

# Book Reviews

## Slapping the Visible Hand

*The SEC and Corporate Disclosure: Regulation in Search of a Purpose.* By Homer Kripke. New York: Law & Business, Inc., 1979. Pp. 368. \$49.50.

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In the 1960s, Professor Lipson described the Yale Law School faculty as a collection of Young Fogies and Old Turks. Among securities lawyers, a group not particularly noted for its iconoclasm, Homer Kripke is without question the premier Old Turk. Beginning forty-five years ago as an enthusiastic member of the staff at the Securities and Exchange Commission, he soon grew disillusioned with the Commission's regulatory philosophy and became one of its principal critics. In *The SEC and Corporate Disclosure*,<sup>1</sup> he tells why he thinks that the SEC and the system of mandated disclosure it administers harm the very investors they are supposed to protect.

Professor Kripke's views differ in breadth as well as in tone from most of what is written about securities regulation. Detailed criticism of the SEC ordinarily comes from industry groups and bar association committees composed of practicing securities lawyers. Although those lawyers may conscientiously leave their clients at the door when they speak for the organized bar, their approach to securities regulation inevitably reflects their professional experience and orientation. As a result, the SEC hears far more about the practical problems of complying with its proposed rules than about the rules and the policies that it should be, but is not, proposing.

Professor Kripke has never suffered from such a limited vision. He has devoted enormous energy and polemical skill to working for basic changes in the pattern of securities regulation. Two causes, in particular, are associated with his name: encouraging securities issuers to make public disclosure of earnings projections and other forward-

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1. H. KRIPKE, *THE SEC AND CORPORATE DISCLOSURE* (1979).

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looking information,<sup>2</sup> and replacing a system of accounting based almost entirely on historical costs with one that reflects current costs and values.<sup>3</sup>

For years, those positions placed Professor Kripke in opposition to the SEC, which excluded earnings projections from prospectuses and proxy statements and allowed the accounting profession to require that financial statements be prepared on the basis of historical costs. During the 1970s, events began going Professor Kripke's way. In 1977, the Advisory Committee on Corporate Disclosure recommended that the Commission permit issuers to include projections and other "soft" information in their SEC disclosure documents, and a short while later, the Commission in substance adopted the Committee proposal.<sup>4</sup> Meanwhile, in Accounting Series Release No. 190, the SEC took a first step in the direction of current-value accounting by requiring that companies registered with the Commission disclose the cost of replacing productive capacity (for example, plant and equipment) and inventory.<sup>5</sup> Following the completion of Professor Kripke's book, the Financial Accounting Standards Board (FASB), the policy-making body of the accounting profession, acknowledged the need to account for inflation and required large public companies to try various ways of reporting inflationary effects on income.<sup>6</sup>

Although his ideas have now won broad acceptance, success has not softened Homer Kripke. His years of combat with the SEC and the FASB seem to have persuaded him that those institutions are misguided and still have a pernicious influence on securities disclosure. Professor Kripke's present views, as reflected in *The SEC and Corporate Disclosure*, rest on three fundamental ideas. First, it is doubtful that any system of government-mandated disclosure to investors is needed. Professor Kripke would abolish the detailed forms by which the SEC requires companies to disclose information to the investing public. Second, if the government is to prescribe disclosures for a public company, different information should be disclosed, including data that relate the company to the entire economy and stock market. Third, the SEC as an institution needs a complete reorientation, away from its recent preoccupations with presenting

2. See, e.g., Kripke, *The SEC, the Accountants, Some Myths and Some Realities*, 45 N.Y.U. L. REV. 1151, 1197-1201 (1970).

3. See *id.* at 1188-96.

4. See Rule 175, 17 C.F.R. § 230.175 (1979).

5. See Securities Act Release No. 5695, 41 Fed. Reg. 13,596 (1976).

6. See FINANCIAL ACCOUNTING STANDARDS BOARD, STATEMENT OF FINANCIAL ACCOUNTING STANDARDS NO. 33 (1979).

historical data and punishing corporate wrongdoers, and toward providing investors with information that will help them evaluate a company's prospects.

The chapters of the book that question the need for government-mandated disclosure had their origin in Professor Kripke's service on the Commission's Advisory Committee on Corporate Disclosure. Professor Kripke tried unsuccessfully to get the Committee to undertake a serious reexamination of the need for government-mandated disclosure.<sup>7</sup> When the report was completed, Professor Kripke prepared a separate concurring opinion in which he "expressed some cost/benefit hypotheses." In response, one of the Committee members prepared a lengthy defense of the existing pattern of securities regulation, in which detailed disclosure requirements prescribed by the government supplement general antifraud rules and in which compliance is encouraged by a combination of industry self-regulation, government enforcement, and private civil actions. This defense became the Introduction to the Advisory Committee report.<sup>8</sup> Finding that the Committee report as revised expressly rebutted his views on mandated disclosure, Professor Kripke changed his concurrence to a dissent and promised that he would address the need for mandated disclosure in detail at another time.

## I

*The SEC and Corporate Disclosure* contains Professor Kripke's promised statement of his views. A few months ago, a book that questioned the need for any mandated disclosure would have seemed to have only academic interest. The SEC was a fixture, and opponents could hope to do no more than to curtail its activities modestly. Today, with a Reagan Transition Team report having called for a forty percent reduction in the SEC staff<sup>9</sup> (to include a seventy-five percent cut in the Division of Enforcement), SEC abolitionism seems less far-fetched. Against this background, Professor Kripke's book is timely and important. Because he is a brilliant and knowledgeable critic of securities regulation, it is worth examining the theoretical structure he provides for the case against mandated disclosure.

7. See HOUSE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, 95TH CONG., 1ST SESS., REPORT OF THE ADVISORY COMMITTEE ON CORPORATE DISCLOSURE TO THE SECURITIES AND EXCHANGE COMMISSION at D-49 (Comm. Print 1977).

8. *Id.* at I-XXIX.

9. The Transition Team concluded that a great deal of the current disclosure requirements are unnecessary for investor protection and described the Commission's attempts to streamline disclosure as "a regulator's idea of deregulation." See *Legal Times of Wash.*, Jan. 26, 1981, at 8, col. 2.

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Professor Kripke's basic point is that issuers have an adequate economic incentive to publicize voluntarily any information whose value to investors exceeds the cost of collection and dissemination. Should investors not receive an adequate regular flow of information from a public company, they would shun its securities, which would then drop in price; the company, as well as its management and shareholders, would suffer when trying to sell the securities in public markets. Professor Kripke is correct when he says that the incentive provided by the investors' demands may be sufficient for a company that is doing well and that periodically sells securities to the public, but what of a company that has an embarrassing problem or fears that disclosure of important information will injure the company commercially? Management may decide that the benefits of keeping the information under wraps outweigh the harm that will be done to the company's reputation with investors, particularly if the company is not currently selling securities to the public and can exclude the information without violating the antifraud rules. If some companies elect not to provide the information that was needed by investors, all public companies will suffer, because investors in public securities will presumably discount the value of the securities they buy to reflect the risk that the issuer will someday elect to retreat into the shadows.

Of course, the burden that compliance with mandated disclosure places on public issuers may outweigh the benefits to investors. Professor Kripke believes that the present system is very costly, in that issuers are forced to generate voluminous materials that are of no interest to investors and are restrained from providing investors with useful evaluative material. His arguments on this point, however, are merely impressionistic; so too are the claims of the Advisory Committee on the other side. There has not yet been a detailed study of the costs and benefits of mandated disclosure. Indeed, Professor Kripke's greatest disappointment with the Advisory Committee is that it did not attempt such a study.

In evaluating government-mandated disclosure, it is tempting, though wrong, to blame either the SEC's forms or its advance screening of disclosure documents for faults that are caused by the anti-fraud rules and the civil-liability provisions, both of which Professor Kripke would retain. Like other critics of federal securities regulation, Professor Kripke complains of the undue length and indiscriminately negative tone of Securities Act prospectuses. Whatever the historical role of the Commission in encouraging the develop-

ment of these traits, they would survive, I think, even without an SEC mandate because they provide useful protection against civil liability.

On questions of whether particular information is material to investors, securities lawyers typically err on the side of overdisclosure rather than run the risk that a judge with perfect hindsight will later find an omission material. Securities Act prospectuses would be prolix documents even if the SEC were to disappear tomorrow. The negativism of SEC disclosure documents can also be credited to protective lawyering; that too would continue without the SEC. A lawyer whose client is issuing securities to the public is understandably more comfortable with a warning about the bad that can happen than with an attempt to evaluate the prospects for good and bad. Although sophisticated securities lawyers try to avoid a standard parade of horrors and recognize that boilerplate disclosure is usually too general to indicate to investors the specific problems that merit their concern, the overall influence of securities lawyers has been to shift disclosure documents to the dark end of the spectrum. For example, the safe harbor for projections and other forward-looking statements, adopted after years of campaigning by Professor Kripke and others, may encourage the inclusion of judgmental material in some circumstances. Yet even when the safe harbor is available, lawyers are likely to worry that the prospective statements will be found misleading for failure to make adequate disclosure of the underlying assumptions. Except for projections that are essential to a successful sale of a security issue, lawyers are likely to counsel their clients against taking the risks of gratuitous evaluation.

These conclusions do not mean that I would go beyond Professor Kripke and recommend the abolition of the antifraud rules and the civil liability provisions along with the disclosure forms. Perhaps the greatest contribution of the present system of securities regulation is the process by which accountants and lawyers, motivated in large part by the civil liability provisions of the federal securities laws, seek to ferret out problems that should be disclosed in the prospectus. Professor Kripke does not give due credit to the disclosure system's achievements in this area. When he observes that the leading financial debacles of recent times—Equity Funding, Penn Central, and Sterling Homex—involved companies registered with the SEC, he might also mention that the problems of the Penn Central Company, by far the largest of these corporations, were brought to light by a lawyer performing due diligence for a lead underwriter.

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No one can say how many of the troubled companies of recent times would have gone quietly along signaling "business as usual" if disclosure professionals had not been on the scene.

Having paid this tribute to my own profession, I must acknowledge that there is a cost of having liability-oriented disclosure documents, a cost that goes beyond the fees that are paid to lawyers for drafting those documents and defending them in court. As long as the primary concern of those who prepare disclosure documents is defense against potential litigation, those documents will be discursive and indiscriminately negative in tone. Therefore, the main question about many SEC rule proposals is not whether the role of the staff should be expanded or contracted, but whether the fear of civil liability should be used to encourage greater involvement by outside lawyers and other liability-minded disclosure professionals. For example, the adoption of registration forms that allow incorporation by reference of various filings under the Securities Exchange Act, including a company's report on Form 10-K, has constricted the investigations performed by underwriters and their lawyers, who have little chance to help prepare the description of the company and its business. Should the standards by which courts judge the adequacy of the underwriters' investigation reflect their limited opportunities for review? Or should the threat of civil liability be used to spur underwriters to develop intensive investigation procedures and supplemental disclosures for short-form registration? Assuming that the appropriate occasion for due diligence is the preparation of Form 10-K rather than of the registration statement, is the SEC correct to encourage the anxieties of public-company directors by requiring them to sign the 10-K? Having heard Professor Kripke speak eloquently on these issues in private sessions, I was disappointed to find that he paid little attention to them in his book.

Assuming that the SEC will continue to administer a mandatory disclosure system, the most promising path to reform may be the one suggested by the Advisory Committee: the development, based on information from industry analysts and other users of the information, of more disclosure forms for specific industries. Professor Kripke criticizes the Commission for adopting industry-segment reporting requirements in response to pressure from securities analysts, but he does not adequately consider whether the value of the information merits the cost to issuers of providing it. If we acknowledge a need for attention to information costs, the segment-reporting episode illustrates the role that the SEC can properly play in the disclosure

system: whenever the Commission believes that the information is not excessively costly to provide and need not be kept secret for commercial reasons, it can assist sophisticated investors in getting information that issuers are not providing voluntarily. Ideally, the SEC would only rarely require disclosure of information that issuers uniformly withhold from the public: that public companies in general do not find a sufficient incentive to furnish a particular class of information to investors should be taken to establish a *prima facie* case that the costs of disclosure outweigh the benefits. In addition to playing this informational role as a kind of enlightened Federal Trade Commission for securities analysts, the SEC could still perform the other tasks it has undertaken in the past. For example, it could use securities disclosure to highlight ethical issues, such as improper payment and management "perks," and it could alert public investors to special risks needing their attention. Those tasks, however, are distinct from the task of providing information useful to sophisticated investors, and I personally find Professor Kripke persuasive when he argues against those uses of the disclosure process.

Some of Professor Kripke's ideas about disclosure are based on his readings in the modern economic theory of securities markets. In particular, he relies on the efficient market theory, which maintains that the market price of a security reflects all publicly available information about the issuer, and on model portfolio theory, which holds that the risk of a security relative to the market as a whole—measured by the beta coefficient—can be eliminated by a properly diversified portfolio. Professor Kripke is impressed by the importance of risk analysis in portfolio selection. To help investors evaluate the riskiness of the securities they buy, he would have the SEC require that public issuers either disclose their beta coefficients or give information from which those numbers could be deduced. It might suffice to disclose, for example, a comparison of the security's past market history with the performance of a broad-based market index, or a comparison of the company's earnings history with general market fluctuations in earnings. All this information, however, seems to be of a kind that, at present, is publicly available or can be assembled from public sources. Even conceding that the information is valuable, therefore, it is puzzlingly inconsistent with his general attitude towards government-mandated disclosure that Professor Kripke would involve the SEC in its dissemination. The most persuasive arguments for government-mandated disclosure by public issuers rest on the fact that information of certain kinds cannot be obtained from sources

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other than the issuer, even by investors that are willing to pay for it. There seems to be no good reason, on the other hand, not to allow information that can be put together from public sources to prove its worth in the marketplace. If a compilation of the beta coefficients of particular securities is genuinely worthwhile to investors, some investment research firm should find it profitable to compute and to distribute the information.

## II

Another theme that pervades *The SEC and Corporate Disclosure* is that the Commission is a frightening institution. Most of Professor Kripke's criticisms of the Commission have been heard before, but rarely with such vehemence and in such concentrated form. As seen by Professor Kripke, the SEC staff is arrogant, ignorant, and self-righteous.<sup>10</sup> It misunderstands the investment process (for example, it overemphasizes historical, company-oriented information),<sup>11</sup> wages crusades against business practices that are outside its proper field of concern (for example, it attacks improper payments and management "perks"),<sup>12</sup> ties the hands of the securities industry and public issuers with far-fetched interpretations of its rules (for example, it applies Rule 10b-6 to "distributions" of securities through employee stock options, and it applies SEC rules excessively to foreign companies),<sup>13</sup> and generally comports itself with a self-righteous air that maddens Professor Kripke. These polemical assaults sometimes seem unfair to the Commission. For example, the discussion of the 140 series of rules, prescribing exemptions from the registration requirements of the Securities Act, falsely gives the impression that the 140 series has significantly complicated the task of selling securities without registration. In fact, Rule 144, which deals with sales by affiliates and by people that buy securities in private placements, has certainly made it easier to sell without registration, and the other rules in the 140 series have not, in my opinion, significantly added to the burden of securities regulation. Ten or even five years ago, an unbalanced attack on the Commission might have been a useful coun-

10. See H. KRIPKE, *supra* note 1, at 37-60 (describing ways in which "Overrating the Importance of Its Contribution to the Securities Market Makes the SEC Overly Zealous").

11. See *id.* at 24-31.

12. See *id.* at 42.

13. See *id.* at 53-56, 59-60. The Commission has proposed an amendment to Rule 10b-6 that would exempt distributions pursuant to stock-option plans. See Securities Exchange Act Release No. 16,646, 45 Fed. Reg. 18,948 (1980).



terweight to the uncritical praise it generally received. Recently, however, the SEC staff has met significant obstacles, even if the events of 1981 are ignored. The Supreme Court has turned against the Commission,<sup>14</sup> the Commissioners have become more independent,<sup>15</sup> and there is an antiregulatory mood in Congress that could eviscerate the SEC, as it has the FTC. With these changes, the Commission has developed a responsiveness to the opinions of others very different in spirit from the agency portrayed by Professor Kripke. As a result, reading Professor Kripke's book, which was written just as the tide was beginning to turn, is like watching someone fire at a wounded soldier.

### III

*The SEC and Corporate Disclosure* includes a lengthy historical critique of the Commission's views on accounting theory. I imagine that many business lawyers share my hazy understanding of the issues of principle that divide the accounting profession. Professor Kripke's book provides an interesting, if somewhat theoretical, introduction to these matters. Along the way, it tells the fascinating story of Judge Robert E. Healy, a Vermont lawyer who, while investigating the collapse of the public utility holding systems, became convinced that writing-up assets was the equivalent of "original sin."<sup>16</sup> He carried this conviction to the SEC, where, as a Commissioner, he established the original-cost dogma that was with us through the 1970s.

The SEC's complicity with the accounting profession in preserving original-cost accounting might seem at first to be one of its most serious historical failings. Recently there has been much published criticism of the top management of our large corporations for allowing America's industrial productivity to lag.<sup>17</sup> With the Japanese managers seen as the model of correct behavior, American managers have been criticized for neglecting the modernization of our industrial plants in order to pursue short-term profits. Original-cost accounting might seem to encourage this behavior because it increases depreciation charges against reported earnings for firms that purchase new plant

14. See, e.g., *Aaron v. SEC*, 446 U.S. 680 (1980) (SEC required to establish scienter in order to enjoin violation of § 10(b) of Securities Exchange Act).

15. For example, in *In re Carter & Johnson*, Securities Exchange Act Release No. 17,597 (Feb. 28, 1981), [1981] 593 SEC. REG. & L. REP. (BNA) N-1, the Commission dismissed a highly publicized staff proceeding against two securities lawyers, though it adopted some of the legal theories that the staff had put forth in the case.

16. See H. KRIPKE, *supra* note 1, at 179-84.

17. See N.Y. Times, Jan. 27, 1981, § D, at 2, col. 1 (interview with Reginald Jones).

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and equipment. From evidence cited by Professor Kripke,<sup>18</sup> however, it appears that financial analysts recognize that income reported by companies with old plant and equipment is in effect inflated, and that analysts make the adjustments they consider appropriate for valuing the securities of such companies. Therefore, if management desires to support the price of its company's stock, it does not have an incentive to defer modernization. Whatever a company gains in additional reported earnings, it loses in the form of a quality-of-income discount.<sup>19</sup>

These questions regarding the importance of the accounting practices of public issuers return us to a point made earlier, in the discussion of disclosures about a company's beta coefficient. The unifying theme of Professor Kripke's views on disclosure is his commitment to encouraging issuers to reveal "soft" information. Few would question the importance to investors of management's judgments about matters, such as earnings projections, on which it has a unique vantage point. Its views on other questions relating to the company, including macroeconomic issues, the general prospects for the company's industry, and possibly even the cost of replacing the company's productive capacity, are of less compelling interest because investors can get an equally expert and perhaps less biased judgment elsewhere. Therefore, unless one believes that Securities Act prospectuses should contain all the information needed for an investment decision about the issuer's securities—a naive position that Professor Kripke certainly does not take—it is unnecessary to wage the battle for soft information on all fronts, and advocates like Professor Kripke should probably reserve their enthusiasm for items on which the issuer's views are irreplaceable.

18. H. KRIPKE, *supra* note 1, at 161-68.

19. In a recent interview with *The New York Times*, a leading business executive suggested that management is reluctant to take measures that might reduce reported earnings "because most top executive contracts are tied to reported earnings." N.Y. Times, Jan. 27, 1981, § D, at 2, col. 2 (interview with Reginald Jones). If an executive is concerned with his compensation under a contract of this type, rather than with the market price of a company's shares, original-cost accounting would probably give the executive a disincentive to have his company make new investments in plant and equipment. Moreover, even the steps toward inflation accounting recently taken by the FASB would not seem to solve the problem because they give inflation-adjusted earnings as supplementary information while allowing reported earnings to be calculated on an original-cost basis.

# *The Federalist* as Myth

*Explaining America: The Federalist.* By Garry Wills. New York: Doubleday & Company, 1981. Pp. xxii, 286. \$14.95.

Judith N. Shklar†

## I

Political myths are neither true nor false. They are generally vehicles of self-expression and self-orientation. If they correspond to the requirements of a group, they may be told, retold, and embroidered by one generation after another.

Among all the varieties of political myths, none have a longer history or a greater popularity than those that deal with the creation of states. The classic form of the political creation myth recounts the activities of founders of cities. The lives and works of these supermen serve at once as models of aspiration, as justifications for traditions and rules, and as legitimations of the structure of power. For those brought up on the classics, that is, the entire educated class of Europeans and Americans until the present century, the supreme and most familiar telling of political creation myths was Plutarch's *Lives*. From the pages of Plutarch, the great legislator has risen to haunt our political imagination. The legislator-superman has served as a useful ideal both for radicals intent on indicting existing regimes, and for authoritarians in awe of the past. All things considered, however, the influence of Plutarch's founders has been for the worse: the myth of Lycurgus' creation of Sparta has had a thoroughly mischievous effect on our thinking; the accounts of Solon and Publius certainly have done nothing for our common sense.

It was unfortunate, therefore, that Madison and Hamilton chose to write under the single pseudonym of Publius. To take on such a name was very much consistent with the fashions of the day, of course, and the selection underscored the importance that the two authors attached to *The Federalist*.<sup>1</sup> But the choice of Publius also was very

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1. THE FEDERALIST (J. Cooke ed. 1961) [hereinafter cited to this edition without reference to editor]. John Jay wrote five papers in *The Federalist*. Wills discusses Jay briefly, but correctly concentrates on Madison and Hamilton.

misleading. Madison and Hamilton, after all, took great pains to demonstrate to their countrymen that the proposed Constitution had not been drawn up by a single, supreme individual, but instead was the product of collaboration.<sup>2</sup> Indeed, they explained, the constitutional plan was superior to the work of any ancient prodigy precisely because it had been framed by many reasonable citizens acting together. Their work, moreover, drew heavily upon the latest and the best in political science, which meant, again, that no single mind prevailed. Nothing was more in keeping with the scientific spirit of the age than to view political reasoning and institution building as collaborative public planning. In fact, the only resemblance this explicitly modern act of legislation had to its ancient mythical namesake was the recognition that lawmaking was a deliberate and conscious activity and that drift and fatality were to be avoided at all costs.

Unhappily, Publius' decidedly self-confident stress on the merits of political collaboration was in vain. In essence, his name has triumphed over his overt intentions. Publius has become the chief subject—perhaps the chief victim—of a silly creation myth at odds with both his message and his spirit.

The myth of “The American Founding” is nothing if not personal and heroic. The Constitution may have been written by the men assembled in the Convention, goes the argument, but its true meaning can be found only in *The Federalist*. Publius thus becomes our great national legislator, our Lycurgus and our Solon. He is *the* Founding Father; to understand his every thought is essential in order to know what is “acceptable” in constitutional law, national ideology, political practice, and public values generally. Publius defines, once and for all, what America is and what it ought to be. He explains, directs, and expresses all that we are and can become. *The Federalist* is, so to speak, our political essence. The sacred writ is to be glossed and its authors deified.

What renders such an exercise in historical superstition credible, of course, is that “the intent of the Framers” is often an important starting point in constitutional adjudication. Such reference to and reverence for tradition no doubt contributes to the continuity and acceptability of judicial decisions. Perhaps it is understandable, then, that a certain kind of conservative in search of authority, remembering what ancestor worship did for the Romans, should appeal to “the Fathers” and ignore all subsequent generations. For that matter, creation myths can serve—indeed, have usually served—the purpose of

2. See, e.g., *id.* No. 2 (J. Jay); Nos. 37, 38 (J. Madison); No. 85 (A. Hamilton).

the disaffected. After all, retrospective utopias are by no means lacking in revolutionary charm.

In writing history and political analysis, however, an atavistic impulse is useless for explaining or for judging the character of contemporary constitutional and political institutions. For a historian or a political scientist, a creation myth can be of little value. To be sure, the original understanding of the Constitution may have had a more profound and enduring impact upon its subsequent development than any other single theory. But the notion of "explaining" America by looking only at *The Federalist* is an historical absurdity, considering all that has happened since Publius wrote. To dwell only on the character and vision of Madison and Hamilton, admirable as those men were, makes even less sense. Nevertheless, that is exactly what Garry Wills has done in *Explaining America*.<sup>3</sup>

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It would be bad enough if *Explaining America* were simply another contribution to the mythological literature on our national creation. Unfortunately, the book is not even a very good retelling of the myth. Wills' discussion often is so confused that it is impossible to discern the subject matter of a given chapter. Moreover, because as he warns us early on, "ask not for context,"<sup>4</sup> we need not expect anything in the way of historical narrative. What we get are potted biographies of Madison and Hamilton, but only up to the moment of their writing *The Federalist*; an elaborate effort to show the influence of David Hume on both men; and finally, an attempt to deal with their theories of checks and balances and representation.<sup>5</sup> At the end, Wills admits that, contrary to his title, he has not really explained all of America, but only its worthiest part: the memory of Publius.<sup>6</sup>

Oddly enough, considering this performance as a whole, Wills is quite aware of a number of the real issues at hand. Although he generalizes rather wildly about the Enlightenment, he recognizes that the era made for men who would have disliked this kind of homage even though they longed for fame. He also realizes the importance

3. G. WILLS, *EXPLAINING AMERICA: THE FEDERALIST* (1981) [hereinafter cited by page number only].

4. P. 11.

5. Wills' tone is moderate when discussing authors with whom he disagrees, but effusive and cloying when writing about those whom he admires—especially the late Douglass Adair, who some years ago drew our attention to David Hume's probable influence on *Federalist* 10, see p. 947 *infra*.

6. See pp. 265-70.

for Publius of the political supremacy of opinion, the promise of political science, and the possibility of constructing a wholly new form of government. Because Wills does not trace the institutional implications either of these ideas or of Publius' own careful analyses of political structures, however, all of this floats in a vacuum.

More important, Wills' insights pale in comparison with his omissions. *Explaining America* covers federalism in six and a half pages; the term is elaborately defined, but there is no discussion.<sup>7</sup> Yet this was the most important political issue of the day. Wills' treatment of sovereignty is equally incomplete.<sup>8</sup> And save for Robert Yates, he never mentions the opponents against whom Publius was defending the Philadelphia proposal. One would never know from Wills that *The Federalist* was designed to calm the fears of local politicians as well as to offer a new and grander project of government. In addition, Wills seems only vaguely aware of the primacy of foreign affairs for Hamilton and fails to explain Hamilton's emphasis on military strength and his vision of a continental empire. Finally, Wills has hardly scanned the pages of Gordon Wood's definitive political history of the years preceding the Convention.<sup>9</sup> From Wood, Wills could have learned why Madison viewed a new central government based on "the people" as the only cure for the threatening anarchy that resulted from radical, debt-forgiving, disorderly state legislatures. A book about *The Federalist* that does not recognize the absolute centrality of the tension between local and national politicians is simply unreal.

### III

*Explaining America* begins with accounts of the intellectual development of Madison and Hamilton prior to their writing of *The Federalist*. Wills contends that both men have been utterly misunderstood by all previous biographers and historians: Madison in fact was an aristocratic centralist; Hamilton was really a republican populist.<sup>10</sup> The first contention is unexceptional if it is meant to refer only to Madison's view during the 1780s when he was thoroughly disturbed by Shay's Rebellion and similar incidents. The second contention is entirely unpersuasive in light of Hamilton's career. Wills' way of "explaining" the two authors, however, is certainly not political.

Wills' biographical method leaves much to be desired. He focuses

7. Pp. 169-75.

8. See pp. 949-50 *infra*.

9. G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969).

10. See pp. 3-93.

almost exclusively on what young Hamilton and Madison read in college and by whom they were taught—presumably on the assumption that one's intellectual outlook is forever shaped in late adolescence. Perhaps Wills genuinely holds such primitive ideas about historical causality. Perhaps he genuinely believes that certain intellectual influences, such as the books that an individual reads, act as the formal and effective causes of his later conduct. Concentration on youthful training, moreover, is usual in heroic myths. All this aside, however, what is particularly inadequate about Wills' procedure is his total silence about everything Madison and Hamilton said and did after *The Federalist*. The possibility that their later writings and speeches might tell us something about their earlier selves or their characters as a whole seems never to have occurred to Wills.

We hear nothing in *Explaining America*, for example, about Madison's relationship to Jefferson, except for a discussion of the one occasion in *The Federalist* when Madison disagreed with the latter's proposal.<sup>11</sup> If one reads only Wills, one would find it impossible to guess that—much less to understand why—Madison introduced and promoted the first ten amendments. It would be just as difficult to guess that Madison was constantly aware of the terrible tensions between the Northern and Southern states, and that this affected his thinking about parties. And no reader of this book would know of Madison's part in advancing the "federal ratio" and what that entailed for the place of slavery in the Constitution and in our history.<sup>12</sup>

The portrait of Hamilton is equally incomplete. We are given a genuine sense of his modernity and are made to understand the importance of his military experience. But Hamilton's political opinions are grotesquely misrepresented. To be sure, Wills correctly absolves Hamilton of hypocrisy: he defended the Constitution with perfect candor because he knew that it was better than nothing. But if Wills had consulted Hamilton's later correspondence, he would have learned that the coauthor of *The Federalist* despised the Constitution as a feeble and faulty instrument.<sup>13</sup> Wills would have known, as all Hamilton's opponents knew, that good administration is not the same thing as republican equality and that Hamilton thought the people deserved the former but were not entitled to the latter. Wills could

11. See pp. 24-45 (discussing *Federalist* No. 49).

12. See generally M. MEYERS, *THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON* (1973).

13. See J. MILLER, *ALEXANDER HAMILTON: PORTRAIT IN PARADOX* 543 (1959).

only have concluded that Hamilton was not “really” a republican populist.

Perhaps Wills’ most bizarre misreading of Hamilton involves *Federalist* 78. Wills’ argument is that, far from implying judicial supremacy, in defending judicial review Hamilton really was arguing for the sovereignty of the legislature.<sup>14</sup> That Hamilton denied the obvious implications of judicial review is true enough. Men like Robert Yates had already warned the New York ratifying convention that the proposed federal judiciary would be free to decide exactly what the vaguely worded Constitution meant, that the federal courts would dominate over those of the states, and that there was no practicable restraint upon this new power.<sup>15</sup> Hamilton tried to soothe these prophetic anxieties by insisting on the absence of will and power in the judiciary; he contended, quite implausibly, that the range of federal discretion would not be greater than in ordinary cases involving conflicts of law. Thus, the judiciary would be in no position to legislate. It could hardly act as an additional expression of the popular will.<sup>16</sup> Had Wills looked at Hamilton’s later comments on the Marshall Court, however, he might have understood *Federalist* 78 differently. In Hamilton’s view, the Chief Justice was far too moderate in the application of judicial power against the Jeffersonian ascendancy.<sup>17</sup> Judicial supremacy as a bulwark against democratic legislatures and localism was exactly what Yates feared and what Hamilton had in mind when he wrote *Federalist* 78.

Wills’ second aim in *Explaining America* is to demonstrate the decisive influence of David Hume on Publius. Douglass Adair correctly observed that *Federalist* 10 bore Hume’s imprint.<sup>18</sup> According to Wills, however, not only *Federalist* 10, but the entire mindset of our heroes can be explained by the Scot’s influence. Characteristically, Wills provides no clear account of Hume’s philosophy as a whole.<sup>19</sup> But whenever there is to be found in Publius a shared phrase or a common thought, we are meant to see deep ties to Scottish philoso-

14. See pp. 130-50. Wills writes of *Federalist* 78: “Over and over in this paper Hamilton is stressing one thing—legislative supremacy, the supremacy of the more democratic ratifying conventions over indirect representation by majority vote in the Congress.” P. 134.

15. See Yates, *The Letters of “Brutus”*, in C. KENYON, *THE ANTIFEDERALISTS* 334-57 (1966).

16. See *THE FEDERALIST* No. 78 (A. Hamilton).

17. See R. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* 57-68 (1971).

18. See D. ADAIR, *FAME AND THE FOUNDING FATHERS* 75-106 (1974).

19. Wills begins each chapter in *Explaining America* with a short quotation from Hume. In most instances, however, the relevance of the selection is extremely obscure.



phers in general and to Hume in particular. Hamilton liked cities, and so did they. What could prove influence more conclusively? Hume had no use for the Country party with its cant about ancient virtue and its grumbling about corruption and decay. Publius also was a generation removed from the Country-style ideology of New England's pre-Revolutionary Old Whigs. Again, influence is manifest.

This is not to say, of course, that Wills errs in finding traces of Hume within *The Federalist*. It is to say, however, that too often Wills infers too much from those traces. For example, Hume's historical utilitarianism, in which antiquity is proof of an institution's worth, his dislike of violence, and his overall caution are not unlike Madison's general outlook. Nevertheless, religious toleration was Madison's first and deepest political commitment, and such toleration did not spring from a Humean agnosticism. Moreover, Madison did not shirk novelty of the most extreme sort. The Constitution itself exemplified exactly the type of enormous innovation feared by Hume. The novelty of the Convention scared not only radicals from Pennsylvania, but also traditionalists from Massachusetts who wanted to preserve their particular culture. All were suspicious of Publius' un-Humean rashness. Finally, while Wills notices that Hamilton did not share Hume's objections to a funded national debt,<sup>20</sup> he obviously has no idea of how important that issue was in eighteenth-century Anglo-American politics. "Ask not for context," to be sure!

In addition to Hume, the Enlightenment also is made to do heavy-duty work in *Explaining America*. For Wills, the Enlightenment means a new vocabulary and scientific optimism. To illustrate the vocabulary we get not only a glossary, but also a chapter of vaguely medical definitions drawn from eighteenth-century dictionaries to explain Publius' metaphors.<sup>21</sup> The purpose of this exercise, however, is far from clear. With respect to scientific optimism, Wills' failure to be precise leads him to overstate his case. Publius contended that political science had advanced far enough for him and his contemporaries to engage in successful institutional engineering.<sup>22</sup> That assertion, however, was a considerable distance from the optimism of Jefferson and Rush. Publius did not admit to any great confidence in moral progress or any belief in the intelligence of most men. He looked to safeguards against mankind's "limited generosity," to use Hume's phrase—one that Wills misses. Such a view set him apart from his more egalitarian

20. See pp. 69-71.

21. See pp. 238-47, 280-82.

22. See THE FEDERALIST No. 9 (A. Hamilton).

opponents who preferred frequent elections, small constituencies, popular participation, and as little government as possible.

At the same time, though, Publius was not unduly grim about his fellow citizens: his certainly was more of an up-beat spirit than that of the older John Adams or those of the New Englanders who could see only despotism in a Constitution that bound both themselves and dissipated Southern slave owners into a single political unit. In short, Publius was safely in the middle; this contributed to his triumph. An analysis not of the Enlightenment, but of Publius' place in the spectrum of American opinion, would help explain the position and the success of *The Federalist*. Such detailed and potentially rewarding historical analysis, however, does not interest Wills, who either deals in the broadest of generalities or gets lost in the minutiae of speech.

#### IV

When Wills directly confronts the genuine subject matter of *The Federalist*, he usually gets it wrong or talks around it. That such a conclusion is not unjustly harsh can be shown by considering his extended discussions of sovereignty and representation, the importance of which he rightly recognizes.

Wills is quite right in noting that Publius thought sovereignty, separated from its monarchical and absolutist origins, could nonetheless survive federalism and republican government.<sup>23</sup> Wills never asks, however, just what the sovereignty of "the people" could mean. He never discovers just how remote the concept of popular sovereignty advanced in *The Federalist* was from the monarchical ideology that led to the belief that an *imperium in imperio* was an absurdity. For Hamilton, sovereignty had more to do with a unified and reliable United States playing an independent role in the international society of states.<sup>24</sup> Here no great conceptual alteration was required by republican institutions, though an "energetic" executive was part of Hamilton's orientation.

From a domestic perspective, however, the sovereignty of "the people" implies nothing more than the primacy of recognized procedures in lawmaking, even in the sovereign act of amendment. Public law and policy are made through the process of politics rather than by a final deciding will. With respect to individual cases, of course, judicial reasoning may require an end point in the hierarchy of deci-

23. See pp. 162-68.

24. See THE FEDERALIST Nos. 11, 15 (A. Hamilton).

sions. With respect to republican lawmaking and remaking in general, there is no need for such an ultimate judgment. In America, sovereignty was replaced by politics as a continuous, legally directed process; indeed Madison recognized as much in his later years.<sup>25</sup> And precisely because it was replaced by politics, the end of sovereignty proved no great loss to American public law or to political theory. The will of the people is an appeal to legitimacy, not sovereignty.

Unhappily, Wills understands none of this. He never examines why some have suggested,<sup>26</sup> along the above lines, that Madison dispensed altogether with the idea of sovereignty as a necessary item of political thinking. Wills simply asserts, unpersuasively, that *The Federalist* remained true to time-worn notions of sovereignty.<sup>27</sup> About popular sovereignty, however, he says nothing at all.

Representation is the most important of all topics discussed in *The Federalist*. Wills knows this, but again fails to make sense of what is being said and why it mattered. What bothers Wills is that Publius still cared about public virtue, that he wanted men of probity to be elected. Unlike modern pluralists, as Wills notes,<sup>28</sup> Madison was not interested in diversity itself, but in how to arrange the interaction of conflicting groups in such a way that they would not violate "the public good." For Publius still believed in the discernible existence of "a public weal" and in its difference from private preferences.<sup>29</sup> As Hume's disciple, however, Publius should not have bothered with public virtue at all. Clearly such residual classicism bothers Wills immensely.

Actually, Publius' distance from Hume in this regard is not particularly great. Hume had great respect for impartiality and thought it a great social virtue. In a society in which, as men had known since the seventeenth century, "opinion is the queen of the world," impartial, aloof, self-distancing judgment becomes particularly important for statesmen. It is, in fact, the core of public virtue.

Without a belief in detached and impartial decisionmaking, neither the separation of the judiciary from the legislature nor Madison's advocacy of representative government would make sense. The public good is what all impartial men, devoted to their country, recognize as the best course. It is neither certain nor static. There is room for

25. See Madison, *Notes on Nullification*, in M. MEYERS, *supra* note 12, at 568-74.

26. See, e.g., M. MEYERS, *supra* note 12, at 91.

27. Pp. 167-68.

28. See pp. 201-07.

29. See, e.g., THE FEDERALIST No. 10 (J. Madison).

argument, but it is an attainable end and it entails a self-restraining code of public conduct. To Madison, representative government seemed particularly conducive to such an end.

For Madison, representative government was not just a necessary substitute for direct democracy, given that the latter was impossible in an "extended" republic.<sup>30</sup> It was an inherently superior arrangement. Representatives chosen for a two-year term from large districts would come from a pool of the ablest people, and would have enough time to gain the necessary political experience.<sup>31</sup> To a democratic anti-federalist, however, it was equally clear that this scheme played into the hands of the rich and the clever who would best be able to organize a large constituency, and who would forget all about their electors in the long two years away from home. The anti-federalists preferred a House of Representatives that was closer to, or more like, the people.<sup>32</sup>

Madison, on the other hand, wanted the best men to emerge from the electoral process. And the best men were likely to be educated and rich. In Madison's view, these few were more likely to be impartial, more able to rise above the medley of opinions. Wills is a bit upset by Madison's aristocratic stance, but he recognizes its confidence in at least the possibility of public probity. Madison's intentions were fully understood by his anti-federalist critics. Wills might be less surprised about *The Federalist* had he read their comments.

There is, in fact, a second theory of representation in *The Federalist*, a theory that shows why Hamilton's reputation as a less-than-ardent democrat is so fully deserved. Wills appears not to have understood *Federalist* 35 even though he occasionally quotes from it. Had he taken more trouble to analyze this paper, he might have gained a deeper understanding both of the quarrel between Publius and the anti-federalists and of the central issues of the period. Like Madison, Hamilton looked not to unaided public virtue but to the electoral process for superior representatives. But while Madison hoped for a House of Representatives that was an improved, but still genuine, portrait of the electorate, Hamilton rejected as "visionary" the idea that every class should be represented. Observing the behavior of voters in large states such as his own New York, he noted with relief that members of the lower orders did not identify with their own kind, but instead tended to support the most successful individuals

30. See *id.* No. 10 (J. Madison).

31. See *id.* Nos. 52-58 (J. Madison).

32. See Shklar, *Publius and the Science of the Past*, 86 *YALE L.J.* 1286, 1288-89 (1977).

in the economic or professional group to which they belonged. A shoemaker would vote for a successful large-scale bootmaker rather than for a potter who might be his social equal.<sup>33</sup> Hamilton's theory of representation was premised on a belief that people at the bottom trusted and would therefore elect those who, because of their industry and capacity, had risen to the upper reaches of their particular interest group.

According to Hamilton, there were three such interest groups in society: the agricultural, the manufacturing, and the commercial. Hamilton expected that, in order to reconcile these potentially incompatible groups, voters would also send members of the learned professions to the House. These men of character and talent—lawyers, presumably—would mediate among the landowners, the manufacturers, and the merchants. In addition, they would act as experts. It was impossible, for example, to write tax laws without a thorough knowledge of political economy.<sup>34</sup> It was essential, therefore, that the less instructed elect learned men to perform this and other tasks. Such men, in short, would represent the brains of America.

*Federalist* 35 demonstrates that Hamilton simply was not a democrat. His idea of the needs of the public reflected both his admiration for the wealthy and, more significantly, his enthusiasm for the new social sciences. Expertise, however, is not widely diffused through society, nor is it the same thing as Madison's disinterested public spirit. In the deferential order Hamilton envisioned, popular elections would yield a ruling class in which clever, modern economists and lawyers like himself would play a significant part. Although his scheme did not reject popular elections, it did resemble older, discarded notions about a virtual representation of stable interests.<sup>35</sup> *Federalist* 35 explains how Hamilton acquired his reputation and why he and Jefferson later came to stand for two parties of such differing principles. It may be well also to recall that it was Madison who organized the election for Jefferson. The Madison of Publius is not that later man, but he was no Hamilton at any time.

Many Americans reading Hamilton may well have wondered what the Revolution had been about if their relationship to their representatives was to be as remote as Hamilton hoped. To be sure, Madison's papers on the House of Representatives might have reassured them somewhat in this regard. But other aspects of the proposed Constitu-

33. THE FEDERALIST No. 35 (A. Hamilton).

34. *Id.*

35. Even Edmund Burke, the most vigorous defender of virtual representation, admitted that it must ultimately be grounded in the actual.

tion were troubling to Americans of a more democratic persuasion than Publius: a separation of powers designed to curb the legislature;<sup>36</sup> a Senate overtly called an upper house;<sup>37</sup> a powerful and “energetic” executive.<sup>38</sup> These were the concerns of the men against whom Publius wrote, whose opinions he wanted to challenge, and whom he tried to convert.

If Wills had placed Publius within this whole structure of controversy and had spent less time on remote influences, he might have presented us with a believable portrait of two remarkable men. Their characters, however virtuous, do not “explain America,” of course, but Wills at least might have shed some light on their intentions. Unfortunately, Wills attempts none of this. His book strains for originality, but is inconclusive and incoherent. Even those who treasure and believe in our national creation myth will not be satisfied.

36. See THE FEDERALIST Nos. 47, 48, 51 (J. Madison).

37. See *id.* Nos. 62, 63 (J. Madison); No. 64 (J. Jay); Nos. 65, 66 (A. Hamilton).

38. See *id.* Nos. 66-77 (A. Hamilton).

