

The FEDERALIST
or the NEW
CONSTITUTION
by ALEX·HAM-
ILTON · J·JAY
& J·MADISON



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MOST
CURRENT
FOR THAT
THEY COME
HOME TO
MEN'S
BUSINESS
& BOSOMS
LORD BACON

INTRODUCTION

The Federalist was the first noteworthy treatise on federal government; and hitherto it has been the most important. And it is not likely, for a long time to come, to lose its position of pre-eminence; for it is the contemporary commentary, and a dignified and worthy commentary, upon the creation of the greatest federal constitution the world has yet seen, that of the United States.

The idea of federal government has become so familiar to the world during the last century and a quarter; we have seen so many states created on federal lines—the North German Confederation, the Dominion of Canada, the German Empire, the Commonwealth of Australia, not to mention Brazil and other federal republics of South America; and there has consequently been so much discussion of federal theory and experience, that we are apt to forget how new and untried a thing federal government, as we understand it, was in 1787. For the type of government which the United States Constitution set up there existed no precedent. Madison, one of the creators of the American polity, drew up for his own use a careful set of “Notes of Ancient and Modern Confederacies,” and on these notes are based three of the essays in *The Federalist* (Nos. 18-20). But the examples of the Lycian and Achæan leagues of ancient Greece were far too remote and dubious to influence men’s minds. The “Germanic Empire” was hardly a confederation at all in theory, and its defects in practice were sure to repel rather than attract. There were in fact only two confederate states in existence that serious statesmen could give a moment’s thought to—the Republic of the United Netherlands and the Swiss Confederacy. But it was well known to all students of politics that the United Netherlands had been held together only by the semi-monarchical authority of the hereditary Stadtholder; and in 1787 they were “suffering from popular convulsions, from dissensions among the states, and from the actual invasion of foreign arms, the crisis of their destiny” (No. 20). Meanwhile, the loose Swiss Confederation had

split up into the two almost independent leagues of Protestant and Catholic Cantons. So far as "the Batavian and Helvetic republics" served as models at all, it was for the Articles of Confederation of 1781, the first written constitution of the United States. But a very few years had shown the utterly unworkable character of the principle upon which that first American constitution, like those of its European exemplars, rested: the principle of "legislation for states in their corporate capacities and as contradistinguished from the individuals of which they consist" (*Federalist*, No. 15). Something altogether new had to be "extorted"—in the phrase of John Quincy Adams—"from the grinding necessity of a reluctant nation."

Not only were there no real precedents, there existed as yet in political literature no first-rate treatment of the problem involved. Indeed it would be hardly going too far to say that the subject had never yet been seriously treated at all. A few meagre paragraphs in Montesquieu's *Esprit des Lois* were all that was available; and "this enlightened civilian" had got no further than a general eulogy of a confederate constitution as combining "the internal advantages of a republican with the external force of a monarchical government" (No. 9). Even since the appearance of *The Federalist* it can hardly be said that there has been a superabundance of really excellent writing concerning the nature of federal government. But we can now at any rate turn to Freeman's *History of Federal Government*, to the chapters in Mill's *Representative Government*, in Dicey's *Law of the Constitution*, and in Sidgwick's *Elements of Politics*; and on the working of the American Constitution itself we have the invaluable treatises of De Tocqueville and Bryce. But the literary champions of the American Constitution had, so to speak, to blaze their own way; they had, to change the figure, to block out for themselves the outlines both of the general theory and of its several parts. And their success is largely due to the fact that they did but provide a theory for that practical compromise which moderate men had felt to be dictated by the necessities of the situation.

The truth of this proposition is sufficiently shown by the circumstances of authorship. *The Federalist* consists of 85 articles or essays, contributed to certain New York journals from the autumn of 1787 to the spring of 1788. Their purpose was to persuade the people of the State of New York

to ratify the Constitution which had just been drawn up by the Convention. The series was planned, and its general line of argument marked out by Alexander Hamilton, who wrote at least 51 out of the 85 articles. 14 were certainly written by James Madison, 3 by Hamilton and Madison in conjunction; and 5 by John Jay. Four of those by Jay deal entirely with the general desirability of Union and of its advantages in relation to foreign powers (Nos. 2-5)—a theme appropriate to a statesman of diplomatic experience, but not directly involving the form of government. His only directly constitutional contribution was one (No. 64) defending the treaty-making power assigned to the Senate. The authorship of 12 essays is uncertain; but they were undoubtedly written either by Hamilton or Madison.

The Federalist, therefore, is almost entirely the work of these two men. But neither of them altogether approved personally of the shape the new Constitution had taken. Madison had been the author of the so-called "Virginia plan," which proposed much more national "consolidation" (to use the language of the time) than the Convention would agree to. The Virginia plan would have abandoned the principle of equal representation of the several states in the Senate, and it would have given the federal legislature "a negative on state laws." Hamilton had gone further, and had brought forward a plan under which both the Senate and the Governor (or President) should hold office for life. It may be that Hamilton only produced his scheme to assist the party with which he was in general sympathy: as Mill says somewhere, the merit of an extreme proposal is that it makes everything short of it seem moderate. But his own personal preference was certainly for something more like what he understood to be the English constitution; and, like Madison, he was anxious to strengthen the federal authority at the expense of the state governments. Yet in *The Federalist* Hamilton and Madison will be found defending the whole of the compromise actually arrived at, and giving no hint of dissatisfaction. They might, no doubt, do this with a perfectly clear conscience; for the new Constitution was infinitely superior to the old, and there seemed no chance of getting anything better. But in these circumstances it is clear, as the chief authority on the constitutional writings of this period, Mr. Paul Leicester Ford, has well said, that "*The Federalist* had in it quite as much of the legal brief as of the philosophical

commentary on government." It contains so much sound political philosophy not only because its authors were men of great political insight, but also because the constitution they undertook to defend was wiser than themselves.

It has not always been sufficiently observed that, while the necessity of reconciling national union with state autonomy was the very heart of the difficulty which "the Fathers of the Constitution" had to overcome, it also furnished them with the means to solve problems which have proved peculiarly intractable in more unified forms of government. Take, for instance, the question of a second chamber. "All single and numerous assemblies," say the authors of *The Federalist* (No. 62), "have a propensity to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders into intemperate and pernicious resolutions. Examples on this subject might be cited without number." That this propensity indicates "the necessity of a senate" is, indeed, in their eyes a position which "need not be proved" because "it will not be contradicted." And in another place (No. 22) it is asserted that to "accumulate in a single body all the most important prerogatives of sovereignty" is "to entail upon our posterity one of the most execrable forms of government that human infatuation ever contrived." Hitherto most European political thinkers, though they may not have expressed themselves so strongly on the subject, have agreed with Hamilton and Madison in preferring a bi-cameral constitution. But the gravest practical difficulty has been to find the materials out of which a second chamber can be constituted, and in particular how to bring it about that the second chamber shall be sufficiently unlike the first chamber, and yet shall not violate the principle of popular representation. The solution of the problem in the United States was furnished by the very necessities of the situation. It was necessary, in order to safeguard the rights of the several states, that a Senate should be created, representing the states as such; and the result has been that, now there is no longer any controversy over state rights, the United States Senate still remains the most impressive and firmly-rooted second chamber in the world.

In the same considerations will be found the key to features of the United States Constitution which meet perhaps with less universal approbation. It has been said, and it is undoubtedly true, that the American system is relatively

"rigid," while the present English system is relatively "flexible." The rigidity has been blamed by writers like Bagehot, who congratulates England on the greater ease with which this country can deal with the executive emergencies of the moment; it has been praised by writers like Maine because it puts certain rights of the individual citizen, regarded as fundamental, beyond the reach of the legislature. So far as the power of the legislature is concerned, there can, indeed, hardly be a greater contrast than that between the United States and England. In the United States in 1894 an Income-Tax, passed by the House of Representatives and by the Senate, and allowed to become law by the President, was declared unconstitutional by the Supreme Court by a majority of one vote only; and at once became void. It was declared unconstitutional because it exempted incomes below a certain level, and because such an exemption was held to be contrary to the article of the Constitution which laid down that "no direct tax shall be laid except in proportion to the census" or population of each state (cf. *Federalist*, No. 36). In the United Kingdom, on the other hand, a certain low minimum income has long been exempted from Income Tax; and a majority of the House of Commons has recently forced upon an unwilling House of Lords a pretty far-reaching measure of progressive taxation of the higher incomes. Whatever we may think of the principle of progressive taxation—and it hardly needs saying that the American Constitution finds a good many critics in this respect in America itself—the contrast is sufficiently striking. And an equally significant, if not equally dramatic, contrast would be furnished by a comparison of the history of labour legislation in England and the United States. England has nothing remotely resembling the long series of decisions of American courts by which scores of labour laws have been set aside as violating the articles of the Constitution which protect "property" (5th Amendment, 1789; 14th Amendment, 1866) and "the obligation of contracts" (article 1, section 10). An instructive account of the legislation, wise and unwise, thus defeated will be found in a recent Bulletin (No. 91, November 1910) of the U.S. Bureau of Labour.

The admirers of the American Constitution are wont to see in this feature of the system a proof of the extraordinary wisdom of its founders. "The federal compact was the first deliberate attempt and assent of a majority," says Mr. Ford,

“to tie its own hands; to give to the minority guarantees of fair and equal treatment.” And again: “this guarantee to the minority in the federal Constitution is one of the most remarkable examples of self-control in history, and constitutes its chief claim to pre-eminence.” But once more one has to remark that the uniqueness of the American Constitution in this respect is historically the outcome of its federal character, and not of exceptional individual wisdom on the part of its founders. That governments were formed to protect “property” was the common Whig doctrine both in England and America: it was clearly stated by Locke, and was reckoned one of the principles of 1689. And after such a wave of lawlessness and anarchy as had lately passed over the American states, after such dishonour and loss of credit and international embarrassment as had followed upon the dominance of the anti-mercantile and anti-Tory and anti-creditor influences in the state legislatures, all men of affairs would be eager to insist both on freedom of contract and on the rights of property. But it was the fact that American statesmen were at the same time drawing up a written Constitution which enabled them to assert these rights in a peculiarly permanent way. And—what is even more to the point—it was the fact that they were obliged, for federal reasons, to set up a strong Supreme Court which created an instrument strong enough at a later period to enforce such principles even in greatly changed circumstances.

The Constitution of the United States, and *The Federalist* as, in a sense, its authorised exponent, have sometimes been regarded with a veneration which is more than their due. A paper Constitution can only work at all successfully if it satisfies the main needs of the people to which it applies, and if the people possesses the political sense which is requisite to work it. The United States Constitution broke down, it is true, in the one great emergency by which it has been tried: it could not solve the problem of slavery. The courteous tenderness with which *The Federalist* (No. 54) treats “our Southern brethren” illustrates, like the Constitution itself, the occasional inability of human wit to deal with the deeper things of life. And it was a decision of the Supreme Court, defending the rights of property of the slave owner according to the Constitution, which precipitated the Civil War. On the other hand, the Union did survive the strain of attempted disruption; so that we

may say that the Constitution carried the American people *into* the Civil War and also that it carried it *through* the Civil War.

After all, it may be doubted whether peoples of the same racial character, with the same general ideas of right and duty, and substantially the same social and economic needs, are likely permanently to be governed under diametrically different institutions. The more the practical problems of the United Kingdom and of the United States approximate in character, the more likely is it that the latter will find a way to secure more flexibility, and that the former will be driven to introduce an element of fixity. It will, I think, strike every reader of *The Federalist* that there is a complete absence in it of the idea that now so powerfully affects all political thinkers, the idea of development or evolution. There is no suspicion that the needs of the future will ever render any substantial change necessary; and still less that this change may be brought about under cover of judicial interpretation of the apparently quite definite terms of the constitutional document. Yet by "broad construction" some not inconsiderable changes have been wrought in the American Constitution; by popular choice the avowed purpose of one part of the system, the Electoral College (No. 68) has been set at nought; while by the policy of statesmen an extra-constitutional but none the less powerful instrument of government, the "spoils system," has first been fashioned and is now being disused. We may be sure that this process of evolution will not cease in the future, whatever may be the form it may have to take. Meanwhile in England any limitation by statute of the powers of either house of legislature will necessarily involve the creation of a tribunal of some sort to enforce its observance. Any grant of self-government to Ireland will necessarily involve a definition of powers, in a document which (like the Acts establishing the Canadian and Australian federations) will be a written Constitution in fact, though in form an ordinary statute, and will need a court for its interpretation. And, even if a federal constitution at all closely resembling the ideal of Hamilton should always remain impracticable for the British Empire as a whole, the systematic co-operation of the Dominions with the Mother Country will necessitate defined forms of joint counsel and joint action. There has hitherto been no English edition of *The Federalist*, because the

general English public has hitherto been but little interested in questions of federal government. But that lack of interest, in all probability, will no longer characterise us.

[The numbers of *The Federalist* of which the authorship is really doubtful are 49, 50-58, 62, and 63. The present state of the discussion may be seen in the Introduction to the edition of *The Federalist* by Senator Henry Cabot Lodge, dated 1886; in the article by Professor E. G. Bourne in the *American Historical Review* for April, 1898, together with the reply by Mr. Paul Leicester Ford and the comments of Professor Bourne in the same review for July 1898; in Mr. Ford's reproduction of his argument in the Introduction to his edition of *The Federalist* (1898); and in Professor Bourne's reprint of his articles in *Essays in Historical Criticism*, 1901. In the present edition the ascription by Lodge is followed simply for reasons of convenience. The present editor will only permit himself the expression of the opinion that the importance of the dispute has been greatly exaggerated. Hamilton and Madison drew from a stock of ideas common to both of them; and though Hamilton had a readier pen and a weightier style, the intellectual contributions of the two men to the theory of federal government are almost certainly not to be measured by the relative number of their essays in *The Federalist*.

The Federalist has come to stand out more distinctly in the public view because of the oblivion that has befallen the torrent of other controversial writings of the same period. But the relation of *The Federalist* to the thought of the time cannot be adequately realised without reference to this contemporary literature. It has been collected by Mr. Paul Leicester Ford in two volumes—*Pamphlets on the Constitution of the United States, 1787-1788* (1888), and *Essays on the Constitution, 1787-1788* (1892).

Among the many histories of the United States during the period, and the many biographies of its founders, it may be sufficient here to refer to John Fiske, *The Critical Period of American History, 1783-1789* (1888); and to a recent English life of Alexander Hamilton by F. S. Oliver (1906, and subsequent cheap edition).]

W. J. ASHLEY.

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CONTENTS

NO. OF ESSAY	PAGE
I. INTRODUCTORY: THE UNION AND ITS NEW CONSTITUTION	1
II. CONCERNING DANGERS FROM FOREIGN FORCE AND INFLUENCE	5
III. FOREIGN DANGERS CONTINUED	9
IV. FOREIGN DANGERS CONTINUED	12
V. FOREIGN DANGERS CONTINUED	16
VI. CONCERNING DANGERS FROM WAR BETWEEN THE STATES	20
VII. DANGERS FROM WITHIN CONTINUED	25
VIII. THE CONSEQUENCES OF HOSTILITIES BETWEEN THE STATES	31
IX. THE UNION AS A SAFEGUARD AGAINST DOMESTIC FACTION AND INSURRECTION	36
X. THE UNION AS A SAFEGUARD CONTINUED	41
XI. THE UTILITY OF THE UNION IN RESPECT TO COMMERCIAL RELATIONS AND A NAVY	48
XII. THE UTILITY OF THE UNION IN RESPECT TO REVENUE	54
XIII. ADVANTAGE OF THE UNION IN RESPECT TO ECONOMY IN GOVERNMENT	59
XIV. OBJECTIONS TO THE PROPOSED CONSTITUTION FROM EXTENT OF TERRITORY ANSWERED	61
XV. THE INSUFFICIENCY OF THE PRESENT CONFEDERATION TO PRESERVE THE UNION	66
XVI. THE INSUFFICIENCY OF THE PRESENT CONFEDERATION CONTINUED	74
XVII. THE INSUFFICIENCY OF THE PRESENT CONFEDERATION CONTINUED	79
XVIII. THE INSUFFICIENCY OF THE PRESENT CONFEDERATION CONTINUED	83
XIX. THE INSUFFICIENCY OF THE PRESENT CONFEDERATION CONTINUED	88
XX. THE INSUFFICIENCY OF THE PRESENT CONFEDERATION CONTINUED	93
XXI. OTHER DEFECTS OF THE PRESENT CONFEDERATION	97
XXII. OTHER DEFECTS CONTINUED	102

NO. OF ESSAY	PAGE
XXIII. THE NECESSITY OF A GOVERNMENT AS ENERGETIC AS THE ONE PROPOSED TO THE PRESERVATION OF THE UNION	110
XXIV. THE POWERS NECESSARY TO THE COMMON DEFENCE FURTHER CONSIDERED	115
XXV. POWERS NECESSARY TO THE COMMON DEFENCE CONTINUED	119
XXVI. THE IDEA OF RESTRAINING THE LEGISLATIVE AUTHORITY IN REGARD TO THE COMMON DEFENCE CONSIDERED	124
XXVII. RESTRAINING THE LEGISLATIVE AUTHORITY CONTINUED	130
XXVIII. RESTRAINING THE LEGISLATIVE AUTHORITY CONTINUED	133
XXIX. CONCERNING THE MILITIA	137
XXX. CONCERNING THE GENERAL POWER OF TAXATION	142
XXXI. GENERAL POWER OF TAXATION CONTINUED	147
XXXII. GENERAL POWER OF TAXATION CONTINUED	151
XXXIII. GENERAL POWER OF TAXATION CONTINUED	155
XXXIV. GENERAL POWER OF TAXATION CONTINUED	159
XXXV. GENERAL POWER OF TAXATION CONTINUED	164
XXXVI. GENERAL POWER OF TAXATION CONTINUED	169
XXXVII. CONCERNING THE DIFFICULTIES OF THE CONVENTION IN DEVISING A PROPER FORM OF GOVERNMENT	176
XXXVIII. DIFFICULTIES IN DEVISING A PROPER FORM OF GOVERNMENT CONTINUED, AND THE INCOHERENCE OF THE OBJECTIONS TO THE NEW PLAN EXPOSED	182
XXXIX. THE CONFORMITY OF THE PLAN TO REPUBLICAN PRINCIPLES	190
XL. THE POWERS OF THE CONVENTION TO FORM A MIXED GOVERNMENT EXAMINED AND SUSTAINED	196
XLI. GENERAL VIEW OF THE POWERS CONFERRED BY THE CONSTITUTION	203
XLII. THE POWERS CONFERRED BY THE CONSTITUTION FURTHER CONSIDERED	211
XLIII. THE POWERS CONFERRED BY THE CONSTITUTION CONTINUED	218
XLIV. RESTRICTIONS ON THE AUTHORITY OF THE SEVERAL STATES	226
XLV. THE ALLEGED DANGER FROM THE POWERS OF THE UNION TO THE STATE GOVERNMENT CONSIDERED	233
XLVI. THE INFLUENCE OF THE STATE AND FEDERAL GOVERNMENTS COMPARED	238
XLVII. THE PARTICULAR STRUCTURE OF THE NEW GOVERNMENT AND THE DISTRIBUTION OF POWER AMONG ITS DIFFERENT PARTS	245

NO. OF ESSAY	PAGE
XLVIII. THESE DEPARTMENTS SHOULD NOT BE SO FAR SEPARATED AS TO HAVE NO CONSTITUTIONAL CONTROL OVER EACH OTHER	251
XLIX. METHOD OF GUARDING AGAINST THE ENCROACHMENTS OF ANY ONE DEPARTMENT OF GOVERNMENT BY APPEAL- ING TO THE PEOPLE THROUGH A CONVENTION	256
L. PERIODICAL APPEALS TO THE PEOPLE CONSIDERED	260
LI. THE STRUCTURE OF THE GOVERNMENT MUST FURNISH THE PROPER CHECKS AND BALANCES BETWEEN THE DIFFERENT DEPARTMENTS	263
LII. THE HOUSE OF REPRESENTATIVES	268
LIII. HOUSE OF REPRESENTATIVES CONTINUED	272
LIV. THE APPORTIONMENT OF MEMBERS AMONG THE STATES	277
LV. THE TOTAL NUMBER OF THE HOUSE OF REPRESENTA- TIVES	282
LVI. THE TOTAL NUMBER OF THE HOUSE OF REPRESENTA- TIVES CONTINUED	287
LVII. THE ALLEGED TENDENCY OF THE NEW PLAN TO ELEVATE THE FEW AT THE EXPENSE OF THE MANY CON- SIDERED IN CONNECTION WITH REPRESENTATION	291
LVIII. OBJECTION THAT THE NUMBER OF MEMBERS WILL NOT BE AUGMENTED AS THE PROGRESS OF POPULATION DEMANDS, CONSIDERED	296
LIX. CONCERNING THE POWER OF CONGRESS TO REGULATE THE ELECTION OF MEMBERS	301
LX. THE POWER OF CONGRESS CONTINUED	305
LXI. THE POWER OF CONGRESS CONTINUED	311
LXII. THE SENATE	314
LXIII. THE SENATE CONTINUED	320
LXIV. THE POWERS OF THE SENATE	327
LXV. THE POWERS OF THE SENATE CONTINUED	332
LXVI. OBJECTIONS TO THE POWER OF THE SENATE TO SIT AS A COURT FOR IMPEACHMENTS FURTHER CONSIDERED	337
LXVII. THE EXECUTIVE DEPARTMENT	342
LXVIII. THE MODE OF ELECTING THE PRESIDENT	346
LXIX. THE REAL CHARACTER OF THE EXECUTIVE	350
LXX. THE EXECUTIVE DEPARTMENT FURTHER CONSIDERED	357
LXXI. THE DURATION IN OFFICE OF THE EXECUTIVE	364
LXXII. THE DURATION IN OFFICE OF THE EXECUTIVE CON- TINUED, AND RE-ELIGIBILITY OF THE EXECUTIVE CONSIDERED	368
LXXIII. THE PROVISION FOR THE SUPPORT OF THE EXECUTIVE, AND THE VETO POWER	373

NO. OF ESSAY	PAGE
LXXIV. THE COMMAND OF THE MILITARY AND NAVAL FORCES, AND THE PARDONING POWER OF THE EXECUTIVE .	378
LXXV. THE TREATY-MAKING POWER OF THE EXECUTIVE .	381
LXXVI. THE APPOINTING POWER OF THE EXECUTIVE . .	385
LXXVII. THE APPOINTING POWER CONTINUED AND OTHER POWERS OF THE EXECUTIVE CONSIDERED . .	390
LXXVIII. THE JUDICIARY DEPARTMENT	394
LXXIX. THE JUDICIARY CONTINUED	402
LXXX. THE POWERS OF THE JUDICIARY	404
LXXXI. THE JUDICIARY CONTINUED, AND THE DISTRIBUTION OF THE JUDICIAL AUTHORITY	410
LXXXII. THE JUDICIARY CONTINUED	419
LXXXIII. THE JUDICIARY CONTINUED IN RELATION TO TRIAL BY JURY	423
LXXXIV. CERTAIN GENERAL AND MISCELLANEOUS OBJECTIONS TO THE CONSTITUTION CONSIDERED AND ANSWERED .	436
LXXXV. CONCLUDING REMARKS	445

THE FEDERALIST

For the Independent Journal

THE FEDERALIST. No. I
(HAMILTON)

To the People of the State of New York :

After an unequivocal experience of the inefficiency of the subsisting federal government, you are called upon to deliberate on a new Constitution for the United States of America. The subject speaks its own importance; comprehending in its consequences nothing less than the existence of the UNION, the safety and welfare of the parts of which it is composed, the fate of an empire in many respects the most interesting in the world. It has been frequently remarked that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force. If there be any truth in the remark, the crisis at which we are arrived may with propriety be regarded as the era in which that decision is to be made; and a wrong election of the part we shall act may, in this view, deserve to be considered as the general misfortune of mankind.

This idea will add the inducements of philanthropy to those of patriotism, to heighten the solicitude which all considerate and good men must feel for the event. Happy will it be if our choice should be directed by a judicious estimate of our true interests, unperplexed and unbiased by considerations not connected with the public good. But this is a thing more ardently to be wished than seriously to be expected. The plan offered to our deliberations affects too many particular interests, innovates upon too many local institutions, not to involve in its discussion a variety of objects foreign to its merits, and of views, passions and prejudices little favourable to the discovery of truth.