**The Federalist No. 47**

**The Particular Structure of the New Government and the Distribution of Power Among Its Different Parts**

***New York Packet*  
Wednesday, January 30, 1788  
[James Madison]**

**To the People of the State of New York:**

HAVING reviewed the general form of the proposed government and the general mass of power allotted to it, I proceed to examine the particular structure of this government, and the distribution of this mass of power among its constituent parts.

One of the principal objections inculcated by the more respectable adversaries to the Constitution, is its supposed violation of the political maxim, that the legislative, executive, and judiciary departments ought to be separate and distinct. In the structure of the federal government, no regard, it is said, seems to have been paid to this essential precaution in favor of liberty. The several departments of power are distributed and blended in such a manner as at once to destroy all symmetry and beauty of form, and to expose some of the essential parts of the edifice to the danger of being crushed by the disproportionate weight of other parts.

No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than that on which the objection is founded. The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed, or elective, may justly be pronounced the very definition of tyranny. Were the federal Constitution, therefore, really chargeable with the accumulation of power, or with a mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system. I persuade myself, however, that it will be made apparent to every one, that the charge cannot be supported, and that the maxim on which it relies has been totally misconceived and misapplied. In order to form correct ideas on this important subject, it will be proper to investigate the sense in which the preservation of liberty requires that the three great departments of power should be separate and distinct.

The oracle who is always consulted and cited on this subject is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying and recommending it most effectually to the attention of mankind. Let us endeavor, in the first place, to ascertain his meaning on this point.

The British Constitution was to Montesquieu what Homer has been to the didactic writers on epic poetry. As the latter have considered the work of the immortal bard as the perfect model from which the principles and rules of the epic art were to be drawn, and by which all similar works were to be judged, so this great political critic appears to have viewed the Constitution of England as the standard, or to use his own expression, as the mirror of political liberty; and to have delivered, in the form of elementary truths, the several characteristic principles of that particular system. That we may be sure, then, not to mistake his meaning in this case, let us recur to the source from which the maxim was drawn.

On the slightest view of the British Constitution, we must perceive that the legislative, executive, and judiciary departments are by no means totally separate and distinct from each other. The executive magistrate forms an integral part of the legislative authority. He alone has the prerogative of making treaties with foreign sovereigns, which, when made, have, under certain limitations, the force of legislative acts. All the members of the judiciary department are appointed by him, can be removed by him on the address of the two Houses of Parliament, and form, when he pleases to consult them, one of his constitutional councils. One branch of the legislative department forms also a great constitutional council to the executive chief, as, on another hand, it is the sole depositary of judicial power in cases of impeachment, and is invested with the supreme appellate jurisdiction in all other cases. The judges, again, are so far connected with the legislative department as often to attend and participate in its deliberations, though not admitted to a legislative vote.

From these facts, by which Montesquieu was guided, it may clearly be inferred that, in saying "There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates," or, "if the power of judging be not separated from the legislative and executive powers," he did not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted. This would have been the case in the constitution examined by him, if the king, who is the sole executive magistrate, had possessed also the complete legislative power, or the supreme administration of justice; or if the entire legislative body had possessed the supreme judiciary, or the supreme executive authority. This, however, is not among the vices of that constitution. The magistrate in whom the whole executive power resides cannot of himself make a law, though he can put a negative on every law; nor administer justice in person, though he has the appointment of those who do administer it. The judges can exercise no executive prerogative, though they are shoots from the executive stock; nor any legislative function, though they may be advised with by the legislative councils. The entire legislature can perform no judiciary act, though by the joint act of two of its branches the judges may be removed from their offices, and though one of its branches is possessed of the judicial power in the last resort. The entire legislature, again, can exercise no executive prerogative, though one of its branches constitutes the supreme executive magistracy, and another, on the impeachment of a third, can try and condemn all the subordinate officers in the executive department.

The reasons on which Montesquieu grounds his maxim are a further demonstration of his meaning. "When the legislative and executive powers are united in the same person or body," says he, "there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws to *execute* them in a tyrannical manner." Again: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*. Were it joined to the executive power, *the judge* might behave with all the violence of *an oppressor*." Some of these reasons are more fully explained in other passages; but briefly stated as they are here, they sufficiently establish the meaning which we have put on this celebrated maxim of this celebrated author.

If we look into the constitutions of the several States, we find that, notwithstanding the emphatical and, in some instances, the unqualified terms in which this axiom has been laid down, there is not a single instance in which the several departments of power have been kept absolutely separate and distinct. New Hampshire, whose constitution was the last formed, seems to have been fully aware of the impossibility and inexpediency of avoiding any mixture whatever of these departments, and has qualified the doctrine by declaring "that the legislative, executive, and judiciary powers ought to be kept as separate from, and independent of, each other *as the nature of a free government will admit; or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of unity and amity*." Her constitution accordingly mixes these departments in several respects. The Senate, which is a branch of the legislative department, is also a judicial tribunal for the trial of impeachments. The President, who is the head of the executive department, is the presiding member also of the Senate; and, besides an equal vote in all cases, has a casting vote in case of a tie. The executive head is himself eventually elective every year by the legislative department, and his council is every year chosen by and from the members of the same department. Several of the officers of state are also appointed by the legislature. And the members of the judiciary department are appointed by the executive department.

The constitution of Massachusetts has observed a sufficient though less pointed caution, in expressing this fundamental article of liberty. It declares "that the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them." This declaration corresponds precisely with the doctrine of Montesquieu, as it has been explained, and is not in a single point violated by the plan of the convention. It goes no farther than to prohibit any one of the entire departments from exercising the powers of another department. In the very Constitution to which it is prefixed, a partial mixture of powers has been admitted. The executive magistrate has a qualified negative on the legislative body, and the Senate, which is a part of the legislature, is a court of impeachment for members both of the executive and judiciary departments. The members of the judiciary department, again, are appointable by the executive department, and removable by the same authority on the address of the two legislative branches. Lastly, a number of the officers of government are annually appointed by the legislative department. As the appointment to offices, particularly executive offices, is in its nature an executive function, the compilers of the Constitution have, in this last point at least, violated the rule established by themselves.

I pass over the constitutions of Rhode Island and Connecticut, because they were formed prior to the Revolution, and even before the principle under examination had become an object of political attention.

The constitution of New York contains no declaration on this subject; but appears very clearly to have been framed with an eye to the danger of improperly blending the different departments. It gives, nevertheless, to the executive magistrate, a partial control over the legislative department; and, what is more, gives a like control to the judiciary department; and even blends the executive and judiciary departments in the exercise of this control. In its council of appointment members of the legislative are associated with the executive authority, in the appointment of officers, both executive and judiciary. And its court for the trial of impeachments and correction of errors is to consist of one branch of the legislature and the principal members of the judiciary department.

The constitution of New Jersey has blended the different powers of government more than any of the preceding. The governor, who is the executive magistrate, is appointed by the legislature; is chancellor and ordinary, or surrogate of the State; is a member of the Supreme Court of Appeals, and president, with a casting vote, of one of the legislative branches. The same legislative branch acts again as executive council of the governor, and with him constitutes the Court of Appeals. The members of the judiciary department are appointed by the legislative department and removable by one branch of it, on the impeachment of the other.

According to the constitution of Pennsylvania, the president, who is the head of the executive department, is annually elected by a vote in which the legislative department predominates. In conjunction with an executive council, he appoints the members of the judiciary department, and forms a court of impeachment for trial of all officers, judiciary as well as executive. The judges of the Supreme Court and justices of the peace seem also to be removable by the legislature; and the executive power of pardoning in certain cases, to be referred to the same department. The members of the executive counoil are made EX-OFFICIO justices of peace throughout the State.

In Delaware, the chief executive magistrate is annually elected by the legislative department. The speakers of the two legislative branches are vice-presidents in the executive department. The executive chief, with six others, appointed, three by each of the legislative branches constitutes the Supreme Court of Appeals; he is joined with the legislative department in the appointment of the other judges. Throughout the States, it appears that the members of the legislature may at the same time be justices of the peace; in this State, the members of one branch of it are EX-OFFICIO justices of the peace; as are also the members of the executive council. The principal officers of the executive department are appointed by the legislative; and one branch of the latter forms a court of impeachments. All officers may be removed on address of the legislature.

Maryland has adopted the maxim in the most unqualified terms; declaring that the legislative, executive, and judicial powers of government ought to be forever separate and distinct from each other. Her constitution, notwithstanding, makes the executive magistrate appointable by the legislative department; and the members of the judiciary by the executive department.

The language of Virginia is still more pointed on this subject. Her constitution declares, "that the legislative, executive, and judiciary departments shall be separate and distinct; so that neither exercise the powers properly belonging to the other; nor shall any person exercise the powers of more than one of them at the same time, except that the justices of county courts shall be eligible to either House of Assembly." Yet we find not only this express exception, with respect to the members of the irferior courts, but that the chief magistrate, with his executive council, are appointable by the legislature; that two members of the latter are triennially displaced at the pleasure of the legislature; and that all the principal offices, both executive and judiciary, are filled by the same department. The executive prerogative of pardon, also, is in one case vested in the legislative department.

The constitution of North Carolina, which declares "that the legislative, executive, and supreme judicial powers of government ought to be forever separate and distinct from each other," refers, at the same time, to the legislative department, the appointment not only of the executive chief, but all the principal officers within both that and the judiciary department.

In South Carolina, the constitution makes the executive magistracy eligible by the legislative department. It gives to the latter, also, the appointment of the members of the judiciary department, including even justices of the peace and sheriffs; and the appointment of officers in the executive department, down to captains in the army and navy of the State.

In the constitution of Georgia, where it is declared "that the legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other," we find that the executive department is to be filled by appointments of the legislature; and the executive prerogative of pardon to be finally exercised by the same authority. Even justices of the peace are to be appointed by the legislature.

In citing these cases, in which the legislative, executive, and judiciary departments have not been kept totally separate and distinct, I wish not to be regarded as an advocate for the particular organizations of the several State governments. I am fully aware that among the many excellent principles which they exemplify, they carry strong marks of the haste, and still stronger of the inexperience, under which they were framed. It is but too obvious that in some instances the fundamental principle under consideration has been violated by too great a mixture, and even an actual consolidation, of the different powers; and that in no instance has a competent provision been made for maintaining in practice the separation delineated on paper. What I have wished to evince is, that the charge brought against the proposed Constitution, of violating the sacred maxim of free government, is warranted neither by the real meaning annexed to that maxim by its author, nor by the sense in which it has hitherto been understood in America. This interesting subject will be resumed in the ensuing paper.

PUBLIUS

**The Federalist No. 48**

**These Departments Should Not Be So Far Separated as to Have No Constitutional Control Over Each Other**

***New York Packet*  
Friday, February 1, 1788  
[James Madison]**

**To the People of the State of New York:**

IT WAS shown in the last paper that the political apothegm there examined does not require that the legislative, executive, and judiciary departments should be wholly unconnected with each other. I shall undertake, in the next place, to show that unless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained.

It is agreed on all sides, that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident, that none of them ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective powers. It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it. After discriminating, therefore, in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary, the next and most difficult task is to provide some practical security for each, against the invasion of the others. What this security ought to be, is the great problem to be solved.

Will it be sufficient to mark, with precision, the boundaries of these departments, in the constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power? This is the security which appears to have been principally relied on by the compilers of most of the American constitutions. But experience assures us, that the efficacy of the provision has been greatly overrated; and that some more adequate defense is indispensably necessary for the more feeble, against the more powerful, members of the government. The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex.

The founders of our republics have so much merit for the wisdom which they have displayed, that no task can be less pleasing than that of pointing out the errors into which they have fallen. A respect for truth, however, obliges us to remark, that they seem never for a moment to have turned their eyes from the danger to liberty from the overgrown and all-grasping prerogative of an hereditary magistrate, supported and fortified by an hereditary branch of the legislative authority. They seem never to have recollected the danger from legislative usurpations, which, by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations.

In a government where numerous and extensive prerogatives are placed in the hands of an hereditary monarch, the executive department is very justly regarded as the source of danger, and watched with all the jealousy which a zeal for liberty ought to inspire. In a democracy, where a multitude of people exercise in person the legislative functions, and are continually exposed, by their incapacity for regular deliberation and concerted measures, to the ambitious intrigues of their executive magistrates, tyranny may well be apprehended, on some favorable emergency, to start up in the same quarter. But in a representative republic, where the executive magistracy is carefully limited; both in the extent and the duration of its power; and where the legislative power is exercised by an assembly, which is inspired, by a supposed influence over the people, with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions, by means which reason prescribes; it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions.

The legislative department derives a superiority in our governments from other circumstances. Its constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments. It is not unfrequently a question of real nicety in legislative bodies, whether the operation of a particular measure will, or will not, extend beyond the legislative sphere. On the other side, the executive power being restrained within a narrower compass, and being more simple in its nature, and the judiciary being described by landmarks still less uncertain, projects of usurpation by either of these departments would immediately betray and defeat themselves. Nor is this all: as the legislative department alone has access to the pockets of the people, and has in some constitutions full discretion, and in all a prevailing influence, over the pecuniary rewards of those who fill the other departments, a dependence is thus created in the latter, which gives still greater facility to encroachments of the former.

I have appealed to our own experience for the truth of what I advance on this subject. Were it necessary to verify this experience by particular proofs, they might be multiplied without end. I might find a witness in every citizen who has shared in, or been attentive to, the course of public administrations. I might collect vouchers in abundance from the records and archives of every State in the Union. But as a more concise, and at the same time equally satisfactory, evidence, I will refer to the example of two States, attested by two unexceptionable authorities.

The first example is that of Virginia, a State which, as we have seen, has expressly declared in its constitution, that the three great departments ought not to be intermixed. The authority in support of it is Mr. Jefferson, who, besides his other advantages for remarking the operation of the government, was himself the chief magistrate of it. In order to convey fully the ideas with which his experience had impressed him on this subject, it will be necessary to quote a passage of some length from his very interesting *Notes on the State of Virginia*, p. 195. "All the powers of government, legislative, executive, and judiciary, result to the legislative body. The concentrating these in the same hands, is precisely the definition of despotic government. It will be no alleviation, that these powers will be exercised by a plurality of hands, and not by a single one. One hundred and seventy-three despots would surely be as oppressive as one. Let those who doubt it, turn their eyes on the republic of Venice. As little will it avail us, that they are chosen by ourselves. An *elective despotism* was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others. For this reason, that convention which passed the ordinance of government, laid its foundation on this basis, that the legislative, executive, and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time. *But no barrier was provided between these several powers.* The judiciary and the executive members were left dependent on the legislative for their subsistence in office, and some of them for their continuance in it. If, therefore, the legislature assumes executive and judiciary powers, no opposition is likely to be made; nor, if made, can be effectual; because in that case they may put their proceedings into the form of acts of Assembly, which will render them obligatory on the other branches. They have accordingly, *in many* instances, *decided rights* which should have been left to *judiciary controversy*, and *the direction of the executive, during the whole time of their session, is becoming habitual and familiar*."

The other State which I shall take for an example is Pennsylvania; and the other authority, the Council of Censors, which assembled in the years 1783 and 1784. A part of the duty of this body, as marked out by the constitution, was "to inquire whether the constitution had been preserved inviolate in every part; and whether the legislative and executive branches of government had performed their duty as guardians of the people, or assumed to themselves, or exercised, other or greater powers than they are entitled to by the constitution. " In the execution of this trust, the council were necessarily led to a comparison of both the legislative and executive proceedings, with the constitutional powers of these departments; and from the facts enumerated, and to the truth of most of which both sides in the council subscribed, it appears that the constitution had been flagrantly violated by the legislature in a variety of important instances.

A great number of laws had been passed, violating, without any apparent necessity, the rule requiring that all bills of a public nature shall be previously printed for the consideration of the people; although this is one of the precautions chiefly relied on by the constitution against improper acts of legislature.

The constitutional trial by jury had been violated, and powers assumed which had not been delegated by the constitution.

Executive powers had been usurped.

The salaries of the judges, which the constitution expressly requires to be fixed, had been occasionally varied; and cases belonging to the judiciary department frequently drawn within legislative cognizance and determination.

Those who wish to see the several particulars falling under each of these heads, may consult the journals of the council, which are in print. Some of them, it will be found, may be imputable to peculiar circumstances connected with the war; but the greater part of them may be considered as the spontaneous shoots of an ill-constituted government.

It appears, also, that the executive department had not been innocent of frequent breaches of the constitution. There are three observations, however, which ought to be made on this head: *first*, a great proportion of the instances were either immediately produced by the necessities of the war, or recommended by Congress or the commander-in-chief; *second*, in most of the other instances, they conformed either to the declared or the known sentiments of the legislative department; *third*, the executive department of Pennsylvania is distinguished from that of the other States by the number of members composing it. In this respect, it has as much affinity to a legislative assembly as to an executive council. And being at once exempt from the restraint of an individual responsibility for the acts of the body, and deriving confidence from mutual example and joint influence, unauthorized measures would, of course, be more freely hazarded, than where the executive department is administered by a single hand, or by a few hands.

The conclusion which I am warranted in drawing from these observations is, that a mere demarcation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands.

PUBLIUS

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**Antifederalist No. 17 FEDERALIST POWER WILL**

**ULTIMATELY SUBVERT STATE AUTHORITY**

The "necessary and proper" clause has, from the beginning, been a thorn in the side of those

seeking to reduce federal power, but its attack by Brutus served to call attention to it, leaving a

paper trail of intent verifying its purpose was not to give Congress anything the Constitution

"forgot," but rather to show two additional tests for any legislation Congress should attempt: to

wit--that the intended actions would be both necessary AND proper to executing powers given

under clauses 1-17 of Article I Section 8. This is the fameous BRUTUS.

This [new] government is to possess absolute and uncontrollable powers, legislative, executive

and judicial, with respect to every object to which it extends, for by the last clause of section

eighth, article first, it is declared, that the Congress shall have power "to make all laws which

shall be necessary and proper for carrying into execution the foregoing powers, and all other

powers vested by this Constitution in the government of the United States, or in any department

or office thereof." And by the sixth article, it is declared, "that this Constitution, and the laws of

the United States, which shall be made in pursuance thereof, and the treaties made, or which

shall be made, under the authority of the United States, shall be the supreme law of the land; and

the judges in every State shall be bound thereby, any thing in the Constitution or law of any State

to the contrary notwithstanding." It appears from these articles, that there is no need of any

intervention of the State governments, between the Congress and the people, to execute any one

power vested in the general government, and that the Constitution and laws of every State are

nullified and declared void, so far as they are or shall be inconsistent with this Constitution, or

the laws made in pursuance of it, or with treaties made under the authority of the United States.

The government, then, so far as it extends, is a complete one, and not a confederation. It is as

much one complete government as that of New York or Massachusetts; has as absolute and

perfect powers to make and execute all laws, to appoint officers, institute courts, declare

offenses, and annex penalties, with respect to every object to which it extends, as any other in the

world. So far, therefore, as its powers reach, all ideas of confederation are given up and lost. It is

true this government is limited to certain objects, or to speak more properly, some small degree

of power is still left to the States; but a little attention to the powers vested in the general

government, will convince every candid man, that if it is capable of being executed, all that is

reserved for the individual States must very soon be annihilated, except so far as they are barely

necessary to the organization of the general government. The powers of the general legislature

extend to every case that is of the least importance-there is nothing valuable to human nature,

nothing dear to freemen, but what is within its power. It has the authority to make laws which

will affect the lives, the liberty, and property of every man in the United States; nor can the

Constitution or laws of any State, in any way prevent or impede the full and complete execution

of every power given. The legislative power is competent to lay taxes, duties, imposts, and

excises;-there is no limitation to this power, unless it be said that the clause which directs the use

to which those taxes and duties shall be applied, may be said to be a limitation. But this is no

restriction of the power at all, for by this clause they are to be applied to pay the debts and

provide for the common defense and general welfare of the United States; but the legislature

have authority to contract debts at their discretion; they are the sole judges of what is necessary

to provide for the common defense, and they only are to determine what is for the general

welfare. This power, therefore, is neither more nor less than a power to lay and collect taxes,

imposts, and excises, at their pleasure; not only the power to lay taxes unlimited as to the amount

they may require, but it is perfect and absolute to raise ;hem in any mode they please. No State

legislature, or any power in the State governments, have any more to do in carrying this into

effect than the authority of one State has to do with that of another. In the business, therefore, of

laying and collecting taxes, the idea of confederation is totally lost, and that of one entire

republic is embraced. It is proper here to remark, that the authority to lay and collect taxes is the

most important of any power that can be granted; it connects with it almost all other powers, or

at least will in process of time draw all others after it; it is the great mean of protection, security,

and defense, in a good government, and the great engine of oppression and tyranny in a bad one.

This cannot fail of being the case, if we consider the contracted limits which are set by this

Constitution, to the State governments, on this article of raising money. No State can emit paper

money, lay any duties or imposts, on imports, or exports, but by consent of the Congress; and

then the net produce shall be for the benefit of the United States. The only means, therefore, left

for any State to support its government and discharge its debts, is by direct taxation; and the

United States have also power to lay and collect taxes, in any way they please. Everyone who

has thought on the subject, must be convinced that but small sums of money can he collected in

any country, by direct tax; when the federal government begins to exercise the right of taxation

in all its parts, the legislatures of the several states will find it impossible to raise monies to

support their governments. Without money they cannot be supported, and they must dwindle

away, and, as before observed, their powers be absorbed in that of the general government.

It might be here shown, that the power in the federal legislature, to raise and support armies at

pleasure, as well in peace as in war, and their control over the militia, tend not only to a

consolidation of the government, but the destruction of liberty. I shall not, however, dwell upon

these, as a few observations upon the judicial power of this government, in addition to the

preceding, will fully evince the truth of the position.

The judicial power of the United States is to be vested in a supreme court, and in such inferior

courts as Congress may, from time to time, ordain and establish. The powers of these courts are

very extensive; their jurisdiction comprehends all civil causes, except such as arise between

citizens of the same State; and it extends to all cases in law and equity arising under the

Constitution. One inferior court must be established, I presume, in each State, at least, with the

necessary executive officers appendant thereto. It is easy to see, that in the common course of

things, these courts will eclipse the dignity, and take away from the respectability, of the State

courts. These courts will be, in themselves, totally independent of the States, deriving their

authority from the United States, and receiving from them fixed salaries; and in the course of

human events it is to be expected that they will swallow up all the powers of the courts in the

respective States.

How far the clause in the eighth section of the first article may operate to do away with all idea

of confederated States, and to effect an entire consolidation of the whole into one general

government, it is impossible to say. The powers given by this article are very general and

comprehensive, and it may receive a construction to justify the passing almost any law. A power

to make all laws, which shall be necessary and proper, for carrying into execution all powers

vested by the Constitution in the government of the United States, or any department or officer

thereof, is a power very comprehensive and definite, and may, for aught I know, be exercised in

such manner as entirely to abolish the State legislatures. Suppose the legislature of a State should

pass a law to raise money to support their government and pay the State debt; may the Congress

repeal this law, because it may prevent the collection of a tax which they may think proper and

necessary to lay, to provide for the general welfare of the United States? For all laws made, in

pursuance of this Constitution, are the supreme law of the land, and the judges in every State

shall be bound thereby, anything in the Constitution or laws of the different States to the contrary

notwithstanding. By such a law, the government of a particular State might be overturned at one

stroke, and thereby be deprived of every means of its support.

It is not meant, by stating this case, to insinuate that the Constitution would warrant a law of this

kind! Or unnecessarily to alarm the fears of the people, by suggesting that the Federal legislature

would be more likely to pass the limits assigned them by the Constitution, than that of an

individual State, further than they are less responsible to the people. But what is meant is, that

the legislature of the United States are vested with the great and uncontrollable powers of laying

and collecting taxes, duties, imposts, and excises; of regulating trade, raising and supporting

armies, organizing, arming, and disciplining the militia, instituting courts, and other general

powers; and are by this clause invested with the power of making all laws, proper and necessary,

for carrying all these into execution; and they may so exercise this power as entirely to annihilate

all the State governments, and reduce this country to one single government. And if they may do

it, it is pretty certain they will; for it will be found that the power retained by individual States,

small as it is, will be a clog upon the wheels of the government of the United States; the latter,

therefore, will be naturally inclined to remove it out of the way. Besides, it is a truth confirmed

by the unerring experience of ages, that every man, and every body of men, invested with power,

are ever disposed to increase it, and to acquire a superiority over everything that stands in their

way. This disposition, which is implanted in human nature, will operate in the Federal legislature

to lessen and ultimately to subvert the State authority, and having such advantages, will most

certainly succeed, if the Federal government succeeds at all. It must be very evident, then, that

what this Constitution wants of being a complete consolidation of the several parts of the union

into one complete government, possessed of perfect legislative, judicial, and executive powers,

to all intents and purposes, it will necessarily acquire in its exercise in operation.

BRUTUS

**Antifederalist No. 84 ON THE LACK OF A BILL OF RIGHTS**

By "BRUTUS"

When a building is to be erected which is intended to stand for ages, the foundation should be

firmly laid. The Constitution proposed to your acceptance is designed, not for yourselves alone,

but for generations yet unborn. The principles, therefore, upon which the social compact is

founded, ought to have been clearly and precisely stated, and the most express and full

declaration of rights to have been made. But on this subject there is almost an entire silence.

If we may collect the sentiments of the people of America, from their own most solemn

declarations, they hold this truth as self-evident, that all men are by nature free. No one man,

therefore, or any class of men, have a right, by the law of nature, or of God, to assume or

exercise authority over their fellows. The origin of society, then, is to be sought, not in any

natural right which one man has to exercise authority over another, but in the united consent of

those who associate. The mutual wants of men at first dictated the propriety of forming societies:

and when they were established, protection and defense pointed out the necessity of instituting

government. In a state of nature every individual pursues his own interest; in this pursuit it

frequently happened, that the possessions or enjoyments of one were sacrificed to the views and

designs of another; thus the weak were a prey to the strong, the simple and unwary were subject

to impositions from those who were more crafty and designing. In this state of things, every

individual was insecure; common interest, therefore, directed that government should be

established, in which the force of the whole community should be collected, and under such

directions, as to protect and defend every one who composed it. The common good, therefore, is

the end of civil government, and common consent, the foundation on which it is established. To

effect this end, it was necessary that a certain portion of natural liberty should be surrendered, in

order that what remained should be preserved. How great a proportion of natural freedom is

necessary to be yielded by individuals, when they submit to government, I shall not inquire. So

much, however, must be given, as will be sufficient to enable those to whom the administration

of the government is committed, to establish laws for the promoting the happiness of the

community, and to carry those laws into effect. But it is not necessary, for this purpose, that

individuals should relinquish all their natural rights. Some are of such a nature that they cannot

be surrendered. Of this kind are the rights of conscience, the right of enjoying and defending life,

etc. Others are not necessary to be resigned in order to attain the end for which government is

instituted; these therefore ought not to be given up. To surrender them, would counteract the very

end of government, to wit, the common good. From these observations it appears, that in forming

a government on its true principles, the foundation should be laid in the manner I before stated,

by expressly reserving to the people such of their essential rights as are not necessary to be

parted with. The same reasons which at first induced mankind to associate and institute

government, will operate to influence them to observe this precaution. If they had been disposed

to conform themselves to the rule of immutable righteousness, government would not have been

requisite. It was because one part exercised fraud, oppression and violence, on the other, that

men came together, and agreed that certain rules should be formed to regulate the conduct of all,

and the power of the whole community lodged in the hands of rulers to enforce an obedience to

them. But rulers have the same propensities as other men; they are as likely to use the power

with which they are vested, for private purposes, and to the injury and oppression of those over

whom they are placed, as individuals in a state of nature are to injure and oppress one another. It

is therefore as proper that bounds should be set to their authority, as that government should have

at first been instituted to restrain private injuries.

This principle, which seems so evidently founded in the reason and nature of things, is confirmed

by universal experience. Those who have governed, have been found in all ages ever active to

enlarge their powers and abridge the public liberty. This has induced the people in all countries,

where any sense of freedom remained, to fix barriers against the encroachments of their rulers.

The country from which we have derived our origin, is an eminent example of this. Their magna

charta and bill of rights have long been the boast, as well as the security of that nation. I need say

no more, I presume, to an American, than that this principle is a fundamental one, in all the

Constitutions of our own States; there is not one of them but what is either founded on a

declaration or bill of rights, or has certain express reservation of rights interwoven in the body of

them. From this it appears, that at a time when the pulse of liberty beat high, and when an appeal

was made to the people to form Constitutions for the government of themselves, it was their

universal sense, that such declarations should make a part of their frames of government. It is,

therefore, the more astonishing, that this grand security to the rights of the people is not to be

found in this Constitution.

It has been said, in answer to this objection, that such declarations of rights, however requisite

they might be in the Constitutions of the States, are not necessary in the general Constitution,

because, "in the former case, every thing which is not reserved is given; but in the latter, the

reverse of the proposition prevails, and every thing which is not given is reserved." It requires

but little attention to discover, that this mode of reasoning is rather specious than solid. The

powers, rights and authority, granted to the general government by this Constitution, are as

complete, with respect to every object to which they extend, as that of any State government-it

reaches to every thing which concerns human happiness-life, liberty, and property are under its

control. There is the same reason, therefore, that the exercise of power, in this case, should be

restrained within proper limits, as in that of the State governments. To set this matter in a clear

light, permit me to instance some of the articles of the bills of rights of the individual States, and

apply them to the case in question.

For the security of life, in criminal prosecutions, the bills of rights of most of the States have

declared, that no man shall be held to answer for a crime until he is made fully acquainted with

the charge brought against him; he shall not be compelled to accuse, or furnish evidence against

himself-the witnesses against him shall be brought face to face, and he shall be fully heard by

himself or counsel. That it is essential to the security of life and liberty, that trial of facts be in

the vicinity where they happen. Are not provisions of this kind as necessary in the general

government, as in that of a particular State? The powers vested in the new Congress extend in

many cases to life; they are authorized to provide for the punishment of a variety of capital

crimes, and no restraint is laid upon them in its exercise, save only, that "the trial of all crimes,

except in cases of impeachment, shall be by jury; and such trial shall be in the State where the

said crimes shall have been committed." No man is secure of a trial in the county where he is

charged to have committed a crime; he may be brought from Niagara to New York, or carried

from Kentucky to Richmond for trial for an offense supposed to be committed. What security is

there, that a man shall be furnished with a full and plain description of the charges against him?

That he shall be allowed to produce all proof he can in his favor? That he shall see the witnesses

against him face to face, or that he shall be fully heard in his own defense by himself or counsel?

For the security of liberty it has been declared, "that excessive bail should not be required, nor

excessive fines imposed, nor cruel or unusual punishments inflicted. That all warrants, without

oath or affirmation, to search suspected places, or seize any person, his papers or property, are

grievous and oppressive."

These provisions are as necessary under the general government as under that of the individual

States; for the power of the former is as complete to the purpose of requiring bail, imposing

fines, inflicting punishments, granting search warrants, and seizing persons, papers, or property,

in certain cases, as the other.

For the purpose of securing the property of the citizens, it is declared by all the States, "that in all

controversies at law, respecting property, the ancient mode of trial by jury is one of the best

securities of the rights of the people, and ought to remain sacred and inviolable."

Does not the same necessity exist of reserving this right under their national compact, as in that

of the States? Yet nothing is said respecting it. In the bills of rights of the States it is declared,

that a well regulated militia is the proper and natural defense of a free government; that as

standing armies in time of peace are dangerous, they are not to be kept up, and that the military

should be kept under strict subordination to, and controlled by, the civil power.

The same security is as necessary in this Constitution, and much more so; for the general

government will have the sole power to raise and to pay armies, and are under no control in the

exercise of it; yet nothing of this is to be found in this new system.

I might proceed to instance a number of other rights, which were as necessary to be reserved,

such as, that elections should be free, that the liberty of the press should be held sacred; but the

instances adduced are sufficient to prove that this argument is without foundation. Besides, it is

evident that the reason here assigned was not the true one, why the framers of this Constitution

omitted a bill of rights; if it had been, they would not have made certain reservations, while they

totally omitted others of more importance. We find they have, in the ninth section of the first

article declared, that the writ of habeas corpus shall not be suspended, unless in cases of

rebellion,-that no bill of attainder, or ex post facto law, shall be passed,-that no title of nobility

shall be granted by the United States, etc. If every thing which is not given is reserved, what

propriety is there in these exceptions? Does this Constitution any where grant the power of

suspending the habeas corpus, to make ex post facto laws, pass bills of attainder, or grant titles of

nobility? It certainly does not in express terms. The only answer that can be given is, that these

are implied in the general powers granted. With equal truth it may be said, that all the powers

which the bills of rights guard against the abuse of, are contained or implied in the general ones

granted by this Constitution.

So far is it from being true, that a bill of rights is less necessary in the general Constitution than

in those of the States, the contrary is evidently the fact. This system, if it is possible for the

people of America to accede to it, will be an original compact; and being the last wilt, in the

nature of things, vacate every former agreement inconsistent with it. For it being a plan of

government received and ratified by the whole people, all other forms which are in existence at

the time of its adoption, must yield to it. This is expressed in positive and unequivocal terms in

the sixth article: "That this Constitution, and the laws of the United States which shall be made in

pursuance thereof, and all treaties made, or which shall be made, under the authority of the

United States, shall be the supreme law of the land; and the judges in every State shall be bound

thereby, any thing in the Constitution, or laws of any State, to the contrary notwithstanding."

"The senators and representatives before-mentioned, and the members of the several State

legislatures, and all executive and judicial officers, both of the United States, and of the several

States, shall be bound, by oath or affirmation, to support this Constitution."

It is therefore not only necessarily implied thereby, but positively expressed, that the different

State Constitutions are repealed and entirely done away, so far as they are inconsistent with this,

with the laws which shall be made in pursuance thereof, or with treaties made, or which shall be

made, under the authority of the United States. Of what avail will the Constitutions of the

respective States be to preserve the rights of its citizens? Should they be pled, the answer would

be, the Constitution of the United States, and the laws made in pursuance thereof, is the supreme

law, and all legislatures and judicial officers, whether of the General or State governments, are

bound by oath to support it. No privilege, reserved by the bills of rights, or secured by the State

governments, can limit the power granted by this, or restrain any laws made in pursuance of it. It

stands, therefore, on its own bottom, and must receive a construction by itself, without any

reference to any other. And hence it was of the highest importance, that the most precise and

express declarations and reservations of rights should have been made.

This will appear the more necessary, when it is considered, that not only the Constitution and

laws made in pursuance thereof, but alt treaties made, under the authority of the United States,

are the supreme law of the land, and supersede the Constitutions of all the States. The power to

make treaties, is vested in the president, by and with the advice and consent of two-thirds of the

senate. I do not find any limitation or restriction to the exercise of this power. The most

important article in any Constitution may therefore be repealed, even without a legislative act.

Ought not a government, vested with such extensive and indefinite authority, to have been

restricted by a declaration of rights? It certainly ought.

So clear a point is this, that I cannot help suspecting that persons who attempt to persuade people

that such reservations were less necessary under this Constitution than under those of the States,

are wilfully endeavoring to deceive, and to lead you into an absolute state of vassalage.

BRUTUS