Education of the Regime and the Soul in *The Federalist*[*]

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Abstract: As a general proposition, any regime requires at least some of its citizens to think and behave in ways that, at a minimum, do not undermine the regime. That requirement points to the need for education for at least some of the regime's citizens. In presenting arguments for ratification of the U.S. Constitution, however, the authors of *The Federalist* make no explicit argument for such education. Despite this omission, *The Federalist* provides the basis for an education in citizenship in two respects. First, *The Federalist*, as a work of public, reasoned advocacy, teaches it readers not only the need for the Constitution and the meanings (or possible meanings) of it provisions, but how to think about it and how to act in the constitutional regime to be created under it. The authors intended *The Federalist* to be a continuing basis for thought, conversation, and action after ratification. Second, by dealing explicitly with what we now call the doctrine of judicial review, the authors of *The Federalist* made explicit the idea of a small group of specially-selected people voiding acts of the legislative and executive branches of the government. This role of the federal judiciary may be recognized as that of teacher. The federal courts' interpretations of the Constitution and the law are the judges' teachings, and the officers of the political branches and the regime's citizens are the judges' students. *The Federalist* and the work of judges serve as an education for governing ourselves as individual souls and as a Constitutional regime.

This essay has its origins in a master's essay I wrote for St. John's College in Santa Fe in 2005.[1] It's a pleasure to revisit this place with a continuation of work that I started here almost ten years ago. The title of that thesis was "State and Soul in *The Federalist*." The title of my essay today reflects better terminology – "regime" instead of "state" – and a concentration on and expansion of the final section of that essay.

Very briefly: in "State and Soul in *The Federalist*," I explored what is required of a citizen in the conception of the U.S. Constitution held by the authors of *The Federalist*.

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[*] Presented at "What Is Liberal Education For? A Conference at St. John's College on the 50th Anniversary of the Santa Fe Campus" on 16 October 2014.

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[1] Charles C. Claunch, "State and Soul in *The Federalist*," (M.A. Liberal Arts thesis, St. John's College, Santa Fe, 2005).

Following up on the authors' suggestion that government is "the greatest of all reflections on human nature," I used the Constitutional regime described in *The Federalist* to understand both that regime and the individual "Constitutional soul."[2] In that original essay, I made the following broad points:

1. Power can be exercised legitimately by all three branches of the Constitutional regime, but the judiciary can void acts of the legislature and the executive; we call this today "judicial review." This suggests, correspondingly, that the individual can use judgment, will, and force (to use the terms of *The Federalist*)[3] but that judgment can exercise a certain kind of control over will and force.[4]

2. The necessary and proper clause[5] suggests personal liberty with a necessarily broad reach and the supremacy clause[6] suggests the acceptability of one's acts, according to one's judgment, as long as they are compatible with one's responsibilities.[7]

3. The discussion of the control of faction in *No. 10* of *The Federalist* suggests control of individual passions through (a) the development by the individual of a variety of interests, none of which motivate his actions completely but all of which engage his attention to some moderate degree, and (b) the reduction of time and energy devoted to any single interest, reducing the chances of waste or of indulging in passions with regard to any single interest.[8]

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2 Alexander Hamilton, James Madison, and John Jay, *The Federalist: A Commentary on the Constitution of the United States*, ed. Robert Scigliano (New York: Modern Library, 2000) ("*The Federalist*"), *No. 51*, 331.

3 Ibid., *No. 78*, 496.

4 Claunch, 2-6.

5 U.S. Constitution, art. 1, sec. 8, cl. 18.

6 Ibid., art. 6, cl. 2.

7 Claunch, 6-10.

8 *The Federalist*, *No. 10*, 53-61; Claunch, 11-15.

4. Appropriate judicial review and political acts mutually affect each other. Appropriate judicial review provides a reasoned sense of the limits of Constitutional power in various circumstances, and Constitutionally-minded deliberations, policy statements, and legal defenses justifying the political branches' acts provide grist for the mill of a well-informed and well-reasoned judicial review. This suggests that similarly, individual judgment and one's acts of will and force mutually affect each other. Individual judgment is used to determine the extent and responsibilities of one's individual liberty, and in doing so it governs one's acts of will and force; one's acts of will and force and the reasons for them provide material on which individual judgment can operate.[9]

5. The actions of the Constitutional convention, the ratification of the Constitution, and the various methods of Constitutional amendment suggest the wisdom of adoption of new or revised individual standards in the presence of outmoded or inadequate standards. They should be changed greatly, however, only when necessary; generally, they should be changed only incrementally. The defense by the authors of *The Federalist* of Constitutional drafting, ratification, and amendment is an expression of their confidence in the capacity of the people, together and as individuals, to use judgment, will, and force to assess and change standards in a harmony that makes good use of liberty.[10]

6. The authors of *The Federalist* present the Constitution as an invitation to and a means for the people, individually and collectively, to rise above their usual selves at the same time as it tries to protect them from their failure to do so. This rise, however, requires an understanding of

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[9] Claunch, 15-21.

[10] Ibid., 21-27.

the Constitution and of the individual. Both the existence and the lessons of *The Federalist* indicate that the authors believe that such understanding can be taught and learned.[11]

All of these broad points were developed to lead to the idea that *The Federalist* and judges play important roles in the education of the Constitutional regime and the citizen of that regime. I turn now to the final section of the thesis and my expansion of it for our conference today.[12]

The Constitution makes no explicit provision for, and *The Federalist* makes no explicit argument for, education. Despite the omission of an explicit discussion, however, *The Federalist* provides the basis for an education in citizenship in two respects. First, the authors of *The Federalist*, as a work of public, reasoned advocacy, teach their readers the need for the Constitution and the meanings or possible meanings of its provisions and how to think about it and how to act in the Constitutional regime to be created under it. With their detailed arguments, the authors ask their readers to think deeply and to assess or make cogent counterarguments concerning their government. In particular, the arguments of the authors regarding the meanings of the more contentious provisions make it clear that after ratification those provisions' meanings and implications will have to be worked out in practice through day-to-day operation of the government. The thrust of *The Federalist* is that the Constitution allows its meanings and implications to unfold in time, within limits. Beyond assisting ratification, by making their arguments, they intended to shape future debates by providing a continuing basis for thought, conversation, and action after ratification.

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[11] Ibid., 27.

[12] Ibid., 28-32.

Second, by dealing explicitly with what we now call the doctrine of judicial review, the authors of *The Federalist* made explicit the idea of a small group of specially-selected people voiding acts of the legislative and executive branches of the government, at times against the immediate will of the people but in conformance with the will of the people as expressed in the Constitution. Despite their argument that the judiciary is the "least dangerous" of the branches, the actual power of judicial review is clear enough from the authors' discussion as a whole.[13] If the judiciary's interpretation of the law is to be called rule by an unelected elite, it is very indirect rule, practiced through decisions in cases raised by legislative and executive acts and subject to limitation and change through amendments to the Constitution. If it is to be called politics, it is an attenuated politics, filtered through the formal requirements of explaining decisions in terms of law, and again subject to limitation and change through Constitutional amendment. As an alternative to these negative characterizations, the role of the federal judiciary may be recognized positively as that of teacher. The federal courts' interpretations of the Constitution and the law are the judges' teachings, and the officers of the political branches and the regime's citizens are their students. The judges and their interpretations are one source of understanding of how we, as a Constitutional regime and as individuals in it, may govern ourselves.

Judges are fallible, like all other humans, and therefore their judging and their teachings are liable to fallibility. Their isolation from the political branches and from the politics of the people cannot isolate them from their own humanity. Judges must have and are expected to exercise the same qualities for which the authors of *The Federalist* hoped in the people's choices as political agents—but the necessity of isolation means that they are expected to have the same

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[13] *The Federalist*, *No. 78*, 496.

weaknesses as the rest of us, too. The issue is whether judges can be expected, in their isolation from politics, to turn away from personal passions and illegitimate interests to a reasonable degree, or whether they should be expected to indulge them without adequate restraint. The mechanism described by the authors to prevent a concentration of power in one department in which "the interest of the man must be connected with the constitutional right of the place," has only limited applicability to the judiciary.[14] The quality of ambition required by this competition among the branches seems incompatible with the particular quality of public-spiritedness required of judges. By participating in such institutional ambition contests, judges would risk setting themselves up as a third political branch that is concerned primarily with policy like the other two branches. In keeping with the unique nature of the role and power of the judiciary with respect to the other two governmental branches, the measures appropriate to assist judges in performing their role are different than the measures designed for politicians.

To work successfully as judges and teachers, judges must exercise a self-control that is analogous to the governmental self-control that they exert on other parts of the government. Most crucially among government agents, judges must confine themselves to acts of will and force that lie within the boundaries imposed by their Constitutional positions. Their isolation improves their opportunity to internalize those constraints, but it does not give them the required means. Judges must have the will and the force to do what judgment tells them that they must do and to refrain from doing what it tells them that they must not do. They must direct and teach without dictating. If they are successful at self-control, they teach the remainder of the government and the people Constitutional self-control by exposition and example through their public, reasoned opinions and through the self-control that gives rise to those opinions. Thus,

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[14] Ibid., *No. 51*, 331.

well-behaved judges are also a source of our understanding of how we may govern ourselves as individuals.

To illustrate well-behaved federal judges displaying such judicial self-control, I present two examples of relevant judicial teaching among many attractive candidates. The first example is Justice James Wilson's seriatim opinion in *Chisholm v. Georgia*.[15] The second example is the introductory part of the opinion of Chief Justice John Roberts, Jr., in *National Federation of Independent Business (NFIB) v. Sebelius*.[16]

Chisholm presented this question: was the State of Georgia subject to the jurisdiction of the U.S. Supreme Court in a suit brought by two South Carolina citizens against Georgia to collect a debt? The relevant Constitutional provision stated that "[t]he Judicial Power [vested in the U.S. Supreme Court] shall extend … to Controversies … between a State and Citizens of another State …."[17] Taken literally, the Constitution granted the Court jurisdiction over states in suits like the *Chisholm* suit. But in answering objections to this provision in *The Federalist*, Publius argued that

> [i]t is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its consent* …. [T]he exemption, as one of the several attributes of sovereignty, is now enjoyed by the government of every state in the union. Unless, therefore, there is a surrender of this immunity in the plan of the convention [the proposed Constitution], it will remain with the states, and the danger intimated must remain merely ideal…. [T]o ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the state governments, a power which would involve such a consequence, would be altogether forced and unwarrantable.[18]

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15 2 U.S. (2 Dall.) 419, 453-66 (1793).

16 567 U.S. _____ (2012) (opinion of Roberts, C.J.) (slip opinion). Parts of this opinion – though not the introduction discussed here – were the opinion of the Court.

17 U.S. Constitution, art. 3, sec. 2, cl. 1.

18 *The Federalist*, *No. 81*, 521-22.

In seriatim opinions, four out of five members of the U.S. Supreme Court, including Justice Wilson, made the "forced and unwarrantable" inference dismissed by Publius, deciding that the Court had jurisdiction over Georgia, with one justice dissenting.[19] Rather than starting with the relevant clause of the U.S. Constitution and its implications, Wilson started with the much broader question, "Do the people of the United States form a nation?" Wilson's opinion in *Chisholm* is a rich display of learning in philosophy and law, and it can be appreciated as a lesson to the public about how to think about what ratifying the Constitution meant.

Amusingly, Wilson used the wording of a toast to make a profound Constitutional point. He noted that the toast is given in the form, "[t]he United States," instead of "[t]he People of the United States," and that this reflects a confusion between the artificial person, the United States, and the natural person, the people of the United States, who "spoke it [the United States] into existence."[20] In adopting the Constitution, the people – including the people of Georgia speaking as part of the people of the United States – were capable of vesting and did in fact vest judicial power over states, including Georgia, in federal courts.[21]

Among the lines of argument that Wilson followed, I focus here on his treatment of the scope of Georgia's sovereignty as a state of the United States. He argued that the citizens of Georgia, when "they acted upon the large scale of the Union," acted "as a part of the 'People of the United States'" and did not surrender their sovereign power to Georgia; rather, with respect

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19 2 U.S. (2 Dall.) 419, 429-50 (seriatim opinion of Iredell, J., dissenting), 450-53 (seriatim opinion of Blair, J.), 453-66 (seriatim opinion of Wilson, J.), 466-69 (seriatim opinion of Cushing, J.), 469-79 (seriatim opinion of Jay, C.J.).

20 Wilson, James, Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 453-66 (1793) (seriatim opinion), in Vol. 1, *The Collected Works of James Wilson*, eds. Kermit Hall and Mark David Hall (Indianapolis: Liberty Fund, 2007), 362.

21 Ibid., 362.

to the purposes of the Union, they retained their sovereign power to themselves.[22] Consequently, the State of Georgia was not a sovereign state with regard to the Union.[23] Later in his opinion, Wilson argued that the Court's decision of the case at hand was one of purposes of the United States, so that Georgia was not sovereign for the purpose of the suit.

He further argued at length that the people of the United States intended to form a national government for national purposes, complete with legislative, executive, and judicial power.[24] Contrary to Publius, Wilson argues that to have allowed in this complete national scheme an exception for states to consent to be sued would "be repugnant to our very existence as a nation[.]"[25] This is an instance in which Wilson's teaching with regard to nationhood differed from that of Publius. As noted above, Publius saw nothing repugnant to the Constitutional regime for states to retain sovereign immunity.

Only after following several other lines of argument to reach the conclusion that Georgia was subject to the jurisdiction of the Supreme Court in the suit (and I leave the others aside in the present essay) does Wilson turn to the meaning of the specific relevant text of the Constitution. "[C]ould this strict and appropriated language, describe, with more precise accuracy, the cause now depending before the tribunal?"[26] The question is rhetorical, and the answer, to Wilson, obviously negative. Note that with respect the Constitutional text, Wilson and Publius taught two different but reasonable ways of reading the grant of power. Wilson read the grant strictly, requiring no additional language to deprive the states of the relevant aspect of sovereign

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22 Ibid., 355

23 Ibid.

24 Ibid., 362-66.

25 Ibid., 365.

26 Ibid., 365-66.

immunity, while Publius read the grant in the context of the states' historical powers, understanding it to be limited tacitly by the states' sovereign immunity absent specific language denying that immunity to the states. Like the authors of *The Federalist*, Wilson explained the reasons for his opinion publicly and clearly, teaching the people a particular method of thinking about themselves and the Constitution that they had adopted. It was left to the people and their elected representatives to decide whether Wilson's lessons, the lessons of *The Federalist*, or some other lessons would be accepted. In this particular case, the people – through their elected representatives in the Congress and in the requisite number of states – rejected his teaching and that of the Supreme Court majority. In 1794 the Congress proposed and in 1794 and 1795 the requisite number of state legislatures ratified the Eleventh Amendment to exempt a state from suits by citizens of another state or by citizens or subjects of a foreign state. This rapid response to the Court's decision in *Chisholm* is itself an illustration of the capacity of the people, acting through their elected representatives, to react to federal judicial decisions.

Chief Justice Roberts's more recent opinion in *National Federation of Independent Business v. Sebelius* was a much more direct example of judicial teaching.[27] In the first six pages, Roberts was obviously teaching his readers certain aspects of the judiciary's relationship to the political branches, the people, and the Constitution. He began his lesson by pointing out that "[i]n our federal system, the National Government possesses only limited powers; the States and the people retain the remainder," and by quoting Chief Justice Marshall's observation that the extent of the powers granted to the federal government "will probably continue to arise, as long as our system shall exist."[28] "Resolving this controversy [the issue at hand] requires us to

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[27] National Fed'n of Indep. Bus. v. Sebelius, 567 U.S. _____ (2012) (slip opinion) ("NFIB"); NFIB, opinion of Roberts, C.J.

[28] NFIB, opinion of Roberts, C.J., 2.

examine both the limits of the Government's power, and our own limited role in policing those boundaries."[29] Our concern here is primarily with Roberts's examination of the Court's role in enforcing the limits of the federal government's powers.

Roberts argued that the Supreme Court reads Constitutional grants of power to the federal government "permissively" because it is reluctant to void acts of elected federal officials. In Roberts's view of the Court's role, the Court should void such an act only when the absence of Constitutional authority to pass the act (or, by extension, the absence of Constitutional authority to perform an executive act) is clearly demonstrated.[30] "[Policy] decisions are entrusted to the Nation's elected leaders, who can be thrown out of office if the people disagree with them. It is not our job to protect the people from the consequences of their political choices."[31] On the other hand, according to Roberts, "[o]ur deference in matters of policy cannot, however, become abdication on matters of law…. [T]here can be no question that it is the responsibility of this Court to enforce the limits on federal power by striking down acts of Congress that transgress those limits."[32] By logical extension, Roberts's argument extends to voiding executive acts that transcend Constitutional limits, too.

Aside from his obvious teaching of the role of the people and of elected officials in the Constitutional regime, Roberts's argument implies that the Supreme Court and the federal courts generally have an educational role. When an issue is presented for decision by a court, that court must decide which Constitutional grants and limits on federal power are relevant to the issue, and it must explain the reasons for that decision to the public. The court must then decide whether the

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29 Ibid., 2.

30 Ibid., 6.

31 Ibid.

32 Ibid.

legislative or executive act at issue is a transgression of Constitutional limits, again publicly explaining the reasons for the decision. The fact that Roberts explains the role of the Court strongly implies that he understands that for the Court to be seen to be staying out of policy decisions and to be seen as making legitimate Constitutional decisions, it must explain its decisions publicly and credibly. Going beyond such limited efforts to retain credibility, Roberts's teaching points to the Court's role in educating the public and government officials about the Court's responsibilities with regard to policy judgments and Constitutional judgments. Careful delineation of the policy and Constitutional questions and careful observance by judges of their responsibilities with respect to those questions serve to teach the public Constitutional and personal self-control.

It is entirely possible, of course, that the Court can make a policy judgment by mistaking it for or disguising it as a Constitutional judgment, and it has been accused of doing so (e.g., in *NFIB v. Sebelius*). The value of public explanations, as noted in the discussion of Wilson and *Chisholm*, is that they provide material that government officials and the public can use to make their own judgments in accepting or rejecting their judges' teachings.

As the authors of *The Federalist* point out, if judges fail in self-control, the last resort lies in the people themselves.[33] Do people need to be made ready for such responsibility, and if so, how? According to the authors of *The Federalist*, men require government "because the passions of men will not conform to the dictates of reason and justice, without constraint."[34] Free people require more than the constraining Constitutional regime described in *The Federalist*; they require self-control. The authors of *The Federalist* appeal to a capacity among their readers to

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[33] *The Federalist*, *No. 51*, 331-32.

[34] Ibid., *No. 15*, 91.

consider their arguments. Individuals must learn, or they must be taught, even that preliminary skill, and, as the foregoing discussion suggests, much more is required of Constitutional citizens. They must have the capacity to choose their agents well and to observe and judge them carefully. To observe and judge the behavior of political officers and judges with respect to the Constitution, an individual must understand the dynamic of legislative and executive action and judicial review as they relate to his liberty so that he may act in his rationally-directed and rationally-constrained interests. The Constitutional regime requires self-constrained citizens who are capable of establishing and maintaining a government that can constrain them when necessary and a government that in turn can exercise and demonstrate power responsibly by exercising and demonstrating self-restraint. The Constitutional regime and the Constitutional citizen must mutually shape and sustain each other. *The Federalist* is a significant feature of that mutual shaping and sustaining, speaking to the people for a conception of the Constitution and providing a model for some of the continuing requirements of citizenship. The judiciary, as it plays its unique role in the Constitutional regime as intermediary between the people and their legislative and executive agents, speaking for the Constitution to the people and their agents and providing examples and explanations for the continuing requirements of government, is also a significant feature of that mutual shaping and sustaining.[35] *The Federalist* and the work of judges serve as an education for governing ourselves as individual souls and as a Constitutional regime.

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[35] "It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and their legislature, in order, among other things, to keep the latter within the limits assigned to their authority." *The Federalist*, *No. 78*, 498.

Works Cited

Claunch, Charles C. "State and Soul in *The Federalist*." M.A. Liberal Arts thesis. St. John's College, Santa Fe, 2005.

Chisholm v. Georgia. 2 U.S. (2 Dall.) 419, 453-66 (1793).

Hamilton, Alexander, John Jay, and James Madison. *The Federalist: A Commentary on the Constitution of the United States*. Edited by Robert Scigliano. New York: Modern Library, 2000.

National Federation of Independent Business v. Sebelius. 567 U.S. _____ (2012). Slip opinion.

Roberts, John R., Jr. National Federation of Independent Business v. Sebelius. 567 U.S. _____ (2012) (opinion). Slip opinion.

Wilson, James. Chisholm v. Georgia. 2 U.S. (2 Dall.) 419, 453-66 (1793) (seriatim opinion). In Vol. 1, *Collected Works of James Wilson*. Edited by Kermit Hall and Mark David Hall. Indianapolis: Liberty Fund, 2007.