

Anti-Federalism and the Question of Constituent Power in the American Constitutional Debate

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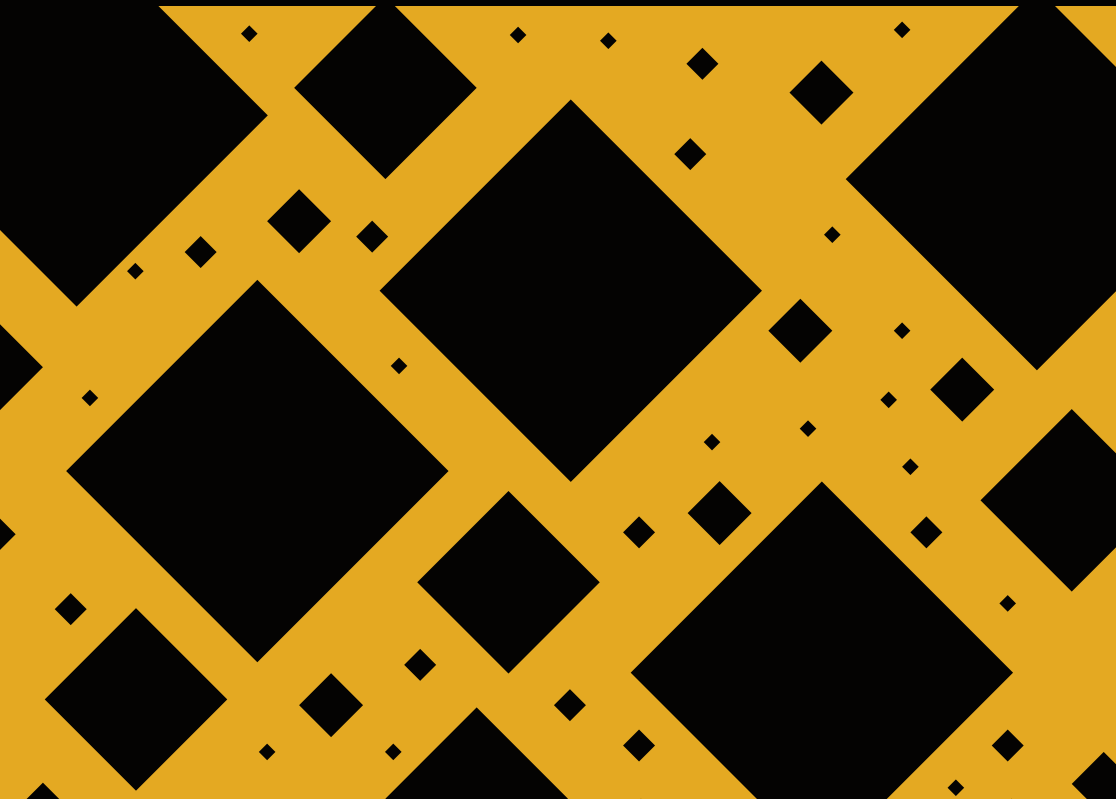
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Anti-Federalism and the Question of Constituent Power in the American Constitutional Debate

*Benjamin Popp-Madsen**

Constituent Power and the Neglected Opposition to the American Constitution

The concept of founding new political regimes has in the history of political thought mainly been understood as the workings of a mythical lawgiver or through the theoretical, hypothetical construct of the state of nature. But in the American context—as James Madison was well aware in Federalist no. 38 (Madison 1961, 227–236)—the constitution was written and ratified after popular discussions, town hall meetings, deliberations and conventions. The Anti-Federalists—the group of politicians and public figures who argued against the ratification of the constitution—were also conscious of the special way foundings, alterations and politics in general had been conducted in the new world; they also celebrated what Gordon Wood in *Creation of the American Republic* has labelled as politics conducted by the people-out-of-doors (Wood 1969, 319). DeWitt (1986, 189) notes that “from the first settlement of the country, the necessity of civil associations, founded upon equality, consent and proportionate justice have ever been universally acknowledged.” As such, the American Revolution in 1776 and the adoption of the constitution in 1788 are good examples of Lockean social contract theory in practice, with the two successive steps of forming an original political community (codified in the Declaration of Independence) and instituting a form of government (codified in the American Constitution). This article will investigate the second contractual moment of American politics, and the paradoxical loss of the constituent power in the very moment of the ratification of the constitution. This will be done through a detailed analysis of the constitutional debate between the Federalists and the Anti-Federalists; a more loosely organized group composed by John DeWitt, Patrick Henry, Melancton Smith and the pseudonym writers Centinel, Brutus, Cato and the Federal Farmer.

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The Anti-Federalists have played a peculiar and often neglected role in the debates on constituent power and the American Revolution. Even though Hannah Arendt in *On Revolution* discusses the lost treasure of the revolutionary spirit, and insightfully states that “it was the Constitution itself, this great achievement of the American people, which eventually cheated them of their proudest possession” (Arendt 1963, 231), she does not discuss the actual Anti-Federalist opposition to the constitution. Antonio Negri understands in a similar fashion the American Constitution to be decisive moment in the history of the constituent power; the moment of the tragic transformation of the concept and its complete appropriation by liberal constitutionalism: “By now, the constitutional motor is marching, even hastening forward. The masterpiece of transferring the constituent foundation from the people to the constitution is fully realized already at the end of the first part of *The Federalist*” (Negri 1999, 165). Again, the omission of the political actors who argued against this transformation of the constituent power is significant.¹

In more general writings on the American Revolution the Anti-Federalists play an analogous role. Herbert Storing describes the Anti-Federalists as conservative, agrarian politicians afraid of changing the status quo (Storing 1981, 7–23), and Gordon Wood writes the Anti-Federalists off as “state-centered men with local interests and loyalties only, politicians without influence and connections, and ultimately politicians without social and intellectual confidence” (Wood 1969, 486), and thus the debate between the Federalists and the Anti-Federalists does not even qualify as political, but instead “the struggle over the constitution, as the debate of nothing else makes clear, can best be understood as a social one” (Wood 1969, 484).

As such, the Anti-Federalists—even though they were the principal critics of the centralization of power and the aristocratic elements in the constitution—are either neglected (Arendt, Negri) or ridiculed (Storing, Wood). One theoretical explanation of this peculiar treatment of the Anti-Federalists is the dominance and interrelatedness of concepts such as size, space and representation in writings on the American revolutionary period. For Negri, for example “the battles and the political alternatives taking place here assume the organization of space as their specific object” (Negri 1999, 142), and for Wood the transition from a confederation of small republics with direct representation to a federal state covering extensive territory and employing multiple representational mechanisms, is magnified into “the end of classical

1 For a contemporary omission of the Anti-Federalists, see Jean Cohen’s work on federations (2011).

politics” (Wood 1969, 606), and the complete replacement of republicanism with liberalism. Although more nuanced and in opposition to Wood’s depiction, Andreas Kalyvas and Ira Katznelson also understands the American debate through size and representation (and also omits the Anti-Federalists), as representation is precisely the Madisonian answer to the problem of size in the making of an extensive republic for the moderns (Kalyvas and Katznelson 2008, 88–117).

On the contrary, recent historical scholarship culminating in Saul Cornell’s seminal *Anti-Federalism & the Dissenting Tradition in America, 1788–1828* (1999) has acknowledged the described tendency to omit or ridicule the Anti-Federalists (Cornell 1989, 39; Cornell 1999, 1). This recent historical engagement with the Anti-Federalists is—like the attempt of this article—“motivated by the desire to expose an alternative American political tradition and to uncover a political path not taken” (Cornell 1989, 39). In illuminating this untaken path, many historical commentators have depicted the Anti-Federalists positively and have associated their localism and distrust in centralization with a specific theory of democracy and representation (Cornell 1989, 46, 1999, 3; Howe 1989, 3; Rose 1989, 75; McWilliams 1989, 22–25). To these commentators, the Anti-Federalists were aware of the inherent dangers in what Alexander Hamilton called a consolidated government, i.e., a sovereign state; these dangers being the lack of local democracy and direct participation and the dismantling of a vibrant public sphere. As Sheldon Wolin has argued in his powerful essays on the bicentennial celebration of the American constitution in *The Presence of the Past: Essays on the State and the Constitution* (1989), by ratifying the constitution a specific way of understanding politics was chosen and another way was lost. This lost Anti-Federalist way of politics is for Wolin directly associated with “the loss of democratic hopes” (Wolin 1989, 4). In a similar way, Carol Rose has very convincingly shown how the debate between the Federalists and Anti-Federalists resembles the earlier European debate between Royalists and Anti-Royalists, and how the Federalists shared their royalist forerunners concern of the weakening of government by popular influence (Rose 1989, 85–92). I will return to this historical scholarship later in article.

In opposition to the described derision of the Anti-Federalists and the extensive focus on *size* in the debates on the American constitutional struggle, and form the constituent power, I propose to discuss and explore the Anti-Federalists not through the notion of representation and space, but through

the notion of *time*. Obviously, the Anti-Federalists *did* discuss representation, space and size (DeWitt 1969, 329–335; “Cato” 1969, 336–341; “Brutus” 1969, 345–358), and even linked them together arguing against Madison’s famous meditation on factions in Federalist no. 10: “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” (“Centinel” 1969, 249). However, in a more general manner, if we take the perspective of the constituent power, the Anti-Federalists were occupied with a certain question of *time*: what is to be done after a revolution? How to keep the spirit that guided the revolution alive after the moment of foundation? How to make sure that the people during the temporal gap between the two Lockean contracts, do not forget the spirit of the first moment of foundation, and waste it in the second moment of the institution of government?

These questions, I think, are key in understanding the novelty and radicalism of the Anti-Federalists, and to reconfigure the American constitutional debate not as a debate between republicanism and liberalism (Wood), not as different modalities of the relationship between space, size and representation (Negri, Kalyvas, and Katznelson), and not as conservative agrarians *contra* progressive, capitalist metropolitans (Storing), but as a debate between two types of sovereignty: sovereignty as the supreme command of the state, and sovereignty as the constituent power of the people. This is similar to the way that both Wolin (1989, 82–88) and Cornell (1999, 303–309) have depicted the debate.

The questions, which the Anti-Federalists posed concerning the relationship between time, constituent power and the revolutionary aftermath, were certainly not new. Machiavelli had already in his remarkable notion of refoundation as augmentation in *The Discourses* described refoundation as the necessary return to the origins: “The way to renovate them [constitutions], as have been said, is to reduce them to their starting-points” (Machiavelli 1983, 385–386). He was thus aware of the negative influence on time to the revolutionary achievement.² Arendt grappled with the same question in her discussion on the conflict between the council system and the professional revolutionary parties, which over time had destroyed every revolution (Arendt 1963, 207–274). So did the Marquis de Condorcet in his development of his

² So was Aristotle in *Politics*, book 5, where he developed an entire theory of the cyclical change of constitutions and regimes due to the inevitable corruption and decay of institutions, and Aristotle understood these changes directly as “political revolutions” (Aristotle 1954, 214).

model of primary assemblies with participation from below (Cordorcet 1976, 151–153). But the most famous formulation of the relationship between time, revolution and constituent power is that of Thomas Jefferson and Thomas Paine, and their shared idea of the power of living over the dead: “Can one generation bind another, and all others, in succession forever? I think not. The Creator has made the earth for the living, not for the dead” (Jefferson 1999, 386). Paine echoed him in *Rights of Man*: “The vanity and presumption of governing beyond the grave is the most ridiculous and insolent of all tyrannies” (Paine 1969, 138).

Already some years before Paine’s statement and contemporary to Jefferson, however, the Anti-Federalists struggled to convince the American public of the dangers inherent in the proposed constitution. They tried to convince their opponents that the revolutionary spirit, which had founded the American confederation twelve years earlier, would be destroyed if the constitution were adopted.

In order to understand the theoretical consequences for the constituent power and its relation to foundations of new political regimes and subsequent institutionalization, I will trace the detailed, rich and contextual debate between the Federalists and the Anti-Federalists in 1787–1788, and seek to understand it as a debate between two types of sovereignty. It thus becomes an American update of the earlier debate on sovereignty, federalism and revolution in sixteenth and seventeenth century Europe. In order to show this, the article will be structured in the following way: a) an analysis of *The Federalist Papers* in order to show how the essential aspiration of the Federalists was the construction of Hobbesian or Bodinian sovereignty, b) an interpretation of the basic Anti-Federalist question as a question of time, that is, a question of how to preserve the revolutionary spirit, c) finally, a discussion of the Anti-Federalists answer to the problem of time, namely the discovery of the federal principle.

The American Leviathan: *The Federalist Papers*

From October 1787 to May 1788 Hamilton, Madison and Jay issued eighty-five newspaper articles arguing in favour of the ratification of the constitution, and the articles understanding of republicanism, constitutionalism and the division of powers have become dominant in American political theory. In this section, I propose to read *The Federalist Papers* as an argument for unified state sovereignty in the Bodinian and Hobbesian tradition. As such, it becomes one of history’s most extensive deceptions that Hamilton, Madison

and Jay took the name *Federalists*, as they argued against the *real* Federalists, that is, the Anti-Federalists.

The central argument in *The Federalist Papers* is the that choice between the Constitution and the Articles of Confederation is in fact a choice between stability and anarchy, between security and violent struggle—in short a Hobbesian choice: “Among the many objects to which a wise and a free people find it necessary to direct their attention, that of providing for their safety seems to be the first” (Jay 1961, 36), and to obtain this first principle of politics a strong sovereign is required, otherwise the “division of the States into distinct confederacies of sovereignties” will equal “a number of unsocial, jealous, and alien sovereignties” (Jay 1961, 32–33). Ultimately, it is a choice between “an adoption of a new Constitution or a dismemberment of the Union” (Hamilton 1961, 31), or with Hobbes: anarchy or sovereignty. Whereas Jay’s papers no. 2–5 are concerned with the advantages of the union in relation to external dangers from other nations, Hamilton’s papers no. 6–9 are concerned with internal conflict and sedition. Just as nations are in a state of nature with each other, so would the confederate states be without a sovereign national government: “To look for continuation of harmony between a number of independent, unconnected sovereignties situated in the same neighbourhood would be to disregard the uniform course of human events, and to set at defiance the accumulated experience of ages” (Hamilton 1961, 48). Thus, the freedom the Americans obtained with the revolution, and which according to Arendt is the sole goal of every revolution (Arendt 1963, 19), must—in order for the Americans to become a real nation—give way for security or *raison d’état*: “Safety from external danger is the most powerful director of national conduct. Even the ardent love of liberty will, after a time give way to its dictates ... To be more safe, they at length become willing to run the risk of being less free” (Hamilton 1961, 61–62). Here we can see the Federalists understanding of the relation between constituent power and time: the revolution granted freedom, but in order not to fall back into “the pernicious labyrinths of European politics and war” (Hamilton 1961, 60), security needs to be provided at the very expense of freedom. This hierarchical relation is confirmed to an even greater extent when Madison in Federalist no. 49 discusses the idea of a recurrent appeal to the people in moments of crises: “there appear to be insuperable objections against the proposed recurrence to the people” Madison stated, and these being that “frequent appeals would, in great measure, deprive the government of that veneration which time bestows on everything, and without which perhaps the wisest and freest

governments would not possess the required stability” (Madison 1961, 311). In short, *time* itself, in Madison’s understanding, requires that the freedom of the founding ought to be replaced with the stability of government; stability in other words requires that a political community abstains from returning to its principal source of legitimacy, that is, to the constituent power of the people.³ It is exactly this relationship between time, stability and freedom that the Anti-Federalists challenge, and which I will discuss in section three.

So far, the Federalists have posed the problem of unity in a completely Hobbesian vocabulary of the passionate and evil human nature, the inevitability of conflict, and the trade of freedom for the ultimate political value of security. Moreover, the federalist solution is also strictly Hobbesian: “Government implies the power of making laws. It is essential to the idea of a law that it be attended with a sanction; or, in other in words, a penalty or punishment for disobedience” (Hamilton 1961, 105), or as Hobbes himself famously stated in *Leviathan*: “covenants without the sword are but words, and of no strength to secure man at all” (Hobbes 1994, 106). In order to establish a secure republic, which is governable, the Federalists wanted to destroy all the intermediate layers of political community, corporations, pledges and promises that theorists of the constituent power from Marsilius of Padua (Marsilius 2005) over Johannes Althusius (Althusius 1995) and Condorcet to Arendt all relied on. Instead a direct, hierarchical relation between the sovereign and the subject is necessary in order to govern and establish safety: “we must extend the authority of the Union to the persons of the citizens—the only proper objects of government” (Hamilton 1961, 105). The Anti-Federalists must give up their “blind devotion to the political monster of an *imperium in imperio*” (Hamilton 1961, 103). According to the analysis of the historical similarity between the political aspirations of the Federalists and the earlier European royalists made by Carol Rose, this attempt to nullify all intermediate political layers between the state and the subjects has always been primary object of monarchist politics. As such, Rose understands the Federalists as a continuation of what was originally royalist political goals as “our own Revolution was in some ways just another in a long line of revolts of provincial privilege against centralizing royalist pretension” (Rose 1989, 81).

In short, instead of the corporatist theory of the constituent power and a political community held together by multiple pledges and contracts between

³ The question is not whether the people are the source of legitimacy “*as the people are the only legitimate fountain of power*” (Madison 1961, 310), but whether they should be appealed to in moments of crises and exception—that is, whether the constituent power should be re-activated.

numerous layers of power, the Federalists aspired for classical Bodinian sovereignty as the “absolute and perpetual⁴ power of a commonwealth ... that is, the highest power of command” (Bodin 1992, 1).

No attempt to argue that the Federalists aspired for Bodinian or Hobbesian sovereignty would be complete without a discussion of Madison’s famous paper no. 10. For Madison, the main political problem for a republic is the problem of factions; and the problem cannot be solved in the small, confederate republics due to the problem of majoritarianism (Madison 1961, 76). Instead, only through extending the size of the republic and channelling the opinions of the people through a series of complex representational mechanisms can the factional disaster be avoided. As Wilson McWilliams has argued, Madison and the Federalists employ here a very distinct understanding of representation. The representatives ought not to be familiar with their constituencies, and should not debate and deliberate with them. Only by distancing themselves from the electors could they reach the objective public interest: “the Federalist doctrine of representative government can be reduced to a single concise principle: Objective interests, objectively arrived at” (McWilliams 1989, 15).

With this “republican remedy for diseases most incident to republican government” (Madison 1961, 79), the Federalists reach the apex of their Hobbesianism: social life is nothing but factional strife, the end of politics is nothing but the control of these factional conflicts. The instrument to this end is the creation of a system where the people only exists through representation and cease to be existentially present so that the “society will be broken down into so many parts, interests and classes of citizens” (Madison 1961, 321). This picture of political reality is combined with the Hobbesian obsession with security over freedom, with the Hobbesian fear of the people as existentially present outside the constitution—manifest in Madison’s warning against re-experiencing the foundational moment. This finally becomes combined with the Bodinian demand for a direct hierarchical relation between the sovereign and the subject.

Essentially, the Federalists wanted to refuse the Americans the same experience of freedom and founding that they experienced with the Declaration of Independence in 1776, and instead replace these expressions of freedom with

⁴ Again, we see the Federalists understanding of the relation between time and constituent power through a very interesting semantically similarity: Sovereignty has to be perpetual. Compared to Jefferson’s idea that “no society can make a perpetual constitution, or even a perpetual law” (Jefferson 1999, 596), this is a radically different understanding of time.

perpetual sovereignty: “Stability, on the contrary, requires that the hands in which power is lodged should continue for a length of time the same. A frequent change of men will result from a frequent return of elections; and a frequent change of measures from a frequent change of men: whilst the energy in government requires not only a certain duration of power, but the execution of it by a single hand” (Madison 1961, 223). In short, even though Hamilton accused the Anti-Federalists of creating the political monster of *imperium in imperio*, it was the Federalists who created an American Leviathan.

The Anti-Federalist Question of Time: How to Keep the Revolutionary Spirit Alive?

“What if there is no other way?” Negri asks, “What if the very condition for maintaining and developing the juridical system were to eliminate constituent power?” (Negri 1999, 10). For the Federalists there indeed is no other way: the adoption of the constitution means the elimination of the constituent power. On the contrary, the Anti-Federalists’ answer to the problem of time, and the hereby related conflict between constituent power and its constituted achievements is completely different, and delivered in two steps: a) an analysis of the constitution and the writings of the Federalists as precisely an attempt to eliminate the constituent power, that is, the identification of the problem of keeping the revolutionary spirit alive (elaborated in this section), b) a positive answer to this question through the discovery of the federal principle as the political form of freedom (elaborated in the next section).

As noted in the introduction, the Anti-Federalists do not represent a cohesive group, and their political arguments are not as clear and persuasive as Madison’s and Hamilton’s. Thus, in order for the radicalism of the Anti-Federalists to emerge, a theoretical reconstruction of their arguments is necessary.

What *did* unite the Anti-Federalists was their opposition to the constitution, and the shared awareness of the implicated loss of the constituent power. In the words of John DeWitt, with direct reference to the Bodinian definition of sovereignty, “it is not temporary, but in its nature, perpetual. It is not designed that you shall be annually called, either to revise, correct or renew it; but, that you shall grow up under, and be governed by it, as well as ourselves. It is not so capable of alterations as you would at first reading suppose; and I venture to assert, it can never be, unless by force of arms” (DeWitt 1986, 195). Here, DeWitt recognized that the ratification of the constitution would be a Hobbesian self-fulfilling prophecy: if the constitution does not allow for

public alterations, then, ultimately, it will be a choice between sovereignty and anarchy, as the constitution can be altered only by *force of arms*, that is, by returning to the state of nature.

The same concern is expressed by the Anti-Federalist Patrick Henry: “we may fairly and justly conclude, that one-twentieth part of the American people, may prevent the removal of the most grievous inconveniences and oppression, by refusing to accede to amendments” (Henry 1986, 205). This concern strikes at the heart of problems of constituent power and time insofar as the constituent subject tendentially loses its authority and becomes alienated by what it has constituted. In political terms, this is problem of tyranny and tyrannicide, which were the central issue for the French Monarchomacs, as well as Henry: “My great objection to this government is, that it does not leave us the means of defending our rights; or, of waging war against tyrants” (Henry 1986, 203). He furthermore argued that the adoption of the constitution would be yet another historical “instance of the people losing their liberty by their own carelessness and the ambition of the few” (Henry 1986, 202). Instead, Henry directly links constituent power and popular sovereignty together because “whenever any government shall be found inadequate, or contrary to these purposes, a majority of the community hath, and undubitable, unalienable and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal. This, Sir, is the language of democracy” (Henry 1986, 206).

These arguments can also be found in the pseudonym writer “Brutus,” who expresses the same concerns as DeWitt and Henry: “the people in general would be acquainted with very few of their rulers; the people at large would know very little of their proceedings, and it would be extremely difficult to change them” (“Brutus” 1986, 292). This was because “many instances can be produced in which the people have voluntarily increased the powers of the rulers; but few, if any, in which rulers have willingly abridged their authority” (“Brutus” 1986, 283).

We can now begin to see the Anti-Federalists understanding of the relationship between constituent power, the constituted order and time: the achievement of the constituent power—the constitution—will over time alienate itself from its principle source of legitimacy—the people—and thus the split between legitimacy (the constituent power of the people) and legality (the constitution) will render every further appeal to the constituent power illegal. Due to this split between legitimacy and legality, the Anti-Federalists argue, constitutional changes can only happen illegally through violent struggles.

The Anti-Federalists in the very midst of the constitutional debate provide us with the same insight which Arendt presents nearly two hundred years later in *On Revolution*, namely that the ratification of the constitution is equal to the destruction of the revolutionary spirit: “When the American spirit was in its youth, the language of America was different: Liberty, Sir, was then the primary object ... But now, Sir, the American spirit, assisted by the ropes and chains of consolidation, is about to convert this country to a powerful and mighty empire” (Henry 1986, 209).⁵ Two important elements are obvious from this quote: first, the Arendtian vocabulary of the lost spirit of the revolution as the spirit of freedom, and secondly, that this loss is due to a certain political form: the consolidated, sovereign state with imperial characteristics.

As such, the aim for the Anti-Federalists was not the depreciation of government in general. Nor was it the idea of a non-institutionalized, ever-present constituent power in permanent revolution, as Negri would have it (Negri 1999, 225). Rather, it was a critique of a *specific* way to institutionalise politics which made it difficult to change the basic constitutional norms of the community. To see how Anti-Federalists criticized the political form of state sovereignty and to understand why the emergence of constituent power stands in opposition to the state form, it is necessary to analyse the arguments which the Anti-Federalists provided in direct response to the two main arguments of the Federalists, namely the Hobbesian hierarchy of security over freedom, and the Bodinian aspiration for a direct relation between sovereign and subject.

As described in the section above, the Federalists imagined a more energetic government by destroying the intermediate layers of states, contracts and promises, and by establishing a direct relation between the sovereign and the subject. For the Anti-Federalists, this attempt was inscribed in the very first line of the proposed constitution: “America may depend on this: Have they said, we the States? Have they made a proposal of a compact between states? If they had, this would be a confederation: It is otherwise most clearly a consolidated government. The question turns, Sir, on that poor little thing—the expression, We, the people, instead of the States of America” (Henry 1986, 199). The same analysis is made in the Pennsylvania Minority Statement after the state’s ratification of the constitution: “The preamble begins with the words, ‘We the people of the United States,’ which is the style of a compact between individuals entering into a state of society,

⁵ Consolidation is the word the Federalists used for sovereignty (Hamilton 1961, 30).

and not that of a confederation of states” (“Centinel” 1986, 254). Thus, the Anti-Federalists clearly understood that the Federalists and the language of the constitution performed exactly the same theoretical operation that Hobbes’ did in *Leviathan*: social contract theory from medieval political theory over Althusius and until Hobbes was always a contract between pre-existing political communities, city states or provinces (Gierke 1913, 6–7). Thus Hobbes’ radicalism lay in his appropriation of this tradition, and the subsequent individualization of it. This is precisely the critique made by the Anti-Federalists. By changing the preamble from “We, the States” to “We, the People,” the constitution envisions its own production as a result of pre-political individuals contracting in a state of nature rather than numerous pre-existing political communities coming together, with the obvious consequence of creating “a monarchy, like England—a compact between Prince and people” (Henry 1986, 200).

Besides the critique of the replacement of a communal social contract with a liberal individualist one, the Anti-Federalists furthermore engage critically with the idea of security as the prime political value. The argument of the Federalists had been Hobbesian in essence: in order to avoid external danger and to forge internal unity, security must be prioritized over freedom. The Anti-Federalists re-inverted this argument. For Henry “The first thing I have at heart is American liberty; the second thing is American union” (Henry 1986, 215). The end of politics for the Anti-Federalists was thus not commercial prosperity or imperial ambition, but freedom: “You are not to inquire how your trade may be increased, nor how you are to become a great and powerful people, but how your liberties can be secured; for liberty ought to the direct end of your government” (Henry 1986, 200). Importantly, the freedom the Anti-Federalists have in mind is not liberal, private freedom, but the public, political freedom of self-government: “There can be no free government where the people are possessed of the power of making laws by which they governed ... in their own persons” (“Brutus” 1986, 345).

As such, the Federalists and the Anti-Federalists had completely different ontologies of the political: for the Federalists, the political emerges as a contract between individuals for the sake of security, the social world is dominated by factional conflict, and the sole aim of government is the reduction of factional influence by dispersing popular interest as much as possible. On the contrary, for the Anti-Federalists, the political is a product of an agreement between already formed political communities in order to cooperate, and the goal of government is the enhancement of public freedom.

In summary, the debate between the Federalists and the Anti-Federalists can be reinterpreted as a debate between two different types of sovereignty as Andreas Kalyvas' ideal typically has developed them (Kalyvas 2005): state sovereignty as a command in the Bodinian and Hobbesian tradition and sovereignty as the constituent power of the people.

It has become apparent from the comparison so far that the main difference between these two types of sovereignty is their altogether different configuration of the relationship between foundation (constituent power), constituted order and time: through an understanding of the foundation as a contract between individuals, a notion of social life as conflictual, and the appraisal of security as the highest political value, Federalists recommended the impossibility of returning to the foundations (Madison in papers no. 49–50) and advocated for the temporal exhaustion of the constituent power and the revolutionary spirit in the constituted order. The political form which could achieve these goals could only be the sovereign state. The Anti-Federalists configuration of the concepts is different. As political institutions can only be an agreement between already existing political communities in the endeavour for freedom, it is necessary that the constructed institutions have inherent mechanisms for refoundation as the temporal distance between the original new beginning and the present will always corrupt the spirit of the foundation.

The temporal corruption of political institutions has been a common theme in the history of political thought from the Aristotelian and Polybian understandings of inevitable cyclical change of regime forms, over Machiavelli's idea of refoundation as returning to the origins and Jefferson's and Paine's revolt of the living, up to the modern expression of Weberian institutional routinization. Thus, the divide between the Federalists and the Anti-Federalists exists in fact that the Federalists due to their political ontology welcomes this routinization as necessary, whereas the Anti-Federalists criticize it because of the loss of freedom and constituent power. Whereas the state form—Hamilton's energetic and consolidated government—becomes emblematic of the necessary routinization and lack of appeal to the founding moment, the extremely important and unresolved question is (I think this is the question with which the Anti-Federalists were occupied) which form of political organization, if any, accommodates the re-emergence of the constituent power. In other words: with the interpretation of the basic Anti-Federalist question as a question of how to keep the revolutionary spirit alive after the founding moment; it is now time to look at their solution.

The Anti-Federalists Answer: The Federal Principle

At first glance, the answer to the Anti-Federalist question is obvious: they are in favour of a federation, or what they called a confederation due to Hamilton's and Madison's strategic theft of the concept. As such, the Anti-Federalists argued in favour of a federation instead of a consolidated sovereign state. They were also well aware of the Federalists' aspirations: "Instead of being thirteen republics, under a federal head, it is clearly designed to make us one consolidated government" ("The Federal Farmer" 1986, 270) or as "Brutus" straightforwardly put it "all ideas of a confederation are given up and lost" ("Brutus" 1986, 284). The main argument against the constitution by the Anti-Federalists was, as described above, the future impossibility for the constituent power to reconfigure the basic elements of the commonwealth. The important question is now to understand *why* the federal principle, *why* the federation as a political form, is better suited for revisiting the foundations than the state.

Just as the interpretation of the constitutional debate as conflict between the two types of sovereignty required a theoretical reconstruction of the arguments, so does an evaluation of the federal principle, as the Anti-Federalists were more eager to engage critically with the constitution than to lay out their own principles. When they did provide their own principles, as Cornell has argued, they were often more abstract and less potent than their federalist counterparts. This does not make the arguments weaker, but only more difficult to state cohesively and convincingly (Cornell 1999, 8).

For the Anti-Federalists, the federation was superior to the sovereign state form due to two characteristics: the internal freedom and participation in each republic and the external relations of equality, reciprocity, unanimity and cooperation between the states. As this political form was the Anti-Federalists' answer to the question of constituent power, constituted orders and time, and thus an attempt to go beyond the radical opposition and conflict between constituent power and constituted power in the sovereign state paradigm, I will discuss both characteristics starting with the internal advantages.

In the sovereign state, the infinite regress of legality will end in the factuality of the sovereign itself, as for example for Hans Kelsen and the legal positivism of his *groundnorm*, but in a federated republic with the ability to re-activate constituent power, both legality and legitimacy cannot come from above, only from below: "we at last arrive at some supreme, over whom there is no power to control but the people themselves. This supreme controlling power should be in the choice of the people, or else you establish an author-

ity independent, and not amenable at all“ (“Brutus” 1986, 354). Here, again, we see the intimate relationship between popular sovereignty and constituent power, as it is only if the people are sovereign, and not the consolidated government, that the institutions do not alienate themselves. Interestingly, the Anti-Federalists’ institutional solution to how the people can remain sovereign has striking resemblances with other historical proponents of the constituent power: “In a pure democracy the people are the sovereign, and their will is declared by themselves; for this purpose they must all come together to deliberate, and decide. ... it must be confined to a single city, or at least limited to such bounds as that the people can conveniently assemble, be able to debate, understand the subject submitted to them, and declare their opinion concerning it” (“Brutus” 1986, 289). Firstly, in order for the constituent power to emerge, in order for the will of the people to be declared, the people must be existentially present, they must debate and decide in person. This notion of the people-as-presence is apparent in Rousseau’s famous notion of the unrepresentable people (Rousseau 2002, 220), in Arendt’s idea of public spaces as a necessity of politics (Arendt 1958, 50–58), and in Carl Schmitt’s direct linkage between the people and the public, as there is “no people without public and no public without the people. By its presence, specifically, the people initiate the public” (Schmitt 2008, 272). The existential presence of the people is obviously impossible in the political set-up the Federalists imagined, both for reasons of size and space, but also for normative reasons as the people outside representation is nothing but violent factions. It is thus no coincidence that existing historical scholarship on anti-federalism stresses the crucial importance of their localism, not as a conservative introspective quality, but as an essential precondition for democratic self-rule (Cornell 1989, 59; 1999, 213–218; McWilliams 1989, 31; Rose 1989, 97).

Thus, again in accordance with the tradition of the constituent power, the political space has to be confined to a single city, as it is only this form of political organization, which allows for the presence of the people.⁶ It is thus possible to understand the Anti-Federalists as the first thinkers of the ward system, which Jefferson describes in a very similar way as “Brutus” in his letters around 1815: “nearest to my heart, is the division of counties into wards. These will be pure and elementary republics, the sum of all which, taken together, com-

6 This conjunction of Rousseau, Arendt and Schmitt as thinkers of existential presence of the people obviously ignores the internal differences between the thinkers, namely their different understandings of how the people decide, when they are existentially present. Schmitt, inspired by Rousseau, sides with the will, whereas Arendt sides with deliberation.

poses the State, and will make the whole a true democracy” (Jefferson 1999, 219), and which Arendt appraised as the lost treasure of the revolution. Even Marx, when he discusses the Paris Commune in *The Civil War in France*, sides with communal ward system instead of the proletarian dictatorship and the seizing of the state as the first revolutionary step: “The Commune was formed of the municipal councillors, chosen by universal suffrage in various wards of the town, responsible and revocable at short terms” (Marx 1996, 184).⁷ As such, it is only the single city (“Brutus”), the wards (Jefferson), the councils (Arendt) or the Communes (Marx), which makes the representatives *responsible and revocable at relatively short notice* (which is exactly what McWilliams shows in his comparison of the federalist and Anti-Federalist notions of representation [1989]), or translated into the language of the constituent power: it is only in these types of political communities that the constituent power can control its constituted institutions. In short, the federal principle for the Anti-Federalists (and Arendt, Jefferson and Marx) implies that internally in the elementary republics, the people have control over what they have instituted: “when a person authorises another to do a piece of business for him, he should retain the power to displace him, when he does not conduct according to his pleasure” (“Brutus” 1986, 356–357). As such, constituent power’s control of its creations (that the representatives are responsible), and the continuing possibility for the constituent power to emerge (that the representatives are revocable), is the condition for freedom. Or, as the dissenters of ratification of the Virginia Convention phrased it in their proposed amendments: “all power is naturally invested in, and consequently derived from, the people; that magistrates therefore are their trustees and agents, at all time amenable to them ... the doctrine of non-resistance against arbitrary power and oppression is absurd, slavish, and destructive to the good and happiness of mankind” (Amendment Convention 1986, 223).

Whereas all the Anti-Federalists observed the internal blessings of the federal form, the external advantages of a federation were less described and discussed. The most thorough account is given by the Anti-Federalist William Paterson, when he during the convention of the summer of 1787 proposed an opposition to the Virginia Plan; a plan which retained sovereignty

7 It is very interesting that Marx in his commentary on contemporary French politics in *The Eighteenth Brumaire of Bonaparte* (1852), and especially in *The Civil War in France* (1871), departs from what has come to known as the “mature” Marx: he understands revolution as a change in government, and not as the ultimate horizon and the end of politics, and he deliberately understands political institutions such as the Commune and political power to be important aspects of a revolutionary situation, and not as concepts withering away together with class distinctions.

in republics, had a “federal head”—as it was called—to coordinate cooperation among the states, and which became known as the New Jersey Plan. For Paterson the fundamental principle of federal collaboration exists in “giving each State a vote—and the thirteenth declaring that no alteration shall be made without unanimous consent. This is the nature of all treaties. What is unanimously done, must be unanimously undone” (Paterson 1986, 43). This was that each state is “authorized to conclude nothing, but to be at liberty to propose anything” (Paterson 1986, 45). Furthermore, there was to be “no power to vary the idea of equal sovereignty,” as the federal head receives its legitimacy “immediately from the States, not from the people” (Paterson 1986, 43). Thus, the external relations between the states had to be grounded upon plurality in agendas, but consent, equality and unanimity in decisions. Furthermore, decisions are made directly by representatives from the federated states, who’s mandate—as we saw above—is authorized directly by the existentially present people.

In summary, the federation is the only political form the Anti-Federalists imagined could keep the revolutionary spirit alive, precisely because it allows for the constituent power to emerge both internally in the republics through the ward system confined to single cities with more or less direct democratic assemblies, but also externally as the states in cooperation through institutional principles such as freedom, equality, consent and unanimity can—following Patterson, *undo what has been done*; that is, they can politicise their own foundations. Thus, the Anti-Federalists’ countermove to the inevitable decay of the revolutionary spirit and the routinization of constituted institutions is a radical break with the state form and the command of the sovereign, and the discovery of the federal principle.

Political Modernity and The Loss of the Constituent Power

The insights of this article are threefold: historical, analytical and normative.

Historically, the article argues against the omission of the Anti-Federalists by Arendt and Negri and the derision by Storing and Wood. Following the historical recovery of the Anti-Federalist especially made in the pioneering work of Saul Cornell and the positive evaluation of their thinking, I break with the understanding of the Anti-Federalists as local politicians occupied with special interests, and I instead argue that the Anti-Federalists grappled with one of the most important questions in relation to the constituent

power: the question of time. The main problem for the Anti-Federalists—a problem raised in various ways by Machiavelli, Condorcet, Jefferson, Paine and Arendt—is how to keep the revolutionary spirit alive after the founding moment, and thus they argued for certain institutional mechanisms for the re-activation of constituent power. If we want to understand the radicalism of the Anti-Federalists, and not just see them as the losing part of a constitutional debate almost two hundred fifty years ago, I think it must be through the prism of the question of constituent power, foundational promises and institutional routinization over time.

Analytically, instead of understanding the American debate as a debate between republicanism and liberalism (Wood) or as different modes of relating size and representation (Negri), and instead of understanding the Federalists and the Anti-Federalists as aspiring to the same end but through different means, I suggest a radical opposition between them, and propose an interpretation of the debate as a conflict between sovereignty as command in the Bodinian and Hobbesian tradition and sovereignty as constituent power. This is as a debate between the state form and the federation. As such, the views of the Federalists and Anti-Federalists cannot be reconciled as they employ completely different political ontologies: security, individualism, hierarchical relations between sovereign and subject, and fear of both factions and of re-experiencing the foundational moment on the federalist side contra political freedom, corporatist and communal relations between multiple layers of power and an understanding of the necessity of refoundation and renewal on the Anti-Federalists side.

Finally, *normatively*, the paper has explored the reasons why the Anti-Federalists understood the federation as the political form of freedom and the form most suited for the re-activation of the constituent power. In short, for the Anti-Federalists, the revolutionary spirit can only be kept alive in a federation, not in a sovereign state. The reasons resemble those of Arendt and Schmitt in stressing the importance of the existential presence of the people in deliberation and decision. Furthermore, the institutional solution of confining the democratic assemblies to limited areas—a single city as “Brutus” put it—has striking similarities to Jefferson’s ward system, Arendt’s council system and Marx’ appraisal of the Paris Commune.

In the end, in March 1789, the American Constitution came into effect, and the Anti-Federalists lost the constitutional debate. Thus, the founding moment, the revolutionary spirit and the constituent power was lost, as the

constitution itself—the very creation of the constituent power—sealed off future possibilities of appeal to the principle source of democratic legitimacy in the people itself and replaced this possibility with the legality of the constitution and the command of the sovereign.

In this way, the American debate can be seen as an update of European debates on sovereignty, the state form and constituent power taking place in the sixteenth and seventeenth century between Jean Bodin, the Monarchomacs, Althusius and Hobbes, and which came to a historical conclusion with the construction of the European system of sovereign states with the treaty of Westphalia in 1648, and to a theoretical conclusion with Hobbes' *Leviathan* in 1651. It is thus the decisive experience of political modernity in both its European and American variants that a conflict between two types of sovereignty took place, that sovereignty as constituent power lost and was eradicated by sovereignty as command, and that the state form crushed all federal aspirations.

This meta-narrative points to exactly the same question of constituent power and time that the Anti-Federalists were occupied with. If political modernity is inaugurated by the new beginnings of the American and French revolutions, that is, by the emergence and achievements of the constituent power, and at the same time, if political modernity came to be characterized by the loss of the constituent power and the hegemony of the state form, then we must admit that the Anti-Federalists posed the necessary question for every radical politics, namely how to keep the revolutionary spirit alive after the foundation. How does one reconcile constituent power and constituted institutions without the latter exhausting the former? Whether the answer the Anti-Federalists have in common with Jefferson, Arendt and the communal Marx is right must be a question of coming political experimentation and democratic trial and error.

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