Reader's Guide to The Federalist - George W. Carey, *The Federalist (Gideon ed.)* [1818]

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PART I

Advantages of a More Perfect Union

In *Federalist* No. 1, Publius sets the tone for the essays that follow by emphasizing the urgency and uniqueness of the situation facing the American people, as well as the magnitude and significance of the choice confronting them. He pictures this choice in transcendent terms: It is for the American people to determine "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." What is more, he writes, a "wrong election" on their part would "deserve to be considered the general misfortune of mankind."

Publius warns his readers that those who would seek to persuade them one way or the other with regard to ratification may be motivated by ambition, greed, partisanship, or simply mistaken judgment. In particular, he cautions, the people should be on guard against demagogues who preach against the proposed Constitution in the name of the people. They speak zealously of the need to protect rights but forget that weak government can be just as much a threat to liberty as one that is too strong. Indeed, Publius contends, "a dangerous ambition more often lurks behind the specious mask of zeal for the rights of the people, than under the forbidding appearances of zeal for the firmness and efficiency of government. History will teach us, that the former has been found a much more certain road to the introduction of despotism, than the latter, and that of those men who have overturned the liberties of republics, the greatest number have begun their career, by paying an obsequious court to the people . . . commencing demagogues and ending tyrants."

Persuaded that it would be in the best interests of the American people to adopt the Constitution, Publius promises that he will be candid and truthful in presenting his arguments. He discloses the subjects he will cover, beginning first with a discussion of the advantages to be gained by forming a more perfect union. To this end, in *Federalist* No. 2, he stresses that the Americans are already "one united people; a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and opinions, and who, by their joint counsels, arms and efforts, fighting side by side through a long and bloody war, have nobly established their general liberty and independence." The need now, he informs his readers, is for a stronger, more effective central government to preserve and perpetuate the Union. Indeed, he writes, every national assembly, from the First Continental Congress down to the Federal Convention, has "invariably joined with the people in thinking that the prosperity of America depended on its Union."

Publius argues in essays 3 and 4 that one clear and obvious advantage of having closer ties among the States is greater national security. He points out that a more unified country is better able to defend itself against foreign invasion and intrigue and that diplomatic relations with foreign nations can best be handled by a national government speaking for the whole people, not by the several States or "by three or four distinct confederacies." He goes on to note (No. 5) how the Act of Union, which strengthened Great Britain by uniting England and Scotland, provides us with "many useful lessons" on the advantages of unification.

In *Federalist* No. 6, Publius points to the history of internecine wars and petty squabbles in ancient Greece and Europe to emphasize the dangers of confederacy. He condemns "idle theories" which suggest that "commercial republics" will be immune to these dangers. It is not unrealistic to suppose, he suggests in *Federalist* No. 7, that in time the several States might also be warring among themselves over territorial and commercial differences, the public debt, or paper money laws which deprive creditors of

their property rights. The present circumstances are such, Publius concludes in *Federalist* No. 8, that America does not need extensive military fortifications. But if America were disunited, he admonishes, "Our liberties would be prey to the means of defending ourselves against the ambition and jealousy of each other."

Of particular importance in these early essays are Nos. 9 and 10, wherein Publius defends the political principles upon which the proposed Constitution is based. In No. 9 he maintains that an improved "science of politics" provides a cure for the "rapid succession of revolutions" which plagued "the petty republics of Greece and Italy" and "kept" them "perpetually vibrating between the extremes of tyranny and anarchy." Among the improvements he mentions are the doctrines of separation of powers and "legislative balances and checks," judicial independence, and "the representation of the people in the legislature, by deputies of their own election"—the republican principle. The "enlightened friends of liberty," he asserts, have woven these principles into the new Constitution. Moreover, by establishing a "CONFEDERATE REPUBLIC" they have combined the advantages of energetic government with those of republican government over an extensive territory.

In No. 10, the most widely read of all the essays, Publius continues to respond to the charges of the Anti-Federalists who, citing Montesquieu, contend that a stable and enduring republic is possible only over a confined territory with a small population possessing the same interests. He explains how the conditions associated with extensiveness will operate to cure the disease of majority factions—i.e., majorities "united and actuated by some common impulse of passion, or of interest, adverse of the rights of other citizens, or to the permanent and aggregate interests of the community"—which have caused the demise of earlier small republics. He envisions the election of representatives "whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice, will be least likely to sacrifice it to partial considerations." Moreover, he holds that in the extensive republic under the proposed Constitution there will be a multiplicity and diversity of interests which will render it

unlikely that “a majority of the whole will have a common motive to invade the fights of other citizens.” Thus, he sees representation coupled with numerous and diverse interests controlling the effects of “faction.”

In *Federalist* No. 11, Publius argues that a stronger Union among the states would be commercially advantageous. A loose confederation of wholly independent States, he suggests, invites commercial weakness, European control of American markets, and domestic jealousies. A strong Union, he adds, would also make it possible for the American people to create a navy and a merchant marine and improve navigation for the protection of American commercial interests.

Likewise, he contends in No. 12, the new union will promote “the interests of revenue.” Simply increasing taxes, he points out, will not fill the empty treasuries of the State and national governments. “It is evident,” he writes, “from the state of the country, from the habits of the people, from the experience we have had on the point itself, that it is impracticable to raise any very considerable sums by direct taxation.” Noting that taxes on land, wealth, or consumption are either unpopular with the people or extremely difficult to administer, he maintains that the main source of revenue for the foreseeable future will be the collection of duties on imports. One national government, he observes in *Federalist* No. 13, would be far more economical and efficient in collecting these duties than separate confederacies or independent states.

Federalist No. 14 offers a summary of the preceding essays, with particular emphasis on the meaning, importance, and application of the “republican” principle embodied in the new Constitution. Publius concludes by noting the continuity between the ideals and spirit of the American Revolution and the present struggle for a new government. The Framers of the new Constitutions are, he suggests, simply improving and perpetuating the goals of the American Revolution and the early constitutional systems that arose from it.

PART II

Weaknesses of the Existing Confederation

Publius begins his discussion of the second topic of his outline, "the insufficiency of the present Confederation to preserve . . . [the] Union," in *Federalist* No. 15. In this paper he asserts that the people of the United States under the Articles of Confederation "may indeed, with propriety, be said to have reached the last stage of national humiliation. . . . There is scarcely anything that can wound the pride, or degrade the character, of an independent people, which we do not experience."

Publius explains why the situation is so desperate. The "great and radical" defect of the government under the Articles, he maintains, is that it must legislate for States, not individuals. Such a practice, he charges, allows each of the States to subvert, undermine, and even ignore the laws of the general government and fails to take account of the "spirit of faction" and the "love of power." Thus, he believes it imperative that the authority of the national government operate upon individuals, "the only proper objects of government."

In *Federalist* No. 16, he continues his attack on the "great and radical vice" of the Articles—that it legislates for States, not individuals. While noting that a resort to force has resulted in the "violent death" of such confederacies in the past, he believes that the confederacy under the Articles will undergo a more "natural death"—a gradual and peaceful collapse through the general noncompliance of its members. The solution to the problem is to vest the national government not only with the authority to operate directly upon individuals, but also with the capacity to impose sanctions, if necessary, through the "courts of justices" in order to obtain compliance with its laws. Under this arrangement, he observes, the States could subvert the execution of national laws only through an "overt" act in violation of the Constitution, an unlikely occurrence, in his view, save in the case of a "tyrannical exercise" of national power.

Understandably, Publius has to turn his attention to answering the charges of the Anti-Federalists that such a powerful national government will swallow up the States.

powerful national government will swallow up the States. This he does in *Federalist* No. 17. Those in charge of the broad and general responsibilities of the national government, he argues, will have no need or desire to encroach upon the residual powers of the states. Thus, there is unlikely to be any clash of basic interests between the two levels of government. The national government will be dealing with national issues relating to "commerce, finance, [treaty] negotiation, and war," whereas the states will be concerned with matters involving the "administration of private justice," the "supervision of agriculture, and of other concerns of a similar nature." Moreover, he continues, if the national government were to encroach upon the States' residual powers, the States and local governments, being closer to the people, would be more than a match for the national government. Indeed, in his view, State encroachment on the national government "will always be far more easy" than national encroachment on the State authorities.

Intent upon illustrating the basis for his views on the "great and radical vice" of the Articles, Publius examines the histories of ancient and modern confederacies in *Federalist* Nos. 18, 19, and 20. In the first of these essays, he surveys the structure, workings, and eventual disintegration of the major confederacies of ancient Greece. He suggests there are parallels between these confederacies and the condition of the States under the Articles of Confederation, and sees a lesson to be learned from the fact that foreign intervention and internal dissensions among the member States, rather than oppression on the part of the central governments, were primarily responsible for their demise. In *Federalist* No. 19 he turns to more modern confederacies, devoting most of his attention to the history, development, and status of the Germanic empire. Here again he finds a weakness and disunity fostered by a lack of central authority over the member states. Continuing with his analysis of modern confederacies in *Federalist* No. 20, he examines the United Netherlands, racked by dissension, "popular convulsions," and "invasion by foreign arms." He concludes this essay by emphasizing once again an "important truth" to which the experience of the United Netherlands amply attests: "a sovereignty over sovereigns, a government over governments,

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 *coercion* of the *sword,* in place of the mild and salutary *coercion* of the *magistracy*."

In the final two essays of this section (Nos. 21 and 22), Publius concentrates on other weaknesses of the Articles. In *Federalist* No. 21 he deals with the want of "SANCTION" or means of enforcement of the laws passed by Congress; the absence of a "mutual guaranty of the state governments" which would allow the national government to intervene in cases of rebellion against the duly constituted state governments; and the lack of any just or satisfactory principle or standard for determining the "QUOTAS" or contributions of each State to the national treasury. In *Federalist* No. 22, he remarks on the want of authority under the Articles to regulate interstate commerce and the lack in them of any workable means to raise an army.

He then concentrates on both the structural and the procedural defects of the Articles. Equality of State suffrage in the Congress, coupled with the need to secure the approval of nine States for the passage of a law has, he asserts, created a situation that allows for a minority veto, contrary to the republican principle of majority rule. Moreover, he notes, the absence of the States from Congress has often resulted in a "single vote" being sufficient to block action. He regards "the want of a judiciary power" to be "a circumstance which crowns the defects of the Confederation." Anticipating arguments he will later develop with regard to the separation of powers, he contends that the powers necessary for an effective national government cannot be vested in a single legislative body. To do so would either cause its breakdown or, if not that, an accumulation of power in one body that would amount to tyranny. Finally, he emphasizes the importance of having a popularly based Constitution, noting that, under the proposed Constitution, the new government, unlike the Articles, will rest on the consent of the people.

PART III

Powers That Should Be Exercised by a National Government

Federalist essays 23 through 36 are devoted to showing that the powers delegated to the national government by the proposed Constitution are necessary for a government that is to overcome the difficulties inherent in the Articles and to preserve the Union. At various places, Publius also endeavors to show that the powers delegated to the national government, particularly those relating to the national defense and taxation, will pose no dangers to the existence of the States or the liberties of the people.

In paper No. 23, Publius sets forth a proposition that he repeats throughout *The Federalist* to justify the powers delegated to the national government—namely, that "the means ought to be proportioned to the end." If, that is, the national government is charged with a responsibility, it must possess the unfettered authority to discharge that responsibility. In the case of the national defense, he concludes that the powers of the national government must be virtually unlimited, because the means of defense depends upon factors and circumstances that cannot be fully anticipated.

Publius applies this reasoning in *Federalist* No. 24 in answering the objections of many Anti-Federalists that the proposed Constitution contains no provision against a standing army in times of peace. A constitutional prohibition against a standing army in time of peace, he points out, would be most inappropriate and imprudent, particularly in light of the nation's western land interests and the need to protect its naval facilities. But his response to the Anti-Federalists does not rest upon this ground alone. He notes that only two States have such provisions against standing armies in their constitutions and that, moreover, there is no such provision to be found in the Articles. Beyond this, he can see no need for any such provision, given that the proposed Constitution places the authority for raising armies in the hands of the representatives of the people, thereby providing a check on the military establishment.

In essay No. 25, Publius completely rejects the proposition that the state governments ought to assume the functions performed by a national standing army. This, he writes, would constitute "an inversion of the primary principle of our political association; as it would in practice transfer the care of the common defence from the federal head to the individual members: a project oppressive to some states, dangerous to all, and baneful to the confederacy." He envisions any such arrangement as subjecting the security of the whole to the willingness of the parts to fulfill their obligations; he can imagine how rivalries might even develop among the States that could eventually lead to the disintegration of the Union; and he maintains that the more powerful States might pose a danger to the existence of the national government.

In *Federalist* Nos. 26 through 29, Publius focuses on still other aspects of the controversy surrounding standing armies in time of peace. In No. 26, for instance, he points to the reasonableness and appropriateness of the constitutional provision (Article 1, Section 8, Paragraph 12) which limits appropriations for raising and supporting an army to two years—a provision which, he argues, meets the requirements of national defense while preventing the potential evils that can arise from a permanent standing army. In a more philosophical vein, he touches upon a basic theme that recurs throughout the essays: that the concern for private rights and liberty must always be balanced against the imperative need for an energetic government, one capable of defending the nation against foreign and domestic enemies. In addition, he emphasizes that any successful conspiracy or scheme to usurp the liberty and rights of the people through force of arms would require time to develop and mature, a virtual impossibility given the accountability of the members of Congress and the anticipated vigilance of the States.

Publius makes clear (No. 27) that he does not anticipate the national government's having, as a matter of course, to resort to the use of force to execute its laws. Indeed, he believes, force will rarely be required once the proposed system is put into operation. As soon as the operations of the national government become part of the ordinary life of its citizens,

government become part of the ordinary life of its citizens, their attachment to it will grow. Even State officers will find themselves integrated into the national system through their obligation to uphold legitimate national laws. Nevertheless, Publius does acknowledge (No. 28) that there will be circumstances which will require the use of national force. He again remarks, however, that the vigilance and potential resistance of State governments "afford complete security against invasions of the public liberty by the national authority." Nor does he see (No. 29) that national control over the State militia will pose any threat to the liberties of the people or the security of the States. Among the reasons for this, he maintains, is that the vast majority of the militia will consist of ordinary citizens whose attachment to the community will not allow them to participate in any plot to subvert popular rights and liberties.

Starting with *Federalist* No. 30, Publius devotes seven papers to a discussion of the national taxing power and its relationship to the taxing powers of the States. At the outset, he makes it clear that the national government must possess unfettered authority to raise revenue in order to fulfill its constitutional responsibilities. Repeating the line of argument used in No. 23, he argues that "every POWER ought to be proportionate to its OBJECT" and that to restrict the national government to "external" taxation—that is, to "duties on imported articles"—would be disastrous, because it is impossible to foretell with certainty what the future needs of the national government might be. In *Federalist* No. 31, he again emphasizes that the national government must possess a power to tax commensurate with its responsibilities —a power "free from every other control but a regard to the public good and the sense of the people."

Publius is also anxious to show that the national government's power to tax will not lead to the extinction of the States. By way of answering those who contend that vesting the national government with an "indefinite power of taxation" will "deprive . . . [the States] of the means of providing for their own necessities," he answers (No. 31) by pointing out the impossibility of dealing rationally with the infinite "conjectures about usurpation" which spring from the unwarranted fears of the Anti-Federalists. In *Federalist*

the unwarranted fears of the Anti-Federalists. In Federalist No. 32, he takes pains to point out that the States "clearly retain all the rights of sovereignty" that were not "exclusively delegated" to the national government, prohibited to them, or whose exercise would be "totally contradictory and repugnant" to the exercise of delegated national powers. Thus, he shows that, save for duties on imports, the States possess a concurrent and discretionary power to tax the same sources as the national government. He demonstrates (No. 33) that the "necessary and proper" clause cannot be used to deprive the States of their powers to tax. Any law "abrogating or preventing the collection of a tax laid by the authority of a State (unless on imports and exports) would not be the supreme law of the land, but an usurpation of a power not granted by the Constitution." Finally, in essay No. 34, he rejects the idea that there is need for a constitutional division of the sources of revenue between the State and national governments to ensure sufficient revenues for the States. Such a division, he warns, might prevent the national government from fulfilling its critical responsibilities. Moreover, he cannot see any division of the sources of revenue that would not leave the States with either "too much or too little" relative to their needs.

In the final two essays (Nos. 35 and 36) of this section, Publius takes up and answers Anti-Federalist objections that the House of Representatives will not be able to produce an equitable system of taxation because it will not be large enough to reflect the diversity of interests in the nation. While he holds (No. 35) that the representation of all classes of people is both "unnecessary" and "altogether visionary," he firmly believes that the classes that will dominate —"landholders, merchants, and men of the learned professions"—will have a sufficient understanding and sympathy with the various interests of society to produce an equitable system for revenues. In this respect, he envisions those from the "learned professions" adjudicating whatever differences might arise between the "different branches of industry" in a fashion consistent with the general welfare. In addition, he rejects (No. 36) the charge that the Congress will not have sufficient knowledge of local circumstances to formulate effective and equitable taxation policies. He notes that the information needed for this purpose can easily be

that the information needed for this purpose can easily be obtained with respect to the imposition of indirect taxes, such as import duties and excise taxes. As for direct taxes, such as those on real property, he maintains that the system used by the individual States can readily be "adopted and employed by the federal government."

PART IV

Why the Proposed Constitution Conforms with the Principles of Republicanism and Good Government

A.

The General Form of Government

Federalist Nos. 37 through 40 discuss concerns of a general nature. No. 37, for instance, is perhaps the most philosophical of all the essays. Here Publius (Madison) provides an overview of the complexity and enormity of the task confronting the Founding Fathers at the Philadelphia Convention. He comments on the "novelty of the undertaking"; the difficulties of marking out the divisions between the departments of government, as well as those surrounding the division of authority between the State and national governments; and the delicate task of providing for the proper balance between energy and stability necessary for an effective and stable government without infringing upon liberty or violating the principles of republicanism.

After stressing the enormous obstacles that must be faced in establishing a new government by pointing to examples from ancient history (No. 38), Publius proceeds to castigate the Anti-Federalists for compounding these difficulties. He notes the lack of consensus among them about what is wrong with the proposed system and their clamor for amendments before the proposed system has even had a chance to operate. He faults them for quibbling over supposed defects in the proposed Constitution while ignoring the highly dangerous and unbearable political situation under the Articles.

In essay No. 39, Publius takes up two highly important

concerns. First, he sets forth the "true principles" of republicanism, which call for direct or indirect control over government by "the great body of the society, not from an inconsiderable proportion, or favoured class of it." Second, he undertakes to answer Anti-Federalist critics who charge that the proposed Constitution calls for a consolidated, national, or unitary government that does not conform to the principles of federalism. He examines the proposed system from five different vantage points and concludes that it is neither wholly national (unitary or consolidated) nor federal (confederate) but a "composition of both."

Finally, in *Federalist* No. 40, Publius takes up and attempts to answer the charge—one that has endured over the decades—that the members of the Constitutional Convention exceeded their authority by drafting an entirely new constitution instead of simply revising the Articles, as they had been instructed to do. He answers by arguing that the delegates appropriately accorded priority to that part of their mandate which instructed them to provide for a government capable of preserving the Union and meeting its needs. Such a government, he maintains, simply could not be fashioned through any conceivable revision of the Articles.

B.

The Powers of Government

Publius indicates at the outset of his discussion of the powers of the proposed national government that two questions are uppermost in his mind: first, whether any of the powers delegated to the national government are "unnecessary or improper," and second, whether these powers will pose dangers to the authority of the States. To answer the first question he surveys (Nos. 41 through 44) the powers of the national government under six categories: defense; commerce with foreign nations; relations between the States; "miscellaneous objects of general utility"; restraints upon the States; and "provisions for giving due efficacy" to the foregoing powers. He answers the second of these questions, regarding foreign commerce, in the last two essays (Nos. 45 and 46).

In his discussion of the common defense (No. 41), Publius again warns of the danger and futility of trying to limit the powers of the national government. “The means of security,” he writes, “can only be regulated by the means and the danger of attack. They will in fact be ever determined by these rules and by no others.” At the same time, he rejects the notion that the “general welfare” clause vests the national government with undefined powers. In No. 42 he justifies the powers delegated to the national government on various grounds. He notes, for instance, that few would question the propriety of the national government’s conducting foreign relations, the need for some superintending authority to regulate commerce among the States, or the convenience of general laws regarding naturalization. Likewise, in No. 43 he points to the need or at least the desirability of giving “miscellaneous powers” to the national government, which include provision for the admission of new States, national control over the seat of government, and the guarantee of a republican form of government for each State.

Relatively little controversy surrounds the powers Publius surveys in *Federalist* Nos. 41–43. However, the Anti-Federalists were greatly concerned about the “necessary and proper” clause (Article 1, Section 8, Paragraph 18) and the extent to which the national government might use this provision to enlarge its powers at the expense of the States. Publius turns his attention to this clause in No. 44, where he argues that even if the Constitution had contained no such provision, the national government would, “by unavoidable implication,” still possess the power to pass laws “necessary and proper” to execute its expressly delegated powers. Once again, Publius emphasizes that the means must be apportioned to the ends: “No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it, is included.” He points out, however, that if the national government were to overextend its authority and do that which is unnecessary or improper, the people can “annul the acts of the usurpers” through the “election of more faithful representatives.”

Publius's discussion of the "necessary and proper" clause provides the backdrop for his discussion (essays 45 and 46) of the second question—that is, whether the powers of the national government threaten the States. In No. 45, he advances the opinion that in contests between the States and national government over the extent of their respective powers, the State governments will enjoy an inherent advantage. In both Nos. 45 and 46, he sets forth in detail the reasons why he holds this position. He does concede (No. 46) that "manifest and irresistible proofs of better administration" on the part of the national government can operate to overcome these inherent State advantages. However, he is adamant in maintaining that any infringement on popular liberties through unwarranted intrusions of the national government would be met by stern opposition on the part of the States—an opposition that "the federal government would hardly be willing to encounter."

C.

The Separation of Powers

The first sentence of *Federalist* No. 51 provides a convenient point of departure for understanding those essays (Nos. 47 through 51) devoted to the principle of the separation of powers. In this sentence Publius asks: "To what expedient then shall we finally resort, for maintaining in practice the necessary partition of power among the several departments, as laid down in the Constitution?" Publius strongly believes it is necessary to maintain the separation of powers provided for in Articles I, II, and III of the proposed Constitution. In No. 47, he indicates in no uncertain terms why it is necessary to maintain this partition. Echoing the accepted wisdom of that period, he writes that "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." By tyranny, as he makes clear by quoting from Montesquieu, he means arbitrary, capricious, and oppressive rule by those possessing any two of these powers. Thus, he believes that for the proposed Constitution to succeed it is imperative that no one branch be able to

exercise the whole power of another.

In the remaining papers in this group, Publius sets out to canvass the means by which the departments can be kept separate in order to prevent tyranny. In the first of these (No. 48), he inquires whether "parchment barriers" or written provisions in the Constitution to the effect that each department should stay within its own sphere would be sufficient to maintain the separation. In answering this question, he emphasizes that the legislature is most to be feared because it "is every where extending the sphere of its activity and drawing all power into its impetuous vortex." For this reason, he urges the people "to indulge all their jealousy, and exhaust all the precautions" against this branch of government. Noting that the legislature possesses so many means and pretexts for aggrandizing the powers of the other branches, and mindful of difficulties experienced by some State governments, he concludes that a delineation of powers of the branches in the constitution will not, by itself, serve to prevent a "tyrannical concentration" of powers.

He next turns his attention (No. 49) to a critical examination of Jefferson's proposal for keeping the branches within their proper spheres. The Jefferson plan called for appeals to the people whenever two-thirds of the membership of two branches of government so requested. Upon such an appeal a popularly elected convention would meet to resolve the conflict. Aside from certain technical difficulties that he notes, Publius finds the plan seriously deficient from a theoretical point of view. He believes that such occasional appeals to the people over constitutional questions would, particularly if frequent, serve to undermine popular "veneration" of the government in that they would suggest serious defects in the system. The favorable opinion of the people upon which the authority of government ultimately rests would then, he maintains, suffer a serious, if not complete, erosion. Moreover, passions would be aroused over these constitutional matters, thereby disturbing the "public tranquillity" and the very stability of the constitutional order. But the "greatest objection," in his mind, is that the legislature is most likely to encroach on the other branches

and that its members, because of their influence and popularity with the people, would most likely be the members of any convention elected to redress the alleged violations. Consequently, the legislators would be the judge of their own cause. But even if this were not the case, Publius argues that "passions," not "reason," would most likely prevail in these conventions.

Publius then considers (No. 50) whether periodic appeals to the people at fixed intervals might serve the purpose of maintaining the necessary separation of powers. Again he sees fatal flaws in any such scheme. If the appeals occur too close to the time of the alleged infraction, they will be attended with all the "circumstances" which "vitiate and pervert the result of" occasional appeals. And if the interval between the appeal and the alleged transgression is a long one, he sees good reasons why the appeal is not likely to serve its purpose: the prospect of distant censure will not restrain those bent upon aggrandizement; the transgressors might have already accomplished their ends, thereby rendering the remedy superfluous; or the transgression may, in the interval, have taken "deep root" so that it cannot be remedied. He notes that the experience of Pennsylvania with its Council of Censors bears out his observations concerning the ineffectiveness of this barrier.

Having rejected paper barricades, and occasional and periodic appeals, Publius proceeds in *Federalist* No. 51 to set forth his solution to the problem of maintaining the necessary constitutional separation. "The only answer," he contends, consists in "contriving the interior structure of government" so that the departments "by their mutual relations" will keep "each other in their proper places." This, in turn, requires "giving to those who administer each department, the necessary constitutional means, and personal motives, to resist the encroachment of others." After noting that the "compound" nature of the republic with "two distinct governments" controlling each other will provide a "double security . . . to the rights of the people," he concludes this essay by reformulating the arguments used in his *Federalist* No. 10 to show how the extended federal republic, with its multiple and diverse interests, will render the

formation of majority factions "improbable, if not impracticable." He reasserts the proposition "that the larger the society, provided it lie within a practicable sphere, the more duly capable it will be of self-government."

D.

The House of Representatives

With *Federalist* No. 52, Publius begins his examination of the specific institutions of the proposed Constitution: the House of Representatives, the Senate, the executive, and the judiciary. This survey runs through No. 83, or all but the last two essays of the volume.

Essay No. 52 is also the first of ten devoted to describing and explaining the constitutional provisions and features of the House of Representatives. In this particular paper, Publius remarks on the propriety of the constitutional provisions relating to the qualifications for voting for members of the House and the qualifications for membership in this chamber. He then takes up the more controversial matter of whether the two-year term for members of the House will endanger the liberties of the people. Surveying the experiences of Great Britain and Ireland but particularly those of the States, he concludes that biennial elections pose "no danger" to liberty.

Publius resumes his discussion of the appropriateness of a two-year term (No. 53) by taking up and debunking the notion "that where annual elections end, tyranny begins." In this endeavor, he explicitly sets forth for the first time the American doctrine of constitutionalism, which holds that a constitution, resting on the consent of the people, is "unalterable by the government" it creates. The major portion of the essay deals with the necessity and utility of two-year terms. On this score, he emphasizes the need for representatives to have sufficient time to acquire "the knowledge requisite for federal legislation."

Publius next (No. 54) confronts the matter of apportioning representatives among the States according to population and, specifically, to the matter of counting slaves as three-

fifths of a person. Speaking through the medium of "one of our Southern brethren," he offers up the reasons for the three-fifths "compromise" that emerged from the Philadelphia Convention. Among those he cites are that the laws regard slaves as both property and persons; that the Southern States would regard it as inequitable to count slaves for purposes of taxation but not for representation; and that there should be some allowance for the comparative wealth of the States in apportioning seats. Though conceding that this reasoning is "a little strained in some points," he finds that, taken as a whole, it "fully reconciles" him to the compromise. He concludes this essay by noting that the "common measure" for purposes of representation and taxation will render it unlikely that the States will attempt to distort their actual populations. That is, the disposition to reduce the number of inhabitants for purposes of taxation will be counteracted by the potential loss of representatives.

With *Federalist* No. 55, Publius begins a series of four papers that deal with four major criticisms that have been leveled against the House of Representatives regarding its composition and capacity to represent the people. This paper is concerned with the question of size and whether the House —initially to consist of only sixty-five members—is a safe "depository of the public interests." Noting that there is no exact formula for determining the proper size of a legislative assembly, he maintains that the number must be sufficient for purposes of "consultation and discussion" and to prevent cabals. On the other hand, he emphasizes that it must also be limited "in order to avoid the confusion and intemperance of a multitude." In this connection, he writes, "Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob." As for the question of whether the size of the House renders it a safe depository, he observes that the size of the body will increase with anticipated increases in population. Moreover, he cannot conceive of this body, subject to election every two years, as betraying the trust of the people. The essay concludes with one of his few statements concerning the relationship between virtue and republican government. Republican government, he remarks, "presupposes" qualities of human nature "which justify a certain portion of esteem and confidence . . . in a

higher degree than any other form."
In answering the second charge (No. 56), that the House will be "too small to possess a due knowledge of the interests of its constituents," Publius has recourse to an argument very similar to that advanced in No. 10, namely that information relevant for national purposes, which are general in nature, can be conveyed by a relatively few individuals. The major task of representatives, as he views it, will be to assimilate the information they acquire from other representatives concerning conditions in other States and locales. Over time, however, he sees the interests within the States as becoming more numerous and diverse, while the differences between them in terms of interests will diminish.

To the charge that those elected to the House will have "least sympathy with the mass of the people" and will "be most likely to aim at an ambitious sacrifice of the many, to the aggrandizement of the few," Publius recurs in paper No. 57 to the republican foundations of the system as set forth earlier in essay No. 39. He points out that the electors of the representatives are "to be the same" as those who elect members to the popular branch of the State governments and that the objects of popular choice are not constitutionally limited by requirements of wealth, profession, or religious affiliation. Beyond this, he sees various circumstances—chief among them frequent elections, along with the fact that representatives cannot pass laws that will not apply to themselves, their family, and friends, as well as their constituents—as forging a genuine bond of affection between the representatives and their constituents.

To the fourth and final charge, that "the number of members" in the House of Representatives "will not be augmented from time to time, as the progress of population may demand," he observes (No. 58) that no serious problems on this score have been encountered at the State level. Moreover, he does not foresee how a coalition of the small States would be able to prevent periodic augmentations in the size of the House. Among the reasons he cites is that the House, with the people on its side, and vested with the power of the purse, will be more than a match for the Senate or president should they attempt to thwart any increase.

However, Publius takes pains to repeat his earlier concerns about an excessively large representative assembly. Any number beyond that necessary for providing "local information," of ensuring "diffusive sympathy with the whole society," or for "purposes of safety," he argues, might well lessen the republican and deliberative character of the assembly.

The final three essays devoted to the House of Representatives deal with the necessity and desirability of national control over elections for national offices as set forth in Article 1, Section 4 of the Constitution. These essays constitute a break between his survey of the House and his examination of the Senate.

Publius begins (No. 59) by defending national regulation of elections to national office as vital for the preservation of the national government. He maintains that if this function were to be exercised by the States, it would leave the national government at their mercy. While recognizing that the State legislatures can refuse to elect senators, he does not regard this a warrant for more extensive State control. However, he does believe that State control over House elections could lead to a crisis. In responding to Anti-Federalists who maintained that the national government might use its regulatory power to manipulate elections in order "to promote the election of some favourite class of men," Publius answers (No. 60) that neither the people nor the States would ever stand for any such discrimination. Moreover, he regards any plan to favor "the 'wealthy and well born'" as impracticable, because these classes are randomly distributed throughout the nation. Finally, in *Federalist* No. 61, he responds to the criticism that the Constitution is deficient because it contains no provision specifying the time and place of national elections. He answers by pointing out that neither the New York nor any of the other State constitutions contain such specifications, and that there have been no ill effects. He goes on to point out some of the positive advantages that will flow from the national government's fixing a uniform time of election. Most importantly, he argues, it will ensure that the entire membership of the House will simultaneously be subject to

control by the people.

E.

The Senate

The Anti-Federalists viewed the Senate with mixed emotions. The vast majority favored a second chamber, and most were pleased that the States were accorded equality of representation. Yet many voiced strong criticisms of its powers, composition, and relationship to the executive branch. Beginning with essay No. 62, Publius devotes five essays to answering the most common criticisms of the Senate and to pointing out what role he anticipates it will play in providing for stable government free from the ravages of faction.

In this first paper, Publius deals with the qualifications for election to this chamber, the mode of election, and equality of State representation. He also begins his discussion concerning its size and term of office by inquiring "into the purposes which are to be answered by a senate." Notable in this paper is his lukewarm defense of equal State representation in the Senate and his detailed analysis of the contemplated role of the Senate. Equality of representation, he maintains, is the result of a necessary compromise that "may prove more convenient in practice, than it appears to many in contemplation." However, he views the Senate as indispensable in checking the potential excesses of the House, as well as in ensuring sound, well-conceived legislation. He is most emphatic in stressing the role of the Senate in curing the poisonous effects, both internal and external, of an "unstable government" that produces "mutable" policies.

In *Federalist* No. 63, Publius continues his discussion of the role of the Senate in promoting stability. It will provide, he maintains, "a sense of national character" necessary for the respect of foreign nations and the orderly conduct of international relations. He observes that the Senate, because of its stability and continuity, will also be more inclined than the House to take the successive steps sometimes necessary for the implementation of long-range goals and policies. But the bulk of the essay is devoted to a discussion of the Senate

as an institution that can prevent oppressive and unjust majorities from ruling. The Senate, he argues, can serve to check such factions "until reason, justice, and truth can regain their authority over the public mind."

Publius next examines (No. 64) the role of the Senate in the treaty-making process. He emphasizes its stability, as well as the intelligence, knowledge, and character of its members, that render the body suitable for this purpose. However, the essay is most notable for delineating a significant and distinct role for the president in the area of treaty negotiations. Noting that "secrecy" and "despatch" are often necessary, he praises the proposed Constitution for allowing the president sufficient latitude to take advantage of changing circumstances and to maintain secrecy in the negotiation process. In answering major criticisms of this process, he stresses that treaties, viewed as "bargains" between nations, have a different character from ordinary legislation, because the consent of the contracting parties to the treaty is necessary "to alter or cancel them." He cannot foresee the process being abused, largely because the president and members of the Senate, as well as "their families and estates," will be bound by the terms of treaties to the same extent as ordinary citizens.

The final two essays (of the next twenty by Hamilton) dealing with the Senate are concerned with its role in the impeachment process. The main issue discussed in No. 65 is the propriety of vesting the Senate with the power to try those impeached by the House of Representatives. Though Publius can see merit in having a "court for the trial of impeachments . . . distinct from" the regular departments of government, he notes practical difficulties and the "heavy expense" that would attend any such arrangement. In *Federalist* No. 66, he takes up a detailed defense of the role of the Senate in the impeachment process. The constitutional provisions, he argues, do not violate the separation of powers principles. Nor does he believe that the Senate's role in the appointment or treaty-making processes, which it shares with the president, will inhibit it from removing culpable individuals from office.

F.

The Presidency

With *Federalist* No. 67, Publius begins an eleven-essay survey of various aspects of the presidency. In the opening essay, he strives to dispel the charge leveled by many Anti-Federalists that under the proposed Constitution the president will have an authority and status akin to that of the most powerful monarchs. Such a depiction he regards as utterly without foundation. To illustrate the absurdity of these charges, he refutes the claim that the president may fill "casual vacancies in the senate."

After setting forth (in No. 68) the virtues of the electoral college for electing a president—a process that "affords a moral certainty, the office of president will seldom fall to the lot of any man who is not in an eminent degree endowed with the requisite qualifications"—Publius explores (No. 69) the "real character of the proposed executive" by comparing his status and powers with those of the king of Great Britain and the governor of New York. To counter the charge that the president is little more than an "elective king," he discusses his term of office, his liability to impeachment and removal, his participation in the legislative process, his powers as commander-in-chief, and his powers of appointment and treaty making. He concludes that it is questionable whether the president's authority even exceeds that of the governor of New York, but that, in any event, "there is no pretence for the parallel which has been attempted between him [the president] and the king of Great Britain."

Nevertheless, Publius does emphasize the need for energy in the executive to secure the blessings of good government and liberty. In *Federalist* No. 70, he identifies four ingredients of an energetic executive: "unity; duration; an adequate provision for its support; [and] competent powers." In the remaining essays on the presidency he deals with these ingredients, beginning first with the need for "unity." On this score he maintains that both reason and experience clearly speak against having plural executives or an executive council. He argues strenuously and at length against the idea of a council whose concurrence would be required for the exercise of executive functions. Such an arrangement, he

exercise of executive functions. Such an arrangement, he

observes, would make it difficult, if not impossible, for citizens to fix responsibility for fraud, misconduct, and incompetence. Moreover, he concludes, this lack of accountability would render any such council a greater threat to liberty than would a single executive.

In discussing "duration" (No. 71), the second ingredient of an energetic executive, Publius defends the four-year term of office as contributing to the firmness of the executive, a firmness that would allow the executive to block oppressive and unjust measures in order to give the people the "time and opportunity for more cool and sedate reflection." What is more, he believes such a term is essential if the executive is to act independently of Congress, particularly the popularly elected branch whose members "sometimes . . . fancy, that they are the people themselves." Given these views, it is hardly surprising that Publius vigorously defends the view (No. 72) that the executive ought to enjoy indefinite reeligibility. He enumerates in some detail the potential "ill effects" that limitations on reeligibility would produce. He concludes by arguing that the presumed advantages of the principle of exclusion ("greater independence" and "greater security to the people") are highly dubious.

The third ingredient of an energetic executive authority, "adequate provision for its support," is discussed in essay No. 73 by taking note of the constitutional provision prohibiting an increase or decrease of presidential pay during the executive's term of office. However, his major focus in this essay, and in those that follow, is on the fourth ingredient, "competent powers." This, in turn, leads to an extensive discussion of the president's veto power. He notes the imperative need for such a power to prevent legislative encroachment on the executive branch in order to preserve the separation of powers. He also sees the veto power as a means of curing the "inconstancy and mutability in the laws," which he calls the "greatest blemish" on the character of the state governments. He looks upon the qualified veto as an encouragement for an otherwise reluctant chief executive to exercise this prerogative in questionable cases, because it lacks the finality of an absolute veto.

Continuing with his discussion of "competent powers" in *Federalist* No. 74, Publius turns to the president's power as commander-in-chief, as well as his authority to require the "opinions, in writing" of his principal subordinates. The major portion of the essay, however, is devoted to his power "'to grant reprieves and pardons.'" On this matter, he weighs the pros and cons of the argument that at least the concurrence of one chamber of the legislature should be required for pardons in the case of treason. On balance, he concludes, the need for flexibility and dispatch justifies vesting this authority solely with the executive. In No. 75 Publius examines the treaty-making power of the president by way of showing the appropriateness of the constitutional provisions relating to this authority. To the charge that the participation of the Senate in this process involves an undesirable mixture of legislative and executive powers he responds that the treaty-making power does not fit neatly into either the executive or the legislative branches, that it partakes of both. Moreover, he remarks, "the history of human conduct" indicates that the executive should not be able to exercise this whole power unilaterally. On the other hand, he observes, the Senate is not as suited as is the president for conducting treaty negotiations.

In the last two essays devoted to the presidency, Publius takes up the president's power of appointment and the role of the Senate in this process. Nomination by the president and confirmation by the Senate, he contends in No. 76, have all the advantages of appointment by a single person while avoiding the factional strife that inevitably arises when assemblies are vested with the authority to appoint. Nomination by the president, he believes, will be tantamount to appointment. Though he recognizes that the Senate may reject the nomination—something he believes it would do infrequently in the absence of compelling reasons—the subsequent nominee would still be the preference of the president, not the Senate. In this vein he comments on the benefits that would result from Senate confirmation, not the least of which is that the mere possibility of rejection would serve as "a strong motive to care in proposing." Finally, he sees little prospect that the president could use his powers of

sees little prospect that the president could use his powers of appointment "to corrupt or seduce a majority" of the senators.

Publius opens *Federalist* No. 77 by asserting that the Senate would have to consent to the removal of executive officers (a position rejected by the first Congress which, in effect, held that removal was an inherent executive power). The remainder of this paper, however, is devoted to defending the mode of appointment set forth in the proposed Constitution. In this regard, he dismisses as without foundation the contention that the Senate might be able to exercise an undue "influence [on] the executive." He rejects any participation by the House of Representatives in the appointment process, because the "fluctuating" character of its large membership would destroy "the advantages of stability" and cause "infinite delays and embarrassments." Toward the end of the essay, returning to a concern he discussed earlier in No. 70, he contends that the "structure and powers of the executive department" do "combine the requisites of safety, in the republican sense." He cites, in this connection, the power of impeachment and removal and the concurrence of the Senate over those concerns where "abuse of the executive authority was materially to be feared."

G.

The Judiciary

In *Federalist* Nos. 78 through 83, Publius examines the third branch of government, the judiciary. The most significant of these essays is the first, in which he sets forth the case for judicial review, or what he describes as the power of the courts "to declare all acts [of the legislature] contrary to the manifest tenor of the Constitution void."

In essay No. 78 Publius defends the constitutional provision for tenure during good behavior for justices. In the course of this defense, he notes the feebleness of the judiciary relative to the other branches of government: it has no control over either the "sword or the purse"; it "can take no active resolution whatever"; it "will always be the least dangerous to the political rights of the Constitution"; and it possesses "neither Force nor Will, but merely judgment." The national

"neither Force nor Will, but merely judgment." The national courts can pose a threat to the liberties of the people, he argues, only if they are united with either of the other two branches. Thus, he points out, there is a need for "PERMANENCY IN OFFICE" to secure its separation.

Having stressed the need to maintain a separation between the judiciary and the other branches to avoid tyranny, Publius goes on to contend that an independent judiciary is "essential in a limited constitution"—a constitution which, as he puts it, "contains . . . specified exceptions to legislative authority." At this juncture, he sets forth his famous argument for judicial review. The Constitution, he insists, must be viewed as fundamental law, the embodiment of the constituent will of the people. Any legislative act contrary to a provision of this fundamental law, in his view, must be regarded as "void." "To deny" this conclusion, he contends, "would be to affirm, that the deputy is greater than his principal: that the servant is above his master; that the representatives of the people are superior to the people themselves." Because "The interpretation of the laws is the proper and peculiar province of the courts," Publius holds that it falls to them to determine when there exists an "irreconcilable difference" between the Constitution and a law passed by Congress. It is "the duty of the judicial tribunals," he writes, to void statutes that contravene the "manifest tenor" of the Constitution. This does not mean, he adds, that the judiciary is superior to the legislature, but only that the will of the people expressed in the Constitution is superior to both.

In this essay Publius canvasses other reasons to justify life tenure. The independence of the courts is essential if they are to uphold the Constitution against any "momentary inclination" that may lead majorities to back proposals "incompatible with the provisions in the existing Constitution." Changes or alterations in the Constitution, he insists, must be made through "some solemn and authoritative act"—i.e., through the amendment process outlined in Article V. Still another reason for the independence of the judiciary relates to the "qualifications" for fit judges. Not only must they be steeped in the law with a knowledge of precedents, they must also be individuals of

knowledge of precedents, they must also be individuals of high moral character. Such "fit characters," he remarks, are not to be found in abundance. Life tenure, he reasons, might serve as an inducement for such characters to leave "a lucrative line of practice" in the private sector and to "accept a seat on the bench."

Publius defends (No. 79) other constitutional provisions that provide for judicial independence. The constitutional provision that the compensation of judges "'shall not be diminished during the continuance in office'" he regards as "the most eligible provision that could have been devised." More importantly, he finds that the removal of judges through the impeachment process is the only method "consistent with the independence of the judicial character."

In *Federalist* No. 80, Publius inquires into the "proper objects" of the "federal judicature" and whether Article III of the proposed Constitution conforms to them. In this connection he comments on the role of the federal courts in "giving efficacy to constitutional provisions" by overturning State laws in "manifest contravention" of the Constitution. Moreover, he also sees the need for a judicial power "coextensive" with the legislative to provide for "uniformity in the interpretation of the national laws." He points as well to the need of the federal judiciary to act as an impartial arbiter in "determining causes between two states, between one state and the citizens of another, and between the citizens of different states."

Having defended an independent federal judiciary with the power of judicial review over both State and national laws, in *Federalist* No. 81 Publius proceeds to answer those Anti-Federalists who argue that the federal courts—and the Supreme Court in particular—will become the dominant branch of government, because they will be free to go beyond the letter of the Constitution to interpret its "spirit." Publius responds by noting that the Constitution does not "directly" authorize the "national courts to construe the laws according to the spirit of the Constitution" and that, moreover, the latitude given to the national courts by the Constitution is no greater than that enjoyed by the State courts. Publius holds that the "danger of judiciary encroachments" on the

legislature is a "phantom," and that the legislative power to remove judges through the impeachment process is a sufficient deterrent against judicial usurpation.

After stressing the need for "inferior" federal courts—that is, courts below the Supreme Court—by pointing out that the existing State courts could not very well provide for uniform and impartial interpretations of the national laws (No. 81), Publius takes up the matter of the relationship between the federal and State courts in No. 82. He assures his readers that the adoption of the Constitution will not diminish the jurisdiction of the State courts, save where there is express provision for exclusive federal jurisdiction. He maintains that the degree to which the State courts will share jurisdiction with the federal courts over those matters that are "peculiar to" or "grow out of" the Constitution is a matter for Congress to determine. He again notes that the need for uniformity requires that in cases of concurrent jurisdiction there must be appeal to the national courts.

In the longest of all the essays, No. 83, Publius engages in a detailed response to Anti-Federalists who argue that the proposed Constitution abolishes trial by jury in civil cases. Publius makes a number of points, three of which are central. First, he rejects the notion that the silence of the proposed Constitution on this score can be interpreted as abolishing trial by jury in such cases. Second, he does not personally believe that trial by jury in all civil cases, unlike trial by jury in criminal cases, is an indispensable "safeguard to liberty." And, finally, because the practices of the States with regard to civil cases varied, the members of the Convention wisely left this matter to the discretion of Congress.

H.

Concluding Observations

By way of picking up loose ends, Publius takes up (No. 84) certain "miscellaneous" matters which, he contends, "did not fall naturally under any particular head, or were forgotten in their proper places." The most important of these he deems to be the objection that the proposed Constitution "contains no bill of rights."

no bill of rights.

Publius approaches this objection from several perspectives. He begins by noting that the proposed Constitution already protects a number of important rights, including the guarantee of the writ of habeas corpus and the prohibition against ex post facto laws; and that, unlike the rights proclaimed in the New York Constitution, the rights in the proposed federal Constitution are not alterable by simple legislation. He then observes that bills of rights, "according to their primitive signification," are grants of privilege from the sovereign to the people and, as such, have no place in republican governments founded on the consent of the people. "We, The People" of the Preamble, he declares, "is a better recognition of popular rights, than volumes of those aphorisms which make the principal figure in several of our state bills of rights." He goes on to maintain "that bills of rights, in the sense and to the extent they are contended for, are not only unnecessary . . . but would even be dangerous. . . . They would," he argues, "contain various exceptions to powers not granted; and on this very account, would afford a colourable pretext to claim more than were granted." He remarks as well that the security for liberties rests ultimately "on public opinion, and on the general spirit of the people and of the government."

The last essay, *Federalist* No. 85, contains Publius's final plea for ratification of the Constitution. Holding that "I never expect to see a perfect work from imperfect man," he maintains that the proposed Constitution is "the best which our political situation, habits, and opinions will admit." To counter Anti-Federalists urging the addition of amendments as a precondition for ratification, Publius stresses the dangers of seeking to perfect the Constitution through amendments "prior to" its operation. He also observes that such a precondition would require starting the ratification process all over again, producing a delay that might well result in "anarchy, civil war, a perpetual alienation of the states from one another, and perhaps the military despotism of a victorious demagogue." He notes, by way of answering those concerned about the national government resisting changes that would diminish its powers, that the States can initiate amendments once the system is set in motion; that

initiate amendments once the system is set in motion; that they will not have to rely upon Congress, an arm of the national government, for this purpose. Recurring to a theme of *Federalist* No. 1, he strongly suggests that the nation is at the crossroads, and that the opportunity for a republican union might never again present itself.