ANTI-FEDERALISTS, *THE FEDERALIST PAPERS*, AND THE BIG ARGUMENT FOR UNION

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In what follows, I shall make some rather smallish points about the Anti-Federalists.[1] Toward the end, I will try to make up for my pointillism by making a rather big claim, one that moves a bit away from the topic of this panel, the Anti-Federalists, and says something about the general topic of this symposium, *The Federalist Papers*. To anticipate my one big argument at the end: I think that all of us in this symposium have missed perhaps the biggest argument for union in *The Federalist Papers*. You will not find it in the excerpts of *The Federalist Papers* circulated for this conference. You will not find it in *The Federalist Number 10* and you will not find it in *The Federalist Numbers 51* or *78*. This big argument for union has some interesting implications for the theories of both the Federalists and the Anti-Federalists.[2]

But before I get to that, I will discuss the Anti-Federalist vision. I am already simplifying a bit, because of course "Anti-Federalist" is the label that politicians of 1787 coined in order to lump together all the folks who opposed ratification of the Constitution. These folks may have opposed the Constitution for different reasons, perhaps for inconsistent reasons, just as some members of today's Federalist Society may agree about what they do not like but sometimes have a more difficult time agreeing about what they do like. Nevertheless, for simplicity's sake they will be categorized together as one group—Anti-Federalists.

Speaking in broad brush terms about the Anti-Federalists, theirs was a vision that celebrated localism and feared centralization of authority. The American Revolution, of course, was a revolution that had been fought not simply for freedom, but for localism. "No taxation without representation" was about rep-

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1. For much more detail and general background on the Anti-Federalist vision, see generally Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991).

2. *See generally* Akhil Reed Amar, *Some New World Lessons for the Old World*, 58 U. CHI. L. REV. 483 (1991)(elaborating on this big argument and its contemporary implications).

resentation in local colonial legislatures, and so that slogan of the Revolution integrated freedom rhetoric with federalism rhetoric. The Anti-Federalists carried on the tradition of being very suspicious of any central government, way off, removed from ordinary constituents. Whether the government sits in London or whether it sits in Washington, D.C., it is still quite far-removed from the folks back home. Thus arose great concern about this new government that was being summoned into existence—possibly simply to replace the imperial yoke that had been cast off only a decade before.

Well, did this concern come true, that the Constitution would centralize all authority and displace the States? Today I think a lot of us would say yes. Not much is left of state autonomy. Thus one could argue that the Anti-Federalists were right on that one. If they were right, however, they were right only in the long term and only because of all sorts of subsequent constitutional changes that occurred long after the founding period. Until the Civil War, the federal government did not exercise lots of power. Even if on paper John Marshall was willing to read the Commerce Clause[3] and other clauses in Article I, Section 8 fairly broadly, congressional legislation was considerably more restrained—and, indeed, even *McCulloch*[4] may not have been quite as expansive as some of us have read it in a post-*Wickard*[5] and -*Darby*,[6] post-New Deal world.

So what really accounts for the centralization? The Civil War accounts for a lot of it. That war was triggered by an expression of states' rights, but (like most wars) it resulted in a centralization of federal executive authority. In the wake of the war, it became necessary to introduce constitutional amendments that really restricted the States: the Reconstruction Amendments.[7] All this helped pave the way for the Sixteenth and Seventeenth Amendments, which profoundly shifted the balance of power

3. U.S. CONST. art. I, § 8, cl. 3 (empowering Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

4. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)(upholding Congressional power to create a federal bank).

5. Wickard v. Filburn, 317 U.S. 111 (1942)(holding that a federal wheat quota act fell within the commerce power of Congress).

6. United States v. Darby, 312 U.S. 100 (1941)(sustaining federal power to regulate production of goods for commerce).

7. U.S. CONST. amend. XIII (abolishing slavery); U.S. CONST. amend. XIV (making various principles of the Bill of Rights applicable against States and limiting state power in other ways); U.S. CONST. amend. XV (eliminating discrimination on the basis of race with respect to the right to vote).

between state governments and the federal government.[8] Some—indeed many—of these centralizing changes involved the participation of state legislatures. These legislatures, after all, ratified the Sixteenth and Seventeenth Amendments and thereby gave away the store that the original Constitution had kept for them.

As the constitutional system succeeded in actually creating an integrated national market, more and more economic activity became truly interstate in scope. Roads got better and canals were built. Railroads, telegraphs, and other developments in the Twentieth Century revolutionized communication and transportation technology. The idea of a common market on a new continent succeeded and had the predictable effect of transferring more power to the central government, which could coordinate that central economy and thwart local economic obstruction. So some of these changes occurred because of the success of the original vision of the common market for America and others because of subsequent constitutional developments.

So much for my first point about centralism versus localism. My second point is that the Anti-Federalists were especially concerned with preserving for ordinary citizens the ability to participate in government. We see that concern most obviously in the idea of the jury, in which ordinary citizens would be able to participate; but the Anti-Federalists also liked local government generally. Ordinary, respectable members of the community, solid citizens who were trusted and admired by others, were much more likely to be able to serve in a local government or a state legislature than in Congress. This was the flip side of the prediction of *The Federalist Number 10*, that there would be a lot more refinement of representation at the congressional level than at the state level.[9] What that meant was that fewer people would be able to participate in government, and the Anti-Federalists thought that would be a big loss. They feared that ordinary citizens would simply become consumers—passive folk ruled by a political elite. This point about ordinary citizen participation is thus connected to the earlier

8. U.S. CONST. amend. XVI (authorizing direct income taxation of individuals by the federal government); U.S. CONST. amend. XVII (providing for Senators to be popularly elected from each State).

9. THE FEDERALIST No. 10, at 83-84 (James Madison)(Clinton Rossiter ed., 1961).

point about localism. For most folks even today, to the extent that they get involved in politics, they get involved at the local level—the city council, the PTA. In the old days they used to muster in local militia, and there really was a jury of the vicinage that served as a vehicle for ordinary citizens to participate; hence the connection between local government and the idea of citizen participation.

The citizen participation concern goes along with my third point—the Anti-Federalist suspicion of professionalism and specialization of labor. The Anti-Federalists were wary of professional politicians always in office; instead, they believed in rotation of office-holding. One of Thomas Jefferson's two biggest criticisms of the Constitution was that it lacked a provision for rotation of office-holding—simply put, the Constitution didn't impose term limitations.[10] By contrast, the jury idea involved rotation. In the legislative sphere, the basic Anti-Federalist idea was that you serve in the legislature for a while and then you get out of it and spend some time suffering under the laws that you had a hand in making.

The Anti-Federalists were suspicious not only of professional politicians, but also of all specialization of labor. Specialization, said *The Federalist Number 10*, would breed inequality,[11] which raised problems for democracy—and the Anti-Federalists tended to be democrats. So, for example, a professional army was very suspicious because professional soldiers and officers could promote their own self interest, in ways that might be inconsistent with the best interests of the general community. In more modern terms, the Anti-Federalists feared the emergence of a "military-industrial complex." Thus they celebrated the citizen militia—ordinary folks, again local, organized around cities and towns keeping a check on the central standing army. So the militia idea was simply, in the military context, the analog of the jury idea. In both cases locally-organized folks participated in government and kept a check on these professionals, whether judges, or legislators off in Washington, D.C., or professional soldiers in the military. Thus, ordinary citizens took their turn in the militia and the jury kept a check on pro-

10. Jefferson's second criticism was the failure to include a bill of rights in the original Constitution. *See* Letter from Thomas Jefferson to James Madison (July 31, 1788) *in* 13 THE PAPERS OF THOMAS JEFFERSON 443 (Julian Boyd ed., 1956).

11. THE FEDERALIST No. 10, *supra* note 9, at 84.

fessional politicians. Once again the states' rights dimension of all this is evident—local folks keeping check on central officials.

For all these reasons, the Anti-Federalists thought the original Constitution needed a bill of rights. The bill of rights they wanted, however, was not simply a bill of rights to protect individuals and minorities but also, and perhaps even more fundamentally, a bill of rights to protect the States and to protect certain kinds of intermediate associations.[12] The "no taxation without representation" slogan, the banner of the Revolution, suggests states' rights and individual rights went hand-in-hand to a considerable degree.

Let us also recall the Virginia and Kentucky resolves, in which folks organized at the local level to resist the repressive federal Sedition Act.[13] Just as in Eastern Europe last summer when Boris Yeltsin mobilized forces at the state level to combat the attempted central coup, so too did the Virginia and Kentucky resolves yoke First Amendment and Tenth Amendment rhetoric.[14] Indeed, the First Amendment argument that the Anti-Federalists made was in large part a federalism argument: Congress simply has no enumerated power over speech. The First Amendment intentionally inverted the language of the Necessary and Proper Clause, which stated that "*Congress shall* have Power To . . . *make all Laws* which shall be necessary and proper . . . ."[15] Note how the First Amendment, which read unlike any other, tracked and reversed this language: "*Congress shall make no law* . . .,"[16] meaning that Congress simply had no enumerated power over either speech or religion. Indeed, speech and religion were put together in the original First Amendment largely for reasons of federalism. Congress had no enumerated power in *either* of these domains. No Eighteenth-Century state constitution combined speech or press with religion. The federal Constitution did, and here we see this inte-

12. *See* Amar, *supra* note 1; see also Panel, *The Bill of Rights and Governmental Structure: Republicanism and Mediating Institutions*, 15 HARV. J.L. & PUB. POL'Y 99 (1992).

13. THE ALIEN AND SEDITION ACTS, 1 Stat. 566, 570, 577, 596 (1798). The Sedition Act made it a federal crime to criticize incumbent federal officials too vigorously.

14. *See, e.g.*, 5 THE FOUNDERS' CONSTITUTION 132 (Philip B. Kurland & Ralph Lerner eds., 1987) (Kentucky Resolution No. 3) (intertwining First and Tenth Amendment arguments). The Virginia and Kentucky resolutions declared the Alien and Sedition Acts to be unconstitutional. The resolutions argued that the Sedition Act was in direct violation of the First Amendment's freedom of speech and the press, as well as an invasion of rights reserved to the states under the Tenth Amendment.

15. U.S. CONST. art. I, § 8, cl. 18 (emphasis added).

16. U.S. CONST. amend I (emphasis added).

gration of states' rights and libertarianism. We see this again in the Second Amendment, which set forth the right to bear arms and celebrated the state militia.[17] We also see this in the Establishment Clause[18]—Congress was prohibited not only from establishing a national church, but also from disestablishing a state church. It simply had no power *either* way *respecting* the establishment of religion—that issue was just left to locals.

Pulling all this together, if we want one central image of the original Anti-Federalist vision, let's think of the jury.[19] The jury is local rather than central. A jury of the vicinage or district is not just a jury from within the state, but it is from the community. The jury is participatory and involves ordinary citizens regularly in the process of government. In this respect, the jury is not so much for the benefit of the defendant or the parties to a given lawsuit; rather, it is intended to educate the ordinary citizens who serve on it.[20] This is where they learn virtue and learn how to deliberate with each other. The jury is non-professional. Ordinary citizens rotate through; you serve on the jury, and then you're out of the jury.[21]

Today the jury is no longer the central image of our constitutional order, even though it was the dominant motif of the original Bill of Rights. This is not so much because the Anti-Federalists were completely right in predicting that the federal government was going to destroy all these things immediately, but because American society subsequently changed. We had a Civil War precipitated in part by an overassertion of states' rights. The Civil War, unlike the Revolution, was a war in which the winners were the centralizers suspicious of repressive localism, and so the jury as a local body became less prominent. Specialization of labor increased, and as a result many people became unwilling to take their turn serving as jurors because the personal opportunity cost of jury service was too high. In the more complicated Twentieth Century, it is widely believed

17. U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.").

18. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .").

19. *See* Amar, *supra* note 1, at 1183-99 (analyzing the role of the jury).

20. *See generally* 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 284-94 (Vintage ed. 1945)(1838).

21. The Anti-Federalists thought that the same rotation principle should be applied in the legislature: you should serve a term and then you should get out for a while and let someone else take a shot. *See supra* text accompanying note 10.

that we need even more specialized professionals. Therefore there has been a shift away from, for example, the civil jury and toward the headless bureaucracy fashioning the rules that govern civil society. This is all largely a reflection of the increasing specialization of labor.

In the long run, the Anti-Federalists predicted many things correctly, but they were correct only in the very long term. Their prediction that the Constitution was going to lead *immediately* to consolidation, centralization, and lack of involvement of ordinary citizens didn't come true.

Let me conclude by shifting gears, moving away from the Anti-Federalists, and toward *The Federalist Papers*. Today we focus on *The Federalist Numbers 10* and *51*, and Madison's basic idea that Americans needed a strong central government to protect citizens against their own state government—to protect people in Rhode Island against the Rhode Island government's rage for paper money and other forms of oppression.[22] This is also the tradition of the Fourteenth Amendment.[23] But before the Civil War, no one read *The Federalist Number 10* as the central *Federalist Paper*.[24] The most common antebellum arguments for union were rather to be found in *The Federalist Numbers 4* through *8*.[25] The arguments in these papers were accepted because both Anti-Federalists and Federalists could agree with them. The Anti-Federalists did not agree with *The Federalist Number 10*: In sharp contrast to Madison, Anti-Federalists liked states better than the federal government. But the argument from *The Federalist Numbers 4* through *8* was that Americans needed a federal government in order to prevent the states from warring with *each other*, and in order to prevent states from having land borders with each other that would lead to the buildup of state armies and strongman military figures. All of this would destroy democracy. So to protect democracy, the

22. Madison argued in both *The Federalist Number 10* and in the First Congress that state governments were more likely to tyrannize minorities than a federal government because of state governments' greater vulnerability to majoritarian factions. THE FEDERALIST No. 10, supra note 9, at 83; *see also* Amar, *supra* note 1, at 1146-49.

23. *See* Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992).

24. *See* DOUGLAS ADAIR, FAME AND THE FOUNDING FATHERS 75-76 (1974)("Before [1913], practically no commentator on *The Federalist* or the Constitution, none of the biographers of Madison, had emphasized Federalist 10 as of special importance for understanding our 'more perfect union.' ").

25. For a more elaborate description and analysis of *The Federalist Numbers 4* through *8*, see Amar, *supra* note 2, at 486-88.

states had to combine and rely on a moat called the Atlantic Ocean to protect them from Europe. They would not need big armies to protect themselves. Thus the original vision of *The Federalist Numbers 4* through *8* was that a central government was needed not so much to protect you from your own state, but to protect you from foreign nations and to prevent the states from warring against each other. Citizens need protection from the citizens of other states, not from their own state government. That is one vision with which both Anti-Federalists and Federalists could agree, which is why it's even more prominent in *The Federalist Papers* than Publius' argument in *The Federalist Number 10*.[26]

In conclusion, I invite you to read *The Federalist Numbers 4* through *8*. Publius would probably be pleased by this symposium in his honor, but he might be even more pleased if we were aware of his first and perhaps biggest argument. And even the Anti-Federalists probably wouldn't mind.

26. Of course, prominence in *The Federalist Papers* does not necessarily equal primacy in the minds of the Federalist framers themselves or in the Constitution's basic architecture. For Madison himself, and for other leading Federalists, the vision of *The Federalist Number 10* was indeed critical; but during the ratification process, Publius, at least, placed the geostrategic argument of *The Federalist Numbers 4* through *8* front and,center. Madison returned to this theme in *The Federalist Number 41* where he elaborated upon the geostrategic argument found in the earlier Federalist Papers. *See also* JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 527-29 (Taylor & Maury, 1854)(remarks of James Wilson at the Pennsylvania ratifying convention in 1787).