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> People, for reasons of their own, often fail to do things that would be good for them or good for society. Those failures—joined with the similar failures of others—can readily have a substantial effect on interstate commerce. Under the Government's logic, that authorizes Congress to use its commerce power to compel citizens to act as the Government would have them act.
>
> That is not the country the Framers of our Constitution envisioned.[1]

INTRODUCTION: THE FRAMERS' INTENT

What was the country the Framers of our constitution envisioned? Michael Klarman,[2] in his magisterial, comprehensive, and meticulously documented *The Framers' Coup: the Making of The United States Constitution*, answers that question—at least if "the framers" (or Framers) is a designation that comprehends the masters of the process that led to the drafting and adoption of the document that was transmitted by the Philadelphia Convention to the Confederation Congress in 1787, then forwarded to the thirteen states for their consideration in conventions specially to be created by the state legislatures for that purpose, and ratified by those conventions in all states but Rhode Island by 1789. (Rhode Island ratified in 1790 (pp. 529–30).) Though many remarkable men participated in that process, including passionate but ultimately defeated opponents, the undoubted masters of the conception, formulation, and defense of the Constitution of 1789 were Alexander Hamilton and James Madison. Standing behind them

* Beneficial Professor of Law, Harvard Law School. I thank my colleagues Annette Gordon-Reed, Kenneth Mack, Bruce Mann, and John Manning for comments and suggestions and Samantha Miller of the Harvard Law School class of 2019 for research assistance.

1. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 554 (2012) (opinion of Roberts, C.J.) (explaining why in his view the mandate in the Affordable Care Act is not authorized by the Commerce Clause).

2. Kirkland & Ellis Professor of Law, Harvard Law School.

at every stage with lesser eloquence but unparalleled judgment, commitment, and prestige stood the guiding spirit of George Washington,[3] who had been the president of the Philadelphia Convention.

The precarious journey, from the contested authority of the Philadelphia Convention to act at all to its triumphant outcome in 1789, that Klarman presents in riveting detail shows beyond all doubt that these master Framers were determined to overcome the populist dislike, born of the spirit of the Revolution of 1776, of strong government in general and of a strong national government in particular. Following the work of Gordon S. Wood and many others,[4] Klarman shows how these Framers overcame the populist democratic sentiment—a sentiment animating majorities in every state. Although this is an oft-told tale, Klarman's narrative has the suspense and tradecraft of the best adventure thrillers. He shows how the Framers in 1789 caused the emergence of a structure of government that was strongly centralized—or at least designedly carried the seeds of strong centralization in it—and that leaned heavily in the direction of institutionalizing government by a small elite, presided over by a strong executive embodied in a single dominant personality. All this was accomplished against a general sentiment favoring a pervasive localism, which dispersed power first to the states and then further dispersed it to localities, the limitation of all governmental powers at every level, and the further dispersion of actual authority to legislatures in which each legislator represented a relatively small constituency. This last feature—together with provisions for recall and binding instructions, short terms of office (in many states legislative elections were annual), and term limits—was all designed to keep legislators closely bound to the popular will and to obviate the development of a professional cadre of rulers (p. 173). State executives, such as governors, also enjoyed short terms of office and were often restrained by an elected or appointed executive council (pp. 213–14). Analogous provisions were pressed in the Philadelphia Convention (pp. 171–76).

This was anathema to the Framers. Theirs was a maximalist vision. The Framers succeeded in pressing for a numerical limit on the number of members of the House of Representatives, thereby assuring representatives with larger, more diverse districts (pp. 171–73). The representatives' terms were two years, but with no mandatory rotation in office, no recall, no binding instructions (pp. 244–45). When it came to the Senate, the Framers (or some of them) pressed for seven-year or even life terms—staggered to assure

3. *See* Gordon S. Wood, *The Inventor of the Presidency*, N.Y. Rev. Books (May 25, 2017), http://www.nybooks.com/articles/2017/05/25/George-washington-inventor-of-the-presidency/ (on file with the *Michigan Law Review*) (reviewing T.H. Breen, George Washington's Journey: The President Forges a New Nation (2016)).

4. *See* Pauline Maier, Ratification: The People Debate the Constitution, 1787–1788, at 229–31 (2010). *See generally* Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution (1996); Gordon S. Wood, The Creation of The American Republic, 1776-1787 (1998); Gordon S. Wood, The Radicalism of the American Revolution (1992).

a more limited turnover at each election (pp. 209–11). And as for the executive, the focus of the popular and probably majority antipathy to concentrated power (like the classical Roman *odium nominis regis*),[5] here the Framers moved in quite the opposite direction. They pushed for a president who would serve a long term in office—some initially proposing seven-year terms, some even life terms (pp. 228–29)—with all executive power, including that of commander-in-chief (Hamilton's "unitary executive") (pp. 237–38). From the outset, the Framers initially sought this—what its opponents called monarchic and aristocratic—government, not the limited powers accorded to the Continental Congress, which were conceived as those of a confederation of sovereigns.[6]

Though this concentrated, nationalist conception was in the course of the Convention adjusted and compromised in several respects, the lineaments of our present government are clearly discernible. As what emerged from the Convention and was later ratified in the states ran counter to the nation's majority preference for a dispersed, populist, and popular structure of government, Klarman's characterization of this outcome in the title of his book as *The Framers' Coup* seems altogether correct. The arguments that the Affordable Care Act's invocation of this conception "is not the country the Framers of our Constitution envisioned"[7] and that it would "change[ ] the relationship of the Federal Government to the individual in a very fundamental way"[8] seem, if not rhetorical excesses, at least considerable exaggerations.[9]

Klarman's meticulous and exhaustive documentation is a signal feature of this definitive work, as is his predilection for developing his account so far as possible out of the mouths of the participants themselves.[10] Indeed, Klarman hardly takes notice of the dispute about the accuracy of Madison's

5. *See* Eric Nelson, The Royalist Revolution: Monarchy and the American Founding ch. 5 (2014) (pointing out that educated persons were well aware that there were elected monarchs, like the king of Poland, the Holy Roman emperor, and, of course, the pope). Edmund Randolph called this a "foetus of monarchy." *Id.* at 188.

6. *See* pp. 155–56, 213.

7. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 554 (2012) (opinion of Roberts, C.J.).

8. Transcript of Oral Argument at 32, *Nat'l Fed'n of Indep. Bus.*, 567 U.S. 519 (No. 11-398).

9. *See* p. 241. At the outset, Hamilton contemplated doing away with the states' rights of sovereignty altogether. *See generally* Rakove, *supra* note 4, at 11, 65 (discussing law office history as compared to "real" history).

10. Klarman briefly describes the factors that limit our knowledge of what happened at the Philadelphia Convention. "[T]here was no stenographer present," he notes, "unlike as at some of the state ratifying conventions . . . ." P. 135 n.*. And he details the difficulties in final reliance on Madison's notes. Yet the Convention laid down a voluminous and various record. Several of the other delegates kept more or less detailed notes, which they did not scruple to make public soon after the event. Many delegates wrote lengthy letters about the proceedings while they were going on. And there were endless journalistic accounts, some of which reported firsthand accounts from the delegates. These are all exhaustively mined and set out in the notes, which together with the bibliography comprise almost two hundred pages. This work was surely immeasurably assisted by the recently completed twenty-eighth volume of *The*

notes of the debates in the Philadelphia convention (pp. 392–93). That Madison took such notes daily during the Convention is not disputed. Whether he had altered these notes to accord more with his later avatar as a defender of states' rights, strict construction—especially of the grant of powers to the national government—and in general as a stalwart lieutenant of Thomas Jefferson's conception of popular government and as Jefferson's protégé and successor is more controversial (pp. 135–36, 229, 384, 737 n.300). There are those who contend that Madison was a sincere and principled supporter of states' rights, limited government, strict construction of the powers of Congress, and a restrained view of the role of the executive and that he had fallen in with Hamilton's more consolidating and monarchical views out of necessity to save the Convention altogether.[11] Klarman's account, without explicitly entering into that dispute, as it mainly relates to developments after 1789 and the end of his story, leaves little doubt that this account of Madison as a consistent man of principle—or the same principles—is hardly plausible.[12] It was Madison who in the Virginia Plan proposed a general veto somewhere in the national government of any state legislation (pp. 139–40). If there could be any doubt that Madison became a different man in the years after 1790 as the relations between France and Great Britain heated up and Jefferson's opposition became more pronounced, Mary Sarah Bilder's recent *Madison's Hand: Revising the Constitutional Convention* puts paid to those revisionist contentions. Bilder shows that Madison either altered or replaced his contemporaneous notes so that his own speeches to the Convention would be more in accord with his burgeoning Jeffersonian bent.[13] In any event, as I say, Klarman makes little of Madison's later change of heart and is able to rely on multiple sources to tell his story. The account I give in the next Parts takes Klarman's story to be as well-founded as his exhaustive documentation can offer.

Documentary History of the Ratifications of the Constitution, released on April 15, 2017. Pauline Maier's superb *Ratification*, on which Klarman evidently draws heavily in his chapter 6, did not have the benefit of the completed compilation. Pp. 737–95.

11. *See, e.g.*, Lance Banning, The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic 1–10 (1995).

12. It is one of the signal virtues of Noah Feldman's excellent new biography, *The Three Lives of James Madison: Genius, Partisan, President*, that he acknowledges without equivocation the radical shift in Madison's views on states' rights and national powers from Convention and pre-Convention writings to his stance as a leading figure of the newly formed Republican Party and the principal associate of its leader, Thomas Jefferson. Noah Feldman, The Three Lives of James Madison: Genius, Partisan, President (2017). On the former, see Madison's correspondence with Thomas Jefferson, in which he states that "he intended 'to arm the federal head with a negative *in all cases whatsoever* on the local legislatures.' . . . Congress must either dominate the states or be dominated by them." *Id.* at 101 (footnote omitted) (quoting Letter from James Madison to Thomas Jefferson (Mar. 19, 1787), *in*2 The Writings of James Madison 324, 326 (Gaillard Hunt ed., 1901)). On the latter, see Feldman's discussion of the Alien and Sedition Acts and the Kentucky and Virginia Resolutions. *Id.* at 416–21.

13. *See, e.g.*, Mary Sarah Bilder, Madison's Hand: Revising the Constitutional Convention 186–201, 214–20 (2015).

The reliability, objectivity, and good faith of Klarman's account are underwritten by a remarkable fact: Klarman is no fan of the centralizing, elitist tendency of the Federalist project and its outcome. The very title of the book attests to that—a coup after all is not a celebratory sobriquet. I am reminded of a discovery made in reading *The Travels of Marco Polo*. The author records so many marvels in his fourteenth-century account of his travels to a world almost wholly unknown to Europeans that one grows skeptical of his claim to firsthand experience. So when toward the end of his narrative he tells of his encounter (in what today is known as Sumatra) with a unicorn, I thought, *Aha, now I got you, here is the thirteenth chime of this particular clock*—until I read on to his description of the graceful, mythical beast:

> [Having] hair like that of a buffalo, feet like those of an elephant, and a horn in the middle of the forehead, which is black and very thick. . . . The head resembles that of a wild boar, and they carry it ever bent towards the ground. They delight much to abide in mire and mud.[14]

And then I realized that Polo was telling the truth in much the same way as it dawned on me how much Klarman's sympathies lay with the populist, democratizing majority. Any skeptical doubts of the accuracy of his narrative dissipated—to him this was not a triumphalist tale. Klarman ends his epic account of those three years on a distinctly sour note:

> In the final analysis, the Constitution—like any governmental arrangement—must be defended on the basis of its consistency with our basic (democratic) political commitments and the consequences that it produces. That it has been around for a very long time or that its authors were especially wise and virtuous should not be sufficient to immunize it against criticism (p. 631).

In the last Part of this Review I go into the objection of Klarman and others that our present day Constitution is imperfectly democratic on many counts—from the way it causes us to be represented in and to our government to the power of unelected federal judges to decree what our governing arrangements shall be—intimating that these defects, if such they are, can be traced to the work of the Framers, to their coup of 1787–1789. And such a

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14. 2 Marco Polo, The Travels of Marco Polo 285 (Henry Yule & Henri Cordier trans., The Complete Yule-Cordier ed., Dover Publ'ns 1993) (1477). I cannot here forbear to quote, with her kind permission, my favorite poem about this animal by the poet Gjertrud Schnackenberg, although it is an admitted diversion:

> Why does a rhino's horn exist?
> Its not to hang your trousers on!
> Its not for digging up the lawn,
> Or prying open birthday gifts.
>
> I think its there for keeping track
> Of which is "front" and which is "back".
> Since either end is Very Large,
> It helps us know which end will charge!

Poem by Gjertrud Schnackenberg (on file with author).

fairly straight line can indeed be drawn. The interruption of the Civil War and Reconstruction, by adding to the powers of Congress and the federal courts at the expense of the states (and making good in part on the premise if not the promise of equality in the Declaration of Independence), only makes that line heavier and more distinct. It is a remarkable story for that very reason. And this is where I differ from Klarman's splendid account, with whose trajectory I agree entirely—except that what it deplores I celebrate.

To understand what Madison, Hamilton, and Washington accomplished, it is necessary to dwell in some detail on the drama of the Convention and the Ratification: these were the quintessentially Enlightenment foundry from which the steel filaments guiding and strengthening us to this day were drawn. The Framers were exceptionally clearheaded, as their words which Klarman quotes repeatedly show. They were also excellent politicians, knowing how to take advantage not only of their opponents' weaknesses but of their own strengths and most of all their good luck. So it is a story about these to be sure, and that is why in Klarman's telling it is such a good story. But it is a tale of discovery as well: the discovery of the axioms, theorems, and lemmas of what at the time was an entire novelty—a republican government on a scale grand not only of geography but population. Federalism, judicial review, and human rights emerged from that foundry and not only govern us now but instructed the world's newer republics to come. Clearheadedness, imagination, and good luck caused, through the Framers' hands, a system to emerge the stability and humanity of which they could not possibly have come near to appreciating. But they did it. It was not a miracle; rather, at work was, in Hegel's words, "the cunning of reason."[15]

I. The Precarious Nation

Most delegates to the Philadelphia Convention and many informed Americans would agree: the government of the combined thirteen states was not working. There was no executive, only presiding officers (p. 213). The subjects the Congress could address were strictly limited to those "expressly" set out, and many powers were omitted (p. 25). For instance, the Confederation Congress had no power to regulate trade, so that the states took every advantage to beggar their neighbors (pp. 21–23). New York had a fine harbor, and it charged New Jersey and Connecticut whatever the traffic would bear in the way of export and import fees.[16] Under the Confederation, there was no authority to regulate trade between the states (p. 21). The national authority had no power to levy taxes but was limited to levy an assessment on the states without a corresponding authority to collect that levy

15. G.W.F. Hegel, Lectures on the Philosophy of History 30 (Ruben Alvarado trans., WordBridge Publ'g 2011) (1837).

16. *See* pp. 21–24. Chief Justice Marshall did not have to stretch far in *Gibbons v. Ogden*, 22 U.S. 1 (1824), to interpret the Navigation Act passed by the first Congress as forbidding such competitive regulation and requiring unencumbered passage in the navigable waters of the nation.

(pp. 18–19). National arrears were inevitable and mounting (p. 11). The payment of Revolutionary War debts was subject to the same infirmity, and the credit of the nation was gravely impaired.[17] The Treaty of Paris, the peace treaty ending the Revolutionary War, provided for the payment of certain debts to British subjects, and the British were obliged to vacate western forts (pp. 11–12). Because there was no federal court system to adjudicate and enforce payment of these debts, the British felt justified in holding onto the forts from which they encouraged Indian raids against western settlers.[18] There was no national army to enforce the treaty or to protect against Indian raids, and one could only be raised by a unanimous vote in the Congress.[19] States had full power to alter or abrogate public and private debts and to issue paper money that had to be accepted as legal tender.[20] The impotence of the national government threatened depredations by rival foreign powers and offered the constant temptation to one or more states to make their own arrangements and the further temptation that the confederation would pull apart into one or more regional groupings (p. 48).

Not only was the authority binding the states together weak but there were also powerful centrifugal forces of all sorts. Madison gives the conflict between northern and southern states regarding slavery as one of the most threatening of these (p. 257). That is appropriate given the salience of the issue in the public mind, to outsiders watching the proceedings from abroad, and to the decisive role slavery and race played in the next centuries of the nation's social, political, and constitutional history. In Klarman's telling, the tensions and uncertainties regarding slavery were eclipsed by other concerns and were relatively readily resolved.[21]

Much more acute were the economic differences between the various states and regions.[22] Of course, that the South was a source of agricultural riches and the North of trade and incipient manufactures was tied to the South's slave and the North's free economy. But it was the economic, not the moral, differences that the Convention had to reconcile. The southern states had a great interest in free export of their agricultural products and in the

17. *See* p. 20.

18. *See* p. 12.

19. *See* p. 389.

20. *See* p. 131.

21. Chapter 4; *accord* Ron Chernow, Alexander Hamilton 238–39 (2004); *see* pp. 258–61 (stating that Connecticut, New Jersey, New York, Pennsylvania, and Rhode Island had significant numbers of slaves); *see also* Chernow, *supra* at 210–16, 307 (stating that Hamilton and Franklin, like Adams, were convinced abolitionists but accepted the persistence of slavery as the price of a successful union).

22. P. 390 ("[T]he principal basis of [Anti-federalists'] opposition [to the Constitution] seems to have been fear that northerners would control the national government and use its powers—especially those over commerce and treaty making—to the detriment of southern economic interests."). *Contra* p. 257 ("[The] sectional disparity of interests [between northern and southern states] 'resulted partly from climate, but principally from the effects of their [the states'] having or not having slaves.'" (quoting James Madison, *Saturday, June 30, 1787*, *in* 1 The Records of the Federal Convention of 1787, at 486 (Max Farrand ed., rev. ed. 1966))).

ability to play various merchant fleets off against each other in order to get the best deals on carriage (p. 35). But this was a trade that northerners wished to be able to engross in themselves (pp. 35–36). On the other hand, northern manufacturers and merchants wanted protection against foreign competition, an interest directly opposed to that of the agricultural South (pp. 35, 390–91). The southern states expected increased population and expansion (pp. 192, 388–89). The northern states, in contrast, underestimated the lure of the Northwest Territories, with the result that northern interests were always ready to trade off navigation rights on the Mississippi, which were vital to expanding southern populations, with recognition by the European powers of their marine interests (pp. 54–56, 389).

Perhaps of overriding importance was the split between the leading citizens from the large cities—Boston, New York, Philadelphia, Charleston—from whom the Federalist leaders were largely drawn and what was variously called the frontier, the backwoods, or the up-country (p. 395). The latter was as much a state of mind as a geographical designation. As Frederick Jackson Turner put it,

> [T]he frontier is productive of individualism. . . . The tendency is anti-social. It produces antipathy to control, and particularly to any direct control. The tax-gatherer is viewed as a representative of oppression.[23]

Not all Federalists came from the large cities: some of the great planters in the Southern states were leading Federalists and some of the leading Anti-Federalists, such as Samuel Adams (pp. 380–81) and Melancton Smith,[24] were large city dwellers. And of course there was the ambivalent figure of Jefferson, whose ideological sympathies embraced many of those of the frontiersmen, but who was a cosmopolitan through and through.

A final division was between small and large states. New Hampshire, Connecticut, Rhode Island, New Jersey, Delaware, and Maryland were chary of having their interests swamped (and their leading men deprived of the status of middling fish in small ponds) by the power and populations of Virginia, Pennsylvania, New York, and Massachusetts (pp. 14, 422–23). Of these, Rhode Island was a kind of reductio ad absurdum; not only was it minuscule but it also contained in microcosm the divisions found in the larger states.[25]

Against this background, the Confederation Congress first authorized a convention to be held in Annapolis, and after the failure of that project, in Philadelphia, to propose changes to the Articles of Confederation (pp. 101, 110).

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23. Frederick Jackson Turner, *The Significance of the Frontier in American History*, *in* The Frontier in American History 1, 30 (1921).

24. Robert H. Webking, *Melancton Smith and* the Letters from the Federal Farmer, 44 Wm. & Mary Q. 510, 511 (1987).

25. *See* pp. 517–18, 520.

II. The Philadelphia Convention

The general sense of dissatisfaction had matured into something bordering on panic when Shays's Rebellion in central Massachusetts made manifest the growing dilapidation of governmental authority at every level (pp. 90–92, 117). It was not just an arcane plot by Hamilton, Madison, and their allies to foist unwanted strong government on an unwilling nation that led to the calling of the Philadelphia Convention (p. 117).

A good response was guaranteed when Washington was persuaded to attend as a delegate with the general expectation that he would be asked to preside over any such more potent body (pp. 112, 122). The game was now on, and it was clear from the outset that there were two opposing camps: those who were content to limit the outcome of the convention to some amendments and enlargements of the Confederation Congress's powers in the realm of regulation of trade and to the grant of some form of national taxing power, and the Federalists' project (pp. 140–43). It was clear that the latter would require traveling far outside any authority the Congress could bestow, as under the Articles any such radical reconceptualization needed to be guided by the unanimity of state legislatures to which it would have to be submitted (pp. 140–42). And this was the constant objection thrown up against the work of the Federalists—that it was unauthorized, illegitimate—both by those who disliked the whole elitist, nationalizing, government-empowering project altogether and those who had limited but deep objections to particular aspects of the Federalist project (pp. 141–44).

Madison arrived in Philadelphia with a plan (pp. 133, 137–38, 597). He envisioned a great and general enlargement of the powers of the national legislature to all matters that may affect the interests of the nation as a whole—powers to be expansively interpreted, rather than limited as under Articles of Confederation (pp. 129–33). The national government would be empowered to act directly on the people and not only through the states; the national government would have the authority to preclude any contradiction or even interference with exercises of national power (pp. 139–40); there would be a bicameral legislature—one house more popular and subject to more frequent elections, the other more insulated from popular pressure by its smaller number, longer terms of tenure, and indirect election by the state legislatures—with both houses to be apportioned by population (p. 139); there would be a unitary and energetic executive (Hamilton's terms) to be similarly insulated from popular pressures by longer terms in office and indirect election;[26] and finally, there would be a federal judiciary to adjudicate claims and conflicts touching on national concerns (pp. 137–41). These were the main features of what was known as the Virginia Plan (pp. 138–39). Obviously this far exceeded any project merely to amend the Articles and could not be achieved under the Articles' requirement of unanimous adoption by then-thirteen state legislatures (pp. 141–43, 239). These

26. Pp. 140, 214–15, 218; *see* p. 48.

were the stated grounds of objection of its principal opponents (pp. 141–43, 239).

That the final document (and indeed our present charter of government) hews so closely to the Virginia Plan—for which Madison was largely responsible (pp. 37, 133, 137–38)—is a testimony to Madison's tactical genius and the strategic flexibility of the principal Federalists. As set out initially, there was much to divide the twelve delegations and their members: the representation of the large and small states, the treatment of slavery, the terms of admission of new states, the powers of the chief executive, the treatment of the differing economic interests of the regions, the assurance that national legislation would prevail over state interference, the nature of the federal judicial power (pp. 139–41, 200–03). Madison was heartened that at the very outset it seemed the delegation from Pennsylvania—the second most populous state after Virginia with the most populist constitution of any of the states (pp. 127–28, 428)—was in accord with his plan (p. 134), as were Washington and Jefferson (pp. 128–129). As Klarman points out, both design and luck played a role in this. The Convention took place in Philadelphia, which was less accessible to those who may have opposed the plan, favoring the Federalists in the various state ratifying conventions (pp. 247, 406–07, 610).

In the Confederation Congress, each state's delegation had one vote; the delegates were sent by their respective state legislatures, and amendments to the Articles of Confederation had to be unanimous.[27] This was exactly what a gathering of sovereigns would look like, and indeed the Articles provided, "Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation, expressly delegated to the United States, in Congress assembled."[28] This was at the heart of what Madison and the Federalists were determined to exchange for a truly nationalist, "consolidated" government, and the lawmaking authority was the place to start.[29] By virtue of what became Article I, Section 8, the new national legislature was not to be limited to the powers explicitly set out, many of which in any event were expressed in very general terms (pp. 146–47). That it should be bicameral seemed quite natural: the state legislatures of all but Pennsylvania and Georgia were bicameral (p. 169). A national legislature with such broad and overriding powers was certainly central to the Federalist project, but I would not call its ultimate attainment a coup. The sense was general that the existing confederation-of-sovereigns model would end in the ultimate disintegration of the union and the failure of the great republican project of the Revolutionary War; but the Federalists Framers were clearheaded and resolute enough to see and embrace the entailments of that general understanding.

What turned out to be the main impediment on the way to a "consolidated" nation was the vast disparity in size, prominence, and population

27. P. 25; Articles of Confederation of 1781, art. V.

28. Articles of Confederation of 1781, art. II.

29. *See* pp. 140–41.

between the smaller and the largest states (p. 182). Certainly Madison began with a notion of population-based representation in both houses (p. 182). Indeed, many delegates from the more populous states insisted on representation according to population (pp. 184–85). But Connecticut, New Hampshire, New Jersey, Maryland, and Delaware were obdurate: they simply would not participate if they were to be submerged in the mass of the more populous states (pp. 188–94). The leading Federalists believed the smaller states would make good on their threat to quit the Convention. Madison and Washington concluded—surely rightly—that a draft subscribed to by only eight states (Rhode Island was presumed to be equally recalcitrant) simply had no chance of being accepted by the Congress and no chance of there being ratified by state conventions.[30] But the threat was graver than that. The threatened defection would have led to the breakup of the union altogether, especially as there was talk of these states returning to the British fold, thus putting at naught the whole revolutionary project.[31] It was at the point of impasse that Roger Sherman of Connecticut offered what was represented as a compromise: the House would be apportioned according to population but each state would have two seats in the Senate—the system we enjoy today (pp. 190–96).

Once the Federalists signaled their willingness to accept the Connecticut Compromise, the smaller states—though they may have shared some of the unease about several aspects of the Federalist project—were quite content to fall into line with the Federalist program (p. 205). For instance, many delegates objected to Hamilton's "monarchical" conception of the chief magistrate (pp. 222–26, 228–29), but the method ultimately proposed of choosing the president[32] so greatly favored the interests of the smaller states that they did not persist in any principled objection they might have had to the conception of the office. And in a remarkable amalgam of principle with contingency, once this obstacle had been cleared the spirit of accommodation seemed to infuse the Convention, leading to many distinctive and perhaps anomalous features, some of which are with us still. Of the many seemingly irresolvable points of contention, none was more fraught than disagreements about slavery (p. 257). Strategic compromises on this issue, which some might have thought would satisfy no one, were readily accepted: the southern states got the Fugitive Slave Clause, Article IV, Section 4, and what looked like a commitment that the national government if called would aid in putting down a slave insurrection (or depredations by Indian tribes in the southwestern hinterlands); slaves would count as three-fifths of a person in making up their representation in the House; Congress could not interfere with the slave trade for twenty years—but could and did ban it after that (pp. 269–71, 291–94). Virginia and Maryland were quite content with this, as they expected to become chief suppliers of enslaved persons to the states further south as their own agricultural needs waned (pp. 278–79, 284, 291).

30. *See* p. 250.

31. *See* pp. 193–94.

32. U.S. Const. art. II, § 1.

They would become breeders of slaves and—as the expression went—would "sell them down the river" to Georgia, the Carolinas, later to the new states to their west, and, after the Louisiana Purchase, across the Mississippi River.[33]

As a result of skilled oratory, persuasive substantive argumentation, but most of all deft compromises, most of the delegates, northern and southern, eventually fell into line behind the Federalists on one after another of what had seemed peculiarly divisive issues (pp. 239–41). The delegates agreed to grant authority to the national government to impose taxes directly on the people, the most pressing aspect of the general principle that the national legislature could regulate and impose obligations directly on the people (pp. 239–40). The new legislature would have the authority—which they exercised at the first opportunity[34]—to institute a federal judiciary. Recall Frederick Jackson Turner's account on the frontiersmen's view of the "tax-gatherer . . . as a representative of oppression."[35] A federal judiciary would now stand behind the federal tax gatherers to enforce their authority (p. 167). Coming into the Convention, Madison had contemplated giving the national government a veto on all state legislation but stepped back from that provocative stance in favor of a supremacy clause which would give the federal judiciary the general authority to invalidate particular items of state law as incompatible with federal laws or treaties (pp. 155, 160–61). This led to some of the most intricate and consequential bodies of federal judicial doctrine that are with us still.

Similarly on trade, southern delegates, fearing the northerners would take advantage of their numerical advantage to monopolize for themselves the crucial carrying trade while bargaining away to Spain the access to the Mississippi (as John Jay as agent for the Confederation Congress had been ready to do), had at first insisted that any trade regulation would require supermajorities in Congress (pp. 390–91). Believing that such a provision would cripple the national government in its negotiations with foreign powers, the Federalists persuaded the southern delegates to drop their insistence on a supermajority requirement for commercial legislation only *after* northern delegates made concessions on slavery (p. 152) and agreed to bar the national legislature from taxing exports (a consolation to the exporting economies of the South) or giving preference to the ports of any state.[36] Thus, we have the very broad and general commerce power, which became the most fruitful font of federal regulation then and ever since.

Subtler touches showed the consolidating hand of the Federalists. For instance, unlike in the Confederate Congress, the salaries of the members were to be paid by the national government, not by the states from which they came (pp. 176–77). Finally, reflecting the horror at the fiscal chaos that had been a principal impetus for the Convention in the first place and that

33. *See* p. 291.

34. *See* Judiciary Act of 1789, ch. 20, 1 Stat. 79.

35. *See supra* text accompanying note 23.

36. *See* p. 287.

was widely shared by the group of sober and prosperous men gathered in Philadelphia, the draft precluded the states from passing debtor-relief legislation, which were viewed as laws "impairing the obligation of contracts" and issuing paper money. It also left the regulation of coinage up to the national legislature (p. 606). Take that, Rhode Island!

But perhaps the most radical departures from the previous order were the provisions for putting the draft into effect: It was to be submitted by the Confederation Congress not to the state legislatures but to ratification in conventions in the states—entities that did not exist under any of the states' governing structures. This provision was meant to signal that the Constitution would emanate from the will of the people and not from the consent of any sovereign state authority (p. 416). And retreating further from the unanimity precept of the Confederation model, the draft would go into effect upon ratification by nine of the state conventions (p. 413). This was a brilliant, risky, and successful tactical move, threatening the recalcitrant by specifying that the draft would go into effect only for those nine or more ratifying it (pp. 413–14).

There were objections, but the overwhelming number of the delegates concurred that this draft was the best that could be done. Moreover, they succeeded in heading off proposals that the draft only come into effect on the addition of a Bill of Rights, perhaps to be drafted in a second convention (p. 565). The Federalist leadership understood that any such conditional or postponed coming into effect would likely cause the whole finely constructed system of compromises to come apart (p. 565). Certainly no second convention would come as close to the consolidated and elitist structure the Framers had here obtained. At most, they were willing to assuage those with reservations by holding out the possibility of subsequent amendment but after the government structure they now proposed had been set up and was functioning (pp. 565–66). And on this score, the Framers deployed a brilliant and brazen argument. Making a virtue of a vice, they noted that as the Congress had no authority under the Articles of Confederation to propose amendments to so radically unconstitutional a document, they persuaded the Congress to forward the draft to the states "without a syllable of approbation or disapprobation" and that unanimously (pp. 418–22).

III. The Ratifying Conventions

The Philadelphia Convention was, in large part, an elite cabal. The state ratification conventions were another matter. As Pauline Maier put it in her detailed and gripping account: *Ratification: The People Debate the Constitution: 1787-1788*, the ratification process was the occasion of

> one of the greatest and most probing public debates in American history, one that occurred at the end of the American Revolution and involved far more than the handful of familiar "founding fathers." It is the story of how

> "We the People" decided whether or not to ordain and establish the Constitution of the United States.[37]

The ratification conventions were a far harder test for the Federalists than was the Philadelphia Convention with its mostly well-educated, upper-class members drawn from the Atlantic coast cities. The state ratifying conventions were made up of some two thousand delegates from all over the participating states,[38] and they in turn had been elected by an electorate often broader than that qualified to vote in their own state elections.[39] Yet the Federalists were able to bring it off. Attaining unanimity (with the usual comedic holdout of Rhode Island) required the same confluence of skills and good luck as favored the Federalists in Philadelphia—but working over a longer period of time to influence a far larger target audience in many and diverse places (p. 540). If the Federalists had been less astute, less eloquent, or less lucky, the United States would not be what it is today.

A major obstacle was the insistence by many opponents, in good faith and not so good faith, that so dramatic an expansion of the powers of the national government carried with it such dangers of overreaching and abuse that the draft Constitution must not be ratified without the addition of a Bill of Rights. The Anti-Federalists hoped and the Federalists feared that these demands would lead to a second convention in which the victories of Philadelphia would be undone (pp. 530–31). But the claim had a compelling logic: after all, many of the states had bills of rights, and there was the almost irresistible analogy of the British Bill of Rights of 1689 (p. 552). Against all this, Hamilton's response in Federalist 84 seemed rather sophistical. He argued that first, the draft Constitution already included in Article I (the Habeas Corpus, the Bill of Attainder and Ex Post Facto Clauses) and Article III (the right in criminal trials to a local jury and the Treason Clause) the essence of what would be provided in a bill of rights; and second that the analogy to the British Bill of Rights was inapposite. The British Bill of Rights was a statement of rights against the crown enacted by the other part of government, the Parliament, but ours was a government of the people and a Constitution to be ratified by the people, who did not need a Bill of Rights to protect them from themselves (pp. 550, 552). Madison in particular was in a tough spot because he had been an ardent supporter of the June 1776 Virginia Declaration of Rights and of Jefferson's Bill for Establishing Religious Freedom, enacted in Virginia in 1786 (p. 566) and much assisted by Madison's 1785 "Memorial and Remonstrance Against Religious Assessments."[40] The pressure for a bill of rights was too difficult to resist. And

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37. MAIER, *supra* note 4, at ix.

38. *See* pp. 417–530.

39. *See* p. 485 ("While the New York constitution imposed property qualifications for voting in legislative elections, now, for the first time ever in the state, all free males over the age of twenty-one would be eligible to vote in the election of ratifying convention delegates.").

40. JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments* (June 20, 1785), *in* 8 THE PAPERS OF JAMES MADISON 295 (Robert A. Rutland et al. eds., 1973) (1785).

Madison, particularly, adopted the strategy of *reculer pour mieux sauter*, giving in the Virginia ratifying convention a solemn assurance that once the Constitution had been ratified and put into effect, the first Congress would indeed adopt a bill of rights (pp. 591, 593). And that is what happened. The Bill of Rights was adopted in 1791 in the form in which we now know it (p. 590). So on this matter, astute maneuvering and strategic compromise removed an obstacle that in any event was a sideshow on the way to the main event. This is shown by the circumstance that the Speech, Press, and Religion Clauses of the First Amendment, which today are among the most admired, copied, and, consequential provisions in the Constitution, did not come into their own until well into the twentieth century.

Astute maneuvering, high and low, aided by good luck brought off the first major victory in the contest for ratification. That Pennsylvania held its convention in cosmopolitan, mercantile Philadelphia, the seat of arch-Federalists Benjamin Franklin and James Wilson, and not rural Harrisburg, was a piece of good luck, for ratification on December 12, 1787, by that large and prosperous state began a cascade of ratifications in other states (p. 430). But it had taken some extraordinary shenanigans to bring it off. In order to make up the quorum in the legislature necessary to send the Philadelphia draft to a convention, two Anti-Federalists, who were lingering in their boarding house, were "forcibly seized and dragged to the State House by the sergeant of arms and three men who supported quick ratification of the Constitution."[41] In Massachusetts, too, something other than logic or persuasive rhetoric carried the day. Two old Revolutionary-era warhorses, Sam Adams (John's second cousin) and John Hancock—together with the implacable Elbridge Gerry—went into the ratifying convention counting themselves Anti-Federalists.[42] It looked to be a close thing until, in a timeless maneuver, the Federalists' promise to support Hancock for reelection as governor turned the tide and made Massachusetts the second major state and the sixth to ratify (pp. 440–42).

New York was a much tougher case: the convention was held in Poughkeepsie, where the Anti-Federalist governor George Clinton held sway (pp. 482–85). New York's rejection would have left a large and irreparable hole in the middle of the country. It fell into line on June 26 only after the news that New Hampshire on June 21 and Virginia on June 25 had been the ninth and tenth states to ratify. So by 1788 it was a done thing (North Carolina ratified in 1789 and Rhode Island in 1790). No apter illustration of the old saw about the making of laws and sausages than the making of our Constitution in the two years from 1787 to 1788 can be imagined.

41. Maier, *supra* note 4, at 64.

42. Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 Sup. Ct. Rev. 301, 322.

Conclusion

Veneration of the Framers and of the Constitution they drafted has from the beginning provoked a strong contrarian current of dissent.[43] Contemporary criticism is collected in Sanford Levinson's *Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It)*.[44] The largest target, signaled in the title of Levinson's book, is the undemocratic nature of the national government. Of course the United States is undeniably democratic in the sense that the legislatures and executives of every state are chosen (gerrymanders aside) on strictly democratic lines. It is at the federal level that the glaring discrepancies are found. In 1789, a senator from Virginia represented twelve times as many voters as a senator from Delaware (pp. 626–27). Today, the ratio between California and Wyoming is more than 65:1 (pp. 626–27). This was by design, justified then as a necessary concession to the small states. But now? Must a bargain struck more than two hundred years ago still bind in vastly changed circumstances? Klarman, like Jefferson,[45] does not think so; on the last page of his book, he writes, "the Constitution—like any governmental arrangement—must be defended on the basis of its consistency with our basic (democratic) political commitments and the consequences that it produces" (p. 631).

But the Connecticut Compromise was not just a bargain; it was a conception. Recall that the original conception of the nation, embodied in the Articles of Confederation, was something like a multilateral treaty concluded between independent sovereigns (p. 14). This is not a crazy conception: after all, the United Nations, the European Union, and the World Trade Organization are based on some such conception. What stands behind it is a sense of the value of distinct, indigestible units, each with a distinct character, culture, perhaps even language. This conception recognizes that cooperation and coordination between and among sovereigns has great benefits, may even be critical to preventing armed conflicts destructive to all, while the unique character of each participant is preserved—a notion collected under the portmanteau concept of sovereignty. This is not just a quaint or antiquarian interest, as if the natural tendency of all human groupings was to larger and larger consolidated entities until all peoples were comprehended within a single world government. For some this may be a dream, but for many it could be a nightmare.[46] Consolidation tends towards homogenization,

43. In Jefferson's September 6, 1789, letter to Madison, Jefferson mused that "the earth belongs in usufruct to the living," and implied that that the newly minted Constitution would not last longer than a generation. *See* Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *in* 6 The Works of Thomas Jefferson 3, 3–4 (Paul Leicester Ford ed., 1904).

44. Sanford Levinson, Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It) (2006); *see also* Symposium, *Constitutional Stupidities*, 12 Const. Comment. 139 (1995).

45. *See generally* The Works of Thomas Jefferson, *supra* note 43.

46. *Compare* Immanuel Kant, *Idea for a Universal History from a Cosmopolitan Point of View*, *in* On History 11 (Lewis White Beck ed., Lewis White Beck et al. trans., Bobbs-Merrill

bureaucratization, a hyperrationality that drives government away from contact with the sentiments and loyalties of ordinary citizens—not technical experts in banking, telecommunications, and the like—so that some ideal notion of democracy and equal representation at the more general level are in fact incompatible with the real experience of democracy.

Yes, but 65:1—surely that is carrying a good joke too far. Not at all. In the family of nations, there are small countries and vast ones, and yet we are committed to the independence, the equal dignity of even the smallest.[47] They may not be gobbled up because two adjacent behemoths need to straighten their borders. It is for this that the term "riding roughshod" seems to have been invented.

The more one rhapsodizes about the sweetness of diversity, the more one is brought back in equal measure to the realities that faced the Framers and led to the strong consolidating tendencies of the Virginia Plan and Madison and Hamilton's vision. Practical and commercial interests moved the Federalists to be sure, but the great men, John Rutledge and the Pinckneys of Charleton, James Iredell of North Carolina, Madison, Hamilton, Wilson, Oliver Ellsworth of Connecticut, John Adams, Benjamin Franklin ("we must, indeed, all hang together or most assuredly we shall all hang separately"),[48] and that hero of equal measures of courage, good sense and discipline, George Washington—they were all devoted to what the Revolution had accomplished. They viewed it—rightly—as a new creation on the face of the earth, a large and powerful republic[49] able to take its place among the great nations of the earth, a gift to humanity and to their own posterity. They were American patriots; they believed—rightly—that the republic proclaimed in 1776 was in imminent danger of dilapidation and disappearance into the maw of great power politics,[50] and they were convinced—rightly again, I believe—that only the consolidating Constitution of the Philadelphia Convention could save the republic.

The central conceptions of the Philadelphia Convention's draft are with us still. But it was not the conception with which Madison went into the

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Co. 1963) (1784), *with* Immanuel Kant, Perpetual Peace (Lewis White Beck ed. & trans., Liberal Arts Press, Inc. 1957) (1795).

47. *See, e.g.*, U.N. Charter art. 2, Para. 1 ("The Organization is based on the principle of the sovereign equality of all its Members.").

48. 1 Benjamin Franklin, The Works of Benjamin Franklin 408 (Jared Sparks ed., Boston, Hilliard Gray & Co. 1840).

49. France was a monarchy until August 1792; it would become a dictatorship in 1799 and not again a continuous republic until 1870.

50. *See, e.g.*, pp. 24–25 ("In June 1783, General Washington, in his last official address to the nation as commander-in-chief, declared that the states must either 'give such a tone to the federal government as will enable it to answer the ends of its institution' or else 'relax the powers of the union, annihilate the cement of the Confederation and expose us to become the sport of European politics, which may play one state against another.'" (quoting Letter from George Washington to Execs. Of the States (June 18, 1783) *in* 13 The Documentary History of the Ratification of the Constitution 60, 54)).

Convention. It is the draft that produced the 12:1, now grown to 65:1, disparity that endures. It is a conception that—through the taxing and spending powers, the Commerce Clause, the Necessary and Proper Clause—has permitted all the consolidation this continental nation needs, while leaving distinct political entities with distinct local personalities to grow up and flourish. Sixty-five to one indeed, but sometimes you have to pay a price for diversity, distinctiveness. As much as I dislike the aphoristic flights of some of the Supreme Court's decisions (Justice Kennedy's assertion that "[t]he Framers split the atom of sovereignty")[51]—the Court more or less gets the point of what was accomplished. The opposing views of the Anti-Federalists presented the Framers with a real antinomy, which they resolved with finesse and with implications far into a future they could not have foreseen. The abandonment of Madison's initial plan for a federal veto of all state legislation in favor of the subtler doctrinal compromise that emerged from judicial elaboration of the Supremacy Clause was a better resolution than the Framers could have foreseen.[52] So also still in the bosom of time was the rich panoply of human rights doctrine that the courts later extrapolated from the Bill of Rights and especially the First Amendment (pp. 594–95).

With what parts of this does Klarman disagree? Certainly the representational disparity in the Senate, but he also finds the tenure and the interpretive excursions of the federal judiciary hard to square with democracy (pp. 626–27, 629–30). His critique of the Electoral College (pp. 625–26) seems to me the hardest to answer. The equal representation in the Senate seems an important part of a fabric that proclaims and enables the limited but distinct sovereignty of the states. It allows them a presence that cannot be ignored on the national scene and offers a platform for local personalities to appear on that scene, sometimes in postures that transcend their local interests. But the president has from the beginning been seen as a single personality representing the whole nation.[53] The possibility that because of the vagaries of the Electoral College a person receiving significantly less than a majority of the votes of the whole electorate should nevertheless rule in that position is more than an anomaly; it is a travesty.[54]

Who can disagree with Klarman that because the Constitution "has been around for a very long time or that its authors were especially wise and

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51. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

52. Pp.158–59. With which Justice Scalia never came to terms and Justice Thomas has to this day not seen his way to coming to terms.

53. *Cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 653–54 (1952) (Jackson, J., concurring).

54. I also tend to agree with those who would limit Supreme Court Justices to one twelve-year term. That is long enough to allow them to develop a style and an approach of their own, while still guaranteeing their independence. It would assure the political system at regular intervals the occasion to reflect on and redirect the tendencies of the Court. And it would remove what seems to me the toxic anomaly that life tenure tempts justices to choose the time of their leaving and so gives them a quite inappropriate role in influencing the choice of their successors.

virtuous should not be sufficient to immunize it against criticism" (p. 631)—especially with the adjectival "sufficient"? Well, maybe I do. Present-day democratic sentiments should not control in all respects. The Framers were like the great mathematicians—Euclid, Pythagoras—who formulated propositions, methods, and proofs that had entailments far beyond what they envisaged, but because of the clarity and power of their vision those entailments were indeed implicit in what they offered.[55] What is remarkable about the story Klarman tells is how what the Convention came up with was not what the Framers had gone in with. Their original plan was more radical and simplistic than what the various compromises Klarman recounts forced on them. The result was more novel, surprising, and fruitful than what they had started with. The objections forced on the Framers the acceptance of human complexity and the necessity to resolve antinomies previous theorists had ducked, perhaps just because they were just theorists not forced to come up with a product or pay a steep price for failure. Lord Mansfield speaks of "the common law, that works itself pure by rules drawn from the fountain of justice."[56] Ours is in part a common law constitution[57] and the best of our judges do just that with the elements the Framers have handed them. But I prefer Hegel's: "the cunning of reason."[58]

55. *Cf.* G.H. Hardy, A Mathematician's Apology (1940).

56. Omychund v. Barker (1744_ 26 Eng. Rep. 15, 23; 1 Atk. 22, 23 (emphasis omitted).

57. Charles Fried, Saying What the Law Is: The Constitution in the Supreme Court ch. 1 (2004); David A. Strauss, The Living Constitution 33–46 (2012); Harry H. Wellington, Interpreting the Constitution: The Supreme Court and the Process of Adjudication 77–78 (1990).

58. Hegel, *supra* note 15, at 34.