The Federalist

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Published by Johns Hopkins University Press


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Conclusion
In the preceding pages, the main purpose has been not to interpret, but to analyze, the Federalist. Too much interpreting is being done these days, with a view to adjusting classic thought to modern use. Stimulating and interesting as interpretations may be, they are also fraught with danger. Often they are unobjective enough to justify questions about scholarship. In this time of rapid change, we should keep in mind that not everything new is necessarily also true.

Attempts have been made in recent decades to reinterpret the formative period of American history. Charles A. Beard's economic interpretation of the Constitution, adjusting a great era to the designs and desires of his progressive contemporaries,¹ was by no means the respectable scholarship with which it has been credited by those who liked the Beardian doctrine and used it for their own purposes.² The so-called liberal school continued the process of adjusting interpretation, but their very use of the word "liberalism" was sympto-

¹ See Adair, "The Tenth Federalist Revisited," loc. cit.
² See ibid.; Brown, op. cit.; Forrest McDonald, We the People (1958); B. F. Wright, op. cit., 17 ff.
matic of the hypocrisy of their method, for during the formative period liberalism meant anything but a protagonism of the welfare state. Later, when the new type of liberalism became more and more suspect, a need was felt for a new, more palatable name. The "New Conservatism" was created. Needless to say, that conservatism is as much new as it is not true, a defense of the New Freedom and the New Deal, but by no means of conservatism! The two-hundredth anniversary of Hamilton's birth appeared like a culmination of the trend toward adjusting interpretation. Whereas in previous decades liberal authors had been content with denying that Alexander Hamilton was a great American because he did not share their liberal views, they now attempted to show Hamilton as a new conservative, who put the interests of the nation above those of the individual and who, after all, was not opposed to the government's interference with the freedom of the individual.

In the present study of the Federalist, the interpretative method has been rejected in favor of the analytical one, on the assumption that the authors' own interpretation of the Constitution should not be altered. It has not been intended to provide startling news that would please most readers but simply to show what stands written in the Federalist in black and white. Although this approach might not be as challenging and interesting as a more subjective one, the method seems justified not only because the values of the Federalist are timeless and important for this generation, but also because these values seem in danger of being forgotten.

I

1. What are these values? It has been shown in the preceding chapter that the Federalist broadened the orthodox concept of federalism by maintaining that federalism was a means not only to achieve peace and security, but also to guarantee the protection of the in-

3 Woodrow Wilson, while admitting that Hamilton was a great man, denied him the privilege of being considered a great American, because presumably "he did not think in terms of American life." The New Freedom (1913), 47.
5 See supra, pp. 31 ff.
dividual from the government. To insure that protection in a democratic society even further, the *Federalist* introduced the doctrine of judicial review. These two contributions to the science of federalism and popular government point to the values of the work.

To begin, it may be said that justice, meaning the protection of the rights of the individual, occupies a superior place. The authors conceived of these rights as being part of human freedom as one entity. This is not surprising. In the Declaration of Independence as well as in the various state constitutions, the protection of property and the free use thereof was mentioned in one breath with such rights as freedom of worship, freedom of the press, and other civil rights. Quite naturally, the authors of the *Federalist* did not discriminate between economic and noneconomic rights. They by no means suggested that the latter were superior to the former, feeling that all of them were ingredient parts of the freedom of the individual. As a matter of fact, it appears as if the Papers are actually more concerned with the protection of property than any other right. This may be due to the fact that at that time property was more under attack and that, consequently, a greater need was felt to stress its sacrosanctity. Perhaps also the authors, who shared the political ideals of John Adams, recognized a more fundamental value of property. At any rate, the rights of property rated for them at least as high as the other rights of the individual.

2. For the sake of freedom, the authors advocated a popular government that promised to guarantee a high degree of the protection of the individual, a government that was characterized by both spatial and institutional divisions of power. Unlike thinkers of previous generations, they felt that federalism had more to offer than merely security from foreign powers and peace among the federating states, being also a means for the protection of the freedom of the

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6 For the thesis that the guarantee of human rights is a consequence of previous oppression and the ensuing fight against such oppression, see Georg Jellinek, *Die Erklärung der Menschen- und Bürgerrechte* (1895).

7 Beloff, op. cit., lxii.

8 In *Defence of the Constitutions of Government of the United States of America*, John Adams wrote: "Property is surely a right of mankind as really as liberty. . . . The moment the idea is admitted into society, that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence." Charles Francis Adams, ed., *The Works of John Adams* (1850-56), vi, 8-9.
individual from governmental interference. The separation of powers was conceived to serve similar aims. Again for the protection of the individual, an important American contribution to constitutional democracy was elaborated in the *Federalist* as the doctrine of judicial review.

3. The function of federalism to secure the freedom of the individual was acknowledged to exist on a broad scale. In the *Federalist*, the more perfect Union is, of course, advocated primarily as a means for the prevention of oppressions by the state governments. But this emphasis is probably a mere accident, due to the fact that at the time the Papers were written, the citizens were oppressed by the legislatures of the states and not by Congress, because the latter was in no position to do so. Nowhere in the *Federalist* do we find a remark to the effect that the national government exercises an exclusive and absolute role in protecting the individual's rights. On the contrary, nothing appears as absolute as freedom itself. Therefore, federalism is conceived to serve as a means for the protection of the individual as much from the national government as from the state governments. In a word, the states are as much of a potential protector of the individual from the national government, as the national government is a protector of the individual from the states. This means that, should the national government become oppressive, the Constitution could be as much invoked against the actions of that government as it can be used against similar behavior by the states. The *Federalist* is a polemic against oppressive government in general and is directed as much against a majoritarianism on the national, as on the state, level. As a matter of fact, we may ask whether, *a fortiori*, Hamilton, Madison, and Jay, individualists as they were, might not have been much more afraid of the former than of the latter.

Federalism, conceived to be a prerequisite for the protection of the individual in a democratic society, is created by the Constitution and preserved by the interpreters of that law, the judges. The authors, aware of the contractual nature of the federal union and the probability of federal problems, advocate that the function of umpiring controversies arising from the complex of federalism should be vested in the body most likely to be impartial, the judiciary. Both state and national governments being of the popular type, the function of the judiciary to iron out federal issues amounts largely to the function of checking democracy, or the will of the majority, as reflected in the political branches of government. Again, the power
The Federalist—Values and Prospects

The discovery of the New World has been the outstanding event of modern history. When we ask what the major contribution of the New World to our civilization has been, we may answer that it lies in the field of government, or political science. The Americans were not only the first to emancipate themselves from the Old World. They were also the first to establish a popular republican government that worked. In doing so, they made an important contribution to modern constitutionalism. Not only did they lead the way in guaranteeing the individual's freedom by bills of rights, but they also recognized the dangers of centralization and majoritarianism. At an early stage in their democratic experiment, the Americans succeeded in solving the major problem of democracy and decided to what degree the majority, while ruling, should be checked for the sake of minority rights. The *Federalist* gives the classic exposition of the importance of individual freedom and the important devices for protecting it, such as federalism and judicial review. This raises the question whether the ideals of Hamilton, Jay, and Madison were realized and to what degree they are still part of today's form of government. While we can reply to the former question in the affirmative, the latter question cannot be answered so easily. It should not be overlooked that the beliefs of the *Federalist* are about to become simply ideals, which correspond less and less to an actually existing situation.

The first consideration should be what happened to the authors' concept of free government. As was mentioned before, they conceived of free government as that form of popular government under which the democratic principle of popular participation in government, while accepted, was a mere means, inferior to the liberal principle of the protection of the individual, as the end. It appears doubtful whether this concept is still accepted today. American government is still called a "free government," but many people feel that too serious a shift has taken place in the relative importance of the participation and protection principles to justify speaking of an

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9 See supra, pp. 279 ff.
10 See Jellinek, op. cit.
actual existence of the ideas of the *Federalist*. In an effort to secure the protection of the individual from the ruling majority, Chancellor Kent, fearful lest the people, conscious of their power to govern, might get intoxicated with that power, and, making laws for their own sovereign pleasure only, might interfere with the rights of the minority, warned of an extension of suffrage to those who had no property. His statement, “there is no retrograde step in the rear of democracy,” admitted the inevitable end of free government, as understood by the authors of the *Federalist*. If there is no retrograde step in the rear of democracy, the participation principle, i.e., democratic rule, must grow until it has relegated the idea of the protection of the individual from a primary to a secondary position, until the conditions the Constitution was designed to prevent are reinstated, until there exists a democratic despotism under which the majority may trample upon the rights of the minority at discretion. While the very fact of the adoption of the Constitution proves the untenability of Chancellor Kent’s statement, his warning was justified. Ever since the Constitution was ratified, there has taken place, through the extension of suffrage, an increasing acceptance of mere majority rule and Rousseauistic philosophy. Freedom has become more and more considered to be the right to participate in government, rather than the right to be protected from the government, i.e., an individualistic concept of liberty has been largely replaced by a commune one.

One of the consequences of this shift was a different evaluation of the individual’s freedom from the government itself. That freedom, which for the authors of the *Federalist* had constituted a unity, became the victim of an increased atomization, which the nominalism inherent in popular government created in quite a few other fields. Discrimination was now made against the rights of property. The influx of poor European immigrants, who came to this country mainly for material gain, increased those Americans who considered an equal distribution of property more important than the sanctity of property. Property, which in the *Federalist* had been on a

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12 Compare Jacob Burckhardt, WELTGESCHICHTE Betrachtungen (Kaegi, ed., 1941), 279. Sharing Ranke’s doubts as to the value of the sovereignty of the people, Burckhardt felt that the French Revolution, which “considered itself the symbol of freedom,” was actually “as fundamentally unfree as a forest fire.”

13 Compare Raoul E. Desvernine, DEMOCRATIC DESPOTISM (1936).
par with, if not superior to, the noneconomic rights of the individual, now became considered a right of second order.

Thus changes have occurred during the past decades that have challenged the very substance of the Federalist's concept of free government. It may be added that what appeared to the authors as major means for the existence of freedom, federalism and judicial review, experienced a similar decline, which is not surprising in view of the fundamental shift from a primacy of individual protection to one of majority rule.

2. As to federalism, there has been a trend toward nationalism ever since the adoption of the Constitution. The power of the federal government has been continually increased at the cost of that of the states. This development was given a good start by one of America's great chief justices, John Marshall. Nationalists have exploited this fact, as well as Hamilton's nationalistic interpretation of the Constitution in the Federalist, to further their own designs. However, their version is actually a contortion of both Hamilton's and Marshall's concepts of nationalism. National power was for Hamilton by no means an end in itself, but was a mere means for securing the happiness of the individual, of which the protection of property constituted a prominent part. This is no different in the case of Marshall. It should not be overlooked that the man who brought forth the doctrine of implied powers\footnote{McCulloch v. Maryland, 4 Wheaton 316 (1819).} and started the nationalistic interpretation of the commerce clause\footnote{Gibbons v. Ogden, 9 Wheaton 1 (1824).} did so only after having established in judicial review an effective means for securing individual rights\footnote{Marbury v. Madison, 1 Cranch 137 (1803).} and after having stressed the sacrosanctity of property.\footnote{Fletcher v. Peck, 6 Cranch 87 (1810).} For Marshall also the more perfect Union was nothing but a means for the protection of the freedom of the individual. He strictly followed Hamilton's doctrine of "happiness through national power," brought forth in the Federalist, and did not transcend that doctrine by favoring national power at the cost of individual rights.

We have doubts whether this can be said of more recent exponents of the nationalist doctrine. Ever since the problem of the nature of the Union was resolved on the battlefield, nationalism has come to be considered an end in itself. Hamilton's doctrine in the
Federalist was misunderstood as often as it was invoked. The advocate of free government appeared more and more as an advocate of nationalism.\textsuperscript{18} The dangers of this development were hardly recognized.\textsuperscript{19} The nationalists' cause was enhanced when, after the beginning of the twentieth century, the United States emerged as a world power. The emergencies of World War I, the Great Depression, World War II, and the Cold War also contributed to a promotion of their designs. The trend away from federalism, however, was not due only to the factors just mentioned. Another cause that should not be overlooked was the broadening of democracy. When democracy became increasingly Rousseauistic in character, the general will of the nation gained in importance, to the detriment of the rights of the states. American federalism became replaced more and more by a federal melting pot, which absorbed and majorized the states.

The Supreme Court, umpire over the constitutional balance between national power and states' rights, did not halt this development. It was silent on the protection of states' rights in the period immediately following the Civil War.\textsuperscript{20} Though later invoking the doctrine of dual federalism,\textsuperscript{21} and showing some awareness of the necessity of checking infringements upon the states' rights, it did not harness the general trend toward nationalism. This brings us to the other institution contributed by the Americans to modern constitutionalism, judicial review.

\textsuperscript{18} See Adair, "The Authorship of the Disputed Federalist Papers," \textit{loc. cit.}, 111 ff. It is admitted that Hamilton was much more of a nationalist, when writing the \textit{Federalist}, as was Madison, and that he became even more of a nationalist in his later years. Still, nationalism remained for him always a means for the advantage of the individual. It was never an end in itself. See Dietze, "Hamilton's Concept of Free Government," \textit{loc. cit.}.

\textsuperscript{19} Before the Civil War, outstanding treatises warned of the dangers of centralization. See John Taylor's last books, \textit{Construction Constrained, and Constitutions Vindicated} (1820), \textit{Tyranny Unmasked} (1822), \textit{New Views of the Constitution} (1823). The classic work is John C. Calhoun, \textit{A Disquisition on Government} (1853). Another one of Calhoun's important contributions in this respect is \textit{A Discourse on the Constitution and Government of the United States} (1853). It is surprising that after the Civil War, no comparable works came forth. See, however, the recent study by Felix Morley, \textit{Freedom and Federalism} (1959).

\textsuperscript{20} First steps toward a recognition of states' rights were taken in the Slaughter-horse Cases, 16 Wallace 36 (1873), United States v. Cruikshank, 92 U.S. 542 (1876), and the Civil Rights Cases, 109 U.S. 3 (1883).

\textsuperscript{21} For this doctrine, see Alfred H. Kelly and Winfred A. Harbison, \textit{The American Constitution—Its Origins and Development} (1948), 683 ff., 738 ff, 786 ff. On p. 787, it is stated that "'dual federalism' is apparently dead and beyond revival."
3. With federalism as a means for the protection of the individual, the increasing elimination of the rights of the states was fraught with danger. Still it is conceivable, though unlikely, that the judges, while neglecting their duty to preserve the rights of the states, would have balanced that neglect by a very conscious exercise of judicial review over acts of the national government. But the judges failed to do so. Whereas the Supreme Court, throughout the nineteenth and the early decades of the twentieth centuries, was indeed that "citadel of public justice," functioning as the "excellent barrier to the encroachment and oppressions of the representative body" that Hamilton wished it to be, and that "stronghold and ... battery" from which Jefferson thought "all the works" of egalitarian democracy would be "beaten down and erased," it seems no longer to deserve these attributes. During the last decades the Supreme Court showed great reluctance to declare Acts of Congress unconstitutional. Of course, this reluctance does not in itself imply the disappearance of judicial review as a governmental practice. American constitutional history has known a period longer than a mere quarter of a century in which the constitutionality of national laws was not contested by the Supreme Court. Nevertheless, recent developments indicate changes that warrant apprehensions concerning the very survival of judicial review as an institution. Throughout the years from Marbury v. Madison to Dred Scott, the acquiescence of the judiciary in acts of Congress implied a recognition of neither legislative supremacy nor majoritarianism, in spite of the fact that this was the epoch of the great debates that saw Congress at the apex of its prestige, and witnessed a substantial progress of democracy through the broadening of suffrage. The rigorous exercise of judicial review in the years after the Civil War did not come as a surprise. Rather, it seems to have been a corollary to the further increase of egalitarian democracy. Today, judicial acquiescence in

22 78, 503; 78, 505.
25 There was a considerably longer lapse of time between Marbury v. Madison (1803) and the Dred Scott decision (1857).
26 It was during this very period that the great jurists Joseph Story, James Kent, and Thomas M. Cooley advocated judicial review along the same lines as Chief Justice Marshall. Compare Story, op. cit., i, 344 ff., 382 ff.; iii, 425 ff. (It is significant that Story dedicated his work to Marshall.) Kent, op. cit., i, 295; Cooley, Constitutional Limitations (1868).
27 From 1789 to 1864, the Supreme Court declared an act of Congress void in
congressional fiat must, by contrast, appear as the arrival of legislative supremacy. The Supreme Court seems to have abdicated its former position as the guardian of the individual’s freedom with its capitulation before the American volonté générale in 1937.

This abdication can be attributed, in the main, to factors that are the result of the march of egalitarian democracy and the adjustment of juridical thinking to this march. Ever since the last decades of the past century, the ranks of those Americans who considered themselves underprivileged and believed in unrestricted majority rule have been swelled, as Justice Lurton complained, by the “great influx of an enormous mass of immigrants . . . wholly unfamiliar with the American constitutional idea . . .,” people who increased “the number of those voters who object to any restraint upon the will of the majority . . .,” people who, arriving from nations which rejected judicial review, considered the “power to annul a law as the usurpation of legislative authority.” These currents that attacked the very institution of judicial review, culminating in the New Deal.

An opposition to judicial review by the majority of the people or by the political departments of government, no matter how vehement, does not necessarily amount to a disappearance of that institution. American history furnishes ample proof of this. As long as only two cases. From 1864 to 1885 in sixteen, from 1886 to 1906 in twelve, from 1906 to 1924 in twenty-three, and from 1924 to 1935 in seventeen cases. During the first seventy-five years of the Court’s existence national judicial review was exercised only twice, whereas in the following seventy-one years this was done as often as sixty-eight times.


These currents were expressed, for instance, in Theodore Roosevelt’s Square Deal. It is interesting to note that Roosevelt led the Bull Moose Party in a campaign that included a demand for the recall of judicial decisions. In 1912, he stated: “I contend that the people, in the nature of things must be better judges of what is the preponderant opinion than the Court, and that the Courts should not be allowed to reverse the political philosophy of the people.” Roosevelt, “The Right of the People to Rule,” OUTLOOK (March 23, 1912), 620. Compare in this connection the answers by Elihu Root, “The Importance of an Independent Judiciary,” THE INDEPENDENT (1912), LXXII, 704, and William Howard Taft, POPULAR GOVERNMENT (1913), 163.

For a few examples of animosity toward judicial action, compare the comments of various American presidents: Jefferson’s letter to W. H. Torrance of June 11, 1815, JEFFERSON’S WRITINGS, XIV, 302-6; Jackson’s veto of the Bank of the United States, in J. D. Richardson, comp., COMPI LATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS (1869-99), II, 582; Lincoln’s attitude toward the Dred
The Federa list- Value s and Prospect s

no constitutional amendments prohibited its exercise, there could be no doubt that judicial review did exist, provided it was not renounced by the judges themselves. As a matter of fact, the Supreme Court seemed for quite some time little impressed by the growing tendency toward majoritarianism and legislative supremacy. A considerably greater number of congressional statutes or parts thereof were found to be unconstitutional during the first thirty-five years of the present century, than in the same period preceding it.31 The very threat of a potential growth of legislative majoritarianism seemed to stimulate the judiciary to stop legislative ambitions.32 Stability was secured by testing what were conceivably acts of a majoritarian passion for their compatibility with the Constitution and those principles of the older law that were considered part of the American constitutional order.33 But this general attitude of the Court was, in the end, challenged by the legal profession itself. There came about a new form of juridical thinking that was ideally suited to the march of egalitarian democracy. Stimulated by contemporary developmentalist and pragmatist philosophy that considered stability an impossible—even an undesirable—condition and elevated the concept of change into a principle of social theory,34 sociological jurisprudence questioned the Court's skeptical attitude toward legislative fiat and, thereby, the institution of judicial review itself.

Oliver Wendell Holmes stated as early as 1881 that the law "should correspond with the actual feelings and demands of the community, whether right or wrong."35 Three years later, he said: "Everyone instinctively recognizes that in these days the justification of a law for us cannot be found in the fact that our fathers always have followed it. It must be found in some help which the law


31 See supra, page 343, note 27.

32 Indeed, it seems justified to speak here of reaction and counter-reaction and the rule that dangers of legislative majoritarianism are being matched by tendencies toward a more rigorous exercise of judicial review. Such a rule would, of course, correspond to what was originally conceived to be the function of judicial review, namely, the restriction of the legislature representing the popular majority to within the limits set by superior constitutional and extraconstitutional law.

33 For the fact that too much and too fast a lawmaking may lead to legal insecurity, compare Madison's statement at 62, 406. Hamilton made similar comments in the Federalist. 27, 167 and 85, 568.

34 Fred V. Cahill, JUDICIAL LEGISLATION (1952), 21-31.

35 Oliver Wendell Holmes, THE COMMON LAW (1881), 41-42.
brings toward reaching a social end which the governing power of
the community has made up its mind it wants." The necessity of a
law which reflected the mutability of social conditions was thus
linked up with a rejection of older law. Law was to be purged of
"every word of moral significance," i.e., of a priori higher law
standards. To make things complete, Holmes argued against judicial
review. In his famous dissent in Lochner v. New York, he main-
tained "the right of the majority to embody their opinions in law,"
and cautioned the Court about its exercise of judicial review. In
1913, the Boston Brahmin used a more direct language. "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." This
meant that the Constitution and the older and higher law were ir-
relevant if they conflicted with the wishes of the majority as reflected
in the acts of Congress. Here was a revolutionary concept of Amer-
ican government indeed. The supremacy of the American volonté
générale was now recognized.

Sociological jurisprudence has had a great impact upon constitu-
tional development in the United States. In a way, Holmes came to
occupy in great measure the position of official judicial philosopher

36 Oliver Wendell Holmes, "The Law in Science and Science in Law," COLLECTED
LEGAL PAPERS (1920), 225. Compare also his statement, made in 1897: "It is revol-
ting to have no better reason for a rule of law than that so it was laid down
in the time of Henry IV. It is still more revolting if the grounds upon which it
was laid down have vanished long since, and the rule simply persists from blind

37 "I often doubt whether it would not be a gain if every word of moral signifi-
cance could be banished from the law altogether, and other words adopted
which should convey legal ideas uncolored by anything outside the law. We
should lose the fossil records of a good deal of history and the majesty got from
ethical associations, but by ridding ourselves of an unnecessary confusion we
should gain very much in the clearness of our thought." Quoted in Harold R.
McKinnon, "The Secret of Mr. Justice Holmes: An Analysis," AMERICAN BAR
ASSOCIATION JOURNAL (1950), xxxvi, 264.

39 "Law and the Court," COLLECTED LEGAL PAPERS (1920), 295-96.
40 For Holmes' derisive attitude toward the Court's testing of legislative acts
for their compatibility with older and higher law, see his dissent in Baldwin v.
Missouri, 281 U.S. 586, 595 (1930), where he complains that one can see "hardly
any limit but the sky" to the invalidation of legislative acts "if they happen to
strike a majority of the Court as for any reason undesirable." The common law
was for Holmes "not a brooding omnipresence in the sky but the articulate
voice of some sovereign or quasi-sovereign that can be identified." Southern
Pacific Co. v. Jensen, 244 U.S. 205, 222 (1917).
for the modern age. He can be considered not only "the starting point for almost all recent American legal writers," but also the judge who brought about the fundamental shift in the attitude of the Supreme Court toward judicial review. His philosophy, originally confined to a small minority of the Court, advanced as consistently within that body as did the idea of absolute democracy with the American people. In the middle 1920's, the famous minority of Holmes and Brandeis was strengthened by Stone. By the middle of the 1930's the minority favoring the Court's acceptance of New Deal legislation had increased to four judges. Finally, in 1937 the Court, faced with the threat of Roosevelt's court-packing plan, submitted to the demands of the popular majority. The "Cult of the Robe" was replaced by a cult of the popular vogue. A landmark of American constitutionalism, the Court's traditional policy of protecting "the rights of the minor party" from "the superior force of an interested and overbearing majority" through the invalidation of legislative fiat irrespective of the reaction of the other branches of government and the general public, had come to an end. It is one of the principles of limited democracy that majoritarian tendencies should be matched by an increased exercise of judicial review. Consequently, one would have expected that throughout the New Deal the judiciary would continue to meet an increased majoritarian challenge with an increased activity in the exercise of judicial review. Instead, weakened by a judicial philosophy that bore the mark of majoritarian democracy and was complementary to rather than preventive of a democratic despotism, the Supreme Court capitulated.

Nothing the Court did in the ensuing years could minimize the importance of that capitulation, the decisive feature of which was the abandonment by the Court of the individual to the dangers of majoritarian oppression. The Court, it is true, set out on an ambitious program to protect noneconomic civil rights. In approaching these cases, the judges, often invoking older and natural law, have tended to assume that statutes regulating such rights are unconstitutional. While in almost all instances the regulatory measures were the product of local and state legislation, the Court did not refrain

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41 Cahill, op. cit., 32.
42 This term was first used by Jerome Frank as the title of an article which appeared in the Saturday Review of Literature on Oct. 13, 1945, 12.
43 10, 54.
44 Compare Desvernine, op. cit.
from exercising judicial review over national legislation. The recent decision in the citizenship case is indeed a refreshing reminder of the Court's tradition.\footnote{Trop v. Dulles, 356 U.S. 86 (1958).} Still, for the time being, it is hardly more. It does not conceal the decline of judicial review in the United States. Aside from the reluctance of the Court to face a nationwide unpopularity by challenging acts of Congress as distinguished from state and local legislation, it is open to doubt whether the Court's attitude actually amounts to a challenge of majoritarianism. Occasional invalidations of statutes that merely regulate noneconomic rights are not likely to make the Court too unpopular, as long as the judges refrain from invalidating laws that restrict the activities of economic minorities. But throughout American history, it has appeared to be the very essence of judicial review that it has been exercised \emph{in spite of} popular disapproval and irrespective of whether it was criticized by economic or noneconomic groups. Therefore, it is hard to believe that judicial review is emerging from its period of decline as long as the Court has not demonstrated its willingness to face unpopularity by challenging legislative action also for the sake of economic rights. The different evaluation of noneconomic and economic rights appears to be arbitrary.\footnote{See Earl Latham, "The Majoritarian Dilemma in the United States Supreme Court," CONFLUENCE (No. 4, 1953), 22.} It is absurd to maintain that the right to picket is more important than the right to work. There is, aside from the Four Freedoms, a Fifth Freedom.\footnote{Herbert Hoover, "The Fifth Freedom," an address of 1941, in ADDRESSES UPON THE AMERICAN ROAD: WORLD WAR II, 1941-1945 (1946), 222.} Of course the latter occupies the position of a numerical minority vis-à-vis its four brethren. But this is a symbol of importance rather than irrelevance. It should not be overlooked that the juxtaposition to the Four Freedoms may be interpreted to mean that from a qualitative point of view the Fifth Freedom is as important as the Four Freedoms taken together and thus more important than any one of the four. The only explanation for the judges' acquiescence in legislation harmful to the rights of economic minorities can be the fact that they believe in legislative supremacy and majoritarianism.

III

1. The arrival in the United States of majoritarianism and the ensuing decline of the institutions America contributed to modern
constitutionalism does not detract from the importance of the *Federalist* for our own day. The values of the work still stand, a constant reminder of a great past. Sooner or later they might again be appreciated. This might help to spare the United States the fate of the European nations that learned their lessons about absolute democracy the hard way.

The plight of continental democracies and their final collapse can be attributed largely to the acceptance of the ideas of the French Revolution. Although the dangers of these ideas were realized at a rather early stage by a few sages, the great mass believed in the righteousness of French thought. That thought was different from that of the American Revolution and its concluding document, the Constitution. It advocated the very concepts the authors of the *Federalist* sought to fight, absolute democracy combined with legislative supremacy and centralization.

In America, the idea of limited democracy, which was started in 1776, after some absolutist aberrations under the Articles of Confederation became consolidated with the ratification of the Constitution. Higher, natural, and common law principles with their inherent protection of the rights of the individual strongly influenced the Founders. The Constitution was largely a transmutation of these principles into written norms and by no means, as Gladstone would have it, "struck off at a given moment." The Founding Fathers were aware of the fallibility of human reason. They considered the Constitution good, but not perfect. The situation was quite different in France. Whereas the Americans had refused to reject the old order completely, the French revolutionaries favored a total break. The absolutism of the *ancien régime* was replaced by a new absolutism, that of the people, the nation. Having discovered their own divinity, the people felt that their will, as embodied in constitutions written by themselves, was the very embodiment of reason. The belief in the infallibility of the national *volonté générale* had inescapable conse-

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48 In spite of all attempts to restore the *ancien régime*, the vision of Kant came true: The French Revolution, having "discovered in human nature . . . an ability to improvement," was "a phenomenon in human history" which was "never forgotten." Immanuel Kant, *Der Streit der Fakultäten in drei Abschnitten* (1798), vii, 400. As to the hypnosis deriving from French codifications under Napoleon I, see Dietze, "America and Europe—Decline and Emergence of Judicial Review," *loc. cit.*, 1249 ff.

49 For instance, Jacob Burckhardt, Friedrich Nietzsche, and José Ortega y Gasset.

60 See *supra.*, p. 3, note 1.
quences. There was room neither for a check upon the nation, in the form of federalism, nor for a check upon the representatives of the nation, the legislature, in the form of judicial review, the national legislature having become the constituent power itself.

The existence of absolute democracy, combined with centralization and legislative supremacy, became characteristic not only of the constitutional development in France, but also of that of other countries, such as Italy and Germany.\footnote{The German Rechtsstaat (classic definition in Friedrich Julius Stahl, Die Staatslehre und die Prinzipien des Staatsrechts [3rd ed., 1856], 137), implying the rule of legislative acts, was taken over by the Italians. See Carmelo Carista, "Ventura e avventure di una formula: Rechtsstaat," Rivista di diritto pubblico (1984), xxvi, 388. The unification of Italy resulted in the creation of a unitary state that became highly centralized under Mussolini. Imperial Germany was succeeded by the unitary state of the Weimar Republic, and the latter, by the centralized Third Reich.} It had ill effects in all these nations. The concept of legality more and more superseded that of legitimacy.\footnote{The distinction between legality and legitimacy was recognized by Lamennais as early as 1829. It is interesting to note that already at that time the connection between legislative majoritarianism and centralization was seen by a few Frenchmen, de Tocqueville being one of them. It was felt that the development of the law in France, characterized by a transformation of right into statutory legality, amounted to nothing but a means for a progressive centralization. See Carl Schmitt, Die Lage der europäischen Rechtswissenschaft (1950), 31.} Everything the legislature did was accepted at face value. The question of legitimacy was no longer raised. A government of laws was replaced by a mere government of statutes.\footnote{The words of the French jurist Bugnet, "Je ne connais pas de droit civil; je n'enseigne que le Code Napoléon" (quoted in Julien Bonnecase, École de l'exégèse en droit civil [2nd ed., 1924], 128), are characteristic of this development. The term Rechtsstaat (state of right) proved more and more to be a misnomer, since it degenerated more and more into a mere Gesetzesstaat.} A wrong of the state, of the legislative majority, came to be considered a contradiction in terms.\footnote{Hans Kelsen, Hauptprobleme der Staatsrechtslehre (1923), 249. It is realized, of course, that Kelsen's dictum could, from the point of view of his theory of law, not be different and did not necessarily amount to a denial of ethical values. Nevertheless, it afforded despotic rulers a means for demanding obedience from their subjects, including the jurists, and was, therefore, not unlikely to have dangerous consequences. It appears indeed ironical that Kelsen should have been one of the first to feel the injustice (the "wrong of the state" that could not exist according to his theory) of the Hitler regime.} Few thinkers warned of this trend. They were not able to stem the tide and halt disaster. Mussolini, Hitler, and Pétain came to power under the legality of existing democratic
constitutions. Backed by a positivism that had developed as the inevitable result of the blind acceptance of the principle *vox populi vox dei*, the new Caesars were able to eliminate the freedom of the individual. Absolute democracy convicted itself.

This brought forth a definite reaction. Having become aware of the danger inherent in majoritarianism, the Europeans came to realize that there were values higher than those of the general will and acknowledged the necessity of limitations upon democracy. The *Federalist*'s ideal of free government was now appreciated, as were the institutions proposed by Hamilton, Madison, and Jay for the realization of that ideal, federalism and judicial review.

2. The constitutional development in postwar Europe was characterized by federal trends. Even France, with its tradition of centralized government, was not free from them. As a reaction against centralization, which, especially under the Vichy regime, had proved to be detrimental to freedom, the Fourth Republic changed the prefectural system. Although the prefect remained the representative of the national government, he was to yield his place as the chief executive of the department to that local district's own elected officials. The process of decentralization was further advanced under the Fifth Republic, when the communes were strengthened and the probability of an oppressive national government decreased. In Italy, the trend toward decentralization was even stronger than in France, taking the form of regionalism. Not content with just re-

Mussolini was appointed Prime Minister by the King on Oct. 30, 1922, and obtained a 306 to 116 vote of confidence in the Chamber on Nov. 18. A week later, the Chamber granted him plenary powers by a vote of 275 to 90. Hitler was appointed Chancellor by President Hindenburg on Jan. 30, 1933, and got plenary powers through the Enabling Act of March 24 by the comfortable majority of 441 to 94. (No votes were cast by 81 communists and 26 socialists, who were imprisoned or in hiding.) Pétain received plenary powers from the regularly constituted assembly on July 10, 1940, by a vote of 569 to 80. Even if the communists, who were not present at the vote, had voted against this act, it would have passed with a comfortable majority.


creating the rights of communes and provinces as they existed prior to the fascist regime, the Italians set up new territorial subdivisions that roughly correspond to the old historic states of the Apennine peninsula, the regions. The latter were given a substantial degree of independence and autonomy.\textsuperscript{58} The Germans went still further. Having learned under the third Reich the disadvantages of centralization to the rights of the individual, they not only re-instituted a unitary state with strong federal features after the pattern of the Weimar Republic, but they established a genuine federal state. Federalism was considered so important that it was put beyond the reach of the amending power and elevated to a superior principle of the Basic Law.\textsuperscript{59}

3. The general trend toward federalism was matched by one favoring judicial review.\textsuperscript{60} Even France, with its strong tradition of legislative supremacy, took steps in that direction. Judicial review, which had been advocated by a small minority of jurists ever since World War I, was officially instituted a generation later. Although the Fourth Republic still showed a certain reluctance in establishing that institution in a strong fashion, the Fifth Republic corrected that shortcoming.\textsuperscript{61} In the Italian Republic, a Constitutional Court possesses far-reaching powers of judicial review. That court, originally believed to be not too effective as a means for checking the political branches of government, soon proved to be a bulwark of individual freedom from governmental encroachment.\textsuperscript{62} In Germany, judicial review had already been exercised during the Weimar period, though it was not officially established at that time. Of course, its existence was out of the question under the Hitler regime. However, once this regime had been defeated, judicial review was enthusiastically instituted on both the state and national levels.

\textsuperscript{58} This applies especially to the so-called "autonomous" regions (Sicily, Sardinia, Valle d’Aosta, Trento-Alto Adige and Friuli Venezia), which, due to their geographic position and minority problems, were permitted an especially high degree of self-government. Compare Roberto Lucifredi, \textit{LA NUOVA COSTITUZIONE ITALIANA} (1952), 240 ff.; Ferruccio Pergolesi, \textit{Diritto costituzionale} (1955), 400 ff.

\textsuperscript{59} Art. 79 of the Basic Law.


\textsuperscript{61} Under Articles 56-63 of the present constitution, an effective form of judicial review is established.

\textsuperscript{62} See David Farrelly, "The Italian Constitutional Court," \textit{Italian Quarterly} (1957), 1, 50; Carlo Esposito, \textit{La costituzione italiana} (1954), 263 ff.
During the past fifteen years it has proved an effective means for the protection of freedom. German courts even broadened the orthodox concept of judicial review, maintaining that not only statutes and decrees, but also constitutional provisions themselves, may be incompatible with the principles of higher and natural law as embodied in the constitution. Aside from the acts of government, those of the constituent power, the people themselves, were subjected to review. A far step from the dogma that the voice of the people is the voice of God!

4. The recognition by the Europeans of not merely one, but of both the outstanding American contributions to modern constitutionalism is hardly surprising. Having experienced the most dangerous combination of centralized power and majoritarianism, they saw in decentralization and control of the political branches of government complementary means for the protection of freedom. In the middle of the twentieth century, the old continent at last became convinced of the important truths proclaimed by the new world's great classic and recognized the value of American political institutions for individual liberty. The idea of an American mission for the world had gained substantial confirmation. But strangely enough, this new development in Europe took place at a time when both federalism and judicial review were undergoing a decline in the very country where they were first adopted, the United States. This trend is as paradoxical as it is dangerous, and ought to be halted before it is too late. It is true, as the authors of the Federalist claimed, that an absence of federalism and judicial review is likely to spell despotism, be it that of the national government, or that of an oppressive majority, or, worst but most probable of all, that of a combination of both. There exists in this country a present danger of centralization and majoritarianism that, since it does not seem to be clear to many, ought to be pointed out. Such a warning will be unpopular in twentieth-century America. Still, I feel I can advance it, having experienced the disastrous consequences of centralized nationalism and the idea that right is what is useful for the people. That idea is as democratic as it was destructive of freedom under

the new Caesars that came to power with popular sanction. I am unable to share the prevalent blind belief in the infallibility of popular government. There is no reason to trust human nature more today than did Hamilton, Madison, and Jay when they advocated the Constitution. And there is as little ground for abandoning the safeguards against human frailty that the Founding Fathers established for the sake of freedom.

With this note of warning I conclude. There has been too much talk these past years about what should be done in order to make the world safe for democracy, without serious thought about the meaning of that term. Also of concern should be the question of where popular government in America has gone and what type of democracy is being advocated. The foregoing may sound rather pessimistic. One could, of course, share the optimism fashionable today and enjoy the security that goes with being part of the crowd. This appears, at least on the surface, to be the way of the easy life. But this public philosophy is fraught with danger. Once we become members of the mass, we lose our identity and with it our quality as human beings. For a very dubious security we would have to give up our liberty, and this is too high a price to pay for something that results from human shortcomings rather than from humane thinking. Our pessimism is thus anything else but defeatism. At a time when justifications are found for everything people are doing, when the pursuit of happiness is said to mean the meager and shallow welfare of the masses rather than the freedom of the individual, we feel the need for expressing our belief in Hamilton's, Madison's, and Jay's concept of liberty, by emphasizing the values of the Federalist, American classic on federalism and free government.