

Complete Anti-Federalist

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BOOK REVIEW

THE COMPLETE ANTI-FEDERALIST. Edited by *Herbert J. Storing*. Chicago, Ill.: University of Chicago Press. 1981. Seven vols. \$175.00 (cloth).

ANTIFEDERALISTS: THE LOYAL OPPOSITION AND THE AMERICAN CONSTITUTION

As George C. Scott so eloquently told us in his cinematic portrayal of General George Patton, Americans like winners. Indeed, both popular and scholarly approaches to history often have little to say about losers. How scholars have viewed the ratification of the Constitution reflects this. The classic work supporting the Constitution—*The Federalist Papers*—has been available in book form since 1788. Today paperback editions of it abound. Similarly, biographies and papers of such famous federalists as George Washington, James Madison, John Jay, and Alexander Hamilton are readily available. Even such lesser supporters of the Constitution as John Marshall, Robert Morris, John Dickinson, and James Wilson are well-known historical figures.

Those who opposed the Constitution have not fared as well. Few people have heard of Elbridge Gerry, Luther Martin, and Melancton Smith. The three leading Virginia antifederalists, George Mason, Richard Henry Lee, and Patrick Henry, are better known, but probably not for their opposition to the Constitution. Some leading antifederalists have their biographers¹ and the personal papers of some have been published. For the most part, however, legal scholars have directed relatively little attention to the opponents of the Constitution.² More importantly, the ideas these men had, and the arguments they advanced, have been neglected. Dismissed as “men of little faith,”³ the

¹ Antifederalist George Mason even has a law school named for him.

² The number of books and articles on antifederalists and antifederalism is quite small. Among the leading works are: S. BOYD, *THE POLITICS OF OPPOSITION: ANTIFEDERALISTS AND THE ACCEPTANCE OF THE CONSTITUTION* (1979); J.T. MAIN, *THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION 1781-1788* (1961); R. RUTLAND, *THE ORDEAL OF THE CONSTITUTION: THE ANTIFEDERALISTS AND THE RATIFICATION STRUGGLE OF 1787-1788* (1966); Kenyon, *Men of Little Faith: The Antifederalists on the Nature of Representative Government*, 12 *WM. & MARY Q.* 3 (3d ser. 1955). Background reading on the adoption of the Constitution should begin with C. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1913); G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969). William W. Crosskey is the most prominent legal scholar to give attention to the ideas and politics of the antifederalists. See W.W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* (1953 (vols. 1 & 2), 1980 (vol. 3 with W. JEFFREY)).

³ See Kenyon, *supra* note 2.

words of the antifederalists have, until now, been all but forgotten.⁴

To a large extent the late Herbert Storing's seven volume collection, *The Complete Anti-Federalist*, has remedied the lack of antifederalist sources. Storing has assembled most of the important antifederalist documents, including some that have not previously been in print. An elaborate, yet easily used, footnote and index system supplements Storing's first-rate editing job. Although there are many omissions in this collection,⁵ Storing has set the stage for a reinvigorated study of the Constitution by providing scholars access to the arguments of the document's critics.

As the bicentennial of the Constitution approaches, it is worth examining the ratification debates. Such an examination requires a close look at opponents of the Constitution as well as the document's supporters. Reading through *The Complete Anti-Federalist* teaches us the importance of the antifederalists in shaping the American Constitution. The recurrent theme of the antifederalists is fear: fear that the national government would usurp the rights of the people; fear that without a Bill of Rights all liberty would be destroyed; fear that the presidency and Senate would lead to an aristocracy. If these fears seem paranoid and outrageous today, it may be because the antifederalists expressed such fears in 1787-88, and thereby helped define the nature of the American Constitution. Through Storing's volumes we see that, for our constitutional history, the arguments of the losers are just as important as those of the winners.

I

THE INCOMPLETE ANTIFEDERALIST

At the outset it should be noted that *The Complete Anti-Federalist* is not really complete. Some relatively well-known antifederalist documents are missing. The collection itself is geographically skewed. Storing has not included any articles from North Carolina, New Jersey, and Delaware, only one article from Georgia, Connecticut, and Rhode Island, and only two articles from South Carolina and New Hampshire. The mere listing of these omissions resembles an antifederalist argument: Storing, like the Framers, has ignored the smaller states and the deep South.

The failure to include any materials from North Carolina and the

⁴ For earlier reprints of primary materials on the antifederalists, see THE ANTIFEDERALIST PAPERS (M. Borden ed. 1964); A. MASON, THE STATES RIGHTS DEBATE: ANTIFEDERALISM AND THE CONSTITUTION (1964); THE ANTIFEDERALISTS (C. Kenyon ed. 1966); ESSAYS ON THE CONSTITUTION OF THE UNITED STATES (P. Ford ed. 1892); PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES (P. Ford ed. 1888). Some individual antifederalist pieces have been separately reprinted. See, e.g., LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN (W. Bennett ed. 1978).

⁵ See *infra* notes 6-17 and accompanying text.

inclusion of only one antifederalist piece from Rhode Island is particularly striking, in light of the fact that North Carolina and Rhode Island were the last two states to ratify the Constitution. In August 1788, the North Carolina Convention refused to ratify the Constitution by a greater than two to one majority.⁶ North Carolina did not ratify until November 1789.⁷ Rhode Island initially defeated the Constitution by overwhelming votes in town meetings.

Ratification by a Rhode Island state convention did not occur until May 1790, and then by the narrow vote of thirty-four to thirty-two.⁸ Thus, where antifederalist sentiment was strongest, Storing's collection is weakest. In his introduction, Storing concludes that the "Anti-Federalists lost the debate over the Constitution not merely because they were less clever arguers or less skillful politicians but because they had the weaker argument."⁹ Storing makes this assertion, however, without presenting the arguments of the most successful antifederalist politicians.¹⁰

The absence of materials from North Carolina underscores the paucity of materials from the state ratifying conventions in Storing's collection. Even if Storing could not find newspaper articles or pamphlets opposing ratification in North Carolina,¹¹ he certainly could have presented the speeches delivered in the state ratifying convention by such antifederalist leaders as Willie Jones and Judge Samuel Spencer.¹² Although eleven states had already ratified, and thus the new Constitution was in effect, the antifederalists at the 1788 North Carolina convention were still able to prevent their state from ratifying the document.

⁶ The vote is recorded in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 250-51 (J. Elliot rev. ed. 1881) [hereinafter cited as THE DEBATES IN THE SEVERAL STATE CONVENTIONS].

⁷ R. RUTLAND, *supra* note 2, at 302-03.

⁸ *Id.* at 303-04.

⁹ 1 THE COMPLETE ANTI-FEDERALIST 71 (H. Storing ed. 1981).

¹⁰ Storing fails to consider the possibility that the antifederalists were defeated for political reasons. The political reasons would include: (1) the federalists were better political organizers; (2) the federalists received the backing and financial support of the wealthier classes in America in the campaign for ratification; (3) the elective franchise was limited in ways that favored the federalists and hindered the antifederalists; (4) southern slaveholders, who were for the most part federalists, wielded excessive political power because state apportionment systems counted slaves even though slaves could not vote; (5) federalist supporters included most of the famous and prominent men in the states who were more likely to be elected to the ratifying conventions; (6) the ratification process made it possible for federalists to ratify the constitution swiftly in the most pro-federalist states and thus undercut antifederalist activities in other states; and (7) it was easier to organize urban constituencies, a majority of which were federalist (and to ensure that their delegates attended the ratifying conventions) than it was for the antifederalists to organize rural opposition. *See, e.g.*, J.T. MAIN, *supra* note 2, at 21-40 (discussing sectional and class alignments in the South).

¹¹ There is no indication whether Storing searched for any such materials.

¹² The debates of the North Carolina ratifying convention are reprinted in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 6, at 1-252.

Surely their arguments are worth hearing and should not have been omitted.

With only a few exceptions, Storing ignored the debates in the state ratifying conventions. Although many of these debates are generally available in Jonathan Elliot's five volume collection,¹³ that is certainly no reason for excluding the major antifederalist speeches from this set.¹⁴ Although comprehensive, Elliot's volumes place the burden on the student and scholar to identify the speeches of those who voted against ratification. *The Complete Anti-federalist* would be much more complete if it had included the major antifederalist speeches from the state debates.

There is yet another critical reason for including the debates from the state ratifying conventions. Storing is concerned with analyzing "the political thought of the Anti-Federalists."¹⁵ By excluding most of the ratification debates, however, Storing has taken the "politics" out of his study of political thought. The technical and often dry analysis of the Constitution that Storing has presented may be the meat of a political theorist, but much of the material lacks the passion of the political antagonists of 1787-88.

Just as he has excluded the passion of debate, so Storing has ignored the vicious. James Hutson has written that "Storing's definition of his work justifies the exclusion of the scurrilous squibs of Antifederalist mudslingers like 'A Turk,' 'Defecater,' 'Peep,' 'Peep, Jr.,' and 'A Bricklayer.'"¹⁶ By excluding such "mudslingers," however, Storing may mislead students and scholars who are unaware that the debate over the Constitution led to vitriolic, passionate, and even unfair criticisms of the federalist position.

Storing's work is clearly not a "complete" compilation of antifederalist writings.¹⁷ Nevertheless, in spite of its omissions, it will be the best

¹³ See 1-5 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 6; see also 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY THE STATES, PENNSYLVANIA (M. Jensen ed. 1976). The Rhode Island debates appear in THEODORE FOSTER'S MINUTES OF THE CONVENTION HELD AT SOUTH KINGSTOWN, RHODE ISLAND, IN MARCH, 1790, WHICH FAILED TO ADOPT THE CONSTITUTION OF THE UNITED STATES (R. Cotner ed. 1929). One of Storing's most important contributions are the heretofore unpublished notes of the speeches of George Clinton in the New York ratifying convention. See *Notes of Speeches Given by George Clinton before the New York State Ratifying Convention*, in 6 THE COMPLETE ANTI-FEDERALIST, *supra* note 9, at 177-91.

¹⁴ Storing recognized that there was no need for comprehensiveness with regard to the convention speeches, 1 THE COMPLETE ANTI-FEDERALIST, *supra* note 9, at xix, but that does not explain the almost total omission of these speeches from this edition.

¹⁵ 1 THE COMPLETE ANTI-FEDERALIST, *supra* note 9, at xix.

¹⁶ Hutson, *The Incomplete Antifederalist*, 11 REVS. AM. HIST. 204, 204-05 (1983).

¹⁷ Hutson also indicates that Storing failed to reprint "substantial Antifederalist essays by, among others, Algernon Sydney (beginning in the *Independent Gazetteer*, Nov. 21, 1787), Cicero (*id.*, Jan. 30, 1788) and Leonidas (*Freeman's Journal*, July 30, 1788)" as well as "John Nicholson's important pamphlet, *A View of the Proposed Constitution*." Hutson, *supra* note 16, at 205. Hutson also chides Storing for neglecting James Warren, *The Disadvantages of Federalism upon the New Plan*, Luther Martin's "important replies to the Landholder" printed in March

source of antifederalist thought for many years to come. Having noted what it does not have, it is time to examine what it does include.

II

DISSENT AMONG THE DISSENTERS

In his introductory essay, Storing writes that “[i]n the most obvious sense” there was no “single Anti-Federal position.”¹⁸ Storing correctly notes that there were many points of agreement among those who opposed the Constitution, but, at the same time, “[i]t would be difficult to find a single point about which *all* the Anti-Federalists agreed.”¹⁹ Indeed, they could not “even agree unanimously in opposing the adoption of the Constitution.”²⁰ Some were willing to accept the Constitution with amendments, some eventually accepted it without the promise of amendments, others wanted a second convention to rewrite the entire document, and some would have preferred no significant changes at all in the structure of government under the Articles of Confederation.²¹

There were clear differences on certain issues among the antifederalists. Some antifederalists thought the Constitution provided too much democracy, although most thought it was not sufficiently democratic. On many issues there was a range of antifederalist opinion, but often this simply represented different degrees of skepticism.

Reaction to the creation of the Senate under the new Constitution illustrates such antifederalist differences. Because most antifederalists believed that the states would be the greatest guardian of liberty, some welcomed the concept of indirect election of Senators who would thus represent the interests of the states.²² The antifederalists did not gener-

1788, and Spencer Roane’s “Letter of Plain Dealer.” *Id.* To this list I would add the essays by “Caution” [Samuel Chase] in Maryland; the essays of “Lycurgus” (in *Independent Gazetteer* (Philadelphia), Oct. 17, 1787); “Letter from a Hermit” (in *United States Chronicle* (Providence), Mar. 27, 1788); “Philanthropos” (in *Virginia Journal* (Alexandria), Dec. 1787); and “An Old Constitutionalist” (in *Independent Gazetteer*, Oct. 26, 1787). There are numerous other essays and short squibs in the antifederalist newspapers that might have been published to illustrate the variety of antifederalist sentiment.

¹⁸ 1 THE COMPLETE ANTI-FEDERALIST, *supra* note 9, at 5. The University of Chicago Press has also published Storing’s introductory essay, *What the Anti-Federalists Were For*, as a separate paperback volume by that title.

¹⁹ *Id.* (emphasis in original).

²⁰ *Id.*

²¹ *See id.*

²² *See, e.g., Observations Leading to a Fair Examination of the System of Government Proposed by the Late Convention; And to Several Essential and Necessary Alterations in It. In a Number of Letters From the Federal Farmer to the Republican* (letter of Jan. 10, 1788), in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 9, at 288 [hereinafter cited as *Letters from the Federal Farmer*] (“The senate, from the mode of its appointment, will probably be influenced to support the state governments, and, from its periods of service will produce stability in legislation . . .”); *cf. A Letter from a Gentleman in a Neighbouring State, to a Gentleman in this City*, in 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 9, at 10 (although approving of states choosing Senators, fearful that Congress may somehow punish the states if their Senators are not “acceptable to Congress”).

ally agree, however, on whether the Senate under the new Constitution was in itself a good idea.

The anonymous "Federal Farmer,"²³ with his usually balanced opposition, thought the Senate might "be useful to many purposes" in part because the new body would "be influenced to support the state governments."²⁴ Nevertheless, the "Farmer" had reservations about the six year term of Senators, the lack of mandatory rotation in office and the Senators' role in ratifying treaties and in impeachment.²⁵

Maryland's Luther Martin agreed that a Senate representing the states was valuable, but was wary of how that body would operate under the Constitution. Martin noted that, unlike the Articles of Confederation, the Constitution provided that Representatives to the national legislature be paid by the national government, not by the states. Thus, the Senators "in conjunction with the other branch, are to *pay themselves* out of the treasury of the United States; and are not liable to be *recalled* during the period for which they are chosen: Thus, . . . for *six years* the *senators* are rendered totally and absolutely *independent* of their *States*, of *whom* they ought to be the *representatives* . . ."²⁶

Other antifederalists were not even this sanguine about the Senate. Pennsylvania's Samuel Bryan, writing as "Centinel," disliked the Senate because it gave to "[t]he smallest state in the union" representation that was of "equal weight with the great states."²⁷ "Centinel" predicted that

²³ The true author of the "Letters From the Federal Farmer to the Republican" is unknown. The traditional view was that Richard Henry Lee of Virginia was the author. Storing believes this is not the case, and concludes that the author cannot be determined. 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 9, at 215-16. Storing's conclusion is based on the research of Gordon Wood and the unsubstantiated assertions of W.W. Crosskey. *Id.* at 215; *see also* 2 W.W. CROSSKEY, *supra* note 2, at 1299-1300 n.3. Steven R. Boyd argues that the overwhelming contemporary opinion was that Lee was indeed the "Federal Farmer." *See* Boyd, *Impact of the Constitution on State Politics: New York as a Test Case*, in THE HUMAN DIMENSIONS OF NATION MAKING 270, 276 n. 14 (J. Martin ed. 1976). Storing curiously acknowledges communications with Boyd on this question but fails to refer to Boyd's article. *See Letters from the Federal Farmer*, *supra* note 22, at 222 n.11. Ultimately the identity of the "Federal Farmer" is not the most important question. Indeed, he may have kept his identity secret because what mattered to many of the eighteenth century men involved in this debate, and what should matter to us today, is the substance of the letters and not the personality behind them. As another antifederalist wrote: "It is not material whether the federal farmer belongs to Virginia or Kamtschatka—whether he owns five hundred negroes, or is a man of no property at all—if his arguments are cogent—his reasonings conclusive . . ." *Essays by Helvidius Priscus* (essay of Jan. 22, 1788), in 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 9, at 158.

²⁴ *Letters from the Federal Farmer* (letter of Jan. 10, 1788), *supra* note 22, at 288.

²⁵ *Id.* at 289-93.

²⁶ Martin, *The Genuine Information Delivered to the Legislature of the State of Maryland Relative to the Proceedings of the General Convention Lately Held at Philadelphia*, in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 9, at 46 (emphasis in original).

²⁷ *Letters of Centinel*, in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 9, at 142. For a discussion of the identity of "Centinel," *see* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 9, at 130.

the Senate would become the basis of an "aristocratic junto."²⁸ Because the Senate had executive as well as legislative powers "it would become a *permanent aristocracy*, and swallow up the other orders in the government."²⁹ "Cincinnatus" went one step further, asserting that "the senate, is vested with—legislative—executive—and judicial powers" and "is likely to produce a baneful aristocracy, which will swallow up the democratic rights and liberties of the nation."³⁰

The Senate was just one area of the Constitution where antifederalists differed. Some antifederalists, troubled by the two year terms of members of the House, would have preferred annual elections of that body or a guarantee of rotation in office.³¹ Others did not view the two year term as a problem. Some antifederalists were more worried than others about the judicial branch.³²

Sectionalism also contributed to the differences among the antifederalists. Some southerners opposed the Constitution because they believed the commerce clause would harm the farming interests of the largely agrarian South.³³ Others, like Virginia's George Mason, agreed that national regulation of commerce was necessary, but believed that such regulation should be subject to a two-thirds vote in Congress, in order to prevent Northern domination.³⁴ In contrast, the commerce clause did not greatly concern northern antifederalists.

The question of slavery divided many antifederalists along sectional lines. Except for Rawlins Lowndes of South Carolina,³⁵ Storing found

²⁸ *Id.* at 142.

²⁹ *Id.* at 150 (emphasis in original).

³⁰ *Essays by Cincinnatus* (letter of Nov. 22, 1787 to James Wilson), in 6 THE COMPLETE ANTI-FEDERALIST, *supra* note 9, at 18. These Essays have been attributed to Richard Henry Lee as well as his brother, Arthur Lee. The true author remains unknown. 6 THE COMPLETE ANTI-FEDERALIST, *supra* note 9, at 5, 6 & n.2.

³¹ See, e.g., *Letter by an Officer of the Late Continental Army*, in 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 9, at 94; Arms, Maynard & Field, *Reasons for Dissent*, in 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 9, at 256; *Letters from the Federal Farmer* (letter of Jan. 10, 1788), *supra* note 22, at 290-91.

³² See S. Chase, *Notes of Speeches Delivered to the Maryland Ratifying Convention*, in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 9, at 83; *A Review of the Constitution Proposed by the Late Convention by a Federal Republican*, in 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 9, at 77-78; *Letters from the Federal Farmer* (letter of Jan. 18, 1788), *supra* note 22, at 315-23.

³³ See J.T. MAIN, *supra* note 2, at 273-77. Even many southerners who supported the Constitution did not like the commerce clause. General Charles Cotesworth Pinckney of South Carolina declared "it was the true interest of the S[outhern] States to have no regulation of commerce," but agreed to the commerce clause because of "liberal views" of the eastern States "towards the views of South Carolina." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 449-50 (M. Farrand ed. 1911). The "views of South Carolina" was a euphemism for the continuation of the slave trade.

³⁴ Mason, *Objections to the Constitution of Government formed by the Convention*, in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 9, at 12-13.

³⁵ *Speeches of Rawlins Lowndes in the South Carolina Legislature*, in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 9, at 150 [hereinafter cited as *Lowndes*]. For a more extended discussion of slavery and antifederalism, see *infra* notes 104-23 and accompanying text.

no opponents of the Constitution who defended the continuation of the slave trade. On other issues involving slavery, however, northern and southern antifederalists differed. Antifederalist interpretations of the Constitution's war powers clauses perhaps best illustrates this sectional split. Three Massachusetts antifederalists complained that they would be forced to take up arms to defend slavery.³⁶ Patrick Henry, on the other hand, feared that the war power would be used to end slavery. Henry warned that "[a]mong ten thousand *implied powers*" in the Constitution "[the national government] may, if we be engaged in war, liberate every one of your slaves if they please."³⁷ It is ironic that both sides were correct in their analysis. On the one hand, troops of the national government were used to suppress slave rebellions, and to fight a war with the Seminole Indians that, at least in part, concerned runaway slaves.³⁸ Both federal troops and the state militias—including those in Massachusetts—were ordered to help return fugitive slaves to the South.³⁹ On the other hand, Lincoln used implied powers and the war powers to issue the Emancipation Proclamation.⁴⁰

³⁶ Arms, Maynard & Field, *supra* note 31, at 263.

³⁷ *The Debates in the Convention of the Commonwealth of Virginia, on the adoption of the Federal Constitution*, in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 6, at 589-90 [hereinafter cited as *Virginia Debates*]. Henry made this argument on June 24, 1788. Storing provides nearly 50 pages of Henry's arguments in the Virginia ratifying convention. But inexplicably Storing ended his excerpts of Henry's speeches on June 17, even though Henry delivered major speeches on the 20th, the 23d, the 24th, and the 25th. See *id.* at 539-46, 577-80, 587-96 & 649-52.

³⁸ Federal troops and state militias were used to hunt down slaves after the 1831 rebellion that Nat Turner led in Southampton County, Virginia. See generally H. AP THEKER, NEGRO SLAVE REVOLTS (1939); F. JOHNSON, THE NAT TURNER SLAVE INSURRECTION (1966); S. OATES, THE FIRES OF JUBILEE: NAT TURNER'S FIERCE REBELLION (1975). Federal troops, led by Colonel Robert E. Lee, were responsible for the capture of John Brown after Brown's raid on Harper's Ferry, Virginia. See S. OATES, TO PURGE THIS LAND WITH BLOOD, A BIOGRAPHY OF JOHN BROWN 297-303 (1970).

A major cause of the Seminole Indian Wars, fought intermittently from 1810 to 1858, was the Seminole's willingness to offer a safe haven for fugitive slaves from Florida and Georgia. A main goal of the U.S. Army during these wars was to recapture the runaway slaves. See generally J. GIDDINGS, THE EXILES OF FLORIDA (1858); D. LITTLEFIELD, JR., AFRICANS AND SEMINOLES (1977); J. SPRAGUE, THE ORIGIN, PROGRESS, AND CONCLUSION OF THE FLORIDA WAR (1848); 1 H. WILSON, HISTORY OF THE RISE AND FALL OF THE SLAVE POWER IN AMERICA 133, 515-16 (1872).

³⁹ One of the most notorious uses of federal troops to return a fugitive slave was the Anthony Burns episode. At a cost of thousands of dollars, several hundred federal army troops, a detachment of U.S. Marines, a coast guard revenue cutter with full crew, and many companies of state militia removed Anthony Burns from Boston. He was returned to Virginia and sold at auction for \$910. J. PEASE & W. PEASE, THE FUGITIVE SLAVE LAW AND ANTHONY BURNS: A PROBLEM IN LAW ENFORCEMENT 38-53 (1975); see also S. CAMPBELL, THE SLAVE CATCHERS 125-32 (1970).

⁴⁰ J.H. FRANKLIN, THE EMANCIPATION PROCLAMATION (1963).

III

AGREEMENT AMONG THE DISSENTERS

Despite these conflicts on certain issues, the antifederalists demonstrated a significant degree of unity, which Storing's collection clearly reflects. The antifederalists dissected the Constitution word by word and clause by clause. At least one antifederalist found something objectionable with virtually each part of the document. Some state politicians opposed the Constitution for rather parochial reasons: a stronger national government might undermine their power and prestige. Others opposed it for rather narrow economic interests. Most antifederalists, however, honestly feared that the new Constitution would destroy republican government and deprive the people of their hard-won liberties.

How the antifederalists articulated those fears illustrates the strengths and weaknesses of the federal compact. Moreover, by examining in detail four of the antifederalist arguments—first, that the Constitution was written illegally; second, that it posed a threat to American liberty; third, that the document lacked a bill of rights; and fourth, that the document did not resolve the slavery issue—we can more clearly understand the meaning of the Constitution. From an examination of these arguments, it becomes apparent that such men as George Mason, Luther Martin, and the "Federal Farmer" understood the dangers of the Constitution just as clearly as James Madison, Alexander Hamilton, and James Wilson understood the virtues of the compact. While "Publius" taught Americans how great their nation might become, "Cato" and "Brutus" warned Americans to guard their liberties and to prevent greatness from degenerating into tyranny.

A. The Illegally Written Constitution

As might be expected from a group that included many lawyers, the antifederalists raised serious questions about the procedures that brought the Constitution into being. The procedural arguments against the Constitution can be divided into three distinct issues.

The first two procedural arguments represent separate but interconnected attacks on the Constitutional Convention: (1) that the convention went beyond its designated powers and legal authority in writing a new constitution; and (2) that, even if the convention had a right to propose a new form of government, the ratification provisions which allowed nine states to create a new nation were illegal, contrary to the Articles of Confederation, and were dangerous to the American Union. The third procedural complaint concerned the politics of ratification and the high handed tactics employed by those who favored the Constitution. Antifederalists feared that the new Constitution would

bring tyranny to the American nation; the ratification process certainly did little to allay such fears.

Antifederalists argued that the Constitutional Convention was called only to propose amendments to the existing Articles of Confederation, *not* to write a new constitution. "A Republican Federalist" argued that the delegates to the convention "had no other authority to act in this matter, than what was derived from their *commissions*—when they ceased to act *in conformity thereto*, they ceased to be a federal convention, and had no more *right* to propose to the United States the new form of government, than an equal number of other gentlemen, who might voluntarily have assembled for this purpose."⁴¹

Such an argument might appear overly legalistic and even disingenuous. After all, the Congress could have ignored the proposed Constitution and not sent it on to the states for ratification. In the broadest sense, the Constitution was merely a recommendation for revising the Articles, although perhaps a more extensive revision than initially contemplated. Furthermore, even if the delegates had gone beyond their legitimate authority, such an occurrence was not unprecedented. Only a dozen years earlier, some members of the Second Continental Congress had exceeded their authority by declaring independence. In 1787, America was still a revolutionary nation.

In fact, this procedural argument reflected the nation's revolutionary heritage. The delegates to the Philadelphia convention had not been democratically elected. The states selected these representatives for the sole purpose of proposing amendments to the Articles. If the people of the United States were to adopt a new Constitution, then it seemed logical, especially to a generation of democratic revolutionaries, that the drafting process should be broadly based.

Some of the antifederalist protest foreshadowed problems of more modern revolutions. South Carolina's Rawlins Lowndes worried that one illegal change would be the first step towards other illegal changes. "Charters," he told the state legislature, "ought to be considered as sacred things."⁴² Lowndes noted this new constitution was "an experiment" and asked why "risque the loss of political existence on experiment?"⁴³ Storing asserts that such a response was typical of Lowndes, a conservative who feared change.⁴⁴ That is in part true. But, at the same time, Lowndes was a revolutionary, asking a question that many modern revolutionaries would understand. Lowndes asked when *did* the revolution actually end and the process of nation-building begin?

⁴¹ *Letters of A Republican Federalist* (letter of Jan. 2, 1788), in 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 9, at 168 (emphasis in original).

⁴² *Lowndes, supra* note 35, at 149-50.

⁴³ *Id.* at 150.

⁴⁴ 1 THE COMPLETE ANTI-FEDERALIST, *supra* note 9, at 8.

With hindsight we can readily see that the adoption of the Constitution answered Lowndes's question. To Lowndes and his antifederalist contemporaries, however, the new constitution was just another governmental experiment in what appeared to be an era of permanent revolution.

The fear of the illegally written constitution led to the second procedural objection to the Constitution—that the Convention itself was part of an antidemocratic conspiracy. Antifederalists objected not only that the proceedings were secret and that the delegates had exceeded their authority, but also that the convention had presented the nation with a *fait accompli* that could only be voted up or down, and that the Constitution would become effective after only nine states had accepted it, even though the Articles of Confederation could not be amended without the unanimous approval of the states. As the Albany Antifederalist Committee proclaimed:

They have declared, that if the conventions of nine states ratify the constitution, it shall be established between the states so ratifying the same; by which means, if all the states should not adopt it, they have laid a foundation to defeat the confederation and dissolve the union of the states. A clause dictated by the same genius of aristocracy, which prompted the convention to enjoin secrecy [sic] on their members, to keep their doors shut, their journals locked up, and none of the members to take any extracts.⁴⁵

The fact that ratification required the approval of only nine states undermined antifederalist efforts in both Virginia and New York. By the time these two states voted on ratification, nine states had already ratified the Constitution. A majority of those elected to the ratification convention in New York opposed the Constitution. Some of these men, including Melancton Smith, nevertheless voted for the Constitution because they believed that they had no choice. New York would have preferred to remain in a United States governed by the Articles of Confederation, but, by the time New York's convention voted, that alternative no longer existed.⁴⁶ The political situation that New York confronted undermines Storing's contention that the federalists won because they had better arguments. Even the essays of "Publius"—*The Federalist Papers*—could not convince New Yorkers to elect a federalist majority to the ratifying convention.⁴⁷ In New York, and later in North Carolina and Rhode Island, the fact that the Constitution was already ratified, and not superior arguments, carried the day. Had the New York antifederalists recognized the trap created by previous ratifications, they might have raced with Maryland and Pennsylvania to be the

⁴⁵ *Address of the Albany Antifederal Committee*, in 6 THE COMPLETE ANTI-FEDERALIST, *supra* note 9, at 124.

⁴⁶ J.T. MAIN, *supra* note 2, at 237-39.

⁴⁷ *See id.* at 237.

first to hold a convention in order to defeat the Constitution and thereby influence subsequent state ratification debates. It is within this context that opponents of the Constitution felt that this new form of government was being imposed upon them.

The third procedural issue, like the first, centered on the legality of the process. Storing asserts that the argument that the Convention lacked legal power to write a new Constitution “became less pertinent every day simply because the Constitution was in fact before the people.”⁴⁸ The process of ratification emerged as an even more dangerous factor, however. In Pennsylvania, for example, the state assembly voted to call a ratification convention before the Congress (meeting in New York at the time) had even transmitted the Constitution to the states.⁴⁹ On the penultimate day of the session, the pro-Constitution “Republicans, enjoying a temporary majority in the Assembly, pressed for immediate action.”⁵⁰ Those opposed to the Constitution argued that a decision on when and how to choose delegates to a ratifying convention should be postponed until after the election of the new legislature set for the following month. The antifederalists advocated delay on the grounds that the Constitution was not officially before the assembly, and that the people of the state deserved the opportunity to read the proposed Constitution and vote for or against assembly members on the basis of that document. When the temporary federalist majority rejected these arguments, the antifederalist members of the assembly boycotted the last session in order to prevent a quorum. The next day, a mob forced two of the assemblymen back to the chamber in order to establish a quorum, and the call for a convention was approved.⁵¹

If this behavior on the part of the federalists reflected the tenor of politics to be expected under the new Constitution, it is understandable that many people feared an impending end to liberty. “Philadelphien-sis” wondered

[i]f the proposed plan be a good one upon the whole, why should its friends endeavour to prevent investigating its merits or defects? Why should they hurry it on us before we have even read it? Does not this look suspicious like? Is it not a proof that it is the works of darkness, and cannot bear the light? Why should they summon a Convention in Pennsylvania, before the tenth part of the people had time to judge for themselves, or to know whether it was a free or a tyrannical system of government? Why employ bullies to drag some members of the Assembly per force to the House to make a quorum, in order to call a Convention?⁵²

⁴⁸ 1 THE COMPLETE ANTI-FEDERALIST, *supra* note 9, at 7.

⁴⁹ S. BOYD, *supra* note 2, at 23-24.

⁵⁰ *Id.* at 23.

⁵¹ See S. BOYD, *supra* note 2, at 24; J.T. MAIN, *supra* note 2, at 187-88.

⁵² *Essays of Philadelphien-sis*, in 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 9, at 131.

Another Pennsylvanian was even more fearful of the excesses of the federalists. "An Old Whig" noted that in Boston

no man is permitted to publish a doubt of the infalibility of the late convention, without giving up his name to the people, that he may be delivered over to speedy destruction; and it is but a short time since the case was little better in this city. [This was] a portion of the very same spirit, which has so often kindled the fires of the inquisition: and the same Zealot who would hunt a man down for a difference of opinion upon a political question which is the subject of public enquiry, if he should happen to be fired with zeal for a particular species of religion, would be equally intolerant.⁵³

Since the proposed Constitution contained no Bill of Rights or protections of speech or "Liberty of Conscience,"⁵⁴ it is not unreasonable that the "Old Whig" was concerned about the implications of force and the ratification process. He warned: "They are idiots who trust their future security to the whim of the present hour."⁵⁵

The "Federal Farmer" was calmer but his position was similar. The "Farmer" rejected the need for the new Constitution, noting that if "we remain cool and temperate, we are in no immediate danger of any commotions; we are in a state of perfect peace, and in no danger of invasions; the state governments are in the full exercise of their powers."⁵⁶ The "Farmer" acknowledged there were problems with the "regulation of trade, securing credit" and paying public debts, but he asserted "whether we adopt a change, three or nine months hence" did not matter.⁵⁷ The nation was only just recovering from "a long and distressing war."⁵⁸ The "Farmer" thought the nation should finish its post-war recovery and "reform our federal system" but not by hastily changing the whole system for one which might "totally destroy the liberties of this country."⁵⁹

B. A Threat to Liberty

How might the Constitution "totally destroy the liberties" of America? Some antifederalists feared the presidency, a position that combined the responsibilities of the nation's civil executive with those of commander-in-chief of the Army, while allowing for unlimited terms in

"Philadelphensis" was a mathematics instructor at the University of Pennsylvania. 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 9, at 99.

⁵³ *Essays of An Old Whig*, in 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 9, at 35 (footnote omitted).

⁵⁴ *Id.* at 34.

⁵⁵ *Id.* at 35.

⁵⁶ *Letters from the Federal Farmer* (letter of Oct. 8, 1787), *supra* note 22, at 225.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 226.

office. Patrick Henry looked at the Constitution and did not see the "beautiful features"⁶⁰ that James Madison saw. Henry told the Virginia ratifying convention, "when I come to examine these features, Sir, they appear to me horribly frightful: Among other deformities, it has an awful squinting; it squints towards monarchy . . . Your President may easily become King . . ." ⁶¹ Others worried about the Senate whose members would serve long terms without any check on them by the people. Many antifederalists predicted that the Senate would become an aristocracy. Because the Senate possessed executive and judicial, as well as legislative, roles, that body seemed especially dangerous. Henry warned, "Your Senate is so imperfectly constructed that your dearest rights may be sacrificed by what may be a small minority; and a very small minority may continue forever unchangeably this Government, although horribly defective."⁶²

Even the House of Representatives was too remote for some antifederalists. In their view, that body consisted of too few members for it to be truly representative of the people.⁶³

At first glance such fears seem virtually unfounded, but there is an eerie modernity to these antifederalist concerns. Is the modern imperial presidency any different from the one the antifederalists feared? Even the War Powers Act⁶⁴ has not prevented an American president from sending troops to Lebanon and Grenada. Without such a law, a secret war in Cambodia and Laos was fought for many years. And the imperial presidency has not been confined to foreign affairs. With a single order, Franklin Roosevelt incarcerated nearly 100,000 American citizens for three and a half years.⁶⁵ As the antifederalists might have predicted, even the Supreme Court lacked both the moral authority and the moral sensitivity to object.⁶⁶ The use of federal troops to suppress strikes in the nineteenth century and veterans protesting the depression during the

⁶⁰ *Speeches of Patrick Henry in the Virginia State Ratifying Convention* (speech of June 5, 1788), in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 9, at 224 [hereinafter cited as *Speeches of Patrick Henry*].

⁶¹ *Id.*

⁶² *Id.*

⁶³ *See, e.g.*, Chase, *supra* note 32, at 89; Mason, *supra* note 34, at 11; *Essays of John De Witt*, in 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 9, at 27-28; *Letters from the Federal Farmer*, *supra* note 22, at 287; *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to their Constituents*, in 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 9, at 158-59.

⁶⁴ 50 U.S.C. §§ 1541-48 (1982).

⁶⁵ *See Exec. Order No. 9066* (1942), reprinted in 3 C.F.R. 1092 (1938-1942 comp. 1968); *see also* J. BURNS, ROOSEVELT: THE SOLDIER OF FREEDOM 213-17, 266-68, 463-64 (1979); R. DANIELS, THE DECISION TO RELOCATE THE JAPANESE AMERICANS (1975); P. IRONS, JUSTICE AT WAR (1983).

⁶⁶ The Court refused to interfere with a curfew imposed on American citizens of Japanese ancestry, *Hirabayashi v. United States*, 320 U.S. 81 (1943), or with their internment, *Korematsu v. United States*, 323 U.S. 214 (1944). *See generally* J. TENBROEK, PREJUDICE, WAR AND THE CONSTITUTION (1954). The Court modified its support of the internment in *Ex parte Endo*, 323 U.S. 283 (1944).

1932 Bonus March are yet other examples of what the antifederalists feared. If there are few such instances of this type of behavior in our nation's early history, it may be because the fears of the antifederalists remained alive until the Civil War. If there are more instances in recent years, it may be because a less well-read and less historically aware America has forgotten the warnings of antifederalists.

The fear of secrecy in government has only recently been rediscovered by Americans. The antifederalists had a healthy dose of this fear. The Constitution itself had been written in secret, and then simply presented to the states for approval or disapproval. This in itself was an argument against the Constitution, but it also underscored the antifederalist demand for open government.⁶⁷ Edmund Randolph worried about executives acting in secret.⁶⁸ "Deliberator" warned Pennsylvanians that "Congress may withhold, as long as they shall think proper, all information respecting their proceedings from the people."⁶⁹ William Symmes sarcastically noted that the Constitution required "[t]he Houses to keep a journal, and to publish the same, excepting such parts as may *in their judgment* require secrecy.' Good again. A very wise Congress!"⁷⁰ Symmes pointed out that such secrecy used to apply to "private articles in foreign treaties, secret expeditions, &c.,"⁷¹ but now anything might be kept secret. Symmes asked, "Who can complain, after this, that he knows nothing of public affairs, except the expenditure of the public money?"⁷² Patrick Henry, vitriolic and untrusting as ever, pointed out that the phrase "*from time to time*" in the section of the Constitution requiring a congressional journal "admits of any extension."⁷³ He predicted Congress may "carry on the most wicked and pernicious of schemes, under the dark veil of secrecy. The liberties of a people never were nor ever will be secure, when the transactions of their rulers may be concealed from them."⁷⁴ These antifederalists would surely have recognized the steps that led to Watergate and the arguments of government lawyers in the Pentagon Papers case.⁷⁵ The futile attempts to force Congress to reveal how much is spent on "national security," the

⁶⁷ Martin, *supra* note 26, at 26-27; *A Review of the Constitution Proposed by the Late Convention by a Federal Republican*, *supra* note 32, at 70; *Letters of Cato*, in 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 9, at 107; *Letters of Centinel*, *supra* note 27, at 144.

⁶⁸ *Letter from Edmund Randolph Giving His Reasons for Refusing His Signature To the Proposed Federal Constitution*, in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 9, at 92.

⁶⁹ *Essay by Deliberator*, in 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 9, at 179.

⁷⁰ Symmes, *Letter to Capt. Peter Osgood, Jr.* (Nov. 15, 1787), in 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 9, at 57 (emphasis in original).

⁷¹ *Id.*

⁷² *Id.* See also *A Friend to the Rights of the People*, Anti-Federalist, No. I, in 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 9, at 238-39.

⁷³ *Speeches of Patrick Henry* (speech of June 5, 1788), *supra* note 60, at 237 (emphasis in original).

⁷⁴ *Id.*

⁷⁵ See *New York Times v. United States*, 403 U.S. 713 (1971).

refusal of the government to allow reporters on Grenada during the 1983 invasion,⁷⁶ and the attempts to silence critics of the Central Intelligence Agency⁷⁷ would not have surprised the antifederalists.

Antifederalist criticisms of the Congress also have a strikingly modern tone. The Senate often has been called a "millionaires' club," distant from the people, and, if not aristocratic, at least the servant of certain special (and usually elite) interests.⁷⁸ The seventeenth amendment, which provides for direct popular election of Senators, suggests that the antifederalists were right in fearing an aristocratic Senate.

Many antifederalists also feared a system of government that did not provide for rotation of office.⁷⁹ They argued that if men remained in office for too long a period, they would be corrupted by power. The twenty-second amendment, which limits the permissible number of presidential terms, represents a delayed response to the antifederalist fear of a Constitution that lacked mandatory rotation in office. The seniority system of Congress and the difficulty of unseating incumbents make the antifederalists seem like prophets. Samuel Chase of Maryland complained that members of the House of Representatives "will not be the representatives of the people at large but really of a few rich men in each state. A representative should be the image of those he represents. He should know their sentiments and their wants and desires . . ." ⁸⁰ Chase feared that "only the *gentry*, the *rich* and well born will be elected."⁸¹ It might be impractical to enlarge the House, but no one can seriously argue that congressmen from geographically large and diverse

⁷⁶ See N.Y. Times, Nov. 8, 1983, at A10, col. 2.

⁷⁷ See *Snepp v. United States*, 444 U.S. 507 (1980).

⁷⁸ The first use of the term "millionaires' club" in American politics was in 1888. Populists and progressives used the term "millionaires' club" at various times in the 1890s. In 1907, one editorialist wrote "[T]he 'millionaires' club' is a facetious but truthful alias for our Upper House." *Shall Millionaires Run the Government?*, 35 AM. MONTHLY REVIEW OF REVIEWS 340, 340 (1907). See also H. SPERBER & T. TRITTSCHUH, AMERICAN POLITICAL TERMS 267 (1962). The term might remain apt today. In 1983, 23 Senators reported wealth of at least one million dollars. At that time, Senators had a salary of over \$60,000, which was more than five times the national average salary of \$11,056. N.Y. Times, May 22, 1983, § 1, at 21, col. 1. See also *Detailed Listing of Senators' 1982 Finances*, CONG. Q., Dec. 3, 1983, at 2563-94.

⁷⁹ See, e.g., Warren, *History of the Rise, Progress and Termination of the American Revolution* (Chapter 31), in 6 THE COMPLETE ANTI-FEDERALIST, *supra* note 9, at 199; *Observations on the New Constitution, And on the Federal and State Conventions By a Columbian Patriot*, in 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 9, at 275-76, 278; *Speech by Charles Turner* (Jan. 17, 1788), in 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 9, at 218.

⁸⁰ Chase, *supra* note 32, at 89. Samuel Chase later became a "high" federalist and served on the United States Supreme Court from 1796 to 1811. His notorious and repressive activities on the bench in trials concerning violations of the Sedition Act of 1798 illustrated the inadequacies of the Constitution for protecting political dissidents. Chase's later actions also underscore the importance of the Bill of Rights. We can only speculate how Chase and other Federalist judges would have acted without the restraint of the Bill of Rights. For a history of the Sedition Act, see generally J. SMITH, FREEDOM'S FETTERS (1956); see also Koffler & Gershman, *The New Seditious Libel*, 69 CORNELL L. REV. 816, 827-30 (1984).

⁸¹ Chase, *supra* note 32, at 89 (emphasis in original).

districts can possibly represent the interests and needs of all their constituents. Certainly the percentage of "rich men" and women in the House far exceeds the national average.⁸²

The antifederalists did not limit their attacks to specific provisions of the Constitution. Rather, they looked at the whole document, and they shuddered. "John Humble" envisioned a standing army collecting taxes. Those poor persons unable to pay would be hauled off "before our *federal judges*, who shall have power without *jury* or *trial*, to order the said miscreants for immediate execution; nor will we think their sentence severe unless after being hanged they are also to be both *beheaded* and *quartered*."⁸³ "A Turk" sarcastically praised the new Constitution for

the resemblance that it bears to that of our much admired Sublime Porte. Your President general will greatly resemble in his powers the mighty Ahdul Ahmed, our august Sultan—the senate will be his divan—your standing army will come in the place of our janizaries—your judges unchecked by vile juries may with great propriety be styled cadis⁸⁴

More sober critics of the Constitution were equally alarmed by the new powers of the new government. "Brutus" warned New Yorkers that "standing armies in time of peace are dangerous to liberty, and have often been the means of overturning the best constitutions of government."⁸⁵ "Brutus" warned Americans that they would not always be fortunate enough to have men like Washington to lead their armies. "Brutus" pointed out that after the victory in the Revolutionary War some officers wanted to march on the government but "[f]ortunately

⁸² Assets of members of the House of Representatives in the 97th Congress are listed in FINANCIAL DISCLOSURE REPORTS OF MEMBERS OF THE U.S. HOUSE OF REPRESENTATIVES OF THE 97TH CONGRESS, H.R. DOC. NO. 97-197, 97th Cong., 2d Sess. (1982). Similar reports have been published in recent years. These documents, however, do not give the total assets for each member and there are no summaries. Furthermore, assets are reported by ranges, rather than by specific amount. Although it is impossible to know exactly how rich members of the House are, it is clear from even the limited information available that the members are quite wealthy compared to the average citizen. Their salary in 1983 of more than \$60,000 far exceeded the average American worker's salary of \$11,056. See N.Y. Times, *supra* note 78; see also *Disclosure of Representatives' 1982 Finances*, CONG. Q., Dec. 10, 1983, at 2631-65.

⁸³ *Address of John Humble*, in 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 9, at 90 (emphasis in original).

⁸⁴ Letter from A Turk (in Independent Gazetteer, Oct. 10, 1787), reprinted in PENNSYLVANIA AND THE FEDERAL CONSTITUTION 159, 159 (J. McMaster & F. Stone eds. 1888). It is unfortunate that Storing failed to print any of the many vicious little antifederalist articles that reflected the fears of a good number of Americans.

⁸⁵ *Essays of Brutus* (essay of Jan. 24, 1788), in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 9, at 416. Storing questions the traditional attribution of these essays to Robert Yates. 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 9, at 358. For a legal history of the background to the controversy concerning standing armies in the colonies before the American Revolution, see J. REID, IN DEFIANCE OF THE LAW: THE STANDING ARMY CONTROVERSY, THE TWO CONSTITUTIONS, AND THE COMING OF THE AMERICAN REVOLUTION (1981).

indeed for this country, it had at the head of the army, a patriot as well as a general.”⁸⁶ These antifederalist protests, among other factors, helped set the American pattern of strong civilian control of the army through both the executive and the legislative branches. During the eighteenth and nineteenth centuries, standing armies were miniscule in part because the antifederalists’ fears of a standing army were absorbed into American political ideology. Given the militaristic sentiments of some of the Federalist founders, most notably Alexander Hamilton, the antifederalist arguments against a standing army become even more significant.

“Centinel” feared not only a standing army but the abuse of local militias by the national government.⁸⁷ He also understood, far better than the Federalists, that the Constitution would allow a tyranny of the majority to persecute Quakers and other conscientious objectors. “Centinel” believed the Constitution would “subject” American citizens

to the most arbitrary military discipline, [and] even death may be inflicted on the disobedient; in the character of militia, you may be dragged from your families and homes to any part of the continent, and for any length of time . . . and as militia, you may be made the unwilling instruments of oppression, under the direction of government; there is no exemption upon account of conscientious scruples of bearing arms⁸⁸

Maryland’s Luther Martin feared that congressional authority over the militia meant that “the *only defence and protection* which the *State* can have for the security of *their rights* against *arbitrary encroachments* of the *general government*, is taken entirely out of the power of their *respective States*, and placed under the *power of Congress*”⁸⁹ Martin believed that the state militias were necessary “to counteract the arbitrary measures of the general government” and he thought “every State in the union ought to reject [the Constitution] with indignation, since, if the general government should attempt to oppress and enslave [the states], they could not have any possible means of self defence.”⁹⁰ The second amendment⁹¹ was ultimately added to the Constitution because antifederalists such as Martin helped convince the nation that “the security of a free State” would only be maintained if local militias could not be destroyed by some future tyrannical central government.⁹²

⁸⁶ *Essays of Brutus*, *supra* note 85, at 414.

⁸⁷ *Letters of Centinel* (letter of Nov. 5, 1787), *supra* note 27, at 159-60.

⁸⁸ *Id.* at 159.

⁸⁹ Martin, *supra* note 26, at 58 (emphasis in original).

⁹⁰ *Id.* at 59.

⁹¹ “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. CONST. amend. II.

⁹² Patrick Henry expressed a similar fear in the Virginia ratifying convention. Throughout that convention, Henry consistently demanded a Bill of Rights to protect “the

"Centinel" would not have been so concerned about a standing army or the destruction of the state militias if the Constitution guaranteed a free press: "For even a standing army, that grand engine of oppression, if it were as numerous as the abilities of any nation could maintain, would not be equal to the purposes of despotism over an enlightened people."⁹³ Indeed, "[a]s long as the liberty of the press continues unviolated, and the people have the right of expressing and publishing their sentiments upon every public measure, it is next to impossible to enslave a free nation."⁹⁴ "Centinel" noted with great regret that "[t]he abolition of that grand palladium of freedom, the liberty of the press, in the proposed plan of government, and the conduct of its authors, and patrons, is a striking exemplification of these observations."⁹⁵

C. Towards the Bill of Rights

The most common complaint of the antifederalists was that the Constitution lacked a Bill of Rights. Most of the fears of "Centinel," "Brutus," "John Humble," and "A Turk" might have been allayed if the Constitution had contained such protections. Indeed, the least understandable aspect of the ratification struggle was not the demand for a Bill of Rights, but the insistence of the federalists, particularly Hamilton, that it was unnecessary.⁹⁶

people" and the states from the national government. Henry particularly feared a national military tyranny that, in his view, only the state militias would be able to thwart. But Henry warned that, "[a] standing army we shall have also, to execute the execrable commands of tyranny." To resist that tyranny would be impossible, Henry believed, in part because "[the state] militia is given up to Congress also in another part of the plan All power will be in their own possession Of what service would militia be to you, when most probably you will not have a single musket in the State; for as arms are to be provided by Congress, they may or may not furnish them." *Speeches of Patrick Henry, supra* note 60, at 217.

⁹³ *Letters of Centinel* (undated essay), *supra* note 27, at 144.

⁹⁴ *Id.* at 143-44.

⁹⁵ *Id.* at 144.

⁹⁶ "It is significant that Alexander Hamilton did not share either the anxiety or dissatisfaction of his contemporaries over the absence of a bill of rights in the original Constitution." S. KONEFSKY, JOHN MARSHALL AND ALEXANDER HAMILTON, ARCHITECTS OF THE AMERICAN CONSTITUTION 20 (1964). Hamilton believed that under the new Constitution a Bill of Rights was unnecessary because the powers of the new government were strictly limited. Thus, Hamilton wrote, "I go further, and affirm that bills of rights, in the sense and in the extent in which they are contended for, are not only unnecessary in the proposed constitution, but would even be dangerous. . . . For why declare that things shall not be done which there is no power to do?" THE FEDERALIST, NO. 84, at 579 (A. Hamilton) (J. Cooke ed. 1961).

Hamilton seems also to have been annoyed with the demands for a Bill of Rights simply because such demands threatened ratification. Thus, Hamilton complained of "the pretended defects" of the Constitution, which included "the omission of a formal bill of rights, the omission of a provision respecting the liberty of the press." THE FEDERALIST NO. 85, *supra*, at 588. Given the vague powers granted to Congress through the various war powers clauses and the "necessary and proper clause" (U.S. CONST. art. 1, § 8) and to the President as commander-in-chief, it is easy to understand why the antifederalists feared the lack of a Bill of Rights. The arrogant intolerance that Hamilton showed for dissenters throughout his

In his introductory essay, Storing asserts that the Bill of Rights was "an ambiguous legacy" of the antifederalists because "the success of the Bill of Rights reflects the failure of the Anti-Federalists."⁹⁷ Had the Constitution not been ratified, a Bill of Rights would have been unnecessary. Thus, Storing concludes that "[t]he whole emphasis on reservations of rights of individuals implied a fundamental acceptance of the 'consolidated' character of the new government."⁹⁸ This analysis is flawed because it assumes that the antifederalists were tied to a strict theory of government. They certainly did not believe that a consolidated national government would succeed. They assumed it would degenerate into tyranny. Their major fear was of tyranny itself, and not of a particular kind of government. They wanted strict separation of powers, limitations on the military, rotation in office, and other changes because these reforms would prevent tyranny. Most of all, however, the antifederalists wanted a Bill of Rights.

The importance of a Bill of Rights to the antifederalists is suggested by the objections to the Constitution of those who participated in the Convention in Philadelphia. George Mason, who attended the Convention in its entirety, refused to sign the final document. Mason began his *Objections to the Constitution of Government formed by the Convention* by stating: "There is no Declaration of Rights; and the Laws of the general Government being paramount to the Laws and Constitutions of the several States, the Declaration of Rights in the separate States are no Security."⁹⁹ Mason's other major objections to the Constitution flowed from this deficiency. Elbridge Gerry of Massachusetts also refused to sign the Constitution, explaining his decision this way: "It was painful to me, on a subject of such national importance, to differ from the respectable members who signed the constitution: But conceiving as I did, that the liberties of America were not secured by the system, it was my duty to oppose it."¹⁰⁰ Gerry had grave reservations about the relationship between the executive and legislative branches, but his foremost objection was "that the system is without the security of a bill of rights."¹⁰¹

The willingness of the antifederalists to accept a Bill of Rights suggests that they were, in the end, not "men of little faith."¹⁰² Quite the

career, as well as his creative use of the "necessary and proper clause" to promote the first bank of the United States, suggests that the antifederalists were justified in demanding a Bill of Rights. See, e.g., P. BREST & S. LEVINSON, *THE PROCESS OF CONSTITUTIONAL DECISION-MAKING: CASES AND MATERIALS* 15-18 (2d ed. 1983) (presenting Hamilton's arguments utilizing the "necessary and proper" clause in support of Bank of the United States).

⁹⁷ 1 THE COMPLETE ANTI-FEDERALIST, *supra* note 9, at 65.

⁹⁸ *Id.*

⁹⁹ Mason, *supra* note 34, at 11.

¹⁰⁰ Hon. Mr. Gerry's objections to signing the National Constitution, in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 9, at 6.

¹⁰¹ *Id.* at 7.

¹⁰² See Kenyon, *supra* note 2.

opposite, they were men of great faith. They were willing to risk this experiment in government provided that the Constitution protected a free press, jury trials, and due process; incorporated bans on arbitrary and cruel justice; and allowed for state militias that would be able to strike back against any president or general who might attempt to seize power.

In another sense they were also the great realists of the period. Most scholars point to the *Federalist Papers* to illustrate that Madison and Hamilton understood the dangers of the majority. The great beauty of the American system, we are told, is that the rights of the minority were protected through the diffusion of power and limited government. But, it was the antifederalists who saw that without a Bill of Rights there would be no limits on the government. They understood just how corrupting power could be. Had it been left to Hamilton and James Wilson, the republic might not have survived to celebrate its two hundredth birthday. Some Imperial President might long ago have created his own empire, acting as commander-in-chief and aided by a pliant Congress utilizing the necessary and proper clause. It was the faith of the antifederalists like "Centinel" who understood that "if the liberty of the press . . . could be rendered *sacred*, . . . despotism would fly before it."¹⁰³

D. Antifederalism and Antislavery

Seventy-four years after the ratification debates began, America's great constitutional experiment almost ended. The Civil War nearly destroyed what the framers had built. The nation not only survived, but altered the Constitution in ways that removed many of its perceived defects. The Civil War, caused by slavery, led to the end of that institution. Furthermore, as a consequence of the Civil War, the Bill of Rights would be extended to the states.¹⁰⁴

The Civil War might not have surprised those antifederalists troubled by the new government's connection to slavery. Whether they opposed the Constitution because it aided slavery, or, in the case of a few southerners, because it did not protect slavery enough, those antifederalists who attacked the Constitution because of its relationship with slavery displayed an understanding that the federalists could not, or would not, appreciate. Quite simply, many of the antifederalists understood, as Lincoln would verbalize seventy years later, "A house divided against itself cannot stand. I believe this government cannot endure, perma-

¹⁰³ *Letters of Centinel*, *supra* note 27, at 143 (emphasis in original).

¹⁰⁴ On the legal history of the war and its aftermath, see H. HYMAN & W. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835-1875* (1982).

nently half *slave* and half *free*."¹⁰⁵

The question of slavery was present throughout the debates over the Constitution. At the Convention, Madison cogently argued that the states were not divided by size, but "[from the effects of] their having or not having slaves."¹⁰⁶ The Constitution contained a number of explicit clauses protecting slavery. In addition, a number of clauses indirectly protected the institution.¹⁰⁷

During the debates over ratification, the antifederalists were usually far more willing than the federalists to discuss the connection between slavery and the Constitution. This should not be surprising. Many antifederalists, in the South as well as the North, were quick to attack the provisions allowing the African slave trade.¹⁰⁸ Only in South Carolina and Georgia was it respectable to defend this clause.¹⁰⁹ Some southern antifederalists did attack the Constitution as a threat to slavery but, by and large, federalists successfully parried these criticisms. Few could argue with Edmund Randolph, who told the Virginia ratifying convention "[w]ere it right here to mention what passed in convention . . . I might tell you *that the Southern States, even South Carolina herself, conceived this property to be secure* I believe, whatever we may think here, that there was not a member of the Virginia delegation who had *the smallest suspicion of the abolition of slavery*."¹¹⁰

¹⁰⁵ 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 461 (R. Basler ed. 1953) (emphasis in original).

¹⁰⁶ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 33, at 486; *see also* P. FINKELMAN, AN IMPERFECT UNION 20-45 (1981).

¹⁰⁷ The Constitution protected slavery directly through the three-fifths clause (U.S. CONST. art. I, § 2), the slave trade clause (art. I, § 9), the fugitive slave clause (art. IV, § 2), and the amendment provisions of article V. Indirect protection for slavery is found in the guarantee to suppress slave rebellions. *See* W. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848, at 62-83 (1977).

¹⁰⁸ Among the southerners who opposed the slave trade was the Kentuckian "Republicus," who thought that the slave trade provision to be "an excellent clause . . . in an Algerian Constitution." *Essays by Republicus* (essay of Mar. 1, 1788), in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 9, at 169. *See also* Martin, *supra* note 26, at 59; *Sentiments of Many*, in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 9, at 276. Federalists north of Georgia and South Carolina attempted to minimize the impact of this clause and discussed it as little as possible. Where they did discuss it, the northern federalists were often quite misleading as to what the clause would accomplish. James Wilson, who surely knew better, tried to convince the Pennsylvania ratifying convention that the clause would allow Congress to end all slavery in the United States. Wilson argued that after "the lapse of a few years, . . . Congress will have power to exterminate Slavery within our borders." 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 6, at 484.

¹⁰⁹ *See* P. FINKELMAN, *supra* note 106, at 23-24; D. ROBINSON, SLAVERY IN THE STRUCTURE OF AMERICAN POLITICS, 1765-1820, at 222-45 (1972); *Loundes*, *supra* note 35, at 159-52 (speech of Jan. 16, 1788).

¹¹⁰ *Virginia Debates*, *supra* note 37, at 599 (emphasis in original). Randolph attended the Constitutional Convention but refused to sign the document. *Id.* at 24-25. That would seem to make him an antifederalist. He later supported and voted for the Constitution in the Virginia ratifying convention. *Id.* at 652, 655. When Randolph made the statement quoted, he still opposed the Constitution.

That antifederalists discussed slavery is subject to two different interpretations. Some scholars have assumed that the antifederalists employed *any* argument that might defeat the Constitution. This analysis leads to the conclusion that any antifederalist who raised the issue of slavery was simply trying to sabotage the whole Constitution by discussing the undiscussable. Thus, Cecelia M. Kenyon dismissed "Cato's" opposition to the Constitution because he criticized "the guarantee of a continuation of the slave trade until 1808, without considering whether such compromises were necessary to secure agreement among the various groups whose interests and ideas were in conflict."¹¹¹ Kenyon's argument implies that the success of the Constitution was worth any cost and any compromise. We can only speculate if any of the more than 80,000 slaves imported into the United States before 1808 would have agreed with Kenyon. Storing curiously relegates the entire issue of slavery to a footnote on the last page of his essay *What The Anti-Federalists Were For*. Here Storing states that "[t]he Anti-Federalists were less easily persuaded that questions of politics can be freed from questions of conscience."¹¹²

The second interpretation of antifederalist opposition to slavery is that many Americans sincerely opposed constitutional protection for slavery on both moral and policy grounds. For example, "A Countryman from Dutchess County" thought that Americans might become "a happy and respectable people" if the Constitution were "corrected *by a substantial bill of rights*" and, among other changes, the states were forced into "relinquishing every idea of drenching the bowels of Africa in gore, for the sake of enslaving its free-born innocent inhabitants."¹¹³ This is rather strong language, but it pales before Joshua Atherton's ringing complaint in the New Hampshire convention:

The idea that strikes those, who are opposed to this clause, so disagreeably and so forcibly, is, hereby it is conceived (if we ratify the Constitution) that we become *consenters to*, and *partakers in*, the sin and guilt of this abominable traffic

We do not think ourselves under any obligation to perform works of supererogation in the reformation of mankind; we do not esteem ourselves under any necessity to go to Spain or Italy to suppress the inquisition of those countries; or of making a journey to the Carolinas to abolish the detestable custom of enslaving the Africans; but, sir, we

¹¹¹ THE ANTIFEDERALISTS, *supra* note 4, at 301.

¹¹² 1 THE COMPLETE ANTI-FEDERALIST, *supra* note 9, at 100 n.20. Storing's refusal to address the question of the relationship between the founders and the issue of slavery is just one example of his pro-federalist sympathies. The texts of Storing's volumes seriously undermine his assertion that the "Federalists were not, generally speaking, less antislavery than the Anti-Federalists." *Id.*

¹¹³ *Letters from a Countryman from Dutchess County* (letter of Jan. 22, 1788), in 6 THE COMPLETE ANTI-FEDERALIST, *supra* note 9, at 62 (emphasis in original).

will not lend the aid of our ratification to this cruel and inhuman merchandise, not even for a day. There is a great distinction in not taking a part in the most barbarous violation of the sacred laws of God and humanity, and our becoming guaranties for its exercise for a term of years.¹¹⁴

The passions of Atherton and others on this issue shaped how the Constitution would be understood and implemented. "A Friend of the Rights of People" asked, "Can we then hold up our hands for a Constitution that licences this bloody practice? Can we who have fought so hard for Liberty give our consent to have it taken away from others? May the powers above forbid."¹¹⁵ "A Friend" was particularly troubled because even after twenty years the Constitution did not require that "this cruel and barbarous practice . . . shall cease."¹¹⁶ It is likely, however, that the strong antifederalist criticism of the slave trade insured that the clause which permitted its continuation would be construed narrowly, and as soon as the twenty year time limit ended, the trade would be prohibited. To defend the Constitution, federalists were forced to insist that the slave trade *would* end in 1808.

Nevertheless, federalist support for the slave trade deeply troubled many Americans. Three Massachusetts antifederalists wondered what type of men the federalists were who "now appear such strenuous advocates for the establishment of that diabolical trade of importing the Africans."¹¹⁷ These antifederalists were concerned about "forming a constitution for the whole" nation which supposed "the states are under obligation . . . reciprocally to aid each other in defence and support of every thing to which they are entitled thereby, right or wrong."¹¹⁸ They wondered when they would be called to suppress a slave revolt. More importantly, these antifederalists recognized that a compromise with slavery could not last forever. They believed the Constitution with "this lust for slavery, [was] portentous of much evil in America, for the cry of innocent blood, . . . hath undoubtedly reached to the Heavens, to which that cry is always directed, and will draw down upon them vengeance adequate to the enormity of the crime."¹¹⁹ Their fears might seem fantastic and apocalyptic; but the slaughter at Shiloh, Antietam, and a thousand other battle sites proved that they were far more prescient about the nature of the Constitution than were those sanguine

¹¹⁴ *Fragment of Debate at New Hampshire Convention*, in 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 6, at 203-04 (emphasis in original). Storing unfortunately did not include this speech in THE COMPLETE ANTI-FEDERALIST, even though it is one of the few in existence from the New Hampshire ratifying convention.

¹¹⁵ *A Friend to the Rights of the People*, *supra* note 72, at 234, 241.

¹¹⁶ *Id.*

¹¹⁷ Arms, Maynard & Field, *supra* note 31, at 262-63.

¹¹⁸ *Id.* at 263.

¹¹⁹ *Id.*

federalists who believed that *anything* might be compromised for the sake of union and prosperity.¹²⁰

Northern antifederalists were not the only ones to complain about the extension of the African slave trade. Virginia's "Republicus" thought that the slave trade provision was "[a]n excellent clause this, in an Algerian constitution: but not so well calculated (I hope) for the latitude of America."¹²¹ Maryland's Luther Martin tied opposition to the slave trade with opposition to the three-fifths clause. He thought the latter an "absurdity" for "*increasing* the power of a State in making laws for *free men* in *proportion* as that State *violated* the *rights of freedom*."¹²² Furthermore, he objected to counting slaves for purposes of representation because that "tended to *encourage* the *slave trade*, and to make it the *interest* of the States to *continue* that *infamous traffic*."¹²³

IV

BEYOND RATIFICATION

When the new Constitution became effective on June 21, 1788, Virginia and New York had not yet ratified the document. The new nation, however, could hardly expect to survive without these two key states.

The battle for ratification in Virginia was won when a motion by Patrick Henry for amendments to the Constitution *before* its ratification was defeated by eight votes. A change of but five votes would have kept Virginia out of the Union.¹²⁴ Before the Virginia convention could take its final vote and adjourn, George Mason brought his antifederalist allies together for one last strategy session. To Mason's surprise, antifederalist Benjamin Harrison urged his colleagues to accept defeat and work under the Constitution in hopes that "those destructive consequences to their liberty . . . which the minority apprehended" might never materialize.¹²⁵

It is fortunate for the nation that most antifederalists followed Harrison's advice. The greatness of the antifederalists ultimately was their willingness to work within the structure to oppose tyranny, rather than to take up arms against a government they feared.¹²⁶ The antifederal-

¹²⁰ See *supra* text accompanying note 111-12.

¹²¹ *Essays by Republicus, supra* note 108, at 169.

¹²² Martin, *supra* note 26, at 49 (emphasis in original).

¹²³ *Id.*

¹²⁴ Virginia ratification is discussed in R. RUTLAND, *supra* note 2, at 249-53. Henry's procedural motion was defeated by a vote of 88 to 80. *Id.* at 250. The final vote for ratification was 89 to 79. Two of those who voted for the Constitution in the Virginia convention were from Washington County, which was actually in Pennsylvania. J.T. MAIN, *supra* note 2, at 229 n.31.

¹²⁵ Quoted in R. RUTLAND, *supra* note 2, at 251.

¹²⁶ A similar position is taken and more fully developed in S. BOYD, *supra* note 2.

ists sought, as one of Mason's Virginia allies stated, "[t]o form a government that shall shield you from dangers from abroad, promote your general and local interests, protect in safety the life, liberty, and property, of the peaceful, the virtuous and the weak, against the encroachments of the disorderly and licentious."¹²⁷ When the Bill of Rights they demanded was added to the Constitution, much of their goal was accomplished. By taking part in the new government the antifederalists helped ensure the success of the Constitution they opposed. It is at least partially because of their willingness to remain politically active that their articulated fears of 1787-88 seem so extreme. The Virginian just quoted in fact had a significant influence in this regard. As a Senator, Governor, diplomat, Secretary of State, and finally President, James Monroe was instrumental in implementing a Constitution that he initially opposed.

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¹²⁷ Monroe, *Some Observations on the Constitution*, in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 9, at 307.

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