

The Anti-Federal Appropriation

JEFFREY K. TULIS and NICOLE MELLOW

ABSTRACT

The Anti-Federalists lost the battle to defeat the Constitution but won back through interpretation what they lost in constitutional construction. To counter Anti-Federalists' accurate depictions of the proposed constitution as one that would radically alter the existing regime, *The Federalist* adopted a rhetorical structure that facilitated an opposing political tradition layered over the constitutive logic of the Constitution. Our analysis of the developmental logic embedded in founding political thought, the rhetoric used to defend that political logic, and the subsequent appropriation of Federalist rhetoric by the losers of this debate illustrates the mutual dependence of American political development and political thought.

The ratification of the US Constitution was a stunning Federalist political victory both in the extent of the political transformation that it set in motion and in the extraordinary number of obstacles that needed to be overcome along the way. And it was a thoroughgoing loss for those who wished to preserve the previous regime. Faced with deep and broad skepticism about strengthening national government power, Federalists nonetheless secured ratification for a Constitution that sought that very end. How? Over the entire ratification campaign, the Federalists developed an ability to allay the fears of ordinary citizens that the proposed change would be too much to bear. They overcame the natural and normal conservative responses of a citizenry faced with a new and unfamiliar proposal in a time fraught with uncertainty.

One can see this assuaging strategy in the most basic framing of the constitutional debate—the naming of the two partisan positions. The Federalists chose their own name as well as the label of their opponents: the “Anti-Federalists” did not choose this name for themselves. Unlike the Philadelphia

Jeffrey K. Tulis is associate professor at the University of Texas at Austin, 158 West 21st Street, Austin, TX 78712 (tulis@austin.utexas.edu), and Nicole Mellow is associate professor of political science at Williams College, 66 Stetson Court, Williamstown, MA 01267 (Nicole.E.Mellow@williams.edu).

This essay is drawn from a long chapter in a forthcoming book that covers the other aspects of the political logic and this theme in more detail: Jeffrey K. Tulis and Nicole Mellow, *Legacies of Loss in American Politics* (Princeton, NJ: Princeton University Press, forthcoming).

convention, which in its formal proposal was clear and frank in presenting the new Constitution as a fundamental change from the past, the Federalist campaign for ratification was more deliberate and circumspect in making the case for the nationalizing trajectory of the new Constitution. Proponents attempted to win support by initially interpreting the Constitution as an improvement of the familiar rather than as the inauguration of something unprecedented and new. Over time, Federalists embraced and defended the newness of their project, but initially they prepared the ground for change by arguing that the proposal was an improvement of known political institutions and practices. Their sober caution was a response to Anti-Federalist rhetoric that stressed that the Constitution was a radical (and, in their view, dangerous) departure from time-tested political practices.

Thus, the Federalists began their campaign by claiming for their own name the constitutive principle of the opposition. David J. Siemers and Jack Rakove have noticed that *The Federalist* gained authoritative status due to the irony that, under the new Constitution, the former Anti-Federalists “were able to use Publius as an ally in the fight against those who would extend federal authority” (Siemers 2002, xi; Rakove 1987, 239). Siemers persuasively shows how the Anti-Federalists played a crucial role in the legitimation of the Federalist Constitution by lending their support to it immediately upon ratification. In other words, by this logic and to rephrase Jefferson’s famous declaration: everyone was a federalist now. In this essay, we develop the other side of that coin. The Anti-Federalists chose to support the Constitution after ratification not because they decided to legitimize the Federalist project (even if their actions had that effect). After ratification, the Anti-Federalists adopted a new strategy to accomplish their old purposes. Most thoughtful Anti-Federalists had agreed that the Articles of Confederation needed to be repaired, that they faced a crisis of governance. They opposed the Constitution in favor of a return to the original plan to amend and improve the Articles. In the postratification political world, the Anti-Federalist strategy was to recover the spirit of the Articles through a reinterpretation of the Constitution. They began a tradition of constitutional interpretation at odds with the animating political logic of the Constitution—a logic they had previously described so well. We mean to show how the rhetorical structure of *The Federalist* legitimated this Anti-Federal political persuasion, facilitating an opposing political tradition layered over the constitutive logic of the Constitution.

Our analysis of the developmental logic embedded in founding political thought, of the rhetoric used to defend that political logic, and of the subsequent appropriation of Federalist rhetoric by the losers of this debate illustrates the mutual dependence of American political development and American political thought. Our interest here is not in the disciplinary subfields that

go by those names but rather in how the actual phenomena of political development and political thought in America were initially woven together in this layered way.

These two conflicting aspects of American political development—the logic of nationalization inherent to the Constitution and the ability to undermine the Constitution (and that nationalization) by skillful appropriation of the iterated Federalist defense—took root in the founding era and have persisted throughout American history. The very same strategic decisions that facilitated the massive victory of the Federalists enabled an opposing Anti-Federal tradition more vibrant and more problematic for the regime than most scholars have noticed. In other words, it was the rhetoric of *The Federalist* that helped turn the biggest losers in American politics, the Anti-Federalists, into winners over the long run.

FEDERALISTS AND ANTI-FEDERALISTS

The most influential political actors and political writings in the midst of the battle were not the texts that have achieved iconic status in American history. *The Federalist*, for example, was not widely read outside of New York. Some of the finest Anti-Federalist writing, such as by “Brutus,” had limited influence upon publication. Nevertheless it is appropriate, indeed essential, that one focuses on these texts to address the question of the long-term success of the Anti-Federal movement. Some political texts achieve “iconic status” not because they express typical or common sentiments of the time in which they were written but rather because they display acute understanding of the issues at work. As Herbert Storing (1981) has written, they reveal not so much what was “common” as what was “fundamental” (6). To say that such writers are smarter than the typical pamphleteer is to suggest that they see “farther or better” and that they can “explain more.” They can explain how the Constitution will actually work, in practice and over time. They can explain how the Constitution will transform a political world and what the broad trajectory of political development will be. They paint a very plausible picture of the political future. Thus, *The Federalist* and major Anti-Federal writings such as essays by “Brutus” and “The Federal Farmer” are routinely cited in searches for the Constitution’s “original meaning,” whether or not many citizens in the founding era understood or agreed with the views they express.

The Federalist and leading Anti-Federalists shared a view of constitutional interpretation that is strikingly different from conventional approaches today, including the views of many who invoke them. Conservatives in contemporary America tether constitutional meaning to specific clauses, to the

meaning of the text as deduced from eighteenth-century usages and practices, and to the so-called intentions of the framers—that is, the framers (or the ratifiers) preferences or expectations regarding the meaning of vague concepts in the document. Liberals often share these interpretative practices even when they seem to depart from them with claims that a “living Constitution” needs to be updated to contend with new and unanticipated modern circumstances. Liberals, nonetheless, pay homage to the conservative view that the original Constitution’s meaning is tethered to the extant understandings and practices of the eighteenth century. The Constitution needs to be updated, in the liberal reading, because it was made for a polity that no longer exists.

Thoughtful Federalists and Anti-Federalists had a very different view of the nature of the Constitution and of the proper way to understand its meaning. For them, the document was not simply a political settlement of their own disputes regarding the shape of their government. More importantly, it was an architectural plan for the building of a whole polity—government, society, culture, and even the character of individual citizens. They thought of the Constitution as a plan for the future. At their best, thoughtful partisans on both sides of the debate shared an approach to understanding the Constitution. One could call that approach a constitutional frame of mind, or a constitutional way of thinking. Thinking constitutionally meant (1) identifying which decisions embedded in the Constitution were core and which were peripheral or ancillary, (2) elucidating the philosophic or normative presuppositions behind the core commitments, and (3) detailing the institutional, policy, and cultural implications of the core commitments (Storing 1974; Tulis 1991). For our purposes, the identified core decisions and commitments and their political implications are the aspects of constitutional thinking most relevant to the shape of American political development.

When one looks closely at the major aspects of the new Constitution (federalism—the relation of the states and national government; the scope of national power; the extent of executive power; the transformation of the idea of separation of powers; the role of the judiciary; the projected shape of the economy and political culture), the most thoughtful Anti-Federalists often described a Federalist future more vividly than did *The Federalist*. Anti-Federalists objected to the Constitution because they could envision the kind of polity that it would bring into being over time. They highlighted and worried about the implications of fundamentally new political commitments: for example, the commitment to a very big regime—a polity of continental scope with substantial power at the national level that included coercive power over individuals. The Anti-Federalists understood that the specific provisions supportive of states in the new Constitution (e.g., equal representation in the Senate) would be overwhelmed by the self-perpetuating workings of a

large national regime fueled by such core commitments. Over time, they feared, the regime would become one “consolidated” national regime. And because there was no precedent for a successful democracy that massive in human history, the Anti-Federalists worried that individual rights would be threatened altogether by the likelihood of governmental tyranny.

The idea that the Constitution would lead to a bad form of politics was vigorously disputed by *The Federalist*. But it is vital that we separate this well-known and often-studied normative dispute—whether the plausible future polity was good or bad—from the first question of what the Constitution meant, what its words implied, and what its structure portended in broad nonnormative, empirical terms. On this question of constitutional logic, there was broad agreement between *The Federalist* and leading Anti-Federalists. The smartest minds on both sides understood that adoption of the Constitution meant the nationalization of American politics, big government, a powerful presidency, and a judiciary at the national level with wide interpretative license. Anti-Federalists warned of the dangers of centralized power, of a standing army, of the nationalization of policy, and of an administrative state—in short, they warned against adopting the Constitution. Federalists defended the benefits of these very same features. Both sides, therefore, agreed on the fundamental features of the regime. They disagreed over the desirability of the new regime, not over its political logic.

How then did the political heirs of the Anti-Federalists succeed in convincing many Americans—including scholars, politicians, Supreme Court justices, and ordinary citizens—that big government, the nationalization of policy, and other features of modern governance in America are departures from the Constitution since the Anti-Federalists so acutely and accurately described this very Constitution? They did so by inducing leading Federalists during ratification to defend the Constitution in ways that muted its essential logic. In this essay, we provide evidence regarding the treatment of one crucial component of that logic—the meaning of federalism and states rights in the new Constitution.

FEDERALISM AND STATES’ RIGHTS

The animating and persistent concern of the Anti-Federalists was that the Constitution would create a new national regime, one that consolidated power in a central government, thus making state and local governments less relevant over time. They understood the fundamental project of the Constitution to be a nationalizing one, and this was an abandonment of the core confederal principles of the Articles of Confederation. “Federalism means that the states are primary, that they are equal, and that they possess the main weight of

political power. The defense of the federal character of the American union was the most prominent article of Anti-Federalist conservative doctrine” (Storing 1981, 9). Evidence for the Anti-Federalist worry included the letter George Washington sent to the president of the Congress with the transmittal of the proposed Constitution, in which he explicitly referred to the object of the plan as “the consolidation of our Union” (Washington 1911). The Constitution established a direct and unmediated relation between the new federal government and individual citizens, bypassing the states, and this central government was given enormous power, including the powers to tax (to provide for the common defense as well as for the general welfare), to borrow money, to regulate commerce, to promote the progress of science and the useful arts, to declare war, and to call up state militias—as well as all powers necessary and proper to execute those and other powers listed elsewhere in the Constitution. The Anti-Federalist’s first claim was that the new Constitution had replaced a regime in which the states were sovereign entities with one in which the central authority was sovereign.

The Federalist’s initial response to the Anti-Federal worry was to attempt to mollify those uncomfortable with such a radical departure from the status quo. While it was true that “federalism,” understood as state sovereignty with delegations of power from the states to a central authority for common purposes, had not worked, it was not true, claimed *The Federalist*, that “nationalism” or consolidation was replacing federalism. Instead, a new federalism was being invented, in which sovereignty would be shared by dividing the spheres of responsibility between states and a central authority. The old federalism was a “federation,” and the new federalism would be based on a division of powers between levels of government. On this view, the new government was a new form of mixed regime, with state and national authority shared in complicated ways that made it impossible to describe the regime as either a states’ rights or a nationalist polity.

The most elaborate description of this new mixed regime is presented by “Publius” in *Federalist* 39 (Hamilton, Madison, and Jay 1788/1999, 263–43).¹ The whole account in *Federalist* 39 is a very elaborate scheme designed to reinforce the view that the newly invented form of “federalism” combined states’ rights and nationalist principles. The Anti-Federalists were not mollified by these complicated arguments. Much like Tocqueville’s critique of the Aristotelian theory of “mixed regimes,” they insightfully pointed out that in politics one cannot mix or share sovereignty—one element of the mixture always dom-

1. All citations to *The Federalist* are to the edition edited by Rossiter and with introduction and notes by Kesler (Hamilton et al. 1788/1999) and are given henceforth by page number only.

inates (Tocqueville 1835/2000). In their view, the gestures to state sovereignty in the Constitution only camouflage the fact that the national government is the predominant power. They focused their attention on how the provisions of the Constitution would work in practice as well as on which of the provisions were most important. Brutus (1787/1998, 6) warned, for example, that the exercise of power inherent in the necessary and proper clause could lead the national government to “annihilate all the state governments, and reduce this country to one single government.” Further, Anti-Federalists complained that nowhere in the Constitution were there “measures to insure the independence and vigor of the states” (Storing 1981, 35). As Storing points out, they objected to the absence of any explicit reservations on behalf of the states, they complained that the central authority’s ability to call up militia transformed those state forces into instruments of the national authority and deprived the states of the most basic attribute of sovereignty (control over the legitimate use of force), and they claimed that the Senate did not really institutionalize the states qua states because Senators would vote as individuals not as delegates of the states. The states’ power to appoint meant little without the power to control or dismiss.

Under the proposed Constitution, the states have virtually no role in the operation of the national authority. What role they have in the regime is confined to the residue of power they retain—but it is the national government that would police the boundaries between national and state authorities. “It is true,” Publius wrote in *Federalist* 39, “that in controversies relating to the boundaries of the two jurisdictions the tribunal which is ultimately to decide is established in the general government. But this does not change the principle of the case” (242). The Anti-Federalists saw this for the sophistry that it was. The structural properties of the regime are much more determinative of real power, and, correctly, the Anti-Federalists saw precious little structural support for states in the Constitution. If the national government decided what was “national” and what was of local or state concern, “federalism” was transformed from a constitutive feature of the Constitution to a matter of discretionary national policy (Barber 2013).

This last point is the key one, and, in fact, *The Federalist* follows its rhetorical gestures to mollify skeptics with a sophisticated version of these very Anti-Federalist objections. For Federalists, the “federal” or state-oriented features of the Constitution are not core or constitutive aspects—they are peripheral to a regime whose animating logic is national. Nonetheless, these features are not merely tactical concessions. Federalists recognized that the criticisms of centralized authority and the virtues of localism are often sensible cautions about the harmful effects on political life of a large administrative state. Policies may sometimes be better executed, or even perhaps better formulated, at

the state or local level. The Constitution transforms this fact from one of invariable constitutional principle to one of discretionary national policy. That is, the national legislature may wisely leave matters to states or decentralize the administration of policy, but it is a national standard, a national assessment, that is the basis of such devolution, and it might vary as circumstances vary.

In *Federalist* 17, Publius describes the singular significance to citizens of the daily administration of “criminal and civil justice” and emphasizes that because these are state responsibilities, citizens will be most endeared to their local government. In contrast, Publius writes, the more general operations of national government are out of sight of most citizens and thus far less likely to inspire the same level of devotion. However, the subsequent argument in *Federalist* 17 would point in the opposite direction. Publius says that “each State would be apt to feel a stronger bias toward their local governments than toward the Union; *unless the force of that principle should be destroyed by a much better administration of the latter*” (115; italics ours). As evidenced in *Federalist* 27, much of the later argument of *The Federalist* is devoted to showing that the true advantage of the Constitution and of national authority within it would be due to the “probability that the general government will be better administered than the [states]” (170). Moreover, as the authority of the national government expands and its effects penetrate the daily lives of ordinary citizens, its legitimacy will be further enhanced over the states: “the more the operations of the national authority are intermingled in the ordinary exercise of government, the more the citizens are accustomed to meet with it in the common occurrences of their political life” and “the greater will be the probability that it will conciliate the respect and attachment of the community” (172).

Why would the national government be so visible in day-to-day political life if the most important tasks of government other than national defense—police powers, regulation, domestic welfare, and so forth—are reserved to the states? As with the issue of where legitimacy and attachment would lodge, *The Federalist* shifts from a mollifying rhetoric of deference to state sovereignty to a sophisticated version of the Anti-Federalists’ insistence that the national government would over time supplant the states.

The Federalists’ rhetorical sophistication emerges as they stress the virtues of the very thing that they had previously said would be unlikely. In a point that has taken solid root in American political culture ever since, *The Federalist* reassured the Anti-Federalists that the national government was given only powers enumerated in the Constitution, with all other powers reserved to the states. The Anti-Federalists argued that the specific powers granted (especially taxation and commerce), along with the necessary and proper and supremacy clauses, meant that over time the national government would

usurp state authority. After insisting that the national government would possess only enumerated powers, Publius expands and justifies the Anti-Federalist insight about the logic of the Constitution. The Anti-Federalists had proposed cutting back on powers that might be abused in order to make them safe. Publius's reply is that it makes no sense to deny any competent authority all the power necessary to accomplish its legitimate purposes. "Limited government," then, should refer to the purposes of power, not the amount of power required to effect legitimate purposes. In *Federalist* 23, Hamilton writes: "The *means* ought to be proportioned to the *end*; the persons from whose agency the attainment of any *end* is expected ought to possess the means by which it is to be attained" (149).

Publius thus argued that the "necessary and proper" clause simply made clear the logic that inhered in the granting of the primary powers in the first place. "These powers ought to exist without limitation" because one cannot foresee all the circumstances for which they will be necessary (149). This logic suggests that over time circumstances that were initially "local" and beyond the scope of federal authority might, in different circumstances (perhaps changed socioeconomic conditions facilitated by the Constitution itself), become "national." Thus as the nation's economy became more complex and robust, the power to regulate commerce might similarly expand. Indeed, in a subsequent iteration of the syllogism quoted above, Publius slips in another proposition that makes problematic the whole idea of "limited government." In *Federalist* 31, Publius again begins with an assertion of the self-evidence of first principles: "that there ought to be no limitation of a power destined to effect a purpose *which is itself incapable of limitation*" (189; italics ours).

With these rhetorical iterations, *The Federalist* brings the reader to see that the subject of the Anti-Federalist complaint about the Constitution is an ineluctable fact of a well-designed political order. If power needs to be unlimited to effect legitimate purposes, and if those purposes themselves can expand over time, how is limited government possible? Against the Anti-Federalist argument that the Constitution be abandoned or modified to cut back on national power, *The Federalist* defends the Constitution's novel solution to this problem—that power be cabined principally by structural provisions that create competing sources of power within the national government.

CONCLUSION

The Anti-Federalists lost the political war over ratification of the new Constitution. But they, and their heirs, have won many subsequent battles regarding the interpretation of the Constitution in practice. The result has been a hybrid political order: the logic of the Constitution has unfolded and operated

as both the Anti-Federalists and the Federalists suggested it would, yet, at the same time, that unfolding logic has been regarded as a departure from the Constitution. It is seen as a departure on account of the rhetorical sleight of hand that Federalists had to proffer in order to overcome resistance to ratification. Looking back on the founding debate, this is a substantial and long-term Anti-Federal victory, amazing to behold. By using the rhetoric of that authoritative source, *The Federalist*, as ammunition against the Anti-Federalist's own best understanding of the consequences of adopting the Constitution, Anti-Federalist heirs created space for an interpretation of the Constitution that subverts its animating logic. *The Federalist* provided the rhetorical resources that enabled their opposition to regroup and attempt to achieve through interpretation what they could not achieve in the original constitutional construction. American politics can be understood as a layered political development, vibrant Anti-Federal ideas layered over and in tension with the unfolding Federalist design.

REFERENCES

- Barber, Sotirios A. 2013. *The Fallacies of States' Rights*. Cambridge, MA: Harvard University Press.
- Brutus. 1787/1998. "Brutus 1." In *Federalists and Antifederalists: The Debate over the Ratification of the Constitution*, 2nd ed, ed. John P. Kaminski and Richard Leffler. Madison, WI: Madison House.
- Hamilton, Alexander, with James Madison and John Jay. 1788/1999. *The Federalist Papers*. Ed. Clinton Rossiter. Introd. Charles R. Kesler. New York: Signet.
- Rakove, Jack N. 1987. "Early Uses of *The Federalist*." In *Saving the Revolution: The Federalist Papers and the American Founding*, ed. Charles R. Kesler. New York: Free Press.
- Siemers, David J. 2002. *Ratifying the Republic: Antifederalists and Federalists in Constitutional Time*. Stanford, CA: Stanford University Press.
- Storing, Herbert J. 1974. "The Problem of Big Government." In *A Nation of States*, ed. Robert Goldwin. Chicago: Rand McNally.
- . 1981. *What the Anti-Federalists Were For*. Chicago: University of Chicago Press.
- Tocqueville, Alexis de. 1835/2000. *Democracy in America*. Trans. and ed. Harvey Mansfield and Delba Winthrop. Chicago: University of Chicago Press.
- Tulis, Jeffrey K. 1991. "The Constitutional Presidency in American Political Development." In *The Constitution and the American Presidency*, ed. Martin Fausold and Alan Shank. Albany, NY: SUNY Press.
- Washington, George. 1911. "Letter to the President of Congress, Arthur St. Clair." In *The Records of the Federal Convention of 1787*, vol. 2, ed. Max Farrand. New Haven, CT: Yale University Press.