…and to set at defiance the accumulated experience of ages."
    - Here we see the fallibilism of the republican theory.
    - And the strong reliance on history's lessons; i.e., the empiricism beneath the Constitution.

- No. 10 (Madison).
  - One of the most famous of the papers, and one whose interpretations fall along a dividing line between conservative and liberal thinkers in the present day.
  - The subject is faction, which Madison defines as "…a number of citizens, whether amounting to a majority or 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 interest of the community."
  - Factions, in Madison's terms, would now be called interest groups; e.g., labor unions, the elderly, tort lawyers, various ethnic and racial groups, etc.
    - The dominant mode of national U.S. politics has become what some scholars call "interest group liberalism."
      - Its strategy is to appeal to enough interest groups to gather a majority of the vote.
  - Madison regards faction as a great political evil; he argues that the Constitution's design will enable its avoidance.

- The argument proceeds according to the valid deductive form *disjunctive syllogism*.



- (1) (a) is rejected by analogy:
  - Liberty / Faction :: Air / Fire;
  - Destroying air would eliminate fire, but also animal life;
  - Liberty is necessary to political life just as air is to animal life;
  - Therefore, liberty cannot be destroyed.
- (1) (b) is rejected because it is impossible.
- We must conclude that, "The latent causes of faction are thus sown in the nature of man; and we see them everywhere brought into different degrees of activity, according to the different circumstances of civil society." Therefore, (1) is rejected and we must turn to (2).
- We are fortunate to have two means by which the design of the Constitution will control faction:
  - (a) The aristocratic element of representationalism will reduce the danger of faction by filtration.
    - The representatives will be disposed to think more in terms of the public good than that of factions.
  - (b) The extent of the new republic will make the formation of effective factions difficult; hence, the dangers will be reduced by dilution.

- The devolution of the aristocratic feature of our actual representation renders (a) quite problematic.
- The advances in communication render (b) unconvincing.
- But Madison's factionalism has become a fundamental feature of our politics in large part because of the inherent egoism of the theory under which our government was formed, on the one hand, and the embrace of egoism and faction by politicians, on the other.

- *Federalist* 10 often divides those now termed "liberals," or "progressives" in American politics from those called "conservatives."
  - Liberals regard the argument as "cynical" by virtue of their tending to believe that human nature is not fixed, but can be changed, and is, in fact, evolving.
    - Further evolution can be spurred by reducing the inequality in the distribution of property, i.e., through an appropriate standard of distributive justice.
  - Conservatives regard the argument as "realistic" because while good child rearing and education can moderate our darker tendencies human nature is fixed.
    - Moreover, there are limits to the redistribution of wealth established by principles of justice.

- No. 39 (Madison).
  - What is a "republican" form of government?
  - "It is evident that 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."
    - ('genius' here means animating, or guiding, spirit.)
  - The heart of the characterization lies in ¶ 4 in the form of two propositions: the government is founded on the principle of popular sovereignty; and the officers of the government ("magistrates" in the most general sense of the word) hold their offices temporarily, and at the pleasure of the people.
    - ¶ 6 may seem odd until one realizes that European titles of nobility brought with them permanent claims to public office.
  - ¶ 7 introduces a new topic, whether the Constitution's government is "national" or "federal."
    - The issue here is an obsolete one, as a comparison of the assertions of ¶ 14 with present day conditions makes reasonably obvious.

- No. 39 (cont.).
  - On the other hand, the South's defenders at the time of the Civil War maintained precisely that the Union was merely a confederacy, an alliance of independent states, any of which could withdraw at any time, just as any nation might withdraw from an alliance.
  - Lincoln, by contrast, maintained that the Union was a single nation and the government was national; secession was therefore unconstitutional.
- No. 51 (Madison or Hamilton).
  - In No. 47 Madison had asserted: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." He then goes on to argue that the Constitution's design avoids such accumulation of functions. That argument is continued in No. 51.
  - Here the question is how the occupants of any one of the three major branches are to be kept from encroaching on the domain of either of the other two.

- No. 51 (cont.).
  - The answer is given in the famous ¶ 4: "But the great security against a gradual concentration of the several powers…but experience has taught mankind the necessity of auxiliary precautions."
  - It continues in the next paragraph: "This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public…"
  - As with No. 10 we see the assumptions about human nature that are characterized as "realistic" by some, and as "cynical" by others. The assumptions derive naturally from an empirical approach to the problem of defining a government.
  - Republicanism's adherence to the PPS implies that the legislative branch of governments devised on Montesquieu's three-fold division of basic functions will predominate.
    - To equalize the legislative branch's natural force with the other two branches it is divided into two houses defined so that there is opposition between them.

- No. 51 (cont.).
  - The success of this arrangement is perhaps seen in the fact that members of the House of Representatives sometimes say that their enemy is not the other party, but the Senate.
  - In a line of cases beginning with *Baker v. Carr*, 1962, the Supreme Court repudiated this reasoning for the legislatures of the states, requiring that both houses' memberships be based on population, whereas prior to those decisions state legislatures were modeled on the national one.
    - (Except for Nebraska, which has a unicameral legislature.)
    - The Court formulates the "one man, one vote" rule, Justice Douglas claiming that it has been the rule from the D.I. onward.
    - The Court puts itself in the awkward position of potentially making the 14th the Amendment that swallows the Constitution, a predicament from which it extricates itself by arguing that the divisions of the states into counties, or their equivalent, is arbitrary and haphazard.
  - ¶¶ 8-10 Consider two other safeguards against tyranny. The federalism principle is one. In this argument we see one of the few references to rights which might be construed as natural. We also see the dilution argument of No. 10 rehearsed. The argument here is notable for Publius' assertion that, "Justice is the end of government. It is the end of civil society."

- No. 78 (Hamilton).
  - The five papers Nos. 78-82 are the judicial essays.
  - No. 78 is arguably the most important of these, and is certainly the most frequently quoted.
  - Its principal topic is the life tenure, "during good behavior," of the federal judges.
    - Hamilton argues that this degree of tenure is necessary for the independence crucial to the judiciary under republican principles.
      - Recall the D.I.'s charge that George III had made judges simply agents of his arbitrary power.
      - Under the Constitution, of course, the danger of corruption of the judiciary will not come from a king, but from "the representative body."
  - Paragraphs 7 and 8 are famous for their assertion that the judiciary is "the least dangerous to the political rights of the Constitution."
    - The judiciary, Hamilton argues, has no power either of "the sword or the purse"; they must depend on the other branches for the enforcement of their rulings.

- No. 78 (cont.).
  - Indeed he is correct, as history has shown. Andrew Jackson refused a Court enjoining the removal of an Indian tribe from the South, saying, "They've issued their order. Now let them enforce it."
  - More recently, Democratic Presidents, beginning with Bill Clinton, have refused to take necessary steps to implement the Beck decision on union dues.
  - In ¶¶ 9 ff. Hamilton takes up the topic of what is now known as judicial review, arguing that it is an essential duty of the federal judiciary "…to declare all acts contrary to the manifest tenor of the Constitution void."
  - ¶ 9: "There is no position which depends on clearer principles, that that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised is void. No legislative act, therefore, contrary to the Constitution, can be valid."
    - He is working from the doctrine of agency here.

- No. 78 (cont.).
  - There follows an argument in which an important analogy appears and a crucial distinction is made.
    - "The People" / their delegates : : the Constitution / positive law; i.e., the Constitution is the voice of the people in its most immediate, direct, form; it manifests their original delegation of their political sovereignty.
    - The acts of the legislative branch, on the other hand, are mediated, indirect and "derivative"; the legislature's power derives from a secondary grant by the people.
  - It follows from this character of the Constitution that in interpreting its language the courts may "substitute their own pleasure to the constitutional intentions of the legislature."
    - Hamilton has several times in the last 50 years no doubt spun in his grave when federal courts have interpreted legislative acts to say the opposite of the plain meaning of their language on some point.

- Five philosophical fault lines in the philosophers' government.
  - #1: The principle of popular sovereignty's shortcomings.
    - Popular government places a burden on the masses that they are not by nature up to bearing.
  - #2: Two hidden assumptions of the social contract theory (SCT); the ill-defined character of the American community.
    - (a) The SCT assumes the pre-existence of a community of heritage.
    - (b) The SCT assumes that the basic political entity is the adult individual.
  - #3: The written constitution requires interpretation.
    - There are two opposed general theories of textual interpretation.
    - These differences profoundly affect our law.

- #4: The natural law, natural rights, tradition versus some form of conventionalism or radical democracy.
  - The Founders were inspired by a natural law tradition, but the foundations for the belief in natural law have eroded away.
- #5: Rationalism and empiricism in politics.
  - The *Declaration of Independence* is a rationalist document, despite the debt which it owes to Locke's *Second Treatise*.
  - The *Constitution*, on the other hand, is an empiricist one whose principal philosophical creditor is David Hume.
  - While both rationalism and empiricism are modes of application of reason, they differ radically in spirit.
- #5 ½: The conflict between liberty and equality: the death of the philosophers' government.
  - Liberty and equality coexist uneasily.
  - In the last hundred years we have repudiated the Founders' conception of liberty in the pursuit of equality, and equally repudiated their concept of individuality.