The Constitutional Thought of the Anti-Federalists

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Although they claimed to be the true federalists and the true republicans, the men who opposed the Constitution's unconditional ratification in 1787-1788 were called Anti-Federalists. The leading opponents from the major states included Patrick Henry, George Mason, and Richard Henry Lee from Virginia, George Clinton, Robert Yates, and Melanchton Smith from New York, John Winthrop and Elbridge Gerry from Massachusetts and Robert Whitehill, William Findley, and John Smilie from Pennsylvania. They all agreed that the document produced by the Convention in Philadelphia was unacceptable without some amendments. Since most state constitutions contained bills of rights, the need for a similar feature for the national constitution formed the Anti-Federalists’ most effective argument against unconditional ratification. The national Bill of Rights is the result of that dialogue.

Nevertheless, the Anti-Federalists’ major contribution to the American founding lay more in their critical examination of the new form of federalism and the new form of republican government than in their successful campaign for a bill of rights. The Anti-Federalists sought substantial restrictions on federal power, which the amendments subsequently adopted did not provide. Suspicious of a strong national government, these opponents nevertheless failed to agree on an alternative constitutional arrangement. Still, the legacy of the Anti-Federalists persists in our constitutional debates over federalism and republican government.

Anti-Federal constitutionalism finds its most thoughtful and comprehensive expression in the Letters of the Federal Fan and the Essays of Brutus, attributed to Richard Henry Lee and Robert Yates, respectively. Although authorship remains uncertain, these writers covered all major constitutional questions in a manner that required, and received, the attention of "Publius," the penname adopted by Alexander Hamilton, James Madison, and John Jay, authors of the famous Federalist papers.

This essay will discuss Anti-Federal constitutionalism in three parts: federalism; the separation of powers; and the bill of rights.

Republican Government and Federalism The Anti-Federalists claimed to be the true federalists because they were the true republicans. Consequently, we begin with their account of republican government and its relation to federalism.

The Anti-Federalists believed that to maintain the spirit of republican government, which was the best defense against tyranny, individuals needed to know one another, be familiar with their governments, and have some direct experience in government. Only then would the citizenry possess a genuine love of country, which is the essence of republican, or civic, virtue.

The Anti-Federalists espoused the then traditional view of republican government, reflected in the first state constitutions, which emphasized the legislative branch of government. With the first federal constitution, the Articles of Confederation, the states, through their legislatures, retained effective control of federal men and federal measures. The delegates to Congress were chosen by the state legislatures and were subject to being recalled. The federal power to raise taxes and armies not only required a vote of nine states, but, even after such a vote, it
depended on state requisitions, which meant that the federal government depended on the
good will of the states to execute the law.

In stark contrast, the Constitution proposed by the Federal Convention in 1787 provided the
basis for a strong national government. Elections to the House of Representatives were by the
people directly, not the states, and the federal powers over taxes and the raising of armies
were completely independent of the state governments. This new form of federalism
necessarily produced a new form of republicanism, the "large republic." Furthermore, Publius
did not shrink from providing a positive argument in support of it." Federalist 10 justified the
new form of republicanism, not only as the price of union but as the republican remedy to the
disease of majority faction, or majority tyranny.

Because the Federalists saw a major danger not from the aggrandizing of the ruling few, but
from the tyranny of the majority, they sought to restrain the influence of that majority in
order to secure individual rights and the permanent and aggregate interests of the
community. Such restraint was to be achieved through a large extended sphere, i.e. the
constituencies of the federal government. These would be larger and more diverse than the
constituencies of the states, and so would make majority tyranny more difficult, since more
negociation and compromise would be needed for any single faction to become part of a
majority. In addition, the increased competition for office would produce better
representatives and a more effective administration throughout the government.

Perhaps because he took republican government for granted, as a given in America, Publius
understood it to require only that offices of government be filled directly or indirectly by
popular vote. Furthermore, the representation of the people was satisfied by the fact of
election, regardless of the contrast between the wealth and influence of the elected and the
electorate.

To the Anti-Federalists, the people would not be free for long if all they could do was vote for a
representative whom they would not know and who would be very different from them.

Because the Anti-Federalists emphasized participation in government, they argued that a
small territory and a basically homogeneous population were necessary for a notion of the
"public good" to be agreed upon. The Anti- Federalists did not insist that every citizen exercise
legislative power. But they did emphasize representation of the people in the legislatures and
on juries. By "representation" they meant that the number of people in a legislative district
must be small enough and the number of districts large enough so that the citizens will know
the people they are voting for and be able to elect one of their own-one of the "middling
class." This latter phrase referred to the large number of farmers of modest means. A
substantial representation of this agricultural middle class was possible even in the large
states and necessary for the character of the governors to reflect the governed. Under the
proposed constitution, argued the Anti-Federalists, this kind of representation would be
impossible at the federal level, where the districts would contain at least 30,000 people.

Likewise, by participating in local jury trials, in civil as well as criminal cases, the people in
their states acquired a knowledge of the laws and the operation of government, and thereby,
argued the Anti-Federalists, they become more responsible citizens. It was feared that this
responsibility would be lost when cases were appealed to the proposed national supreme
court, which had jurisdiction on appeal over all questions of law and fact.

Since the Anti-Federalists believed that republican government was possible in the states but
not in one single government for the entire country, only a confederacy, that is, a federal
republic, could safeguard the nation's freedom. They understood such a form of government
to have a limited purpose, primarily common defense. Hence, those who became Anti-
Federalists originally favored limited amendments to the Articles of Confederation, rather than
an entirely new constitution. When a new constitution became inevitable, they hoped to limit
the transfer of political power from the states to the national government. They claimed to be
the true republicans and the true federalists because they understood republican government to require a closely knit people attached to their government. They sought to grant only so much power to the federal government as was absolutely necessary to provide for defense. In this way, the distribution of governmental power, as between the nation and the states, would correspond to the distribution of representation. And while the Anti-Federalists did argue for an increase in the federal representation, that by itself would not have satisfied the requirement of republican government, as they saw it, since the people would always be more substantially represented in their state governments. According to the Anti-Federalists, the Federalists were not federalists but consolidationists; and the ultimate effect of the Constitution would be to reduce the states to mere administrative units, thereby eliminating republican liberty.

**Federalism and the Constitution: The Legislative Powers** Already fearful of the Constitution's threat to republican liberty, the Anti-Federalists vehemently objected to the large number of specific powers granted to Congress, especially the taxing power and the power to raise armies. They found the undefined grants of power in the "necessary and proper" and the "supremacy" clauses (1, 8, 18 and VI, 2) alarming as well. The government, Brutus claimed, "so far as it extends, is a complete one, and not a confederation," and "all that is reserved to the states must very soon be annihiliated, except so far as they are barely necessary to the organization of the general government." With the power to tax virtually unchecked, Brutus lamented that "the idea of confederation is totally lost, and that of one entire republic is embraced." The Anti-Federalists attempted to draw a line between federal and state powers, conceding to the federal government only those powers which were necessary for security and defense. Their most common tax proposal would have limited the federal government to a tax on foreign imports, leaving internal taxes, both on individuals and on commodities, to the states. This limitation would guarantee the states a source of revenue out of reach of the national government. If this federal tax source proved insufficient, the Anti-Federalists proposed turning to the states for requisitions, as was the case under the Articles of Confederation.

Brutus warned, as well, that the power "to raise and support armies at pleasure... tend[s] not only to a consolidation of the government, but the destruction of liberty." The Anti-Federalists generally took the position that there should be no standing armies in time of peace. Brutus proposed a limited power to raise armies to defend frontier posts and guard arsenals to respond to threats of attack or invasion. Otherwise, he maintained, standing armies should only be raised on the vote of two-thirds of both houses.

Publius' rejection of this position was complete and uncompromising. The "radical vice" of the Confederation had been precisely the dependence of the federal power on the states. The universal axiom that the means must be proportional to the end required that the national government's powers be adequate to the preservation of the union. (Federalist 15, 23)

**The Separation of Powers and Republican Government** The separation of powers refers primarily to the division of power among the legislative, executive, and judicial branches of government, but it also includes bicameralism, or the division of the legislature into a house of representatives and a senate. In this part, we begin with the Anti-Federalists' general approach to the separation of powers, which will be followed by accounts of their views on the senate, the presidency, and the judiciary.

The Anti-Federalists attacked the Constitution's separation of powers from two different perspectives. Some, such as Centinel (a Pennsylvania Anti-Federalist), alleged that there was too much mixing and not enough separation; others, like Patrick Henry and the Maryland Farmer, asserted that there were no genuine "checks" at all. The first position opposed the special powers given to the senate and the executive. The second argued that a true separation of powers depended upon social divisions not available in the United States, such
as an hereditary nobility as distinct from the common people. The English Constitution drew on such divisions; social class checked social class in a bicameral legislature, and each was checked, in turn, by an hereditary monarch. While the Federalists celebrated the filling of all offices by election directly or indirectly, some Anti-Federalists, including Patrick Henry, argued that such elections would result in the domination of the natural, or elected, aristocracy in all branches of government, not a true "checks and balances" system.

The Senate The Anti-Federalists feared that an aristocracy would emerge from the senate, taking more than its share of power. A small number of individuals, elected by the state legislatures for six years, and eligible for reelection, shared in the appointment and treaty-making powers with the executive, as well as in the law-making process with the house of representatives. In order to prevent senators from becoming an entrenched aristocracy, the Anti-Federalists favored an amendment requiring rotation in office and permitting recall votes by the state legislatures. They also favored a separately elected executive council, which would have relieved the senate of its share in the appointment power. None of these proposals was adopted.

The Executive Anti-Federal opposition to the office of president was surprisingly limited. While Patrick Henry asserted that the constitution "squints toward monarchy," most of the Anti-Federalists accepted the unitary office and the "electoral college" mode of election. The eligibility of the president to run repeatedly for office, however, did provoke substantial opposition, as did the absence of a special executive council, which would have shared the appointment power. Whereas Publius had argued that re-eligibility provides a constructive use for ambition, Federal Farmer replied that once elected a man will spend all his time and exercise all his influence to stay in office. The executive council would have weakened the power of the Senate, which concerned the Anti-Federalists even more than the president's power.

No Anti-Federalist expressed concern about the general phrase "the executive power," perhaps because it was unclear whether this was a grant of power or merely the name of the office. Some questioned the "commander-in-chief" clause, the pardoning power, and the authority to call either of both houses into special session. But in light of the difficulties of governing without an independent executive, which the country experienced under the Articles of Confederation, and the common expectation that George Washington would become the first president, the Anti-Federalists let their objections go.

The Judiciary While many Anti-Federalists failed to discuss it, Brutus' account of the judicial power anticipated the full development of judicial review as well as the importance of the judicial branch as a vehicle for the development of the federal government's powers, both of which he opposed. By extending the judicial power "to all cases, in. law and equity, arising under this Constitution," Article III permitted the courts "to give the constitution a legal construction." Moreover, extending the judicial power to equity as well as law (a division made originally in English law) gave the courts power "to explain the constitution according to the reasoning spirit of it, without being confined to the words or letter." Hence, Brutus concluded that "the real effect of this system will therefore be brought home to the feelings of the people through the medium of the judicial power."

Under the judicial power, the courts would be able to expand powers of the legislature and interpret laws in a way Congress did not intend. Brutus interpreted the grant of judicial power to all cases arising under the Constitution as a grant of "judicial review." He opposed this grant, because he thought the judges, who were appointed for-life, should leave it to Congress to interpret the constitutional reach of its powers. That way, if Congress mis interpreted the
Constitution by overextending its powers, the people could repair the damages at the next election. Brutus approved of the framers' decision, following the English Constitution, to make the judges independent by providing them with a lifetime appointment, subject to impeachment, and fixed salaries. But he pointed out that the English judges were nonetheless subject to revision by the House of Lords, on appeal, and to revision, in their interpretation of the constitution, by Parliament. Extending the judicial power to the American Constitution meant that there would be no appeal beyond the independent non-elected judiciary. Brutus did not think that impeachment for high crimes and misdemeanors would become an effective check, and while he did not mention it, he doubtless would have regarded the amendment process also as unsatisfactory.

Anti-Federalists including Brutus objected as well to the extensive appellate jurisdiction of the supreme court. Article III section 2 may have guaranteed a jury trial in criminal cases, but on appeal, the fate of the defendant would be up to the judges. The Anti-Federalists wanted to have the right of jury trials extended to civil cases and to have the results protected against appellate reconsideration.

Finally, Brutus objected to the "Madisonian compromise," which authorized, but did not require, Congress to "ordain and establish" lower courts. Except for the limited grant of original jurisdiction in the supreme court, judicial power, the Anti-Federalists argued, should have been left to originate in the state courts.

The Bill of Rights

The Anti-Federalists are best known for the Bill of Rights, since the Constitution would not have been ratified without the promise to add it. But the Bill of Rights was as much a Federalist as an Anti-Federalist achievement. The Anti-Federalists wanted a bill of rights to curb the power of the national government to intrude upon state power; the Bill of Rights, as adopted, did not address this question. Instead, it limited the right of government to interfere with individuals, and, as such, included provisions similar to those in the bills of rights in many of the state constitutions.

When the Federalists denied the necessity of a federal bill of rights, on the grounds that whatever power was not enumerated could not be claimed, the Anti-Federalists pointed to the Constitution's supremacy and to the extensiveness of the enumerated powers to argue that there were no effective limitations on federal authority with respect to the states. None of the actual amendments, which were written up and guided through the House by Madison, followed the Anti-Federal proposals to restrict federal powers, especially the tax and war powers. As for what became the tenth amendment, Madison himself said that it simply clarified the existing enumeration of powers but changed nothing. Furthermore, when an Anti-Federalist tried to get the adverb "expressly" inserted before "delegated" in the amendment- "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people"-his motion failed by a substantive margin.

The Anti-Federalists' demand for a bill of rights derived from their understanding of republican government. Such a form of government was mild in its operation and a public proclamation of their rights kept the people aware of them. Consequently, the Bill of Rights, even in its Federalist form, reflects Anti-Federal constitutionalism. But the amendments did not restrict the major federal powers, over taxes, commerce, and war, or in any way limit implied powers. Furthermore, as Jefferson noted, in a letter he wrote to Madison in 1789, by emphasizing individual rights, the Bill of Rights put a legal check in the hands of the judiciary. In other words, before he opposed the power of judicial review, Jefferson seemed to take its existence for granted. He argued that writing a bill of rights into the Constitution would provide judicial protection of those rights. Neither Jefferson nor the Anti-Federalists seemed to realize how a federal bill of rights, by strengthening the federal courts, would thus serve to strengthen Federalist constitutionalism.
Conclusion The Anti-Federalists lost the ratification debate because they failed to present a clear and convincing account of a constitutional plan that stood between the Articles of Confederation, which they acknowledged was unable to provide for the requirements of union, and the Constitution proposed by the Federal Convention, which they feared would produce a consolidation of power. And yet the periodic and contemporary constitutional debates over federalism, over the extent of legislative and executive power, and over individual rights and judicial review reflect the different conceptions of republican government that were developed in the founding dialogue over the Constitution.

Any strict construction of federal power has much in common with Anti-Federalist constitutionalism. During the founding debate, opponents of a strong national government wanted to amend the Constitution; after ratification, Anti-Federalists had no choice but to interpret the Constitution to require limited federal government. The contemporary controversies over abortion, pornography, and sexual practices among consenting adults, and the issues surrounding the religion clauses of the First Amendment reveal disagreements over the scope of individual rights, on the one hand, and the legitimacy of government maintenance of community manners and morals on the other. These controversies resemble the founding debate over republican licanism, where the Federalists focused on the security of individual rights and the Anti-Federalists expressed a greater concern for the character of republican citizenship, maintained in part through religion. Through such debates, Anti-Federal constitutionalism, as applied to governmental structure and to moral qualities necessary for free government, thus remains an important part of our constitutional polity.

Suggested Additional Readings: Herbert J. Storing, What the Anti-Federalists were For (1981).

Herbert J. Storing (with Murray Dy), The Anti-Federalist (1985).
