

“WHAT CAN WE LEARN FROM THE POLITICAL PARTY THAT LOST THE ADOPTION OF THE CONSTITUTION ELECTION?”

J. CLIFFORD WALLACE*

February is the month in which we celebrate our nation’s presidents. Nine days from now, February 12, is the birthday of Abraham Lincoln. Ten days after that, we celebrate the birthday of George Washington. Because of those significant dates, as you all know, we will celebrate “Presidents’ Day” later this month. But while the President of the United States holds an important position, it is important only because of the document that makes it important: the Constitution of the United States of America.

Accordingly, in these remarks I will invite us to take a step back and give thought to our Constitution. Our Constitution is now 226 years old. It is the longest living written Constitution in the history of the world. This is all the more remarkable, in light of the fact that national constitutions have only lasted for *seventeen* years, on average, since ours was ratified.¹ Yet this remarkable document has survived wars and depressions, changes in culture, and the development of an advanced industrial society unknown in the history of the world, whose people enjoy more of the goods and services that are available than the people of any other nation.

Although our Constitution has proven to be an astonishingly successful and enduring document, it is important to remember that it was not a foregone conclusion that the Constitution would be approved by the states in the form that came from Pennsylvania. Indeed, many aspects of the Constitution were hotly contested in the months and years following its publication. We all know a great deal about the arguments that were put forward by the eventual winners of that debate: the Federalists. Indeed, most of us learned about the political background of the development of the Constitution through studying the Federalist Papers authored by Alexander Hamilton, James Madison, and John Jay, who collectively used the pseudonym “Publius” in presenting their arguments on behalf of the adoption of the Constitution.

However, there was another party, the Anti-Federalist Party, that took a less approving view of the document that had been created in Philadelphia. The Anti-Federalists, though much less remembered today, had well-reasoned positions and many adherents. While this is the party that came in second and failed to defeat the Constitution, many of their arguments were sound. In addition, it helps to understand the Constitution by analyzing both the arguments that were made in its favor *and* those who took the other side. On the wall of one of our Circuit Court conference rooms in San Francisco is inscribed: “Hear one side and you will be in the dark. Hear both sides and all will be clear.”²

* Senior Judge and Chief Judge Emeritus, U.S. Court of Appeals, Denton Darrington Annual Lecture on Law and Government (Feb. 3, 2014).

1. See, e.g., Thomas Ginsburg, et al., *The Lifespan of Written Constitutions*, THE RECORD ONLINE (Spring 2009), <http://www.law.uchicago.edu/alumni/magazine/lifespan> (observing that “national constitutions have lasted an average of only seventeen years since 1789.”).

2. 2 H.P. BLAVATSKY, THE SECRET DOCTRINE: THE SYNTHESIS OF SCIENCE, RELIGION, AND PHILOSOPHY 839 (2d ed. 1888), *available at*

Thus, the title of my remarks today is “What Can We Learn from the Political Party That Lost the Adoption of the Constitution Election?” By using this title, I do not mean to imply that the Anti-Federalists should have prevailed, but only to develop the context within which the Constitution was adopted. You may find some of the arguments persuasive—many citizens did at the time. By reviewing these arguments, we can gain not only a greater understanding of the meaning and intent of the Constitution, but a greater understanding of its significance. A constitution is a document in which the people determine how their government shall be constituted. It is an outline of basic principles to which we must all adhere. Understanding both sides of the debate will lead to a better understanding of what those principles stand for and, thus, put us in a better position to support the Constitution, as many of us have made a vow to do.

In the discussion that follows, I rely to a great extent upon the valuable work of Professor Herbert Storing, formerly of the University of Chicago. It was Professor Storing who, during the 1960s and 1970s, gathered the first comprehensive collection of what we now think of as the “Anti-Federalist Papers,” and who also provided an interesting analysis of the Anti-Federalist position.³

First, however, I will briefly summarize the Federalist position, as expounded in the Federalist Papers. Because this position is so familiar, I will not linger over it at any length. Essentially, the Federalists believed that the government that existed prior to the Constitution, under the Articles of Confederation, was too weak. By contrast, they argued for a strong central government. In what is perhaps the most famous of the Federalist Papers, Federalist 10, James Madison argued against the view that only geographically small countries could successfully achieve a republican form of government. Rather, he asserted that large areas composed of diverse populations would actually make for *better* republican governments, because such would be less likely to fall victim to the problems of “faction.”⁴

The Anti-Federalists provided an alternative view of how the nation should be governed. They argued for a governmental system in which the citizen stands in a close relationship to the government and the citizens’ active participation is held in a very high place. Thus, the Anti-Federalists thought that the government should be as close as possible to the citizens. It was through this closeness, the Anti-Federalists believed, that the individual vote of each citizen would be rendered more meaningful, because the citizens would be close enough to the workings of their government to have a genuine, informed opinion about what is best for that government to do.

It is important to recognize that the Anti-Federalists were not united against a single issue, and that they did not produce anything as simple as a counter-proposal. Rather, the term “Anti-Federalism” describes a political philosophy, one that is as principled and complex as any of the major political philosophies held by serious Americans in the present day. The Anti-Federalist philosophy has, as its starting point, a challenge to the Federalists’ preoccupation with strong national power and concern over the prospect of majoritarian tyranny that could be created by that

http://blavatskyarchives.com/theosophypdfs/blavatsky_the_secret_doctrine_vol_2_1888.pdf. This quotation appears in Room 329b of the Ninth Circuit building in San Francisco.

3. See generally HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR (1981) (discussing the Anti-Federalist position).

4. THE FEDERALIST NO. 10 (James Madison).

power. It was the Anti-Federalists' belief that the Federalist position would lead to neglect of the value of democratic participation, and that it created a real danger that the nation's politics would be dominated by a wealthy elite. In the view of the Anti-Federalists, the Constitution that was advocated by their opponents had the effect of substituting effective administration for political participation and would lead to an unhealthy reliance on private interests rather than public virtue.

At the core of the Anti-Federalist position was their belief in the necessity of a close and active relation between the citizen and his government. The Anti-Federalists agreed with their opponents that direct democracy was not the most practical form of government. Nonetheless, they believed that it was of the utmost importance for representatives to be as close to the citizens as possible. The citizen then would feel a greater attachment to, and responsibility toward, his government. Instead of being an abstract institution that governed him from afar—much as the British government in the eighteenth century governed the American colonies from across the Atlantic Ocean—government would become much nearer to, and thus more responsible to, the people. The Anti-Federalists expected that each citizen would have knowledge and experience that would provide for a better government.

The Anti-Federalists had a commendable outlook. However, there was a formidable obstacle that stood in the way of making their views a reality. The problem they faced was that their ideas were not necessarily usable in all sizes of countries. That is, a form of government that might be optimal for relatively small nations, like the ancient Greek city-states or Swiss republics that were admired by the Anti-Federalists, is less capable of working effectively in a nation whose citizenry numbers in the millions.

This, in effect, is the crux of the dispute between the Federalists and the Anti-Federalists. The Federalists took for granted that our nation would, for better or worse, have to be of an enormous size. Starting from that presupposition, they set out to address the practical problem of how that nation could most effectively be governed. The Anti-Federalists, by contrast, focused on the ends, rather than the means, of government. For them, the essential thing was that government would secure the individual liberties of the people.

For the Anti-Federalists, then, the best form of government could be realized only in relatively small communities. These communities in a large country would be multiple, separate states. The Anti-Federalists thought that the smaller the state, the better. In such small states, the middle class would have an opportunity truly to know the important issues and to exercise leadership in the development of programs and policies. Their view was that the larger power should remain in the local states, not the national government. However, as you know, this view did not prevail. Instead, what emerged victorious was the Federalist position—namely, the view that an adequate central government required that extensive powers be arrogated to that government, and that the country could only survive and prosper if it was equipped with such a powerful central government. While the Anti-Federalists believed that the power of the federal government would be dangerously misplaced, they did not propose an alternative structure that could bring about the undisputed good of a strong central government, such as providing for the common defense, without decreasing the power of the states in relation to that central federal government.

At this point, I will make a brief digression. What would have happened if the Anti-Federalist position of having all the states in our country relatively small had

prevailed? My remarks today are offered in the context of this lecture honoring Senator Denton Darrington. As you know, Senator Darrington devoted 30 years to serving the state of Idaho. In the course of preparing this lecture, I watched a video that was made to honor Senator Darrington on the occasion of his resignation from office.⁵ Watching it, I was struck by the heartfelt tributes to the Senator that were offered by several members of the Idaho Supreme Court. For instance, former Chief Justice Robert Bakes commented on the “excellent” relationship between Idaho’s legislature and its judiciary. He explained that, in his view, this relationship was “primarily” the work of Senator Darrington, through his efforts as chairman of the Idaho Senate Judiciary Committee.

Chief Justice Bakes went on to make an interesting observation. He stated that in many other states, the legislature and judiciary are “at odds” with one another. In Idaho, however, those two branches have had an amicable and productive working relationship. Without wishing to denigrate from the admirable achievements of Senator Darrington, I suggest that the close relationship between these branches of Idaho’s government is also an illustration of the wisdom of the Anti-Federalist outlook. In a relatively small state, there is a tendency for the branches of government to be able to foster closer relations with one another, which in turn makes it possible for them to work together effectively and with collegiality.

Returning to the overarching theme of my remarks, there are two things that should be clear at this point. First, our Constitution was not intended to give power to the government. Rather, at its core, the point of our Constitution is to *protect* the states and the citizens from the national government. This was accepted by both the Federalist party and the Anti-Federalist party. This was to be “Our Federalism.”

In this context, it is helpful to realize that our Constitution is not a “rights constitution.” Many other countries have written constitutions that state long lists of rights held by individuals. As one ironic example, even the former Soviet Union had a constitution that ostensibly provided for the “basic rights” of its citizens, including such putative rights as the “right to rest and leisure” and the “right to enjoy cultural benefits.”⁶ Our Constitution is not such a document. In fact, there is only one right named in the Constitution: the right to patent.⁷ Instead, rights were to be developed by local governments. The Constitution restricted the scope and power of the national government so that states could develop locally the rights of their citizens.

Second, although there was a general agreement between the Federalists and Anti-Federalists regarding the importance of democracy, there was also a common recognition that in a democracy, the majority may become tyrannical and oppressive toward minorities. Therefore, the Constitution was set up to develop boundaries for majoritarian democracy so that the rights of individuals would not be swept aside. This was to be accomplished in two ways. First, as I observed earlier, the national government was to have restrictions placed on it. Second, considerable power was to remain in the states where government was closer to the people.

5. See Senator Darrington Tribute, IDAHO STATE JUDICIARY, http://www.isc.idaho.gov/press_releases/Darrington%20Tribute.wmv (last visited Jan. 23, 2015).

6. See CONSTITUTION (FUNDAMENTAL LAW) OF THE UNION OF SOVIET SOCIALIST REPUBLICS Oct. 7, 1977, available at <http://www.departments.bucknell.edu/russian/const/77cons02.html>.

7. U.S. CONST. art I, § 8, cl. 8.

It cannot be questioned that the Federalists won and the Anti-Federalists lost. Nonetheless, the Anti-Federalists had valuable things to say, things to which we probably ought to pay attention. Most importantly, the Anti-Federalists teach us that there are basic, fundamental rights that each citizen is entitled to have. However, the way to ensure that those rights are respected is not to enshrine them in the abstractions of a constitution, which like the earlier Soviet Constitution, honors them in principle while rejecting them in practice. Instead, if we are to make sure that those rights will genuinely be protected, it is necessary to create a government that imposes limitations on majoritarian democracy. Our republican form of government is best seen at the national level as an attempt to set up such limitations, which it does by dividing the national branches into three separate powers. This separation of powers was not instituted because it would create a more *efficient* government. Rather, it was done to create a government that would be more likely to safeguard individual rights.

The second method developed to protect the rights of individuals was a decision made not by the framers of the Constitution, but by the Supreme Court itself. In the years following adoption of the Constitution, the Supreme Court decided that the federal judiciary, and it alone, would be the final arbiter of what is and what is not constitutional. In *Marbury v. Madison*, Chief Justice John Marshall authored an opinion which held that the Court would have the final word on what is constitutional.⁸ It can be argued that this was an act of judicial usurpation of power, what would today be termed “judicial activism.” On the other hand, it can also be argued that Chief Justice Marshall was simply making explicit what was already implicit in the structure of the Constitution itself—namely, the implication that it was the province of the courts to establish the meaning of the Constitution, and to emphasize the importance of separation of powers in the three-branch government.

For the purposes of this lecture, however, the significant thing about the much-discussed decision in *Marbury* is that the decision would have come as no surprise to the Anti-Federalists. In fact, they predicted it in the debate prior to the adoption of the Constitution, as I will now explain.

The discussion of the federal judiciary in the Federalist Papers is well known. The central Federalist Paper on this subject is Federalist 78, which was written by Alexander Hamilton.⁹ In Federalist 78, Hamilton argues that the judiciary would be the *weakest* branch of the federal government. He explains this view by pointing out that the executive branch will have the “sword,” or the military power, and the legislative branch will have the “purse,” or the power to tax and spend.¹⁰ However, Hamilton asserts that the judiciary will have neither of those. Instead, as he sums up his position, the judiciary has “neither force nor will, but merely judgment.”¹¹ I have always found this to be a strange argument, considering the context of when it was made. For me, the question about this argument has always been: Why did the issue even arise in the first place? Why did Hamilton feel the need to argue that the judiciary would be so weak?

We never knew why until Professor Storing brought forth the Anti-Federalist papers. Hamilton published Federalist 78 in June of 1788. A few months earlier, the

8. *Marbury v. Madison*, 5 U.S. 137, 180 (1803).

9. THE FEDERALIST NO. 78 (Alexander Hamilton).

10. *Id.* at 1.

11. *Id.*

anonymous “Brutus” published a discussion of the proposed federal judiciary that is now known as Anti-Federalist Papers 11 and 12. In Anti-Federalist 11, Brutus argues that the federal judiciary will be incredibly powerful.¹² As he explains, it will be the task of the Supreme Court of the United States to “determine, according to what appears to them, the reason and spirit of the Constitution.”¹³ The Supreme Court’s opinions, he goes on to explain, will “have the force of law,” because there “is no power provided in the Constitution that can correct their errors, or control their adjudications.”¹⁴ Thus, he explains that the “judicial power” provided in the proposed Constitution will “operate to effect, in the most certain, but yet silent and imperceptible manner, what is evidently the tendency of the Constitution”—namely, “an entire subversion of the legislative, executive, and judicial powers of the individual states.”¹⁵

This is a shocking statement. On what grounds does Brutus think that the proposed Constitution will subvert the powers of the states? First, he observes that many of the proposed Constitution’s key provisions, such as what we now refer to as the “Necessary and Proper Clause” that gives Congress the power to make all laws that “shall be necessary and proper for carrying into execution” its other powers, are written in “general and indefinite terms.”¹⁶ He argues that the courts would have both the liberty to interpret this language as broadly as they like, given how vague it is, and also that courts would be naturally inclined to give it a broad reading, in keeping with the lofty aims of the Constitution, as expressed in its preamble. Next, he argues that judges would be “inclin[ed] to this mode” of explaining the Constitution, because all men are “tenacious of power.”¹⁷ By this, he means that all people are inclined to extend their own power and “enlarge the sphere of their own authority.”¹⁸ By giving a broad interpretation to Congress’s power to legislate whatever is necessary or proper, Brutus argues, federal judges would in turn increase the power of the courts, as well as the “dignity and importance” of federal judges themselves.¹⁹ Thus, Brutus concludes that this judicial power would enable federal judges to “mould the government” into “almost any shape they please.”²⁰

Thus, the well-known Federalist 78 is best seen as a response to the much less famous argument in the Anti-Federalist Papers that preceded it. Hamilton argued that the federal judiciary would be weak, at least in part, in response to this argument presented by the Anti-Federalist opponents of the Constitution that the federal judiciary would inevitably become the *most* powerful of the branches.

It is this principle of the Anti-Federalists that I think is significant for us to consider today. The issue highlighted by Brutus, in the passages I have just brought to your attention, is the place of the courts in the democratic process. It is clear that the people were to have the ability under the Constitution to develop their rights through the democratic process. But there is nothing that says that this is to be done

12. ANTI-FEDERALIST NO. 11, at 1 (Brutus).

13. *Id.*

14. *Id.*

15. *Id.*

16. U.S. CONST. art. I, § 8; ANTI-FEDERALIST NO. 11 (Brutus).

17. ANTI-FEDERALIST NO. 11, at 1 (Brutus).

18. *Id.*

19. *Id.*

20. *Id.*

by “interpreting” new rights through some “living Constitution.” While the role of the judiciary is important, it is not, and cannot be, absolute. Indeed, a little judicial humility is always helpful, as we judges must recognize that we do not have all of the answers. I have written on this issue on several occasions, including in a lecture I gave some 32 years ago on “The Jurisprudence of Judicial Restraint.”²¹ I still adhere to that position.

In these remarks, I do not judge whether the Supreme Court as a whole has fulfilled its responsibility of protecting individual rights. This is a question that has been much debated, and I am sure all of us have our views on this subject. The important point here is to remember that there was a second party and a second view during the time prior to the adoption of the Constitution. It may well be that Brutus was closer to the mark on how the federal judiciary would conduct itself than was Hamilton.

Regardless of where one comes out on that issue, I suggest that the Anti-Federalists had an important point; namely, that the people should be significantly involved in the government process. How they are to be involved is more difficult now than it was 200 years ago, but still the principle seems to me to be correct. That is, the Constitution demands that its citizens understand the principles and conflicts that confront our nation, that they read about them and study them in their own mind, and that they become an influence directly upon legislators who, in our republican form of government, are entrusted with the responsibility of carrying out the democratic process.

The Constitution has not failed us, though perhaps in some ways we have failed it. Certainly, interest in it and the government it established has been less than complete. The number of Americans who actually go to the ballot box is astonishingly small. Yet there are school districts throughout the United States that no longer teach civics as a required course. How can the Constitution become effective if in our schools we fail to teach the Constitution, its principles, and the responsibility of citizens towards this founding document?

Thus, my thinking today returns to the idea of responsibility. Citizens in this great country have the privilege of being here, but they must take upon themselves the responsibility of citizenship. This means being involved in government, to the extent they can. It means reading about and studying the issues that face our nation. It means becoming involved in citizen groups. It means contacting elected representatives and letting them know our views. And, for the courts, it means the responsibility to recognize that in our democracy, the views of the people, whether we perceive them to be right or wrong, should not be irresponsibly rejected by an interpretation of the Constitution with which the founders would not agree.

In closing, I ask you to reflect upon our civic responsibility towards this great document, the Constitution. At the time of the bicentennial of the Constitution, surveys were made which indicated that the citizenry was remarkably uninformed about our nation’s foundational document.²² Understanding the Constitution, edu-

21. J. Clifford Wallace, *The Jurisprudence of Judicial Restraint: A Return to the Moorings*, 50 GEO. WASH. L. REV. 1 (1981).

22. See, e.g., Stanley A. Twardy Jr., *Learning and Living the Constitution*, N.Y. TIMES, June 7, 1987, <http://www.nytimes.com/1987/06/07/nyregion/connecticut-opinion-learning-and-living-the-constitution.htm>

cating our children about the Constitution, and making the Constitution important by and through the civic lives we live should be our focus every day.

¹ (discussing a survey conducted by the Hearst Corporation at the time of the bicentennial of the Constitution that revealed “a widespread lack of knowledge and understanding of the basic tenets and provisions of our Constitution.”).