

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 famous 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 them 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 be 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

No. 68 – On The Mode Of Electing The President

From a speech by William Grayson given to the Virginia ratifying convention on June 18, 1788.

Mr. [William] GRAYSON. Mr. Chairman, one great objection with me is this: If we advert to . . . [the] democratical, aristocratical, or executive branch, we shall find their powers are perpetually varying and fluctuating throughout the whole. Perhaps the democratic branch would be well constructed, were it not for this defect. The executive is still worse, in this respect, than the democratic branch. He is to be elected by a number of electors in the country; but the principle is changed when no person has a majority of the whole number of electors appointed, or when more than one have such a majority, and have an equal number of votes; for then the lower house is to vote by states. It is thus changing throughout the whole. It seems rather founded on accident than any principle of government I ever heard of. We know that there scarcely ever was an election of such an officer without the interposition of foreign powers. Two causes prevail to make them intermeddle in such cases: - one is, to preserve the balance of power; the other, to preserve their trade. These causes have produced interferences of foreign powers in the election of the king of Poland. All the great powers of Europe have interfered in an election which took place not very long ago, and would not let the people choose for themselves. We know how much the powers of Europe have interfered with Sweden. Since the death of Charles XII, that country has been a republican government. Some powers were willing it should be so; some were willing her imbecility should continue; others wished the contrary; and at length the court of France brought about a revolution, which converted it into an absolute government. Can America be free from these interferences? France, after losing Holland, will wish to make America entirely her own. Great Britain will wish to increase her influence by a still closer connection. It is the interest of Spain, from the contiguity of her possessions in the western hemisphere to the United States, to be in an intimate connection with them, and influence their deliberations, if possible. I think we have every thing, to apprehend from such interferences. It is highly probable the President will be continued in office for life. To gain his favor, they will support him. Consider the means of importance he will have by creating officers. If he has a good understanding with the Senate, they will join to prevent a discovery of his misdeeds. . . .

This quadrennial power cannot be justified by ancient history. There is hardly an instance where a republic trusted its executive so long with much power; nor is it warranted by modern republics. The delegation of power is, in most of them, only for one year.

When you have a strong democratical and a strong aristocratical branch, you may have a strong executive. But when those are weak, the balance will not be preserved, if you give the executive extensive powers for so long a time. As this government is organized, it would be dangerous to trust the President with such powers. How will you punish him if he abuse his power? Will you call him before the Senate? They are his counsellors and partners in crime. Where are your checks? We ought to be extremely cautious in this country. If ever the government be changed, it

will probably be into a despotism. The first object in England was to destroy the monarchy; but the aristocratic branch restored him, and of course the government was organized on its ancient principles. But were a revolution to happen here, there would be no means of restoring the government to its former organization.

This is a caution to us not to trust extensive powers. I have an extreme objection to the mode of his election. I presume the seven Eastern States will always elect him. As he is vested with the power of making treaties, and as there is a material distinction between the carrying and productive states, the former will be disposed to have him to themselves. He will accommodate himself to their interests in forming treaties, and they will continue him perpetually in office. Thus mutual interest will lead them reciprocally to support one another. It will be a government of a faction, and this observation will apply to every part of it; for, having a majority, they may do what they please.

I have made an estimate which shows with what facility they will be able to reelect him. The number of electors is equal to the number of representatives and senators; viz. , ninety-one. They are to vote for two persons. They give, therefore, one hundred and eighty-two votes. Let there be forty-five votes for four different candidates, and two for the President. He is one of the five highest, if he have but two votes, which he may easily purchase.

In this case, by the 3d clause of the 1st section of the 2d article, the election is to be by the representatives, according to states.

Let New Hampshire be for him, a majority of its. . . .	3 representatives is	2
Rhode Island	1	1
Connecticut	5	3
New Jersey	4	3
Delaware	1	1
Georgia	3	2
North Carolina	5	<u>3</u>
A majority of seven states is		15

Thus the majority of seven states is but 15, while the minority amounts to 50

The total number of voices (91 electors and 65 representatives) is . .	156
Voices in favor of the President are, 2 state electors and 15 representatives . .	<u>- 17</u>
	139

So that the President may be reelected by the voices of 17 against 139.

It may be said that this is an extravagant case, and will never happen. In my opinion, it will often happen. A person who is a favorite of Congress, if he gets but two votes of electors, may, by the

subsequent choice of 15 representatives, be elected President. Surely the possibility of such a case ought to be excluded.

Brutus II

Brutus

November 1, 1787

(excerpts)

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To the Citizens of the State of New-York.

I flatter myself that my last address established this position, that to reduce the Thirteen States into one government, would prove the destruction of your liberties.

But lest this truth should be doubted by some, I will now proceed to consider its merits.

Though it should be admitted, that the argument against reducing all the states into one consolidated government, are not sufficient fully to establish this point; yet they will, at least, justify this conclusion, that in forming a constitution for such a country, great care should be taken to limit and definite its powers, adjust its parts, and guard against an abuse of authority. How far attention has been paid to these objects, shall be the subject of future enquiry. 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 defence 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 now enquire.

So much, however, must be given up, 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 natural 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 declaration[s] 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 controul. 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 authorised 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 offence, 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 defence 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 this national compact, as in that of these 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 defence 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 controuled 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 controul 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 9th section of the 1st 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, &c. 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 right, guard against the abuse of, are contained or implied in the general ones granted by this constitution.

So far it is 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, will, 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 6th 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. ...

☐ Nov 15, 1787: Brutus III (New York)

The Antifederalist Brutus continues his efforts to point out "the principal defects" of the proposed Constitution. He examines "its parts more minutely, and show[s] that the powers are not properly deposited for the security of public liberty." He criticizes the scheme of representation in both the House and Senate. The small number of representatives to be chosen violates the core meaning of representation: "those who are placed instead of the people should possess their sentiments and feelings, and be governed by their interests; or, in other words, should bear the strongest resemblance of those in whose room they are substituted." But under the plan "the well born and highest orders in life, " and not "the farmer, merchant, mechanic" will be represented [☒ Full Text of Document](#)