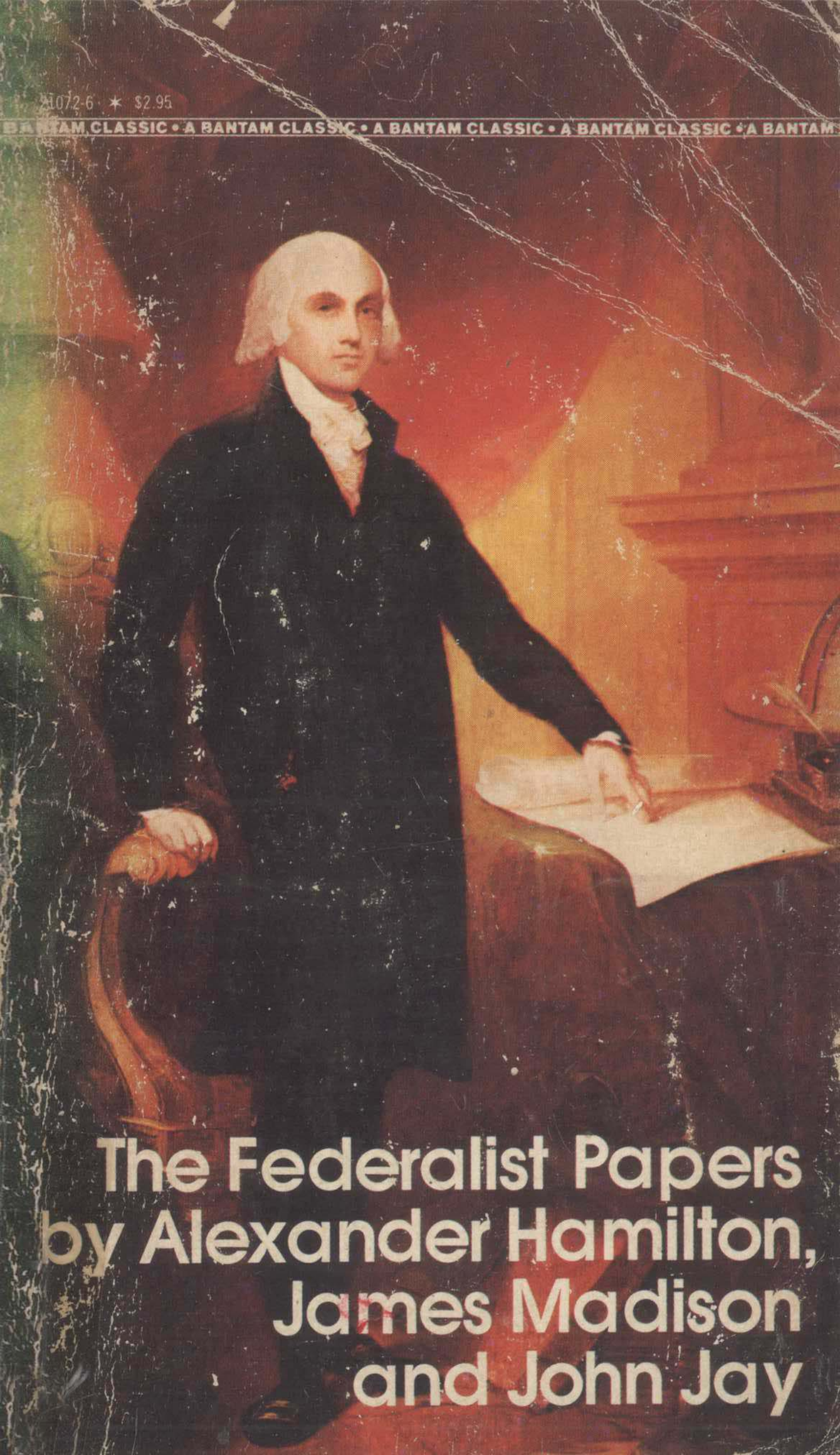


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The Federalist Papers by Alexander Hamilton, James Madison and John Jay



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The Federalist Papers by Alexander Hamilton, James Madison and John Jay

With an introduction and commentary by Garry Wills



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THE FEDERALIST PAPERS

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ALEXANDER HAMILTON was born in the West Indies in 1757, the illegitimate child of a Scottish merchant. He came to the American colonies to study at King's College (now Columbia University), and became an early and ardent supporter of the Revolutionary cause. During the Revolutionary War he was aide-de-camp to George Washington and a member of the Continental Congress. He was a leading figure at the Constitutional Convention (1787) and a principal author of the *Federalist Papers*. As first Secretary of the Treasury he articulated a policy of protection for manufacturing interests, strong central government, and establishment of a national bank. After leaving the Cabinet, he practiced law in New York. His personal attacks hindered the political career of the volatile Aaron Burr, who finally challenged him to a duel in 1804. Hamilton was shot, and died of his wounds.

JOHN JAY (1745–1829) was a conservative lawyer who became a leading patriot. He was minister to Spain (1780–82), the first Chief Justice of the U.S. Supreme Court (1789–95), and he negotiated the treaty of 1795 between the U.S. and Britain. His contributions to the *Federalist Papers* concern foreign affairs.

JAMES MADISON was born in 1751, the son of a Virginia planter. He worked for the Revolutionary cause as a member of the Continental Congress and the Virginia House of Delegates. The leader of deliberations at the Constitutional Convention, he fought for the adoption of the Constitution and the Bill of Rights. Though an ally of Hamilton on the Constitution, he was a supporter of Jefferson's agrarian policies. He was Jefferson's Secretary of State (1801–9) and his successor as President (1809–17), but his Presidency was marred by the unpopular War of 1812. Madison died in 1836.

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INTRODUCTION

The Fight for New York

The Constitutional Convention, meeting in Philadelphia to amend the Articles of Confederation, first rebelled against its own orders, and then invited the country to rebel against its own government. The first act was hazardous enough—it took all of James Madison's ingenuity to defend it in Federalist No. 40. But the second move was even riskier. It asked the Continental Congress to surrender its role as superintendant of the amending process under the Articles. It asked the state legislatures to turn authority over to ratifying conventions newly elected for one purpose, to adopt or reject an entirely new form of government. And it did this with a proviso—that only nine states would be needed to form the union. Nonratifying states, up to the number of four, might be left to shift for themselves. So much for the Articles' pledge that its "union shall be perpetual."

American citizens had made a commitment in the thirteenth Article that they were now asked to abandon:

The Articles of Confederation shall be inviolably observed by every state, and the union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in a congress of the United States, and be afterward confirmed by the legislature of every state.

Critics of the proposal from Philadelphia were quick to point out its revolutionary nature. In the Pennsylvania legislature William Findley argued that the scheme set at naught not only the thirteenth of the Articles of Confederation but Article Six as well: "No two or more states shall enter into any treaty, confederation, or alliance whatever between them without the consent of the United States in congress assembled." Findley said the call for new conventions was a dissolution of the social contract; it returned Americans to a "state of nature" outside the law they were sworn to uphold.

Some defenders of the Philadelphia proposal cheerfully accepted the charge that they were overturning the whole legitimate order. Hugh Henry Brackenridge, James Madison's classmate and friend from Princeton days, answered Findley by agreeing with him: "We are not on federal ground but on the wild and extended field of nature, unrestrained by any former compact, bound by no peculiar tie."

The friends of the new Constitution have been portrayed in some books as conservatives; but their actions looked radical to contemporaries. The framers were gambling on a new mood out in the country, created by new emergencies. They would risk offending the state legislatures because those were the bastions of local privilege, honoring traditions that forestalled any *continental* vision. The Philadelphia proposal was for a fresh start entirely, for an address to the people at large. If it had any chance of adoption, it must risk a procedure more democratic than any the young republic had yet seen.

But this meant a massive effort at persuasion was incumbent on those presenting such a radical plan. New arguments had to rationalize the response to new emergencies. Those who finished the draft in Philadelphia could not leave for home in June of 1787 with any sense that their work was over. They must now mount a propaganda campaign in every state, conscious that their opponents would be doing the same thing. In Philadelphia, Tench Coxe coordinated the efforts at ratification, establishing a network of communication with federalists everywhere. In New York, John Lamb performed a similar task for the antifederalists. James Wilson, second only to Madison as a champion of the draft, issued a long speech that became the canonical defense of the Constitution. Philadelphia delegates who had refused to sign the draft published their reasons for opposition—George Mason in Virginia, Luther Martin in Maryland, John Lansing and Robert Yates in New York. Pamphlets and speeches, articles and letters were published by the hundreds. "Cato" and "The Federal Farmer" attacked the Constitution, and "Caesar" replied. These pamphlets would be mistakenly attributed to—respectively—George Clinton, Richard Henry Lee, and Alexander Hamilton. The views of prominent men were known, and were easily attached to pseudonymous polemic. After all, the two greatest names in America—George Washington's and Benjamin Franklin's—were openly aligned with the Constitution.

Four states were crucial to the success of any new government—Pennsylvania, Massachusetts, Virginia, and New York. Of these,

New York may have been the key state; yet nowhere was opposition stronger. The state had not approved the draft in Philadelphia, since two of its three delegates—Lansing and Yates—withdraw in protest during the proceedings, leaving their compatriot, Alexander Hamilton, without a vote. The leading figure in New York politics, Governor George Clinton, was considered an opponent of the plan. New York had carved an independent course under the Articles, alienating neighbor states and enriching itself by trade and tariff measures. Perhaps no state had as much to lose, in the short run, as the home Alexander Hamilton had chosen for himself when he came from his native West Indies.

Hamilton decided that a propaganda effort more intense and ambitious than any other would be needed to sway the voters of New York. He was a master of rapid writing in controversy—he first made his name with a revolutionary pamphlet, written in his teens—but his new plan called for a kind of “saturation bombing” of the electorate, a sustained barrage of arguments appearing in the newspapers four times a week, so he would need at least two fellow authors to work with him under the shared pseudonym of “Publius.” He recruited his fellow New Yorker, John Jay, who had been something of a hero to Hamilton when he first came to America. Jay was the most distinguished friend of the Constitution in New York; but he was wounded in a street riot soon after the *Federalist* series was launched and returned to harness only once, to write No. 64.

Hamilton tried to persuade Gouverneur Morris to take up the pen of Publius, but Morris declined. William Duer was also given a try but did not produce the kind of work Hamilton wanted. Luckily for him (and us), the Continental Congress was sitting in New York during the winter of 1787–88, so Hamilton could use the talents of his friend and ally James Madison, a delegate to the Congress. Though the *Federalist* “Numbers” would all be addressed to New Yorkers, one of the men addressing his fellow citizens was actually from Virginia. And this member of the Publius team wrote almost forty percent of the final product. He could not have done so, he assures us, but for his preparations before the convention in Philadelphia and his participation in its debates. Along with Hamilton, Madison had studied the history of leagues, ancient and modern, to prove that a loose confederation could not possibly address itself to challenging times with any efficiency. The notes taken in Philadelphia supplied him with a text for the New York campaign.

The Federalist appeared with remarkable regularity, considering the fact that two men were doing the work of three. It blanketed the city of New York, coming out in four of the city's five newspapers, and prompting this angry letter to the editors:

We take McLean to read Publius in the best edition, and he gives us two at a time; and Childs for the daily news and advertisements, but they are curtailed—and we are disappointed—for the purpose of serving up the same Publius at our expense. Loudon we take for his morality and evangelic sentiments; but here again we are imposed upon by being made to pay for the very same Publius, who has become nauseous by having been served up to us no less than in two other papers on the same day.

The series was noteworthy not only for the speed of its production but for the architecture of the whole. Hamilton planned to treat the entire controversy in a methodical way and supplied a general outline for future Numbers at the end of No. 1. His principal departure from this outline was the omission of a point-by-point comparison of the federal draft with New York's Constitution—a project abandoned with the loss of Jay, who had been the principal author of the state document. The series as Hamilton and Madison actually completed it falls into two major sections—one tracing the defects of the Articles, the other discussing the Philadelphia draft under its three principal divisions (legislature, executive, and judiciary). The first thirty-six articles were completed by January of 1788 and appeared as volume one of the book on March 22. The remaining forty-nine were rushed into print as volume two on May 28, four weeks after the election of delegates to New York's ratifying convention. (Of course, the Numbers had been appearing in newspapers all through the spring of 1788.)

If the first aim of the series was to persuade New Yorkers to elect friends of the Constitution to the ratifying convention, then Hamilton failed. The delegation opposed the Constitution two to one (though the popular vote had only been opposed by fifty-six percent). *The Federalist* in book form could still be used to influence debate after the delegates assembled in Poughkeepsie; and Hamilton rushed off copies to Virginia, where Madison distributed them to influence the Virginia convention. But the heroic propaganda effort does not seem to have swayed many people by its logic or its eloquence. The New York convention

abandoned its opposition to the Constitution in large part because a ninth state (New Hampshire) ratified during the Poughkeepsie debates, leaving New York with the prospect of lonely nationhood to itself.

Though *The Federalist* did not motivate people to adopt the constitution, it supplied them with the most authoritative interpretation of the Constitution once it was adopted. The text of the Philadelphia draft is brief. It mandates; it does not explain. It does not enunciate doctrine—there is no mention in it of checks and balances, of separate powers, of judicial review. Furthermore, the debates of the delegates in Philadelphia were secret; no official record gave *reasons* for shaping the clauses as they stand. Even Publius pretends in several places that he is not privy to what went on in Philadelphia. The rationale of the Constitution had to be supplied by acknowledged participants (principally James Wilson) or by inference from the bare document. In this void of authoritative explication *The Federalist* was the fullest exposition of the Madison-Wilson case for the Constitution as that case had been made in the Philadelphia debates. In this respect *The Federalist*—though conceived and carried to completion by Hamilton's energy—continued the educational process Madison had engaged in from the time he took the "Virginia Plan" to Philadelphia. There, with George Washington presiding over the convention, Madison conducted what was, in effect, a seminar for the first President on the nature of the government he would have to bring to life. This interpretation of the Constitution was in turn enunciated by James Wilson outside the convention doors and further elaborated in *The Federalist*. Then, at the Virginia ratifying convention, Madison conducted another seminar for his fellow delegate, John Marshall, on the constitution Marshall would have to interpret as Chief Justice of the United States. No man's ideas had more effect on our republic.

Madison's ideas are at the heart of *The Federalist*. Hamilton had noted some disagreements during the Philadelphia debates as he listened to Madison make his case for representation in an extended republic. But in *The Federalist*—either for strategic purposes of argument or in sincerity—he argued that case as forthrightly as Madison himself. Many of the Constitution's framers were, like Hamilton, trained as lawyers. Madison was not. Yet Madison remains the greatest teacher of our laws.

Madison's teaching, though clearly important, seems strangely mutable or dubious in its influence on our history, however. His

legacy has proved ambiguous, has produced contradictory readings of *The Federalist*. For many years fluctuations in the assessment of the text were attributed to a tension between its two main authors. If readers went away with different messages, that was because they were adverting primarily to Hamilton the northern centralizer or Madison the southern agrarian. Later disputes between the two men led critics to look for the seeds of contention in their period of collaboration as Publius. But that often meant that differences were *read into* the text. The so-called "Hamiltonian" positions can be found in Madison's contributions to *The Federalist*, and vice versa. Anachronism and doubtful attribution of the Numbers to their proper author helped along such misunderstanding. The varying interpretations of *The Federalist* had more to do with the history of the book's readers than with any argument between its authors, as we can see by considering its principal themes.

PRINCIPAL THEMES

1. FEDERALISM

There was a certain ambiguity forced on Publius as a propagandist. He had to argue for a stronger government and at the same time quiet the fears of strong government. When calling the Articles inadequate, Publius was a champion of centralization. When assuring the nervous states that centralization would not mean the obliteration of lesser units, Publius can be quoted as a champion of the dispersion of power out to subordinate parts of the government.

This ambiguity was built into the very term "federalism." Of itself, this just means a leaguings together, as under treaties (*foedera*). The term was more properly applied to the Articles of Confederation than to the Constitution, as critics of the latter document were quick to point out. Yet the advocates of a stronger government at the joint (federal) level commandeered the term, leaving the hapless defenders of the old system to become antifederalists. Elbiddge Gerry of Massachusetts, stuck with a label he did not like, insisted that the proper terminology would have been Ratifiers and Anti-Ratifiers—or, as he put it, Rats and Anti-Rats!

The ambiguity of the term continued through later history. "Federalists" became the party of a strong central government—but then, more recently, "federalism" became a term for the

diffusion of power through many units of government. Moreover, *The Federalist* was read to express shifting national sentiments on the importance of central vs. local government. In the Jeffersonian-Jacksonian era *The Federalist* was given a "Madisonian" reading. But then the Civil War made *union* the great issue of national survival, and texts from a "Hamiltonian" Publius were most frequently cited. In the Populist era Madisonian federalism was criticized for not giving government the power to tame bankers; so Hamilton, though he was the father of the national bank, became Theodore Roosevelt's hero. More recently, a conservative attack on big government has made Madison the Publius of choice for decentralizers.

In this seesawing of opinion, where did the authors originally stand? We have to remember that the whole first part of *The Federalist* is a massive assault on the Articles of Confederation. Article Two had declared "Each state retains its sovereignty." Both Madison and Hamilton, in their private correspondence, were convinced this local sovereignty had to be abolished, though their public statements were more politic. Madison spoke of a "residual sovereignty" that would inhere in the states even after ratification of the Constitution, and Hamilton of a "concurrency" of power between the national and state governments. Both men wanted to allay any fear that the new government would consolidate states into a single unit, thus liquidating the lower members. Hamilton used an Enlightenment illustration for the process he advocated: under the new Constitution, the states would be like planets revolving around the sun, part of the overall system while retaining their separate status (see No. 9 on "the ENLARGEMENT of the ORBIT" of the states).

But this very illustration enforces the idea of single sovereignty: there can only be one force of gravity if the system is to cohere. Both Madison and Hamilton express the orthodox view that there can be no *multiple* sovereignty, no "realm within the realm" (*imperium in imperio*). Here is Madison on the matter:

Experience is the oracle of truth; and where its responses are unequivocal, they ought to be conclusive and sacred. The important truth, which it unequivocally pronounces in the present case, is, that a sovereignty over sovereigns, a government over governments, a legislation for communities, as contradistinguished from individuals; as it is a solecism in theory; so in practice, it is subversive of the order and ends of civil polity, by substituting *violence* in place of *law*, or the

destructive *coertion* of the sword, in place of the mild and salutary *coertion* of the magistracy. (No. 20)

And here is Hamilton:

While they [critics of the Philadelphia draft] admit that the Government of the United States is destitute of energy; they contend against conferring upon it those powers which are requisite to supply that energy: They seem still to aim at things repugnant and irreconcilable—at an augmentation of Foederal authority without a diminution of State authority—at sovereignty in the Union and complete independence in the members. They still in fine seem to cherish with blind devotion the political monster of an *imperium in imperio*. (No. 15—compare with Madison's No. 44 on "a monster in which the head was under the direction of the members")

Neither man wanted to see the states absorbed entirely into a national government, but neither thought that was likely. It seemed inconceivable to them that a central authority could or would want to descend to enforcement of local laws.

Madison made it clear that where the central and the local authority came into conflict, the decision on their respective roles was to be made by the higher authority:

It is true that in controversies relating to the boundary between the two jurisdictions, the tribunal which ultimately to decide, is to be established under the general Government. Some such tribunal is clearly essential to prevent an appeal to the sword, and a dissolution of the compact; and that it ought to be established under the general, rather than under the local government; or to speak more properly, that it could be safely established under the first alone, is a position not likely to be combated. (No. 39)

Madison would later change his tune; but at this period he was so adamant on the need for central authority that in Philadelphia he proposed a federal veto over state laws! And in No. 44 Madison argued for a loose construction of the federal authority's power to "make all laws which shall be necessary and proper"—the bugbear of later states' righters. Whatever Madison's later views, he stands as Publius against those who arise at national conventions and says that the "*sovereign State of Whatever*" casts its votes a certain way.

What are we to think, then, when Publius assures anxious New Yorkers that their state will have a residual kind of sovereignty or a concurrent power? That is clearly talk dictated by the campaign to ratify. It is neither as emphatic nor as technical as the language on divided sovereignty. Some powers will be left to the states—that was not a matter of immediate concern for Publius, only for his audience. Publius was clearly trying to form the most energetic government possible in the circumstances, since he knew the centrifugal forces were far stronger at that moment than the centripetal. And the only way effectively to argue for a stronger government was to keep saying to the states that it would not be *too* strong. The central government would not have the *whole* say on *every* issue, would not have *all* powers or the *only* power in government. It would simply have the *final* say in disputes between the parts. It would have “the power to conclude the whole”—which is Locke’s definition of sovereignty. When Chief Justice Marshall interpreted the Constitution this way, he was being true to Madison’s first instructions.

2. CHECKS AND BALANCES

It is, by now, part of our folk wisdom that the Constitution is meant to restrict governmental power by means of checks and balances. Yet, as I mentioned earlier, neither term occurs in the Constitution itself. The Constitution, we are told, gives us the machinery of checks and balances, not the rationale for that machinery. We must turn to *The Federalist* for such a rationale. But, when we turn to *The Federalist*, we find an odd thing. The very terms “checks” and “balances” are used in conjunction only once, by Hamilton and in a very narrow sense: in No. 9, he describes bicameralism as a scheme of “legislative ballances and checks.” Hamilton, in other words, does not use the phrase to describe checks upon or by the legislative branch as opposed to the other branches, only for checks *within* the legislature (of the Senate upon the House). And that is the way Madison used “check” in Nos. 62 and 63. In No. 51, it is true, he says more generally that office should check office; but he immediately adds that in a republic the legislative branch is too strong to be checked by the other two branches. It must be checked from within.

The concept of “checks and balances” is principally used in *The Federalist* to defend bicameralism, not the whole constitutional system. This may surprise us, but it should not. The language of

checks and balances is derived, in the first place, from the philosophy of "mixed government." This classical notion seeks a social equilibrium by arming the different classes of society—the monarch, the aristocrats, and the people—with weapons to check each other. In that view of things monarchic and aristocratic institutions had to be given special advantages to counter the numerical force of the people. But both Madison and Hamilton insist that the Constitution proposed for the American people was "strictly republican" (No. 39), "wholly and purely republican" (No. 73). It would not check democratic excesses with aristocratic restraint but would seek "a Republican remedy for the diseases most incident to Republican Government" (No. 10). At the Philadelphia convention Hamilton anticipated objections voiced in the ratifying sessions when he observed that the new draft made no sense in mixed-government terms: "A democratic assembly is to be checked by a democratic senate, and both these by a democratic chief magistrate." It was the task of Publius to deny the assumptions of mixed government theory—that different offices would speak for different interests, that the President would be monarchic in spirit, that the Senate would speak for (and so encourage the creation of) an American version of the British aristocracy. Each department of the American government is to speak for the same interest, that of the people. So it is not surprising that the language associated with mixed government is used more sparingly in *The Federalist* than some might expect.

But if the different parts of the American system do not speak for separate interests, why are they kept separate? The answer to that question lies in the Publian doctrine of separated powers, which has sometimes been confused with the doctrine of mixed government.

3. SEPARATED POWERS

Mixed government calls for a division of forces in terms of interest. It looks to a vertical alignment of classes in a hierarchical order—running from the top (the one) through the middle (the few) to the bottom (the many). It was based on aristocratic assumptions in its classical exposition.

Separation of powers calls for a division of forces in terms of function. It looks to a horizontal alignment, a division of labor to deal with different tasks—with the enactment of law, with the execution of it, and with judgments on that execution. Governmental departments, in this view, do not speak for different

segments of society: they address the different tasks of the whole society. Thus when Madison says (in Nos. 62 and 63) that a Senate is needed to give the government sufficient credit with foreign powers, he does not mean that the Senate will represent a different class in America, one commanding respect abroad. He means that a body sitting for a longer period, one renewed by staggered elections, gives the *continuity* necessary for commitment to treaties and an international order. The whole House of Representatives can be voted out of office every two years. This insures accountability to the electorate, not only for the House but for the whole government (since the House controls the purse strings of the whole government). The Senate, by contrast, supplies a different function, a steadiness of aspect, a predictability in the eyes of foreign powers—which are particularly the Senate's concern in making treaties and approving ambassadors.

Separation of powers, far from aiming at mutual checks and governmental weakness, is meant (among other things) to increase efficiency. It makes sure all the functions of government are served by people specially assigned to them. The idea that Publius wanted to insure a weak government is one of the oddest misconceptions of the Constitutional struggle—it was the weak government of the Articles that Publius had come to replace. Louis Fisher has collected texts to show that separated powers were meant, in the eyes of Madison and his allies, to promote governmental efficiency. As the Senate provides accountability, so the executive provides energy and “dispatch” (No. 70), and the judiciary provides independent deliberation (No. 79). Each office is shaped to the requirements of its different *task*.

Admittedly, separation also allows for a mutual check if efficiency threatens to become usurpation; and that is especially true, for Madison, of the two chambers of the legislature. But the checking makes no sense for Publius if the offices are taken to represent the interests of different segments of the society. Rather, the spokesmen for each branch represent the values of its function. That is, the Senate does not speak for an aristocracy over against the people but for the “national character” (reputation) that senators are pledged to uphold (No. 63). This is what gives a “dissimilarity of genius” to the two chambers (No. 62). In No. 51 Madison says that the officeholder's pride and ambition should be merged with the function of his office: “The interest of the man must be connected with the constitutional rights of the place.” It is not separate classes and economic interests that are being represented, but different values important to the whole of the society.

Madison gives a third reason for separation of powers (beyond efficiency and the balancing of constitutional values against each other)—namely, legitimacy. In No. 10 he says that the concentration of all power in one place is the very definition of tyranny. This was a commonplace of constitutional theory in the aftermath of Britain's two revolutions of the seventeenth century. The restoration of a *constitutional* monarch involved the limiting of sovereignty to preclude absolutism. The king remained sovereign but had to observe the general rule that "No man is allowed to be a judge in his own cause" (No. 10). The king's power as executive was separated from the judicial application of the law by disinterested courts.

Madison applies this constitutional teaching to the American situation, where the people are sovereign. As a king is prevented from becoming a tyrant by the separation of executive and judicial functions, so a *popular* tyranny must be avoided by the separation of powers. But in applying this maxim to a new situation, Madison had to give it an original reading, for the reason we have seen—mixed government was not possible (or desirable) in America. In England the king himself was a *segment* of society, like the nobility and the "commoners." In America the sovereign is "the whole body of the people," and it speaks through all branches of the government—as Hamilton put it, in a *democratic* executive, a *democratic* legislature, and a *democratic* judiciary. Once the sovereign people have spoken through the legislature, the same people speak in theory through the executive that enforces and the judiciary that applies the laws. In terms of mixed government, which has different parts of society acting through its different agents, the American system makes no sense. How can one check the sovereign when popular sovereignty pervades the whole system?

4. PLURALISM

Before answering that last question, it will help to bring up an even more basic question. If the old view does not fit into democratic politics, why not jettison the old view? Why, in democratic theory, should the will of the sovereign people ever be thwarted? Some, assuming that it should not be, have argued that Madison did not really give up the mixed government position, that he was—under the guise of a purely republican scheme—protecting the propertied few by checking the popular will. That was the view of Charles Beard in his influential book