**Episode 69: The Federalist Papers**

This transcript was generated using Pop Up Archive, an automated transcription service, and may contain typographical errors.

**[Michael Gerhardt]** Rather than have other people tell us what to think, rather than have other people tell us what these documents mean, why not go back to original sources? Why not go back to something like the Federalist Papers? What did these people think and say on behalf of the Constitution?

**[Virginia Prescott] *I’m Virginia Prescott, and this is Civics 101, the podcast refresher course on the basics of how our democracy works. Thomas Jefferson called them the best commentary on the principles of government which ever was written. And Lin Manuel Miranda used their origins to the most famous musical of our time. Today we're looking at the Federalist Papers with Professor Michael Gerhardt. He is a former constitutional adviser to the White House and distinguished professor in constitutional law at the University of North Carolina. Michael, welcome to Civics 101.***

**[MG]** Hi. Thanks for having me.

**[VP] *So not everyone has seen Hamilton. With that in mind, what are the Federalist Papers?***

**[MG]** The Federalist Papers are a collection of 85 essays that were written primarily by three people; Alexander Hamilton, James Madison and John Jay. And these papers become perhaps one of the very best pieces of evidence we've got about how the people who framed and drafted the original constitution thought about how it would work. These essays were very important at the time because they were designed at least initially to secure ratification of the Constitution in New York.

**[VP] *So why was New York so important here?***

**[MG]** They needed every state to come back with an affirmative ratification. New York obviously was a very big state in terms of its presence on the East Coast. The population was important. And every state, as we would find out, as the ratification campaign went along, every state became important. Ratification ended up becoming barely a certainty. There actually was a very good chance at the time ratification might not be completed.

**[VP] *So we have this constitution and it is put forward to the states. Then the Federalist Papers; what are they, operating instructions for how this democracy is going to work?***

**[MG]** No they're really much more like arguments; here are our best arguments why the Constitution has been drafted, should be ratified, and the papers go almost one by one through the different arguments, different concepts that animate the Constitution, that underlie the Constitution, and put forward the best thinking that these writers could provide on why the Constitution was ultimately a good thing and should be ratified, approved state by state.

**[VP] *So what makes them so important and critical to our democracy?***

**[MG]** It's because the Constitution was drafted in grand terms. There's a great, “great outlines” is how John Marshall the chief justice would later refer to the Constitution. And so when we look at that great outline or great language in the Constitution, which is rarely self-defining, there's a lot that we might have to, there are a lot of questions that get raised, a lot of meaning that has to be determined. And the Federalist Papers are thought to be one of the very best sources for what the framers might have understood the Constitution to mean at the time it was being drafted. As such they've become enormously influential to the Supreme Court and other authorities in trying to determine what was the so-called original meaning, what did the framers understand this constitution they drafted to mean.

**[VP] *A number of teachers have suggested or asked that we do an entire episode on Federalist 10. What is so important about that essay?***

**[MG]** Federalist 10 which is written by James Madison is one of the most influential essays because it focuses on a principal reason for the U.S. Constitution. That reason was that it was going to be a check or safeguard against factions. Factions were understood by the framers and certainly by the writers of the Federalist Papers as self-interested groups. And self-interested groups could undermine government, they could take over different parts of government and only use it to advance their particular interests. So according to Madison in the essay, the Constitution was put together in part to ensure that no one faction could ever take over all the different aspects of the government. It would be very difficult if not impossible. At the same time the essay puts forward different explanations for why the Constitution could be a safeguard against factions or factional tyranny. The Constitution could help the proliferation of many factions, they could kind of work against each other, and at the same time the Constitution reflected the understanding that in a larger country factions could become diffused across the geography, across the land. And so this became a very important essay for explaining why we needed the Constitution to protect against any single or dominant faction from overriding or taking control of the federal government.

**[VP] *What were some of the factions that Madison was most concerned with at that time?***

**[MG]** Well there are different ones of course. Slavery was a massive problem. The interests that some people might have in owning slaves, economic interests could take the form factional control, and of course later after the Republic takes off and if the Constitution's ratified political parties form and political parties become one of the best examples today of factions

**[VP] *Right, there's no way to eliminate factions, however.***

**[MG]** No, people rather naturally organize into factions and that and that natural inclination or that development can become a hindrance to government. And again the defense of the US Constitution is designed to work against factions not to empower them.

**[VP] *Another essay frequently cited is number 78. What can you tell us about that one?***

**[MG]** So 78 is another influential essay. This one’s written by Alexander Hamilton. And one of the reasons why 78 is quite famous is it defends the creation of the federal judiciary. The federal judiciary as it was conceived in the US Constitution was going to be a different kind of judiciary. In the States, they were appointed in different ways. But the federal judiciary was going to be appointed in such a way as to preclude one branch from dominating their appointment. And at the same time the judiciary was going to be given an extraordinary protection called life tenure. These judges these judges were going to serve for life for they were confirmed. Which is remarkable. And thus there had to be some defense for empowering judges like I just described to function. And part of the defense that is pointed out in Federalist 78 is that this is going to be the least dangerous branch, it was not going to have all these other extraordinary powers of the other branches. Judges would actually not have anything but the power, so-called power of judgment not will; they couldn't appropriate money, they obviously couldn't initiate wars, they couldn't do any number of things. But these judges would be a safeguard to protect liberties and protect the government from overreaching, and thus that became a very powerful defense which has been used on behalf of the federal judiciary from the time of the Federalist Papers to the present.

**[VP] *So this is the Supreme Court that we're talking about. And these are basically the interpreters of the Constitution. Is that correct?***

**[MG]** That's correct. That is not something that Hamilton really talks about in 78, they go, the Federalist Papers do not necessarily foresee that the Supreme Court or the federal judiciary would become as important as it has become as interpreters of the Constitution. But that possibility, the possibility they would have constitutional cases, was recognized by Hamilton and others. And it's really the independence of the judiciary that Hamilton is trying to defend.

**[VP] *Let's talk about essay number 51.***

**[MG]** Yes. This essay is entitled checks and balances. And of course the concept of checks and balances is central, as Madison points out in the essay, to the Constitution. The idea behind checks and balances as Madison puts it is to ensure that “ambition must be made to counteract ambition.” That his point is that each branch may seek to sort of extend or push the boundaries of its own particular power. But if that happens they're all pushing against each other and that's going to prevent any one of them from becoming dominant.

**[VP] *Professor Gerhardt I know that Federalist Paper number 65 is, is part of your extreme area of expertise, right in your wheelhouse. This is one that we get asked about a lot, about impeachment. Can you tell us about what was laid out in Federalist 65?***

**[MG]** Federalist 65 which is written by Alexander Hamilton provides one of the first and most extensive explanations for the Senate being constructed the way it was and remains. And for the particular powers that the Senate has been given. Keep in mind that the Senate is not structured like the House, the Senate has every state represented only by two senators which is rather unusual. That means every state is equally represented, no state can necessarily be dominant regardless of population. Beyond that the Senate has a special term of six years and it has special powers. It has the sole power to be able to give advice and consent on presidential nominations. It is the sole power to be able to convict and remove somebody who has been impeached by the House. These are extraordinary powers and Hamilton sets out to defend the Senate as being a special kind of body which is there to check against presidential aggrandizement. And it's there to ensure that it can be a fair and thoughtful body in trying to deal with big issues like “do we remove the President of United States?” That's a remarkable moment, remarkable possibility the Constitution creates. And the Senate, Hamilton thought, was better suited than other branches to be able to deal with those big questions, partly because it was politically accountable, because the terms were longer so people didn't necessarily expect immediate reprisal, and because the thinking originally was the kinds of people would end up in the Senate would be more thoughtful and deliberative, could see the bigger picture.

**[VP] *The penultimate essay, number 84. Is an oft quoted essay. What can you tell us about that one?***

**[MG]** So 84 as you say comes near the end of the Federalist Papers as they've been collected. And this too is written by Hamilton and of course we're also rediscovering at this moment the extent to which Hamilton was remarkable a lawyer, remarkably gifted lawyer, to be able to put together these terrific arguments which remain influential and really remain the models for great legal argumentation on behalf of the Constitution. In Federalist 84 Hamilton’s actually defending something that turns out to be really critical at that moment in time. The original Constitution was drafted without a Bill of Rights. For many states, including New York, that was a problem. It was a problem because for those states their representatives or their delegates to the different conventions were worried that without any specific or expressed guarantees of individual rights, the Constitution could be interpreted as not protecting those rights. What Hamilton tries to argue in Federalist 84 is ok don't worry we don't have to think this is a reason for not ratifying the Constitution because as long as there's not power given over the areas in which these individual liberties arise, then Congress or the president or another branch would have power over those areas. So for example freedom of speech, Congress is not given and express authority over that, therefore Congress doesn't have authority over that particular subject. That's basically the argument that's put forward in the federalist papers. I must confess at the time it doesn't appease many states. New York is close in part because people are worried about whether they can really trust that the interpretation Hamilton just gave would become the dominant interpretation. So, shortly after ratification James Madison, one of the people that helped to put these essays together, initiates in the Congress, he's a representative in Virginia, he initiates in Congress a movement to try to adopt a particular bill of rights, a set of rights which of course have become known as the Bill of Rights, as a way to ensure, because they expressly protect things, as a guarantee of individual rights. And the skepticism therefore about whether or not the Constitution would protect such rights kind of goes away, because now we have after the ratification of the Bill of Rights a specific set of individual liberties that have been expressly guaranteed.

**[VP] *You mentioned earlier that this is an argument. And this central conflict, the central argument over a strong vs. weak government has been with American politics since then. What is the importance in the argument in itself? What did these papers establish for our, for our country?***

**[MG]** These papers establish a lot of things. I mean to begin with the point you just made. What they're trying to establish is that this is not a government that is essentially is going to be too strong or too weak, it's going to be a balanced government. Notice the concept of checks and balances. What we find is that the papers go further to become important as some of the best insights into what the people who drafted the Constitution thought it was designed to do. We can't really recreate that period very well, we can study it, but this is one of the great sources for insights into what was going on, what the people who crafted the Constitution thought it might mean, thought it was intended to do, thought might be its virtues. Thus the papers become rather invaluable. The papers also are important because they give us really great examples of of the legal arguments that are being put forward by some of the greatest statespeople at the time. They’re young people of course, relatively young at the time they're putting these arguments forward. They're just hitting their stride so to speak as they write the Federalist Papers. But Hamilton and Madison and even John Jay are all going to become very famous Americans for different reasons. So we're seeing evidence of that through these papers.

**[VP] *OK. So what would you say to encourage people to go out and read the Federalist Papers?***

**[MG]** One of the reasons people should read the Federalist Papers for themselves is because it's, it's wonderful to actually be able to experience firsthand these great arguments rather than have other people tell us what to think rather than have other people tell us what these documents mean rather than have other people sort of tell us this is how the Constitution should be interpreted. Why not go back to original sources why not go back to something like the Federalist Papers and look at how these people who lived at the time and had significant roles in the Constitution’s formation and adoption. What did these people think and say on behalf of the Constitution? That's a great way to learn about the Constitution. And then one can think about whether they agree with Hamilton or Madison, whether they disagree, whether or not what they said has borne out over time, whether it's turned out to be not so rosy as they may be, maybe were suggesting, it's a great thing to be able to experience all that kind of thinking on your own.

**[VP] *Professor Michael Gerhardt thank you so much for speaking with us.***

**[MG]** Thanks for having me.