

Commentaries on *The Federalist*

The Federalist on Federalism: “Neither a National Nor a Federal Constitution, But a Composition of Both”

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Something surprising confronts the contemporary reader who turns to *The Federalist* to see what it has to say about federalism. Expecting to find the original source of his view of American federalism, he finds instead a very different understanding from ours of the nature of federalism and of the federal character of American government. We think that the invention of federal government was the most important contribution made by the American founders to the art of government and we thus regard the system they devised as the very paradigm of what we call “federal government.” Indeed, as we shall see, most contemporary definitions of federalism are little more than generalized descriptions of the way we Americans divide governing power between the states and the central government. It is surprising, therefore, to discover that *The Federalist* does not likewise characterize the American constitutional system as a “federal government.” Instead, it tells us that the “proposed Constitution . . . is in strictness neither a national nor a federal constitution; but a composition of both.”¹

This formulation is typical of the way the entire founding generation saw the matter. For example, the proceedings of the Federal Convention—especially in the famous compromise regarding the House and Senate—show that the delegates likewise understood the terms federal and national in a way that required characterizing the Con-

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1. THE FEDERALIST No. 39, at 257 (J. Cooke ed. 1961) [hereinafter cited to this edition without reference to editor]. Professor Cooke's edition is the definitive modern edition of *The Federalist*.

stitution as a compound or composition of both elements. But what Madison and the founding generation carefully distinguished as partly federal and partly national, we have for a long time blended or blurred under the single term federal. Alexis de Tocqueville saw this happening: "Clearly here we have not a federal government but an incomplete national government. Hence a form of government has been found which is neither precisely national nor federal; but things have halted there, and the new word to express this new thing does not yet exist."² Although it may well have been politically salutary that things "halted" at the old word federal, much may thereby have been lost in precision. And that is the concern of this review of what *The Federalist* teaches about federalism, namely, to suggest that it would be analytically useful to restore *The Federalist's* "strict" distinction between the federal and the national elements in our compound political system, and therewith to restore also *The Federalist's* understanding of federalism in general.

The Federalist was operating with a typology, so to speak, composed of two fundamental modes of political organization, the federal and the national. The founders thought that they had combined these two fundamental modes or "elements" into a "compound" system. We disagree and think, instead, that they invented a third fundamental mode or element, which we call federal government. In so thinking, we are operating with a typology composed of three elemental forms: confederation, federal government, and national or unitary government. The difference between our thinking and that of the founders evidently turns on the distinction that we make, and they did not, between confederalism and federalism. That familiar distinction will be found in almost all contemporary writing on federalism. But *The Federalist* and the whole founding generation saw no more difference between confederalism and federalism than we see, say, between the words inflammable and flammable; nothing more was involved than the accidental presence or absence of a nonsignifying prefix. For the founders, then, there were only two basic modes to choose from: confederal/federal as opposed to national/unitary; confederal/federal being that mode which preserves the primacy and autonomy of the states, and the national/unitary being that mode which gives unimpeded primacy to the government of the whole society. Given their bipartite typology or framework, the founders had to view the Constitution as being a "composition" of the two elemental modes

2. A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 143 (J. Mayer & M. Lerner eds. 1966).

and, given our tripartite one, we have to see the Constitution as elementally federal. The question is who is right, we or they? Which is the more useful mode of analysis?

It is instructive, and perhaps disconcerting, to learn that our modern distinction between confederalism and federalism derives from John Calhoun. His *Discourse on the Constitution and Government of the United States* begins with a severe and systematic attack on *The Federalist's* view of federalism. In particular, Calhoun argues that its view of American government as compoundly federal and national is a "deep and radical error."³ Now Calhoun had some very practical reasons for rejecting the "compound" view. He could not admit that there was anything national at all about the central government because that would open the door to an effective national jurisdiction over South Carolina's slave interests. Yet, because the central government under the Constitution was so palpably stronger than under the Articles of Confederation, Calhoun could not characterize it as confederal/federal, which was the only category left to him according to the bipartite typology then still universally accepted. Moreover, Calhoun did not really want to return to the old Articles; he was not averse to having a government as powerful as that under the Constitution, provided it could be rendered safe for southern interests. Calhoun solved all of his problems by inventing a new category of "federal government" which he contradistinguished from both a confederacy and a national government.

Not surprisingly, Calhoun saw "federal government" as differing rather more from the national form, which posed the threat to southern interests, than from the confederal form. Indeed, Calhoun's new "federal government" turns out to be nothing but a confederacy in all respects save one; unlike a confederacy, which has at its center "a mere congress of delegates,"⁴ it has a real central government to carry its powers into execution. This becomes clear if we examine his famous and shrewdly labeled theory of the "concurrent majority." The concurrent *majority* is in fact a system of *unanimous* concurrence; according to Calhoun's scheme, the central government can act only when its measures have the unanimous concurrence of majorities in every sovereign sub-unit of the system. This requirement of unanimity (an exaggeratedly confederal requirement) guaranteed that nothing could be done without the voluntary concurrence of South Caro-

3. J. CALHOUN, A DISQUISITION ON GOVERNMENT AND A DISCOURSE ON THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES 156 (R. Cralle ed. 1851).

4. *Id.* at 163.

lina. Whatever South Carolina concurred in, however, would then be executed, not with confederal weakness, but directly upon individuals throughout the country with the full force of a national government. Is it not clear, then, that far from being contradistinguished from confederation and national government, Calhoun's "federal government" is in fact nothing but a compound of these two fundamental forms? He combined an exaggeratedly confederal/federal means of arriving at central decisions with a wholly national means of execution, and then arbitrarily assigned to his peculiar compound the new label of federal government.

This appears to have been an important source of our contemporary understanding of federalism. While we have largely rejected his theory of the concurrent majority, we have nonetheless taken over Calhoun's tripartite framework and the elemental status it assigns to federal government. Many scholars have, of course, been perfectly aware that the founding generation conceived their handiwork differently than Calhoun did and we do. But the difference has not been taken seriously. Either there has been a patronizing assumption that our understanding has scientifically superseded theirs, or the difference has been shrugged off as a mere matter of their having their terminology and we ours.⁵ But this is surely too serious a matter to be so quickly dismissed; if *The Federalist* is analytically right in its compound view, then we have lost ground in our understanding of federalism. After all, is it not as obscurantist in political things, as it would be in, say, physics or chemistry, to confuse as a new element what in fact is only a compound? In both cases, it would be rendered difficult if not impossible to see how the essential parts of the compound worked and, thereby, to know how to achieve, preserve, or improve it.

To resolve our dispute with *The Federalist*, as to whether our political system is compoundly federal and national or integrally federal, we need a satisfactory definition of federalism. Unfortunately, the current conventional definition will not do. Consider the following from the standard contemporary work on federalism by Professor K. C. Wheare. Like Calhoun, Wheare disagrees with *The Federalist's* compound theory and also sees federal government as a distinctive form differing from both the confederal and the national forms. He defines this distinctive federal principle as "the method of dividing powers

5. A recent example of the latter is Gunther, *Toward "A More Perfect Union": Framing and Implementing the Distinctive Nation-Building Elements of the Constitution*, 2 STAN. LAW., Fall 1976, at 5. In this otherwise very thoughtful essay, Professor Gunther takes note of *The Federalist's* compound theory, but then treats it only as belonging to "the terminology of that day." *Id.*

so that the general and regional governments are each, within a sphere, co-ordinate and independent.”⁶ Nearly all contemporary definitions concur in the single point of this one, namely, the reduction of federalism solely to the idea of the division of the governing power.⁷ Indeed, the “division of power” definition of federalism is so familiar that it is hard to force ourselves to examine it closely. But its shortcomings will become evident if we ask precisely what is federal about such a division of power. Clearly there is nothing federal at all about the “general” government; it is just a national government like every other one, save that its jurisdiction is not complete. The only thing federal, then, is the retention by the “regional governments” of some portion of the governing power. But this is manifestly nothing more than to define arbitrarily as uniquely federal what is merely the combination of an incomplete national government with the retention in the member units of a confederal/federal autonomy in some respects. In short, the modern theory turns out to be an arbitrarily unacknowledged and hence obscuring version of *The Federalist’s* compound theory. *The Federalist* openly alerts us to the national and federal elements in the compound, enabling us to see when it is becoming more simply national or more simply federal, and thereby enabling us to take appropriate action. By lumping together under the term federal government what *The Federalist* keeps separately visible, the modern definition makes it harder for us to see and evaluate such changes in the compound system.

But more importantly, the modern definition is a badly truncated version of *The Federalist’s* compound theory. It blinds us to a whole range of federal phenomena that *The Federalist’s* understanding of federalism properly comprehends. A moment’s reflection reminds us what is left out. Consider the Senate; every school child knows (or at least used to be taught) that the Senate is a peculiarly federal part of American government. *The Federalist*, as we shall see, can readily explain what is federal about the Senate. And so can we all, unless we take seriously the modern definition of federalism, which makes the

6. K. WHEARE, *FEDERAL GOVERNMENT* 11 (3d ed. 1953).

7. An example in a recent American textbook can be found in M. CUMMINGS & D. WISE, *DEMOCRACY UNDER PRESSURE* (3d ed. 1977): “[T]he United States has a *federal* system of government, in which power is constitutionally shared by a *national* government and fifty state governments.” *Id.* at 63 (emphasis added). See also W. BENNETT, *AMERICAN THEORIES OF FEDERALISM* 10 (1964) (The “essence of federalism” is evidenced by any “political system in which there is a constitutional distribution of powers between provincial governments and a common central authority.”); W. RIKER, *FEDERALISM* 5 (1964) (“The essential institutions of federalism are, of course, a government of the federation and a set of governments of the member units”)

federalness of the Senate quite inexplicable. After all, the Senate has nothing to do with the reserved powers of the states, which is the sole federal desideratum according to the modern definition. The Senate is a part of the general government of the whole society. But it is a *federal* part of that government. And that is what the truncated modern definition cannot reach—the federal elements in the structure and procedures of the central government itself. By limiting federalism to the reserved jurisdiction of the states, the modern definition obliges us, insofar as we take it seriously, to conceive the central government as purely national. It thus contradicts what our commonsense tells us about the federal character of the Senate and, as we shall see, it tends to blind us to other federal elements in the design of our central government.

The Federalist's compound theory offers a clearer and fuller account of federalism, albeit not in the handy form of a definition. We must glean that definition from the various ways *The Federalist* replies to the main charge made by the opponents of the proposed Constitution, namely, that it had departed from the federal form in favor of the "consolidated" national form. In *Federalist* 39, where the charge is most systematically dealt with, Madison examines five ways to "ascertain the real character of the government" relative to the federal-national question.⁸ By examining them closely, we will be able to piece together *The Federalist's* understanding of federalism.

First, the mode by which the Constitution is to be ratified, Madison argues, is federal and not national, because only the voluntary assent of each state, taken as a distinct and independent body politic, joins it to the Union. Second, Madison examines the sources of the legislative and executive branches of the central government. The House of Representatives is national because it derives from the whole people treated as a single body politic; the people will be represented in it, Madison says, exactly as they would be in any unitary state. Contrarily, the Senate is a federal element in the central government because it derives from, and represents equally, the states treated as "political and coequal societies." The Presidency has a "very compound source" because the electoral votes allotted to the states "are in a compound ratio, which considers them partly as distinct and coequal societies, partly as unequal members of the same society." The presidential aspect of the central government thus "appears to be of a

8. The quotations in the analysis that follows are taken from THE FEDERALIST No. 39, at 250-57. The concept of federalism is discussed throughout *The Federalist*; other papers that are especially relevant are numbers 15-17, 23, 27, 45, and 46.

mixed character presenting at least as many *federal* as *national* features.”⁹ Third, the government’s mode of operation, in exercising its enumerated powers, is national because it reaches directly to individual citizens like any other national government (like any *government*, one might say). Fourth, as to the extent of its powers, Madison cautiously says that the government “cannot be deemed a national one,” because it has a limited, enumerated jurisdiction. Madison means that the new system is national as to the extent of powers entrusted, but is federal insofar as a substantial portion of the governing powers autonomously remains with the states as distinct political societies. (Notice that Madison is here treating as but one aspect of federalism what the modern definition treats as the whole of it. In his first three considerations, Madison had been inquiring into what was federal in the formation, structure, and operation of the central government, that is, into crucial aspects of federalism which the modern definition excludes from its purview.)

Fifth, and finally, Madison judges the amending process to be neither wholly federal nor wholly national. His argument on this brings to the fore the logic and language of his theory of federalism.

[Were the amending process] wholly national, the supreme and ultimate authority would reside in the *majority* of the people of the Union; and this authority would be competent at all times, like that of a majority of every national society, to alter or abolish its established Government. Were it wholly federal on the other hand, the concurrence of each State in the Union would be essential to every alteration that would be binding on all. . . . In requiring more than a majority, and particularly in computing the proportion by *States*, not by *citizens*, it departs from the *national*, and advances toward the *federal* character: In rendering the concurrence of less than the whole number of States sufficient, it loses again the *federal*, and partakes of the *national* character.¹⁰

This is the way the federal principle was understood in 1787 and, for that matter, in all earlier political writings. We are now in a position to summarize it. Having the nature of a “league or contract,”¹¹ federalism is a relation of independent, equal bodies politic that join

9. THE FEDERALIST No. 39, at 255 (emphasis in original).

10. *Id.* at 257 (emphasis in original).

11. Samuel Johnson’s dictionary defined “confederacy” as: “A league; a contract by which several persons or bodies of men engage to support each other; union; engagement; federal compact.” The definition of “federal” said: “Relating to a league or contract.” The entry for “federate” said: “Leagued; joined in confederacy.” I S. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (Philadelphia 1818) (1st Amer. ed. from 11th London ed.).

together for limited purposes and carry those out, as the Latin root (*foedus, fides*) of the word reminds us, only by the obligation of good faith, rather than by governmental, which is to say coercive, authority. Insofar as any governmental structure, process, power, or practice conforms to the primacy of the separate bodies politic, to their equal status within the federal association, to the limited nature of that association, and to its operational dependence upon faithful compliance rather than political coercion, the structure, process, power, or practice is federal; insofar as it departs toward the principle of a complete, coercive government of a single body politic, it is national. Indeed, one may even contrast federalism, not only with national government, but with government as such. This is in fact what Alexander Hamilton argues in *Federalist* 15. The Constitution differs from the Articles of Confederation, he argues, because it incorporates "those ingredients which may be considered as forming the characteristic difference between a league and a government."¹²

Because they thus understood federalism, the leading Framers of the Constitution were convinced that no "merely federal" system would suffice for the purposes of union.¹³ For those purposes, the federal principle of voluntary association was inadequate; a true government of the whole was required. "Mr. Govr. Morris explained the distinction between a *federal* and *national, supreme*, Govt.; the former being a mere compact resting on the good faith of the parties; the latter having a complet and *compulsive* operation."¹⁴ Accordingly, in the Virginia Plan, the leading Framers proposed "a *national* Government . . . consisting of a *supreme* Legislative, Executive & Judiciary."¹⁵ Happily, as we may now say, they did not wholly succeed in their plan to institute "one supreme power, and one only";¹⁶ federal elements were worked back into their national design. Had the nationalists wholly succeeded, the Preamble of the Constitution would have had to read "in order to form a perfect Union," not just a "*more perfect*" one. Had the opponents of the Constitution succeeded, the country would have remained under the radically imperfect Union provided by the Articles of Confederation. The phrase "a more perfect Union" is no grammatical solecism, but an accurate description of the compromised, compoundly federal and national system that resulted from

12. THE FEDERALIST No. 15, at 95.

13. I M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 33 (rev. ed. 1937).

14. *Id.* at 34 (emphasis in original).

15. *Id.* at 33 (emphasis in original).

16. *Id.* at 34 (remark of Gouverneur Morris).

the Convention and that Madison had the theoretical apparatus to analyze so precisely.

The Federalist's theory of federalism is not only analytically superior to our contemporary approach in explaining the American political system as originally devised, but it also better illuminates the federal-national balance of the system as it has developed historically. The Senate is again a good case in point. It has developed in some respects into a more nationally oriented body than the House, where localist tendencies are very strong. Yet why should this be so if the Senate, because of the equal suffrage of the states, is the formally federal branch of the legislature? Should that not have made the Senate primarily parochial rather than national in outlook? It could be suggested that its not having become so is but one more example of the way formal, institutional factors propose, while underlying historical and behavioral forces informally dispose in unanticipated ways. We need not have recourse to the mysterious working of such forces in order to explain why the Senate developed both federal and national characteristics. Using *The Federalist's* compound theory, we can see that the Senate was formally constituted in a more compound manner than is usually appreciated. Now the leading Framers had always intended some sort of senate to balance and moderate the more immediately democratic House of Representatives; as the democratic analogue of the traditional upper or aristocratic house, it was intended to be the branch that took the longer and more systematic, as it were, the more national view. But the Connecticut Compromise (national House, federal Senate) threatened to balk that intention. The leading Framers feared that the Senators, as had been so many delegates to the Confederal Congress, would be too closely bound by state interests and views to function, as desired, on behalf of long-run national considerations. They succeeded in mitigating the federal character of the Senate by means of four subtle formal departures from the practice under the Articles of Confederation. One was the provision for per capita voting ("each Senator shall have one Vote"). The Articles had required each state's delegates to cast a single ballot as a delegation; this forced them to form, as it were, an ambassadorial judgment on behalf of the state. The constitutional per capita provision invites and enables Senators to form individual legislative judgments just as do members of the national House of Representatives.

The other departures were three closely linked provisions, all of which likewise tended to lessen the federal control of the states over the Senators. One disallowed the states the power they had under the

Articles to recall their delegates at any time. Another provided for the six-year senatorial term; and the third permitted indefinite and uninterrupted eligibility for re-election. The Articles had provided that no person could serve more than three years during any six-year period, the aim being to keep the delegates on a short leash with frequent rustication, so to speak, back to the states.

It is easy to summarize the significance of all these departures. The *federal* aim of the Articles was to reduce the delegates as much as possible to the status of agents of their states. The *national* aim of the Constitution was to make the Senators, despite the federally equal suffrage of the states, more nearly into representatives in the Burkean sense, free to serve long-run national interests as the deliberative process suggested. To appreciate the effectiveness of these provisions in permitting the Senate to develop a national outlook despite its partly federal basis, think how very much more federal (like Congress under the Articles) it would have been had the state delegations been obliged to vote as a unit and had the Senators been obliged to function under the threat of state recall. By contrast, imagine that the states had not been made the electoral districts for the Senate and, as was strongly urged at the Convention, that districts had been based upon the same national population principle as the House of Representatives. How very much *less* federal—how very much less committed to the primacy of state interests and views—the Senate and all of American politics would then have become. The peculiarly mixed character of the Senate as it actually developed becomes more visible and intelligible when we understand it in the light of *The Federalist's* theory of a compoundly federal and national constitutional basis.

Indeed, that theory of federalism can make more visible and intelligible the compound complexity of the whole American political system. It is thus especially valuable to those who treasure the federal elements in the compound and who fear that those elements are weakening, because it enables them to see more clearly what and where the sources of federal vitality are throughout the whole political system. As we have seen, these are of two fundamental kinds: everything connected with the division of governing power, and everything connected with the federal elements in the central government. The importance of the first source, the balance between state power and the enumerated powers of the central government, is understandable enough under the modern theory of federalism; indeed, that is all it comprehends. It also is that source or aspect of federalism most familiar and intelligible to students of

constitutional law. Ever since *McCulloch v. Maryland*, the question of the extent of the enumerated powers has been, to use Marshall's phrase, "perpetually arising."¹⁷ In any event, it happens to be a question that is perpetually gratifying to lawyers and the courts because it is so amenable to legal disputation and judicial determination. But *The Federalist*, as this review has argued, directs our attention to what may be called the political rather than the legal side of federalism. It emphasizes that other and neglected source of federalism, namely, the federal elements in the design of the central government itself and in its politics. Both sources of federalism, not just the one emphasized in the modern theory and in constitutional law, sustain the federal vitality of American government and political life, a vitality achieved by keeping interest, affection, power, and energy alive and well at the state level of politics in an otherwise homogenizing and centralizing age. Neither source should be neglected.

The status of the first of these two has been rendered increasingly problematic since the time of the New Deal. For decades the limiting doctrine of delegated and enumerated powers has been eroded, and the scope of national government has been vastly expanded. True, the strength of the states in the system has not been weakened to a corresponding degree. This is because the states have likewise vastly increased the scope of their activities. Although perhaps not an unmixed blessing, it means that the state is still that government which most affects citizens in their daily lives. Heedless of many learned pronouncements on their obsolescence, the states have thus stubbornly retained more of their federal vigor than might have been expected. Nonetheless, those who are concerned to preserve the federalism in the American compound remain concerned to limit the growth of national government relative to the states, as one indispensable support for that federalism. To this end, it is especially necessary to restore the moral and intellectual *bona fides* of the constitutional doctrine of enumerated powers as a crucial resource for limiting that growth.

But those concerned to preserve federalism must also devote their energies to that other support of American federalism to which *The Federalist* alerts them, namely, the federal elements in the central government. One such element now under heavy attack is the Electoral College. But the federal aspect to the Electoral College controversy has received relatively little attention: indeed, it is regarded as irrelevant to it. The argument has been that because the President is the rep-

17. 17 U.S. (4 Wheat.) 316, 405 (1819).

representative of "all the people," he should be elected by them in a wholly national way, unimpeded by the interposition of the states through the Electoral College. Given the prevailing understanding of federalism, the "general" government is supposed to be purely national; from this perspective, the participation of the states in presidential selection does indeed seem to be an unjustifiable intrusion, and the potential "mischiefs" resulting from that intrusion seem insupportable. But from the perspective of *The Federalist's* compound theory of American government, there is no reason why the President, admittedly the representative of "all the people," cannot represent them and, hence, be elected by them in a way corresponding to the American government's compoundly federal and national character.

The Presidency, especially the modern Presidency, is no doubt the most nationalizing single element in the American political system, and quite rightly so. Yet the method by which the President is elected has also operated for years in a countervailing federalizing fashion, and just as rightly so. Every Presidential election—the nominating campaigns as well as the electoral campaign itself—is a dramatic reaffirmation that the states are the basis of American political life. Nothing is more vigorously federal than this informal manifestation of federalism in political practice. But it all depends upon the formal structure of the Electoral College as originally conceived and as subsequently statutorily modified by the states. The informal federalizing effect of the Electoral College derives in the first instance from the "compound ratio" by which the states figure in the original constitutional design. Still more federalizing is the general ticket or unit-rule system (the state's entire electoral vote goes to the popular vote winner in the state) which, for nearly a century and a half, almost all the states have employed. Any removal of these federalizing elements, any change toward a purely national mode of Presidential election, would have a corresponding nationalizing effect on the spirit and practice of American politics. The nominating process—primaries and national party conventions—now is radically decentralized by force of the Electoral College's use of the states as states; the nominating process naturally takes its cues from the electing process. If the President were elected in a single national election, the same "cuing" process would continue, but in reverse.

However unproblematic such a centralizing effect might have seemed to partisans of electoral reform some years ago, it seems very problematic indeed now when circumstances are so changed. The thrust of much recent social and political criticism has been against

the homogenizing and centralizing tendencies of mass society and its tendency to diminish political participation. *The Federalist* alerts us to the federal implications of the Electoral College and its potential for countervailing those tendencies. To nationalize the Presidential election, especially in this age of electronic media, is to reduce Presidential politics to a single arena with room for little participation. By preserving the federal importance of the states in the process, the Electoral College scatters the Presidential contest into fifty-one arenas (the states and the District of Columbia), with correspondingly enlarged opportunity for a vastly greater number of political participants.

The modern theory of federalism tends to blind us to such peripheral possibilities of federalism in the Presidential election process and throughout our political system. *The Federalist's* theory is superior in clarity and comprehensiveness. The reason this can be so, despite nearly two centuries of eventful history since *The Federalist* was written, is that its political understanding was not limited to the historical period within which it was produced. Rather, it speaks to perennial political issues and, especially, to those peculiar to the genius of American politics. Publius (the pen name Hamilton, Madison, and Jay used in writing the essays) remains our most instructive political thinker. Making accessible to contemporary use his subtle understanding of federalism and of the compoundly federal and national American republic has been the intention of this review.