

“INDEPENDENT OF HEAVEN ITSELF”: DIFFERING FEDERALIST AND ANTI- FEDERALIST PERSPECTIVES ON THE CENTRALIZING TENDENCY OF THE FEDERAL JUDICIARY

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The Anti-Federalists, as Professor Amar states, did not agree on everything among themselves. In fact, it was quite the contrary.¹ But we nonetheless speak of the Anti-Federalist position as though they had been in complete agreement, and I will continue in that tradition, oversimplified though it is.

While the Anti-Federalists did not agree on everything, neither did the Anti-Federalists and the Federalists disagree on everything. Both groups believed that the principal purpose of government is to secure individual rights² and that the best instrument for that purpose is some form of limited republican government.³ They also agreed that individual rights and enumerated powers are opposite sides of the same coin.⁴ The indi-

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1. Akhil Reed Amar, *Anti-Federalists, The Federalist Papers, and the Big Argument for Union*, 16 HARV. J.L. & PUB. POL'Y 111 (1993).

2. See THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) (“... all men are ... endowed by their Creator with certain unalienable Rights That to secure these rights, Governments are instituted among Men . . .”).

3. THE FEDERALIST No. 39, at 240 (James Madison)(Clinton Rossiter ed., 1961) (“The first question that offers itself is whether the general form and aspect of the government be strictly republican. It is evident that no other form would be reconcilable with the genius of the people of America; with the fundamental principles of the Revolution; or with that honorable determination which animates every votary of freedom to rest all our political experiments on the capacity of mankind for self-government. If the plan of the convention, therefore, be found to depart from the republican character, its advocates must abandon it as no longer defensible.”).

4. THE FEDERALIST No. 2, at 37 (John Jay)(Clinton Rossiter ed., 1961) (“Nothing is more certain than the indispensable necessity of government; and it is equally undeniable that whenever and however it is instituted, the people must cede to it some of their natural rights, in order to vest it with requisite powers.”); THE FEDERALIST No. 14, at 102 (James Madison)(Clinton Rossiter ed., 1961) (“In the first place it is to be remembered that the general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects, which concern all the members of the republic, but which are not to be attained by the separate provisions of any. The subordinate governments, which can extend their care to all those other objects, which can be separately provided for, will retain their due authority and activity.”).

vidual has the right to do anything that the government has no power to keep him from doing.⁵ Or, to put it another way, the individual has no right to act contrary to that regulation.

This understanding of rights and powers was the premise on which the framing of the Constitution was based. By delegating legislative power over certain subjects to the federal government, the people consented to abide by the laws enacted by the federal government which pertained to those subjects.⁶ However, as to those subjects over which the federal government had no delegated legislative power, the people retained the right vis-a-vis the federal government to act any way they pleased.⁷

The Federalists and the Anti-Federalists disagreed on whether the enumeration of federal powers would by itself serve to restrain the national government within those powers.⁸ On this question, the stakes were quite high, as any exercise of

5. See THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 184 (Ralph Ketcham ed., 1986) [hereinafter THE ANTI-FEDERALIST] (remarks of James Wilson, 1787)[hereinafter Wilson]:

When the people established the powers of legislation under their separate governments, they invested their representatives with every right and authority which they did not in explicit terms reserve; and therefore upon every question respecting the jurisdiction of the House of the Assembly, if the frame of government is silent, the jurisdiction is efficient and complete. But in delegating federal powers, another criterion was necessarily introduced, and the congressional power is to be collected, not from tacit implication, but from the positive grant expressed in the instrument of the union. Hence, it is evident, that in the latter the reverse of the proposition prevails, and everything which is not given is reserved.

6. *Id.*

7. See *infra* text accompanying notes 8-19; cf. U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.")

8. Compare THE FEDERALIST NO. 45, at 290-93 (James Madison)(Clinton Rossiter ed., 1961)("The State governments will have the advantage of the federal government, whether we compare them in respect to the immediate dependence of the one on the other; to the weight of personal influence which each side will possess; to the powers respectively vested in them; to the predilection and probable support of the people; to the disposition and faculty of resisting and frustrating the measures of each other. . . . The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and propensity of the State.") with "Brutus" (Robert Yates), Oct. 18, 1787, reprinted in THE ANTI-FEDERALIST, *supra* note 5, at 271-72 ("This government is to possess absolute and uncontrollable [sic] power, legislative, executive and judicial, with respect to every object to which it extends, for by the last clause of section 8th, article 1st, it is declared 'that the Congress shall have power to make all laws which shall be necessary and proper for carrying into

powers beyond those specifically granted resulted in an encroachment on the rights of the individual and on the sovereign authority of the States.⁹ This disagreement manifested itself in the debate over the need for a bill of rights.¹⁰ The Anti-Federalists argued that the new government could not be trusted to stay within its delegated powers in the absence of an express declaration of reserved rights,¹¹ while the Federalists argued that such a declaration was not only unnecessary, but positively dangerous.¹² I believe that the Anti-Federalists were

execution the foregoing powers, and all other powers vested by this constitution, in the government of the United States; or in any department or office thereof.'").

9. See "Brutus" (Robert Yates), Dec. 27, 1787, reprinted in *THE ANTI-FEDERALIST*, *supra* note 5, at 281-82:

What will render this power [revenue] in Congress effectual and sure in its operation is, that the government will have complete judicial and executive authority to carry all their laws into effect, which will be paramount to the judicial and executive authority of the individual states: in vain therefore will be all the interference of the legislatures, courts, or magistrates of any of the states on the subject; for they will be subordinate to the general government, and engaged by oath to support it, and will be constitutionally bound to submit to their decisions. The general legislature will be empowered to lay any tax they chuse [sic], to annex any penalties they please to the breach of their revenue laws; and to appoint as many officers as they may think proper to collect the taxes. They will have authority to farm the revenues and to vest the farmer general, with his subalterns, with plenary powers to collect them, in any way which to them may appear eligible. And the courts of law, which they will be authorized to institute, will have cognizance of every case arising under the revenue laws, the conduct of all the officers employed in collecting them; and the officers of these courts will execute their judgments. There is no way, therefore, of avoiding the destruction of state governments, whenever the Congress please to do it, unless the people rise up, and with a strong hand, resist and prevent the execution of constitutional laws. The fear of this, will, it is presumed, restrain the general government, for some time, within proper bounds; but it will not be many years before they will have a revenue, and force, at their command, which will place them above any apprehensions on the score.

10. Compare *THE FEDERALIST* No. 84 (Alexander Hamilton) (Clinton Rossiter ed., 1961) with "John DeWitt," *To the Free Citizens of the Commonwealth of Massachusetts*, *AM. HERALD* (1787), reprinted in *THE ANTI-FEDERALIST*, *supra* note 5, at 196 ("That a Constitution of the United States does not require a Bill of Rights, when it is considered, that a Constitution for an individual State would, I cannot conceive.").

11. GEORGE MASON, OBJECTIONS OF THE HON. GEORGE MASON TO THE PROPOSED CONSTITUTION (1787), in 1 *DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 494 (Jonathan Elliot ed., 1937) ("There is no declaration of rights; and the laws of the general government being paramount to the laws and constitutions of the several states, the declarations of rights in the separate states are no security. Nor are the people secured even in the enjoyment of the benefit of the common law, which stands here upon no other foundation than its having been adopted by the respective acts forming the constitutions of the several states.").

12. *THE FEDERALIST* No. 84, *supra* note 10, at 510-14 ("The most considerable of these remaining objections is that the plan of the convention contains no bill of rights. . . . I go further and affirm that bills of rights, in the sense and in the extent in which they are contended for, are not only unnecessary to the proposed Constitution but would even be dangerous. They would contain various exceptions to powers which

right in their prophecy that the mere enumeration of powers would not protect against federal usurpation, but they were plainly wrong in their belief that a bill of rights would work any better.

The Federalists, on the other hand, believed that the bill of rights was unnecessary because the structure of the national government adequately protected the rights of the people.¹³ Their structural argument was premised on the notion that the national government would be one of enumerated, and therefore limited, powers. The Federalist theory is well-illustrated by the position that they took on the proposed amendment protecting the freedom of the press.¹⁴ They argued that such an amendment was unnecessary because a national government lacked the power to control the press in the first instance.¹⁵ James Wilson, who was a famed Pennsylvania lawyer and one of the foremost opponents of the federal bill of rights, asked this: "What control can proceed from the national government to shackle or destroy that sacred palladium of national freedom?"¹⁶ He conceded that an amendment would be necessary if "a power similar to that [that] has been granted to Congress for the regulation of commerce had been granted to regulate

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? . . . This may serve as a specimen of the numerous handles which would be given to the doctrine of constructive powers, by the indulgence of an injudicious zeal for bills of rights.").

13. *Id.* at 513-15 ("But a minute detail of particular rights is certainly far less applicable to a Constitution like that under consideration, which is merely intended to regulate the general political interests of the nation, than to a constitution which has the regulation of every species of personal and private concerns. . . . The truth is, after all the declamations we have heard, that the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS. . . . And the proposed Constitution, if adopted, will be the bill of rights of the Union. Is it one object of a bill of rights to declare and specify the political privileges of the citizens in the structure and administration of the government? This is done in the most ample and precise manner in the plan of the convention; comprehending various precautions for the public security which are not to be found in any of the State constitutions.").

14. *Id.* at 514 ("What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion? I hold it to be impracticable; and from this I infer that its security, whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government.").

15. *Id.* at 513-14 ("For why declare that things shall not be done which there is no power to do? Why for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretence for claiming that power.").

16. Wilson, *supra* note 5, at 184.

literary publication.”¹⁷ Because Congress, however, lacked the power to regulate the press, the proposed amendment to the Constitution would be altogether superfluous.¹⁸ Alexander Hamilton viewed the issue in precisely the same way. Writing in *The Federalist Number 84*, he asked: “Why, for instance, should it be said that the liberty of the press should not be restrained, when no power is given by which restrictions may be imposed?”¹⁹

Quite apart from their view that a bill of rights would be redundant or unnecessary, the Federalists also viewed a bill of rights as positively dangerous.²⁰ The danger proceeded from the probability that some treasured right would be omitted from the listing. James Wilson again explained the matter well at the Pennsylvania ratifying convention: “If we attempt an enumeration [of rights,] everything that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete.”²¹ As Wilson’s statement makes clear, the Federalists feared that an enumeration of protected rights might imply that the national government had the power to abridge any right that was not expressly preserved in the declaration.²²

The Framers’ belief that the people retained the right vis-a-vis the federal government to do anything that the national government lacked the delegated power to prevent them from doing led them to erect a body of rights that was limited in its

17. *Id.*

18. *Id.* at 184-85 (“[I]t would have been superfluous and absurd to have stipulated with a federal body of our own creation, that we should enjoy those privileges of which we are not divested, either by the intention or the act that has brought the body into existence. . . . In truth, then, the proposed system possesses no influence whatever upon the press, and it would have been merely nugatory to have introduced a formal declaration upon the subject—nay, that very declaration might have been construed to imply that some degree of power was given, since we undertook to define its extent.”).

19. THE FEDERALIST No. 84, *supra* note 10, at 513-14.

20. *Id.* at 513.

21. 2 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 436 (James Wilson)(Jonathan Elliot ed., 1968).

22. THE FEDERALIST No. 84, *supra* note 10, at 513 (“I . . . affirm that bills of rights, in the sense and in the extent in which they are contended for, 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.”); see also Terry Brennan, *Natural Rights and the Constitution: The Original “Original Intent,”* 15 HARV. J.L. & PUB. POL’Y 965, 997-1001 (1992).

express terms, but that could never be contained wholly in a list.²³ The Ninth Amendment was crafted to address the concern that an enumeration of rights retained by the people would imply that the enumeration was exhaustive.²⁴ That forgotten amendment, of course, provides that, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."²⁵ The Ninth Amendment, then, is simply a rule of construction designed to ensure that the federal government does not exceed its delegated powers.²⁶ Similarly, the Tenth Amendment, which reserves to the states or the people all powers not delegated to the federal government, was designed, as Chief Justice Stone put it, "to allay fears that the new national government might seek to exercise powers not granted, and that the States might not be able to exercise fully their reserved powers."²⁷

The express reservations of powers to the States and to the people have not had the constraining influence on the federal government's appetite for power that the Founders, especially the Anti-Federalists, had hoped. When was the last time that the Supreme Court held that the Congress had exceeded its powers and thus encroached on reserved rights of the people? When, in other words, was the last time it invoked the Ninth Amendment? It never has. When was the last time the Supreme Court upheld a State's claim that a congressional enactment encroached on the State's sovereign authority in violation of the Tenth Amendment? That has happened only once in over fifty years. In the 1976 case of *National League of Cities v. Usery*,²⁸

23. THE FEDERALIST No. 84, *supra* note 10, at 513.

24. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1908 (2d ed. 1851) ("Its sole design is to exclude any interpretation, by which other powers should be assumed beyond those which are granted. All that are granted in the original instrument, whether express or implied, whether direct or incidental, are left in their original state. All powers not delegated, (not all powers not expressly delegated), and not prohibited are reserved."). See generally Charles J. Cooper, *Limited Government and Individual Liberty: The Ninth Amendment's Forgotten Lessons*, 4 J.L. & POL. 63 (1987); Symposium, *Are There Unenumerated Constitutional Rights?*, 12 HARV. J.L. & PUB. POL'Y 1 (1989).

25. U.S. CONST. amend. IX.

26. STORY, *supra* note 24, at § 1907 ("Being an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities, if invested by their constitutions of government respectively in them; and if not so invested, it is retained BY THE PEOPLE, as part of their residuary sovereignty.")

27. *United States v. Darby*, 312 U.S. 100, 124 (1941).

28. *National League of Cities v. Usery*, 426 U.S. 833 (1976).

the Court held that the federal government could not regulate the wages and hours of state employees involved in “traditional government functions.”²⁹ That modest, almost insulting, concession to state sovereign authority did not last long, however, because in 1985 the Supreme Court overruled *Usery* in the famous *Garcia* case.³⁰ In *Garcia*, the Court held that the “traditional government function” test was unworkable and that, in fact, any test to determine the limits of Congress’ commerce clause powers was unworkable.³¹ The Court thus decided to let Congress itself decide the extent of its commerce clause powers. Now even the pathetic limit on federal power recognized in *Usery* is gone, and the Supreme Court will no longer go through the charade that it had for fifty years of pretending to inquire into the scope of congressional legislative powers.

As a result, there is literally no area of domestic concern where the states may legislate without fear of federal interference. They act at the sufferance of Washington. The States’ win-loss record against the Congress should not surprise us.

29. *Id.* at 842, 843, 845, 852 (“This Court has never doubted that there are limits upon the power of Congress to override state sovereignty . . . [O]ur federal system of government imposes definite limits upon the authority of Congress to regulate the activities of the States as States by means of the commerce power. . . . The Amendment [Tenth] expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States’ integrity or their ability to function effectively in a federal system. . . . We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner. . . . One undoubted attribute of state sovereignty is the States’ power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime. . . . We hold that insofar as the challenged amendments operate to directly displace the States’ freedom to structure integral operations of traditional governmental [state] functions, they are not within the authority granted Congress by art. I, § 8, cl. 3.”).

30. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

31. *Id.* at 550-554 (“The power of the Federal Government is a ‘power to be respected’ as well, and the fact that the States remain sovereign as to all powers not vested in Congress or denied them by the Constitution offers no guidance about where the frontier between state and federal power lies. . . . [T]he Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority. . . . [W]e are convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the ‘States as States’ is one of process rather than one of result. Any substantive restraint on the exercise of the Commerce Clause powers must find its jurisdiction in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a ‘sacred province of state autonomy.’ ”).

After all, the Supreme Court, which determines the extent of the federal government's powers, is itself a branch of the federal government.³² It is a different branch of the federal government than Congress, to be sure, but it is still part of the federal government. It is a rather obvious two-step process. The political branches, Congress and the Executive branch (some, of course, would also argue that the Supreme Court belongs in this category), enact some measure that clearly encroaches upon the sovereign authority of the States. In due course, the States ask the Supreme Court to declare that the enactment violates the Tenth Amendment, and the Supreme Court answers with a resounding, "No, it does not." It is much like the coach for the other team calling balls and strikes. The situation is even worse after *Garcia*, because now the pitcher is going to be the one behind the plate.

The Federalists were almost insouciant about the dangers of federal encroachment. In *The Federalist Number 17*, Hamilton betrays an extremely benign, even naive, attitude towards the attitudes of federal officeholders. He states,

Allowing the utmost latitude to the love of power which any reasonable man can require, I confess I am at a loss to discover what temptation the persons intrusted with the administration of the general government could ever feel to divest the States of the authorities of that description. The regulation of the mere domestic police of a State appears to me to hold out slender allurements to ambition.³³

And later in the same paper, Hamilton makes this assertion: "It will always be far more easy for the State governments to encroach upon the national authorities than for the national government to encroach upon the State authorities."³⁴

In stark contrast to Hamilton's expectations, the Anti-Federalists fully anticipated the phenomenon of federal encroachment and usurpation.³⁵ They recognized, moreover, that the

32. See "Brutus" (Robert Yates), Feb. 7, 1788, reprinted in *THE ANTI-FEDERALIST*, *supra* note 5, at 298 ("[T]he judicial power of the United States under the first clause of the second section of article eight, would be authorized to explain the constitution, not only according to its letter, but according to its spirit and intention; and having this power, they would strongly incline to give it such a construction as to extend the powers of the general government, as much as possible, to the diminution, and finally to the destruction, of that of the respective states.").

33. *THE FEDERALIST* No. 17, at 118 (Alexander Hamilton)(Clinton Rossiter ed., 1961).

34. *Id.* at 119.

35. See "Brutus" (Robert Yates), Oct. 18, 1787, reprinted in *THE ANTI-FEDERALIST*,

federal judiciary would play a key role in bringing about, as Robert Yates writing as “Brutus” put it, “an entire subversion of the legislative, executive and judicial powers of the individual states.”³⁶ Brutus recognized that in restricting the national legislature’s powers, the Supreme Court would also be restricting its own powers.³⁷ And he clearly expected that the Court would be unwilling to place limits on its own authority.

Every body of men invested with office are tenacious of power; . . . this of itself will operate strongly upon the courts to give such a meaning to the constitution in all cases where it can possibly be done, as will enlarge the sphere of their own authority. Every extension of the power of the general legislature, as well as of the judicial power, will increase the powers of the courts; and the dignity and importance of the judges, will be in proportion to the extent and magnitude of the powers they exercise.³⁸

Brutus justifiably feared that the Constitution placed too few and too weak constraints on the power of the federal courts, enabling them to become unaccountable. Furthermore, Brutus found that federal judges were

independent in the fullest sense of the word. There is no power above them, to control any of their decisions. There is no authority that can remove them, and they cannot be controlled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself.³⁹

And so Brutus’s prophecy came to pass. As the Anti-Federalists feared, the federal judiciary is unaccountable to the people and

supra note 5, at 272 (“It is true this government is limited to certain objects, or to speak more properly, some small degree of power is still left to the states, but a little attention to the powers vested in the general government, will convince every candid man, that if it is capable of being executed, all that is reserved for the individual states must be very soon annihilated, except so far as they are barely necessary to the organization of the general government.”).

36. See “Brutus” (Robert Yates), Jan 29, 1788, reprinted in *THE ANTI-FEDERALIST*, *supra* note 5, at 296.

37. *Id.* at 296 (“Every adjudication of the supreme court, on any question that may arise upon the nature and extent of the general government, will affect the limits of state jurisdiction. In proportion as the former enlarge the exercise of their powers, will that of the latter be restricted. That the judicial power of the United States, will lean strongly in favour of the general government, and will given such an explanation of the constitution, as will favour an extension of its jurisdiction, is very evident from a variety of considerations.”).

38. *Id.* at 297.

39. See “Brutus” (Robert Yates), Mar. 20, 1788, reprinted in *THE ANTI-FEDERALIST*, *supra* note 5, at 305.

decidedly biased in favor of the expansion of the powers of the national government.

In addressing this problem of a judicial branch that tends to centralize power, one answer may be to reevaluate the life tenure of Article III judges. We need to go one step beyond the congressional term limiters and examine the tenure of the federal bench. To be sure, we ought not to undertake flippantly fundamental changes in the Founders' design, but then our federal courts today bear so little resemblance to the judiciary the Federalists described that such radical rethinking is warranted. At a minimum, I certainly do not see how anything other than good can come from a healthy re-examination of that tenure.