2009

Publius for All of Us. Book Review Of: The Story of the Federalist: How Hamilton and Madison Reconceived America. by Dan T. Coenen

Brannon P. Denning

Book Reviews

PUBLIUS FOR ALL OF US

THE STORY OF *THE FEDERALIST*: HOW HAMILTON AND MADISON RECONCEIVED AMERICA. By Dan T. Coenen.[1] Twelve Tables Press. 2007. Pp. xi + 406. $28.95 paper.

Brannon P. Denning[2]

The eighty-five essays written by Alexander Hamilton and James Madison (with an assist from John Jay)—known collectively as *The Federalist*—have attained canonical status among the documents of the Founding Era. And yet for all of the ink spilled recently over the Founders and the Framing Era, little recent attention has been given to *The Federalist* itself. One of the most famous popular commentaries on *The Federalist*, Garry Wills's *Explaining America*, is over twenty-five years old. Other treatments are either older or geared towards the specialist.[3] That gap in the literature makes Dan Coenen's *The Story of* The Federalist particularly timely.[4]

Contrary to what one might think by reading the title, Coenen has not simply written a narrative telling the story of how Madison, Hamilton, and Jay came to write the papers, or the role that the papers played (or didn't play) in the

1. University Professor and Harmon W. Caldwell Chair in Constitutional Law, University of Georgia School of Law.

2. Professor and Director of Faculty Development, Cumberland School of Law, Samford University. Thanks to Dan Coenen for a careful reading of a prior draft.

3. *See, e.g.*, DAVID F. EPSTEIN, THE POLITICAL THEORY OF *THE FEDERALIST* (1984); GOTTFRIED DIETZ, THE FEDERALIST: A CLASSIC ON FEDERALISM AND FREE GOVERNMENT (1960); MORTON WHITE, PHILOSOPHY, *THE FEDERALIST*, AND THE CONSTITUTION (1987); GARRY WILLS, EXPLAINING AMERICA: THE FEDERALIST (1981).

4. Michael I. Meyerson has recently published *Liberty's Blueprint: How Madison and Hamilton Wrote the Federalist Papers, Defined the Constitution, and Made Democracy Safe for the World* (2008), which argues, among other things, that *The Federalist* had an enormous impact on the success of the ratification effort.

Constitution's eventual ratification. That story is included, but sandwiched in between Coenen's account of the essays' writing and publication is a rich and accessible introduction to *The Federalist*'s political thought.

Foremost among the book's strengths is Coenen's deft organization. A lover of mercy, Coenen does not frog march readers through each of *The Federalist*'s eighty-five essays. Instead, he organizes his book into five parts: Parts I and V tell the story of *The Federalist*'s origin and execution, along with its role in the ratification of the Constitution and its lasting impact on constitutional law and American political thought. Sandwiched in between, however, is an analysis of the work itself. Part II explains the rhetorical style of the essays.[5] Part III describes *The Federalist*'s case for change, which was not as obvious to all as it was to the Constitution's prominent backers. Part IV then takes up *The Federalist*'s brief for the new government the Constitution had created.

I.

In the Preface, Coenen offers an explanation for the lack of interest in *The Federalist* relative to the enormous interest shown over the last ten years in the Framers themselves and in Framing-era history. "There are just too many obstacles," he writes, "the coverage of technical topics, an unfamiliar literary style, allusions to then-current but now-forgotten events, the length of the work, its density and detail" (p. ix). His intention, then, is to situate the papers in context and tell their story, as well as "lay out the central messages of *The Federalist* in a readable fashion" and "consider how the papers matter today" (p. x). His hope, he writes, is "to pique interest in the papers," and to encourage people to read the original (p. xi).

He begins with the origins of the essays. Troubled by the prospects for the Constitution's ratification in New York, Hamilton sought a seat at New York's ratifying convention, and then embarked on a writing campaign to produce a comprehensive set of essays favoring ratification. After several prominent persons turned him down, James Madison, in town for a session of the Confederation Congress, agreed to

5. This part draws on Dan T. Coenen, *A Rhetoric for Ratification: The Argument of* The Federalist *and Its Impact on Constitutional Interpretation*, 56 DUKE L.J. 469 (2006).

collaborate, as did John Jay (p. 5). Illness forced Jay to bow out, leaving this unlikely pair—the volatile, confident Hamilton and the shy, bookish Madison—with the laboring oar. And labor they did. Hamilton's *Federalist No. 1* appeared on October 27, 1787, with Jay's *Federalist No. 2* appearing three days later; Madison's first, *Federalist No. 10*, appeared a little less than a month after Hamilton's on November 22, 1787 (pp. 8, 13). The last of the eighty-five essays appeared an astonishing seven months after the first, on May 28, 1788.[6] "[T]he pace of production was breathtaking. Altogether, the essayists pumped out over 190,000 words, more than three essays per week, and almost 2,300 words per essay" (p. 16). Initially published in one of several local papers, "[e]ach of the essays, after its initial printing, appeared in at least one additional newspaper; many appeared in all four," though publication outside New York was "limited" (pp. 17, 18).

Hamilton and Madison had little time to consult with one another on each other's essays (p. 15), and thus Coenen notes that it is "not surprising that some historians have reported the discovery of internal dissonance, if not outright schizophrenia, in the pages of *The Federalist*" (p. 21). Others have stressed how *similar* the papers are, and how consistent over the course of the essays. Coenen stresses the consistency of "Publius"[7] rather than emphasizing any "schizophrenia" (p. 22). Moreover, he follows many historians in attributing authorship of the "disputed" papers to Madison instead of Hamilton (p. 22). Hamilton and Madison were to go their separate ways politically after their historic collaboration, but the quantity and quality of the essays produced continue to command our respect.[8]

II.

Having identified an "unfamiliar literary style" (p. ix) as one of the barriers to contemporary appreciation of *The Federalist*, it

6. Most know that Jay produced only a few essays. Coenen writes that illness was the primary reason. Jay did return to contribute the *Federalist No. 64*, his fifth, in March of 1788, but "[a] month later, the unlucky statesman was hit in the head with a brick during a street riot" and was unable to contribute any more essays (p. 14, footnote omitted).

7. "Publius" was the pen name used in the essays (p. 5).

8. For those keeping score, even with Madison being awarded authorship of the disputed papers, "Hamilton's contribution was preponderant. The New Yorker produced 51 essays, spread over 352 pages, as compared to Madison's 29 tracts and 221 pages" (p. 22, footnote omitted).

is fitting that Coenen begins his discussion with *The Federalist*'s rhetorical style. The papers, he writes, "embodied, first and foremost, a vigorous effort at persuasion aimed at a particular audience situated in a particular time and place. That effort centered on reasoned argument" as well as "appeals to emotion and credibility" (p. 27). They were, at bottom, "campaign literature" (p. 28) and addressed the pressing issues of the day: the weakness of the Confederation government, interstate trade conflicts, and the specter of violence in the form of Shay's Rebellion (p. 29). The essays "did not draw [their] greatest strength from appeals to lofty abstractions" but rather from appeals to the circumstances of the time and the good sense of the authors' audience (p. 28).

In fact, Hamilton and Madison were not above a little flattery. They argued that the virtuous and generous citizens of *all* the United States would, when the facts were before them, see how the new government was essential to the future success of the country. For while the particular problems of New York were discussed (pp. 30–31), Publius's essays were not entirely parochial—appealing to planters, manufacturers, merchants, urban and rural dwellers alike (p. 30). Further, they invited readers to draw lessons from history, both ancient and modern, in support of their project (pp. 32–37). They often portrayed opponents of ratification (whom they shrewdly characterized as "antifederalists") as succumbing to undue suspicion, even paranoia (p. 39). By contrast, "the voice of *The Federalist* took on the tone of a trustworthy and omniscient neutral, marked by a rhetorical detachment calculated to contribute to the credibility of the overall project" (p. 42). This neutrality was bolstered by the authors' willingness to discuss the Constitution's shortcomings[9] and concede that some of the line-drawing involved in its provisions was arbitrary (pp. 44–45). But, the essays often pointed out, the document was the product of politically necessary compromises (p. 43). Both strategies "buil[t] a bridge of candor to their readers designed to reinforce the credibility of their larger project" (p. 45).

Both men recognized the utility of non-reasoned arguments as well. Appeals to emotion, appeals to logic leavened "by

9. Coenen also notes that both men defended provisions each had vigorously condemned at the Philadelphia Convention. Hamilton infamously supported life terms for the President and Senators. Madison had vigorously objected to equal representation of states in the Senate (p. 46).

mixing color, symbolism, and imagery" as well as "invocation of America's revolutionary heritage" (pp. 51, 47), all played important roles in *The Federalist*. As noted above, the essays mocked antifederalist concerns with varying degrees of aggressiveness, occasionally hinting that the objections to the Constitution were so far-fetched they must be the product not of real concern but of more sinister motives (p. 48). "With the repeated tying of aspersion to reasoned argument," Coenen writes, "Publius sowed the seeds of skepticism at a visceral level. By portraying antifederalists as dark-hearted as well as wrong-headed, Hamilton and Madison appealed to deep-seated human sensibilities connected up with pride, caution, indignation, and even self-preservation" (p. 50).

Further, "[t]ime and again, Madison and Hamilton aligned the Constitution, its framers, and its defenders with the spirit of the American Revolution and the intellectual forces that had given that revolution birth" (p. 53). In part, this invocation was defensive, helping to "undercut concerns about the purported unlawfulness of the Philadelphia Convention" (p. 54, footnote omitted). Because the Revolution had come to be seen as a unifying event for the nascent country, tapping into that nationalist sentiment had obvious uses when the authors of *The Federalist* were asking readers to undertake another leap of faith in throwing the Articles of Confederation aside for an entirely new type of government.

But Madison and Hamilton were not content merely to rest on stating the *logical* or even the *emotional* case for the Constitution. Both were practical men; both were very much concerned with the pressing issues of the day. So *The Federalist* went on to press the case for a strengthened central government capable of meeting those challenges, and to describe in detail how the authors saw the various parts of the new government working—and to explain why a *de*crease in liberty did not ineluctably follow from increased central power. It is in Parts III and IV that Coenen hits his stride, first canvassing the themes to which Publius recurred; then discussing Hamilton and Madison's vigorous defense of the government that emerged from the Constitution.

III.

Coenen entitles the third part of *The Story of* The Federalist, "Themes for a Nation." He explains that Hamilton and Madison's key task was selling the need for "strengthening the American union" (p. 59). The authors further invoked the idea, often associated with Adam Smith, of yoking private interest to the public good; and offered a particular take on the ideology of "republicanism." These themes, which form a superstructure for the rest of the papers, are important to understanding the more specific defenses deployed against opponents of ratification.

Encouraging affinity for a strong national government of the "United States" was a tall order in an age when many Americans, following Jefferson, considered their state to be their "country." And yet creating such bonds of affection was essential if the United States was to survive. Several problems were present in the late 1780s; each looked to get worse, not better, given the Articles' relative impotence. First, the parlous state of the country's finances was giving rise to local uprisings, like Shay's Rebellion. Second, interstate trade friction threatened to ignite, becoming something more serious. This instability, in turn, left the United States open to attack from foreign powers eager to carve the U.S. up among them. Hamilton and Madison's support for the Constitution was based in part on the belief that the new government would have the tools to meet these challenges. Publius sought to convince readers this would be the case—that federal authority was "vitalize[d]," but not too much (p. 60).

Taking these concerns in reverse order, many of the early essays cited the danger of external attacks and the need to prepare for them as a reason for centralizing power.[10] For Hamilton, Coenen writes, "[h]istory revealed that a loose assemblage of states would not service this vital need" (p. 65). Moreover, a strong military—a navy especially—was needed to protect commercial shipping; thus did Hamilton's views on national security dovetail with his vision for America as a nascent economic power (p. 69). "Through all these discussions ran the demand for a foreign policy that rested on the twin foundations of union and strength," observes Coenen (p. 69).

10. "According to *The Federalist*, forestalling the dangers of military attack provided the leading reason to build a strong central government" (p. 68).

Union meant that "the central government needed the powers to maintain standing armies, to outfit a navy, and to call on state militias in times of national need" (p. 70). This power would, in turn, ensure that the country's government could credibly threaten the use of force if needed to protect its interests.[11]

Other threats were closer to home. "For Hamilton and Madison, the drift toward disunion fostered by the Articles of Confederation all but ensured future armed clashes among the former allies of the Revolution" (p. 70). Chief among the sources of friction were the accidents of geography that gave some states advantages when it came to trade—advantages states like New York exploited to the detriment of its neighbors.[12] Publius argued that other, looser confederations throughout history had come to grief once their members began fighting for trade and territory. Such disputes would then invite interference from abroad, as European countries formed alliances with various factions, playing each against the other (p. 73). A strong central government, one with control over interstate commerce and with its own source of funds, could counterbalance such centrifugal tendencies.

Finally, a strong government was needed to repel localized troubles, like Shay's Rebellion in Massachusetts. "According to Publius, a strong central government would counter the risk of domestic insurrection in two powerful ways" (p. 75). First, plotters would have to organize extensively in order to subjugate the whole country, or even a part of it, raising the chances of discovery. Second, the central government could bring enormous resources to bear on local problems, to prevent them from spreading (p. 75).

Publius's case for Union may seem like overkill, observes Coenen, because even many antifederalists conceded the need for augmented federal powers, including some independent revenue-raising power and the power to regulate interstate commerce. But Hamilton and Madison did not want fence-sitters to think that these adjustments to the Articles were sufficient, and pressed hard their case for an even stronger government.

---

11. "A government charged with waging war must always be prepared for it, and a government required to bargain with foreign powers must be able to back up its ultimatums with more than idle bluster" (p. 70).

12. For more on this, and the Constitution's response, see Brannon P. Denning, *Confederation-Era Discrimination Against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause Doctrine*, 94 KY. L.J. 37 (2005-2006).

Coenen writes that "[a] general emphasis on the value of the union—particularly as a counterweight to war—rounded out the development of" the themes in all eighty-five essays of *The Federalist* (p. 77).

> Hamilton and Madison knew that citizens harbored honest worries about the Constitution's dramatic shift of power to the central government. They also knew, however, that they held two powerful cards in their hand. The first was the shared belief, born of the Revolution, that strength and safety lay in union. The second was the shared fear that the nation's existing authority had reached a point of such "desperate extremity" that it lacked the capacity to discharge even the most basic responsibilities of government. With powerful arguments, Hamilton and Madison reinforced this belief and played on this fear, keeping in constant view the specter of war and the terrible dangers it posed (p. 77).

If persuading a skeptical populace to invest a central government with greater powers than any would have imagined a decade earlier seemed a tall order, Madison took it upon himself to further persuade readers that much of what they knew about "civic republicanism" needed to be *un*learned. In Coenen's illuminating chapter on *The Federalist No. 10*, one of the most famous documents in American political history, he explains how Madison accomplished this.[13]

"The first seminal contribution of No. 10 lay in its effort to debunk [the] lionization of the small republic" (p. 80). Presciently, Madison sensed that the United States had potential to be one of the largest political units in history. Even the union of thirteen states was too large for some antifederalists. The fear was that large republics would fall prey to "faction," a pejorative term in the eighteenth century, on par with "parties" that all deemed fatal to a true republic. Madison, however, turned this logic on its head. In his view, *small* republics were the ones most likely to fail. Factions were inevitable; "no republic—whatever its size—could instill in 'every citizen the same opinions, the same passions, and the same interests'" (p. 80, quoting *Federalist No. 10*). Rather than attempt to suppress factions' emergence, Madison sought "to place the public well-being over their own

13. There is a large literature on *Federalist No. 10* and how influential it was or wasn't in its day. Coenen acknowledges this literature in the notes, but he explains Madison's essay on its own terms. He also reprints *Federalist No. 10* in its entirety in Appendix B (pp. 373-79).

private interests" (p. 81). "In other words," writes Coenen, "Madison stood ready not only to assert that the argument in favor of small republics was misguided; he was also prepared to claim that a much strengthened central government offered powerful advantages in checking the excesses of factional power" (p. 82, footnote omitted).

Further, Madison argued that *majority* factions were "the greatest danger in self-ruling nations" because they could ride roughshod over the rights of minorities (p. 82). But to suppress the emergence of such factions was fruitless, according to Madison, because such efforts led to tyranny and, ultimately, the surrender of republican government. Better to set them against one another in a large republic with a strong central government so that (1) the sheer size of the country could hamper efforts by any one faction to consolidate power with each acting to check the overweening ambition of the others, and (2) "[t]he filtering process of representative government . . . would work best" by having politics play on a national, rather than a local level (pp. 84–85).

Coenen notes the academic commentary that has mushroomed around *Federalist No. 10*, but takes no sides, concluding simply that "one thing is clear: Madison celebrated the value of including multiple groups with different outlooks within the body politic. . . . Madison's emphasis on inclusive voting regimes reflected an attitude of openness to new forms of human interaction" (p. 88). While it cannot be doubted that large numbers of Americans were initially excluded from participation, either because of sex or race or (at first) wealth, the Constitution showed the way for those groups' inclusion in the political community in the years to come (pp. 89-90). Further, though it was not necessarily apparent to Publius at the time, "No. 10 cemented the . . . proposition that injustice prevails when 51% of the citizenry captures 100% of state-created benefits" (p. 91). The logic of that insight—that majorities could be tyrannous—would lead to Madison's fight for the Bill of Rights in the First Congress.[14]

Coenen closes with some provocative questions about the political theory of *Federalist No. 10*. Does Madison's theory of contending factions indeed secure peace and stability, or does

14. *See generally* RICHARD LABUNSKI, JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS (2008).

it simply entrench the status quo and frustrate revolutionary and progressive politics? Whatever the answers, Coenen claims that such questions "do not diminish the luminosity of *Federalist No. 10.* Rather they reaffirm its status as the key point of reference for judging the work of our constitutional regime" (p. 91). Its themes "of inclusion, collaboration, rights-mindedness, and public-spiritedness" continue to have relevance today (p. 91).

Contemporary historical scholarship abounds with discussions of "republicanism" and the Framers' relationship with it. There is no doubt that the Founders considered themselves ardent "republicans"—as opposed to "democrats" or "monarchists." They even guaranteed each state a "republican form of government" in the Constitution.[15] *The Federalist* abounds with assurances that the proposed Constitution was not only republican, but that it was *more* republican than the Articles or other supposed paradigms of republicanism.

But what *was* republicanism? Historians continue to debate the question, but Coenen argues that it had, for Publius, three main tenets: "(1) the ultimate sovereignty of the people, (2) the republican nature of *all* branches of government, and (3) the idea of distancing the people from the operations of their government and from future control of the Constitution itself" (p. 93).

The first of these is relatively straightforward—the legitimacy of the government and its actions depended upon the consent of those on whose behalf it acted. This was signified by, inter alia, the special ratifying conventions that debated and voted on the proposed Constitution. This was, moreover, a *national* act, with the implication that the Union was something that would be more than a mere confederation of states (pp. 94–95).[16] Moreover, Article V made clear the path for the People to assert their sovereignty through constitutional amendments or, ultimately, another constitutional convention.

By "republicanism in all the branches," Coenen means that the authors of *The Federalist* departed in significant respects from the received traditions of English government. In the latter,

15. U.S. CONST. art. IV, § 4.

16. For an excellent treatment of the conventions, their origins in Revolutionary-era state constitutions, and their significance, see DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776-1995 (1996).

societal classes are represented by different elements: the King and Lords representing the "few" and Commons representing "the many." While the House roughly corresponded to Commons, the Senate did not represent existing aristocratic elements in American society, but rather its membership "hinged on choices made by state legislatures, which (because of their closeness to the people) had a republican complexion of their own" (p. 97). Even with its longer terms, "the Senate's purpose was to give its own expression to the popular mind—albeit with emphasis on that part of the mind that saw special value in 'stability and continuity' in society and government" (p. 97, footnote omitted). Further, the President was elected, held office for a term of years, and was at least indirectly accountable to the populace through those elections and through impeachment (p. 97). "Even the federal judiciary," Coenen notes, "had republican roots. Although given unlimited terms, judges would take office only upon appointment by the President and confirmation by the Senate" (p. 97, footnote omitted). The institution of judicial review itself bore a republican gloss because it could be characterized as vindicating the People's sovereign will, as reflected in the Constitution, against *ultra vires* actions undertaken by agents of the electorate (p. 98).

But republicanism was not synonymous with "democracy"; in fact, the Constitution is *anti*-democratic in some ways. Equality in the Senate and the role of the electoral college in the selection of the President are probably the two best-known ways in which the Constitution can be said to be anti-democratic (or, more precisely, anti-majoritarian). *The Federalist*'s emphasis on "refining" the popular will highlights the authors' hope that *enlightened* popular will would be expressed by members of the federal government. This led to charges of elitism by antifederalists (p. 99). The Constitution does not provide for instructions, whereby voters would control the actions of elected officials once they assumed office. Nor can voters recall elected officials before the next election (pp. 100–01). But for Hamilton and Madison, these were "features" not "bugs." As Coenen summarizes: "In the view of Publius, the people (or their state representatives) were to choose federal legislators but then turn them loose. This might seem undemocratic, but that was the point. A meaningful level of insulation would help federal

officeholders rise above factional politics to pursue a greater good" (p. 102).

Moreover, as Coenen notes, there is no method for continuous involvement by "the People" in constitutional reform, either. In pointed contrast to Thomas Jefferson, who advocated nullifying all laws—including all constitutions—every twenty-five years, Madison hoped to cultivate an almost religious feeling of veneration toward the Constitution. Such veneration, he argued in *The Federalist*, would not be forthcoming if the document could be too easily altered. "In sum," Coenen writes, "the Jeffersonian approach would—on the Madisonian view—threaten the people's Constitution with too much tinkering by the people themselves. Just as representatives needed independence from voters once they took office, so too did the framework of government require insulation from popular manipulation once it was put in place" (p. 103). Thus while the sovereign People could assert itself and alter the Constitution, the supermajority requirements both to propose and ratify amendments ensured they would be rare, as indeed they have been.

IV.

In his final section on *The Federalist* itself, Coenen describes what he calls the "architecture of equilibrium" created by the Constitution and defended by Madison and Hamilton—their defense of the specifics of the new government. He begins with Publius' defense against the charge that the Constitution had violated the sacred commandment that the powers of government shall be separated. He then discusses *The Federalist*'s defense of each branch of government, as well as the ultimately unsuccessful response to complaints that the Constitution was fatally flawed because it omitted a bill of rights.

Unlike contemporary state constitutions, the Constitution contained no explicit separation-of-powers provision.[17] That omission was alarming enough, but to the opponents of the

17. *See, e.g.*, MASS. CONST. pt. I, art. XXX (1780) ("In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws, and not of men."). Most current state constitutions retain some form of a separation of powers clause. *See, e.g.*, ALA. CONST. art. III, § 43.

Constitution the powers of the various officers looked frighteningly mixed. The President vetoing legislation? The Senate approving treaties and confirming executive officers? The Court holding acts of the legislature unconstitutional? What was going on here? Whatever it was, the antifederalists were sure that nothing good could come of such unprecedented mixing of powers. Like Patrick Henry, they "smelt a rat."[18]

Hamilton and Madison responded that what the Constitution of 1787 proposed to give the people was not a mere parchment barrier against tyranny, but a *real* security against abuse of power—the end of separation of powers in the first place. This was achieved, paradoxically, by the very mixing of powers decried by the Constitution's opponents. Though, as Coenen notes, "[t]he terms 'checks and balances' and 'separation of powers' . . . appear nowhere in the Constitution itself," the phrases "capture in a shorthand way themes at the heart of *The Federalist*" (p. 107). As conceived by the Constitution, "each institution of government—occupied by persons naturally protective of their own turf—had to have weapons with which to counteract attempted power grabs by competing centers of authority" (p. 109). Thus, the document sought a kind of "equilibrium" and guarded against concentration of power into any one of the three branches (p. 109).

Further, this horizontal separation was complemented by a vertical separation of powers between the federal and the state governments. "Recognizing states as autonomous entities meant that both they and the central government would carry out critical functions. This division of functions meant, in turn, that the central government and the states would keep a close eye on one another" (p. 109, footnotes omitted). This was an entirely new experiment in government; so revolutionary that Justice Kennedy once described it as "split[ing] the atom of sovereignty."[19] Madison called this dual division of power a "double security" against the concentration of power he defined

18. When asked why he refused a place as a delegate to the 1787 Philadelphia Convention, the famous Patriot is said to have remarked, "I smelt a rat." *See* p. 188; Paul Finkelman, *Turning Losers Into Winners: What Can We Learn, If Anything, From the Antifederalists*, 79 TEX. L. REV. 849, 871 (2001) (book review).

19. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) ("The Framers split the atom of sovereignty."). For an argument that Kennedy's metaphor was not quite apt, see Mark R. Killenbeck, *The Physics of Federalism*, 51 U. KAN. L. REV. 1 (2002).

as tyranny itself (p. 110). Madison in particular labored against attacks by antifederalists who predicted—accurately, as it happened—that the division of power would exert a centripetal pull towards the central government (pp. 112–18).

Madison and Hamilton spent much of *The Federalist* carefully describing and defending the powers given by the Constitution to each branch of government and parrying attacks from antifederalists that the powers given were either too great, given to the wrong branch in violation of separation of powers, or both. Coenen devotes a chapter a piece to Publius's defense of the Constitution's delegation of power to the three great arms of the federal government.

If you took a poll today asking which is "the most dangerous" branch, I suspect most people would answer either the judiciary or the executive branch. Coenen points out, however, that in the late 1780s, the conventional wisdom was that *legislatures* often posed dangers to liberty—especially to that of property holders or the politically unorthodox. As Coenen notes, the Framers "faced the ever-ticklish task of combining energy, stability, and an attentiveness to private rights" (p. 124, footnote omitted). "On the one hand, the framers had to avoid impeding legislative prerogatives too much, particularly in light of basic principles of majority rule. On the other hand, they well knew that legislative activism carried with it risks of factional oppression" (p. 124). The Framers threaded this needle, according to Coenen, by requiring bicamerality, a representative House, the complementary Senate, and by limiting federal legislative power to those enumerated in Article I, section 8. "The combination of these elements," he writes, "produced a legislative body unlike any the world had previously seen" (p. 124).

As to the first, "the framers' endorsement of bicameralism reflected much more than a compromise between frustrated delegates who represented large and small states. The requirement of joint action would promote deliberation, contribute to stability, and confound the sway of 'passions' and 'prejudices' that too often polluted the work of legislative assemblies" (p. 127, footnote omitted). Of the two houses, the House of Representatives fulfilled one of Publius's criteria for the "construction of a true republic": "the creation of at least one legislative body immediately accountable to a broad electorate" (p. 127). And, as Publius pointed out, decisions

about the composition of that electorate were left for states to determine. Madison also defended the two-year term, and the size of the House, which critics thought to small to ensure real representation.[20]

While the House would have a "populist character oriented to near-term goals," the Senate "with its lengthy terms, indirect elections, more exacting qualification rules, and ensured maintenance of institutional continuity" meant it would "take the longer view" and provide security against the passions of transient majorities (p. 132). Naturally, antifederalists saw the Senate as a crypto-aristocratic cabal whose function would be to frustrate the "democratic" initiatives of the House. Publius refuted such charges, but, of course, there was a grain of truth in the antifederalist allegations.

Antifederalists also objected to the powers given the new legislature, however constituted. "Favorite targets of objection included newly created powers to organize and discipline state militias, to levy taxes of almost any sort, to oversee federal elections, and to maintain standing armies." (p. 135). Publius responded first by noting that the real issue involved empowering Congress to regulate interstate commerce and have independent revenue-raising power without depending on states (p. 135). "Second, the authors of the *Federalist* parried discrete challenges to the Constitution's particularized grants of power" (p. 136). The upshot of Publius's defense was threefold: "(1) the importance of creating effectual powers of federal fundraising, (2) the value of uniform federal regulation of foreign and interstate commerce, and (3) the need for broad discretion in the choice of means to carry federal powers into effect" (p. 136). As to the second, Coenen makes a characteristically shrewd observation that "the new national power over commerce was not so much about commerce as it was about union. With this grant of power, the framers sought to cultivate a national mindset that would lead Americans to view themselves as one cohesive people" (p. 141).

Not surprisingly, it fell to Hamilton to defend the new executive created by the Constitution. Many Framers regretted the fetters the new states placed on governors and the lack of

20. "The Constitution provided that the House . . . would create a ratio of roughly one representative for every 5,000 to 6,000 voters, as opposed to one representative for every 500 to 600 voters as was the case in most states" (p. 129, footnote omitted).

any executive in the Articles. But fears of executive abuse recalled by their colonial experience made many fearful of an officer that, at best, might equal some of the arbitrary colonial governors and, at worst, could attempt to set himself up as monarch. Hamilton derided such fears as so much paranoia and argued that all that was sought was "energy" in the executive branch—energy "to act effectively for the nation" (p. 146). According to Hamilton, "energy came from four sources: (1) unity in the executive, (2) continuity in office, (3), possession of broad powers, and (4) independence from the other branches" (p. 146, footnote omitted).

Unity meant that there would be one and only one president. As Hamilton explained, "both strength and restraint would come from lodging executive power in one person" (p. 147). A dual presidency, on the other hand, would find itself hampered by disagreement and would not be as transparent, since it would not be evident whom to blame for bad policies. Placing responsibility in one person would also tend to make the holder circumspect in the execution of duties and careful in the selection of personnel to hold executive office (pp. 147–48).

The four-year term and the absence (then) of presidential term limits, argued Hamilton, ensured continuity and stability—Hamilton feared radical change. Thus Hamilton warmly advocated the wisdom of the presidential veto over legislation, subject to congressional override. Such an executive check provided, with bicameralism, a second check on bad legislation (p. 155). He predicted it would not be used frequently. Hamilton also vigorously defended the President's preeminence in the conduct of foreign affairs and in the appointment of federal officials.

Finally, history had shown the need to make executives independent of legislatures. "Energy in the executive would be more bane than benefit if the legislature could direct that energy into schemes of factional oppression" (p. 158). The President's salary was insulated from legislative meddling, and one could not serve in both the legislative and executive departments simultaneously—there was even a prohibition on a former legislator's service in the executive branch if, prior to taking office, the legislator had voted to raise the salary for that office.[21]

21. The emoluments clause, U.S. CONST. art. I, § 6, cl. 1, has occasioned the

Article III was the shortest article in the Constitution; there was little discussion of the judiciary or its powers in Philadelphia. The lack of discussion probably stemmed from consensus—most thought that the omission of a federal forum from the Articles was a serious flaw. The Framers remedied that by establishing a Supreme Court, then leaving Congress the option of establishing subordinate federal tribunals if it wished—a compromise intended to forestall complaints that the Constitution's proponents sought to strip the state courts of all power. Article III limited the jurisdiction of federal courts to matters of national (and international) importance and gave Congress the ability to restrict the appellate jurisdiction of the Supreme Court. Independence was secured through life tenure, and insulation for judges' salaries from legislative retaliation. Further, the *manner* in which judges would attain office was insulated, to a significant degree, from the vagaries of public opinion: the President would nominate judges and the Senate would confirm them.

Courts would play their role in maintaining the "equilibrium" in the government by exercising judicial review, which Hamilton famously defended in *Federalist No. 78*. Despite Article III's silence on the question, many at the Philadelphia Convention seemed to assume that courts would exercise some independent review over federal and state legislation for compliance with the Constitution.[22] And recent scholarship by William Treanor strongly suggests that judicial review was an accepted practice by the time of the Ratification, even if its precise scope was still contested.[23]

---

lowering of salaries for former legislators who assume executive branch posts whose salaries were increased during their terms in Congress. This "work-around," called the "Saxbe Fix" for William Saxbe, President Nixon's Attorney General, has been questioned by some, but seems to have been generally accepted as a way to get around the Emoluments Clause. *See generally* Mark Tushnet, *Constitutional Workarounds*, 87 TEX. L. REV. 1499 (2009) (describing the Saxbe Fix). For doubts about the workaround's constitutionality, see Michael Stokes Paulsen, *Is Lloyd Bentsen Unconstitutional?*, 46 STAN. L. REV. 907 (1994).

22. *See generally* William Michael Treanor, *Original Understanding and the Whether, Why, and How of Judicial Review*, 116 YALE L.J. POCKET PART 218 (2007).

23. *See* William Michael Treanor, *Judicial Review Before* Marbury, 58 STAN. L. REV. 455 (2005) (arguing that judicial review was well-established by the Framing Era); *but see* Theodore W. Ruger, *"A Question Which Convulses a Nation": The Early Republic's Greatest Debate About the Judicial Review Power*, 117 HARV. L. REV. 826 (2004) (describing contested nature of judicial review in the early Republic).

On one critical issue, however, Publius misfired: the necessity or desirability of a bill of rights. Framer George Mason cited the Constitution's lack of a such a bill as his reason for not signing. Nevertheless, Hamilton argued that any enumeration of rights risked omitting important rights and seemed to invite inference that the government possessed powers not enumerated in Article I. Hamilton, for example, famously argued that the lack of a free press guarantee was unnecessary because Article I mentioned nothing about congressional control of the press.[24]

While Coenen sympathetically acknowledges that Publius wasn't opposed to rights, he nevertheless rightly cites "deep flaws" in their argument against a bill of rights. The no-power-to-interfere-with-rights argument, for example, "clashed with suggestions made elsewhere in *The Federalist* that broadly implied powers should and did flow from the Necessary and Proper Clause" (p. 176). Moreover, the Constitution *already* included some security against contingencies unmentioned in Article I. For example, the Constitution's ban on titles of nobility "limited no expressly granted power and thus supported by implication claims to power no less than would a comparable ban on interference with the press" (p. 177, footnote omitted). As Coenen also points out, "Publius ignored the helpful contribution that a Bill of Rights could make to the proper *structuring* of the federal government. In particular, if federal courts were to perform a checking function, they would need legal rubrics with which to police the other branches" (p. 177). Perhaps more importantly, bills of rights had become common features of constitutions—people expected them to be there. The lack of one in a document bringing forth a new and untested form of government was simply alarming to many. In any event, Madison and Hamilton were playing the hand dealt in Philadelphia. When it was clear their assurances failed to persuade, Madison faithfully cajoled his fellow House members to consider one in 1789, during the First Congress when many wanted to renege on that promise.[25]

24. THE FEDERALIST NO. 84 (Alexander Hamilton).
25. *See, e.g.*, LABUNSKI, *supra* note 14.

V.

In the final part, Coenen returns to the story of *The Federalist* itself, its role in the ratification of the Constitution, and its continuing significance today. He opens with the observation that neither Virginia nor New York's ratification was technically necessary to the Constitution's coming into being because New Hampshire became the ninth state to ratify on June 21, 1788.[26] However, given the importance of both states, it would have been folly to attempt to make the new nation a going concern without them. Coenen writes that a "United States without Virginia or New York would be a strange, noncontiguous assemblage of territories likely to spin towards just the sort of regional balkanization that Hamilton and Madison most feared" (p. 187). But to play a role in securing ratification, each first had to be elected to his state's ratifying convention, which was not assured in either case (pp. 187–204).

In Virginia, Madison—who initially decided against running for a seat in the ratifying convention, only to relent—took on the redoubtable Patrick Henry, quietly but expertly parrying Henry's rhetorical sorties against the Constitution (pp. 189–91). Not only did his work on *The Federalist* pay off, but Madison also directed printed sets to be delivered to the state's leaders. In the end, Madison's efforts (and the willingness of "Governor [Edmund] Randoph and a handful of westerners who broke ranks with their antifederalist neighbors" (p. 193)) bore fruit: Virginia ratified in a close vote, 89-79 (p. 193).

Hamilton faced perhaps even longer odds in New York. The other members of New York's delegation to Philadelphia pulled out months before the Convention's work was complete, leaving Hamilton kicking his heels in Philadelphia. Powerful political interests in the state resisted incorporation into any national scheme it would not be in a position to control. The results of the election to the ratifying convention could not have been less auspicious. "Forty-six antifederalist candidates had swept to victory, in comparison to the federalists' brotherly band of just nineteen" (p. 196). However, Hamilton and his brotherly band scored an important victory "when perhaps-overconfident antifederalists agreed to review the Constitution in clause-by-clause fashion before any votes were taken" (p. 197). This both

26. By its terms, when ratified by nine states, the Constitution would become binding on those nine. U.S. CONST. art. VII.

prevented a rush to rejection and allowed Hamilton to bring his expertise, honed in the writing of *The Federalist*, to bear. News of Virginia's ratification also buoyed the Federalists' efforts (p. 198). In the end, ardent antifederalist Melancton Smith proposed that New York ratify the Constitution and press for amendments later, reserving the right to secede if they were not forthcoming (p. 200). This peeled off enough opponents to carry the day for ratification, if only by three votes (p. 201).

There is a strong irony that *The Federalist* had relatively little impact on the ratification debate (its *raison d'etre*), but has endured as a key to the meaning of the Constitution long after ratification was an accomplished fact. Coenen spends his concluding chapter considering *The Federalist* as "A Work for the Ages" (p. 205). Why has it endured?

One reason is that the essays are of very high quality, produced by two of the most brilliant minds of the founding generation who also happened to be good writers. Another reason is that "it filled an enormous gap. The Constitution sets forth rules," writes Coenen, "[i]t does not . . . set forth *reasons* for those rules. The Philadelphia Convention left behind no explanatory report, and the first-hand accounts of the Convention are scarce because delegates agreed to keep their proceedings secret" (p. 207). Madison's own notes were not published until 1840. Further, it provided a coherent justification for the whole Constitution, and attempted to demonstrate that the government—far from being a concatenation of compromises—had a deep structure (pp. 207–08). This is one reason why, as Coenen points out, the judiciary has turned to it for aid in interpreting the Constitution (pp. 208-13). By Coenen's count, the Court's resort to *The Federalist* increased several-fold in the last decade of the twentieth century and is likely to be cited as frequently in the twenty-first (p. 213). It is surely no coincidence that the rise in judicial citations corresponds to the prominence of originalism in constitutional interpretation, even among those judges and justices for whom it is not dispositive.

Whatever the legitimacy or wisdom of judicial (and non-judicial) reliance on *The Federalist*,[27] it is clearly regarded as a legitimate source of constitutional meaning. But Coenen encourages us to view the eight-five essays as much more than a

27. Coenen summarizes the arguments for and against on pp. 219–21.

source for legal cherry-picking. He urges us to admire the effort and the quality of the essays, as well as their aim. "In the place of a tempestuous, fractious post-revolutionary America," Coenen writes, "Publius held up the prospect of a dynamic, yet stable, society poised to prosper in government, in commerce, and in spirit" (p. 223, footnote omitted). "At bottom," he concludes, "this was the aim that drove *The Federalist Papers*" (p. 223).

* * *

Measured against the aims that Coenen set for himself in the book's introduction—"to pique interest in the papers" (p. xi)—his book succeeds brilliantly. It is accessible to the general reader, yet is useful even to the specialist. *The Story of* The Federalist is an ideal companion to Herbert J. Storing's *What the Antifederalists Were For*; both, moreover, are best read with a good edition of *The Federalist* and Storing's selections from his *The Complete Antifederalist*.[28] Reading Coenen's book, the teacher in me is saddened that few undergraduates now are familiar with *The Federalist* and that there is little room in law schools' constitutional law courses for an introduction.

More's the pity, too, because Coenen's book is especially well-suited for classroom use. He includes in appendices complete copies of the Constitution and *Federalist Nos. 10*, *51*, and *78*. There is a helpful general index, as well as an index listing the number of each essay and where it is mentioned in the work. Experienced scholars will find much of interest in the lengthy endnotes section, which runs to over one hundred pages. But one may read Coenen's book with nary a glance at the notes, because he is skilled at letting Madison and Hamilton (and Jay!) speak for themselves, without burdening the reader with lengthy block quotations.

Coenen only departs from his generalist orientation on a few occasions when he discusses evidence from *The Federalist* bearing on legal questions such as the limits on Congress's power to make "regulations and exceptions" to the Supreme Court's appellate jurisdiction to keep it from hearing certain classes of cases (e.g., those dealing with school prayer)[29] or whether the

28. THE ANTI-FEDERALIST: WRITINGS BY THE OPPONENTS OF THE CONSTITUTION (Herbert J. Storing ed., 1985).

29. U.S. CONST. art. III, § 2; Ex Parte McCardle, 74 U.S. 506 (1868) (upholding power of Congress to deprive Court of jurisdiction over class of cases involving habeas corpus). The evidence for and against is summarized in ERWIN CHEMERINSKY,

federal government can "commandeer" state and local government officials to implement federal programs (pp. 172, 210–12).[30] Whether one is persuaded by his reading of *The Federalist* is rather beside the point.[31] What is important, and what Coenen no doubt intends to show by commenting on current controversies, is that the questions that preoccupied Madison and Hamilton—questions about the scope of federal power, the nature of American federalism, and the relation of the federal branches to each other—are still with us. Publius's concerns are still ours today, two hundred twenty years after those essays appeared.

If the ability of a work to transcend its time and address future audiences is part of what makes it a "classic," then it is little wonder *The Federalist* is regarded as a classic of American political thought. But "classic," alas, also often describes a work that people discuss but never actually read. Coenen's valuable contribution is to remind us *why* the work is so important, and to spur us to take it off the shelf and read it for ourselves. With Dan Coenen's book as your guide, the effort will be a little less daunting.

CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 2.9 (3d. ed., 2006).

30. Printz v. United States, 521 U.S. 898 (1997) (invalidating portion of Brady Bill requiring state law enforcement personnel to perform background checks on purchasers of firearms). Justices Scalia and Souter both invoked *The Federalist* to support their positions. *Compare id.* at 919–22 *with id.* at 971–75 (Souter, J., dissenting).

31. I'm not persuaded that the exceptions clause in Article III doesn't mean precisely what it says, for example. While it is true that the courts were to be a check on the other branches, the exceptions clause, providing as it does at least a theoretical check on the Court itself, seems precisely the sort of interlocking check and balance that is familiar in the Constitution.