Introduction to *Federalist #39*

In *Federalist #39*, Madison addresses the primary objection to the Constitution: the belief that the new national government would effectively eliminate the power and sovereignty of the states. The opponents of the Constitution were not eager for the states to relinquish the independence they had fought the British to establish, an independence they felt had been secure under the Articles of Confederation. Those who supported stronger state governments, the Antifederalists, felt that because each state had its own particular economic base, its own customs, and its own interests, each should be able to make laws tailored to fit its particular circumstances without interference. Furthermore, since 1783 conflicts had occurred between adjoining states arising from boundary disputes, trade barriers, and over-printed currency. As a result, they were neither predisposed to trust each other in a stronger union nor to trust the powerful central government proposed by the Constitution of 1787. On the other side, the Federalists believed a stronger union was required to protect the young country from instability from within and aggression from without.

Madison attempts in this essay to allay the fears of the Antifederalists, or at least to deprive them of an argument, and to secure the support of the undecided. He describes the new government as a finely-crafted compromise between a confederate government and a highly centralized unitary government. This compromise government would balance the prerogatives of local government against the necessity for national unity and strength. It is essential when assigning this essay to students first to define clearly the concepts of sovereignty (supreme authority, independence), as well as the modern terms, unitary, confederate and federal. A lesson on the original design of the Electoral College is also very helpful.

Madison begins this essay by showing how terms of office under the new Constitution are based on those of the states, and he ends having detailed the many provisions of that document which allow the states to continue the co-equal and independent status they have enjoyed under the Articles of Confederation. Modelled on the states and incorporating their sovereignty, the new government is neither radical nor dangerous.

He admits the superior position of the national government in this new arrangement only briefly when he says that disputes about the limits of state versus federal sovereignty will be decided in a court of the national government. He then dismisses this as a source of conflict by asserting, without proof, that the federal judiciary will be impartial in these disputes. It is interesting to consider John Marshall's decisions in Gibbons v. Ogden and McCulloch v. Maryland in light of this assertion. In fact the subsequent history of federalism shows an enlargement of the powers of the federal government at the expense of state powers primarily justified by the "necessary and proper" clause and the interstate commerce clause. Neither of these Constitutional provisions is mentioned in *Federalist #39*.

The Constitution, in fact, seems to have created the conditions for a power struggle which erupted into civil war in 1861 and which continues to the present day. We see it in the debate over unfunded mandates, the federal government's use of superior taxing powers to coerce the states into accepting national policies, and in the ability of the states, on occasion, to thwart the national will. On the other hand, even though the intricate balance between two separate spheres of power painstakingly constructed in the Constitution has not survived the intervening two hundred plus years perfectly in tact, the federal republic, which that document created, has. The success of this hybrid government is further attested to by the other large democracies which have adopted its form.

The Federalist No. 39

(The Conformity of the Plan to Republican Principles)

January 17, 1788

Define these terms before you read the essay:

unitary	ratification	elite	judicial	sphere of power
confederate	republic	executive	popular government	sovereignty
federal	republican	legislative	impeachment	

In this paper, Madison first establishes that the new government will be a true republic. He then goes on to describe the nature of that government. He argues that it is neither unitary (like England's) nor is it a confederate government (such as existed under the Articles of Confederation) but a combination of the two. Unique in history, this new system of government would come to be called "federalist."

Madison uses the terms "federal" where we would use "confederate." He uses the word "national" as we would use the word "unitary." In the version in the right column, the modern terms "unitary," "confederate," and "federal" have been substituted for Madison's terms for the sake of clarity.

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Original

THE last paper having concluded the observations which were meant to introduce a candid survey of the plan of government reported by the convention, we now proceed to the execution of that part of our undertaking.

The first question that offers itself is, whether the general form and aspect of the government be strictly republican. It is evident that no other form would be reconcilable with the genius of the people of America; with the fundamental principles of the Revolution; or with that honorable determination which animates every votary of freedom, to rest all our political experiments on the capacity of mankind for self-government. If the plan of the

Modern

The Federalist No. 38 having concluded our survey and overview, we now proceed to examine the new Constitution in detail.

The first question we need to answer is whether the general form of the new government is strictly republican. Clearly, no other form would fit the special character of the American people, the basic principles of the Revolution, and the desire of all those who love freedom to base our political experiments on the capacity of mankind for self-government. If the new Constitution, therefore, departs from the principle of republican government, its advocates cannot honorably defend it.

convention, therefore, be found to depart from the republican character, its advocates must abandon it as no longer defensible.

What, then, are the distinctive characters of the republican form? Were an answer to this question to be sought, not by recurring to principles, but in the application of the term by political writers, to the constitution of different States, no satisfactory one would ever be found. Holland, in which no particle of the supreme authority is derived from the people, has passed almost universally under the denomination of a republic. The same title has been bestowed on Venice, where absolute power over the great body of the people is exercised, in the most absolute manner, by a small body of hereditary nobles. Poland, which is a mixture of aristocracy and of monarchy in their worst forms, has been dignified with the same appellation. The government of England, which has one republican branch only, combined with an hereditary aristocracy and monarchy, has, with equal impropriety, been frequently placed on the list of republics. These examples, which are nearly as dissimilar to each other as to a genuine republic, show the extreme inaccuracy with which the term has been used in political disquisitions.

If we resort for a criterion to the different principles on which different forms of government are established, we may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior. It is ESSENTIAL to such a government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans, and claim for their government the honorable title of republic. It is

What, then, characterizes a republican form of government? If we look at the way political writers use the term in describing the constitutions of different governments, we will not find a satisfactory answer. The whole world calls Holland a republic when no part its governments powers is derived from the people. The same title has been given to Venice where absolute power over the people is exercised by an hereditary ruling class. Poland, which is a mixture of aristocracy and monarchy in their most extreme forms has been honored with the same name--a republic. The government of England which has one republican (representative) branch only combined with an hereditary aristocracy and monarchy has just as incorrectly been called a republic. The examples, which are as different from each other as they all are from a genuine republic, show the extreme inaccuracy with which this term is used in political writing.

By referring to the principles upon which governments are established, we may define a republic as a government which derives all of its powers directly or indirectly from the people, and is administered by officers who hold their positions for limited terms or for unlimited terms with the possibility of impeachment for improper conduct. It is essential for such a government that it derive its power from the people as a whole, not from a small faction or a favored class. Otherwise, a few members of an economic or political elite, oppressing the people through their appointed officials, might want to call themselves republicans and claim for their government the honorable title of a republic. To be called a republic, it is enough that the persons administering the government be directly or indirectly appointed by the people, and that they hold their appointments for a limited term or during a term of good behavior. Any other method of choosing an executive branch would undermine a popularly elected government regardless of how otherwise well

SUFFICIENT for such a government that the persons administering it be appointed, either directly or indirectly, by the people; and that they hold their appointments by either of the tenures just specified; otherwise every government in the United States, as well as every other popular government that has been or can be well organized or well executed, would be degraded from the republican character. According to the constitution of every State in the Union, some or other of the officers of government are appointed indirectly only by the people. According to most of them, the chief magistrate himself is so appointed. And according to one, this mode of appointment is extended to one of the co-ordinate branches of the legislature. According to all the constitutions, also, the tenure of the highest offices is extended to a definite period, and in many instances, both within the legislative and executive departments, to a period of years. According to the provisions of most of the constitutions, again, as well as according to the most respectable and received opinions on the subject, the members of the judiciary department are to retain their offices by the firm tenure of good behavior.

On comparing the Constitution planned by the convention with the standard here fixed, we perceive at once that it is, in the most rigid sense, conformable to it. The House of Representatives, like that of one branch at least of all the State legislatures, is elected immediately by the great body of the people. The Senate, like the present Congress, and the Senate of Maryland, derives its appointment indirectly from the people. The President is indirectly derived from the choice of the people, according to the example in most of the States. Even the judges, with all other officers of the Union, will, as in the several States, be the choice, though a remote choice, of the people themselves, the duration of the appointments is equally conformable to the republican standard, and to the model of State constitutions. The House of Representatives is periodically elective, as in all the States; and for the period of two years, as in the State of South Carolina. The Senate is elective, for

organized and well executed it might be. According to the constitutions of every State in the Union, some officers are appointed indirectly by the people. According to most State constitutions, the governor is also appointed indirectly by the people. And according to one State constitution this method of choosing officials is also used for one of the branches of its legislature. According to all of these constitutions, also, all terms of office are for a specific, limited number of years. According to the provisions of most of the States' constitutions, and the most respected opinions on the subject, the judiciary branch are to retain their offices permanently with the possibility of impeachment for wrong conduct.

Comparing the standards set by the State constitutions to the proposal that we are examining here (the new Constitution), we see at once that the new Constitution strictly conforms to the standard set by the constitutions of the States. The House of Representatives is elected directly by the people in the new Constitution as is the lower house in each State legislature. The new Senate, like the Senate under the Articles of Confederation and the Senate of the State of Maryland, is appointed indirectly by the people. The President is indirectly elected by the choice of the people in a manner that is similar to the selection of the governors of the States. As in the individual States, even judges and all other Presidential appointments will be the choice, though very indirectly, of the people themselves. The terms of office also conform to the standard of republican governments and the model of the State constitutions. The House of Representatives is elected at regular intervals as in all the States and for the period of two years as in the State of South Carolina. The Senate is elected for a period of six years which is only one year more than the Senate is elected for in the State of Maryland and only two more than are the Senates of New York and Virginia. The President is in office for a period of four years. The governors of New York and

the period of six years; which is but one year more than the period of the Senate of Maryland, and but two more than that of the Senates of New York and Virginia. The President is to continue in office for the period of four years; as in New York and Delaware, the chief magistrate is elected for three years, and in South Carolina for two years. In the other States the election is annual. In several of the States, however, no constitutional provision is made for the impeachment of the chief magistrate. And in Delaware and Virginia he is not impeachable till out of office. The President of the United States is impeachable at any time during his continuance in office. The tenure by which the judges are to hold their places, is, as it unquestionably ought to be, that of good behavior. The tenure of the ministerial offices generally, will be a subject of legal regulation, conformably to the reason of the case and the example of the State constitutions.

Could any further proof be required of the republican complexion of this system, the most decisive one might be found in its absolute prohibition of titles of nobility, both under the federal and the State governments; and in its express guaranty of the republican form to each of the latter.

"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.

Delaware are elected for terms of three years and in South Carolina for two years. In other States the election is annual. In several of the States, however, no provision is made for the impeachment of the governor, and in Delaware and Virginia he is not impeachable until he is out of office. By contrast, the President of the United States is impeachable at any time during his term of office. The term of office for judges is, as it unquestionably ought to be, that of good behavior (that is, unlimited except in the case of impeachment). The term of office for executive branch officials other than the President will be decided by Congress according to the nature of the job the official will do and to the example of the State constitutions.

Could any further proof be required that this is a republican government, the most decisive would be that the Constitution absolutely prohibits titles of nobility (this is quite as true for the central government as for the State governments), and guarantees a republican form of government for each of the States.

But it isn't enough, say the opponents of the new Constitution, that the Framers chose a republican form of government, they ought to have cared as much about establishing a confederate form of government which would regard the Union as a confederacy of sovereign States. Instead of which they have formed a unitary government which regards the Union as a consolidation of the States. They further ask by whose authority this bold and radical innovation was undertaken? We need to examine these objections carefully as they are often raised. [The first is examined in this paper and the second is examined in Federalist No. 40.]

Whether or not we agree with this distinction between a confederacy of the States, on the one hand, and

Without inquiring into the accuracy of the distinction on which the objection is founded, it will be necessary to a just estimate of its force, first, to ascertain the real character of the government in question; secondly, to inquire how far the convention were authorized to propose such a government; and thirdly, how far the duty they owed to their country could supply any defect of regular authority.

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.

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 consolidation of the States on the other hand, to fairly judge the merits of this argument, we first need to find out what this new government is really like. Secondly, we need to ask if the delegates to Philadelphia were authorized to propose a new form of government. Thirdly, we should ask how much their sense of duty and devotion to their country can make up for any lack of authorization.

First, in order to discover the real nature of the government, that is whether it is confederate or unitary, we need to look at how it will be ratified by the people, to the sources of its powers; to its use of those powers; to the scope of those powers; and to the source of authority by which this government can be changed.

On examining the first point relating to the real nature of the government, it appears that the Constitution is to be founded on the approval of the people of America through their elected delegates to State ratifying conventions. However, this approval is to be given by the people not as individuals composing one nation but as individuals composing the distinct and independent States to which they belong. The approval of the States will be derived from the supreme authority of each State, that is, from the authority of the people themselves. The act of establishing the Constitution will not be a unitary act (that is, the act of a nation of people), but a confederate act (that is, the act of an association of sovereign States).

A single fact proves that ratification will be confederate in nature: ratification will result not from the decision of a majority of the people in the Union nor from a majority of the States. It must result from the approval of every State that is to be a part of the new nation. If the people were looked upon as forming one nation, the ratification of the Constitution would only require a majority

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 otherwise 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 the majority of the States as evidence of the will of a majority of the people of the United States. Neither of these rules have 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.

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 coequal 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 vote of the whole people of the United States. The majority approval would also obligate the dissenting minority. The will of the majority would be determined by a general vote of all the people or by the approval of a majority of all the States (which would also obligate the dissenting States). But neither of these rules has been adopted. Each State in ratifying the Constitution is considered sovereign and independent and can only obligate itself to the new government by its own voluntary act. Therefore, the new Constitution in its method of ratification will be confederate and not unitary.

We can now look at the second point--the source from which the government derives its powers. The House of Representatives will derive its powers from the people of America and the people will be proportionally and directly represented as they are in the representative house of their own State legislatures. So far then, the government is unitary and not confederate. The Senate, on the other hand will derive its powers from the States as equal political entities. They will be represented on the principle of equality in the Senate as they now are in the existing Continental [Confederate] Congress. So in this respect the government is confederate not unitary. The executive power will be derived from several sources. The first step in the election of the President is to be made by the States as political entities. By choosing some of the Electors according to population, the States are looked upon as unequal because they are unequal in population. By choosing some Electors on the principle of equality, the States are looked upon as equally sovereign and important. The electors then will represent the will of the people in a way that is both unitary and confederate. Unitary because a certain number of electors are chosen according to the population of each State and therefore the people are represented equally as if they were the people of one nation even though the States are represented unequally. And a number of electors are also chosen on the confederate

partly as distinct and coequal societies, partly as unequal members of the same society. 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 coequal 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.

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 completely 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 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.

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

principle, that is, each State has the same two Electors as every other State. However, if no candidate receives a majority of Electoral votes, the election will be decided in the House of Representatives according to the Constitution. The House is the branch of Congress where the people are represented equally as though they were the people of one nation. Even though this is a unitary feature there is a confederate component as well because all of the Representatives from a State will comprise the State delegation and together they will have one vote to cast in the election of the President. And so even though representation is based on a unitary principle in the House of Representatives, the method of election will be confederate. Again we see that the government from this point of view appears to be a mixture with as many confederate as unitary features.

The difference between the way a confederate as opposed to a unitary government operates amounts to this, that in a confederate system the powers of the central government operate on the states composing a confederacy, while unitary governments operate on the individual citizens who compose the nation. Judging the Constitution by this standard, it falls under the unitary and not the confederate category, although perhaps not so completely as you may at first think. In some cases, particularly in settling disputes between the States, the powers of the national government must operate on the States. But in the ordinary operations of government, the people will be dealt with directly by the national government as individual citizens. So by the definition of the Antifederalists, it will be a unitary government.

But if the government is unitary in respect to how it uses its powers, it seems to be more confederate when we consider the scope of those powers. A unitary government compared to a confederate government, does not merely have

and things, so far as they are objects of lawful government. Among a people consolidated into one nation, this supremacy is completely 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 controlled, 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.

authority over individual citizens but an absolute supremacy over all persons and things which are subject to any government control. In unitary governments this supremacy is held by a national legislature. In confederate nations, sovereignty is held partly by the national and partly by the local legislatures. In the case of a unitary form of government, all local units of government are subordinate to the central government and may be controlled, directed, or abolished by it at any time. In a confederate form, local government holds independent and sovereign power over those things which it has a right to control. Within the powers reserved to them by the Constitution, the States are not more subject to the authority of the central government than the central government is subject to them within its own sphere of powers. And in this relationship of shared and independent sovereignty, the proposed government cannot really be called a unitary one since it has only a certain number of powers which are spelled out in the Constitution and it leaves to the States all other powers, powers which cannot be violated by the central government. It is true that when there is a dispute about the boundary between the federal government's and the States' spheres of power, the court which will ultimately decide the question is a court of the federal government and not of one of the States. However, this does not change the basic argument. The decision of that court is to be made impartially according to the rules of the Constitution with all the usual precautions taken to insure impartiality. Some court is clearly necessary to resolve disputes between the States otherwise they will resort to violence which will lead to the dissolution of the whole Union. Furthermore, this court could only be safely established under the national government. It is obvious that only a national court would be regarded as impartial by the States.

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 hand, 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 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.

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.

PUBLIUS.

If we try the Constitution by examining the authority by which amendments are to be made, we find that, again, the government will be neither completely unitary nor completely confederate. If it were unitary, the powers of the government would be derived by a majority vote of all the people. This authority would be enough to amend or even to abolish the government. If the new government were completely confederate, on the other hand, the approval of each State in the Union would be essential to ratify an amendment that would be binding on all the States. Instead, the method provided by the new Constitution does not depend on either of these principles alone. First, it requires more than a simple majority, it requires a three-fourths majority and that is three-fourths not of the citizens but of the States. In this respect, it departs from the unitary and advances toward the confederate character. And, in allowing an amendment to pass by less than a unanimous vote of the States, it loses the pure confederate form and comes closer to the unitary form.

The proposed Constitution, therefore, even when tested by the rules laid down by the Antifederalists is strictly speaking neither a unitary nor a confederate Constitution but a combination of both. In its method of ratification, it is not unitary but confederate. In the source from which the government derives its power, it is partly confederate and partly unitary. In the exercise of these powers it is unitary not confederate. In the scope of these powers it is confederate not unitary. And finally, in the way it is to be amended it is neither wholly confederate nor completely unitary.