A RHETORIC FOR RATIFICATION: THE ARGUMENT OF *THE FEDERALIST* AND ITS IMPACT ON CONSTITUTIONAL INTERPRETATION

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ABSTRACT

Courts, lawyers, and scholars have long assumed that The Federalist Papers *supply important information for use in constitutional argument and interpretation. In recent years, commentators have questioned this view. Their skepticism grows out of two major concerns. First, Justice Scalia's challenge to the use of legislative history in the statutory context casts a cloud over judicial use of background texts such as* The Federalist *in seeking the meaning of the Constitution. Second, even if courts may rely on some background materials in interpreting the Constitution, there is reason to conclude that* The Federalist *does not qualify as the sort of material that provides useful guidance. The basic difficulty is that the authors of* The Federalist *wrote their essays as advocacy documents for publication in local newspapers, rather than as scholarly texts designed to lay out in neutral fashion the purposes and terms of the Constitution. Building on this historical reality, analysts have properly asked why courts should view a series of editorials, churned out to help win a heated political battle, as a key modern-day source of constitutional interpretation.*

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This Article explores the proper role of The Federalist *in the search for constitutional meaning. It demonstrates that the essays were in fact sophisticated advocacy documents that wove together different styles of rhetoric designed to win over readers to the cause of ratification. This reality requires courts to approach the papers with a measure of caution. At the same time, the Article rejects the view that the campaign-literature purpose of* The Federalist *disqualifies it from serving as an important touchstone of constitutional interpretation. This is the case primarily because the authors of* The Federalist*, in conceiving and structuring their argument, focused on making a highly rational and highly comprehensive appeal to a broad and diverse audience. Against this backdrop,* The Federalist *should be viewed as setting forth something akin to a consensus understanding of the Constitution.*

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INTRODUCTION

The Federalist stands, head and shoulders above all else, as the most significant book in the history of American law and political theory. Authored by Alexander Hamilton, James Madison, and John Jay, *The Federalist* contains eighty-five essays on the origins, purposes, and teachings of the Constitution. The essays range across every major subject of constitutional interpretation: the separation of powers, federalism, the judicial role, republicanism, the proper scope of the congressional powers, the roots of legitimate government, the functions of the president, and the nature of rights.[1]

The importance of *The Federalist* cannot be overstated. Throughout American history it has provided a pivot point of argument in great struggles over constitutional meaning. Hamilton and Madison themselves drew on *The Federalist* in debates over the constitutionality of the National Bank Act and other early assertions of federal authority.[2] In the years leading up to the Civil War, Southern nullificationists and Northern unionists both invoked the essays,[3] and modern-day proponents and opponents of sweeping executive powers have done so as well.[4] In scores of cases, and with much-increased frequency in recent decades, the Supreme Court has drawn on *The Federalist* in resolving hard-fought battles over what the Constitution means for disputants in the context of federal litigation.[5] The essays are also the stuff of high political drama. In the

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1. For an extensive examination of *The Federalist*'s treatment of these subjects, see generally Dan T. Coenen, The Story of *The Federalist*: How Hamilton and Madison Reconceived America (April 21, 2006) (unpublished book manuscript, on file with the author).

2. Hamilton, for instance, quoted from Madison's *The Federalist No. 44* in arguing that the bank bill was constitutional. RALPH KETCHAM, JAMES MADISON 321 (1971). Madison, in turn, quoted from Hamilton's treatment of the executive in *The Federalist* in challenging Hamilton's support for the president's unilateral issuance of a proclamation of neutrality. *Id.* at 346–47.

3. *See* Jack N. Rakove, *Early Uses of* The Federalist, *in* SAVING THE REVOLUTION 234, 239 (Charles R. Kesler ed., 1987) ("During the debate over the admission to the Union of Maine and Missouri, eight out of nine speakers who cited *The Federalist* did so while justifying the right of states to determine the propriety of slavery.").

4. *See, e.g.*, DEP'T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING ACTIVITIES OF NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT 7 (2006), *available at* http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf (citing *The Federalist No. 70* as supporting the president's authority in the area of national security); *id.* at 30 (citing *The Federalist No. 64* for the president's authority to undertake intelligence activities without congressional approval).

5. *See* Ira C. Lupu, *Time, the Supreme Court, and* The Federalist, 66 GEO. WASH. L. REV. 1324, 1329 (1998) (documenting the Supreme Court's common and increasing use of *The*

broadly publicized hearings on the appointments of John Roberts and Samuel Alito to the Supreme Court, for example, participants alluded to *The Federalist* on no fewer than eleven occasions.[6]

Against this backdrop, Americans often assume that the authors of *The Federalist* prepared their famous text as a legal treatise or as a scholarly recapitulation on how the Constitution came to be. This view is wrong. In fact, the authors first published their essays in New York newspapers while citizens of that state struggled with whether to support or oppose the proposed Constitution.[7] More particularly, the *Federalist* essays responded to a torrent of tracts published by Constitution-opposing editorial writers who were at work in a key state where a majority of voters appeared to lean against ratification.[8]

In short, *The Federalist* was an advocacy document, perhaps even "propaganda."[9] Either way, the essential purpose of the essays was to set forth an argument. That argument, in turn, was designed to maintain the loyalties of existing federalists while bringing undecided and unsympathetic voters over to the proratification cause. Recognizing this essential function of *The Federalist* raises two basic, but little-explored, questions: First, just how did the essays' authors seek to persuade the essays' readers? Second, how does the nature of the argument of *The Federalist* bear on judicial use of the essays in the modern day? In this article, I seek to offer answers to these questions.

In Part I, I set the stage for further inquiry by sketching the historical context in which the essays were written. Because the purpose of *The Federalist* was to persuade citizens to elect ratification convention delegates who would support the Constitution, the

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Federalist in recent years); Buckner F. Melton, Jr. & Jennifer Miller, *The Supreme Court and* The Federalist*: A Supplement, 1996–2001*, 90 KY. L.J. 415, 420–40 (2001) (tabulating references to *The Federalist* in Supreme Court opinions).

6. *See* Transcripts: The Roberts Confirmation Hearings, http://www.washingtonpost.com/wp-dyn/content/linkset/2005/09/14/LI2005091402149.html (last visited Oct. 18, 2006) (statements of Sen. Orrin Hatch, Sen. John Cornyn, Judge John Roberts, and Sen. Tom Coburn); Campaign for the Supreme Court: The Politics of the Nomination of Samuel A. Alito, Jr., http://blogs.washingtonpost.com/campaignforthecourt/2006/01/hearing_transcr.html (last visited Oct. 18, 2006) (statements of Judge Samuel A. Alito, Jr.).

7. *See infra* text accompanying notes 18–20.

8. *See* RON CHERNOW, ALEXANDER HAMILTON 262 (2004) (noting that the antifederalist delegation elected to the New York ratification convention was over twice as large as that of the federalists).

9. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 5 (1980).

immediate circumstances in which those citizens found themselves were of extreme importance to Hamilton, Madison, and Jay. Part I thus directs attention to key background facts of the time, including the already-demonstrated shortcomings of the Articles of Confederation, mounting frustrations with interstate trade conflicts, and rising fears brought on by growing debtor militancy, evidenced most pointedly by the Massachusetts uprising known as Shays's Rebellion.

Building on Part I, I set forth in Part II a typology of the rhetorical techniques used by the authors of *The Federalist*. I created this typology by employing a three-step process. First, I extracted all significant lines of argument presented in each of the eighty-five essays on all of the many *subjects* of controversy of the time (for example, the need for a strengthened union to enhance military capabilities and commercial prosperity, the appropriateness of two-year terms for House members and six-year terms for senators, the legitimacy of judicial review, etc.). Second, I sought to identify the different *styles* of argument that cut across *The Federalist*'s treatment of these topics. Finally, I characterized and contrasted these styles, double-checking along the way to see that each subject-matter argument I had identified fell into at least one rhetorical category.

In the end, I conclude that Hamilton, Madison, and Jay utilized six major tools of argument. They made appeals to (1) the particular circumstances of their audience; (2) the lessons of history; (3) practical reasoning; (4) imagery and metaphor; (5) the need for compromise; and (6) emotional responses, including responses inspired by America's revolutionary experience. Other observers might well group the rhetorical tools of *The Federalist* in other ways. The key point to glean from this exercise, however, does not depend on precisely how the process of counting and characterizing is done. The key point is that—however that process might be fine-tuned—the argumentative strategy of *The Federalist* was nuanced and complex.

In Part III of the article, I explore the implications of Part II. In particular, I address the question whether courts may legitimately use *The Federalist* as a tool of modern-day constitutional interpretation. Answering this question proves difficult because others have advanced a host of different theories as to why judicial use of the essays makes sense. I seek to show that the argumentative style of the essays creates difficulties for each of these theories, especially theories based on the utility of *The Federalist* as legislative history, as a dictionary-like guide to eighteenth-century word meanings, or as a

learned legal treatise. The argumentative style of the essays, however, supports the case for citing *The Federalist* in one important way. Because the *Papers*' authors sought to build wide support for the Constitution through careful appeals to reason, there is cause to view their work as approaching a consensus understanding.

I. THE CONTEXT SURROUNDING *THE FEDERALIST*

On September 17, 1787, the members of the Constitutional Convention gathered for their last meeting in Philadelphia's Independence Hall. After months of toil that had demanded compromise by every delegate, these statesmen prepared to sign a charter of government like none that had ever existed before. There was cause for celebration, and a sense of accomplishment filled the chamber. Doubts for the future, however, mixed with the thrill of the moment.

Worries stemmed from the Constitution itself. In the document's final article, the framers specified that the states should hold special ratification conventions to consider whether to approve the Constitution and thereby bring it into effect.[10] Nobody could predict what would happen at those conventions, but everyone could see storm clouds on the horizon. Most ominously, as the Convention closed, the delegations of the two most populous states, Virginia and Massachusetts, found themselves sharply divided.[11] Edmund Randolph, joined in dissent by fellow Virginian George Mason, took the floor to predict that "[n]ine States will fail to ratify the plan."[12] Elbridge Gerry, one of three Massachusetts delegates, likewise refused to sign the charter, predicting that in his state the Constitution might well contribute to the "calamitous event" of "a Civil war."[13]

The news from New York was even less encouraging. That state had sent three delegates to Philadelphia—John Lansing, Jr., Robert Yates, and Alexander Hamilton. In July, however, the states-rights-

10. U.S. CONST. art. VII.

11. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 648–49 (Max Farrand ed., rev. ed. 1966) ("The Constitution being signed by all the members except Mr. Randolph [of Virginia], Mr. Mason [of Virginia], and Mr. Gerry [of Massachusetts] who declined to give it the sanction of their names.").

12. *Id.* at 645–46; *see also id.* at 631 (setting forth a plan for inviting amendments from state delegations and then holding a second convention in anticipation of failed ratification).

13. *Id.* at 647.

minded Lansing and Yates abandoned the Convention altogether, stripping New York of even a quorum entitled to vote and leaving Hamilton as the state's sole signatory of the final constitutional proposal.[14] By its terms, the Constitution would come into effect upon ratification by nine states. Everyone knew, however, that the new nation stood little chance of success without the strategically situated state of New York, and it stood no chance at all if Virginia or Massachusetts abandoned the enterprise as well.[15]

Things would soon get worse for supporters of the Constitution. As the document circulated through the former colonies, prominent critics stepped forward in large numbers. Dissenters included famous patriots, such as Patrick Henry and Richard Henry Lee of Virginia, as well as influential local leaders, such as Luther Martin of Maryland and James Winthrop of Massachusetts.[16] Opponents of the Constitution, who became known as "antifederalists,"[17] moved swiftly to block ratification. Scores of essayists, using names like "Cato," "A Plebeian," and "Centinel," directed an avalanche of criticisms at the proposed Constitution almost as soon as it was made public by the Philadelphia conventioneers.[18]

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14. Signature by just one of New York's three delegates meant that the state did not officially join in the act of promulgating the Constitution, a fact in some tension with assertions later made in *The Federalist* that "all the deputations composing the Convention . . . were induced to accede . . . ." THE FEDERALIST NO. 37, at 239 (James Madison) (Jacob E. Cooke ed., 1961).

15. *See, e.g.*, *Introduction* to THE FEDERALIST PAPERS, at vii, viii–ix (Buccaneer Books 1992) (noting that a successful government would require participation by Massachusetts, New York, Pennsylvania, and Virginia, and that "New York was the most difficult case with the strongest opposition"); DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 250 (2d ed. 2005) (finding that "the new government would have little prospect of succeeding" without the "large, powerful, and centrally located states" of New York and Virginia); JOHN FISKE, THE CRITICAL PERIOD OF AMERICAN HISTORY: 1783–1789, at 340 (Cambridge, Riverside Press 1888) (arguing that "the Union could never be cemented without" New York).

16. Martin, who was Maryland's attorney general at the time, had previously been a member of the Confederation Congress and the Philadelphia Convention, which he had left in disgust before its completion. Gregory Stiverson, *Maryland: Necessity, the Mother of Union*, *in* THE CONSTITUTION AND THE STATES 131, 145 (Patrick T. Conley & John P. Kaminski eds., 1988). Winthrop took the lead in opposing the Constitution in Massachusetts, including by writing critiques under the pen name "Agrippa." RICHARD B. MORRIS, WITNESSES AT THE CREATION 225 (1985).

17. *See, e.g.*, LINDA GRANT DE PAUW, THE ELEVENTH PILLAR 170 (1966).

18. *See* THE FEDERALIST NO. 40 (James Madison), *supra* note 14, at 263 (noting that "publications . . . have swarmed against the Convention"). *See generally* 2–6 THE COMPLETE ANTI-FEDERALIST (Herbert J. Storing ed., 1981) (collecting antifederalist tracts).

The chances for ratification in New York looked especially bleak. Prominent antifederalists such as Melancton Smith trumpeted objections to the charter; Lansing and Yates soon joined the chorus;[19] and the local essayist "Brutus" (believed by many to have been Yates himself[20]) leveled trenchant attacks against the Constitution. These critics had much material to work with, especially in appealing to residents of a state that had weathered recent economic distresses far better than most of the other former colonies. That the Empire State, with a population of over 300,000, was given no more voice in the Senate than Rhode Island, with a population of some 68,000,[21] struck many New Yorkers as outrageous.[22] Some local citizens worried that a federal monopoly over import taxes would disadvantage a state that had long leveraged its famous port to impose duties borne in large part by nonresident buyers and sellers.[23] Still other New Yorkers feared that a strengthened federal Congress would reject land claims made by the state with regard to the disputed territory of Vermont.[24] Most important of all, the state's leading political figure, Governor

19. *See* John P. Kaminski, *New York: Adjusting to Circumstances*, *in* THE CONSTITUTION AND THE STATES 225, 234–35 (Patrick T. Conley & John P. Kaminski eds., 1988) ("Yates and Lansing waited a while before publicly declaring their objections to the proposed constitution.").

20. 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 18, at 358.

21. The 1790 census reported that New York had a population of 340,120 and Rhode Island a population of 68,825. RICHARD L. FORSTALL, U.S. BUREAU OF CENSUS, POPULATION OF STATES AND COUNTIES OF THE UNITED STATES: 1790–1990, at 4 (1996).

22. *See, e.g.*, Brutus III, N.Y. J., Nov. 15, 1787, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 18, at 377, 379 (criticizing as "unreasonable, and unjust" the equality of representation between Delaware on the one hand and Massachusetts and Virginia on the other). *But see id.* at 447 n.26 (editorial note) (observing that "[t]he question of the apportionment of Senate seats equally among the states was one on which the Anti-Federalists were equivocal" and that several antifederalists, including Brutus, seem not to have been consistent on this point).

23. *See, e.g.*, CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 28–29 (1986) (footnote omitted) (noting that "the manorial lords of the Hudson valley region . . . took advantage of [their] predominance to shift the burden of taxation from the land to imports, and this fact contributed powerfully to [their] opposition to the Constitution, because it implied a transference of the weight of taxation for state purposes to the soil"); CHERNOW, *supra* note 8, at 244 (asserting that "[t]he tariff issue held special force in New York"). *But see* DE PAUW, *supra* note 17, at 174 & n.19 (discussing the conflicting views of historians Thomas C. Cochran and Forrest McDonald on whether impost-related concerns were a significant factor as New Yorkers considered the Constitution).

24. *See* Kaminski, *supra* note 19, at 228–29 ("The state's claim to the area known as Vermont was disputed" and "delegates warned [Governor] Clinton about the possible attempts to seize New York's northwestern territory").

George Clinton, took up the antifederalist banner.[25] Support for the Constitution from George Washington, who had served as President of the Philadelphia Convention, and Benjamin Franklin, who had sat as the Convention's most senior member, surely counted for something. These icons, however, did not hail from New York, where the popular Governor Clinton wielded a potent influence. That influence was so great that some believed the governor alone would determine in the end the outcome of the ratification battle.[26]

It was into this vortex that Alexander Hamilton chose to throw his talents as a theorist, strategist, and writer. Hamilton was an archenemy of Governor Clinton,[27] an experienced political essayist,[28] and a lawyer steeped in the skills of advocacy.[29] He had a commitment to the constitutional project matched by few in America,

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25. *See, e.g.*, JOHN P. KAMINSKI, GEORGE CLINTON 135 (1993) (noting that Clinton at first "refused to take a public stand on the new form of government" but that, "[w]ithin a short time, the governor's opposition to the Constitution was widely reported").

26. John P. Kaminski has noted that Clinton was very popular as governor, *id.* at 9, and William L. Stone wrote of the "vast influence" Clinton wielded "in his day," William L. Stone, *George Clinton*, MAGAZINE OF AMERICAN HISTORY, June 1879, at 329, 354. Indeed, Clinton was so popular that he was elected seven times. KAMINSKI, *supra* note 25, at 2. According to federalists, the governor was indeed the focal point of the opposition. Referring to Clinton, one observer opined that "'[t]he *Helmsman* leads a majority by the nose just as he pleases.'" John P. Kaminski, *New York: The Reluctant Pillar*, *in* THE RELUCTANT PILLAR 48, 99 (Stephen L. Schechter ed., 1985) (quoting Extract of a letter from New York (July 20, 1788), *in* NEW HAMPSHIRE SPY, July 29, 1788).

27. For example, in a piece dated July 21, 1787, anonymously published in the *Daily Advertiser*, Hamilton accused Governor Clinton of undermining the work of the Philadelphia Convention. CHERNOW, *supra* note 8, at 237. Hamilton wrote that "such conduct in a man high in office, argues greater attachment to his *own power* than to the *public good*, and furnishes strong reason to suspect a dangerous predetermination to oppose whatever may tend to diminish the *former*, however it may promote the *latter*." Alexander Hamilton, N.Y. DAILY ADVERTISER, July 21, 1787, *reprinted in* 4 THE PAPERS OF ALEXANDER HAMILTON 229, 232 (Harold C. Syrett ed., 1962). Not surprisingly, this letter stirred much hostility in the state and helped render Hamilton and Clinton lifelong political antagonists. Hamilton's antipathy for Governor Clinton also surfaced in *The Federalist*. *See* THE FEDERALIST NO. 77 (Alexander Hamilton), *supra* note 14, at 518 (asserting that "a great number of very improper appointments" had been made by the executive council, which included Governor Clinton; noting that "whether he [seeks] the advancement of persons, whose chief merit is their implicit devotion to his will" and whether he seeks to advance a "despicable and dangerous system of personal influence, are questions which unfortunately for the community can only be the subjects of speculation and conjecture").

28. *See* GARRY WILLS, EXPLAINING AMERICA 59 (1981) (noting Hamilton's early work as an essayist, beginning at age eighteen).

29. *See, e.g.*, CHERNOW, *supra* note 8, at 168 (noting that Hamilton's law manual was "so expertly done, its copious information so rigorously pigeonholed, that it was copied by hand and circulated among New York law students for years").

and he also had valuable experience in government—as Washington's chief aide in the early years of the Revolution, as a battlefield commander later in the war, as a member of the New York legislature following the Revolution, and as a representative to the Confederation Congress.[30] Hamilton's legendary self-assurance was in full flower by 1787, as was his unmatched zeal in battling political adversaries of every sort.[31] Propelled by these forces, Hamilton took the lead in defending the Constitution in his home state.

The first order of business was to devise a plan. Hamilton would do what was expected by meeting with local citizens, by plotting federalist tactics, and by seeking one of the 65 seats at his state's ratifying convention.[32] The core of his strategy, however, involved a project so ambitious that it was not pursued anywhere else in the nation. Hamilton would oversee the production of an elaborate series of essays, to be published in local newspapers, that made the case for ratification.[33] In keeping with the fashion of the day, these tracts would bear only a pen name, and—in an effort to sound a high-toned note of public-spiritedness—Hamilton chose the title "Publius."

Hamilton's next order of business was to find collaborators. New York's most prominent federalist, John Jay, quickly signed onto the project. Jay had not served as a delegate to the Philadelphia Convention, but he was an ardent supporter of the Constitution and a well-versed student of government. Indeed, few Americans—and no New Yorkers—could match Jay's record of federal service.[34] He had sat as a delegate to both the First and the Second Continental Congresses, as President of the wartime federal Congress, and as minister to Spain from 1780 to 1782. Along with fellow luminaries Benjamin Franklin and John Adams, Jay had served on the negotiating team that produced the peace treaty that ended the Revolutionary War and, as of the time of the writing of *The*

30. *See id.* at 100–02 (as Washington's aide); *id.* at 163–64 (as commander at Yorktown); *id.* at 173 (service in Confederation Congress); *id.* at 221 (service in New York Assembly).

31. *See, e.g.*, *id.* at 60 (describing the "slashing style of attack" that "would make Hamilton the most feared polemicist in America").

32. *See* DE PAUW, *supra* note 17, at 186 ("Alexander Hamilton held a seat from New York . . . .").

33. *See, e.g.*, CHERNOW, *supra* note 8, at 222 (describing Hamilton as "editorial impresario" of the *Papers*); *id.* at 246 (reporting that "Hamilton conceived [the] ambitious writing project").

34. JACK N. RAKOVE, ORIGINAL MEANINGS 254 (1996) (noting that "Jay was the most prominent national official" after 1783).

Federalist, he held the Confederation's most important office as Secretary of Foreign Affairs. In the end, however, Jay would contribute little to the project. A severe bout of rheumatism put him on the sidelines after he completed only four tracts, and he would later find time to pen only one more essay.[35]

Who would fill the breach created by Jay's unavailability? Gouvernor Morris declined an invitation to participate, and William Duer, a New York City federalist who would later write as "Philo-Publius," proved incapable of producing work that met Hamilton's exacting standards.[36] The great stroke of luck, for Hamilton and for the nation, came through a coincidence of scheduling. Following its formation in 1781, the hapless federal legislature created by the Articles of Confederation had wandered from Philadelphia to Princeton to Annapolis to Trenton.[37] In the fall and winter of 1787, however, the Confederation Congress was meeting in New York City.[38] This turn of events meant that Virginia representative James Madison, fresh from the Constitutional Convention, was near at hand as Hamilton contemplated who should help him wield the quill of Publius.[39]

Madison was uniquely well qualified to collaborate on the project. Like Hamilton, he was an ardent student of government who had served in both his own state's legislature and the Confederation Congress.[40] Madison had also played a key role at the Philadelphia

35. DE PAUW, *supra* note 17, at 106–07.

36. *Id.* at 107–08. Duer had previously "served in the Continental Congress" and the convention that framed the New York Constitution. CHERNOW, *supra* note 8, at 293. He was also an inveterate speculator and a continuing presence in Hamilton's life. In particular, Duer's later mishandling of joint business dealings would later bring Hamilton great embarrassment and Duer himself seven years in debtors' prison. *See id.* at 381–88 (Duer "was packed off to debtors' prison" and "Hamilton was appalled to learn of Madison's allegation that his purchases of government securities to steady the market had been made at high prices to benefit speculators").

37. *See* FISKE, *supra* note 15, at 271 ("[T]he Continental Congress had skipped about from Philadelphia to Princeton, to Annapolis, to Trenton, to New York, until it had become a laughing-stock . . . .").

38. Congress had been meeting in New York since November 7, 1785. *See* 23 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, at xii (Paul H. Smith ed., 1995) (providing chronology).

39. *See* Martin Diamond, *The Federalist*, *in* HISTORY OF POLITICAL PHILOSOPHY 659, 659 (Leo Strauss & Joseph Cropsey eds., 3d ed. 1987) (asserting that Hamilton brought in Madison "ironically, only after several others had declined his invitation").

40. *See* KETCHAM, *supra* note 2, at 158 (calling Madison the "leader of the group anxious to continue the reform in the laws of Virginia"); *id.* at 179 (attributing Madison's candidacy and election to a desire to maintain the credibility of the national government).

Convention itself, including by crafting the main features of the so-called Virginia Plan, which had provided the starting point for discussions among the delegates.[41] Madison, in contrast to Hamilton, had dutifully attended and fruitfully participated in every session of the Convention. He had also taken extensive notes of the proceedings and written lengthy tracts on constitutional theory even before the Convention commenced.[42] If Hamilton was a lightning rod of controversy, Madison—at least as of 1787—seemed to be a paragon of understated brilliance and good will.[43] Writing of the Virginian, Georgia delegate William Pierce observed:

> [E]very Person seems to acknowledge his greatness. He blends together the profound politician, with the Scholar . . . . From a spirit of industry and application which he possesses in a most eminent degree, he always comes forward the best informed Man of any point in debate.[44]

Pierce added that "[i]n the management of every great question," Madison "took the lead in the Convention"—and rightly so because, about "[t]he affairs of the United States, he perhaps, has the most correct knowledge of, of any Man in the Union."[45]

That history has adjudged Madison the "Father of the Constitution"[46] suggests that Pierce was right in emphasizing his critical role in bringing about the "Miracle at Philadelphia."[47] The

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41. *See, e.g.*, RAKOVE, *supra* note 34, at 59 (noting that the Virginia delegation approved "articles incorporating the essential elements of Madison's pre-Convention analysis" and that this Virginia Plan provided the focal point for the Convention's early debates).

42. *See* KETCHAM, *supra* note 2, at 184–89 (detailing Madison's research and writings on the theory of the extended republic); *id.* at 195–96 (describing Madison's motivation for taking notes during the Philadelphia Convention).

43. *See* JOSEPH J. ELLIS, FOUNDING BROTHERS 53 (2000) (observing that Madison "seemed to lack a personal agenda" and was "eager to give credit to others, especially his opponents"); *id.* at 57 (noting that "[u]nlike Jefferson, he could be genuinely gracious in defeat"); *id.* at 74 (highlighting "Madison's matchless political savvy").

44. William Pierce, *Character Sketches of Delegates to the Federal Convention*, *in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 11, at 87, 94.

45. *Id.*

46. *See* Benjamin Fletcher Wright, *Introduction* to THE FEDERALIST 1, 8 (Benjamin Fletcher Wright ed., 1961) (noting that Madison, though "on the losing side in a number of important votes in the Convention[,] . . . is more nearly the author of the Constitution of 1787 than any other man").

47. Both Washington and Madison referred to the events at Philadelphia as a "miracle," and Catherine Drinker Bowen used "Miracle at Philadelphia" as the title of her well-known account of the Constitutional Convention. CATHERINE DRINKER BOWEN, MIRACLE AT PHILADELPHIA, at ix (1966).

Miracle at Philadelphia, however, would have no enduring impact unless leading states, including New York, joined in ratification. So as the autumn of 1787 moved toward winter, Hamilton, Madison, and Jay put their shoulders to the wheel. *The Federalist No. 1*, written by Hamilton, appeared on October 27. Jay contributed *Nos. 2*, *3*, *4*, and *5* in a period that spanned October 31 to November 10. Madison's first contribution—the justly famous *The Federalist No. 10*—was published on November 22.[48] By the time Publius surrendered to exhaustion in May of 1788, seventy-seven separate essays had made their appearance in New York newspapers and eight more had surfaced in the book version of Publius's work.

Despite these efforts, word on the street in early 1788 indicated that ratification in New York was doubtful. America's spiraling struggles under the Articles of Confederation, however, gave Hamilton and his collaborators cause for hope.[49] The essential problem was well known: the Articles of Confederation vested the central government with so little power that the states operated much like independent nations.[50] In theory, the federal Congress could wage war, make treaties, and conduct relations with Native American tribes. But the Articles sapped these powers of energy by denying Congress the authority to raise an army on its own or to impose taxes directly on American citizens.[51] Instead, the federal government could gather funds and troops only by demanding contributions from the states, which often hesitated to comply.[52] This system of "quotas" and "requisitions" produced a steady stream of budget shortfalls and

48. Jacob E. Cooke, *Introduction* to THE FEDERALIST, at xi, xiii (Jacob E. Cooke ed., 1961).

49. For major treatments of this period in addition to FISKE, *supra* note 15, see MERRILL JENSEN, THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION, 1781–1789 (1950), MORRIS, *supra* note 16, and JACK N. RAKOVE, THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETATIVE HISTORY OF THE CONTINENTAL CONGRESS (1979). A useful bibliography appears in MORRIS, *supra*, at 263–67.

50. *See, e.g.*, GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 356–57 (1993) (noting that the states exercised even powers forbidden by the Articles of Confederation). Notably, the Articles of Confederation reserved to the states "every power, jurisdiction, and right . . . not . . . expressly delegated to the United States, in Congress assembled" and did not expressly delegate the Confederation Congress many of the powers the present-day Congress possesses, including the powers to lay taxes and to regulate interstate and foreign commerce. ARTS. OF CONFEDERATION art. II.

51. ARTS. OF CONFEDERATION art. IX.

52. *See* BOWEN, *supra* note 47, at 5 (noting that "[t]he Confederation . . . had no power to collect taxes [or] defend the country" and "[o]ften enough there was no response" to Congress's requisitions for money).

escalating aggravation among citizens throughout the nation.[53] In particular, the defaults of some states in meeting their obligations bred animosities—and further defaults—on the part of other states.[54] Because of these conditions, Hamilton could observe in *The Federalist No. 30* that "the government of the Union has gradually dwindled into a state of decay, approaching nearly to annihilation."[55] By 1787, many citizens shared his view that the federal government's "radical vice" of a wholesale dependence on the states had brought America to the "last stage of national humiliation."[56]

Problems related to commerce also plagued the Confederation. The central government's inability to impose taxes left it hard-pressed to deal with an ever-mounting debt that had grown out of the Revolution.[57] To make matters worse, the states created a dizzying array of currencies[58] that experienced sharp shifts in valuation, thus spawning economic uncertainty and loss.[59] Meanwhile, states through which commercial traffic flowed enacted self-serving legislation that burdened neighboring jurisdictions.[60] These problems cried out for national solutions. Federal authorities were eager to act. The government created by the Articles of Confederation was so feckless,

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53. Hamilton knew particularly well the difficulties of the requisition system. On October 1, 1787, and twice thereafter, the following notice appeared in the *New York Packet*: "THE SUBSCRIBER has received nothing on account of the quota of this State for the present year. (Signed) ALEXANDER HAMILTON, Receiver of Continental Taxes." *Id.* The situation in other states was doubtless worse, as New York assertedly paid a greater proportion of what the congress requested than did any other state in the post-Revolution years. *See* DE PAUW, *supra* note 17, at 10 ("When peace returned and the collection of taxes improved, New York paid a larger percentage of her Congressional requisitions than did any other State.").

54. *See* BOWEN, *supra* note 47, at 5 ("The states which paid were bitter against the states which did not, and said so.").

55. THE FEDERALIST NO. 30 (Alexander Hamilton), *supra* note 14, at 188; *see also* THE FEDERALIST NO. 15 (Alexander Hamilton), *supra* note 14, at 91 (adding that "[t]here is scarcely any thing that can wound the pride, or degrade the character of an independent nation, which we do not experience").

56. THE FEDERALIST NO. 15 (Alexander Hamilton), *supra* note 14, at 93.

57. *See* FISKE, *supra* note 15, at 104–05 (describing Congress's failure to produce income and the resultant loss of creditworthiness); MORRIS, *supra* note 16, at 124–25 (detailing amounts of budget shortfalls).

58. *See* FISKE, *supra* note 15, at 171 (noting that the existence of "different kinds of paper created such a labyrinth as no human intellect could explore").

59. *See id.* at 176 (noting that one dollar of paper money in Rhode Island issued in May 1786 was only worth sixteen cents by November of that year).

60. *See, e.g.*, Kaminski, *supra* note 19, at 228 (describing the effects of New York's impost system upon neighboring states); *see also* THE FEDERALIST NO. 42 (James Madison), *supra* note 14, at 283 (describing the need for "relief of the States which import and export through other States, from the improper contributions levied on them by the latter").

however, that it lacked even the nominal power to regulate interstate and foreign commerce.

One instance of failed reform demonstrates pointedly the ineffectiveness of the government under the Articles of Confederation. In 1782, a fiscal crisis triggered support from twelve separate states for letting Congress lay duties directly on importers. Tiny Rhode Island, however, held out. The other states had conditioned their approval of the plan on unanimous support, in keeping with the rule that amendments to the Articles of Confederation required each state's consent, so that Rhode Island's rejection operated as an effective veto.[61] That a state occupied by less than two percent of the nation's people could block a measure so widely endorsed and so greatly needed struck most Americans as the height of folly.[62]

Perhaps it was poetic justice that the greatest economic crisis of the preconstitutional period reared its head in the same state that stubbornly resisted reform efforts designed to bolster the nation's fiscal powers. Rhode Island, like other states, experienced intense controversies over the issuance of paper money during the 1780s.[63] Creditors opposed this medium of payment because it lacked inherent value. Debtors, however, saw things differently. They pressed state governments to print paper money, to assign it a fixed value, and to distribute it in sufficient volumes to provide a soft-money medium for paying off hard-money loans.[64] Debtors also encouraged legislators to pass so-called "stay laws," which delayed the ability of creditors to collect debts even after they had fully matured.[65]

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61. *See* DE PAUW, *supra* note 17, at 33.

62. *See, e.g.*, THE FEDERALIST NO. 22 (Alexander Hamilton), *supra* note 14, at 140 (lamenting the system under which "[a] sixtieth part of the Union . . . has several times been able to oppose an intire bar to its operations").

63. FISKE, *supra* note 15, at 173.

64. *See id.* at 174 (discussing efforts to use "promissory notes of a bankrupt government" to pay "real money" debts). Some modern historians have been more charitable toward the proponents of paper money. *See, e.g.*, PATRICK T. CONLEY, DEMOCRACY IN DECLINE: RHODE ISLAND'S CONSTITUTIONAL DEVELOPMENT 1776–1841, at 88 (1977) (arguing that the "real motives . . . were tax relief and reduction of the state debt"); *id.* at 89 (arguing that "the paper plan must be considered a success").

65. *See* 1 GEORGE BANCROFT, HISTORY OF THE FORMATION OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 228–41 (3d ed., New York, D. Appleton 1883) (describing laws interfering with contracts in several states, including stay laws).

Many Americans, especially in the propertied classes, saw grave danger in debtor-relief laws and quick-fix paper money schemes. In Rhode Island, however, a "debtor party" captured the statehouse and proceeded to implement aggressive reforms. In particular, the legislature permitted the printing of vast amounts of new currency—more dollars per person than in any other state—and then it forced creditors to take the currency in payment of past debts at face value.[66] In addition, Rhode Island laid heavy fines on merchants who rejected payment in currency and also went so far as to strip persons charged with this offense of the benefit of trial by jury.[67] These moves triggered turmoil in Rhode Island and beyond, particularly among nonresidents who had lent money to Rhode Island borrowers. Mounting resentments raised concerns that commercial antagonisms soon might give way to interstate conflicts of a bloodier kind.[68]

The threat of armed hostilities was not without substance. In the winter of 1783, the Continental Army was encamped in Newburgh, New York, where officers fumed about the federal government's wavering on whether to honor debts owed to Revolutionary War veterans.[69] Frustrations boiled over into open talk of marching on Congress, and fliers advocating just that course of action began to circulate in camp. With a dramatic speech, General Washington quelled the gathering tempest.[70] Three months later, however, another band of embittered troops did march on Philadelphia all the way from western Pennsylvania. Once in town, these mutineers ransacked local arsenals and surrounded Independence Hall. Again, local authorities put down the threat of violence, but not before

66. GEORGE BROWN TINDALL, AMERICA: A NARRATIVE HISTORY 260 (1984).

67. CONLEY, *supra* note 64, at 90. The highest court of Rhode Island refused to enforce the law stripping defendants of the right to a jury trial. As Patrick T. Conley has pointed out, the formal reason given was that the court lacked jurisdiction, but the state legislature and many historians interpreted the court's action as declaring the statute unconstitutional. *Id.* at 95–96.

68. *See, e.g.*, THE FEDERALIST NO. 7 (Alexander Hamilton), *supra* note 14, at 42 (cautioning that wars may result from "[l]aws in violation of private contracts as they amount to aggressions on the rights of those States, whose citizens are injured by them"); *see also id.* at 39 (counting "[t]he competitions of commerce" among the states as a "fruitful source of contention").

69. On the so-called Newburgh Conspiracy, and the events leading up to it, see MORRIS, *supra* note 16, at 127–33.

70. CHERNOW, *supra* note 8, at 178–79 ("The mutinous soldiers, inexpressibly moved, were shamed by their opposition to Washington and restored to their senses.").

Congress had taken leave of Pennsylvania to seek protection from New Jersey's presumably more reliable militia.[71]

Risks of armed conflict with foreign powers also threatened the infant nation. Britain, which was outraged by American refusals to pay off English creditors as required by the Revolution-concluding Treaty of Paris, ignored its own obligations to abandon forts in the sparsely populated Northwest and fomented Native American attacks on settlers in that region.[72] Meanwhile, Spain, which controlled the lower stretch of the Mississippi, blocked American navigation of the river and waited for settlers in present-day Kentucky and Tennessee "to abandon their feeble Congress for the solid commercial advantage of Spanish citizenship."[73]

The forces of turbulence took their most troubling turn during 1786 in western Massachusetts. There, a crisis arose after conservatives in the Boston statehouse adopted a policy of paying off war debts in hard currency, a choice that imposed severe hardships on farmers and the poor, as taxes rose and money supplies tightened. As a result, an armed band of disillusioned locals under the leadership of Daniel Shays marched on a county courthouse, demanding relief.[74] The uprising was quickly put down.[75] News of Shays's Rebellion, however, gripped a fearful nation.[76] Rhode Island's radical paper

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71. *Id.* at 180, 181–82.

72. *Id.* at 394; *see also* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 141 (2005) (noting that Britain retained five forts within New York, "thereby blocking free access to the lucrative fur trade and complicating American relations with Indian tribes in the region").

73. JOHN M. BLUM ET AL., THE NATIONAL EXPERIENCE 121 (3d ed. 1973). Nor were the Spanish mere passive observers in seeking to induce American secession in favor of Spanish rule. As noted by Professor Morris: "James Wilkinson, as unsavory a character as bestrode the Western scene, a man given to lying, bullying, or fawning as circumstances dictated, devoted himself to the task of separating Kentucky from Virginia in order to turn it over to Spain, for whom he served as a secret agent." MORRIS, *supra* note 16, at 124.

74. *E.g.*, FISKE, *supra* note 15, at 180. The Shays brigade also went after guns at an arsenal in Springfield, Massachusetts. Upon being told that the weapons stored there belonged to the federal government, Shays offered a telling response: "To hell with Congress! That crowd is too weak to act." MORRIS, *supra* note 16, at 173.

75. *See, e.g.*, FISKE, *supra* note 15, at 182–83 ("A few minutes sufficed to scatter [Shays's men] in flight.").

76. The impact of the uprising was heightened because it did not stand alone. As Professor Morris has written:

> [B]ackcountry resistance to debt and tax collection was a contagion that spread from New England to pockets of law defiance evident from New Jersey to South Carolina. In June of 1786 "a tumultuous assemblage of the people" closed down Maryland's Charles County courthouse, and boycotts against the sale of debtor property were spreading rapidly in other parts of Maryland. In South Carolina, farmers attacked the

money reforms had revealed the potential excesses of localized democracy. Shays's Rebellion raised the more ominous specter that the new nation stood on the precipice of anarchy.

It was in this context that Hamilton, Madison, and Jay undertook to make the case for ratification in *The Federalist Papers*. Just *how* they made their case for ratification is considered in Part II.

II. THE ARGUMENT OF PUBLIUS

A modern observer might well suppose that ratification of the Constitution was a sure bet under the difficult conditions of late 1787. That, however, is far from true. Both before and after the Philadelphia Convention, there was broad agreement that proliferating problems under the Articles of Confederation called for a more vigorous central government. There was massive disagreement, however, about the way in which that government should be structured.[77] In particular, many feared that the newly proposed Constitution would bring about such a dramatic shift from state to national power that Americans soon would labor under the yoke of a distant and unresponsive consolidated government. As one antifederalist (who, with a touch of irony, called himself "A Federalist") observed: "I had rather be a free citizen of the small republic of Massachusetts, than an oppressed subject of the great American empire."[78]

Critics also hurled dozens of specific objections at the handiwork of the Convention. Was it not clear that an aristocracy would grow

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> Camden courthouse and sent the judges scurrying home. In Virginia . . . . [i]n May of 1787 a mob burned down the King William County courthouse, destroying all the records, and court proceedings were blocked in other county courts as well.

MORRIS, *supra* note 16, at 176.

77. *See, e.g.*, Impartial Examiner V, VA. INDEP. CHRON., June 18, 1788, *reprinted in* 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 18, at 197, 199 (agreeing that "the Congress are not invested with sufficient powers for *regulating commerce*, and procuring the *requisite contributions* . . . for the *common defence* or *general welfare*" but seeing "no necessity for an innovation further than strengthening [the Congress]" because of fear "that no *security for* . . . liberties will remain after [the Constitution's] adoption"); AN OLD WHIG IV, PHILA. INDEP. GAZETTEER, Oct. 1787–Feb. 1788, *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 18, at 30, 30–34 (asserting that "experience seems to have convinced every one, that the articles of confederation . . . are insufficient for the purposes intended" but objecting to the Constitution on the ground that the resulting federal republic would be too large to function effectively).

78. A Federalist, BOSTON GAZETTE, Nov. 26, 1787, *reprinted in* 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 18, at 117, 118.

out of a Senate made up of a mere twenty-six members elected to six-year terms? Was not a House of Representatives with only sixty-five members too small to produce meaningful connections between elected legislators and their constituents? Would not the absence of restrictions on presidential re-election inevitably lead to the emergence of a *de facto* monarch? And why on earth did the Constitution omit a Bill of Rights? These were fair challenges, and critiques of this sort found expression in hundreds of writings unleashed by furious antifederalists. With the proposal of the Philadelphia Convention, like so much in life, the devil was in the details. And many citizens preferred the devil they knew over the devil they did not.

As the authors of *The Federalist* surveyed this scene, they sought a rhetoric suited to the purpose at hand. The essays would have to speak of enduring themes, and they did so. At bottom, however, the tracts were campaign literature. As a result, *The Federalist* delivered a partisan argument, and that argument did not draw its greatest strength from appeals to lofty abstractions. Instead its force came from a web of persuasion spun from history, emotion, shared concerns, and common sense, all woven together to capture the support of New Yorkers in 1787 and 1788.

The whole of *The Federalist* exceeded the sum of its parts. Still, the parts were important, and critical components of the case made by Publius built on (1) the characteristics and desires of the local audience; (2) history and accepted practice; (3) practical reasoning; (4) imagery and metaphor; (5) openness to compromise; and (6) emotional responses, including responses inspired by America's revolutionary tradition.

A. Attending to the Audience

Because Hamilton, Madison, and Jay wrote *The Federalist* for newspapers, they trained their sights on local readers—shopkeepers and shippers, farmers and merchants, the wealthy and the middle class, the cautious and the bold. Among these readers lurked concerns of all sorts, from theoretical scruples held by politically minded intellectuals to bottom-line fears of business owners faced with the prospect of dual taxation.[79] The fortunes of many men—

79. *See, e.g.*, THE FEDERALIST NO. 36 (Alexander Hamilton), *supra* note 14, at 227–29 (noting concerns over double taxation).

particularly local political figures who faced "diminution of the power, emolument and consequence of the offices they hold under the State-establishments"—hung in the balance.[80]

Hamilton took heed of these forces as he charted the direction of the essays. In *The Federalist No. 1*, he worried openly that "[t]he plan offered to our deliberations, affects too many particular interests, innovates upon too many local institutions, not to involve in its discussion a variety of objects foreign to its merits, and of views, passions and prejudices little favourable to the discovery of truth."[81] He also perceived that pulls against ratification were both "numerous" and "powerful" even for "wise and good men."[82] As a result, Publius set out to "determine clearly and fully the merits of this Constitution," a task that would involve "examining it on all its sides; comparing it in all its parts, and calculating its probable effects."[83] In short, the *Federalist Papers* would be long. The authors would strive to give "a satisfactory answer to *all* the objections which shall have made their appearance that may seem to have *any* claim to . . . attention."[84] The argument of Publius, however, would offer more than a series of counterpunches. Spread through the text would be affirmative appeals to the interests and concerns of a diverse and skeptical audience situated in 1787 in the state of New York.

In keeping with their purpose, the authors of *The Federalist* focused attention on shared worries of their time and place. Talk of

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80. THE FEDERALIST NO. 1 (Alexander Hamilton), *supra* note 14, at 4.

81. *Id.* Madison expressed much the same thought in *No. 37*:

> It is a misfortune, inseparable from human affairs, that public measures are rarely investigated with that spirit of moderation which is essential to a just estimate of their real tendency to advance or obstruct the public good; and that this spirit is more apt to be diminished than prompted, by those occasions which require an unusual exercise of it.

THE FEDERALIST NO. 37 (James Madison), *supra* note 14, at 231.

82. THE FEDERALIST NO. 1 (Alexander Hamilton), *supra* note 14, at 4.

83. THE FEDERALIST NO. 37 (James Madison), *supra* note 14, at 231. Meticulous attention was necessary, Madison added, because "the act of the Convention . . . recommends so many important changes and innovations, which may be viewed in so many lights and relations, and which touches the springs of so many passions and interests." *Id.* at 231–32. Hamilton worried that such a painstaking treatment might at times prove "tedious and irksome" to readers. THE FEDERALIST NO. 15 (Alexander Hamilton), *supra* note 14, at 90. The cost was worth the price, however, because the project addressed "a subject . . . most momentous" and was complicated by "the mazes with which sophistry has beset the way." *Id.*

84. THE FEDERALIST NO. 1 (Alexander Hamilton), *supra* note 14, at 7 (emphasis added).

Rhode Island's intransigence,[85] interstate trade conflicts,[86] and Shays's Rebellion[87] made frequent appearances in the essays. The writers drew on the fears of their day. In particular, *The Federalist* reminded readers at every turn that a failure to adopt the Constitution meant retaining the Articles of Confederation, under which a "melancholy situation" had taken hold.[88]

The argument of Hamilton, Madison, and Jay appealed to different voting blocs. They targeted prospective borrowers, emphasizing that credit had been "reduced within the narrowest limits" due to an "opinion of insecurity" born of a weak central government.[89] They pleaded for the support of urban property owners, arguing that the depressed "price of improved land . . . can only be fully explained by that want of private and public confidence, which are so alarmingly prevalent among all ranks and which have a direct tendency to depreciate property of every kind."[90] For patrons of frugality, Hamilton devoted a full essay to detailing why the Constitution promised economies of scale that made cost-based objections "appear in every light to stand on mistaken ground."[91] Manufacturers and planters needed a strong union to supply "a flourishing marine"; otherwise a dependence on foreign carriers

85. *See, e.g.*, THE FEDERALIST NO. 7 (Alexander Hamilton), *supra* note 14, at 42–43 ("We have observed the disposition to retaliation excited in Connecticut, in consequence of the enormities perpetrated by the legislature of Rhode-Island . . . .")

86. *See id.* at 39–40 (noting that, left unchecked, states would tend to pursue trade policies to their own benefit and the detriment of their neighbors); THE FEDERALIST NO. 11 (Alexander Hamilton), *supra* note 14, at 71–72 (advocating a uniform interstate trade system); THE FEDERALIST NO. 22 (Alexander Hamilton), *supra* note 14, at 135–37 (same); THE FEDERALIST NO. 42 (James Madison), *supra* note 14, at 283–85 (same); THE FEDERALIST NO. 45 (James Madison), *supra* note 14, at 314 (same).

87. *See* THE FEDERALIST NO. 6 (Alexander Hamilton), *supra* note 14, at 31, 35 (cautioning that uprisings like Shays's Rebellion could have dangerous consequences for the republic); THE FEDERALIST NO. 21 (Alexander Hamilton), *supra* note 14, at 131 (same); THE FEDERALIST NO. 28 (Alexander Hamilton), *supra* note 14, at 177 (same); THE FEDERALIST NO. 74 (Alexander Hamilton), *supra* note 14, at 502 (same).

88. THE FEDERALIST NO. 15 (Alexander Hamilton), *supra* note 14, at 92.

89. *Id.*

90. *Id.*; *see also* THE FEDERALIST NO. 12 (Alexander Hamilton), *supra* note 14, at 74 (noting that it had been "found, in various countries, that in proportion as commerce has flourished, land has risen in value").

91. THE FEDERALIST NO. 13 (Alexander Hamilton), *supra* note 14, at 82. Indeed, Hamilton supplemented his extensive discussion of this subject in *No. 13* with a further treatment in *No. 84*. *See* THE FEDERALIST NO. 84 (Alexander Hamilton), *supra* note 14, at 587 (concluding that "the sources of additional expence from the establishment of the proposed constitution are much fewer than may have been imagined").

would compel us "to content ourselves with the first price of our commodities, and to see the profits of our trade snatched from us to enrich our enemies and persecutors."[92] Why should fishermen—whose "spirit of enterprise" had rendered them "able to undersell [European] nations in their own markets"—support the Constitution?[93] Because without a government energetic enough to negotiate fair treaties with foreign powers, nothing would be "more natural, than that they should be disposed to exclude . . . such dangerous competitors" from the grant of local trading privileges.[94]

Time and again, Publius appealed to special concerns of the New York audience. Equal representation of the states in the proposed Senate, for example, might rankle residents of large and fast-growing New York. Hamilton emphasized in *The Federalist No. 22*, however, that the system adopted by the Philadelphia Convention, which paired the Senate with a House apportioned solely on the basis of population, improved on the existing system, under which each state—no matter what its size—had only one vote.[95] In *The Federalist No. 35*, Hamilton observed that alternative constitutional proposals would deny Congress the power of general taxation and instead permit only the imposition of duties on imports from foreign countries.[96] "New-York," he added, "is an importing State, and is not likely speedily to be to any great extent a manufacturing State. She would of course suffer in a double light from restraining the jurisdiction of the Union to commercial imposts."[97] In *The Federalist No. 41*, Madison noted that New York faced special dangers because its "sea coast is extensive" and it "is penetrated by a large navigable river for more than fifty leagues."[98] Resulting vulnerabilities to naval assault—much heightened by "the precarious situation of European affairs"—made New York a likely future "hostage, for ignominous compliances with the dictates of a foreign enemy, or even with the rapacious demands of pirates and barbarians."[99] Safety in these circumstances could come only from a strong federal navy. But "[i]n

92. THE FEDERALIST NO. 11 (Alexander Hamilton), *supra* note 14, at 69.
93. *Id.* at 69–70.
94. *Id.* at 70.
95. THE FEDERALIST NO. 22 (Alexander Hamilton), *supra* note 14, at 138–39.
96. THE FEDERALIST NO. 35 (Alexander Hamilton), *supra* note 14, at 216–18.
97. *Id.* at 217.
98. THE FEDERALIST NO. 41 (James Madison), *supra* note 14, at 275.
99. *Id.*

the present condition of America, the states more immediately exposed to these calamities, have nothing to hope from the phantom of a general government which now exists."[100]

In *The Federalist No. 25*, Hamilton shifted his attention to northern New York, pointing to his state's shared border with English-occupied Canada. Danger from British armies confronted all the states, but New York was "more directly exposed," and a continuing drift toward disunity would require it to bear the full cost of border-area fortifications.[101] "Upon the plan of separate provisions, New-York would have to sustain the whole weight of the establishments requisite to her immediate safety, and to the mediate or ultimate protection of her neighbours."[102] Such a system, Hamilton observed, would not be "safe as it respected the other States."[103] Even more important, it would not be "equitable as it respected New-York."[104]

Hamilton, Madison, and Jay also sought to cultivate the support of their audience by plying their readers with compliments. Publius praised "the present genius of the people,"[105] whom he described as "considerate and virtuous,"[106] "candid and judicious,"[107] "impartial and discerning,"[108] and "intelligent and well informed."[109] The "gallant citizens of America," for example, would never acquiesce in the use of federal armies to overthrow legitimate state authorities.[110] New

100. *Id.*

101. THE FEDERALIST NO. 25 (Alexander Hamilton), *supra* note 14, at 158. Nor was an exposure to foreign invaders of only theoretical interest to New Yorkers in the 1780s. As Professor Wright explained:

> In a city that had been occupied by British forces for almost seven years during the Revolution (longer than any other city) and in a state that was the site for major battles and whose northern and western frontiers had suffered from British armies and Indian raids, it was scarcely necessary to underline the point that war is unpleasant. Moreover, five of the posts that England had not given up, but had continued to occupy in violation of the Treaty of 1783, were in New York State.

Wright, *supra* note 46, at 18.

102. THE FEDERALIST NO. 25 (Alexander Hamilton), *supra* note 14, at 158.

103. *Id.*

104. *Id.*

105. THE FEDERALIST NO. 55 (James Madison), *supra* note 14, at 375.

106. THE FEDERALIST NO. 10 (James Madison), *supra* note 14, at 57.

107. THE FEDERALIST NO. 36 (Alexander Hamilton), *supra* note 14, at 230.

108. THE FEDERALIST NO. 23 (Alexander Hamilton), *supra* note 14, at 148.

109. THE FEDERALIST NO. 3 (John Jay), *supra* note 14, at 13.

110. THE FEDERALIST NO. 46 (James Madison), *supra* note 14, at 322.

Yorkers were "little blinded by prejudice, or corrupted by flattery."[111] The very institution of republican self-government revealed that there exists no small "portion of virtue and honor among mankind."[112]

Rhetoric of this kind created tension with those parts of *The Federalist* that emphasized the need to fashion government to the shortcomings of human nature, and steering a course between these competing ideas took some artful maneuvering. Publius met the challenge primarily by stressing the difference between political leaders and the general citizenry. Without question, some Americans—especially those drawn to public office—would embrace a "love of power"[113] and prove "capable of preferring their own emolument and advancement to the public weal."[114] Among ordinary citizens, however, the great danger came not from malevolence or unchecked self-centeredness, but from "temporary errors and delusions."[115] Thus, "people commonly *intend* the PUBLIC GOOD," and "[t]his often applies to their very errors."[116] The difficulty, as Madison explained in *The Federalist No. 63*, came from "particular moments in public affairs, when the people stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn."[117] It was no insult to recognize these conditions because even the most praiseworthy citizens "know from experience, that they

111. THE FEDERALIST NO. 63 (James Madison), *supra* note 14, at 424–25; *see also* THE FEDERALIST NO. 49 (James Madison), *supra* note 14, at 340–41 (noting "the success . . . which does so much honour to the virtue and intelligence of the people of America").

112. THE FEDERALIST NO. 76 (Alexander Hamilton), *supra* note 14, at 514; *see also* THE FEDERALIST NO. 55 (James Madison), *supra* note 14, at 378 (arguing that "[w]ere the pictures which have been drawn by the political jealousy of some among us, faithful likenesses of the human character, the inference would be that there is not sufficient virtue among men for self-government; and that nothing less than the chains of despotism can restrain them from destroying and devouring one another"); THE FEDERALIST NO. 57 (James Madison), *supra* note 14, at 386 (noting that "the universal and extreme indignation which [ingratitude] inspires, is itself a proof of the energy and prevalence of the contrary sentiment").

113. THE FEDERALIST NO. 15 (Alexander Hamilton), *supra* note 14, at 97.

114. THE FEDERALIST NO. 59 (Alexander Hamilton), *supra* note 14, at 402. Indeed, government service would always attract "a few aspiring characters" who seek to abuse power to their own "subversive" ends. THE FEDERALIST NO. 57 (James Madison), *supra* note 14, at 386. And in almost any individual representative, some "motives of a . . . selfish nature" would operate, including "pride and vanity." *Id.*

115. THE FEDERALIST NO. 63 (James Madison), *supra* note 14, at 425.

116. THE FEDERALIST NO. 71 (Alexander Hamilton), *supra* note 14, at 482.

117. THE FEDERALIST NO. 63 (James Madison), *supra* note 14, at 425.

sometimes err."[118] Indeed (and here Publius reached the apex of playing both sides of the table), "the wonder is, that they so seldom err as they do; beset as they continually are by the wiles of parasites and sycophants, by the snares of the ambitious, the avaricious, the desperate; by the artifices of men, who possess their confidence more than they deserve it."[119] Publius appealed to the "accuracy and candour"[120] and the "cool and deliberate sense"[121] of the broader community in urging ratification. Human frailty would come into play as citizens grappled with the Constitution because "there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust."[122] There were, however, also "other qualities in human nature," and Publius argued that the idea of self-government reflects confidence that human virtue was sufficient, in the absence of tyranny, to "restrain [citizens] from destroying and devouring one another."[123] After all, "the people of any country . . . seldom adopt, [or] steadily persevere for many years in, an erroneous opinion respecting their interests."[124] It was largely in this way that a frequent depiction of the citizenry as virtuous and wise comported with Publius's simultaneous calls for extreme caution in shaping the structures of republican self-rule.

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118. THE FEDERALIST NO. 71 (Alexander Hamilton), *supra* note 14, at 482.

119. *Id. But cf.* Wright, *supra* note 46, at 83 (asserting that Publius does not "fall back on the common and unfortunate view that politicians are less virtuous than private citizens").

120. THE FEDERALIST NO. 45 (James Madison), *supra* note 14, at 314.

121. THE FEDERALIST NO. 63 (James Madison), *supra* note 14, at 425.

122. THE FEDERALIST NO. 55 (James Madison), *supra* note 14, at 378; *see also* THE FEDERALIST NO. 6 (Alexander Hamilton), *supra* note 14, at 35 (noting that people "are yet remote from the happy empire of perfect wisdom and perfect virtue").

123. THE FEDERALIST NO. 55 (James Madison), *supra* note 14, at 378; *see* THE FEDERALIST NO. 76 (Alexander Hamilton), *supra* note 14, at 513–14 (claiming that "[t]he supposition of universal venality in human nature is little less an error in political reasoning than the supposition of universal rectitude"); THE FEDERALIST NO. 57 (James Madison), *supra* note 14, at 385 (noting that "[t]here is in every breast a sensibility to marks of honor, of favor, of esteem, and of confidence, which, apart from all considerations of interest, is some pledge for grateful and benevolent returns"); *see also* Wright, *supra* note 46, at 79–80 (drawing on Professor Scanlon's work in asserting that Publius's "method of 'reasoned discourse'" reflected the assumption "that his readers could be helped to see beyond their immediate prejudices and even beyond their local or personal, but still immediate, self-interest and to decide on the basis of what may be termed a long-run view of their interests"); *see also id.* at 14 ("The authors of *The Federalist* did not . . . hold a romantic view of the nature of man, but they were influenced by the Age of Reason to the extent of believing that man's reason was adequate to the task of devising satisfactory political institutions, provided continuity with past experience in government was maintained.").

124. THE FEDERALIST NO. 3 (John Jay), *supra* note 14, at 13.

B. The Case from History

Appeals to history complemented *The Federalist*'s focus on the interests of New York readers. Over and over, Madison emphasized that "[e]xperience is the oracle of truth"[125] and "the guide that ought always to be followed."[126] Hamilton likewise saw history as "the parent of wisdom"[127] and "the least fallible guide of human opinions."[128] More than 100 years later, Oliver Wendell Holmes, Jr. would declare that "the life of the law has not been logic: it has been experience."[129] Publius held the same view, maintaining in *The Federalist No. 43* that "theoretic reasoning . . . must be qualified by the lessons of practice."[130] These words reflected an outlook of deep significance to the three authors of *The Federalist*, for each of them was an insatiable student of history. Madison, for example, had immersed himself in the study of past governments throughout the months preceding the Constitutional Convention,[131] and Hamilton's and Jay's investigations of history were little less impressive.[132] Lessons gleaned from historical research pervaded *The Federalist*, reaching from Greek and Roman history through British experience to the recent experiments with government of the American states.

1. *The Ancients*. At the heart of *The Federalist*'s treatment of history—especially in *Nos. 19* and *20*—were sobering depictions of

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125. THE FEDERALIST NO. 20 (James Madison), *supra* note 14, at 128.

126. THE FEDERALIST NO. 52 (James Madison), *supra* note 14, at 355.

127. THE FEDERALIST NO. 72 (Alexander Hamilton), *supra* note 14, at 490.

128. THE FEDERALIST NO. 6 (Alexander Hamilton), *supra* note 14, at 32; *accord* THE FEDERALIST NO. 15 (Alexander Hamilton), *supra* note 14, at 96 (describing history as the "best oracle of wisdom").

129. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (Boston, Little, Brown, & Co. 1881).

130. THE FEDERALIST NO. 43 (James Madison), *supra* note 14, at 293.

131. *See, e.g.*, KETCHAM, *supra* note 2, at 183–85 (describing Madison's exhaustive study of the history of federated governments during the spring and summer of 1786).

132. *See* CHERNOW, *supra* note 8, at 24 (noting "Hamilton's omnivorous, self-directed reading"); *id.* at 52 (recounting that Hamilton "ransacked the library" while in college in his studies of philosophy and law); *id.* at 110–12 (explaining how Hamilton "constantly educated himself" during the war, spitting out 112 pages of notes from readings ranging from Bacon to Postlethwayt to Plutarch); *id.* at 137 (noting that "[i]n his spare time, Hamilton pored over financial treatises"); *id.* at 206 (noting that "Hamilton read widely and accumulated books insatiably" in the post-Revolution period and that he "never stopped pondering the ancients"). Jay attended King's College in New York City beginning in 1760 (at the age of fourteen) and there encountered the classical histories of Herodotus and Thucydides, as well as the legal theories of Grotius. WALTER STAHR, JOHN JAY 9–11 (2005).

republics and confederacies of the distant past. Tracking then-dominant traditions of classical learning, Hamilton, Madison, and Jay laced their essays with allusions to Athens,[133] Sparta,[134] Thebes,[135] the Achaean League of ancient Greece,[136] and the Lycian League of Asia Minor.[137] There were treatments of Rome,[138] Carthage,[139] and more modern European experiments in government.[140] Careful attention was paid to the United Netherlands,[141] Swiss cantons,[142] postfeudal German alliances,[143] and the legislature of Poland.[144]

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133. THE FEDERALIST NO. 6 (Alexander Hamilton), *supra* note 14, at 29, 32; THE FEDERALIST NO. 18 (James Madison), *supra* note 14, at 110–17; THE FEDERALIST NO. 25 (Alexander Hamilton), *supra* note 14, at 163; THE FEDERALIST NO. 38 (James Madison), *supra* note 14, at 240–41; THE FEDERALIST NO. 55 (James Madison), *supra* note 14, at 374; THE FEDERALIST NO. 63 (James Madison), *supra* note 14, at 425, 427.

134. THE FEDERALIST NO. 6 (Alexander Hamilton), *supra* note 14, at 32; THE FEDERALIST NO. 18 (James Madison), *supra* note 14, at 110–17; THE FEDERALIST NO. 63 (James Madison), *supra* note 14, at 426.

135. THE FEDERALIST NO. 18 (James Madison), *supra* note 14, at 111, 113.

136. *Id.* at 113; THE FEDERALIST NO. 38 (James Madison), *supra* note 14, at 240–41; THE FEDERALIST NO. 45 (James Madison), *supra* note 14, at 310; THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 14, at 473.

137. THE FEDERALIST NO. 9 (Alexander Hamilton), *supra* note 14, at 55–56; THE FEDERALIST NO. 45 (James Madison), *supra* note 14, at 310.

138. THE FEDERALIST NO. 5 (John Jay), *supra* note 14, at 27; THE FEDERALIST NO. 6 (Alexander Hamilton), *supra* note 14, at 32; THE FEDERALIST NO. 34 (Alexander Hamilton), *supra* note 14, at 209–10; THE FEDERALIST NO. 38 (James Madison), *supra* note 14, at 240–41; THE FEDERALIST NO. 41 (James Madison), *supra* note 14, at 271; THE FEDERALIST NO. 63 (James Madison), *supra* note 14, at 426, 428; THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 14, at 471–80.

139. THE FEDERALIST NO. 6 (Alexander Hamilton), *supra* note 14, at 32; THE FEDERALIST NO. 63 (James Madison), *supra* note 14, at 426–27.

140. *See, e.g.*, THE FEDERALIST NO. 24 (Alexander Hamilton), *supra* note 14, at 152 (observing that the antifederalist objection to standing armies in times of peace was "in contradiction to the practice of other free nations").

141. THE FEDERALIST NO. 6 (Alexander Hamilton), *supra* note 14, at 33; THE FEDERALIST NO. 20 (James Madison), *supra* note 14, at 124–27; THE FEDERALIST NO. 39 (James Madison), *supra* note 14, at 250; THE FEDERALIST NO. 42 (James Madison), *supra* note 14, at 284; THE FEDERALIST NO. 43 (James Madison), *supra* note 14, at 291–92; THE FEDERALIST NO. 75 (Alexander Hamilton), *supra* note 14, at 508.

142. THE FEDERALIST NO. 19 (James Madison), *supra* note 14, at 122–23; THE FEDERALIST NO. 42 (James Madison), *supra* note 14, at 284; THE FEDERALIST NO. 43 (James Madison), *supra* note 14, at 292–93.

143. THE FEDERALIST NO. 12 (Alexander Hamilton), *supra* note 14, at 74; THE FEDERALIST NO. 14 (James Madison), *supra* note 14, at 86; THE FEDERALIST NO. 19 (James Madison), *supra* note 14, at 117–20; THE FEDERALIST NO. 22 (Alexander Hamilton), *supra* note 14, at 137; THE FEDERALIST NO. 42 (James Madison), *supra* note 14, at 284; THE FEDERALIST NO. 43 (James Madison), *supra* note 14, at 292; THE FEDERALIST NO. 80 (Alexander Hamilton), *supra* note 14, at 536–37.

Hellenic experience laid waste to the notion—central to the philosophy underlying the Articles of Confederation—that confederated governments could direct legislative commands only at member states, rather than at individuals. Indeed,

> of all the confederacies of antiquity, which history has handed down to us, the Lycian and Achaean leagues, as far as there remain vestiges of them, appear to have been most free from the fetters of that mistaken principle, and were accordingly those which have best deserved, and have most liberally received the applauding suffrages of political writers.[145]

In particular, the experiences of Lycia and Achaea revealed that a confederated government could hold the power to regulate individuals without destroying the sovereignty of confederacy members. "[H]istory does not inform us," Madison wrote, "that either of them ever degenerated or tended to degenerate into one consolidated government."[146]

Rome's experiments also offered important lessons of which the Constitution's drafters had taken proper heed. Was it advisable to require the ratification of treaties by two-thirds of the whole membership of the Senate, rather than two-thirds of those present to vote? Such an approach might require *de facto* unanimity among those in attendance, and "the examples of the Roman tribuneship" revealed the "impotence, perplexity and disorder" that would result from this form of legislative sign-off.[147] Would it not be wise to commit the executive power to more than a single person? "Roman history records many instances of mischiefs to the republic from the dissentions between the consuls . . . ."[148] Despite these dangers, might there not be offsetting gains in keeping the executive power out of the hands of just one officer? Rome "gives us no specimens of any peculiar advantages derived to the state, from the circumstance of the plurality of those magistrates."[149]

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144. THE FEDERALIST NO. 14 (James Madison), *supra* note 14, at 86; THE FEDERALIST NO. 19 (James Madison), *supra* note 14, at 122; THE FEDERALIST NO. 22 (Alexander Hamilton), *supra* note 14, at 140; THE FEDERALIST NO. 39 (James Madison), *supra* note 14, at 251; THE FEDERALIST NO. 75 (Alexander Hamilton), *supra* note 14, at 508.

145. THE FEDERALIST NO. 16 (Alexander Hamilton), *supra* note 14, at 99.

146. THE FEDERALIST NO. 45 (James Madison), *supra* note 14, at 310.

147. THE FEDERALIST NO. 75 (Alexander Hamilton), *supra* note 14, at 508.

148. THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 14, at 473.

149. *Id.*

2. *British Practice*. The authors of *The Federalist* often consulted British history, emphasizing that it "presents to mankind . . . many political lessons."[150] As to the Constitution's closer bonding of the states, the successful integration of England, Scotland, and Wales provided a model for America to follow.[151] It was enough to say in defense of the Intellectual Property Clause that the "copy right of authors has been solemnly adjudged in Great Britain to be a right at common law."[152] As to the lifetime appointments of judges, "[t]he experience of Great Britain affords an illustrious comment on the excellence of the institution."[153] British practice also supported the Constitution's division of power between House and Senate in impeachment proceedings. After all, "[i]n Great Britain, it is the province of the house of commons to prefer the impeachment; and of the house of lords to decide upon it."[154]

One high-visibility debate between federalists and antifederalists elicited from Publius a particularly close examination of British history. Critics of the Constitution had assailed its provision for two-year House terms by invoking a favorite slogan of the day—"that where annual elections end, tyranny begins."[155] For Madison, however, "the degree of liberty retained even under septennial elections" in Great Britain left no doubt that two-year terms presented no danger of oppression.[156] Indeed, even during its most republican episodes, Britain provided for elections no more frequent than once every three years.[157]

In similar fashion, the history of the mother country undercut widely voiced concerns about recognition of a congressional power to

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150. THE FEDERALIST NO. 56 (James Madison), *supra* note 14, at 382.

151. THE FEDERALIST NO. 5 (John Jay), *supra* note 14, at 23–24.

152. THE FEDERALIST NO. 43 (James Madison), *supra* note 14, at 288.

153. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 14, at 530.

154. THE FEDERALIST NO. 65 (Alexander Hamilton), *supra* note 14, at 440. British experience also undercut complaints that a four-year term for the president was so lengthy that it would lead to executive domination of the legislative branch. After all:

> If a British House of Commons, from the most feeble beginnings . . . have by rapid strides, reduced the prerogatives of the crown and the privileges of the nobility . . . while they raised themselves to the rank and consequence of a coequal branch of the Legislature . . . what would be to be feared from an elective magistrate of four years duration, with the confined authorities of a President of the United States?

THE FEDERALIST NO. 71 (Alexander Hamilton), *supra* note 14, at 485–86.

155. THE FEDERALIST NO. 53 (James Madison), *supra* note 14, at 359.

156. THE FEDERALIST NO. 52 (James Madison), *supra* note 14, at 356.

157. *Id.*

maintain a standing army.[158] Following the defeat of King James II in the Glorious Revolution, after all, the drafters of the English Bill of Rights had provided for keeping military forces in service "with the consent of parliament."[159] Thus even "when the pulse of liberty was at its highest pitch, no security against the danger of standing armies was thought requisite, beyond a prohibition of their being raised or kept up by the mere authority of the executive magistrate."[160] It was a telling point that, on this score, "[t]he patriots, who effected that memorable revolution, were too temperate and too well informed, to think of any restraint in the legislative discretion."[161]

3. *State Experience*. Publius bolstered his argument for ratification by citing American, as well as British, history. Arguments from state practice drew in part on the experiences of dysfunctional institutions. Exclusive federal regulation of the currency, for example, found support in "the pestilent effects of paper money" circulated by states whose "guilt . . . can be expiated [not] otherwise than by a voluntary sacrifice on the altar of justice, of the power which has been the instrument of it."[162] Rhode Island's past obstinacy in resisting reform of the federal taxing power supported "an irresistible conviction of the absurdity of subjecting the fate of 12 States, to the perverseness or corruption of a thirteenth" in the constitutional amendment process.[163] Thus the Constitution properly required assent by only three-fourths of the states to amendments duly proposed by Congress.

In some instances, the essayists drew on state practice to craft *a fortiori* arguments in support of the Constitution.[164] In response to the contention that two-year House terms were too lengthy, for example, Madison pointed to the history of his own state. Although Virginia had provided for seven-year election cycles at the time of the

158. THE FEDERALIST NO. 26 (Alexander Hamilton), *supra* note 14, at 165–66.

159. *Id.* at 166.

160. *Id.*

161. *Id.*

162. THE FEDERALIST NO. 44 (James Madison), *supra* note 14, at 300.

163. THE FEDERALIST NO. 40 (James Madison), *supra* note 14, at 263.

164. Notably, in just the first fifty-two pages of his classic treatment of *The Federalist*, Garry Wills happens upon at least three *a fortiori* arguments based on state or British practice. *See* WILLS, *supra* note 28, at 43–44 (regarding the Constitution's ratio of representatives to constituents); *id.* at 44 (regarding corruptibility and unresponsiveness of legislators); *id.* at 52 (regarding the acceptability of imprecise limits on government powers).

Revolution, "the colony . . . stood first in resisting the parliamentary usurpations of Great-Britain," and "it was the first also in espousing by public act, the resolution of independence."[165] It followed from Virginia's experience with septennial elections "that the liberties of the people can be in no danger from *biennial* elections."[166] The case for two-year terms found support in another recent piece of state-side history as well: the "iniquitous measures" propounded in Rhode Island to protect local debtors had come from legislators who had stood for election at six-month intervals.[167]

Publius repeatedly argued that what was good for the local goose should be good for the federal gander. Critics of the Constitution, for example, complained that it would permit the federal government to impose poll taxes. Hamilton retorted:

> Every State in the Union has power to impose taxes of this kind . . . . Are the State governments to be stigmatised as tyrannies because they possess this power? If they are not, with what propriety can the like power justify such a charge against the national government, or even be urged as an obstacle to its adoption?[168]

Some antifederalists questioned the wisdom of lifetime appointments for federal judges,[169] but Publius defended this approach as "conformable to the most approved of the state constitutions."[170] Some critics decried the Constitution's blending of functions among

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165. THE FEDERALIST NO. 52 (James Madison), *supra* note 14, at 358.

166. *Id.*

167. THE FEDERALIST NO. 63 (James Madison), *supra* note 14, at 423; *see also* THE FEDERALIST NO. 53 (James Madison), *supra* note 14, at 360 (observing that, despite each state's half-year terms of legislative office, "it would not be easy to shew that Connecticut or Rhode-Island is better governed, or enjoys a greater share of rational liberty than South-Carolina," which had two-year terms). Even proposed rules that seemed inconsistent with state practice could be made to look appealing through the creative logic of Publius. In *The Federalist No. 39*, Madison brushed aside attacks on six-year terms for senators even though not one state in 1787 tolerated legislative service of this duration. AMAR, *supra* note 72, at 75 (noting that no state senate term exceeded five years). A six-year term, Madison reasoned, is "but one year more than the period of the Senate of Maryland; and but two more than that of the Senates of New-York and Virginia." THE FEDERALIST NO. 39 (James Madison), *supra* note 14, at 252. Because the experience of those states had been distinctively positive, it followed that the six-year term would be present no difficulties. *Id.*

168. THE FEDERALIST NO. 36 (Alexander Hamilton), *supra* note 14, at 229.

169. *See* THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 14, at 522 (noting that this provision had "been drawn into question by the adversaries of [the] plan").

170. *Id.*

the three branches of government.[171] "If we look into the constitutions of the several states," Madison replied, "we find that . . . there is not a single instance in which the several departments of power have been kept absolutely separate and distinct."[172] Responding to attacks on the congressional power to maintain a standing army, Hamilton noted that the framers' proposed treatment of this subject corresponded "to the general sense of America, as expressed in most of the existing constitutions."[173]

Publius had to walk a tightrope in relying on state constitutional practice because he was not, by his own admission, "an advocate for the particular organizations of the several state governments,"[174] whose constitutions bore "strong marks of the haste, and still stronger of the inexperience, under which they were framed."[175] Even so, those constitutions exemplified "many excellent principles" that the Philadelphia Convention had honored.[176] At the least, these charters revealed that few features of the new Constitution reflected wholesale innovations.

4. *New York*. At the outset of the project, Hamilton emphasized to New Yorkers the "analogy to your own state constitution" of the proposed federal charter.[177] Had the framers erred in failing to set a date for congressional and senatorial elections? If so, "it may be asked, why was not a time for the like purpose fixed" in New York's Constitution?[178] Was it wrong to let a

171. *See, e.g.*, Brutus XIV, N.Y. J., Apr. 10, 1788, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 18, at 442, 446 (asserting that "a branch of the legislature should not be invested with the power of appointing officers" and that "[t]his power in the senate is very improperly lodged for a number of reasons"); Cato V, N.Y. J., Sept. 1787–Jan. 1788, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 18, at 116, 118 (decrying the Senate's role in appointments, impeachment trials, and treaty ratification).

172. THE FEDERALIST NO. 47 (James Madison), *supra* note 14, at 327.

173. THE FEDERALIST NO. 24 (Alexander Hamilton), *supra* note 14, at 152. Pointing to a particularly familiar episode of recent history, he added that the Revolution showed that state militias alone could not defend the nation; rather, a "regular and disciplined army" was required. THE FEDERALIST NO. 25 (Alexander Hamilton), *supra* note 14, at 162.

174. THE FEDERALIST NO. 47 (James Madison), *supra* note 14, at 331.

175. *Id.*

176. *Id.*

177. THE FEDERALIST NO. 1 (Alexander Hamilton), *supra* note 14, at 7 (emphasis omitted).

178. THE FEDERALIST NO. 61 (Alexander Hamilton), *supra* note 14, at 414. The answer to this question, Hamilton continued, was that this "was a matter which might safely be entrusted to legislative discretion, and that if a time had been appointed, it might upon experiment have been found less convenient than some other time." *Id.*

president seek re-election? The governor of New York could seek new terms of office "without limitation or intermission."[179] Did the new Constitution create House districts too populous to allow voters to cast ballots wisely? "[T]he members of [the State] Assembly, for the cities and counties of New-York and Albany, are elected by very nearly as many voters, as will be entitled to a representative in the Congress . . . ."[180] In *The Federalist No. 69*, Hamilton compared the prerogatives of the president to those of the governor of New York (as well as governors of other states and the King of England). This analysis ranged across the veto, military, pardon, legislative-adjournment, and appointment powers. After putting the distinctively national matter of treaty-making by the president to one side, Hamilton concluded that "it would be difficult to determine whether that Magistrate . . . possess[es] more or less power than the Governor of New-York."[181] Some antifederalists argued that a proper constitution would provide for polling in each county,[182] yet the New York Constitution provided for state senate elections "in the great districts into which the State is or may be divided," which "at present . . . comprehend each from two to six counties."[183] Here, as elsewhere, Publius argued that in comparing the two constitutions "it will be impossible to acquit the one and to condemn the other."[184] What's more, any "similar comparison would lead to the same conclusion in respect to the Constitutions of most of the other states."[185]

Reliance on the past practices of New York reflected the authors' attentiveness to the nature of their audience. So, too, did the authors' insistence that the readers of their essays stood at a turning point in history. According to Publius, it had fallen to Americans "to decide . . . whether societies of men are really capable or not, of establishing good government from reflection and choice . . . ."[186]

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179. THE FEDERALIST NO. 69 (Alexander Hamilton), *supra* note 14, at 463.

180. THE FEDERALIST NO. 57 (James Madison), *supra* note 14, at 389.

181. THE FEDERALIST NO. 69 (Alexander Hamilton), *supra* note 14, at 469; *see also id.* at 461–62 (noting that objections to the office and function of the vice president applied equally to New York's lieutenant governor, who in similar fashion presided over the senate and assumed the governorship upon the death of the state's chief magistrate).

182. THE FEDERALIST NO. 61 (Alexander Hamilton), *supra* note 14, at 410–11.

183. *Id.* at 411.

184. *Id.* at 412.

185. *Id.*

186. THE FEDERALIST NO. 1 (Alexander Hamilton), *supra* note 14, at 3.

With words of this kind, the authors of *The Federalist* urged their readers not just to follow history, but to make it. The past had proven that the Articles of Confederation embodied a clumsy and shortsighted plan. The Constitution, in contrast, held the promise of creating a form of government "glorious . . . to mankind."[187]

C. Publius and Practical Reasoning

According to Publius, the capacity of Americans to heed "the suggestions of their own good sense" was nothing less than "the glory of the people."[188] Given this outlook, it is not surprising that the authors of *The Federalist* often invoked "common sense" in making the case for the Constitution.[189]

Antifederalists, for example, excoriated the Constitution's creation of a sweeping congressional taxing power. According to Publius, however, practical Americans would understand the need for this power because the United States would "experience a common portion of the vicissitudes and calamities, which have fallen to the lot of other nations."[190] Dreamers might see in America's future only "halcyon scenes of the poetic or fabulous age."[191] But practical citizens would prepare for the worst, including the prospect of costly wars that would present "dangers, to which no possible limits can be assigned."[192] A new federal government—like any government—could abuse the taxing power. Madison, however, counted on the "good sense of the people of America" to perceive that "in every political institution, a power to advance the public happiness, involves a discretion which may be misapplied."[193] To be sure, antifederalist

187. THE FEDERALIST NO. 36 (Alexander Hamilton), *supra* note 14, at 230.

188. THE FEDERALIST NO. 14 (James Madison), *supra* note 14, at 88.

189. The term "common sense" appears in THE FEDERALIST NO. 5 (John Jay), *supra* note 14, at 24; THE FEDERALIST NO. 22 (Alexander Hamilton), *supra* note 14, at 139; THE FEDERALIST NO. 29 (Alexander Hamilton), *supra* note 14, at 185; THE FEDERALIST NO. 31 (Alexander Hamilton), *supra* note 14, at 194; THE FEDERALIST NO. 83 (Alexander Hamilton), *supra* note 14, at 559, 560; THE FEDERALIST NO. 84 (Alexander Hamilton), *supra* note 14, at 583. The term "good sense" is used in THE FEDERALIST NO. 14 (James Madison), *supra* note 14, at 87, 88; THE FEDERALIST NO. 30 (Alexander Hamilton), *supra* note 14, at 190; THE FEDERALIST NO. 41 (James Madison), *supra* note 14, at 268; THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 14, at 474; THE FEDERALIST NO. 85 (Alexander Hamilton), *supra* note 14, at 591.

190. THE FEDERALIST NO. 30 (Alexander Hamilton), *supra* note 14, at 193.

191. *Id.*

192. THE FEDERALIST NO. 31 (Alexander Hamilton), *supra* note 14, at 195–96.

193. THE FEDERALIST NO. 41 (James Madison), *supra* note 14, at 268–69.

"rhetoric and declamation . . . may inflame the passions of the unthinking."[194] Citizens who were "cool and candid," however, would see that these critics had "chosen rather to dwell on the inconveniences which must be unavoidably blended with all political advantages" to be gained from a much-strengthened federal government.[195]

Common sense combined with common experience to reveal the flaws of the Articles of Confederation. The Articles, for example, rested in part on the idea that Congress should direct its commands at state legislatures (rather than at individuals) because "breaches, by the States, of the regulations of the federal authority were not to be expected . . . ."[196] But why was that? Logic cut down the notion that a spirit of rightfulness more often characterizes "bodies of men . . . than individuals";[197] indeed, groups of persons were in general more undeserving of trust than particular individuals because concern for reputation "has a less active influence, when the infamy of a bad action is to be divided among a number . . . ."[198] What is more, common sense suggested that groups of persons who took the form of a state would be distinctly prone to disobey federal commands because "there is in the nature of sovereign power an impatience of controul" that conflicts with the inclination to honor duties owed to a larger confederation.[199]

According to Publius, some antifederalist arguments departed so far from sound reasoning that they qualified as "extravagant."[200] Skeptics worried, for example, that a federal power to mobilize local militias would lead the central government to overwhelm American liberties. Hamilton's reply drew on his readers' personal knowledge of state militia members:

> Where in the name of common sense are our fears to end if we may not trust our sons, our brothers, our neighbours, our fellow-citizens? What shadow of danger can there be from men who are daily

194. *Id.* at 269.
195. *Id.*
196. THE FEDERALIST NO. 15 (Alexander Hamilton), *supra* note 14, at 96.
197. *Id.*
198. *Id.*
199. *Id.*
200. THE FEDERALIST NO. 29 (Alexander Hamilton), *supra* note 14, at 185.

> mingling with the rest of their countrymen; and who participate with them in the same feelings, sentiments, habits and interests?[201]

According to Madison, "little critics" had raised a raft of "imaginary" concerns,[202] including the particularly far-fetched suggestion that the new government might forgo the collection of debts rightfully owed to the nation under the Articles of Confederation.[203] The Constitution, Madison acknowledged, did not specify in terms that obligations owed to the federal government would survive ratification. But "no real danger can exist that the government would DARE . . . to remit the debts justly due to the public, on the pretext here condemned."[204]

The reasoning of Publius often involved the drawing of deductions from incontestable principles. Ultimate congressional (rather than state) power to oversee the manner of congressional elections, for example, rested on the "plain proposition, that every government ought to contain in itself the means of its own preservation."[205] Could a loosely organized collection of autonomous states properly manage the national debt? No, because "there is nothing men differ so readily about as the payment of money."[206]

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201. *Id.*

202. THE FEDERALIST NO. 43 (James Madison), *supra* note 14, at 295–96.

203. This argument stemmed from the Constitution's specification that debts owed *by* the United States under the Articles of Confederation would persist under Article VI of the Constitution. One of the "lesser criticisms" of the Constitution was that the omission from this clause of any treatment of debts owed *to* the United States might imply the extinguishment of such debts under the interpretive rule *expressio unius est exclusio alterius*. *See id.* at 295 ("[I]t has been remarked that the validity of engagements ought to have been asserted in favour of the United States, as well as against them; . . . the omission has been transformed and magnified into a plot against the national rights.").

204. *Id.* at 296. In similar fashion, Hamilton lambasted Cato's suggestion that the president could make appointments to fill vacancies in the Senate during congressional recesses. This argument ignored Article I's "clear and unambiguous" delegation of this power to state legislatures, or to state governors "during the recess of the [l]egislature." THE FEDERALIST NO. 67 (Alexander Hamilton), *supra* note 14, at 456 (emphasis omitted). Cato's argument, Hamilton concluded, was "destitute . . . even of the merit of plausibility" and "must have originated in an intention to deceive the people." *Id.* at 456–57.

205. THE FEDERALIST NO. 59 (Alexander Hamilton), *supra* note 14, at 398 (emphasis omitted).

206. THE FEDERALIST NO. 7 (Alexander Hamilton), *supra* note 14, at 42 (adding that "[t]here is perhaps nothing more likely to disturb the tranquility of nations, than their being bound to mutual contributions for any common object, which does not yield an equal and coincident benefit").

Madison also blasted away at critics for applying principles "to cases to which the reason of them does not extend."[207] Some antifederalists, for example, faulted the framers for failing to require periodic conventions to review and revise the federal Constitution. These critics reasoned that, because past state constitutional conventions had unfolded in a productive and harmonious manner, there could be no harm in holding periodic federal conventions going into the future. Madison responded that the temperance exhibited at earlier state conventions cast no light because each of them had occurred during the Revolutionary War. This fact was all-important because:

> [T]he existing constitutions were formed in the midst of a danger which repressed the passions most unfriendly to order and concord; of an enthusiastic confidence of the people in their patriotic leaders, which stifled the ordinary diversity of opinions on great national questions; of a universal ardor for new and opposite forms, produced by a universal resentment and indignation against the antient government; and whilst no spirit of party, connected with the changes to be made, or the abuses to be reformed, could mingle its leven in the operation.[208]

According to Madison, not one of these background conditions was likely to exist with respect to any future federal convention.[209] Thus the "situations in which we must expect to be usually placed" in upcoming years would not "present any equivalent security" against factional cacophony and immoderation.[210]

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207. THE FEDERALIST NO. 53 (James Madison), *supra* note 14, at 359. In a similar vein, Hamilton and Madison sometimes challenged antifederalist contentions on the ground that embracing them would produce the very evils those arguments sought to avoid. Did it make sense for antifederalists to object to the Constitution because it authorized a federal standing army? No, because the very disunion they advocated would inevitably lead to such widespread hostilities among neighboring states that large local standing armies would emerge. THE FEDERALIST NO. 8 (Alexander Hamilton), *supra* note 14, at 45–46.

208. THE FEDERALIST NO. 49 (James Madison), *supra* note 14, at 341.

209. *Id.*

210. *Id.* Similarly, as we have seen, antifederalists argued against two-year congressional terms by invoking the slogan that "where annual elections end, tyranny begins." THE FEDERALIST NO. 53 (James Madison), *supra* note 14, at 359. But this slogan had come from Britain, where members of Parliament had gone so far as to extend their terms from three to seven years, adding four years to the term for which they were elected. *Id.* at 361. The maxim was therefore "wholly inapplicable to our case," because the new Constitution fixed two-year terms as the supreme law of the land unalterable in any way except by constitutional amendment. *Id.* at 360.

The authors of *The Federalist* often resorted to the multipronged attack. In *The Federalist No. 57*, for example, Madison offered five separate reasons why House members would seldom betray the public trust even if they worked far from home: (1) voters would typically elect deserving representatives; (2) widely shared values would induce most representatives to act with honor and gratefulness toward their constituents; (3) even undeserving representatives would seek approbation out of self-interest; (4) frequent elections would provide a strong measure of accountability; and (5) the "full operation" of federal laws on the elected representatives themselves would mitigate dangers of abuse.[211] Not to be outdone, Hamilton offered five reasons of his own against the imposition of presidential term limits. He argued that (1) removing the possibility of re-election would negate a powerful "inducement[] to good behaviour"; (2) avaricious or ambitious presidents would be spurred to abuse their office for personal gain if faced with the prospect of "descend[ing] from the exalted eminence forever"; (3) term limits would "depriv[e] the community of the advantage of the experience gained by the chief magistrate in the exercise of his office"; (4) emergencies might call for the leadership of "particular men" who, because of prior service, would be barred from office; and (5) constantly changing the occupant of the "first office in the nation" would interfere with the stability of government.[212]

Lawyers learn that facts persuade, and this working principle pervades *The Federalist*. Some antifederalists argued, for example, that the poor attendance records of members of the Confederation Congress cut against further empowering a government for a territory as expansive as the United States.[213] Hamilton responded that past attendance problems sprang from the impotence of the Confederation government, rather than geographic dispersal.[214] Any doubt in this regard fell victim to the fact that "members from the most distant States are not chargeable with greater intermissions of

211. THE FEDERALIST NO. 57 (James Madison), *supra* note 14, at 385–87.

212. THE FEDERALIST NO. 72 (Alexander Hamilton), *supra* note 14, at 488–91.

213. *See* THE FEDERALIST NO. 14 (James Madison), *supra* note 14, at 85 ("[T]he natural limit of a republic is that distance from the center, which will barely allow the representatives of the people to meet as often as may be necessary for the administration of public affairs.").

214. *Id.*

attendance, than those from the States in the neighbourhood of Congress."[215]

In *The Federalist No. 38*, Madison used facts drawn from the Articles of Confederation itself to rebut a host of challenges directed at the new Constitution:

> Is an indefinite power to raise money dangerous in the hands of a fœderal government? The present Congress can make requisitions to any amount they please; and the States are constitutionally bound to furnish them; they can emit bills of credit as long as they will pay for the paper; they can borrow both abroad and at home, as long as a shilling will be lent. Is an indefinite power to raise troops dangerous? The Confederation gives to Congress that power also; and they have already begun to make use of it. Is it improper and unsafe to intermix the different powers of government in the same body of men? Congress, a single body of men, are the sole depository of all the fœderal powers. Is it particularly dangerous to give the keys of the treasury, and the command of the army, into the same hands? The Confederation places them both in the hands of Congress. Is a Bill of Rights essential to liberty? The Confederation has no Bill of Rights. Is it an objection against the new Constitution, that it empowers the Senate with the concurrence of the Executive to make treaties which are to be the laws of the land? The existing Congress, without any such controul, can make treaties which they themselves have declared, and most of the States have recognized, to be the supreme law of the land.[216]

Citing these points, Madison asked how sensible citizens could resist ratification when "most of the capital objections urged against the new system, lie with tenfold weight against the existing Confederation."[217]

This is not to say that all of Publius's arguments themselves reflected good sense.[218] Hamilton, for example, erred in predicting

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215. *Id.* And even if that evidence did not suffice, Hamilton added, in the near future "intercourse throughout the union will be daily facilitated by new improvements" made to roads, canals, and natural waterways. *Id.* at 86–87.

216. THE FEDERALIST NO. 38 (James Madison), *supra* note 14, at 247.

217. *Id.*

218. In particular, the *Papers* did contain a number of simple errors. *See, e.g.*, Roy P. Fairfield, *Introduction* to THE FEDERALIST PAPERS, at v, xxv (Roy P. Fairfield ed., 2d ed. 1966) (noting Publius's "misquoting of the Declaration, Constitution, Montesquieu, and other sources"); Seth Barrett Tillman, The Federalist Papers *as Reliable Historical Source Material for Constitutional Interpretation*, 105 W. VA. L. REV. 601, 603–14 (2003) (noting imprecision or

that the prohibition on appropriations to support military forces for more than two years would in practice provide a "powerful guard" against congressional maintenance of standing armies.[219] History also has discredited his suggestion in *The Federalist No. 66* that the requirement of the origination of revenue bills in the House would fall among the "important counterpoises" to senatorial power.[220] (After all, senators can easily induce sympathetic House colleagues to propose appropriations bills, and both chambers must enact these bills, regardless of where they originate.[221])

Worst of all, Publius occasionally managed to shoot himself in the foot. Responding to fears that federal taxing authority would disrupt state revenue collections, for example, Hamilton predicted that soon "the wants of the States will naturally reduce themselves within *a very narrow compass*."[222] A moment's reflection reveals that this argument had a self-defeating quality, for patrons of state power hardly wanted to hear that they need not worry about dampened tax collections because soon the states would have no meaningful powers at all![223] Missteps of this kind did not occur often in *The Federalist*. To the extent they did, the essayists could take some comfort in the

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error in Publius's treatment of the size of the legislature, the quorum needed in the Senate, the manner of selecting the vice-president, and the manner of selecting the president).

219. THE FEDERALIST NO. 24 (Alexander Hamilton), *supra* note 14, at 155. Hamilton's suggestion that legislators are subject to impeachment, *see* THE FEDERALIST NO. 60 (Alexander Hamilton), *supra* note 14, at 450–51, has been rejected, as has his countertextual claim that removal (as well as appointment) of executive officers would require Senate consent. *See, e.g.*, RAKOVE, *supra* note 34, at 350 (documenting Hamilton's change of mind, upon his candidacy for Secretary of Finance, regarding the necessity of Senate consent for removal of executive officers).

220. THE FEDERALIST NO. 66 (Alexander Hamilton), *supra* note 14, at 448.

221. *See also* AMAR, *supra* note 72, at 107 (noting that the Origination Clause had "little bite" because "the Senate would enjoy unlimited power to propose amendments").

222. THE FEDERALIST NO. 34 (Alexander Hamilton), *supra* note 14, at 210.

223. Little less curious was Hamilton's treatment of peace treaties in *The Federalist No. 22*. There, he complained of the Articles' supermajority voting requirements, voicing concern that such requirements would invite "bribes and intrigues" from foreign powers to "tie up the hands of government from making peace, where two thirds of all the votes were requisite to that object." THE FEDERALIST NO. 22 (Alexander Hamilton), *supra* note 14, at 142. To be sure, the new Constitution did not require treaty confirmation of two-thirds of *all* the states—just two-thirds of the "Senators present." U.S. CONST. art. II, § 2. Even so, given the Constitution's own supermajority requirement, Hamilton's assault on this feature of the Articles smacked of proving too much.

excuse that they had no choice but to turn out their work at a breakneck pace.[224]

A final rhetorical technique, which runs throughout the *Papers*, subtly bolstered Publius's appeals to reason. Illustrative was Madison's assertion in *The Federalist No. 43* that the unamendable nature of the two-senators-per-state clause "was probably meant as a palladium to the residuary sovereignty of the States, . . . and was probably insisted on by the States particularly attached to that equality."[225] In reality, of course, Madison was not confined to reporting what "probably" happened in Philadelphia.[226] He had actually been there, and he knew exactly what had transpired. The writers who had taken on the name of Publius, however, had reason not to disclose anything like a personal stake in the constitutional project born of their own past labors. Indeed, in defending the Constitution's structuring of government, Publius himself made use of the maxim that "[n]o man ought certainly to be a judge . . . in any cause in respect to which he has the least interest or bias."[227] As a result, 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.[228]

D. The Wisdom of Compromise

In keeping with appeals to common sense, the authors of *The Federalist* often stressed the need for practical accommodation.

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224. *See* David McGowan, *Ethos in Law and History: Alexander Hamilton,* The Federalist*, and the Supreme Court*, 85 MINN. L. REV. 755, 852 (2001) (adverting to Hamilton's erroneous and later-retracted assertion in *No. 77* that the Senate must approve presidential removals, as well as appointments, of executive officers; adding that "under the burden of the series as a whole, his law practice, and his general politicking . . . , he simply got caught up in responding to particular anti-federalist arguments and momentarily lost the forests in the trees"—something "[t]hat can happen, even to a Hamilton or a Madison").

225. THE FEDERALIST NO. 43 (James Madison), *supra* note 14, at 296.

226. *But cf.* THE FEDERALIST NO. 37 (James Madison), *supra* note 14, at 237 (purporting to extrapolate what "must have been" and what one "may well suppose" happened at the Philadelphia Convention); THE FEDERALIST NO. 40 (James Madison), *supra* note 14, at 265 (opining on what the delegates "must have reflected," "must have recollected," and "must have borne in mind").

227. THE FEDERALIST NO. 80 (Alexander Hamilton), *supra* note 14, at 538; *accord* THE FEDERALIST NO. 10 (James Madison), *supra* note 14, at 59.

228. *See* WILLIAM LEE MILLER, THE BUSINESS OF MAY NEXT 165 (1992) (noting that the style of Hamilton and Madison rendered each of them a "pretended outsider" to the Convention); WILLS, *supra* note 28, at 22 (describing the persona of Publius as that of an "impartial judge").

Publius, for example, did not try to convince New Yorkers that equal representation of the states in the Senate was a good idea. Instead, Madison acknowledged in *The Federalist No. 62* that this feature of the Constitution was "evidently the result of compromise between the opposite pretensions of the large and the small states"[229] reached in a setting where "neither side would entirely yield to the other."[230] Ever the pragmatist, he added that "[a] government founded on principles more consonant to the wishes of the larger states, is not likely to be obtained from the smaller states."[231] Thus, "the advice of prudence" counseled that New York should accept the deal offered by the Constitution while it still lay on the table.[232]

Publius took much the same approach in defending the infamous Three-Fifths Compromise, under which slaves were treated as a fractional part of a person for purposes of allocating House seats. Hamilton, an ardent abolitionist, could not bring himself to write on this topic. Madison, however, addressed it in *The Federalist No. 54*, urging that, even though southern arguments for the three-fifths approach were "a little strained in some points," this "compromising expedient of the Constitution [should] be mutually adopted."[233]

Political realities dictated other outcomes as well. The appointment of senators by state legislatures, though not Publius's preferred approach, embodied the selection method "most congenial with the public opinion";[234] thus, even if it operated as "an inconvenience," this methodology had been adopted "for the attainment of a . . . greater good."[235] Madison also recoiled at the Constitution's approach to voter eligibility, under which the franchise in federal elections varied from locale to locale, depending on each state's qualification standards for elections to its own larger legislative chamber.[236] Nonetheless, he urged patience with this approach because the better option of a uniform nationwide rule "would

229. THE FEDERALIST NO. 62 (James Madison), *supra* note 14, at 416.

230. THE FEDERALIST NO. 37 (James Madison), *supra* note 14, at 237.

231. THE FEDERALIST NO. 62 (James Madison), *supra* note 14, at 416–17.

232. *Id.* at 417.

233. THE FEDERALIST NO. 54 (James Madison), *supra* note 14, at 371, 369.

234. THE FEDERALIST NO. 62 (James Madison), *supra* note 14, at 416.

235. THE FEDERALIST NO. 59 (Alexander Hamilton), *supra* note 14, at 401.

236. *See* U.S. CONST. art. I, § 2, cl. 1 ("[T]he Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.").

probably have been . . . dissatisfactory to some of the States" and "difficult to the Convention."[237]

In all these cases, according to Madison, "the Convention must have been compelled to sacrifice theoretical propriety to the force of extraneous considerations."[238] The document now before the people was not a constitution planned by "an ingenious theorist . . . in his closet or in his imagination."[239] It was less than ideal because "compacts which are to embrace thirteen distinct states . . . must . . . be a compromise of . . . many dissimilar interests and inclinations."[240] Yet, "[i]f mankind were to resolve to agree in no institution of government, until every part of it had been adjusted to the most exact standard of perfection, society would soon become a general scene of anarchy, and the world a desert."[241]

In a similar vein, Publius acknowledged that highly principled justifications could not be identified for many of the lines drawn in the Constitution. How often should elections occur? The proper interval of time "does not appear to be susceptible of any precise calculation."[242] How many representatives should represent how many people? Again, the problem is not "susceptible of a precise solution"; in fact, there is no "point on which the policy of the several states is more at variance."[243] How long should a person have citizenship before qualifying to run for the Senate? Who knows? But nine years "appears to be a prudent mediocrity between a total exclusion of adopted citizens . . . and hasty admission of them, which might create a channel for foreign influence."[244] How many states should join together in ratifying a constitutional amendment proposed by two-thirds of the House and of the Senate? Three-quarters of the states seemed about the right number in order to guard "equally against that extreme facility which would render the

237. THE FEDERALIST NO. 52 (James Madison), *supra* note 14, at 354.

238. THE FEDERALIST NO. 37 (James Madison), *supra* note 14, at 237.

239. *Id.* at 238.

240. THE FEDERALIST NO. 85 (Alexander Hamilton), *supra* note 14, at 591.

241. THE FEDERALIST NO. 65 (Alexander Hamilton), *supra* note 14, at 444. For this reason, Hamilton argued in *The Federalist No. 65* that "[t]o answer the purpose of the adversaries of the Constitution, they ought to prove, not merely, that particular provisions in it are not the best, which might have been imagined; but that the plan upon the whole is bad and pernicious." *Id.* at 444–45.

242. THE FEDERALIST NO. 52 (James Madison), *supra* note 14, at 355.

243. THE FEDERALIST NO. 55 (James Madison), *supra* note 14, at 373.

244. THE FEDERALIST NO. 62 (James Madison), *supra* note 14, at 415–16.

Constitution too mutable; and that extreme difficulty which might perpetuate its discovered faults."[245]

These points demonstrated that the framers had sought earnestly to find fair accommodations among the welter of proposals put forward at the Convention.[246] In *The Federalist No. 38*, Publius sought to build on this theme by turning antifederalist objections to the federalists' advantage. The following passage (much longer in its entirety) catches the flavor of the argument:

> An objector in a large State exclaims loudly against the unreasonable equality of representation in the Senate. An objector in a small State is equally loud against the dangerous inequality in the house of representatives. From this quarter we are alarmed with the amazing expence from the number of persons who are to administer the new Government. From another quarter, and sometimes from the same quarter, on another occasion, the cry is that the Congress will be but the shadow of a representation, and that the Government would be far less objectionable, if the number and the expence were doubled. A patriot in a State that does not import or export, discerns insuperable objections against the power of direct taxation. The patriotic adversary in a State of great exports and imports, is not less dissatisfied that the whole burden of taxes may be thrown on consumption. . . . In the eyes of one the junction of the Senate with the President in the responsible function of appointing to offices, instead of vesting this executive power in the executive, alone, is the vicious part of the organization. To another, the exclusion of the house of representatives whose numbers alone could be a due security against corruption and partiality in the exercise of such a power, is equally obnoxious. With another, the admission of the President into any share of power which must ever be a dangerous engine in the hands of the executive magistrate, is an unpardonable violation of the maxims of republican jealousy.[247]

Madison's point was not only that the self-contradictory nature of antifederalist objections revealed their shaky foundations. The deeper point was that the framers already had navigated with extraordinary skill a middle course among the very clutter of criticisms now lodged

245. THE FEDERALIST NO. 43 (James Madison), *supra* note 14, at 296.

246. *See, e.g.*, THE FEDERALIST NO. 65 (Alexander Hamilton), *supra* note 14, at 443 (noting that, for presidential impeachments, given a choice between Senate trials and trials before a joint session of the Senate and the Supreme Court, the framers picked "perhaps the prudent mean"—trial in the Senate with the Chief Justice presiding).

247. THE FEDERALIST NO. 38 (James Madison), *supra* note 14, at 244–45.

against the constitutional proposal. In all of this, there was a deeper point still: Hamilton, Madison, and Jay stood ready to discuss openly the Constitution's shortcomings and, in doing so, to build a bridge of candor to their readers to reinforce the credibility of their larger project.

One curiosity of the *Federalist Papers* is that they defend many constitutional provisions that Hamilton or Madison had condemned at the Philadelphia Convention. Hamilton, for example, gave an infamous Convention speech, later used to tar him as a monarchist, in which he advocated life terms for both presidents and senators.[248] As if to reaffirm the extremity of his views, Hamilton reported to his fellow delegates in one of the last speeches of the Convention that "[n]o man's ideas were more remote from the plan than his own were known to be."[249] At the Convention, Madison also advocated many ideas that never found their way into the Constitution. He had been, for example, an unsuccessful advocate of proportionate representation in the Senate, of unimpeded federal authority to restrict the slave trade, and of a congressional power to veto state laws.[250]

Cynics might cite these points in arguing that *The Federalist* has a disingenuous quality. Perhaps so. But one might also view the essays through another prism—with the thought that the project may well have brought new clarity to these former Convention delegates.[251] One senses in reading the essays that Hamilton and Madison had come to grasp at a deeper level the intricacies of the document, the subtlety of its themes, the careful balances it struck, and the neatness with which its provisions fit together. At the very least, the writing of the *Federalist Papers* must have heightened the authors' awareness of the framers' extraordinary practical achievement. From a crazy quilt of conflicting personal, regional, and theoretical positions, the

248. *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 289 (Max Farrand ed., rev. ed. 1937) (setting forth Madison's notes, which describe Hamilton's speech of June 18 before the Convention: "Let one branch of the Legislature hold their places for life" and "[l]et the Executive also be for life").

249. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 11, at 645–46.

250. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 248, at 151.

251. *See, e.g.*, ALBERT FURTWANGLER, THE AUTHORITY OF PUBLIUS 147 (1984) (suggesting that drafting triggered a "dynamic" process in the "two strong minds" of Publius); WILLS, *supra* note 28, at 93 (noting that Hamilton critiqued the Constitution before it was finalized, had the benefit of learning what was "realizable" in the ratification controversy, and may have experienced "real changes of mind between his [Convention] speech and the composition of *The Federalist*").

Philadelphia Convention had forged a coherent treatment of government creatively designed to meet the new nation's needs. Publius knew that "a faultless plan was not to be expected."[252] For sensible Americans, it would suffice "that the system, though it may not be perfect in every part, is upon the whole a good one, is the best that the present views and circumstances of the country will permit, and is such a one as promises every species of security which a reasonable people can desire."[253]

E. Imagery and Metaphor

Hamilton, Madison, and Jay knew well that few readers would pore over intricate arguments set forth in arid prose. As a result, Publius laced the tracts with imagery, symbolism, and color.[254] Metaphor surfaced often. A strong federal Supreme Court was needed because "[t]hirteen independent courts of final jurisdiction . . . is a hydra . . . from which nothing but contradiction and confusion can proceed."[255] There was "poison" in antifederalist arguments.[256] It was time to "break the fatal charm which has too long seduced us from the paths of felicity and prosperity."[257]

Hamilton, in particular, delighted in this style of rhetoric and used it with frequency in castigating his adversaries. The writings of antifederalist critics, he observed in *The Federalist No. 8*, suggested that "airy phantoms . . . flit before [their] distempered imaginations."[258] In *The Federalist No. 29* he added that:

> In reading many of the publications against the Constitution, a man is apt to imagine that he is perusing some ill written tale or romance; which instead of natural and agreeable images exhibits to the mind nothing but frightful and distorted shapes . . . discoloring and

252. THE FEDERALIST NO. 37 (James Madison), *supra* note 14, at 232; *see* CHERNOW, *supra* note 8, at 246 (adding that "all the delegates at Philadelphia had adopted the final document in a spirit of compromise" and then "approached it as a collective work and championed it as the best available solution").

253. THE FEDERALIST NO. 85 (Alexander Hamilton), *supra* note 14, at 590.

254. *See generally* Philip Abbott, *What's New in the* Federalist Papers*?*, 49 POL. RES. Q. 525, 528 (1996) (emphasizing Publius's "excellence as a storyteller").

255. THE FEDERALIST NO. 80 (Alexander Hamilton), *supra* note 14, at 535.

256. THE FEDERALIST NO. 14 (James Madison), *supra* note 14, at 88.

257. *Id.* at 92.

258. THE FEDERALIST NO. 8 (Alexander Hamilton), *supra* note 14, at 49–50.

> disfiguring whatever it represents and transforming every thing it touches into a monster.[259]

Hamilton's use of metaphor reached full flower in *The Federalist No. 9*, when he observed that ancient republics, even when built on democratic principles, had encountered only "furious storms."[260] History offered hope because "stupendous fabrics reared on the basis of liberty" had "in a few glorious instances" provided models for America.[261] Even so:

> If now and then intervals of felicity open themselves to view, we behold them with a mixture of regret arising from the reflection that the pleasing scenes before us are soon to be overwhelmed by the tempestuous waves of sedition and party-rage. If momentary rays of glory break forth from the gloom, while they dazzle us with a transient and fleeting brilliancy, they at the same time admonish us to lament that the vices of government should pervert the direction and tarnish the lustre of those bright talents and exalted indowments, for which the favoured soils, that produced them, have been so justly celebrated.[262]

Hamilton's purple prose supported a conclusion also captured in metaphorical terms: Americans must abandon the localized model of democratic self-rule to build "the broad and solid foundation" on which "permanent monuments" to republican liberty could rise up.[263]

Madison was drawn to allegory. In *The Federalist No. 37*, for example, he took on antifederalist grumbling about the difficulty of defining the precise reach of state and federal powers. "The most sagacious and laborious naturalists," Madison explained, "have never yet succeeded, in tracing with certainty, the line which separates the district of vegetable life from the neighboring region of unorganized matter, or which marks the termination of the former and the commencement of the animal empire."[264] Madison's message was hard to miss: Just as surely as students of natural science should not abandon biological classifications because of the difficulty of the task,

259. THE FEDERALIST NO. 29 (Alexander Hamilton), *supra* note 14, at 185–86.
260. THE FEDERALIST NO. 9 (Alexander Hamilton), *supra* note 14, at 50.
261. *Id.* at 51.
262. *Id.* at 50–51.
263. *Id.* at 51.
264. THE FEDERALIST NO. 37 (James Madison), *supra* note 14, at 235.

patrons of political science had to tolerate some measure of imprecision in laying down the boundary lines of power.[265]

In *The Federalist No. 38*, Madison again turned to allegory to attack the litany of small criticisms leveled by antifederalist objectors. He explained that:

> No man would refuse to quit a shattered and tottering habitation, for a firm and commodious building, because the latter had not a porch to it; or because some of the rooms might be a little larger or smaller, or the cieling [sic] a little higher or lower than his fancy would have planned them.[266]

Madison drove home the point with the parable of the stricken man. Called by a dying patient, a group of physicians (who were carefully selected by him because of their distinguished accomplishments) unanimously agreed on a course of treatment.[267] Then, another group of doctors appeared on the scene. With blustering self-assurance, each of them challenged their colleagues' proposed plan, insisting to the patient that it would "poison . . . his constitution."[268] Drawing on this story to attack antifederalist natterers, Madison posed two telling questions:

> Might not the patient reasonably demand before he ventured to follow this advice, that the authors of it should at least agree among themselves, on some other remedy to be substituted? and if he found them differing as much from one another, as from his first counsellors, would he not act prudently, in trying the experiment unanimously recommended by the latter, rather than in hearkening to those who could neither deny the necessity of a speedy remedy, nor agree in proposing one?[269]

Publius's use of imagery in portraying America's present state—as "a poor pitiful figure"[270] situated at "the point of extreme depression"[271]—went far in suggesting to wavering New Yorkers that they needed to think hard about a change of national direction. And

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265. *See id.* (recounting that "[e]xperience has instructed us that no skill in the science of Government has yet been able to discriminate and define, with sufficient certainty, its three great provinces, the Legislative, Executive and Judiciary").

266. THE FEDERALIST NO. 38 (James Madison), *supra* note 14, at 246–47.

267. *Id.* at 242–43.

268. *Id.* at 243.

269. *Id.*

270. THE FEDERALIST NO. 4 (John Jay), *supra* note 14, at 23.

271. THE FEDERALIST NO. 6 (Alexander Hamilton), *supra* note 14, at 35.

the imagery employed in describing America's unrealized potential—as a nation forged in a "common bond of amity,"[272] united by "the affection of friends,"[273] and "not heated by the local flame"[274]—bespoke the wisdom of embracing the much-strengthened central government proposed by the new Constitution. In all of this, Publius sought to render more graphic and more gripping the reasoned arguments for ratification around which *The Federalist* was built.

F. Appeals to Emotion

The essence of *The Federalist* lay in its presentation of relentlessly logical arguments in an "elevated and philosophical tone."[275] The authors, however, sought to appeal to the heart as well as to the head. They did so, most of all, by characterizing in heatedly unflattering terms their antifederalist adversaries, as well as the contentions those adversaries advanced.

Some antifederalist arguments involved overreaches that exposed their authors to obvious attack. In *The Federalist No. 27*, for example, Hamilton mocked the suggestion that only military troops could enforce federal law as resting "on mere general assertion; unsupported by any precise or intelligible designation of . . . reasons."[276] In *The Federalist No. 29*, he was no less dismissive of antifederalist predictions that the proposed new government would inevitably abuse its military powers. As he wrote:

> At one moment there is to be a large army to lay prostrate the liberties of the people; at another moment the militia of Virginia are to be dragged from their homes five or six hundred miles to tame the republican contumacy of Massachusetts; and that of Massachusetts is to be transported an equal distance to subdue the refractory haughtiness of the aristocratic Virginians. Do the persons, who rave at this rate, imagine, that their art or their eloquence can impose any conceits or absurdities upon the people of America for infallible truths?[277]

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272. THE FEDERALIST NO. 84 (Alexander Hamilton), *supra* note 14, at 591.

273. THE FEDERALIST NO. 43 (James Madison), *supra* note 14, at 294.

274. *Id.*

275. James W. Ducayet, Note, *Publius And Federalism: On the Use and Abuse of* The Federalist *in Constitutional Interpretation*, 68 N.Y.U. L. REV. 821, 852 (1993); *see* RAKOVE, *supra* note 34, at 132 (describing the "lucidity and cool rationality" of *The Federalist*).

276. THE FEDERALIST NO. 27 (Alexander Hamilton), *supra* note 14, at 171.

277. THE FEDERALIST NO. 29 (Alexander Hamilton), *supra* note 14, at 186.

Madison denigrated those who detected a grant of unlimited *regulatory* powers in the General Welfare Clause, which by its clear terms concerned only the federal *taxing and spending* authority. "No stronger proof could be given of the distress under which these writers labour for objections," he exclaimed, "than their stooping to such a misconstruction."[278] In essence, the authors of *The Federalist* kept asking: Who can believe such critics? "A bad cause seldom fails to betray itself," Madison wrote in *The Federalist No. 41*, adding that "[o]f this truth, the management of the opposition to the Federal Government is an unvaried exemplification."[279]

Challenges to the credibility of antifederalist writers sometimes shaded into more aggressive forms of attack. Antifederalist objections to lifetime judicial appointments, for example, showed "the rage for objection which disorders their imaginations and judgments."[280] Concern expressed about oppression at the hands of federally controlled state militias was "so far fetched . . . that one is at a loss whether to treat it with gravity or with raillery."[281] To Madison, antifederalist arguments "must appear to every one more like the incoherent dreams of a delirious jealousy, or the misjudged exaggerations of a counterfeit zeal, than like the sober apprehensions of genuine patriotism."[282] Critics who expounded self-evidently strained positions had to be acting out of self-serving pettiness, if not "magnificent schemes of personal aggrandizement."[283]

In effect, Hamilton, Madison, and Jay sought to "double dip" on their invocations of history and reason. After laying out an argument said to be unanswerable by "men of discernment,"[284] they would ask how that argument could be rejected by anyone not driven by "a predetermination to condemn,"[285] a "distempered jealousy,"[286]

278. THE FEDERALIST NO. 41 (James Madison), *supra* note 14, at 277.

279. *Id.* at 274.

280. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 14, at 522.

281. THE FEDERALIST NO. 29 (Alexander Hamilton), *supra* note 14, at 185.

282. THE FEDERALIST NO. 46 (James Madison), *supra* note 14, at 321.

283. THE FEDERALIST NO. 22 (Alexander Hamilton), *supra* note 14, at 145. In *The Federalist No. 9*, the unrelenting Hamilton suggested why antifederalists might advocate a system of atomized states in separate subconfederacies. "[T]he multiplication of petty offices," he observed, might "answer the views of men, who possess not qualifications to extend their influence beyond the narrow circles of personal intrigue." THE FEDERALIST NO. 9 (Alexander Hamilton), *supra* note 14, at 53.

284. THE FEDERALIST NO. 31 (Alexander Hamilton), *supra* note 14, at 195.

285. THE FEDERALIST NO. 37 (James Madison), *supra* note 14, at 232.

286. THE FEDERALIST NO. 59 (Alexander Hamilton), *supra* note 14, at 399.

"obstinacy, perverseness or disingenuity,"[287] or "political fanaticism."[288] Could expressions of concern about the central government's oppression of the citizenry with state militias truly reflect "the sober admonitions of discerning patriots to a discerning people?"[289] More likely, they were "the inflammatory ravings of chagrined incendiaries or distempered enthusiasts."[290] For Hamilton, expressions of concern about a standing army smacked of scare tactics "unfriendly to an impartial and right determination."[291] "[A] man of calm and dispassionate feelings," Hamilton opined, "would indulge a sigh for the frailty of human nature; and would lament that in a matter so interesting to the happiness of millions the true merits of the question should be perplexed and entangled by [these] expedients."[292]

Publius did not hesitate to suggest that antifederalist contentions reflected "disingenuous artifice,"[293] "false impressions,"[294] "political legerdemain,"[295] and the "exaggerated colours of misrepresentation."[296] Hamilton, Madison, and Jay questioned whether antifederalists were "sincere in their opposition"[297] and urged readers to consider whether opposing essayists were so driven by an "imprudent zeal"[298] that they might seek "to instill prejudices at any price."[299] In all of this there was irony, for Publius had both professed

287. THE FEDERALIST NO. 31 (Alexander Hamilton), *supra* note 14, at 195.

288. THE FEDERALIST NO. 29 (Alexander Hamilton), *supra* note 14, at 185. In *The Federalist No. 29*, after obliterating the contention that federal authorities could not deputize citizens for law enforcement purposes, Publius asked: "What shall we think of the motives which could induce men of sense to reason in this manner?" *Id.* at 183; *accord* THE FEDERALIST NO. 31 (Alexander Hamilton), *supra* note 14, at 195 ("How else could it happen . . . that positions so clear as those which manifest the necessity of a general power of taxation in the government of the union, should have to encounter any adversaries . . . ?").

289. THE FEDERALIST NO. 29 (Alexander Hamilton), *supra* note 14, at 186–87.

290. *Id.* at 187.

291. THE FEDERALIST NO. 24 (Alexander Hamilton), *supra* note 14, at 155.

292. *Id.*

293. THE FEDERALIST NO. 29 (Alexander Hamilton), *supra* note 14, at 185.

294. THE FEDERALIST NO. 9 (Alexander Hamilton), *supra* note 14, at 54.

295. THE FEDERALIST NO. 36 (Alexander Hamilton), *supra* note 14, at 227.

296. THE FEDERALIST NO. 33 (Alexander Hamilton), *supra* note 14, at 204; *see* THE FEDERALIST NO. 24 (Alexander Hamilton), *supra* note 14, at 154 (warning of "an experiment upon the public credulity, dictated either by a deliberate intention to deceive or by the overflowings of a zeal too intemperate to be ingenuous").

297. THE FEDERALIST NO. 31 (Alexander Hamilton), *supra* note 14, at 195.

298. THE FEDERALIST NO. 33, (Alexander Hamilton), *supra* note 14, at 206.

299. THE FEDERALIST NO. 29, (Alexander Hamilton), *supra* note 14, at 185.

at the outset an intention to appeal only to "the genuine and sober dictates"[300] of the reader's judgment and chided other essayists for "the bitterness of their invectives."[301] In his concluding essay, Hamilton went so far as to congratulate himself on the temperance he had displayed in taking on critics of the Constitution:

> I trust at least you will admit, that I have not failed in the assurance I gave you respecting the spirit with which my endeavours should be conducted. I have addressed myself purely to your judgments, and have studiously avoided those asperities which are too apt to disgrace political disputants of all parties . . . .[302]

Then, touching the edges of self-contradiction, Hamilton added:

> The charge of a conspiracy against the liberties of the people, which has been indiscriminately brought against the advocates of the plan, has something in it too wanton and too malignant not to excite the indignation of every man who feels in his own bosom a refutation of the calumny. . . . And the unwarrantable concealments and misrepresentations which have been in various ways practiced to keep the truth from the public eye, have been of a nature to demand the reprobation of all honest men.[303]

Perhaps Hamilton, Madison, and Jay could not resist the urge to decry political opponents whose own writings brimmed with "unhallowed language,"[304] "virulent invective,"[305] and "petulant declamation."[306] This was an era, after all, in which one writer might describe another as a "monkey,"[307] a "blockhead,"[308] or even among "the 'meanest traitors that ever dishonoured the human character.'"[309] In a lamentably low moment, the essayist Inspector had dubbed Hamilton "Tom Shit" (the actual spelling was "Tom S—t") and

300. THE FEDERALIST NO. 85 (Alexander Hamilton), *supra* note 14, at 589.

301. THE FEDERALIST NO. 1 (Alexander Hamilton), *supra* note 14, at 5.

302. THE FEDERALIST NO. 85 (Alexander Hamilton), *supra* note 14, at 589.

303. *Id.*

304. THE FEDERALIST NO. 14 (James Madison), *supra* note 14, at 88.

305. THE FEDERALIST NO. 33 (Alexander Hamilton), *supra* note 14, at 204.

306. *Id.*

307. DE PAUW, *supra* note 17, at 100 (quoting one writer's barb that "[a] monkey has more unexceptionable claim to reason" (quoting A Friend to Common Sense, N.Y. J., Dec. 18, 1787)).

308. *Id.* (quoting comment by "Examiner" that "[a]s to that sniveling blockhead, Democritus, his drunken performance does not indeed merit a reply" (quoting Examiner III, N.Y. J., Dec. 18, 1787)).

309. BERNARD BAILYN, TO BEGIN THE WORLD ANEW 107 (2003).

described him as a mixed-race "mustee" who had "quitted [his] native soil in the torrid zone."[310] Faced with vilification of this sort, Hamilton—not surprisingly—confessed to moments in which "moderation itself can scarcely listen to the railings which have been so copiously vented . . . without emotions that disturb its equanimity."[311] And to such remarks, he added the telling clincher that, if the line of proper discourse had been crossed, the wrong had occurred "neither often nor much."[312]

It may be that Publius lashed out at antifederalist adversaries because natural human feelings of resentment left no choice. It may be that, as Hamilton stated in defense of his most heated rhetoric, explicit accusations of antifederalist mendacity were necessary to help "sincere lovers of their country" conduct a "fair and candid examination" of the Constitution.[313] A broad-gauged look at *The Federalist*, however, suggests that another motive was at work. Through a constancy of aspersion tied to reasoned argument, Publius sowed the seeds of skepticism at a visceral level. By portraying antifederalists as dark-hearted as well as wrong-headed, Hamilton, Madison, and Jay appealed to deep-seated human sensibilities tied to pride, caution, resentment, indignation, and even self-preservation. It is hardly surprising that, in pursuing their project of persuasion, the authors of *The Federalist* should draw on forces rooted so deeply in the human psyche.

The Federalist's emotional appeal for ratification had a positive, as well as a negative, edge. In particular, *The Federalist*'s authors aligned the Constitution, its framers, and its defenders with the spirit of the American Revolution and the intellectual forces that had given

310. CHERNOW, *supra* note 8, at 245. Mindful of these excesses, Albert Furtwangler emphasized "the consistent high tone" of *The Federalist*. FURTWANGLER, *supra* note 251, at 81; *see also id.* at 75 (asserting that Publius "practiced severe restraint"); *id.* at 81–82 (claiming that Publius's work "served as a damper on the violence of the ratification debate" and "shows three important writers laboring to assert calm reason"); *id.* at 97 (arguing that "the authority of Publius is strong because of his high civility"). Particularly in the context of a tempestuous time, this depiction has some accuracy. Moreover, it would be wrong to suppose that name-calling pervades *The Federalist*, most of which is given over to logical examination of relevant subjects. Even so, the appellations collected in the text—and many others too—counsel caution in characterizing *The Federalist* in terms as unequivocal as Furtwangler employs.

311. THE FEDERALIST NO. 33 (Alexander Hamilton), *supra* note 14, at 204.

312. THE FEDERALIST NO. 85 (Alexander Hamilton), *supra* note 14, at 589.

313. *See* THE FEDERALIST NO. 24 (Alexander Hamilton), *supra* note 14, at 155 (referring to arguments that the Constitution did not prevent standing armies in peace time as "clamours" and "dishonest artifices of a sinister and unprincipled opposition").

it birth. Their essays cited the Declaration of Independence[314] and its great author, Thomas Jefferson.[315] The heroes of American independence had "accomplished a revolution which has no parallel in the annals of human society,"[316] and Publius portrayed the Constitution as the logical continuation of that revolutionary process. As Madison put the point in *The Federalist No. 14*, for a people bold and ingenious enough to break the chains of British oppression, "[i]t is only to be lamented, that any of her citizens should wish to deprive her of the additional merit of displaying" the "full efficacy" of republican self-rule.[317]

Like the Revolution, the Constitution would draw Americans together: "[T]he mingled blood which [Americans] have shed in defence of their sacred rights, consecrate their union, and excite horror at the idea of their becoming aliens, rivals, enemies."[318] Like the Revolution, the Constitution would promote ideals far removed from the petty interests that marked America's experience under the Articles of Confederation. "Was . . . the hard earned substance of millions lavished, not that the people of America should enjoy peace, liberty and safety; but that the Governments of the individual States . . . [might] be arrayed with certain dignities and attributes of sovereignty?"[319] And like the Revolution, the Constitution was rooted in a selfless collaboration of fearless and far-sighted patriots. Indeed, the Philadelphia Convention had brought together "some of the most distinguished members of [the Revolutionary Congress of 1774], who have been since tried and justly approved for patriotism and abilities."[320]

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314. *See, e.g.*, THE FEDERALIST NO. 40 (James Madison), *supra* note 14, at 265 (arguing for the right to "abolish or alter" the government (quoting the Declaration of Independence)).

315. *See, e.g.*, THE FEDERALIST NO. 48 (James Madison), *supra* note 14, at 335 (discussing Jefferson's constitutional efforts in Virginia).

316. THE FEDERALIST NO. 14 (James Madison), *supra* note 14, at 89.

317. *Id.* at 84–85.

318. *Id.* at 88.

319. THE FEDERALIST NO. 45 (James Madison), *supra* note 14, at 309.

320. THE FEDERALIST NO. 2 (John Jay), *supra* note 14, at 12. Jay went so far as to suggest that the Philadelphia Convention was rightly viewed as the second coming of the "Memorable Congress of 1774." *Id.* at 11. As with the work of the Convention, the proposals of that "Patriotic Congress" had caused "the Press . . . to teem with Pamphlets and weekly Papers against [its] measures" even though time had "proved their wisdom." *Id.* Both assemblies had brought together men "convened from different parts of the country," *id.*, who gave themselves over for an extended period to a process of "mature deliberation," *id.* at 12. Indeed, "some of the most distinguished members of [the 1774] Congress . . . who have grown old in acquiring political information, were also members of this Convention." *Id.* Thus, "if the people at large

It is of interest that the names of Washington and Franklin appear in none of the eighty-five essays. Even so, the stature of these luminaries and their fellow framers overhung all that Publius wrote.[321] In *The Federalist No. 37*, Madison recalled that "[t]he history of almost all the great councils and consultations, held among mankind for reconciling their discordant opinions . . . is a history of factions, contentions, and disappointments; and may be classed among the most dark and degrading pictures which display the infirmities and depravities of the human character."[322] In contrast, the Philadelphia Convention had cast a "lustre to darken the gloom."[323] Drawing on the image of the selfless patriot, Madison proclaimed that "all the deputations composing the Convention, were either satisfactorily accommodated by the final act; or were induced to accede to it, by a deep conviction of the necessity of sacrificing private opinions and partial interests to the public good."[324]

Publius made use of America's revolutionary heritage in a variety of ways. For example he assured readers that, although the Constitution included novel elements, citizens who had pressed a revolution to success should not hesitate to embrace "what is new."[325] Many innovations had been "displayed on the American theatre,"

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had reason to confide in the men of that Congress, few of whom had then been fully tried or generally known, still greater reason have they now to respect the judgment and advice of the Convention." *Id.* Notably, the very idea of a constitution coming forth from a convention was a revolutionary innovation. In the past, Madison explained, the task of framing a government had fallen to "some individual citizen of pre-eminent wisdom and approved integrity"—like Minos of Crete, Lycurgus of Sparta, or Romulus of Rome. THE FEDERALIST NO. 38 (James Madison), *supra* note 14, at 240. The very different mode of the proceeding in Philadelphia reflected an "improvement made by America," and it underscored the singularity of the Convention's achievement. *Id.* at 241. This achievement, according to Madison, was all the greater because there was no "want of . . . care in the investigation" conducted by the assembled delegates. *Id.* So it was because those gathered had recognized "that the hopes and expectations of the great body of citizens, throughout this great empire, were turned with the keenest anxiety, to the event of their deliberations." THE FEDERALIST NO. 40 (James Madison), *supra* note 14, at 264.

321. The competence of the Philadelphia delegates was unquestionably broad and deep. As Catherine Drinker Bowen has written:

> Nearly three-fourths [of the delegates] had sat in the Continental Congress. Many had been members of their state legislatures and had helped to write their state constitutions in the first years after Independence. Eight had signed the Declaration, seven had been state governors, twenty-one had fought in the Revolutionary War. When Jefferson in Paris read the names he said it was "an assembly of demi-gods."

BOWEN, *supra* note 47, at 4.

322. THE FEDERALIST NO. 37 (James Madison), *supra* note 14, at 238.

323. *Id.* at 239.

324. *Id.*

325. THE FEDERALIST NO. 14 (James Madison), *supra* note 14, at 88.

and it was "the glory of the people of America" to eschew "a blind veneration for antiquity."[326] In *The Federalist No. 11*, Hamilton sought to build support for the Constitution by tapping into optimistic notions of American ascendancy and uniqueness. Disunion, he admonished, would vindicate the "arrogant pretensions of the European" that had "tempted her to plume herself as the Mistress of the World, and to consider the rest of mankind as created for her benefit."[327] It had fallen to America to rise above the station of long-oppressed Asians and Africans and to "vindicate the honor of the human race."[328] Hamilton's words crackled with patriotic fervor:

> Let Americans disdain to be the instruments of European greatness! Let the thirteen States, bound together in a strict and indissoluble union, concur in erecting one great American system, superior to the controul of all trans-atlantic force or influence, and able to dictate the terms of the connection between the old and the new world![329]

The Federalist's celebration of the Revolution also helped allay concerns about the purported unlawfulness of the Philadelphia Convention.[330] One problem arose from the fact that the Constitution would take effect upon approval by only nine states, even though the Articles of Confederation in express terms conditioned their modification on unanimous state action.[331] Another problem existed because the Confederation Congress had directed delegates to meet "for the sole and express purpose" of proposing modifications to the

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326. *Id.*

327. THE FEDERALIST NO. 11 (Alexander Hamilton), *supra* note 14, at 72.

328. *Id.* at 72–73.

329. *Id.* at 73.

330. *See generally* THE FEDERALIST NO. 40 (James Madison) (discussing this subject at length). The debate on whether the ratification was, strictly speaking, legal continues to this day. *Compare* Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 458 (1994) (arguing that the founding was legal because it was rooted in popular sovereignty), *with* Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475, 476 (1995) (rejecting the idea that the founding was "consummately legal"), *and* Henry Paul Monaghan, *We The People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121, 121 (1996) (characterizing Amar's argument as "appealing, but historically groundless").

331. *Compare* ARTS. OF CONFEDERATION art. XIII ("[N]or shall any alteration at any time hereafter be made in any of [the Articles of this Confederation]; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State."), *with* U.S. CONST. art. VII ("The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.").

Articles of Confederation, and not for the purpose of proposing an entirely new charter of government.[332] Responding to critiques based on these facts, Madison focused on the same principle of "absolute[] necess[ity]" that had spawned the American Revolution.[333] For Publius, the "law of nature and of nature's God" dictated "the great principle of self-preservation" and required abandonment of political institutions at odds with "the safety and happiness of society."[334] The Philadelphia delegates, much like the heroes of the Revolution, had encountered "a system so radically vicious and unsound" that it did not "admit . . . of amendment" but instead required "an entire change in its leading features and characters."[335] The "peculiarly distinguished" leaders who gathered in Philadelphia thus chose the path of not "sacrificing substance to forms," but instead of "exercising a manly confidence in their country, by . . . pointing out a system capable in their judgment of securing its happiness."[336] Like the Revolution, this action reflected the "patriotic emotion" of the "virtuous citizen."[337] "[I]f [the framers] had exceeded their powers," Publius concluded in *The Federalist No. 40*, they were—just like the leaders of a decade before—"required, as the confidential servants of their country, by the circumstances in which they were placed, to exercise the liberty which they assumed."[338]

According to Publius, the Constitution was properly aligned not only with the spirit of the Revolution but with the views of great philosophers who helped spur revolutionary thinking. The essayists cited thinkers such as Grotius, Mably, and Hume, noting with Enlightenment-era enthusiasm that "[t]he science of politics . . . like most other sciences has received great improvement" over time.[339] Publius also relied on contemporary writers like Blackstone[340] and the

332. THE FEDERALIST NO. 40 (James Madison), *supra* note 14, at 259.

333. *Id.* at 264.

334. THE FEDERALIST NO. 43 (James Madison), *supra* note 14, at 297.

335. THE FEDERALIST NO. 22 (Alexander Hamilton), *supra* note 14, at 144–45.

336. THE FEDERALIST NO. 40 (James Madison), *supra* note 14, at 266.

337. *Id.*

338. *Id.* at 267.

339. THE FEDERALIST NO. 9 (Alexander Hamilton), *supra* note 14, at 51.

340. *See* THE FEDERALIST NO. 69 (Alexander Hamilton), *supra* note 14, at 465, 467 (citing Blackstone in footnote); THE FEDERALIST NO. 84 (Alexander Hamilton), *supra* note 14, at 577 (citing the "judicious Blackstone").

English essayist Junius.[341] The authors of *The Federalist*, however, heaped their most lavish attention on the writings of the French political philosopher Montesquieu, who had developed and defended the notion of separated governmental powers in his masterpiece, *The Spirit of Laws*.[342] In challenging the proposed Constitution, antifederalists trumpeted this work, extracting from it the idea that republican governments stood no chance of success except in small geographical settings.[343] In *The Federalist No. 9*, Hamilton sought to debunk this reading of Montesquieu, thus aligning the name of the great political philosopher with the work of the Philadelphia Convention.[344]

Did an even higher authority support the case for ratification? Jay wrote in *The Federalist No. 2* that "it appears as if it was the design of Providence, that [this] band of brethren, united to each other by the strongest ties, should never be split into a number of unsocial, jealous and alien sovereignties."[345] Hamilton could not bring himself to urge that God had taken sides in the ratification debate,[346] but Madison seemed ready to make the case. In *The Federalist No. 37*, he first celebrated the solidarity and success of the Philadelphia

341. *See* THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 14, at 479 (citing the "celebrated Junius").

342. *See* THE FEDERALIST NO. 9 (Alexander Hamilton), *supra* note 14, at 53–54 (quoting Montesquieu at length); THE FEDERALIST NO. 43 (James Madison), *supra* note 14, at 295 (quoting Montesquieu on the "advantages of a confederate republic" in quelling insurrection). For background information about many of the authors Publius cites, see generally Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077, 1095–136 (2004).

343. *See, e.g.*, Brutus I, N.Y. J., Oct. 18, 1787, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 18, at 363, 368 (quoting Montesquieu's *Spirit of Laws* on the advantages of a small republic); Cato III, N.Y. J., Oct. 25, 1787, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 18, at 109, 110 (same). Storing believes Publius was responding specifically to Cato's invocation of Montesquieu. 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 18, at 127 n.11 (editorial note).

344. *See* THE FEDERALIST NO. 9 (Alexander Hamilton), *supra* note 14, at 53–54 (quoting Montesquieu's advocacy of reforms "by which smaller *States* agree to become members of a larger one," and thus arguing that his writings "contain luminous abridgement of principal arguments in favour of the Union").

345. THE FEDERALIST NO. 2 (John Jay), *supra* note 14, at 9.

346. So it was even though the New Yorker apparently was, in some fashion, a religious man. *See* CHERNOW, *supra* note 8, at 132 (noting that "Eliza never doubted her husband's faith," although "Hamilton refrained from a formal church affiliation"); s*ee also id.* at 205 (adding that, although Hamilton "did not seem to attend church regularly," he probably embraced deism and "never doubted God's existence"). *See generally* Douglass Adair & Marvin Harvey, *Was Alexander Hamilton a Christian Statesman?*, *reprinted in* ALEXANDER HAMILTON 230 (Jacob E. Cooke ed., 1967).

Convention in the face of overwhelming odds. Then he turned to the broader theme:

> It is impossible for any man of candor to reflect on this circumstance, without partaking of . . . astonishment. It is impossible for the man of pious reflection not to perceive in it, a finger of that Almighty hand which has been so frequently and signally extended to our relief in the critical stages of the revolution.[347]

III. JUDICIAL RELIANCE ON *THE FEDERALIST*

The preceding account reveals that *The Federalist* embodies a strategic argument designed to win an intense political campaign. This historical fact raises a question of pressing contemporary significance: How does the argumentative nature of the essays affect the legitimacy of relying on them as a source of modern-day constitutional interpretation?

The question is timely for two reasons. First, in recent decades the Supreme Court has invoked *The Federalist* with far greater frequency than in earlier time periods; indeed, as Professor Ira Lupu documents, "[m]ore than half of all the Supreme Court decisions in which one or more citations to *The Federalist* appear have been rendered since 1970."[348] Second, in a bevy of recent scholarly writings, commentators have grappled with the question whether the courts have any business consulting *The Federalist* as they search for constitutional meaning.[349] Not surprisingly, some observers argue that the essays should carry little interpretive freight precisely because of the key point developed in this paper—namely, that *The Federalist* was a highly argumentative and politically motivated document. These analysts contend that it is unsound to seek the Constitution's

347. THE FEDERALIST NO. 37 (James Madison), *supra* note 14, at 238.

348. Lupu, *supra* note 5, at 1330.

349. *See generally* Ducayet, *supra* note 275; William N. Eskridge, Jr., *Should the Supreme Court Read* The Federalist *but Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301 (1998); John F. Manning, *Textualism and the Role of* The Federalist *in Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1337 (1998); J. Michael Martinez & William D. Richardson, *The Federalist Papers and Legal Interpretation*, 45 S.D. L. REV. 307 (2000); McGowan, *supra* note 224; Tillman, *supra* note 218.

meaning by consulting what was at worst "propaganda"[350] and at best "political advocacy."[351]

Critiques of this kind, while understandable, tend to oversimplify analysis, in part because there are different theories about why courts may use *The Federalist* to help resolve constitutional ambiguities. In particular, various observers posit five significant arguments in support of judicial reliance on the *Papers*. According to these theories, judicial use of *The Federalist* properly reflects (1) their iconic status; (2) their utility as "legislative history"; (3) their dictionary-like character; (4) their function as learned commentary; and (5) their embodiment of exceptionally wise insights about the sound functioning of government. Any fair consideration of *The Federalist*'s role in constitutional interpretation must take account of each of these approaches, and I undertake such an evaluation in the pages that follow. I offer this evaluation only as a tentative account of my still-developing views of this complex subject. Even this preliminary account suggests, however, that adherents of all five theories have much work to do in reconciling their positions with the argumentative purpose of *The Federalist.* Nonetheless, in the end, that purpose does not preclude judicial reliance on the essays. In fact, in one important way, the authors' purpose of persuasion reinforces the case that courts should make use of *The Federalist* in resolving hard questions of constitutional law.

A. The Federalist *as Icon*

The first argument for the propriety of judicial use of Publius's writings is the most straightforward. According to this theory, *The Federalist* stands at the heart of our legal culture. It is celebrated. It is revered. It is the subject of grade school social studies and high school civics classes. How can it possibly be—so the argument goes—that courts should not consider in the process of constitutional interpretation a text that is almost as basic to American law as the Constitution itself? It is simply unthinkable, on this view, that courts could ignore a legal text of such iconic status.[352]

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350. Eskridge, *supra* note 349, at 1309.

351. Manning, *supra* note 349, at 1339 (adding that the essays' contents thus "may at times reflect the exigencies of debate").

352. For one variation of this argument, see Manning, *supra* note 349, at 1355 n.69 (discussing *The Federalist*'s "canonical status" and possibility of its legitimate use as an interpretive tool because it has "become an important part of a long-standing constitutional

The difficulty with this argument is that many things are icons. Elvis is an icon. The American Flag is an icon. The work of Shakespeare is an icon. But neither Elvis nor the Flag nor Shakespeare tells us anything about the meaning of the Constitution. The obvious response to these observations is that *The Federalist* is an icon that specifically concerns the Constitution. But so what? *The Federalist* may be an icon that concerns the Constitution for reasons that provide it with no serious claim to legitimacy as a source of constitutional interpretation. Its fame might result primarily from an emotional sense of connection to its celebrated (indeed, iconic) authors. Or its glory might stem—especially in light of its argumentative purpose—from its association with the great victory achieved in securing ratification of the Constitution. These things might make *The Federalist* an icon, but they do not make it a proper indicator of constitutional meaning.

In fairness, much of the rhetoric that concerns and supports *The Federalist*'s celebrated stature does suggest, at least at first blush, that it is a valuable wellspring of constitutional information. Chief Justice John Marshall, for example, described the essays as "a complete commentary on our [C]onstitution,"[353] and Justice Samuel Chase attributed to Publius "extensive and accurate knowledge of the true principles of Government."[354] These Justices, however, never considered the critical question whether the argumentative nature of *The Federalist* undermines its status as a sound source of constitutional meaning. Even more important, the Supreme Court as a whole has never considered in explicit terms this now-familiar line of attack. In essence, writers like Chief Justice Marshall and Justice Chase do little more than assume the conclusion that *The Federalist* merits attention in interpreting the Constitution.

In the end, the argumentative nature of *The Federalist* threatens its claim as an authoritative source as to the meaning of the Constitution. The reason why is simple: It is hard to say that *The Federalist* sets forth an authoritative elaboration of the Constitution,

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culture"). *See also* Ducayet, *supra* note 275, at 821 (noting that "*The Federalist* has long enjoyed a talismanic status in American constitutional interpretation" and that courts "start from the premise that [the *Papers*] are vested with a special kind of power to help resolve issues of constitutional meaning"); *id.* at 856 (suggesting that, because "*The Federalist* occupies an important position within American political culture," a proper theory of interpretation "ought to account for [it] in some fashion").

353. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 418 (1821).

354. Calder v. Bull, 3 U.S. (3 Dall.) 386, 391 (1798).

when its purpose was not to set forth such an elaboration, but instead was to achieve a political objective of generating popular support for the Constitution and the election of proratification delegates. Many forms of advocacy, after all, are precisely the sorts of materials that judges would never cite as useful touchstones of textual meaning. For example, great briefs might be filed in constitutional cases, and great oral presentations might be delivered, too. Yet the Supreme Court would not give authoritative legal status to Thurgood Marshall's argument in *Brown v. Board of Education* or to Clarence Darrow's speeches at the Scopes Trial, even though those addresses have achieved iconic status. Even more to the point, it is almost unimaginable that courts charged with ascribing meaning to a legal text would rely on partisan campaign literature and one-sided letters to the editor. Yet these labels apply readily to *The Federalist Papers*. For these reasons, it is eminently sensible to wonder why the modern court, in discharging its interpretive mission, should give attention to writings that embody "a brief in favor of ratification,"[355] and that reflect—to use Madison's own words—"the zeal of advocates"?[356] There may be a good answer to this question. But it does not suffice to say, without more, that *The Federalist* has a towering stature.

B. The Federalist *as Legislative History*

A more nuanced defense of *The Federalist* has its roots in the longstanding practice of considering background legal materials—such as committee reports and floor debates—in ascribing meaning to ambiguous legal texts. The idea behind the consideration of such materials is that the touchstone of interpretation should be the intention of the lawgivers; thus, if the text of the law itself is ambiguous, courts may consider statements made in the lawgiving process by or on behalf of the lawgivers to clarify what their intentions were.[357] Building on this thought, some analysts suggest that *The Federalist* should count in constitutional interpretation because it qualifies as a form of legislative history. The argument begins with the idea that the intentions of the ratifiers, rather than

355. Chase J. Sanders, *Ninth Life: An Interpretive Theory of the Ninth Amendment*, 69 IND. L.J. 759, 765 n.25 (1994).

356. Letter from James Madison to Edward Livingston (Apr. 17, 1824), *in* 9 THE WRITINGS OF JAMES MADISON 187, 189 (Gaillard Hunt ed., 1910).

357. *See* John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 419 (2005) (describing the historical use of legislative intent in judicial opinions).

those of the Philadelphia framers, provide the decisive source of constitutional meaning because it was the ratifiers who brought the Constitution to life.[358] It thus follows, as Professor Amar has written, that courts may cite the essays because they "were consciously quoted and used more than any other source during the ratification period."[359]

There are major difficulties with this line of analysis. One difficulty is that some judges and commentators—Justice Scalia most prominently among them—do not believe that it is *ever* legitimate to consider legislative history in interpreting statutes.[360] Adherents of this position rely in part on the artificiality of ascribing a unitary intent to the diverse body of representatives who constitute a legislative majority.[361] This argument applies *a fortiori* to constitutional interpretation because it is necessarily more difficult to discern the intention of thirteen deliberative bodies than to discern the intention of a single legislature.[362] For analysts who think like

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358. *See* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 11, at 374 (presenting opinion of James Madison that the proposed Constitution "was nothing more than the draft of a plan, nothing but a dead letter, until life and validity were breathed into it by the voice of the people, speaking through the several State Conventions"); Letter from James Madison to Thomas Ritchie (Sept. 15, 1821), *in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 11, at 447, 447–48 (noting that the "legitimate meaning" of the Constitution must be derived either in the text or "in the sense attached to it by the people in their respective State Conventions," not "in the opinions or intentions of the Body which planned & proposed the Constitution").

359. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1498 n.285 (1987). A variation on this argument is that, even if the intentions of Philadelphia framers are paramount, *The Federalist* provides strong evidence of their intentions because Madison and Hamilton were present at the Convention and participated in its work. *See, e.g.*, Ducayet, *supra* note 275, at 841–42. This history-of-the-writing theory suffers from even more problems than the history-of-the-ratification approach discussed in the ensuing text, in part because it is doubtful that the Philadelphia framers' intentions should count for much of anything in constitutional exegesis. *See supra* note 358. Even if their intentions do count, however, it is questionable whether *The Federalist* provides a very good account of what those intentions were. *See* Ducayet, *supra* note 275, at 845–47. In part this is the case because of the argumentative nature of the essays; after all, adoption of an argumentative purpose meant that "the work was *not* intended as a recapitulation of the convention deliberations." *Id.* at 845 (emphasis added).

360. *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION 29–37 (1997) (explaining Justice Scalia's rationale for disfavoring legislative history).

361. *See, e.g.*, Frank H. Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J.L. & PUB. POL'Y 87, 92 (1984) (noting that "the most humble judge will fail if given a charge to recreate in his own mind the 535 minds that contemplated yesterday's problems").

362. *See* Eskridge, *supra* note 349, at 1308 (asserting that "[i]f the collective 'intent' of the bicameral legislature is an incoherent concept, . . . the collective 'understanding' of an entire nation during a constitutional moment must be even more so"). There are other reasons as well

Justice Scalia, it follows easily that courts may not cite *The Federalist* on the theory that it qualifies as legislative (or, more accurately, constitutional) history.[363]

Even for those who endorse the use of legislative history, efforts to rely on *The Federalist* raise profound problems. It is now settled as a historical matter, for example, that the *Papers* did not circulate widely outside New York.[364] How, then, can they provide legislative history for the ratification conventions as a whole?[365] In addition, ratification had already occurred in most of the states before many of the essays (including Hamilton's famous treatments of the judicial power) were even published.[366] How can the essays provide legislative *history* for official action that in fact predated their appearance? Finally, historians have concluded that the *Papers* had little impact on the ratification decision even in New York.[367] It is difficult, if not incoherent, to view Publius's work as legislative history when "[t]here is no good evidence that anyone, even in New York, relied on *The Federalist* as the basis for voting to ratify."[368]

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for viewing constitutional history with more skepticism than legislative history. *See, e.g.*, *id.* at 1311 (noting that Congress might direct corrective legislation at judicial misreadings of statutes based on manipulations of legislative history, but cannot cure similar manipulations in the constitutional context; also worrying that reliance on constitutional history from the founding period ignores postratification amendments that profoundly altered key themes of the Constitution). *But see id.* at 1316–21 (suggesting a possible case for continued use of constitutional, but not legislative history: Exclusion of legislative history—but not constitutional history—may properly respond to modern-day interests groups' strategic creation of legislative materials to facilitate later arguments to judges, which in turn distorts the deliberative lawmaking process).

363. *See* SCALIA, *supra* note 360, at 38 (stating that the "original meaning of the text" is paramount, not "what the original draftsmen intended").

364. *See* DE PAUW, *supra* note 17, at 111 n.25 (finding no record of publication in seven of the states and that "no more than twelve" of the essays appeared in newspapers outside of Boston and Philadelphia).

365. *See* Eskridge, *supra* note 349, at 1309 (noting that "[n]o historian has rigorously established that the arguments [in *The Federalist*] were known and accepted in any other state, or even for that matter in New York"); Manning, *supra* note 349, at 1340 (finding no evidence that ratifiers agreed with the "intricate and often-lengthy essays"); *id.* at 1355 (questioning whether a "constitutionally sufficient number of ratifiers" were influenced by *The Federalist*, given the *Papers*' limited circulation).

366. FURTWANGLER, *supra* note 251, at 19–21.

367. *See* McGowan, *supra* note 224, at 756 (noting overwhelming election of antifederalist delegates in New York and the key role of Virginia's acceptance of the Constitution, rather than of *The Federalist*, in triggering New York's ratification).

368. *Id.*; *see also* Ducayet, *supra* note 275, at 846 (noting these and additional problems with the legislative-history account).

These problems greatly complicate the case for citing *The Federalist* on a legislative-history theory. Perhaps the two greatest difficulties in doing so, however, spring from the argumentative character of the work. The first problem is that Hamilton, Madison, and Jay did not write or publish the essays in the context of lawmaking operations. Rather, in keeping with their overarching plan to present an argument to voters, they penned the tracts for publication as newspaper editorials. As others have observed, it is difficult to view materials written wholly outside the legislative process as *legislative* history.[369]

Second, even assuming the essays could surmount this hurdle, they may well not rank as the sort of legislative history that deserves significant respect. Courts have long recognized that different forms of legislative history merit different levels of judicial attention,[370] and in applying this principle there is much reason not to give the *The Federalist* high legislative-history marks. For example, Hamilton and Madison's project of persuasion led them to defend ideas with which they themselves disagreed.[371] It seems odd to say that, even when documents are crafted so strategically that they do not reflect their own authors' outlook, they can nonetheless qualify as an official expression of a body of lawgivers on whose behalf those authors somehow supposedly spoke.

C. The Federalist *as Dictionary*

As we have seen, Justice Scalia strongly rejects the use of legislative history in interpreting enacted materials.[372] How, then, can

369. *See* Manning, *supra* note 349, at 1349 (noting that, because of the anonymity of the authors, state ratifiers "would have had no reason to believe that Madison, Hamilton, or Jay were authorized to speak for the Convention"); Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1316 (1990) (emphasizing that the essayists lacked authorization to represent the views expressed at the Philadelphia Convention).

370. *See, e.g.*, Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 395 (1951) (Jackson, J., concurring) (recognizing the superior validity of committee reports above other forms of legislative history because they are generally "well considered and carefully prepared").

371. *See supra* text accompanying notes 248–50.

372. *See supra* note 360 and accompanying text.

he routinely cite *The Federalist*?[373] Justice Scalia himself answered this question in a well-known commentary on the foundations of law:

> I will consult the writings of some men who happened to be delegates to the Constitutional Convention—Hamilton's and Madison's writings in *The Federalist*, for example. I do so, however, not because they were Framers and therefore their intent is authoritative and must be the law; but rather because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood. Thus I give equal weight to Jay's pieces in *The Federalist*, and to Jefferson's writings, even though neither of them was a Framer. What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.[374]

This approach seems to involve an "abstract, grammatical" use of the *Papers*.[375] Because the enacted terms of the Constitution are central to determining "original meaning," the key question becomes how those terms were viewed in the time and place of their adoption. Thus courts may consult *The Federalist* for much the same reason that they may consult "Samuel Johnson's dictionary or any other usage guide."[376] The cited text—here, *The Federalist*—serves the sole purpose of shedding light on then-accepted understandings of the words and phrases that appear in the Constitution.

This approach to *The Federalist* has encountered resistance,[377] in part because it lends no special weight to the "character and achievements of Hamilton and Madison."[378] Justice Scalia's account would seem to treat no differently than *The Federalist* a commentary on the Constitution crafted by a local blacksmith, so long as the blacksmith understood as well as Publius how the average ratification delegate would use the words that appear in the Constitution. It might even be that Justice Scalia would accord as much significance to the views of "intelligent and informed" antifederalist writers as he

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373. *See, e.g.*, Printz v. United States, 521 U.S. 898, 910–15 (1997) (citing cautions in *The Federalist* against congressional imposition of duties upon states "without consent of the States," *id.* at 911).

374. SCALIA, *supra* note 360, at 38.

375. McGowan, *supra* note 224, at 835.

376. *Id.* at 757.

377. *See, e.g.*, Eskridge, *supra* note 349, at 1312 (describing Justice Scalia's approach as embodying "a weak justification for consulting *The Federalist*").

378. McGowan, *supra* note 224, at 835.

would ascribe to the views of Publius. The writer Brutus, for example, detected in the words of the Constitution—particularly its vesting of equity jurisdiction in the Supreme Court—a broad grant of authority to the federal judiciary to safeguard unenumerated rights.[379] If Brutus was bright and fully familiar with proper use of the English language in late-eighteenth-century America (as he surely was), does it not follow that we should assign his views on the meaning of the constitutional text as much significance as the views expressed in *The Federalist*? According to Justice Scalia's methodology, it seems as though we should.

One might say that judges should be leery of accepting Brutus's treatment of the judicial power because he was writing in an effort to persuade readers to oppose the Constitution. But that is the point. By symmetry of logic, courts should hesitate to rely on the no-less-advocacy-driven writings of Hamilton, Madison, and Jay. Standard works by Blackstone or Coke might well serve a dictionary function by fleshing out generally understood meanings of legal terms employed in the Constitution. Such works, however, are a far cry from pseudonymously produced newspaper editorials.[380] At the very least, Justice Scalia's treatment of *The Federalist* suffers from a significant omission in that it offers no explanation as to *why* its adversarial argument fairly "display[s] how the text of the Constitution was originally understood."[381]

D. The Federalist *as Treatise*

As shown, there is reason to reject both the legislative-history and dictionary-like-aid approaches to judicial use of *The Federalist.* Some analysts have sought to fill the resulting gap by arguing that courts should consider Publius's teachings in much the same way they consider scholarly treatises on law. According to this theory, courts should approach *The Federalist* like they approach books written by Joseph Story or James Kent, or perhaps even Laurence Tribe. As Professor McGowan notes, "[t]his is how the Court tended to use the

379. *See* Brutus XI, N.Y. J., Jan. 31, 1788, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 18, at 417, 419 (stating that the Constitution "vests the judicia[ry] with a power to resolve all questions that may arise on any case on the construction of the constitution").

380. *See* Manning, *supra* note 349, at 1355–59 (cautioning against "equat[ing] the expressions of Publius with the understanding of the ratifiers").

381. SCALIA, *supra* note 360, at 38.

essays in the eighteenth and nineteenth centuries, and it is the only form of reasoning the essays support very well."[382]

This point of view raises foundational issues about the nature of constitutional interpretation. To begin with, what business do courts have relying on treatises in the first place? At least from an ardently originalist perspective, courts should eschew reliance on treatises, or at least most of them, because they typically tell more about the views of the treatise writer than about the views of the framers. Notably, the leading proponent of the learned-treatise approach seems to concede this point, acknowledging that treatise-based views of *The Federalist* "do not assert that the essays reveal what the drafters of the Constitution thought . . . , nor do they claim that the essays show what ordinary speakers of late-eighteenth century English thought the words of the Constitution meant."[383] Even if *The Federalist* qualifies as a learned treatise, this concession is significant because few judges—regardless of the interpretive principles they embrace—view treatises as having the level of interpretive clout normally associated with *The Federalist Papers*. The question thus remains of whether the learned-commentary approach to *The Federalist* gives the work its full and proper due.

In any event, the key point developed earlier in this article rubs up hard against viewing *The Federalist* as a learned commentary. Common experience suggests, after all, that what makes "learned commentaries" learned is in large measure that the relevant writing reflects the work of a detached, objective, and non-self-interested scholar. The function of *The Federalist* as a tool of political debate makes it hard to view its authors in this light. Put simply, it is strained to justify reliance on *The Federalist* by characterizing it as a learned treatise when its authors wrote it not as a learned treatise but as self-serving campaign literature.

E. The Federalist *as Brilliant Philosophy*

The preceding discussion focuses on originalist styles of constitutional interpretation. This is the case because that discussion primarily addresses the question whether *The Federalist* can qualify as a proper indicator of "original intent" or "original meaning" in light

382. McGowan, *supra* note 224, at 756.

383. *Id.*

of its demonstrably political-persuasion-based character.[384] It is hardly surprising that a consideration of *The Federalist*'s role in constitutional interpretation should have an originalist focus. Publius, after all, wrote his essays during the very time period when original thinking about the Constitution occurred.[385] Yet if there are serious problems with looking to *The Federalist* as legislative history or as an indicator of then-existing linguistic understandings, a surprising conclusion might follow—namely, that nonoriginalist, rather than originalist, styles of interpretation provide the firmest basis for judicial use of *The Federalist*. Charles Fried, for example, heads in the direction of this conclusion when he writes that the *Papers* warrant judicial attention because of their "intrinsic worth" and because they reflect "the thought of the wisest men who had occasion to think most deeply" about the Constitution.[386]

Observers other than Fried state even more clearly that *The Federalist* should count in constitutional interpretation not because it reflects the thinking of the Constitution's ratifiers, but because it contains unusually wise insights offered by writers deserving of the highest respect.[387] From this vantage point, relying on the writings of Abraham Lincoln (for example) would parallel judicial invocation of the writings of Publius. Why? Because Lincoln—like Hamilton, Madison, and Jay—had the benefit of deep experience in the affairs of government, a brilliant understanding of human nature, and extraordinary practical wisdom. These qualities might not permit Lincoln to offer much information about the thinking of long-dead ratification delegates, but they would permit him to make invaluable observations on how government works best. In fact, the Supreme Court has cited Lincoln in defining the essential nature of the state-

384. *See* Eskridge, *supra* note 349, at 1312–16 (discussing the difference between "original intent" and "original meaning" but further arguing that this difference is "questionable" and at best "a fine one").

385. *See* McGowan, *supra* note 224, at 825–26 (noting that recent court cases tend to "cite *The Federalist* in connection with decisions based on the 'original meaning' or 'original understanding' of the Constitution").

386. CHARLES FRIED, ORDER AND LAW 63 (1991).

387. *See* Ducayet, *supra* note 275, at 825 (suggesting that *The Federalist* "may serve as a useful form of constitutional authority by providing a particularly sophisticated theory of political psychology," and adding that this "justification treats the work neither as evidence of the binding 'intentions' of the Framers nor as a dated and biased historical artifact, but rather as a rich lode of insights"); *id.* at 829–30, 833 (attributing a similar view of *The Federalist* to Joseph Story and, at least in part, to historian Charles Beard).

federal relationship.[388] Likewise—so the argument goes—the Court should be free to cite the no less timeless and insightful work of Publius.

There are at least three difficulties with citing *The Federalist* on the theory that it embodies wise discourse. First, given the argumentative character of *The Federalist*, its pages may well not embody the most trustworthy—as opposed to the most polemically appealing—account of the matters the essays address. Writings that attribute "political fanaticism"[389] and "distempered imaginations"[390] to one's opponents, for example, do not have the same ring as The Gettysburg Address. Second, nonoriginalist styles of interpretation (or at least some of them) are controversial. In particular, concerns about illegitimacy and indeterminacy would lead many scholars to bemoan an interpretive principle that read something like this: "Courts should interpret the Constitution to mean whatever would cause it to work best in the view of the wisest people." Yet, the nonoriginalist argument for invoking *The Federalist* seems to hinge on this very notion.

Finally, even assuming that a sound nonoriginalist case for using *The Federalist* exists, few would argue that a nonoriginalist justification would possess as solid a grounding in accepted interpretive traditions as a strong originalist justification.[391] Put another way, *The Federalist* will carry more interpretive heft if both an originalist theory and a nonoriginalist theory for its invocation are available. I return, then, to the question whether *The Federalist* can properly serve as a reasonable proxy for the intentions and meaning of those who ratified the Constitution.

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388. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 821 (1995) (citing the Gettysburg Address for the proposition that "[o]urs is a 'government of the people, by the people, for the people'").

389. THE FEDERALIST NO. 29 (Alexander Hamilton), *supra* note 14, at 185.

390. THE FEDERALIST NO. 8 (Alexander Hamilton), *supra* note 14, at 49–50.

391. *But cf.* Ducayet, *supra* note 275, at 847–48 (questioning originalist methodologies in evaluating *The Federalist*'s proper role in constitutional interpretation). It is outside the purposes of this Article to explore the comparative merits of originalist and nonoriginalist methods of interpretation. For present purposes, it suffices to note that the Supreme Court has long considered references to the framers' intentions as *among* the important methods of constitutional interpretation.

F. The Federalist *as Consensus Understanding*

Commentators have offered a rich mix of theories for judicial use of *The Federalist.* Yet all of the theories considered so far suffer from serious shortcomings, or at least from incompleteness. How can it be, especially from an originalist perspective, that a self-serving set of campaign tracts should factor into the process of constitutional interpretation?

Answering this question requires circling back to the original purpose of *The Federalist*. As shown, that purpose was to set forth an argument. What is important, however, is that that argument was of a particular kind, for the authors rooted their case for persuasion in a meticulous appeal to reason.[392] To be sure, bombast and braggadocio made their way into the essays, and Publius appealed to visceral concerns and emotional reactions along the way.[393] At its core, however, *The Federalist* set forth a relentlessly cohesive and logical argument built on lessons of experience, accepted principles of human conduct, and deductions drawn from widely accepted premises.[394]

The decision of Hamilton, Madison, and Jay to focus on reasoned argument carried with it a consequence of great significance to present-day students of constitutional meaning. Precisely because Publius's purpose was to gain support from a broad and diverse audience with arguments based on reason, the views set forth in the *Papers* could be neither sloppy nor personal nor idiosyncratic. Rather, Publius's depiction of the Constitution had to reflect a broadly acceptable view of the document's meaning. And because that depiction had to reflect a broadly acceptable view, it seems fair to conclude that it articulated something that approximated a consensus understanding.[395] It is this reason—coupled with the authors' genius and their inside knowledge of the Convention's thinking—that lends *The Federalist* a powerful claim to interpretive significance. The

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392. *See, e.g.*, *supra* note 310 (discussing development of this theme by Professor Furtwangler).

393. *See supra* Part II.F.

394. *See supra* Part II.A.–II.E.

395. *See* STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 22 (1993) (noting that *The Federalist* presented "in aggregate the outer bounds as well as the central substance of what their authors conceived was the claim they could make—the object being above all persuasion—on their readers' experience, aspirations, and habits of thought"); *see also* Ducayet, *supra* note 275, at 822 (noting that *The Federalist* "was designed to place the Constitution in the most desirable light possible").

authors' genius plays a role because it suggests that they would and did succeed in the task they undertook—namely, to construct the best possible reason-based argument for ratification that, in turn, would best speak to a wide and diverse audience. The authors' inside knowledge facilitated this effort by providing valuable insights about how the provisions of the Constitution might be elaborated in the most sensible, coherent and appealing fashion.[396] And if *The Federalist* in fact sets forth something like a consensus view, it cannot help but shed light on the all-important question of what "We the People" meant to say in the words of the Constitution.[397]

In sum, as William Eskridge explains, there are "[c]onventions that make it reasonable to suppose that certain focal speakers reflect more than their own views when they make statements in the course of public constitutional . . . debates."[398] Even more important, there are powerful reasons to conclude that those conventions apply with added force to the writings of Publius.[399]

G. The Consensus-Understanding View and Other Theories

At the very least, these observations may help to strengthen other theories that support judicial reliance on *The Federalist.* To the extent that the essays qualify as legislative history, for example, it lends them weight to say that they embodied mainstream viewpoints that an ordinary ratifier would likely share. In similar fashion, to the

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396. It might be said in response that *The Federalist* reflected at most a likely consensus of only those pro-Constitution voters in New York. In particular, this argument gains support—at least on a superficial level—from the fact that Publius laced his case for ratification with appeals that focused on the local interests of New York. *See supra* text accompanying notes 95–104, 177–87. It seems apparent, however, that the special treatment of New York voters had more to do with the examples used in the essays to illustrate the Constitution's effects than with any effort to define the terms and purposes of the Constitution in light of New York's special needs. One significant fact confirms this non-single-state view of the argument made in the essays; upon their completion, Madison had them carted off to Virginia, where he used them extensively in arguing for ratification at the convention of his own southern, agrarian, slave-holding state. *See* KETCHAM, *supra* note 2, at 258, 261–62 (noting that *The Federalist* provided the source of many arguments Madison made at Virginia's ratification convention); *see also* Ducayet, *supra* note 275, at 822 (noting that the essays "were hastily published in book form so that they could be distributed to partisans in other states").

397. *See* RAKOVE, *supra* note 34, at 15 (noting that *The Federalist Papers* are "[f]oremost" among contemporary sources reflecting the original understanding of the Constitution).

398. Eskridge, *supra* note 349, at 1313.

399. *See id.* at 1318 ("[P]ublic dialogue of the sort engaged in by the authors of *The Federalist* and the Anti-Federalists is potentially quite reliable for figuring out original constitutional understanding or meaning.").

extent that the essays might give dictionary-like guidance to the meaning of constitutional words, it helps the case for judicial use that their authors prepared them with a strong sensitivity to the mind of the general public, rather than out of mere whim or highly specialized purposes. This same point may also help to show why the writings of Publius should count for more than the antifederalist writings of commentators such as Brutus. Brutus, after all, had every reason to portray the document's terms in their most extreme and controversial light because he was seeking to drive voters away from ratification. Against this backdrop, when ratifiers adopted the Constitution, it seems unlikely they said in effect: "We believe that the Constitution embodies the troubling interpretations put forward by Brutus, rather than the more moderate interpretations put forward by Publius, but we are going to ratify anyway." More likely, they ratified because they shared something like the consensus-seeking vision, designed to induce the very action they took, put forward in *The Federalist*.[400]

The consensus-oriented nature of *The Federalist* may also bolster its cite-ability on the theory that it is a learned legal treatise or a wise statement of the principles of sound government. For example, although it strains common usage to place campaign literature in the "learned treatise" or "fount of wisdom" pigeonholes, as a general matter, the effort seems less farfetched when one recalls that this particular body of campaign material was studiously designed to appeal to human reason. The "sustained, systematic" character of *The Federalist*[401] strengthens this suggestion. Hornbook law teaches, for example, that judges must take care to read the provisions of a legal text in light of one another.[402] Publius's effort at comprehensiveness ensured that—in treatise-like fashion—*The Federalist* took fair account of this principle.

It is not surprising that thoughtful observers often point to the argumentative nature of *The Federalist* in suggesting that it should play little role in constitutional interpretation. On close examination, however, the argumentative nature of the essays helps explain why

400. *See id.* at 1318 (noting that "key players . . . have incentives to represent the commonly held views as faithfully as they can, lest they lose parts of the coalition" while opponents' "strategic statements are worth little in understanding the provision if it is adopted, because their incentives are to exaggerate and distort the meaning and effect of the provision").

401. Rakove, *supra* note 3, at 234.

402. 2A NORMAN J. SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 47.02, at 139 (5th ed. 1992) (describing "whole act" rule).

they carry interpretive force. Because Publius sought to appeal to a broad and diverse audience with methodical arguments rooted in reason, *The Federalist* is fairly seen as embodying something like a then-consensus understanding of the Constitution's meaning. To be sure, *The Federalist* does not qualify as "holy writ,"[403] and this is all the more the case because of its campaign-rhetoric roots.[404] As a result, courts must handle the essays with no less, and perhaps more, care than other tools of interpretation. At the same time, *The Federalist* must be given its due. Over the past two centuries, the Court has struck this balance in a sensible fashion, refusing to view the essays as an "authoritative exposition of constitutional meaning"[405] but according them "great respect in expounding the constitution."[406]

CONCLUSION

The authors of *The Federalist* set forth an argument that was layered and complex. They made sure to appeal to the special interests of their New York readers. To a phalanx of arguments founded on history and common sense they added color and imagery designed to bolster their appeals to logical reasoning. Hamilton, Madison, and Jay urged their readers to recognize the wisdom of practical accommodation. They appealed to pathos and ethos as well, particularly by aligning the cause of ratification with America's celebrated revolutionary heritage.

What may be gleaned from the authors' nuanced interweaving of these different strands of argument? To begin with, the account offered here removes any doubt about the centrality of strategic and politically motivated argument to the plan of Publius. This intensely partisan purpose in turn provides good reason not to accept blindly the essays as a determinative statement of the Constitution's purposes and meaning. At the same time, the argumentative tenor of *The Federalist* does not strip it of significance as a source of constitutional exegesis. Indeed, the persuasion-driven character of *The*

403. Tillman, *supra* note 218, at 617.

404. *See, e.g.*, Manning, *supra* note 349, at 1358 (noting that, while "the room for strategic maneuvering might have been circumscribed by the need to make plausible arguments," nonetheless "[w]ithin that range . . . the exposition of particular understandings or provisions might well reflect the shadings of political strategy").

405. *Id.* at 1365.

406. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 433 (1819).

Federalist—founded on comprehensive arguments directed at a broad audience and rooted firmly in reason—tends to support the view that the writings of Publius approximated a widely shared, then-existing, coherent understanding of the Constitution.

Whatever one concludes about these matters, one thing is certain. The intensely political purposes of *The Federalist*'s authors brought about the enduring impact of their work. It was the ardor and enthusiasm that the authors brought to their task, after all, that generated the clarity, comprehensiveness, and overarching quality that have ensured the *Papers*' persisting fame. To be sure, Hamilton, Madison, and Jay focused their energies on pushing the case for ratification among citizens of their own time and place. They did so, however, with the all-out effort of single-minded advocates bent on promoting a cause they viewed as transcendently important. It was this drive to persuade, fueled by passionate commitment, that produced what may well be—as Thomas Jefferson put it—"the best commentary on the principles of government which ever was written."[407]

407. Letter from Thomas Jefferson to James Madison (Nov. 18, 1788), *in* 1 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON 1776–1826, at 566, 567 (James Morton Smith ed., 1995).