

THE PARADOXICAL CONTRIBUTION  
OF THE ANTIFEDERALISTS  
TO THE UNITED STATES CONSTITUTION

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**1. Longevity of the Federal Constitution and its “Difficult Birth”**

Today, I would like to talk about the Constitution of the United States, in particular about the role of the Antifederalists. There are two reasons for this. The first point is, as you know, the Constitution of the United States, or the Federal Constitution, is the oldest existing written constitution in the world today. However, as to when the Constitution will celebrate its bicentennial, there is a problem. In 1787, two hundred years ago next year, a meeting was held and the draft of the Constitution was proposed. It is certain that the Constitution was not finalized at this time. If you look at the table based upon Jackson Turner Main's *The Antifederalists*, we can see just when the Constitution was ratified. According to the original draft of the Constitution, nine states had to ratify the Constitution before it went into effect. New Hampshire, as it shows on the chart, was the ninth state to ratify it. This took place on June 21, 1788. Thus, one could say that around the middle of June, 1988 is the real 200th anniversary of the Constitution of the United States. Furthermore, strictly speaking, the government of the United States made a start, when the first president, George Washington, was inaugurated in April of 1789.

TABLE: RATIFICATION ORDER, DATE AND VOTE

|     | States by Order of Ratification | Ratification Date | Vote on Ratification |
|-----|---------------------------------|-------------------|----------------------|
| 1.  | Delaware                        | December 7, 1787  | 30-0                 |
| 2.  | Pennsylvania                    | December 12, 1787 | 46-23                |
| 3.  | New Jersey                      | December 18, 1787 | 39-0                 |
| 4.  | Georgia                         | January 2, 1788   | 26-0                 |
| 5.  | Connecticut                     | January 9, 1788   | 128-40               |
| 6.  | Massachusetts                   | February 6, 1788  | 187-168              |
| 7.  | Maryland                        | March 28, 1788    | 63-11                |
| 8.  | South Carolina                  | May 23, 1788      | 149-73               |
| 9.  | New Hampshire                   | June 21, 1788     | 57-46                |
| 10. | Virginia                        | June 25, 1788     | 89-79                |
| 11. | New York                        | July 26, 1788     | 30-27                |
| 12. | North Carolina                  |                   |                      |
| 13. | Rhode Island                    |                   |                      |

source: adopted from Jackson Turner Main, *The Antifederalists* (Norton, 1974)

I am from the pre-war generation and a bit older. I entered Tokyo Imperial University in 1940 and studied the Japanese Imperial Constitution under Professor Toshiyoshi Miyazawa. Professor Miyazawa, a sarcastic person, used to say with a grinning face. "The Japanese Imperial Constitution is an eternal constitution. That is, it is a constitution that will continue forever. However, . . ." As Professor Miyazawa grinned, that Constitution came to an end in 1945. At any rate, with the exception of the English Constitution, which is not a written document, the United States Constitution is the oldest existing constitution. This is a certain fact and must be noticed.

This first point does not present much controversy. The second point, however, is one with which I would like to take issue. That is the fact that this Constitution has had such a long history and has been so remarkably stable. The fact that it has had such a long history leads people to suppose that the establishment of this Constitution was not such a difficult problem. If you know even a little bit about the history of the United States Constitution, however, you will understand that many heated disputes occurred at the Federal Convention in 1787. In

September of 1787, a draft of the Constitution was completed. Then, each state held a convention in which to seek ratification of this Constitution and this led to further argument. It was only after the minimum number of states, nine, decided to ratify the Constitution that it came into being. Thus, the Constitution became effective without the consent of all the states. This suggests the “difficult birth” the Constitution experienced at the time of its establishment.

If we look at the table again, we can see the tally of votes for and against the proposed Constitution according to state. The first few states to ratify the Constitution had relatively little difficulty in doing so. However, if we look at Massachusetts, a very important state at the time, we see that the vote was 187 to 168, which is not much of a difference. Massachusetts was the sixth state to ratify the Constitution and was followed by Maryland, South Carolina, and New Hampshire. If we look at the next state to take the initiative to ratify, the very important state of Virginia, we see that the vote was only decided by ten votes (89 to 79); another close battle. Following Virginia, New York, another big state, was the next state to ratify, but by only three votes (30 to 27). North Carolina and Rhode Island did not, at this time, choose to ratify.

The total number of votes for all the states totalled 844 for the Constitution and 467 against. This comes to 64.37% for and 35.63% against. Robert E. Brown in his *Charles Beard and the Constitution* was impressed with the 64% popularity rate it received stating that if we consider presidential elections, no president has ever captured this high a percentage of the popular vote, and if one were to do so, it would signify an overwhelmingly strong show of support for that candidate. On the other hand though, we could also say that over one-third of the vote went *against* the Constitution. It is also important to remember that North Carolina and Rhode Island did not ratify the Constitution and are *not* included in the above figures. If we were to include these two states, the vote against the Constitution would have been much greater. Perhaps it would have been more than 40%, perhaps around 45%. Thus opposition to the Constitution was great.

Even though the Constitution went through many hardships in its birth, the reason it has lasted so long is, though it may sound paradoxical,

cal, because of the great opposition to the Constitution which was so critical at the time it was being ratified. The Federalists realized that the Constitution they had originally in mind might never attain ratification. Thus, they were forced to take into consideration the Antifederalists' demands and to some extent included them in the draft of the Constitution. The fact that the Constitution has been in effect up until the present is, I presume, due greatly to this factor. This kind of paradoxical contribution that the Antifederalists have made is an important premise that I would like to make.

Last year, in a bulletin put out by International Christian University, I published an article entitled, "James Wilson and the Fundamental Principles of the Establishment of the Federal Constitution." In that article, I referred to the very important role Wilson's ideas played in the Constitution attaining ratification. For your information, the reason why Wilson is not looked at in the same regard as Madison or Hamilton might be explained as follows. After the Constitution was ratified, he became a justice of the Supreme Court. He was a Scotchman by birth. He was also, like everyone else at the time, including George Washington, very fond of land speculation. Wilson, however, was a bit eccentric at this and invested again and again in land. Land prices, though, never did reach as high as he thought they would. Yet, he still persisted on investing. He then had to borrow money to support his investments and proceeded to accumulate a large debt. At that time, if you could not repay a debt, you were put in jail. So, while he was still a justice of the Supreme Court, he was spending time in jail in South Carolina, or some other state, due to his failure to repay his debts. From jail, he wrote letters to his son begging him to send money. He then became a bit neurotic and spent the remainder of his life in misery. Because of all this, he did not attain fame and, consequently, not much research has been done concerning him. Publications of his works are, for the most part, very limited.

In spite of all this, while many people consider Wilson second in importance only to Madison, I feel that he should be considered equal to, if not more important than Madison, in terms of the degree of importance his contribution to the Federal Constitution. He was from Pennsylvania which had a very radical state constitution. It was also

a place where the Antifederalists enjoyed much strength. Wilson, being in Pennsylvania as a conservative, had at least a knowledge of the sentiment created by the Antifederalists. This sentiment he read about beforehand and it compelled him to constructively insert the idea of popular sovereignty, or democracy, into the Constitution.

## **2. What Constitutes a Constitution?**

Now, I would like to discuss the concept of “constitutionalism” itself. I would like to briefly touch upon the idea of just what the function of a constitution is. Its primary function is that of establishing legal authority of government while, at the same time, placing legal restrictions on this authority. In other words, we can say that the legal foundation and legal restriction of governmental powers are the essential, logical functions of a constitution. In historical reality, more often than not, the existence of political power has preceded the establishing of a constitution. Therefore, a constitution has had the function of restricting arbitrary and absolute power. To some extent, the English Constitution has followed this pattern.

I want to turn back to issues concerning the United States Constitution, but we must first look briefly at the English Constitution. When we consider England’s constitutional history, there evolved the concept of Coke (Sir Edward)’s containment of absolute power. Furthermore, with the Puritan Revolution, followed by the Glorious Revolution, more restrictions on the royal prerogative were enforced. From this point on, many differences exist, concerning the concept of “constitution,” between the United States and England. In England, there does not exist a written constitution in any form. It is nothing but a bundle of customs and statutory laws. The question then arises as to just what constitutes a constitution. That problem is decided when a national assembly, once having established legislative sovereignty, as Parliament did, passes an important statutory law. This in reality is constitution per se. Yet, who is to check this legislative authority and decide the constitutionality of this particular statutory law? Do restrictions exist? This is probably one of the problems that existed between England, the mother country, and colonial America from around 1763

to 1774 and after causing constitutional dispute. The American colonists greatly respected the English Constitution. They said that they fought the British based upon their English constitutional rights. Yet, just exactly what the English Constitution consisted of was not clear. Due to this, Americans have insisted that a constitution must be fixed and written. This is the first point that distinguishes American constitutionalism from English constitutionalism.

The second point is that the American colonists felt that a constitution must be recognized as higher law than ordinary statutory law passed by a legislature. If not, no matter how representative a legislature is of the people, when it chooses to pass laws, there is no way they can place restrictions on it.

The third point is, when restrictions are placed on authority, two important conditions must be made. The first condition is that, when restricting government, no government should overlook the fact that the people's rights are sacred. They should never be violated. A bill of rights should be constructed to ensure this. The second is, power must not be concentrated in one branch of government, but divided up among several. A separation of powers is necessary. These three points encompass the essence of the concept of "constitutionalism" in the United States that was first expounded in 1776. In theory, it was believed that if these three important elements did not exist, then neither did a constitution.

The very first state constitution, which was written in Virginia in 1776, was nothing more than statutory law. For this reason, Thomas Jefferson in his *Notes on Virginia* criticized the Virginia "constitution," saying that it was in essence, not a constitution in the true sense. It was a statutory law enacted by the ordinary legislature and was not higher law. Thus, strictly speaking, it could not be considered a constitution. George Mason, of whom I will refer to later, also came to this conclusion. Massachusetts, in order to draft their state constitution, went through a very elaborate procedure. A convention of representatives, separate from the state assembly, was chosen by the people for the sole purpose of drafting a constitution. The proposed constitution then went through the ratification procedures. The Massachusetts Constitution of 1780 was higher law than statutory law set by the state

legislature.

I would like to jump back a bit to Japanese constitutional history. Many people in Japan say that the Meiji Constitution was not a legitimate constitution because it was an "absolutist constitution," *given* by Emperor Meiji, and that the present Japanese Constitution, because it was *forced* upon Japan by the occupation forces, also is not legitimate. Thus, between these two Constitutions there is no succession. Perhaps it is because I am a little old fashioned, but I feel that the Meiji Constitution can be considered a legitimate constitution. While there were many problems with the Meiji Constitution, still, it does come close to meeting the requirements necessary for a constitution to exist. The feelings the Japanese have for a constitution do not simply stem from the Constitution that was forced upon them after the war by the occupation forces. Constitutionalism was, to some degree, already a part of the Japanese even before the war. Interpreting Japanese constitutional history in this way facilitates in the Japanese people's acceptance of the post-war Constitution.

In 1916, Sakuzo Yoshino wrote an article with the very long title, "A Discourse on the Fundamentals of the Constitutional Government and the Way to Reach Final Success," (*Kensei no Hongi o Toite Sono Yushu no Bi o Nasu no Michi o Ronzu*) which was published in *Chuokoron*. In this article, Yoshino very clearly defines just what constitutes a constitution. "If you take the word 'constitution' in its most literal sense, it can be interpreted as meaning the most basic law of a national government." However, that is not all that a constitution consists of when we consider constitutional law. He goes on to say, "A constitution has the characteristic of acting as the basic law of a nation. At the same time, it must also possess other essential elements to be considered constitution . . . I will next give two points. First, what we call a constitution is a step higher, in terms of its effect, than ordinary statutory law." The second point is broken down into three parts. "It must contain the following: a bill of rights, a separation of powers, and a system of popularly elected legislature." Within the Meiji Constitution there existed many problems, including the prerogative of supreme command in particular. Still, however, we can see a sprout of constitutionalism in the making within the Meiji Constitu-

tion.

I would like to submit to you another example. In 1789, in the French Declaration of Rights of Men and Citizens, we find a similar statement regarding constitutionalism. Article 16 states, “Any society in which the guarantee of rights is not assured or the separation of powers not determined has no constitution.” That is to say, if there is no bill of rights, there is no constitution. Essentially, if the above two conditions are not met, even though a constitution may exist in form, it does not really exist in spirit.

Every state constitution was, for the most part, based on the principles outlined above. From this, in 1787, the United States Constitution was drafted. Based upon what we have been saying up until now, the constitutionalists, people determined to draft a constitution, advocated building into the Constitution restrictions on power. From our standpoint, this seems to be naturally acceptable idea. We should, however, remember that conditions did not permit the establishment of a constitution at the time in the United States, as we have been discussing here. Up until now, we have been saying that a constitution is something that, once a national authority has been established, in relation to this authority, restrictions should be placed. However, in the 1780's, the United States of America did not exist as a nation. It was a group of nations. Strictly speaking, legally, states, such as Virginia, had a national authority. Yet, in the United States of America, no one national authority existed in any shape or form. Consequently, drafting a Federal Constitution meant that a nation of United States was to be formed. To put it another way, there was a movement to establish a national authority called the United States of America.

If we accept the viewpoint that the Antifederalists had at the time, that the existing system of the confederation of States was adequate, then we see that there was no real necessity to draft a constitution. The Federalists proposed drafting a constitution for the purpose of establishing a national authority. The Antifederalists, however, called for maintenance of the existing system. The Antifederalists were conservative when seen from this point of view. They were conservative not over issues, but over the movement to maintain the status quo.

We can think of the Federalists, on the other hand, as being very innovation-oriented. Thus in 1787, the movement to draft a constitution began, and a Federal Convention was held.

### **3. Main Issues Around the Framing of the Federal Constitution**

Let us now look at just what issues led to dispute. I will break them into three points. The first problem was whether to keep the United States as a “confederation” or to remake it as a “consolidation.” Up until that time, the United States was a confederation of states. Because of this, one group advocated changing this group of united states into one united nation. At this time, this was called a “consolidation.” Directly speaking, it involved forming the United States as a national authority as well as establishing a national government. In the opening address at the Federal Convention, the proposal submitted by the state of Virginia used the word “national” numerous times; national executive, national legislative, national judiciary, etc.. Essentially, the intention was to form a nation. Thus, the first big problem was to decide what form or shape this United States would take.

The second major problem had to do with what kind of governmental structure this nation should adopt. Specifically, should it be in “democratic” form or “aristocratic” form? The “aristocratic” model advocated decision-making by the minority, whereas the “democratic” model advocated decision-making by the majority. In other words, the problem centered around whether to allow decision-making to be performed by only the highly refined sector of society regardless of social position, or by a wide variety of people.

Many people like to say that democracy was not looked upon favorably at the time of the Convention in post-revolutionary America. However, if you read the literature of that time, this was not necessarily true. In respect to this, I often quote the phrase, “the excess of democracy” which was expressed by a representative from Massachusetts at the Convention, Elbridge Gerry. People who criticize the social trends of this time like to correctly point out that, here, Gerry was saying that the excess of democracy was undesirable. What they

fail to realize is that Gerry, by saying this, was not saying that democracy itself was bad, but that it was desirable to refine democracy a little to ensure sophisticated decision making. A change from the present confederation to a consolidation, coupled by a movement from an excessive “democracy” to an “aristocracy” was actually what the Federalists were pursuing at this time. In opposition to this were the Antifederalists, who advocated maintaining the status quo.

Hamilton, who supported the Federalists’ views to an extreme, proposed his own version of a constitution and suggested at the Convention that the states be dissolved, governors be appointed by a central government, and that the president and members of the Upper House in Congress be given life terms even though their positions were to be decided by election. Hamilton reasoned that, since England had, at the time, the most efficient system, the American constitution must be molded to it. Hamilton was an extremist and no one considered adopting his proposal. Even so, he took up more than three hours of conference time to present his proposal and left everyone at ill. Suppose the Convention had adopted Hamilton’s proposal. It would then have had to go to the thirteen state conventions to be ratified. You can imagine that this would have supplied the energy the Antifederalists needed to attack the proposed Constitution and would have led to its defeat. In the end, rather than proposing an extreme plan, it was decided to draft a proposal that left room for compromising with the Antifederalists on important points.

In regard to the problem of government form, while the confederation model that had been in use up until this point was deemed inadequate, a simple consolidation also had its problems. In the end, it was proposed that the United States of America come to exist as a nation, while, individual states also maintained the status of nation. The result was a “dual nation” system. This became known as “federalism.” Necessarily, the United States became a nation, yet, the state of Virginia also was a nation. In reality, Federal Government is nothing but a national government, but the adjective “national” was carefully dropped out. This was, to some extent, a compromise to the Antifederalists.

Whether the United States adopted a “democracy” or an “aristoc-

racy” was a target of heated discussion. At that time, no one used the word “aristocracy” in positive terms, but, for all purposes, it was an aristocracy with decision-making being performed by a refined minority. This point evolved into another big dispute, concerning, among other things, the question on how to elect members of the Lower House. Gerry, among others, stated that people cannot be trusted to elect competent representatives and they fell victim to demagoguery. Due to the fear of getting caught up in democracy, the call for indirect elections of Lower House members was strong. James Wilson, on the other hand, very strongly called for direct elections. He insisted that members of the Lower House be elected by the people considering this to be the one point that on which he would not compromise. In exchange for this, he did compromise on the issues of indirect elections of Upper House members and of the President. This resulted in what was known, in those days, as a republic. The term “republic” was used in many ways, though. Madison, in contrast to democracy, used it in terms of a “representative government.” This resulted in a proposal to create a “federal republic” in lieu of a “consolidated aristocracy” which saw no real chance of passing ratification by required number of states.

There definitely was quite a bit of compromising that went on within the Federal Convention. For example, a problem arose as to how to handle the differences in the size of the states in terms of number of representatives to Congress. In the end, in order to maintain the dignity of the smaller states, it was decided that each state should be allowed to have two delegates in the Upper House and that only the number of representatives in the Lower House would be determined by state population. This is a very well-known compromise. Another problem had to do with differences between the northern and southern states. At that time, southern blacks were slaves and not considered in legal population counts. In this case, they compromised by saying that, in deciding the number of representatives in the Lower House per state, only three-fifths of the black population would be considered.

When the discussion got overheated, Benjamin Franklin, uncharacteristically, requested everyone to pray to God. This became a famous story. At any rate, my main focus of discussion here is the fact

that the idea of a federal republic was adopted as a compromise in response to the probable opposition that existed outside the Convention. That is to say, some shrewd Federalists at the Federal Convention anticipated a strong Antifederalist objection outside the Convention and compromised accordingly. A very close fight followed, yet this compromise paved the way for the Constitution attaining ratification in the end.

By the advocates of the Constitution labeling themselves as “Federalists” and their opposition as “Antifederalists,” the Federalists were in effect, humiliating the opposition. The prefix “anti” carries with it a negative connotation. A stroke of bad luck that the Antifederalists were plagued with was the fact that the Federalists were able to publish a book that has become more of a “bible” for government, *The Federalist*. Later, they enjoyed success in the political world. Hamilton served as Secretary of the Treasury; Jay, Chief Justice of the Supreme Court; and Madison, leader of the Lower House, Secretary of State, and finally President. Once one establishes oneself in the political world, fame follows. As no Antifederalist reached this plateau, none of them attained fame. What they have written, they have done so under a pseudonym. At this time, the authors of *The Federalist* also wrote under pseudonyms but as they were very popular, readers were soon able to identify the work as being that of Madison, Hamilton, and Jay. The Antifederalists were not so easily distinguishable. They did not join the political world on the national level and, among them, there were even some who joined the Federalists. Thus, no outstanding symbol existed. There was not anyone who could stand out as their leader. To use an example, the Civil Rights Movement had Martin Luther King as a symbolic figure. In any political movement, this symbolic figure is extremely important. Among the Antifederalists, there was no one who took on this role. Thus, their existence was overshadowed.

For the sake of giving a name, at most, George Mason was their symbolic leader. George Mason was a leading person in drafting the Virginia Bill of Rights and its constitution. At the Federal Convention, he objected in vain to the fact that the Bill of Rights was not to be included in the final draft.

#### 4 . The Bill of Rights and George Mason

Just why was the Bill of Rights left out of the original Constitution? This was the third major point of dispute and is very interesting. From the Antifederalists' perspective, this posed a major problem, precisely because they believed that without a Bill of Rights, no constitutional government could exist. However, in the original Constitution, there was no Bill of Rights. It was later added as the first ten amendments. Why was it not included from the beginning?

Logically speaking, it is probably for the better that it was not included in the beginning. In the American system of dual government, there are the state governments as well as the Federal Government. The Federal Government's authority is limited to the delegated powers. Just exactly what it can do is enumerated in Article I, Section 8 of the Constitution. Inserting a Bill of Rights on a government with essentially limited powers, would have been sounded awkward to say the least. From the beginning, limitations on power were placed on the Federal Government. It could only do X. At the same time, if the Constitution were to turn around and say that the government could not do Y, it leaves open the possibility of other powers being added to the government. It cannot do Y, but what about Z? So, in order to avoid this kind of confusion, it was decided that not including a Bill of Rights would be for the better. To put this in more concrete terms, if a clause such as "Freedom of speech must not be violated" was included in the Constitution, it could be taken that other rights were fair game for violation. In this respect, the constitutions of the state governments and those of other countries, differed from the original United States Constitution.

The Bill of Rights was just not necessary. Hamilton said this in *The Federalist* No. 84. Wilson had insisted this in asserting that the sovereignty of the people is essential but inserting a Bill of Rights into the Constitution was a logical contradiction. Certainly, in terms of legal logic, I think that the Federalists were correct.

A constitution, however, must not only be considered in terms of legality. Politics are also involved. As it were, opposed to logic were problems of psychology. Because of distrust of national power, there

was the problem with many people that, if a Bill of Rights was not included in the Constitution, the document could not be considered a constitution. Thus, psychologically, people were not at ease. Antifederalists representing these people, strongly voiced their objections to this at the ratifying convention of each state. Mason also, at the Federal Convention, insisted that the Bill of Rights be inserted. He was criticized for it and gave up his fight. "Col. Mason left Philada. in an exceeding ill humour." He immediately published a critical short essay, *Objections to the Constitution*, in which at the very beginning he stated: "There is no Bill of Rights." He also emphasized this at the Virginia State Convention. This argument became stronger and stronger and finally, the Bill of Rights amendment was added to the Constitution.

The vote to insert it was close and, even though it was included, it took a tough battle to get it there. Madison felt that the inclusion of the Bill of Rights was logically strange and did not think it was needed. However, he still called for it to be included. This was probably because he felt that if it were not inserted, the Constitution would not be approved. He also felt that, by inserting it, at the same time, the Antifederalists would be silenced. At the opening of the first federal Congress, Madison took the initiative and had the Bill of Rights inserted into the Constitution as the first ten amendments.

I personally think that, logically speaking, the Bill of Rights was not necessary. However, being a part of the Federal Constitution, it has served as a basic guarantor of the people's rights. One of the major reasons that the Federal Constitution has continued up until today is due to the efforts the Antifederalists put into insisting that the Bill of Rights be included in the Constitution. Since then, amendments to the Constitution have come to number twenty-six. Among these, the only amendments that can truly be considered amendments besides the original ten, are the three that were inserted after the Civil War concerning the black problem. In reality though, they were, to some extent merely extensions of the Bill of Rights.

Today, that the Constitution continues to exist as a huge pillar of pride is not only due to the efforts of the Federalists, but also to those of the Antifederalists. Madison, in political terms, took the lead in

having the Bill of Rights inserted. Thus, he has received the distinction of becoming known as the “Father of the Bill of Rights.” However, before Madison there was George Mason who should be remembered as the “Father of the Bill of Rights,” not only of the Declaration of Rights of Virginia, but also of the Bill of Rights of the Constitution of the United States.

(translated by Mark Caprio)