

Government 30

Lecture 3

Criticisms (and Defenses) of the Constitution

February 8, 2006

Announcements

Electronic sectioning site:

<http://www.section.fas.harvard.edu>

- Open at 5:00 p.m. Wednesday, closed at 5:00 p.m. Friday
- Direct all sectioning questions to Colin Moore, Head TF (cdmoore@fas.harvard.edu).

Return to Question from Lecture 1

How many times does the word “democracy” appear in the U.S. Constitution?

What the Constitution does say (Article IV, Section 4): “The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against invasion....”

Read *Federalist* through lens of “small-r” republicanism

Constitution and Federalist movement was explicitly and unapologetically anti-democratic.

Hamilton, *Federalist* #1

I propose, in a series of papers, to discuss the following particulars: -- The utility of the UNION to your political prosperity – the insufficiency of the present confederation to preserve that Union – the necessity of a government at least as energetic with the one proposed, to the attainment of this object – The conformity of the proposed Constitution to the true principles of **republican government** – Its analogy to your own State constitution – and lastly, The additional security which its adoption will afford to the preservation of that species of government, to liberty, and to property.

So, What is a Republic? Hamilton, *Federalist* #9

The science of politics, however, like most other sciences, has received great improvement. The efficacy of various principles is now well understood, which were either not known at all, or imperfectly known to the ancients. The regular distribution of power into distinct departments; the introduction of legislative balances and checks; the institution of courts composed of judges holding their offices during good behavior; the representation of the people in the legislature by deputies of their own election: these are wholly new discoveries, or have made their principal progress towards perfection in modern times. They are means, and powerful means, by which the excellences of republican government may be retained and its imperfections lessened or avoided.” (Rossiter ed., p. 40)

Democracy v. Republic Madison, *Federalist* #10

Madison contrasts two forms of government, democracy and republic.

“a pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person”

Madison: pure democracy “can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert results from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual.”

So What’s Wrong with Democracy? Madison, *Federalist* #10

“Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths.”

“Theoretic politicians, who have patronized this species of government, have erroneously supposed that by reducing mankind to a perfect equality in their political rights, they would at the same time be perfectly equalized and assimilated in their possessions, their opinions, and their passions.”

What is a Republic? Madison, *Federalist* #10

“The two great points of difference between a democracy and a republic are: first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens and greater sphere of country over which the latter may be extended.”

“The effect of the first difference is, on the one hand, to refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.” [Rossiter ed, p. 50]

Criticisms of the American Constitutional Order

1. THE OLD: The Anti-Federalist Critique

Debate over a Bill of Rights

2. THE "NEW":

Whose rights were protected?

Isn't there too much gridlock and too little "energetic government" in the American system?

I. The Anti-Federalist Critique of the Constitution of 1787

I. Liberty is secure only in small republics (Montesquieu).

II. There should be many more restrictions on government than the Constitution contains.

- A. narrow S. Ct. jurisdiction
- B. council of review for Prez.
- C. rely on state militias
- D. increase size of House
- E. reduce tax power of Congress

III. Need a separate guarantee of rights.

Anti-Federalist Point #1: Liberty is secure only in small republics (Montesquieu).

The Anti-Federalists asked: *Why should we unite?*

The Address and Reasons of the Pennsylvania Minority:

"We dissent, first, because it is the opinion of the most celebrated writers on government, and confirmed by uniform experience, that a very extensive territory cannot be governed on the principles of freedom, otherwise than by a confederation of republics, possessing all the powers of internal government; but united in the management of their general, and foreign concerns."

The Problem of Faction

#6 (Hamilton): Real threat to liberty comes from within, from domestic faction (Rossiter ed., pp. 24-5).

#9/#10 (Hamilton, Madison): FACTION IS THE ENEMY. HOW TO AMELIORATE FACTION.

What is a faction? “By faction I understand a number of *citizens*, whether amounting to a *majority* or minority of the whole, who are united and actuated by some *common impulse of passion*, or of *interest*, adverse to the *rights* of other citizens, or to the *permanent and aggregate interests of the community*” (Madison, *Federalist* #10: p. 46).

Madison’s Response (Federalist #10):

Do Not Restrict, but Expand the Representative Sphere

Anti-Federalists (and Montesquieu) misunderstand the real threat to liberty: faction.

“By faction I understand a number of *citizens*, whether amounting to a *majority* or minority of the whole, who are united and actuated by some *common impulse of passion*, or of *interest*, adverse to the *rights* of other citizens, or to the *permanent and aggregate interests of the community*” (p. 46).

How to solve the problem of faction?

(1a) eliminate its causes by abolishing liberty

“It could never be more truly said of the first remedy that it was worse than the disease. Liberty is to faction what air is to fire, an aliment without which it instantly expires. But it could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.” (Rossiter ed, p. 46)

How to solve the problem of faction? (cont.)

(1b) eliminate its causes by standardizing opinion

“The second expedient is as impracticable as the first would be unwise. As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. As long as the connection subsists between his reason and his self-love, his opinions and his passions will have a reciprocal influence on each other, and the former will be objects to which the latter will attach themselves.” (Rossiter ed, p. 46)

How to solve the problem of faction? (cont.)

(2a) ameliorate its effects by pure democracy? That's just 1/2 solution

“If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote. It may clog the administration, it may convulse the society; but it will be unable to execute and mask its violence under the forms of the Constitution.” (Rossiter, p. 48).

(2b) The Republican Solution to Faction
“Extend the Sphere” and “The Rule of the Wise.”

“Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other.” (Rossiter ed., p. 51)

“The influence of factious leaders may kindle a flame within their particular States but will be unable to spread a general conflagration through the other States.” (Rossiter ed., p. 52)

Anti-Federalist Point #2:
The Feds will annihilate the states

See again the PA minority:

“We dissent, secondly, because the powers vested in Congress by this constitution, must necessarily annihilate and absorb the legislative, executive and judicial powers of the several states, and produce from their ruins one consolidated government, which from the nature of things will be an iron handed despotism, as nothing short of the supremacy of despotic sway could connect and govern these United States under one government.”

Madison’s response (*Federalist #45*):
States are adequately protected

- (1) election of the president depends on state legislatures
- (2) Senate elected by state legs
- (3) states together have more officers of government than does the national govt
- (4) there are major restrictions on federal power (pp. 260-61).

Anti-Federalist Point #3: Too much mixture
of powers across the 3 branches

- House impeaches (judicial power)
- Senate ratifies treaties (exec power)
- President has a veto over all laws, and recommends laws to Congress’ consideration (leg power)
- VP is President pro-tempore in Senate, and can cast deciding vote in cases of a tie (leg power)

Madison’s response: *Federalist # 47 & #48*

- (1) state constitutions do this as well
- (2) *need* a sharing of power

Anti-Federalist Point #4:

Need more restrictions on government than the Constitution contains.

1. narrow S. Ct. jurisdiction
 - Hamilton’s response: *Federalist* #78.
2. rely on state militias (PA Minority).
 - Hamilton’s response: *Federalist* # 23.
3. ↑ size of House (akin to small republic argument)
 - Federalists’ response: Madison, #55:
4. reduce tax power of Congress: (PA Minority).
 - Hamilton’s response, *Federalist* # 35:

Anti-Federalists’ Point #5 (Brutus):
Need a Bill of Rights

The danger of authority: “Those who have governed, have been found in all ages ever active to enlarge their powers and abridge the public liberty. This has induced the people in all countries, where any sense of freedom remained, to fix barriers against the encroachments of their rulers.”

Look at England: “The country from which we have derived our origin, is an eminent example of this. Their magna charta and bill of rights have long been the boast, as well as the security, of that nation.”

Anti-Federalists’ Point #5 (Brutus):
Need a Bill of Rights (cont.)

Look at the state constitutions: “...in all the constitutions of our own states; there is not one of them but what is either founded on a declaration or bill of rights, or has certain express reservation of rights interwoven in the body of them.”

Const powers of the fed govt are like those of our states: “The powers, rights, and authority, granted to the general government, are as complete, with respect to every object to which they extend, as that of any state government – It reaches to every thing which concerns human happiness – Life, liberty, and property, are under its control. There is the same reason, therefore, that the exercise of power, in this case, should be restrained within proper limits, as in that of the state governments.”

Hamilton's response to Brutus (# 84)
Bill of Rights unnecessary

1. **Constitution contains rights.**

- writ of habeas corpus required
- no bills of attainder
- no ex post facto laws
- right of trial by jury in criminal cases
- no religious test for office
- no law impairing the obligation of contracts may be passed by the states

2. Indeed, let us look at those **state constitutions**

NY has "not a syllable" of rights for press, has flourishing newspapers (Rossiter ed., p. 482)

Hamilton's response to Brutus (# 84)
Bill of Rights *dangerous*

3. **Bill of Rights will lead to less liberty.**

"I go further and affirm that bills of rights...are not only unnecessary in the proposed Constitution but would even be dangerous. They would contain various exceptions to powers which are not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do?" (Rossiter ed., p. 481)

Modern Criticism I:
Whose Rights Are Protected?

A. White Rights: Failure to Confront Slavery

- Ignorance of problem in 1787
- Three-Fifths Compromise
- William Riker: Other compromises in which Northern interests traded in opposition to Southern slavery for economic benefits
- OR, was an imperfect and unjust Union better than confederacy for rights in long term?

Modern Criticism I: Whose Rights Are Protected?

B. Men's Rights: The Constitution and Women

1. Votes granted by default to men only (Article I, S 2)
2. Women not mentioned in the const
3. James Q. Wilson & John DiIulio: Constitution and Bill of Rights contain general clauses applying to "persons" or "citizens."
4. Problem: application of this logic to states and localities.

Modern Criticism I: Whose Rights Are Protected?

C. Property Rights: the Const protects property owners more than it protects debtors and the poor

1. Beard: those who owned government debt supported Const; debtors opposed.
2. no clear div along class lines found
3. but no worse faction according to Framers than property-seeking ones.

Madison, *Federalist* #10 (Rossiter ed., pp. 47, 52)

"But the most common and durable source of faction has been the various and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, ... The regulation of these various and interfering interests forms the principal task of modern legislation..."

"A rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it, in the same proportion as such a malady is more likely to taint a particular county or district than an entire State."

Modern Criticism I: Whose Rights Are Protected?

The problem of social liberty: what about private threats to private rights?

Medical information; control over your e-mail, etc.

Problem: does the Constitution protect only those rights which are held by persons/citizens commonly defined? (unborn, immigrants, animals, or blacks, women, Native Americans, the poor at the time of the Founding)

Modern Criticism II: Government as GRIDLOCK

A. Both military and domestic powers too constrained by politics

- e.g., Vietnam War
- e.g., Clean Air Act: procedural control on Prez, bureaucracy

B. Need more, not less cooperation btw Prez and Cong

C. Need stronger President; Hamilton's "energetic" executive.

Criticism II: Solutions (model of G. Britain)

1. allow Cabinet appts from Congress
2. Schlesinger: 6-yr term for President; no re-election
3. four-year House terms

Problems: results uncertain, worse?

Modern Criticism III
American government too strong

I. Presidential usurpation of properly legislative powers (war-making, spending).

II. Unlimited power of national government to tax

III. Proposed Solutions

- A. Limit amount of taxes collectible
- B. Super-majority to increase taxes
- C. Balanced budget
- D. Line-item veto
- E. Narrow authority of federal courts
