

Interpretation

A JOURNAL OF POLITICAL PHILOSOPHY

Fall 2021

Volume 48 Issue 1

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Edward J. Erler, *Property and the Pursuit of Happiness: Locke, the Declaration of Independence, Madison, and the Challenge of the Administrative State*. Lanham, MD: Rowman & Littlefield, 2019, 235 pp., \$42.00 (cloth).

Michael J. Faber, *An Anti-Federalist Constitution: The Development of Dissent in the Ratification Debates*. Lawrence: University Press of Kansas, 2019, xiii + 489 pp., \$49.95 (cloth).

Happiness and the Constitution

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The idea that happiness is the goal of political life has a distinguished history. Liberalism is often assumed to imply a different goal: securing conditions for the individual pursuit of happiness, understood in subjective terms. According to this view, the goal of political life is not happiness but security for individual rights. One might expect to find confirmation of this view in the writings of the framers and defenders of the Constitution. But as Edward Erler notes in *Property and the Pursuit of Happiness*, references to “public happiness” (or the “public good” or the “happiness of the people”) can be found throughout *The Federalist*. He concludes that “for Madison and Hamilton...the purpose of government was not exhausted by the simple idea of protecting private rights,” and this was probably true of the Federalists generally (10).

For their part, the opponents of the Constitution do not seem to have thought differently about the purpose of government, if one judges by the materials presented in Michael Faber’s book *An Anti-Federalist Constitution*. But the Anti-Federalists must have believed that public happiness could best be promoted by a government different from the one proposed for establishment under the Constitution of 1787.

Erler and Faber illustrate different ways of engaging with the framers' work. Erler is concerned to defend an understanding of the Constitution that has the right to property at its philosophical center. His approach has the advantage of showing how scholarship can aid citizens in curbing the excesses of the "administrative state," but it risks putting scholarly aims at the service of political ones. Faber does not address the political disputes of our time. He presents a careful and thorough account of the Anti-Federalists' state-by-state response to what they viewed as a seriously flawed constitutional proposal, then offers an alternative proposal that he believes most Anti-Federalists could have united around. He cannot avoid evaluating the merits of this proposal (he doubts that it could have held the states together for long), but that is not his main concern. For all their differences of approach, both authors draw on sources that challenge any understanding of the founding that focuses exclusively on individual rights.

The writings of the founders suggest that governments are to be measured by two criteria: "private rights and public happiness," to borrow Madison's formulation from *Federalist* 14 (cf. Erler, 7). But if there are *two* criteria of good government, the question arises whether they are consistent with each other. Is the exercise of individual rights necessarily consistent with the welfare of the community as a whole? If it is not, then rights will have to be sacrificed to happiness or happiness to rights. It is at least plausible to argue that rights ought to be sacrificed to happiness in the event that these criteria diverge from each other. Erler quotes (at 9) a passage by Madison from *Federalist* 45 that includes a strong statement of the view that happiness is the highest criterion in political life. "It is too early for politicians to presume on our forgetting that the public good, the real welfare of the great body of the people, is the supreme object to be pursued; and that no form of government whatever has any other value than as it may be fitted for the attainment of this object." The Constitution itself is to be judged by this criterion. "Were the plan of the convention adverse to the public happiness, my voice would be, Reject the plan."

Madison's statement was intended as a challenge to the Anti-Federalist defenders of state sovereignty, but they might have turned it back on the Federalists. If another plan could be expected to promote the public happiness better than the plan put forward by the Philadelphia Convention, then the other plan ought to be adopted. Evaluating the thought of the Anti-Federalists is made difficult by the fact that they did not present their own plan for consideration. But Faber has removed this difficulty, so far as it is possible to

remove it: he draws on the writings of the Anti-Federalists and the amendments they proposed in the state ratifying conventions to present a concrete alternative to the Philadelphia plan. His “Anti-Federalist Constitution” cites “the happiness of the people” in its preamble, though it does little to clarify the relation between happiness and rights.

The Anti-Federalist Constitution takes the Philadelphia plan as its basis but incorporates the proposed amendments that had the widest support (355–95). Unsurprisingly, this constitution begins (after the preamble) with a bill of rights. Article I in the Anti-Federalist Constitution covers much of the same ground as the ten amendments adopted in 1791, though with important differences in wording; its version of what we know as the Takings Clause of the Fifth Amendment includes a stronger affirmation of the right of property, for example. (As discussed below, this clause has a prominent place in the conclusion of Erler’s study.) More strikingly, Faber’s version of the preamble contains a list of five fundamental principles that make up something like another bill of rights. The fourth principle (taken from the Anti-Federalist writer Brutus) states: “The design of civil government is to protect the rights and promote the happiness of the people.” This statement seems to assume that the protection of rights and the promotion of happiness will always be consistent with each other. The assumption is, again, disputable; but even if it is correct, the question of happiness does not disappear, because many of the issues that divided Federalists and Anti-Federalists cannot be understood in terms of rights.

Faber distinguishes three major strands in the thought of the Anti-Federalists (22–44). Some did emphasize rights, or the protection of individual liberty, over other concerns (“Rights Anti-Federalists”). Others devoted more attention to the distribution of power between the states and the federal government (“Power Anti-Federalists”), while still others focused on the representation of the people (“Democratic Anti-Federalists”).

Representation at the federal level was a concern common to all of them, though emphasized most by those Faber calls Democratic Anti-Federalists. The Anti-Federalist Constitution reflects this concern in a number of ways. It increases the size of the House of Representatives and requires the creation of legislative districts in which the representatives must reside. Senators are to serve four-year terms and may be recalled by their respective state legislatures. Both houses are subject to rotation (their members would become temporarily ineligible for reelection after four consecutive years in office). The power of confirming executive appointments is taken away from the Senate

and assigned to a council, to be chosen by the House of Representatives. Faber quotes Brutus in support of these changes (360): a body chosen for the purpose of representing the people “should resemble those who appoint them.”

The authors of *The Federalist*, of course, defended a very different understanding of representation. In the words of *Federalist* 10, the role of representatives is to “refine and enlarge the public views.” Such an understanding was anathema to the Anti-Federalists. Study of the literature on both sides of the ratification debate invites this question: Which kind of representation best promotes the happiness of the American people?

It is a question that still divides Americans, though it is seldom addressed explicitly. The view expressed by Brutus can be restated in the political language of today: the representatives of the people should have “real world experience,” such as the experience of running a business; they should not be “career politicians” or “Washington insiders.” The Anti-Federalist understanding of representation goes by the name of “populism,” especially among those who disparage it. Because the *name* often signals disapproval, few are willing to defend the *thing* as clearly and openly as the Anti-Federalists did. Much the same is true on the other side. The filtering role that was defended by Federalists such as Madison is stigmatized with the name of “elitism.” As a result, it is not defended with the same frankness that the Federalists showed.

Faber’s account of the ratification debates in the individual states, which makes up the middle chapters of his book, shows that both sides were guilty of questionable tactics, including personal attacks on their opponents. On the whole, however, they showed a willingness to put forward and respond seriously to arguments, which may be the most enduring lesson of this episode in American political history.

The reference to the “pursuit of happiness” in Erler’s title orients readers to the earlier and more fundamental of Americans’ two founding documents. The Declaration of Independence figures in Faber’s account also, though less prominently. The preamble of the Anti-Federalist Constitution is an attempt to address the Constitution’s “perceived abandonment of the principles of the Revolution,” which are found in the Declaration (356). But Faber does not say whether he believes the perception was correct. Erler leaves no doubt about his understanding: the Declaration of Independence is “the principled source

of the Constitution” (11; cf. 165). This is the view he attributes to the authors of *The Federalist*, but he has evidently adopted it as his own. Unfortunately, the effect of reading the Constitution through the lens of the Declaration is that the question of happiness gradually falls away and a focus on rights takes its place. By the end of the book Erler appears even to reject happiness as a criterion of good government.

I cannot do justice to the full scope of Erler’s argument, much of which concerns Locke, the figure who most obviously connects the American founders with the tradition of political philosophy in the West. Erler suggests that the *Second Treatise*, viewed as “a prudential application of natural right to the political circumstances of the late seventeenth century,” is consistent with Aristotle (90), and his discussion of Locke encompasses less familiar works also (he notes that the phrase “pursuit of happiness” appears frequently in Locke’s *Essay concerning Human Understanding*, a book the principal founders certainly knew [96–97]). However, I leave these points to the consideration of other readers and proceed to his discussion of recent constitutional jurisprudence.

The Takings Clause of the Fifth Amendment prohibits the taking of private property “for public use, without just compensation.” But the effect of recent Supreme Court decisions, as Erler demonstrates, has been to effectively change the constitutional standard from “public use” to “public purpose.” This change comes at a time when laws and government actions that bear on other constitutional rights are subject to heightened scrutiny. Something has happened to create a division in Americans’ minds between the right of property and those other rights—a division that did not exist at the time of the founding. The principal landmark in this change is the Court’s decision in the 2005 case *Kelo v. City of New London*. Erler characterizes it as a “decision to expel the right to property from the pantheon of fundamental rights that make up the Bill of Rights” (163). In this case the Court upheld the taking of residential property for the purpose of economic redevelopment, even though much of the property was intended for use by a private corporation.

Erler describes the *Kelo* decision as being in line with a broader change in the understanding of the American political system that actually amounts to a “re-founding.” Under the influence of Progressivism, the system has been transformed “from one that protected individual rights and liberties to one in which public welfare and the redistribution of property was the primary object of government” (205). But this description is ambiguous, because it speaks of “public welfare” and “the redistribution of property” as if they were

the same thing. That is an odd view for a defender of property rights to take. One would expect him to say that public welfare and individual rights are not incompatible objects of government, provided that public welfare is correctly understood. Indeed, he affirms that this was the founders' view: "The founders were convinced that the welfare of the community was best protected by promoting liberty" (211). The action that the Court upheld in *Kelo*, then, was a *mistaken* application of a legitimate criterion, because the redistribution of property does not in fact contribute to public welfare; what contributes to public welfare, or happiness, is the protection of property. But this does not appear to be Erler's view.

In another place (209), Erler omits any reference to redistribution and writes simply, "The protection of individual rights has been replaced by the welfare of the community as the end, or purpose, of government." As he goes on to observe, "The welfare of the community, of course, demands the subordination of rights and liberties to this greater good." This is presented as a reason for rejecting the welfare of the community as the end of government. Again, one would expect him to say that individual rights are incompatible only with a false understanding of happiness or public welfare; but he seems to go further and deny that the happiness of the people is a legitimate criterion at all. If I am correct about Erler's view, one reason for this unexpected and even shocking conclusion may be that "public welfare" is alarmingly similar to the new standard for determining constitutionality under the Takings Clause, "public purpose." But this looks like the constitutional tail wagging the philosophical dog.

If it is true that the rights protected by the Constitution do not serve to promote the happiness of the American people, then Americans certainly find themselves in a grave crisis, and the citizens of other liberal democracies along with them. But this crisis may not be exactly the one that Erler has diagnosed.