IV

The *Federalist* Papers

Generations of people—scholars and politicians alike—have believed the *Federalist* papers to be the finest explanation of the principles that underlie the American government and the most accurate analysis of the intentions of those who designed it. More than that, the *Federalist* papers seem to many to have a timeless, transhistorical quality. The New York jurist Chancellor Kent concluded that they were superior to any work on the principles of free government, and that, he said, included the works of Aristotle, Cicero, Machiavelli, Montesquieu, Milton, Locke, and Burke. It is still, Benjamin Wright, a distinguished modern authority on the subject, wrote, "by far the greatest book on politics ever written in America"—written, that is, on politics as such, not merely on our own national brand of politics.

Informed Europeans agreed. When the Spanish ambassador to France confessed to Talleyrand that he did not know *The Federalist*, the foreign minister wasted no sympathy on him: "Then read it," he told the envoy curtly, "read it." Later, Guizot said *The Federalist* "was the greatest work known to him" in applying the principles of government to practical administration. And in England, a writer in *Blackwood's Magazine*, echoing views in the *Edinburgh Review*, wrote that The Federalist may be called, "seriously, reverently, the Bible of Republicanism . . . which for comprehensiveness of design, strength,

clea[illegible]d simplicity has no parallel" even in the works of Montesq[illegible]l Aristotle.[1]

B[illegible]*ederalist* papers were not always thought of as such a profo[illegible]cument, especially by the small number of the authors' conte[illegible]ies who are known to have read the papers as they appe[illegible]e Antifederalists, of course, who were determined to prevent the adoption of the Constitution as it had been submitted, challenged the *Federalist* papers' arguments when they did not simply dismiss them out of hand—as one Antifederalist did who said *The Federalist* would "jade the brain of any poor sinner" and another did by claiming that *The Federalist* had mistaken "sound for argument . . . accumulated myriads of unmeaning sentences, and *mechanically* endeavored to force conviction by a torrent of misplaced words." And while many of the Federalists praised the papers, some of them too had doubts. Washington's former secretary, for example, the Federalist judge A. C. Hanson, conceded that the papers were penetrating in part and "ingenious," but he confessed that he found them sophistical in some places, obvious in others, and throughout simply tiresome: they do not "force the attention," he wrote, "rouze the passions, or thrill the nerves."[2]

The paradoxes multiply the closer one looks. The papers are assumed to have been a collaborative effort by Alexander Hamilton, James Madison, and John Jay; but in fact the authors worked quite independently. Madison and Hamilton began but then quickly stopped reviewing each other's papers before they were published, and there is no evidence that one writer's work was ever revised on the advice of either of the others. While there was broad agreement on fundamental points and an acknowledgment of each author's particular concerns, there was no "special allotment," Madison wrote, "of the different parts of the subject to the several writers" and no concurrence on the weight to be given the various issues. "Frequently one half of 'Publius' [Hamilton or Madison] would not know what the other half said until he read the article in the newspaper." At one point, Madison and Hamilton appeared to disagree so strongly that John Quincy Adams said they were writing what he

called "rival dissertations." One modern historian has diagnosed the papers as suffering from "a split personality," others have said its trouble is intellectual "schizophrenia." Madison himself admitted that the authors had distinct differences "in the general complexion of their political theories," and had no desire "to give a positive sanction to all the doctrines and sentiments of the other[s]." None of the writers were "mutually answerable for all the ideas of each other." Some later commentators have concluded that the papers are simply a work of political rhetoric written to gloss over the compromises of the Constitution and to make that document look consistent; still others have claimed that in terms of systematic political theory the papers are trivial. However that may be (and we shall return to that) there is no doubt that the authors had different kinds of commitments to the project. Of the eighty-five papers, John Jay wrote only five; Madison, twenty-nine; Hamilton, fifty-one. Hamilton was the manager of the project throughout. It was he who proposed the series in the first place, and it was he who published the first thirty-six papers together as volume I of the book edition and who added eight new papers of his own to those that had appeared in newspapers to round out the second volume.[3]

There was something helter-skelter about the whole enterprise: there are "violations of method," Hamilton confessed in the preface to the book edition, "and repetitions of ideas which cannot but displease a critical reader." Which is hardly surprising, in view of the circumstances. Hamilton wrote the first number on board a river sloop traveling from Albany to Manhattan. The seventy-seven papers that were first published in newspapers appeared twice a week, then four times a week, and so had to be written at great speed. Some were simply dashed off to meet the printers' deadlines. Madison later wrote that often "whilst the printer was putting into type parts of a number, the following parts were under the pen and to be furnished in time for the press." During the most intense period of the work, Madison, an active member of the Continental Congress then meeting in New York, and Hamilton, busy in his law practice, were both writing an essay every three or four days. In six months the

authors wrote and published an average of 1,000 words a day; between October 1787 and May 1788 Hamilton and Madison wrote for publication 175,000 words. In their haste they understandably and necessarily drew on—at times copied—things they had written before. Without this prepared material, Madison later confessed, the papers could not have been written in time to be effective. Much of the most famous of the papers, No. 10, by Madison, was largely taken from a letter he had written to Jefferson a month earlier and from his "Vices of the Political System" written seven months before that. Three other papers by Madison (Nos. 18–20) were largely lifted from the reading notes on ancient and modern confederacies he had made a year before in preparation for the Constitutional Convention. Similarly, Hamilton took much of the design and some of the substance of his early contributions to the series from an elaborate speech he had delivered at the Philadelphia Convention. And some of the individual papers are not essays in themselves but sections of extended discourses broken off for the convenience of semiweekly newspaper publication. A block of twenty-one consecutive *Federalist* papers (Nos. 37–58) that Madison published over five weeks when Hamilton was attending the New York Supreme Court session (over 150 pages in the modern book editions) are simply sequential segments of a single, long, well-structured essay. Newspaper readers would have had to have collected the pieces as they appeared and to have saved them in order to read them together as the coherent unit they are.[4]

Far from an integrated, systematic treatise on basic principles of political theory produced in calm contemplation, the *Federalist* papers were polemical essays directed to specific institutional proposals written in the heat of a fierce political battle which every informed person knew would determine the future of the new nation. Yet generations of scholars, students, lawyers, and judges have approached the *Federalist* papers as if they were a formal, carefully deliberated discourse of basic theory. Every phrase in the *Federalist* papers has been studied by scholars for its possible meanings, and the Supreme Court, in decisions that affect the lives of all Americans, has increas-

ingly accepted the papers as a uniquely reliable source for the meaning of the Constitution. In the 210 years between the Court's first session and January 2000, there are records of 291 citations in the Court's opinions: 1 in the eighteenth century, 58 in the nineteenth century, 38 in the first half of the twentieth century, and no less than 194 in the second half. Analysis of the citations shows their uses by both liberal and conservative justices and litigants on a remarkably broad range of issues, from banking and taxation to the prohibition of alcohol, from term limits to piracy, and from slavery to presidential election laws. At times the justices have considered the papers important enough to challenge each other's interpretations of particular passages in them in the course of their written opinions.[5] There is now a concordance of *The Federalist*—something one usually associates with the Bible and the works of Shakespeare—in which every use of every word in the eighty-five essays except articles, pronouns, and the verb "to be" is listed out, together with the words that precede and follow it, to enable students to grasp through verbal context every nuance that might be found in what these three very busy politicians wrote.

In this near-religious veneration for a series of political arguments that emerged from a frantic public struggle there is a strange and important paradox. *The Federalist* is an eighteenth-century document, written in and limited by the circumstances of that distant time; yet it is seen now, and increasingly, as not merely relevant in some vague way to our postindustrial world but instructive, even prescriptive, on specific problems of the twenty-first century. But the authors of the *Federalist* papers lived in a preindustrial world whose social and economic problems were utterly different from ours and whose social policies, insofar as they had any, if implemented now would create chaos. They knew about special interests and about social and political passions, but they had no idea how powerfully public opinion in a modern democracy can be manipulated, especially by instruments of communication they could not have conceived of. Much of their thinking—certainly Madison's—was based on assumptions about physical distance and its calming and dissipating effect on political passions; but we live at a time when distance is obliterated and scattered forces can coalesce by instantaneous communication with intensifying effect. The instruments of coercive force that they knew, the machinery of physical intimidation, were far weaker than ours, and the modes of escaping from the power of the state more numerous.

Beyond all that, the Constitution that the *Federalist* papers defended and explained is simply a different instrument from the Constitution as we know it now. Hundreds of federal court decisions, in implementing clauses of the Constitution, have given them new shape. The amendments that have been added to the Constitution—especially the Civil War amendments which made possible the extension of the federal Bill of Rights into the states and overthrew the Founders' notions of citizenship—have fundamentally altered the scope and meaning of the Constitution. Further, the *Federalist* authors deplored political parties, which they identified not with broad policy positions but with narrow, selfish "factional" interests; but we know that, while special interests exist in abundance, political parties, for all their divisiveness, are essential to the functioning both of our federal system and of the separated powers within the federal and state governments. And the Founders made elaborate provision for what they called a filtration of popular influences which—in the form of electors specially chosen to select the president and state legislatures as electors of senators—we have discarded. It is a reworked, significantly amended Constitution that we live with. Yet, though modern commentators explain our present, elaborated Constitution as it now actually operates, we still go back to the *Federalist* papers, written more than two centuries ago, for instruction and understanding.

Why? Should we? What, if anything, accounts for *The Federalist*'s authority? Where does its value now lie?

The starting point, I believe, for understanding the relevance of *The Federalist* in our time is to go back to the context from which the papers emerged.

In 1878 William Gladstone, the British prime minister, declared that the American Constitution was "the most wonderful work ever struck off at a given time by the brain and purpose of man."[6] He was right about the wonder of the Constitution, but he was wrong about the "given time." It was no product of a single stroke. The creation of the Constitution stretched out through four distinct stages: from 1787 at least to the end of Washington's first administration in 1793.

The first stage was, of course, the secret constitutional convention in Philadelphia in which the Constitution was written—May to September 1787. Only fifty-five people attended that four-month convention, but in itself it was an extended process—a history in itself—of subtle and complex changes, compromises, revisions, and adjustments.

The second stage was the public debate within the states on the ratification of the proposed Constitution, which lasted from late September 1787 through July 1788, when all the states but North Carolina and Rhode Island ratified. It was understood at least halfway through that process that amendments, based on proposals from the states, would be added that would constitute a Bill of Rights.

The third stage was the work of the first session of the First Congress, March to September 1789, when two fundamental supplements to the Constitution were made. In the House, the first ten amendments, the Bill of Rights, were devised, by Madison working with some eighty of the states' recommendations, and sent out to the states for approval. In the Senate, the Judiciary Act, drafted by Oliver Ellsworth, was passed, which fleshed out the Constitution's brief Article III, on the judiciary, by creating the federal court system and giving to it powers that the people in Philadelphia had not dared to include.

But still, the whole thing was merely words on paper until implemented by Washington's government. Washington knew how malleable the situation was; he understood that every move he and his administration made would be a precedent that would shape the actuality of the Constitution, and he proceeded with great care. It was Washington, for example, who created the structure of the executive offices (the cabinet) and it was he who defined the Senate's role in foreign policy and something of the operational meaning of the words "advice and consent."

In this long and complicated process, the ratification debates—the second stage—have a peculiar importance, and provide the immediate context for understanding the *Federalist* papers.

The initial publication of the Constitution on September 19, 1787, and Congress's call for the states to vote on ratification touched off one of the most extensive public debates on constitutionalism and on political principles ever recorded.[7] The entire political nation was galvanized in the debate. Literally thousands of people, in this nation of only approximately one million eligible voters, participated in one way or another. There were some fifteen hundred official delegates to the twelve state ratifying conventions, where every section, every clause and every phrase of the Constitution was raked over. There was a multitude of newspaper commentaries, sermons, letters, broadsides, and personal debates on the Constitution; they turned up in even the most remote corners of the nation. The *Federalist* papers were not the only extended series of essays published during the months of ratification. There were in fact twenty-four such series besides *The Federalist,* some of which, like the sixteen papers written in New York under the pseudonym "Brutus," were perceptive and penetrating, and were responded to, not always successfully, by Madison and especially by Hamilton. At the very end of the entire project Hamilton was still replying to "Brutus"'s fear that the Supreme Court justices would "feel themselves independent of Heaven itself."[8]

Not all the critical papers were as intelligent as "Brutus"'s. There were blasts of verbal violence, like those that erupted in a series in Philadelphia that called the supporters of the Constitution the "meanest traitors that ever dishonoured the human character," and accused them of conspiring to create "one *despotic monarchy* in America," concluding that "the days of a cruel Nero approach fast." But most of the writings and speeches in this great debate—in which alone, Madison later wrote, could be found the true meaning of the

Constitution—were sensible, and through them all there was one dominant theme: *fear*.[9]

Everyone involved in the controversy knew what the central issue was. The American Revolution in its essence had been a struggle against unconstrained centralized power—not power in some raw, unmediated sense, but power as it was understood within the ideological context of British political thought in which the Founders were immersed and which they themselves helped develop. This understanding, this set of mind, was a complex universe of attitudes, memories, beliefs, and aspirations whose roots go back to classical antiquity, the Renaissance, and the English civil war of the seventeenth century and which matured in the reformist theories of early-eighteenth-century Britain. It was in effect a map full of danger markers and historic signposts to guide one to political safety. Events of the 1760s and 1770s had been seen by the politically aware to be the signs of an approaching autocracy, to which the reasonable and necessary response was resistance, in the end rebellion. The result had been the deliberate resistance to and then the destruction of a centralized power system—a rebellion against British power justified, not by the egalitarian aspirations of the masses (most of the Revolution's leaders were socially conservative), but by the belief that unconstrained power will destroy free states, which are fragile, and the liberties that free people enjoy.[10]

Impelled by the threat they felt as they interpreted developing events within this complex of beliefs, the Revolutionaries, after destroying the British power system, had put their faith in the smaller, weaker, local governments of the states, linked together into a loose national confederation that was more a consultative body than a functioning government with the powers associated with national states. But with the proposed Constitution, in 1787, the movement of the Revolution seemed to have been reversed. The proposal before the ratifying conventions was not the dissolution of power but the opposite: the rebuilding of a potentially powerful central government that would have armed force, that would enter into all the dangerous struggles of international conflicts, and that had

the potential to sweep through the states and dominate the daily lives of the American people.

So fear and the responses to fear dominated the debate on ratification—fear of recreating a dangerous central power system, similar, it seemed, to what they had only recently escaped from. For some, fear was unbounded. In North Carolina it was ominously observed that there was nothing in the Constitution that would prevent the pope from becoming president—a charge that James Iredell, the future Supreme Court justice and the author of a brilliant five-part essay series in favor of ratification, deemed worthy of refutation:

> No man but a native, and who has resided fourteen years in America, can be chosen President. I know not all the qualifications for a Pope, but I believe he must be taken from the College of Cardinals . . . A native of America must have very singular good fortune, who after residing fourteen years in his own country, should go to Europe, enter into Romish orders, obtain the promotion of Cardinal, afterwards that of Pope, and at length be so much in the confidence of his own country, as to be elected President. It would be still more extraordinary if he should give up his Popedom for our Presidency.[11]

But most of the fears were directed not to what the Constitution failed to prohibit but what it proposed specifically to enact.

In examining the provisions of the document, the critics had at times an eerie prescience. Some pointed to the supremacy clause in Article VI, which states that the Constitution and federal laws and treaties "shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." Surely, it was argued, the supremacy clause made the whole idea of federalism a farce. The nation's laws, the Antifederalists said, would inevitably penetrate into the states and override state laws and state court decisions.

Many of the critics concentrated on the federal taxing power. The power to tax, "Brutus" wrote,

> exercised without limitation, will introduce itself into every corner of the city and country. It [the national government] will wait upon the ladies at their toilett, and will not leave them in any of their domestic concerns; it will accompany them to the ball, the play, and the assembly . . . it will enter the house of every gentleman, watch over his cellar, wait upon his cook in the kitchen, follow the servants into the parlour, preside over the table, and note down all he eats and drinks; it will attend him to his bedchamber and watch him while he sleeps; it will take cognizance of the professional man in his office, or his study . . . it will follow the mechanic to his shop, and in his work, and will haunt him in his family, and in his bed . . . it will penetrate into the most obscure cottage; and finally, it will light upon the head of every person in the United States. To all these different classes of people, and in all these circumstances in which it will attend them, the language in which it will address them will be, GIVE! GIVE!

They feared the treaty-making power—some because they thought the president should not have the power to negotiate agreements in secret, others because they feared that a president who could command a bare two-thirds majority in the Senate would be able to commit the country to anything he wished, whether millions of ordinary citizens liked it or not. But the Senate's power was feared for more reasons than that. It was feared because its members' six-year tenure seemed "aristocratical"; it was feared for its power to block presidential appointments, which might lead—who knew?—to political deal making; and it was feared too for its role as a court of impeachment. Was it not possible, one Antifederalist asked, that a president might someday use hidden slush funds, just as the British had done, to enable the "secret services" to engage in covert operations in defiance of the people's representatives, and then, through the pardoning power, "screen from punishment those whom he had secretly instigated to commit the crime, and thereby prevent a discovery of his own guilt"? The president could of course be impeached—but the impeachment trial court would be the Senate, a group he might well dominate, and in any case, it was noted, the trial would be presided over by a chief justice whom the president himself had nominated, and nominated "probably not so much for his eminence in legal knowledge and for his integrity, as from favouritism and [political] influence . . . a person of whose voice and influence he shall consider himself secure." A fantastic, unreal scenario? Some in 1788 did not think so.[12]

Dangers, for some, appeared wherever one looked—in every turn of phrase and possible implication of the Constitution.

A national, professional army? But they had only recently overcome Britain's "standing army" and they knew from history how standing armies could become bloodthirsty palace guards, janissaries, to be manipulated against the people by an overambitious executive. And what kind of a protection would there be from the states' militias, since, according to the Constitution, they could be nationalized by the same ambitious president on the excuse of some possible threat from abroad?

A federal district was proposed for the seat of the national government. But an area where the people had no representation and where Congress would rule directly, uninhibited by an intervening state government—was *that* a good idea? "Few clauses in the Constitution," George Mason, the author of the first state bill of rights, declared, were as dangerous as this. The federal district, he said, would become "the sanctuary of the blackest crimes." The place, Patrick Henry added, might well become the headquarters of a powerful army controlled solely by Congress. "Is there any act," he asked, "however atrocious which [Congress] cannot do by virtue of this clause? Can you say that you will be safe when you give [Congress] such unlimited powers, without any real responsibility? . . . Will not the Members of Congress have the same passions which other rulers have had? They will not be superior to the frailties of human nature." A district that has no representation in the government that rules them, a judge in Virginia's Kentucky district wrote, "will be the most successful nursery of slaves that ever was devised by man." It will be a market where honors and emoluments bestowed by the government will be sufficient to buy the liberty and with it the loyalty of "the bulk of mankind . . . these numerous and wealthy

slaves will infallibly be devoted to the views of their masters; and having surrendered their own will always be ready to trample on the rights of free men."

"Brutus" saw a subtler, more insidious danger—in the federal government's power to "borrow money on the credit of the United States." With this power, he wrote, Congress "may create a national debt, so large as to exceed the ability of the country ever to sink. I can scarcely contemplate a greater calamity that could befal[l] this country than to be loaded with a debt exceeding their ability ever to discharge . . . it is unwise and improvident to vest in the general government a power to borrow at discretion, without any limitation or restriction." Given all these dangers and many more, the Antifederalists were shocked to discover that the Constitution, unlike most state constitutions, did not include a Bill of Rights to protect people against the threatening powers of the government being created. On this flagrant omission they attacked the Federalists again and again.[13]

Such were the Antifederalists' arguments, worked out in elaborate critiques of almost every clause of the Constitution, which Hamilton, Madison, and Jay undertook to refute in the *Federalist* papers. The task was peculiarly difficult not simply because the arguments against the Constitution were for the most part cogent and well informed but because these objections had behind them the authority of a sanctified tradition. They were drawn—often literally—from the ideas, ideals, and fears that had led to the rebellion against Britain, and these were fears and beliefs and ideals not of the passing moment but fundamental to the deepest values of Anglo-American political culture. They were embedded in the world view, the ideological complex, that had dominated Americans' political understanding just a short decade earlier and that had impelled the rebellion against Britain.

The great achievement of the authors of the *Federalist* papers is not merely that they replied in detail to specific dangers that critics saw in the Constitution and explained in detail how the new government should, and would, work, but that they did so without repudiating the past, without rejecting the basic ideology of the Revolution. Indeed, their ultimate accomplishment was to remove the Revolutionary ideology from what Hamilton called "halcyon scenes of the poetic or fabulous age" and place it squarely in the real world with all "the vicissitudes and calamities which have fallen to the lot of other nations." *The Federalist* sought to embrace the Revolutionary heritage, and then to update it in ways that would make it consistent with the inescapable necessity of creating an effective national power.[14]

The Constitution, in creating a strong central government, *The Federalist* argued, did not betray the Revolution, with its radical hopes for greater political freedom than had been known before. Quite the contrary, it fulfilled those radical aspirations, by creating the power necessary to guarantee both the nation's survival and the preservation of the people's and the states' rights.

Soberly, patiently, sometimes repetitiously, *The Federalist* took up, analyzed, and responded to all the major issues. It was difficult, uphill work—difficult intellectually, politically, even psychologically—and there was no predictable outcome. They knew that the political world they were trying to create, uniting national power and personal liberty, was something new under the sun, and that the mere contemplation of such an unknown world stimulated morbid, malignant fantasies of impending doom—"frightful and distorted shapes—gorgons, hydras, and chimeras dire," "palpable illusion[s] of the imagination"—that could frustrate all their realistic arguments. But confident themselves of a future based on the new Constitution, they sought to overcome these amorphous, free-floating anxieties and keep the struggle within realistic bounds. No doubt, as one debater in the North Carolina ratifying convention put it, "those things which *can* be, *may* be," but if every omission in the Constitution is magnified into "a plot against the national rights," Madison wrote, no improvement in the state of the nation would ever be accomplished. "Where in the name of common sense," Hamilton said, "are our fears to end if we may not trust our sons, our brothers,

our neighbours, our fellow-citizens? What shadow of danger can there be from men who are daily mingling with the rest of their countrymen, and who participate with them in the same feelings, sentiments, habits and interests?"[15]

So while attempting to calm the dark, unfocused fears that permeated the political atmosphere, *The Federalist* took up the real, palpable threats posed by an enlarged and effective central government.

Would not the federal government overwhelm the states, take over their powers, supersede their laws, and sacrifice their local needs to some abstract "general interest" that would be to no one's benefit but those who controlled the central power? To this *The Federalist* replied: how *could* it? The federal government was designed as a creation of the states; it would depend on the states for its existence, while the states would continue to exist independently of the nation. The states would enact the procedures for presidential elections, they would elect the senators, they would probably collect some of the federal taxes, and they would retain all the rights and powers not specifically delegated to the federal government. The powers assigned the federal government are "few and defined," the states' powers "numerous and indefinite . . . extend[ing] to all the objects which, in the ordinary course of affairs, concern the life, liberties, and properties of the people." And in any case, people are always more attached to, more loyal to, their local, familiar institutions than to a distant, unseen power; and local, state attachments will determine the actions of the people's representatives in Congress. The two governments, state and national, would not be adversaries. They would have different powers, of different magnitudes, to serve different purposes, which would only occasionally overlap. If, by some turn of events, the federal government did manage to encroach on, assault, the powers of the states, the people in the states would defeat it by refusing to cooperate and by joining together to create procedural roadblocks. And if, beyond even that, it ever came to some kind of military confrontation, the official state militias equipped with their own arms (as the Second Amendment, anticipated by Hamilton, would later guarantee) would overwhelm any "standing army" that the executive could create.[16]

But what would prevent the executive from building up an oppressive army, a "standing army," to overwhelm the liberties of the people? To this profound fear, based on the whole heritage of ancient and modern history, Hamilton, for whom the creation of a national army was a major concern, devoted some of his most closely wrought papers. So long as the Constitution functioned, he wrote—that is, so long as there was no complete overthrow of all civil institutions by a coup d'état—a military buildup, under the rules of the Constitution, would require "progressive augmentations" of Congressional appropriations, and since military appropriations had to be renewed every two years, that would happen only if there were a conspiracy between Congress and the president sustained over successive transformations of House membership. Was it even remotely conceivable, Hamilton asked, that every incoming congressman would instantly "commence a traitor to his constituents and to his country"? And if there ever were such a fantastic plot, how could it be concealed?[17]

But if the states and the nation were not likely to clash in arms, would they not come into conflict in other ways since in some areas they had what seemed to be overlapping jurisdictions? Everyone knew that two or more sovereign governments could not coexist in the same territory: sovereignty in its nature was absolute and exclusive. That famous doctrine had in fact lain at the root of the conflict with Britain; if those two powers, Parliament and the colonial governments, both of which claimed sovereignty, the one explicitly, the other implicitly, could have existed together cooperatively there would have been no revolution. What difference, it was asked, was there between the Constitution's "supremacy clause" and Britain's Declaratory Act, which had declared Parliament to have "full power . . . to bind . . . the people of America . . . in all cases whatsoever"? To this, *The Federalist* replied that while the ancient doctrine that dual sovereignties could not coexist was undeniable and had correctly applied in the pre-Revolutionary situation, it did not apply in the present case since neither of the governments was a sovereign entity. They were both agencies of the one and only absolute sovereign power, the people, and the people could appoint any combination of governmental agencies they chose to serve their purposes.[18]

But were there not other fatal flaws in the structure of the system? Might not the federal government, as "Brutus" feared, empowered as it was to "lay and collect taxes," impoverish the nation by endless taxation? For Hamilton, this was a fiscal and administrative question, for Madison a matter of verbal precision. Federal taxation, Hamilton wrote, would be either indirect (tariffs and excises) or direct (taxes on property or polls). If indirect, consumers would defeat excessive taxation by cutting down on the consumption of the targeted goods and so defeat the effort. If direct, first, the modest means of the majority of farmers would yield too little from taxes on land and houses; second, personal property other than real estate is "too precarious and invisible a fund" to tax properly; and third, poll taxes are so universally obnoxious that no sensible government would resort to them except in dire emergencies.[19]

Madison replied to the fears of federal taxation by turning to the wording of the empowering clause in Article I, Section 8. One finds there, he said, no limitless authorization to tax. Yes, Congress is empowered to lay and collect taxes—that was one of the main reasons for writing the Constitution—but only "to pay the debts and provide for the common defense and general welfare of the United States." And as for the phrase "general welfare," it is no open-ended license to prey on the community. It is specifically explained and qualified, Madison wrote, by the enumerated particulars in the clauses that immediately follow. Shall these "clear and precise expressions," Madison asked, "be denied any signification" and only "the more doubtful and indefinite terms be retained in their full extent"? That, he said, would be absurd.[20]

The real question, Madison and Hamilton both concluded, is not whether federal taxation would impoverish the nation but whether the natural bias against any and all taxation, the difficulty of collecting federal taxes, and the competing financial needs of the states would not prevent the general government from ever raising the funds it needed to do its work.

But financially oppressive or not, how could such a continental-sized government actually work? How could the myriad interests in

such a nation—at its birth five times the size of Britain, and likely to grow—how could such an immense nation possibly be represented in a single legislature of manageable size? Would not the great diversity of factions, private ambitions, and passionate causes, all of them entirely free to flourish in any way they could, lead to a chaotic struggle of all against all? Would not the sheer size of the country make it impossible to achieve the consensus needed to sustain the government?

To this fundamental question *The Federalist* replied calmly, cogently, clearly, and concisely. Direct representation of the innumerable interests of the people, many of them passionate and extreme in their partisan ambitions, was neither desirable nor possible; it was, Hamilton wrote, "altogether visionary." The combination of large electoral districts and a relatively small House of Representatives would necessarily lead to the selection of moderate representatives agreeable to many factions and cross-sections of the population. Further, the institutional complexity of the national government would tend to neutralize conflicts among factions as they attempted to work through the government, and draw them together into moderated coalitions. But beyond all of that, the system would lead to the selection as representatives those who would be likely to stand above special interests and pursue the true interests of all their constituents, as well as the common good of society. Thus, Hamilton wrote, mechanics and tradesmen would have mutual interests in selecting merchants, their natural patrons and economic allies, to represent them, and these would be men of "influence and weight and superior acquirements." For landholders, rich and poor, "middling farmers," "moderate proprietors of land," would be the natural, sensible representatives. And above all, members of the learned professions, especially lawyers, "who truly form no distinct interest in society," were likely to be "the objects of the confidence and choice of each other and of other parts of the country." The goal of representation, Hamilton wrote, was not to mirror the infinity of private interests in the way a pure democracy would do, but to meld the contesting forces into the permanent and collective interests of the

nation. The proper representatives, he wrote, were not those who understood only their home districts' local interests but those who, while informed and respectful of their constituents' "dispositions and inclinations," could grasp the technical issues of public policy and the logic of the nation's welfare, which in the end would benefit all. For this, the best-qualified people—in terms of education, independence, judgment, and breadth of vision—would be needed, and such representatives, he believed, would be forthcoming.[21]

To some degree the whole issue had been misunderstood, *The Federalist* argued. The destabilizing effect of clashing factions—a notorious flaw in popular governments—did not apply in such a large-scale republican nation as the United States. In fact the opposite was true. For the larger the society, Madison most famously wrote, "provided it lie within a practicable sphere" in which the bond between ruler and ruled could be maintained, the safer all would be. The multiplicity of factions would make it unlikely that any one group or combination of groups could overwhelm the others. In a large republican nation the grinding struggle of interests will tend to splinter factional coalitions; fragmentation would deflect what he called "plans of oppression." In effect passion and interest would create their own remedy. "Extend the sphere," Madison wrote in the most famous passage of the *Federalist* papers,

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

But what would prevent one of the four elements of the federal government—the executive, the two branches of the legislature, and the judiciary—from dominating the others and thus establishing a one-sided, autocratic regime? It could not happen, *The Federalist* replied. Each branch of the federal government had powers that could negate those of the others, and all four overlapped in their powers sufficiently to brake the others' possible excesses.[22]

As for the absence of a Bill of Rights, Hamilton confronted the issue directly, in his own distinctive way. The Constitution itself, he argued, guaranteed essential rights—jury trials in criminal cases, habeas corpus, freedom from bills of attainder, from ex-post-facto laws, from religious tests for officeholding, and from titles of nobility. And quite aside from that, the concept was inapplicable. Bills of rights were "stipulations between kings and their subjects," in effect abridgments of royal prerogatives that had been fought for "sword in hand." Here the people have all the rights not explicitly surrendered in grants of power to the government. "Why declare that things shall not be done which there is no power to do?" To do so might well furnish ambitious men "a plausible pretence for claims to that power."[23]

And as for the most general concern of all, there was no reason, *The Federalist* wrote, why a centralized national government must be incompatible with personal liberty if, as the Constitution provided, that authority were limited to enumerated powers, all others being retained by the states and the people. If it ever happened that those restrictions, enforced by the courts, were ignored by federal officeholders, then the whole constitution of government would be at an end and private problems would scarcely matter in the general catastrophe that would result.

So in page after page (592 pages in all in the first book edition), in essay after essay, week after week through seven months while the fate of the nation hung in the balance, the authors of the *Federalist* papers, amid a bedlam of conflicting voices, explained and explored the Constitution, article by article, clause by clause—the need for it, its powers and limitations, and its proof against the attacks aimed to defeat it. But in explaining the document and the government it would create, the *Federalist* authors, impelled by the urgency they felt and the complexity of reconciling radical ideals of political liberty with the present need for power, went beyond the range of familiar problems to reach a level of thought deeper and more original than that of any of the other pamphleteers and essayists. Pragmatically,

unsystematically, almost inadvertently, they drew fundamental principles into the popular debate. They were not attempting to write a formal treatise on the foundations of government or to create a new science of politics. Their aim was simply to convince people whose minds and experiences were shaped by the Revolutionary ideology that the principles they revered, especially the preservation of private rights, would still apply under the powers of the new federal government. But doing so presented unexpected challenges, paradoxes, and dilemmas that forced them to think freshly and devise new formulations which enriched, elaborated, and deepened the political tradition they had inherited and continued to revere.

New phrases, fresh terms crop up in their defense of the Constitution, reflecting new angles of vision in approaching the problems of power. So Hamilton, insisting with increasing urgency that the two levels of government, states and nation, could coexist within the same territory without conflict, focused that famous issue on the distinction, familiar in law but not in political thought, between repugnance and concurrence. Jurisdictions that confronted each other, he argued, might, like conflicting laws, find their powers repugnant to each other. If that happened, a struggle would inevitably result until the dominance of one was somehow established. In a contest of governments this would mean nothing less than civil war. But repugnance was not inevitable. Two authorities with similar powers could concur, if their roles were clearly established—could divide their responsibilities into separate spheres—could even reinforce each other and clarify each other's role. The Constitution's federalist division of absolute powers was a structure of concurrence, he argued, not repugnancy. To understand that distinction was to understand the heart of the Constitution and the public world it would create.[24]

If the concept of repugnancy was misleading, so too was the doctrine, so celebrated by Thomas Paine in *Common Sense,* that simplicity in government was a virtue, complexity an unmitigated evil. The opposite, *The Federalist* argued, was true. For the simpler the structure of government, the more likely it was to be dominated by particular interests or individuals at the expense of others. Complexity not simplicity was needed to provide the institutional conditions for adversarial challenges, without which ambition could run free.

But the issue was more general than that. Complexity and adversarial institutions were instances of something broader. Tension—networks of tensions—was the fundamental necessity for free states. The whole of the Constitution, *The Federalist* made clear, was a great web of tensions, a system poised in tense equilibrium like the physical systems Newtonian mechanics had revealed. Administration within and among departments of free governments, Madison wrote, will have both the "means and the personal motives to resist encroachments of the others . . . Ambition must be made to counteract ambition." The organized competition of "opposite and rival interests" that is built into the Constitution, he believed, reflects "the whole system of human affairs, private as well as public." Pressures exerted at one point would activate rebalancing responses elsewhere; and it was in this mechanism of tense equilibria that Madison placed his hopes of protecting minorities from the impact of majoritarian rule.[25]

If for Hamilton the main problem was to convince a reluctant people that creating a centralized power complete with an army, commercial regulation, and taxation was both necessary and safe, for Madison the principal and much subtler problem was how to protect minority groups and individuals from the domination of majorities in control of a powerful, freely elected government. On the face of it, the problem was unsolvable: both legislative majoritarianism and private rights were ultimate values in free societies, and surely they contradicted each other. How could they coexist? One or the other would have to prevail: a choice was inescapable. But Madison refused to choose between them, and struggled to resolve the dilemma.

He had learned how difficult and yet how urgent the problem was as he had observed the evil effects of legislative majorities within some of the states over the previous five years. Again and again minority property rights had been overwhelmed by populist majorities. And he had good reason to anticipate that the same injustice

would happen to other minorities—religious groups, whose plight he had seen at close hand in the recent struggle in Virginia to enact Jefferson's Act for Establishing Religious Freedom, and political dissidents. He took some comfort from the section of Article I that prohibited the states from impairing the obligation of contract and from issuing their own bills of credit and tender laws. And there were implicit reinforcements in the clauses that guaranteed to the states protection against violence that would threaten their republican integrity and bound the judges in every state to enforce the Constitution, the laws of Congress, and the treaties entered into by the United States. He believed too that the complicated amendment process would help block the domination of one or another passionate and well-organized group, and he expected the Senate to constrain the powers of majorities in the House.

But these institutional arrangements, he feared, would not be enough to protect minorities within the states. He had pondered the issue deeply, and by the time the Philadelphia convention met he had reached a conclusion, which he explained to Jefferson in the massive letter that became the basis for *Federalist* No. 10.

He was convinced, he wrote Jefferson in what he called an "immoderate digression," that the only true protection for minority rights threatened by majorities in the state assemblies was a veto by the federal Congress on legislation passed in the states—a "constitutional negative" that he believed would tend to be impartial because of the moderating effect of diversity at the national level. In the Philadelphia convention, he explained, he had argued that a congressional veto over state legislation was necessary "to secure individuals against encroachments on their rights." But to his great regret that effort had been defeated, and with that defeat had gone his hope for enforcing justice at the state level. But, one might ask—and he asked himself this—would not the federal judiciary "supply the place of a [congressional] negative on [the states'] laws"? Possibly, he wrote; but "it is more convenient to prevent the passage of a law than to declare it void after it passed," and in any case, would injured individuals within the states be in a position to carry suits against

states up to the Supreme Court? And if they did, and if they won, would it not take the use of force by the federal government to impose a judicial ruling against an offending state? And was that not precisely what the Constitution had sought to avoid?

So in Philadelphia he had failed in his efforts to secure private rights within the states by placing them under the direct guardianship of the federal government. But that bitter experience had greatly sharpened his understanding of the general problem of minority rights, and he applied that understanding at the national level in *Federalist* No. 10 with a brilliance that would enlighten constitutional thought ever after. In that resonant essay, so much more insightful than Hamilton's *Federalist* No. 9, which dealt with similar problems, he explained, as no one else had done, how the extended nation's complex web of tensions would prevent a "common interest or passion" from creating "a majority . . . in an unjust pursuit" that would deprive individuals of their rights. Others had approached that insight, had written of the moderating effect of diversity, but had not grasped its importance, uncovered its inner logic, or explained its implications as Madison did. And the heart of his understanding lay in his instinctive sense of the balancing equilibrium created by the interaction of contending forces.[26]

Tension, balance, adversarial clashes leading to conciliating moderation lay at the core of the *Federalist* writers' thought—but they knew that a mechanically tense, self-balancing system did not activate or maintain itself. Its success would depend in the end on the character of the people who managed it and who allowed themselves to be ruled by it—their reasonableness, their common sense, their capacity to rise above partisan passions to act for the common good and remain faithful to constitutional limits. The *Federalist* authors shared the common belief that most people everywhere, in their deepest nature, are selfish and corruptible and that the desire for domination is so overwhelming that no one should be trusted with unqualified authority, but they were confident that under the Constitution's checks and balances power would not be unconfined, and for such a self-limiting system there would be virtue enough in the

American people for success. "As there is a degree of depravity in mankind," Madison wrote, "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." But it was Hamilton, in one of the last of the *Federalist* papers, who made the point most succinctly: "The supposition of universal venality in human nature," he wrote, "is little less an error in political reasoning than the supposition of universal rectitude. The institution of delegated power implies that there is a portion of virtue and honor among mankind, which may be a reasonable foundation of confidence. And experience justifies the theory."[27]

Goodwill and a degree of impartiality would always be needed. If every compromise is taken as a defeat that must be overturned, and if no healing generosity is ever shown to defeated rivals, the best-contrived constitution in the world would not succeed. Properly understood and faithfully adhered to, the Constitution, the *Federalist* writers explained, despite its possible imperfections, was a sensitive instrument for balancing power and liberty. And it is the detail, clarity, and fullness of their explanation of the Constitution's structure and the principles that underlay it, and their perceptiveness and shrewdness in analyzing the general problems of power and its dangers in human society, that has made *The Federalist* an enduring document.

For all its distance from us in time and culture, for all the changes that have overtaken the world since 1788, the *Federalist* papers remain relevant, and acutely relevant, because they address masterfully our permanent concerns with political power—under our Constitution and in general. The *Federalist* writers knew that a structure of power must exist in any stable, civilized society, but they knew too that power uncontrolled will certainly be abused. They had vividly in mind the principles of political freedom that had been formulated in the decade of pounding ideological debate before 1776 and that had been discussed again in the writing of the state constitutions in the years that followed. Defending the establishment of sufficient

national power to sustain a stable and effective society, they sought to preserve the maximum range of personal rights consistent with it. In this fundamental concern for the balance of power and liberty—which had been the central theme of America's earlier struggle with Britain—the *Federalist* writers, conservators of what were then radical political principles, are our contemporaries. Their constitutional idiom is ours; their political problems at the deepest level are ours; and we share their cautious optimism that personal freedom and national power—the preservation of private rights and the maintenance of public safety—can be compatible. But maintaining that balance is still a struggle, in times of danger or disillusion a bitter struggle; and so we continue to look back to what these extraordinarily thoughtful men wrote so hurriedly under such intense pressure two centuries ago. The *Federalist* papers—not a theoretical treatise on political philosophy but a practical commentary on the uses and misuses of power—still speak to us directly.