



UNLOCKING
THE
FEDERALIST PAPERS

Edited by

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We attempt in this volume to accomplish what the subtitle suggests: unlock the full wisdom, thought and power of the *Federalist Papers* to countless generations of young Americans.

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The Proposed Constitution ... Is Neither Wholly Federal nor Wholly National

Federalism in the Federalist Papers

by John Shu

Federalist Papers referenced in essay: #9, 33, 39, 44, 45, 63, 68

A. Every American citizen has a type of dual citizenship. Americans are citizens of the United States, and may carry a U.S. passport, but Americans are also citizens of the respective states in which they live, and may carry that state's "passport," such as a driver's license or state identity card. A person may be criminally charged for what appears to be the same criminal act in both state court and federal court. This does not violate the Fifth Amendment protection against double-jeopardy because state and federal governments are considered separate political entities. The principle of federalism allows both of these scenarios.

B. Federalism is the division of governmental powers amongst the various levels of governments: national, state, and sometimes local. Federalism is a crucial principle in the U.S. Constitution, yet the Constitution never uses the actual word. Our modern-day government system has several basic federal characteristics: (1) legally distinct governmental domains (*e.g.*, national and state government); (2) the states have certain powers and the federal government has certain powers, but the states are subordinate to the national government and the U.S. Constitution is the supreme

law of the land; (3) the states have a general “police power” to regulate behavior and enforce order within their own borders for the betterment of their citizens’ general welfare, morals, health, and safety; whereas the federal government’s authority comes from its powers which are specifically enumerated in the Constitution; and (4) the U.S. Supreme Court is the final arbiter of legal conflicts between states, as well as between a state and the national government.

C. The federalist nature of our government came about as a result of hard-won lessons. The Founders feared the tyranny of a powerful national executive like King George III, but the Articles of Confederation, fully ratified on March 1, 1781, were not working. One reason was because the states had too much sovereign power. For example, certain states issued their own paper money after the Revolutionary War, which caused runaway inflation. Thus, it was important that only the national government could mint and issue currency. The precarious financial situation of the young nation led to discontent and even armed rebellion. This troubled George Washington, who wrote, *“Let us have a government by which our lives, liberties, and properties will be secured, or let us know the worst at once.”* James Madison, also convinced that the young nation needed a stronger national government, among other things, to prevent states from infringing on citizens’ rights, wrote *“liberty may be endangered by the abuses of liberty as well as the abuses of power* (No. 63).” He and other Founders looked to the principle of federalism to create the proper balance between national and state power.

D. In light of these challenges, the Founders had particular goals when developing the U.S. Constitution, such as: (1) a government responsive to its citizens; (2) a political system that enhanced, rather than discouraged, interaction between government and its citizens; (3) a political system that allowed for

a peaceful coexistence of political order, social order, and individual liberties; and (4) a judicial system that was fair in ensuring justice and not beholden to either the legislature or the executive.

E. The *Federalist Papers* contains numerous passages that address federalism and its role in the proposed U.S. Constitution. For example, Hamilton argues in No. 9 that creating both a sovereign national government and sovereign state governments subordinate to the national government would help protect individual rights against potential abuses by both the national and state governments. Madison expresses concerns over these potential abuses, particularly his fear of the “*tyranny of the majority*,” as opposed to “*tyranny of the minority*,” especially at the state level. However, Madison in No. 45 wrote the “*State governments may be regarded as constituent and essential parts of the federal government*” and the “*component parts of the State governments will in no instance be indebted for their appointment to the direct agency of the federal government*.” At the same time, Madison noted insufficient federal power would be problematic. The Articles of Confederation had failed in part because the several states had veto power over each other, causing the national government to be weak, thus preventing the nation from efficiently governing and operating.

F. Our system of government, unlike a confederation, does not permit the individual states to be equal in sovereignty to the national government. As George Washington envisioned, the United States of America is a *union* of states, not a *confederacy* of states. Article VI, Clause 2 of the U.S. Constitution is known as the “Supremacy Clause” because it establishes the U.S. Constitution, U.S. treaties, and federal statutes as “the supreme law of the land.” Alexander Hamilton in No. 33 stated the Supremacy Clause is important so the national government could properly

execute its powers. National laws would have no “teeth” if they were not considered supreme. James Madison also emphasizes the critical need to have supreme federal law; otherwise, our system of government would be *“an inversion of the fundamental principles of all government; it would have seen the authority of the whole society every where”* meaning the national government

“subordinate to the authority of the parts” meaning the separate state governments; *“it would have seen a monster, in which the head was under the direction of the members [limbs] (No. 44).”*

G. Madison, in No. 39, explains how the national government is to be both state-based (*e.g.*, two senators from each state, regardless of a state’s population) and population-based (number of congressmen from a particular state based on that state’s population). In order to avoid the tyranny of the majority, the several states were to originally ratify the Constitution and later to amend it. The process of amending the Constitution may begin at either the federal level, where two-thirds of both houses of Congress may vote to propose a constitutional amendment, or at the state level, where two-thirds of the state legislatures may ask Congress to call a national convention to propose a constitutional amendment. Ratification of a proposed constitutional amendment requires at least three-fourths of the state legislatures or ratifying conventions in three-fourths of the states. Thus, much of the power of the federal government comes from, and relies on, the several states.

H. Madison also explains powers held by the federal government, and exercised by the Congress, are also derived both from the states and the people within the states. The House of Representatives derives its powers directly from the people, because the people directly elected their representatives and the number of representatives of each state is based on population. The Senate originally derived its powers from the states, because the

state legislatures chose their senators (until the Seventeenth Amendment in 1913 provided for direct election of senators). Each state has two Senators regardless of geographic or population size.

I. The election of the president, according to the original constitution, is also based upon the principle of federalism, in this case a mix of population-based and state-based power. Each state has a number of electors equal to the number of representatives (*i.e.*, a measure of the state's population) plus the number of senators (every state in the nation, regardless of population, has two senators.) The Electoral College is an indirect election in which

the electors, chosen in each State, are to assemble and vote in the State in which they are chosen, this detached and divided situation will expose them much less to heats and ferments, that might be communicated from them to the people, than if they were all to be convened at one time, in one place. (No. 68)

J. This system addressed concerns regarding the preservation of state sovereignty. As long as federal power was exercised by a president who was elected by representatives and senators accountable to the states as well as the citizens of the states, state sovereignty and individual liberty would be preserved. Moreover, Hamilton confidently predicted this mixture of state-based and national constituencies would ensure that "*the office of President will never fall to the lot of any man who is not in an eminent degree endowed with the requisite qualifications* (No. 68)."

K. In the years since the Founding, many Americans have thought of the states as "laboratories" where, because of their sovereignty within their own borders, they could experiment without necessarily affecting their sister states or the nation. In the 1932 case of *New State Ice Company v. Liebmann*, Associate

Supreme Court Justice Louis Brandeis wrote in his dissent, “*It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.*” In the 2005 case of *Gonzales v. Raich*, Associate Supreme Court Justice Sandra Day O’Connor wrote in her dissent that

this case exemplifies the role of States as laboratories.

The States’ core police powers have always included authority to define criminal law and to protect the health, safety and welfare of their citizens ... Exercising those powers, California (by ballot initiative and then by legislative codification) has come to its own conclusion about the difficult and sensitive question of whether marijuana should be available to relieve pain and suffering.

L. The states continue to have great power under the Constitution. As Madison wrote, “*the powers delegated by the proposed Constitution to the Federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite* (No. 45).” The Tenth and Eleventh Amendments also reflect state sovereignty and federalism.

M. Federalism, which divides power among the federal and state governments and the people, is an integral part of our system of government. Part of the genius of our Constitution is as Madison cleverly explained,

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. (No. 39)