The modern decisions reaffirming the importance of state sovereignty are important intellectually and symbolically. They help to maintain public appreciation for a system of multiple and partial sovereigns in an era when consolidation seems natural and desirable to many. However, these decisions do not prevent a determined Congress from nationalizing its policy preferences. The commerce clause cases, for example, can often be evaded by predating the national regulation on the movement of a commercial good in interstate commerce. Both the state immunity cases and the rule against commandeering state governments can be evaded by purchasing state consent through the power to condition federal expenditures. Other tactics for achieving national objectives are readily available.

Moreover, history suggests that it may be a challenge for the Court itself to maintain the kinds of abstract distinctions upon which its recent federalism decisions rest. For example, the contrast between a noncommercial activity and a commercial activity is the type of distinction that in the past the Court has been unable to sustain either as a conceptual or as a practical matter. It is for such reasons that during most of its history the Court has expressed appreciation for federalism while providing only limited and temporary resistance against the political and social forces driving centralization.

SEE ALSO  Anti-Federalist/Federalist Ratification Debate; Constitutional Interpretation; Constitutionalism; Constitutional Theory; Constitution of the United States; Dual Federalism; Great Compromise; Marshall Court; Rehnquist Court

BIBLIOGRAPHY
Carey, George W., and James McClellan, eds. 2001 (1787–1788). The Federalist No. 17 (Alexander Hamilton), No. 39 (James Madison), No. 44 (James Madison), and No. 46 (James Madison). Indianapolis, IN: Liberty Fund.

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FEDERALIST ERA
SEE Jay Court; Madison, James; Marshall Court.

FEDERALIST PAPERS
The Federalist (1787–1788) was one of the books that Thomas Jefferson listed as essential for students studying law and government at the then new University of Virginia, taking its place alongside Jefferson’s own Declaration of Independence (1776) and works such as John Locke’s Second Treatise (1690) and Sir Edward Coke’s The First Institute of the Laws of England (1552–1664). And while Alexander Hamilton (c. 1755–1804), James Madison (1751–1836), and John Jay (1745–1829), writing under the pen name Publius, did not write a legal treatise, The Federalist Papers, as they have come to be known, have long been turned to as an essential commentary on the Constitution by the U.S. Supreme Court. Yet The Federalist Papers offer insight into the very nature of American constitutionalism in a manner that runs far beyond a law book for judges. In offering a broad-ranging defense and analysis of the Constitution, The Federalist Papers rarely speak to what we would now call
constititutional law. Rather, they offer a political understanding of the Constitution: Jefferson’s insistence that The Federalist Papers were “the best commentary on the principles of government, which was ever written,” may be taken to illuminate how they lay out the grounds on which American constitutionalism rests. Indeed, Jefferson went so far as to say The Federalist Papers can be taken as an authority on the “distinctive principles” of the Constitution—an authority, he noted, “to which appeal is habitually made by all” (quoted in Epstein 1984, p. 1). And so it has been: from the ratification debates of 1787 to 1788 to the present, Americans have turned to The Federalist Papers to cast light on the U.S. Constitution.

DEFENSE OF AMERICAN CONSTITUTIONALISM

The Federalist Papers begin by explaining the “utility of the Union,” which itself begins with the inadequacy of the 1781 Articles of Confederation and a defense of a government “at least as energetic” as the one proposed. The first few papers insist that the union is essential to provide against “foreign force and influence” (Hamilton et al. 1999 [1787–1788], p. 30); it also must be powerful enough to control hostilities between the states. In offering this defense of the union, The Federalist Papers insist that the Constitution’s novel innovations, based upon advances in the “science of politics,” conform to the principles of republican government. These innovations include the
separation of powers, checks and balances, the election of representatives by the people, and judges holding office during good behavior, to name a few that are highlighted in The Federalist Papers, No. 9. These innovations, while novel against the history of government itself, were shared by most of the Constitution’s critics. This is highlighted, in part, by Publius’s singling out “the enlargement of the orbit” that the Constitution will extend to as a central innovation of the new Constitution—the one, Publius notes, that was most vehemently objected to. Against the insistence that the union should persist as a confederation where power resides within the states in conformity with the understanding that republican government was best suited to “small” states, The Federalist Papers defend a large and expansive republican government. In Publius’s language, the Constitution restructures the union in a manner that “offers a republican remedy for the diseases most incident to republican government” (p. 79).

In this manner, much of what occupies The Federalist Papers, roughly half of the eighty-five papers is a defense of the principles and thought that underlie American constitutionalism. But these principles and thought are not spoken of in the Constitution’s written text. Federalism, for example, is generally taken to be central to American constitutionalism, but is rarely spoken of in explicit textual terms. The Federalist Papers have thus been frequently turned to as making sense of the written Constitution, but doing so has very often required turning to the thought and principles the Constitution rests upon. While the papers are written, to be sure, to the partisan end of justifying the proposed constitution to the people, they also speak to the very premises of American constitutionalism.

Addressed to the citizens of New York, who were voting on delegates to the New York ratifying convention, The Federalist Papers appeared in New York newspapers in an effort to persuade the people to adopt the Constitution. This, itself, says something about the papers’ understanding of constitutionalism, which is rooted in a particular conception of human beings. As the opening paper by Alexander Hamilton argues, the people are capable of engaging in self-government—indeed, The Federalists Papers tend to treat “popular” government as the only legitimate form of government—and therefore of engaging in government based on “reflection and choice” (Hamilton et al. 1999 [1787–1788], p. 27). Yet, there is also the recognition that human beings themselves can be untrustworthy: “what is government itself but the greatest reflection on human nature? If men were angels, no government would be necessary” (p. 319).

American constitutionalism, as advocated and defended by The Federalist Papers, seeks to cultivate and refine popular government, creating a government that is at once energetic and limited. The people are thus the basis of constitutional legitimacy, but the Constitution spreads, channels, and softens the peoples’ direct voice. It does this insofar as it is “a composition” of both national and federal features (Hamilton et al. 1999 [1787–1788], p. 242), as well as by separating power at the national level, which itself partakes of both “national” and “federal” characteristics. The states, for instance, are represented as states in the Senate and in the selection of the president through the Electoral College. Thus even national institutions reflect federal features. In so doing, The Federalist Papers argue that the Constitution creates and channels different versions of the people as the foundation for different institutional forms in a manner that would contain and inspire both the government and the governed—as both are potential threats to constitutional liberty as well as necessary defenders of it: “In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself” (p. 290).

This understanding underpins the specifics of the written Constitution, which The Federalist Papers then expound upon, illuminating the logic of separation of powers and checks and balances and the specific organization of the Congress, president, and Supreme Court. In doing this, The Federalist Papers connect the institutional arrangements to the logic of popular government, while also insisting that the particular institutional arrangement of each branch will help foster effective government; that is, the institutional structure of the branches will not simply limit power, but call forth those features that will help facilitate good government in each branch—deliberation in the legislature and energy in the executive, for example.

THE FEDERALIST ON THE AMERICAN JUDICIAL SYSTEM

Following the general analysis of The Federalist Papers, those dealing with the judiciary “stand somewhat apart from the rest of the book, just as the judiciary stands somewhat apart from politics” (Epstein 1984, p. 186). The Federalist Papers rarely refer to the Constitution’s legal status. Yet Hamilton’s discussion of the judiciary in the last few papers (Nos. 78–83), published, incidentally, in the second bound volume and not in the newspapers, does seem to treat the Constitution in a more legal fashion, with the judiciary enforcing the law.

The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution...
ought to be preferred to the statute, the intention of the people to the intention of their agents. (Hamilton et al. 1999 [1787–1788], p. 435)

Here Hamilton is clearly defending the Court’s power of judicial review—its ability to strike down acts of the legislature as unconstitutional. It is, Hamilton says, the Court’s “proper and peculiar province” to do just this in cases before it. These cases, as Hamilton makes clear in Nos. 80 and 81, extend to issues involving the states and equity, which were two of the most prominent objections the Anti-Federalist Brutus leveled against the judiciary and Constitution.

The Anti-Federalist Brutus is usually thought to be Robert Yates (1738–1801) of New York, who attended the Constitutional Convention but opposed its ratification. In this, The Federalist Papers on the judiciary were written in response to Brutus (papers XI–XV). Thus while The Federalist Papers, No. 78, clearly defends judicial review, it is quick to hedge an expansive view of judicial power, suggesting that the judiciary has “neither force nor will but merely judgment” (Hamilton et al. 1999 [1787–1788], p. 464). No. 81 even takes on Brutus’s insistence that the Supreme Court will be able to interpret the “spirit” of the Constitution and thereby mold the laws and Constitution into “whatever shape they think proper” (p. 481). Here Hamilton circumscribes the potential power of the Court, by noting that laws ought to give way to the Constitution “whenever there is an evident opposition.” Still, Hamilton insists that the power stems from the very nature of a limited Constitution. And in order to act as “the bulwarks of a limited Constitution against legislative encroachments,” judges are appointed for life with good behavior, securing an independent judiciary, which is also helpful in securing the private rights of individuals (p. 468). For Hamilton, this means men of a particular character and learning; it is a small number of men “who unite the requisite integrity with the requisite knowledge” to sit on the bench (p. 470).

Based on their learning in the law and their subtlety of mind, on their reasoning spirit and independence from political pressure, judges may justly claim to be uniquely suited to the task of legal interpretation.

These traits may become expansive when the Constitution itself is viewed wholly through a legal lens, making the judiciary, in Hamilton’s formulation, “the faithful guardians of the Constitution” (Hamilton et al. 1999 [1787–1788], p. 469). Whereas in the earlier Federalist Papers the political dynamic of the Constitution is emphasized, when the judiciary is discussed the Constitution is seen in more legalistic terms. In this regard, the Court’s check against legislative and executive invasions may become an instrument that enables it to take up primary responsibility for constitutional interpretation. Such an understanding is not clearly supported by the overarching logic of The Federalists Papers, even if it has found frequent expression from the Court itself. At the same time, The Federalist Papers are frequently turned to by the Court to define and cabin the Court’s role. Since the 1990s this has occurred most frequently in arguments over federalism and unenumerated rights. In the first instance, some members of the Court have argued that it has no role in policing the boundary between state and federal power (United States v. Morrison, 529 U.S. 598 [2000]). In the second, The Federalist Papers have been turned to in insisting on the limits of judicial power, quoting Hamilton in No. 78 as illustrating a “modest role” for the Court as envisioned “by the Founders” (Planned Parenthood v. Casey, 505 U.S. 833 [1992]) against the judicial “creation” of rights.

**THE JUSTICES’ USE OF THE FEDERALIST**

The Supreme Court quickly began to cite The Federalist Papers. In the 1798 case of Calder v. Bull, 3 U.S. 386, which dealt with the reach and meaning of ex post facto law, Justice Samuel Chase turned to Publius “for his extensive and accurate knowledge of the true principles of Government.” Counsel was also quick to draw on The Federalist Papers in such high-profile cases as Stuart v. Laird, 5 U.S. 299 (1803) and Fletcher v. Peck, 10 U.S. 87 (1810), a practice that has continued. In the latter, Justice William Johnson, concurring in the Court’s opinion written by Chief Justice John Marshall on the nature of the contract clause, referred to and leaned upon the letters of Publius, “which are well known to be entitled to the highest respect.”

Chief Justice Marshall himself would turn to The Federalist Papers in M’Culloch v. Maryland, 17 U.S. 316 (1819) and Cohens v. Virginia, 19 U.S. 264 (1821), two of the most prominent cases he decided during his tenure. In Cohens, Marshall turned to The Federalist Papers, No. 83, to insist on Supreme Court review of state court decisions that involved a federal or constitutional question. Marshall went so far as to call the work “a complete commentary on our constitution,” which “is appealed to by all parties in the questions to which that instrument has given birth,” and noted that its “intrinsic merit entitles it to high rank.” Yet, in M’Culloch, while praising The Federalist Papers in similar terms, Marshall insisted that “a right to judge of their correctness must be maintained.” Even so, Marshall drew on The Federalist Papers to insist that the states could not properly tax an instrument of the national government: “no man, who has read their instructive pages, will hesitate to admit, that their answer must have been in the negative.” Marshall did not, interestingly, draw specifically on the papers to insist that the Constitution gave the national government the power to incorporate a bank, where Publius himself was divided, so to speak, as Hamilton argued that the Constitution did provide for such a power and Madison insisted that it did not.
Yet it is not uncommon to find citations to The Federalist Papers on both sides of the issue. In Luther v. Borden, 48 U.S. 1 (1849), the case that expounded on “political questions” as beyond the realm of the Court’s authority, Justice Levi Woodbury (1789–1851) turned to The Federalist Papers to reinforce the Court’s understanding of the limits of judicial power, even while dissenting on another issue. Citations would continue, from Justice Joseph Story in Prigg v. Pennsylvania, 41 U.S. 539 (1842) to Chief Justice Roger Taney in Dred Scott v. Sandford, 60 U.S. 393 (1857). Indeed, if we might rush over decades, it has become standard in the most high-profile cases to find citations to The Federalist Papers in both majority and dissenting opinions.

Today, this occurs most often in federalism and separation-of-powers cases—and often enough that it is impossible to discuss all the examples (see Melton 1997). There is often, however, an insistence that adhering to constitutional limits in these areas is also essential to liberty. As Chief Justice William Rehnquist put it in United States v. Lopez, 514 U.S. 549 (1995), the first clear instance of the Court striking down an act of Congress as beyond its commerce power since 1937 and the advent of the New Deal:

We start with first principles. The Constitution creates a Federal Government of enumerated powers. . . . As James Madison wrote: “The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.” The Federalist No. 45. . . . This constitutionally mandated division of authority “was adopted by the Framers to ensure protection of our fundamental liberties.”

In Printz v. United States, 521 U.S. 898 (1997), which took up the question of whether Congress could “enlist” state authorities to carry out its policies, Justices Antonin Scalia and John Paul Stevens argued over the meaning of The Federalist Papers. And Justice David Souter, writing a separate dissenting opinion, went so far as to say: “In deciding these cases, which I have found closer than I had anticipated, it is The Federalist that finally determines my position.”

Thus, more than two hundred years after it was written, the Court continues to turn to The Federalist Papers to understand the nature of American constitutionalism. This gives voice to Jefferson’s insistence that it was an authority on the peculiars of American constitutionalism that would justly be appealed to by all sides.

SEE ALSO Anti-Federalist/Federalist Ratification Debate; Articles of Confederation; Commentaries on the Constitution; Federalism; Judicial Independence; Judicial Review; Marshall Court; Separation of Powers

BIBLIOGRAPHY

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FEDERAL JUDICIAL SYSTEM

Although the Constitution grants power to the federal judiciary, the only specific court mentioned in the document is the Supreme Court. According to Article III, the “judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” The federal judiciary has seen been faced with an increasing number of both civil and criminal cases filed in the federal courts, which has prompted a significant increase in the number of judges in the federal judicial system. The number of judges in the federal judiciary has increased steadily since the middle of the twentieth century.

Congress first established the judicial structure through the Judiciary Act of 1789 (1 Stat. 73). The original statute provided for a district court in each state, with one judge serving for each court. The Supreme Court was staffed with six justices. Congress also created intermediate appellate courts, known then as circuit courts, but these courts did not have their own judges. Instead, when a circuit court convened in a particular state, the district judge from that state was joined by two Supreme Court justices to make up the three-judge panel. The purpose for this structure was to reduce expenses for both the nation and for litigants, and at that time the Supreme Court justices were largely underworked. The original roles for the different levels of courts were quite unique for that period of time. Under the first judiciary act, the district courts were given power to make findings of fact, whereas the Supreme Court could only review issues of law. The distribution of authority between the lower courts and the Supreme Court now serves as the model for all state court systems.