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## Brothers' Foundings

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**BROTHERS' FOUNDINGS**

**A Thesis**

**Submitted**

**In Partial Fulfillment**

**of the Requirements for the Designation**

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In 1776, twelve of the thirteen colonies simultaneously but independently declared their independence from Britain. New York, whose delegate had yet to obtain permission to do so from the capital, declared independence shortly after learning the other twelve had done so. In the coming months and years the revolutionaries would fight a tough and bitter war together and draft the infant nation's first formative document. In this period of great trial and turmoil, the colonies banded together like never before, fighting side by side for their dream of freedom and independence.

The battle for independence, though, was constrained by the nation's ability and willingness to pay for it. Under the Articles of Confederation, the federal government could raise no revenue, collect no tax unless and until all thirteen colonies approved the measure. The revenue and commercial dilemmas facing the nation led to "poorly paid soldiers, inadequate regulation of trade, inflationary currency, and interstate conflict and social disorder" (Sheldon 2001, 38). Commenting on the bizarre occurrence of a national war being funded by thirteen different states with thirteen competing industries and interests, General George Washington stated "I see one head gradually changing into thirteen... I see the powers of Congress declining too fast for the consideration and respect which is due to them as the grand representative body of America, and am fearful of the consequences" (Sheldon 2001, 38). According to Madison, the consequences were more frightening than ever:

Our army has as yet been kept from starving, and public measures from total stagnation, by draughts on the states for the unpaid requisitions...A punctual compliance on the part of the states with the specific supplies will indeed render much less money necessary than would otherwise be wanted, but experience by no means affords satisfactory encouragement that due and unanimous exertions will be made for that purpose...our

distress is so pressing that it is uncertain whether any exertions of that kind can give relief in time. (Sheldon 2001, 39)

Thus, according to Madison and many others, the only solution viable in the long run was a national power to lay and collect taxes. Due to the austerity of the situation, even this radical proposal would not alone solve the problem. In order to survive, much less function successfully, Madison believed the national government would need much more centralized political authority.

This centralized political authority, though, was needed in many spheres of influence. He noted that competing land interests by both states and individuals in the Western territories (yet to be won in the war) were already tearing at the states, and a strong judiciary would be needed to solve these long and complicated disputes. A stable national currency would be necessary in order to both instill public confidence and facilitate trade between the colonies, colonies that had differing resources, products, interests, and whole economies (Sheldon 2001, 38-41).

It was with these and many other deficiencies in mind that the founders traveled to Philadelphia. There the founders discovered that the dreams they had been fighting for were not as universally shared as they once thought. Many of the nation's foremost statesmen had very different philosophical ideas as to what those founding principles were.

In the summer of 1789, the second Constitutional convention (after the failed Annapolis Convention, called to amend the Articles was sparsely attended) began in Philadelphia. As the convention wore on, it became apparent that significant differences persisted. For some, these differences were so profound they left the capital in disgust and never returned to the convention. This sentiment, however, was a narrowly held one. Most participants were fully aware of the

daunting task before them and the divisiveness that it would almost certainly lead to. They were equally aware of the necessity of the task at hand.

What exactly happened behind the closed doors remains somewhat of a mystery. A number of participants, including Madison, took extensive notes. None of these notes agree entirely. Among the anti-Federalists there were very few note takers, and those that did attended infrequently, sometimes leaving for weeks at a time. As a result, we may have been left with an excellent record or precisely what went on, or accounts biased towards the Federalist perspective.

While two seemingly distinct groups emerged, the Federalists and the anti-Federalists, it is important to remember that, much like the modern political parties, these groups were not as uniform and consistently dichotomous as we have come to believe. There were moderates and factions on both sides, and it is thus difficult to articulate exactly what each side stood for. The Federalists and anti-Federalists from Virginia likely had more in common and agreed more often than any two Federalists or anti-Federalists would have with each other. The anti-federalists especially were often times united merely by their opposition to the Federalists positions. They were literally voices of opposition, each for his own personal, political, ideological, or economic reasons, and often times for a muddled and confusing combination of reasons. What was apparent, however, was that a variety of men had a variety of objections that threatened to end the revision process before it began.

The anti-Federalists had a number of objections that can be placed in three broad categories: legal objections, risks associated with continuous reform, and objections to specific provisions of the proposed Constitution. It is important to note that they saw themselves as upholders of the causes of the revolution and the spirit of the Declaration of Independence, and

were thus true patriots. They believed with all of their minds and especially their souls that the road about to be traveled would lead to great perils for a nation already dealing with enough uncertainty. It is important also to note that without their contributions, the very idea of America may have never survived.

First and foremost, the anti-Federalists held significant legal objections. These objections were especially important, because they called in to question the premise of redrafting the founding document. In his landmark work, *What the Anti-Federalists Were For*, Herbert Storing lays out a number of these problems.

The anti-Federalists first questioned the authority of the assembly to draft a new constitution at all. The Congress had not asked or granted the authority for such an undertaking. “They argued that that convention [the current one in Philadelphia] had been authorized ‘for the sole and express purpose of revising the Articles of Confederation,’ and had no right to propose any radical change in the government of the Union” (Storing 1981, 10). While this may perhaps seem minor and trivial, it was far from so for the generally conservative anti-Federalists. They believed in the strength, consistency, endurance, and supremacy of the rule of law. Altering the nation’s formative document so early in its existence was problematic enough; doing so outside the proscribed mechanisms and authority of that document was, for the anti-federalists, treasonous.

The technical answer that the anti-Federalists deserved was that their contention was completely accurate. Legally and technically, they were correct. On the other hand, the majority did not see it this way. Most recognized that the Articles were simply insufficient. With or without an express grant of authority, these men recognized that change was necessary and felt that a mere technicality should not obstruct that eventuality. Their opponents, then, were left

with little of a choice. They could continue to protest, appearing to fully support the Articles, or they could acquiesce and continue to participate. Most chose the latter. As the convention went on, the argument drew less and less attention, and those respecting the rule of law of the Articles had little choice but to continue in the process.

This was not their only legal objection. Even if the founders had had an express grant of authority to draft a second “formative” document, the convention was doing so outside the boundaries of the first. The method for amending the Articles was ignored, and the accepted method for ratification was abandoned. Instead of ratifying through Congress or state legislatures (since each state was still an independent sovereign and thus could by itself refuse to be governed) The convention held that special ratifying conventions, elected by the people of each state, ought to vote on the new constitution, and the ratifying states should then be bound once nine states had ratified. This was problematic for several reasons. First, either the states were, in the absence of the Articles, sovereign and independent, or they were still bound by them. If they were still bound by them then the rules governing amendment and change should have held; if they were not then a ratifying vote ought to have been required of each state, not simply a supermajority. Ironically, the convention repeatedly ignored legal precedent and the rule of law in general in forming the new document.

Some of these complaints lead directly into their second main complaint. If they could, after the Articles were drafted, in effect, and legal, alter them outside the bounds of that supposedly supreme document, what mechanism or force would stop future generations, or for that matter the same generation again, from changing the law of the land?

Simply put, the anti-federalists feared that if the leaders and the people were that willing and eager to discard the Articles for a new, perhaps equally ineffective Constitution,



who's to say that the second document would not be easily discarded for a third, fourth, or fifth? If a group of citizens or even worse the government can easily disregard the founding charter and create a new one using wholly different mechanisms, how is any formative document to become sacred? How many times will it be changed? According to the anti-Federalists, the idea of changing the document, even within the proscribed means should be taken seriously and with great forethought and precision.

Storing, quoting several revolutionary contemporaries, presents the argument as such:

“The late revolution having Effaced in a great measure all former habits, and the present institutions are so recent, that there exists not that great reluctance to innovation, so remarkable in old communities, and which accords with reason, for the most comprehensive mind cannot foresee the full operation of material changes on civil polity...” Hasty and blind government will lead to hasty and blind alterations, “and changes must ensue, one after another, till the peaceable and better part of the community will grow weary with changes, tumults, and disorders, and be disposed to accept any government, however despotic, that shall promise stability and firmness.”

(Storing 1981, 25)

The men of that time recognized that they were all very new to this concept of self-government; so, in fact, was the world. If self-governance simply meant mob rule, if it meant that no longstanding institutions could ever develop and everything would be tried for fear that the next thing might be better, the very concept might fail. Again we see a group of men concerned not with merely opposing simply to oppose or for only personal reasons, but for what they considered to be the good of the republic.

Luther Martin in his major publication during the convention “Genuine Information” makes a similar point.

“...If we, contrary to the purpose for which we were intrusted, considering ourselves as master-builders, too proud to amend our original government, should demolish it entirely, and erect a new system of our own, a short time might show the new system as defective as the old, perhaps more so. Should a convention be found necessary again, if the members thereof, acting upon the same principles, instead of amending and correcting its defects, should demolish that entirely, and bring forward a third system, that also might soon be found no better than either of the former, and thus we might always remain young in government, and always suffering the inconveniences of an incorrect imperfect system.” (Siemers 2003, 60)

This perspective, then, was shared by many. While America now knows that it has the longest standing Constitution in the world, this was by no means a foregone conclusion in the 1780s and 1790s. Here and elsewhere, it is especially important to recall that what we now see as inevitable history was once a pivotal point in America where the future was incredibly uncertain and the leaders of that time constantly questioned themselves and their ideas.

In addition to the disputes over the idea of changing the form or at least the structure of the national government, anti-Federalists also objected to several specific provisions of the new proposal. One of the first and major concerns cited was the proposed necessary and proper clause. After a listing of the specific powers granted to Congress, the proposal gave Congress the authority “to make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers vested by this Constitution in the Government of the United States” (Article I, section 8, United States Constitution).

Federalists quickly pointed out that the clause was limited by the next phrase – it applied only to the foregoing powers. They contended the document as a whole contained only defined, explicit powers and no implied powers. James Wilson, a Federalist, argued on October 6, 1787 for the distinctions between a federal and a state constitution. State constitutions gave the state all powers not expressly reserved to the people. The national Constitution, however, reserved to the people and the several states all powers not expressly delegated to the national government. This argument was widely known and reprinted.

Anti-Federalists however, argued that it would not be interpreted as such since the necessary and proper clause was clear and concise, and the “foregoing powers” phrasing was much more complicated. They argued that it would frequently be cited as a legitimate source of national power, allowing the federal government to increasingly expand its sphere of control.

Additionally, they saw the enumeration of limits as problematic. After the necessary and proper clause comes a listing of certain acts which Congress is prohibited from engaging in. An enumeration of any kind implies that it is both necessary to list the limits, and a complete listing. All things not listed then, are within the power of Congress. Since it would be impossible to list all the things Congress cannot do, much less anticipate the activities that Congresses of the future would deal with, any enumeration at all is highly problematic. While the powers of Congress section (section 8) contains 18 clauses/powers, the limits imposed by section 9 contain only 8 clauses. The anti-Federalists believed this should have been reversed, and was indicative of an all too powerful Congress, not in the sense that it had too many explicit grants, but instead not enough limits. Since in their view, governments tend to grab more and more power and never give up power, the Congress could swell to become a few hundred tyrants just as the king was.

Specifically, many feared that because there was no prohibition against it, Congress and

the federal government would be able to restrict free speech, control the press, and otherwise limit the very same rights that England had for so long. If the prohibitions in Article I were worthy of mentioning, surely these basic protections should be provided for.

A third specific complain of the anti-federalists was over the provision for a standing army. While the country was currently at war, one day it would not be, and the anti-Federalists could not see the need for one in peacetime. Obviously the anti-Federalists recognized the need for an army. What they objected to was one so loosely controlled in terms of constraints placed upon it. Specifically, they wanted the size to be limited during peace time in order to both prevent a military coup or rebellion and to minimize the financial burden that a standing army presented.

Additionally, the anti-Federalists had numerous problems with the proposed method and language for taxation. The Constitution seemed to allow direct taxation and limitless taxation. The government could then use the repressive taxes to fund a standing army that would then control the populace. Furthermore, the more the federal government could tax, the less there was for the states to tax and therefore exist at all. They objected not out of greed for their share, but out of fear that unchecked national taxation would starve the states, effectively giving the federal government a broader sphere of influence. Essentially the people could only withstand so much taxation, and if the federal government did so too much and too often, the states would effectively play the role that the federal government currently was without its power to tax.

Separately, there were significant objections to the court structure. Under the Constitution, federal courts could determine both law and fact. Congress could create whatever lower courts, if any, as necessary. Anti-Federalists thought that by determining law and fact, the courts could not only determine guilt or innocence based on interpretation of the law but by

examining the particulars of a case. The courts could thus be used to deliver whatever punishments were desired by interpreting the law how it wanted, and by deciding the facts to fit those interpretations. Also, with no trial courts established, they feared that the closest court with jurisdiction might be well outside the local area of the defendant, jeopardizing that citizen's right to a trial by jury of his peers.

All of these objections could have been solved or kept in check by duly elected representatives that held the will and voice of the people. It was here that some feared representation at the national level and the national government it self would suffer its greatest failure. Along with the centuries old contention that no large republic could function as such, Anti-federalists saw another problem. Whereas state legislators returned to their home districts between sessions, the mere fact that the capital would be weeks away (no matter where it was located) called into question the ability of representatives to remain in touch with their constituents. Frequenting their home district forced the legislators to live with their constituents: they had to shop with them, attend church with them, and face them on a daily basis. This "mingling with their constituents" would not only keep the legislators in touch with the needs and goals of the populace, but it would also create "social pressure" to pursue the peoples interest (Siemers 2002, 34).

John Francis Mercer argued similarly at the time. "We are persuaded that the people of so large a Continent, so different in Interests, so distinct in Habits, cannot in all cases legislate in one Body by themselves or their representatives...for if these representatives are to pursue the general interest,... it must be done by a mutual sacrifice of the Interests, wishes, and prejudices of the parts they represented – and then they cannot be said to represent those Parts, but to misrepresent them" (Siemers, 13).

Finally, the anti-Federalists as a whole agreed that the Articles of Confederation needed serious revision and reform. Their concerns were with the methods and means of altering and in the end replacing the nation's first formative document. But by granting the national government a certain source of revenue and by allowing it to regulate interstate commerce, they believed that the Articles could be sufficient. The course the nation as a whole chose was at best ill-advised and at worst self-destructive. Clearly then, there was intense debate and resistance to the Constitution.

Had the anti-Federalists chosen to oppose the constitution beyond its ratification, their actions would have almost certainly led to civil war. As Siemers points out in *The Antifederalists*, they may have been successful in such a war:

Antifederalists were sufficiently numerous and geographically concentrated that at the very least they could have successfully resisted incorporation into the Union for many years. Ultimately, they may have been able to split the Union and establish their own republics in areas like upstate New York and western Pennsylvania.” (Siemers, 34)

It is important to note that the anti-Federalists saw themselves as the true followers of the revolution. They believed the Federalists had wandered from the path, and that they had to stand for the original reasons and values of the revolution if popular government was to work. They believed they were protecting America from a new tyrannical government even closer to home than the previous regime.

Additionally, Federalists dominated the newspapers, but did not control public opinion. Most newspapers of the time were concentrated in larger cities and along the coast – two areas where the Federalists dominated. In the western states and the smaller cities and towns, the anti-Federalist opinion dominated. Furthermore, citizens in these regions were led almost entirely by

the opinions of their local leaders and political nobles. Their opinions would not and could not be changed unless that change was endorsed by their representatives.

Obviously crucial then, was anti-Federalist support the Constitution once ratified if it was to work at all. This was important for a variety of reasons. A consensus for popular government of any kind is essential. In order for popular government to work, there must be consensus by definition. While it is impossible or even undesirable for all to agree with every specific law, court decision, or executive decision all the time, all absolutely must consent to the essential core framework from which those decisions originate. It is consent to be governed by these constituting rules that makes popular government work. David Siemers, in *Ratifying the Republic* stated that, “required to play baseball or bridge or politics is agreement of the “constitutional” rules. When consensus on this structure is achieved then the game can continue despite calls or hands or policies that do not always go one’s way, because the people involved have accepted the legitimacy of what is marked as authoritative” (2002, 47). Without this agreement and the explicit assent of the anti-Federalists, bringing with them their regional followers, the Constitution never could have worked.

Why then would the anti-Federalists concede? It would be more than explicable had they been forced to or done so out of some need. But this is clearly not the case. They could have fought and survived as a collective group with a separate government either for the states as a whole or at the least for certain regions.

There are a number of different theories. Michael Lienisch chooses to instead give credit to the Federalists for an instant and overwhelming victory after ratification. “The critical figures in this effort were those champions of the constitution who, beginning as early as mid-1787 but especially following ratification, worked relentlessly to win popular acceptance for the new

government” (Siemers, 2002, 59). Essentially, he argues that the Federalists defeated the anti-Federalists by winning the great public debate. This analysis, however, ignores the great advantage that the anti-Federalists and the Federalists knew the opponents held: they held a clear majority. Thus Siemers responds, “Whole sections of the country were firmly Antifederalists in 1787, with few or no credible leaders who had advocated ratification. These areas, and ones more evenly divided did not turn suddenly to accept abstract Federalist political theorizing. Rather, they seem to have gone along with the Constitution because their recognized leaders did” (Siemers, 60).

Why then did the leaders themselves “go along?” What would cause these men so devoted to their cause to abate? Here too, there are a variety of reasons that fall short. None of these reasons by themselves can explain their curious political calculus.

Secretary of the Treasury Alexander Hamilton, during the first Congress, advocated various policies that the anti-Federalists viewed to be in violation of their own document. That is to say that the anti-Federalists felt that the Federalists ratified the Constitution and then, at least to some extent, ignored it. Not only had the anti-Federalists lost the ratification fight, but now the Federalists were violating what they viewed as less than the bare minimum protections against government. The anti-Federalists were quick to point out these inconsistencies and chose to hold the Federalists accountable to the people and the Constitution. By using the charter to thwart Hamilton, however, the anti-Federalists gave their implicit approval.

Hamilton’s Bank Bill in 1791 and the ensuing debate were crucial. The Federalists believed that creating a National Bank amounted to the creation of a law that was “Necessary and Proper for carrying into Execution” one of the enumerated foregoing powers, specifically the



power to tax. The anti-Federalists again protested that such a broad interpretation opened every possible sphere of American life to Congressional rule and regulation.

Another view takes the position that the anti-Federalists participated in and joined the Constitutional system because they believed doing so would give them an electoral advantage.

“Federalists and Antifederalists believed the latter could win through the first federal elections what they had lost in the state conventions... Overwhelmed at the polls, deprived of effective leadership, and facing further defections from their own ranks, Antifederalists acquiesced” (Siemers, 61). Essentially, the combination of the victory at the polls and the acquiescence of the losers allowed the Federalists to win popular support and legitimacy for the Constitution.

Furthermore, some argue that it was through appeasement using the Bill of Rights that caused the anti-Federalists to support wholeheartedly the Constitution. After attempts at a post-Philadelphia convention failed, partially because innovative states proposed amendments, the anti-federalists saw the amendment process as their only hope. This vein argues that the anti-Federalists were fully pleased with the Constitution, but given the type and significance of their complaints, this could hardly have been the case.

More generally, others contend that the inherent political divisiveness of the anti-Federalists and some of the more extremist branches led to the demise of the group as a whole. The so called Plebian populists rioted in Carlisle after the battle for ratification, and this lawlessness caused an alienation of the more moderate anti-Federalists, who, not wanting to be associated with the anarchists distanced themselves from the violence. This split in the democratic portions of the movement caused the remainder of the group to agree to abide by the Constitution instead of enduring more violence.

Even this more logical and probably explanation, however, leaves part of the story out. Collectively, they all miss the point. Each seeks to explain the anti-Federalist decision as a result of some external event or an outmaneuvering by their opponents. This view underestimates the group as a whole and as individuals. This group, as has often been said, saw themselves as the true bearers of the Declaration. Their extremism, evidenced in anti-Federalist Patrick Henry's "Give me liberty or give me death" persisted to such an extent that no external action or circumstance short of force could have caused some anti-Federalists to subside.

Most anti-Federalists were extremely conservative. They frequently defended the status quo, as evidenced by their belief that the Articles could be "fixed." One contemporary stated that "The framing of entirely new systems, is a work that requires vast attention; and it is much easier to guard an old one" (Storing 1981, 14). As hard as these men fought for maintaining the Articles, they believed that once it had been overwritten, the new document, no matter how inadequate, needed to be preserved and protected against the same erosions of faith that had led to the demise of the Articles. While this was not their personal political objective, they, on their own, recognized that it was for the good of the nation.

Similarly, they believed wholeheartedly in democracy and collective good. The constitution was not what they had wanted, but it was ultimately done with relative legitimacy and accepted by the states and the people. Accepting political loss, they recognized, was part of popular government.

It is important to remember that they were an incredibly diverse group; in fact, they can barely be collectively labeled. Some may have been dissuaded, appeased, or

pacified by a potential electoral advantage or the attachment of a Bill of Rights. Some were no doubt fearful of further violence and thus led to relent due to conscience. Had they felt it was necessary or proper to do so, they would have revolted relentlessly until the needs of not their private political ambitions but those of formative nation full of potential were assured long into the future. The larger whole, however, realized that they were the losers in a democratic process and, for the sake of the endurance of the system, however imperfect, chose willingly to join in that imperfect system.

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