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In Federalist 39, James Madison characterized the proposed Constitution as "partly federal and partly national"[1] Since ratification, the proportion of those "parts"—the degree to which the Constitution is national or federal—has been the subject of the most frequent, sustained, and intense debates in constitutional law and politics. From the 1791 debate over the Bank of the United States, to slavery and the secession crisis, to the rise of Jim Crow, to the mid-twentieth century civil rights movement, to the twenty-first century debates over national health care policy—to name just a few constitutional controversies—the theme of the national versus federal character of the Constitution has occupied a central place and produced varying answers about which characterization is more correct.

And the question whether the Constitution is more national or more federal has only been confused by an evolution in what the word "federal" means. Since at least the New Deal, our constitutional order has become accustomed to using the word "federal" to refer to a strong central government presiding over states possessing very limited sovereignty. But the delegates to the Constitutional Convention in Philadelphia in the spring and summer of 1787 used the term "national" to describe that governmental structure, while reserving "federal" to describe what

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[1] THE FEDERALIST NO. 39, at 246 (Madison) (Clinton Rossiter ed. 1961).

they viewed as the fatally flawed system of the Articles of Confederation.

The semantic evolution of the word "federal," from its origin as a descriptor of the decentralized Confederation system to a descriptor of today's predominantly centralized national government, is a story that has yet to be fully told. That story is enmeshed in the history of U.S. constitutional politics in which the nationalism of the Philadelphia Convention was rhetorically downplayed in the ratification debates, and then significantly rolled back by erstwhile Antifederalists who became ascendant after the election of 1800 and habituated our constitutional order to an ideology of federalism that, to this day, exaggerates the Constitution's original commitment to its "partly federal" character.

Our understanding of this colossal federalism story is doomed to incompleteness if not inaccuracy without a proper account of the evolution of the use of the word "federal" in our constitutional order. Such an account would be at least a long article or a book. This essay offers a first step toward such an account by describing and analyzing the first significant appearance of the words "national" and "federal" at the outset of the Philadelphia Convention.

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Wednesday, May 30, 1787, marked the first full day of substantive debate at the Constitutional Convention in Philadelphia. That day, the Convention made two momentous decisions. Sitting as the Committee of the Whole House,[2] it resolved "that a national government ought to be established consisting of a

[2] The Committee of the Whole House was (and is) a legislative procedural device enabling the full legislative chamber to debate under somewhat relaxed procedures and allowing its decisions to be reconsidered by the chamber when sitting as a full house proper. CONG. RSCH. SERV., COMMITTEE OF THE WHOLE: AN INTRODUCTION 1 (2013).

supreme Legislative, Judiciary, and Executive."[3] And it postponed consideration of the provisions to base representation in the national legislature on population.[4] That postponement foreshadowed what proved to be the longest and most challenging debate at the Convention—the one resulting in the "Great Compromise" establishing state voting equality in the Senate. That second decision has therefore tended to overshadow the adoption of the "national government" resolution, which historians and constitutional scholars view as an important but straightforward decision to replace the Articles of Confederation with a wholly new system. The "national government" resolution can thus easily be overlooked as a mere clearing of the decks by the Convention before getting down to business.[5]

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[3] THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand, ed. 1911) (hereinafter "FARRAND") at 30–31 (Convention Journal). Citations to Farrand in this essay will identify the source of the document by the name of the delegate whose private notes are cited (e.g., "Madison," "McHenry") or, where applicable, the official Convention "Journal." This practice seems worthwhile in light of the research of Professor Mary Bilder, who has shown that the Journal is more reliable, and Madison's notes less reliable, than traditionally believed. *See* Mary Sarah Bilder, *How Bad Were the Official Records of the Federal Convention?*, 80 GEO. WASH. L. REV. 1620, 1624 (2012).

[4] 1 FARRAND, *supra* note 3, at 31 (Journal).

[5] For example, Jack Rakove's classic *Original Meanings* (1996) mentions only the proportional representation issue in his discussion of May 30. JACK RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 60–61 (1996); *see also* CHRISTOPHER COLLIER & JAMES LINCOLN COLLIER, DECISION IN PHILADELPHIA: THE CONSTITUTIONAL CONVENTION OF 1787 123–24 (same). Most other scholars note its importance primarily as signifying the delegates' decision to scrap the Articles of Confederation, but without exploring what the federal/national distinction meant to the Framers. *See, e.g.*, CLINTON ROSSITER, 1787: THE GRAND CONVENTION 172–73 (1966); MICHAEL J. KLARMAN, THE FRAMERS COUP 141 (2015); MARY SARAH BILDER, MADISON'S HAND 61 (2016). A handful of historians note the federal/national distinction on May 30 as important, but do not trace its continuation through the rest of the Convention. *See* RICHARD BEEMAN, PLAIN HONEST MEN 100–02 (2009); CAROL

But the "national government" resolution was not just a verbal formulation of the decision to scrap the Articles. It—and the distinction it drew between a "federal" and a "national" system—expressed a crucial theoretical underpinning of all the business that followed. The delegates self-consciously debated this resolution in relatively precise theoretical terms: would they maintain the "federal" structure of the Articles of Confederation, or would they restructure the Constitution to create a "national" government?

This vitally important "federal" versus "national" debate on May 30 has gotten short shrift. Why? One partial explanation is a sort of cognitive error that might be called "truism bias" or "platitude bias": the significance of a fact seems so obvious and well-known that it warrants no further investigation. A more important contributor may be the linguistic merging of the words "federal" and "national" that began to occur in the ratification debates and that was, indeed, foreshadowed in the Philadelphia Convention itself. American federalism has managed to reconcile a supreme central government with a system of state governments purportedly retaining "residual sovereignty." That success has changed the meaning of the word "federal" itself. The "new system" that replaced the Articles of Confederation has for generations been called "the federal system," and our central government, with its vast national powers, is "the federal government." Why should we suspect that the Framers viewed these (now) more-or-less synonymous terms, "federal" and "national," as somehow at odds? Yet for the Framers, they were.

To be sure, the labels "federal" and "national" covered a range of views across a broad spectrum. Under the Articles of Confederation, the "federal" principle ranged from the view

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BERKIN, A BRILLIANT SOLUTION: INVENTING THE AMERICAN CONSTITUTION 69–70 (2002); CATHERINE DRINKER BOWEN, MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION, MAY TO SEPTEMBER 1787, at 41–42 (1966).

that the states retained *all* sovereignty to the view that the federal confederation government possessed implied sovereign powers to legislate on national matters beyond the competence of the states.[6] At the Constitutional Convention, the national principle was advanced in the Virginia Plan—the fifteen resolutions introduced on May 29 that created the template for the Convention discussions and have been aptly called the first draft of the Constitution.[7] That national principle, too, was subject to a range of interpretations: from the position that states would retain significant residual sovereignty (held, perhaps, by Roger Sherman and eventually James Madison), to a conception of a national government with implied power to legislate on all national matters, to a fully consolidated nation, with states reduced to the status of non-sovereign administrative districts or counties.[8] Moreover, it is likely that the terms "federal" and "national" were somewhat moving targets at the Convention. The next 110 days of the Convention up to September 17, when the proposed Constitution was finalized and signed, produced significant revisions of both the Virginia Plan and the delegates' thinking. And views about the nature and details of a "national" government probably

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[6] The state-sovereignty view was articulated most forcefully by Thomas Burke, one of North Carolina's delegates to the Confederation Congress. *See* Aaron N. Coleman & Adam L. Tate, *Thomas Burke and State Sovereignty, 1777*, 1 J. AM. CONST. HIST. 593, 598 (2023). The implied-powers view was advanced by Pennsylvanian James Wilson. *See* JAMES WILSON, CONSIDERATIONS ON THE BANK OF NORTH AMERICA 10 (1785) ("The United States have *general* rights, *general* powers, and *general* obligations, not derived from any particular States, nor from all the particular States, taken separately; but resulting from the union of the *whole*."); John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045, 1070 (2014) (summarizing Wilson's views).

[7] *See infra* note 21 and accompanying text.

[8] *See* 1 FARRAND, *supra* note 3, at 136 (Madison's notes) (statement of delegate George Read that "we must look beyond the[] continuance" of the states); David S. Schwartz, *Recovering the Lost General Welfare Clause*, 63 WM. & MARY L. REV. 857, 861, 917–25 (2022) (summarizing views of Madison, Sherman, Wilson, and others).

evolved as the structure of the proposed Constitution came increasingly into focus.

But these complications are a far cry from reducing the federal/national distinction to meaninglessness. Many terms in philosophy and politics have large gray areas, but this does not render them unintelligible. Those gray areas surround a core of meaning that is shared by the varying related theories. "Democracy" is an example of this.[9] So is "originalism."[10] Both "federal" and "national," as those terms are applied to constitutional schemes, are of this character. The terms, though imprecise, were intelligible to the framers, who used them throughout the convention, though perhaps most prominently after May 30 in their debates comparing the Virginia Plan to the much more "federal" New Jersey Plan, introduced on June 15. The core elements of a *federal* system were (1) the retention of indefeasible state sovereignty over all or most internal matters, and (2) strict construction of confederation powers.[11] For some, like Madison, a federal system also entailed a right to secede.[12] In marked

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[9] *See, e.g.*, *Democracy*, STAN. ENCYC. OF PHIL. (Jun. 18, 2024), https://plato.stanford.edu/entries/democracy/#DemoDefi (noting that the term encompasses a range of governmental and decisionmaking practices).

[10] *See, e.g.*, Lawrence Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 456–57 (2013) (arguing that all bona fide originalists agree on the two principles of "fixation" and "constraint," irrespective of the wide methodological differences among different strains of originalism).

[11] *See* 1 M. DE VATTEL, THE LAW OF NATIONS §§54–55, 263–64, 300–02, at 154, 244–45, 263–70 (Philadelphia, T&J.W. Johnson, 6th ed., 1844); Anthony J. Bellia, Jr. & Bradford R. Clark, *The International Law Origins of American Federalism*, 120 COLUM. L. REV. 835, 849 (2020) (arguing that understanding of federal systems in the Confederation period was influenced by Vattel); David S. Schwartz, *The International Law Origins of Compact Theory: A Critique of Bellia & Clark on Federalism*, 1 J. AM. CONST. HIST. 629, 634–35 (2023).

[12] THE FEDERALIST NO. 43, *supra* note 1, at 279–80 (Madison) (arguing that a member state could withdraw from a confederation if other parties breached the confederation treaty).

contrast, the core elements of a *national* government were (1) its supremacy over state constitutions and laws, a supremacy that—as the delegates increasingly understood—would entail ratification by the people, and (2) direct reciprocal accountability between government and governed: the national government would have power to regulate the people directly, and the people would participate in electing the government.[13]

Soon after the Convention, as noted above, Madison would characterize the proposed Constitution as "partly federal and partly national."[14] This characterization, whose accuracy is debatable if not dubious, was intended to comfort moderate ratifiers who were thought to be uneasy about a change from a federal to a national Constitution.[15] It is comforting today to lawyers, judges, and scholars who wish to make interpretive claims founded on bromides like "dual sovereignty"[16] or "limited enumerated powers,"[17] or a Constitution that "split the atom of sovereignty."[18] But let's be clear: Madison's federal–national hybrid is a description—not a theory. It describes, or purports to describe, a phenomenon without explaining it. A theory of federalism should have some power to resolve interpretive controversies, or at least to create strong presumptions. That the

[13] *See, e.g.*, 2 FARRAND, *supra* note 3, at 6 (Madison's notes); *infra* text accompanying notes 42–43; THE FEDERALIST NO. 39, *supra* note 1, at 243–46 (Madison) (listing "national" features of the Constitution).

[14] THE FEDERALIST NO. 39, *supra* note 1, at 246 (Madison).

[15] *See* Andrew Coan & David S. Schwartz, *Interpreting Ratification*, 1 J. AM. CONST. HIST. 449, 492–94 (2023).

[16] *See, e.g.*, Murphy v. NCAA, 138 S. Ct. 1461, 1475 (2018) ("[O]ur system of government is said to be one of 'dual sovereignty.'").

[17] *See, e.g.*, NFIB v. Sebelius, 567 U.S. 519, 534 (2012) (noting that the Constitution's "enumeration of powers is also a limitation of powers, because . . . [the] express conferral of some powers makes clear that it does not grant others").

[18] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) ("Federalism was our Nation's own discovery. The Framers split the atom of sovereignty.").

Constitution is "partly national and partly federal" does not tell us whether the "anti-commandeering" and "independent state legislature" theories are valid, nor whether the Constitution has an "equal state sovereignty" principle that renders ongoing supervision of state electoral procedures unconstitutional, or whether states are immune from damages suits.[19] It doesn't tell us whether the Constitution is more national than federal, or the other way around.

These complexities are all the more reason to investigate the debate of May 30, 1787, with care.

* * *

On May 29, 1787, Edmund Randolph introduced the fifteen resolutions now known as the Virginia Plan.[20] The Virginia Plan set the Convention's agenda, and the entire Convention can be understood as a series of successive revisions to that plan.[21] On May 30, with the Virginia Plan as the only substantive proposal on the table, the Committee of the Whole House turned to the Plan's first resolution, which provided:

> Resolved, that the articles of Confederation ought to be so corrected & enlarged as to accomplish the objects

[19] Without relying on, or even quoting, Madison's general dictum, the Court discovered the anti-commandeering doctrine, *see* Printz v. United States, 521 U.S. 898, 935 (1997), and the equal state dignity doctrine, *see* Shelby Cnty. v. Holder, 570 U.S. 529, 544 (2013), rejected the ISL theory, *see* Moore v. Harper, 600 U.S. 1, 26 (2023), and held states immune from damages suits under Article I legislation. *See* Seminole Tribe of Fla. v. Fla., 517 U.S. 44, 47 (1996).

[20] 1 Farrand, *supra* note 3, at 20–22 (Madison's notes).

[21] Depending on how one counts, there were as many as six successive revisions: the Committee of the Whole House debates on the Virginia Plan resolutions, the full Convention debate on the report of the Committee of the Whole, the Committee of Detail draft, the clause-by-clause debate on the Committee of Detail draft, the Committee of Style draft, and the brief emendations to that draft. This characterization is owed to William Riker's incisive analysis of the Convention. *See* WILLIAM H. RIKER, THE STRATEGY OF RHETORIC: CAMPAIGNING FOR THE AMERICAN CONSTITUTION 151–52 (1996).

> proposed by their institution; namely[,] "common defence, security of liberty and general welfare."[22]

This resolution seems somewhat mealymouthed in retrospect, attempting to frame the resolutions that followed as though they were conformable to the authorizing resolutions calling the Convention into existence. The Confederation Congress, on February 21, 1787, had recommended to the state legislatures "a convention of delegates who shall have been appointed by the several states to be held at Philadelphia for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions[.]"[23] Each state credentialled its delegates with similar authorizing language. Virginia, for example, "authorized" its "deputies"

> to meet such Deputies as may be appointed and authorized by other States to assemble in Convention at Philadelphia . . . to join with them in devising and discussing all such Alterations and farther provisions as may be necessary to render the Foederal Constitution adequate to the Exigencies of the Union.[24]

The "Foederal Constitution" most likely referred to the Articles of Confederation specifically, but even if it was meant, or could be read, as a more generic reference to "a constitution" for the Union, it was still phrased as a "federal" one. Although not without nuance and contention, the word "federal" had a relatively well-understood core meaning. Derived from the Latin *foedus*, meaning "treaty," a *federal* arrangement was broadly understood as a treaty or compact among sovereign states for limited

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[22] 1 FARRAND, *supra* note 3, at 20, 36 (Madison's notes).

[23] 1 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 185–87 (John Kaminski et al., eds., 1976–2019) (hereinafter "DHRC").

[24] John Beckley, *An Act for Appointing Deputies from this Commonwealth to a Convention Proposed to be Held in the City of Philadelphia in May Next, for the Purpose of Revising the Federal Constitution*, LIBR. OF CONG. (1786).

purposes affecting the members generally, while leaving the member states' "home rule" largely untouched.[25] A federal government depended on its member states to implement its policies and directives. It was not a national government acting directly on, and directly accountable to, a national people.

The Virginia Plan was not a federal plan. As signaled by its repeated use of the word "national" to describe the institutions and powers it was proposing—nineteen times in all[26]—the Virginia Plan proposed a change in the theoretical basis of government, and not just a modification of the Articles. And the delegates knew it immediately, as soon as they were presented with the Virginia Plan. We will see this momentarily, but as soon as discussion of the Plan opened on May 30, before any delegates outside the Virginia and Pennsylvania delegations had a chance to comment on it, Randolph, seconded by Gouverneur Morris of Pennsylvania, moved to "postpone" the first Virginia Plan resolution.[27] According to the notes of Maryland delegate James McHenry, Randolph "wished the House to dissent from the first proposition" of the Virginia Plan.[28] It was Morris who explained the reason: "the subsequent resolutions would not agree with" the first Virginia Plan resolution.[29] That is to say, the first

[25] *See* Schwartz, *supra* note 11, at 633–35.

[26] 1 FARRAND, *supra* note 3, at 20–22 (Madison's notes).

[27] *Id.* at 33 (Madison's notes).

[28] *Id.* at 40 (McHenry's notes).

[29] *Id.* at 38 (Yates's notes). This observation by Morris is found in Robert Yates's notes, but not Madison's, which gloss over the initial discussion. Indeed, the discussion on replacing the first Virginia Plan resolution is deceptively simple. It is conveyed in about 12 pages of *Farrand's Records* that pack in a surprising amount of procedural complexity and theoretical disagreement. To pull this together requires harmonizing Madison's notes, which are demonstrably incomplete on this day, with the Convention Journal and the surviving notes of two other delegates, Robert Yates of New York and James McHenry of Maryland. Yates's notes should be viewed with caution where they are uncorroborated and appear to make Madison look like an ultranationalist. This is because they came to Max Farrand indirectly, through the

resolution's prefatory call for revising the Articles of Confederation failed to reflect the decisive abandonment of a federal system in favor of a national one that was implicit in the Virginia Plan's succeeding, operative resolutions.

Thus, the Randolph-Morris motion proposed to substitute three new resolutions for Resolution 1 of the Virginia Plan:

> 1. that a Union of the States merely federal will not accomplish the objects proposed by the articles of Confederation, namely common defense, security of liberty, & gen[eral] Welfare.
>
> 2. that no treaty or treaties among the whole or part of the States, as individual sovereignties, would be sufficient.
>
> 3. that a *national* Government ought to be established consisting of a *supreme* Legislative, Executive, and Judiciary.[30]

Significantly, the Virginia and Pennsylvania delegations had been the first to arrive in Philadelphia, on May 14. They had promptly begun collaborating on the Virginia Plan while waiting for the other delegates to arrive. It is curious why Randolph and Morris, two prominent members of those delegations, would now move to reject and replace its first resolution. The possible explanations are intriguing, but speculative. Perhaps Randolph and Morris disagreed with the first resolution all along and meant to go above their delegations' respective heads and appeal to the full Convention. Perhaps they had second thoughts about it, realizing belatedly that there was no point trying to disguise the Virginia Plan as an amendment to the Articles. Or perhaps

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publication of Edmund Genet's 1821 compilation of Yates's notes, which Genet apparently edited heavily to maximize embarrassment to Madison.

[30] 1 FARRAND, *supra* note 3, at 33 (Madison's notes). The emphasis is in Madison's notes, though apparently not the written motion itself. *See id*. at 30–31 (Journal). The angle brackets in *Farrand's Records*, indicating Madison's subsequent correction to his notes based on review of the Journal, are omitted.

this move was planned all along: to let the boldness of the Virginia Plan sink into the minds of the full Convention, and only then to formally acknowledge and emphasize that the Plan was designed to displace the Articles. Whatever their exact motivations, Randolph and Morris clearly wanted to confront the federal-versus-national theoretical question directly. And it is not unlikely that the Virginians and Pennsylvanians believed they had the votes for the more aggressive resolutions based on discussions off the Convention floor during the evening of the 29th or morning of the 30th.[31]

When no one rose to speak on the motion, Virginia delegate George Wythe "presume[d] from the silence of the house that [the gentlemen] were prepared to pass on the resolution" and moved for a vote.[32] Wythe's eagerness—perhaps over-eagerness—to settle the question suggests that the rest of the Virginia delegation was already on board with Randolph's motion. But his comment only broke the silence, as the South Carolina delegates spoke up in quick succession. Pierce Butler replied that the house was not prepared to pass on the resolution. He and Charles Pinckney asked whether the new resolutions entailed an abolition of the states. Randolph replied vaguely that the new substitute resolutions were merely intended to introduce the rest of the Virginia Plan resolutions.

At approximately this point,[33] Butler successfully moved to postpone consideration of the first two substitute resolutions

[31] The Convention delegates all lived or lodged within a few blocks of one another in downtown Philadelphia, with ample opportunity for informal discussion outside of Convention meeting times. *See* BEEMAN, *supra* note 5, at 304–05; Schwartz, *supra* note 8, at 920 n. 327.

[32] 1 FARRAND, *supra* note 3, at 41 (McHenry's notes).

[33] The order of speakers is somewhat jumbled in *Farrand's Records*, as the Journal and the three sets of surviving delegates' notes—those of Madison, Yates, and McHenry—do not completely jibe. McHenry's notes appear the most comprehensive for this part of the debate,

and debate the third, the "national government" resolution.[34] This was, after all, the crux of the three—the first two resolutions functioning in effect as "whereas" clauses for the third. Randolph seconded Butler's motion, repeating that the third resolution was merely introductory to the rest of the Virginia Plan and adding that the plan as a whole was intended "to give the national government a power to defend . . . itself," while taking from the states "no more sovereignty than is competent to this end."[35]

Here, General C. C. Pinckney of South Carolina lodged an objection that got to the heart of the matter. The Virginia Plan as a whole, he asserted, would exceed the delegates' authorizations, which were limited to amending rather than replacing the Articles of Confederation.[36]

Why would a strengthened central government, which presumably all the delegates present were willing to accept in principle, represent a wholesale replacement rather than merely an amendment of the Articles? Hoping to set that theoretical question aside, John Dickinson of Delaware emphasized that there was a broad consensus that the Articles were "defective" and that the Convention could and should shift straight away to deciding the additional legislative, judicial, and executive powers that should be vested in the central government, whether in the existing Confederation Congress or elsewhere.[37]

But Massachusetts delegate Elbridge Gerry did not wish to finesse the theoretical dispute. "A distinction has been made between a *federal* and *national* government," he said, and to opt for

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though all three omit speeches contained in at least one of the others' notes.

[34] 1 FARRAND, *supra* note 3, at 41 (McHenry's notes).

[35] *Id.* at 42 (McHenry's notes).

[36] *Id.* at 34 (Madison's notes).

[37] *Id.* at 42 (McHenry's notes).

a national government was "to annihilate the confederation."[38] The Convention, he asserted, could establish a separate legislative, judicial, and executive branch, but only if the central government would retain its federal character.[39] Gouverneur Morris, speaking next, agreed that the federal/national distinction was decisive, but insisted that the delegates be sure they were all on the same page about what those terms meant. To Morris, a "federal" government was "a mere compact resting on the good faith of the parties."[40] The current Confederation, which each state "may violate at pleasure," was barely even a federal government.[41] A national government, in contrast, is a "supreme power" "having a compleat and compulsive operation."[42] Virginia's George Mason added that a national government "was necessary" to "directly operate on individuals." [43]

Delaware sought to paper over the theoretical disagreement for a second time, when Dickinson's colleague George Read, seconded by General Pinckney, moved to postpone the "national government" resolution to take up a watered-down substitute, calling for "a more effective Government." [44] This postponement failed by a tie 4–4 vote. [45] With that conciliatory euphemism off the table, the delegates were confronted directly with the

[38] *Id.* at 42–43 (McHenry's notes).

[39] *Id.* (McHenry's notes).

[40] *Id.* at 34 (Madison's notes).

[41] *Id.* at 43 (McHenry's notes).

[42] *Id.* at 34 (Madison's notes); *id.* at 42–43 (McHenry's notes). Madison's summary of Morris's speech accorded with Madison's own views. McHenry's notes are somewhat different. He records Morris as saying that a federal government can compel each member state "to do its duty," but the Articles of Confederation was not even a true federal government as it could not even do that. *Id.* at 43 (McHenry's notes).

[43] *Id.* at 34 (Madison's notes).

[44] *Id.* at 35 (Madison's notes).

[45] *Id.* (Madison's notes).

question: Will we pursue a national government, or retain a federal one?

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The theoretical debate between proponents of a national and those of a federal system was thus joined at the outset. A federal government meant the continuation of the Articles of Confederation in some amended form. The states would retain considerable sovereignty and would continue to be the constituent members of the compact. It would be difficult to retain this structure without leaving the central government where it already was: having to legislate through the states. A national government would create a direct connection between the central government and the people. Much of this was only implicit in the records of the May 30 debate and would become clear as the Convention progressed. But the national character of the Virginia Plan was clear enough: in its resolutions providing for a first branch of the national legislature to be chosen by the people directly, in the proposed legislative powers (Resolutions 2 and 6), and in the repeated use of the descriptor "national" to describe its various elements—seventeen times in all.[46] At the same time, a national government did not entail consolidation or an "annihilation" of the states, a suggestion that was bruited about a few times during the Convention but never taken seriously.[47]

The South Carolinian Butler moved for a vote on the substantive question, and it was not close. Six of the eight states present (Massachusetts, Pennsylvania, Delaware, Virginia, and

[46] *Id.* at 20–22 (Madison's notes).

[47] *See, e.g.*, *id.* at 324 (Madison's notes) ("[Rufus King] doubted much the practicability of annihilating the States."); *id.* at 143 (King's notes) (delegate George Read advocating for "consolidation" in which "[t]he State Govt's must be swept away"); *id.* at 449 (Madison's notes) (arguing that "the true policy of the small States" should be "promoting those principles & that form of Govt. which will most approximate the States to the condition of Counties").

North and South Carolina) voted in favor of a *supreme national* government with legislative, executive, and judicial powers. New York divided (Alexander Hamilton voting aye, Yates no), meaning that it effectively abstained. Only Connecticut voted no.[48]

Although the Convention records and delegate notes recorded votes by state rather than by named individual delegates, we can make several inferences. Of the thirty-six delegates present and voting that day,[49] no fewer than twenty-three and as many as thirty-two voted in favor of the motion. The higher end of this range seems more likely. All but three of the delegates present on May 30 who were still in attendance at the end of the Convention ultimately signed the Constitution, suggesting their broad agreement with a national Constitution replacing the federal Articles. And of the three who didn't sign—Randolph, Mason, and Gerry—both Randolph and Mason spoke in favor of the motion on May 30 and presumably voted "yes."[50] Only four delegates can be said with any certainty to have voted no.[51] The

[48] *Id.* at 35 (Madison's notes).

[49] Farrand's details of delegate attendance, based in significant part on inference, suggest that 41 delegates had made appearances on or before May 30. *See* 3 FARRAND, *supra* note 3, at 586–90 (cataloguing attendance of the delegates throughout the Convention). Of these 41 delegates, five did not cast votes: the delegates from New Jersey who were apparently (mysteriously) absent, and the single delegates representing Maryland and Georgia. *See infra* note 51.

[50] 1 FARRAND, supra note 3, at 33–35 (Madison's notes).

[51] The uncertainty is because voting was by state, and individual votes were generally not recorded in the Journal or the delegates' notes. *See id.* at 39, 54, 137–38, 354. But we can make numerous inferences based on the delegates' speeches, the record of delegates who were in attendance as of May 30, and the Convention's voting rules requiring a state to have at least two delegates present to vote and discarding the vote of any state whose delegation was evenly divided. *See id.* at 8 (Journal); *id.* at 35 (Madison's notes). For example, despite their initial doubts, at least three of the four South Carolina delegates must have voted yes, since otherwise that state's delegation as a whole would have divided or voted no. *Id.* at 34–35 (Madison's notes). The three certain "no" votes were the two Connecticut delegates, Ellsworth and

Randolph-Morris resolution calling for establishment of "a *national* Government . . . consisting of a *supreme* Legislative, Executive & Judiciary" now replaced the milder first resolution of the Virginia Plan.

While historians have not fully reckoned with the theoretical implications of this decision, at least one keen observer appreciated its significance. In his October 24 post-mortem letter briefing Thomas Jefferson on the Convention, Madison wrote that while "[i]t appeared to be the sincere and unanimous wish of the

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Sherman (had one voted yes, the state would have divided) and Yates of New York, noted as registering a "no" vote by Madison. *Id.* at 35 (Madison's notes). Gerry of Massachusetts almost certainly voted no, based on his spoken opposition to the motion and on his consistent opposition to a strong central government throughout the convention. *Id.* at 42–43 (McHenry's notes). Curiously, New Jersey did not vote. Three of its delegates were present on the Convention's first day, May 25, but on May 30, according to Yates's notes, the state was "unrepresented." *Id.* at 1, 39 (Yates's notes). Maryland and Georgia each had only one delegate present on May 30, and thus could not vote. *Id.* (Yates's notes).

This solid majority for the Randolph-Morris "national government" motion—ranging between 64% and 88%—belies the argument of William Riker that the Convention preferred the Delaware version as a middling compromise. Riker claims that the Delaware version would have "won" had New York not voted against it, and he speculates that New York's anti-nationalist delegate Robert Yates voted against the Delaware substitute based on a mistaken belief that the Convention majority would vote down the Randolph-Morris proposal. *See* RIKER, *supra* note 21, at 152–54. Riker's point was that there was not a solid majority for a nationalist position vis-à-vis a centrist one, but that once the centrist position was rejected, a centrist bloc felt compelled to prefer a "supreme national government" over the weak confederation. But Riker misinterprets the records. The vote on the Delaware proposal was procedural—whether to substitute it for discussion. A substantive vote "on the question" would have come later. *Compare* 1 FARRAND, *supra* note 3, at 30 (Journal), 35 (Madison's notes) (describing Delaware motion as one to "postpone"), *with id.* at 31 (Journal), 35 (Madison's notes) (describing a vote "on the question"). Thus, in contrast to the very strong majority in favor of the "national government" proposal, only four states wanted even to discuss the Delaware proposal.

Convention to cherish and preserve the Union of the States," nevertheless "[i]t was generally agreed that the objects of the Union could not be secured by any system founded on the *principle* of a confederation of Sovereign States."[52] That Madison referred to a *principle* meant that he was not speaking about the *fact* of the Confederation or its memorialization in a *document*—the Articles—but the *federal* principle. "This ground-work being laid," Madison continued, the Convention then turned to "the great objects which presented themselves"—namely, the nuts and bolts of creating a national government on republican principles.[53]

After "laying the groundwork" by adopting the principle of a supreme national government, the Convention moved directly to Resolution 2 of the Virginia Plan proposed the day before: the basis of representation in the *national* legislature. That issue was debated off and on for the next six weeks and would almost wreck the Convention, until a July 16 vote adopted the so-called Great Compromise, accepting equal state suffrage in the Senate. But on the national character of the government they were creating, the Convention delegates never looked back. To be sure, the Confederation-friendly New Jersey Plan, which would have retained a unicameral Congress representing the states on an equal basis, was introduced on June 15. In debating the New Jersey Plan, the delegates referred to it as "the federal plan," in contrast with "the national [i.e., Virginia] plan." After three days of debate, the Committee of the Whole House rejected the "federal" New Jersey Plan and approved the "national" Virginia Plan by a vote of seven states to three, with one state divided.[54]

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[52] Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* 3 FARRAND, *supra* note 3, at 131 (emphasis added).

[53] *Id.* at 132.

[54] *See* 1 FARRAND, *supra* note 3, at 313 (Madison's notes). The three states voting no were New York, New Jersey, and Delaware, with Maryland divided. *Id.* There were 39 delegates present and voting that day.

Only two elements of the New Jersey Plan found their way into the final Constitution. One was the Supremacy Clause, clearly a "national" rather than a "federal" element. The only arguable "federal" element from the New Jersey Plan incorporated into the Constitution was voting equality in the Senate, but the federal character of the Senate was greatly watered down by the Constitution's elimination of the state legislative control over senators compared to their control over delegates to the Confederation Congress.[55] The rest of the federal elements of

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While it is theoretically possible for the seven states to have been carried by a minimum of 19 votes based on delegate attendance and voting rules, that is unlikely. In New York, the anti-nationalists Yates and Lansing were both present, and most likely outvoted Hamilton, 2-1. The Maryland delegation split 1-1, with Luther Martin almost certainly voting no and Daniel St. Thomas Jenifer voting aye. *See id.* at 340 (Madison's notes) (explaining Luther Martin's interest in state governments over a general government). It is likely that the New Jersey and Delaware delegations were unanimous in voting against the Virginia Plan at this stage: New Jersey introduced the plan, *see id.* at 245 (Madison's notes), and Delaware was adamant about voting equality in the Senate. See *id.* at 37 (Madison's notes) (declaration by Reed of Delaware that his delegation would have to "retire from the Convention" rather than accept proportional representation in the legislature). Assuming a "no" vote from Gerry of Massachusetts, and a possible "no" vote in the Connecticut delegation (Ellsworth and Sherman had voted against the May 30 motion, but at least one of those two would have had to switch in the June 19 votes, since Connecticut now voted "aye"), there is no reason to suppose that the "noes" carried more than 13 votes. *Id.* at 35, 313 (Madison's notes). It is probable that the Virginia and Pennsylvania delegations unanimously supported the amended Virginia Plan on June 19, so the number of delegates voting aye would have been at least 24 of the 39 votes. And, as we have seen, the Delaware and New Jersey votes were motivated primarily by the question of equal state representation in the Senate. *See id.* at 167, 177, 491 (Madison's notes). So the nationalist position was still polling strongly at this time.

[55] The Articles of Confederation had provided for tight and ongoing state legislative oversight of their delegates to Congress in the form of one-year terms, mandatory rotation of delegates after three years, and an expressly reserved power to "each state to recall its delegates . . . at any time." ARTICLES OF CONFEDERATION OF 1781, art. V. By merely

the New Jersey Plan were almost certainly a bluff; they were intended either as chips to be bargained away for voting equality in the Senate or as a signal that without such voting equality, the small states would refuse to join the national project. But the converse was also true: as Charles Pinckney perceptively and wryly observed, "the whole comes to this . . . . Give N[ew] Jersey an equal vote, and she will dismiss her scruples, and concur in the Nati[ona]l system."[56] A month later he was proven right, when two of the three most vocal "small state" delegations—New Jersey and Delaware—voted in favor of a resolution granting broad national powers to the proposed government.[57]

Thus, the New Jersey Plan did not represent a serious effort to reverse the May 30 decision to create a *national* government. While numerous motions were made throughout the Convention to reconsider its decisions, it is fair to say that no one ever asked directly and sincerely for reconsideration of the "supreme national government" motion.

Nevertheless, the day after rejecting the New Jersey Plan, the delegates strategically decided to drop the word "national" from their lexicon when it came to presenting the new Constitution for public consumption. On June 20, Oliver Ellsworth of Connecticut moved to amend the Randolph-Morris resolution

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amending the Articles and retaining the Confederation's unicameral Congress, the New Jersey Plan would have kept these controls in place. The final Constitution, in contrast, eliminated mandatory rotation and state recall while greatly extending the Senators' terms. This, it was hoped, would promote a national outlook and *esprit de corps* among Senators.

[56] 1 FARRAND, *supra* note 3, at 255 (Madison's notes); *accord* Letter from James Madison to Theodore Sedgwick, Jr. (Feb. 21, 1831), *in* 3 FARRAND, *supra* note 3, at 496 (arguing that "the main object of [the New Jersey Plan] being to secure to the smaller States an equality with the larger in the structure of the Govt, . . . it is difficult to say what was the degree of [national] power" which the New Jersey delegates favored in the abstract).

[57] 2 FARRAND, *supra* note 3, at 26–27 (Madison's notes).

to replace the phrase "*national* government" with "Government of the United States."[58] Ellsworth's motion, adopted unanimously, was apparently intended by most to enable "the plan of the Convention to go forth"—*rhetorically*—"as an amendment to the [A]rticles of Confederation."[59] And, of course, for purposes of the debates over ratification, the proponents of the new national government would label themselves "Federalists," in one of the greatest branding coups in political history. The ironic—indeed Orwellian—quality of that language reversal has gone largely unremarked by historians and constitutional scholars.

But even after the delegates expunged the word "national" from the draft Constitution, they continued to refer to it as the "national plan" behind the closed doors of the Philadelphia Convention. Nearly all the delegates continued to refer to the "national legislature," "national judiciary," and "national government" to the very last day of the Convention.[60] On that day, September 17, 1787, Gouverneur Morris summed up for his fellow delegates the major task that lay before them: "The moment this plan goes forth all other considerations will be laid aside—and the great question will be, shall there be a national Government or not?"[61]

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[58] 1 FARRAND, *supra* note 3, at 335 (Madison's notes).

[59] *Id.* at 335–36 (Madison's notes). Ellsworth himself "wished … the plan of the Convention to go forth as an amendment to the articles of Confederation" in substance, so that it would have to be ratified by the state legislatures. *Id.* (Madison's notes). Edmund Randolph immediately objected to the substantive underpinning of the wording change. *Id.* at 336 (Madison's notes). Although the wording change was agreed to unanimously, it was clear in context that a majority of delegates disagreed with Ellsworth's substantive preference for state legislative ratification.

[60] *See supra* text accompanying notes 46–54.

[61] 2 FARRAND, *supra* note 3, at 645. Might Madison have used the words "federal" and "national" in his notes to summarize speeches by delegates who used other terminology? That is certainly possible. Rufus King's

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The difference, in 1787, between a federal system and a national government mattered to the Framers. And it should matter to anyone who deems it important to have a clear understanding of the origins of American federalism. The decision on May 30, 1787 shows that constitutional scholars and jurists have long adhered to an origin story that is, if not false, at least very misleading. The notions of "inviolable" state sovereignty, of "dual federalism," and of significant legislative fields left to the exclusive domain of the states that predominated in U.S. constitutional thinking until the New Deal, and which echo today in the insistence on limited enumerated powers and in the states' rights rhetoric of Justice Clarence Thomas, have always been attributed to the Framers' careful design. But to a much larger extent than has been recognized, these federalism claims are artifacts of post-ratification developments in constitutional politics. The dominant political coalitions from the election of 1800 to the election of 1860 engineered a partial reversion—one step back toward the Confederation, from the Framers' two steps toward a supreme national government. If the Framers' design matters, we must see through this post-ratification ideological smokescreen to understand what they intended.

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notes at times attribute "general" government to a speaker where Madison uses "national," which is concerning. But there is plenty of corroboration of Madison's use of "national," especially in the May 30 discussion. Even assuming the unreliability of Yates's Genet-edited notes on this point, the Journal corroborates the wording of the Randolph-Morris motion, and it is McHenry's notes that recount Gerry making a big deal of the national-federal distinction. And of course, the Virginia Plan itself uses the word "national," and several delegates' notes on June 16 (including King's) call the New Jersey and Virginia Plans the "federal" and "national" plans, respectively. Finally, given Madison's importance, his own consistent use of "national" is noteworthy.