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The Federalist Papers and the Constitution of the United States

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Essay

The Federalist Papers and the Constitution of the United States*

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INTRODUCTION

Unlike many modern constitutions, the Constitution of the United States was not a direct product of social or political cataclysm. The Articles of Confederation were adopted under the pressures of the Revolutionary War, but the Constitution was drafted six years after the end of that struggle—not in response to great military events or political upheavals, but rather out of deep dissatisfaction with the operations of government under the Articles. The proposed Constitution, therefore, afforded the Americans an opportunity to establish a government through considered judgment rather than on the basis of "accident and force"[1]—"in time of profound peace, by the voluntary consent of a whole people."[2]

Although it was "the People" who adopted the Constitution, it was not the people in a simple undifferentiated body: the original English settlers had founded separate colonies, and it

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[1] THE FEDERALIST No. 1, at 33 (A. Hamilton) (all citations to *The Federalist* are from Rossiter ed. 1961).

[2] THE FEDERALIST No. 85, at 527 (A. Hamilton).

was these political units—now individual states—that claimed the primary allegiance of most Americans in 1787. Thus the Framers of the Constitution were confronted not only with various economic and social interests, but also with the disparate *political* interests of the respective states. In the period after 1776 almost all of the states had adopted constitutions to replace the former colonial charters, and experience under these documents furnished examples—some of them cautionary—for the drafters of the new federal Constitution.

Perhaps because the Constitution was proposed in a period of relative calm, and because the Americans' capacity for political debate had been enlarged by the experience under the state constitutions, the proposed document evoked a torrent of discussion in newspapers and pamphlets on basic political principles and their application in the current context. These essays and pamphlets, both supporting and opposing the proposed constitution, reflected the view that problems of political organization were subject to resolution through conscious human choice. Indeed, a striking feature of this literature is the assumption that the citizens of the new states had the power to determine their own political destiny. A sense of the possibilities of self-creation emerges with great clarity in these documents.

The debate surrounding the ratification of the Constitution reflected deep political struggles. The Constitution established a strong central government with an independent executive and judiciary, institutions unknown to the Articles of Confederation. The federal Congress was granted authority to regulate commerce, and to levy taxes and raise armies directly—rather than through requisitions mediated by the states. Moreover, the states were prohibited from issuing paper money and enacting laws that impaired the obligation of contract. These provisions protected the interests of stability and property.

In contrast, debtors and the dispossessed, and those favoring more decentralized government in general, believed that their interests and views would be disregarded. Cutting across these opposed economic and social interests was the fear of the small states that the large states would gain control of the federal apparatus, and the concern of the large states that their greater contributions to the joint enterprise would not be sufficiently recognized. Another set of political conflicts, dividing the North

and the South, revolved to some extent around commercial interests but also focused on the South's deeply controversial institution of slavery.

The Constitutional Convention sought to resolve some of these problems through compromise. First, by granting power to Congress in limited areas, the Convention sought to confide a measure of extensive authority to the central government while retaining significant power in the states. Second, by allowing representation by population in the House of Representatives but retaining equal representation of the states in the Senate, the framers sought to achieve a balance between the large and small states. Slavery was reluctantly acknowledged and in significant ways supported in the constitutional text; it thus remained an issue for later struggles.

The new Constitution needed the votes of at least nine state conventions for ratification, and the decision in many states was close. Opponents of the Constitution, who came to be known as the Anti-Federalists, were as sedulous as its advocates in propagating their views.[3] To influence the result in the important state of New York, three prominent supporters of the Constitution undertook to write a series of newspaper articles explaining and supporting its underlying principles. The authors were among the paragons of an extraordinary generation: Alexander Hamilton, one of Washington's aides-de-camp in the Revolutionary War, was to become the first Secretary of the Treasury; James Madison, a leader of the Constitutional Convention, later became the fourth President of the United States; John Jay, architect of the Treaty of Paris, was soon to be appointed the nation's first Chief Justice.[4] The work of these authors contained its share of political polemics and occasionally showed traces of the haste with which it was composed. Nonetheless, their essays, first published under the pseudonym "Publius" and later collected as *The Federalist*, constituted a trenchant defense of a cautious form of republicanism in a tradition of political writing that descended from the ancients. In sum, *The Federalist* rep-

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[3] For the views of the opponents, *see* H. STORING, THE COMPLETE ANTI-FEDERALIST (1981).

[4] On the careers of Hamilton, Madison, and Jay, *see* R. MORRIS, WITNESSES AT THE CREATION (1985).

resents the classic explanation and defense of the Constitution in its original form.[5]

I. *THE FEDERALIST*: THEORETICAL BACKGROUND

The authors of *The Federalist* represented a striking combination of Calvinist and Enlightenment thought.[6] Their Calvinist views are reflected in the position, seen throughout the essays, that human nature as revealed in political life is deeply and significantly flawed. Whereas political actions should rest on a desire to further the common good, in reality the political acts of individuals are often founded on "interest" and "passion," impulses that can give rise to reflective or unreflective self-preference.[7] In politics these "interests" or "passions" sometimes coalesce in the organized form of "factions," groups that seek to control a political structure not for the advancement of the general good but in a manner that is "adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."[8] These moral infirmities lie deep within the nature of human beings, and are therefore, for all practical purposes, ineradicable.[9] It is this fallen nature—the sad fact that men are not angels, as Madison put it in one of the most brilliant passages of *The Federalist*[10]—that requires the institution of government.

Fortunately, however, a government that can restrain these ineradicable human traits is possible through the exercise of the faculty of reason. It is here that the authors of *The Federalist* are representatives of a more optimistic strand of Enlightenment

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[5] *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 418 (1821).

[6] *Cf.* Wright, The Federalist *on the Nature of Political Man*, 59 ETHICS 1, 29 (1949).

[7] *See, e.g.*, THE FEDERALIST No. 6, at 56-57, No. 15, at 109-10 (A. Hamilton); *see generally*, Wright, *supra* note 6; Howe, *The Political Psychology of* The Federalist, 44 WM. & MARY Q. 485 (1987). The authors of *The Federalist* did not believe, however, that human nature was so corrupt that individuals would *never* act to favor the common good. Rather, the authors believed that in most cases the bad would outweigh the good motives. *See* M. WHITE, PHILOSOPHY, *The Federalist* AND THE CONSTITUTION 91-101, 123, 126-27 (1987); *see also infra* note 45.

[8] THE FEDERALIST No. 10, at 78 (J. Madison).

[9] *Id.* at 78-79.

[10] THE FEDERALIST No. 51, at 322 (J. Madison).

thought, which balanced the authors' pessimistic view of human nature.[11] Reason, if properly employed, can construct a governmental system that will at least mitigate the serious dangers posed by the passions of human nature and promote individual rights and the happiness of the people at large.[12] Behind this view lies a rough-hewn utilitarianism, which saw the diffusion of happiness as a central goal of government.[13]

Human reason, however, is not so strong that it can operate completely in the abstract. One cannot reason directly from the system established by the Constitution to the success (or failure) of its future operation without the aid afforded by "experience." The probable success or failure of various devices for the suppression of passion, interest, and faction can be evaluated only through comparison with concrete historical examples. The wealth of these examples—and the ingenuity with which they are employed—is one of the most striking features of the *The Federalist*. Some of the examples are drawn from the classical history of Greece and Rome, which furnishes an abundant record of the successes and failures of ancient federations and republics. Other examples reflect events of more recent European history—the circumstances and conditions that, in a general sense, formed the background of the American Revolution. A third source of

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[11] For a discussion of Madison as a figure of the Enlightenment, see D. ADAIR, *James Madison*, in FAME AND THE FOUNDING FATHERS (1974).

[12] *See, e.g.*, THE FEDERALIST No. 15, at 110 (A. Hamilton): "Why has government been instituted at all? Because the passions of men will not conform to the dictates of reason and justice without constraint"; *see also* Howe, *supra* note 7, at 509; Wright, *supra* note 6, at 28; Barber, *Judicial Review and* The Federalist, 55 U. CHI. L. REV. 836, 884-87 (1988). But the capacity of reason to control passion is precarious: "[T]he mild voice of reason, pleading the cause of an enlarged and permanent interest, is but too often drowned, before public bodies as well as individuals, by the clamors of an impatient avidity for immediate and immoderate gain." THE FEDERALIST No. 42, at 268 (J. Madison). Nonetheless, the authors of *The Federalist* write as though the drafters of the Constitution (and the authors themselves) possessed the ability to understand and to convey the dictates of reason. Perhaps this is because the unique experience of the Revolution suppressed disorderly political passions, and thereby encouraged reason, in an entire generation. *Cf.* Barber, *supra*, at 852, 878 (citing THE FEDERALIST No. 49 (J. Madison)). Yet, because opponents of the Constitution were also members of the "revolutionary generation," the authors of *The Federalist* must have believed that the supporters of the Constitution were particularly well-favored in this regard. *See* M. WHITE, *supra* note 7, at 114-15.

[13] *See, e.g.*, THE FEDERALIST No. 45, at 288-89 (J. Madison) (Political institutions must be subordinate to the happiness of the people.).

history was even more immediate: developments in the American states under the Articles of Confederation furnished some of the most vivid cautionary details.[14] In the historical discussion an implicit pattern of argument is sometimes evident: history presents cases in which the flaws of human nature threaten to bring about the triumph of passion, interest, or faction. In some cases these dangerous traits prevail; in others, they are restrained by human reason in the form of wise governmental institutions. Whether an institution succeeded or failed in this way can furnish an argument for its use (or rejection) in the Constitution of the United States.

In one sense these are historical arguments, because they draw from the materials of history. In another sense, however, these arguments are fundamentally ahistorical because they assume that political problems are the same in all times and places and that the institutions that succeed in suppressing passion and promoting the public good in one setting will also be effective in others.[15] Although the authors were students of Montesquieu in some respects, they generally disregarded his view that climate, geography, and other exogenous factors could alter human activities and attitudes in various times and places.

II. *THE FEDERALIST*: STRUCTURE AND BASIC THEMES

Against this theoretical background Publius sought to convince his readers of the virtues and the necessity of the new Constitution. The pursuit of this task is undertaken in two major sections. In the first section, Publius examines the relations between the federal government and the states and supports extensive federal power as a means of furthering public happiness and checking dangers of faction, which are more likely to

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[14] *See, e.g.*, THE FEDERALIST No. 6, at 56 (A. Hamilton); THE FEDERALIST No. 21, at 140 (A. Hamilton); THE FEDERALIST No. 25, at 166-67 (A. Hamilton) (citing Shays' Rebellion, an uprising in Massachusetts in 1786-87, as an example of the dangers of insurrection that can threaten governments).

[15] *See, e.g.*, Introduction to THE FEDERALIST (M. Beloff, ed. 1948), *quoted in* G. DIETZE, THE FEDERALIST: A CLASSIC ON FEDERALISM AND FREE GOVERNMENT 26-28 (1960) (noting *The Federalist*'s "unawareness of history as a continuing process"); *see also* M. WHITE, *supra* note 7, at 48-49 (Publius treated past and present historical examples as being of equal weight.).

arise in the smaller political societies of the states. Yet strong central power raises its own dangers, and in the second section Publius examines the structure and institutions of the federal government to show that this system can restrain the encroachments of the federal departments, while leaving basic representative institutions intact.

A. *The Federal Government and the States*

The initial question for Publius, as for the people themselves, was whether there should be a union of the thirteen states at all. Montesquieu had argued that a republic is impossible over an extended area, and some opponents of the Constitution apparently contended that a number of smaller confederations should be preferred.[16] In the initial papers the authors asserted the immense practical advantages of union: enhanced commercial strength[17] and greater safety against attack and insurrection[18]—virtues that would contrast sharply with the military weakness and fiscal and commercial infirmity that afflicted the confederation under the Articles. Smaller confederations, moreover, would lead to rivalries and war among the confederations; and constant mutual suspicion would require dangerous standing armies.[19]

The authors' main point, however, was a more fundamental one: paradoxically, an extended confederation is actually *necessary* for a successful republic.[20] First, in an extended republic

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[16] THE FEDERALIST No. 9, at 73, No. 13, at 97 (A. Hamilton); *see also* 1 H. STORING, *supra* note 3, at 15-23 (discussing the Anti-Federalist argument that "free, republican governments could extend only over a relatively small territory with a homogeneous population").

[17] THE FEDERALIST No. 11 (A. Hamilton).

[18] THE FEDERALIST Nos. 4 (J. Jay), 9 (A. Hamilton).

[19] *See* THE FEDERALIST Nos. 7, 8 (A. Hamilton). Portions of these papers seem to anticipate the struggles of the American Civil War. In contrast, in *The Federalist* No. 14, Madison invokes the mutual sympathy of the people of America, "knit together as they are by so many cords of affection," in a passage that seems to prefigure the closing paragraph of President Lincoln's First Inaugural Address. *See* THE FEDERALIST No. 14, at 103-04 (J. Madison); IV THE COLLECTED WORKS OF ABRAHAM LINCOLN 271 (R. Basler ed. 1953).

[20] This is the famous argument of THE FEDERALIST No. 10 (J. Madison), which has become a focal point of discussion of *The Federalist* in the twentieth century. *See generally* D. ADAIR, *The Tenth Federalist Revisited*, in FAME AND THE FOUNDING FA-

the population from which a more or less fixed number of officers is to be chosen increases substantially; consequently, the chances of finding and electing persons of high caliber—persons less than ordinarily affected by self-seeking passions or interests—will be greater. Moreover, and perhaps most important, in an extended confederation the moderating influence of a large population and disparate interests distributed over a broad area will deprive self-seeking factions and dangerous individuals of the opportunities for success that they might have in a democracy or republic of smaller scope. Because factions will ordinarily be confined to political communities of limited size, a larger compound area, such as that of the United States, would necessarily encompass a number of contending factional groups. Thus, the mediating effect of the clash of factions in this larger society would prevent any single faction from achieving control. This view, which relies on the moderating effect of contending forces, is echoed in later papers on the clash of "departments" within the federal government and is one of the basic themes of *The Federalist*.[21] More generally, the importance of government as a device for moderating extreme views and actions is paralleled by an emphasis on moderation as a virtue in many other passages of *The Federalist*.

Perhaps the greatest strength of the central government under the new Constitution lay in Congress's authority to raise taxes and armies by proceeding directly against individuals, instead of being limited to levying requisitions against the states.[22] Con-

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THERS, *supra* note 11 (discussing various interpretations of THE FEDERALIST No. 10 throughout American history). For the use of THE FEDERALIST No. 10 in an "economic interpretation" of the Constitution, see C. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913); *see also* I V. PARRINGTON, MAIN CURRENTS IN AMERICAN THOUGHT 267-291 (1958) (important critical discussion of *The Federalist*, influenced by Beard). The contributions of Beard and Parrington are trenchantly analyzed in Adair's essay, *supra*.

[21] *See* M. WHITE, *supra* note 7, at 159-66. For a similar point in the context of foreign affairs, see also THE FEDERALIST No. 3 (J. Jay) (While the passions in a single state may lead to hostility with other nations, a national government is likely to take a more balanced and moderate view.).

[22] Publius viewed this new power, also, as a device through which reason would further public happiness by limiting the baneful force of passion. Under the Articles of Confederation, Congress could generally proceed against the states, but not against individuals, and that system made it too easy for the passions and ambitions of factions

gress, however, was not accorded the power to regulate individuals in every way, but could only legislate on those "objects" confided to it in the constitutional text. All other regulatory powers remained in the states. Yet the "objects" of federal power are described in very general terms, and a fundamental debate centered on the extent of Congress's discretion in legislating to achieve these ends.

In an argument destined to have continuing importance, Publius pressed the Federalist case for a broad interpretation of national power: where power over certain "objects" is granted to Congress, that body must have extensive discretion in determining how its own authority should be exercised. Grants of power to the federal government are intended for the indefinite future—Publius clearly saw the Constitution as creating a permanent governmental structure—and it is impossible to determine in advance the exigencies that will require special exertions of that power. Indeed, the exercise of any given power must be proportionate to the specific historical instances that evoke its exercise, and these circumstances cannot be foretold in advance. Congress must consequently retain the broadest possible authority to determine a proportionate exercise of power under the specific circumstances that it faces.[23] Thus the Framers were right in not restricting Congress's power by prohibiting standing armies in peacetime or limiting the federal taxing power to specified forms or subjects of taxation—two prominent Anti-Federalist demands.[24] Yet the failure to place explicit restrictions on congressional power over the "objects" of national legislation does not mean that the federal power in those areas is actually unlimited; the structure of the federal government and its ulti-

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controlling the states to avoid compliance with federal measures for the general good. *See, e.g.*, THE FEDERALIST No. 15, at 111-13 (A. Hamilton).

[23] *See* THE FEDERALIST Nos. 31, 34 (A. Hamilton); *see also* M. WHITE, THE PHILOSOPHY OF THE AMERICAN REVOLUTION 78-94 (1978). The authors' emphasis on proportionality in discussing federal power seems to echo their emphasis on moderation in other parts of the work. Proportionality can be viewed as a form of moderation—a response that is appropriate to the events evoking the response, without being either too strong or too weak.

[24] The Constitution did, however, limit to two years the permissible duration of appropriations for the army. U.S. CONST. art. I, § 8, cl. 12. For Anti-Federalist attacks on standing armies, see, e.g., *Essays by a [Maryland] Farmer*, 5 H. STORING, *supra* note 3, at 22-28.

mate control by the people will furnish an effective means of restraint.[25]

Thus, one important limit on extensive federal power will be the vigilance of the people themselves, and the authors take pains to emphasize the strictly republican nature of the national government.[26] Yet if the people are to check improper taxation, opponents argued, the legislature established by the Constitution will not be large enough to encompass the numerous social and economic groups whose distinct interests will be affected.[27] Publius acknowledges that few members of the less powerful classes are likely to be elected to the legislature, but he argues that they will be adequately represented, through an identity of interests, by representatives of the more prosperous classes.[28] The merchant class, for example, will broadly represent "mechanics" and "manufacturers" (that is, various forms of artisans)[29] and "middling" landowners will represent the interests of all other landowners, great and small. Moreover, members of the "learned professions," without a distinct interest of their own, may enjoy the confidence of all and may therefore represent all.[30] Thus an elite political structure is justified through a form of economic and social "virtual representation."

In their task of investigating and checking the federal government the people will have as allies the governmental organs of the States. Indeed, Madison argues that the combined mass

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[25] THE FEDERALIST Nos. 31, 33 (A. Hamilton); *see also* THE FEDERALIST Nos. 24, 25 (A. Hamilton). These papers foreshadow the opinion of Chief Justice Marshall in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), which acknowledges the broad discretion of Congress to choose the means that it considers appropriate in legislating on the "objects" confided to it. *The Federalist*'s argument and Marshall's opinion are also similar in according a minor role to the "necessary and proper" clause of art. I, § 8, which is viewed by both as adding little to the inherently broad nature of delegated power under a written constitution. *See* THE FEDERALIST Nos. 33, at 201-03 (A. Hamilton); 44, at 283-86 (J. Madison). For a discussion of this section of the papers, see D. EPSTEIN, THE POLITICAL THEORY OF *The Federalist* 40-50 (1984).

[26] THE FEDERALIST No. 39 (J. Madison).

[27] *See, e.g.*, Samuel Chase, *Notes of Speeches Delivered to the Maryland Ratifying Convention*, 5 H. STORING, *supra* note 3, at 89-90 ("only the *gentry*, the *rich* and well born will be elected."); *Essay by a Georgian*, *id.* at 130 (fearing aristocratic government).

[28] *See* THE FEDERALIST No. 35 (A. Hamilton).

[29] On the meaning of these terms, see G. STOURZH, ALEXANDER HAMILTON AND THE IDEA OF REPUBLICAN GOVERNMENT 88-89 (1970).

[30] *See* THE FEDERALIST No. 35, at 215 (A. Hamilton).

of federal power will not endanger the state governments, because the "natural attachment"[31] of the people, and their "predilection and probable support,"[32] will inevitably favor the states in comparison with the distant federal government. Consequently, the organized state governments would assist the people to repel any measures of oppression attempted by the national government.[33] The first portion of *The Federalist* thus concludes with an argument that extensive federal power will promote public happiness and suppress the effects of faction in the states, without unduly impairing the states' independent status.

B. *The Structure of the Federal Government*

Having discussed the allocation of authority between the federal government and the states, the authors turn to the second great division of authority in the American Constitution: the distribution of powers among the legislative, executive, and judicial branches *within* the federal government. Here, in Montesquieu's doctrine of separated powers, lay a primary safeguard against the oppressive use of strong federal power.[34] The Anti-Federalists argued, however, that the Constitution disregarded Montesquieu's doctrine and raised the spectre of tyrannical consolidation by "mixing" the powers of the three branches—for example, by allowing the President to veto legislation and empowering the legislature to impeach and remove executive officers.[35] As in his argument in *The Federalist* No. 10 on the size of republics, Publius (Madison in both cases) sought to show that the very *opposite* of the view attributed to Montesquieu was actually correct. First, according to Madison, Montesquieu sought only to prohibit the exercise of *all* the power of one branch by another branch—a degree of consolidation that was certainly not present in the proposed Constitution.[36] Even more important,

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[31] THE FEDERALIST No. 46, at 294 (J. Madison).

[32] THE FEDERALIST No. 45, at 290 (J. Madison).

[33] *See* THE FEDERALIST No. 46 (J. Madison).

[34] THE FEDERALIST No. 47 (J. Madison).

[35] *See, e.g.*, G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 548 (1969).

[36] According to Madison, Montesquieu "did not mean that [the governmental] departments ought to have no *partial agency* in, or no *control* over, the acts of each

however, was Madison's argument that a partial "mixture" of separated governmental powers is actually *necessary* in order to preserve the basic separation of powers and thus to preserve liberty. If a constitution merely separates governmental powers, the system is unlikely to function because "the encroaching spirit of power" will disregard mere "parchment barriers." Rather, according to Madison, "auxiliary precautions" are necessary.[37]

The necessary "auxiliary precaution" found in the Constitution is the authority of one branch to "check" the actions of another branch—for example, by withholding consent to actions on which both must agree. This device will be effective in preserving the powers of all branches intact because, here, passion will be made to do the work of reason: the personal ambition that will lead one department to resent and resist the encroachments of another will be combined with adequate "constitutional means"—that is, the authority to check certain actions of the other department—in order to create a system in which each branch will be restricted to its own proper sphere. Thus, the ambition or passion of individuals, which unconfined may have a ruinous effect, can be channeled through a device contrived by reason to a beneficial end. In sum, "the private interest of every individual may be a sentinel over the public rights."[38]

Because the legislature necessarily predominates in any republic, it is important to take special measures to check that branch; the Constitution accordingly divides Congress into two different branches and requires the consent of both for legislation.[39] The division between the federal government and the

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other." Rather, Montesquieu intended to say only "that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted." THE FEDERALIST No. 47, at 302-03 (J. Madison).

[37] THE FEDERALIST No. 48, at 308-09 (J. Madison); THE FEDERALIST No. 51, at 322 (J. Madison). Sometimes it might be possible to turn to the people to resist governmental abuses; but decisions of the people in a constitutional crisis are likely to partake more of "passion" than "reason" and might indeed support the encroachments of power. THE FEDERALIST No. 49, at 317 (J. Madison); *see also* THE FEDERALIST No. 50 (J. Madison).

[38] THE FEDERALIST No. 51, at 322 (J. Madison); *see* Barber, *supra* note 12, at 849.

[39] THE FEDERALIST No. 51, at 322 (J. Madison). Invoking the experience of some

states adds a further safeguard to the security thus created.[40] As the safeguard of extended territory in *The Federalist* No. 10 protects one part of the people against another, the safeguard of partially separated powers in *The Federalist* No. 51 protects the people against governmental oppression.[41]

After analyzing the general structure of the national government, Publius turns to a discussion of its individual departments which, although detailed, nonetheless reflects the more general doctrines of the work. As in the Constitution itself, the order of discussion proceeds from the most to the least representative of the governmental branches.

The House of Representatives, elected directly by popular suffrage, was the most "republican" organ of the government. The Anti-Federalists argued, however, that even the House would be oligarchical and remote from the people because of its biennial (rather than annual) election and relatively small size.[42] Publius responded that a two-year period allows the representatives to become familiar with the governmental problems of such an extended nation.[43] On the size of the legislature, the great problem was to have a number large enough "to secure the benefits of free consultation and discussion, and to guard

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states in the period following the Revolution, Madison argues that the legislature "is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex." THE FEDERALIST No. 48, at 309. Although Madison cites the legislature as the example of an encroaching power, the discussion nonetheless assumes that the legislature will always be the strongest branch (and properly so) in republican government. *See* G. WILLS, EXPLAINING AMERICA: *The Federalist* 126-29 (1981).

[40] THE FEDERALIST No. 51, at 323 (J. Madison).

[41] *See* M. WHITE, *supra* note 7, at 159-66. Interestingly from a contemporary perspective, the judiciary is not explicitly mentioned in THE FEDERALIST No. 51 as an organ that will keep the other branches within their constitutional limits. Perhaps as the "least dangerous" branch, the judiciary was not seen as powerful enough to check the other two branches. On the other hand, the power of judicial review may have been tacitly included within the general language of THE FEDERALIST No. 51 as one of the devices through which one branch would restrain another. *See also* Wright, *supra* note 6, at 10 (THE FEDERALIST No. 51 does not mention courts because Publius thought that judicial review would be limited to protecting civil liberties only). *But see generally* Barber, *supra* note 12, at 887 (Publius favored judicial power because he believed that courts embody the value of reason).

[42] *See, e.g., Letters from The Federal Farmer*, 2 H. STORING, *supra* note 3, at 235, 265-86; Dellinger, *1787: The Constitution and "The Curse of Heaven,"* 29 WM. & MARY L. REV. 145, 149-50 (1987).

[43] THE FEDERALIST No. 53 (J. Madison).

against too easy a combination for improper purposes," but yet small enough "to avoid the confusion and intemperance of a multitude" since in large assemblies "passion never fails to wrest the scepter from reason."[44] Interestingly, the discussion relies on a degree of confidence in human nature in order to avoid difficulties that the governmental structure itself cannot entirely control. Certainly, the institution of representation must rest, to some extent at least, on such a view.[45]

The popularly-elected House was thus viewed as the most powerful branch, and the other three federal organs—Senate, president and judiciary—were conceived, at least in part, as republican devices to restrain the popular strength of the House. For precisely this reason they were the subject of bitter attack by the Anti-Federalists. The Senate, a small body elected by the legislatures of the states for a lengthy six-year period, was criticized as carrying within it the seeds of aristocratic tyranny.[46] Invoking the example of ancient republics, Publius defends a small and rather permanent senatorial institution—chosen by "enlightened and respectable" state legislators—as affording the necessary judgment and knowledge of affairs to collaborate with the president in making treaties and to check occasional bursts of "passion" in the more popular branch.[47] The Senate "will

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[44] THE FEDERALIST No. 55, at 342 (J. Madison); *see also* THE FEDERALIST No. 58, at 360-61 (J. Madison).

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> As there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust, so there are other qualities in human nature which justify a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree than any other form.

THE FEDERALIST No. 55, at 346 (J. Madison). Nonetheless Publius admits the possibility that the "cords" of sympathy between the people and their representatives "may all be insufficient to control the caprice and wickedness of men." THE FEDERALIST No. 57, at 353 (J. Madison); *see supra* note 7 and accompanying text.

Another important feature of the composition of the House of Representatives resulted from the compromise by which slaves were to be counted as 3/5 of other persons in allocating representatives and direct taxation among the states. A chilling paper, THE FEDERALIST No. 54 (J. Madison), seeks to defend this compromise.

[46] *See, e.g.*, *Letters from The Federal Farmer*, 2 H. STORING, *supra* note 3, at 288 ("Men six years in office absolutely contract callous habits, and cease, in too great a degree, to feel their dependance [sic], and for the condition of their constituents."); *see generally* 1 H. STORING, *supra* note 3, at 48-49.

[47] THE FEDERALIST Nos. 63, at 384 (J. Madison), 64, at 390-91 (J. Jay).

blend stability with liberty,"[48] and defend the people "against the tyranny of their own passions."[49]

It was the presidency, however, with its command of the armed forces and qualified veto of legislation, that the Anti-Federalists saw as representing a particularly dangerous, almost monarchical, power.[50] In response to such arguments, Publius argued that the executive was a basically republican institution but also an institution that, like the Senate, represents stability. In the indirect election of the president—by state electors chosen by the people—the "sense" of the populace is preserved, but the actual choice is made through the "deliberation" of "men most capable of analyzing the [necessary] qualities" under circumstances that will avoid "tumult and disorder" and "cabal, intrigue, and corruption."[51] Under such a system "there will be a constant probability of seeing [the office of president] filled by characters pre-eminent for ability and virtue."[52]

Perhaps the most monarchical feature of the executive was its location in a single officer, the president, rather than in a group. Hamilton argues that a single executive best promotes the virtues of "[d]ecision, activity, secrecy, and dispatch" without sacrificing "due responsibility" and accountability to the people.[53] A plural executive would degenerate into quarrels and weakness, but a single executive with a four-year term will be firm enough to "check excesses in the majority," withstand the "humors of the legislature," and save the people from their "temporary delusion."[54] The president's qualified veto over legislation will be particularly useful for this purpose.[55]

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[48] THE FEDERALIST No. 63, at 385 (J. Madison).

[49] *Id.* at 384.

[50] *See, e.g., Letters of Cato*, 2 H. STORING, *supra* note 3, at 113-18; *Essay by a Farmer and Planter*, 5 H. STORING, *supra* note 3, at 76-77 ("a four-years President will be, in time, a King for life, and after him, his son. . . ."); *Essay by Tamony*, *id.* at 146 ("though not dignified with the magic name of King, he will possess more supreme power, than Great Britain allows her hereditary monarchs. . . .").

[51] *See* THE FEDERALIST No. 68, at 412 (A. Hamilton).

[52] *Id.* at 414. The history of the American presidency has not confirmed this sanguine forecast.

[53] THE FEDERALIST No. 70, at 424 (A. Hamilton).

[54] *Id.* at 425-31; THE FEDERALIST No. 71, at 432-33 (A. Hamilton).

[55] THE FEDERALIST No. 73, at 442-44 (A. Hamilton).

Even though the individual executive will promote "energetic" government, care must be taken to guard against the excessive passions of that individual. Requiring that the president's salary remain fixed throughout his term[56] will enhance the president's ability to resist the legislature and prevent corruption of "his integrity by appealing to his avarice."[57] Allowing re-election (as the Constitution does) will make use of the executive's experience and will restrain the "peculation" and usurpation that might be undertaken by an avaricious or ambitious president who knows that he has no hope of further office.[58] Indeed former presidents, barred from re-election through a constitutional disability and "wandering among the people like discontented ghosts," might actually raise the prospect of civil war.[59] In order to enhance political responsibility, the power to pardon is conferred upon the president alone,[60] but the Senate is properly associated with the president in making treaties because an avaricious or ambitious individual, if given sole power, "might be tempted to betray the interests of the state to the acquisition of wealth" or to his own aggrandizement.[61]

Thus even the president may be infected with passions that must be artificially curbed. Hamilton does note that "the institution of delegated power implies that there is a portion of virtue and honor among mankind,"[62] and the indirect choice of the

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[56] *See* U.S. CONST. art. II, § 1, cl. 7.

[57] THE FEDERALIST No. 73, at 442 (A. Hamilton).

[58] THE FEDERALIST No. 72, at 437-38 (A. Hamilton).

[59] *Id.* at 438. Interestingly, Alexis de Tocqueville, who followed *The Federalist* in many particulars, vigorously disputed the wisdom of allowing the president to be re-elected and did so without necessarily rejecting Hamilton's basic frame of reference. With the advantage of more than forty years of historical experience, Tocqueville argued that the prospect of a re-election campaign greatly impaired the president's value as a check on the "caprices" of the people by making him unduly deferential to the wishes of the majority. *See* I A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 136-38 (P. Bradley ed. 1945).

[60] THE FEDERALIST No. 74 (A. Hamilton).

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> The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States.

THE FEDERALIST No. 75, at 451 (A. Hamilton).

[62] THE FEDERALIST No. 76, at 458 (A. Hamilton).

president through a complex system of state electors is intended to further the selection of individuals whose "portion of virtue and honor" is especially great. What is particularly noteworthy in this entire discussion, however, is that even though the president's election is carefully filtered through layers of complicated procedure, it is still necessary to devise further elaborate measures to check the passions that might nonetheless infect even such a paragon. In this way the discussion of the presidency reflects the application of reason to the vices of human nature in order to create an office that combines the executive virtues of "energy" with the safeguards of republican government.

In the final long section of the *The Federalist*, Hamilton discusses the judicial department.[63] Rather than a qualified veto like that of the executive, the courts possess the power of judicial review—the power to refuse to enforce a statute that is inconsistent with the Constitution. In exercising this power, however, the courts are not superior to the legislature. Rather, the people are superior to both, and the courts must enforce the permanent will of the people (set forth in the Constitution) against the temporary will of the people's agents.[64] In light of the courts' role, permanent judicial tenure (during good behavior) and a level of compensation that cannot be reduced by Congress are essential—since *"a power over a man's subsistence amounts to a power over his will."*[65] In contrast, Hamilton argues that the danger of "encroachments" by the courts on the legislative authority is "in reality a phantom."[66]

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[63] THE FEDERALIST Nos. 78-83 (A. Hamilton).

[64] In Hamilton's famous words, the courts themselves exercise "neither FORCE NOR WILL but merely judgment" and are, of all the branches, the "least dangerous to the political rights of the Constitution." THE FEDERALIST No. 78, at 465 (A. Hamilton). In this essay Hamilton anticipates the argument, and much of the language, of Chief Justice Marshall's opinion establishing judicial review in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), fifteen years later.

[65] THE FEDERALIST No. 79, at 472 (A. Hamilton); *see* THE FEDERALIST No. 78 (A. Hamilton).

[66] THE FEDERALIST No. 81, at 484 (A. Hamilton). Hamilton also defends the creation of lower federal courts (left to the discretion of Congress in art. III) and argues that the federal Supreme Court should exercise appellate review over the state courts. Once again, Hamilton anticipates by many years a fundamental decision of the Supreme Court, this time the opinion of Justice Story in Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816). *See* THE FEDERALIST Nos. 81, 82 (A. Hamilton).

In light of this battery of safeguards, the Federalists believed that a bill of rights was correctly omitted from the original Constitution. In the penultimate paper, *The Federalist* No. 84, Hamilton emphasizes this point by arguing that a bill of rights would be unnecessary and even dangerous: the power to invade fundamental rights is not granted to the federal government and a bill of rights might seem to acknowledge such a grant by implication. This argument was not convincing to most,[67] and the Bill of Rights was swiftly added in 1791.

The Federalist concludes on a note of mixed optimism and uneasiness characteristic of much of the work: "The establishment of a Constitution, in time of profound peace, by the voluntary consent of a whole people, is a PRODIGY, to the completion of which I look forward with trembling anxiety."[68] Perfection, however, cannot be demanded because, "I never expect to see a perfect work from imperfect man."[69] Accordingly, the present draft should be adopted and then improved over the course of time; a government cannot be perfected in the abstract without the help of experience. On this point, Hamilton invokes Hume's words: "To balance a large state or society . . . on general laws, is a work of so great difficulty that no human genius, however comprehensive, is able, by the mere dint of reason and reflection, to effect it. The judgments of many must unite in the work; EXPERIENCE must guide their labor. . . ."[70] In checking the dangers of passion, interest, and faction, therefore, reason is always in need of assistance from the lessons of contemporary experience.

III. *THE FEDERALIST*: A VIEW FROM THE PRESENT

Any consideration of the arguments of *The Federalist* from the vantage point of the present must acknowledge that the structure of American government and many of its basic presuppositions have changed considerably in the years since 1787.

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[67] *See, e.g., Letters from The Federal Farmer*, 2 H. STORING, *supra* note 3, at 249; *Essays by a [Maryland] Farmer*, 5 H. STORING, *supra* note 3, at 9-16.

[68] THE FEDERALIST No. 85, at 527 (A. Hamilton).

[69] *Id.* at 523.

[70] *Id.* at 526.

First, the system of representation has become more direct—more democratic—and less republican in the sense favored by the Federalists. Since 1913, senators have been elected directly by the people of the states and not by state legislatures. Thus, the indirect aspects of senatorial election praised in *The Federalist* No. 62 have disappeared, although the interests of the smaller states remain equally represented in the Senate. Similarly, the "electoral college"—the group of presidential electors whose deliberate judgment was viewed by Publius in *The Federalist* No. 68 as ensuring the choice of superior chief executives—has become nothing more than a numerical device through which the popular will in the respective states is registered. The electors retain no significant discretion of their own. Thus, although the House of Representatives, Senate, and President continue to be elected for different terms, all are in effect elected directly by the people. Correspondingly, the anti-democratic overtones of *The Federalist* do not evoke the same sympathies that they may have had among a population that had once lived under a monarchy. Today, for example, the presidential checking power is frequently justified on the ground that it is *more* democratic—and not less democratic—than the power of the legislature.

Second, while still retaining substantial importance, the states do not play the significant role that they assumed as quasi-independent sovereignties in 1787. Indeed, the fears of the Anti-Federalists that the Constitution would eventually bring about a consolidated nation have to a substantial extent been realized. In many respects this result is to be applauded. Slavery, the great blemish of the Constitution of 1787, was abolished in the aftermath of the Civil War, and the thirteenth, fourteenth, and fifteenth amendments granted power to the federal government that eventually revolutionized its relations with the states. Furthermore, the judicial revolution of the 1930s, which recognized the centralizing force of a century of industrialization, greatly reduced the independent authority of the states in Supreme Court doctrine.

As the authority of the states has declined, the balance of power *within* the federal government has also been drastically realigned. Although it doubtless remains the "least dangerous branch," the judiciary has gradually assumed a role of power probably unforeseen even by the Federalists, although such a

development might well have met with their approval. The greatest change, however, has taken place in the relative strength of Congress and the executive. Since the Second World War, at least, it seems to be the executive rather than the legislature that is sweeping increased power into its "impetuous vortex."[71] Some implications of this development will be mentioned at the conclusion.

Another important change in constitutional reality has been the development (particularly since the New Deal) of independent administrative agencies and the apparatus of a vast administrative state which exercises a degree of governmental authority unforeseen in 1787 and combines legislative, executive, and judicial authority in a manner that is arguably inconsistent with the underlying presuppositions of *The Federalist* No. 51.[72] Moreover, the development of modern political parties in the 19th century has also changed the structure of American government, although it is difficult to see in the massive and ill-organized Democratic and Republican parties the single-minded "factions" feared by Publius.

Finally, the Bill of Rights, an institution not included in the original Constitution and disapproved in *The Federalist* No. 84, has assumed increasing importance in American life and in the jurisprudence of the Supreme Court. Most of the guarantees of these amendments have been held judicially enforceable not only against the federal government but also against the states through their "incorporation" into the due process clause of the fourteenth amendment. The fourteenth and fifteenth amendments, moreover, contain guarantees of equality, which have in effect functioned as extensions of the Bill of Rights in the jurisprudence of the Supreme Court. Indeed, the provisions of the Civil War amendments, particularly the equal protection clause of the fourteenth amendment, have set much of the tone of Supreme Court litigation in the period since the Second World War.

Some of these changes are perhaps reflected in the role played by the *The Federalist* in the jurisprudence of the Supreme

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[71] *See supra* note 39.

[72] *See supra* text accompanying notes 37-38.

Court in recent decades.[73] As we have seen, *The Federalist* is basically concerned with governmental structure: the internal organization of the federal government and the relationship of the federal government to the states. Although a concern for individual rights certainly lies behind many of the structural discussions, *The Federalist* contains no comprehensive analysis of specific individual rights. Publius rejects the addition of a Bill of Rights and does not devote a great deal of attention to the few individual rights that are protected in the original Constitution. Moreover, the authors countenance, if they do not defend, the institution of slavery. Indeed, personal equality in general is not of particular concern to the authors of *The Federalist*, and a number of their arguments assume or approve the existence of certain forms of social, economic, and even political *inequality*. Accordingly, 20th-century struggles over the meaning of equality—for example, civil rights battles over desegregation, integration and affirmative action—raise issues that are quite remote from the authors' preoccupations and concerns. These are constitutional problems of a later era, as are the issues of women's rights and abortion, which also occupy a central role in the contemporary jurisprudence of the Supreme Court. Thus, the constitutional issues that have absorbed the lion's share of judicial attention since World War II—equality and a series of specifically-defined individual rights—generally fall outside the direct concerns of *The Federalist*.[74]

The Federalist, therefore, has its main impact on litigation concerning governmental structure. But here, too, significant shifts have taken place in Supreme Court doctrine. Although constitutional litigation in the Nineteenth Century focused largely on the relationship of the federal government to the states (thus mirroring the preoccupations of the Framers), the relative importance of these questions has decreased significantly since the New Deal revolution of the 1930s. It was during this period that the Court, for all practical purposes, ceased to impose limits on Congress's power to enter areas of economic regulation previ-

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[73] For a comprehensive review, see Wilson, *The Most Sacred Text: The Supreme Court's Use of* The Federalist *Papers*, 1985 B.Y.U. L. REV. 65.

[74] Even so, the number of citations of *The Federalist* in Supreme Court opinions has shown a generally increasing trend in recent years. *See id.* at 66.

ously occupied by the states, thus curtailing a prolific source of structural litigation.

In the forty years before 1937, for example, the Court actively reviewed exercises of congressional power under the Commerce Clause. Since 1937, in contrast, the Court has only once invalidated a congressional exercise of the commerce power on structural grounds. In this case, *National League of Cities v. Usery*,[75] the Court struck down a federal statute that regulated the minimum wages of state employees. Numerous citations of *The Federalist* in *National League of Cities* and its successors—until the case was overruled in 1985[76]—reflect *The Federalist*'s concentration on issues of state and federal power. The doctrinal question in these cases was whether (or the extent to which) Congress could regulate the economic activities of the state governments. The underlying dispute, however, was more closely concerned with the appropriate extent of *judicial* power. On one side were justices who believed that the judiciary should intervene in these cases to protect the power of the states.[77] Other justices, however, maintained that because the states were well represented in Congress, the precise allocation of authority should be left to the political process.[78] *The Federalist* was liberally cited on both sides of this debate.[79] After attempting to handle the complex economic assessments necessary in these cases, without much success, the Court decided that the judiciary should ordi-

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[75] 426 U.S. 833 (1976).

[76] *See* Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985).

[77] *See id.* at 570-72, 575 n.18, 578 (Powell, J., dissenting) (citing THE FEDERALIST Nos. 7, 11, 17, 22 (A. Hamilton), 39, 42, 45, 46 (J. Madison)); *id.* at 582 (O'Connor, J., dissenting) (citing THE FEDERALIST Nos. 17 (A. Hamilton), 45, 51 (J. Madison)); EEOC v. Wyoming, 460 U.S. 226, 270-71 (1983) (Powell, J., dissenting) (citing THE FEDERALIST Nos. 45 (J. Madison), 84 (A. Hamilton)); FERC v. Mississippi, 456 U.S. 742, 792-93 (1982) (O'Connor, J., concurring in the judgment in part and dissenting in part) (citing THE FEDERALIST Nos. 15, 16 (A. Hamilton)); *see also* Nagel, *Federalism as a Fundamental Value: National League of Cities in Perspective*, 1981 SUP. CT. REV. 81 (invoking *The Federalist* in defense of *National League of Cities* decision); *see generally* Dry, *Federalism and the Constitution: The Founders' Design and Contemporary Constitutional Law*, 4 CONSTITUTIONAL COMMENTARY 233 (1987).

[78] *See Garcia*, 469 U.S. at 551-52 (citing THE FEDERALIST Nos. 43, 46, 62) (J. Madison)); *see also National League of Cities*, 426 U.S. at 876-77 (Brennan, J., dissenting) (citing THE FEDERALIST Nos. 45, 46 (J. Madison)).

[79] *See supra* notes 77-78; Wilson, *supra* note 73, at 85-89.

narily not intervene but rather defer to congressional findings.[80]

In another area of federal-state relations, however, the Supreme Court has continued to exercise vigorous judicial review. The Court has continued to decide cases in which Congress has not affirmatively regulated commerce, but where a state statute is alleged to invade an area of exclusive federal power. In these "dormant" commerce clause cases, *The Federalist* is most often cited to assert the *national* interest in commerce unimpeded by particularistic or parochial state restrictions.[81] In these cases, however, *The Federalist* is ordinarily cited in the course of a general assertion of a very general value, *i.e.*, the federal interest in commerce; the specific arguments of *The Federalist* do not often give any very clear guidance on how these cases should be decided.[82] Indeed the cited numbers of *The Federalist* give only the most ambiguous support to the questionable doctrine of the "dormant" commerce clause at all. In a recent opinion, a newly-appointed justice has supported *state* power by calling into question the entire nationalist doctrine of the "dormant" commerce clause, remarking that *The Federalist* praised free trade and national uniformity in general but "said little of substance specifically about the Commerce Clause. . . ."[83]

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[80] *Garcia*, 469 U.S. 528.

[81] *See, e.g.*, Reeves, Inc. v. Stake, 447 U.S. 429, 448 (1980) (Powell, J., dissenting) (citing THE FEDERALIST Nos. 11 (A. Hamilton), 42 (J. Madison)); Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 142 (1978) (Blackmun, J., concurring in part and dissenting in part) (citing THE FEDERALIST Nos. 7, 11, 12 (A. Hamilton), 42 (J. Madison)); *see also id.* at 151 n.16. For an important pre-war example in this area, see Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 522 (1935) (citing THE FEDERALIST No. 42 (J. Madison)).

For a similar use of *The Federalist* in cases considering the provision of art. I, § 10, cl. 2 of the Constitution, which prohibits the states from taxing imports or exports, see Youngstown Sheet & Tube Co. v. Bowers, 358 U.S. 534, 555-58 (1959) (Frankfurter, J., dissenting) (citing THE FEDERALIST Nos. 12, 32, 67 (A. Hamilton), 44 (J. Madison) for the view that the import-export clause reflects the Framers' intention to grant the federal government exclusive power over foreign commerce). *See also* Michelin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976) (federal government "must speak with one voice" in regulating foreign trade; citing THE FEDERALIST Nos. 11, 12 (A. Hamilton), 42, 44 (J. Madison)).

[82] When the meaning of an archaic term is in question, however, *The Federalist* can be helpful as a specific example of contemporary usage. *See, e.g., Michelin Tire Corp.*, 423 U.S. at 291-93 n.12 (1976) (invoking THE FEDERALIST No. 12 (A. Hamilton) as evidence to show that state ad valorem property tax does not constitute an "impost" prohibited by art. I, § 10, cl. 2).

[83] Tyler Pipe Industries, Inc. v. Washington Department of Revenue, 107 S. Ct.

In contrast with disputes involving federal and state power, cases considering the allocation of powers within the federal government—and particularly cases involving the role of the President—have increased notably in the past two decades. Before the events of the early 1970s—the Vietnam War and the dramatic fall of the Nixon Administration—cases of this sort were comparatively rare in the Supreme Court's jurisprudence. In recent years, however, the Court has decided a number of extremely important separation of powers cases arising from extensive assertions of executive power and congressional attempts to restrain that power. In these cases portions of *The Federalist* have played a role.

Against the background of their historical experience, the authors of *The Federalist* sought to restrain legislative power. They were challenged to defend the new (and in some ways monarchical) institution of the presidency and, as we have seen, *The Federalist* Nos. 67-77 contain a spirited defense of a vigorous chief executive.[84] In separation of powers cases, therefore, *The Federalist* has been frequently invoked in favor of, rather than against, strong claims of presidential power.[85] When the

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2810, 2829 (1987) (Scalia, J., concurring in part and dissenting in part).

The Federalist has also recently played a role in cases considering whether the states can be sued in federal courts—another problem of federal-state relations. Justices seeking to extend the immunity of states in federal courts—as well as justices seeking to restrict that immunity—have sought support in various numbers of *The Federalist*. *See, e.g.*, Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985) (states are immune under the eleventh amendment from certain damage actions based on federal discrimination statute) (majority cites THE FEDERALIST Nos. 17 (A. Hamilton), 39, 45, 46 (J. Madison) for view that the Framers endorsed strong state governments; Justice Brennan's dissent invokes THE FEDERALIST Nos. 32, 80, 81 (A. Hamilton) in asserting that states possess no immunity in causes of action based on *federal* law); Welch v. Texas Dept. of Highways and Public Transp., 107 S. Ct. 2941 (1987) (eleventh amendment bars admiralty action against a state) (Justice Powell's opinion cites THE FEDERALIST No. 81 (A. Hamilton) for view that states are not subject to suit without their consent; Justice Brennan's dissent invokes THE FEDERALIST No. 80 (A. Hamilton) to emphasize the strong *national* interest in the admiralty jurisdiction.).

For use of *The Federalist* in an area in which assertions of state "sovereignty" and individual rights collide, see Heath v. Alabama, 474 U.S. 82, 93 (1985) (THE FEDERALIST No. 9 (A. Hamilton) cited in argument that states retain separate "sovereign power," and therefore conviction of defendant by two states for the same criminal act does not violate the double jeopardy clause of fifth amendment).

[84] *See supra* notes 50-62 and accompanying text.

[85] *See, e.g.*, Haig v. Agee, 453 U.S. 280, 294 n.24 (1981) (citing THE FEDERALIST

Supreme Court struck down the so-called "legislative veto" in *INS v. Chadha*,[86] for example, the majority invoked *The Federalist* No. 73 in emphasizing the importance of the presidential veto, an institution thought to be endangered by the device invalidated by the Court. The Court also cited *The Federalist* Nos. 22, 51, and 62 on the importance of bicameralism as a further check on feared excesses of the legislature.[87] Among the passages quoted by the Court in *Chadha* are statements that warn against legislative despotism.[88]

Last term the Court decided another significant separation of powers case when it upheld legislation that provided for judicial appointment of "independent counsel" to investigate and prosecute suspected crimes of members of the executive branch.[89] In a dissenting opinion that sought to support the power of the President, Justice Scalia quoted *The Federalist* No. 51 on the importance of checking the legislature and "fortifying" the executive, and providing each branch (here, the executive) with adequate tools for its own defense.[90] In arguing that the independent counsel legislation represents an unconstitutional usurpation of executive power, Justice Scalia also cited Madison in *The Federalist* Nos. 47 and 49 and Hamilton in *The Federalist* Nos. 70, 73, 78, and 81.[91]

Yet not all citations of *The Federalist* have favored presidential power. *The Federalist* No. 47 argues, for example, that the separation of governmental powers need not be rigidly main-

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No. 64 (J. Jay) in asserting broad presidential authority over foreign affairs); United States v. Nixon, 418 U.S. 683, 708 n.17 (1974) (citing THE FEDERALIST No. 64 (J. Jay) in asserting "a presumptive privilege for Presidential communications"); Nixon v. Administrator of General Services, 433 U.S. 425, 507 n.2, 511 n.6 (1977) (Burger, C.J., dissenting) (citing THE FEDERALIST No. 48 (J. Madison) in arguing that a statute providing for seizure of President Nixon's papers threatens the independence of the President).

[86] 462 U.S. 919 (1983).

[87] *Chadha*, 462 U.S. at 948-50.

[88] *See id.* at 949 (citing THE FEDERALIST No. 22 (A. Hamilton)); *see also id.* at 948 (citing THE FEDERALIST No. 73 (A. Hamilton)). In a concurring opinion in *Chadha*, Justice Powell invoked THE FEDERALIST Nos. 47, 48 (J. Madison) in arguing that the legislative veto exercised in *Chadha* represented legislative infringement on *judicial* power. *Id.* at 960-62.

[89] Morrison v. Olson, 108 S. Ct. 2597 (1988).

[90] *Id.* at 2622-23, 2625, 2637 (Scalia, J., dissenting).

[91] *Id.* at 2622, 2626, 2629, 2634, 2638-39.

tained and one branch may exercise a portion of another department's power.[92] This language has been invoked—sometimes successfully, sometimes unsuccessfully—in arguments for congressional authority to regulate or to check functions that, under a more doctrinaire view, might seem to fall within the executive's domain.[93]

This use of *The Federalist* No. 47 to support congressional limitations on presidential power, by insisting on flexibility rather than a rigid allocation of authority, bears some resemblance to the Court's ultimate invocation of *The Federalist* to uphold congressional limitations on the *states* by emphasizing the states' political ability to protect themselves.[94] In both instances, certain judges have invoked *The Federalist* to support flexible *congressional* authority to define the limits of basic governmental structures, and have left the protection of other political organs (the president and the states) to the political process rather than the judiciary.

A contrasting technique, however, is evident in separation of powers opinions like *Chadha* that invoke *The Federalist*'s discussion of an independent executive to support strong *judicial* limits on congressional authority when confronted with assertions of presidential power. In these cases, courts have refused to defer to legislative judgment. Similarly, some judges have invoked *The Federalist*'s reflections on state power in order to support judicial authority to assert that power against the national legislature. In these instances, judges have sought to use *The Federalist* to support extensive *judicial* power to elaborate,

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[92] *See supra* note 36.

[93] The Court, for example, cited THE FEDERALIST No. 47 (J. Madison) in upholding a statute that ordered the seizure of President Nixon's papers in *Nixon v. Administrator of General Services*, 433 U.S. at 442 n.5; *see* Wilson, *supra* note 73, at 92; *see also Morrison*, 108 S. Ct. at 2620. Justice White's dissent in *Chadha* also invoked THE FEDERALIST No. 47 (J. Madison) in arguing that executive power could be checked by the "legislative veto"; in advancing this view, White emphasized that "the history of the separation-of-powers doctrine is also a history of accommodation and practicality." *Chadha*, 462 U.S. at 999.

[94] *See supra* text accompanying notes 78-80; *see also* Quint, *The Separation of Powers and Judicial Review at the End of the Reagan Era*, 57 GEO. WASH. L. REV. (forthcoming).

define, and enforce constitutional controls on the powers of Congress.[95]

Thus, these structural decisions—allocating power between the federal government and the states and among the branches of the federal government—often boil down to a question of whether the courts should defer to Congress in drawing lines for the precise allocation of power or whether they should attempt to allocate governmental power themselves.[96] Because *The Federalist* largely speaks in terms of a clash of *political* power, however, it has little to say about the precise extent of the *judicial* role in assisting the political branches, or the states, in the task of self-protection. Moreover, allocation of power among governments and branches of government involves the examination and assessment of vast and intricate political institutions that have changed far beyond anything that the authors of *The Federalist* could have known. These extensive changes make

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[95] Similar arguments have also been made in cases involving congressional experiments with the judiciary. As we have seen, the concluding numbers of THE FEDERALIST were written in praise of a federal judiciary that was protected, through life tenure and assured salaries, against incursions by the other branches. *See supra* notes 63-66 and accompanying text. These essays have recently been invoked by justices seeking to limit congressional power to establish courts or other adjudicatory bodies that lack the special judicial protections of article III. *See* Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50, 58-60, 86-87 n.39 (1982) (plurality opinion) (non-Article III bankruptcy courts unconstitutional under certain circumstances) (citing THE FEDERALIST Nos. 78-82 (A. Hamilton)); Commodity Futures Trading Commission v. Schor, 478 U.S. 833, 860-61 (1986) (Brennan, J., dissenting) (seeking to limit the adjudicatory functions of administrative agency) (citing THE FEDERALIST No. 78 (A. Hamilton)); *see also* United States v. Raddatz, 447 U.S. 667, 704, 712-13 n.10 (1980) (Marshall, J., dissenting) (arguing that facts supporting admissibility of confession must be found by article III judge rather than by federal magistrate) (citing THE FEDERALIST Nos. 78, 79 (A. Hamilton)); Palmore v. United States, 411 U.S. 389, 417-18 (1973) (Douglas, J., dissenting) (arguing that District of Columbia judges must be appointed in accordance with article III) (citing THE FEDERALIST No. 79 (A. Hamilton)); *cf.* United States v. Will, 449 U.S. 200, 218, 220 (1980) (invalidating certain reductions of salaries of federal judges) (THE FEDERALIST No. 79 (A. Hamilton) cited as evidence of Framers' interest in protecting judicial compensation).

In a number of these opinions, justices favoring a more rigid interpretation of the separation of powers have cited *The Federalist*'s advocacy of independent courts to support judicial limitations on congressional extension of certain judicial functions to other organs. In so doing, they are responding to other justices who are willing to acknowledge a larger scope for legislative experimentation in this area.

[96] *See generally* J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980).

specific use of *The Federalist* in this context even more problematic. Indeed, although we use the same words as the authors of *The Federalist*—"congress," "president," "states"—the things to which those words now refer would be almost unrecognizable to the political authors of 1788. Thus, when *The Federalist* is invoked in litigation over governmental structure, it is primarily useful as an indicator of very general propositions, rather than yielding helpful advice on specific results in a contemporary setting. Moreover, because of the changing focus of Supreme Court doctrine, *The Federalist* is not of direct relevance to many of the major issues of contemporary constitutional litigation: on questions of individual rights, where historical change might not be quite so important, *The Federalist* provides only scattered commentary, in contrast with the sustained analysis of governmental structure that forms the main focus of the work.[97]

IV. PASSION, REASON, AND EXPERIENCE IN *THE FEDERALIST* TODAY

The Constitution of the United States is now 200 years old, and *The Federalist* has also reached that age. As is also true of the debates in the Constitutional Convention, these essays respond to historical circumstances that are in many important ways quite different from our own. It is therefore not surprising that the text of *The Federalist* does not yield very clear answers to specific questions of contemporary constitutional interpreta-

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[97] *See supra* text accompanying note 74. Interestingly, in at least one area in which *The Federalist* is relevant on specific questions of individual rights, there may also be some uncertainty about the implications of the discussion for the scope of judicial power. In THE FEDERALIST Nos. 10 and 51, Madison emphasized the importance of a multiplicity of religious sects as a guarantee of religious liberty, and two recent Supreme Court decisions have adopted this theme, albeit with somewhat differing emphases. In one case, *The Federalist* was invoked to support *judicial* power to further religious diversity by invalidating a charitable solicitation statute that seemed to favor prosperous, well-established religious groups over small and less well-favored denominations. Larson v. Valente, 456 U.S. 228, 245 (1982) (citing THE FEDERALIST No. 51 (J. Madison)). In a second decision, however, the Court indicated that the clash of religious interests seeking various advantages must be relegated to the *political* process. Lyng v. Northwest Indian Cemetery Protective Association, 108 S. Ct. 1319, 1327 (1988) (citing THE FEDERALIST No. 10 (J. Madison)). Perhaps these cases may be reconciled on the ground that the solicitation statute struck down in *Larson* may have unduly curtailed the ability of some groups to participate adequately in the political process.

tion. In this respect *The Federalist*—along with other historical materials arising from the adoption and ratification of the Constitution—will most likely play a somewhat different role than similar materials relating to the adoption of those modern constitutions whose provisions were drafted and enacted within living memory.

It is as a more general work of political analysis that *The Federalist* maintains its contemporary value. *The Federalist* is a "text that has not yet lost its hold on the legal mind"[98]—or on the "political mind" either—and an understanding of contemporary political culture may be deepened by exploring the extent to which certain central theories of *The Federalist* are borne out in modern political life. One might examine, for example, the extent to which Madison was correct in believing that an extended territory and population inhibits the oppressive effects of faction.[99] Perhaps the American civil rights legislation of the 1960s can be seen as a vindication (albeit belated) of that theory. The faction of segregationists was powerful enough to control a number of state governments but, ultimately, not powerful enough to control the government of the United States.[100] The great multiplicity of religious sects throughout the United States certainly contributes to a high degree of religious liberty, a result specifically foreseen by Madison in *The Federalist* No. 51.[101] Other examples can probably be adduced. On the other hand, it may be that modern methods of communication—particularly television—can so unify the population, and so reduce the practical problems of concerted action, that the original strength of Madison's argument is reduced to a large extent in the contemporary context. Perhaps these factors can convert even a large and diverse population into one in which an oppressive "common passion or interest will . . . be felt by a majority of the whole."[102]

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[98] Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1016 (1984).

[99] *See* THE FEDERALIST No. 10 (J. Madison); *supra* text accompanying notes 20-21.

[100] *See* Dellinger, *supra* note 42, at 159-60. The eradication of slavery through civil war could also possibly be viewed in this light. D. EPSTEIN, *supra* note 25, at 105.

[101] THE FEDERALIST No. 51, at 324 (J. Madison).

[102] THE FEDERALIST No. 10, at 81 (J. Madison); *see* Wright, *supra* note 6, at 25-26.

A related question is the extent to which the economic and social "virtual representation" of *The Federalist* No. 35[103] has worked in practice. Certainly, given the great size of the states and congressional districts, it is very difficult for a person whose life has been spent in typical (non-professional) occupations of the vast majority of citizens to be elected to national office. Hamilton believed that members of the "learned professions" would mediate between "classes of citizens,"[104] but it is at least questionable that the lawyers who make up a significant portion of Congress are actually well equipped to perform that task. Whether years of prosperous professional activity followed by life in the District of Columbia will effectively dilute a representative's understanding of his or her constituents, or whether the requirements of re-election will be sufficient to reinforce the "chords of sympathy"[105] existing between voter and representative, are contemporary questions that are very sharply raised by the argument of *The Federalist* No. 35.

Behind these more specific problems and resolutions, however, lie more general theoretical themes, and it is these aspects of the work that are most likely to enrich our contemporary understanding.[106] Although the United States today little resembles the agrarian nation of less than four million inhabitants that clustered along the Atlantic seaboard in 1787, certain basic views on human nature and political life may be of common value in both periods. Accordingly, I would like to return to a fundamental aspect of *The Federalist*—an aspect that is perhaps not significantly affected by the accidents of place or time—and try to suggest some ways in which the views of *The Federalist* on human nature and the force of reason should most properly be understood today. As we have seen, *The Federalist* holds that human nature in politics is profoundly flawed and that this flaw may give rise to an "impetuous" seeking after power in indivi-

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[103] *See supra* text accompanying notes 27-30.

[104] THE FEDERALIST No. 35, at 216 (A. Hamilton).

[105] *Id.*

[106] Recent commentators, for example, have employed basic doctrines of *The Federalist* in seeking to explain prominent features of American public law. *See* Ackerman, *supra* note 98; Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

duals and "factions" and also in the holders of governmental office.[107] At the basis of politics, therefore, lies the paradox of *The Federalist* No. 51: the government must have adequate "energy" to further the happiness of the people and protect individual rights, but the government must also be obliged to control itself.[108] It is the task of reason and experience to accomplish this end, and Publius appeared to believe—perhaps with some degree of hesitation—that the task might indeed be accomplished.

Under the circumstances of 1787, it seemed to the authors of *The Federalist* that it was the legislative power—the principal power in a republic—that posed the most immediate dangers of abuse. In *The Federalist* No. 48 Madison paints a vivid picture of the legislature "everywhere extending the sphere of its activity and drawing all power into its impetuous vortex."[109] This picture is based on events in the states following the Revolution, and, drawing on that experience, Madison suggests that legislative encroachments are inherent in representative government and that the exercise of reason should therefore be directed toward limiting that power. The executive is less dangerous, "being restrained within a narrower compass and being more simple in its nature";[110] indeed, the executive is "carefully limited, both in the extent and the duration of its power."[111] A political lesson of *The Federalist* might therefore be—as the Supreme Court's citations of *The Federalist* in the *Chadha* case suggest[112]—that the legislature is the branch that must be most sedulously controlled.

Yet the authors of *The Federalist* were not only philosophers but also practical individuals, many of whose doctrinal views were based ultimately on the lessons of history and experience.[113] As Hamilton emphasizes in the closing passages of the work, reason is an essential tool, but it also has its weaknesses, and

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[107] *See supra* notes 6-10, 37-41, 56-62 and accompanying text.

[108] THE FEDERALIST No. 51, at 322 (J. Madison).

[109] THE FEDERALIST No. 48, at 309 (J. Madison).

[110] *Id.* at 310.

[111] *Id.* at 309.

[112] *See supra* text accompanying notes 86-88.

[113] *See, e.g.*, Wright, *supra* note 6, at 2-3.

these weaknesses can only be supplemented by the lessons of experience.[114] This point suggests that now—more than two hundred years after *The Federalist* was written—an understanding of its implications for contemporary political life can only be gained through a careful, continuing examination of contemporary "experience." Rather than any specific device to curb the passion for power arising out of the events and vicissitudes of 1787, it is *The Federalist*'s underlying view of human nature and the need to curb it by the force of reason that remains. Precisely how that principle is to be understood in any specific period rests on a contemporary understanding of that period's own political experience. The experience in the states after 1776 may indeed have suggested that, in a republic, the executive's power tends to be fragile. If contemporary experience tells us, however, that the national executive no longer seems "restrained within a narrower compass"—if the executive's "more simple" nature has expanded over time into a vast and complex establishment, and if it, more than the contemporary legislature, seems inspired "with an intrepid confidence in its own strength"[115]—the lessons of *The Federalist* under contemporary circumstances may well be to seek the dangers of passion and encroachment where they now lie, and to exercise the strength of reason and experience to meet those contemporary dangers.

Indeed, in the post-War period in the United States, it seems clear that it is the President and the entire executive branch, rather than the Congress, that have assumed the most extensive power in the governmental structure.[116] The executive origins of the Vietnam War, the Watergate affair, and now the exposure of presidential and executive actions relating to sales of arms to Iran and possibly illegal covert aid to the Nicaraguan "Contras" are only the most evident manifestations of the extraordinary expansion of executive power in the decades following World

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[114] *See supra* text accompanying note 70.

[115] THE FEDERALIST No. 48, at 309 (J. Madison).

[116] In this respect Jefferson's remarks in 1789 seem prophetic: "The tyranny of the legislatures is the most formidable dread at present, and will be for long years. That of the executive will come in its turn, but it will be at a remote period." 14 PAPERS OF THOMAS JEFFERSON 661 (Boyd ed. 1958) (letter to James Madison, March 15, 1789).

War II.[117] In foreign affairs, particularly, the extent of executive power is most clearly evident, and it is in this area that concerns of international relations and international law intersect with the internal separation of governmental powers under the American Constitution. The "reflagging" of Kuwaiti ships in the Persian Gulf in 1987 is only one recent example of the broad power of the executive to commit the United States to policies that may involve war, without the affirmative authorization of Congress.

In this light, the more basic doctrine of *The Federalist*—emphasizing the weaknesses of human nature that make it unwise to concentrate power unduly in any governmental branch—may favor restraint of the executive rather than the legislature, under present circumstances, and counsel that the resources of reason and experience be directed toward that end. Reacting to the experience of the Nixon presidency, Congress in the 1970s did seek to impose some limitations on the executive through legislation concerning war powers and budget processes as well as through increased use of the legislative veto. In the *Chadha* case the Supreme Court, citing *The Federalist*, found the legislative veto unconstitutional;[118] on the other hand, the Court has upheld legislation authorizing "independent counsel" for the investigation of the executive branch.[119] At the commencement of the third century of the Constitution, one pressing task for American jurists may be to develop a deeper understanding of the causes of the continuing expansion of executive power and to employ the forces of reason and experience to re-create a more equitable balance among the political departments of the American government.

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[117] For a general discussion, see Quint, *The Separation of Powers Under Nixon: Reflections on Constitutional Liberties and the Rule of Law*, 1981 DUKE L.J. 1; Quint, *The Separation of Powers Under Carter*, 62 TEX. L. REV. 785 (1984). On the Iran-Contra affair, see, *e.g.*, Schlesinger, *The Constitution and Presidential Leadership*, 47 MD. L. REV. 54 (1987).

[118] *See supra* text accompanying notes 86-88.

[119] *See supra* text accompanying note 89.