

THE ANCIENT CONSTITUTION VS. THE FEDERALIST EMPIRE: ANTI- FEDERALISM FROM THE ATTACK ON "MONARCHISM" TO MODERN LOCALISM

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Anti-Federalism is generally thought to represent a major "road not taken" in our political history. The Anti-Federalists, after all, lost the great debate in 1787-88, while their opponents' constitution prevailed and prospered over the years. If we needed proof of the staggering victory of the Federalist Constitutional project, the 200th anniversary celebrations of 1987 would certainly seem to have given it, at least insofar as victory is measured by longevity and adulation.¹

One of the most imposing signals of the Federalists' triumph is the manner in which their constitution has come to dominate the very rhetoric of constitutionalism. This is particularly the case in the United States, where the federal Constitution has the status of what might be called the "plain vanilla" brand—a brand so familiar that it is assumed to be correct for every occasion. This Constitution is the standard by which we understand and judge other constitutions, as for example those of states and localities.² Indeed, the federal Constitution's rhetorical dominance extends to some degree even to other parts of the world, when foreign citizens look to it for guidance about their own governmental structures.³

What, then, might be left over for the defeated Anti-Federalists? This Article is an effort to reconsider the degree to which the Anti-Federalist road may still be trod after all, and in particular to reconstruct some

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¹ Cf. M. KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF* 3-5 (1986) (popular adulation of the Constitution).

² See, e.g., Waggoner, *Log-Rolling and Judicial Review*, 52 U. COLO. L. REV. 33, 42-43 (1980); Note, *City Government in the State Courts*, 78 HARV. L. REV. 1596, 1597-99 (1965) (comparing local governmental institutions unfavorably to federal ones with respect to protection of individual rights).

³ M. KAMMEN, *supra* note 1, at 93 (19th century Russian and Latin American governments looked to U.S. federal constitutional model, along with those from France and Spain).

elements of Anti-Federalism that have been incorporated into a tradition of local autonomy. This Article will argue, among other things, that Americans do have a tradition of localism, and that this tradition rests on a rather different, and indeed much older, version of constitutionalism than the one that is often associated with the Federalists' plain vanilla Constitution.

I will try, first of all, to get at that older tradition by illustrating the ways in which the Federalist version of constitutionalism clashed with it; in that connection I will try to locate Federalist constitutionalism historically and theoretically in the eighteenth century Western political topography. Here I will consider most particularly the Anti-Federalist claim that the proposed Federalist Constitution was "monarchical," and will point out the parallels between European monarchic projects and the centralizing and commercializing aspects of Federalism. Next, I will discuss the ways in which the Anti-Federalists elaborated at least some elements of the older version of constitutionalism. I will then argue that this older version of constitutionalism has continued to survive locally, despite an intellectual environment that is dominated by Federalist rhetoric to this day. Finally, however, I will argue that the localist tradition has also been affected by its complex symbiosis with the centralizing and commercializing Federalist program.

I. THE "PLAIN VANILLA CONSTITUTION" AND THE "ANCIENT CONSTITUTION"

Without question, the Federalists' "plain vanilla" constitutional model contains innumerable ambiguities, and always has.⁴ Without question too, there have been quite far-ranging attacks on the original plain vanilla model, and departures from it as well. Several legal scholars have argued recently that these departures have occurred particularly in this century, as the national governing scheme incorporated New Deal concepts.⁵ Still, that plain vanilla Federalist model has a set of elements that are widely understood, and widely thought to structure the actions of our national government.

Theoretically (if somewhat imperfectly in practice), our government is supposed to function through a series of familiar mechanics: there are divisions of branches and checks and balances among the branches; there are equal and uniform laws, operating directly on the people; there is a popular representation, constructed in such a way that many interests appear in the representative body and that no one interest can dominate the others.⁶

⁴ *Id.* at 5-7; *cf. id.* at 30-35 (disagreements and conflicts are in context of larger consensus).

⁵ See Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 422-25 (1987); see also Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1052-56, 1069 (1984) (sees New Deal as example of constitutional change).

⁶ Sunstein, *supra* note 5, at 430-37 (setting out traditional mechanics of Federalist government).

One underlying theme of these structural features is the protection of rights, since the mechanical playing-out of the whole structure works to impede incursions on individual entitlements.⁷ Historically, the right that was thought to need greatest protection was the right to acquire and hold property.⁸ Today, of course, that emphasis on protecting property engenders much more debate,⁹ but it is still fair to say that the plain vanilla model of a constitution, with its attention to individual entitlements, is one that the Marxists might dub bourgeois democratic. Like most of the other constitutions in the modern western democracies, the Federalist Constitution has strong connections with entitlements-conscious capitalist economic processes.

There are indeed other constitutions, but in our own time, their operations are often explained by reference and comparison to this plain vanilla model, and critiques of the actual operations of our government often refer to the plain vanilla model that we are perhaps erroneously *thought* to have.¹⁰ But when we think back to the time of the adoption of the Constitution, and to the debates over its ratification, the provincialism of our view comes into relief. The debates of that time show how mistaken it would be to suppose that the Federalists' Constitution has always represented the basic model of a constitution, on which all others are more or less mere variants. Years before we adopted our plain va-

⁷ See *id.* at 433-37 (pointing out relationship between traditional constitutional structure and protection of rights, including private property).

⁸ See *id.*; see also THE FEDERALIST No. 10 (J. Madison); *cf.* Sunstein, *supra* note 5, at 439-40, 443 (contrasting Madisonian association of separation of powers and protection of property, with New Deal rejection both of separation of powers and property rights); *id.* at 452 (summarizing modern criticism of New Deal's abandonment of separation of powers).

⁹ One signal of this point is the heated controversy raised by Richard Epstein's book TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985), which attempts to place property in the position of a centrally located constitutional right, and argues against a trend of the last several decades that has downgraded property and economic rights and has focused on political rights such as voting, speech and assembly, as well as religion and equal treatment. For some of the quite sharp criticisms of Epstein's book, see Grey, *The Malthusian Constitution*, 41 U. MIAMI L. REV. 21 (1986); Kelman, *Taking Takings Seriously: An Essay for Centrists*, 74 CAL. L. REV. 1829 (1986); Sax, *Takings*, 53 U. CHI. L. REV. 279 (1986); see also *Proceedings of the Conference on Takings of Property and the Constitution*, 41 U. MIAMI L. REV. 49 (1986). More sympathetic is Merrill, *Rent Seeking and the Compensation Principle*, 80 NW. U.L. REV. 1561 (1986).

¹⁰ For example, Cass Sunstein and Bruce Ackerman both compare the post-New Deal constitutionalism to what I am calling the "plain vanilla" model, arguing that the New Deal effected a de facto constitutional change of great magnitude, and that the federal Constitution isn't plain vanilla any more. See Sunstein, *supra* note 5, at 437-43; Ackerman, *supra* note 5, at 1053-55. Sunstein, however, would like to reform the New Deal model by reinstating some major elements of the plain vanilla model. See, e.g., Sunstein, *supra* note 5, at 483 (New Deal critique of three-part government "far too crude"; checks and balances can assist accountability). Some authors also compare state or local governmental structures to the larger federal Constitution's plain vanilla checks-and-balances, extended representation and so on. See, e.g., D. MANDELKER & D. NETSCH, STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM 8-9 (1983) (comparing state constitutional powers to federal); see also Waggoner, *supra* note 2, at 42-43; Note, *supra* note 2, at 1597-99 (comparing local governmental structure unfavorably to national).

nilla model, there was a very different vision of constitutionalism, a vision captured in the phrase of J.G.A. Pocock in his justly famous book, *The Ancient Constitution and the Feudal Law*.¹¹ Indeed, it is difficult to see what our plain vanilla version was all about unless we note its sharp break from this older version of constitutionalism, the "ancient constitution."

Constitutionalism on the model of the ancient constitution was a vision of fundamental law deriving from longstanding ways of doing things, justified either by the sheer antiquity of practice,¹² or by the wisdom and suitableness that antiquity signifies.¹³ While Pocock himself has concentrated on the "republican" tradition in the British version of the ancient constitution, he describes a mentality that was not confined to Britain. In a broader European context, the idea of an ancient constitution encompassed all kinds of long-established laws, charters, practices, customs, and local privileges—not the least of which might be local economic privileges—that were thought to be constitutive of a given political realm, whether republican or not.

The elements of ancient constitutionalism, in this broader sense, were thus those ways of doing things that were so well-established as to count as the "nature" of a given polity. Indeed, a constitution on this older model has close connections with the medieval and early modern vision of a "body politic": just as one's personal physical makeup is one's "constitution," so a political constitution was seen as the way that the body politic was made up—the set of established practices that gave identity to that body politic.¹⁴

Some echo of this usage survives in the way that the British talk about the "English Constitution." But in the seventeenth and eighteenth centuries, it was commonplace all over Europe—and in the English colonies as well¹⁵—that political life was organized about longstanding "con-

¹¹ J.G.A. POCKOCK, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW* (2d ed. 1987). For generalized usage of the term "ancient constitution," see, e.g., remarks of the Scottish Enlightenment thinker James Steuart, *quoted in text at note 29, infra*.

¹² *Id.* at 17-20 (European political conceptions, sixteenth through eighteenth centuries), 47-49 (Coke and seventeenth century British "ancient constitutional" thought).

¹³ *Id.* at 171-73 (discussing Hale's anticipation of Burke's arguments of traditional wisdom).

¹⁴ C. MCILWAIN, *CONSTITUTIONALISM, ANCIENT AND MODERN* 27 (1947) (comparison of polity to body); see also J. ALLEN, *A HISTORY OF POLITICAL THOUGHT IN THE SIXTEENTH CENTURY* 196 (rev. ed. 1960) (quoting T. HOOKER, *LAWS OF ECCLESIASTICAL POLITY* (1594) (the king together with Parliament "is even the body of the whole realm")); cf. *id.* at 248 (quoting T. ELYOT, *THE GOVERNOUR* (1531) ("The public weal . . . is a body living, compact or made up of sundry estates and degrees of men, which is disposed by the order of equity and governed by the rule and moderation of reason." Allen makes the point that Elyot did not think that the form of government was the most important element in the body politic). McIlwain locates the first use of "constitution" as an overall frame of government in a document dating from 1610, though he notes other terms for this concept dating back to the Greek usage of "politeia" as the "soul" of the polis." C. MCILWAIN, *supra*, at 25-27.

¹⁵ See J. GREENE, *PERIPHERIES AND CENTER: CONSTITUTIONAL DEVELOPMENT IN THE EX-*

stitutions" or "fundamental laws."¹⁶ It was well understood that these fundamental laws and constitutions might take different names and describe quite different governmental institutions; as one eighteenth century German jurist remarked, "England must be governed according to the English [constitution], Sweden according to the Swedish, Poland according to the Polish, Germany according to the German and also Wuerttemberg according to Wuerttemberg's own ancient constitution."¹⁷ As a matter of fact, Wuerttembergers referred to their ancient constitution as the "good old law."¹⁸

Somewhat later, Tocqueville used a different term—"aristocratic"—to describe this particularistic mode of perceiving political life, and he spoke of the aristocratic mind-set that continued, albeit in a decaying form, into the eighteenth century France of "Old Regime."¹⁹ Toc-

TENDED POLITIES OF THE BRITISH EMPIRE AND THE UNITED STATES, 1607-1788, at 35-42 (1986) (early eighteenth century American arguments that colonial political practices were based on charters declaring ancient rights and on custom, not to be altered at pleasure of crown; issue was central to conflicts between crown and colonies).

¹⁶ The leading eighteenth century English proponent of this version of constitutionalism was undoubtedly Edmund Burke. Though his best-known exposition was in his REFLECTIONS ON THE REVOLUTION IN FRANCE 108-11 (Dolphin ed. 1961) (1790) (treats laws as "inheritance" and society as intergenerational contract), he had expressed similar views earlier, arguing against Parliamentary reform in 1782, for example, on the ground that "[o]ur constitution is a prescriptive constitution, it is a constitution whose whole authority is that it has existed time out of mind." J.G.A. POCKOCK, THE ANCIENT CONSTITUTION, *supra* note 11, at 380 (quoting Burke). For continental visions of "fundamental law," see C. BEHRENS, THE ANCIENT REGIME 96-98, 102 (1967). See also F. FORD, ROBE AND SWORD 232 (1953) (eighteenth century France—both royalist and aristocratic constitutional theory revolved around antiquity of practice). The chief 18th century French theorist of the fundamental law or ancient constitution was Montesquieu, though he borrowed from predecessors. See F. FORD, *supra*, at 238-43. The tradition of fundamental law was strong in French political thought, despite the reputation of the French for "absolutist" monarchic theory. See J. ALLEN, *supra* note 14, at 283, 416-17 (16th century royalist theorists agreed that king is bound by fundamental law); see also Van Gelderen, *The Position of the States in the Political Thought of the Dutch Revolt 1555-1581*, 7 PARLIAMENTS, ESTATES AND REPRESENTATION 163, 168, 175 (1987) (Dutch theorists at time of revolt from Spain argued that king was bound by ancient rights and privileges, and fundamental laws of provinces).

¹⁷ Letter of J.J. Moser to Duke Karl Eugen of Wuerttemberg (1765) ("nach dessen . . . althergebrachter Verfassung"), reprinted in R. RUERUP, JOHANN JACOB MOSER, PIETISMUS UND REFORM 245, 246 (1965).

¹⁸ H. Lehmann, Die wuerttemberischen Landstaende im 17. und 18. Jahrhundert, in STAENDISCHE VERTRETUNGEN IN EUROPA IM 17. UND 18. JAHRHUNDERT 183 (D. Gerhard ed. 1969); see also M. WALKER, JOHANN JACOB MOSER AND THE HOLY ROMAN EMPIRE OF THE GERMAN NATION 189 (1981). A chief feature of the "old law" was the continued existence of a representative body of the "estates," who in turn regarded themselves as guardians of existing political, ecclesiastical and legal relations. H. Lehmann, *supra*, at 202-03.

¹⁹ Tocqueville used the aristocratic designation not so much in the sense of hierarchy as in the sense of particularism, in contradistinction from the leveling or "democratic" qualities he found in America. See, e.g., 2 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 173 (P. Bradley ed. 1945) ("Among an aristocratic people each caste has its own opinions, feelings, rights, customs, and modes of living"). He saw this aristocratic world as decaying, but to some degree still intact in 18th century France. See A. DE TOCQUEVILLE, THE OLD REGIME AND THE FRENCH REVOLUTION 57-60 (S.

queville's sense of "aristocratic" was a concept of privilege that is now somewhat strange to us, but was much more familiar in the eighteenth century. In this older conception, as one modern commentator has explained, "privilege" did indeed include hierarchy, but need not have suggested (as it usually does today) an unjustifiable special favor to some groups over others. The concept was rather a larger one, denoting the way that a multiform society was organized into distinct elements, *all* of which were "constituted bodies" with their own privileges.²⁰ Hence, an actual aristocracy, the nobility, represented only a subset within a multiplicity of privileged corporate groups and bodies, in a society in which "privilege was an integral part of the social order."²¹

In practice, then, a dizzying array of particularistic privileges, enjoyed by localities and groups in their corporate capacity, comprised the ancient constitution. One Frenchman described the nature of the eighteenth century French political scene this way: "Imagine a country where there are a great many corporate bodies. The result is that . . . one hears talk of nothing but rights, concessions, immunities, special agreements, privileges, prerogatives. Every town, every community, every province, every ecclesiastical or judicial body, has its interest to defend in this confusion."²² Even though the contents of this sort of constitutionalism varied from place to place, the historian Robert R. Palmer has noted that, prior to the French Revolution, political observers saw the Atlantic political culture as being all of a piece, and they were perfectly comfortable comparing the institutions of Poland and Virginia, Venice and Geneva, Belgium and Hungary, Ireland and the provinces of France.²³

There is no question, however, that the political culture of the ancient constitution had a sharply different set of characteristics from our plain vanilla version of a constitution. In the first place, ancient constitutionalism was distinctly not a political vision of impartiality or equality under uniform law. Rather, it recognized the special and particularized customary privileges of provinces, guilds, municipalities, families, ecclesiastical groups, nobles of varying gradations, assemblies of estates, and on and on, all these elements enjoying some measure of "co-governing" power with whatever purported to be the central authority.²⁴

Nor, in the second place, did this version of constitutionalism have

Gilbert trans. 1955) (Part II, ch. 5 "How the idea of centralized administration was established among the ancient powers, which it supplanted, without, however, destroying them").

²⁰ See C. BEHRENS, *supra* note 16, at 46, 52-53. For an excellent description of this idea of aristocratic societies organized about the principle of the distinctive privileges of "constituted bodies," see 1 R. PALMER, *THE AGE OF THE DEMOCRATIC REVOLUTION* 27-30 (1959).

²¹ See C. BEHRENS, *supra* note 16, at 59-60.

²² *Id.* at 179 (quoting Rabaut Saint-Etienne).

²³ 1 R. PALMER, *supra* note 20, at 27 (citing Edmund Burke, Jean-Jacques Rousseau, and Prince Kaunitz of Austria).

²⁴ See D. GERHARD, *PROBLEMS OF REPRESENTATION AND DELEGATION IN THE EIGHTEENTH CENTURY* 117, 123, in *LIBER MEMORIALIS SIR MAURICE POWICKE* (1965).

anything to do with free enterprise and equal rights to develop property. Every ancient constitution was packed with economic privileges that were treated as proprietary and sometimes inheritable rights—including exclusive rights to manufacture and sell particular goods, or to conduct markets in particular places, or even to hold certain offices of state, along with their accompanying annuities, fees, and perquisites.²⁵

Nor, finally, did the ancient constitutions have any truck with a concept of unified government acting directly on the subjects. Everywhere in Europe, partisans of the ancient constitution fought tooth and nail against any centralizing efforts of monarchs, efforts that might have removed their particularized privileges and authority.

Indeed, in the eighteenth century, it was the *monarchs* who borrowed “enlightened” thinkers’ ideas of economic and political reform,²⁶ and who wanted to oust guild privileges and market monopolies and open up economic enterprise and commerce;²⁷ it was the monarchs, if anyone, who wanted to abate aristocratic authority in the countryside and shift power away from local oligarchies in the towns.²⁸ In a remarkable passage, James Steuart, one of the thinkers associated with the eight-

²⁵ See M. WALKER, *GERMAN HOME TOWNS: COMMUNITY, STATE AND GENERAL ESTATE 1648-1871*, at 77-78 (1971) (17th-18th century German town guilds’ continuing legal monopoly over specified economic interests within specified territories); see also F. FORD, *supra* note 16, at 105 (almost all members of French sovereign courts held office as “negotiable property”); J. PLUMB, *THE GROWTH OF POLITICAL STABILITY IN ENGLAND 1685-1725*, at 126 (1967) (describing sale of military office in 17th-18th century Britain); H. ROSENBERG, *BUREAUCRACY, ARISTOCRACY AND AUTOCRACY: THE PRUSSIAN EXPERIENCE 1660-1815*, at 80 (1958) (describes family monopolies over state-run Prussian industries, notably mining and metallurgy).

²⁶ This was especially true on the Continent. In Britain, centralization of authority fell increasingly to the monarchs’ advisers who could control Parliament through patronage; the minister who established this “system” in the early eighteenth century was Robert Walpole, whose corruption was eschewed by “republicans” as a subversion of the “ancient constitution.” See J. PLUMB, *supra* note 25, at 156-59, 179-80. The association of corruption with monarchist centralization was not lost on “republicans” in the American colonies. See B. BAILYN, *THE ORIGINS OF AMERICAN POLITICS 52-54* (1967); G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 33-34 (1969).

²⁷ See, e.g., J. GAGLIARDO, *ENLIGHTENED DESPOTISM 37* (1967) (monarchs in German states, Tuscany, Spain, Austria, and Sweden attempted to limit guild monopolies and open up opportunities for nonguild manufacturers); L. KRIEGER, *KINGS AND PHILOSOPHERS, 1689-1789*, at 132-35 (1970) (monarchs on the continent as well as in Britain attempted to liberalize commerce and industry).

²⁸ J. GAGLIARDO, *supra* note 27, at 24 (Austrian efforts to limit powers of local nobility, town patriciates); L. KRIEGER, *supra* note 27, at 135 (other monarchs). Austria’s Joseph II was perhaps the most extreme of the “enlightened despots” in his efforts to centralize and rationalize government; Frederick II of Prussia and Catherine the Great of Russia, though they are often cited as premier examples of enlightened despots, in fact made considerable concessions to the nobility. See J. GAGLIARDO, *supra* note 27, at 27-29; L. KRIEGER, *supra* note 27, at 298-300; H. ROSENBERG, *supra* note 25, at 156-65. Centralization was compatible with the continuation of a nobility, however, so long as the nobility was kept subservient to the crown. This had been the tactic of Louis XIV—that is, neutralizing the aristocratic local power base by keeping the nobility at Versailles—and it was this tactic that Montesquieu found most disturbing. See 1 MONTESQUIEU, *THE SPIRIT OF THE LAWS* 141-42 (Legal Classics Library reprint of 1751 English trans. 1984); see also F. FORD, *supra* note 16, at 15-16.

eenth century Scottish Enlightenment, summed up these developments and illustrated their interrelationships: "Trade and industry owed their establishment to the ambition of princes, who supported . . . the plan . . . principally with a view to enrich themselves, and thereby to become formidable to their neighbours." But, Steuart went on, this plan also strengthened commercial enterprisers who had an interest in greater liberty, and this in turn induced princes to "introduc[e] . . . a more mild and more regular plan of administration," which entailed "limiting the power of the higher classes," and "restrain[ing] the great lords." Although it might appear that these centralizing efforts were designed to make all power "depend on the prince's will only," Steuart wrote, and "although the prerogative of some princes . . . increased considerably beyond the bounds of the ancient constitution, even to such a degree as perhaps justly to deserve the name of usurpation; yet the consequences cannot every where be said, upon the whole, to have impaired what I call public liberty."²⁹

Arthur Young, a later eighteenth century British political essayist who quoted Steuart's comments, disagreed vehemently with Steuart's optimism. In his own work, he interspersed the quotations above with acid side comments on monarchist overreaching.³⁰ As Steuart had suggested, however, the monarchs had their own reasons for liberalization and centralization, notably their effort to solve the pandemic fiscal crises that accompanied the lack of central control. It was typically the particularistic, oligarchic, and "privileged" elements—much more than the more or less liberal literati like Young—who opposed these monarchist efforts, and who pounded for the "good old law," even to the point of rebellion against their kings.

From the later sixteenth century until the French Revolution, anti-royalist rebellions occurred frequently in the Europe of the ancient constitution. We Americans don't pay much attention to these things, but our own Revolution was in some ways just another in a long line of revolts of provincial privilege against centralizing royalist pretensions.³¹ Sometimes religious differences sharpened these rebellions, but, at root, they always rested on provincial disgruntlement as monarchs attempted to undermine local privileges, or to subordinate them to a centralizing and uniform administration.

We now pay little attention to the revolt of the Netherlands from

²⁹ 1 J. STEUART, AN ENQUIRY INTO THE PRINCIPLES OF POLITICAL ECONOMY 248 (1767), quoted in A. YOUNG, POLITICAL ESSAYS CONCERNING THE PRESENT STATE OF THE BRITISH EMPIRE 71-72 (1970 ed.) (1772).

³⁰ A. YOUNG, *supra* note 29, at 71-72.

³¹ See J. GREENE, *supra* note 15, at 41-42 (status of colonial provincial rights, whether as Englishmen or according to local custom, central in issues of American assemblies' political status in 18th century); see also *id.* at 84 (colonial claim to exemption from central taxation based on "long Usage" and acknowledged privilege).

their centralizing Spanish monarchs in the later sixteenth century.³² We pay even less to the later Catalonian and Portuguese revolts against the same monarchs—or to the French provincial nobles' revolt after decades of Richlieu's regimentation—all of which transpired at about the same time as the mid-seventeenth century English civil war.³³ As to the English civil war, we forget, if we ever knew about it, that the event that set off the calling of the Long Parliament, and led to the eventual beheading of Charles I, was the rebellion of the Scots against what they thought were royal violations of their provincial privileges, notably their distinctive ecclesiastical organization.³⁴ We forget too that in the late eighteenth century, the French revolution erupted only after decades of squabbles between the French monarchs and their own privileged classes.³⁵ We really don't pay attention to the point that in the 1780s, when the "Enlightened" Austrian Emperor Joseph II (who supposedly thought that even Mozart's music had too many notes) attempted to suppress fiscal and guild privileges of his many provinces in favor of simplified and uniform imperial laws, his Belgian provinces and their "constituted bodies" greeted his acts with a sharp resistance—a resistance that gave an example of revolution to their neighbors in France.³⁶

We may forget these things now, but our forefathers who debated about the 1787 Constitution did not. They were very well aware of these historic conflicts between centralizing monarchs and longstanding local privilege, and of the way in which the subversion of "ancient constitutions" might—and indeed ought to—lead to revolution.³⁷

Of late, there has been some dispute whether the Anti-Federalists might be the American heirs to England's republican "ancient constitutionalists," to the exclusion of their Federalist opponents.³⁸ On the one

³² See, e.g., Koenigsberger, *Why did the States-General of the Netherlands become Revolutionary in the Sixteenth Century?*, in 2 PARLIAMENTS, ESTATES AND REPRESENTATION 103, 108 (1982); Van Gelderen, *supra* note 16, at 164 (Dutch revolt against Spain in later 16th century based in part on dislike of central encroachments on local privileges, also had religious overtones).

³³ For a summary of these mid-17th century revolutionary disturbances, see C. FRIEDRICH, *THE AGE OF THE BAROQUE, 1610-1660*, at 227-28 (1952) (Catalonia and Portugal); *id.* at 236-42 (France).

³⁴ 2 G. TREVELYAN, *HISTORY OF ENGLAND: THE TUDORS AND THE STUART ERA* 177 (rev. ed. 1952); C. WEDGWOOD, *THE KING'S PEACE, 1637-41*, at 176-78, 196-99 (1955).

³⁵ See J. GAGLIARDO, *supra* note 27, at 33-34. For the increasingly heated disputes between the French crown and the "constituted orders," see 1 R. PALMER, *supra* note 20, at 86-99, 448-65. For similar conflicts in Sweden and in the various provinces of the Hapsburg Empire, see *id.* at 99-108.

³⁶ 1 R. PALMER, *supra* note 20, at 341-48. The Belgians planted the first tricolor flag in early 1789. *Id.* at 348. The legendary joke about Joseph's view that Mozart's music had "too many notes" appears in the play and film "Amadeus."

³⁷ See, e.g., George Mason's reference (Virginia Ratifying Convention) to the flourishing condition of Holland after its revolt from Spain, in 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 268 (J. Elliot ed. 1881) [hereinafter ELLIOT'S DEBATES, with state of debate in parentheses]; see also remark of Randolph (Virginia), *id.* at 190, that the delegates at the convention were "harassed by quotations from Holland and Switzerland."

³⁸ See, e.g., Kramnick, *The "Great National Discussion": The Discourse of Politics in 1787*, 45

hand, in sheer conservatism and insistence on established usages, the Anti-Federalists undoubtedly paralleled more closely the habits of thought of ancient constitutionalism than their Federalist opponents.³⁹ On the other hand, Anti-Federalism covered a considerable range of opinion—some of it overlapping with Federalist views. Anti-Federalists and Federalists alike cited similar sources and drew from the same rhetorical founts. Both sides cited Montesquieu, for example, that well-known European proponent of the ancient constitution. Both sides also seemed to eschew the institution of nobility, as Anti-Federalists accused the Federalists of promoting something like a nobility, while Federalists more or less denied it.⁴⁰ Similarly, the Anti-Federalists explicitly aligned

WM. & MARY Q. 3, 12 (1988) [hereinafter Kramnick, *The Great National Discussion*] (case for seeing Federalists as Republican theorists along with Anti-Federalists). In an earlier article, *Republican Revisionism Revisited*, 87 AM. HIST. REV. 629, 634-35 (1982), Kramnick sought to revive the centrality of Lockeanism to the Anglo-American political debates after 1760, saying that the earlier concerns of the Republican debate had been "shunted aside" after that time. Kramnick, however, was discussing radical/reformist thought, primarily from British sources; certainly some of the older issues such as the standing army and the specter of "placemen" re-surfaced in Anti-Federalist objections to the Federalist constitution.

The relationship of the constitutional debate to the ancient constitution overlaps with the question of the role of "civic republicanism" in American politics, early and recent. This subject is rapidly acquiring the status of an academic cottage industry; for its influence in legal scholarship, see the symposium, *The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988). See also Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57 (1987).

³⁹ See H. Storing, *What the Anti-Federalists Were For*, in 1 THE COMPLETE ANTI-FEDERALIST 7 (H. Storing ed. 1981) [hereinafter STORING] (Anti-Federalist devotion to status quo, "good old way," "established usage," rejection of "innovation").

⁴⁰ See the influential Anti-Federalist "Federal Farmer's" remarks on aristocracy, including "natural aristocracy," Letters from the Federal Farmer to the Republican (Dec. 31, 1787), reprinted in 2 STORING, *supra* note 39, at 266-67. See also speech of George Mason (Virginia), in 3 ELLIOT'S DEBATES, *supra* note 37, at 266-67 (claims that Federal representatives will be "well-born," "that aristocratic idol . . . that exotic plant . . . lately imported from . . . Great Britain"); for the Federalists, see THE FEDERALIST No. 35 (landowners and merchants likely to be elected, but will attend to wishes of constituents). Perhaps the most interesting exchange on this subject was that between Melancton Smith and Alexander Hamilton in the New York ratifying convention, in which Smith argued that the new constitution would foster a natural aristocracy, and Hamilton replied that an aristocracy of wealth and talent was inevitable in any scheme of government. See M. Smith, 2 ELLIOT'S DEBATES, *supra* note 37, at 245-48; A. Hamilton, *id.* at 256.

The American arguments on aristocracy were related to the ancient constitution in a rather complex fashion. Montesquieu had considered an aristocracy essential in a monarchy, as a mediating influence, (see 1 MONTESQUIEU, *supra* note 28, at 18-19) but even Montesquieu thought nobility inappropriate in a republic. Republican America had rejected monarchy and had never had a nobility; thus it was perfectly consistent that American ancient constitutionalists would reject a nobility, even if Montesquieu saw it as appropriate for the French monarchy. See Letters from the Federal Farmer, (Dec. 31, 1787), 2 STORING, *supra* note 39, at 267.

All the same, there was always a hierarchical element in any version of the ancient constitution, including the republican version. See *supra* notes 18-20 and accompanying text. The Federalists followed this aristocratic version of republicanism more than the Anti-Federalists, insofar as the Federalists favored the rule of the best. See Kramnick, *The Great National Discussion*, *supra* note 38, at 14.

themselves with the “republicanism” and “republican virtue” that marked the American’s chosen version of the ancient constitution⁴¹—but then, so did their Federalist opponents, at least rhetorically.⁴²

In at least one very important respect, however, the identification between Anti-Federalism and the ancient constitution did make sense. That was in the Anti-Federalists’ championship of local particularism.⁴³ They insisted that a national, “consolidated” government would necessarily quell liberty, because a national government would be too large and its representative bodies too far removed from the people to reflect their multiform mores and natures.⁴⁴ Indeed, even the Anti-Federalist thumpings about “republican virtue” reflected a conflict between localism and centralism, since corruption was widely regarded as a tool by which centralizing monarchs and their ministers—notably in Britain—attempted to overcome the resistance of the virtuous squires of the “country.”⁴⁵

The identification between the Anti-Federalists and ancient constitutionalism, then, appears most sharply in their charges, first, that the Federalist Constitution would institute a consolidated government, and second, that it smacked of monarchism. Given the circumstances of the contemporary Atlantic political world, these were in large measure variants on the same charge. And the Anti-Federalists made this charge for a very good reason: the Federalist program of a national state did indeed echo many of the eighteenth century European monarchist projects that took aim at long-established provincial privileges.

⁴¹ See, e.g., M. Smith (New York), in 2 ELLIOT’S DEBATES, *supra* note 37, at 250 (Anti-Federalist, extols republicanism).

⁴² See Kramnick, *The Great National Discussion*, *supra* note 38, at 15-16. As to the rhetorical aspect of the Federalist devotion to republicanism, note the revealing speech of Pendleton (Virginia), in 3 ELLIOT’S DEBATES, *supra* note 37, at 295-96: after stating that the protection of property was necessary for “political happiness,” he stated that “the true principle of republicanism, and the greatest security of liberty, is regular government. *Perhaps I may not be a republican, but this is my idea.*” (emphasis added). See also A. Hamilton (New York), in 2 ELLIOT’S DEBATES, *supra* note 37, at 257 (true meaning of republicanism is that people can choose whom they wish as governors).

⁴³ For current perspectives, see J. NELSON, LIBERTY AND PROPERTY: POLITICAL ECONOMY AND POLICYMAKING IN THE NEW NATION, 1789-1812, at 20-21 (1988) (identifies opposition to Constitution with localist economic interests); Sullivan, *Rainbow Republicanism*, 97 YALE L.J. 1713 (1988) (notes that modern civic republican revival differs from Anti-Federalist republicanism in focus on national political scale).

⁴⁴ See, e.g., G. Mason (Virginia), in 3 ELLIOT’S DEBATES, *supra* note 37, at 29-30; see also notes 67-68 and accompanying text *infra*.

⁴⁵ See J. PLUMB, *supra* note 25, at 138, 185-86 (1967) (“Country” party’s objections to patronage and corruption, Walpole’s use of these means to centralize authority); see also *supra*, note 26. Hamilton noted that the Anti-Federalist fears of corruption related largely to royal corruption of the House of Commons; see Hamilton (New York), in 2 ELLIOT’S DEBATES, *supra* note 37, at 264.

II. THE FEDERALIST PROJECT: CENTRAL POWER AND ITS MONARCHIST OVERTONES

The plain vanilla Constitution of the Federalists, like the centralizing efforts of European monarchs, broke with the older vision of an ancient constitution comprised of a multiplicity of "co-governing" established bodies. The Federalists, like the European monarchs, saw an overwhelming problem with the ancient constitution: it kept government weak. Government in such a regime was weak because a polity riddled by special particularized rights was perpetually beset by fiscal crises⁴⁶—and this, of course, was also the perceived opinion about the United States under the Articles of Confederation.⁴⁷ But, more generally, governance under the ancient constitution was weak because such a multi-form polity, dependent as it was on those who held particularized privileges, could gather itself only with the utmost strain and effort to exercise any concentrated force or influence. Alexander Hamilton's radical conclusion was that the very notion of a regime dependent on other political authorities, in their corporate or collective form, was "the bane of the old [constitution] and . . . in itself evidently incompatible with the idea of GOVERNMENT."⁴⁸

Hamilton looked to Europe for this assertion, quite as much as to the United States of the Articles of Confederation. In two of *The Federalist* papers that have been rather neglected, Numbers 19 and 20,⁴⁹ Hamilton and Madison excoriated precisely the type of regime that appeared throughout Europe before the French Revolution. One can see their viewpoint most clearly in their scathing remarks on the fragmented politics of the Dutch and the Swiss republics—which the Anti-Federalists often cited as models of confederate republics⁵⁰—and even more in their attitude toward the Germans' "Holy Roman Empire," which, as Voltaire had wisecracked, was "neither holy, nor Roman, nor an empire."⁵¹ Indeed, by the later eighteenth century, the old Empire had shattered into

⁴⁶ See, e.g., C. BEHRENS, *supra* note 16, at 116-17 (even European "absolute" monarchs unable to overcome fiscal and administrative problems that accompanied multiplicity of local privileges).

⁴⁷ See, e.g., remarks of Rufus King (Massachusetts), in 2 ELLIOT'S DEBATES, *supra* note 37, at 55-56 (comparing inability of provincially fragmented 17th century Netherlands to U.S. inability to raise money for defense); see also F. McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 170-72* (1985) (United States' fiscal problems under Articles attributed to divisions among states, particularist attitudes); G. WOOD, *supra* note 26, at 466.

⁴⁸ THE FEDERALIST No. 15, at 108 (A. Hamilton) (Rossiter ed. 1961) [page references hereinafter to this edition].

⁴⁹ These papers, for example, are not included in Clinton Rossiter's listing of the 21 papers considered the "cream" by "common consent of learned opinion." THE FEDERALIST xvii.

⁵⁰ See, e.g., Henry (Virginia), in 3 ELLIOT'S DEBATES, *supra* note 37, at 142-43 (Switzerland), 145-47 (Holland); see also *supra* note 37 (complaints in Virginia ratifying convention about references to Holland and Switzerland).

⁵¹ J. GAGLIARDO, *REICH AND NATION: THE HOLY ROMAN EMPIRE AS IDEA AND REALITY, 1763-1806*, at 291 (1980) quoting VOLTAIRE, *ESSAI SUR LES MOEURS ET L'ESPRIT DES NATIONS* 70 (1769) ("ni saint, ni romain, ni empire").

hundreds of semi-sovereign entities, and it undoubtedly represented the most striking efflorescence of the ancient constitutional style of governance.⁵² *The Federalist* No. 19 treated the Empire as the quintessential horrible example of the polity that exists in a "community of sovereigns," and its discussion of this "nerveless body" displays Publius' polemical style at its most savage. Upbraiding the Empire for its "general imbecility, confusion and misery," the Federalist followed with a litany of its subjection to external invasions, internal intrigues, overweening strong men and oppressed weak ones, atrocious administration, and bungled enforcement.⁵³

How could this weakness be overcome? The Federalists had a program, and, like the contemporary monarchic plans, theirs entailed a sharp break from ancient constitutionalism altogether. The first component of their program flowed from a Hamiltonian rejection of dependence on other political bodies. The new constitution would set out a large, unified government whose laws and taxes would fall directly upon the citizenry. This government would reject the mediation of any other governmental bodies in their corporate form—all those in-between states and provinces and other local bodies, those "pouvoirs intermédiaires" of which Montesquieu spoke approvingly in large-scale monarchy, but which many Continental monarchs had at least half-heartedly attempted to supplant long before the Federalist's constitutional foray.⁵⁴

The second component in the Federalist program also rang a familiar monarchic note, at least among the monarchs of an Enlightened stripe: the new government would promote commerce.⁵⁵ Commerce, as

⁵² J. GAGLIARDO, *supra* note 51, at 4-5 (Empire had over 1800 territories as member states, varying greatly in size); see also Rose, *Empire and Territories at the End of the Old Reich*, in J. VANN & S. ROWAN, *THE OLD REICH: ESSAYS ON GERMAN POLITICAL INSTITUTIONS, 1495-1806*, at 61, 62-63 (1975) (fragmentation continued to sub-territorial level, had constitutional basis).

⁵³ *THE FEDERALIST* No. 19, at 130-31 (J. Madison).

⁵⁴ See *supra* notes 26-28 and accompanying text. See also F. FORD, *supra* note 16, at 239; 1 MONTESQUIEU, *supra* note 28, at 18-19. Tocqueville's theme in *THE OLD REGIME AND THE FRENCH REVOLUTION* was that the Revolution only carried to a logical extreme the earlier royal efforts to banish intermediating powers. See *OLD REGIME*, *supra* note 19, at 19-20, 32. For the Federalist program of legislation acting directly on the people, see Hamilton in *THE FEDERALIST* No. 15 (inconsistent with idea of government to depend on intermediating states) and No. 16 (national government must act directly on individuals). In the Constitutional ratifying period, much of the debate over direct federal authority over the citizenry concerned taxation. See, e.g., remarks of Gore (Massachusetts), in 2 ELLIOT'S DEBATES, *supra* note 37, at 66-67 (defense requires national government to be able to tax citizens directly); Madison (Virginia), in 3 ELLIOT'S DEBATES, *supra* note 37, at 250-51 (same); cf. opponents: Lansing (New York), in 2 ELLIOT'S DEBATES, *supra* note 37, at 373-74 (state taxes with requisitions to national government preferable since state legislatures better acquainted with citizens).

⁵⁵ See, e.g., *THE FEDERALIST* No. 12, at 92 (A. Hamilton) ("The prosperity of commerce is now perceived and acknowledged by all enlightened statesmen to be the most useful as well as the most productive source of national wealth, and has accordingly become a primary object of their political cares."). Note the similarity of Hamilton's views to those of James Steuart. See J. STEUART, *supra* note 29.

Publius observed, would produce wealth, and wealth would make the nation powerful.⁵⁶ And what did commerce entail? Quite apart from the enlarged markets with free exchange that would be guaranteed by the commerce clause, commerce itself entailed individual rights, and especially the rights of property. If everyone were secure in his property, everyone would invest time and effort in that property, and make the property even more valuable. And in turn, this would have positive consequences for the nation's wealth and strength.⁵⁷

Quite a bit earlier, John Locke had pointed out the relationship between security of property and national force. As he had put it, the "wise and godlike" prince who "by established laws of liberty . . . secure[s] protection and incouragement to the honest industry of Mankind against the oppression of power and narrownesse of Party will quickly be too hard for his neighbours."⁵⁸ Somewhat later, the Physiocrats on the Continent had noted the connection between private property and national power, and had encouraged European monarchs to secure private property and remove restraints on exchange, so that the fruits of individual enterprise could flow unimpeded through the nation and make the whole wealthier. Many monarchs and their advisers had heard the message, and had liberalized commerce and promoted the factory industry that undermined local restraints on labor practices and markets.⁵⁹

The Federalists heard the message too, perhaps as translated by Adam Smith.⁶⁰ In addition to the commerce clause that would nationalize the market, their Constitution had several elements aimed at securing a commercial republic from internal threats to private property. One threat involved what Locke had called "narrownesse of Party," or, in the Federalist translation, faction—the enthusiasms of partial interest groups that could erode individual rights and property interests, and in general disrupt the "honest industry of Mankind." The Federalists' control of faction dovetailed back to the idea of a unified central government acting directly on the citizenry, most explicitly stated by Madison in his famous *The Federalist* No. 10: in the multiparty representation of the "extended

⁵⁶ THE FEDERALIST No. 12, at 93, 96 (A. Hamilton) (free commerce enhances revenues, revenues necessary for strength).

⁵⁷ See Diamond, *The Federalist*, in HISTORY OF POLITICAL PHILOSOPHY, 631, 649-50 (L. Strauss & J. Cropsey eds. 2d ed. 1972) (authors of *The Federalist* saw need for protection of property and large commercial republic, for sake of strength).

⁵⁸ J. LOCKE, TWO TREATISES OF GOVERNMENT 340 (P. Laslett rev. ed. 1963).

⁵⁹ See L. KRIEGER, *supra* note 27, at 131-35 (widespread liberalization of commerce and industry, influence of Physiocrats and other laissez-faire thinkers); see also E. FOX-GENOVESE, THE ORIGINS OF PHYSIOCRACY: ECONOMIC REVOLUTION AND SOCIAL ORDER IN EIGHTEENTH-CENTURY FRANCE 10-11 (1976). The Physiocrats thought that all wealth flowed from agriculture, but other laissez-faire thinkers of the period, including Adam Smith, extended their views of private property and free enterprise to manufacture as well. See L. KRIEGER, *supra*.

⁶⁰ F. McDONALD, *supra* note 47, at 128 (Smith's *Wealth of Nations* created a sensation in America; Hamilton and Madison used its ideas extensively).

republic," parochial factions would neutralize each other's attempts to intrude on the rights of property. Moreover, the clause protecting obligations of contracts would halt local or state governments' factional encroachments on property rights—encroachments that might otherwise weaken the nation by sapping the enterprising drive of the citizenry. As to what Locke called the "oppression of power" at a higher level, any Federal encroachments would be halted before they began, through checks and balances among the various governmental institutions.

The protection of commerce and the unification of government thus aimed at the same goal: the unified commercial republic would be a stronger political entity than those that were fragmented, through their "ancient constitutions," into a kaleidoscope of local privileges and special laws. It would be stronger not just because it was unified politically and economically, but also because its commercially-minded citizens, secure in the rights of private property, could safely hustle about their interests in a way that would make the whole nation richer.

The Federalists' plain vanilla version of constitutionalism, then, was a logical extension of some of the major European monarchical projects. It displaced ancient constitutionalism with a new constitutionalism of uniform laws that directly affected individual citizens. It safeguarded all in a homogeneous commercial environment of secure property and free exchange; in this environment, differences in talents could freely arrive at differences in wealth. The resulting unified, commercial nation would be a strong and wealthy one, ready for any jealous threats that its own prosperity might bring forth.⁶¹

At bottom, of course, I am suggesting that considerations of external strength—national defense and a credible foreign policy—wagged a good part of the constitutional dog that the Federalists proposed.⁶² To some considerable degree, their constitutional project concentrated on overcoming the deplorable weakness of the early republic, and by taking a leaf from Locke's Godlike prince, they hoped to make the republic "too hard for its neighbors."

⁶¹ See Hamilton's discussion of commerce in *THE FEDERALIST* No. 6 and No. 12. For an interesting recent parallel, see Epstein, *Modern Republicanism—Or the Flight from Substance*, 97 *YALE L.J.* 1633, 1635, 1641-42 (1988) (criticizing republican revival for inattention to unattractive features of historical republics, including bellicosity and dissipation of "social output . . . on aggression and defense," goes on to argue for firm individual rights).

⁶² Cf. LaFeber, *The Constitution and United States Foreign Policy: An Interpretation*, 74 *J. AMER. HIST.* 695, 695-96 (1987) (founders kept foreign policy considerations clearly in mind, did not separate those considerations from domestic policy and constitutional issues). This point has also been stressed in Gerald Stourzh's analytical biography, *ALEXANDER HAMILTON AND THE IDEA OF REPUBLICAN GOVERNMENT* 127-30, 142-45 (importance of commerce in modern warfare), 160-61 (importance of unification for strength) (1970). Steven Watts, *THE REPUBLIC REBORN: WAR AND THE MAKING OF LIBERAL AMERICA, 1790-1820*, at xvi-xvii, 310-12, 316-20 (1987), argues that the War of 1812 acted as a catalyst in popularizing this political program of commercialism/liberalism/national strength, and in substituting this political agenda for the earlier classical republicanism of the eighteenth century.

I am further suggesting that some key components of the Federalists' plain vanilla constitutional scheme—uniform, large-scale central government on the one hand, and the promotion of commerce on the other—were also ideas associated with monarchist projects in Europe. The European monarchs had not been particularly successful at these projects, but, as Tocqueville pointed out, it was the French Revolution that ruthlessly carried forth the monarchist project of leveling local privileges, and Napoleon that became the first monarch of a truly centralized state.⁶³ The monarchs of the Enlightenment era had set the direction that the French Revolution and Napoleon later followed—and that the Anti-Federalists so feared in the United States.

III. THE ANTI-FEDERALIST CRITIQUE

With all this, let me turn back to the Anti-Federalists. The Anti-Federalists understood very well the Federalist goal of strength—along with the commercialization and centralization that were designed to promote that strength. More than any other of the Constitution's opponents, it was Patrick Henry who hit upon the very nerve of the Federalist project of external strength. "You are not to inquire how your trade may be increased," he said, "nor how you are to become a great and powerful people, but how your liberties can be secured; for liberty ought to be the direct end of your government."⁶⁴ It was these "liberties" that the Anti-Federalists saw threatened by the plan of what they called a consolidated government, the liberties that guaranteed their ability to rule themselves, to choose their destiny in a way that had genuine meaning. And it was concern for these "liberties" that linked the Anti-Federalists with the ancient constitution of Europe, particularly the republican version of the ancient constitution.

To begin with the centralizing component of the Federalist project: the Anti-Federalists thought that an "extended republic" was a misnomer, and that any large-scale government would necessarily fall back

⁶³ A. DE TOCQUEVILLE, *OLD REGIME*, *supra* note 19, at 19-20, 32.

⁶⁴ P. Henry (Virginia), in 3 ELLIOT'S DEBATES, *supra* note 37, at 44. In another passage he elaborated, in a way that still conveys an idea why his contemporaries thought him such an effective orator: "Some way or other we must be a great and mighty empire," he sneered,

we must have an army, and a navy, and a number of things. 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 into a powerful and mighty empire. . . . Such a government is incompatible with the genius of republicanism.

P. Henry (Virginia), in 3 ELLIOT'S DEBATES, *supra* note 37, at 53-54.

The New York Anti-Federalist writer "Brutus" linked the Federalist project to European governments' military ambitions: "The European governments are almost all of them framed . . . with a view to arms, and war. . . . We ought to furnish the world with an example of a great people, who in their civil institutions hold chiefly in view, the attainment of virtue, and happiness among ourselves." *Essays of Brutus to the Citizens of New York* (Jan. 3, 1788), *reprinted in* 2 STORING, *supra* note 39, at 401.

into a system that depended on force rather than republican self-rule. Why was this so? First, there was the authority of Montesquieu, who had said that even moderately extended areas could only be governed by monarchy (assisted and tempered by the nobility) and that very large territories were necessarily despotic. Republics, on the other hand, which depended on civic participation, were necessarily small.⁶⁵

When the Federalist tried to skirt Montesquieu by arguing that representative institutions made it possible to create a large republic,⁶⁶ the New York Anti-Federalist Melancton Smith countered that even popular representation would be defective in a large territory. Electoral districts would of necessity be large, he said, and the constituents of those districts could not really know their so-called representatives, and vice versa.⁶⁷ Thus, the only persons who could get elected in large districts would be the persons whose wealth and fame would enable them to publicize themselves—persons quite dissimilar from and unrepresentative of those for whom they purportedly spoke. The yeoman, the everyday citizen of the “middling class,” would have no chance of election against this “natural aristocracy.” Thus, the supposedly representative body would not be at all representative of the various elements of the constituency, but would fall into the hands of a wellborn and influential upper class, which had no feel for the ordinary citizen’s needs and wishes.⁶⁸

From all this, the Anti-Federalists thought, it followed that the Federalist plan necessitated force. These so-called representatives, ignorant of their constituents’ needs, and both literally and psychically distant from those constituents, would pass laws that were unsuited to the different parts of the republic. As a consequence, the execution of their laws would ultimately depend on force rather than consent.⁶⁹ In the bleakest

⁶⁵ 1 MONTESQUIEU, *supra* note 28, at 18-22 (distinguishing monarchies, which had nobility, from despotism); *id.* at 150-53 (republics must be in small area; monarchies may be larger; very large areas require despotism). Patrick Henry seemed to reflect Montesquieu’s division of authoritarian rule into monarchy and despotism, when he remarked that Great Britain was a monarchy—“a compact between prince and people, with checks on the former to secure the liberty of the latter,” P. Henry (Virginia), in 3 ELLIOT’S DEBATES, *supra* note 37, at 44, whereas the Federalists’ consolidated government would have no such checks and would be a tyranny. *Id.* at 59.

⁶⁶ THE FEDERALIST No. 14, at 100 (J. Madison).

⁶⁷ M. Smith (New York), in 2 ELLIOT’S DEBATES, *supra* note 37, at 245-48. This argument was made frequently by other Anti-Federalists as well, e.g., P. Henry (Virginia), in 3 ELLIOT’S DEBATES, *supra* note 37, at 64 (representatives would be “chosen blindfolded.”).

⁶⁸ M. Smith (New York), in 2 ELLIOT’S DEBATES, *supra* note 37, at 245-47; *see also* Letters from a Federal Farmer (Oct. 10, 1787), in 2 STORING, *supra* note 39, at 235; Letters of Centinel to the Freemen of Pennsylvania, in 2 STORING, *supra* note 39, at 142; and Essays of Brutus (Nov. 15, 1787), in 2 STORING, *supra* note 39, at 380. Hannah Pitkin, in describing theories of representation, has described a “picturing” or “mirroring” theory that seems to fit the Anti-Federalist understanding of representation. H. PITKIN, THE CONCEPT OF REPRESENTATION 60-61 (1967); for an example, *see* Essays of Brutus, *supra* (representative body should “bear a just resemblance to the several classes of people who compose it,” including farmers, merchants, etc., who should be “represented according to their respective weight and numbers.”).

⁶⁹ *See* M. Smith (New York), in 2 ELLIOT’S DEBATES, *supra* note 37, at 246-47 (upper-class

version of this Anti-Federalist view, the Federalists' "extended republic" would have to depend on a standing army to enforce its laws. Nor would the states retain the ability to defend their citizens; they would lose control of their militias, which would in any event be overwhelmed by the national government's standing army.⁷⁰ Moreover, to collect the funds for such an army and for all the other misguided plans of a bloated, crypto-monarchical national government, a swarm of "bloodsucking" tax collectors would land like "harpies" on the tyrannized citizenry—at the same time further emasculating the states, by drying up their revenue sources.⁷¹ Better, then, and certainly more consistent with Montesquieu's description of republican principles, that the nation be a kind of league of more or less autonomous and truly republican states, in which representation was a genuine form of self-rule.⁷²

The Anti-Federalists' concern for local autonomy ranged in all different directions, and even included, for example, an argument about jury trials. In arguing for the right to civil jury trial, they said that legal rights should be settled by the jury of the vicinage—a jury which would base its decision on the local knowledge of ordinary people (including information about the parties) rather than on some uniform, homogeneous version of the law.⁷³ The preservation of local autonomy—and with it, the meaningful liberty of self-rule—was thus at the center of the Anti-

representatives would neither know nor care about concerns of middling classes and poor); Letters from a Federal Farmer (Oct. 10, 1787), in 2 STORING, *supra* note 39, at 234 (laws in new government would have to be effectuated by force); Letters of Centinel to the Freemen of Pennsylvania, in 2 STORING, *supra* note 39, at 166-67 (slavery the fate of people in consolidated extensive territory); Essays of Brutus (Nov. 29, 1787), in 2 STORING at 385.

⁷⁰ P. Henry (Virginia), in 3 ELLIOT'S DEBATES, *supra* note 37, at 59-60, 384-87; *see also* G. Mason (Virginia), in 3 ELLIOT'S DEBATES, *supra* note 37, at 378-81 (argues for state militias instead of standing army, sees need for state consent for use of militia out of state); *cf.* J. Madison (Virginia), in 3 ELLIOT'S DEBATES, *supra* note 37, at 382 (argues for central control of militia). The arguments over control of military forces in some ways paralleled the arguments over taxation, with the Federalists wishing for at least some direct national control, while Anti-Federalists argued for state control of their own militias, with contributions to the national government. Similarly, the Anti-Federalists wanted taxes to be raised through requisitions from the states. *See, e.g.*, Letters from the Federal Farmer (Oct. 10, 1787), in 2 STORING, *supra* note 39, at 241-42. For further comments on taxes, *see infra* note 71 and accompanying text. For the importance of the militia in traditional republican arguments, *see* J.G.A. POCKOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* 124, 292-93, 527-28 (1975).

⁷¹ *See* P. Henry (Virginia), in 3 ELLIOT'S DEBATES, *supra* note 37, at 51 (standing army to enforce tyrannous laws); *id.* at 55-56 (tax collectors described as bloodsuckers and harpies, taking people's property for "splendour" and "extravagance" of national offices). For references to monarchic character of the office of the presidency in the consolidated national government, *see, e.g.*, Letters of Cato to the Citizens of the State of New York, in 2 STORING, *supra* note 39, at 115-17. For the effect of direct federal taxation on the states, *see, e.g.*, Essays of Brutus (Dec. 13, 1787), *reprinted in* 2 STORING, *supra* note 39, at 391.

⁷² *See* M. Smith (New York), in 2 ELLIOT'S DEBATES, *supra* note 37, at 224 (citing Montesquieu); P. Henry (Virginia), in 3 ELLIOT'S DEBATES, *supra* note 37, at 44, 52-53.

⁷³ *See, e.g.*, P. Henry (Virginia), in 3 ELLIOT'S DEBATES, *supra* note 37, at 578-79; *cf.* Letters from a Federal Farmer, 2 STORING, *supra* note 39, at 320 (saw issue more as one of not excluding

Federalist position; this concern animated their objections to consolidated government.

A more muted part of the Anti-Federalist argument, however, involved a critique of the Federalist approach to property rights. Although the Anti-Federalists supported the rights of property and even commerce,⁷⁴ and eschewed the then-recent "leveling" of Shay's Rebellion,⁷⁵ they rejected the Federalist program of protecting property solely for the sake of encouraging individual economic efforts in the short run, or national wealth and power in the long run. They had a different goal in mind in protecting property: they thought that property was a basis of republican civic independence. This character-building goal in turn modified the way that they approached property rights.

Anti-Federalist speeches and writings were shot through with a kind of ideal type of citizen: the model was the yeoman, the citizen of the "middling" sort—the respectable, knowledgeable, frugal, and public-spirited individual, who acts upon deliberation and cooperation with other citizens of similarly modest means and independence.⁷⁶ It was important to protect property to allow this ideal citizen to maintain the independence necessary for self-rule. Property, in this view, was only useful insofar as it helped citizens retain a sturdy manliness, among others of like character. Some Anti-Federalist writings followed Montesquieu in suggesting that gross disparities of wealth were corrupting in a republic.⁷⁷ The implication was that property rights should not be so zealously guarded as to reach this point, since the evil of inequality

common people, who understand oral testimony better and who should be included in all branches of government).

⁷⁴ See, e.g., Letters from a Federal Farmer (Dec. 25, 1787), in 2 STORING, *supra* note 39, at 262, (listing among the fundamental rights in the United States, "The people have a right to hold and enjoy their property according to known standing laws, and which cannot be taken from them without their consent, or the consent of their representatives . . ."). Herbert Storing makes the point that the Anti-Federalists supported commerce as well, and had no wish to return to primitivism. 1 STORING, *supra* note 39, at 45-46. On the other hand, recent scholarship has suggested that the Enlightenment discussion of commerce had presented commerce as a socializing and liberating institution, and the Anti-Federalists may have had this version of commerce in mind. See A. HIRSCHMAN, *THE PASSIONS AND THE INTERESTS* 59-66 (1977) (commerce a calming and socializing activity); see also J. APPLEBY, *CAPITALISM AND A NEW SOCIAL ORDER* 31-32, 37, 94-97 (1984) (capitalism thought to remove necessity of hierarchical ordering; this view associated with Anti-Federalist/Republican thought). For an interesting example of the mixture of republican and commercial thought in the early 1800s, see the description of John Taylor's writings in S. WATTS, *supra* note 62, at 16-28. Taylor, described as a former "lukewarm Anti-Federalist," *id.* at 18, approved of commerce and Adam Smith, but railed against "finance capitalism" as an institution that would undermine Republican equality and morality. *Id.* at 23-27.

⁷⁵ Letters from a Federal Farmer (Oct. 13, 1787), in 2 STORING, *supra* note 39, at 253.

⁷⁶ See, e.g., M. Smith (New York), in 2 ELLIOT'S DEBATES, *supra* note 37, at 248.

⁷⁷ Montesquieu's view was that while republics could be commercial, and could withstand inequalities of wealth to a point, equality was the hallmark of democracy, and too great disparities could undermine the virtues supporting commerce as well as the republic itself. See 1 MONTESQUIEU, *supra* note 28, at 52-57.

would sap a source of strength quite different from Federalist economic wealth. That source of strength was civic virtue.

Indeed, the real protection of liberty, the Anti-Federalists thought, lay not in property rights and commerce as such, but rather in those institutions that would promote the courage, independence, judgment, and selflessness of the citizenry. They thought, as the influential "Letters from the Federal Farmer" put it, that

[i]f there are advantages in the equal division of our lands, and the strong and manly habits of our people, we ought to establish governments calculated to give duration to them, and not governments which never can work naturally, till that equality of property, and those free and manly habits shall be destroyed.⁷⁸

In short, then, the Anti-Federalist view was that the Federalists' plain vanilla constitutional project—to become a rich and powerful nation—was a case of collective loss of focus on the real objects of republican government. In order to arrive at a powerful state, we would have to have at the outset a centralized government that smacked of the worst versions of monarchism. A centralized government, in turn, would destroy effective liberty and self-rule, which was necessarily local. Finally, this government might so relentlessly protect a regime of property and commerce—along with the "natural aristocracy" that would dominate the regime economically and politically—as to bring about the debasement of the best citizenry.⁷⁹

Still another point was only hinted at by Anti-Federalists, but it loomed larger in later years: that the Federalist project of wealth and power might carry corruptions greater than our own citizenry. As the Anti-Federalist "Brutus" commented, the new United States should structure itself to give the world an example of virtue and happiness, and not follow the European governments that were "framed" for armaments and war.⁸⁰

Though they could not know it at the time, the true culmination of Anti-Federalist fears—and Tocqueville's specter later—was Napoleon's Empire. Here was the politically centralized regime, built up after the revolutionary leveling of local "liberties," now with a single, uniform national administration. Here was the economic regime of property rights, now established through a legal system that protected the acquisitions and commercial pursuits of the citizens.⁸¹ And here was the ruthless dictatorship that stood squarely on military force and a standing army, and that could terrorize the citizenry at home as well as the neighboring states.

⁷⁸ Letters from a Federal Farmer (Oct. 13, 1787), in 2 STORING, *supra* note 39, at 251.

⁷⁹ See M. Smith (New York), in 2 ELLIOT'S DEBATES, *supra* note 37, at 250-51.

⁸⁰ Essays of Brutus, in 2 STORING, *supra* note 39, at 401, quoted *supra* note 64.

⁸¹ See E. FOX-GENOVESE, *supra* note 59, at 312 (aside from influence of peasantry, sees economic individualism of Revolution and Napoleonic Empire as "physiocracy triumphant").

IV. ANTI-FEDERALIST ECHOES OF LOCALISM AND REPUBLICANISM

Everyone knows that the Anti-Federalists lost, and they may have lost precisely because they could not come up with a credible alternative to the Federalist program for national strength.⁸² Even in the early years of the Republic, their localist position faded from view in the great national debates.⁸³ But did they lose entirely? Or did they retain some influence on American political life—and if they did, why did they and where was that influence located? And is it perhaps just another version of that same question to ask, why has the Federalist attack on the ancient constitution produced no American Napoleon?

A. *The Echoes of a Distinctively Local Practice*

Those seeking a continuing Anti-Federalist presence might well locate that presence in “states’ rights,” in its various historical permutations.⁸⁴ While states’ rights proponents unquestionably borrowed republican rhetoric,⁸⁵ the equation with states’ rights misidentifies the most influential aspects of the Anti-Federalist legacy. It is a misidentification of an interesting sort, though, because in linking later states’ rights arguments to Anti-Federalism, the argument replicates a major difficulty in the Anti-Federalists’ own position.

The Anti-Federalists spoke fervently and often for the continuing autonomy of the states. But as Hamilton quite trenchantly pointed out, the states were themselves too large for the kind of republicanism that the Anti-Federalists seemed to have in mind.⁸⁶ Their version of republicanism, with its self-rule and civic participation, is only possible at a level more localized than the states. And this is why the association of Anti-Federalism with states’ rights is relatively sterile ground if we are looking for the lasting contribution of Anti-Federalist ideas. Instead, we have to look to *local* political organizations to seek the continuing influence of the Anti-Federalist attitude, and indeed the continuing influence of the ancient constitution.

Let me begin with a first distinctive characteristic of local govern-

⁸² See, e.g., 1 STORING, *supra* note 39, at 42-43 (though generally sympathetic to Anti-Federalists, thought they never answered Federalist arguments for effective government).

⁸³ See J. NELSON, *supra* note 43, at 20-21 (debates of the 1780s centered on dispute between nationalists and localists, but thereafter political issues on national level were within a nationalist consensus); see also S. WATTS, *supra* note 62 (liberal capitalist position supplanted classic republicanism by end of War of 1812).

⁸⁴ See, e.g., Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1452 (1987).

⁸⁵ See, e.g., L. FORD, JR., ORIGINS OF SOUTHERN RADICALISM. THE SOUTH CAROLINA UP-COUNTRY, 1800-1860, at 49-52, 68 (1988) (describing upcountry South Carolina neighbors and friends of John C. Calhoun as having ideology of “country republicanism,” stressing independence and productive property).

⁸⁶ THE FEDERALIST No. 9, at 73 (A. Hamilton) (states already larger than republic size recommended by Montesquieu); see also THE FEDERALIST No. 57, at 355 (J. Madison) (some state electoral districts as large as national).

ments—a characteristic that raises great chagrin among some commentators. Local governments have had a quite distinctive attitude about private property rights.⁸⁷ Land use controls are one of the major areas in which local governments currently exercise authority, and a great number of land use decisions have to do with one-on-one disputes among neighbors about the appropriate level of development. Entitlements in these areas are notoriously fuzzy, and when local boards do spell them out, they lean toward the maintenance of the status quo. Even formalized zoning restraints often prove quite malleable in fact; actual decisions relate less to some formal structure of entitlements than to discussions, negotiations, and "venting" based on community understanding of appropriate behavior.⁸⁸ As between neighbors, local institutions play less the role of the protector of entitlements, and more the role of ad hoc mediators. These same local institutions, however, are apt to make considerably higher demands on outsiders and innovators than they do on established uses.⁸⁹ In short, in these very important aspects of local government, political bodies are not much engaged as Federalist-style impartial guardians of entitlements or protectors of investment and commerce. If anything, they are more the guardians of the ancient constitution, in the sense of a web of community understandings—sometimes highly idiosyncratic—about the way things ought to be done.⁹⁰

If local governments have their own views about rights, and most notably about the rights of property, what then serves as the brake on

⁸⁷ See, e.g., R. EPSTEIN, *supra* note 9, at 265 (local intrusions on private property); Kmiec, *Deregulating Land Use: An Alternative Free Enterprise Development System*, 130 U. PA. L. REV. 28, 40-43 (1981) (complains about cavalier and uncontrolled local regulations affecting property); see also Kmiec, *The Role of the Planner in a Deregulated World*, LAND USE L. & ZONING DIG., June 1982, at 4 (same).

⁸⁸ See Rose, *New Models for Local Land Use Decisions*, 79 NW. U.L. REV. 1155, 1168-70 (1984-85), and authorities cited therein.

⁸⁹ *Id.* (local decisionmakers mediate between neighbors). For higher demands on outsiders, see the great array of growth control and subdivision exaction cases, e.g. *Associated Home Builders of the Greater E. Bay, Inc. v. City of Walnut Creek*, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971); *Golden v. Planning Bd. of Ramapo*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972). See generally F. JAMES & D. GALE, *ZONING FOR SALE* 31-34 (1977) (describing new exaction devices as unequal "tax" on new residents and businesses); Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 430-35 (1977) (describing growth controls as insiders' "cartel"). The most recent example may be the so-called "linkage" programs, whereby new developments are asked to contribute to transportation systems, public works, or neighborhood development elsewhere in a city. Such schemes may be limited by the recent Supreme Court case *Nollan v. California Coastal Comm'n.*, 107 S. Ct. 3141 (1987) (development exactions must be related to burdens imposed by development itself).

⁹⁰ For the connection between local decisionmaking and the Anti-Federalist tradition, see Rose, *Planning and Dealing*, 71 CALIF. L. REV. 837, 882-87 (1983). For some very interesting observations on the ways in which community understanding supersedes formal law, see Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623, 668-76, 679-80 (1986) (local residents ignore formal law; public officials more or less accommodate local understanding).

their oppressiveness? What, if anything, prevents local majorities from ganging up to wrest away the fruits of honest industry, particularly from out-group minorities?⁹¹ There are, of course, the widely-discussed federal and state constitutional strictures against "takings" of property,⁹² but I want to leave those to one side in this discussion.

An answer that could come straight from the civic republican tradition is *virtue*—and this presents a second difference between local governments and centralized ones. No one, of course, is naive enough to suggest that local government is necessarily more virtuous than central government; the usual suggestion is just the reverse.⁹³ But I would suggest that local government is the location where virtue and its opposite, corruption, are most discussed as political issues.⁹⁴ This is because, at the local level, we have to rely more on the virtue of the participants; and as a consequence, we talk more about their rectitude or corruption.

But (no doubt fortunately) virtue is not the only safeguard against local oppression. Again, leaving to one side the Constitutional limitations on takings of property, still other restraints inhibit local overreaching, which brings me to a third difference between local governments and governments on a larger scale. Local governments are quite differently organized from the federal or even the state governments, and, among other things, have far fewer of the mechanics of checks and balances, and far less multiple-interest representation, than do larger governments. But it is at least arguable that, in local governments, the absence of these structural restraints is counterbalanced by the possibilities for constituent contact and civic participation—what Albert Hirschman calls the "voice" option.⁹⁵

I think there is much territory to be explored in connection with the forms of local civic voice. For one example, some cities are themselves rather large for the personal participation of individuals, and it may be important to think about sub-political bodies, such as neighborhood organizations and other civic groups, as the locus for "republican" associa-

⁹¹ For fears of this sort, see Waggoner, *supra* note 2, at 43; Note, *supra* note 2, at 1598-99 (local governments' structure may permit oppression of minorities).

⁹² Richard Epstein's TAKINGS, *supra* note 9, is a recent foray, but almost every property teacher takes a shot at this elusive subject. For some of this literature, including my own shot, see Rose, Mahon *Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561, 562 n.5 (1984).

⁹³ See, e.g., NATIONAL INST. OF LAW ENFORCEMENT & CRIMINAL JUSTICE, CORRUPTION IN LAND USE AND BUILDING REGULATION (1979).

⁹⁴ This has also been true historically. Consider, for example, the discussion of big city corruption beginning in the later 19th century. See, e.g., THE CITY BOSS IN AMERICA: AN INTERPRETATIVE READER (A. Callow ed. 1976); GRIFFITH, A HISTORY OF AMERICAN CITY GOVERNMENT: THE CONSPICUOUS FAILURE, 1870-1900, at 97 (2d ed. 1972) (chapter entitled *The Cancer of Corruption*).

⁹⁵ See A. HIRSCHMAN, EXIT, VOICE AND LOYALTY (1970). A recent spokesman for the view of city government as a locus of associational, participatory self-determination is Gerald Frug, in his article *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1087 (1980).

tional voice. For another and related example, some scholars may be thinking too much about local participation in the form of voting, and not enough about other forms of participation.⁹⁶ Indeed, voting may well be a relatively minor aspect of local civic participation. Other versions of voice may be much more important locally: the informal constituent contacts, the PTA meetings, the civic groups' banging on the door at city hall, the cub reporters' scandal-mongering, the highly issue-oriented jawboning that is the very stuff of local controversy.⁹⁷

Yet another and quite different safeguard on local government brings me to a fourth difference between local and central governments. This is the safeguard, to use Hirschman's terminology again, that we might call "exit"⁹⁸—the ability to abandon something when dissatisfied—and it exists most distinctively at the local level. Public life at the local level is much more idiosyncratic than national public life, and much less homogenized: it is primarily at the local level that we are given to wild enthusiasms about sports teams, parades, and bizarre public art; these idiosyncrasies survive even what has been called the "malling of America."⁹⁹

These local peculiarities tell us something important about the character of local government, and about its relation to Anti-Federalist ideas of self-rule. There is a reason for the heterogeneity of local communities vis-a-vis each other: people have a *choice* about the community in which they live, in a way that they do not have so much choice about the state or especially nation in which they are citizens. To some degree, people choose their localities according to compatibility with their own wishes and needs. This, in turn, requires local governments to be careful about the practices they adopt and the reputations they acquire, so that they will not frighten away desired citizens. This is not new; the Anti-Federalists themselves were accustomed to American communities in which dissatisfied persons could and did exit, in order to form communities more to their own liking.¹⁰⁰

The opportunities for local exit—perhaps even more than for voice—establish a connection between local entities and voluntary orga-

⁹⁶ See, e.g., Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 MICH. L. REV. 930 (1988) (discusses participation under rubric of plebiscites, contrasts with other voting mechanisms; non-voting forms of participation not considered).

⁹⁷ See, e.g., Tarlock, *Anywhere but Here: An Introduction to State Control of Hazardous-Waste Facility Location*, 2 UCLA J. ENVTL. L. & POL'Y 1, 3 (1981) (local activism against unwanted land uses).

⁹⁸ See A. HIRSCHMAN, *supra* note 95, at 15-16 (exit is the ability to depart or withdraw.).

⁹⁹ W. KOWINSKI, *THE MALLING OF AMERICA* (1985).

¹⁰⁰ See K. LOCKRIDGE, *A NEW ENGLAND TOWN: THE FIRST HUNDRED YEARS 100-16* (1970) (dissenting New England colonists left villages to form new ones). See also T. BENDER, *COMMUNITY AND SOCIAL CHANGE IN AMERICA*, 73 (2d ed. 1982) (1978) (practice of dividing towns in eighteenth century).

nizations.¹⁰¹ What makes a voluntary organization “voluntary” is that one can enter and leave at one’s own volition; to a considerable degree, one can do the same thing with one’s locality. One signal of this affinity between local governments on the one hand, and voluntary organizations on the other, is that we have great difficulty in sorting out the differences between “public” local governments and “private” planned communities.¹⁰² Indeed, the whole distinction between public and private becomes blurred locally,¹⁰³ particularly when we think that people choose their localities in more or less the same ways that they choose the condominium or the retirement community in which they will live. I will come back to this exit characteristic shortly, because it is this aspect of local government—related as it is to Anti-Federalist conceptions of local autonomy—in which modern scholarship has made some particularly interesting contributions.¹⁰⁴

Now we return to the earlier question: did the Anti-Federalists lose entirely? I think not, when we take political practice into account—or at least not so much as some seem to think.¹⁰⁵ We see a number of the Anti-Federalist attitudes and concerns in our local politics: the acceptance of community definitions of the rights and responsibilities of prop-

¹⁰¹ See also Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1531 (1988) (associating voluntary organizations with national civic republicanism). But see Sullivan, *supra* note 43, at 1716 (noting conflict between modern national civic republicanism and voluntary organizations); Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983) (contrasting intense and sometimes exclusive local groups against national or universalist “empire”).

¹⁰² See *Marsh v. Alabama*, 326 U.S. 1501, 1523, 1526, 1547-63 (1946) (acts of company town may be “state action”). Compare Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519 (drawing analogies between municipalities and homeowners associations but suggesting that “public” municipalities are marked by presence of involuntary members; also suggesting vote in municipalities be based on economic stakes comparable to votes in homeowners associations) with Frug, *Cities and Homeowners Associations: A Reply*, 130 U. PA. L. REV. 1589 (rejecting Ellickson’s view that cities are less voluntary organizations than homeowners associations).

¹⁰³ This may be the reason for the interest in local government among some scholars who reject the liberal public/private distinction. See Frug, *supra* note 102, at 1591; Frug, *supra* note 95, at 1127-29.

¹⁰⁴ Particularly important is Charles Tiebout’s seminal article, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956), suggesting that local governments might be envisioned as firms that offer competing packages of goods and services, and that are selected by residents for their respective “packages.” This article has generated a great deal of commentary, described by Clayton Gillette as a “major academic industry.” See Gillette, *Equality and Variety in the Delivery of Municipal Services (Book Review)*, 100 HARV. L. REV. 946, 956 n. 29. The opportunities for local exit may also tend to make communities (or neighborhoods within larger localities) internally homogeneous, just as they are externally heterogeneous. This characteristic local homogeneity is repugnant to some. See, e.g., R. ELICKSON & D. TARLOCK, *LAND-USE CONTROLS* 812 (1981) (comparing the Tiebout approach to the “Waring Blender” approach). But internal homogeneity does relate modern localities to an Anti-Federalist concern that republican government required like-mindedness and relative equality among the citizenry. See I STORING, *supra* note 39, at 15.

¹⁰⁵ Cf., e.g., J. TULIS, *The Modern Presidency and Domestic Policy* (Sept. 2-5, 1987) (delivered at American Pol. Sci. Ass’n. meeting, Chicago, Illinois) (using Anti-Federalist oppositional arguments, and their rejection, to prove commitments actually made in ratification of Constitution).

erty, the concern for virtue and corruption, the possibility for personal participation or voice, the further possibility for choice through the exit option.

Lest it be thought that all American government has been "consolidated" in principle through the operations of the Federalist Constitution, and that we are simply awaiting the eventual and inevitable demise of local self-rule, we should recall that our history reflects a tenacious and continuous countercurrent to most efforts to centralize local functions. Thus, the later nineteenth century's judicial doctrine of "Dillon's Rule," which held that municipal powers should be read narrowly, was answered in the early twentieth century by *Euclid v. Ambler Realty*, which gave back, under land use auspices, the local authority supposedly taken away by Dillon's restrictive reading.¹⁰⁶ Similarly, in the 1970s, the mechanisms of the "Quiet Revolution" in land use controls, supposedly subjecting local decisions to much greater state control, were just as quietly redominated by local governments.¹⁰⁷ In these and other instances of stubborn local particularism, one sees the evolution of a kind of Anti-Federalist praxis, almost invisible in an intellectual environment of overwhelmingly Federalist theory.

B. *Echoes in Theory: Anti-Federalism and the Rethinking of Federalist Theory*

The Anti-Federalist tradition has indeed not been a very strong strand in our political *theory*, and this seems to me a serious gap; insofar as Anti-Federalist thinking is overlooked, we are overlooking an important part of our own political tradition. Happily, this seems to be in the process of rectification, both from the direction of a renewed historical interest in the civic republican tradition,¹⁰⁸ and from the very different direction of economic analysis and the "regulatory competition" among local communities.¹⁰⁹ This is particularly important, because the local

¹⁰⁶ For Dillon's Rule, see Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 WIS. L. REV. 83, 88-89. Williams also discusses a theory of local autonomy that she identifies with the 19th century jurist Thomas Cooley. *Id.* at 88, 145-49. *Euclid v. Ambler Realty*, 272 U.S. 365 (1926) upheld the constitutionality of local zoning.

¹⁰⁷ See U.S. COUNCIL ON ENVTL. QUALITY, *THE QUIET REVOLUTION IN LAND USE CONTROLS* (1971). For continuing local dominance, see Callies, *The Quiet Revolution Revisited*, 46 J. AM. PLAN. A. 135, 136, 139 (1980) (real effect of "revolution" may have been to strengthen local dominance in land use).

¹⁰⁸ See, e.g., J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT*, *supra* note 70; see also F. McDONALD, *supra* note 47, at 66-77; G. WOOD, *supra* note 26, at 46-90. For a survey, see Shalhope, *Republicanism and Early American Historiography*, 39 WM. & MARY Q. 334 (1982). Legal scholarly interest has been informed by this historical literature, see *supra* note 38, though subject to some caveats, e.g., Powell, *Reviving Republicanism*, 97 YALE L.J. 1703, 1707, 1711 (1988) (noting anachronistic character of recent legal interest in civic republicanism).

¹⁰⁹ See Tiebout, *supra* note 104; see also Ellickson, *supra* note 102, at 1547-54; Gillette, *supra* note 104, at 956.

governmental aspect of our tradition—as Tocqueville said of our voluntary organizations—could modify the tendencies that we otherwise may have to fall into a timorous and deadening conformity, and into an obsession with getting and spending that discourages participation in public life.¹¹⁰

One of the areas in which the Anti-Federalist tradition of localism might help us to rethink our political theory stems from the exit option at the local level, and in the new reflection that this might cast on the Federalist's famous discussion of faction. To state the matter succinctly, it may be that the problem of faction is an artifact of that very "extended republic" that, supposedly, was going to render factionalism harmless.

Everyone is by this time tediously aware of the Federalist argument that we need a large republic as a safeguard against faction.¹¹¹ Because of the possibilities for exit from local government, however, we might question whether faction really is a problem at the local level, and we might consider whether the Federalist's discussion of faction is in some ways a red herring. Faction would indeed be a local problem if voice were the only safeguard against local oppression; in smaller republics, minority voices can indeed be drowned out. But where localities genuinely differ, and where it is possible to move among them, oppression can be left behind, and even a local penchant for redistribution is muted.¹¹²

Let us take the argument a step further: quite contrary to the usual notion, it is at the *central* level that faction is the most serious problem. How do we see this? One way is to consult history, where we see at least two salient examples. First, the most egregious example of minority oppression in our history has been racial discrimination. There is no question but that racial discrimination existed at the local level from the very start, but racism was particularly oppressive because it held sway throughout an entire region. Blacks attempted to leave that region even during the days of slavery, only to be greeted by a *national* fugitive slave law.¹¹³ In post-Civil War days, at least some relief was available, as Southern blacks exercised an exit option to arrive at the doubtful improvement of the Northern states.¹¹⁴ Racial oppression has required na-

¹¹⁰ 1 A DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, *supra* note 19, at 198-202; *see also* 2 *id.* at 114-18, 123-28 (voluntary associations and association with political life); 2 *id.* at 148-51 (dangers of commercialism and attendant withdrawal from public life).

¹¹¹ *See supra* notes 60-61 and accompanying text.

¹¹² *See* Ellickson, *supra* note 102, at 1547-48 (if Tiebout hypothesis works, redistributive programs wash out). *But cf. id.* at 1553 (intercommunity competition not as strong as Tiebout suggests).

¹¹³ *See* S. CAMPBELL, *THE SLAVE CATCHERS. ENFORCEMENT OF THE FUGITIVE SLAVE LAW, 1850-1860* (1968). The author makes the point that, although the statute was ineffective, it was not for reasons of nonenforcement by federal officials. *Id.* at 167-69. If anything, the reason was the indifference or downright obstruction by Northern localities. *See, e.g., id.* at 164-65.

¹¹⁴ *See, e.g.,* A. SPEAR, *BLACK CHICAGO: THE MAKING OF A NEGRO GHETTO, 1890-1920*, at 11 (1967) (80% of Chicago's 1900 population born outside Illinois, most in southern states).

tional solutions precisely because the pattern of racism has been so widespread, and so difficult to escape by exit. The example suggests that more localized oppression, while unquestionably an intolerable evil, might have been less serious over the long run because localized oppression might have given a genuine opportunity for escape.

The second example stems from slightly more recent times. It is the saga of the federal administrative agencies, where we see the dangers of faction under the modern name of "capture"—and it is capture at the national level. To put the matter simply, capture of an agency occurs when the agency adopts the position of a particular interest group, usually the regulated entity, to the detriment of everyone else. This problem has plagued the federal administrative agencies from the start, beginning with the regulation of the railroads under the Interstate Commerce Commission,¹¹⁵ and running through the agribusiness domination over water reclamation projects, to airline domination of the CAB, and on and on.¹¹⁶

At the *local* level, those fearing oppression through factional "capture" have two lines of defense. First, they can complain loudly that their enemies have captured the store, in a context where limited numbers at least allow them to be heard—and also allow them the opportunity to organize with fellow complainants and hence magnify individual voices. Second, they can threaten to cut their losses and leave for a more favorable regulatory climate—that is, exercise the exit option—a threat that the locality may well fear because of the damage to its own reputation, and the danger that other valuable citizens might decide *ex ante* to settle elsewhere.

These are not perfect solutions to local factionalism. For one thing, there is a tension between the voice and exit options, insofar as the possibility for exit may undermine the community spirit represented by voice—the effort to stay and make things better. For another, some residents may indeed be "stuck," unable either to exit or to be heard; these residents may not be assuaged by the knowledge that their plight warns others to settle elsewhere. But despite these shortcomings, as a comparative matter, exit and voice give local residents at least some leverage and some chance to overcome factional oppression.

At the *national* level, on the other hand, the citizen whose interests

¹¹⁵ See G. KOLKO, *RAILROADS AND REGULATION, 1877-1916*, at 233 (1965) (railroads dominated ICC from its inception). *But see* Hovenkamp, *Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem*, 97 *YALE L.J.* 1017 (1988) (arguing that efficient regulatory scheme for railroads had to be on national scale).

¹¹⁶ For an attack on a number of agencies thought to be captive to industry, see *THE MONOPOLY MAKERS: RALPH NADER'S STUDY GROUP REPORT ON REGULATION AND COMPETITION* (M. Green ed. 1973). For reclamation, see C. MEYERS, *WATER RESOURCE MANAGEMENT* 874 (3d ed. 1987) (subsidy to irrigators). For the historical context of the charge of administrative "capture," see Rabin, *Federal Regulation in Historical Perspective*, 38 *STAN. L. REV.* 1189, 1278-95 (1986).

are adversely affected by institutional capture has neither of these options. Voice is more or less useless, because the national government is too big for most people to get a hearing, unless they get themselves organized sufficiently to exercise influence. Moreover, large-scale organization in itself may not entail freedom from capture, but simply a different version of capture, as particular members of the organized group use it for purposes of their own.¹¹⁷ The exit option is useless for a different reason: there is nowhere to run, and no alternatives from which to choose.¹¹⁸ Thus, it is at the *national* level, not the local level, that the danger of faction most especially requires the trappings of checks and balances and the play of interest against interest—as is evidenced by numerous proposals for the reintroduction of something like checks and balances and interest representation into administrative law.¹¹⁹

Publius to the contrary notwithstanding, then, faction is far more a national problem than a local one. If we think back to the ancient constitution, where every locale and every privileged body had its own institutions and narrow interests, we can see that there is an escape from faction in such a constitutional structure: each locale may have its foolish enthusiasms, but the person who doesn't like them can gripe, or settle elsewhere—as Hirschman puts it, exercise a voice or exit option. It is the large republic that presents the problem of faction—in the sense of one-sided oppression—in a particularly pointed way. We first learned this from the oppression of our minority citizenry, and, in more recent years, we have learned it from the problem of capture in the administrative state.

¹¹⁷ See, e.g., R. HARDIN, COLLECTIVE ACTION 35-37 (1982) (role of "political entrepreneurs" in organizing and presenting view of large number groups, for reasons of their own). Restraints on voice have been formalized at the national level—in standing requirements, limitations on taxpayer suits and the like. One needs a relatively strong personal interest to get a federal hearing. See Warth v. Seldin, 422 U.S. 490 (1975) (restraints on standing in federal exclusionary zoning suits); Massachusetts v. Mellon, 262 U.S. 447 (1923) (no federal taxpayers' suits); cf. Sierra Club v. Morton, 405 U.S. 727 (1972) (relaxed requirements for environmental suits, but plaintiffs must still allege individual harm to themselves). Some of the recent literature on civic republicanism appears to assume that the republican tradition of deliberation can be incorporated directly into national politics. See, e.g., Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1548 (1988); Michelman, *supra* note 101, at 1531 (discussing, somewhat more ambiguously, deliberation in civic, local and state bodies as well as national legislatures); cf. Frug, *supra* note 95, at 1087; Rose, *supra* note 90, at 882-87, 911 (special opportunities for deliberation locally).

¹¹⁸ It has been suggested that capture—or the problem of governmental monopolization—should give rise to special constitutional claims for those left without alternatives. See Williams, *Liberty and Property: The Problem of Government Benefits*, 12 J. LEG. STUD. 3 (1983).

¹¹⁹ Sunstein, *supra* note 5, at 483, 489-90 (need for checks and balances in modern administrative practice); *id.* at 505 (efforts at increasing citizen participation); see also Rabin, *supra* note 116, at 1298-99 (case law challenging "de facto partnership between regulator and regulated," demanding greater interest group participation).

C. *Crosscurrents: The Federalist Contribution to a Sustained Anti-Federalist Tradition*

I come now to a point that runs quite contrary to the Anti-Federalist critique: the Federalists' plain vanilla Constitution, perversely enough, does have some important aspects that recommend it, even from the point of view of preserving a tradition of localism. I am not speaking only of the obvious point that the Federal Constitution left the states intact. There are several much more important ways in which the Federalist's victory has assured the continuation of an Anti-Federalist version of the ancient constitution in the United States.

For one thing, as I have tried to point out, the arguments for the large republic, with its size and commerce, were in some significant measure arguments about securing the national defense. The Anti-Federalists never were very convincing on the issue of how the nation could be defended in the absence of a strong national government.¹²⁰ There is every reason to believe that it has been the large republic of the Federalists that has shielded the Anti-Federalists' smaller communities from the ravages of external enemies—not to speak of their own mutual strife.

For another thing, the Federalists' plain vanilla Constitution has created a single nation of states, with minimal difficulties in bringing goods and persons across boundaries. In this way, the Federalist Constitution is the guarantor of the exit safeguard among local communities.¹²¹ Once again, it is the large republic that makes it possible and safe for citizens to protect themselves, through exit, from local oppression, and to build and strengthen their own communities wherever they settle.

Even the commercialism implicit in the Federalist project has an arguably salutary influence on localism: in assuring the ability of Americans to follow commercial pursuits, the plain vanilla Constitution may have cooled some of the local political fervor from which individuals might wish to exit. Commercial life, to be sure, sets up a kind of competing attraction to politics and public life.¹²² But that is not altogether bad, as *The Federalist* authors apparently noticed, because by siphoning off

¹²⁰ 1 STORING, *supra* note 39, at 27-30. The usual argument was that the people of the states would voluntarily come to each others' aid in times of peril. See, e.g., Comments of Nason, Mass. ratifying convention, in 2 ELLIOT'S DEBATES, *supra* note 37, at 137; G. Livingston (New York), in 2 ELLIOT'S DEBATES, *supra* note 37, at 297. The Federalists countered with a collective action argument, and pointed out the recent difficulties in raising money and soldiers during the Revolution. See, e.g., remarks of Thatcher (Massachusetts), *id.* at 142; Hamilton (New York), *id.* at 237; J. Marshall (Virginia), in 3 ELLIOT'S DEBATES, *supra* note 37, at 228. The Anti-Federalist author of the Letters of Centinel to the People of Pennsylvania boldly took on the Federalists, and asserted that division and "occasional wars" would be preferable to the "fangs of despotism" of a consolidated government, 2 STORING, *supra* note 39, at 186.

¹²¹ See T. BENDER, *supra* note 100, at 87, 96 (national economic and transportation integration fostered historical local identification and community-building).

¹²² 2 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA, *supra* note 19, at 165; see also A. HIRSCHMAN, SHIFTING INVOLVEMENTS (1982) (public and private pursuits in competition).

partisan ambitions into money-making pursuits, commerce may moderate the temperature of local political issues.¹²³ In addition, insofar as commercial pursuits increase the size of the total wealth “pie,” commerce can make local issues about dividing the now-more-ample pie seem less compelling, and may render local political “rent-seeking” less morally defensible to a locality’s own citizens—precisely because this rent-seeking behavior may decrease total wealth.¹²⁴

Moreover, the Federalists’ plain vanilla Constitution did, after all, do something to prevent faction at the national level, too; all those checks and balances and so forth do play a role in controlling national aggrandizement. This leaves a space for localities that was impossible in Napoleon’s France (not to speak of Hitler’s Germany or Stalin’s Russia). American localities have known how to exploit their opportunities, and have managed to entrench themselves quite firmly in the consciousness of national politicians.¹²⁵ There is a price to be paid for this entrenchment.¹²⁶ It may be, however, that the price we pay is worth paying in order to prevent the absolute rule that might accompany true consolidation. As in Old Regime Europe, it would be unthinkable to unseat established local interests without something close to revolution. In a sense, then, the Federalists’ plain vanilla Constitution has incorporated a certain chocolate layering from the ancient constitution, as translated by the Anti-Federalist vision of localism.¹²⁷

V. CONCLUSION

The Federalist Constitution attacked the ancient constitution, and chose commerce, uniformity, and size in large part for the sake of national defense and strength. Insofar as that is true, it might be thought—as the Anti-Federalists said—that the Federalist Constitution corrupts the polity by lowering its aims. The choice of the plain vanilla Constitu-

¹²³ Diamond, *supra* note 57, at 648-49.

¹²⁴ For “rent-seeking,” see, e.g., J. BUCHANAN, R. TOLLISON & G. TULLOCK, *TOWARD A THEORY OF THE RENT SEEKING SOCIETY* (1980); see also McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEG. STUD. 101 (1987) (political rent-seeking decreases total wealth). The not-unreasonable assumption of these authors is that more wealth is better than less, all other things being equal. Some Anti-Federalist arguments, of course, would suggest that all other things are not necessarily equal, if the pursuit of wealth undermines republican character. See *supra* notes 76-79 and accompanying text.

¹²⁵ For two interesting case studies on local lobbying in Congress, see Lee, *The Political Safeguards of Federalism? Congressional Responses to Supreme Court Decisions on State and Local Liability*, 20 URB. LAW. 301 (1988).

¹²⁶ An academic industry has arisen on the ability of small and well-organized groups—such as local lobbyists—to get what they want out of large legislative bodies like Congress. Founding books are J. BUCHANAN & G. TULLOCK, *THE CALCULUS OF CONSENT* (1965) and M. OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965). Notorious examples are the local tenacity in securing sewage treatment plant grants, water projects, and defense installations.

¹²⁷ For a similar view, though with quite different terminology, see Sullivan, *supra* note 43, at 1721-23 (proposes “normative pluralism” conception of nation’s political organization).

tion represents a decision that big Babylon is in the long run stronger than little Athens, and probably even than little Sparta—and that this strength is more important than civic character or other high-flown republican aspirations.

But it is well to remember that there are many people who really like Babylon, who prefer its coarseness to noble character, who revel in its remarkable energy, and find charm in the very vulgarity of its dynamism.¹²⁸ Certainly the rhetoric of 1987 made us reflect that there is, after all, some moral quality to the Federalist Constitution over and above mere national survival, and that the plain vanilla Constitution has generated a certain enthusiasm for a way of life, however gleefully crass and raw it may sometimes seem.

I would like to suggest that a continuing and countervailing Anti-Federalist and ancient constitutional tradition of localism—like the tradition of voluntary organizations—has enriched the cultural and political life of the Babylonian large republic, and has even enhanced the commercial vigor of that republic. The local tradition has done so, on the one hand, by keeping alive a certain cooperative initiative and a belief in the possibilities for self-help through association, which is likely to be much easier at the local level.¹²⁹ And on the other hand, the local tradition has enhanced a kind of optimistic self-confidence, by reminding us that it is always possible to bail out to try something new—that is, by reminding us about the exit option. With this we are back to the Anti-Federalists' idea that character must be nourished by institutions. Initiative and optimism are character traits that the Federalist Constitution needs too, not only for political life but for commerce as well.

If Anti-Federalist localist echoes have sounded in the way that Federalist constitutionalism has played out over time, however, the reverse is also true. It is the Federalist Constitution that has protected localities from external danger, has guaranteed the "exit" option among them, and—through the promotion of commercialism—has muted their excesses. As it has turned out, the Federalist program required a dose of Anti-Federalist character, and vice versa.

¹²⁸ For an example of the celebration of vulgarity, see R. VENTURI, *LEARNING FROM LAS VEGAS* (1972) (praise for Las Vegas "strip" architecture). This fondness for lowlife may be rather prevalent among Americans, as for example in the remark of a friend of mine: "I like country music," she said, "because it's so trashy."

¹²⁹ Tocqueville noted that a nation's commercial success depended on the initiative that could only be generated in free institutions. See 2 A. DE TOCQUEVILLE, *supra* note 19, at 148. He thought that voluntary organizations, which I have likened to localities, were a major element in American free institutions.