and their contributions, as "junior partners," to the new constitutional order. David F. Epstein, who is also a political scientist, views matters in a different way, finding much to praise in the Federalists' constitutional theory and practical politics.

The Anti-Federalists and the American Constitutional Tradition

MURRAY DRY

Until recently, little attention has been paid to the political thought of the Anti-Federalists. They were the losers in the debate over the ratification of the United States Constitution; their name, which the victorious Federalists successfully imposed upon them, gives no indication of what they stood for; and many of their major writers, who wrote under pseudonyms, have not been identified for certain.

With the publication of Herbert J. Storing's *The Complete Anti-Federalist,* it is now possible to consider the contribution of the opponents of the Constitution to American political life. We have full and accurate texts of all Anti-Federal pamphlets and all substantial newspaper essays, complete with introductory sketches and extensive cross references and annotation to the major Federalist writings, and we have Storing's own masterful account of their thought, in an essay entitled, *What the Anti-Federalists Were For.* Storing was the first to argue that the Anti-Federalists, because they played "an indispensable if subordinate part in the founding process, . . . are entitled . . . to be counted among the Founding Fathers."

The argument of this essay, while in agreement with Storing, focuses on the constitutionalism of the Anti-Federalists. It is my contention that the Anti-Federalists deserve to be considered "junior partners" in the Founding not only because their view of republican government made them thoughtful critics of the Constitution, but also because their constitutionalism survived ratification. In this essay I will elaborate on that contention by focusing on the major Anti-Federalist arguments against the Constitution and their major alternative proposals.

I. Points of Departure

By points of departure, I refer, first, to the posture taken by the Anti-Federalists toward the ratification of the proposed Constitution and, second, to their views on the fundamental principles of government. On the first point, some were candid about the need for change, while others were cautious, even defensive, about the existing constitution. On the second point, there was general agreement with the Federalists on fundamental principles but disagreement on the relative emphasis of liberty and government authority.

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The authors of the most extensive and most thoughtful essays written in opposition to the Constitution, Brutus and The Federal Farmer, both acknowledged the inadequacy of the existing Articles of Confederation and agreed that 1787 was a critical moment in American history. "I know our situation is critical, and it behooves us to make the best of it," The Federal Farmer writes in his first letter, although he also urges deliberation and thinks that there is time for a considered judgment. Later, in the first of his *Additional Letters,* he writes that "the opposers, as well as the advocates of [the Constitution] confirm me in my opinion, that the system affords, all circumstances considered, a better basis to build upon than the confederation." Brutus opens his first letter with a reference to the people's never having seen "so critical a period in their political concerns," which he attributes to "the feebleness of the ties by which these United States are held together, and the want of sufficient energy in our present confederation, to manage, in some instances, our general concerns."

Other Anti-Federalists expressed decided reservations or opposition. Agrippa, emphasizing the tranquility of the times, urged a recommitment to a second Convention or to the Congress for necessary amendments. Impartial Examiner warned the people that "a wise nation will . . . attempt innovations of this kind with great circumspection." Centinel decried the influence of "the authority of names" in favor of the Constitution and the advocates' openness to innovation. And Patrick Henry, in his first speech in the Virginia ratification convention, argued that the danger did not come from the times but from the work of the Federal Convention: "If our situation be thus uneasy, whence has arisen this fearful jeopardy? It arises from this fatal system—it arises from this proposal to change our government:—a proposal that goes to the utter annihilation of the most solemn engagements of the States."

On the principles of government, Brutus' account of natural right and consent follows the Declaration of Independence and reveals a fundamental agreement between the Federalists and the Anti-Federalists. But Brutus also warns his readers that "when the people once part with power, they can seldom or never resume it again but by force." For a sharper version of the distinctive Anti-Federal approach to the principles of government, consider Patrick Henry's indictment of America for its willingness to consider a strong government. "When the American spirit was in its youth, the language of America was different; Liberty, Sir, was then the primary object." And, later, in the same speech: "The first thing I have at heart is American *liberty;* the second is American Union."

Henry did not oppose union, but his emphasis on liberty implied that union was dispensable. Impartial Examiner's concluding statement presented the more common Anti-Federal position. "No contention . . . subsists about supporting a *union,* but only concerning the mode; and as well those, who disapprove of the proposed plan, as those, who approve of it, consider the existence of a union as essential to their happiness."

II. Federalism and the Constitution

The last two statements reveal the Anti-Federal dilemma: they were for union and they recognized the need to strengthen the Articles of Confederation, but, in the name of liberty, they opposed the establishment of a full government for the union. As they understood it, republican liberty required a federal republic, which meant an association of small republics for certain limited purposes, mainly defense. Montesquieu's *Spirit of the Laws* was their authority on the subject. Brutus quotes one passage: "It is natural to a republic to have only a small territory, otherwise it cannot long subsist." Melancton Smith paraphrases another: "a confederated republic has all the internal advantages of a Republic, with the external force of a Monarchical Government." Such a position was widely held by the Anti-Federalists. For that reason, The Federal Farmer describes the Constitution as "appear[ing] to be a plan retaining some federal features; but to be the first important step, and to aim strongly to one consolidated government of the United States."

Consequently, Melancton Smith argued that the opponents of the Constitution "were the true Federalists, and those who advocated it Anti-Federalists." Impartial Examiner explained how they got stuck "with the epithet of anti-foederal."

> The strong desire, which has been manifested, for a union between the American states, since the revolution, affords an opportunity of making the distinction, as they imagine, to their advantage.—As *foederalists,* in their opinion, they must be deemed friendly to the *union:*—as *anti-foederal,* the opposers must, in their opinion too, be considered unfriendly. Thus on the sound of names they build their fame.

He goes on to say that the advocates are not acting on "true *foederal* principles," because the "new code" places "all sovereignty . . . in the hands of Congress," while the true federalists "desire a continuance of each distinct sovereignty" along with "such a degree of energy in the general government, as will cement the union in the strongest manner."

At the outset, then; we are faced with a terminological question—which side had the better claim to the title "federalist"? It is a question which, for once, is more than merely terminological.

The Terminological Issue. During the confederation period, the terms *federal* and *anti-federal* referred to a willingness or unwillingness to support the instrumentality of the federation, the general government under the Articles of Confederation. The essential elements of that federal form were: (1) state equality in voting in Congress and state control, via financial support, annual elections, rotation and recall, of its congressional delegation; (2) strict construction of the powers granted to the Congress, with a nine-state requirement for approval of major matters; and (3) reliance on state requisitions for the raising of armies and money. The states were clearly the primary political units, and this was considered a strong federal system.

The origin of the terminological confusion lay in the speeches and deeds

of the Framers of the new Constitution. The Federal Convention met in Philadelphia from May to September 1787; the states had petitioned Congress for such a meeting, and the Congressional Resolution of February 21, 1787, authorized a convention

> for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alternatives and provisions therein, as shall, when agreed to in Congress and confirmed by the states render the federal government adequate to the exigencies of government & the preservation of the Union.

To begin with the deeds, the Federal Convention drafted an entirely new Constitution and then transmitted it to Congress to be sent on to the states for their consideration in separate ratification conventions. The Convention did not ask Congress to approve the Constitution, but merely to send it on to the states for their approbation, with the ratification of nine states, through specially elected conventions, sufficient to bring the Constitution into being. This bypassed the thirteenth article of the existing constitution, according to which amendments required the unanimous consent of the thirteen states, through their legislatures. The Anti-Federalists objected to the legality of the ratification process for this reason.

To understand the effect of the newly proposed Constitution on the federalism issue, we need to consider certain proposals and speeches at the outset of the Federal Convention and others that took place in the debate over congressional apportionment. The Virginia Plan, written by James Madison and supported by the avowed nationalists, proposed separate and independent executive and judicial branches of government, a nationally proportioned bicameral legislature, with the lower house elected by the people. The legislature was to be given a general grant of legislative power and a national negative on state laws conflicting with the articles of union. Arguing in support of the proposition that a union "merely federal" would not accomplish the objects proposed and that a national government was necessary, Gouverneur Morris "explained the difference between a *federal* and *national, supreme* Govt.; the former being a mere compact resting on the good faith of the parties; the latter having a compleat and *compulsive* operation." George Mason said virtually the same thing, and then Madison observed "that whatever reason might have existed for the equality of suffrage when the Union was a federal one among sovereign States, it must cease when a national Govérnt. should be put into the place." From what Madison goes on to say about the extra-legal influence of the large states under the Articles, since they are responsible for raising their own quotas of men and money, it is clear that a federal system was characterized by requisitions, or voluntary compliance by the states, and a national government was characterized by the coercion of law, acting directly on individuals.

This distinction was clear and uncontested until the Convention voted to have the State legislatures elect the senate and then turned to the rule of apportionment for that body. Oliver Ellsworth and other members of the Connecticut delegation defended equality of representation in the Senate by

arguing that "we were partly national; partly federal." State equality in the Senate permitted the supporters of the Constitution to retain the term, "federal," for a new form of government. This can be seen by comparing Madison's response to the "partly national; partly federal" argument in the Convention with his own use of that argument in *The Federalist* and in the Virginia ratification convention. In the former place, he contested the partly federal description—he was arguing against equality of representation in the Senate—by claiming that the mode of operation, on individuals not states, was the sole criterion and it was entirely national. But in *Federalist* No. 39, where he could now use what he was forced to accept in defense of the Constitution, Madison introduced four other criteria for determining the character of the Constitution—mode of ratification, source of authority (which he identified with the electing agent), extent of powers, and mode of amendment—and he interpreted each of these as reflecting the federal principle to the extent that the states were recognized in the constitutional structure.

Thus, the meaning of "federal" underwent a transformation, partly, as Tocqueville put it later, because a new thing was created for which there was no new word, and partly because the supporters of the constitution could not afford to concede the "federalist" title to their opponents. Storing has pointed out that a "larceny" charge against the Federalists is overstated, since during the Confederation period "federal" referred to men and measures supportive of the government of the union. On the other hand, Storing indicates that the federal *authority* could be strengthened in such a way that the federal *principle,* requisitions, was discarded. This is what the Framers of the Constitution, and then the supporters who called themselves the Federalists, did, and with their success, a new form of federalism arose.

The Anti-Federalist position was complicated by their conceding the necessity of strengthening the Articles of Confederation. At the same time, it must be noted that those favoring modest changes were not in the forefront of the reform movement. The Federal Convention had already discussed the Virginia Plan for two weeks when William Paterson proposed the New Jersey Plan, which included a limited tax power for Congress and a plural executive, but generally stayed with the Articles of Confederation. However, the limited tax power for Congress revealed a need to go beyond the federal principle, strictly speaking.

This concession meant that the Anti-Federalists' understanding of federalism, as well as that of the Federalists, underwent a transformation. The best example comes from the "Letters of The Federal Farmer." In his first letter, The Farmer describes three plans, which he calls federal, consolidation, and partial consolidation: (1) "distinct republics connected under a federal head," or a system similar to the Articles; (2) "do away with the several state governments, and form or consolidate all the states into one entire government"; and (3) "consolidate the states as to certain national objects, and leave them severally distinct independent republics, as to internal police generally." "Touching the first, or federal plan," The Farmer says, "I do not think much can be said in its favor." He supports the third

plan and charges that the Constitution will eventually produce a complete consolidation. But in the first of his *Additional Letters,* The Farmer, when he describes the parties to the contest over the Constitution, calls the third or middle ground position, federalism.

> Some of the advocates are only pretended federalists; in fact they wish for an abolition of the state governments. Some of them I believe to be honest federalists, who wish to preserve *substantially* the state governments united under an efficient federal head; and many of them are blind tools without any object. Some of the opposers also are only pretended federalists, who want no federal government, or one merely advisory. Some of them are the true federalists, their object, perhaps, more clearly seen, is the same with that of the honest federalists; and some of them, probably, have no distinct object.

Then, in his last discussion of federalism, in his seventeenth letter, The Federal Farmer returns to the distinction between consolidated government and a federal, or confederal, republic, without any reference to those who only want an advisory federal government. In a federal government, "the state governments are the basis, the pillar on which the federal head is based," and this means that men and money are raised by requisitions and the states organize and train the militia.

So, while the Federalists were taking great liberties with federalism, by calling the Constitution partly federal and partly national, even the Anti-Federalists were moving away from pure federalism. To learn more about the "new federalism," both as presented by the Constitution and as presented by the Anti-Federalists, we need to turn to the specific arguments making up the opponents' consolidation charge.

The Constitution as a Consolidated Government. The federalism issue involves the relationship between the states and the union. The Anti-Federalists argued for the primacy, or at least the equality, of the states as against the general government. We shall consider the Anti-Federal arguments about the Preamble, the enumeration of legislative powers, and the construction of the Senate.

The Preamble to the Constitution begins with "We the People of the United States," and it refers to six reasons for ordaining and establishing the Constitution: "in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity." The preamble to the Articles of Confederation referred to the delegates of the United States of America in Congress assembled, named each of the states, and was followed by an article asserting that each state retains every power "not expressly delegated." This is why Patrick Henry pounced on the Preamble to the Constitution:

> My political curiosity, exclusive of my anxious solicitude for the public welfare, leads me to ask, Who authorized them to speak the language of, *We the people,* instead of *We the states?* States are the characteristics and

the soul of a confederation. If the states be not the agents of this compact, it must be one great consolidated national government.

Brutus made the same point in more sober, constitutional terms. "If the end of government is to be learned from these words, which are clearly designed to declare it, it is obvious it has in view every object which is embraced by any government." The reference to a more perfect union suggested that "it is not an union of states or bodies corporate. . . . But it is a union of the people of the United States considered as one body, who are to ratify this constitution, if it is adopted."

Madison's remarks, in the Federal Convention, about the importance of popular ratification for establishing the supremacy of the Constitution, especially over subsequently passed state laws, lend support to the Anti-Federal argument about the preamble; it suggests a government for the people of the United States as a whole, without reference to the several states, that is, a consolidated government rather than a federal system. To consider the consolidation charge fully, however, it is necessary to turn to the enumeration of powers.

The major powers include taxing and spending for the general welfare, borrowing money, regulating commerce, declaring war, and raising and supporting armies and providing for a navy. In addition, the last clause of Article I, section 8 authorizes Congress "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

To Brutus, the necessary and proper clause, the enumerated powers, and the supremacy clause of Article VI add up to a national government of substantial powers.

> It appears from these articles that there is no need of any intervention of the state governments, between the Congress and the people, to execute any one power vested in the general government, and that the constitution and the laws of every state are nullified and declared void, so far as they are or shall be inconsistent with this constitution, or the laws made in pursuance of it, or with treaties made under the authority of the United States.—The government then, so far as it extends, is a complete one, and not a confederation. . . . It is true this government is limited to certain objects, or to speak more properly, some degree of power is left to the states, but a little attention to the powers vested in the general government, will convince every candid man, that if it is capable of being executed, all that is reserved for the individual states must very soon be annihilated, except so far as they are barely necessary to the organization of the general government.

The Anti-Federalist approach to the powers of government was to draw a line between federal and state powers, whereby only those powers which were necessary for security and defense would be assigned to the government of the union. Roger Sherman took this position in the Federal Convention, the day after the compromise on apportionment was approved. Sherman,

who signed the Constitution and supported it, proposed that the legislature have the power to make laws in all cases concerning the common interests, "but not to interfere with [the Government of the individual States in any matters of internal police which respect the Govt. of such States only, and wherein the General] welfare of the U. States is not concerned."

Sherman never tried to spell out what this might look like, and, as James Monroe wrote in 1788, the task was not easy. "To mark the precise point at which the Powers of the general government shall cease, and that from whence those of the states shall commence, to poise them in such manner as to prevent either destroying the other, will require the utmost force of human wisdom and ingenuity." The Federal Farmer attempted such a delineation:

> Those respecting external, as all foreign concerns, commerce, imposts, all causes arising on the seas, peace and war, and Indian affairs, can be lodged in no where else, with any propriety, but in this government. Many powers that respect internal objects ought clearly to be lodged in it; as those to regulate trade between the states, weights and measures, the coin or current monies, post offices, naturalization, etc. These powers may be exercised without essentially effecting [sic] the internal policy of the respective states: But powers to lay and collect internal taxes, to form the militia, to make bankrupt laws, and to decide on appeals, questions arising on the internal laws of the respective states, are of a very serious nature, and carry with them almost all other powers.

The most important applications of the line-drawing approach involved the powers to tax, to raise and support armies, and to borrow money. The most common tax proposal was to limit the federal government to an impost, a tax on foreign imports, leaving internal taxes, both those on individuals and those on commodities, to the states. This would guarantee the states a source of revenue, which was important since the Anti-Federalists feared that any concurrent tax power might lead to federal preemption of the sources of taxation; it would also eliminate the need for numerous federal assessors and collectors and federal ordinances that would interfere with state laws. One specific proposal, which came out of the Massachusetts ratification convention, was that Congress could not lay direct taxes, but, if the impost did not provide sufficient funds, it could seek additional money from the states via requisitions.

As for the power to raise armies, there was substantial support for the proposition 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 raise troops in peacetime, in anticipation of an attack or invasion, should require a two-thirds vote of both houses. Likewise, The Federal Farmer first proposed that a two-thirds or three-fourths majority be required in Congress, until the representation increased; then, in his last letter, he proposed the principle of requisitions for raising armies, with the states retaining a right to refuse, and, in addition, that land forces could not be maintained for more than a year without congressional approval.

Brutus also objected to the unlimited power to borrow money. Anticipating the debate over the assumption of state debts, he argued that "by this means [Congress] may create a national debt, so large, as to exceed the ability of the country ever to sink." He proposed that the power should be restricted to "the most urgent occasions, and then we should not borrow of foreigners if we could possibly help it."

The Anti-Federalists also objected to the provisions relating to the militia and the regulations of elections under the time, place and manner clause. Luther Martin was concerned about a state's being deprived of all of its militia; he wanted a percentage limit on the number that could be sent out of the state; The Federal Farmer was concerned about the development of a "select militia," which he regarded as inconsistent with republican government. Brutus thought that under the time, place and manner clause, the "right of election would be transferred from the people to their rulers." He argued that Congress might not permit districting for the election of the representatives. It was, interestingly, the same kind of concern, as applied to state action or inaction, which led the Federal Convention to grant Congress supervisory authority over elections.

The other major objections to the powers of government were sectional, and hence did not constitute a common Anti-Federalist position. In the North, objection was raised to counting slaves in the apportionment; in the South, objection was raised to the limit on slave importation and to the absence of special protection against tariffs (the Federal Convention rejected a proposal to require a two-thirds majority in both houses to pass navigation laws). In addition, Anti-Federalists in the Virginia convention expressed concern that the new government might negotiate away navigation rights on the Mississippi.

Turning now to the construction of the Senate, the Anti-Federalists were handicapped by the decision of the Convention, over the strenuous objection of the nationalists, to have state equality as well as election by the state legislatures. Brutus approved of equal representation, noting that it would have been inappropriate for a consolidation but was appropriate for a confederation. The Federal Farmer noted that the senators voted individually, rather than by state delegation, in a true federal manner, but he did not object. But Impartial Examiner, after contrasting the truly federal scheme of the Articles with the proposed Senate, concluded that the Senate was part of the general government, which would "participate in the sovereignty of America. Thus circumstanced, they will know not any authority superior to that, whereof they themselves possess a part." Therefore, he thought senators should be chosen by the people. He made no comment about the apportionment. Brutus, The Federal Farmer, and Smith, ignoring the point made by Impartial Examiner, went on to recommend rotation and recall and a shorter term for the Senate.

The Senate became the agency of the state governments in the federal government, and that body was also given important foreign affairs powers. This unlikely combination of traits gave rise to the following exchange in the New York convention. After Gilbert Livingston moved an amendment requiring rotation and recall, Robert Lansing, a member of the Federal Convention, who opposed the Constitution, argued in support of the motion, saying "if it was the design of the plan to make the Senate a kind of bulwark to the independence of the states; and a check to the encroachments of the general government, certainly the members of this body ought to be particularly under the control, and in strict subordination to the state who delegated them." Robert Livingston, in reply, said: "The Senate are indeed designed to represent the state governments; but they are also the representatives of the United States, and are not to consult the interest of any one state alone, but that of the Union."

III. The Anti-Federalists and Republican Government

The Anti-Federalist arguments about federalism were based, ultimately, on their understanding of republican government. In this part, we shall begin with the Anti-Federalists' general conception of republican government. Then we shall consider the two most significant constitutional contexts within which this topic was discussed: representation in the legislature and the nature of the senate and the executive branch of government.

The General Characteristics of Republican Government. For the Anti-Federalists, republican government is small in size, simple in structure, and operates with minimal coercion. On the size question, Brutus quotes from Montesquieu to the effect that "it is natural to a republic to have only a small territory," because otherwise there is an insufficient moderation of fortunes and, consequently, "the public good is sacrificed to a thousand views." Centinel advocates a unicameral legislature and legislative supremacy as examples of a simple structure. The Federal Farmer emphasizes representation and trial by jury as two essential means of assuring this mildness. For Brutus, the character of republican government precludes reliance on standing armies; one relies, instead, on "the confidence, respect, and affection of the people," and this arises from "their knowing their [rulers], from [the rulers'] being responsible to them for their conduct, and from the power they have of displacing them when they misbehave." In contrast to the Federalists, and especially to the argument of *Federalist* No. 10 and No. 51, the Anti-Federalists emphasize the attachment of the people to their country, which Montesquieu defined as virtue, i.e., political virtue. They are more concerned with this quality than they are with mechanisms aimed at restraining majority tyranny. A further illustration comes from Mercy Warren, a historian of the period who identified with the Anti-Federalists; she wrote the following in 1805:

> Nothing seemed to be wanting to the United States but a continuance of their union and virtue. It was their interest to cherish true, genuine republican virtue, in politics; and in religion, a strict adherence to a sublime code of morals, which has never been equalled by the sages of ancient time, nor can ever be abolished by the sophistical reasonings of modern philosophers.

The Anti-Federalists did not follow this public-spirited, even austere, conception of republican government without qualification, however. First, they too held to the principles of natural rights, according to which individual claims took precedence over duties. Second, several of the states were already too large for the republican form, strictly understood. Hence, they were forced to present their arguments about republican government in terms of representation, even though it may be incompatible with republican government in the strict sense. Montesquieu, who is most frequently quoted on republics, did not bring up representation in connection with the old, frugal, "small" republics; only when he discussed England, which he called a "republic disguised under the form of monarchy," did representation become prominent. Of the Anti-Federalists, only A Maryland Farmer, discussed below, takes this radical position on representation and republican government.

Representation, Aristocracy and Democracy. The first Congress was expected to have sixty-five representatives and twenty-six senators, with an increase following a census in 1790. The Anti-Federalist position was that even after the increase, and any subsequent increases, representation in the federal government was inadequate, that it was substantial in the state governments, and that therefore the powers of government should remain more evenly divided between the states and the nation. Here are two prominent examples of the Anti-Federal position on representation, from Brutus and The Federal Farmer, respectively.

> The very term, representative, implies, that the person or body chosen for this purpose, should resemble those who appoint them—a representation of the people of America, if it be a true one, must be like the people. It ought to be so constituted, that a person, who is a stranger to the country, might be able to form a just idea of their character, by knowing that of their representatives. They are the sign—the people the thing signified. . . . It must have been intended, that those who are placed instead of the people, should possess their sentiments and feelings, and be governed by their interests, or, in other words, should bear the strongest resemblance of those in whose room they are substituted.
>
> A full and equal representation, is that which possesses the same interests, feelings, opinions, and views the people themselves would were they all assembled—a fair representation therefore, should be so regulated, that every order of men, merchants, traders, farmers, mechanics, etc. to bring a just proportion of their best informed men respectively into the legislature, the representation must be considerably numerous.

In one sense, the first statement reflects no disagreement with the Federalists. In the Federal Convention, when the nationalists were arguing the importance of a direct popular election for the lower house, James Wilson said that "the legislature ought to be the most exact transcript of the whole Society. Representation is made necessary only because it is impossible for the people to act collectively." But, according to The Federal Farmer, election did not by itself guarantee an adequate representation. He praised the proposed government for being "founded on elective principles," but added that everything valuable "in this system is vastly lessened for the want of that one important feature in a free government, a representation of the people."

The Federalists had the advantage of defending a system which was thoroughly based on the elective principle; their argument equated representation with election. The Anti-Federalists were forced into a discussion of classes or orders in society in order to prove that election was not a sufficient condition for true representation. We shall examine the accounts of The Federal Farmer, Melancton Smith, and A Maryland Farmer on this subject.

After distinguishing a constitutional from a natural aristocracy, and remarking that a constitutional aristocracy does not exist "in our common acceptation of the term," The Federal Farmer presents this account of natural aristocracy and natural democracy.

> In my idea of our natural aristocracy in the United States, I include about four or five thousand men; and among those I reckon those who have been placed in the offices of governors, of members of Congress, and state senators generally, in the principal officers of Congress, of the army and militia, the superior judges, the most eminent professional men &. and men of large property.—the other persons and orders in the community form the natural democracy; this includes in general the yeomanry, the subordinate officers, civil and military, the fishermen, mechanics, and traders, many of the merchants and professional men.

The men in the first class "associate more extensively, have a high sense of honor, possess abilities, ambition, and general knowledge"; the men in the second class

> are not so much used to combining great objects . . . possess less ambition, and a larger share of honesty: their dependence is principally on middling and small estates, industrious pursuits, and hard labour, while that of the former is principally on the emoluments of large estates, and of the chief offices of government.

The Federal Farmer wanted "the two great parties" to be "balanced" and the only way to do that, he thought, was to balance the powers of the state and federal governments. This is because, and here I direct his argument to Madison's in *Federalist* No. 10, the very operation of the extended sphere, which is heralded as moderating the effect of the majority principle and refining the representation, produces an aristocratic representation, that is, a concentration of the most able, ambitious, and wealthy, as opposed to the frugal, industrious and modest democracy.

Melancton Smith described the natural aristocracy in the country similarly in the New York ratification convention. On his formulation, however, there were three classes—the aristocracy, the middling class, and the poor. He favored the representation of the middling class, or the "respectable yeomanry," on the grounds that

when the interest of this part of the community is pursued, the public good is pursued. . . . No burden can be laid on the poor, but what will sensibly affect the middling class. Any law rendering property insecure, would be injurious to them. When therefore this class in society pursue their own interest, they promote that of the public, for it is involved in it.

In light of the differences between the aristocracy and the democracy, as The Federal Farmer describes them, Smith may be going too far here, since his middling class resembles The Farmer's natural democracy, but he can claim that his argument does not require a perfect reflection of the entire society, and therefore is not inconsistent with the elective principle. The middling class is likely to be more substantially represented in the several state legislatures than in Congress. Once again, this is the obverse of Madison's *Federalist* No. 10 argument.

While A Maryland Farmer's account of the classes is more elaborate than the other two, his division between aristocracy and democracy is similar. But he predicts that the aristocratic class "is nearly at the height of their power," and that "they must decline or moderate, or another revolution will ensue." And representation is rejected out of hand: "Where representation has been admitted to a component part of government, it has always proved defective, if not destructive."

The Anti-Federalist argument about representation and republican government, therefore, stands between the Federalist position, which requires no more than the elective principle, and the traditional definition of republics, which emphasizes the love of country and the obligations of citizenship more than the pursuit of interest.

The Separation of Powers and Republican Government. The Anti-Federalist critique of the constitutional separation of powers drew on a sharp distinction between republics and monarchies. As Storing put it, the Anti-Federalists believed that "the framers of the Constitution had fallen awkwardly and dangerously between the two stools of simple responsible government and genuine balanced government." Extensive checks and balances, which have the effect of shifting the powers of government from the more popular part of the government, the lower house of the legislature, to the less popular parts, the Senate and the executive, are, in this view, inappropriate for republics.

Centinel presents the clearest and fullest case for simple, responsible government. In his first letter, he attacks John Adams' notion of balanced government, which he identifies with the Constitution. "This hypothesis supposes human wisdom competent to the task of instituting three co-equal orders in government, and a corresponding weight in the community to enable them respectively to exercise their several parts. . . ." Such a plan requires "a powerful hereditary nobility" to be effective. In America, "we must recur to other principles."

A republican, or free government, can only exist where the body of the people are virtuous, and where property is pretty equally divded[;] in such a government the people are the sovereign and their sense or opinion is the criterion of every public measure. . . . The highest responsibility is to be attained, in a simple structure of government, for the great body of the people never steadily attend to the operations of government, and for want of due information are liable to be imposed on. . . .

Centinel appears to attack the whole notion of bicameralism, with Pennsylvania's unicameral legislature as his model. He also seems more concerned about the small size of the Senate than its distinctive powers. Brutus takes note of the powers, such as advice and consent for appointment and treaties, and judging impeachments, but he stops short of proposing alternatives. The Federal Farmer also expresses reservations about the Senate's powers, but he proposes rotation and recall rather than a shifting of the powers to another part of the government.

The Federal Farmer, A Maryland Farmer, and Patrick Henry all attack the Constitution for attempting checks and balances without the proper materials. Henry calls the checks "imaginary balances," says the president would have "the powers of a king," and claims that he would prefer to "have a king, lords, and commons, than a government so replete with insupportable evils." The Federal Farmer, who earlier referred to the predominance of the natural aristocracy, argues that America does not have the proper materials for a balance of classes: "the senate would be feeble, and the house powerful," if the aristocracy and democracy were assigned to each respectively. A Maryland Farmer presents the alternatives in their starkest forms: "government founded on representation" requires an executive and a senate for life, while in republican government, such as Switzerland, "the people personally exercise the powers of government." He goes on to propose a government by the freeholders, who must approve the laws, by a referendum "in their counties and cities" before they go into effect.

In addition to these general arguments, there were specific objections to the governmental structure, such as the absence of an executive council for the president and, in one case at least, the existence of the executive's qualified veto.

IV. The Bill of Rights and the Judiciary

The most common Anti-Federal argument against the Constitution concerned the absence of a Bill of Rights. The Federalists' explanation, prominently presented by James Wilson and Thomas McKean, in the Pennsylvania ratification convention, and also by Hamilton in *The Federalist,* was the weakest of any of their replies to the opponents' objections. In their ratification convention, the Massachusetts Federalists hit upon the idea of proposing unconditional ratification and submitting a list of recommended amendments; this took the place of conditional ratification, which would have necessitated a second Convention. Congressional passage of the first ten amendments, in 1789, known as the Bill of Rights, supports the contention that while the Federalists gave us the Constitution, the Anti-Federalists gave us the Bill of Rights. But the story is more complicated, since the

passage of the Bill of Rights signaled the end of any sustained opposition to the Constitution, and it was Madison who led the campaign in the House for speedy passage of the Bill of Rights. In a letter to Jefferson, dated October 17, 1788, Madison said that while his "own opinion had always been in favor of a bill of rights; provided it be so named as not to imply powers not meant to be included," he also "never thought the omission a material defect."

The main Federalist arguments in defense of the Constitution without a Bill of Rights were: (1) the entire Constitution, as it provides for a well-framed government with power checking power and offices filled by election, is a bill of rights; (2) there is an internal bill of rights, especially in Article I, sections 3 and 10; and (3) unlike the state governments, the federal government is one of enumerated powers, and hence what is not enumerated is not given, and the state bills of rights remain in force. The Anti-Federal responses, in reverse order, were: (1) the clear supremacy of the federal Constitution and the extensiveness of the powers granted call into question any reliance on the state bills of rights on the one hand, or the implied restrictions on powers on the other; (2) to the extent that one might rely on the principle of implied restrictions on powers, the very fact that certain restrictions are noted, suggests, if anything, that what is not expressly reserved is granted; and (3) the general argument about a well-constructed government points back to the discussions of federalism and republican government.

An examination of some amendments proposed but not adopted illustrates the difference between the amendments preferred by the Anti-Federalists and the actual Bill of Rights. The first proposed amendment in the Massachusetts convention was "that it be explicitly declared, that all powers not expressly delegated by the aforesaid Constitution are reserved to the several states, to be by them exercised." The fourth proposed amendment limited the tax power to the impost, to be supplemented, if necessary, by a requisition on the several states, with Congress permitted to collect it only if the states failed to do so. In the New York convention, Gilbert Livingston proposed rotation and recall for the Senate.

Even as passed, however, the Bill of Rights could serve the Anti-Federalist purpose of fostering the political and moral education of the people. Having the rights provisions written into the Constitution reminds the people of the leading principles of government. But it also served to strengthen the judiciary, since it became part of the fundamental law. This was noted with favor by Thomas Jefferson, in his letter to Madison dated March 15, 1789.

> In the arguments in favor of a bill of rights, you omit one which has great weight with me, the legal check which it puts into the hands of the judiciary. This is a body, which if rendered independent, and kept strictly to their own department merits great confidence for their learning and integrity.

This argument must have impressed Madison, who led the House in its passage of the Bill of Rights in June 1789. But the position was not consistent with the Anti-Federal concern about the extensiveness of the judicial power provided for in the Constitution, to which we now turn.

Brutus provides the fullest discussion of the judiciary. He anticipates 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. Article III permits the courts "to give the constitution a legal construction," and the equity jurisdiction gives the courts power to "explain the constitution according to the reasoning spirit of it, without being confined to the words or letter." This is why Brutus claims that "the real effect of this system of government will therefore be brought home to the feelings of the people through the medium of the judicial power." The judicial power will be able to attribute certain powers to the legislature "which they have not exercised," and they will also use the preamble to expand on the legislative powers. The judicial review argument arises out of the specific language regarding equity plus the written Constitution. "It is to be observed, that the supreme court has the power, in the last resort, to determine all questions that may arise in the courts of legal discussion, on the meaning and construction of the constitution. This power they will hold under the constitution and independent of the legislature."

Brutus discusses two possible solutions to the problem of complete judicial independence: either limit the judicial tenure to a fixed term, or limit the judicial power to exclude construction of the Constitution. While Brutus indicates how the influence of the Crown introduced special problems for judicial independence in England, not applicable to the United States, he still favors appointment for good behavior. Hence, his preferred change is to leave constitutional construction to the legislature, and ultimately to the people.

Hamilton argued that the courts would do nothing more than declare laws "contrary to the manifest tenor" of the Constitution void. Brutus' account shows how much could be read into judicial power from Article III, but he did not connect his warning about the judiciary with his advocacy of the Bill of Rights.

V. Conclusion

At the outset of this essay, it was said that the Anti-Federalists deserved to be considered among the Founding Fathers because of their important part in the constitutional debate and their contribution to the finished document and its development. By way of conclusion, I should like to review the Anti-Federal arguments on the three major topics—federalism, republican government, and a bill of rights—and consider the manner in which their positions were retained, often in a different form, after the Constitution's ratification.

With respect to federalism, the Anti-Federalists were right about the novelty of the scheme, but the Federalists were able to make good use of the compromise in the construction of the Senate in order to argue that the Constitution is "partly federal; partly national." The Constitution was more

an incomplete national government than a true mixture, as Tocqueville could see in 1831 and as Storing explains fully. The Anti-Federalists hammered home the point about the extensiveness of the powers, and they were right. Yet, the preservation of the Union required a stronger government, and this is why the Constitution was ratified. Ratification ended Anti-Federalist opposition to the Constitution, but it did not end the controversy over the extent of the powers of the general government. Jefferson's disagreement with Hamilton, and then Marshall, on the necessary and proper clause, in connection with the debate on the constitutionality of the national bank, is the classical source for this controversy. (Did "necessary" mean "convenient," or did it mean "without which an enumerated power becomes nugatory"?) But the alternative to "loose construction" was not confined to Jefferson. Madison himself adopted the "strict construction" position in the First Congress, when the bank bill came up. Regardless of what caused Madison's shift, his taking a strict view of the powers of the national government shows very clearly how the Anti-Federalist position was retained by being transformed; the argument shifted from a critique of the Constitution to an interpretation of the powers different from the original Anti-Federalist position, but to the same effect. Controversy over the extent of the federal government's powers, once thought to have been settled in 1937 in favor of congressional discretion, i.e., congressional federalism, has been renewed in recent years.

The Anti-Federalist conception of republican government emphasized smallness, simplicity, and mildness, so the people would know one another and their governing officials. The Anti-Federalists rejected as inadequate the equation of election with representation. Their discussion of aristocracy and democracy reveals a concern about character and the effects of inequality. They wanted the agricultural middling class to set the tone in government, and hence in society as a whole. The legacy here is doubtful, since the United States has developed into a robust commercial society, which reflects the Federalist formulation. At the same time, as Storing points out, the Anti-Federalist reservations about a community based primarily on interest, as opposed to dedication to the common good, remain valid. The more heterogeneous the population, the weaker the tie of citizenship. On this key topic, the Anti-Federalists seem to have pointed to a problem for modern free government more than they have come up with a solution. While aristocracy and democracy do not describe divisions in American society accurately, the distinction between the few with substantial wealth, influence and talents and the many without them remains clear. And if we occasionally worry about the effects of unrestrained acquisitiveness, then we have returned to the Anti-Federalist reservations about the success of the large commercial republic.

Finally, the Bill of Rights appears to be the Anti-Federalists' greatest success, and yet its importance has gone hand-in-hand with the expansion of both federal power, vis-à-vis the states, and judicial power, vis-à-vis the political branches of government. To the extent that people suppose that their liberties are secure as a result of the Bill of Rights, more than as a

result of effective government, this appears to confirm an Anti-Federalist contribution. And yet, this may only reflect the results of the large republic, where people are too far removed from the operation of government to appreciate the political checks and balances. For the Anti-Federalists, the key rights brought the people closer to government; for example, The Federal Farmer emphasized a substantial representation in the legislature and jury trial in the vicinage so that people would gain some governmental experience.

The Anti-Federalists, then, deserve to be considered junior partners in the founding of a Constitution "intended to endure for years to come." To apply the lessons of the Anti-Federalists to American politics today, we need to keep in mind that we are citizens of a large, prosperous, and heterogeneous republic. Whatever limits on interest are proposed must take into account our size and diversity.

How to Understand the Federalists

DAVID F. EPSTEIN

The speeches and writings that made the case for ratification of the United States Constitution reveal most of what we can know about the intentions of those who made the Constitution legally authoritative, the American people of 1787–1788. It is true that these speeches and writings offer the opinions only of the most articulate supporters of the Constitution, but their intended audience was the people and their elected representatives at the ratifying conventions; and so they also indicate what considerations those articulate supporters thought would or should lead others to support the Constitution.

Federalist ratification statements differed from the private deliberations of the Constitutional Convention by having this public, argumentative character; and also because many of the detailed questions addressed by the convention were now of secondary importance. The proponents of ratification did not have to believe or prove that each decision by the Framers had been perfect in order to support a judgment that, on balance, adopting this Constitution was a better course than rejecting it. The assertion that the proposal was "such a constitution as, upon the whole, is the best that can possibly be obtained" was consistent with the position that it "must be examined with many allowances, and must be compared not with the theory, which each individual may frame in his own mind, but with the system which it is meant to take the place of, and with any other which there may be probability of obtaining. . . ."

The broad claims made on the Constitution's behalf, rather than the reasoning that explained each of its provisions, are the subject of this chapter. These claims may conveniently be divided into promises and reassurances: promises that the new government could supply blessings not available under

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