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Document of the Month

Center *for the* Study *of the* American Constitution

No. 18: Union, Consolodation, and *The Federalist #39*

Two ideas that figure prominently in the enduring debates in American constitutional history are sovereignty and power. Prior to 1787, most political thinkers assumed that sovereignty could not be divided; in essence, a zero sum proposition. In the British constitutional system, the struggle for sovereignty was contested between the monarchy and Parliament. This struggle was most notable in mid-17th century England. The culmination of this struggle was when Parliament declared itself sovereign. In 1688 in the English Bill of Rights, Parliament stated "the pretended power of the monarchy and the execution of laws by regal authority without consent of Parliament is illegal." While these two entities contested for supremacy, American colonials were left in large part to govern themselves with minimal interference from either. This legacy, often called benign neglect, was critical in how colonists would think about sovereignty and power.

Perhaps the most notable events illustrating this dispute between King and Parliament occurred in the mid-1760s. After the French and Indian War, Parliament embarked on a new imperial policy, which colonists viewed as unconstitutional. The period of benign neglect, a period where there was little control exercised by Parliament over the American colonies, came to an abrupt end. Most notably, Parliament passed the Stamp Act in 1765 "for granting and applying certain stamp duties, and other duties, in the British colonies and plantations in America." British colonists resented the notion that a distant imperial government was interfering with a long established tradition of local prerogatives. Consequently, the act led to widespread popular protests (some which were violent), formal petitions from colonial legislatures, as well as a remonstrance from the Stamp Act Congress. The Stamp Act Congress tersely noted "that no taxes ever have been, or can be constitutionally imposed on them, but by their respective legislatures." Although Parliament would repeal the Stamp Act in 1766, it would also on the same day, assert its sovereignty in the Declaratory Act declaring that Parliament had the right to bind the colonists in "all cases whatsoever" and any act, resolution, or petition by their local colonial legislatures counter to this authority was "hereby declared to be, utterly null and void to all purposes whatsoever."

Given the irreconcilable nature of the dispute, the conflict ultimately culminated in war. After the Boston Tea Party (16 December 1773), Parliament passed a series of four laws American colonists labeled as the Intolerable Acts. Additionally, delegates from twelve colonies calling themselves a Continental Congress, gathered in September 1774 in Philadelphia to address what they considered as the heavy handedness of a distant and tyrannical government. Few argued for independence, while most sought to stay within the British Empire with some measure of local autonomy. The central dilemma was whether sovereignty could be divided. Ultimately, in the Second Continental Congress, their deliberations produced two critical documents each asserting that sovereignty was in fact localized. In the last paragraph of the Declaration of Independence, Congress stated that the "Colonies are, and of Right ought to be Free and Independent States." Congress also drafted a federal constitution–the Articles of Confederation–in which the second article stated that "Each state retains its sovereignty, freedom, and independence" and that Congress should only have those powers that were "expressly delegated" in the Articles. The states adopted the Articles of Confederation on 1 March 1781.

Throughout the 1780s, issues of sovereignty and power continued to be hotly contested topics. Nationalists, those who wanted a strong central government, were frustrated as several attempts to strengthen the Articles of Confederation failed. For the Articles to be amended, the assent of all thirteen state legislatures was necessary; a provision that reflects the principle of the equality and sovereignty of each state. Both the Impost of 1781 and of 1783 ultimately failed to get the unanimous approval of the states. Likewise, other proposals to strengthen the Confederation Congress' commercial and taxing powers also failed to be ratified by all of the states. Exasperated nationalists like James Madison best summed up their frustrations with these setbacks which illustrated the problem of the powers of the states and their desire to protect their sovereignty. Much of his memo called Vices of the Political System of the United States reveals this frustration. In an 8 April 1787 letter to Edmund Randolph. Madison noted "that an individual independence of the States, is utterly

irreconcileable with the idea of an aggregate sovereignty." It was this frustration that drove the agenda of Madison and other nationalists like Alexander Hamilton, Gouverneur Morris, and James Wilson at the Philadelphia Convention.

During the ratification debates, this discussion continued. Although many issues were debated by the Federalists and Antifederalists, the primary issues were a lack of a bill of rights and the nature of the federal/state relationship. Federalist writer Numa saw the "union is slender" and that it "exists in idea rather than reality." He proposed that since union was paramount, the proposed Constitution would "bestow dignity . . . control our finances . . . and secure prosperity to the citizens." For Antifederalists, the proposed Constitution was nothing short of a consolidation of the states into a single and potential tyrannical government. Agrippa IV suggested that the necessary and proper and the supremacy clauses would create a system that was as dangerous as the Declaratory Act passed by Parliament in 1766. He asserted that Congress could "make rules in all cases" and that the system was "a consolidation of all the states into one large mass." Any attempts to combine the people of a nation the size of the United States was "contrary to the whole experience of mankind."

It was within this framework that Publius (James Madison) attempted to assure Americans that the Constitution preserved key elements of state power while at the same time creating a stronger central government. In essence his task was to establish the legitimacy of dual sovereignty. In *The Federalist 39*, Madison outlined the parts of the Constitution that retained the sovereignty and powers of the states: a Senate that represented the states and a national government that would only exercise enumerated powers leaving all other powers to the states. He also delineated the features of the Constitution that were necessary to an American union to be successful including a supremacy in enumerated powers. Without such a supremacy Publius feared "an appeal to the sword and a dissolution to the contract." Dual sovereignty was illustrated in that both the national government and state governments had a role in: ratifying the Constitution, amending the Constitution as well as electing the President through an electoral college.

Students of the *Federalist Papers* most often cite essays #10, #51, #78, and #84 as essential reading. Although, it is certain these should rightfully be considered indispensable, this month we submit for your consideration, *Publius: The Federalist 39* for inclusion in the pantheon of *The Federalist* essays. ■

Documents

Numa: Political and Moral Entertainment VII, *Hampshire Gazette* (Northampton, Mass.), 5 September 1787 (excerpts)

. . . Our union is slender: exists rather in idea than in reality—in the shadow than in the substance. Her present state is the grief of the friends of the union, the source of the fears of strangers and the subject of the ridicule of enemies. It is an acknowledged point that without a federal government which binds, collects and consolidates the wisdom, wealth & strength of the states, the union is dissolved, our national existence is destroyed, and the world knows us not. Without a government which can employ and improve the power of the whole to national purposes we are an headless trunk: a monster in creation. Thirteen bodies without one soul to inspire, pervade and move the complicated, unwieldy and nameless machine.

A federal constitution is essential to bestow dignity on the union, to control our finances, to regulate commerce, to make treaties, to establish the government of the individual states, secure prosperity to the citizens, protect from foreign invasions, aid and insure the establishment of our credit abroad, provide for the discharge of our debts, discover and apply aright the means in our possession for this end, banish discontent, effect a oneness of wishes and designs, and preserve to us and our posterity the blessings of independence.

To gain such valuable and essential objects, every state must relinquish some privileges of less consideration. The separate interests of the states, viewed upon a large scale, are small objects and must be given up for the public good. When all is at stake, it will not be wise nor reputable to grasp too tight, and dispute too obstinately about claims which do not belong to us in a federal capacity. On the generous relinquishment of which our political happiness stands. Demolish the dagon of state sovereignty which you have too long worshipped. Guard against selfishness the bane of public bodies as well as individuals. Beware of those local views which would draw every thing into their own narrow vortex. Rise not on the ruin of a sister state. Make not a sacrifice of the country. . . .

Agrippa IV, *Massachusetts Gazette*, 4 December 1787 (excerpts)

. . . It is the opinion of the ablest writers on the subject, that no extensive empire can be governed upon republican principles, and that such a government will degenerate to a despotism, unless it be made up of a confederacy of smaller states, each having the full powers of internal regulation. This is precisely

the principle which has hitherto preserved our freedom. No instance can be found of any free government of considerable extent which has been supported upon any other plan. Large and consolidated empires may indeed dazzle the eyes of a distant spectator with their splendour, but if examined more nearly are always found to be full of misery. . . To promote the happiness of the people it is necessary that there should be local laws; and it is necessary that those laws should be made by the representatives of those who are immediately subject to the want of them. . . .

It is impossible for one code of laws to suit Georgia and Massachusetts. . . . The continental legislature has, therefore, a right to make rules *in all cases* by which their judicial courts shall proceed and decide causes. No rights are reserved to the citizens. The laws of Congress are in all cases to be the supreme law of the land, and paramount to the constitutions of the individual states. The Congress may institute what modes of trial they please, and no plea drawn from the constitution of any state can avail. This new system is, therefore, a consolidation of all the states into one large mass, however diverse the parts may be of which it is to be composed. The idea of an uncompounded republick, on an average, one thousand miles in length, and eight hundred in breadth, and containing six millions of white inhabitants all reduced to the same standard of morals, of habits, and of laws, is in itself an absurdity, and contrary to the whole experience of mankind. . . .

Publius: The Federalist 39, New York *Independent Journal*, 16 January 1788 (excerpts)

[Introduction]

. . . But it was not sufficient, say the adversaries of the proposed Constitution, for the Convention to adhere to the republican form. They ought, with equal care, to have preserved the *federal* form, which regards the union as a *confederacy* of sovereign States; instead of which, they have framed a *national* government, which regards the union as a *consolidation* of the States. And it is asked by what authority this bold and radical innovation was undertaken. The handle which has been made of this objection requires, that it should be examined with some precision. . . .

First. In order to ascertain the real character of the government it may be considered in relation to the foundation on which it is to be established; to the sources from which its ordinary powers are to be drawn; to the operation of those powers; to the extent of them; and to the authority by which future changes in the government are to be introduced.

[Ratification of the Constitution]

On examining the first relation, it appears on one hand that the Constitution is to be founded on the assent and ratification of the people of America, given by deputies elected for the special purpose; but on the other that this assent and ratification is to be given by the people, not as individuals composing one entire nation; but as composing the distinct and independent States to which they respectively belong. It is to be the assent and ratification of the several States, derived from the supreme authority in each State, the authority of the people themselves. The act therefore establishing the Constitution, will not be a *national* but a *federal* act.

That it will be a federal and not a national act, as these terms are understood by the objectors, the act of the people as forming so many independent States, not as forming one aggregate nation, is obvious from this single consideration that it is to result neither from the decision of a *majority* of the people of the Union, nor from that of a *majority* of the States. It must result from the *unanimous* assent of the several States that are parties to it, differing no other wise from their ordinary assent than in its being expressed, not by the legislative authority, but by that of the people themselves. Were the people regarded in this transaction as forming one nation, the will of the majority of the whole people of the United States, would bind the minority; in the same manner as the majority in each State must bind the minority; and the will of the majority must be determined either by a comparison of the individual votes; or by considering the will of a majority of the States, as evidence of the will of a majority of the people of the United States. Neither of these rules has been adopted. Each State in ratifying the Constitution, is considered as a sovereign body independent of all others, and only to be bound by its own voluntary act. In this relation then the new Constitution will, if established, be a *federal* and not a *national* Constitution.

[Election of Congress and the President]

The next relation is to the sources from which the ordinary powers of government are to be derived. The house of representatives will derive its powers from the people of America, and the people will be represented in the same proportion, and on the same principle, as they are in the Legislature of a particular State. So far the Government is *national* not *federal*. The Senate on the other hand will derive its powers from the States, as political and co-equal societies; and these will be represented on the principle of equality in the Senate, as they now are in the existing Congress. So far the government is *federal*, not *national.* The executive power will be derived from a very compound source. The immediate election of the President is to be made by the States in their political characters. The votes allotted to them, are in a compound ratio, which considers them partly as distinct and co -equal societies; partly as unequal members of the same society. [If no person receives a majority of the electoral votes,

the president is to be selected by the House of Representatives.] The eventual election, again is to be made by that branch of the Legislature which consists of the national representatives; but in this particular act, they are to be thrown into the form of individual delegations from so many distinct and co-equal bodies politic. From this aspect of the Government, it appears to be of a mixed character presenting at least as many *federal* as *national* features.

[Operation of Government]

The difference between a federal and national Government as it relates to the *operation of the Government* is supposed to consist in this, that in the former, the powers operate on the political bodies composing the confederacy, in their political capacities: In the latter, on the individual citizens, composing the nation, in their individual capacities. On trying the Constitution by this criterion, it falls under the *national*, not the *federal* character; though perhaps not so compleatly, as has been understood. In several cases and particularly in the trial of controversies to which States may be parties, they must be viewed and proceeded against in their collective and political capacities only. So far the national countenance of the Government on this side seems so to be disfigured by a few federal features. But this blemish is perhaps unavoidable in any plan; and the operation of the Government on the people in their individual capacities, in its ordinary and most essential proceedings, may on the whole designate it in this relation a *national* Government.

[Powers of the Government]

But if the Government be national with regard to the *operation* of its powers, it changes its aspect again when we contemplate it in relation to the *extent* of its powers. The idea of a national Government involves in it, not only an authority over the individual citizens; but an indefinite supremacy over all persons and things, so far as they are objects of lawful Government. Among a people consolidated into one nation, this supremacy is compleatly vested in the national Legislature. Among communities united for particular purposes, it is vested partly in the general, and partly in the municipal Legislatures. In the former case, all local authorities are subordinate to the supreme; and may be controuled, directed or abolished by it at pleasure. In the latter the local or municipal authorities form distinct and independent portions of the supremacy, no more subject within their respective spheres to the general authority, than the general authority is subject to them, within its own sphere. In this relation then the proposed Government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects. It is true that in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide, is to be established under the general Government. But this does not change the principle of the case. The decision is to be impartially made, according to the rules of the Constitution; and all the usual and most effectual precautions are taken to secure this impartiality. Some such tribunal is clearly essential to prevent an appeal to the sword, and a dissolution of the compact; and that it ought to be established under the general, rather than under the local Governments; or to speak more properly, that it could be safely established under the first alone, is a position not likely to be combated.

[Amendments to the Constitution]

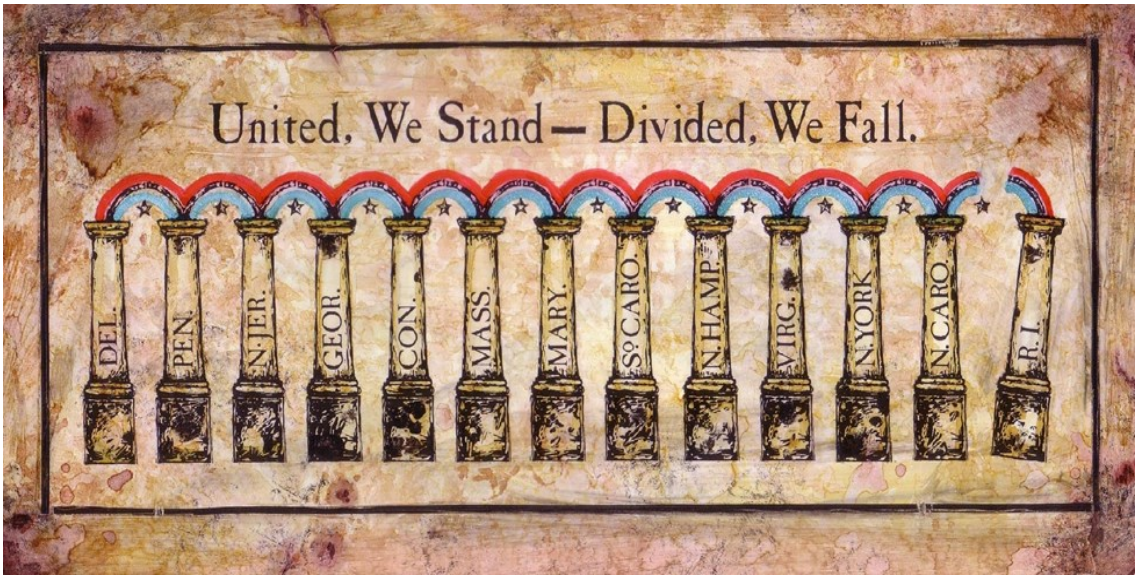
If we try the Constitution by its last relation, to the authority by which amendments are to be made, we find it neither wholly *national*, nor wholly *federal*. Were it wholly national, the supreme and ultimate authority would reside in the *majority* of the people of the Union; and this authority would 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 head, the concurrence of each State in the Union would be essential to every alteration that would be binding on all. The mode provided by the plan of the Convention is not founded on either of these principles. In requiring more than a majority, and particularly, in computing the proportion by *States*, not by *citizens*, it departs from the *national*, and advances towards 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.

[Conclusion]

The proposed Constitution therefore is in strictness neither a national nor a federal constitution; but a composition of both. In its foundation, it is federal, not national; in the sources from which the ordinary powers of the Government are drawn, it is partly federal, and partly national: in the operation of these powers, it is national, not federal: In the extent of them again, it is federal, not national: And finally, in the authoritative mode of introducing amendments, it is neither wholly federal, nor wholly national. ■

Discussion Questions for a Socratic Seminar

- Would you suggest that Numa relies too heavily on prestige as the basis of his argument?
- Is it possible for a nation to have prestige without a strong central government?
- Do you find Agrippa's argument convincing when he claims the nation is too diverse to have a central government that would not be oppressive?
- To what extent do historical events play in the arguments of both Numa and Agrippa?
- Both Numa and Publius are Federalists, to what extent are their arguments similar? To what extent are they different?
- In your view, which characteristic of the republic as described by Publius has been predominate in American history–the federal or the national?
- Does a federal republic like Publius envisions automatically create a continuous struggle over sovereignty and powers.
- Do you find Publius' argument convincing that the Constitution is neither wholly federal nor wholly national?



Teaching Tools

I. Numa and the Use of Hyperbole in the Ratification Debates

1. As a preface to this lesson, you may want to define and discuss the meaning of the word "hyperbole." After a brief discussion, tell the class they will be looking at an item from the ratification debates that contain hyperbolic language.
2. Divide the class into groups of 3-5 students. All students should read Numa and as they read the essay, they should highlight words they think are hyperbolic.
3. After students have read their assigned essay, have them share in their small groups and compile a list of hyperbolic words in their essay.
4. You can have groups report their findings to the entire class.
5. After groups have shared their findings, you can lead a discussion using the following questions.

    a) Do you think hyperbole is effective in a debate?

    b) Is there a point where hyperbole becomes ineffective?

    c) Has Numa gone too far in the use of hyperbole?

    d) In your opinion, why has Numa used hyperbolic rhetoric?

(As an extension activity, you may want to have students illustrate the United States without the Constitution as described by Numa. Students should consult the cartoons, illustrations, and drawings associated with graphic novels, dystopian novels and movies as examples to consider as they create their own illustrations.

II. Which is It: Federal or National?

An Important Note to the Teacher: Before using this lesson, you will need to explain how James Madison uses the terms "federal" and "national." In this essay, when Madison uses the word "federal," he actually means a system of government that is a collection of states that has a high degree of local control over the central government. This, in fact, is what the term meant at that time. When Madison uses the term national, he is referring to a system of government that has a strong central government and local governments have less power. Another critical point for students to consider is the matter of representation. Under the Articles of Confederation, states were represented in the Confederation Congress. Under the proposed Constitution, states were represented most notably in the Senate. Individuals were represented in the House of Representatives.

1. Divide the class into six groups. Each group should have access to the graphic organizer below. Each group should read a section of Publius: *The Federalist 39*.
2. The initial question students should consider is if their assigned feature is national (consolidated) or federal (confederated).

Constitutional Feature	Federal/National/Both?	Why?
Process of Ratification		
Election of Senators		
Election of Representatives		
Amending the Constitution		

3. After students have had time to read and discuss their conclusions, you can have them share their findings with the class. It is critical for students to see and explain from the document that, according to Publius:

- The process of ratification is federal (states ratify) and national (people ratify).
- The election of Congress (the Senate) is federal. The election of Congress (the House) is national. Which means Congress as a whole is both federal and national.
- The election of the President is both federal and national.
- The operation of government is both since laws impact individuals (national) as well as states (federal).
- The powers of government are federal. This is perhaps the most difficult argument made by Madison in the essay. It is based on the idea that since the powers in the Constitution are limited/enumerated powers and all other powers are retained by the local governments. Madison concludes that in this regard, the Constitution is federal: having minimal impact on the local governments.
- Amending the Constitution is both federal and national.

4. After reviewing the students' findings you may want to lead a discussion using the following questions:

- Do you find Publius' argument that the Constitution is both federal and national convincing?
- Do you think the system of government under the Constitution has developed so that one feature (federal or national) dominates over the other?
- What, if any, part of Publius' arguments do you find unconvincing?
- To what extent do you think that the arguments made by Publius that sovereignty can be divided is valid?

Vocabulary

Numa: Political and Moral Entertainment VII

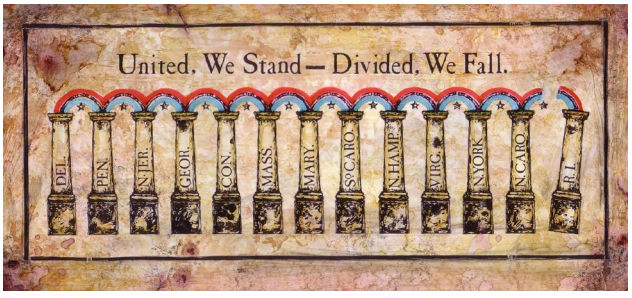
1. *ridicule:* mockery
2. *consolidates:* combines into one
3. *pervade:* spread throughout or be present in all
4. *bestow:* to present an honor
5. *banish:* to rid, eliminate, or take away
6. *posterity:* future generations
7. *relinquish:* give up
8. *dagon:* an evil pagan deity
9. *bane:* great distress
10. *vortex:* a whirlpool or whirlwind

Agrippa IV

1. *despotism:* a system of absolute power
2. *confederacy:* a league or alliance of equals
3. *consolidated:* combined into one
4. *paramount:* more important or supreme

Publius: *The Federalist #39*

1. *adversaries:* enemies
2. *sovereign:* supreme authority
3. *innovation:* a new idea or invention
4. *ascertain:* to reason with certainty
5. *assent:* agree
6. *derived:* a conclusion based on reasoning
7. *aggregate:* a whole based on a combination of things
8. *delegations:* a group of representatives
9. *capacities:* the ability or power to act
10. *countenance:* appearance
11. *disfigured:* an appearance severely harmed or altered
12. *designate:* to assign or appoint
13. *contemplate:* to think or speculate
14. *vested:* assigned power
15. *subordinate:* lower in rank or position
16. *jurisdiction:* area or sphere of authority
17. *enumerated:* listed
18. *residuary:* remainder
19. *inviolable:* never broken or dishonored
20. *tribunal:* court
21. *impartially:* objectively
22. *competent:* having required ability or skill
23. *concurrence:* of the same opinion or to agree


United, We Stand — Divided, We Fall.
DEL.
PEN.
N.JER.
GEOR.
CON.
MASS.
MARY.
S.CARO.
N.HAMP.
VIRG.
N.YORK
N.CARO.
R.I.