Behold the Lessons of Brutus:

The Federal Judiciary and the Specter of Consolidation

By Michael Skeen

It has often been noted that the lasting legacy of the Anti-Federalists is the Bill of Rights. What is less known are the Anti-Federalists' fears about the federal judiciary—most specifically about the role of the Supreme Court in the new constitutional regime. In this essay, we will explore a line of reasoning advanced by an Anti-Federalist author by the pen name Brutus. Brutus was deeply worried about the judicial branch employing judicial review to consolidate the various state governments into a single, national authority. Of course, the states have not disappeared; consolidation has not been an open-ended and consistent development. However, in many instances, the lessons of Brutus have certainly proven themselves to be prescient.

For good and bad, the Constitution of the United States is not quite the same document that was ratified circa 1789. Beyond the relatively few amendments adopted via the formal processes of Article V, the federal judiciary, with the High Court at the helm, has transformed the Constitution in a variety of ways. Among the most important of these is the tendency of the federal judiciary to augment national power at the expense of state power. Granting this subsequent judicially inspired transformation, some historically interesting questions begin to emerge. For example, were the Anti-Federalists, who predicted such a transformation, correct in their assessment? Did they see more honestly into human nature and the practical limits of republican politics than did their better-remembered rivals, the Federalists? To answer these questions, we will turn to the writings of Anti-Federalist pamphleteers such as Brutus and The Federal Farmer and their prescient observations concerning the judicial power of the United States—specifically to the interplay between the federal judiciary, the doctrine of judicial review and the specter of consolidated government.

As Herbert Storing notes, the most fundamental Anti-Federalist objection to the Constitution was its perceived "consolidating tendency."[1] In large part, the demurral was because the Anti-Federalists tended to favor the Classical view, most prominently espoused by Montesquieu, that republican government can safely operate only within the confines of a small or 'contracted territory' whose inhabitants basically share the same customs and interests—but it manifestly cannot work within an expanse as large and diverse as that of the Union. Therefore, in opposition to the political (and commercial) aspirations of the Federalists, Ralph Ketchum writes, [2]

> { *[t]he Anti-Federalists looked to the Classical idealization of the small, pastoral republic, where virtuous, self-reliant citizens managed their own affairs and shunned the power and glory of empire. To them, the victory in the American Revolution meant not so much the big chance to become a wealthy world power, but rather the opportunity to achieve a genuinely republican polity, far from the greed, lust for power, and tyranny that had generally characterized human society.* }

To the Anti-Federalists, this meant—as much as possible—retaining the vitality of the state governments where rulers and the ruled are best able to know and understand each other. Under the new constitutional regime, the fear was that the state governments, which the Anti-Federalists saw as necessary to the preservation of individual liberty, would eventually be absorbed into a distant national authority. This authority would be so far removed (in both location and spirit) from the everyday lives of the people—their 'habits and attachments'—that the longstanding Puritan-inspired tradition of local self- government, in any meaningful sense, would eventually disappear. In its place, would emerge a subtle form of despotism that Alexis de Tocqueville, many years later, would refer to as 'administrative centralization,' that is to say, a centralized political power that seeks to regulate the sundry activities of citizens via uniform rules and blanket provisions that tend to ignore reasonable communitarian claims to local self-determination.[3] At its core, this fear draws upon the axiom that an *imperium in imperio* (i.e., a state within a state) is a serious error in political thinking. Two sovereign authorities, it was believed, could not coexist within a single polity; one or the other must be

supreme; and because power is dynamic, the loser in the struggle for supremacy must ultimately expect its authority to wane—in this case, the authority of the state governments.

For the Anti-Federalists, the garden path to national consolidation was paved in two directions: (1) the new Constitution created powers that were not necessary to the Union; and (2) it failed to adequately regulate and restrain those powers that, in fact, were necessary. Either way, both of these avenues display a hallmark of early American political thought, namely, the Puritanical belief that the innate human craving for power will exploit any opportunity to exercise dominion. Under the Federalists' proposed constitutional regime, the branch of government that ultimately would be responsible for articulating the scope of these powers—and thus limiting the sway of Old Man Adam—would be the federal judiciary, and most specifically the United States Supreme Court. For Anti-Federalists such as Brutus, however, this presented more of a problem, than a solution.

At the outset, it should be noted that Brutus did not question the federal judiciary's authority to practice judicial review: [4]

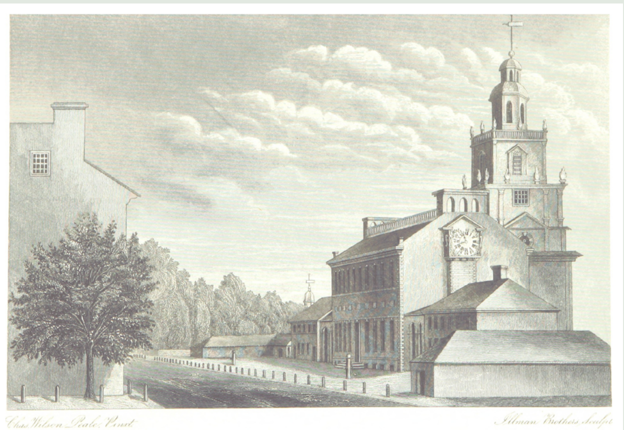
> { *…if the legislature pass laws, which, in the judgment of the court, they are not authorized to do by the constitution, the court will not take notice of them; for it will not be denied, that the constitution is the highest or supreme law. And the courts are vested with the supreme and uncontrollable power, to determine, in all cases that come before them, what the constitution means; they cannot, therefore, execute a law, which, in their judgment, opposes the constitution, unless we can suppose they can make a superior law give way to an inferior.* }

In ecognizing that judicial review is within the purview of the federal judiciary, Brutus draws an important conclusion, namely, that "the judgment of the judicial [branch], on the constitution, will become the rule to guide the legislature in their construction of their powers [because] the legislature... will not go over the limits by which the courts may adjudge they are confined."[5] What alarmed Brutus was the ease with which the judicial branch could apply its power of judicial review to circumvent the Constitution's separation of powers in the service of national consolidation. Indeed, Brutus feared that this skirting could threaten the continued independence of the states.

As Brutus read Article III, the federal judiciary would be the final arbiter in interpreting the meaning of the Constitution, and since its jurisdiction extended to cases "in equity," it would also enjoy a rather wide "latitude of construction."[6] Discounting Alexander Hamilton's assertion in Federalist 78 that the judiciary was the "least dangerous" branch of the national government because it lacked "either the sword or the purse,"[7] Brutus argued that the federal courts "will not confine themselves to any fixed or established rules." Instead, they will adopt "certain principles, which being received by the legislature, will enlarge the sphere of [legislative] power beyond all bounds."[8] No matter how carefully the delegates to the Philadelphia Convention had tried to fix the limits of the national legislative power, the federal judiciary would have enough interpretive discretion that it could easily undermine those efforts. Thus, as the Federal Farmer admonished: "We are more in danger of sowing the seeds of arbitrary government in this department of government than in any other."[9]

So far, we see that Brutus largely treated the doctrine of judicial review as an aspect of the 'horizontal' separation of powers, but he soon indicated

that its real force would be felt along the 'vertical' axis of federalism, where it would "operate to effect, in the most certain, but yet silent and imperceptible manner, what is evidently the tendency of the constitution: —I mean, an entire subversion of the legislative, executive and judicial powers of the individual states." The "equivocal" and "ambiguous" language of key passages of text as well as the broad purposes proclaimed in the preamble, would allow the judiciary to adopt "an equitable construction" of the Constitution consistent with the document's "spirit, intent and design…as well as the words in their common acceptation." Futhermore, just as the federal judiciary would have a stake in



The State House in Philadelphia, 1778. *Courtesy of Wikimedia Commons.*

"using this latitude of interpretation" to expand the powers of the legislature because, in turn, that would serve to "enlarge the sphere of their own authority," so judicial determinations would call the legislature's attention to the "bounds" to which its power could aspire, the reach to which it may grasp.[10]

In a telling example, Brutus seized upon the open-textured language of the Constitution's preamble to demonstrate just how far an equitable interpretation of the Constitution might be carried. Brutus asked, what did it mean to "form a more perfect union" of the American people? "Now to make a union of this kind perfect," he answered, "it is necessary to abolish all inferior governments, and to give the general one complete legislative, executive and judicial powers to every purpose." Such a result, however, would not be accomplished with reckless alacrity, but only with "as much celerity, as those who have the administration of [the general government] will think prudent," as the federal judiciary strikes down state laws that interfere with the exclusive jurisdiction of the national legislature or even in areas of "concurrent jurisdiction."[11]

In conclusion, if one were to search American legal history for evidence to support Brutus' contention that the Constitution's language is as malleable or enticing as he supposes it to be, one would not have to look far into the future. Beyond the preamble, according to Brutus, the provision in the proposed Constitution that seemed most likely to be subject to such an egregious interpretation was the Necessary and Proper Clause.[3] Indeed, the open-ended language of the clause threatened to justify the unwarranted expansion of national power "to almost everything about which any legislative power can be employed…[N]othing can stand before it." The aim of the clause was to vest the legislature with enough authority to undertake measures that are justifiably "for the carrying into Execution" of its enumerated powers.[12] In other words, relying on the literal language of the clause, the legislature may adopt measures that are designed to assist or facilitate the national government in executing its constitutionally enumerated powers. In actual practice, however, the legislative branch does not rely

on the limitations of literal language, but on a judicially favored interpretation of the text that affords wide-ranging and expansive powers to the national government.

For example, in the High Court's landmark decision, *McCulloch v. Maryland*, 4 Wheat. 316 (1819), Chief Justice John Marshall, an ardent Federalist, upheld the constitutionality of the Bank of the United States with a broad reading of legislative power and a devout nationalist interpretation of our federal system of divided government. In his classic formulation, Marshall writes: [13]

> { *Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional.* }

Moreover, the Chief Justice interestingly construed the word "necessary" to mean the much more helpful "convenient" or "useful" and rejected the narrow reading of "indispensable."[14] So even though the authority to establish a national banking system (the Federal Reserve) is not among the enumerated powers of the legislative branch, it can do so because establishing such a system is a 'necessary and proper' (i.e. convenient) way of executing its power to lay and collect taxes, to borrow and collect money, regulate interstate commerce, and the such. When the word 'necessary' is judicially construed to mean 'convenient,' perhaps we should behold the lessons of Brutus.

Endnotes

1 Storing, Herbert J. 1981. *What the Anti-Federalists were for: The Political Thought of the Opponents of the Constitution*, edited by Murray Dry. Chicago: University of Chicago Press. .

2 Ketcham, Ralph. 1991. *Roots of the Republic: American Founding Documents Interpreted*, edited by Stephen L. Schechter. Lanham: Rowman & Littlefield Publishers.

3 Tocqueville, Alexis de. 2003. *Democracy in America and Two Essays on America*. Penguin Classics. 13th ed. London: Penguin Books.

4 *The Complete Anti-Federalist 2007*., edited by Herbert J. Storing. Chicago: University of Chicago Press.

5 Ibid.

6 Ibid.

7 Hamilton, Alexander. 1788. "The Federalist no. 78: The Judiciary Department." *Independent Journal*.

8 *The Complete Anti-Federalist 2007*., edited by Herbert J. Storing. Chicago: University of Chicago Press.

9 Ibid.

10 Ibid.

11 Ibid.

12 See U.S. Constitution, Article I, § 8, cl. 18.

13 McCulloch v. Maryland, 17 U.S. 316 (1819)

14 Ibid.