



**THE “CONSTITUTION OF MAN”:  
REFLECTIONS ON HUMAN NATURE  
FROM *THE FEDERALIST PAPERS* TO  
BEHAVIORAL LAW AND ECONOMICS**

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INTRODUCTION

This Note challenges claims to novelty made by the last three decades of behavioral law and economics scholarship, and offers a framework for understanding the historical development of studies of human nature. Studies of human nature in the context of legal policy over the last thirty years tend to contrast the standard rational choice view against the emergent behavioral model of decision-making. This way of pitching the debate is remiss in two ways. First, the classical liberal conception of human nature articulated in the *Federalist Papers* plausibly explains the need for and design of

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the original United States Constitution, so it is odd to omit such an august school of thought from discussions of human nature and law. Second, a survey of classical liberal literature, such as the *Federalist Papers*, reveals that many of the insights into human nature proffered by contemporary behavioral research, and a few descriptions from the standard view, find expression centuries prior. These findings suggest an etiological rather than binary approach to framing the debate about human nature, an approach that seeks out the conceptual development from classical liberal to neoclassical economic to behavioral perspectives. Behavioral law and economics did not emerge *sui generis* as a novel counterpoint to the application of neoclassical economics to legal issues. Rather, classical liberal, neoclassical, and behavioral precepts about human nature form a unified whole, a narrative about ourselves that has refined and evolved over time. The lodestar for our conception of human nature today should be the classical liberal perspective because it is the basis upon which our Constitution was built, because it accommodates some key predictions about human behavior from both the neoclassical and behavioral perspectives, and because it endures as an accurate account of our nature.

It may be common to think *The Federalist Papers* primarily concerns institutional design implicating public choice and political economy problems and is therefore not relevant to the design of specific policies implicating individual biases and bounds. However, the conception of human nature that predicated the Constitution's design has been largely vindicated by contemporary empirical investigations into individual psychology. Therefore, these founding era documents deserve renewed attention by students of human nature and designers of specific government policies. Theories of human nature matter because law must incent and deter human behavior, and therefore must be based upon an accurate conception of the subjects of the laws. The "constitution of man" elaborated in *The Federalist Papers* explains the need for and effectiveness of many of the architectural features of the United States Constitution, including separation of powers and other safeguards

designed to prevent abuse of government and to ensure excellence in government as near as humanly possible. *The Federalist Papers* also contains numerous examples of policy failure and explains them in terms of human nature. Therefore *The Federalist Papers* is not limited in focus to institutional design and the corresponding famous discussions of public choice and political economy problems that are quoted to every 1L in a course on administration and the legislative process. The text also includes content relating to individual biases and cognitive bounds that is relevant to contemporary discussions of human nature and policy design.

I draw the following concepts from *The Federalist Papers'* remarkably insightful discussion of human nature: we are bounded (bounded rationality, will-power, self-interest, and ethicality), biased (availability bias, self-serving bias, confirmation bias, and optimism bias), bad betters (reactive devaluation, escalation of commitment, myopia, endowment effect, loss aversion, and prospect theory), and bad with others (collective action problems, rent seeking, free riding, groupthink, and holdouts).<sup>1</sup> It is worthwhile to compare Founding-era conceptions of human nature with contemporary discussions if only to know whether they are still accurate. It appears they are.

Discussions of human nature in the context of law, economics, and psychology tend to frame the debate as a contest between two

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<sup>1</sup> Some of these concepts are presented under a different taxonomy in the review of behavioralism literature in Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 101 (1999). As is common in the behavioral literature, these concepts are introduced in an ahistorical manner as though they were exclusively the result of relatively recent research: "For the past few decades, cognitive psychologists and behavioral researchers have been steadily uncovering evidence that human decision-making processes are prone to nonrational, yet systematic, tendencies." 74 N.Y.U. L. REV. 103. The Hanson & Kysar discussion includes confirmatory bias (117), hypothesis-based filtering (120), motivated reasoning (123), optimistic bias (124), the illusion of control (128), availability (132), representativeness (133), the status quo bias and endowment effect (143), and experiential thinking, affect and the perception of risk (138).

paradigms: the “standard view” of neoclassical economics which suggests we are rational maximizers of our own utility, versus the “behavioral view” of contemporary cognitive science, statistics, and economics which suggests we possess imperfect rationality, will-power, and self-interest.<sup>2</sup> This binary approach is convenient, but it is an ahistorical way of introducing students to the topic of human nature. The standard versus behavioral debate fails to adequately appreciate the origin of these schools of thought, as though human nature was discovered for the first time in the latter half of the 20<sup>th</sup> century. Our inquiry should begin with the Enlightenment, from which many of our notions of human nature in the context of government arise, then move on through neoclassical economics, and finally into behavioral law and economics. To this end, Part I briefly chronicles the contours of prevailing models of human behavior and decision-making since the Enlightenment.

In Part II, I will take a close look at the depiction of human nature provided by the classic constitutional commentary, *The Federalist Papers*. After all, “what is government itself but the greatest of all reflections on human nature?”<sup>3</sup> Although the contrast of reason with passion is a frequent refrain in *The Federalist Papers*, Publius, the voice of the *Federalist Papers*,<sup>4</sup> offers a discussion of human nature that is more nuanced than this simple dichotomy between reason and passion suggests. As an exemplar of Enlightenment era

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<sup>2</sup> See, e.g., Oren Bar-Gill & Richard A. Epstein, *Consumer Contracts: Behavioral Economics vs. Neoclassical Economics*, NYU Law and Economics Research Paper No. 07-17; MINN. L. REV. 92 (2007), available at <http://ssrn.com/abstract=982527>; Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1473 (1998).

<sup>3</sup> THE FEDERALIST NO. 51, at 319 (James Madison) (Clinton Rossiter ed., 2003).

<sup>4</sup> “Publius” is the allusive pen name chosen by the authors of the *Federalist Papers*, Alexander Hamilton, James Madison and John Jay. In the spirit of literary interpretation, I will refer to Publius rather than to these individuals as the author of the papers.

thinking, Publius describes the “constitution of man”<sup>5</sup> in terms that reflect an understanding of bounded rationality, bounded willpower, bounded self-interest, and bounded ethicality. Publius was aware of heuristics such as reactive devaluation, escalation of commitment, availability bias, self-serving bias, confirmation bias, optimism bias, and myopia. Further, Publius understood how coordinated action is beleaguered by organizational constraints such as collective action problems, rent-seeking, free-riders, groupthink, and holdouts.

In Part III, I consider the hypothesis that conceptions of human nature have undergone a dialectical progression over time. This etiological understanding of human nature is preferable to the framework that simply contrasts the standard view against the behavioral view. As an alternative to the “Standard versus Behavioral” framing of debates about rationality, we should understand the rational choice model not as a given but as a general departure from the classical liberal theory’s model of human decision-making; and the behavioral model not as *sui generis* but rather a reaffirmation and refinement of an otherwise accurate conception of human nature that predated it by a few centuries.

#### I. MODELS OF HUMAN NATURE SINCE THE ENLIGHTENMENT

In this section I briefly describe key features of prominent conceptions of human nature in the modern era for the purpose of contextualizing contemporary discussions of decision-making.

##### THE CLASSICAL LIBERAL PERSPECTIVE

The classical liberal theory of human nature included as a key premise the “irrationality hypothesis.” Such thinkers as Locke, Mill, Smith, Madison, and Spinoza “were all perfectly aware that emo-

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<sup>5</sup> THE FEDERALIST NO. 15, at 106 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

tional and habitual behavior was extraordinarily widespread and refractory to rational control.”<sup>6</sup> These modern era thinkers were influenced by Stoic philosophers of antiquity, notably Cicero, who emphasized “the variety of human motives and the rarity of rational goal seeking.”<sup>7</sup> Stoic philosophy “continued to exert a powerful influence on psychological theories up through the eighteenth century,” as “[r]ational and truly self-interested behavior, conceived as rare and exceptional, was repeatedly contrasted with commonplace forms of irrational and self-destructive behavior.”<sup>8</sup> Hence it should not be contended that seventeenth and eighteenth century thinkers were so under the spell of the Enlightenment that they were naively optimistic about our capacity for rationality. Far from it: one of the most salient takeaway messages from *The Federalist Papers* is that good government requires attention to our cognitive and volitional limits. The original U.S. Constitution was designed to govern an imperfectly rational assemblage of states and people, and it created a government to be administered by imperfectly rational agents, by empowering rational human capabilities and either sublimating or blunting irrational human tendencies.

The author of *The Federalist Papers* was also an empiricist, a fact aptly demonstrated in this aphorism: “Experience is the oracle of truth; and where its responses are unequivocal, they ought to be conclusive and sacred.”<sup>9</sup> The second section of this paper will delve deeper into *The Federalist Papers*, and more will be said on the psychology of Publius, *infra*. For now it should simply be noted that

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<sup>6</sup> STEPHEN HOLMES, *PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY* 42–43 (1995).

<sup>7</sup> *Id.* at 57.

<sup>8</sup> *Id.*

<sup>9</sup> *THE FEDERALIST* NO. 20, at 133 (Alexander Hamilton & James Madison) (Clinton Rossiter ed., 2003).

Publius understood human nature from an empirically inclined, classical liberal perspective.

#### THE RATIONAL CHOICE MODEL

By the 19<sup>th</sup> and 20<sup>th</sup> century, “the supremacy of rational self-interest” dominated models of moral psychology.<sup>10</sup> Developing in the wake of utilitarianism, Marxism, liberal economics, and Adam Smith,<sup>11</sup> the rational choice model describes humans as “fully rational Bayesian maximizers of subjective utility.”<sup>12</sup> Modern economic thought regarded humans as universally pursuing their own self-interest by rational calculation of costs and benefits. *Homo economicus*, as the abstract decision-maker was named, has well-defined, stable, and consistent preferences, and makes unbiased forecasts based on accurate perceptions and optimal information in order to satisfy such preferences.

Legal studies began to incorporate this economic methodology. Modern law and economic analysis had its origins in the 1960’s where scholars recognized the nexus “between legal rules, wealth maximization and transaction costs.”<sup>13</sup> The Chicago School of economics, championed by the work of Ronald Coase, Milton Friedman, Richard Posner, Gary Becker, and other Nobel Laureates in economics, is based around neoclassical price theory and a rational utility-maximizing theory of human nature, and helped develop modern economic analysis of law by applying marginal utility

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<sup>10</sup> HOLMES, *supra* note 6, at 43.

<sup>11</sup> See *id.* at 43–45. Arguably, it was a misreading of Adam Smith that lead advocates of the rational choice model to suppose their views were supported by his.

<sup>12</sup> Reinhard Selten, *What Is Bounded Rationality?*, in *BOUNDED RATIONALITY: THE ADAPTIVE TOOLBOX* 13, 13 (Gerd Gigerenzer & Reinhard Selten eds., MIT Press 2001).

<sup>13</sup> Samuel Issacharoff, *Can There Be a Behavioral Law and Economics?*, 51 *VAND. L. REV.* 1729, 1729 (1998).

analysis to a wide range of decisions, such as transactions and legal rules.<sup>14</sup>

The law and economics movement had a totalizing presence in the literature. “Posner’s *Economic Analysis of Law*, which first appeared in 1973, sounded most explicitly the modern theme of economic imperialism: You name the legal field, and I will show you how a few fundamental principles of price theory dictate its implicit economic structure.”<sup>15</sup> Of course Posner concedes that the utility function is simply a method for generating hypotheses, and does not attempt to account for subjectivity.<sup>16</sup> So while the economic model is useful, it is admittedly incomplete. The precision of reductionist thinking which characterizes modern thought about human nature comes at a steep cost. “[W]ith science’s quantitative analysis of the world, the methodological liberation from subjective distortions was accompanied by the ontological diminution of all those qualities—emotional, aesthetic, ethical, sensory, imaginative, intentional—that seemed most constitutive of human experience.”<sup>17</sup> By objectively knowing the world we emptied it of subjective value. Taken to an extreme, the neoclassical economic model of decision-making risks stripping away the very idiosyncrasies that make us human for the sake of generating hypotheses. Through qualifications, the neoclassical model has come to allow for idiosyncratic

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<sup>14</sup> See GARY S. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR*, 8 (1976). See also Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW*, Part II, the Common Law (3d ed. 1996).

<sup>15</sup> Richard A. Epstein, *Law and Economics: Its Glorious Past and Cloudy Future*, 64 U. CHI. L. REV. 1167, 1168 (1997).

<sup>16</sup> See RICHARD A. POSNER, *OVERCOMING LAW* 110–11 n.4 (1995) (stating “I do not mean to suggest that judges have privileged access to the judicial utility function. A utility function is not a psychological or phenomenological concept but a device for generating hypotheses. I doubt that any judge subjectively experiences his job in the way modeled in this chapter. I don’t.”).

<sup>17</sup> RICHARD TARNAS, *THE PASSION OF THE WESTERN MIND*, 326 (1993).

preferences and information asymmetry, allowing some play in the joints.

What is more problematic than the initial incompleteness of the neoclassical economic model is the set of patently untenable assumptions about human behavior it endorses:

First, that humans respond rationally to the cost and benefit incentives placed before them; second, that they are capable of calibrating different utility comparisons across shifting time and informational barriers; third, that they invest in acquiring information that would better inform their interutility comparisons; fourth, that they make these calculations accurately, or more precisely, that any departures from accuracy are the product of random error that would in turn wash out in the grand statistical pool; finally, that alterations in the incentive structures produce corresponding alterations in behavior.<sup>18</sup>

In light of these shortcomings, commentators eventually sought to eradicate the rationality assumption via behavioral critiques of the economic model.<sup>19</sup>

#### THE EMPIRICAL BEHAVIORAL MODEL.

The failings of the rational choice model prompted “a second generation inquiry into the extent to which the law and economics methodology could survive.”<sup>20</sup> This approach “relax[es] the [assumptions] about [human] behavior and actually observe[s] how

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<sup>18</sup> Issacharoff, *supra* note 13, at 1732 (footnotes omitted).

<sup>19</sup> See Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051 (2000) (contradicting the rationality assumption of law and economics with empirical evidence and outlining a more nuanced view of human behavior that enables superior policy prescriptions).

<sup>20</sup> Issacharoff, *supra* note 13, at 1730.

individuals behave[.]”<sup>21</sup> Empirical observation is meant to enable policymakers to “refine both legal analysis and legal rules to anticipate departures from presumed rational responses[.]”<sup>22</sup> The behavioral school’s “ultimate goal, quite simply, is to understand the incentive effects of law better than modern law and economics is able to do by enlisting more sophisticated understandings of both the ends of those governed by law and the means by which they attempt to achieve their ends.”<sup>23</sup> The behavioral approach purports to offer a “more subtle and realistic (although considerably less tidy)” conception of human cognition than the standard model.<sup>24</sup> The supremacy of the “traditional rational-actor, law and economics approach to law and policy” had been called into question by the “cognitive-psychological or behavioral economics approach, [which] focuses on mental heuristics and biases that lead to departures from optimal or rational decision-making.”<sup>25</sup> The rational-actor model had been further called into question by scholarship on the “role of emotion in legal judgment and decision-making, whether by judges, juries, bureaucrats, legislators, or citizens.”<sup>26</sup>

It takes time for ideas from one academic discipline to cross-pollinate. At about the same time that economic analysis began infiltrating legal discourse, the picture of the human upon which economic analysis depended was being called into question by empirical research. The 1950’s witnessed a renaissance of sorts of the irra-

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<sup>21</sup> *Id.* at 1730–31.

<sup>22</sup> *Id.* at 1731.

<sup>23</sup> Korobkin & Ulen *supra* note 19, at 1058 (attempting to provide a research blueprint that might ultimately enable behavioral insights to operationalize by informing the formation of legal commands).

<sup>24</sup> *Id.* at 1059.

<sup>25</sup> See Jeremy A. Blumenthal, *Emotional Paternalism*, 35 FLA. ST. U. L. REV. 1, 2 (2007) (footnotes omitted).

<sup>26</sup> *Id.*

tionality hypothesis in the form of challenges to the rational choice model. Similar to the neoclassical economic movement, many Nobel prizes in economics were awarded for pioneers of behavioral economics. Maurice Allais' eponymous paradox, published in 1953, contradicts the hypothesis that humans maximize expected utility.<sup>27</sup> The notion of bounded rationality resurfaced in the work of Herbert Simon in 1957.<sup>28</sup> Reinhard Selten, a contemporary of Simon, came to understand that "[t]he structure of boundedly rational economic behavior cannot be invented in the armchair, it must be explored experimentally."<sup>29</sup> The work of Janis in 1972 on "groupthink" constitutes another purported discovery of modern psychology.<sup>30</sup> In 1977, the psychological phenomena of self-serving bias and myopia were understood as realistic constraints in the context of organizational management.<sup>31</sup> In 1979, Kahneman and Tversky published on prospect theory, promising a descriptive alternative to the theory of expected utility.<sup>32</sup> We learned through experiment in 1980 that we suffer from optimism bias;<sup>33</sup> and in 1981 that we suffer from self-serving bias.<sup>34</sup> The notion of hyperbolic discounting, which suggests

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<sup>27</sup> See Maurice Allais, *Le comportement de l'homme rationnel devant le risque: critique des postulats et axiomes de l'école Américaine*, 21 *ECONOMETRICA* 503, 503-546 (1953).

<sup>28</sup> See HERBERT A. SIMON, *MODELS OF MAN* (Wiley and Sons 1957).

<sup>29</sup> Reinhard Selten, *Autobiography*, NOBELPRIZE.ORG, [http://nobelprize.org/nobel\\_prizes/economics/laureates/1994/selten-autobio.html](http://nobelprize.org/nobel_prizes/economics/laureates/1994/selten-autobio.html) (last visited Nov. 8, 2010).

<sup>30</sup> See Irving L. JANIS, *VICTIMS OF GROUPTHINK* 9 (Houghton Mifflin 1972).

<sup>31</sup> See Laurie Larwood & William Whittaker, *Managerial Myopia: Self-Serving Biases in Organizational Planning*, 62 *J. APPLIED PSYCHOL.* 194, 194 (1977).

<sup>32</sup> See Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision under Risk*, 47 *ECONOMETRICA* 263, 263-289 (1979).

<sup>33</sup> See generally Neil D. Weinstein, *Unrealistic Optimism About Future Life Events*, 39 *J. PERSONALITY & SOC. PSYCH.*, 806, 806-820 (1980).

<sup>34</sup> See Ola Svenson, *Are We All Less Risky and More Skillful than Our Fellow Drivers?*, 47 *ACTA PSYCHOLOGICA* 143 (1981).

our preferences are temporally inconsistent, also became subject to experiment in 1981.<sup>35</sup>

Based on the foregoing, even a scholarly (rather than casual) reader would be justified in believing that *nowadays* humans understand their own cognitive limitations. Unreasonable influences can contradict short- and long-term interests.<sup>36</sup> Unreasonableness exerts influence on our predictions of future events.<sup>37</sup> Unreasonable forces distort our perceptions of risk.<sup>38</sup> Unreasonable forces conduce to social prejudice<sup>39</sup> and epistemic bias.<sup>40</sup> Unreasonableness leads us to ignore information.<sup>41</sup> Unreasonableness, seemingly by definition, undermines our capacity to analytically and analogically reason.<sup>42</sup> Unreasonable forces lead us to prioritize short-term benefits over

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<sup>35</sup> See Richard H. Thaler, *Some Empirical Evidence on Dynamic Inconsistency*, 8 ECON. LETTERS 201 (1981) (finding that individual discount rates for gains vary inversely with the reward size and temporal duration, and that discount rates are smaller for losses than for gains).

<sup>36</sup> See George Loewenstein & Jennifer S. Lerner, *The Role of Affect in Decision Making*, in THE HANDBOOK OF AFFECTIVE SCIENCES 619, 627–28 (Richard J. Davidson et al. eds., 2003); George Loewenstein, *Out of Control: Visceral Influences on Behavior*, 65 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 272, 272–273 (1996).

<sup>37</sup> See Daniel T. Gilbert et al., *The Future Is Now: Temporal Correction in Affective Forecasting*, 88 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 430, 440 (2002).

<sup>38</sup> See Paul Slovic, *Trust, Emotion, Sex, Politics, and Science: Surveying the Risk-Assessment Battlefield*, 1997 U. CHI. LEGAL F. 59 (1997) (showing public perception of risk, even when contrary to technical expertise, influences regulatory policy).

<sup>39</sup> See Susan T. Fiske, *What We Know About Bias and Intergroup Conflict, the Problem of the Century*, 11 CURRENT DIRECTIONS IN PSYCHOL. SCI. 123, 123–24 (2002).

<sup>40</sup> See Martha C. Nussbaum, *"Secret Sewers of Vice": Disgust, Bodies, and the Law*, in THE PASSIONS OF LAW, 19, 35–38 (Susan A. Bandes ed., 1999). See also Rose McDermott, *The Feeling of Rationality: The Meaning of Neuroscientific Advances for Political Science*, 2 PERSP. ON POL. 691, 700–01 (2004) (arguing that emotion exerts a decisive impact on political decisions).

<sup>41</sup> See Eric A. Posner, *Law and the Emotions*, 89 GEO. L. J. 1977, 2011 (2001).

<sup>42</sup> See Norbert Schwarz & Herbert Bless, *Happy and Mindless, But Sad and Smart? The Impact of Affective States on Analytic Reasoning*, in EMOTION AND SOC. JUDGMENTS 55–56 (Joseph P. Forgas ed., 1991).

long-term welfare enhancement.<sup>43</sup> Unreasonable tendencies to reactively devalue offers made by others frustrate efforts to negotiate.<sup>44</sup> If Aristotle is right that man is a rational animal, the exception often swallows the rule. But we have known this for quite some time.

The purported “newness” of behavioral perspectives on human nature is questionable. In 1998, a popular law review article understood itself as “drawing attention to cognitive and motivational problems of both citizens and government” and offering a “superior understanding of human behavior” that reflected bounded self-interest, bounded rationality, and bounded will-power.<sup>45</sup> There is no disputing the insightfulness of this piece, but what is questionable is the notion that the proposed conception of human behavior was quite as novel as the aggrandizing language would suggest. Notions of bounded self-interest, rationality, and will-power did not originate in 1998.

Another notable omission of prior knowledge came in 2000, as scholarship in group polarization held itself out as answering a neglected question: “I have been unable to find sustained discussions in the relevant literature in economics, sociology, philosophy, law, or political science, and there appears to be no treatment of the implications of group polarization for social behavior or the theory of democracy.”<sup>46</sup> There is no reason why the relevant search would fail to include such indispensable works as John Locke’s *Two Trea-*

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<sup>43</sup> See Colin Camerer et al., *Neuroeconomics: How Neuroscience Can Inform Economics*, 43 J. ECON. LITERATURE 9, 40–41 (2005).

<sup>44</sup> See Richard Birke & Craig R. Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 HARV. NEGOT. L. REV. 1, 48–49 (1999) (researching the phenomenon of “reactive devaluation”).

<sup>45</sup> See Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1471, 1474 (1998).

<sup>46</sup> Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L. J. 71, 74 n.8 (2000).

*tises of Government* or David Hume's *Of Parties in General*.<sup>47</sup> This omission suggests that Enlightenment-era literature of the classical liberal persuasion has been neglected by contemporary scholarship on human nature. While the author references *The Federalist Papers* for the notion that deliberation can lead us to good government, he concludes that "the mechanisms that underlie group polarization raise serious questions about the view that deliberation is likely to yield correct answers to social questions,"<sup>48</sup> without a single mention of Publius' discussion of the pathology of factions. A rich source of material is to be found in *The Federalist Papers* and other Enlightenment era philosophical and political theory concerning group polarization. Their absence here is conspicuous. *The Federalist Papers* is not limited in content to structural issues of the federal government or amusing historical anecdotes. Accordingly, the next section will survey *The Federalist Papers* for descriptions of collective and individual behavior of relevance to institutional and policy design.

## II. THE PSYCHOLOGY OF PUBLIUS

The 21<sup>st</sup> century resurgence of the irrationality hypothesis should come as no surprise when 20<sup>th</sup> century neoclassical economic theory failed to explain the wide range of "human behavior that remains fairly unschooled by calculation, foresight, and a prudential weighing of costs and benefits."<sup>49</sup> In this respect, behavioral law and economics signals a reaffirmation of a "defining feature of clas-

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<sup>47</sup> See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Peter Laslett, ed., Cambridge University Press 1988); DAVID HUME, *Of Parties in General*, in *ESSAYS: MORAL, POLITICAL, AND LITERARY* (Liberty Classics 1985).

<sup>48</sup> Sunstein, *supra* note 46, at 118.

<sup>49</sup> HOLMES, *supra* note 6, at 43.

sical liberal theory.”<sup>50</sup> To see how this is so, this section illuminates the strikingly contemporary psychology of Publius.<sup>51</sup>

For the purpose of this analysis, I do not find it necessary to distinguish between Madison, Hamilton, or Jay in discussing authorial intent. Hamilton was cognizant of the risk that emotional impulse would lead to the capricious abandonment of rational commitments: “the popular passions . . . spread like wild fire, and become irresistible.”<sup>52</sup> Madison knew the rule of law could be undermined by “the turbulence . . . of unruly passions.”<sup>53</sup> Even the less prolific Jay understood the toxic combination of powerful incentives combined with frail self-control in the need for union to avoid the risk of succumbing to immediate foreign pressures at the expense of long-term national security.<sup>54</sup> Indeed, constitutional commitments were designed as safeguards against emotion’s potential to distort decision-making by constitutional actors.<sup>55</sup>

In persuading the ratifying conventions of the merits of the constitution, Publius had to allay fears that the constitutional plan was either inadequate to the great task before it, or had established the lineaments of a tyrannical federal government. Publius vindicates the constitutional design by showing the ways in which human propensities would cause anarchy without it, and the human

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<sup>50</sup> *Id.*

<sup>51</sup> Although this section is based on a cover-to-cover reading of *The Federalist Papers*, I resist the temptation to call this an exhaustive study. I omitted numerous anecdotes, theories, and principles concerning human nature which are less controversial or interesting than the passages included here.

<sup>52</sup> THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 287 (Max Farrand ed., Yale Univ. Press 1966).

<sup>53</sup> *Id.* at 430–31.

<sup>54</sup> THE FEDERALIST NO. 4, at 43 (John Jay) (Clinton Rossiter ed., 2003). Arguably, the disparity between our new nation and old European nations in terms of actual possession of gold was a primary reason for constituting a union between the States; the loyalty of individual States could be too easily purchased by foreign sovereigns without the binding fabric of a Constitution.

<sup>55</sup> See HOLMES, *supra* note 6, at 272.

frailties responsible for disrupting society could best be counteracted by the carefully tailored features of this new form of government.

BOUNDED

*Bounded Rationality*

In attempting to disambiguate certain constitutional provisions from the storm of smoke and heat cast upon it by such ardent dissenters, Publius backhandedly remarks, “[t]he obscurity is much oftener in the passions and prejudices of the reasoner than in the subject.”<sup>56</sup> In a clever inversion of Hume’s famous phrase (“Reason is, and ought only to be the slave of the passions, and can never pretend to any other office than to serve and obey them.”),<sup>57</sup> Publius decrees “it is the reason, alone, of the public, that ought to control and regulate the government. The passions ought to be controlled and regulated by the government.”<sup>58</sup> The irrationality hypothesis functions as the *raison d’être* of governmental regulation. The irrationality hypothesis also explains why an intermixture of legislative, executive, and judicial powers were necessary while periodic appeals to the people and parchment barriers were insufficient to prevent governmental abuse. Simply put, Publius knew humans possessed bounded rationality.

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<sup>56</sup> THE FEDERALIST NO. 31, at 190 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

<sup>57</sup> DAVID HUME, A TREATISE OF HUMAN NATURE: BEING AN ATTEMPT TO INTRODUCE THE EXPERIMENTAL METHOD OF REASONING INTO MORAL SUBJECTS 195 (T.H. Green & T.H. Grose eds., Longmans, Green, & Co. 1882) (1739–40).

<sup>58</sup> THE FEDERALIST NO. 49, 314 (James Madison) (Clinton Rossiter ed., 2003).

*Bounded Will-power*

Despite our nation's best laid plans and heroic efforts to achieve a lasting, benevolent government, such an outcome was far from certain.

To judge from history of mankind, we shall be compelled to conclude that the fiery and destructive passions of war reign in the human breast with much more powerful sway than the mild and beneficent sentiments of peace; and that to model our political systems upon speculations of lasting tranquility would be to calculate on the weaker springs of the human character.<sup>59</sup>

We cannot resist the bellicosity of our nature, so must design a political system which includes but constructively channels the beast that comes out when our willpower falls short of ensuring tranquility. A particularly prominent feature of the "constitution of man" is our unruly temperament arising from bounded will-power.

*Bounded Self-interest*

Publius acknowledges the bounded self-interest of the average American in illustrating the utility of a "well-constructed Senate": to safeguard the people from their own "errors and delusions," and to "check the misguided career and to suspend the blow mediated by the people against themselves."<sup>60</sup> Indeed, "there are particular moments in public affairs when the people . . . may call for measures which they themselves will afterwards be the most ready to lament and condemn."<sup>61</sup> Without a temperate, coolly rational Senatorial safeguard, the people, via their government, may end up

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<sup>59</sup> THE FEDERALIST NO. 34, at 204 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

<sup>60</sup> THE FEDERALIST NO. 63, at 383 (James Madison) (Clinton Rossiter ed., 2003).

<sup>61</sup> *Id.* at 382.

“decreeing . . . hemlock on one day and statues on the next.”<sup>62</sup> The Senate is useful because average Americans have bounded self-interest.

#### *Bounded Ethicality*

In championing the need for union, Publius suggests we would have to be “far gone in Utopian speculations” to think disunited States would resist the entropic pull toward violence: “men are ambitious, vindictive, and rapacious.”<sup>63</sup> Left alone to our vices, disunited States would quickly degenerate in conflict. One of the justifications for the Senate as a check on the House of Representatives is to occlude the passage of laws “stimulated by some irregular passion, or some illicit advantage.”<sup>64</sup> The selfishness of leaders is another instance of the boundaries of our ethical means.

Men of upright, benevolent tempers have too many opportunities of remarking, with horror, to what desperate lengths this disposition is sometimes carried, and how often the great interests of society are sacrificed to the vanity, to the conceit, and to the obstinacy of individuals, who have credit enough to make their passions and their caprices interesting to mankind. Perhaps the question now before the public may, in its consequences, afford melancholy proofs of the effects of this despicable frailty, or rather detestable vice, in the human character.<sup>65</sup>

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<sup>62</sup> *Id.* at 383.

<sup>63</sup> THE FEDERALIST NO. 6, at 48 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

<sup>64</sup> THE FEDERALIST NO. 63, *supra* note 60, at 382.

<sup>65</sup> THE FEDERALIST NO. 70, at 425 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

We need a checked, balanced, and limited government because we can be at times detestably vicious with our use of power.

Publius' understanding of bounded ethicality is informed by the long view of human nature. In explaining why negotiating treaties is not exclusively the authority of the President but rather involves the Senate, Publius contends that "[t]he history of human conduct does not warrant that exalted an opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind [as negotiating with foreign powers] to the sole disposal" of the President.<sup>66</sup> In light of any President's bounded ethicality, the framers sought to structure the Executive office as to utilize the wisdom and virtue of the President (as seen in vesting the office with veto power) without depending exclusively on the moral firmness of the person holding the office (as seen in conferring upon the Senate oversight functions).

#### BIASED

##### *Availability Bias*

To the original audience of *The Federalist Papers*, the most historically salient instance of power abused was King George III. In a tactful criticism of the authors of State constitutions, Publius remarks that the fear of liberty's deprivation at the hands of a hereditary tyrant precluded any attention to "legislative usurpations, which, by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations."<sup>67</sup> The framers of State constitutions had in mind their struggle under King George III, and neglected to protect against many other forms of governmental abuse. This omission is an example of availability bias.

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<sup>66</sup> THE FEDERALIST NO. 75, at 450 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

<sup>67</sup> THE FEDERALIST NO. 48, at 306 (James Madison) (Clinton Rossiter ed., 2003).

*Self-serving Bias*

The problem of periodic appeals to the people for constitutional review of allegedly violative acts is that any such review would be conducted by a body comprising those who “had been active and influential members of the legislative and executive branches within the period to be reviewed; and even patrons or opponents of the very measures to be thus brought to the test of the Constitution.”<sup>68</sup> The need for the power of independent Constitutional review to be vested in the Judiciary is rooted in the necessity of counteracting a self-serving bias that is no less prevalent amongst elected representatives than on the part of average Americans. “No man is allowed to be a judge in his own cause because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time.”<sup>69</sup> Our inability to objectively evaluate the legitimacy of our own positions exacerbates the problem of factions. This tendency is so engrained into our nature that Constitutional design didn’t even try to change it: “the *causes* of faction cannot be removed [so] relief is only to be sought in the means of controlling its *effects*.”<sup>70</sup> Self-serving bias remains with us, animating party politics and fostering entrenchment.

*Confirmation Bias*

Publius is aware of confirmation bias on the parts of both advocates and detractors of the new Constitution. Much initial discussion concerning the proposed Constitution came “not only with a predisposition to censure, but with a predetermination to condemn; as the language held by others betrays an opposite predetermina-

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<sup>68</sup> THE FEDERALIST NO. 50, at 316 (James Madison) (Clinton Rossiter ed., 2003).

<sup>69</sup> THE FEDERALIST NO. 10, at 74 (James Madison) (Clinton Rossiter ed., 2003).

<sup>70</sup> *Id.* at 75.

tion or bias, which must render their opinions also of little moment in the question.”<sup>71</sup> Those suffering from confirmation bias are poorly suited for a moderate discussion of a proposed rule or organizational design, as their cognitive processes will be commandeered by prior beliefs: they tend to ignore countervailing evidence while seeking out any scintilla of evidence that favors their prior beliefs. Confirmation bias is the plague of deliberative republicanism, as it undermines the mechanism for dialectical improvement. Deliberation is useful because it tends to eradicate false beliefs and distill true beliefs. This is not possible when we are more concerned with upholding our prior beliefs than with seeking the truth. For deliberation to work, our beliefs must be endogenous to the deliberative process. Neither the “predetermined patron” nor the “predetermined adversary” are of any use to the deliberative process.

#### *Optimism Bias*

Publius had little patience with his contemporaries who believed happiness as a people did not require reforming the structure of the government at the time.

Have we not already seen enough of the fallacy and extravagance of those idle theories which have amused us with promises of an exemption from the imperfections, the weaknesses, and the evils incident to society in every shape? Is it not time to awake from the deceitful dream of a golden age and to adopt as a practical maxim for the direction of our political conduct that we, as well as the other inhabitants of the globe, are yet remote from the happy empire of perfect wisdom and perfect virtue?<sup>72</sup>

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<sup>71</sup> THE FEDERALIST NO. 37, at 221 (James Madison) (Clinton Rossiter ed., 2003).

<sup>72</sup> THE FEDERALIST NO. 6, *supra* note 63, at 53.

Indeed, contending against optimism bias was likely a significant motivating factor behind *The Federalist Papers'* original serialization.

#### MYOPIA

Publius forecasts that “the mild voice of reason” will be “too often drowned, before public bodies as well as individuals, by the clamors of an impatient avidity for immediate and immoderate gain.”<sup>73</sup> Publius describes the assault on reason stemming from general myopia in the form of narrow time horizons. Allocating resources in a way that is skewed toward present consumption at the expense of meaningful, long-term goals is surely immoderate. This myopia is exemplified in deforestation and other environmentally-costly practices which provide temporary gains. We mustn't skin the sheep; a reasonable person knows how much to take and how much to leave for later. But we are myopic, and the procedures for lawmaking must take that myopia into account if we are to realize sustainable governance.

Publius believed that, “invariably . . . momentary passions, and immediate interests, have a more active and imperious control over human conduct than general or remote considerations of policy, utility, or justice[.]”<sup>74</sup> Narrow time horizons prevent us from considering the lofty goals of system designers. The tendency to err due to myopia justifies a more cumbersome procedure for wielding state power to give us the benefit of time in shaping our judgments.

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<sup>73</sup> THE FEDERALIST NO. 42, at 264 (James Madison) (Clinton Rossiter ed., 2003).

<sup>74</sup> THE FEDERALIST NO. 6, *supra* note 63, at 51.

## BAD BETTERS

*Reactive Devaluation*

“Men often oppose a thing merely because they have had no agency in planning it, or because it may have been planned by those whom they dislike,”<sup>75</sup> which is one of the reasons why partisan entrenchment is so prevalent. We (irrationally) don’t trust offers we didn’t have a role in making. With shifting majorities and omnibus legislation, the effect of reactive devaluation is ameliorated in Congress. But the tendency to reactively devalue the proposals of our opponents is so profound and ineluctable that it would thwart any plural executive arrangement.

*Escalation of Commitment*

One would think including the opponent in the decision-making process—that is, consultation—could counteract reactive devaluation.

But if they have been consulted, and have happened to disapprove, opposition then becomes, in their estimation, an indispensable duty of self-love. They seem to think themselves bound in honor, and by all the motives of personal infallibility, to defeat the success of what has been resolved upon contrary to their sentiments.<sup>76</sup>

Because of the tendency to escalate commitment to positional statements, agreement in the context of plural executives can be frustrated by consultation with the counterparty prior to resolving to act. Escalation of commitment provides a reason for a singular executive.

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<sup>75</sup> THE FEDERALIST NO. 70, *supra* note 65, at 424.

<sup>76</sup> *Id.* at 424–25.

*Endowment Effect/Loss Aversion/Prospect Theory.*<sup>77</sup>

It is a general principle of human nature that a man will be interested in whatever he possesses, in proportion to the firmness or precariousness of the tenure by which he holds it; will be less attached to what he holds by a momentary or uncertain title, than to what he enjoys by a durable or certain title; and, of course, will be willing to risk more for the sake of the one than for the sake of the other.<sup>78</sup>

This “general principle” combines an understanding of the endowment effect, loss aversion, and prospect theory, respectively. People value what they already possess more than what they do not (endowment effect). People prefer avoiding loss to acquiring gains (loss aversion). People evaluate outcomes based on the change that outcome represents from an initial reference point rather than based on the nature of the outcome itself (prospect theory). So much was said without reference to a single replicable, empirical study.

“[T]he obvious interest of a certain class of men in every State to resist all changes which may hazard a diminution of the power, emolument, and consequence of the offices they hold under the State establishments”<sup>79</sup> was one of the cardinal obstacles encountered by the new Constitution. Incumbent State officials resisted the federal establishment because they believed their status could diminish, and they were not willing to take the risk. Surely a position at the State or Federal level post-ratification would still carry with it “power, emolument, and consequence.” Nonetheless, this class of interested men (those already in possession of power) would presumably require greater powers in order to relinquish their station

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<sup>77</sup> These three concepts are related and so I treat them in one section.

<sup>78</sup> THE FEDERALIST NO. 71, at 430 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

<sup>79</sup> THE FEDERALIST NO. 1, at 28 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

than they would demand for such a position in the first place because of the uncertainty involved in securing a position post-ratification.

The power struggle over representation between disproportionately populated States exemplifies the endowment effect. More powerful States would not voluntarily agree to any organizational arrangement which reduced their advantage in size and strength. Less populous States would not voluntarily agree to any organizational arrangement which reduced their representation from the status quo ex ante (that is, prior to ratification).

We cannot err in supposing that the former would contend for a participation in government, fully proportioned to their superior wealth and importance; and the latter would not be less tenacious of the equality at present enjoyed by them. We may well suppose that neither side would entirely yield to the other, and consequently that the struggle could be terminated only by compromise.<sup>80</sup>

A constitutional compromise was necessitated by the fact that endowment effect would otherwise put large and smaller states into a bargain over representation without a potential zone for agreement.

#### BAD WITH OTHERS

Notably, most of the issues discussed in this section (collective action problems, rent seeking, free riding, and holdouts) are the result of perfectly rational forms of behavior. Because they have nothing to do with behavioral, irrational tendencies, they would be predicted by the neoclassical economic model. This goes to show the classical liberal model entails both the neoclassical and behavioral law and economic models.

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<sup>80</sup> THE FEDERALIST NO. 37, *supra* note 71, at 225–26.

*Collective Action Problems*

Publius' critique of democracy (relative to republicanism) turns on the risk of executive usurpation in light of collective action problems on the part of the citizenry. "In a democracy, where a multitude of people exercise in person the legislative functions and are continually exposed, by their incapacity for regular deliberation and concerted measures, to the ambitious intrigues of their executive magistrates, tyranny may well be apprehended, on some favorable emergency[.]"<sup>81</sup> Transaction costs and information costs form powerful barriers to effective organizing in a direct democracy, and put the citizens in a position to be taken advantage of by the executive. Collective action problems justify the imposition of limits on executive power.

Publius saw a positive role for the collective action problem: extending the circumference of actors would stymie the efforts of factions.<sup>82</sup> Union would expand the size of the body politic, rendering it more difficult for unjust factions to "execute their plans of oppression."<sup>83</sup> In arguing for the advantage of a republic over a democracy, Publius notes:

Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other.<sup>84</sup>

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<sup>81</sup> THE FEDERALIST NO. 48, *supra* note 68.

<sup>82</sup> THE FEDERALIST NO. 51, *supra* note 3, at 321.

<sup>83</sup> THE FEDERALIST NO. 10, *supra* note 69, at 78.

<sup>84</sup> *Id.*

The collective action problem presented here serves as an independent limitation to unjust factious control. While Hume believed factions are “deplorable . . . because they make communitywide cooperation impossible[.]”<sup>85</sup> Publius finds a way to fit factions within a functioning republic. Because of collective action problems, factions themselves should remain impotent.

#### *Rent Seeking*

One of the rationales behind the Senate as a check on the House of Representatives is the tendency of the people to be “misled by the artful misrepresentations of interested men” in urging the enactment or redaction of a law.<sup>86</sup> While the “republican principle demands that the deliberate sense of the community should govern” the agents of the people, the republican form also allows rent seeking when the people are “beset as they continually are by the wiles of parasites and sycophants, by the snares of the ambitious, the avaricious, the desperate, by the artifices of men who possess their confidence more than they deserve it, and of those who seek to possess rather than to deserve it.”<sup>87</sup> A persistent concern with the form of government we have chosen is the rent seeking of the very officials who wield the public trust.

#### *Free Riding*

A perennial concern in a republican government is the mitigation of agency costs. The human tendency to free-ride in a group setting exacerbates agency costs in deliberative bodies and justifies a singular rather than plural executive. The structure of government must ensure “the faithful exercise of any delegated power,”<sup>88</sup> and

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<sup>85</sup> HOLMES, *supra* note 6, at 49.

<sup>86</sup> THE FEDERALIST NO. 63, *supra* note 60, at 382.

<sup>87</sup> THE FEDERALIST NO. 71, *supra* note 78, at 431.

<sup>88</sup> THE FEDERALIST NO. 70, *supra* note 65, at 427.

one method to ensure this is to provide for the sanction of public opinion on government decisions. Public opinion, mobilized by periodic elections, operates on agent behavior through the agent's concern over her reputation. This key constraint on delegated power allows citizens to show elected officials the cost of bad policy, but only if public vigilance can peer into the black box of governmental decision-making. Periodic elections fail to limit agency costs when access to information about the conduct of elected officials is unavailing.

Plurality among agents creates a free rider effect, as individuals are not held accountable due to the uncertainty created by group behavior: "Regard to reputation has a less active influence when the infamy of a bad action is to be divided among a number than when it is to fall singly upon one."<sup>89</sup> "[O]ne of the weightiest objections to a plurality in the executive . . . is that it tends to conceal faults and destroy responsibility"; "the multiplication of the executive adds to the difficulty of detection" of wrongdoing, so that it "becomes impossible, amidst mutual accusations, to determine on whom the blame or the punishment of a pernicious measure . . . ought really to fall."<sup>90</sup> Free riding is especially problematic when a sufficient "number of actors who [have] different degrees and kinds of agency" are involved in a national misfortune, so that "it may be impracticable to pronounce to whose account the evil which may have been incurred is truly chargeable."<sup>91</sup> Examples of free riding in government today are so numerous as to make exposition of them here superfluous.

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<sup>89</sup> THE FEDERALIST NO. 15, *supra* note 5, at 106 ("A spirit of faction, which is apt to mingle its poison in the deliberations of all bodies of men, will often hurry the persons of whom they are composed into improprieties and excesses for which they would blush in a private capacity.").

<sup>90</sup> THE FEDERALIST NO. 70, *supra* note 65, at 426.

<sup>91</sup> *Id.*

*Groupthink*

In delineating the proper size of the House of Representatives, Publius avers:

the number ought at most to be kept within a certain limit, in order to avoid the confusion and intemperance of a multitude. In all very numerous assemblies, of whatever character composed, passion never fails to wrest the scepter from reason. Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob.<sup>92</sup>

“The necessity of the senate is not less indicated by the propensity of all . . . numerous assemblies to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders into intemperate and pernicious resolutions.”<sup>93</sup> Publius would have us believe, and plausibly so, that the quality of decision-making is concavely correlated with the number of decision-makers. Multiple agents in a decision-making capacity requires reason-giving and enables the representation of multiple views, but when too many agents are responsible for a choice, the quality of decision-making precipitously declines. Problems associated with groupthink justify a quantitative, not simply qualitative, limit to representation in government.

*Holdout Situations*

The “power of making requisitions upon the States for quotas of men” was insufficient to provide vigorous or economical defense of the Union. The practice

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<sup>92</sup> THE FEDERALIST NO. 55, at 340 (James Madison) (Clinton Rossiter ed., 2003).

<sup>93</sup> THE FEDERALIST NO. 62, at 377 (James Madison) (Clinton Rossiter ed., 2003).

gave birth to a competition between the States which created a kind of auction for men. In order to furnish the quotas required of them, they outbid each other till bounties grew to an enormous and insupportable size. The hope of a still further increase afforded an inducement to those who were disposed to serve to procrastinate their enlistment.<sup>94</sup>

The reticent recruit is a poignant example of a holdout problem. The person wants to enlist, the safety of the Union calls, yet the monetary reward for enlistment increases the longer he waits. The consequence of this holdout problem was "slow and scanty levies of men, in the most critical emergencies of our affairs; short enlistments at an unparalleled expense; continual fluctuations in the troops, ruinous to their discipline and subjecting the public safety frequently to the perilous crisis of a disbanded army."<sup>95</sup> This sort of holdout problem is clearly more problematic than a homeowner holding up a commercial real estate development.

Publius defends majority rule based on a variant of the holdout problem. If action depends upon a supermajority, the minority will have a de facto veto over the wishes of the majority, and can "hold out" from assenting until satisfied with the concessions gained by this devious bargaining tactic afforded by poor structural design. Rather than promote security, the "real operation" of a rule of supermajority "is to embarrass the administration, to destroy the energy of the government, and to substitute the pleasure, caprice, or artifices of an insignificant, turbulent, or corrupt junto to the regular deliberations and decisions of a respectable majority."<sup>96</sup> To prevent

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<sup>94</sup> THE FEDERALIST NO. 22, at 141 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 143.

the legislature from being “held up” by a corrupt minority of votes, regular legislation passes on the basis of a majority.

#### CONCLUSION OF THIS SECTION

Many of the behavioral concepts introduced to first year law students in property, contract, and tort law courses, and even in a law school’s more advanced studies in human nature, are available from perusing of *The Federalist Papers*: bounded rationality, bounded will-power, bounded self-interest, bounded ethicality, reactive devaluation, escalation of commitment, availability bias, self-serving bias, confirmation bias, optimism bias, myopia, endowment effect, loss aversion, prospect theory, collective action problems, rent seeking, free riding, groupthink, and holdout situations. It is an open question how far we have really come in our understanding of human nature with the recent renaissance of studies challenging the neoclassical economic model of human decision-making. We have coined terms for the biases and systematic errors in judgment to which humans are prone, but they are not new discoveries. As such, it would be more intellectually honest to understand the behavioral law and economic perspective as a link in a long chain of pessimistic anthropological views, rather than as a truly novel innovation in academic discourse.

### III. THE DIALECTICAL PROGRESSION OF MODELS OF HUMAN NATURE

In contrast to the “standard versus behavioral” framework for understanding human nature, my claim is that prevailing views of human rationality have undergone a triadic dialectical progression. What do I mean when I say conceptions of human nature have undergone a dialectical progression? Strictly speaking, “historical progression” is a descriptive phrase that minimally implies change over time. Alternatively, “progress” is not devoid of normative content—progress implies gradual positive (adding a desirable feature) or negative (removing an undesirable feature) improvements over time. Distinct from both historical progression and progress gener-

ally, “dialectical progression” descriptively implies change in form and normatively implies improvement in content. A dialectical progression consists in an assertion in the form of a thesis, a reactive negation in the form of an antithesis, and a resolution of the tension between these two in the form of a synthesis.<sup>97</sup> The three phases of a dialectical progression are all parts of an organic unity. “[T]he resultant synthesis of the [thesis and antithesis occurs] through a process of ‘overcoming’ (concurrently implying to lift up, abolish, and transcend).”<sup>98</sup> The implication of my claim is that the “standard versus behavioral” framework should be jettisoned in favor of an etiological view which appreciates the origins and permutations of the concepts under discussion. Otherwise we arbitrarily cut contemporary behavioral scholarship from its historical roots.

Allow me to outline the rudiments of the dialectical progression in models of human nature. *Thesis*: Classical liberal philosophers of the 17<sup>th</sup> and 18<sup>th</sup> centuries took as a central tenet the irrationality hypothesis, expounded by philosophers ranging from Adam Smith to Baruch Spinoza.<sup>99</sup> *Antithesis*: By the 19<sup>th</sup> and 20<sup>th</sup> centuries, neo-classical economics endorsed a rational maximizer theory of human decision-making. *Synthesis*: In the mid-20<sup>th</sup> and 21<sup>st</sup> centuries, scholars of multiple domains have endeavored to provide an empirical account of decision-making that seeks to reconcile imperfect

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<sup>97</sup> HEINRICH MORITZ CHALYBÄUS, *HISTORISCHE ENTWICKLUNG DER SPEKULATIVEN PHILOSOPHIE VON KANT BIS HEGEL* (1837, 5th ed. 1860) (interpreting Hegel in an exegetical account of German philosophy). G. W. F. Hegel’s *Phänomenologie des Geistes* [“The Phenomenology of Spirit”] (1807) expresses the dialectical triad “abstract-negative-concrete,” while Hegel’s *Wissenschaft der Logik* [“The Science of Logic”] expresses the dialectical triad “immediate-mediated-concrete.” Although Kant uses the ‘abstract-negative-concrete’ formulation to describe cognition in *The Critique of Pure Reason*, I am using these terms to refer to a dynamic three-stage developmental process more in keeping with usage by Hegel.

<sup>98</sup> VINCENT B. LEITCH ET AL., *THE NORTON ANTHOLOGY OF THEORY AND CRITICISM* 626 (2001).

<sup>99</sup> See HOLMES, *supra* note 6, at 42–43.

rationality with utility maximization. The conceptual framework of the triad as abstract-negative-concrete applies to the etiology of prevailing studies of rationality in human nature. Philosophical abstractions about the limits of human nature based on anecdotal evidence were replaced by a strict model of rational decision-making that negated the idiosyncratic features of the classical liberal account to enable theoretical predictions about human behavior, which model in turn was replaced by an empirically grounded, concrete account of decision-making that challenged the prior phase, transcended it, and reaffirmed the original phase.

One could challenge the choice of the Enlightenment as a starting point in this analysis, pointing to scholars of antiquity who expounded on the nature and limitations of human reason. However, if we understand the Enlightenment as a renaissance of ancient wisdom, then it is not misleading to conceive of the ideas expressed in this time period as an initiating movement in an ongoing discourse about human nature. So, the hypothesis plausibly assumes the conceptions of human nature in the Enlightenment era serve as the “thesis.”

The conception of human rationality in the subsequent period can be accounted for as the “antithesis” in the dialectical progression, inasmuch as its defining tenet (that globally we act rationally to promote our self-interest) negates a definitive element of its precursor. The rational maximizer hypothesis negatives the irrationality hypothesis by ignoring the “deviations from calculating self-interest” that attend our passions<sup>100</sup> in a way that isolates what Aristotle considered the quintessential hallmark of our species. “[M]an is the only animal who has *logos*.”<sup>101</sup> *Logos* means both reason and language, a touchstone faculty which enables rational deliberation,

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<sup>100</sup> Consider the principle antonyms of self-interest discussed by Holmes, which “provide striking evidence for the complexity of seventeenth- and eighteenth-century views of motivation.” HOLMES, *supra* note 6, at 57–58.

<sup>101</sup> “[L]ogon de monon anthrōpos ekhei tōn zōōn.” (1253a9).

qualitative ranking, and the performance of abstract economic or utilitarian reasoning. This understanding of human decision-making served for quite some time, and remains influential and useful despite inroads made by the behavioral movement.

The third stage, the interdisciplinary approach in our time, tacitly reconciles the concerns of both prior models, by experimentally diagnosing the tendencies illuminated by the thesis in order to promote the goals of the antithesis. Studying irrationality allows us to become more rational. Thus, contemporary empirical behavioral studies are colorable as a synthesis in the dialectical progression. The claim, "conceptions of rationality since the Enlightenment have undergone a triadic dialectical progression," is plausible.<sup>102</sup> If this is true, we can see the evolution of consciousness growing before our eyes; mind becoming ever more aware of itself over time; we have cause to celebrate the achievements of contemporary academic discourse as something really new, something truly superior, to that of our predecessors, notwithstanding the withering futility suggested by Ecclesiastes:

The thing that hath been, it is that which shall be; and that which is done is that which shall be done: and there is no new thing under the sun. . . . There is no remembrance of former things; neither shall there be any remembrance of things that are to come with those that shall come after.<sup>103</sup>

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<sup>102</sup> Obviously this generalization is subject to exception by a number of theorists, pamphleteers, novelists, essayists, thinkers, politicians, mothers, grandmothers, fortune cookies, etc., espousing differing views about human nature since the Enlightenment.

<sup>103</sup> *Ecclesiastes* 1:9, 11 (King James).

#### IV. CONCLUSION

The implications of the foregoing argument are not merely theoretical (how should we understand the etiology of our concepts of human nature?) or pedagogical (how should the debate about human nature be taught and framed to students?). Because of the depth of insight offered into individual human decision-making, *The Federalist Papers* has implications for policy analysis and policy optimization, and not just institutional design, as one would be forgiven for thinking about that document. The proposed dialectical progression argument has implications for contemporary policy analysis because it would discourage applying either neoclassical or behavioral models in isolation. These approaches reveal different aspects of a complex cognitive, emotional, and very human, being that is continually learning more about why it behaves in certain ways on an individual and collective level. Additionally, it is important to bear in mind that our views of human nature influence the way we regulate ourselves, to greater and lesser degrees of success. A research agenda to validate the dialectical progression argument could consist of identifying temporal correlations between prevailing conceptions of human nature and the relative success of governance philosophies. Such a research agenda would, in my opinion, reveal that more accurate depictions of human nature correspond with more successful government, measured in terms of greater compliance with and reduced unintended consequences of legal policies. Without additional resources and a more clearly defined scope of study, my conclusions remain largely speculative. What has been established by this research, however, is that *The Federalist Papers* remain relevant to contemporary policy analysis and research into human nature.

Over the course of the last few centuries, perhaps the constitution of man has changed. The modern psychological character “con-

spicuously emerged in the Renaissance, was sharply clarified and empowered by the Scientific Revolution, then extended and solidified in the course of the Enlightenment."<sup>104</sup> The "mature form" of the modern character came "in the wake of the democratic and industrial revolutions."<sup>105</sup> We, however, belong to the so-called post-modern age. Our condition is unique and perhaps not fully accounted for in classical models. To briefly explain the shift from modern to postmodern sensibilities: "whereas the modern mind's conviction of superiority derived from its awareness of possessing in an absolute sense more knowledge than its predecessors, the postmodern mind's sense of superiority derives from its special awareness of how little knowledge can be claimed by any mind, itself included."<sup>106</sup> While this turn of phrase is useful, we must keep in mind, like the proverbial grain of salt, the fair helping of skepticism concerning our cognitive and volitional capacities contained in modern political philosophy.

As one important account tells it, "modern man's optimistic self-estimate from the Enlightenment was subject to repeated contradiction and diminution by his own advancing intellectual horizons";<sup>107</sup> "it was the irony of modern intellectual progress that man's genius discovered successive principles of determinism—Cartesian, Newtonian, Darwinian, Marxist, Freudian, behaviorist, genetic, neurophysiological, sociobiological—that steadily attenuated belief in his own rational and volitional freedom."<sup>108</sup> This picture of our intellectual trajectory is true in a broad sense. However, as suggested by this paper, Enlightenment era thinkers, from Hume to Hamilton, were not exactly optimistic about the virtue, self-control,

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<sup>104</sup> TARNAS, *supra* note 17, at 319.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 401.

<sup>107</sup> *Id.* at 329.

<sup>108</sup> *Id.* at 332.

or wisdom of their fellows. If we postmodern humans read *The Federalist Papers* closely enough, we find the depiction of the modern human condition contained therein more like a mirror than a dated photograph.