

**THE POLITICAL THEORY OF THE FEDERALIST.** By David F. Epstein.<sup>1</sup> Chicago: University of Chicago Press. 1984. Pp. ix, 234. \$22.00.

*Ralph Lerner*<sup>2</sup>

By and large, Rector Thomas Jefferson thought, the determination of curriculum in "public Seminaries" was best left to the several professors who might be presumed to be expert in their fields. He meant to follow that sound rule, rather than the common practice of having trustees prescribe "Text-books," in the case of the new university he was fathering in Charlottesville. Yet, in truth, there was one branch of study in the Law School "in which I think we are the best judges, and the branch itself is of that interesting character to our state and the US. as to make it a duty in us, to lay down the principles which are to be taught. [I]t is that of gov[ern]m[en]t."<sup>3</sup>

His correspondent, fellow trustee, and expert partner in founding did not dissent, but saw fit to add to Jefferson's proposed list of titles while "relax[ing] the absoluteness of its injunction." James Madison understood how a strict prescription of approved texts for the Law School might rekindle prejudices and partisanship and perhaps "induce the more bigoted to withhold [sic] from [the University] their sons, even when destined for other than the studies of the Law School." He also held it likely that some or most would confuse "framing a political creed" with framing a religious one ("tho the public right be very different in the two cases"). Nonetheless Madison thought it "certainly very material that the true doctrines of liberty, as exemplified in our Political System, should be inculcated on those who are to sustain and may admin[i]ster it."

The texts finally selected as "[s]tandards without requiring an unqualified conformity to them" were such as might guide and guard young lawyers-in-the-making while under the tutelage of "an able & orthodox Professor." It is not a long list: John Locke's

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1. Analyst, Office of Net Assessment, Office of the Secretary of Defense.

2. Professor of the Social Sciences, The College, University of Chicago.

3. The immediately relevant documents are assembled as an appendix to Arthur Bestor's perceptive analysis, *Thomas Jefferson and the Freedom of Books*, in *THREE PRESIDENTS AND THEIR BOOKS* 39-44 (1955).

*Second Treatise*; Algernon Sidney's *Discourses on Government*; "the Declaration of Independence, as the fundamental act of union of these states"; *The Federalist*; "the Resolutions of the General assembly of Virginia in 1799" concerning the Alien and Sedition Acts;<sup>4</sup> and Washington's Farewell Address. Here were the political foundations of a republican lawyer's education: select authorities that might shape and confirm "young minds" in a dedication to liberty, American style, or at the least "controul or counteract deviations" of some future heterodox professor. Yet this "text book" would be no doctrinal straitjacket, for *The Federalist* and the "Virginia Document of 1799" in themselves constituted a debate on how best to reduce general principles to practice. The law students would find much to ponder.

Subsequent generations of law students have read more law but less political theory. Perhaps a snippet from Locke's chapter on property still finds its way into some massive compendium, but who today reads Sidney? In grammar or high school the students may have been shown the text of the Declaration (abridged for modern readers?). *The Federalist* No. 10 remains a favorite with anthologizers for college English and introductory government courses; the other numbers, however, are largely the preserve of a few specialists. The Virginia Resolutions may have enjoyed a brief and troubled moment in the sun, but they have gone the way of the Dixiecrats. As for Washington's Farewell Address, . . . .

By considering David F. Epstein's book one gets a good sense of what has been lost through this impoverishment of legal education. Though his intention is quite straightforward—an explication of the political theory of *The Federalist*—the overall effect is arresting. For what emerges from these closely argued and densely written pages is indeed a political theory—coherent, capacious, problematic, and challenging. One need not find every one of Epstein's interpretations and conclusions persuasive. It is enough to see that we have here a book whose seriousness reflects and highlights the thoughtfulness and art with which Hamilton, Jay, and Madison addressed the friends and foes of the proposed Constitution. By helping us to enter into that conversation and debate, Epstein has helped us to see more clearly into the institutions, practices, and expectations of our national political life.

Readers familiar with some of the secondary literature on *The Federalist* will find here a considerably different approach. Epstein's Publius is no deeply divided soul, forgetful or heedless

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4. This appears to refer to both the Resolutions of 1798 and the extended defense offered by Madison in the Majority Report of January 1800.

of what he has written elsewhere. Nor is he a tepid participant in the heated preoccupations of a paranoiac age. Nor is he the dutiful rehearser of a Scottish philosophic catechism—nor of some simple Lockean canon, for that matter. Nor is he an overclever advocate, writing under a deadline and conjuring up debater's points as best he can.

In Epstein's account, the authors of *The Federalist* were distinct; neither before, during, nor after their collaboration did they simply stand in one another's shoes. But of course they had much in common. They were concerned with the abuses of power—and the dangers of powerlessness. They did learn from Hume and Locke—and Hobbes, Montesquieu, a host of others, and from life itself. They did indeed write under great pressure (having only from three to five days per essay, on the average), but for none of these experienced and reflective men of affairs did this entail starting from scratch.

Combining to produce a defense that would enlarge their readers' understanding even as it allayed reasonable and not-so-reasonable misgivings, the three authors settled on an approach, a tone of voice, and a line of argument that could be sustained over time. Differences could be muted, not because they were unimportant or unobserved, but because they were not matters of urgency.

The large questions, after all, had still to be addressed. The Declaration's self-evident truth, its assertion that governments are instituted by popular consent—that is, *not* by accident or force—had still to be demonstrated. Was this indeed possible? Under what conditions could such a beginning be sustained? How might the ends of justice and the public good be secured? One needed a government strong enough to prevent injustice yet restrained from committing it. One needed a government that was mindful of men's liberties yet active enough to compel the sacrifice of individual interests when necessary for the public good.

Above all (and here Epstein's analysis is outstanding), one needed a form of government that would take account of human hopes and fears, of "that honorable determination which animates every votary of freedom, to rest all our political experiments on the capacity of mankind for self-government."<sup>5</sup> But mankind includes the great (who want to have their way) and the small (who want to have a say), the political partisan (hot for the triumph of principles or the spoils of office) and the private citizen (worried

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5. THE FEDERALIST No. 39, at 250 (J. Madison) (J. Cooke ed. 1961).

about his crops or mortgage payments). How *The Federalist* went about trying to accommodate these diverse needs and desires—and all within the framework of a reconceived republicanism—is a story well worth pondering.

Is Epstein's book fit for law students? I think not. By current tastes it partakes too much of the spirit and tone of an old-fashioned commentary. Then, too, its discussion of the problems raised by *The Federalist* is perhaps too leisurely for those accustomed to digests and staccato conclusions. What about law professors? Here, I think, much good might be expected from a study of this book. First, it would re-present to them in vividly impressive detail the rich argument and thought that underlie the Constitution's language and institutional arrangements. Further, it might turn those professors back to *The Federalist* and the Constitution themselves. Is a direct confrontation with that earlier thought still possible? This book says yes—and shows that to be so. Is a direct confrontation with that earlier thought still necessary? Readers need engage in no elaborate research to settle that question in their own minds. They may validate Jefferson's or Madison's misgivings and concerns by looking afresh at any volume of the *United States Reports* that comes to hand.