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# Hamilton's Federalist Treatise for Free Government

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# HAMILTON'S FEDERALIST — TREATISE FOR FREE GOVERNMENT*

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## PRACTICE OF FREE GOVERNMENT

### *The Negation of Free Government Under the Confederation*

The situation under the Articles is depicted by Hamilton as "precarious."[146] The people of the United States have been "conducted . . . to the very brink of a precipice," and are about "to plunge . . . into the abyss."[147] The country has "reached almost the last stage of national humiliation."[148] This crisis Hamilton attributes to "material imperfections in our national system"[149] and he warns that "something is necessary to be done to rescue us from impending anarchy."[150] Hamilton elaborates: "Let the point of extreme depression to which our national dignity and credit have sunk; let the inconveniences felt everywhere from a lax and ill administration of government, let the revolt of a part of . . . North Carolina, the late menacing disturbances in Pennsylvania, and the actual insurrections and rebellions in Massachusetts, declare . . . !"[151] Due to democratic excesses in the states, anarchy is impending in so far as minority rights are disregarded by the majority of the debtor element. Owing to material imperfections of the national system,[152] the federal government, unable through its lack of power to provide for more than "a lax and ill administration," is in no position to check "domestic faction and insurrection."[153] It is unable to halt democratic insurrections occurring within the states and to prevent democratic despotism in the state legislatures.[154]

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* The first part of this article was published in the Spring Issue of the present volume of the Quarterly, 42 Cornell L.Q. 307 (1957). The article will form part of a comprehensive study of the Federalist papers which Professor Dietze intends to publish as a book next year. Occasional references to Madison in this article refer to opinions as expressed by the Virginian in the FEDERALIST.

† See Contributors Section, Masthead, p. 519, for biographical data.

146 The Federalist No. 85 at 570 (E. M. Earle ed. 1937) (hereinafter cited by number and page only, as 85, 570).

147 15, 88.

148 15, 87.

149 Ibid.

150 Ibid.

151 6, 33.

152 15, 87.

153 9, 47.

154 Like Madison, Hamilton considers the disadvantages of the non-separation of powers mainly as they exist in the states. This is not surprising in view of the fact that in a strict sense he denies the United States under the Articles the quality of a federal state with one government (15, 87), and thus logically precludes a separation of powers of that non-existent government. There can be no doubt, however, that the problem of the states, namely, too much democracy, is for him identical to that of the United States. The decline of "national

The rule of the legislatures is viewed by Hamilton with concern. Seeing them "tainted with the spirit of faction" and contaminated with "those occasional ill-humors, or temporary prejudices and propensities, which . . . beget injustice and oppressions of a part of the community,"[155] Hamilton complains of "those practices . . . of the State governments which have undermined the foundations of property and credit, have planted mutual distrust in the breasts of all classes of citizens, and have occasioned an almost universal prostration of morals."[156] Under the Articles, there exists in the states an oppressive rule of the debtors. Motivated by "momentary inclination or desire"[157] rather than by considerations of justice, they encroach upon the rights of the minority. Free Government is negated because the existence of too much democracy, in which "the pestilent breath of [the powerful debtor's] faction may poison the fountains of justice,"[158] constitutes a primacy of the participation before the protection principle.

For lack of power, the federal government is in no position to meet this situation with effective counter-measures. Having come into existence not through "a ratification by the PEOPLE" and "having no better foundation than the consent of the several legislatures, it has been exposed to frequent and intrinsic questions concerning the validity of its powers."[159] While the ghost of "the political monster, an *imperium in imperio*,"[160] hovered over the ratification of the Articles, it became a sad reality through their "radical vice . . . the principle of LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and contradistinguished from the INDIVIDUALS of which they consist."[161] With the states being sovereigu, "national disorder, poverty and insignificance" was as natural as the reduction of the federal government to "imbecility" and a "mimic sovereignty."[162] To Hamilton, the Confederation offered the "awful spectacle" of "a nation, without a national government."[163]

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dignity" is a consequence of "the revolt of . . . North Carolina, [and] the . . . insurrections . . . in Massachusetts" (6, 33). Similarly, as we shall see, the remedy for too much democracy in the states is a strong national government. When Hamilton speaks of the "material imperfections of our national system" (singular!) (15, 87), he has the same outlook to the problem of reform as Madison in his "Vices of the Political System of the United States."

155 27, 167.
156 85, 568.
157 27, 167.
158 81, 525.
159 22, 140-41.
160 15, 89.
161 Ibid.
162 15, 88.
163 85, 574. "We have neither troops, nor treasury, nor government" says Hamilton in 15, 87, continuing that the principle of legislation for states is "evidently incompatible with the idea of GOVERNMENT" (15, 90). Hamilton denies further that under the Articles there is

For the debtor element in the states, the weakness of the federal government meant clear sailing for their legislation inimical to property. "Usurpation may rear its crest in each state, and trample upon the liberties of the people, while the national government could legally do nothing more than behold its encroachments with indignation and regret. A successful faction may erect a tyranny on the ruins of order and law, while no succor could constitutionally be afforded by the Union to the friends and supporters of the government."[164] Reminding his countrymen of Shays's Rebellion, Hamilton emphasizes that the threat of democratic insurrections is not merely speculative and that the outcome of the convulsions in Massachusetts might have been different "if the malcontents had been headed by a Caesar or Cromwell."[165]

The damage done by democratic excesses within the particular state is not confined to that state. Domestic factions may not only endanger "the peace and liberty of the [other] States,"[166] but may lead to an overthrow of Free Government in other states by peaceful infiltration: "Who can predict what effect a despotism, established in Massachusetts, would have upon the liberties of New Hampshire or Rhode Island, of Connecticut or New York"?[167]

Like Madison, Hamilton sees the individual's rights threatened by democratic excesses in the states and wants Free Government secured by a guarantee by the federal government to protect the state constitutions.[168] Unlike Madison, Hamilton fears that factions in one state may cause trouble in other states rather than being absorbed and neutralized. Therefore, his remedy against factions is less a territorial power-balance and more a power-concentration in the national government.

Since to Hamilton the federal government under the Articles is so totally deficient in power that its quality as a government can be denied altogether, there exists "an absolute necessity for an entire change . . . of the system."[169] "Let us break the fatal charm which has too long seduced us from the paths of felicity and prosperity,"[170] Hamilton asks his countrymen, for "the evils we experience do not proceed from minute

a federal government, because the laws enacted by Congress have no sanction (15, 92; 21, 125-26).

164 21, 126.

165 21, 127.

166 9, 47.

167 21, 127.

168 Hamilton's conception of the union as a means to an end follows specifically from 1, 6, where he speaks of "the utility of the UNION to . . . prosperity," and from 20, 124, where he calls the union "the parent of tranquility, freedom, happiness." Of course the quality of the Union as a mere means follows logically from Hamilton's conception of government as a means.

169 23, 143.

170 15, 88-89.

or partial imperfections, but from fundamental errors in the structure of the building, which cannot be amended otherwise than by an alteration in the first principles and the main pillars of the fabric."[171] How far there was effected in the Constitution "an entire change" of the "radically vicious and unsound" system of the Articles of Confederation,[172] we shall now see.

*The Achievement of Free Government under the Constitution*

Free Government being an ideal, Hamilton concedes that the plan of the Convention is "a compound as well of the errors and prejudices, as of the sense and wisdom" of the delegates, "a compromise of . . . many dissimilar interests and inclinations." It "has no claim to absolute perfection."[173] Not expecting "to see a perfect work from imperfect man," Hamilton has praise for the Constitution: The system it establishes, "though it may not be perfect in every part, is, on the whole, a good one; it is the best that present views and circumstances of the country will permit."[174]

The "entire change"[175] that was effected by the Constitution consists in the creation of the Union. Not being ratified, as were the Articles, by the "several legislatures,"[176] but "by the PEOPLE" of America, irrespective of state boundaries,[177] it transforms a league under international law into a nation. More specifically, the "radical alterations" of the Articles mean to Hamilton the grant of "new and extensive powers . . . to the national head, and . . . a different organization of the federal government—a single body being an unsafe depository of such ample authorities."[178] The Constitution, while concentrating power in the federal head as a remedy against democratic tyranny in the states, diminishes the probability of too much democracy on the national level by deconcentrating power from Congress. The achievement of Free Government in the Constitution thus boils down to a restriction of popular government in favor of the protection of the individual's rights. It is brought about mainly by two factors: the slaying of the "political mon-

171 15, 89.
172 22, 140.
173 85, 570-71.
174 85, 570. See also 68, 441. It is interesting to note Hamilton's opinion on the Constitution at a later date, when on February 7, 1802, he wrote to Governor Morris: "Mine is an odd destiny. Perhaps no man . . . has sacrificed or done more for the present Constitution than myself; and contrary to all anticipations of its fate, as you know from the very beginning, I am still laboring to prop the frail and worthless fabric." 10 Works 425 (Fed. ed.).
175 22, 140; 23, 143.
176 21, 125.
177 22, 140.
178 84, 564.

ster of an *imperium in imperio*"[179] and the dethronement of an all-powerful national legislature.

Calling the principle of legislation for states, as recognized by the Articles, "the parent of anarchy,"[180] a power-concentration in the national government starts with the extension of "the laws of the federal government to the individual citizens of America."[181] If the federal government can act directly upon individuals, the *status quo ante* of an *imperium in imperio* is abolished since a state whose citizens are subject to another jurisdiction does not exercise *imperium*. The question as to the relation between the Union and the states is thus only one of the *degree* of consolidation, and its answer depends upon the *extent* of the powers that are granted to the federal government. Although Hamilton denies that under the Constitution there would be "an entire consolidation of the States into one complete national sovereignty" and gives the assurance that "the plan of the convention aims only at a partial . . . consolidation,"[182] the fact remains that, due to extensive grants of power to the national government, a consolidation exists to a high degree.

Hamilton's assurance that "the state governments . . . retain all the rights of sovereignty which they before had, and which were not . . . exclusively delegated to the United States,"[183] is a mere truism. If the states retain the powers not delegated, then the Union *has* all the powers that *were* given to it. In spite of his recognizing residuary powers in the states,[184] Hamilton emphasizes the high degree of power-concentration in the national government. He becomes the advocate of national power.

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179 15, 89.

180 16, 95. If in addition to this quotation one takes into account Hamilton's opinion that there existed, in a strict sense, no government for the Confederation, it admits of no doubt that Hamilton considered the States under the Articles as being in a state of nature, or anarchy. When on June 12, 1787, he said in the Federal Convention that "he denied the doctrine that the States were thrown into a state of nature" and "admitted that the States met now on an equal footing," he can have meant only that internally, i.e., within each state, there did not exist a state of nature. This, however, does not preclude the existence of such a state among the different commonwealths, i.e., a living together under (anarchic) international law. Mulford, in The Political Theories of Alexander Hamilton (1903), does not consider this distinction and thus comes to a wrong conclusion (p. 20).

181 23, 143. More elaborately, Hamilton says in 15, 91: "If we still adhere to the design of a national government, or, what is the same thing, of a superintending power . . . we must resolve to incorporate into our plan those ingredients which may be considered as forming the characteristic difference between a league and a government; we must extend the authority of the Union to the persons of the citizens,—the only proper objects of government." Whether he speaks of "the laws of the federal government" (23, 143) or of "the authority of the Union" (15, 91) it amounts to the same thing.

182 32, 194.

183 32, 194. "This exclusive delegation, or rather this alienation, of State sovereignty," he continues, "would only exist in three cases: where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally contradictory and repugnant." For a similar point of view, see 82, 534-35.

184 See essay 23; 17, 103.

Asserting his power-doctrine, Hamilton stresses one thing: If the national government possesses a certain power, this power is absolute and may be exercised with utmost rigor. "It is both unwise and dangerous to deny the federal government an unconfined authority, as to all those objects which are intrusted to its management."[185] We shall now consider the powers Hamilton wants to be invested in the national government. In this consideration we shall always be aware that, since the Union is regarded by Hamilton as a remedy against democratic excesses in the states, any grant of power to the national government must be viewed as a grant for the achievement of Free Government.

"The principal purposes to be answered by union" are "the common defence . . . ; the preservation of public peace . . . against internal convulsions . . . ; the regulation of commerce. . . ."[186] The powers necessary to meet the exigencies of the Union are thus closely connected with those more immediately concerned with the control of too much democracy. All of Hamilton's comments on the specific powers of the federal government reflect the *leitmotif* of power-concentration. This is evident when Hamilton, after showing the want of power to regulate commerce as one of the main defects in the federal government under the Articles[187] and after demonstrating the advantages of the Union to commerce in essay 11, emphasizes that the powers necessary for the common defense "ought to exist without limitation."[188] Dealing with the question whether fleets and armies are necessary for the common safety, he makes another assertion of national power: "The government of the Union must be empowered to pass all laws, and to make all regulations which have relation to them. The same must be the case in respect to commerce, and to every other matter to which its jurisdiction is permitted to extend."[189] A similar emphasis on national power can be found in Hamilton's chapters on taxation.[190] He holds the lack of taxing power in the federal government under the Articles responsible for the fact that "the government of the Union has gradually dwindled into a state of decay, approaching nearly to annihilation,"[191] and considers a strong federal taxing power as conducive to "the happiness of the people."[192] Seeing in "money . . . the vital principle of the body politic . . . which sustains its life and motion, and enables it to perform its most essential

185 23, 145.
186 23, 142.
187 22, 131.
188 23, 142.
189 23, 144. Hamilton does not deal in the FEDERALIST with most of the "other matters" under the jurisdiction of the federal government, which is done by Madison.
190 Essays 30-36.
191 30, 183.
192 Ibid.

functions,"[193] the author of the Report on Manufactures and advocate of a National Bank holds that "a complete power . . . to procure a regular and adequate supply of it . . . may be regarded as an indispensable ingredient in every constitution."[194] The federal government must, with regard to taxation, have "POWER . . . in proportion to its OBJECT," namely, public justice and credit.[195] It must be able to exercise its taxing power free from any control by the state governments, and give regard only "to the public good and the sense of the people."[196] Independence of the states will give to it "energy and stability, dignity or credit, confidence at home and respectability abroad," and enable it to fulfill "the purposes of its institution . . . the public happiness."[197]

Hamilton could have stated the purpose of power-delegation to the federal government in no clearer language. Power is concentrated in the Union for the existence of an energetic and stable government which provides for the individual's happiness by checking democratic excesses in the states. He pronounces this *doctrine of happiness through national power* in an even more direct language. Referring to the democratic convulsions in Pennsylvania and Massachusetts, Hamilton warns that a restriction of national power with respect to the establishment of an army in time of peace is not advisable, because an army is "essential to the security of the society from internal convulsions."[198] Hamilton trusts that "the citizens of America have too much discernment to be argued into anarchy" and that they are convinced that "greater energy of government is essential to the welfare and prosperity of the community."[199] "It is better to hazard the abuse" of power by the government "than to embarrass the government and endanger the public safety by impolitic restrictions on the legislative authority" of the nation.[200]

In view of Hamilton's assertion of national power with respect to the enumerated subjects, it is not surprising that in contradistinction to Madison[201] he sees, in the necessary and proper clause and the supremacy clause, nothing but declaratory norms. "The constitutional operation of the intended government would be precisely the same, if these clauses

193 30, 182.
194 Ibid.
195 30, 184-85.
196 31, 190.
197 30, 186.
198 25, 157-58.
199 26, 160.
200 Hamilton expresses his doctrine of happiness through national power clearly in 26, 159, where he speaks of "the happy mean which marks the salutary boundary between POWER and PRIVILEGE, and combines the energy of government with the security of private rights."
201 Speaking of the necessary and proper clause, Madison says that "without the substance of this power, the whole Constitution would be a dead letter" (44, 292); without the supremacy clause, the Constitution would "have been evidently and radically defective" (44, 295).

were entirely obliterated, as if they were repeated in every article. They are only declaratory of a truth which would have resulted by necessary and unavoidable implication from the very act of constituting a federal government, and vesting it with certain specified powers."[202] The necessary and proper clause, "though it may be chargeable with tautology or redundancy, is at least perfectly harmless."[203] It was written into the Constitution only because the Convention foresaw the tendency of the state governments to "sap the foundations of the Union"; the convention did not want, with respect to "so cardinal a point," as that of national power, "to leave anything to construction."[204] The supremacy clause is "a truth which flows immediately and necessarily from the institution of a federal government."[205] Since "a LAW, by the very meaning of the term, includes supremacy," the laws which the national government may enact "pursuant to the powers intrusted to it by its constitution must necessarily be supreme" over the states "and the individuals of whom they are composed."[206]

Even in view of Hamilton's strong assertion of national power it would be wrong to suppose that he favors an absolute absorption of the states by the Union. Emphasizing again and again the competency of the state governments,[207] he leaves no doubt that "if the federal government should overpass the just boundaries of its authority and make tyrannical use of its powers, the people, whose creature it is, must appeal to the standard they have formed [in the federal pact] and take such measures to redress the injury done to the Constitution."[208] In spite of all his recognition of state power, unavoidable for an advocate of a federal state, there can,

202 33, 199.

203 33, 200.

204 Ibid. Hamilton's conception of the clause can be seen in two interpretations, both of which contain strong assertions of national power. On the one hand, one may argumentum a majori ad minus argue that if the power to pass all "laws necessary and proper, etc." is included in each specific power of the federal government anyway, even if there was no necessary and proper clause, this must be the case even more so, if there is such a clause. The clause would then become an ingredient of each specific power-grant to the federal government. On the other hand, one may simply say that the clause contains a reassertion of powers that have already been asserted in the enumerated leges speciales. It would then have the quality of a reminder of existing national power. In both cases the clause does not lose its merely declaratory character. It is interesting to note that another advocate of national power, Marshall, accepted in McCulloch v. Maryland, Madison's, rather than Hamilton's, conception of the clause by considering it as constitutive and not as declaratory. Had Marshall considered the clause as merely declaratory, he could have made an even stronger argument for national power.

205 33, 202.

206 33, 201. Connected with Hamilton's Austinian conception of law, this quotation boils down to the proposition "national law througb national power," which means nothing else than "justice through national power" or "happiness through national power." For the connection for Hamilton between law, justice, and happiness, see supra, 42 Cornell L.Q. 311 (1957).

207 For instance, in 17, 103; 26, 163; 27, 169; 28, 174; 31, 191; 32, 193; 32, 194; 33, 202; 34, 208; 59, 386; 81, 530; 82, 535; 84, 562.

208 33, 200.

however, be no doubt that Hamilton is above all an advocate of national power. The passage just quoted further precludes us from thinking that Hamilton's advocacy of federal power as a remedy against too much democracy makes him an opponent to popular government as such. A believer in Free Government, he is opposed to democracy only to the degree that the protection of the individual requires. He is happy that the Constitution will rest "on the solid basis of the CONSENT OF THE PEOPLE," that "the streams of national power . . . flow immediately from that pure, original fountain of all legitimate authority."[209] He praises "the conformity of the proposed Constitution to the true principles of republican government"[210] because it provides for the exercise of the national legislative power by the representatives of the people, for an indirect election of the executive[211] and other officials[212] by the people.[213] Furthermore, and this shows that Hamilton had no leanings toward monarchy or aristocracy, he praises the Constitution for containing that "cornerstone of republican government,"[214] namely, a prohibition of titles of nobility. When Hamilton further calls the people "the natural guardians of the Constitution"[215] and admits their right to amend or abolish it "by some solemn and authoritative act,"[216] he clearly states his belief in popular government.

The control of democratic excesses in the states through the national government[217] does not necessarily preclude such excesses on the national level. Hamilton is careful to stress that the Federal Convention has taken precaution against danger from that end. The Constitution, while territorially concentrating power in the nation, institutionally deconcentrates power from the department most liable to democratic excesses, namely, Congress. Two other departments are made powerful instead: the Judiciary and Executive.

With a view toward creating a judiciary that would act as a balance against Congress, the Convention provided for the independence of the

209 22, 141.
210 1, 6.
211 Essay 68.
212 Essays 76, 77, 78.
213 In his Brief of Argument on the Constitution of 1788, Hamilton says that the United States under the Constitution is "a representative democracy. 1. House of representatives directly chosen by the people. . . . 2. Senate indirectly chosen by them. . . . 3. President indirectly chosen by them. . . . Thus legislative and executive representatives of the people. 4. Judicial power, representatives of the people indirectly chosen. . . . 5. All officers indirect choice of the people." 2 Works 464 (Hamilton ed.).
214 84, 557.
215 16, 100.
216 78, 509.
217 For Hamilton, "the control of democratic excesses" is nearly identical to "the control of faction," i.e., the control of an overbearing majority, mainly composed of debtors. He considers the Union as a remedy against "domestic faction and convulsions" (6, 27), a "barrier against domestic faction and insurrection" (9, 47). Similar, 85, 568.

courts. Hamilton opposes vesting the supreme judicial power in a *part* of the legislative body because this would verge upon a violation of that "excellent rule," the separation of powers.[218] Besides, due to the propensity of legislative bodies to party division, there is "reason to fear that the pestilent breath of faction may poison the fountains of justice."[219] Hamilton therefore praises the Constitution for establishing courts that are separated from Congress. He is pleased to note that to this organizational independence there is added a financial independence.[220]

Another factor contributing to the independence of the judiciary is the judges' right to hold office during good behavior. It is in connection with his advocacy of that "excellent barrier to the encroachments and oppressions of the representative body,"[221] or "citadel of the public justice"[222] that Hamilton pronounces judicial review as being part of the Constitution. It is another barrier against too much democracy. Exercised by state courts before the Federal Convention met,[223] and taken for granted by the members of the Convention[224] as well as by the ratifying conventions in the states,[225] judicial review is expounded by Hamilton as a *doctrine*.[226] What Corwin calls the progress of constitutional theory between the Declaration of Independence and the meeting of the Philadelphia Convention[227] reaches climax and conclusion in essay 78.

Starting with the premise that "a constitution is, in fact, and must be regarded by the judges, as a fundamental law,"[228] we may assume that

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218 81, 524.
219 81, 525.
220 Essay 79.
221 78, 503.
222 78, 505.
223 For what Corwin calls "alleged precedents for judicial review, antedating the Convention of 1787," see The Doctrine of Judicial Review 71-75 (1914).
224 Definitely asserting a right of judicial review in the Federal Convention were: Gerry and King of Massachusetts; Wilson and Gouverneur Morris of Pennsylvania; Martin of Maryland; Madison and Mason of Virginia; Dickinson of Delaware; Rutledge and Charles Pinckney of South Carolina; Williamson of North Carolina; Sherman of Connecticut. (See Farrand, Records etc. (1911): I, 97 (Gerry); 100 (King); II, 73 (Wilson); 76 (Martin); 78 (Mason); 299 (Dickinson and Morris); 428 (Rutledge); 248 (Pinckney); 376 (Williamson); 28 (Sherman); 93 (Madison); III, 220 (Martin in "Genuine Information").
225 Judicial review was dealt with in the Pennsylvania convention by Wilson (Elliot, Debates, 1836 ed., II, 417, 454); also by Ellsworth in the New York convention, ibid., 336-37; in the North Carolina convention that did not ratify, loc. cit., IV, 87, 93, 94, 152, 165, 167, 192; in Massachusetts, Samuel Adams referred to judicial review, loc. cit., II, 142; and so did other speakers, ibid., 97-98; 100-06; 110-11; 138; 154; 167; 171-74. In the Virginia convention judicial review was alluded to by Henry, loc. cit., III, 182, 309; Randolph, ibid., 197, 208, 431; Pendleton, ibid., 287, 498; Nicholas, ibid., 409; Mason, ibid., 441; Madison, ibid., 484-85; Marshall, ibid., 503; Granger, ibid., 514. For the opinion that the courts under the Constitution could not declare an act of Congress void, see loc. cit., I, 545; II, 314-15; 318, 321-22; IV, 175.
226 78, 505.
227 American Historical Review, vol. XXX (1924-25), pp. 511 ff.
228 78, 506.

Hamilton means a constitution providing for Free Government.[229] Judicial review is, for Hamilton, a means of preserving that constitution, and, thereby, Free Government. To be more concrete, he considers the independence of the judiciary as a "barrier to the encroachments and oppressions of the representative body"[230] and "the citadel of the public justice,"[231] i.e., the citadel for the protection of the individual's life, liberty and property. Hamilton states that judicial review means a curb on the legislature's encroachments upon individual rights. Parallel to every denial of legislative power in essay 78 thus goes an assertion of vested rights.[232]

Hamilton's statement that the power of the courts to prevent encroachments upon individual rights *de lege ferenda* and *de lege lata*[233] does not mean that the judiciary is superior to the legislature, because "the power of the people is superior to both,"[234] can only appear, to a superficial reader, as a denial of the superiority of the courts over Congress. Actually it says no more than that both judiciary and legislature are inferior

229 This assumption is justified by Hamilton's theory according to which individuals, when leaving the state of nature, conclude the constitutional compact in order to be protected in their rights by a government in which they may participate, i.e., in order to live under Free Government. On the other hand, it follows from essay 78.

230 78, 503.

231 78, 505.

232 As if he wanted to leave no doubt about the fact that judicial review means to him mainly a means for the preservation of the primacy of the protection principle before the participation principle (Free Government), Hamilton, whenever he speaks of the necessity of independent courts and judicial review, is careful to mention both the restriction of the legislature and the ensuing protection of individual rights closely together, in order to keep the reader aware of the fact that he wants the legislature restricted by the judiciary for the protection of vested rights. In 78, 505 he says, for instance, in one paragraph: "Independence of the courts is . . . essential in a limited Constitution . . . which contains certain specified exceptions to the legislative authority; such . . . as that it shall pass no bills of attainder, no ex-post-facto laws and the like [i.e., other acts directed against vested rights]. Limitations of this kind can be preserved in practice only through the medium of the courts of justice, whose duty it must be to declare all acts contrary to the . . . Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing." Similarly, he says in another passage that the "independence of the judges is . . . requisite to guard the Constitution and the rights of individuals from the effects of those ill humors (in the legislature), which . . . have a tendency . . . to occasion . . . serious oppressions of the minor party" (78, 508). In 78, 509 Hamilton calls the judges the "faithful guardians of the Constitution" against "legislative invasions of it, . . . instigated by the major voice of the community." Since he speaks of a constitution providing for the protection of the individual's rights, the concomitance of legislative restrictions and the protection of individual rights is given. So it is a few lines below, where Hamilton calls "the independence of the judges . . . an essential safeguard against . . . the injury of the private rights of particular classes of citizens by unjust and partial laws" (78, 509). In a clear polemic against too much democracy in the state legislatures Hamilton says that "the benefits of the integrity and moderation of the judiciary have already been felt in more states than one; and though they may have displeased those whose sinister expectations [one need think here only of the debtors hoping to be freed from their obligations through legislation impairing the obligation of contracts] they may have disappointed, they must have commanded the esteem and applause of all the virtuous [creditors insisting on their rightfully acquired rights from contracts!] and disinterested [who believe, from considerations of abstract justice, in the principle 'pacta sunt servanda'] (78, 510)."

233 78, 509.

234 78, 506.

to the people. This, however, by no means implies that the judiciary may not be superior to the legislature, or vice versa. Hamilton leaves no doubt that to him the courts are superior to Congress when he confers on the courts the status of "an intermediate body between the people and the legislature" with the function "to keep the latter within the limits assigned to their authority."[235] If the people are superior to the legislature and the courts stand *between* the people and the legislature, they must be as superior to the legislature as they are inferior to the people. Without that superiority, they would be in no position to keep the legislative body "within the limits assigned to their authority." In essay 78 Hamilton enthrones the courts over Congress. His statement that "the judiciary is beyond comparison the weakest of the three departments of power"[236] has only the purpose of lulling the suspicions of the democratic element against the conservative judges. It does not detract from the powerful position that the judiciary has under the Constitution.

Although he considers a power-concentration in the legislature the "DEFINITION OF DESPOTISM," Hamilton does not perceive a strong judiciary as a threat to Free Government. He admits that "individual oppression may now and then proceed from the courts," but is emphatic in adding that "the general liberty of the people can never be endangered from that quarter."[237] With the judges who "unite . . . integrity with . . . knowledge,"[238] power is in good hands. As the "bulwarks of a limited Constitution against legislative encroachments,"[239] they will use that power for the protection of the individual's rights rather than for an infringement upon those rights.

Through judicial review vested rights are not only protected from the legislature. They are also protected from the executive. An executive act which is sanctioned by the courts and, since it is the *duty* of the judges to declare legislative acts contrary to the Constitution void,[240] which is thus in conformity with the will of the people as it is laid down in the Constitution, cannot be an act of oppression. Consequently, a power-concentration in the executive does no harm to the protection of individual rights. On the contrary, it is conducive to Free Government. Considering "energy in the Executive a leading character in the definition of good government, essential . . . to the steady administration of the laws [that are sanctioned by the courts!] . . . ,"[241] Hamilton praises the

235 Ibid.
236 78, 504.
237 Ibid.
238 78, 511.
239 78, 508.
240 78, 509.
241 70, 454.

Constitution for creating a powerful executive by providing for its unity,[242] duration[243] and adequate support[244] and by fitting it out with extensive powers.[245]

Concluding, we may say that the Constitution creates Free Government by providing, while fundamentally accepting popular government, for a remedy as well as for a preventive against democratic excesses. That remedy is supplied by a concentration of power in the national government. While accepting the federal character of the new state, the Constitution eliminates the *imperium in imperio*. The preventive against democratic excesses consists in a deconcentration of power from Congress, by giving the courts the power of judicial review and by concentrating power in the executive. The concomitance of a territorial concentration of power in the national government and, as it is, mainly in the legislature, and the institutional deconcentration of power from that department is by no means contradictory. Too much democracy, being abolished in the states through a power-concentration in the national Congress is prevented from occurring on the national level through power-deconcentration from Congress by judicial review.[246]

Since Free Government will exist in the Union that is established by the Constitution, let us see what, according to Hamilton's FEDERALIST, is the nature of the Union, let us see what is the "basis" of "happiness" of the American people.[247] Where Madison leaves an ambiguity, Hamilton asserts unequivocally his nationalistic doctrine. Brushing aside Madison's distinction between a ratification given by the people "as individuals . . . composing the distinct and independent states to which they respectively belong" and one given by the people "as individuals composing one entire nation"[248] as "a distinction, more subtle than accurate,"[249] Hamilton takes the wind from the states righters' sails by

242 No. 70.
243 Nos. 71, 72.
244 No. 73.
245 Nos. 74-77.
246 When Corwin (The Doctrine of Judicial Review, p. 66) says that those who denied the power of judicial review under the Constitution on the grounds that the "necessary and proper" clause rendered "Congress' power . . . practically unlimited" could base their claim "especially" on Hamilton's essay 33, he creates the impression that what Hamilton says in that essay is in contradiction to what he says in essay 78. This is far from being the case. Essay 33, containing a strong assertion of national legislative power (as a remedy against democratic excesses on the state level), and essay 78 are, if viewed as advocating features of the new Constitution that are conducive to Free Government (and this view is, due to the fact that Hamilton wants to prove in the FEDERALIST the conduciveness of the Constitution to Free Government, all that counts) absolutely in harmony with each other. Both written from an identical motive, namely, distrust of absolute democracy, advocate what for Hamilton are the two main features of the Constitution that make for Free Government, namely, national power and judicial review. (See 84, 564)
247 84, 564.
248 39, 246.
249 9, 51.

emphasizing that the Union is made indissoluble through the very act of its creation. Considering it a "gross heresy . . . to maintain" that a state would have, even if the Union came into existence by a compact between the States, "a right to revoke that compact," Hamilton precludes such a possibility by stressing that the Union will "rest on the solid basis of THE CONSENT OF THE PEOPLE" of America,[250] irrespective of state boundaries.[251] With "the streams of national power" flowing "immediately from that pure, original fountain of all legitimate authority,"[252] the people, the strength of the Union is deeply rooted. It seems only natural when, continuing in the nationalistic vein, Hamilton praises the Constitution for providing that the acts of the national government will take effect directly upon individuals, resulting in the slaying of the political monster, *imperium in imperio,* and for granting extensive powers to the national government.

Hamilton admits that "the compacts which are to embrace thirteen distinct states in a common bond of amity and union must . . . necessarily be a compromise of as many dissimilar interests and inclinations."[253] He leaves no doubt as to the nature of that compromise. In contrast to the great compromiser, Madison, he, the nationalist, states clearly that the Constitution, although aiming "only at a partial . . . consolidation,"[254] creates a consolidation sufficient to preclude any doubt that the new Union would be indissoluble and perpetual, one state, a nation. It will possess *all* the powers "which were . . . delegated to the United States."[255] The law creating the Union will "rest on the solid basis of THE CONSENT OF THE PEOPLE."[256] An advocate for a powerful

250 22, 141.

251 Hamilton considers society as an intrastate phenomenon and there does not exist for him, under the Articles, one American state. Therefore, from a juristic point of view, it is illogical of him to assert that the Constitution would be ratified by the American people, because that people comes only into existence with the creation of the American state, i.e., through ratification of the Constitution. Before the act of ratification, there existed only different peoples of the different states, and not one people of the nation. However, the term "people" was at that time not always used in that strictly legal sense because the language of the jurist is not always that of the people. Since Patrick Henry said in 1774 that:

> the distinctions between Virginians, Pennsylvanians, New Yorkers and New Englanders are no more. I am not a Virginian, but an American. . . . All distinctions are thrown down. All America is thrown into one mass (Edmund Burnett, Letters of the Members of the Continental Congress, vol. I, pp. 14-15 (1921)),

the idea of one American people had become more and more accepted so that Hamilton could even speak in the FEDERALIST of "the citizens of America" (84, 564). Since, if anything, citizenship strictly pertains to one particular state, this was a very strong assertion of the one-people idea indeed, even before the Constitution was adopted. See, for the whole problem, Alpheus T. Mason, "The Nature of Our Federal Union Reconsidered," 55 Pol. Sci. Q. 502 ff. (1940).

252 22, 141.

253 85, 571.

254 32, 194.

255 Ibid.

256 22, 141.

national government as early as 1780,[257] Hamilton draws a picture of the Union that could prove of great value to his successor in the nationalist line, John Marshall.[258]

The Constitution is not only "framed upon calculations of existing exigencies, but upon a combination of these with the probable exigencies of ages, according to the natural and tried course of human affairs."[259] Hamilton's statement that "nothing . . . can be more fallacious than to infer the extent of any power, proper to lodge in the national government, from an estimate of its immediate necessities,"[260] gives a green light signal to the future champions of nationalism. It lays the foundation for assertions of national power by the Supreme Court, ranging—if we consider only the application of the commerce clause—from Marshall's decision in *Gibbons v. Ogden* to that of Justice Black in *United States v. Eastern Underwriters Association*;[261] from the opinion in the *Shreveport* case to that in the *Darby* case.[262] When Justice Holmes later doubts whether the framers of the Constitution could have "completely" foreseen the development of a mere "organism" into a "nation,"[263] we may reply that for Hamilton that nation already came into being *de jure* and *de facto* with the ratification of the Constitution. Emphasizing in the FEDER-

257 To James Duane, Hamilton wrote on September 3, 1780, that "the fundamental defect (of the Confederation) is want of power in Congress." He denied then, however, that Congress might assert and exercise power adequate to the national exigencies, because this seemed to him "too bold and expedient." 1 Works 213 (Fed. ed.).

258 Compare Marshall's statements in McCulloch v. Maryland, referred to supra., p. 508, n. 204. In the same decision, Marshall said:

> It has been said, that the people had already surrendered their powers to the State sovereignties and had nothing more to give. But surely, the question whether they may assume and modify the powers granted to government does not remain to be settled in this country. Much more might the legitimacy of the General Government be doubted, had it been created by the States. The powers delegated to the State sovereignties were to be exercised by themselves. . . . The Government of the Union, then . . . is, emphatically, and truly, a government of the people. In form and substance it emanates from them." 4 Wheat. 316, 403-04.

259 34, 204.

260 34, 204-05.

261 Gibbons v. Ogden (9 Wheat. 1) was decided in 1824, the Underwriters Case in 1944 (322 U.S. 533). Between these two cases, one can trace the development toward a greater and greater assertion of national power in the following cases: Pensacola Tel. Co. v. Western Union Tel. Co., 96 U.S. 1 (1877); Western Union Tel. Co. v. Pendleton, 122 U.S. 347 (1887); Covington Bridge Co. v. Kentucky, 154 U.S. 204 (1894); International Text Book Co. v. Pigg, 217 U.S. 91 (1910); Western Union Tel. Co. v. Foster, 247 U.S. 105 (1918); Federal Radio Commission v. Nelson Bros., 289 U.S. 266 (1933); Electric Bond and Share Co. v. SEC, 303 U.S. 419 (1938).

262 The Shreveport Case (234 U.S. 342) was decided in 1914, and the Darby Case (312 U.S. 100) in 1941. Compare also, concerning the Transportation Act of 1920, Wisconsin v. C. B. & Q. R.R. Co., 257 U.S. 563 (1920).

263 In Missouri v. Holland, 252 U.S. 416 (1920), Holmes says on p. 433:

> When we are dealing with words that are also a constituent act, like the Constitution of the United States, we must realize that they (the framers) have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope, that they had created an organism; it has taken a century and cost their successors much sweat and blood to prove that they created a nation.

ALIST that the new state would be more than just an "organism" from the very beginning, Hamilton is not concerned with the question of how an "organism" could become a nation, but rather how the existing nation could become a more perfect Union, the state we know today. This development, of course, he could not "completely" foresee. Nevertheless, he saw the growing strength with a rare insight: "Let the thirteen States, bound together in a strict and indissoluble Union, concur in erecting one great American system, superior to the control of all transatlantic force and influence, and able to dictate the terms of the connection between the old and the new world!"[264]

The law creating the Union survived—as was hoped and foreseen by Hamilton—the generation by which it was framed and adopted. Created "for posterity as well as ourselves,"[265] the Constitution outlived the transformation of an agrarian into an industrial society, the continuous struggle between economic theories such as paternalism and *laissez-faire*.[266] It saw conservative and liberal courts come and go. It never lost what is attributed to it by Hamilton in the FEDERALIST, namely, its quality of an embodiment of Free Government.

## CONCLUSION

The concept of Free Government, involving the co-existence of protection for individual rights and popular participation in government combined with the primacy of the former against the latter, may be considered as central to Hamilton's FEDERALIST. Belief in Free Government, thus defined, implies two things. First, the rejection of any form of non-popular government, such as monarchy or aristocracy.[267] Secondly, the rejection of any form of popular government under which the individual's or the minority's rights are not protected, such as tyrannic majority rule, or democratic despotism.[268]

In the years preceding the adoption of the Constitution, the United States was hardly confronted with an alternative—popular government or monarchy. The decision in favor of the former had been made as early as 1776. The question was, rather, to what degree majority rule, which

264 11, 69.
265 34, 208.
266 Compare Justice Holmes' dissent in Lochner v. New York, 198 U.S. 45 (1905).
267 Hamilton expressed concern rather than approval with respect to monarchical tendencies in a letter to Colonel Wadsworth of Aug. 20, 1787, 9 Works 422 (Fed. ed.). On May 26, 1792, Hamilton wrote to Edward Carrington:

> I am told that serious apprehensions are disseminated in your state as to the existence of a monarchical party meditating the destruction of State and republican government. If it is possible that so absurd an idea can gain ground, it is necessary that it should be combated. Id. at 532.

268 See supra, p. 91 n.2 (See 42 Cornell L.Q. 307 n.2 (1957)).

had proved oppressive in various states, should, for the sake of the individual, be restricted.[269] Hamilton saw the solution of this problem of "the critical period of American history"[270] in the creation of a more perfect Union and the institution of judicial review. An increase of national power was conceived to be necessary mainly for quelling democratic despotism in the states. Judicial review, on the other hand, was thought to have the function primarily of preventing sheer majority rule on the national level.

Today, two hundred years after his birth, we commemorate Alexander Hamilton, the builder of the nation. The more perfect Union of his time has developed into a powerful state, due, to a large degree, to the acceptance of Hamilton's interpretation of the Constitution in the FEDERALIST. But since Hamilton advocated the Union in order to secure Free Government, the question seems imperative whether, with Union and national power, there also exists Free Government. It might be going too far to answer this question in the negative. Most Americans harbor no doubts that theirs is a Free Government. On the other hand, some wonder whether the increase of national power was matched by an increased protection of individual and minority rights. Others complain even of democratic despotism.[271]

In the opinion of this writer, there exists a present danger to Free Government which must be pointed out, since it is not clear to many. In 1913, the Boston Brahmin, whose 25th anniversary of retirement from the Supreme Court we celebrate simultaneously with the bicentennial of Hamilton's birth, made a statement that contains a seed which grew into a serious challenge to Free Government. "I do not think," he remarked, "that the United States would come to an end if we lost our power to declare an Act of Congress void."[272] In essence, Holmes' words amount to a sanction of sheer majority rule on the national level, and are thus diametrically opposed to the Hamiltonian concept of Free Government. They caused alarm among the believers in that concept, and the "switch in time that saved nine" confirmed their fears. Ever since the Court's capitulation of 1937, it has undergone a decline in prestige.[273] The will

269 Compare, in this connection, Benjamin Rush's statement in his address to the people of the United States:

> In our opposition to monarchy, we forgot that the temple of tyranny has two doors. We bolted one of them by proper restraints: but we left the other open, by neglecting to guard against the effects of our own ignorance and licentiousness.

The address was made shortly before the meeting of the Federal Convention, Niles, Principles and Acts of the Revolution, 402 (1822).

270 This is the title of the book by John Fiske, first published in 1888.

271 Compare Desvernine, Democratic Despotism (1936).

272 Address of Feb. 15, 1913, Harvard Law School Ass'n of New York, in Oliver Wendell Holmes, Collected Legal Papers, 295-96 (1920).

273 See Swisher, "The Supreme Court—Need for Re-evaluation," 40 Va. L. Rev. 837 (1954).

of the Congressional majority seems to dominate the court. Has the traditional Cult of the Robe[274] been replaced by the modern cult of the democratic vogue?

It is significant that Holmes, in the passage quoted, considers the possibility of an end of the United States only and omits any thought of the destruction of freedom. But in the American tradition, every form of government, be it Union or majority rule, is just a means for the protection of the individual. It is not an end in itself. It is this idea that was brought out clearly and beautifully by Hamilton in the FEDERALIST. And when, today, we celebrate the two hundredth anniversary of the birth of the builder of the Nation, we should be aware that he wanted that Nation to be strong for the protection of individual rights, and also think of Alexander Hamilton, as the advocate of Free Government.

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274 The term "Cult of the Robe" was first used by Jerome Frank as a title of an article in Saturday Review of Literature, Oct. 13, 1945, p. 12.