

## General Introduction Hamilton

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

It is obvious that the Articles of Confederation have failed to establish a viable government. Now you, as citizens, are challenged to establish a new system. At stake is nothing less than the Union's existence, its citizens' safety and its stature in the world. Many say that Americans, by their conduct and example, must decide whether societies are able to establish good governments. If this is true, the decision must be made now.

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*To all to whom these Presents shall come, we the undersigned Delegates of the States who affixed to our Names send greeting.*

*Articles of Confederation and perpetual Union between the states of New Hampshire, Massachusetts-Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia.*

*Preamble to the Articles of Confederation  
We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessing of liberty to ourselves and our posterity, do ordain and establish this Constitution of the United States of America.*

*Preamble to the United States Constitution*

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This "project" will call for altruism and patriotism, and (I hope, but do not expect) discipline to serve, without distraction, our true interests. But the plan you will consider affects too many local interests and institutions not to be diverted into extraneous issues and passions.

The obstacles against the new Constitution are the resistance of certain men in every State to change that could diminish their power, income and social status, and others who hope to elevate themselves by abolishing the Union and dividing the country into several confederacies.

I know it is insincere and unwise to automatically discredit political opposition as "self-interested." And so, as always in great national discussions, these sentiments

will be allowed, acknowledging that they will release angry, malignant passions as opposing factions try to "sell" their opinions and recruit converts. Enlightened government energy and efficiency will be stigmatized as "jealous" offspring of despotic forces. Vigilance against dangers to the people's rights will be represented as stale bait for popularity at the expense of the public good. But jealousy, usually a component of love, and government vigor, essential to the security of liberty, can never, in considering important public actions, be separated. Moreover, dangerous ambition more often lurks behind zeal for our rights than for firm, efficient government. But history teaches that the former is a more certain road to despotism than to good administration. Of those tyrants who have overturned the liberties of republics, most have begun their careers courting "the people."

These thoughts are intended to alert you to dishonest objections – while frankly admitting that I am "friendly" to the new Constitution: I believe ratification is the best way to achieve liberty and assure dignity and happiness.

I plan a series of papers, to discuss:

- the Union's importance to your political prosperity;
- the Confederation's inability to preserve it;
- the importance to these goals of a government as

energetic as the one proposed;

- the proposal's conformity to republican principle;
- its similarity to your own State constitution; and
- the security to your liberty and to your property that

ratification will bring.

In the course of this discussion I will try to answer all the known objections to ratification.

You may consider it unnecessary to defend the Union. But we already hear whispers that one system cannot govern the thirteen States; that we must have separate confederacies. But those able to see the whole picture can see the dangers in Union dismemberment.

**Publius.**

## Dangers from Foreign Force and Influence Jay

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

AMERICANS must now decide one of history's most important questions. We must also consider it thoroughly and seriously.

Government is indispensable to civil society; to assure its success, we must all give up some of our rights. Therefore, we must consider whether it would be in our best interests to be one nation, with one federal government, or divide into individual, sovereign States or separate confederacies, each with "national" powers.

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*Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.*

Article II of the Articles of Confederation  
*[The Congress shall have the power] to make all laws which shall be necessary and proper for carrying into execution the ...powers [delegated to it by the Constitution], and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.*

Article I, Section 8(18) of the United States Constitution  
*No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit, make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law or law impairing the obligation of contracts, or grant any title of nobility.*

Article I, Section 10(1) of the United States Constitution  
*No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.*

Article I, Section 10(2) of the United States Constitution  
*No State shall, without the consent of Congress, lay any duty on tonnage, keep troops and ships of war in time of peace, enter any agreement or compact with another State or with a foreign power, or engage in war, unless actually invaded or in such imminent danger as to admit of delay.*

Article I, Section 10(3) of the United States Constitution

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Until recently, we all agreed that our prosperity depended on our continuing united, and our best, wisest citizens were focused on that goal. Now some politicians insist that we would be more secure and prosperous in separate "confederacies" or "sovereignities." We should not adopt these radical political ideas unless convinced that they are correct.

America, rather than detached, distant territories, is one connected, fertile, wide-spreading country. We are blessed with many soils and crops, watered with many streams, surrounded by navigable waters, with noble rivers forming highways for communication and transportation for our various commodities.

This one connected country belongs to one united people, descended from one heritage, speaking one language, professing one religion, attached to one set of government principles. We are very similar in our manners and customs. Together, fighting through a long and bloody war, we have established liberty and independence.

This country and this people seem to have been made for each other; they should never be split into a number of unsocial, jealous, alien sovereignties.

As citizens, we enjoy the same national rights, privileges, and protection. As a nation we have made peace and war, defeated enemies, formed alliances and made agreements with foreign states.

This sense of Union inspired us – the minute we had a political existence, while the Revolution still raged – to form a federal government to preserve and perpetuate it. At that time, there was little room for calm, mature inquiry and thought required to form a wise, well-balanced government for a free people. We should not be surprised to find, through experience, that a government instituted in those times is inadequate to its intended purpose.

An intelligent people, we recognized and regretted these defects. Still attached to Union and liberty, we saw the immediate danger to the former and the more remote risk to the latter. Persuaded that only a wisely framed national government could protect both, we convened the late convention at Philadelphia, to consider that subject.

This convention included men who had the people's confidence, many distinguished by their patriotism, virtue and wisdom in trying times. In a time of peace, unoccupied by other subjects, they consulted for many months and finally – unawed by power and uninfluenced by any passion except love of country – they presented and recommended their joint, unanimously-approved plan to the people.

Remember: this plan is only recommended, not imposed; it is recommended for sedate, candid consideration the subject demands.

But this is more wished than expected.

Experience teaches us not to be too optimistic.

Imminent danger induced the people of America to form the memorable Congress of 1774, which recommended certain wise measures – which were soon attacked by the press. Then many government officers, acting in their own interests, and mistaken and over-ambitious others, worked to persuade the people to reject that Congress' advice.

But the majority acknowledged the wisdom, experience and patriotism in Congress; that their Representatives would not recommend imprudent or unwise measures. Relying on Congress' judgment and integrity, they took its advice – ignoring the grand efforts to steer them from it.

If we had reason to rely on that inexperienced, little-known Congress, we have greater reason to respect the convention's judgment and advice because its most distinguished members – now seasoned and recognized for their abilities – were members of both.

Every Congress, like the convention, has agreed with the people that America's prosperity depends on its Union. To preserve and perpetuate it was the reason to form the convention, and it is also the purpose of the proposed plan. Why, then, are some men depreciating its importance? Why do some suggest that several confederacies would be better than one? I believe the people have always been correct on this subject, and that their universal, uniform attachment to the Union rests on substantial reason that I will try to explain in later papers.

**Publius.**

## Foreign Dangers – #2 Jay

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

Intelligent people generally adopt ideas and practices that serve their interests. We have long acknowledged the need for unity under one federal government, with enough power to fill all national purposes.

That government's first requirement is an ability to protect the people. Public safety relates to many situations and problems, which gives great latitude to those trying to define it precisely and thoroughly.

For the moment, let's confine the discussion to our safety from foreign arms and influence. Is, in fact, an efficient national government our best protection against hostilities from abroad?

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*No State shall engage in any war without the consent of the United States in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of a delay till the United States in Congress assembled can be consulted; nor shall any State grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States in Congress assembled, and then only against the Kingdom or State and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the United States in Congress assembled ...*

Article VI of the Articles of Confederation  
*All charges of war, and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, ...*

Article VIII of the Articles of Confederation  
*The Congress shall have power to lay and collect taxes, duties, imposts and excises, to ... provide for the common defense ... [of] the United States;*

Article I Section 8(1) of the United States Constitution  
*To declare war ...*

Article I Section 8(11) of the United States Constitution  
*To raise and support armies ...*

Article I Section 8(12) of the United States Constitution  
*To provide and maintain a navy;*

Article I Section 8(13) of the United States Constitution  
*To make rules for the government and regulation of the land and naval forces;*

Article I Section 8(14) of the United States Constitution  
*To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;*

Article I Section 8(15) of the United States Constitution  
*To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of officers, and the authority of training the militia according to the discipline prescribed by Congress;*

Article I Section 8(16) of the United States Constitution

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The number of wars in the world is in proportion to the number and weight of real and perceived causes that provoke them. If true, will more or fewer war causes confront a United America than a disunited America?

Generally, wars are caused by treaty violations and direct attacks. America already has treaties with at least six foreign nations, all except Prussia are maritime, and therefore able to harm us. We also have extensive commerce with Portugal, Spain, and Britain – and the latter two have major colonies in our “neighborhood.”

To preserve the peace, America must observe international laws relating to all these powers, and one national government can do this more effectively than thirteen separate States or three or four confederacies.

Once established, a good national government can – more easily than a town or State – draw on the time and talents of the best men in the country to serve and manage it. This will benefit other nations, as well as our own.

Moreover, under the national government, treaties and international laws will always be established and observed in the same way, based on unified, national policies. Otherwise, our partners would be forced to deal with as many as 13 different points of view.

The convention was also wise enough to commit these questions to courts appointed by and responsible to only one national government.

As a result, deliberate and accidental insults will have far less impact on a single, national government than on several lesser ones.

One good national government can also protect best against direct, violent attacks. Not one Indian war has been caused by aggression by the present federal government, feeble as it is; but several bloody Indian attacks have been provoked by improper conduct of individual States.

Quarrels between States and adjacent Spanish and British territories would be limited to those border areas. A border State alone might become irritated enough to fight with a foreign power. In that case, nothing can prevent hostilities more effectively than intervention by a unified national government, whose wisdom and prudence would not be weakened by the combatants' passions.

Indeed, the national government will not only eliminate just causes of war; it will have the power to settle disputes amicably. It will also act with less passion than pride-filled local and State authorities and will not need to justify all actions or acknowledge, correct or repair errors and offenses. And it can use moderation and candor to consider and decide on proper means to extricate the beleaguered State from foreign challenges.

Besides, a strong, united nation will more likely accept acknowledgments, explanations, and compensations than one of the thirteen States.

**Publius.**

## Foreign Dangers – #3 Jay

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

Our safety from foreign force depends on both not giving or taking offense that can lead to hostilities.

Nations generally make war whenever they believe they can gain from it. Absolute rulers attack for the sake of military glory, revenge, ambition or commitments to relatives, cronies or partisans.

As for *just* causes, consider these opportunities for international “friction”:

With France and Britain we compete in fisheries, and can supply their markets cheaper than they.

They and other European nations would celebrate our failure in navigation and shipping, because our success, if any, will be at their expense. As might China and India, who once sold us goods that we now supply ourselves.

Operating our own commerce in our own ships irritates European nations with nearby territories because the low cost and high quality of our goods, closeness to sources and markets, and our merchants’ and sailors’ skill give us important advantages over them.

In response, Spain shuts us out of the Mississippi and Britain out of the Saint Lawrence, and both bar us from the other waters between them and us. This is why other nations are jealous and uneasy.

Americans know these “discomforts” can lead to war at any time. This is why they also consider Union and a good national government necessary to peace.

One government can call talented, able people wherever in the Union they might be. It can move on uniform principles of policy. It can harmonize, assimilate, and – together or separately – protect the States. In forming treaties, it can act for the whole, and the particular interests of the States.

In sum, to defend any part, it can apply the resources and power of the whole more easily and quickly than State governments or separate confederacies. It can, as the States could not, place the militia in one corps under one chain of command, connected to the President.

What would British militia be if the English, Scottish and Welsh recruits only obeyed their own governments? Against an invasion, could those three governments fight the enemy as effectively as the single government of Great Britain?

We have heard much of the fleets of Britain, and the time may come when the American fleets will be as respected. But if one national government had not made British navigation a nursery for seamen – if it had not organized all national resources for forming fleets – they would not exist.

Apply these facts to our case. Leave America divided under multiple independent governments: what armies and fleets could we raise and pay? If one was attacked, would the others spend their blood and money in its defense?

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*Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.*

Article II of the Articles of Confederation  
*The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion, and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence.*

Article IV Section 4 of the United States Constitution

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The history of the Greek states abounds with such instances and, under similar circumstances, we would probably do the same.

Even if, say, New York would be willing to help an invaded State or confederacy: How much manpower and money would it contribute? Who would command the allied armies and who would issue the orders? Who would negotiate or arbitrate the peace?

With one government watching over our general and common interests, combining and directing the powers and resources of the whole, these problems would not arise.

United under one national government or split, foreign nations will treat us accordingly.

They will be much more ready to cultivate our friendship than provoke our resentment if they see a well-managed national government; prudently-regulated trade; a properly organized and disciplined militia; discreetly managed resources and finances; re-established credit; and a free, contented, united people.

If, on the other hand, they see States or confederacies going their own way, one leaning to Britain, another to France, and a third to Spain and perhaps played against each other by the three, what a poor, pitiful figure America will make in their eyes!

Experience has always taught that when a people or family so divide, it never fails to be against itself.

**Publius.**

## Foreign Dangers – #4 Jay

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

QUEEN ANNE once wrote to the Scottish Parliament on the importance of the UNION then forming between England and Scotland. She said, in part:

*An entire and perfect union will be the solid foundation of lasting peace: It will secure your religion, liberty, and property; remove the animosities amongst yourselves, and the jealousies and differences betwixt our two kingdoms. It must increase your strength, riches, and trade; and by this union the whole island, being joined in affection and free from all apprehensions of different interest, will be enabled to resist all its enemies. ... We most earnestly recommend to you calmness and unanimity in this great and weighty affair, that the union may be brought to a happy conclusion, being the only effectual way to secure our present and future happiness, and disappoint the designs of our and your enemies, who will doubtless, on this occasion, use their utmost endeavors to prevent this union.*

I remarked in my previous paper that weakness and divisions at home would invite dangers from abroad; and that nothing would do more to protect us than union, strength, and good government. British history gives us many lessons to follow without paying the price they paid.

Although it seems obvious that people sharing an island should be one nation, for ages they were divided into three – which almost constantly quarreled and fought. Though their interests respecting European nations were the same, their mutual jealousies were always inflamed, and they were far more trouble than help to each other.

Should we divide into three or four nations, would not the same thing happen? Would not similar long-cherished jealousies arise? Instead of being “joined in affection,” free from fear, envy and jealousy of each other, the States’ and confederacies’ conflicting interests would be the only objects of their policy and pursuits. And, like most bordering nations, we would always be at odds or at war, or living in suspicion and fear of each other.

The most confident supporters of separation cannot suppose that they would begin or remain equally strong because no plan can ever assure equality. Beyond local

conditions which tend to create and increase power in one place and impede it in others, we must acknowledge that superior policy and good management always separate governments from each other. And we cannot presume that all confederacies would be managed equally well.

When one of those nations or confederacies rises, as it certainly will, to political importance, the others will slip to “second-class” status, driven by envy and fear, and then the real conflict will begin.

The North, for example, is generally the region of strength, and we can expect that the most Northern of the proposed confederacies would become the strongest. Soon, the Northerners’ success and the Southerners’ want would ignite the kinds of conflict that afflict northern and southern Europe.

Anyone who understands history knows that American confederacies would neither love nor trust each other, which, in other nations’ eyes, would make them dangerous only to each other because they could never form defensive alliances against outsiders. Example: When did the independent British states unite their forces against a foreign enemy?

The proposed confederacies would be distinct nations, each having commerce and treaties with foreigners, built around the products and commodities they could offer for trade. Different commerce creates different interests, and different political attachments to different foreign nations. Hence, a nation at war with the Southern confederacy might be the Northerners’ best ally and trading partner.

In fact, as in Europe, our bordering confederacies acting in opposite interests would often take different sides. And it would be more natural for them to fear one another than faroff European nations. And therefore they would more likely use foreign alliances to guard against neighbors than neighbors against foreign attack. But remember – it is easier to welcome than repel foreign fleets and armies.

**Publius.**

## Dangers from Conflict Between States Hamilton

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

THERE IS no doubt that, disunited, the confederations the 13 States might join would often fight each other. Men are, after all, ambitious, vindictive and rapacious. To expect harmony between unconnected sovereignties in the same neighborhood is to forget and defy history.

Causes of international hostility are many. Some afflict governments almost constantly. These include the hunger for power, as against people's desire for equality and safety; and commercial rivalry and competition.

Still others arise from private passions of community leaders who abuse the people's confidence by sacrificing public tranquillity to personal benefit. Pericles, wooing a resentful prostitute, at his country's expense, destroyed the city of the Samnians then, in anger, to avoid prosecution, to avert political accusations, or from several causes, launched the Peloponnesian war, which ruined Athens.

Henry VIII's ambitious prime minister, aspiring to the crown, precipitated war between England and France.

And an example among ourselves: Shays's indebtedness, which helped plunge Massachusetts into civil war.

Even today, there are no doubt men who believe there can be "perpetual peace between the States," though separate and alienated from each other. The genius of republics (they say) is pacific; the spirit of commerce tends to soften men's manners and quench tempers which have so often kindled wars. Commercial republics like ours (they say) would never waste themselves in ruinous conflicts with each other. They will be governed (they say) by mutual interest and cultivate amity and concord.

Is it not, we may ask, in all nations' interest to cultivate such benevolent spirits? If so, have they pursued it? On the contrary, momentary passions and interests have greater control over conduct than policy, utility or justice.

In fact, republics are no less addicted to war than monarchies, and legislatures just as subject to irregular, violent biases. They often place their trust in "imperfect" leaders, who taint them with their selfish passions and views.

Moreover, commerce has done little to abolish war, because love of wealth is as corrupting a passion as power or glory. Witness that there have been as many wars fought for commercial gain as for territory or dominion.

Sparta, Athens, Rome, and Carthage were republics. Yet they were as often at war as monarchies in those times.

Sparta was little more than a well-regulated camp; and Rome never tired of conquest.

Carthage, a commercial republic, was the aggressor in the war that destroyed her.

Venice, in later years, more than once fought wars of ambition until Pope Julius II gave a deadly blow to this haughty republic.

The provinces of Holland, until overwhelmed by debt and taxes, were conspicuous in European wars.

Few nations have engaged in more wars than Britain – many instigated by the people and their representatives – often for commercial advantage, against the monarch's instincts and the State's real interests.

These are experiences of countries with interests similar to our own. How, then, can we expect interstate peace and cordiality *after* the present Confederacy is dissolved? It is time to awake from the dream of a golden age and map a practical direction for our political conduct.

The notion that harmony can accompany disunion is far from the general sense of mankind. A longstanding political axiom has it that nearness and likeness create natural enemies, not friends.

**Publius.**

## **FEDERALIST NO. 7**

# **Dangers from Conflict Between States Hamilton**

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

SOME PEOPLE ask, why would the States, if disunited, make war on each other? I answer: For the same reasons all nations have, at different times, been deluged in blood.

Territorial disputes have caused most wars that have desolated the earth – and would be a real threat for us.

We have vast unsettled territories. There are dissonant, undecided claims between several of them; dissolution of the Union would cause similar claims between them all. They have had serious discussions concerning rights which were ungranted at the time of the Revolution, on tracts which were usually deemed "crown lands."

The States that contain those lands have claimed them as their property. Others contend that the crown's rights passed on to the Union – especially that part of the Western territory which, by possession or submission of Indian proprietors, fell under the king's jurisdiction until relinquished in the peace treaty. This, they say, was an acquisition to America by compact with a foreign power.

Congress has prudently appeased this controversy by asking the States to make cessions to the United States for the benefit of the whole. Under resulting agreements, a large part of the vacant Western territory is, if only by cession, the common property of the Union. But if the Union were to end, the ceding States would be apt to reclaim the lands. The other States would insist on a



proportion, by right of representation. Their argument would be that a grant, once made, cannot be revoked, and that land rights acquired or secured by the Confederacy's joint efforts remain undiminished.

If, surprisingly, the States should agree that all share ownership in the public lands, there would remain the difficult question of apportionment. Some worry that different States would set up different principles: self-interested principles that could lead to conflict, with no umpire or common judge to separate the contenders.

In a land dispute between Connecticut and Pennsylvania, the Articles of Confederation required appeal to a federal court, which decided for Pennsylvania. But Connecticut was unsatisfied until compensated with an equivalent tract: she no doubt believed herself injured by the decision.

The lesson is that States, like people, accept defeat reluctantly. Those who witnessed the behind-the-scenes action in the controversy between New York State and Vermont remember the opposition we faced from States with real and pretended interests in the outcome. They can attest that, had New York tried to claim its rights by force, the peace of the Confederacy would have been in real danger. The threat grew from two motives: jealousy of New York's future power and the interests of influential New Hampshire, Massachusetts and Connecticut citizens who had gained land grants from the government of Vermont. Even States with claims clashing with ours seemed more ready to dismember New York than admit their own pretensions. New Jersey, Rhode Island and Maryland affected zealous support of Vermont's independence, hoping to deter our growing greatness.

Should we become disunited, these kinds of passions would likely embroil all States. Commercial competitions also generate tension. Smaller, less favorably located States would want to gain advantage. Every State or separate confederacy would set its own peculiar commercial policy. All of this would create distinctions, preferences and exclusions, which would breed discontent.

The relationships, based on equal privileges that we have enjoyed since the first settlers arrived, would sharpen the causes of discontent. We should be ready to recognize some perceived offenses as justifiable acts of sovereignties serving their own interests.

Still, it is improbable that enterprising Americans would respect trade regulations certain States might use to benefit their own citizens. Violations of those regulations on one side and efforts on the other to prevent and punish them would naturally lead to outrages, reprisals and wars.

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*No tax or duty shall be laid on articles exported from any State.*

Article I Section 9 (5) of the U.S. Constitution

*No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear or pay duties in another.*

Article I Section 9 (6) of the U.S. Constitution

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The opportunities some States would have to exploit others through commercial regulations would be resisted by the exploiters. The relationship between New York, Connecticut and New Jersey gives an example. New York's revenue needs require her to lay duties on her importations, paid by citizen-consumers of the two other States. New York could not give up this advantage, because her citizens would not willingly pay a duty in favor of their neighbors; nor could visitors in our markets be separated from citizens.

How long would our oppressed neighbors, forced to support our happiness, let us live in peace?

The national debt could also cause collisions between the States or confederacies. The way the debt is apportioned and paid would certainly produce ill-humor and animosity. How could we agree on an apportionment rule satisfactory to all? Scarcely any we can propose is free from real objections, and these would be exaggerated by "offended" parties.

Not even the States agree on a general principle for discharging the debt. Some are unimpressed with the need for national credit, others indifferent or opposed to any payment at any rate. Still other States, many of whose citizens are public creditors, would demand some equitable, effective provision. Their resentment would lengthen the former's procrastinations. In short, expect a long delayed settlement. Citizens of the interested States would clamor, while foreign powers demand satisfaction of their claims, and peace between the States would be threatened by both external invasion and internal contention.

Even should the apportionment be made, there is room to suppose that the rule agreed upon would, in practice bear harder upon some States than others. Naturally, the "sufferers" would seek relief from the burden while the others would dismiss a revision which would likely increase their own misery. Their refusal would encourage the complaining States to withhold contributions, and this non-compliance would lead to more wrangling. If all the States agree, some would defer payments due to lack of funds, financial mismanagement or "mistakes," and the natural reluctance to support yesterday's causes. And those delinquencies would generate complaints, recriminations, and quarrels because no one cares to contribute equally to efforts with unequal benefit. It is an old but valid truth that nothing causes friction more quickly than the payment of money.

Laws that violate private contracts and, thereby, citizens' rights, also cause enmity. We cannot expect that the separate States would legislate more liberally toward the others after ratification than before, unless we enact was to insure fairness. We witnessed, when the Rhode Island legislature offended Connecticut – the retaliatory spirit that can result. In such future "arguments," real war is not out of the question.

Previous papers have warned of the dangers to peace of "incompatible" alliances between States or confederacies and foreign nations. If America is not united, or only tied into some weak league, we would certainly entangle ourselves in Europe's deadly intrigues, and become prey to its power-grabbing artifices and

machinations. We must make "Divide and Command" the motto of every nation that hates or fears us.

**Publius.**

## **FEDERALIST NO. 8**

# **Consequences of Hostilities Between States Hamilton**

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

LET US assume that, if disunited, the States or any alliances they might form would undergo the rigors of mutual friendship and enmity that affect all neighboring nations. Then let us examine what that would mean.

First, we would see war between the States, and much more painful war than befalls countries with longstanding military traditions. The disciplined armies of Europe, though indifferent to liberty and economy, have made sudden conquest impracticable and prevented rapid, widespread desolation. The European art of fortification has also helped keep the peace: all European nations are encircled with battlements. Campaigns to defeat frontier garrisons by invasion are wastes of time, money and manpower. Previously, invaders penetrated to the enemy nation's heart before the invadees knew they were under attack. Now a relatively small, disciplined defensive force, aided by listening posts and watchtowers, can stop large armies in their tracks. Europe's military history tells not of nations subdued and empires overturned, but of battles that decide nothing.

In America, events would be reversed. Jealous of the resources military establishments always consume, the States would postpone building them, opening highways for enemies to travel. Big States would easily overrun their small, weak neighbors. But once conquered, the newly-won territory would come under attack by someone larger and stronger. We would see random wars, one after another, typified by plunder and devastation expected from untrained, undisciplined, demoralized irregulars.

Defense against invasion is the most powerful dictator of national policy. Liberty cannot stand against it. Violent death and destruction and ongoing danger compel even freedom-loving countries to resort to institutions that tend to destroy civil and political rights.

These institutions include standing armies, which are not prohibited by the new Constitution; therefore some infer they may exist (though with great expense and difficulty) under it. Dissolution of the Union, however, would guarantee standing armies, produced by frequent war and constant tension. Weaker States or confederacies would arm first, to match more potent neighbors. They would also, by necessity, strengthen their executive arms, while weakening the legislatures, and thereby begin a steady march toward monarchy.

This military strength would make the States or confederacies that use them superior to their neighbors. Under strong governments with disciplined military forces,

small, underendowed states have often defeated large, rich enemies. But very quickly, pride and self-preservation would force potential victim states to arm and organize. Then America would see the same engines of despotism that scourged the Old World. This would be the natural course of events and our policies will more likely succeed in maintaining freedom if they fit these realities.

These are not vague inferences from supposed defects in a Constitution that puts power in the hands of the people, their representatives or delegates. They are solid conclusions, drawn from human history.

You may ask why standing armies did not spring from the dissension that often distracted the Greek republics? There is no one answer. Today's industrious people, absorbed in gainful pursuits, are unlikely to build "soldier nations" like the Greeks produced. Modern revenue sources, multiplied by the growth of gold and silver, the industrial arts, and financial sciences, have revolutionized war, making disciplined armies and hostilities inseparable.

There is also a wide difference between military establishments in countries rarely threatened and those in constant fear of invasion. Safe countries may keep armies as large as any. But their citizens would be in no danger of military subjugation, laws would not be written to protect central authority, and civil government would maintain vigor. When they have no need for protection or to submit to its oppression, citizens view the soldiery as a necessary evil, and readily resist government attacks on their rights. The army may help suppress a mob or insurrection, but cannot encroach against the people's united efforts.

In a country constantly threatened, the opposite happens. The government is obliged to always prepare to repel invasion. Its armies must be big enough for instant defense. The continual need for their services increases the soldier's importance and degrades the citizen's. The military rises above the civil. The rights of inhabitants of threatened territories are unavoidably infringed. This weakens their sense of those rights and causes them to see the army as not only their protectors but their superiors – eventually, as masters. And it is very difficult to motivate people to boldly or effectively resist the military's power.

Britain falls in the "safe" category. Her geography and powerful marine guard her against invasion and eliminate a need for a large army. All she needs is enough force to meet a sudden attack until the militia could form and rally. National policy does not demand, and public opinion

would bar, a large regular army. For a long time, there has been little room for the operation of the other causes of internal war. All these elements serve to preserve liberty in spite of Britain's prevalent venality and corruption. But if Britain were located on the continent, she would be forced to build military establishments competitive with the rest of Europe's huge standing regular armies, and probably be victim to a single man's absolute power. It is possible, though not likely, that the British may be enslaved from other causes, but not by its inconsiderable army.

If we are wise enough to preserve the Union we may enjoy advantages similar to Britain's. Europe is far away.

Nearby colonies will likely continue too weak to threaten us. Therefore we should not need an extensive military.

But if we should disunite, or should the States join in two or three confederacies, we would soon look and act like European powers and our liberties would fall prey to the need to defend ourselves against each other.

This question deserves the most serious and mature consideration of all prudent, honest men of all parties. If they will make a firm, solemn pause and meditate dispassionately on its importance in all its aspects, they will quickly part with trivial objections to a Constitution, rejection of which would probably end the Union.

**Publius.**

## FEDERALIST NO. 9

# The Union as a Safeguard Against Domestic Faction and Insurrection Hamilton

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

A FIRM Union will be vital to the States' peace and liberty, as a bar against faction and insurrection. You cannot read the history of the Greek and Italian confederacies without feeling horror and disgust at the many revolutions that kept them continually swinging between tyranny and anarchy. Those were violent times, when creativity was often shattered by governmental vices.

In those disorders, modern despots find arguments against republicanism. They label free government inconsistent with order and deride its supporters. Ages-old free institutions refute these fallacies. And I believe America will create equally magnificent, permanent monuments to liberty.

The images of republican government they draw are distorted. But political science has improved greatly and, though unknown to the ancients, is now well understood.

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*All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.*

Article I Section 1 of the United States Constitution  
*The executive power shall be vested in a President of the United States. He shall hold his office during the term of four years, and together with the Vice-President, chosen for the same term, be elected as follows:*

Article II Section 1 of the United States Constitution  
*The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office*

.Article III Section 1 of the United States Constitution

during good behavior, establishing legislatures to which the people elect their own representatives – these are new, or newly perfected, ideas. Republican governments use them to strengthen themselves and remove or reduce their imperfections.

To these strengths, I add republicanism's ability to serve large and small constituencies: single states as well as continental confederacies, such as ours.

Confederacies' ability to suppress faction and to keep the domestic peace has been used in many countries and times, and is sanctioned by the most distinguished political writers. The Constitution's opponents have quoted Montesquieu on a republican government's need to limit its territory. But they neglect some of that great man's other opinions.

When Montesquieu recommends small republics, his standard was far smaller than almost all of our States. Neither Virginia, Massachusetts, Pennsylvania, New York, North Carolina or Georgia can be compared with his models. If we accept his idea, we must resort to monarchy or split into infinite little, jealous, clashing, stormy commonwealths breeding endless discord and earning universal contempt. Some writers on the other side seem aware of the dilemma, and have even suggested division of the larger States. That policy, creating countless offices, would serve petty politicians who could never promote the greatness or happiness of the American people.

Moreover, while it would force us to shrink our largest States, it would not prevent them from joining in one confederate government – and this is the real issue here.

Not only does Montesquieu *not* oppose a general Union of States, he views a confederate republic as a way to strengthen popular government. He says:

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Dividing power into distinct departments, legislating balances and checks, staffing courts with judges serving

*It is very probable that mankind would have been obliged at length to live constantly under the government of a single person, had they not contrived a kind of constitution that has all the internal advantages of a republican, together with the external force of a monarchical government. I mean a confederate republic.*

*This form of government is a convention by which several smaller states agree to become members of a larger one, which they intend to form. It is a kind of assemblage of societies that constitute a new one, capable of increasing, by means of new associations, till they arrive to such a degree of power as to be able to provide for the security of the united body.*

*A republic of this kind, able to withstand an external force, may support itself without any internal corruptions. The form of this society prevents all manner of inconveniences.*

*If a single member should attempt to usurp the supreme authority, he could not be supposed to have an equal authority and credit in all the confederate states. Were he to have too great influence over one, this would alarm the rest. Were he to subdue a part, that which would still remain free might oppose him with forces independent of those which he had usurped and overpower him before he could be settled in his usurpation.*

*Should a popular insurrection happen in one of the confederate states the others are able to quell it. Should abuses creep into one part, they are reformed by those that remain sound. The state may be destroyed on one side, and not on the other; the confederacy may be dissolved, and the confederates preserve their sovereignty.*

*As this government is composed of small republics, it enjoys the internal happiness of each; and with respect to its external situation, it is possessed, by means of the association, of all the advantages of large monarchies.*

These passages summarize the principal arguments for the Union, and remove the false impressions intended by misapplying other parts of the work. They are also connected with the subject of this paper: the Union's ability to repress domestic faction and insurrection.

A subtle distinction has been raised between a confederacy and a consolidation of States. The essence of the first, it is said, is that its authority is restricted to the members' collective capacities, excluding the individuals that compose them. Some contend that the national government should be uninvolved in internal administration. Others insist that a confederacy's member States must have exactly equal suffrage. These arbitrary positions are unsupported by principle and precedent. Indeed, there is no absolute rule on these subjects. This investigation will show such equality has caused incurable disorder and imbecility.

The definition of a confederate republic seems simply to be "an assemblage of societies," or two or more States joined in one State. The extent and specifics of federal authority are discretionary. So long as the States' separate governments stay in power serving local purposes but subordinate to the Union's general authority, it would still be an association of States, or a confederacy.

The proposed Constitution, far from abolishing the State governments, makes them integral to national sovereignty, by allowing them direct representation in the Senate and certain exclusive, important portions of sovereign power. This conforms to the definition of a federal government.

In the Lycian confederacy, consisting of 23 cities or republics, the largest were entitled to three votes in the common council, those in the middle to two, and the smallest to one. The common council appointed all the cities' judges and magistrates. This, obviously, interfered with the local jurisdictions' natural powers, which include appointing their own officers. Yet Montesquieu said of this association: "Were I to give a model of an excellent Confederate Republic, it would be that of Lycia."

From this it is apparent that he never contemplated the distinctions the objectors insist upon.

**Publius.**

## FEDERALIST NO. 10

# The Union vs. Faction and Insurrection – #2 Madison

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

IN POPULAR governments, faction is a dangerous vice. The Union's key advantage is its ability to break and control it.

Faction generates instability, injustice and chaos that have destroyed many elected governments – arming liberty's enemies. Our State constitutions have introduced improvements on democracy, but faction remains a danger. Some prominent citizens complain our

governments are too unstable; that the public good is disregarded in factional rivalries and decisions are too often based on the majority's overbearing interest.

These complaints are in some degree true, and some of the blame we lay to government is mistaken. Still, many serious problems derive from distrust of public actions and fear for private rights. These largely result

from factious spirits reflected in unsteady, unjust administration.

By a faction, I mean a minority or majority united and motivated by an interest conflicting with others' rights or the community's interests.

There are two cures for faction: (1) remove its causes, (2) control its effects. And there are two ways to remove the causes: (1) destroy liberty and (2) give everyone the same opinions, passions and the interests.

The first remedy is worse than the disease. To abolish liberty because it nourishes faction makes as much sense as abolishing air because it supports fire. As to the second, as long as reason isn't perfect, and we are free to exercise it, opinions will differ. As reason is linked to ego, opinions and passions influence each other. Men's varied faculties – the source of property rights – also prevent uniform interests.

Protecting these faculties is government's first duty. Protecting different, unequal property-acquiring faculties creates different sizes and kinds of property, and their influence on the emotions and views of respective owners divides society into factions.

Faction is human nature, and it works everywhere at different levels. Different religions, political ideas, attachment to different candidates ... These are some things that divide us into factions. Sometimes faction inflames animosity and drives us to fight each other. This "drive" is so strong, that when there is no major cause at work, minor distractions can ignite violence.

But the most common, durable cause of faction is unequal property distribution. Those with and those without property have always taken political sides. Regulating these conflicting interests (an essential legislative mission) involves partisanship and faction in government's necessary, ordinary operations.

No man is allowed to be a judge in his own cause, because his interest would bias his judgment and probably corrupt his integrity. Wisely, bodies of men are barred from both judgment and advocacy of a given cause. But most legislation is judicial as it concerns citizens' rights. And legislators are advocates and parties to political causes on which they decide and vote. To a proposed law concerning private debts, creditors are parties on one side and debtors on the other. Justice should hold the balance between them, yet the parties themselves are the judges and the largest, most powerful *will* win.

Shall we encourage domestic manufacturing by restricting foreign goods? This question would be decided very differently by the landed versus the manufacturing classes. It is pointless to say that enlightened statesmen can adjust these clashing interests and subject them to the public good. In fact, they will not always be in charge. In short, causes of faction cannot be removed but only (hopefully) controlled to optimize or minimize its effects.

But in a republic, if an evil faction has less than a majority, the republican principle allows the majority to vote against and defeat it. The offenders may clog government and convulse society, but the Constitution will prevent their violence.

But when a faction holds a majority, nothing can stop it from sacrificing the public good for its own benefit.

Elected government must protect against it in order to win popular support, either by preventing a bad idea from gaining a majority or an "infected" majority from taking malevolent action.

From this, you may conclude that a democracy, where citizens govern in person, cannot cure the ills of faction. Common passions or interests almost always affect majorities of the whole; there is nothing to stop them from sacrificing the minority to its own cause. This is why democracies are typically turbulent and contentious, incompatible with personal security or property rights and typified by short lives ending in violent deaths. Theoretic politicians who promote pure democracy suppose that perfect equality will equalize everyone's possessions, opinions and passions; history shows this is mistaken.

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*Each State shall appoint, in such manner as the legislature thereof may direct, a number of Electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States shall be appointed an Elector.*

Article II Section 2 of the United States Constitution  
*The Electors shall meet in their respective States and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of Electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President the votes shall be taken by States, the representation from each State having one vote ...*

Article II Section 3 of the United States Constitution  
*Note: The Articles of Confederation do not contain the words "President" or "election."*

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A republic where people act through elected representatives offers the cure. Examine its differences from pure democracy, and you will see how it benefits the Union. The two great differences between a democracy and a republic are:

1. The small number of delegates elected to government by the rest.
2. The greater number of citizens, and greater territory, over which the republic may extend.

The first difference refines and enlarges public views by passing them through a chosen body, whose wisdom can best discern the country's true interest, and is least likely to sacrifice that interest to expediency. This way, the people's voices, amplified by their representatives, are more in harmony with the public good than if pronounced by the people themselves in a meeting for the purpose.

On the other hand, the effect may be inverted. Corrupt men may use intrigue, bribery or other means to win election and then betray the people's interests. This raises the question whether small or large republics can elect better guardians of the public good. Larger republics are the best choice, because:

A. However small, the republic must have enough representatives to guard against the malicious few.

B. However large, delegates must be few enough to prevent the chaos of over-representation.

Note that the number of representatives in each case is not in proportion to its constituency, and the small republic has a greater proportion. It follows that if the ratio of fit candidates in the large republic equals that in the small, the large republic will offer more choices a better chance to elect a qualified representative body.

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*For the most convenient management of the general interests of the United States, delegates shall be annually appointed in such manner as the legislatures of each State shall direct, to meet in Congress on the first Monday in November, in every year, with a power reserved to each State to recall its delegates, or any of them, at any time within the year, and to send others in their stead for the remainder of the year. No State shall be represented in Congress by less than two, nor more than seven members ...*

Article V of the Articles of Confederation  
*Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons.*

Article II Section 3 of the United States Constitution

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Moreover, as each representative will be elected by more voters in the large than in the small republic, it will be more difficult for unworthy men to win election; and since voters are more free, they will likely gravitate to worthy candidates.

Yet there is a middle ground, surrounded by concerns. Too many voters make it difficult for representatives to

learn their interests. Too few voters tied to them limit their ability to understand and deal with national questions.

The federal Constitution refers the great, aggregate interests to the national Congress and local, particular questions to the State legislatures.

Another difference: A republic can govern a larger population and territory than a democracy, because it is most able to control faction.

The smaller the society and the fewer the interests within it, the more often a majority concentrates in one party and fewer individuals are needed to form a majority – which operates over a short, narrow range of issues. This makes it easy for oppressors to organize, plot and operate.

But when you widen the fields of interest, including more people, more parties and diverse interests, you make it more difficult for a majority to violate the minority's rights. That limits a faction's opportunity and ability to function. For one reason, it takes many more people to gather critical mass and soon distrust and dissension begin to erode effectiveness.

In controlling faction, a large republic like the proposed United States has the same advantage over a small republic that any republic holds over a pure democracy: the ability to place many strong obstacles against unjust self-interested majorities.

Factionous leaders may kindle fires within their own States, but they could not spread general conflagration through the others. A religious sect may degenerate into a political faction in a corner of the nation, but the number and variety of denominations spread across it will shield the country from that kind of danger. A rage for paper money, an abolition of debts, an equal division of property or any other improper or wicked project will be unlikely to pervade the Union.

In the Union's size and proper organization, I see a republican cure for the diseases that most often afflict republican governments. In the pride we feel in being republicans should be our zeal in cherishing the spirit and supporting the character of Federalists.

**Publius.**

## Need for the Union and a Navy to Advance Commerce Hamilton

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

THERE IS little disagreement on the Union's commercial importance to foreign trade.

European maritime powers are uneasy about our adventurous commercial spirit and its possible threat to their shipping – the basis of their navigation strength. Those with American colonies foresee dangers from bordering States able to build powerful marines.

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*No vessel of war shall be kept up in time of peace by any State, except such number only, as shall be deemed necessary by the United States in Congress assembled, for the defense of such State, or its trade ...*

Article VI of the Articles of Confederation  
*[The Congress shall have the power] To provide and maintain a navy ... [and] To make rules for the government and regulation of the ... naval forces ...*

Article I, Section 8 (13) & (14) of the United States Constitution  
*No State shall, without the consent of Congress ... keep troops and ships of war in time of peace ...*

Article I, Section 10 (3) & of the United States Constitution

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In defense, they will likely try to divide us and keep us from carrying our goods in our own ships. This would prevent us from competing with them, gaining the profits from our own goods and realizing our potential greatness.

By remaining united, we can counter this threat in many ways. By enacting regulations, nationwide, we can force foreigners to bid against each other for access to our markets. This is a real concern to those who see the importance of our rapidly growing, essentially agricultural markets to all manufacturing nations. By not acting against us, they risk huge losses in trade and shipping. Suppose we had a government strong enough to bar Great Britain (with whom we have no commercial treaty). This would enable us to negotiate vast, valuable commercial privileges in the British colonies.

In the past, Britain might have responded by simply shipping her goods to America through the Dutch. But the loss of revenue from not using her own ships would be heavy. And the Dutch, not they, would pocket the principal profits. This round-about, expensive trade arrangement would also make British goods higher priced and less competitive against the rest of Europe – another serious financial threat.

I believe that these disadvantages would force Britain to grant us market privileges in her island colonies in the West Indies. To gain these benefits, we would need to grant some exemptions and immunities in our own, and this would affect relations with other nations hoping to share in our trade.

Another way to influence European nations' conduct toward us would be to establish a federal navy. One of an effective Union government would be the strength and

ability to build a navy able to challenge the Europeans. This would be especially valuable to our operations in the West Indies. A few American ships, sent to reinforce either the British or the Spaniards could be enough to make either a winner or loser.

In the West Indies, we can command great respect. And if we offer useful American military equipment, we can negotiate commercial privileges and set attractive prices on our friendship and neutrality.

Indeed, by keeping the Union we can "referee" Europe's American conflicts, and turn them to our advantage. But by separating, we would allow rivalries between the States to destroy all of our advantages in international politics and trade. European nations at war with each other would not fear us, and could raid our resources to fill their needs.

Neutrality rights are respected only when defended. A weak nation gives up even the privilege to be neutral.

Under a vigorous national government, our natural strength and resources, directed to a common purpose, would impede European efforts to limit our growth. Active commerce, extensive navigation and a thriving maritime industry are, in short, morally and physically *necessary*. But disunited, even little schemes by little politicians could defeat us. Powerful maritime nations, capitalizing on our impotence, could set the conditions for our political existence. Moreover, as they have a common interest in carrying our goods and preventing us from shipping theirs, they would likely unite to destroy, or at least neutralize, our shipping. We would then be forced to accept any price for our commodities, and hand our trade profits to our enemies. The unequalled spirit of enterprise, which signifies the genius of American merchants and navigators, and is an inexhaustible mine of national wealth, would be stifled and lost. Then poverty and disgrace would spread across a country that, with wisdom, could win the world's admiration and envy.

Some rights of importance to American trade are also rights of the Union. I mean the fisheries, navigation of the Western lakes and access to the Mississippi. Dissolving the Union would bring the nation's whole waterborne mercantile future into question. Our enemies would certainly exploit our disunity.

Spain stands between us and the Mississippi. France and Britain compete with us for fisheries – and see them as critical to their navigation. They would not neglect this valuable weapon that prevents us from underselling them in their own markets. What could be more natural than preventing their success?

We should not consider our maritime strength a partial benefit. All the navigating States could – probably would –

benefit from it. As a nursery of seamen, it is a universal resource. To the launching of a navy, it is indispensable.

To the navy, the Union is important in various ways. In fact, every federal institution will grow and flourish in proportion to the size and weight of united support we put behind it. A United States Navy, which would tap all the States' resources, would be easier for the Union to build than any single State or partial confederacy.

Indeed, different parts of united America have peculiar advantages to put behind this enterprise. The southern States have certain kinds of naval stores – wood for hulls, tar, pitch, and turpentine – in abundance. Some Southern and Middle States have ample, high-quality iron. Seamen must come chiefly from the North.

Unrestrained commerce between the States will assure success of their products, both at home and, through access to ports, overseas. Also, the different States' varied products will help commercial enterprise grow ever larger. When one State's staple fails from a bad harvest, another State can replace it.

Wide varieties, as well as high values, of exportable products permit market competition and fluctuations that allow us to operate on better terms. Some items may be in demand at one time and unsalable at another, but a range of articles could not all suffer down markets at once. Shrewd traders will readily recognize these opportunities and will acknowledge that the aggregate balance of United States commerce would be much more favorable than that of thirteen separate or partially-united States.

On the other hand, whether the States are united or not, there would be intimate intercourse between them. But this commerce would be obstructed by many causes, which have been amply detailed in these papers. Unity, whether commercial or political, can only result from government unity.

There are other striking, animated points of view on this subject, but they lead too far into the future for discussion in a newspaper article. Still, I say our situation invites and our interests prompt us to plan for on-going improvement in American government. The world may politically and geographically be divided into four parts (Europe, Africa, Asia and America), with four sets of interests. Unhappily for the other three, Europe – through force, negotiations and fraud – dominates them all. Her success tempts her to believe the rest of mankind exists for her benefit. Philosophers have credited Europeans with physical superiority, and have asserted that all animals, including humans, degenerate in America. It is our responsibility to vindicate the honor of the human race and to teach the arrogant Europeans humility.

Union will let us do that. Disunion will defeat us. Let Americans refuse to become instruments of European greatness! Let the thirteen States, bound together in a strict and indissoluble Union, erect one great American system, superior to transatlantic force or influence, and able to dictate terms of connection between the old and new world!

**Publius.**

## FEDERALIST NO. 12

# The Union's Value to Revenue Creation Hamilton

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

A flourishing commerce is the nation's most productive source of wealth. Accordingly, it deserves intense discussion. By rewarding investment and hard work and promoting circulation of currency, it energizes industry and keeps it flowing abundantly. Every businessman aspires and expects to profit from his effort. Indeed, we now know the shared interests of agriculture and commerce have erased their old rivalries. History shows, as commerce prospers, land values rise because, when businessmen add value to earth products, farming creates new wealth. Nothing works harder than enterprise to optimize the value of labor and industry. Still, some men argue against this obvious truth.

Tax rates should conform to the volume and circulation velocity of wealth in the economy. Commerce contributes to both volume and velocity, making taxation easier.

The Emperor of Germany controls Europe's best gold and silver mines. Yet, with weak commerce, he collects small revenues and must borrow from other nations.

In America under the Articles of Confederation, direct national and State taxation is impracticable. It has been

defeated repeatedly by government gluttony and inefficiency, and the economy's inability to create wealth.

This surprises no one acquainted with other countries. In Britain, where direct taxes on huge wealth should be more tolerable and government is vigorous in collecting them, most national revenue comes from indirect taxes: domestic imposts and import duties.

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*The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several States within the time agreed upon by the United States in Congress assembled.*

Article VIII of the Articles of Confederation  
*The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States.*

Article I Section 8 (1) of the United States Constitution

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America obviously must depend on them as well. But with difficulty. Excises must come from a short, narrow list



of sources because our enterprising business people will resist and find ways to avoid them. Farmers will yield reluctantly to impositions on their houses and lands. And personal property is too unstable and easily concealed to be taxed, except at the time of consumption.

We must find a tax mode and source that eliminate these negative concerns and best fill our political and economic needs. It must be based on a federal/national Union, must support commerce and must expand its ability to create wealth and, thereby, generate government revenues. It must also make tax collection simpler, more effective and more productive without raising the rate of duties, and must make it possible for government to raise the rate without reducing trade.

But there are many factors that facilitate import-tax evasion through smuggling: the many rivers, bays and other means of communication-transportation within and between the States, and their similar language, manners and customs. Should we disunite, mutual jealousy would force the separate States or confederacies to keep duties low in order to avoid those temptations. This is because the temper of their governments would not allow the kinds of extreme measures European nations use to guard their trade routes and ports.

France has an army, estimated at 20,000 strong, to constantly patrol her inroads from smugglers. This shows the difficulty it faces in preventing illicit traffic. Should disunion place our States in the same situation, such force would not be tolerated.

But with one government working for all the States, and free trade between them, we would have only the Atlantic Coast to guard. Foreign vessels would rarely risk unloading before reaching port. They would face the

dangers of our rugged coast and detection by our navy before and after reaching their destinations. A few armed vessels, stationed at port entrances, could prevent infractions of our revenue rights. And because the national government would have a uniform interest to prevent smuggling throughout the States, enforcement would also be uniform.

Should we dissolve the Union, we would throw away this advantage. The United States lie a great distance from Europe. No one can pass from there to here in a matter of hours, as happens between France and Britain. This is a great weapon against overseas smuggling. The difference between importation from abroad and through a channel to a neighboring State is obvious. And a national government could, at much less expense, extend import duties further than any single State or partial confederacy.

Historically, I believe, State duties have not exceeded three per cent. In France they are estimated at about 15 per cent; in Britain they exceed that. In this country, there is nothing to keep the States from tripling their taxes. One barrel of whiskey could yield important revenue. About four million gallons of spirits are imported yearly into New York State. A shilling tax per gallon would produce two hundred thousand pounds. The liquor industry could absorb this rate of duty, and if it diminished consumption, that would benefit agriculture, the economy, the public morals and the health of the society.

What if we cannot fully utilize this resource? Without revenues, a nation loses its independence, and degrades into a province. No government would choose that status.

**Publius.**

## **FEDERALIST NO. 13**

# **Union's Benefit to Government Economy Hamilton**

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

Some say the convention plan would cost too much. But the more money government can save, the less it needs to raise in taxes. United under one government, the States will have only one national budget. But dividing into several confederacies will create many treasuries to fill. separating into unconnected governments would cost more.

Those who consider dismemberment seem to envision three confederacies: a Northern and Middle group of four States each, and a Southern group of five. Each would be larger in area than Britain. No entity that size could survive with a government smaller than proposed; once a society reaches a certain size, it requires the same civil energy and organization as the largest nation.

Also, if you study the States' geography, economies and peculiar habits and prejudices, you see that disunion will most naturally align them under two governments.

I believe that the "New England" States, with many links, will unite. New York could not afford to expose her

weak eastern flank to such a powerful confederacy. New Jersey, too small to serve as a frontier against it, would turn north. Even Pennsylvania, with her foreign commerce, strong navigation and her citizens' dependency on them, would want to join the Northern league.

Conversely, Southern States would see little reason to encourage navigation and give other nations freedom to carry and buy the commodities they produce. Pennsylvania, which must in any case be a frontier, would feel safest with her exposed side facing the weaker Southern confederacy. than the more powerful North. Whatever her decision, if the Northern group includes New Jersey, there would be no more than one confederacy south of Pennsylvania.

Obviously, the thirteen States can better support one national government than two or more confederate administrations. This negates the mistaken constitutional objection based on cost.

Considering the number of governments and the employees – police, military and administrators – needed to oversee the routes and borders between the different confederacies and guard them against smuggling and

invasion, it is clear that separation would injure our economy, tranquillity, and liberty.

**Publius.**

## **FEDERALIST NO. 14**

# **Geographic Objections to the Proposed Plan Madison**

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

FEW DOUBT the Union's value in defending us from foreign dangers, domestic unrest and economic weakness. It also protects us from military regimes like those that subverted Europe and the diseases of faction that have killed other popular governments. Only one reasonable objection remains: the huge area the Union must govern.

Adversaries of the new Constitution imagine that a republic's ability to govern is limited. I believe they mistake republics for democracies. The real difference between them is that, in a democracy the people meet and exercise government in person; in a republic they delegate it to elected representatives.

Democracies, as a result, apply best to small nations. Republics can administer huge territories, like ours.

Some writers in absolute or limited monarchies, try to exaggerate republican vices and defects, citing the turbulent democracies of ancient Greece and modern Italy.

Even today's Europe, which invented representative government, has not one pure republic. Americans have the opportunity to establish the first genuine republic. But sadly, some citizens would, by rejecting the proposed constitution, deprive us of its many benefits.

A democracy's limit is the distance the most remote citizens can afford to travel to participate in government. A republic's limit is the distance from the center that barely allows representatives to meet as often as necessary to administer public affairs. Do the United States' borders exceed this distance? Over the past thirteen years, the States' representatives in Congress, from the nearest and the farthest-away districts, have met almost continually.

The Union's limits, fixed by our peace treaty with Britain, are the Atlantic on the east, latitude 31° on the south, the Mississippi on the west, and on the north an irregular border running between 42° and 45°. Comparing this area with several European countries, the task of governing it is well within our ability. It is only a little larger than Germany, where a diet representing the whole empire meets every day. In Great Britain, members of Parliament from the northern extremity routinely travel as far as the longest distance within the Union. In addition:

1. The general government's lawmaking powers would be limited to concerns that affect all States. The State governments would deal with all others.

2. The first objective of the federal Constitution is to secure our 13-State Union, the second is to add other States. Both goals, we know, are practical.

3. Commerce across the Union will be aided by better roads and accommodations, an interior waterway down the Atlantic coast and other communications facilities.

4. Almost every State will, on one side or another, be a frontier bordering foreign nations and, therefore, have the greatest need of its strength and resources.

It may be inconvenient for Georgia or other Western and Northwestern border States to send representatives to Congress, but not as much as struggling alone against an invasion. If they benefit less in some ways than more central States, they will benefit more in other ways.

Do not listen to that voice saying that the American people, united by so many cords of affection, can no longer live together in the same family, can no longer protect mutual happiness, can no longer share a great, respectable, robust empire. Do not believe that the proposed government is a novelty that attempts the impossible. The most alarming novelty is that of tearing us apart to save our liberties and promote our happiness.

Why reject the experiment of an extended republic merely because it is new? Is it not our glory that, while we respect other times and systems, we will not overrule our good sense and the lessons of our own experience.

Future generations will be indebted for the many innovations about to benefit private rights and public happiness. Had the leaders of the Revolution acted only on established precedent, or proposed no government without a perfect historic model, Americans might be suffering the same misery bad governments have always inflicted on mankind. But, happily for America and the whole human race, they found a new and nobler way. They accomplished a revolution which has no parallel in history; created governments with no models on earth. They designed a great Confederacy, which their successors must improve and perpetuate. Their product is not perfect, but we wonder at how close they came. True, in framing the Articles of Confederation, they structured a flawed Union, but this was the most difficult task they faced and this is the mistake that the convention has corrected.

**Publius**

## The Articles' Inability to Save the Union – #1 Hamilton

### To the People of the State of New York.

THE CONVENTION plan's supporters and opponents agree that our national system has material imperfections and something must be done to prevent anarchy. Indeed, we have seen virtually everything that can wound an independent nation.

For example, we have incurred debts to foreigners and fellow citizens to preserve our political existence, with no proper provision for repayment.

A foreign power – against our interests and our rights – holds important territories and valuable posts that we should have reclaimed long ago.

We have neither troops, treasury or government to repel aggression or even remonstrate with dignity.

We cannot freely navigate the Mississippi because Spain bars us from it.

Our public credit, indispensable in dangerous times, has been abandoned as irretrievable.

Our commerce, essential to national wealth, is at its lowest point.

Respectability in foreign powers' eyes should protect us from encroachment, but our government's imbecility discourages them from dealing with us; our ambassadors abroad are a joke.

Violent, unnatural decline in land values is another sign of our distress. Our low improved-land prices can only be explained by lack of confidence.

Our shortage of private credit, too, more reflects insecurity than scarcity of money.

Who and what brought us to this situation? The same interests and ideas that would reject the proposed Constitution. Federalism's old adversaries strenuously oppose the only principles that can give us a chance to succeed. Admitting the United States government is devoid of energy, they oppose equipping it with powers needed to supply it. They still aim to increase Union authority without decreasing State authority. This demands full exposure of the Confederation's main defects, products of errors correctable only by redesigning and rebuilding the entire structure.

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*The said States hereby severally enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever.*

Article III of the Articles of Confederation

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The Confederation's great fault is in the principle of legislating for States as collective entities, not for their individual citizens. It does not run through all Union

authority, but pervades and governs the powers on which its efficiency and effectiveness depend.

The United States can indefinitely requisition men and money, but not by going directly to individual American citizens. As a result, though government resolutions are laws in theory, in practice they are only recommendations the States may observe or ignore.

It is troubling, after our experience with tyranny, that there still are men who fault the new Constitution for deviating from this baneful old principle, which is incompatible with the idea of government and would substitute a bloody sword for reason and persuasion.

There is no reason not to support the idea of a league or alliance between independent nations for specific purposes precisely stated in a treaty that leaves nothing to interpretation and whose success depends on the good faith of the parties. This kind of agreement exists among all civilized nations, subject to the usual rigors of peace and war, of compliance and non-compliance, and the parties' changing interests. Early in this century, Europe had an "epidemic" of these treaties, whose fondly-hoped-for benefits never materialized. To establish a balance of power and secure peace, all the resources of negotiation were exhausted and triple and quadruple alliances were formed – and then immediately broken. It taught mankind how little to depend on treaties with no sanction other than good faith, that entrust peace and justice to immediate political interests or passions.

If our States chose that kind of relationship, with no central government, they would risk the same kind of failure. It would give them an alliance both offensive and defensive where they would be friends one day and enemies the next as their rivalries, fed by foreigners' intrigues, ebb and flow.

But if we refuse to be placed in that situation, and choose a national government or a common council, the plan must include the elements that separate leagues from governments. It must extend the Union's authority to our citizens – government's *only* proper interests.

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*The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.*

– Article IV Section 2 [1] of the United States Constitution

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Government implies the power to make laws. It is essential that a law include a sanction: a penalty or punishment for disobedience. Otherwise, resolutions or commands pretending to be laws will amount to nothing more than advisories or recommendations. And the penalty, whatever it may be, can only be inflicted (1) by the courts and ministers of justice or (2) by force of arms.

The first kind applies only to men, the second to bodies politic or communities or States, because there is no way for a court to punish a rebellious government. In an association where general authority applies to the collective bodies of the communities that compose it, every law violation must evoke a state of war. Such a state does not deserve to be called "government," nor would any sensible person commit his life, liberty and happiness to it.

At one time we were told that a sense of common interest would assure the States' compliance with the Union's constitutional requisitions. Today, based on our intervening experience, this idea seems ridiculous. It betrays an ignorance of human nature.

Why institute government at all? Because, without constraint, men will not conform to reason and justice. Have we found that bodies of men act with greater integrity or impartiality than individuals? All accurate observers of mankind's conduct answer "no." And the source of the inference is that self respect is weaker when the blame for a bad deed is divided among many than when laid to one. A spirit of faction, which poisons deliberations of all bodies of men, often rushes collectivities into acts that individual members would never commit on their own.

Additionally, inherent in sovereign power is a resistance to outside control. In every political association formed to unite a number of smaller groups in a common interest, we see a tendency for subgroups to move away from the common center. This comes from the love of power. Power controlled or abridged almost always opposes power that controls or abridges it.

This proposition teaches us not to expect that the people trusted to govern the States will agree and comply with all of the general authority's resolutions or decrees. Human nature dictates that they will do the opposite.

Therefore, if federal laws cannot be enforced without federal authority, they will not be enforced at all. The State governments, with or without constitutional power to act, will make their own judgments on the rightness of those laws according to their immediate interests, aims and the degree of convenience. This scrutiny will take place oblivious to national interest and concern essential to right judgment, but with a strong bias to local politics, which always misguides decisions. The process will be repeated in every State and the actual execution will be heavily influenced by its ill-informed, prejudiced opinion. Those who take part in Congressional debate, who know how difficult it is to gain agreement on important issues, recognize the impossibility of inducing cooperation among all those State legislatures, deliberating independently at different times with different motivations.

In our case, the Articles of Confederation require agreement of all thirteen sovereign wills to execute every vital national measure. As predicted, Union measures have not been carried out and the States' delinquencies have halted the national government. Today Congress can scarcely keep up the forms of administration, until the States take the time to agree to replace the present shadow of a federal government.

This desperate situation did not arise at once. The specified causes first produced unequal, disproportionate degrees of State compliance. Some States' deficiencies gave others pretexts to follow suit. Why, they asked, should we bear more than our proper share of the common burden? Human selfishness could not resist such suggestions. Even visionary men, who looked forward to distant-future results, could not combat them. Each State, yielding to immediate interest or convenience, withdrew its support, until our frail, tottering governmental edifice seems ready to fall upon our heads and crush us beneath its ruins.

**Publius.**

## **FEDERALIST NO. 16**

# **The Articles' Inability to Save the Union – #2 Hamilton**

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

The Practice of most confederacies to legislate for their political units (e.g., States or Provinces) rather than for their citizens is called "the parent of anarchy." It naturally leads those units to ignore or violate national laws. This drives the central government to resort to force and, often, civil war, a bent that compels it to always maintain a large army. Otherwise, it could either not punish delinquency or hope the winner in the ensuing war will be friendly to the confederacy.

Generally, the dereliction of duty is joined by several States or, through bullying or contrived warnings of some common danger, a large, powerful violator would drag others into the fight. If allies are not available at home, a

dissident might turn for help to foreign powers, who readily exploit competing confederacies' dissension.

In any event, the first war of this kind would probably destroy the Union.

Actually, what we seem to be facing is a more natural death, unless the federal system is quickly and substantially reinvigorated. It is not likely, considering the genius of this country, that States supporting the Union would join it in a war against dissenters. As we have seen in the past, they would more readily take a middle road by imitating the violators' example. The guilt of all would thus become the security of all and this would make it difficult to determine whether and when force is necessary.

More than likely, the violation would amount to withholding tax moneys or other contributions. Before we could take armed action, we would need to know, without doubt, whether the nonpayment results from refusal or inability to pay. To justify force, the act must be so flagrant as to be obvious. This problem alone would open factious views and controversy in the national legislature.

The States should not enact a national Constitution that could only be kept in force by a large army on foot to enforce ordinary government actions. Yet this would be the result should the debate be won by those who would deny the power to govern individuals. Their way would lead to military despotism, which could not be sustained because the Union could not afford to raise or keep an army powerful enough to compel larger States to do their duty. Anyone who can imagine these States' future population and wealth can envision trying to use the law to coerce them.

There are confederacies with members smaller than many of our counties. Even there, legislating for sovereign States, backed by military force, has never succeeded. It has rarely been tried except against weak members, and usually attempts to coerce obedience have led to bloody internecine wars.

From this, an intelligent person must conclude that a federal government able to regulate the nation's concerns and preserve the general tranquillity must govern the citizens first. It must not put the States between the legislature and the people and must have direct power to execute and enforce its own decisions. Moreover, the

national authority must be exercised through the courts of justice. The Union government, like any State government, must be able to address itself directly to individuals' needs and to stir those passions that most strongly move them. It must, in short, be able to use the same powers invested in the State governments.

One may object that if any State should become disaffected with Union authority, it could obstruct its laws just as forcefully as under a State-centered system. True, if State legislature interposition is needed activate a Union measure, they can defeat it by inaction or evasion.

But if national laws were to take effect without this intervention, a State could not stop progress without an open, violent display of unconstitutional power. This would be politically very dangerous in the face of a populace enlightened enough to distinguish between a legal action and an illegal usurpation of authority. Its success would require a State legislative majority and agreement of the courts *and* the body of the people. Unless the judges participated in a given conspiracy with the legislature, they would pronounce it unconstitutional and void, and the people would throw their weight against it.

As to occasional disquiet, the general government could command larger resources than any State. And as to those feuds that can enflame whole nations: no government can always avoid or control them and it is pointless to object to a government unable to perform impossibilities.

**Publius.**

## The Articles' Inability to Save the Union – #3 Hamilton

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

SOME SAY the principle of governing for individual citizens would make the government too powerful, giving it powers properly left to the States. Why would the general government do that? It seems commerce, finance, negotiation and war – and all the rightfully national powers to regulate them – are enough to occupy it. Administering justice between citizens, supervising agriculture and similar concerns are legitimate local concerns. Federal usurpation of them would waste time, money and effort. But the good sense of the citizens of the States affected, and their members of Congress, would quash it.

It is easier for the State governments to encroach on national powers, as long as they govern honestly and prudently, because they have more influence over the public. In fact, this is a weakness of all federal constitutions.

The States' superior influence would result partly from the national government's wide, thinly-spread operations, but mainly from the nature of the States' responsibilities. It is natural that the more distant and unclear an issue, the less attention people pay it. A man is more attached to his neighborhood than to the State, to the State than to the nation – unless the national government manages that much better than State authorities.

The many minute interests that occupy local administrations require more tedious, closer attention to detail than a central authority could exert or maintain.

The State governments have an especially large advantage in administering criminal and civil justice – the most powerful, most relevant source of popular obedience and attachment. As immediate, visible, vigilant guardians of life and property, State law enforcers regulate individual citizens' most personal interests. It also makes the States dangerous rivals to Union power.

As we know from past federal constitutions, national governments operate out of sight of the masses. So they are less apt to directly affect the people's feelings and opinions, or to inspire a sense of obligation or attachment.

Though the ancient feudal systems were not, technically, confederacies, they were similar. There was a sovereign with authority over the whole nation and many feudal lords controlling lands allotted to them, and trains of retainers who occupied and obediently cultivated that land. This arrangement violated central authority leading to frequent wars between the feudal lords and sovereigns, who were too weak to protect the peace or the people from their oppressive lords. Historians call this period of European affairs "the times of feudal anarchy."

Vigorous, warlike sovereigns of superior ability acquired enormous prestige, influence and the closest thing at that time to "general" authority. But in general, the subordinate feudal lords defeated them, often taking over their fiefs and turning them into independent States. Even when the sovereign prevailed, he owed his success to the tyranny and violence the lords – who were enemies of those above and below them – inflicted on their tenants. But had the lords earned their vassals' loyalty and devotion, they certainly would have prevailed.

Our well-run State governments may be compared to the successful feudal lords and the Confederacy with the vulnerable sovereign. By gaining and maintaining the people's confidence and goodwill, the States (like the lords) can defeat the national government's encroachments. This is because the States' interest is governing individual citizens while the Confederacy concentrates on the States as collectivities, as well as the collective States.

**Publius.**

## Articles' Inability to Save the Union – #4 Hamilton and Madison

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

OF THE ancient confederacies, the most famous was the one that included the Greek republics under the Amphictyonic council. Available history tells us it bore an instructive resemblance to the United States under the Articles of Confederation.

The member city-states were sovereign states, with equal votes in the federal council and the power to:

- propose actions it judged necessary for Grecian common welfare;
- declare and wage war;
- decide disputes between members and fine the guilty;
- use all the confederacy's resources to punish the disobedient; and
- admit new members.

The Amphictyons were the guardians of religion and vast treasures in the temple of Delphos, where they heard complaints of inhabitants and directed those who came to consult the oracle. To legitimize their federal powers, they swore to defend the united cities, punish violators of the oath and inflict vengeance on despoilers of the temple.

In theory, these powers seemed sufficient for all general purposes. But in several key areas, they exceeded the authority specified by their articles of confederation. The Amphictyons' exploitation of the superstitious ideas of those times was one of classical government's most effective tools. They also assumed authority to deal with dissident member cities when necessary.

In practice, the powers, like those of Congress under our Articles, were exercised by deputies appointed by the city states they governed. But, instead of complying, powerful city states (Athens, and later the Lacedaemonians and Thebans) used their deputies to tyrannize the rest. This weakened, then destroyed, the confederacy.

Even during the wars with Persia and Macedon, the members never acted together and were often duped or bought off by the enemy. Between wars, they suffered domestic hardships, convulsions and carnage.

After the war with Xerxes, the Lacedaemonians reportedly tried to expel some cities from the confederacy for their unfaithful service. The Athenians, finding that the Lacedaemonians would gain power at Athens' expense, defeated the attempt. This piece of history proves the inefficiency of the confederacy, the ambition and jealousy of its most powerful members, and the dependent, degraded condition of the rest. Smaller members, though entitled in theory to equality under the system, became satellites.

Were the Greeks as wise as they were brave, their experience would have taught them the need for a closer union, and they would have used the peace following their defense against Persia to establish it. Instead, glory-inflated Athens and Sparta fought each other in the Peloponnesian war, which ruined the Athenians who started it.

Weak governments, when at peace, are always torn by internal dissension, which always brings trouble from abroad. When the Phocians plowed some consecrated ground belonging to the temple of Apollo, the Amphictyonic council fined them. The Phocians, helped by Athens and Sparta, refused to pay. The Thebans, allied with other city states, tried to enforce the fine with help from other city states and, secretly, from Philip of Macedon – who ultimately made himself master of the confederacy.

But had Greece been united by a strong central government, she would never have worn Macedon's chains and might have prevented the Roman Empire.

The Achaean league, another confederacy of Greek republics, had a far closer, better organized union. The Achaeans retained their municipal jurisdiction, appointed their own officers, and enjoyed perfect equality. Their senate had the sole power of peace and war, establishing diplomatic relations, entering treaties and alliances and appointing a "president."

He commanded the army and, with ten senators' advice and consent, governed the nation between senate sessions and, during assemblies, joined its deliberations.

The cities shared laws and customs, weights and measures and currency. When Lacedaemon joined the league from another, it abolished old institutions, adopted the Achaeans' but kept her government and legislation.

Many details of the Achaean government are lost to antiquity. But historians note that it was far more just and less violent than any of the independent cities acting alone. One scholar says that popular government – so tempestuous elsewhere – caused no disorders in the Achaean republic because it was tempered by the authority and laws of a centrally-administered union.

But the Achaean system did suffer faction. During the Amphictyonic confederacy, the Achaean league's smaller, little-important member cities – gained little notice and, when the Amphictyons were ruled by Macedon, they remained free. But Alexander's and Philip's successors worked to divide them: they seduced each into separate interests and dissolved the union. Some were subjugated by Macedonian garrisons, others by domestic usurpers.

But before long, shame and oppression awoke the Achaean love of liberty. Cities reunited as they found ways to cut off their tyrants. Soon the rejuvenated confederacy embraced most of Peloponnesus. Macedon watched but internal problems prevented action to stop the progress. All Greece caught the spirit and seemed ready to unite in one confederacy, but Sparta and Athens, jealous of the Achaeans' rising glory, quenched the enterprise. After a series of complex intrigues, the Achaeans were forced to either surrender to Sparta or beg Macedon for mercy. They chose the latter, and a Macedonian army quickly defeated the Spartan king, Cleomenes. The Achaeans soon learned that a powerful, victorious ally is another name for a master. Though weakened by dissension, the Achaeans stood against the Macedonians – this time by allying with the Romans, who re-enslaved the Achaeans.

I believe this history teaches the tendency of federal bodies to succumb to anarchy among their members (e.g., States) rather than tyranny by the central government.

**Publius**

## **FEDERALIST NO. 19**

# Articles' Inability to Save the Union – #5

## Hamilton and Madison

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

IN THE early days of Christianity, Germany was inhabited by seven separate nations. Charlemagne, the king of the Franks, made Germany part of his empire. He invented imperial power, along with its trappings, insignia and manners. But he had left the other nation chiefs – Charlemagne's principal vassals – and their legislatures intact. Inevitably, their fiefs became hereditary and their combined power grew. In the Eleventh Century, they overthrew the Franks and each advanced to true sovereignty, independence. Then, in the Fifteenth Century, furious private wars between them consumed their imperial authority.

Out of this feudal system, which had many features of a confederacy, grew the federal system which constitutes the Germanic empire. Its powers are vested in:

- A diet representing the member states.
- The emperor, also the executive magistrate with veto power over the diet.
- Judiciary tribunals with jurisdiction over disputes involving the empire and/or its members.

The diet has the power to legislate for the empire, make war and peace, form alliances, assess quotas of troops and money, build forts, regulate coinage and admit new members. It can also punish disobedient members by depriving them of their sovereign rights and seizing their possessions.

"Disobedience" is in part defined as entering compacts prejudicial to the empire, imposing tolls and duties without the emperor's and diet's consent, altering the value of money, doing injustice to one another and aiding or abetting lawbreakers.

Diet members are subject to judgment by the emperor and diet and, in their private capacities, by the judiciary.

The emperor's powers are many. Most important is his exclusive right to propose initiatives to the diet, veto its resolutions, name ambassadors, bestow dignities and titles, fill vacant electorates, found universities, grant privileges not injurious to the empire, collect and spend public revenue and watch over public safety. In certain cases, the electors form councils to meet with him. On the debit side, he owns no land, nor receives any payment (although his overall income and properties make him one of Europe's most powerful princes).

This massive list of constitutional powers is typical of European confederacies. Each rests on the basic principle that the empire is a community of sovereigns, that the diet represents and addresses all laws to the sovereigns. Which renders the empire unable to regulate its member states and insecure against external dangers or internal fermentations.

Germany has a long history of wars between the emperor and the princes and/or states, licentiousness of the strong, oppression of the weak, foreign invasions and intrigues, questionable requisitions of men and money

and attempts – aborted or involving death and desolation – to enforce them, general imbecility, confusion, and misery.

In the Sixteenth Century, the emperor went to war with some princes and states and, in one conflict, was put to flight and nearly captured. The late king of Prussia more than once fought and defeated his imperial sovereign. Books are filled with bloody quarrels and wars between the member states. Before the Peace of Westphalia, Germany was desolated by 30 years of war with Sweden. Foreign powers negotiated and enforced the peace, and made the articles of it, to which foreign powers are parties, part of the Germanic constitution.

Organizing for war does not necessarily strengthen a union. Military preparations are so complex that, before they are complete, the enemy is on the march.

The few national troops thought adequate in peacetime are poorly kept up and paid, and demoralized.

To maintain order and justice among these entities, the German empire was divided into nine or ten districts, each with its own internal organization responsible for the military execution of laws against neglect and rebelliousness. This demonstrates that each district is a miniature of the monster. Member states either fail to execute their commissions, or do it with the devastation and carnage of civil war. Sometimes the districts' offenses are worse than the mischief to be remedied.

For example, at one point, it was necessary to put a city in the circle of Suabia under the ban of the empire and the Duke of Bavaria, as director of another circle, was appointed to enforce it. He soon arrived with 10,000 troops and, as he secretly intended to revive an ancestral claim, he seized it in his own name, disarmed and punished the inhabitants.

You may ask, what holds the miserable German confederacy together? It is unwillingness of most member-states to seek help from foreign powers; weakness of most principal members, compared with the powers surrounding them; the weight and influence the emperor derives from his separate hereditary dominions; and the family connections that make him the first prince in Europe. Meanwhile, time continues to strengthen that feeble, insecure confederacy, preventing any reform based on a proper consolidation. Indeed, neighboring powers hate the possibility that consolidation would give the empire the real strength and stature it deserves. Foreign nations have long considered themselves parties to the changes in the German constitution and have often exposed their hidden agenda of perpetuating its weakness.

Another example: The connection between the Swiss cantons does not amount to a confederacy, though the relationship has a similar kind of stability. The cantons share no "national" treasury, no army, no currency, no



judiciary, no mark of sovereignty of any kind. They are kept together by the peculiarity of their geography, their individual weakness and need to band together for defense against powerful neighbors, by a lack of sources of contention, by their shared possessions and by the need to formally settle disputes between them.

There is little in common between Switzerland and the United States except their histories of failing to use their aggregate power to settle important differences. Three

times, Swiss religious controversies have kindled violence that has severed the league. Today Protestant and Catholic cantons have their own diets, leaving the general Swiss diet little business.

This separation also drove Berne and Luzerne into opposing foreign alliances.

**Publius.**

## The Articles' Inability to Save the Union – #6 Hamilton and Madison

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

THE UNITED Netherlands, a confederacy of aristocracies, also supports the main points of these papers. It has seven equal, sovereign provinces, each composed of equal, independent cities. On all important political issues, the provinces and cities must be unanimous.

The confederacy is governed by about 50 deputies appointed by the provinces, who sit in an assembly called a "States-General." Some hold their seats for life, others for one to six years; two deputies serve "during pleasure."

The States-General has power to:

- Make and execute treaties and alliances.
- Make war and peace.
- Raise armies and fleets.
- Ascertain quotas and demand taxes.
- Appoint and receive ambassadors.
- Collect import and export duties.
- Regulate the mint.
- Govern the dependent territories.

The provinces cannot, without general consent, enter foreign treaties, establish interprovincial imposts or duties higher than they charge their own subjects. A council of state supports the federal administration.

The union's chief executive is the stadtholder, now an hereditary prince. His political power comes from this independent title, his great family estates, connections with some of Europe's chief potentates and, most importantly, from his position as stadtholder for the individual provinces. This gives him the power to appoint town magistrates under certain circumstances, execute provincial decrees, preside in provincial tribunals and pardon wrongdoers.

As stadtholder of the union, he has authority to settle disputes between provinces, help in States-General deliberations and conferences, give audiences to foreign ambassadors and be represented at foreign courts.

As commander of a 40,000-man standing army he provides for garrisons, and generally manages military affairs – appoints officers, from colonels to ensigns. As admiral-general, he commands everything naval, presiding over the admiralties in person or by proxy, appointing lieutenant-admirals and other officers, and establishing councils of war, whose sentences he approves.

This is the Belgic confederacy, as outlined on paper. In practice, it is characterized by imbecility in the government, discord among the provinces, foreign influence and indignity, an unstable peace and peculiar calamities from war.

Long ago, Grotius remarked that nothing but his countrymen's hatred of Austria kept them from being

ruined by their constitution. The union of Utrecht, says another writer, gives the States-General seemingly enough authority to secure harmony, which jealousy in the provinces cancels out.

The same instrument, says another, forces each province to levy certain taxes but this article is hardly executed because the inland provinces have little commerce and cannot pay the quotas.

As a result, the provinces that can and do meet their quotas must pay and then try to gain reimbursement from the others, as they can. More than once, the province of Holland – which is richer and more powerful than all the rest – has collected at bayonet-point.

Foreign ministers, says Sir William Temple, himself a past foreign minister, negate referendum results with which they disagree by tampering with the provinces and cities. This way the treaty of Hanover, in 1726, was delayed a whole year. Like instances are many and infamous.

In emergencies, States-General are often forced to exceed their constitutional powers. They concluded, without legislative approval, the 1648 treaty of Westphalia that recognized their independence.

A weak constitution must fail for lack of proper powers or the usurpation of those necessary to public safety. Tyranny has probably more often grown from "emergency" assumptions of power called for by defective constitutions than from the full exercise of overgenerous constitutional government powers.

Even given the defects of stadtholdership, its influence in the provinces has probably prevented anarchy that could have dissolved it. The power of, and the intrigues fed by, The Netherlands' neighbors necessitate union. Its patriots have long spoken against these dangers and tried four times to remedy them by reforming their flawed constitution.

Now the American people, under the Articles of Confederation, seem to be suffering from popular convulsions, interstate conflict and invasion. The world is hoping that this crisis will end in a true union able to bring Americans tranquillity, freedom and happiness. They also hope these blessings will be quickly secured so that they may be "imported" to end their own political catastrophes.

Experience is the prophet of truth. The important truth is that a sovereignty over sovereigns, a government over governments, a legislature for communities rather than individuals, subverts the ends of civil discourse by substituting violence for law.

**Publius.**

## Other Confederation Defects Hamilton

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

AN OBVIOUS defect in the Articles is a lack of powers to exact obedience or punish disobedience to their resolutions, either by fine, suspension or loss of privileges or any other constitutional device. Nor can the federal authority use force against delinquent States. It is absurd that this power does not exist – America is the world's only confederation without the constitutional power to enforce its own statutes – and there has been much severe criticism of its absence in the proposed convention plan.

Without a constitutional penalty for the violation of federal laws, the major benefit of Statehood – help from other States in repelling domestic dangers – must be abandoned. Seizures of power can happen in every State, allowing violators to trample liberty, and the national government could legally do nothing but express indignation. Recently, Massachusetts emerged from a crisis that illustrates this danger. Who can say what might have happened if the malcontents had been led by a “Caesar” or “Cromwell,” rather than a hooligan? Who can predict what havoc a despotism based in Massachusetts can wreak the liberties of New Hampshire, Rhode Island, Connecticut or New York?

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*Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.*

Article II of the Articles of Confederation  
*Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.*

Article IV Section 1 (1) of the United States Constitution  
*A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.*

Article IV Section 2 (2) of the United States Constitution  
*No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim to the party to whom such service or labor may be due.*

Article IV Section 2 (3) of the United States Constitution

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Some object that a guarantee in the federal government might give over-ambitious State governments an excuse to bully others. Accepting this claim would cancel one of the Union's main advantages and reflects misunderstanding of the concept. The guarantee would not diminish the right of a majority of a State's citizens to legally, peacefully reform its constitution. but would only oppose violent changes, against which we cannot have

too many checks: civil peace and governmental stability depend on their effectiveness.

Where all government power is in the people's hands, there is less pretext for the State to use violence against citizens. In a popular or representative government, the natural cure for maladministration is a change of men. A guarantee by the national authority would be as valuable against rulers' usurpations as against ferments and outrages of community faction and sedition.

Another of the Articles' basic errors is the power to collect taxes from the States by quota, which violates the principal of State equality. Those who understand the many ways national wealth is created know there is no such thing as a standard measure of public wealth. Try to compare the wealth of the United Netherlands with that of Russia, Germany or France – factoring total land values and populations. There are no common denominators to take us to an honest valuation. The same comparison between our States would yield the same result. Contrasting Virginia with North Carolina, Pennsylvania with Connecticut or Maryland with New Jersey convinces us that the revenue those States generate in no way relates to their land areas or populations. The same is true of counties. Anyone familiar with New York State knows that King's County is far wealthier than Montgomery, but this is not reflected in square miles and populations.

National wealth depends on an infinite variety of factors. Geography, soil, climate, types of businesses, the nature of the government, education, availability to news and information, cultural environment and many more complex, minute, unique circumstances.

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*All charges of war, and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States in proportion to the value of all land within each State, granted or surveyed for any person, as such land and buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled shall from time to time direct/appoint. The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several States within the time agreed upon by the United States in Congress assembled.*

Article VIII of the Articles of Confederation  
*The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States ...*

Article I Section 8 (1) of the United States Constitution

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If there is no common measure of State wealth, there is no general rule to determine a State's ability to pay taxes. Any attempt to set quotas on contributions will end in inequality and oppression, which could eventually destroy the Union. The suffering States would refuse to cooperate with a formula that impoverishes their citizens while others prosper.

The only way to prevent it is to authorize the national government to raise its own revenues in its own way. Imposts, excises, and duties on consumed articles are essentially “fluid”: they find their own levels by the means used to collect them. Each citizen, by the way he uses his money, can determine the amount of his own taxes. The rich may be extravagant, the poor frugal, and overtaxation can always be avoided by making prudent consumption choices. Inequality that arises in some States from certain duties will probably be counterbalanced by inequalities from other taxes in other States. Over time, equilibrium will occur everywhere. If inequalities persist, they will never be as extreme as those created by quotas.

A signal advantage of consumption taxes is that they automatically protect us against excessive levies. They prescribe their own limit, which we cannot exceed without defeating the goal of expanding revenue. Applied to this issue, the saying is as accurate as it is clever that, “in political arithmetic, two and two do not always make four.”

If duties are too high, they cut consumption, taxes are eluded and the treasury loses revenue it would collect with proper, moderate rates. This forms a complete barrier against oppressive taxes.

Consumption taxes are classified as “indirect” taxes, and must for a long time raise the bulk of revenue in this country. “Direct” taxes are generally applied to land, buildings and people, and may, on the other hand, be apportioned according to fixed “value” or “population” formulas.

A nation’s agricultural strength and its population are nearly connected with each other. In every country it is a large task to maximize land values. In a sparsely-populated, developing country like ours, it is prohibitively expensive. In a branch of taxation where government discretion is not limited by the nature of things, establishing a fixed rule compatible with the end may be more convenient than to leave that discretion to the people.

Publius.

## FEDERALIST No. 22

# Other Confederation Defects – #2 Hamilton

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

IN ADDITION to the present system’s defects already discussed is its lack of a power to regulate commerce between States and with foreign countries. Nothing affecting our economy more urgently needs national supervision. It has caused friction between the States and prevented our entering fruitful treaties. Any nation that understands our political system would be mistaken to concede important privileges to the United States knowing that, at any moment, the States might violate them. It is no wonder that a trade bill in the British House of Commons declares that no new arrangements should be made until our government demonstrates that it can be depended on to perform as promised.

Several States have tried – through separate self-prohibitions, -restrictions, and -exclusions – to win Britain’s confidence, but the absence of unity behind a *national* authority able to end interstate umbrage has frustrated them. They will continue to fail as long as that obstacle exists.

German commerce is continually shackled by the many duties various princes and states exact on goods traversing their territories – to the point where the country’s many fine streams and navigable rivers have become almost useless. Though Americans might not permit this to happen to us, conflicting regulations, at length, could cause each State’s citizens to be treated as foreigners.

*deemed requisite to garrison the forts necessary for the defense of such State; but every State shall always keep up a well-regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and constantly have ready for use, in public stores, a due number of filed pieces and tents, and a proper quantity of arms, ammunition and camp equipage.*

*Article VI of the Articles of Confederation*

**The power to raise armies**, under the Articles, is merely a power to requisition quotas of men from the States. During the Revolution, this practice created competition between States resulting in a kind of auction for men: To meet their quotas, they outbid each other with enormous, insupportable bounties. Hoping for yet higher “rewards,” many men delayed their enlistments and tried to serve as briefly as possible. Hence, at the most critical periods of the war, enlistments were slow and small and short duty tours caused huge recruitment and training costs. This ruined discipline and often placed public safety under the protection of a disbanded army. Occasionally, we used oppressive “recruiting” expedients; e.g., impressment.

Recruiting quotas not only hinder the war effort but unbalance the States’ military burden. States near the war zone, motivated by self-preservation, tried to *overfill* their quotas, and those well behind the lines were equally negligent. Unlike monetary quota failures, which could be punished through fines, manpower could not be quantified for redress. The system of quotas and requisitions, whether applied to men or money, is imbecilic and unjust.

*[No] body of forces [shall] be kept up by any State in time of peace, except such number only, as in the judgment of the United States in Congress assembled, shall be*

*In determining questions in the United States in Congress assembled, each State shall have one vote.*

*Article V of the Articles of Confederation*  
*Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons.*

*Article I Section 3 (2) of the United States Constitution*

**The right of equal suffrage** among States is another Confederation defect. Every rule of fair representation rejects the idea that gives to Rhode Island a vote equal with those of Massachusetts, Connecticut and New York. Equal representation also contradicts the basic principle of republican government: "the majority rules." Its supporters may answer that, as sovereigns are equal, a State majority vote amounts to a majority of confederated America. But it may happen that a majority of States hold a minority of our population and two thirds of the American people will not submit their interests to management and disposal by one third. Large States would soon refuse to obey laws made by the small. To accept such a loss of importance would be to ignore both the love of power *and* equality. It is not rational to expect the first, or just to require the last. Small States, considering how greatly their safety and welfare depend on union, should renounce "equal" representation," which would eventually destroy it.

Objectors may say that not seven but nine States, or two thirds of the thirteen, must approve the most important acts of Congress, and infer that that would always compose a majority of the Union. But this does not negate the problem of an equal vote between unequal States, nor is the inference accurate for we can count nine States containing less than a majority of the people and it is constitutionally possible for these nine to provide the deciding votes. Besides, there will be many bills in Congress requiring bare majorities. Others which seem worthy of a seven-vote majority could have major impact. And the number of States is certain to grow, but there is no provision in the Articles to increase the vote ratio.

To allow a minority to over-rule the majority (which always happens when a decision requires more than a majority), subjects the sense of the greater number to that of the lesser. Congress, in the absence of a very few States has often been in the situation where one vote can stop all movement. Several times, one-sixtieth of the Union – about the proportion of Delaware and Rhode Island – has been able to do just that. This is one of those refinements that, in practice, causes the reverse of what is intended. The necessity of unanimity in public bodies, or something approaching it, is supposed to strengthen security. Actually, it embarrasses the administration, destroys government energy and substitutes the pleasure of a clique for legitimate deliberations of a respectable majority. In national emergencies when government goodness or badness, weakness or strength is critical, there is often a need to act. If a stubborn minority – using clever strategies and tactics – can influence the majority's opinion regarding the best way to manage the

emergency, the majority, to get something done, must accept the minority view. In fact, it is fortunate when such compromises can take place because many crises will not accommodate them. Then government action must be painfully suspended or defeated. Unable to gain the necessary number of votes, it is often kept inactive. Its situation must always smack of weakness, sometimes bordering on anarchy.

This kind of dilemma creates more opportunity for foreign meddling and domestic faction than a climate where the majority controls decisions, though some presume the opposite. Their mistake is to not pay attention to damage caused by obstructing government during crises. When the Constitution requires majority agreement before national action, we can feel safe because nothing improper is likely to be done. But we forget how much good can be prevented, and how much ill produced, by the power to hinder what may be necessary.

Suppose we were at war, allied with one foreign nation against another. Suppose our interest demanded peace but our ally elected to fight on. Naturally, we would be best served by seeking separate terms. In that event, our ally would find it easier to prevent our making peace were a two thirds' vote required rather than a simple majority because he would have to corrupt a smaller number. A two-thirds vote would also help a foreign enemy to frustrate us.

The principle also has commercial application. A trading partner could use the two-thirds rule to easily prevent our doing business with her competitor.

One weakness of republics is that they open doors to foreign corruption. An hereditary king has so great a personal interest in his nation's and his own glory, that a foreign power cannot bribe him into corruption. But in republics, officers elevated from the masses to pre-eminence and power by their fellow citizens' votes more readily accept payment for betraying their trust. History shows how corruption contributed to the deaths of the ancient commonwealths. Deputies of the United Provinces have been purchased by emissaries of neighboring kingdoms. In Sweden officials were so brazenly bought by France and England that Europe's most limited monarch – in a single day, without tumult, violence, or opposition – became one of its most absolute and uncontrolled.

**The want of a judiciary power** is the worst of the Confederation's defects. Laws are a dead letter without courts to expound and define their meaning and function. Treaties, to have force, must be considered part of the law of the land. Their true import, to individuals, must, like all other laws, be judicially determined. To assure consistency in these determinations, they should be submitted, in the last resort, to one supreme tribunal, instituted under the same authority that forms treaties. If each State has a court of final jurisdiction, one point may have as many different final determinations as there are States and courts. Men's opinions are endlessly diverse. We often see different courts and judges of the same courts differing from each other. To avoid contradictory decisions of a number of independent judiciaries, all nations have found it necessary to establish one court

superior to the rest, authorized to settle and uniform rules of civil justice.

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*The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.*

*Article III, Section 1 (1) of the United States Constitution*  
*The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign states, citizens, or subjects.*

*Article III, Section 2 (1) of the United States Constitution*

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This is especially important in our government, where laws of the nation can be negated by the laws of its parts. Giving ultimate jurisdiction to the State supreme courts makes contradictions from differences of opinion – as well as local views, prejudices and regulations – very damaging. Every time such interference happened, it would be understood that State or local statutes might be preferred to national laws: it is natural for men in office to defer to the authority to which gives them power.

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*No State shall lay any imposts or duties, which may interfere with any stipulations in treaties, entered into by the United States in Congress assembled, with any King, Prince or State, in pursuance of any treaties already proposed by Congress, to the courts of France and Spain.*

*Article VI of the Articles of Confederation*  
*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 ...*

*Article VI [2] of the United States Constitution*

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Under the Articles of Confederation, treaties of the United States are open to interpretation by thirteen different legislatures, and as many different courts of final jurisdiction governed by those legislatures. The faith, reputation and peace of the whole Union, are continually at the mercy of the prejudices, passions and interests of each State. How can foreign nations respect or confide in such a government? How can the people entrust their honor, happiness and safety to it?

By now it must be clear to all reflective men capable of objectivity that our system is so vicious and unsound as to require not only amendment but an entire change.

The Congress, by itself, is utterly improper for the exercise of the powers necessary to the Union. A unicameral assembly may suffice for those narrow, limited authorities heretofore delegated to the federal head, but not for the additional powers which even some of the Constitution's adversaries admit should reside in the central government. If that plan is not adopted, and if the Union is left to the ambitious aims of men who will use its dissolution to enrich and empower themselves, we will probably need to confer more upon Congress as now constituted. Then either the Confederation, from its intrinsic feebleness, will fall into pieces in spite of our efforts to prop it or, by progressive, necessary additions to its power, we will one day build a single government with all the most important prerogatives of sovereignty. We will thus impose upon our children one of the worst forms of government ever contrived – the tyranny the new Constitution's adversaries say they want to avoid.

The fact that the Articles were never ratified by the people weakens the system still further. Resting only on the consent of the several legislatures, the validity of its powers is often questioned – in detail. This has given rise to the powerful doctrine of legislative repeal, which holds that, since the Articles were enacted by a State legislature, they could be repealed the same way. It is a gross heresy to maintain that a party to an agreement has the right to revoke it. Still, the idea has respectable advocates. The fact that the question can be asked proves the need to build our national government on a foundation deeper than a mere sanction of delegated authority: specifically, on the consent of the people. The streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority.

**Publius.**

## FEDERALIST No. 23

# Why the New Government is Required to Preserve the Union Hamilton

To the People of the State of New York:

THIS INQUIRY will deal with the new government's major features and benefits, the amount of power it needs to fulfill its purpose and the people who should apply it.

*The said States hereby severally enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever.*

*Article III of the Articles of Confederation  
The Congress shall have power to ... provide for the common defense and general welfare of the United States ...*

*Article I Section 8 (1) of the United States Constitution  
To declare war ...*

*Article I Section 8 (11) of the United States Constitution  
To raise and support armies ...*

*Article I Section 8 (12) of the United States Constitution  
To provide and maintain a navy;*

*Article I Section 8 (13) of the United States Constitution  
To make rules for the government and regulation of the land and naval forces;*

*Article I Section 8 (14) of the United States Constitution  
To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;*

*Article I Section 8 (15) of the United States Constitution  
To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of officers, and the authority of training the militia according to the discipline prescribed by Congress;*

*Article I Section 8 (16) of the United States Constitution  
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 officer thereof.*

*Article I Section 8 (18) of the United States Constitution*

The Constitution's main features are specified provisions to:

- Defend the United States.
- Protect against internal convulsions and external attacks.
- Regulate commerce with other nations and between the States.
- Supervise political and commercial relations with foreign countries.

The powers essential to national defense are to:

- Raise armies, build and equip fleets, prescribe rules to govern both, direct their operations and fund their support.

These powers should be unlimited, because the variety, scope and severity of dangers confronting us is infinite. And they should be at least equal to all possible combinations of threats, and assigned to the same authorities that govern the common defense.

To an intelligent, honest person, this is a self-evident truth, which can be blurred but not made clearer by argument or reason. It rests on such simple, universal axioms as ...

*The means should be proportioned to the end.*

And ...

*The people expected to complete the task should have the means to complete it.*

Whether there should be a federal government entrusted with the common defense is a question that underlies our nation, and is open to discussion. If the answer is "yes," the government must have all the powers required to execute its trust. And unless it can be shown that threats to public safety can be placed within definable limits, there can be no constitutional limit on the government's authority to form, command or support national forces and resources.

Though the present Confederation fails to fulfill this need, its framers recognized this principle.

*... every State shall always keep up a well-regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and constantly have ready for use, in public stores, a due number of field pieces and tents, and a proper quantity of arms, ammunition and camp equipage.*

*Article VI of the Articles of Confederation  
All charges of war, and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States ...*

*Article VIII of the Articles of Confederation*

Congress has unlimited power to requisition men and money, govern the army and navy and direct their operations. As these requisitions are constitutionally binding on the States, who are obligated to furnish the required supplies, the framers evidently intended that the United States should command whatever resources they deemed requisite to the "common defense and general welfare." They presumed that the States could fulfill their duty by pledging to the federal government to serve the nation's true interests in good faith.

Experience has proven this expectation ill-founded and illusory and the observations made in the last paper will, I imagine, convince the objective, thoughtful reader that the entire system must be replaced; that if we are serious about keeping the Union alive in the future, we must stop legislating for the States as collective entities and extend the laws of the federal government to the individual citizens of America. We must also discard our fallacious quotas and requisitions as unworkable and unjust.

In sum, the Union should be invested with full power to levy troops, build and equip fleets and raise the revenues required to form and support of an army and navy in the same customary, ordinary manner as other governments.

If we agree that our country needs a republican government, the next essential issue is how to distribute power between the different branches of the government in order to fulfill their constitutional assignments. *Should the Union be constituted the guardian of common safety? Are fleets, armies and funds necessary to this purpose?*

If so, the Union government must be empowered to pass all laws, make all regulations related to national defense, interstate commerce and every other matter within its authority.

Does administration of justice between citizens of one State belong to the local governments? If so, they must have the legal resources connected to this and every other obligation assigned to their direction. Not to confer

the necessary powers would violate the most obvious rules of prudence and propriety, and to unwisely entrust the nation's great interests to incompetent hands.

We need to determine what level of government is best suited to provide for the public defense by virtue of its ability to:

- centralize information in order to best understand the extent and urgency of threats;
- represent the whole'
  - <sup>a</sup> most deeply involve itself in defending all the States;
- most sensibly exert necessary effort; and
- establish uniformity and consistency in defense plans and measures.

Is it not obviously inconsistent to assign the general defense function to the federal government and give the State governments the power to provide the moneys, men and materiel to carry it out? Is not a lack of cooperation the result of such a system? Will not this disorganization – naturally – be accompanied by weakness, disorder, unbalanced distribution of financial burdens and human calamities? Did we not suffer enough from these deficiencies during the Revolution?

If we are honest, we will see it is unwise and dangerous to restrict the federal government's defensive powers. The people, of course, will be wise to exert care and vigilance to vest them with the correct authority and

reject any plan that does not completely protect their welfare. Adversaries of the convention plan should not have voiced inflammatory declamations and unmeaning complaints about the extent of its powers. The powers are not, as opponents charge, too extensive for the management of our national interests. If it were true, as insinuated by some opposing writers, that the country's size will not permit us to form a government with such ample powers, it would prove that we should resort to separate confederacies operating within narrower boundaries. For it would be absurd to trust a government with our most essential national interests without trusting it with the powers that are indispensable to success. Let us not try to reconcile contradictions, but embrace a rational alternative.

But I believe the impracticability of one general system cannot be shown. Nothing of weight has been advanced to support that position and submit that the arguments in these papers have made the reverse position as clear as possible. In any event, it must be evident that the extent of the country argues strongly in favor of an energetic government because certainly no other can preserve the Union of so large an empire.

**Publius.**



## Powers Necessary to Common Defense – #1 Hamilton

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

TO THE proposed federal powers to create and direct the national forces, I have heard only one specific objection: that the convention plan does not prohibit standing armies in time of peace. I will try to show its weakness.

It is expressed in vague, unsupported – though bold – generalities contradicting the practice of other free nations, and the general sense of America as expressed in most of the existing State constitutions. Moreover, the objection turns on a supposed need to limit the national legislature's military oversight – a principle found in two State constitutions and rejected in all the rest.

Should a stranger read today's newspapers but not the convention plan, he would conclude either that it *mandates* peacetime standing armies or that it gives the executive the power to levy troops with no legislative approval.

If he then read the plan itself, he would find that neither is true: that the whole power to raise armies is lodged in the legislature, not the executive; that this legislature is to be a body of elected representatives, and that, instead of favoring standing armies, there is a clause which *forbids* appropriation to support an army longer than two years – a precaution which seems a real security against unnecessarily keeping up troops.

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*The Congress shall have power to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years.*

*Article I, Section 8 (12) of the United States Constitution*

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Conjecturing further, this imaginary newspaper reader would realize that America – so jealous of its liberties that all State constitutions contain precise, rigid precautions on this point – would not omit them from this new plan.

Indeed, if he reviewed the State constitutions, he would find that only two of them ban peacetime standing armies and that the other eleven are either silent on the subject or expressly admit the legislature's right to allow them.

Still, convinced that there must be some plausible foundation for the outcry – because he could not imagine that it was nothing more than a test of public credulity designed to deceive – he would search the existing Confederation for the explicit provisions against peacetime military establishments that seem to influence these “political champions”. But his astonishment would increase and acquire a measure of indignation upon discovering that they impose not a single such restraint on the United States. And he would see these clamors as the dishonest ruses of a sinister, unprincipled opposition

to a plan which should at least receive a fair, honest examination by all sincere lovers of their country!

But a close examination will show that legislative restraints respecting armies in peacetime would be improper, and if imposed out of societal necessity, would probably be ignored.

Though a wide ocean separates the United States from Europe, we should not feel excessively confident or secure. On one side of us, stretching far to our rear, are growing settlements subject to Britain.

On the other side, bordering the British settlements, are Spanish colonies and establishments. These colonies and their settlements in the nearby West India Islands, give them, in relation to us, a common interest. The tribes on our Western frontier should be regarded as our natural enemies and their natural allies, because they have most to fear from us, and most to hope from them. Improvements in navigation have made distant nations virtual neighbors. Britain and Spain are among Europe's principal maritime powers. Future alliances between them should be regarded as probable. Meanwhile, as a result, the family compact between France and Spain is diminishing every day. Politicians, logically, have always considered blood ties as weak links in the political chain. These realities admonish us not to consider ourselves entirely out of danger.

Before and since the Revolution, there has been a constant need to keep small garrisons on our Western frontier. These will continue to be indispensable, if only against the attacks by the Indians. These garrisons must either be manned by occasional militia detachments or permanent corps in government pay.

The first idea is impracticable; the militia would not long agree to be dragged from their occupations and families to perform that most disagreeable duty in peace time. And if they would, the cost of frequent troop rotations and industry's loss of their labor would cause loud objections. It would be burdensome and injurious to the public and ruinous to private citizens.

The latter, permanent-corps, option amounts to a *peacetime standing army*; albeit a small one, but no less real. This simple fact shows at once the impropriety of a constitutional prohibition, and the need to leave the matter to the legislature's discretion and prudence.

And as our strength grows, no doubt Britain and Spain will increase their military forces in our neighborhood. Unless we are willing to stand exposed and defenseless to their insults and encroachments, we will wisely increase our frontier garrisons in proportion to the annoyance our Western settlements might suffer. There are, and will be, certain posts commanding large territories to facilitate invasions of the remainder. Some of them will be keys to trade with the Indian nations. Can

any man think it would be wise to leave such posts undefended against one or the other formidable neighboring powers?

If we mean to be a commercial people, or merely to be secure on our Atlantic side, we must endeavor, as soon as possible, to build a navy. To that end, we must build dockyards and arsenals, and fortifications and garrisons to defend them. When we grow powerful enough at sea to

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use our fleets to protect our dockyards, those garrisons will become unnecessary. But where naval forces are in their infancy, moderate garrisons are indispensable against attacks to destroy those facilities – and the fleet itself.

**Publius.**

## **Powers Necessary to Common Defense – #2 Hamilton**

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

SOME MAY urge that the States, under Union direction, should provide for the common defense. But this inverts the primary principle of our political association. Transferring the common defense from the federal head to the States would oppress some States, endanger all, and poison the Confederacy.

The British and Spanish territories of Britain, like the Indian nations in our neighborhood, do not border on particular States, but encircle the Union from Maine to Georgia. The danger, though varying in degree, is therefore common. And the means of guarding against it should also be the responsibility of a common authority and a common treasury. As it happens, some States are more directly exposed. New York is one. Under a plan that divides defensive authority, New York would have to undertake all of the tasks and expenses needed to protect her *and* her neighbors. This would be neither be fair to New York nor safe for the other States.

Various problems would result. The States required to support the necessary undertakings would, for a long time to come, be unable and unwilling to carry the load of a competent defense establishment. The security of all would suffer from the selfishness, wastefulness, or incompetence of one member. Should that State become more wealthy and powerful, and its resources enlarged, the others would quickly become alarmed seeing the entire Union military force in the hands of its two or three most powerful members. Each would try to counterbalance that power. And then military units, fed by mutual jealousy, would swell beyond their proper size. And, being at the mercy of fellow States, they could take action that would destroy our national authority.

We have heard reasons to suppose that the State governments will be naturally prone to challenge the Union for power, and that in such a contest the people will most likely unite with their State governments. If the States should feel empowered by this huge advantage, along with their own military forces, they could be tempted, as well as equipped, to try to subvert the Union's constitutional authority. In that case, the people's liberty would be less safe than if the national forces remained in national government hands. If an army is to become a means to gain power, better that it be under the authority Americans are most, rather than least, likely to distrust.

The experience of ages attests that the people are always most in danger when the means to injure their rights belong those of whom they are least suspicious.

The framers of the Confederation, aware of the danger from separate State military forces, prohibited them from having ships or troops without Congress' consent.

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*No vessel of war shall be kept up in time of peace by any State, except such number only, as shall be deemed necessary by the United States in Congress assembled, for the defense of such State, or its trade; nor shall any body of forces be kept up by any State in time of peace ...*

Article VI of the Articles of Confederation

Placing a federal government and military establishment under State authority is no less illogical than paying for them from the federal treasury in a system of quotas and requisitions.

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*...every State shall always keep up a well-regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and constantly have ready for use, in public stores, a due number of field pieces and tents, and a proper quantity of arms, ammunition and camp equipage.*

Article VI of the Articles of Confederation

*All charges of war, and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States in proportion to the value of all land within each State, granted or surveyed for any person, as such land and buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled shall from time to time direct/appoint.*

Article VIII of the Articles of Confederation

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The objection, designed to preclude standing peacetime armies, never tells whether the prohibition should apply to raising armies, keeping them up in tranquil days, or both.

If confined to the "maintenance" issue, it has no precise meaning, and cannot serve the intended purpose. When armies are once raised, what shall be defined as "keeping them up" in violation of the Constitution? What duration will be required to verify a violation? will it be a

week, a month, a year? Or will we say the troops may stay afoot as long as the danger requiring their service continues? This would admit that they could be kept in time of peace, against threatening or impending danger, which would at once deviate from the prohibition's literal meaning and considerably broaden the power to raise and keep armies. Who will judge the existence and duration of danger? This must be submitted to the national government which could then, to respond to the danger, first raise troops and afterwards keep them on duty as long as the community is in jeopardy. It is easy to see how a power so broad would give room to elude its force.

The value of such a provision must rest on the supposed probability, or at least possibility, of a usurpation plot between the executive and the legislative. Should this ever happen, how easy would it be to invent pretenses of approaching danger! Indian attacks, instigated by Spain or Britain, would always be at hand. If we ever have reason to believe such a conspiracy exists, and that it has sufficient chance of success, the army – raised on any pretext – could be used to execute it.

If, to prevent this kind of intrigue, we should ban peacetime armies, the Constitution would incapacitate the United States to defend themselves – even before an invasion. For it would require us to wait until an enemy is inside our borders before the government could legally begin inducting men to protect the State. We must suffer the blow before we could even prepare to return it. And we must abstain from all the means nations have always used to prevent and ward off danger as conflicting with the principles of our “free government.” We must expose our property and liberty to foreign invaders, and allow ourselves, through our weakness, to become naked, defenseless prey. Why? Because we are afraid that rulers we have created, serving with our consent, might endanger our liberty by abusing means necessary to preserve it.

Now I expect to be told that the militia is the country's natural bulwark, always equal to its defense. This doctrine, literally, nearly lost us our independence. It cost the United States millions we could have saved. The experience is too recent to again allow this policy to dupe us. Waging an ongoing war against a regular army can only succeed with another disciplined regular army.

The American militia, in the late war, erected many eternal monuments to their fame, but the bravest of them

feel and know that their country's liberty could not have been established by their efforts alone, however great and valuable. War, like most things, is a science, learned and perfected by diligence, perseverance, time, and practice.

All violent policy, contrary as it is to the natural, experienced course of human affairs, defeats itself. Pennsylvania gives us an example of this truth. Its Bill of Rights declares standing armies dangers to liberty, not to be kept up in peacetime. Responding to disorder in a few of her counties, Pennsylvania, though not at war, raised a body of troops – which it will probably keep as long as there is any trace of danger to public peace.

Massachusetts teaches that, without waiting for Congressional sanction, as required by the Articles of Confederation, she once raised troops to quell a domestic insurrection, and still pays them to prevent a revival.

The Massachusetts constitution contains no obstacle to the measure, still the instance teaches us that such cases are likely to happen under our government, as they have under others. And this sometimes makes a military force in time of peace vital to the society's security. Therefore it is improper to limit the legislature's options on this issue.

It also teaches us how little a feeble government's rights are respected, even by its own citizens. And it teaches us how unequal parchment provisions are to real-life national emergencies.

It was a maxim of the Lacedaemonian commonwealth, that the title of admiral should not be given twice to the same person. The Peloponnesian confederates, severely defeated at sea by the Athenians, demanded that Lysander, a former successful admiral, to command the combined fleets. To gratify their allies and still adhere to the ancient principle, the Lacedaemonians resorted to the flimsy subterfuge of giving Lysander the power of an admiral, but under the nominal title of vice-admiral. This is one of many instances that confirms the truth that nations pay little regard to rules and policies calculated to run counter to national necessities.

Wise politicians beware fettering the government with restrictions that cannot be observed, because they know that breaches of fundamental laws, though dictated by necessity, impair a leader's respect for his nation's constitution and create precedents for more breaches, even in situations where there is no necessity.

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## FEDERALIST NO. 26

# Limiting Legislative Military Authority – #1 Hamilton

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

THE PROPOSAL to restrict the legislature's authority to defend the nation was inspired by an excessive zeal for liberty. But it is not widely popular: only Pennsylvania and North Carolina have applied it in any degree. Other States

have wisely judged that *some* branch of government must be trusted with this vital responsibility and that it is better to risk its abuse than to endanger public safety by restricting it. The Constitution's opponents, rather than

learn from experience to correct such extreme notions, seem ready to lead us into still more dangerous schemes. Should their ideas become popular, they would disqualify America for any kind of government. But Americans are too intelligent to be gulled into anarchy. I believe experience has convinced them that an energized government is essential to our welfare and prosperity.

The idea to prohibit military establishments in time of peace must be traced to habits of thinking inherited from our common British heritage. In England, long after the Norman Conquest, the monarch's authority was almost unlimited. Little by little, libertarian ideas – first advanced by the barons and later by the people – took hold until the monarchy's worst pretensions became extinct. But not until the revolution in 1688, which put the Prince of Orange on the throne, did English liberty triumph. Using the undefined war-making power that was an acknowledged crown prerogative, Charles II kept on foot a peacetime body of 5,000 regular troops, which James II increased to 30,000. The Bill of Rights framed at the revolution stated that "the raising or keeping a standing army within the kingdom in time of peace, unless with the consent of parliament, is against law."

In Britain, at a time when liberty was strongest, no one saw a need to protect against standing armies, beyond prohibiting the magistrate from raising or keeping them up. The patriots who won the revolution knew that a certain number of troops was indispensable as guards and in garrisons; that national emergencies could not be foreseen or controlled and, therefore, that a power equal to every contingency must exist somewhere in the government.

When they delegated that power to the legislature, the American people took the maximum precaution available to guard community safety.

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*[No] body of forces [shall] be kept up by any State in time of peace, except such number only, as in the judgment of the United States in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defense of such State; but every State shall always keep up a well-regulated and disciplined militia ...*

Article VI of the Articles of Confederation

Also from our English tradition comes our supposed "instinct" regarding peacetime armies' threat to liberty. Then our revolution-quickenened public sensibility illuminated the need to protect popular rights. Reflecting this "zeal" is the fact that only two States' tried to constitutionally restrict their legislatures' military powers. In those States, the principles which taught us to limit the powers of hereditary monarchs were unwisely extended to the State legislators. Even some States that avoided this error declared that standing peacetime armies should not be kept up without legislative consent. I call these declarations unnecessary because the logic which introduced a similar provision into the English Bill of Rights does not apply to any State constitution. The power to raise armies, under those constitutions, *must* be lodged in the legislatures. Moreover, it was superfluous to declare that a matter should not be done without consent of the body which alone has the power to do it.

Accordingly, some constitutions are totally silent on the issue.

Note that the two States that considered banning peacetime armies used cautionary rather than prohibitive language. They say that they *should* rather than "shall" not be kept up. This ambiguity seems to reflect conflict between the desire to ban them at all events and the inclination that an absolute ban would be unwise and unsafe. Undoubtedly, the legislature would interpret this language, in a real emergency, as a mere admonition. What good is it, if it ceases to operate the minute we are tempted to disregard it?

Is there be any operational comparison between those State constitution articles and the national defense language in the new Constitution?

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*The Congress shall have power to...raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;*

Article I Section 8 (12) of the United States Constitution

The former, by trying to do too much, does nothing; the latter, by dealing logically with national realities, will have a powerful, beneficial effect.

This provision will oblige Congressmen, at least once every two years, to consider the practicality of keeping an army on duty, to write a new resolution on the issue, and to declare their opinion by a formal vote in front of their constituents. They *cannot* give the executive permanent funds to support an army. As politics infects all elected bodies, some persons in the Congress will try to criminalize the majority and indict its views. Support for a military will always be a subject for speeches and debates. As often as it arises, the opposition party will harangue the public about it and, should the majority want to exceed the constitutional limits, warn the community of the danger and at least try to take measures against it.

Independent of parties in the Congress, the State legislatures, always guarding citizens' rights against federal government encroachments, will, if misconduct occurs, be the voice and the arm of public discontent.

Schemes to subvert a great nations' liberties take time to mature and unfold. An army large enough to threaten freedom must be formed step by step. This would suppose an ongoing conspiracy between the legislature and executive. Could such a conspiracy exist at all? Could the plotters persist, year after year, and pass the strategy, objective and plan across biennial elections from one Congress to the next and the next? Would every Representative and Senator become a traitor to his constituents and to his country? Can you conceive that not one honest man would detect such an atrocious conspiracy and warn the people of the danger? If so, we should at once end all delegated authority, recall all the powers we have delegated to the Congress and turn our countries into democratic sovereignties.

But even if such a conspiracy were possible, concealing it – for *any* time – would be impossible. We would see it the minute the army inexplicably began to grow. What excuse could there be for a country at peace to expand its military? The people would not be long

deceived, and the plot and plotters would soon thereafter be destroyed.

Some say that limiting military funding to two years would fail because the Executive, supported by a force large enough to subjugate the people, would find ways around legislative oversight. But on what pretext could he justify a peacetime army so large, even (or especially) in response to a recent emergency?

Few persons will seriously argue that military forces should not be raised to quell rebellion or resist invasion, and if the community's defense in those circumstances

necessitates an army large enough to endanger its liberty, no form of government can prevent or cure it.

But this evil is infinitely more likely to befall us if we are disunited than if united under the Constitution. Indeed, we are altogether unlikely to face it if we stay together. It is difficult to conceive dangers to the Union formidable enough to demand a force powerful enough to jeopardize our liberties, especially if we take into view the support of the militia, which will always be a powerful auxiliary. But disunited, such a threat would be almost unavoidable.

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## **FEDERALIST NO. 27**

# **Limiting Legislative Military Authority – #2 Hamilton**

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

WE HEAR that the kind of Constitution the convention proposes must have military support to execute its laws. This, like most things the other side alleges, is unsupported by any precise or intelligible argument. As far as I can determine, the notion presupposes that the people will not recognize any internal federal authority. Ignoring for the moment any distinction between “internal” and “external,” on what grounds does such an attitude exist. Unless we presume that the general government will serve the people less honorably or more maliciously than State governments, there seems no reason to presume public ill-will. I believe that confidence in and obedience to any administration relates to its perceived goodness or badness. I admit that there are exceptions to this rule, but they depend on accidental causes, unrelatable to the Constitution's inherent merits or demerits.

These papers suggest various reasons to believe that the general government will be better managed than the State governments, including the multitude of political choices it will offer the people. Moreover, because the national Senate will be selected by the State legislatures – themselves bodies of select civic leaders – we can expect that it will be composed with great care and judgment. Both features of the proposed system promise that the national councils will exhibit higher levels of knowledge and less factionalism, ill humor and prejudice. As a result, we can also expect they will operate without the dissension that often breeds injustice, oppression, and schemes that end in general distress. Therefore, until we have reason to believe the federal government will govern badly, we can assume that it will execute the Union's laws with no less respect and professionalism than the States apply to theirs.

The hope of escape from punishment encourages, and fear of it discourages, sedition. The duly empowered Union government, with access to all Confederacy resources, will be more apt to repress the former sentiment and to inspire the latter than any single State. A

turbulent faction may easily contend with a State government but is no match for the United States of America.

I hazard that the more federal government mingles in everyday life, the more community respect and loyalty it will earn. People are creatures of habit. Things we rarely experience little influence us. A government distant and out of sight can hardly stir our interest.

But as the Union's authority and citizens' affection towards it will be strengthened, not weakened, by its involvement in “internal matters,” it will have less and less reason to resort to force.

One thing is obvious: a government like that proposed would try harder to avoid the need to use force than the kind most opponents favor, whose authority would apply only on the States as political and collective entities. We have seen that such a Confederacy can only enforce its laws by force, that violations of member States are built into that system and that they can be redressed only by war and violence.

The convention plan, by contrast, extends federal authority to the individual citizens of the States, which means it can use the power of the citizenry to enforce its laws. This will, naturally, tend to destroy the distinctions between government levels, and allow federal authorities to achieve the same due obedience and influence on public opinion that the States enjoy. This, again, will result from its power to draw for help on all the Union's resources.

We should be particularly aware that Union laws, as specified in the Constitution, will become the supreme law of the land, and all officers, legislative, executive, and judicial, in each State, will be obligated by oath to enforce and obey them. In this way, the State legislatures, courts, and magistrates will be incorporated into the operations of the national government as far as its just, constitutional authority extends and will help to enforce its laws.

Anyone who reflects on the meaning and consequences of this situation will realize there is reason

to expect a regular, peaceful execution of Union law, provided the Union administers its powers with common sense. Anyone who supposes the opposite may infer anything he pleases, because it is possible, by corruptly exercising the best laws of the best government ever created, to provoke the people into the wildest excesses.

But though the proposed Constitution's adversaries presume the national leaders would not heed the public good or their obligations, I would still ask them how such conduct would promote a spirit of encroachment.

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## FEDERALIST NO. 28

# Limiting Legislative Military Authority – #3 Hamilton

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

I CANNOT DENY that we may see times when the national government must resort to force. Sedition and insurrection arise in all societies, however constituted. The notion that we can govern at all times by the simple force of law is a dream of political doctors who scorn the lessons of experience.

When such emergencies happen under federal jurisdiction, force is the only response and it must be proportioned to the situation's severity. For a small, isolated commotion, the State militia would suffice. But insurrection threatens all government. Respect for law and order alone would motivate responsible citizens to oppose the insurgents. And if they see the general government working for their welfare, the people will defend it.

If the insurrection should affect a major part of a State, a different kind of force might be needed. Massachusetts was forced to raise troops to repress its disorder. Pennsylvania followed suit, merely in fear of unrest among some of her citizens. Had New York State decided to reclaim her lost power over Vermont, would the militia alone have succeeded? New York would have been compelled to raise and maintain a more regular force.

If we admit that civil emergencies require a State to maintain a force superior to its militia, how can we argue that the national government cannot do the same? It is surprising that men who declare loyalty to the Union in the abstract oppose the proposed Constitution that supports *their* policy with ten times as much force – an inevitable consequence of any large-scale political establishment. And who would not prefer keeping a full-time security force to the endless agitations and revolutions we see in petty republics?

In another light, suppose, instead of one general system, we would form two, three or more confederacies. Would not the same problems arise under each of them? And would it not uphold its authority by resorting to the same means to which our opponents object in a government for all the States? Could its militia defend it?

All honest, intelligent men must acknowledge that the principle applies equally to both cases. Whether we have one government for all States or several authorities for parcels of them – or complete separation – we might need to enact laws against insurrection and rebellion, and enforce them with a force other than the militia.

Independent of other arguments, here is a full answer to those who demand an overriding statute banning military establishments in time of peace:

*The whole power of the proposed government will be in the hands of the people's representatives.*

This is civil society's essential and only effective protection for citizens' rights and privileges.

If the people's representatives betray them, there is no recourse but the original right of self-defense that is paramount to all positive forms of government. And this right is infinitely more effective against usurpations by national than State officials. If a State government exceeds its authority, the counties, cities, towns and townships, having no military powers, are defenseless. The citizens must respond with only their own arms, courage and anger. The violators, clothed in pseudo-legal authority, can usually crush such opposition at its dawning. And the smaller the territory, the more difficult it is for citizens to resist effectively because intelligence on their preparations and movements is faster and easier to collect.

The obstacles to usurpation and the ability to resist increase with the size of the state, provided the citizens understand their rights and are willing to defend them. A large population's natural strength, as opposed to its government's artificial power, can usually overpower attempts to institute tyranny.

In a confederacy the people control their fate. Power being the only rival of power, the general government will always be ready to check State usurpations, and the States ready to defend against federal violations. Whichever side the people support will dominate: if either invades their rights, they can use the other to gain redress. They will be wise to support the Union, which gives them insurmountable advantages.

It is an axiom in our political system that State governments will, in all cases, defend liberty against the national authority. Usurpation conspiracies cannot avoid detection by the State legislatures, which have better means of information than the people, and can spot danger at a distance. Controlling all the organs of civil power, and the people's confidence, they can form

regular plans of opposition, combining all the community's resources. They can also communicate with other State governments and combine forces to protect their common liberty.

America's great expanse is another protection. We have seen its value against foreign attack; it would work the same way against domestic violators. If a renegade federal army quells resistance in one State, distant States can bring fresh forces. Gains in one place must be abandoned to fight elsewhere, and once a defeated area is left to itself, it renews resistance.

## FEDERALIST NO. 29

# Concerning the Militia Hamilton

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

THE POWER to regulate the militia and command its service in times of insurrection and invasion is inherent to national defense. No military knowledge is needed to see that their uniform organization and discipline are vital when the militia are needed for public defense. It enables them to train effectively in camp and operate intelligently, as a *bona fide* army, in the field. It also accelerates the readiness essential to their usefulness.

This uniformity can only be accomplished by delegating regulation of the militia to national authority. That is why the convention proposes to empower the Union to use the militia to confront problems requiring military solutions.

If a well-regulated militia is a free country's most natural defense, it should be organized by and available to the authority responsible for guarding national security.

Opponents who argue that standing armies endanger freedom should, to prevent them, *demand* federally-regulated militia. Otherwise something like a standing army is mandatory.

*The Congress shall have power to provide for ... calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;*

*Article I Section 8(15) of the United States Constitution  
For ... organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of officers, and the authority of training the militia according to the discipline prescribed by Congress;*

*Article I Section 8(16) of the United States Constitution*

To discredit Union militia control, some note that the proposed Constitution fails to authorize activating the *posse comitatus* (i.e., deputizing common citizens) to help the President execute his duty. From this they infer that military force is intended to be his only recourse.

I question the objectors' sincerity. They say in one breath that federal powers will be despotic and unlimited; in the next that it has no authority to call out the *posse comitatus*. It is absurd to suppose that a power to pass

The size of a military force depends on national resources. For years to come, we will not be able to keep a large army, but as population grows, so will our military.

Consider what it would take for a future federal government to raise and maintain an army able to install a despotism over an immense empire whose population can, through the State governments, build defenses equal to many independent nations.

**Publius.**

laws to execute specified powers would not include that of requiring citizens to help officers execute those laws.

And what reason is there to infer the convention intends force to be the only tool of authority, merely because the power to use it is available if needed?

We are even taught to fear the militia itself, once in federal government hands. The theory is that it may form select corps of the young and ardent, and use them to install an "arbitrary power."

Were the Constitution ratified, and were I to deliver my sentiments on militia organization to my representative in the federal legislature, I would say:

*Disciplining all the militia of the United States would be futile and injurious – if it could be done. Military expertise requires time and practice. A day, or even a week, will not suffice. To require the great body of our freeholding farmers and other citizens to be under arms as often as might be needed to train a well-regulated force, would inflict real grief on the people and serious public inconvenience and loss. The annual amount of productive labor it would take from the nation would approach the cost of governing all the States. And the experiment could not succeed because we could not long endure it. A reasonable goal, with respect to "citizen soldiers," would be to properly arm and equip them. To do that, we will need to assemble them once or twice a year.*

*But though organizing and disciplining the entire nation is impracticable, as soon as possible, we must adopt a well-digested plan to properly establish the militia. The goal should be to a select corps of moderate size, applying principles that will really fit them for service in time of need. This will not only reduce the need for a standing army, but if ever the government must form an army, it could never be powerful enough to threaten the people's liberties as long as there is a large body of citizens nearly as well-armed, -disciplined and ready to defend their own and their fellow Americans'*

*rights. This to me is the only substitute for a standing army the best defense against it.*

The idea that the militia can endanger liberty is outrageously far-fetched. Where are our fears to end if we cannot trust our sons, brothers, neighbors, and fellow citizens? What danger can there be from men who daily mingle with the rest of us and share our opinions and interests – particularly when the States have the exclusive power to appoint their officers ... a reality that should at once extinguish it? After all, this right of appointment assures the states permanent control over the militia.

Many of the publications against the Constitution discolor and disfigure everything it represents. Examples include exaggerated, improbable suggestions respecting the power to call the militia to service. That of New Hampshire is to be marched to Georgia, of Georgia to New Hampshire, of New York to Kentucky, of Kentucky to Lake Champlain ... No, debts to France and Holland will be paid in militiamen instead of louis d'ors and ducats. Now there is to be a large army to destroy the people's liberties, later the Virginia militia will be dragged 500 or 600 miles from home to tame republican unruliness in Massachusetts and Massachusetts' men an equal distance to subdue the aristocratic Virginians.

Do the ranters of these ravings imagine they will influence the American people so hungry for truth?

Should there ever be an army to use as the engine of despotism, what need of the militia? Should there be no such army, to where would the militia – irritated by being sent on a long, hopeless expedition to enslave their countrymen – steer their course, but at the perpetrating tyrants, to make them an example of the just vengeance of an abused and angry people? Is this how usurpers strive to dominate a large, enlightened nation? Do they begin by stirring the loathing of the armed, trained soldiers they intend to use to destroy their fellow Americans' rights? Do they start their campaigns with wanton, disgusting atrocities, calculated only to earn universal hatred?

In times of insurrection or invasion – in resisting a common enemy or guarding the republic against a violent faction or sedition – *of course* the militia of one State would march into its neighbor. It happened often during the late war; indeed, this mutual support is a vital function of the Union. If the power of regulating it is assigned to the Union, there will be no danger that one State will ignore threats against its neighbors until its help is too feeble or too late.

**Publius.**

## FEDERALIST NO. 30

# The General Power of Taxation Hamilton

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

THE WRITERS believe the federal government should be empowered to pay expenses by means of disbursements from the national treasury. We conclude that there must be, in the framework of the government, a general power of taxation.

Money is the fundamental resource of the body politic that enables it to perform its most essential functions. A power to secure regular, adequate funds is indispensable to every constitution. Without it, either the people must be subjected to continual plunder or the government will atrophy and soon die.

In the Ottoman or Turkish empire, the sovereign, in other respects his subjects' absolute master, has no right to impose new taxes. To compensate, he permits the province governors to loot the people mercilessly. In turn, he squeezes them for the funds he needs.

For similar reasons, the American government is approaching annihilation. No doubt, the people in both countries would be happier under governments able to provide needed public revenues.

*All charges of war, and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States in proportion to the value of all land within each State, granted or surveyed for any*

*person, as such land and buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled shall from time to time direct/appoint.*

*The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several States within the time agreed upon by the United States in Congress assembled.*

Article VIII of the Articles of Confederation

The Articles of Confederation, feeble as they are intended to be, give the United States unlimited power to fill their monetary wants. But they operate in a manner that defeats their purpose.

The Congress is authorized to call upon the States for sums it deems necessary to the United States' welfare. A States' right to refuse compliance would violate the Articles of Union, but it *is* exercised, and will be as long as Confederacy must depend on the States' resources.

This stealthful practice of withholding funds has brought us shame and handed our enemies a triumph. As a remedy, I suggest that we replace our fallacious, delusive quotas and requisitions with a national government power to raise its own revenues through ordinary taxation, as under every well-ordered constitution.



The new Constitution's intelligent adversaries agree with this reasoning, but call for a system of "internal" and "external" taxes. The former they would reserve to the State governments, the latter – duties on imported goods – to the federal head.

But this distinction would violate the sensible policy to proportion every power to its purpose. Because tariffs alone could not fill the Union's needs, it would also leave the general government dependent on the States, which conflicts with administrative vigor and efficiency. History teaches that a nation's financial needs can be expected to *at least* equal, and often exceed, its resources.

To say needs unfilled by the tariffs could be filled by requisitions from the States acknowledges that we cannot depend on the "internal/external" tax system and that we must depend on it beyond a certain limit. Those who recognize and understand its vices refuse to entrust America's national interests in any degree to quotas, which inevitably weaken the Union and ties between the federal head and the State, and between the States themselves. Will this system perform more efficiently in the future? If less is required from the States, they will be proportionally less able to comply.

How can a government always in need fulfill its institutional purposes, provide for our security, advance prosperity, and support the nation's reputation? How can it ever generate energy or stability, dignity or credit, confidence at home or respectability abroad? How can its operation be other than a series of stopgaps? How can it produce long-term public good?

How will this situation affect us when the next war befalls us? Suppose the suggested impost duties are able to support a peacetime government. Then war breaks out. Taught by experience not to depend on old

requisitions and unable on its own to obtain fresh moneys, it would probably be forced by the national danger to divert to the defense effort funds already appropriated for legitimate operations. And if so, it would probably destroy public credit essential to public safety. In modern war, even the most wealthy nations need access to large loans. To a poor country such as ours, they would be more critical. But who would lend to a government proven to be an unreliable debtor? Loans we might be able to get would be limited in value, with hugely burdensome terms.

We may imagine that, from our limited national wealth, the need to divert funds would exist alongside an unlimited power to tax. But two considerations will quiet our fears: one, we are sure all the nation's resources will be available to the war effort and, two, any shortfall could be borrowed.

The power to create new funds via taxation would enable the national government to borrow as much as needed. Foreigners, as well as Americans, could then comfortably trust it. But who would depend on a government that must depend on thirteen (or more) *other* governments for revenues to fulfill its contracts?

Reflections of this kind may have little weight with men with fabulous, poetic hopes for America. But to those who expect to experience the rigors and calamities that befall all nations, they require serious attention. Such men must acknowledge the realities we face with painful concern, and see the need to do what is necessary to defend against the harm that an enemy's ambition or revenge might inflict on our nation.

**Publius.**

## **FEDERALIST NO. 31**

# **The General Power of Taxation – #2 Hamilton**

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

THERE ARE certain basic truths on which all reason depends. These include maxims in geometry, that "the whole is greater than its part; things equal to the same are equal to one another ..." Each contains internal evidence that requires the mind to accept the proposition before applying or considering it further. If an individual cannot agree, it is because of some organic defect or disorder or some strong interest, or prejudice.

So it is with certain ethical and political maxims: "there can be no effect without a cause," "the means should be proportioned to the end," "every power should be balanced with its purpose," "there should be no limit on a power to fill a purpose which is itself incapable of limitation."

There are other truths that, if not of "axiom" rank, are direct inferences from them and so obvious and sensible, that they demand, with irresistible force and conviction, acceptance by sound, unbiased minds.

The purposes of geometrical inquiry are so unrelated to our subjective, emotion-driven pursuits that we easily accept not only simple scientific theorems but the most complex, seemingly contradictory ideas.

But in dealing with moral or political ideas, people are far more skeptical. To a point, this makes sense: Caution and inquiry are necessary defenses against mistakes and arbitrary imposition. But it can be carried too far, and may degenerate into bullheadedness or hypocrisy. We cannot pretend that moral or political principles are as certain as mathematical axioms. But, judging from politicians' conduct at times, they have larger claims to credibility than they deserve. The ambiguity is more often in our emotions and prejudices than in the subject. Too often, we devalue our own ideas and knowledge and, yielding to bias, entangle ourselves in verbiage and confuse ourselves with subtleties.

How else (if we admit the objectors' sincerity) could intelligent people oppose the obvious necessity of a general Union taxing power?

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*The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States.*

Article 1, Section 8 [1] of the United States Constitution

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Though these papers have already stated the writers' positions on this issue, it is proper to repeat them as introduction to an examination of the objections against them. In substance, we submit that:

- *A government should have every power required to fully achieve the purposes and functions committed to its care, and to thoroughly exercise the trusts for which it is responsible – free from any limit but regard for public good and the sense of the people.*

- *As the duties of managing the national defense and guarding peace against foreign or domestic violence involve casualties and dangers to which no possible limits can be assigned, the power to fulfill those responsibilities should have no limits other than national needs and resources.*

- *As revenue is the essential engine for answering national needs, the power to procure revenue must be equal to the responsibility of filling those requirements.*

- *As theory and practice prove the inefficiency of procuring revenue by requisitions on the States, the federal government must have unqualified power to tax in the ordinary modes.*

If experience did not show the contrary, these propositions would be all the support needed for a general federal taxing power. But the proposed Constitution's antagonists seem to make this part their main target.

Their strongest arguments seem to amount to: "It is not true, because the Union's needs may not be unlimited, that its power to tax should be unlimited. Revenue is as essential to the State governments as to the Union, and the former are at least as important as the latter to the people's happiness. It is therefore as necessary for the States as the national government to command means to fill the people's wants. But an indefinite federal taxation power probably would in time

deprive the States of those resources, and would put them entirely at the mercy of the Congress. As the Union's laws are to become the supreme law of the land, as it is to have power to pass all laws its duties require, the national government might at any time abolish State taxes, pretending interference with its own. It might allege a need to do this in order to make its own taxes more effective. Thus the federal government might impose a monopoly on tax sources and destroy the State governments."

This rationale seems sometimes to suppose a federal bent on usurpation. Other times, it seems designed only to reduce its constitutional powers. Only in the latter light can we see any pretensions to fairness. When we start guessing about federal usurpations, we trade reason for imagination. Whatever the limits or modifications of Union powers, it is easy to imagine endless dangers, and by indulging jealousy and timidity, we may carry ourselves to a state of absolute skepticism and irresolution.

I repeat that conjectures on the danger of usurpation should apply to government composition and structure, not to the nature or extent of its powers. The State constitutions invested them with complete sovereignty. What protection do we have against *their* usurpations? Answer: The way they were formed and a due dependence of those who govern them for the people. If we find that the structure of the proposed general government gives us the same sort of security, we should discard all fears of federal usurpation.

We should remember that the federal and State governments are equally disposed to encroach upon each other's rights. Which side would likely prevail in such a conflict would depend on the means of each to insure success. As a republic's strength is always on the side of its people, and as there are sound reasons to believe the State governments will have the most influence over them, I conclude the Union will lose. Moreover, the States will more probably encroach on the federal head than the other way around. But all guesses of this kind are extremely vague and fallible: it is safest to lay them aside and focus on the nature and extent of powers the Constitution bestows. Everything past this point must be left to the people's common sense and firmness; they, who hold the scales, will hopefully always take care to preserve the constitutional equilibrium between the general and State governments. On this firm ground, it will be easy to avert objections to a limitless national power of taxation.

**Publius.**

## FEDERALIST NO. 32

# The General Power of Taxation – #3 Hamilton

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

I BELIEVE the State governments' fears that the federal government will "control" their levies of money are

unjustified. I think the sense of the people, the danger of provoking the States' resentment and their importance to

the citizens would prevent the Union from oppressively using such a power. Still, I admit that the individual States should have independent, uncontrolled authority to raise their own revenues. Making this concession, I affirm that (except for import and export duties) they would, under the convention plan, retain that power and any federal attempt to abridge it would violate the Constitution.

Massing the States into one national union would subordinate them to a general system. Their retained powers would depend on the will of all the people.

But the convention plan calls only for a partial union, wherein the State governments would keep all powers not specifically delegated to the United States.

This exclusive delegation would only occur where the Constitution would grant:

- An exclusive authority to the Union.
- An authority, in one instance, to the Union, and in another prohibit the States from exercising a like power.
- Authority to the Union which, if given to the States, would conflict with its purpose.

These three cases may be illustrated, respectively, by these examples:

1. *Article I Section 8 [17] – “(The Congress shall have the power to) exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square), by cession of particular States and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings.”*

2. *Article I Section 8 [1] – “The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States.”*

3. *Article I Section 10 [2] – “No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress. second clause of the tenth section of the same article declares that, “no state shall, without the consent of Congress, lay any imposts or duties on imports or exports, except for the purpose of executing its inspection laws.”*

This clause gives the Union exclusive power to lay duties on imports and exports, with the noted exception, but it is abridged by...

*Article I Section 9 [5]: No tax or duty shall be laid on articles exported from any State.*

As a result, Section 10 [2] covers only duties on foreign imports, which illustrates the second case (power granted to the Union, denied to the States).

The third is exemplified in ...

*Article I Section 8 [4] (The Congress shall have power) to establish an uniform rule of naturalization.*

This power must be exclusive: If every State could write its own rule, there could be no *national* rule.

An example of a “shared” power is taxation on articles other than exports and imports. The Constitution nowhere grants it exclusively to the Union or prohibits it to the States. But there is a conclusive argument for equality: the restraint on the States related to import/export duties, which implies that, without it, the States would retain this power and all other taxing rights. The restriction amounts to what the legal profession calls a negative pregnant: “a denial that admits or involves an affirmative implication that favors a pleader’s adversary.” In practice, it negates the States’ import/export tax authority and affirms their authority to tax all other articles. It would be illogical to bar them from these revenues but allow them to collect others subject to Congressional control. The prohibitory clause says only that they shall not lay such duties without the Congress’ consent. Logically, the Constitution should then formally provide that the States, with Congressional consent, might tax imports, exports *and* every other article, unless Congressionally restrained. If this was the intention, why not simply confer a general power of taxation on the Union? Obviously, this cannot have been the intention.

A supposed conflict between a Union and State taxation power cannot be supported. A State’s right to tax a particular article denied the Union would not imply a constitutional inability to impose a further tax. The amount of the tax and the practicality of an increase on either side would be questions of mutual prudence, but there would be no direct conflict of powers. The taxing policies of the Union and the States might not always be in harmony and might need negotiation and adjustment, but a pre-existing right of sovereignty can only be endangered by a true constitutional conflict, not a mere inconvenience in the exercise of powers.

The need for shared jurisdiction in certain cases results from the separation of powers. Moreover, the convention rule – that all powers not explicitly transferred from the States to the Union stay with them – is not a theoretical result of separation but a basic tenet of the proposed Constitution. Beyond the grants of general authorities, the delegates took great care in cases where they believed the States should not have powers similar to federal authorities. Article I Section 10 consists entirely of such provisions – a deliberate expression of the convention’s sense that furnishes a rule of interpretation that justifies my position and refutes every argument to the contrary.

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*[1] No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit, make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law or law impairing the obligation of contracts, or grant any title of nobility.*

*[2] No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.*

*[3] No State shall, without the consent of Congress, lay any duty on tonnage, keep troops and ships of war in time of peace, enter any agreement or compact with another State or with a foreign power, or engage in war, unless actually invaded or in such imminent danger as to not admit of delay.*

**Publius.**

## The General Power of Taxation – #4 Hamilton

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

Two clauses of the proposed Constitution have attracted bitter profanity and irascible oratory:

A. *“(The Congress shall have the 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 officer thereof.”*

Article I Section 8 [18] of the United States Constitution

B. *“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, anything in the Constitution or laws of any State to the contrary notwithstanding.”*

Article VI Clause [2] of the United States Constitution

They are described as deadly engines to destroy State governments and exterminate liberties.

Yet, after all this clamor, I confidently affirm that the constitutional operation of the intended government – even without these clauses – would be the same as if they were repeated in every article. They merely declare a truth inherent to the act of constituting a federal government and vesting it with certain powers.

■ A “power” is the ability and the freedom to use the means necessary to do a thing.

■ A legislative power is a power to make laws. The means necessary to make laws are laws.

■ The power of laying and collecting taxes is the power to make laws to lay and collect taxes. And the proper means to do that are necessary and proper laws.

This train of inquiry is a test by which to judge a controversial constitutional clause. It leads us to this concrete truth:

*A power to lay and collect taxes must be a power to pass all laws necessary and proper for the execution of that power.*

The provision in question merely declares the same truth; to wit, that the Congress, to whom the power to lay and collect taxes had been previously given, might, to execute that power, pass all laws necessary and proper to carry it into effect.

I confine these observations to taxation because it is the most important proposed power to be delegated to the Union. But the same process leads to the same result, when applied to all other Constitutional powers. And it is expressly to execute these powers that the subject clause authorizes the Congress to pass all necessary and proper laws. If there is anything questionable, it exists in the specific powers upon which it is based; by itself, the clause, needlessly repetitive as it may be, is harmless.

Why then did the convention introduce it? Only to guard against the petty, quarrelsome knipicks of those who, after ratification, might want to reduce and evade the Union's legitimate authorities. The delegates probably foresaw one of these papers' principal lessons – that the greatest danger to our political welfare is that the State governments will undermine and weaken the Union's foundations – and determined not to leave such a critical point open to interpretation. Whatever the reason, the wisdom of the precaution is obvious from the cry against it, which betrays a tendency to question the Union's power to do its duty.

Who will judge the necessity and rightness of laws passed to execute the Union's powers? This question addresses the granting of those powers, as well as the language in the clause. I answer that, first, the national government, like every other, must assess the quality of its acts and the body politic must be the final judge. Should the federal government autocratically exceed its authority, the people – who created it – must take whatever actions to repair the resulting constitutional damage as the situation may suggest and good sense justify.

We must judge the validity of a law by the nature of the powers that underlie it. Suppose the Congress should try to alter a law in one of the States. This is an excess of authority and an infringement against that State's citizens.

Suppose that, on the pretense of interference with its revenues, the Congress should try to abrogate a State's land tax. Would this not be an equally obvious invasion of constitutionally-sanctioned shared taxing powers.

If anyone doubts this, the blame belongs to those who have labored to obscure the plainest and simplest truths.

But it is said that the laws of the Union will be the supreme law of the land. From this we can infer that if they were not supreme, they would amount to nothing.

A law, by definition, includes supremacy. Those to whom it is prescribed must observe it. This requirement is built into every political association. If one enters a society, that society's laws must be the supreme regulator of his conduct. If a number of political societies join or form a larger entity, the latter's laws, according to its powers under its constitution, must be supreme over them and their citizens. Otherwise the arrangement would be a mere treaty, dependent on the parties' good faith, and not a government – which is another word for political power and supremacy.

Still, it will not follow that acts of the large society which invade the smaller societies' powers will become the supreme law of the land. They are acts of usurpation, deserving to be treated as such.

As a result, we perceive that the clause declaring the supremacy of the Union's laws, like that just considered, only declares a truth which flows necessarily from the

institution of a federal government. It expressly confines this supremacy to laws conforming to the Constitution (which I mention only to illustrate the care taken by the convention), since that limitation would have been understood, if not expressed.

Therefore a tax for use by the United States would be “supreme” and could not legally be opposed or controlled, but a law preventing a State from collecting a tax (except on imports and exports), would be but an unconstitutional

usurpation of power. Improper taxes on the same object would create a mutual inconvenience, arising from an unwise exercise of power by one or the other.

In sum, the States would, under the proposed Constitution, retain independent, uncontrollable authority to raise any amount of revenue they may need, by any kind of tax, except duties on imports and exports.

**Publius.**

## FEDERALIST NO. 34

# The General Power of Taxation – #5 Hamilton

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

AS TO REVENUE, the proposed Constitution, gives the particular States and the Union equal authority, except on import duties. As this gives the States uncontrolled access to greatly expanded community resources, no one can say that they would not have ample means to supply their wants of which, compared to the federal share of public expenses, they would have very few.

To argue that this shared authority cannot exist is to theorize against fact and reality. However proper it might be to show that it should not exist, the evidence is clear that it does.

In the Roman republic the legislative authority, in the last resort, resided in two independent bodies: the *comitia centuriata*, serving the patrician class, and the *comitia tributa* representing the plebeian. Each had power to annul or repeal the others' acts. But no one would dare try to invalidate this system. These two legislatures coexisted through the ages when Rome attained its greatness.

In the case of co-equal taxing power, no such contradiction exists. For example, neither side may counteract the other. And we need not fear any conflict because, very soon, the States' wants would become very narrow, and in the interim, the United States will probably want to abstain from the duties the States would assume.

To precisely judge of the question, consider the proportion between the responsibilities requiring federal versus State spending. The federal needs are unlimited; the State's very limited. Further, we cannot confine our view to the present because constitutions are not framed to deal with current conditions but for the ages, according to the natural and tried course of human affairs. It would be wrong to base the national government's powers on today's needs. We must be able to provide for future contingencies as they happen. Moreover, as these are illimitable in nature, it is impossible to safely limit that ability.

Perhaps it is possible to compute the quantity of revenue needed for existing peacetime Union expenses, and to maintain that level for some time. But would it be wise or folly to trust the government to manage the national defense without the means to protect against future wars? If we exceed this point, where can we stop short of an indefinite power to meet emergencies as they arise?

It is easy to say, in general terms, that we can rationally calculate what would be required to confront probable future dangers. But we should require whoever makes the assertion to present his data. Moreover, any data produced would be as uncertain as all previous computations on the probable duration of the world. Observations confined to possible internal conflicts, which remain uncomputable, deserve no weight. But if we intend to be a commercial people, part of our policy must be to defend that commerce. Supporting a navy and naval wars would involve contingencies that baffle political arithmetic.

We should, indeed, debar our government from waging offensive wars for mere political reasons, but certainly *not* from guarding us against foreign attack. There has been a cloud over Europe for some time. Should it become a storm, no one can insure that we are out of its reach. Peace or war will not always be our choice. Who imagined at the end of the last war that France and Britain, exhausted as both were, would soon bring hostility on each other?

Judging from history, the passions of war reign more powerfully in the human breast than sentiments of peace, and to model our politics on speculations of lasting tranquillity is not realistic.

What are the main causes of spending in every government? What has inflicted enormous debts on several European nations? The plain answers are...war, rebellion and support for establishments to guard against them. The costs of domestic law enforcement, the legislative, executive, and judicial departments and encouragement of agriculture and manufacturing are insignificant compared with those of national defense.

Great Britain spends less than 7% of annual income on the monarchy's ostentatious apparatus; the other 93% goes to pay the interest on debts contracted to carry on its past wars and to maintain fleets and armies. Needless to say, the costs of the monarchy's ambitious, vainglorious pursuits have no place in the budget of our republican government.

Consider the debt we have contracted in one war, and calculate the common share of events that disrupt the peace of nations, and you will see that there is always a huge difference between federal and State expenditures. It is true that several States incurred considerable debts

during the late war. Under the proposed system, this *could not* happen again, and when these debts are paid, the only significant revenue the States will need will be to support their civil obligations, which will total far less than today.

In framing a government for today and tomorrow, we should also, in calculating provisions intended to be permanent, calculate our permanent funding needs. If we compute fairly, the State governments can, indeed, be reasonably estimated, while Union needs will be unlimited. To extend the States' revenue power further, at Union expense, would be to take national resources from authorities who can legitimately use them for the public good and put them in hands with no proper use for them.

Suppose the convention had proportioned Union and State taxing powers to their relative needs. What particular fund could they select for the States' use to match their present and future needs? As in apportioning external and internal taxes, this would give the States command of roughly 67% of the national treasury to

defray 5% to 10% of its expenses, while the Union would have 33% of the treasury to pay 90% to 95% its bills. If we give the States all power to tax houses and lands, there would still be a great imbalance between the means and the end: access to 33% of national resources to supply, at most, 10% of its wants. But if we could choose and supply any fund equal to and not greater than the purpose, it would not cover the States' existing debts, but leave them dependent on the Union for the balance.

The above examination, again, supports the position that a shared taxation power is the only way to avoid a complete subordination of State to Union authority. Separating this authority would sacrifice the nation's great interests to the individual States. The convention chose this "concurrent jurisdiction" – which reconciles an indefinite federal taxing power with an adequate, independent power in the States – over that subordination.

**Publius**

## **FEDERALIST NO. 35**

# **The General Power of Taxation – #6 Hamilton**

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

IF FEDERAL taxes were confined to import duties, the government would be tempted to stretch these tariffs to excess. Some imagine they cannot be carried too far since, the higher they are, the more they will limit lavish consumption and help create a balance of trade favoring domestic manufacturing. Actually, exorbitant import duties encourage smuggling – harmful to fair trade and revenues. They also tend to:

- Make other sectors overly dependent on manufacturing, giving it an artificial market monopoly.
- Force industries out of normal channels into less-productive areas.
- Oppress merchants, who must – when markets are overstocked – pay tariffs themselves, without reimbursement from consumers. This sometimes exhausts profits and drains capital.

(I suspect that, too often, sellers and buyers divide duty payments between them.)

It is not always possible to raise commodity prices to meet added costs. Merchants, especially in a country poor in commercial capital, are often forced to keep prices down to generate sales.

In fact, consumers pay these taxes more often than do merchants and it would be more just to use them to benefit the nation, rather than the importing states. When merchants pay import duties, they create an added tax on importing States, whose citizens pay the government's share by consuming the goods. In this light, those levies create inequality between the States, which would deepen as duties rise.

Limiting federal taxes to tariffs would also create inequality between manufacturing and non-manufacturing States. Those most successful in supplying their citizens'

wants in their own industries will consume fewer imported articles relative to their population and wealth and thereby deny the public treasury the value of their labors. To assure their contributions, the federal government must have access to excises, which are most properly tied to certain kinds of manufacturing.

New York residents who support limited federal taxation ignore these issues' importance to our State. New York is an importing State, not likely to become a manufacturing center. So confining the Union to commercial imposts would *not* benefit us.

As to the danger of extending tariffs to harmful lengths, our attention on the revenues generated would protect us against such extremes – as long as other resources were open. But if avenues to other funds were closed, need would bring experimentation, enforced by rigorous precautions and penalties. These would generate needed moneys for as long as it takes to invent ways around the precautions and penalties. Early success would inspire false security, which might take years of problems to correct. Political necessity often raises false hopes, false logic, and a system of corresponding mistaken measures. But even if the excesses should not result from limiting federal taxing power, the above inequalities would follow, though not in the same degree, from the other causes we have discussed.

Continuing our examination of objections, some say that the House of Representatives is too small to represent and empathize with all classes of citizens and all of their interests and opinions. The idea that the House can contain members to "represent" all classes of the people is utopian. Unless the Constitution requires that each occupation send members, it would never take

place. Mechanics, artisans and manufacturers will usually vote for merchants, rather than their fellows because they know that, as their arts produce what mercantile enterprises sell, merchants are their natural patrons and friends. They also know that, however great their confidence in their own good sense, merchants can more effectively advance their interests than they can. Further, they sense that their life habits do not supply the knowledge and skills required for success in a deliberative assembly and that merchants' social assets make them better able to operate in the public councils that are often unfriendly to industrial-trade interests.

As to the learned professions: with little interest in society or government, they trust and vote for each other, and other parts of the community.

That leaves the landed interest which unites the wealthiest landlord to the poorest tenant. Every land tax affects each equally and that interest in keeping real estate tax rates as low as possible is a sure bond of sympathy. Moreover, there is no reason to conclude that the first would stand a better chance than the last of being elected to the Congress. Indeed, landowners control the current senate and assembly.

The truth is that, where voters' qualifications are the same, and whether voters must choose a few or many, they support candidates – rich or poor – in whom they have the most confidence.

It is said that member-representatives should come from all classes, the better to understand and attend to their feelings and interests. But we have seen that this will never happen in a system where the people are free to vote their own convictions. With few exceptions, the Congress will be composed of landholders, merchants and learned professionals. But why do we fear that these three groups will not understand or attend to the others

interests? Will not landholders promote or insure the interest of landed property? And will they not, from their own self-interest, resist attempts to injure or encumber land ownership? Will not the merchant understand and cultivate the manufacturers on whose arts they rely? Will not the learned professional remain neutral to the rivalries between commerce and industry, and promote both as long as their interests advance society's?

If we consider the changing moods of certain groups, which a wise administration will always attend to, intelligent representatives will likely judge them more competently than those who observe little beyond their own social circles? It is natural that candidates for the people's favor, dependent on their votes to continue their public honors, would learn about their attitudes and tendencies and allow them to properly influence upon their conduct in office? This dependence is the true bond between representatives and constituents.

No government function requires more extensive, thorough knowledge of political economy than taxation. The representative who understands these principles is unlikely to oppress or sacrifice any class of citizens to tax collection. It is demonstrable that the most productive financial system is always the least burdensome. To judiciously exercise the power of taxation, the person responsible must understand the intelligence, habits, and modes of thinking of the people at large and with the nation's resources. And this is the only reasonable definition of "a knowledge of the people's interests and feelings." In any other sense the proposition has no meaning, or an absurd one. And in that sense let every thoughtful citizen judge for himself where to look for the required political qualifications.

**Publius.**

## **FEDERALIST No. 36**

# **The General Power of Taxation – #7 Hamilton**

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

Objectors assert that the Congress could never institute national internal taxation without creating problems. The reasons, they say, are twofold:

1. Its lack of sufficient knowledge of State conditions.
2. The necessary Union legislation would interfere with the States' taxing powers.

The supposed want of proper knowledge seems unfounded. A State legislature in need of detailed knowledge of a county easily acquires the information from the member(s) representing the county. Congress can get like knowledge from the States' delegations. Certainly those sent to Congress will be wise enough to share it.

To administer their finances, governments usually appoint individuals or boards who, first, digest and prepare taxation plans to be later passed into law. Inquisitive, enlightened statesmen are generally considered best qualified to judiciously select programs able to produce revenue. This clearly indicates the kinds

of local or State knowledge required for taxation purposes.

Under consideration are internal taxes of two types: "direct" and "indirect." The local-knowledge objection is aimed at both kinds, but the reasoning seems confined to indirect levies; i.e., duties and excises on consumed goods. I am at a loss to see the problem. Knowledge of a consumed article must be suggested by the nature of the item itself or available from any well-informed person, generally of the mercantile class. Differences between identical articles made in two different states are generally few and simple. The key requirement would be to avoid products already State taxed and it is not difficult to get this information from statutes and/or the appropriate House members.

The objection has slightly more substance when applied to real property. Land taxes are commonly based on actual permanent or periodic valuations by officers empowered to make them. In either case, institution and administration require the local property knowledge of



elected or appointed assessors or commissioners. The law must only name the persons or prescribe the mode of their election or appointment, fix their numbers and qualifications and outline their powers and duties.

What in all this cannot the Congress perform as well as a State legislature? Both must follow the same principles and refer local details to officials who will execute the plan. The Congress, for its part, can adopt the State's method of laying and collecting these taxes.

Let us remember that apportioning these taxes would be determined, not by the Congress, but according to the population of each State.

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*Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons.*

Article I Section 2 [3] of the United States Constitution

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An actual census of the people must justify taxation between the States, which will effectively prevent favoritism or oppression.

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*The actual enumeration [i.e., census] shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct.*

Article I Section 2 [3] of the United States Constitution

*No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.*

Article I Section 9 [4] of the United States Constitution

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The convention very carefully guarded against taxing power abuse. Besides the above precautions, it has provided that all citizens in all States will pay equal tax rates.

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*The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States.*

Article I Section 8 [1] of the United States Constitution

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Different Constitution supporters observe that, if necessary, the new government can resort to the kinds of requisitions we know today. Others ask, "Why not omit internal taxes and leave things as they are?" I can supply two solid answers:

1. Internal taxes, if problem-free, will be more effective, though we can only learn this by enacting them and experiencing the results.

2. Writing internal-tax power in the Constitution will add value to requisitioning. Knowing the Union can function without those quotas, the States will be motivated to exert more effort in their own support.

As to Union interference with the States' tax laws, I have explained why there can be no clash or inconsistency of authority. And it is not difficult to avoid conflicts between federal and State policies: Each can

abstain from purposes and actions the other side has undertaken. As neither can control the other, each will have an obvious, sensible interest in forbearance, and where we have a direct common interest in an issue, we can safely depend on mutual compliance.

Once the States retire their debts and their costs fit their means, the danger of conflict will disappear. For the States, a small land tax will suffice.

Many fictional horrors – duplication of taxes, sets of revenue officers and labor, plus oppressive poll-taxes – have been cleverly created and advertised to frighten the people away from internal taxation.

On the first point, there are two situations which leave no room for double sets of officers: (1) where the right to impose the tax is reserved to the Union, which applies to import duties, and (2) where no State enacts any form of internal tax. In other cases, the United States will probably either abstain from the forms in use by one or more States or use State officials and regulations to collect the added tax. This will save the collection costs and avoid the ire of State governments and citizens.

As to a supposed federal system to influence State officers: Should such a usurpative spirit arise, the best way to achieve its aim would be to attach the State officers to the Union and incur their wages. This would channel State influence toward the national government; in short, reverse the flow of federal influence. But we must eliminate such presumptions from discussion of the great question before us because they will only obscure the truth.

On the double-taxation issue: the Union's wants will be filled one way or another. If by its own authority, it will not have access to State powers. The amount of taxes raised must be the same in either case, with the advantage that – (a) if the Union determines that it can use consumption taxes more efficiently than the States, (b) it will make more troublesome taxation species unnecessary and (c) greater care will be given to organizing and collecting the taxes – internal taxes will supply a larger reservoir of revenue while minimizing unhappiness among the masses. It is fortunate when government's interest in preserving its own power tends to protect the less-than-wealthy from oppression!

As to poll taxes, I disapprove of them, and though they have long benefited those States most jealous of their rights, I would not want to see the national government using them. Still, just because there is a power to lay them is it inevitable that they will be laid? All States have poll-taxing power but some have never imposed them. Should we stigmatize those that have as tyrannies? If not, what would justify such a charge against the national government? As unfriendly as I am to poll taxes, I believe the federal government should have recourse to them. In certain national emergencies, options ordinarily avoided become essential to public welfare. The government, in staying prepared at all times for those crises should always have the choice of using of them. This country's scarcity of productive revenue sources is good reason to not limit the national councils' tax options, for there may come critical situations in which a poll tax may be vital. This portion of the globe is not exempt from the

calamities that befall its other parts. Hence my aversion to projects to deprive of weapons for our defense and security.

Publius.

## FEDERALIST No. 37

# Challenges Met by the Convention Madison

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

RARELY ARE public measures investigated as to their real potential to help or hinder the public good, especially when events call for particularly close study. Students of public affairs could not be surprised that the convention draft, which recommends so many important changes and innovations, should excite such resistance to a fair discussion and accurate judgment of its merits. It is obvious that some publications and scholars scanned the proposal with their opinions, pro or con, already firmly set. This prejudice must render their opinions of little value to the debate. By giving these different authorities and their arguments equal weight, I do not imply that their intentions are of equal purity. I point out only that, though everyone knows our situation demands action, some commentators have formed biases from specious arguments and considerations, some of a sinister nature. But these papers are not addressed to the Constitution's predetermined supporters or opponents but only to those with sincere zeal for their country's happiness and a just means of promoting it.

Unbiased citizens will examine the convention plan aware that a "perfect" plan was never expected. They will judiciously allow for errors always chargeable to a body of fallible men and the difficulties inherent in the delegates' unique assignment.

These papers have shown that:

- The Articles of Confederation are based on fallacies.

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*Each **STATE** retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.*

Article II of the Articles of Confederation

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- We must change this foundation and the structure it supports.

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*We, the **PEOPLE** of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessing of liberty to ourselves and our posterity, do ordain and establish this Constitution of the United States of America.*

The Preamble to the Constitution of the United States

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- Other confederacies that serve as precedents were impaired by the same erroneous principles.
  - Their experiences warn us of the path to be avoided.
- But they did not point to a path we could or should follow. Consequently, the most the convention could do was avoid their, as well as our own, historic errors and to provide a suitable way to avoid similar errors in the future.

One important difficulty the convention faced was in combining the necessary government stability and energy, while protecting liberty and the republican form. Without achieving these goals, the delegates would have very imperfectly fulfilled their assignment and our expectations. But it was not be easily achieved.

Government energy is essential to our security against external and internal danger and to promptly, beneficially execute the laws according to the very definition of good government.

Government stability is essential to national character and to that vital blessing of civil society, the peace of mind of the people. Inconsistent, erratic legislation is evil and odious in itself, and I am convinced that, enlightened and interested as they are in the nature and effects of good government, our citizens will not be satisfied until government remedies the hardships and uncertainties that characterize the State governments.

But comparing these valuable ingredients to the vital principles of liberty, we see at once the difficulty of combining and then properly balancing them. The genius of republican liberty is that all power comes from the people, and that those entrusted with it are kept accountable to the people by the short duration of their appointments. Even during these short terms of office, the public trust should be placed not in a few, but numerous hands.

Stability, on the other hand, requires that the same hands should hold power for a length of time. Frequent changes of men result from frequent elections and frequent changes of measures from frequent changes of men, while government energy requires execution by a single hand.

The convention's success in this part of its work will be apparent after a deeper review and analysis of the "product." From this superficial overview, it appears to have been an arduous part.

No less arduous must have been the task of separating federal from State authority. The science of government distinguishes and defines three great provinces: the legislative, executive, and judiciary. Not even history's most enlightened legislatures and jurists have delineated the functions and dimensions of different codes of laws and tribunals of justice. The precise limits of common law, statute law, maritime law, ecclesiastical law, and corporate law, among others, are unestablished in Great Britain, where they are more vigorously pursued than anywhere else in the world. The jurisdictions of her several national and local courts are no less discussed today than ever. All new laws, penned with great technical skill and passed with the most mature deliberation, are considered open to interpretation until debate and adjudication determine their meaning. Besides the laws' ambiguity – owing to their complexity and human imperfection – the means by which we communicate these conceptions to each other add even more speculation. We use words to express ideas. Intelligence and clarity, therefore, require that ideas be distinctly formed and expressed in terms exclusively appropriate to them. No language is large enough to supply words and phrases for every complex idea, or so correct as to always express thoughts precisely. Hence, however accurately we may (or think we may) differentiate purposes and functions from each other, we may muddle their meanings by expressing them in imprecise terms. And this unavoidable inaccuracy is greater or less depending on the subjects' complexity and uniqueness.

Here are three sources of vague or incorrect definitions:

1. Unclear expression.

2. Imperfect organ of conception.
3. Inadequate vehicle of ideas.

Any of these will create confusion. The convention, in defining the federal and State jurisdictions, must have felt the full effects of them all.

To the above difficulties add the interfering pretensions of the large and small States. Large States will demand participation in the federal government according to their superior wealth and importance. The smaller States will just as tenaciously demand the equality they now enjoy. Neither side will completely yield to the other; consequently, the conflict can be settled only by compromise. And this compromise on the balance of representation will create a new power struggle over government organization and division of power between the branches.

There are features in the Constitution which verify that the convention must have been compelled to sacrifice theoretical propriety to irrelevancy. Besides disputes between the large and small States, other combinations, resulting from incompatible local positions and policies, must have created difficulties. As every State may be divided into districts, and its citizens into classes with contending interests and jealousies, different parts of the United States are distinguished by circumstances. And though these interests may benefit the government when formed, every one must be aware of opposite influences.

It is a wonder that so many difficulties have been resolved, with unprecedented, unexpected unanimity.

We took notice in an earlier paper of the United Netherlands' repeated, unsuccessful trials to reform its constitution's notorious vices. The history of mankind's efforts to reconcile discordant opinions, assuage mutual jealousies, and adjust respective interests, tells of factions, contentions and disappointments. They are among the darkest displays of our species' infirmities and depravities. If an occasional brighter view appears, it serves only to remind us of the general truth. In studying the causes of these exceptions and applying them to the instances before us, we are led to two important conclusions. First, that the convention must have enjoyed, in a singular degree, an exemption from poisonous party animosities common to deliberative proceedings. Second, that all the delegates attending the convention were satisfied by the final act or induced to agree to it by a deep conviction of the necessity to sacrifice private opinions and selfish interests to the public good, and fear that this necessity would be diminished by delays or new experiments.

**Publius.**

## **FEDERALIST NO. 38**

# **Challenges Met by the Convention – #2 Madison**

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

EVERY ANCIENT government framed with public deliberation and consent was created, not by an assembly resembling the constitutional convention, but by an individual of preeminent wisdom and integrity. Examples: Minos of Crete, Theseus of Athens, Lycurgus of Sparta, Romulus of Rome. This also applies to confederate governments. Amphictyon and Achaëus authored the ones that bore their names.

How much influence these lone lawgivers actually wielded is uncertain, though some definitely had absolute approval. The question is, how could the Greeks – famously jealous of their liberty – place their destiny in one man's hands? The Athenians, who would not have an army commanded by fewer than ten generals, chose a "committee of one" to safeguard their fortune and future over the collective wisdom and integrity of its many historic thinkers. We can only suppose that fear that those legendary figures would not agree outweighed fear of one man's treachery or incompetence.

History tells of the difficulties those celebrated reformers faced, as well as the political contrivances they were forced to use to institute their reforms. Solon, the reformer of Athens, confessed that he gave his people the government best suited to their prejudices, rather than their happiness. And Lycurgus found it necessary to mix violence with superstition, then assure success by voluntarily renouncing his country, then his life. These lessons teach us to admire the improvement America has made on the ancient mode of preparing and establishing regular government. They also warn us of the dangers and difficulties in the process and the great imprudence of unnecessarily multiplying them.

There may be errors in the convention plan resulting from lack of professional government-making experience that we will not discover until its application exposes them. Our experience with the Articles of Confederation validates this presumption. Among many objections and amendments the States raised when the Articles were submitted for ratification, none pointed out the great, radical mistake for which we are paying today. And not one suggestion was important enough to justify revision of the system. There is ample reason, nevertheless, to suppose, immaterial as these objections were, that some States would have followed them with dangerous rigidity had their instinct for self-preservation not stifled their zeal for local interests. One State refused for several years to agree even though, the whole time, the British occupied our country. In the end, that State's change of heart came from her fear of being accused of extending public misery and endangering victory.

A patient whose illness worsens daily calls in physicians he judges most entitled to his confidence. The physicians attend, the patient is examined and, after consulting, they unanimously agree the symptoms are critical and prescribe a remedy. But no sooner is it made public than another group warns the patient that the medicine will poison him and forbids him to use it. Might not the patient reasonably demand, before following this advice, that its authors prescribe a substitute remedy? And if he sees them disagreeing with one another as with

his doctors, should he not try the original prescription rather than listen to people who neither deny the need for a fast remedy nor agree in proposing one?

America is in that position today. Acknowledging her illness, she has gained advice from men of her own choice. And she is warned by others against following this advice under pain of death. Do the second-guessers deny the peril? No. Do they deny the need for fast, powerful medicine? No. Are they agreed on a cure? They argue ...

- "The proposed Constitution should be rejected because it is a government over individuals, not a confederation of the States."
- "It should be a government over individuals – to an extent, but not to the extent proposed."
- "I do not object to the government over individuals or to the extent proposed, but to the absence of a bill of rights."
- "I concur in the need for a bill of rights but it should guarantee, not individuals' personal rights but the States' political rights versus the Union."
- "A bill of rights of any sort would be superfluous and misplaced, and the plan would be unexceptional except for the fatal power of regulating election times and places."
- "I am from a large State and oppose the unreasonable equal representation in the Senate."
- "I am from a small State and I oppose the dangerous *inequality* in the House of Representatives."
- "We are alarmed at the amazing cost of administering the new government."
- "The Congress will only be a shadow of a representative body, and the government would be far better if the number and the expense were doubled."
- "My State does not import or export and I object to the power of direct taxation."
- "Mine has great exports and imports and is unhappy that the whole tax burden may fall on consumption."
- "As a politician, I see in the Constitution a direct, irresistible tendency to monarchy."
- "No, I am convinced it will end in aristocracy."
- "I cannot say which of these shapes it will ultimately assume, but clearly see it must be one or other of them."
- "I affirm that the Constitution is has no bias towards either monarchy or aristocracy, but the weight on that side will not be enough to keep it upright and firm against its opposite propensities."
- "The language of the Constitution intermixes the legislative, executive, and judiciary branches in such a way as to contradict all ideas of regular government and all necessary means to protect liberty."
- "Joining the Senate and the President in the power of appointment, instead of vesting it in the Executive alone, is the vicious part of the proposal."
- "Excluding the House of Representatives – whose large membership could guard against corruption and bias – from appointments is equally obnoxious."
- "Admitting the President to any share of appointment authority – always dangerous in the hands of the executive magistrate – violates the maxims of republican jealousy."
- "No part of the arrangement is more unexceptionable than trial of impeachments by the Senate, which belongs both to the legislative and executive branches; besides this power belongs to the judiciary."

• “We fully agree with the above objection, but note that assigning impeachments to the judiciary would only worsen the error. We especially dislike the extensive powers already lodged in that branch.”

Even among avid supporters of a council of state, the most irreconcilable differences of opinion concern the way it should be constituted. One gentleman demands that the council should consist of a small number appointed by the largest House in the Congress. Another wants a large body, appointed by the President.

Suppose that the writers against the proposal are right in believing that they can appoint a better convention to draft a better plan. And suppose the nation agrees and convenes the objectors, with full powers to replace the present plan. Even given the above hostile opinions, I doubt that they would depart widely from the first.

The objectors to the new Constitution never mention the defects of the document it would replace. But the major objections to the new system are ten times as relevant to the Articles?

Query: Is it dangerous that the present Congress can requisition any amount it pleases, and the States must pay it. Congress can release bills of credit as long as it pays for the paper to print them and borrow anywhere, as long as a cent will be lent.

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*All charges of war, and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States in proportion to the value of all land within each State, granted or surveyed for any person, as such land and buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled shall from time to time direct/appoint.*

*The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several States within the time agreed upon by the United States in Congress assembled.*

Article VIII of the Articles of Confederation

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Query: Is infinite power to raise troops a danger? Congress now has it, and has begun to use it.

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*(E)very State shall always keep up a well-regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and constantly have ready for use, in public stores, a due number of filed pieces and tents, and a proper quantity of arms, ammunition and camp equipage.*

Article VI of the Articles of Confederation

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Query: Is it improper and unsafe to combine different governmental powers in one body? Congress is the sole repository of all federal powers.

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*For the most convenient management of the general interests of the United States, delegates shall be annually appointed ... to meet in Congress ...*

*In determining questions in the United States in Congress assembled, each State shall have one vote.*

Article V of the Articles of Confederation

## FEDERALIST NO. 39

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Query: Is it dangerous to put the keys of the treasury and command of the army, in the same hands? The Confederation gives both to Congress.

Query: Is a bill of rights essential to liberty? The Confederation has none.

Query: Is it objected that the new Constitution empowers the Senate, with Executive agreement, to make treaties which are to be the laws of the land? The existing Congress, with no such control, can declare and make treaties which most States, in fact, recognize to be the supreme law of the land.

Query: Will the new Constitution abolish slave importation in 20 years? The Articles, by their silence on the issue, allow it forever.

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*The migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by the Congress prior to the year 1808, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.*

Article I Section 9 [1] of the United States Constitution

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I will be told, that however dangerous this mixture of powers in theory, the Congress' dependence on the States for the funds to act makes it harmless. In that case, we can charge the Confederation to declare certain federal powers necessary and, at the same time, make them vacant. If the Union is to continue unchanged, effective powers must be given to or assumed by the existing Congress. Out of our present "lifeless mass" has grown a mass of abnormal power, giving life to all the feared dangers of bad government.

The West will no doubt yield vast wealth for the United States. It cannot be redeemed instantly to cure our present financial ills or supply all public needs but, properly managed, it will eventually pay off the domestic debt and furnish liberal, ongoing infusions to the federal treasury. Much of this wealth has been already surrendered by individual States and we can expect that the others will make similar contributions. So we can calculate that the rich, fertile land to the west – equal in area to our inhabited territories – will soon become a national asset.

The Congress has assumed management of this great resource and begun to make it productive. It is also forming new States and territorial governments, appointing their officers and defining conditions for admission to the Union. It is doing all this with no duly constituted authority, but no blame has been whispered and no alarm sounded. Large, independent revenues are passing to this single body, which can raise indefinite numbers of troops and money to indefinitely support them.

Still there are men who watch in silence then loudly advocate the system that supports it and object to the new system, as noted above. Wouldn't they be more honest, urging ratification of the Constitution to protect the Union against bodies like the existing runaway Congress?

I do not mean to censure the measures the Congress has pursued – it could not do otherwise under the Articles of Confederation. But it alarmingly demonstrates the damage possible by a government with no regular powers proportioned to its purposes and functions. It is always exposed to threats of dissolution and usurpation.

**Publius.**

## How the Plan Meets Republican Principles

# Madison

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

WILL THE NEW government's shape and direction be strictly republican? Obviously, only a republic will conform to the intelligence and creativity of the American people, with the basic principles of the Revolution and with the essential goal of freedom: to truly test mankind's capacity for self-government. If the convention plan departs from republicanism, it cannot be defended.

What are republican government's unique features? If we ask the political writers this question, we would never get a satisfactory answer.

Among nations accepted as true republics are Holland, where the people have no official authority; Venice, where a few hereditary nobles exercise absolute power; Poland, a mixture of the worst kinds of aristocracy and monarchy; and England, which combines but one republican branch with an hereditary aristocracy and monarchy.

These examples, nearly as different from each other as from a genuine republic, show the inaccuracy of the political "experts" use of the term.

If we are honest and objective, we will say:

*A republic is a government that receives all its powers directly or indirectly from the great body of the people, and is administered by people holding office for a limited period, or during good behavior.*

Power *must* be derived from society at large, not from a minority or favored class; otherwise a handful of tyrannical "nobles" could use their elective powers to oppress everyone else and claim to be republicans ruling a republic. It suffices that the people, directly or indirectly, appoint administrators, to serve with their consent; otherwise *no* popular government anywhere could be called a "republic."

Every State constitution allows some officials to be appointed indirectly by the people. Most permit the chief magistrate – and one allows legislators – to be so appointed. All limit legislative and executive tenures to definite periods. And most allow judges to sit during "good behavior."

The convention plan rigidly conforms to the above standards. As in all or most States ...

- The people would directly elect the national House of Representatives.
- State legislators, representing the people, would appoint Senators.
- The people would elect the chief executive via their votes for State electors.

The States have also set the precedents for judicial appointments.

Tenures, too, are based on the States' experience:

- Two years for House of Representatives members.
- Six years for Senators.
- Four years for the President.

The President of the United States would be impeachable any time during his term. But several States have no provision for the governor's impeachment; in Delaware and Virginia, he is not impeachable until out of office.

Judges *should* sit during good behavior.

Ministers would serve according to set regulations, a standard also set by State constitutions.

But the most convincing proof of the proposed system's republican nature is its prohibition of titles of nobility and its guarantee to all States of republican administration.

"It was not enough," say adversaries, "to adhere to the republican form. It should have kept the federal definition of the Union as a confederacy of sovereign States. Instead, it has framed a national government – a coalition of the States."

In answer, I point out that it will be the American people who will assent to and ratify the Constitution. Their approval will be put forward by representatives they elect for that purpose. In this, the people will act, not as subjects of one entire nation, but as citizens of the independent States that comprise their nation. Yes, it will be expressed in action by the States. But it will take place on their sovereign authority – which is the authority of the people themselves.

Therefore, the act establishing the Constitution will be a federal, not a national, act.

The test of its federal nature, as the objectors understand the term (i.e., action of the people as citizens of, not one aggregate nation, but of independent member States) is that ratification will result from a vote of the States that are parties to it, as determined by their citizens' votes.

Were the people deemed subjects of one monolithic nation, a majority vote would bind the minority, as happens in every State. The majority vote would be defined as (a) the total number of individual votes or (b) by allowing a vote of the majority of States to signify the will of a majority of the American people. Neither rule is proposed: Each State, in voting on ratification of the Constitution, will act as a sovereign, independent body, bound only by its own voluntary act. And that proves the new Constitution will, if established, be a federal, not a national, instrument.

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*The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.*

Article VII Section 1 [1] of the United States Constitution

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From where would the government's ordinary powers come? The House of Representatives would gain its powers from the people of America, represented in the same proportion, and on the same principle, as they are in their State legislatures. If we stopped there, the government created would be national, not federal.

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*The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the*

qualifications requisite for electors of the numerous branch of the State legislature.

Article I Section 2 [1] of the United States Constitution.

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But the Senate will be empowered by the States, as political, coequal entities, represented there as they are in the existing congress. Now the government is federal, not national.

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*The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof for six years; and each Senator shall have one vote.*

Article I Section 3 [1] of the United States Constitution

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The President will be elected directly by the States. The votes allotted to them would be in a compound ratio, whereby they would be partly distinct, equal sovereignties and partly unequal members of a united sovereignty. Should there be a tie vote, the eventual election is to be made in the House of Representatives – the legislative division consisting of the national representatives.

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[1] *The executive power shall be vested in a President of the United States. He shall hold his office during the term of four years, and together with the Vice-President, chosen for the same term, be elected as follows:*

[2] *Each State shall appoint, in such manner as the legislature thereof may direct, a number of Electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States shall be appointed an Elector.*

[3] *The Electors shall meet in their respective States and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of Electors appointed; and if there are more than one who have such majority, and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the Electors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice-President.*

Article II Section 1 of the United States Constitution

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But in this particular act they would be grouped in separate, coequal State delegations. This aspect of the plan makes the proposed government seem like a “mixed” federal/national assembly.

The difference between a federal and national government is that the former would wield power over States; the latter would rule over individual American citizens composing the nation. In defining the Constitution by this criterion, it becomes largely a national, not federal, entity. In controversies between States, they would be considered and dealt with only as collective, political entities.

The government, in light of its direct relationship to the people, appears as essentially a national system with a few federal features. But the picture changes when we view its full range of proposed powers. A true “national” government classically wields power over *all* persons and things subject to lawful government. Under the Constitution:

- The total national authority over the people would be totally lodged in the Congress.
- Relevant authority over cities and towns operating in unison for specified purposes will be divided, as appropriate, between the Congress and town/city councils.

A “national” regime would govern all local authorities all the time, at its pleasure. Under a federal plan, municipalities would be distinct and independent, no more subject to the federal government than the federal government is subject to them. In this relationship, the proposed government cannot be called “national” since its jurisdiction covers only certain constitutionally specified purposes and functions while the States are sovereign over all other concerns.

It is true that “borderline” controversies between the two jurisdictions will be decided by a tribunal to be established by the general government. But decisions would be impartially made, according to the Constitutional rules and precautions would be taken to insure this impartiality.

Some independent tribunal is needed to guard the peace and the Union. Few disagree that it should be set up by the general, rather than State, government.

The Constitution’s authority over amendments is neither wholly national or federal. Were it national, ultimate authority would lie with the majority of the American people, who could at any time, like a majority of every national society, alter or abolish the government. Were it wholly federal, a binding agreement would require the votes of all the States.

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*The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which in either case shall be valid to all intents and purposes as part of this Constitution, when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year 1808 shall in any manner affect the first and fourth clauses in the Ninth Section of the First Article; and*

*that no State, without its consent shall be deprived of its equal suffrage in the State.*

Article V of the United States Constitution

The convention plan uses neither principle. In requiring a supermajority (three-quarters) of the States (not citizens) it moves toward the federal side; in not requiring a vote of all the States, it swings back to the national character.

## FEDERALIST No. 40

# Convention Power to Form a Mixed Government Madison

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

WAS THE convention empowered to frame and propose this mixed national/federal Constitution? Its powers are clearly reflected in the recommendations of the meetings, respectively, in September, 1786, at Annapolis and in Congress, February, 1787.

The Annapolis act recommends “appointment of commissioners to take into consideration the situation of the United States; to devise such further provisions as shall appear to them necessary to render the Constitution of the federal government adequate to the exigencies of the union; and to report such an act for that purpose, to the United States in Congress assembled, as when agreed to by them, and afterwards confirmed by the legislature of every State, will effectually provide for the same.”

Congress recommended ...

*Whereas, There is provision in the articles of Confederation and perpetual Union, for making alterations therein, by the assent of a Congress of the United States, and of the legislatures of the several States;*

*and whereas experience hath evinced, that there are defects in the present Confederation;*

*as a mean to remedy which, several of the States, and particularly the state of New York, by express instructions to their delegates in Congress, have suggested a convention for the purposes expressed in the following resolution;*

*and such convention appearing to be the most probable mean of establishing in these States a firm national government:*

*Resolved, That in the opinion of Congress it is expedient, that on the second Monday of May next a convention of delegates, who shall have been appointed by the several States, 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*

The proposed Constitution is neither a national or a federal system; it is a combination of both. Its foundation is federal, not national; the sources of the proposed government's ordinary powers are partly federal and partly national; in applying those powers, it is national, not federal; in the range of them, again, it is federal, not national; and, finally, the proposed method of introducing amendments to the Constitution is neither federal or national.

**Publius.**

*and provisions therein, as shall, when agreed to in Congress, and confirmed by the States, render the federal Constitution adequate to the exigencies of government and the preservation of the union.*

From these two acts, we deduce that the convention was authorized to frame a national government, adequate to the demands of governing and preserving the Union and to revise the Articles of Confederation as needed to accomplish these ends.

There are two rules we can use to arrive at a clear statement of purpose and empowerment. The first is to give meaning to all parts of each statement and connect them to a common, agreed-upon end. The second is, where parts do not agree, to subordinate the lesser to the more important parts – sacrificing the means to the end, rather than the end to the means.

Suppose that “Annapolis” and “Congress” gave conflicting instructions; that the convention could not possibly achieve an adequate national government with mere “alterations and provisions” to the Articles of Confederation. Now the question is, which part(s) should have been saved, and which deleted? Which were the more and less important parts? Which is the end; which are the means?

Let honest Constitution supporters and objectors answer: Is it best to (a) discard the Articles, provide an adequate government and preserve the Union or (b) save the Articles and allow the Union to die?

*Can we make no changes or additions that would make the articles a functional national government?* No one will argue that the delegates were not authorized to devise a new title. Changes in the Articles themselves, as well as new provisions, are also expressly authorized.

*Is this power exceeded if any part of the old articles remain?* Those who say yes should mark the boundary between authorized and prohibited innovations, between the power to change, expand or replace the old document and government. The States would never have appointed any convention had they not expected substantial reform.

*Would anyone say the convention had no power to examine or change the Confederation's basic principles?* I



ask, what are these principles? Do they require that a new Constitution must regard the States as independent sovereigns? In the proposed Constitution, they are so regarded.

*Do they require that government officials derive their powers from the legislatures, rather than the people of the States?* (One house of Congress, the Senate, is to be appointed by them.)

*Do they require that government act on the States, not directly on individuals?* Some new government powers will so apply, but this is not new. The Articles apply many powers to individuals; e.g., cases of capture, piracy, postal service, coinage, weights and measures, trade with Indians, land-grant claims by separate States and courts marshal trials, which may inflict death without intervention by a jury or even a civil judge.

*Do the Articles' basic principles require that no tax be levied without the State administration?* They authorize a limited direct postal-service tax and Congress interprets coinage as a direct levy. But, disregarding these examples, it was the convention's acknowledged aim, and the people's expectation, that the new general government would regulate trade in ways to make it a direct source of taxes. Congress repeatedly recommended this measure as consistent with the Articles and all but one of the States, including New York, accept this idea.

*Do the Articles' basic principles require limited general government powers and, beyond this limit, States sovereignty and independence?* The new and old governments' powers are limited and the States, in all specified cases, would remain sovereign. The truth is, we may consider the great principles of the Constitution proposed by the convention as expansions of those in the Articles. Our problem is that, under the old system, these principles' feebleness justifies all the inefficiency charged against it, and requires an entire new system.

In one particular, the convention admittedly departed from its predetermined course. It required ratification by the people rather than all the State legislatures, and approval by only nine States to put it in effect. Interestingly, this provision, has received the fewest objections. This leniency avoids the absurdity of subjecting twelve "aye" States – with 59/60ths of the American people – to the obstructionism of one "nay" State with one sixtieth of the population.

To this point, we have characterized the convention as wielding real, final powers to establish a new United States Constitution. But its authority was merely to advise and recommend. Moreover, the States intended and the delegates understood them to be so and that the Constitution they accordingly planned and proposed is vacant unless and until it is approved by those it will affect. This realization puts the subject in a different view and allows us to properly judge the convention's product.

The delegates were deeply, unanimously affected by the crisis that has necessitated drastic steps to correct the system's errors. They are no less convinced that the reform they propose is absolutely necessary to fulfill the purposes of their appointment.

They were fully conscious that all Americans' hopes and expectations were focused on these deliberations, and that external and internal enemies agitated against our liberty and prosperity.

They saw public enthusiasm aroused by one State's (Virginia's) modest, original proposition to partially amend the Articles.

At Annapolis they saw the authority assumed by a very few delegates from a very few States applied to a great, critical endeavor that was alien to their assignment but justified by the mass of public opinion.

At Philadelphia they saw this spirit materialize into a convention involving 12 of the 13 States.

And they acted, because they had watched Congress assume dangerous, great powers, unspecified by the Articles, to address minor concerns.

From this they realized that actions by established governments must be based on substance, not passing fashion. Otherwise the people's right to collectively improve or replace their government to strengthen and protect their freedom becomes vacant.

Thus it is not only legitimate and possible, but *essential* for patriotic, respectable individuals and bodies of citizens to use "informal," "unauthorized" means to affect needed progress. Indeed, the conveners recalled that the States, by just such irregular, assumed privilege, united against the British. Ignoring their lack of real power, they formed committees and congresses to concentrate their efforts and defend their rights; and framed the constitutions by which they govern today. Let us remember that the only supporters of "ordinary forms" were those secretly opposed to the substance sought by all this unrest.

Bear in mind as well that submitting the proposed plan for approval to the people would destroy the old supreme power – along with its errors and irregularities – forever.

What if the delegates, under all these pressures and amid all these considerations, had not demonstrated confidence in their country which had so uniquely honored them? What if they had not produced a system they judge able to secure its happiness? In other words, what if they had coldly and sullenly resolved to disappoint their country's hopes, to sacrifice substance to fashion, to commit their dearest interests to the uncertainties of delay and the hazard of events? I ask every thoughtful person: had the convention failed to do its duty, how should the impartial world, the friends of mankind, every virtuous citizen judge its conduct and character?

Or, to the person with an uncontrolled need to condemn, I ask how would you punish the 12 States who seized the power to send delegates to the convention – an unconstitutional act in every one of them? How would you deal with Congress, who – illegally, under the Articles of Confederation – advised this body's appointment? And how would you condemn New York State, which first urged and then participated in this illegitimate innovation?

To disarm the objectors of every possible excuse, I will grant for the moment that the Annapolis meeting, Congress or circumstances authorized the convention to frame a Constitution. Does it follow that it should, for those reason, be rejected?

If, according to the noble precept, it is lawful to accept good advice even from an enemy, shall we set the bad example of refusing good advice offered by our friends? The issue is not from whom the advice comes but whether it is good.

In sum, the charge that the convention exceeded its powers is unfounded. Had the delegates exceeded their

powers, they were not only authorized but required as their country's servants and by current circumstances. Moreover, even had they, to achieve the people's aims and happiness, violated their powers and obligations, the new Constitution should nevertheless be embraced.

**Publius.**

## Overview of Constitutional Powers Madison

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

THE AMOUNT of power the proposed Constitution would create raises two questions:

1. Will any powers transferred to the general government be unnecessary or improper?
2. Will they endanger those remaining with the States?

Cool, candid people understand that the purest human blessings contain some impurity; that the choice is always between a lesser and greater – but never a perfect – good. Every political power to improve public happiness may be misused or abused.

Our first decision must be whether such a power *is* necessary and, if so, the second must be how to guard, as effectively as possible, against perversion. To reach the correct conclusion, we should review these federal powers by classifying them as to:

- a. Security against foreign danger.
- b. Regulation of foreign trade.
- c. Maintenance of harmony and trade between States.
- d. Certain useful miscellaneous projects.
- e. Restraint of the States from injurious acts.
- f. Provisions for making all these powers effective.

**In the first class are the powers to declare war and grant letters of marque; to provide armies and fleets; to regulate and call forth the militia; to levy and borrow money.**

Security against foreign danger is one of civil society's most basic functions – an avowed, essential purpose of our Union. The required powers must be effectively assigned to the federal government.

Do we need a power to declare war? No one will answer no – the existing Articles amply establish it.

Do we need a power to raise armies and equip fleets? It is inseparable from our right of self-defense.

But do we need an *indefinite* power to raise troops and provide fleets in peace, as well as in war? Our answer appears elsewhere, and seems too obvious and conclusive to justify discussion.

**How could we limit defensive force without the ability to limit our enemies' offensive forces?**

Moreover, how could we safely prohibit our own peacetime preparations for war readiness without the power to ban every hostile nation's preparations and establishments? Security measures must be proportioned to enemy strength and the danger of attack. It is less than useless to enact barriers to self-preservation because it plants in the Constitution necessary seizures of power leading to unnecessary repetitions. One nation constantly maintaining a disciplined army obligates the most peaceful nations within its reach to take like precautions.

The 15th century saw many peacetime armies. Introduced by Charles VII of France, they forced all

Europe to follow suit, or wear the chains of a universal monarch. The same could happen today.

Rome's legions dominated their undisciplined, valorous foes and made her mistress of the world. It is no less true that the Romans' and other Europeans' liberties fell victim to her military establishments.

**A standing force, thus, is a dangerous necessity.**

But a wise nation will, without rashly precluding assets essential to its safety, take care not to build an army that can threaten its freedom. The proposed Constitution contains the necessary precautions.

The Union it cements and secures destroys all excuses for a potentially dangerous military establishment. America united, without a single soldier, is a stronger obstacle to foreign ambition than a disunited America with a hundred thousand combat-ready veterans.

The United States' distance from the powerful nations of the world gives them the same security as Britain's separation from mainland Europe. Additionally, a dangerous military will never be necessary so long as we continue as a united people. But the moment the Union dissolves, the weak States' fears and/or the ambitions of the strong will bring to the New World the misery Charles VII brought to the Old, and America's liberty, like Europe's, will be crushed between standing armies and perpetual taxes.

In fact, a disunited America will be even more unlucky than Europe, whose villains are confined to the continent's limits. Europe, unlike America, has no powerful enemies from other parts of the world sowing conflict between competing nations, inflaming their mutual animosities, and using them to advance ambition, jealousy and revenge. In America, these and more evils would spring from Europe's economic stake in the New World and its freedom from a similar threat.

**The disastrous danger of disunion cannot be exaggerated.**

Every man who loves peace, who loves his country, who loves liberty should always have it in view, so he can appreciate our Union's meaning and value and be able and ready to defend it.

Next to effectively establishing the Union, the best possible way to protect against danger from a domestic standing army is to limit the term for which Congress may appropriate funds to support it – which the Constitution prudently would do.

In Britain, to keep an army on foot requires an annual legislative vote. Our Constitution would lengthen this critical period to two years. This is how the two provisions are discussed in public, but is it an honest discussion?

*The Congress shall have power to ... raise and support armies, but no appropriation of money to that use shall be for a longer term than two years.*

Article I Section 8 [12] of the United States Constitution

Truly stated, in Britain the term for supplying the army, while constitutionally unlimited, is in practice limited to one year only by the parliamentary mood of the moment. The American literally makes two years the longest *legally admissible* term.

The British House of Commons is a large body, elected – for seven years, a long electoral term – by a small percentage of the voters. As a result, representatives feel empowered to mislead the voters, just as the Crown misleads Parliament. And this body has power to support the army indefinitely with no real need to extend the “official” term past one year. Looking back over this arrangement’s long history, are we not justified in trusting the United States’ representatives – elected freely every two years by the whole body of the people – with the authority to renew military appropriations no more seldom than every two years?

The objectors’ attempt to exploit our prudent distrust of standing armies has awakened us to this important issue. Inevitably, this will convince us that the Constitution will be the most effective protection available against that danger *and* that nothing short of a Constitution adequate to the national defense and preservation of the Union can save us from the many standing armies that will arise if we dissolve into separate States or Confederacies.

Our obvious need for the power to raise a navy is all but untouched by criticism. The Union that provides our maritime strength will also be our primary security against danger from abroad. Our isolation by sea is another similarity between the United States and Britain.

All residents of the Atlantic coast have a major stake in our naval defenses, which guard them from foreign predators. This good fortune is *not* creditable to the existing government.

New York State is highly vulnerable from the Atlantic. Her seacoast is long. A key part of the State is an island. A large navigable river penetrates the State for over 150 miles. Its great commercial center, the source of its wealth, is constantly at the mercy of events, foreign enemies and brigands.

Should Europe’s precarious situation lead to war on the ocean, we will be exposed to it, and the States most exposed cannot rely on our present phantom of a general government. If their own defenses were equal to the danger, the assets to be defended would be nearly consumed by the act of defending them.

**As to the value of taxation, levying imported goods will always be a valuable revenue source.**

For a considerable time, it must be a principal source. At this moment, it is an essential one.

*The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States.*

Article I Section 8 [1] of the United States Constitution

But it would be a costly mistake not to include in our revenue calculations the wide fluctuations, inherent in foreign commerce, in volume and kinds of imports. Remember, too: these fluctuations do not move with population growth, which underlies consumer demand. As long as agriculture remains our only labor market, import volume must increase with our consumption level. But it must decrease as population grows and our own industry absorbs the hands no longer needed in agriculture. In the future, the bulk of our imports could be raw materials to be used to make our own exports – which will require bounties rather than discouraging tariffs. A government designed to endure should plan on and plan for these revolutions, and accommodate them.

**Some who acknowledge the need for taxing authority attack the language the Constitution uses to define it.**

They urge that the power to tax in Article I Section 8 [1] amounts to an unlimited license to use every power conceivable in the name of national defense or general welfare. Were there no other Congressional powers, this argument might have some weight. How can one infer a power to destroy freedom of the press or trial by jury in “to raise money for the general welfare?” Particularly when a complete list of Congressional powers immediately follows, separated only by a semicolon?

[1] *The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;*

[2] *To borrow money on the credit of the United States;*

[3] *To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;*

[4] *To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;*

[5] *To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;*

[6] *To provide for the punishment of counterfeiting the securities and current coin of the United States;*

[7] *To establish post offices and post roads;*

[8] *To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;*

[9] *To constitute tribunals inferior to the Supreme Court;*

[10] *To define and punish piracies and felonies committed on the high seas and offenses against the law of nations;*

[11] *To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;*

[12] *To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;*

[13] *To provide and maintain a navy;*

[14] *To make rules for the government and regulation of the land and naval forces;*

[15] *To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;*

[16] *To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of officers, and the authority of training the militia according to the discipline prescribed by Congress;*

[17] *To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square), by cession of particular States and the acceptance of Congress, become the seat of the*

*Government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings;*

*[18] 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 officer thereof.*

Article I Section 8 of the United States Constitution

Why include a complete list of specific powers if we mean to make them part of the first power in the list? It is natural and customary to recite a general phrase and then explain and qualify it with relevant details. But to list details that would neither explain nor qualify, but only mislead, would be absurd. This objection is the more extraordinary as it appears that the convention language nearly copies the Articles of Confederation.

*We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessing of liberty to ourselves and our posterity, do ordain and establish this Constitution of the United States of America.*

The Preamble to the United States Constitution

*The said States hereby severally enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of*

*them, on account of religion, sovereignty, trade, or any other pretense whatever.*

Article III of the Articles of Confederation

The terms of Article I Section 8, above, are even more like those in number VIII of the Articles.

*All charges of war, and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States in proportion to the value of all land within each State, granted or surveyed for any person, as such land and buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled shall from time to time direct/appoint.*

*The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several States within the time agreed upon by the United States in Congress assembled.*

Article VIII of the Articles of Confederation

Construe VIII by the construction used in the Constitution and the existing Congress has unlimited legislative power. But if this generalization gave Congress unlimited powers re the common defense and general welfare, the objectors would not use the same reasoning to justify them as they use against the convention.

**Publius.**

## FEDERALIST No. 42

# Overview of Constitutional Powers – #2 Madison

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

THE SECOND class of general government powers would regulate intercourse with foreign nations:

- To make treaties.
- To send and receive ambassadors, other public ministers, and consuls.
- To define and punish piracies and felonies on the high seas, and offenses against the law of nations.
- To regulate foreign commerce, including prohibition, after 1808, of importation of slaves, and to lay an intermediate per-head duty to discourage it.

This class of powers is essential to the federal administration. If we are to be one nation in any respect, it clearly should be in the other nations' eyes.

*The President shall ... have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur ...*

Article II Section 2 [2] of the United States Constitution

The Articles of Confederation include powers to make treaties and to send and receive ambassadors.

*No State, without the consent of the United States in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with any King, Prince or State ...*

Article VI of the Articles of Confederation

One difference: The convention plan relieves the treaty power of frustration by eliminating conflicting State regulations.

*No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal;...*

Article I Section 10 [1] of the United States Constitution

Also, a power to appoint and receive “other public ministers and consuls,” is expressly, properly added to the Articles’ provision concerning “embassies.”

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*The President shall ... nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls ...*

Article II Section 2 [2] of the United States Constitution  
*No State, without the consent of the United States in Congress assembled, shall send any embassy to, or receive any embassy ... any King, Prince or State;*

Article VI of the Articles of Confederation

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In the Articles of Confederation “ambassador” refers only to the highest grade of emissary deployed to foreign embassies; “ministers” and “consuls are excluded.” But Congress employs lower-grade ministers and exchanges consuls. Because trade agreements often stipulate mutual assignment of consuls to commercial functions, admission of foreign consuls may fall within the power to make commercial treaties. Additionally, where no such treaties exist, committing consuls to foreign countries could be covered under the authority given in the Articles of Confederation to appoint civil officers necessary to manage the general affairs of the United States.

But it does not provide for admitting consuls into the United States, unless stipulated by treaty. Filling this need is one of the convention’s minor contributions. But small provisions become important when they obviate the gradual, secret seizure power. Many times, Confederation defects have forced Congress to violate its powers – a strong argument in favor of the new Constitution.

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*The Congress shall have power to ... define and punish piracies and felonies committed on the high seas and offenses against the law of nations ...*

Article I Section 8 [10] of the United States Constitution  
*The United States in Congress assembled, shall have the sole and exclusive right and power of ... establishing rules for deciding in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated – of granting letters of marque and reprisal in times of peace – appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures, provided that no member of Congress shall be appointed a judge of any of the said courts.*

Article IX of the Articles of Confederation

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The power to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations, belongs to the general government, and is a still greater improvement on the articles of Confederation, which do not provide for offenses against the law of nations and thereby allow any reckless State to embroil the Confederacy with foreign nations.

The Articles’ language on piracies and felonies covers only establishment of courts to try them. The definition of piracies might be left to the law of nations, but we find a legislative definition in every municipal code. A definition of felonies on the high seas is obviously needed.

Felony is loosely defined, even in the common law of England, and varies in importance in its statute law. But every nation should legislate a standard common-law and statutory definition. It is not defined the same in any two States and takes on more new meanings as States revise their criminal laws. For certainty’s and uniformity’s sake, assigning the power to define felonies in this case is necessary and proper.

Regulation of foreign commerce has already been fully discussed in these papers.

Many would stop slave importation immediately, and not wait until 1808. But it is easy to understand both the restriction itself and the way the clause is expressed.

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*[1] The migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by the Congress prior to the year 1808, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.*

Article I Section 9 [1] of the United States Constitution

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It should be considered a great gain for humanity that a period of 20 years may end this barbaric traffic forever within these States and that, during that time, the federal government will emphatically discourage it. It may be totally abolished by the concurrence of the few affected States to the example of the majority of the Union.

Some have tried to turn this clause into an objection against the Constitution, representing it on one side as criminal toleration of an illicit practice, and on another as calculated to prevent voluntary, beneficial emigration from Europe to America.

I mention these misconstructions, not to give them an answer (they deserve none), but to display the manner and spirit in which some conduct their opposition to the proposed government.

The third class of powers includes those to promote harmony among the States, e.g. restraints on States’ authority and certain judicial powers (to be examined along with government’s structure and organization).

Most notable are federal authority to:

- Regulate commerce among States and Indian tribes.
- Coin money
- Regulate the value of domestic and foreign coin.
- Punish counterfeiting of United States current coin and securities.
- Fix standards of weights and measures.
- Establish a uniform rule of naturalization.
- Set uniform bankruptcy laws.
- Prescribe the manner in which each State’s public acts, records, and judicial proceedings shall be proved, and their effect in other States.
- Establish post offices and post roads.

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*The Congress shall have power to ... regulate commerce ... among the several States, and with the Indian tribes; ... establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States; ... coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures; ... provide for the punishment of counterfeiting the*

Experience has exposed the existing Articles' failure to regulate interstate commerce. To the proofs and remarks presented in former papers, we may add that, without this provision, the essential power to regulate foreign commerce would be ineffective.

An important purpose of this power is to relieve States of improper taxes levied for the privilege of importing or exporting through other States. Were those States free to regulate this trade, they certainly would find ways to load the in-transit articles in question with duties which would fall on their manufacturers and ultimate consumers. Past experience would teach us that such taxes would be introduced by future contrivances that would certainly nourish enmity, ending in military action. To those with no personal interest, the commercial States' desire to collect indirect revenues from uncommercial neighbors, must seem imprudent and unfair, because it would encourage the injured parties, by resentment as well as interest, to trade via less convenient channels. But the voice of reason, pleading for a larger, lasting interest, is too often drowned by clamor for immediate, immoderate gain.

The need for superintendence over trade between confederated States has been illustrated elsewhere. Switzerland's weak union obligates each canton to allow merchandise to pass untaxed through its jurisdiction into other cantons. Germany prohibits princes and states from laying tolls or customs on bridges, rivers, or passages without the emperor's and the diet's consent, though there are reports that the law is not always followed, which has produced the same problems there that we foresee arising here. The Netherlands restrains its members, from establishing, without general permission, disadvantageous imposts on their neighbors.

Regulation of commerce with Indian tribes is liberated from two limitations in the Articles, which make the provision obscure and contradictory. The power applies to Indians not members of any State, and would not violate the legislative right of any State within its own limits.

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*The United States in Congress assembled shall also have the sole and exclusive right and power of regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated*

Article XX of the Articles of Confederation

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What Indians will be deemed members of a State is not yet settled and perplexes and divides federal officers. How an external authority, without intruding on internal legislative rights, can regulate trade with Indians who are residents but not citizens of a State is incomprehensible.

This is not the only case in which the Articles of Confederation have tried to achieve the impossible. Included are attempts to reconcile partial Union sovereignty with complete State sovereignty and to subvert a mathematical axiom by taking away a part and letting the whole remain.

All we need say about the power to coin and regulate money is that, by including regulation of foreign money, the Constitution fills a serious void in the Articles of Confederation. The existing Congress may regulate only coin struck by its own or the respective States' authority. Obviously, the proposed uniformity in the value of the current coin might be destroyed by subjecting foreign coin to the varying regulations of the different States.

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*The United States in Congress assembled shall also have [I] the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective States – fixing the standards of weights and measures throughout the United States*

Article IX of the Articles of Confederation

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Punishing public-securities and current-coin counterfeiting is submitted, of course, to the authority empowered to secure the value of both.

Regulation of weights and measures is duplicated from the Articles of Confederation.

Dissimilarity in naturalization rules has long been seen as a fault in our system, and as a foundation for intricate, delicate questions.

In the fourth article of the Confederation, it is declared "that the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice, excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall, in every other, enjoy all the privileges of trade and commerce," etc. This is confusing language. It cannot be easily determined why one part of the Article uses the term "free inhabitants," another uses "free citizens" and yet another specifies "people;" or what was meant by superadding to "all privileges and immunities of free citizens," "all the privileges of trade and commerce." Whatever the legal consequences of all this might have been, other consequences too serious not to be provided against would probably have resulted. The new Constitution thus authorizes the general government to establish a uniform national naturalization rule.

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*The Congress shall have power to ... establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States ...*

Article I Section 8 [4] of the United States Constitution

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The power to establish uniform bankruptcy laws is intimately connected with regulation of commerce. It will prevent many frauds where parties or their property may lie in or be removed to other States.

The power to prescribe general laws for proving each State's public acts, records and judicial proceedings and their effects in other States, is a valuable improvement over the Articles of Confederation clause on this subject.

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*Full faith and credit shall be given in each of these States to the records, acts, and judicial proceedings of the courts and magistrates of every other State.*

Article IV of the Articles of Confederation

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*Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.*  
Article IV, Section 1 of the United States Constitution

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The meaning of the original is unclear and of little importance under any interpretation it will bear.

The power Article IV of the Constitution establishes should be a convenient instrument of justice, particularly beneficial to contiguous States.

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*The Congress shall have power to ... establish post offices and post roads;*  
Article I, Section 8 [7] of the United States Constitution

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The power of establishing post roads is harmless and may, perhaps, by judicious management, produce great public convenience. Anything that tends to facilitate commerce between the States is worthy of public care.

**Publius**

## FEDERALIST NO. 43

# Overview of Constitutional Powers – #3 Madison

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

THE FOURTH CLASS comprises the following miscellaneous powers:

**1. A power (of Congress) “to promote the progress of science and useful arts, by securing to authors and inventors, for a limited time, the exclusive rights to their respective writings and discoveries.”** [Article I Section 8 (8) of the U.S. Constitution]

The author's copy right is considered, in Great Britain, a right of common law. Inventors, for the same reason, deserve the rights to their useful inventions. The public good is served by both powers. States cannot separately provide either protection, and most agree and abide by the laws on this point that Congress has passed.

**2. (Congress has power) “To exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the government of the United States; and to exercise like authority over all places purchased by the consent of the legislatures of the States in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings.”** Article I Section 8 (17)

The need for complete authority over the seat of government proves itself. Every State legislature exercises it via its inherent authority. Without it, public authority may be degraded, proceedings could be disrupted with impunity and the State hosting the capitol might attain influence dishonoring the Union and upsetting to other Union members.

Moreover, building and maintaining public buildings and facilities that are certain to accumulate in the nation's capital city would impose too large an obligation for one State and create so many obstacles to the government as to erode its – necessary – independence.

The proposed Constitution sufficiently limits the size of this federal district to satisfy the politically jealous:

- It will be appropriated to this use with the consent of the State ceding it.

- That State, in the enabling contract, will no doubt protect the rights and consent of the district's citizens.

- The inhabitants will find ample incentive to agree to the cession: election of the federal authorities who will govern them.

- They will also elect their own local legislature.

- And the authority of the legislature and citizens of the ceding State will be required to concur in the cession, as well as the ratification of the Constitution.

The need for similar federal authority over magazines, forts, etc., is equally obvious: The public money expended, and the property deposited, in them requires their exemption from a particular State's authority. It would also be improper to entrust to one State places on which the entire Union's security may depend.

All other objections are obviated, by requiring that all concerned States agree on all such establishments.

**3. (The government has the power) “To declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attained.”**

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*Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.*

Article III Section 3 (1) of the United States Constitution

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As treason may be committed against the United States, the United States should have power to punish it. But “treasons,” such as those by the signers of the Declaration of Independence and leaders in the Revolution, are often the engines by which violent factions, born of free governments, combat each other. Thus, the convention, wisely, protected this freedom by defining the crime, fixing the proof necessary for conviction of it and restraining the Congress from extending punishment beyond its author's person.



**4. (Congress has the power) “To admit new States into the Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States concerned, as well as of the Congress.”** Article IV Section 3 (1)

The Articles of Confederation contain no provision on this important subject. Canada was to be admitted “by right,” upon joining the measures of the United States; and the other British colonies could join if “approved” by nine States. Establishment of other new states was unaddressed.

This omission has caused serious problems and led the Congress to assume unrealistic powers. The new system will correct the defect by way of a practical and just general precaution that no new States shall be formed without concurrence of the federal authority and the States affected. The clause against erecting new States by partitioning another without its consent benefits larger States; the smaller are protected by a prohibition against combining States without their consent.

**5. “To dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, with a proviso, that nothing in the Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.”** Article IV Section 3 (2)

This is an important power, required by considerations akin to those justifying item “4,” above. The added proviso is also proper, and probably necessitated by jealousies and questions concerning the Western territory.

**6. “To guarantee to every State in the Union a republican form of government; to protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence.”** [Article IV Section 4]

In a confederacy of republican states founded on republican principles, the overriding government should be authorized to defend the system against aristocratic or monarchical schemes. The more intimate the Union, the greater the members’ interest in each others’ political institutions and the greater their right to insist on the diligent maintenance of the forms of government underlying their association.

But a right implies a remedy, and where else could it be placed than in the Constitution?

Governments of dissimilar principles and forms are less well-suited to federal coalitions than those that agree. “As the confederate republic of Germany,” says Montesquieu, “consists of free cities and petty states subject to different princes, experience shows us that it is more imperfect than that of Holland and Switzerland. Greece was undone,” he adds, “as soon as the king of Macedon obtained a seat among the Amphictyons.” In Greece, the king’s disproportionate monarchical power no doubt strongly influenced the association.

One may ask, why do we need this precaution? If federal intervention in these crises is not needed, the clause will be a harmless superfluity in the Constitution.

But, could it not become a pretext to alter the State governments against their will by capricious enemies, politicians or foreign powers? If the general government should use its Constitutional authority to interject itself in such adventures, it would be bound to pursue the authority. But the authority extends only to a guarantee of a republican form of government, which is supposed to pre-exist. Therefore, as long as the States continue under the republican form, they are guaranteed by the federal Constitution. Yet, the States have the right to substitute other republican forms and claim the federal guarantee for the latter. But they may not trade republican for antirepublican constitutions; a restriction, I believe, that will not be grieved.

Every political structure is obligated to protect the society against invasion. This obligation includes security against foreigners and more powerful neighbors.

The history of ancient and modern confederacies proves that weaker members should not ignore the point of this article. Protection against internal violence is equally practical. Even the Swiss cantons, which, properly speaking, are not under one government, have this security and they have frequently claimed and received mutual aid.

Our history, too, tells us to prepare for such emergencies. At first view, it might seem to not square with republican theory to suppose either that a majority has not the right nor a minority the force to subvert a government and, therefore, federal intervention can never be required – *except* when it would be improper. But theoretical reasoning, in this as in most cases, must be qualified by experience.

It is possible for majorities within States, counties, districts or towns to combine illegally to attack others. And then the federal government should act to support the State authority. Parts of State constitutions are so interwoven with the federal Constitution that a violent blow to one will wound the other.

Insurrections in a State will rarely induce federal interposition, unless there is a credible threat to the friends of government. Yet, it will be much better for the overriding power to suppress such violence than to allow the majority to impose its will by bloody aggression.

The existence of a right to intervene will generally prevent the need to apply it.

Are force and right inevitably on the same side in republican governments? May not the minor party possess financial resources, military talents, experience and/or secret foreign alliances to give it a majority of power? May not a strategically advantageous position and organization exert leverage against a superior number unable to effectively and promptly apply its strength?

It is fanciful to imagine that, in a crisis, victory may be calculated by rules applied in a census or election!

May not a minority of citizens become a majority by allying with immigrants, adventurers or disenfranchised residents? There are many in some States who, during tranquil times, disappear but, when violence rises, come to light and strengthen one side or the other.

When there is doubt on which side justice lies, what better umpires could two violent factions desire than the cool, objective representatives of confederate States?

What a peaceful world it would be if all nations could have such a remedy for political violence.

Among the advantages of confederate republics listed by Montesquieu, an important one is that, "should a popular insurrection happen in one of the States, the others are able to quell it. Should abuses creep into one part, they are reformed by those that remain sound."

**7. "To consider all debts contracted, and engagements entered into, before the adoption of this Constitution, as being no less valid against the United States, under this Constitution, than under the Confederation."** Art. VI (1)

This proposition may have been inserted to, among other things, satisfy foreign creditors who know that political changes often dissolve nations' moral obligations.

Some Constitutional critics say that the validity of obligations should have been asserted in favor of, as well as against, the United States. As little critics usually do, they magnify the omission into a plot against our national rights. As transactions are by nature reciprocal, asserting their validity on one side automatically validates them on the other. Moreover, as the article is merely declaratory, establishing the principle in one case is sufficient for all. Every constitution must limit its precautions to real dangers and there is no real danger that the government would, on such flimsy pretexts, forgive debts justly due to the public.

**8. "To provide for amendments to be ratified by three fourths of the States under two exceptions only."**

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*The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which in either case shall be valid to all intents and purposes as part of this Constitution, when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year 1808 shall in any manner affect the first and fourth clauses in the Ninth Section of the First Article; and that no State, without its consent shall be deprived of its equal suffrage in the State.*

Article VI of the United States Constitution

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Experience will, of course, suggest useful changes to the Constitution and a system for introducing them is required. The Convention preferred a system that guards equally against a "convenience" that would make the Constitution too easily changed and "extreme difficulty" that would perpetuate its known faults. It also gives the

general and State governments equal opportunity to amend the framers' errors.

The exception favoring the Senate's equal suffrage was probably meant to safeguard the States' sovereignty, and was demanded by those benefiting from that equality.

**9. "The ratification of the conventions of nine States shall suffice to establish this Constitution between the States, ratifying the same."** Article VI Section 1 (1)

Only the express authority of the people can validate the Constitution. To require the unanimous ratification of the 13 States would subject the essential interests of the whole to the one State's caprice. It would have shown an inexcusable lack of foresight in the convention.

This issue raises two questions:

*On what principle can we supercede the Confederation, which is a solemn compact between the States, without their unanimous consent?*

The answer is dictated by the necessity of ratification, by the principle of self-preservation, by the transcendent law of nature and of nature's God that society's safety and happiness are the purposes of all political institutions, to which all such institutions must be sacrificed.

Another answer lies in the compact itself. We have noted a major Confederation defect is that many of States gave it no higher sanction than a legislative ratification. Fairness seems to require that other States should be entitled to use the same low standard. A compact between sovereigns, founded on ordinary legislative acts, can pretend to no higher validity than a league or treaty. It is doctrine that all treaty articles are conditions of each other: that a breach of one article is a breach of the whole treaty and that a breach by either party releases the other and authorizes it to void the agreement.

If we need to apply these truths to justify dispensing with the States' consent in dissolving the federal pact, how will the complainers answer for their many infractions?

*How will the nine States ratifying the Constitution relate to the few who do not?*

This question is no less delicate than the first, and the prospect of its being merely hypothetical forbids a deep discussion: it must be left to provide for itself. In general, we may observe that, though no political relation can exist between the assenting and dissenting States, their moral relations will remain uncanceled. The claims of justice, on both sides, will remain in force, and must be fulfilled. Human rights must be duly and mutually respected. Our common interests and triumph over the obstacles to the Union will, I hope, encourage moderation and prudence.

**Publius.**

## FEDERALIST NO. 44

# Restrictions on the States' Authority

# Madison

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

A FIFTH class of federal constitutional powers deals with States rights:

1. **"No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver a legal tender in payment of debts; pass any bill of attainder, ex-post-facto law, or law impairing the obligation of contracts; or grant any title of nobility."** Article I Section 10 (1) of the U.S. Constitution

The prohibitions on treaties, alliances, confederations and letters of marque are transferred from the Articles of Confederation. (The Articles allow State letters of marque after declarations of war. ) Their purpose is to give the Union the advantage of national uniformity in foreign relations policy.

Coinage rights, which the Constitution takes from the States, are, under the Confederation, shared with Congress, which has the exclusive right to regulate the alloy and value. The proposed provision would eliminate the obvious problems caused by multiple, expensive State mints, as well as forms and weights of the pieces circulated. This defeats a major purpose for giving the power to coin to the federal head. The "inconvenience" of remitting gold and silver for recoinage to the central mint can easily be resolved with local mints under the federal authority.

Extending the prohibition to bills of credit will benefit everyone by promoting public prosperity.

Since the peace, America's use of paper money has greatly reduced trust between men, in the public councils, in industry, in public and in republican government. The enormous debt against the States chargeable to paper money will long remain unsatisfied. For the same reasons States should not be allowed to coin, they should not to be free to substitute paper for metal.

Moreover, if every State can regulate the value of its coin, there could be as many currencies as States, and this would impede commerce between them. Altogether possible are arbitrary value changes that could injure citizens and cause conflict between States. Should foreign subjects be hurt by one State's indiscretion, the entire Union could be discredited and dragged into major international disputes.

Bills of attainder, ex-post-facto laws, and laws impairing contract obligations are contrary to the principles of the social compact and sound legislation. All are prohibited by the letter and/or spirit of many State constitutions. The convention has properly protected against these dangers to personal security and private rights.

Thoughtful Americans resent sudden changes and legislative interference in personal rights that foster careers for enterprising, influential speculators and entrapments for the industrious but uninformed. One such legislative interference is only the first link in a chain of repetitions. Thorough reform is needed to banish speculation on public measures, to inspire prudence and

industry, and to put society's business on a straight course.

The prohibition of titles of nobility comes from the articles of Confederation and needs no comment.

2. **"No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, and the net produce of all duties and imposts laid by any State on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress. No State shall, without the consent of Congress, lay any duty on tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war unless actually invaded, or in such imminent danger as will not admit of delay."** Article I Section 10 (2) of the U.S. Constitution

Forbidding States to import or export recognizes the need for central trade regulation. The restraint is calculated to allow them the discretion to provide for simple, easy movement of goods, and the United States to reasonably check abuse of the discretion. The clause's remaining reasonings are either obvious or already fully discussed.

The sixth and last class consists of powers and provisions that give efficacy to all the rest.

3. **"The 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 officer thereof."** Article I Section 8 (18) of the U.S. Constitution

Few parts of the proposal have been assailed more intemperately than this. Yet without this power, the Constitution would be a dead letter. Objectors, therefore, can only mean that its form is improper. But what better form could replace it?

There are four other methods the convention might have used on this subject.

(1) Copying the language in Article II of the existing Confederation, prohibiting exercise of any power not expressly delegated.

(2) Attempting a positive itemization of the powers acknowledged as "necessary and proper."

(3) Attempting a negative itemization, specifying the powers excepted from the general definition.

(4) Remaining silent on the subject, leaving these necessary, proper powers to interpretation and inference.

Had the convention used method (1), the new Congress, like the old, would be forced to construe the term "expressly" (a) so rigorously as to disarm the government of all real authority or (b) so broadly as to destroy the restriction's force. It would be easy to show, if necessary, that Congress can execute no important power in the Articles of Confederation without resorting to legalistic implication or interpretation.

As the powers delegated under the new system are more extensive, the government, to administer them, would find itself still more distressed by having to choose

between betrayal of the public interest by doing nothing or violating the Constitution by exercising powers that may be indispensable and proper, but not expressly granted.

Had the convention listed, item by item, the powers necessary and proper to execute the other powers, it would have to include every law on every subject to which the Constitution relates, accommodating existing and all possible future conditions. This is because, for every new application of a general power, there must be particular powers to enforce it. Moreover, the particular powers must always vary with that goal while the goal remains the same.

Had they tried to name the particular powers or means *not* necessary or proper for executing their authority, the task would have been no less fanciful and every defect on the list would have been equal to a positive power. If, to avoid this silliness, they had tried to list just some exceptions and, in general terms, described the results, they would have to include only a few of the excepted powers, and these would be the ones least likely to be assumed or tolerated. This is because the list makers would, of course, choose the least necessary or proper authorities and the leftover unnecessary, improper items would be less avidly accepted than if they had not bothered to make the effort.

Were the Constitution silent on this subject, there is no doubt that all the powers required to execute general government authority would take force by unavoidable implication.

No legal or rational axiom is more firmly established than that wherever end is required, the means to reach it are also required. Had the convention stood mute on “necessary and proper powers,” every objection now heard against the plan would, by default, remain valid, and the real problems would result – particularly in national emergencies – from not removing these excuses to question the Union’s essential powers.

If you ask what will happen if Congress misuses this part of the Constitution, and exercises powers not warranted by its true meaning, I answer: the same as if any government should misapply or enlarge any other Constitutional power. First, the usurpation’s success will depend on the executive and judiciary branches, which are required to explain and enforce legislative acts. Last, it must be remedied by the people, by way of election of representatives who will annul the usurpers acts.

The truth is that this “ultimate redress” may be more applicable against unconstitutional Congressional than State-legislative acts. The reason is that every such act by Congress will invade the rights of the State legislatures, which will be ever ready to note the violation, alert the people and use their influence to change the Congressional membership.

As there is no similar intermediate body between the State legislatures and the people, State constitutions are more likely to be violated without notice.

**2. “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.”** [Article VI [2] ) of the U.S. Constitution]

Without this article, the Constitution would be obviously and radically weakened. To understand why, note that the State constitutions had been left intact by a saving clause in their favor.

In the first place, these constitutions give State legislatures absolute sovereignty in all cases not excepted by the existing Articles of Confederation. So all powers in the proposed Constitution, so far as they exceed those in the Confederation, would be null and the new Congress would be reduced to impotence.

Second, some State constitutions do not even expressly and fully recognize the Confederacy’s existing powers. Thus, a clause preserving their supremacy would have brought into question every power in the new proposal.

Third, State constitutions differ widely. So a treaty or national law of equal importance to the States’ could interfere with some but not all of them. Consequently, this legislation would be valid in some, invalid in the rest. Then the world would, for the first time, see a governmental system based on a reversal of the basic principles of all government: a general authority inferior to that of the parts – a monster whose head is commanded by its body.

**3. “The Senators and Representatives, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and the several States, shall be bound by oath or affirmation to support this Constitution.”** Article VI (3 ) of the U.S. Constitution

Some ask what necessity binds the State government to support the federal Constitution, but not United States officers to the State constitutions. The best answer is that federal officials will have no role in executing State constitutions. State government members and officials, on the contrary, will be essential to the federal Constitution. All elections of Presidents, Senators and federal Representatives will depend on the State legislatures, officials and laws.

We have now reviewed all the Constitutional articles delegating powers to the United States Congress and conclude that all are necessary and proper to the Union’s necessary goals.

The question, therefore, whether this power should be granted is answered by two other questions: 1. Should we establish a government equal to the challenges facing the Union? 2. Shall the Union itself be preserved.

**Publius.**

## FEDERALIST NO. 45

# Alleged Dangers to State Governments

# Madison

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

HAVING shown that the powers transferred to the federal government are necessary and proper, we need to ask whether, en masse, they will threaten the States' remaining powers. Adversaries to the convention plan, instead of considering what powers are necessary to the federal government's purposes, have exhausted themselves investigating their possible effects on States' rights. But if the Union, as we have shown, is essential to the security of the American people against foreign danger, against contentions and wars between States, against violent, antifreedom factions, and against poisonous military establishments, it is ridiculous to say that a government that defends the Union may lessen the States' importance?

Did we fight the American Revolution, form the American Confederacy, spill the precious blood of thousands, and lavish the hard-earned substance of millions, not so Americans may enjoy peace, liberty, and safety, but so that the State governments can enjoy power and certain dignities and attributes of sovereignty?

We have heard the impious Old World doctrine that the people were made for kings, not kings for the people. Will we revive it in the New World and sacrifice the people's happiness to some new royalty? It is too early for politicians to presume we have forgotten that (a) the supreme reason for the nation to exist is to serve the public good – the real welfare of the great body of the people – or that (b) no form of government has any value beyond attaining that goal.

Were the convention plan adverse to public happiness, I would say, "Reject it." Were the Union itself inconsistent with public happiness, I would say, "Abolish the Union." In the same spirit, if the States' sovereignty will not promote the people's happiness, every good citizen must say, "Sacrifice States' rights to the people's rights."

How far the sacrifice is necessary has been shown. Now the question is how far the unsacrificed residue will be endangered.

These papers have belittled the supposition that federal government operations will, little by little, do in the State governments. The more I study the subject, the more I believe that the balance is more likely to be offset by the dominance of the States than by the national government.

In all ancient and modern confederacies, we have seen a strong disposition in the members (states, provinces ...) to weaken the general governments, which have failed to defend themselves against the encroachments. Though most of those systems were very unlike the one being considered, as the States will retain much of their existing powers, we should not totally disregard the inference.

The federal head of the Achaean league probably had powers similar to those in the proposed Constitution. The Lycian Confederacy was, in principle and form, even more like the system we are considering. Yet neither collapsed into one consolidated government. On the contrary, we know that the ruin of one of them resulted

from the federal authority's incapacity to prevent the disunion of the subordinate authorities.

These cases deserve our attention because the hostile external forces that forced their member governments to unite were far more powerful than those we face. Consequently, weaker links were required to tie the members to the head and to each other.

Under the feudal system, the local sovereigns, whether popular or much disliked, were generally able to defeat threats to their power. Had no external dangers strengthened internal harmony and control and particularly, had the local sovereigns won the people's affections, Europe's great kingdoms would now consist of as many independent princes as there were once feudal barons.

The State governments will have important advantages over the Federal government relative to the dependence of each on the other, the relative weight of their popular influence, their respective Constitutional powers, the people's biases and support, and their tendencies and abilities to resist and frustrate each other's measures. We may see the States as federal constituents and essential federal parts, but the federal authority is in no way essential to the States' organizations or operations.

Without the State legislatures' participation, the President of the United States cannot be elected. They will always share importantly in his appointment; in fact, will probably determine it.

The State legislatures – exclusively – will elect the Senate. Even elections to the House of Representatives will be influenced by the same class of men, whose popular influence drives their own elections.

Thus, each of the federal government's principal branches will owe its existence more or less to the State governments' approval and must, therefore, feel dependent on them – which is more likely to produce a subservient rather than overbearing attitude towards them.

On the other side, the State governments will in no way be indebted to the federal government for their role in national affairs, or to the local influence of United States Senators and Representatives.

Far fewer people will be employed under the United States Constitution than by the States, resulting in less federal influence at the State level.

The total number of State, county, corporation and town legislators, administrators, judges, justices of peace, militia and law-enforcement officers who will serve the millions of Americans and be intermixed and acquainted with every class and circle of them, must exceed those who will administer the limited powers of the federal system. Thus, we may pronounce the States' advantage to be decisive.

It is true that the Union will exercise the power to collect internal and external taxes throughout the States. But this power will probably not be applied, except to supplement federal revenue, and then the States will

have the option to make their collections before filling federal needs; and the eventual collection, under the immediate authority of the Union, will generally be made by the officers, and according to rules the States will establish. In other cases, particularly in organizing the judiciary, the State officers will probably have authority comparable to the Union's. Should, however, the federal government appoint separate internal revenue collectors, their strength would be far less than that of the States' many officers.

Within every district with an assigned federal collector there would be at least 30 or 40 State officers of different descriptions, many of them persons of character and influence favoring their home States.

The powers delegated by the proposed Constitution to the federal government are few and defined. Those that will stay in the State governments are many and flexible.

The federal will operate on external issues: war, peace, negotiation, and foreign commerce (with which its taxing power will, for the most part, be connected).

The powers reserved to the several States will extend to all the "everyday" issues affecting the people's lives, liberties, and properties, and local measures to secure order, improvement, and prosperity.

Federal operations will be most extensive and important in times of war and national danger; State activities, in secure, peaceful times.

As "dangerous" periods will probably be rare, the State governments will enjoy more of the people's attention.

If we examine the new Constitution accurately and honestly, we will see that the change it proposes subtracts power from the Union, rather than invigorates its original authority. Regulating commerce, it is true, is a new power, but few oppose or fear it.

Federal powers regarding war and peace, armies and fleets, treaties and finance, along with the other, greater powers, are all vested by the Articles of Confederation in the existing Congress. The Constitution will not expand them but substitute better means to administer them.

Taxation changes may seem the most important. Yet the present Congress is empowered to require the States to supply indefinite funds for the common defense and general welfare. In contrast, the future Congress will require them of individual citizens, who will be no more bound than the States now are to pay their quotas.

Had the States complied punctually with the Articles of Confederation, or could their compliance have been as peacefully enforced as the means applicable to single persons, perhaps no one would have raised the fear that the State governments might lose their constitutional powers and consolidate. To predict such an event is to say that the State governments' existence is incompatible with any system to preserve and empower the Union.

**Publius.**

## **FEDERALIST No. 46**

# **Comparing State and Federal Influence Madison**

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

WILL the federal government or the States win the people's loyalty and support? Despite their different electoral systems, both will depend on the great body of citizens. Both are agents and trustees of the people, but with different powers for different purposes.

Constitution adversaries view them as rivals whose powers are unprotected by a common authority. They must be told that the ultimate authority resides in the people, regardless of a government's ambition, location or relative numeric strength.

Truth requires that every case depend on the people's approval. There is little doubt that the people will first and naturally relate to their State governments, which will allow many more persons to wield power through far more offices generating more salaries and wages. These State offices will be better located and organized to regulate and fill the people's personal interests. Moreover, there will be much closer ties, personal and family, between the people and their State authorities.

Therefore, we can expect the popular bias to incline most strongly to the State governments. Experience teaches the same lesson. Though defective under the Articles of Confederation, the federal administration performed well during the Revolutionary War, even when

credit and monetary obligations were backed by mere paper. I expect, under an effective constitutional system, it will again serve the people well.

It was engaged, too, in an enterprise to protect all that was dear, and to gain all the people could desire. Even so, after their fleeting enthusiasm for the early Congresses had passed, the people's loyalty returned to their local governments. Then the federal council lost favor, and opposition to expanding its powers and importance was led by men bent on building their own political strength by serving their fellow citizens'.

If one day the people favor the federal over the State governments, it will be because the former better serves them. Then the people should be free to place their confidence where they believe it belongs. But even then, State governments would have little to fear from federal power operating within a Constitutionally-limited sphere.

Again, the federal government will depend more on the State authorities than the reverse. And the people will be more attentive and loyal to their State governments than to the federal. But in a distinct, important way, the federal side will hold an advantage.

The biases that Congress members and others will take to the federal government will generally favor their

States. Rarely will State officials favor the general government and “act nationally.”

Everyone knows that most State legislatures’ mistakes result from their members’ tendency to sacrifice the States’ broad interest to their home counties’ and districts’ concerns. If they do not adequately widen their views to embrace State needs, how can they embrace the Union’s aggregate prosperity and its government’s dignity and respectability?

For the same reason State legislators are unlikely to attach themselves securely to national issues, members of Congress will likely adhere too much to local interests. The States will relate to the federal government as towns and counties relate to State authority: measures will too often be decided according to their probable benefits, not to the larger constituency, but to the voters back home.

In what spirit has the present Congress proceeded? Past members’ journals and remembrances show that they often act as State partisans than as impartial guardians of a common interest. Great national questions have suffered a hundred times more often from undue attention to local views than Congress members have improperly sacrificed a local interest to federal aggrandizement,.

I do not mean to insinuate that the new federal government will not carry a larger portfolio than the old, or that its attention to local interests will be as focused as the State legislatures. I mean only that it will have enough to occupy its time without invading the States’ rights.

The State governments’ efforts to expand their power at federal expense will not be thwarted by their legislators’ reciprocal biases. But if the federal government were equally inclined to overextend its power, the States would still be better positioned to defeat it.

If a given State should take an action unfriendly to the national government but popular among its citizens, and not too grossly in violation of the officers’ oaths, it will be executed immediately by all available means. Federal intervention would only inflame the State’s zeal and the evil could not be prevented or repaired without pain.

On the other hand, should the federal government enact an unpopular measure against a State, powerful ways to combat it would always be at hand. The people’s unrest and, perhaps, refusal to cooperate with Union officers, the disapproval of State administrators, the embarrassments from laws would bring serious impediments. Should other States agree with the opposition, the federal government would face more unwelcome obstructions. In short, the same fears and responses would arise as were produced by the dread of foreign tyranny.

But what madness would drive the federal government to such an extreme act?

The war with Great Britain, pitted one part of the empire against the other. The larger part unjustly and unwisely invaded the rights of the smaller part. But in the supposed contest between the federal and State governments, who would be the parties? One set – the

federal set – would contend against thirteen sets of representatives and all of their common constituents.

The only argument for those who predict the State governments’ downfall is that the federal government might assemble a military force before taking action. I don’t believe this danger exists. Who could dream that the people and the States would, for a sustained period, elect a parade of men ready to betray both; that the traitors would use the time to systematically plot and work to expand the military; that the State governments and citizens would silently and patiently look on and supply the materiel for their own subjugation ...?

Even if the federal government built and commanded a national-class regular army, the State governments, with the people on their side, could repel it.

The largest army, according to the best computation, could not exceed 1% of the total population, or 4% of those able to bear arms. This would yield, in the United States, an army of not more than 25,000 to 30,000 men – versus a militia nearly a half million strong, led by officers of their choice, fighting for their common liberties and commanded by governments to which they have given all their political affection and confidence.

I doubt such an army could ever defeat such a citizen force. As do those most familiar with our last successful resistance to British arms. Besides the advantage of being armed, which Americans hold over almost all other nations, they alone control the governments which would appoint the militia officers – a barrier to ambition stronger than any simple government can defeat.

Notwithstanding the European kingdoms’ military establishments, which are as large and strong as public resources will support, their governments are afraid to trust the people with arms. And it is not certain, even so, that the people could not defeat them.

Give the European people the advantage of local governments they elect, who could amass the national will and direct a nationwide force through officers from the people’s militia and, assuredly, they would overturn every tyranny in Europe despite the legions protecting it.

Let us not insult the free, gallant Americans with the suspicion that they would be less able to defend their rights than the oppressed Europeans to rescue their freedom. And let us not suppose that they would tamely submit to measures aiming toward their subjugation.

The essential question is whether the federal government structure will render it sufficiently dependent on the people. If so, it will be restrained from schemes against their constituents. If not, it will also not earn the people’s confidence and its threats to liberty will be easily defeated by the State governments – which *will* be supported by the people.

In sum, these last two papers are convincing evidence that the proposed federal powers are as little danger to the States’ authority as they are indispensable to the Union’s purposes, and that all those fears of planned annihilation of the State governments are imaginary.

**Publius.**

## FEDERALIST No. 47

# Government Structure

## Madison

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

More respectable Constitution adversaries charge that it neglects and violates the maxim that legislative, executive, and judiciary branches be separate and independent. The branches, they say, are organized in a way that endangers some units to others' disproportionate powers.

The objection is based on an valuable political truth: Concentrating all legislative, executive, and judiciary powers in the same hereditary, self-appointed or elective hands may be defined as tyranny.

Were the federal Constitution really to accumulate such of powers, or support a mixture tending to allow it, it would deserve denunciation. But I believe the charge cannot be supported, and that the objectors misapply the separation maxim.

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*All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives*

*Article I Section 1 of the U.S. Constitution.*

*The executive power shall be vested in a President of the United States ...*

*Article II Section I (1) of the U.S. Constitution*

*The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.*

*Article III Section 1 (1) of the U.S. Constitution*

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To understand this vital issue, one must understand the reasons liberty depends on separation.

The "prophet" always consulted and cited on this subject is Baron de la Brede et de Montesquieu, (1689-1755), the philosopher/jurist who helped lead the early French Enlightenment. If not the actual author of the separation doctrine, he introduced and recommended it to mankind.

As Homer's works set the standards by which all epics are judged, Montesquieu saw the English Constitution as the medium by which elementary constitutional truths have been conveyed.

The English Constitution does not totally separate the branches. The chief executive (the prime minister) is integral to legislative authority. Only he can make treaties – which, when written under certain limitations, have legislative force – with foreign sovereigns. He appoints and can have removed all judiciary members, who serve as constitutional counsels. One House of Parliament also composes a constitutional executive and exercises judicial power in impeachments and appellate powers in all others. The judges often attend and participate in Parliamentary deliberations, though not permitted to vote on legislation.

From these facts, we may infer 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," Montesquieu

did not mean that these entities should never cooperate with or influence each other. He meant, as his words convey and his examples illustrate, that allowing the *whole* power of one branch to be exercised by the same hands that exercise the *whole* power of another subverts the fundamental principles of a free constitution. This would have been the case had the English Constitution given the king complete legislative and/or judicial power, or if the Parliament held supreme judiciary or executive authority.

The magistrate with the whole executive power cannot alone make laws, though he can "veto" them, nor administer justice in person, though he appoints those who do. Judges can take no executive action, though their power results from executive action. Nor can they enact legislation, though legislators may advise them. The entire legislature can decide no judicial case, though it can remove judges from office and though one House possesses last-resort judicial power. Legislators cannot initiate executive measures, though one House constitutes the supreme executive magistracy and the other the decisive authority in impeachments of executive branch members.

Montesquieu's reasoning on separation also demonstrates his meaning. He says:

*When the legislative and executive powers are united in the same person or body, 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.*

Not one of the State constitutions keeps the three branches separate and independent.

The New York constitution has no separation declaration but appears to have been framed in light of the danger of mixing different branches. Nevertheless, it gives the governor partial control over the legislature and the judiciary – and blends the executive and judiciary in exercising this control. Moreover, the New York legislature counsels the executive on appointment of executive and judiciary officers. And the State's court for impeachment and other trials consists of one house of the legislature and judiciary-branch members.

In citing State constitutions wherein the legislative, executive, and judiciary branches are not separate and independent, I am not advocating that the federal constitution should follow their examples. I know that, among the many excellent principles they exemplify, they reflect the haste and inexperience under which they were framed. It is obvious that in some cases the separation



principle has been violated by too much mixing, and even actual consolidation, of powers.

But what I wish to demonstrate is that the charge against the proposed Constitution of violating the sacred maxim of free government is unwarranted either by its

author's intended meaning or by the sense in which it is understood in America.

**Publius**

## FEDERALIST No. 48

# Checks and Balances Between Branches Madison

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

UNLESS the legislative, executive and judicial branches are connected to give each a constitutional control over the others, we cannot maintain the separation essential to free government. All agree that their proper powers should not be administered by either of the others and none should influence the others' execution of theirs.

Power seeks more power, and must be restrained from passing its assigned limits. After defining the classes of power as legislative, executive and judiciary, we must protect each from invasion by the others. And the greatest difficulty is deciding what this protection should be.

The State constitution framers seemed to believe it was enough to mark the boundaries between branches in the Constitution, and then trust these paper barriers to stop encroachment. But experience teaches that some stronger defense is needed between weaker and stronger branches.

Legislatures constantly try to expand their authority and take over others' powers. Founders of republics give themselves such great credit for their wisdom in doing so that pointing out their errors must be very painful. But they seem to never turn their eyes from the danger to liberty presented by overgrown, all-grasping hereditary magistrates supported by hereditary legislatures, or to see danger from the legislative instinct to amass all power in the same hands, which leads to tyranny as surely as does executive usurpation.

In monarchies, the executive branch is – correctly – regarded as dangerous and watched jealously. In democracies, people legislate in person and are vulnerable by their inexperience to executive intrigue that can impose tyranny through a convenient “emergency.”

But in representative republics, executive authority is carefully limited. Legislation is by elected assemblies, bolstered by their influence over and the confidence of the voters. Moreover, legislatures are large enough to feel passions that ignite the electorate, yet small enough to actually act on them.

In short, the *legislature* is the branch we should fear.

Compared to the others, its constitutional powers are broader and less precise. It can easily use complicated, deceptive measures to mask encroachments. It is often a delicate question whether a given measure will, or will not, exceed its authority.

Meanwhile, the executive's narrow, relatively simple powers, and the judiciary's even more carefully defined limits, immediately betray and defeat their usurpations.

And let us not forget: The legislature alone has access to the people's pocketbooks and, in some constitutions, full discretion and great influence over the other branches' budgets: dependency that makes incursions even easier.

Our own experience supports this political truth. As witnesses, I would call all citizens who have taken part in or been affected by government. But for more concise evidence, I refer to the experiences of two States.

Virginia's constitution requires that the three branches be separate, according to Mr. Jefferson who was himself its governor. I quote him follows from his *Notes on the State of Virginia*:

*The concentrating of (the legislative, executive and judiciary) 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 separated these powers. The judiciary and the executive depended on the legislative for subsistence, financial and political. Therefore, the legislature could, unopposed, assume executive and judicial powers. Any resistance would be ineffective because the legislators could record proceedings as “acts of Assembly,” rendering them obligatory on all. Indeed, they have often decided rights that should belong to the

judiciary and made a habit, while in session, of “directing” the executive.

Pennsylvania’s example involves the Council of Censors, which sat in 1783 and 1784. Part of the body’s constitutional duty 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.”

The council compared legislative and executive acts with their constitutional powers. From the facts collected, it appears that the legislature:

- Unnecessarily passed many laws violating the rule requiring that, before passage, all public bills be printed for the people’s consideration.
- Violated the right of trial by jury.
- Assumed unconstitutional powers.
- Usurped executive powers.
- Varied judges’ salaries, which the constitution requires to be fixed.
- Decided cases belonging to the judiciary.

Particulars of these events are printed in the council’s journals. Some, to be fair, may be attributable to wartime anomalies, but most resulted simply from bad government.

It appears that the executive, too, had breached the constitution, although many of the instances were produced by the necessities of war, or recommended by Congress or the commander-in-chief; most other instances conformed to the legislature’s sentiments.

Pennsylvania’s executive branch has many more members than other States’. In this respect, it is more like a legislature than an executive council. And as its acts as a body are exempt from individual accountability and the members, understandably, use each other’s confidence and follow their examples, it can more freely risk unauthorized measures than can an executive branch administered by one or a few hands.

From these examples I conclude that mere paper barriers between branches’ constitutional limits are too weak to guard against encroachments leading to tyrannical consolidation of government power.

**Publius.**

## Using Conventions to Prevent Encroachment Hamilton or Madison

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

THOMAS JEFFERSON appended to his *Notes on the State of Virginia* a draft of a State constitution he had prepared for discussion at a convention to be called by the legislature in 1783. It advocates a republican government and deals with dangers against which it should be guarded.

He proposes “that whenever any two of the three branches of government shall concur in opinion (as to) altering the constitution, or correcting breaches of it, a convention shall be called for the purpose.

“As the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived, it seems strictly consonant to the republican theory, to recur to the same original authority, not only whenever it may be necessary to enlarge, reduce, or new-model the powers of the government, but also whenever any one of the branches may encroach on the chartered authorities of the others.”

Mr. Jefferson’s point is that the branches are equal under the law: none has a right to settle the boundaries between their respective powers. So, how can we prevent encroachments by the strong or redress the wrongs of the weak without appealing to the people who alone can define and enforce the commissions that empower them?

This is a powerful idea, which the Constitution must allow to assure the people a way to decide extraordinary questions. But there are powerful objections to allowing them to deliberate on *all* Constitutional questions.

In the first place, it does not cover the “ganging up” of two branches against the third. If the legislature, which has so many ways to influence the other branches, could somehow recruit even a third of either of them to its cause, the one remaining would be helpless.

In the next place, it might weaken public respect for the government, as every such appeal would, inherently, imply a government defect. Without due respect, not even the wisest, most free governments could retain the stability they need to govern effectively.

Governments are opinion-based and -driven and the strength of an individual’s opinion and its influence on his conduct require that he hears others sharing his opinion. People are timid when they feel isolated, but gain firmness and confidence as their ideas gain popularity. When evidence and experience that fortify ideas are old and widely shared, they have even greater power.

Respect for the law is taught and reinforced by enlightened reason. But a nation of philosophers is as wild a dream as Plato’s wished-for race of philosophical kings. To the most rational government, having the community’s prejudices on its side is a valuable advantage.

A more serious objection to whole-public participation in constitutional debate is the danger of over-inflaming public passions. Notwithstanding the success of our new form of government, which honors American virtue and intelligence, these experiments are too risk-prone to be too often undertaken.

We should remember that all the existing constitutions were formed in amid great danger to order and concord; when the people’s confidence in their patriotic leaders stifled ordinary debate on great national questions; when we all shared an ardor for new political ideas born of our resentment against the British; and when there were no factions to distract us from the changes we needed to make or the abuses we needed to reform.

But the greatest objection is that the decisions which would probably result from all-out participation would not support the government’s constitutional equilibrium.

We have seen that republican governments tend to aggrandize legislatures at the other branches’ expense. Appeals for conventions, therefore, would usually be made by the executive and judiciary. But whether made by one side or the other, would they yield equal advantages to all sides? Let us view their situations.

The executive and judiciary members are few in number, and personally known to very few people. The judiciary, by its mode of appointment, its nature and permanency, is too far removed from the people to share their concerns.

Legislators, on the other hand, are many. They are well distributed and live among the people at large. Their family, social and other connections make them part of society’s most influential classes. The nature of their public trust and their charge to protect the people’s rights and liberties give them great personal influence. These advantages deny adversaries equal standing in public debate. In fact, in an interbranch debate, the legislators would not only be able to argue their case most successfully; they would probably appoint themselves judges. The same influence that wins them election would gain them convention seats.

The convention delegates, in short, would be men who are, were, or expect to be members of the branch under examination – *parties to the question they will decide*.

But sometimes appeals could favor the executive and judiciary departments, when legislative usurpations obviously, flagrantly violate others’ rights. In such cases, a strong faction of dissenting legislators might join the other branches. And should there be an especially popular president, public support could be swayed his way.

But still, do not expect convention decisions to turn on the questions’ true merits. They would inevitably connect to the spirit of interested parties or parties springing from the issue itself. They would be heavily influenced by

prominent figures with extensive community influence – perhaps even the controversy’s instigators, who would either benefit or suffer from the decisions.

Public passion, therefore, not reason, would decide. But it is public reason that should control and regulate the government, leaving passions to be controlled and regulated by the government.

## **FEDERALIST NO. 50**

We found in the last paper, that mere declarations in the written Constitution cannot confine the branches within their legal powers. It appears that occasional conventions would be neither a proper nor an effective course of action.

**Publius**

# Considering Periodical Appeals to the People Hamilton or Madison

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

SOME MAY contend that scheduled conventions is the way to prevent and correct Constitutional infractions by government branches. Others could say this plan is as unacceptable as calling conventions only to solve specific problems. If the between-convention interval is short, the issues addressed will be of current or recent concern and therefore have all the disadvantages of occasional changes. If the interval is long, any resulting public censure would be a very feeble punishment for abuses or excesses occurring near the start of the cycle.

Are we to imagine that a 100- to 200-member legislature – bent on a special interest and violating the Constitution to serve it – would cease and desist for fear of being called to task in 10, 15, or 20 years? The abuses would probably have done their damage long before any remedial action. Otherwise, the harm would be longstanding, with deep, strong roots.

Pennsylvania tried to revise its constitution to correct recent breaches by way of a council, which met in 1783-84 to inquire “whether the constitution had been violated, and whether the legislative and executive departments had encroached upon each other.” This important, novel political experiment illustrates the above reasoning.

First. It appears that at least some of the Council’s most active members had also been active, leading characters in pre-existing factions.

Secondly. These members had been active, influential members of the legislative and executive branches reviewed, and even patrons or opponents of the measures tested during the period. Two of the members had been State vice-presidents, several had served the executive council, one had been speaker, and a number of others distinguished legislators.

Thirdly. Every page of the minutes testifies to the effects of all these factors on their decisions. Throughout its deliberations, the council was split into two set, violent factions – a fact members acknowledged and regret. In all questions, however trivial or unconnected with each other, the same names stand in favor and opposed. From the record, every unbiased observer may infer that PASSION, not REASON, presided over the council. When men reason coolly and freely on separate issues, their opinions differ on some of them. When governed by common passions, they agree.

Fourthly. It is to be wondered whether the body’s decisions did not, in several instances, misconstrue rather than reduce or limit the legislature’s and executive’s constitutional limits.

Fifthly. I have never believed that the council’s decisions, right or wrong, in any way corrected any legislative abuse or excess. It even appears that, in one instance, the sitting legislature rejected the council’s findings. This censorial body, therefore, proves at once that the disease exists and the remedy does not work.

It would not change my mind to point out that the State, at the time, was beset and distracted by raging factionalism. We cannot presume – or desire – that when such a convention meets that Pennsylvania, or any State, will be free of faction. If so, it would mean public safety is in danger or liberty is dead.

Including only people not in government during the period in question would not solve the problem. For then the important task would probably fall on delegates with inferior ability. Whether or not they had participated in the suspect activities, they would probably have belonged to one of the factions and elected with its support.

**Publius**

## **FEDERALIST NO. 51**

# Checks and Balances Between Branches Hamilton or Madison

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

HOW will we maintain the separation of powers between branches that the Constitution requires? The

only answer, as no external safeguards would suffice, is

that the government must be internally structured so that the branches check and balance each other.

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*All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.*

Article I, Section 1 one of the United States Constitution  
*The executive power shall be vested in a President of the United States.*

Article II, Section 1 [1] one of the United States Constitution  
*The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.*

Article III, Section 1 [1] of the United States Constitution

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I will try to place this important idea in a clear light so that we can correctly see and study the governmental principles and structure the convention has designed.

To effectively separate the powers – as all involved agree to be essential to our liberty – it is evident that each branch must have a will of its own and be constituted so that its members wield as little power or influence as possible in appointing others' members. If adhered to, this "separation" principle would require that all appointments to major executive, legislative and judiciary offices be drawn from the same "pool" of authority – namely, the people – operating through unconnected channels.

Perhaps constructing the several branches would be easier in practice than in contemplation, but it would entail some difficulties and some additional cost. Therefore, some deviations from the separation principle must be expected.

In organizing the judiciary branch in particular, it might be unwise to insist on total separation. Because members must possess unique qualifications, primary consideration should be to use the selection process that secures those qualifications. Moreover, the "permanent" tenure of judicial appointments will destroy all sense of dependence on the authorities (the President and Senate) conferring them.

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*The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.*

Article III Section 1 [1] of the United States Constitution

*[The President] shall have power, by and with the advice and consent of the Senate, to ... appoint ... judges of the Supreme Court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law ...*

Article II Section 2 [2] of the United States Constitution

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It is equally evident that each branch's members should be as little dependent as possible on the others for salaries and other rewards. Without financial independence, the president's and judges' independence in other respects would be merely nominal.

But the best way to prevent concentration of executive, legislative and judicial powers in one branch is to give

administrators the constitutional means and motivation to resist the others' encroachments.

Whatever the method, it must reflect the importance of the defense and the potential damage of successful encroachment. Ambition must be used to counteract ambition. The individuals' interest must be connected with the constitutional rights of the place.

It may reflect human nature that such measures are needed to control government abuses. But government itself is the greatest of all reflections on human nature. If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. The great difficulty in framing a government to be administered by men over men is that, first, the government must be able to govern the governed and, second, it must be obligated to control itself.

The primary control on the government is its dependence on the people but experience teaches that other precautions are also needed. This policy of revealing defects of "good" motives by opposite, rival interests has been applied throughout the history of private and public affairs. We see it clearly displayed in subordinate distributions of power, where the aim is to divide and arrange offices so that each becomes a check on the other by using officials' personal interests (e.g., continued employment in government) to guard public rights.

They apply just as effectively in maintaining "borders" between the upper levels of government. But we cannot give to every branch equal powers of self-defense.

Republican governments are necessarily dominated by the legislative authority. The way to check and balance power within the legislature is to divide it into different parts – we call them "Houses" – and give each a mode of election and principles of operation as unconnected as their common functions and dependence on society will admit. And even these safeguards against intra-legislative encroachment may not be enough.

As the weight of legislative powers requires that they be divided, the weakness of the executive may require that it be fortified. An absolute power to reject – "veto" – legislative action seems, at first glance, the executive's natural weapon or "check" on legislators. But it may not be safe or, by itself, sufficient. On ordinary questions it might not be applied firmly enough to assure safety but when legislative action is in the right, it might be abused.

May not the lack of an absolute executive veto be filled by some "measured" connection between the relatively weak executive and the weaker chamber (the Senate) of the more powerful legislature, which may thus be led to support the executive's constitutional rights without compromising or endangering its own? If the principles supporting these observations are just, as I believe they are, we should apply the "veto" principle to both the State and federal constitutions. But if the federal law does not exactly conform to the State laws, the States will not be able to pass the test.

There are two more interesting considerations peculiar to the proposed federal system.

1. In a single-tiered republic (i.e., without the second "State" level of authority that typifies America), all power to administer the central government is surrendered by

the people and usurpations are controlled by dividing the government into distinct, separate parts. In America's "compound republic," the people's power is first divided between two governments – federal and State – and then the portion of authority allotted to each is subdivided among distinct, separate branches. This gives the people's rights a double security: (a) The different governments control each other and (b) each is controlled by itself.

2. In a republic, it is vital to guard the society against oppression by its rulers and by aggressive factions within the society. Different classes of citizens necessarily have different interests. If a majority unites around a common interest, the rights of the minority will be insecure.

There are only two ways to protect against this evil: (a) by creating an independent "community will" that overrides that of the majority and (b) by composing the society of so many diverse kinds of citizens that assembling an unjust majority is unlikely and impractical.

The first method exists in all governments ruled by monarchs or unelected dictators. But this is an unreliable security because a power that rules from outside the society can impose unjust majority views on the minority and turn them against both sides.

The second method will be applied to the federal republic of the United States. While all power within it will come from and depend on the people, the people will be divided into so many parts, interests, and classes that there will be no majority combinations to threaten individual or minority rights.

In a free government civil and religious rights must be protected equally. This protection derives from the multiplicity of each and from the territory and population the government administers.

This view of the subject proves to all true friends of republicanism the wisdom of a federal system, as it shows that dividing the Union into disunited Confederacies will create dangerous majority factions and weaken security for all citizens' rights. Consequently, the stability and independence of one branch of the government, the only other security, must be proportionately increased.

Justice is the purpose of government. It is the purpose of civil society. It always has been and always will be pursued until it is obtained, or until liberty is lost.

In a society where a strong faction can readily unite and oppress the weak, anarchy will reign and even stronger individuals will be driven, by the uncertainty of their condition, to submit to a government that can protect the weak as well as themselves. Thus, in the first case, more powerful factions or parties will gradually come to support government able to protect the weak and the powerful.

There is no doubt that, should the tiny State of Rhode Island be separated from the Union and left to itself that some power altogether independent of the people would soon be called for by the factions whose misrule would make it necessary.

In the extended republic of the United States – and among the many interests, parties and religious denominations it embraces – it would be very difficult for a majority to form around any principles other than justice and the general good. And there would be less pretext to introduce into the government a will not dependent on the people.

It is as certain as it is important that the larger the society, the greater its capacity for self-government.

**Publius.**

## FEDERALIST No. 52

# The House of Representatives Hamilton or Madison

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

THE QUALIFICATIONS of those who will elect and those who will serve as Representatives will be the same as in the largest house of each State legislature.

Defining the right to vote is basic to republican government. The convention, therefore, was required to define and establish this right in the Constitution. It could not leave it open for occasional regulation by Congress or the State legislatures, which otherwise would have gained power over the Congress that belongs only to the people. To reduce the States' different qualifications to one uniform rule would probably have dissatisfied some of them, as well as many delegates.

The convention's solution seems to be the best available. It must be satisfactory to every State, because it conforms to the standard they have already, or could, set themselves. It will be safe to the United States, because, being fixed by the State constitutions, the State governments cannot change it and their citizens need not

fear that their constitutions can be changed to abridge their federal Constitutional rights.

The convention plan prescribes that ...

*[1] The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.*

*[2] No person shall be a Representative who shall not have attained the age of twenty-five years, and have been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.*

Article I Section 2 of the United States Constitution

These reasonable limitations open the door of the "House" to all men of merit, native or naturalized, young or old, poor or wealthy and of any religious faith.

As to the “every-second-year” term for which Representatives will be elected, two questions must be considered: (1) the safety and (2) necessity of biennial elections.

**First.** It is essential to liberty that the government have a common interest with the people and that the “House” directly depend on, and have the loyalty of, the people. Only frequent elections can secure and guarantee this dependence and loyalty.

How often elections must be held depends on a variety of connected circumstances. For guidance, we can turn to other nations' experience with representative bodies.

The best available example is the British House of Commons, which preceded the Magna Carta. The earliest records show that parliaments were required only to sit every year, not to be elected every year. These annual sessions were at the discretion of the monarch, whose ambition often produced long, dangerous intermissions. As a remedy, a law was passed in the reign of Charles II that restricted the intermissions to no more than three years. On the accession of William III, when a revolution took place in the government, the issue was more seriously discussed, and it was declared that frequent parliamentary sessions were a fundamental right of the people. Another statute, passed in the same reign, gave “frequently” a precise meaning: within three years after the end of the former session. The last change, from three to seven years, was introduced early in the Eighteenth Century.

From this it appears that, to assure a strong bond between representatives and constituents, Britain considered three years the maximum allowable interval between elections. And if we argue from the degree of British liberty even with seven-year terms, among other defects in the parliamentary constitution, we can be assured that (given necessary reforms) reducing the terms from seven to three years would so strengthen the people's influence over their representatives that biennial elections, under the federal system, would not threaten the House of Representatives' dependence on constituents.

Elections in Ireland, until recently, occurred entirely at the crown's discretion, and were seldom repeated except on the accession of a new prince or a similar event. The parliament that began under George I continued through his 35-year reign. Those representatives' only “dependence” consisted in the people's right to fill

occasional vacancies by electing new members, and in the rare event that might induce a new general election. The Irish parliament's ability to protect its constituents' rights was limited by the crown's control over the issues addressed. Recently those limits were eliminated and eight-year terms established. No one knows what effect this might have.

The Irish example throws little light on the subject. We can only conclude that if the people are able to retain any liberty, a two-year election cycle, and the connection it would create with their representatives, would bring them unlimited freedom.

While they were British colonies, all of our own States enjoyed representation in at least one legislative house. But election periods varied, from one to seven years. Should we infer, from the representatives' spirit and conduct before the Revolution, that two-year elections would have endangered public liberties? To the contrary, the spirit we saw at the onset of the war, which swept away all obstacles to independence, proves that we enjoyed enough freedom to gain a sense of its worth and a hunger for more. This applies equally to the then colonies whose elections were least and most frequent. Virginia was the first to resist Great Britain's parliamentary usurpations, and the first to publicly espouse the Declaration of Independence.

Nevertheless, under the colonial government, Virginia's elections were septennial; further proof that liberty is in no danger from biennial elections.

These examples lead us to conclude that:

1. The federal legislature will have only part of the supreme authority vested in the British Parliament, the colonial assemblies and the Irish legislature. It is a well-founded maxim that the greater the power, the shorter should be its duration and, conversely, the smaller the power, the more safely we may extend its duration.
2. We have seen that the federal legislature will not only be restrained by its dependence on the people, as are other legislatures, and (as others are not) it will be watched and controlled by several collateral assemblies.
3. With less power to abuse, the federal representatives can be less tempted on one side and will be doubly watched on the other.

**Publius.**

## **FEDERALIST No. 53**

# **The House of Representatives – #2 Hamilton or Madison**

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

I am reminded of the observation that, “where annual elections end, tyranny begins.” If it is true that proverbial sayings are generally based on reason, it is also true that, once established, they are often applied to cases to which their logic does not follow – such as the one before us.

No one will invite ridicule by pretending any natural connection between the sun's seasonal movements and the length of time wherein human virtue can resist the temptations of power. Happily for mankind, liberty is not confined to any one point of time, but lies between

extremes that accommodate all the variations required by civil society's various situations and circumstances.

Elections of officers might be, as they occasionally have been, daily, weekly, or monthly, as well as annual. If circumstances require a deviation from the rule on one side, why not also on the other?

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*The House of Representatives shall be composed of members chosen every second year by the people of the several States ...*

Article I Section 2 [1] of the United States Constitution

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The electoral terms established for State legislatures' most popular houses, like those for civil magistrates, vary widely. In Connecticut and Rhode Island, the periods are half-yearly. In the other States they are annual; in South Carolina, biennial – as proposed in the federal government.

Here is a range of four to one between the longest and shortest terms. Yet no one can prove that Connecticut or Rhode Island is better governed, or enjoys greater liberty, than South Carolina, or that either of these States is distinguished in these respects and by these causes from States whose elections differ from both.

In searching for the basic logic of this doctrine, I can find only one that applies to our case. The important distinction Americans understand so well between a Constitution established by the people and unalterable by the government and a law established and only alterable by the government seems little understood and less observed in any other country.

Whatever entity holds the supreme legislative power has always also controlled the power to change the form of government. Even in Great Britain, where political and civil liberty have been most discussed, and where we hear most about Constitutional rights, the Parliament's authority, as regards the Constitution and ordinary legislative actions, is overriding and uncontrollable. Parliament has in several instances actually legislated changes in some of the government's most fundamental articles. Most notably, it has, several times, changed the election period. Most recently, it not only replaced a three-year term with a seven-year interval but, by the same act, added four years to its own term.

As a result of these abuses, election frequency has become the cornerstone of free governments seeking to guard liberty against the danger they present.

Where no constitution dominates government, there can be no constitutional security as we know. Some other protection, therefore, is needed, and what better for fixing national sentiment and uniting patriotic endeavors than applying some simple time interval as a standard measure of dangerous political adventures?

The simplest, most familiar applicable period was one year, and hence the doctrine has been (laudably) promoted. But what is the purpose of applying this measure to a government limited, as the federal government will be, by an overriding Constitution? Will not freedom be better protected by unalterably, constitutionally-fixed biennial elections than by any interval set by some arbitrary power?

As to whether biennial elections are necessary or useful, no man can be a competent legislator without a certain degree of knowledge of subjects legislated. Some of this knowledge can come from information sources, but most can come only from experience gained in office. The period of service should, therefore, relate to the volume of practical knowledge needed to perform effectively.

In most states, the term of service in the largest legislative chamber is one year. The question then becomes: would a two-year federal term supply experience proportional to that gained in a one-year State term? In a single State, the knowledge requirement applies to (a) laws that are uniform within it and with which all citizens are more or less conversant, and (b) the general affairs within that relatively small territory, which make up a major share of public attention and conversation.

The great theatre of the United States presents a very different scene. The laws vary from State to State. Public affairs, modified by local interpretations and versions and spread over a huge area, can only be learned in a central council from members from all parts.

Yet the members should have some knowledge of the affairs and even the laws of all the States.

How can domestic or foreign trade be uniformly regulated, taxes fairly and effectively collected, militias formed into armies without some acquaintance with the different governments' unique circumstances?

The most laborious task will be to properly inaugurate the government and form a federal code. Every year, the first drafts will improve, become easier and fewer. For new members, past government transactions will be ready, accurate information sources. With, Union affairs will become of greater public interest and more intelligently discussed among citizens. And growing traffic between States will spread mutual knowledge of their affairs and help assimilate their manners and laws.

Still, the business of federal legislation will so far exceed, in complexity and difficulty, that of any single State as to justify a longer period of Congressional service.

Another branch of knowledge important to federal representatives is foreign affairs. In regulating our own commerce they should be not only acquainted with treaties between the United States and other nations, but with those countries' commercial policies and laws. They should not be altogether ignorant of international law and its influence on domestic affairs. And though the House of Representatives will not directly participate, foreign relations will often affect legislation and require its attention, sanction and cooperation.

Some of this knowledge a man can acquire from his own library and some can come from public sources. But his best education will be through attention to those subjects during actual legislative service.

If Congressional service is limited to only one year, the distance that many representatives will need to travel, and the arrangements necessary to do it, might become serious objections. Delegates to the existing Congress cannot make this argument: though elected annually, their re-election is considered almost "automatic."



Representatives elected by the people would not be governed by the same principle. A few members, as always, will have superior talents and, by frequent re-elections, become longstanding members and masters of the public business. But the higher the percentage of new members, and the more limited the knowledge and experience of the bulk of members, the more easily they fall into snares those "old masters" will lay for them. This also applies to the relationship that will surely form between the House of Representatives and the Senate.

A serious inconvenience of frequent elections is that fraudulent elections cannot be investigated and annulled in time to have due effect.

Were federal legislative elections to be annual, abuse might become a serious issue, particularly in more remote States. Each house, as it must, judges its elections, qualifications, and members' vote returns. Whatever improvements experience may suggest to simplify and accelerate the investigatory process, most of a term could pass before an illegitimate member could be expelled.

All these considerations, together, justify affirmation that biennial elections will be useful to public affairs and the people's liberty.

**Publius.**

## FEDERALIST NO. 54

# Apportioning Representatives and Taxes Hamilton or Madison

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

MEMBERS of the House of Representatives will be appointed according to the same rule that governs direct taxes, based on the population of each State.

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*Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons [i.e., slaves] ...*

*Article I Section 2 [3] of the United States Constitution*

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Few will argue that State population should not be the basis for apportioning representatives or taxes, though the principles involved are different.

As to appointing representatives, the rule refers to the people's personal rights, with which it connects naturally and universally.

On the matter of taxes, it refers to the proportion of wealth, which it in no way precisely measures; in fact, in most cases, it is an ill-fitting concept. But even with its imperfections, the convention delegates apparently found it the least objectionable of available options. Besides, the American people have generally sanctioned the principle.

The objection is to applying the number of slaves in formulating the number of seats each State will have in the Congress. Slaves, objectors will probably say, are property, not persons and should be used to estimate taxes on property, but excluded from representation to be determined by a census of persons.

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*The actual enumeration [census] shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct.*

*Article I Section 2 [2] of the United States Constitution*

Those on the other (Southern) side of the argument might say, "We believe that representation relates more directly to persons and taxation more directly to property. But we deny that slaves are always 'property' and never persons. In truth, our laws view them as both: in some respects, as persons; in others as property. In being forced to labor for a master, vendible by one master to another, deprived of liberty and physically punished at someone else's will, slaves may seem below human rank and classed with animals which are legally defined as property.

"On the other hand, in being protected in life and in limb against violence by all others including their masters and punishable for violence they commit, slaves are legally members of society.

"The federal Constitution, therefore, correctly views them as persons and property. This is because the law has transformed the negroes into objects of property to be made part of the numbers to be computed. We also grant that, if the laws were to restore their rights, they could no longer be refused equal representation.

"In another light, all agree that numbers are the best basis for measuring wealth for taxes and population for representative districting. Would the convention have been inconsistent had it subtracted slaves from the list of inhabitants when mapping representative districts, and then added them when calculating tax liabilities? Would the Southern States agree to a system that considers their slaves financial assets when imposing burdens but as something less when bestowing benefits? Might we not be appalled at those who (a) reproach the South for considering human beings as property and then (b) themselves contend that the government of all the States *should* consider them property?"

The answer might be that, in none of the States that have them, slaves are not included when apportioning seats. They neither vote themselves nor increase their masters' votes. How, then, should they relate to federal representation? In subtracting them altogether, the

Constitution would follow the very laws generally considered the proper guide.

This objection is countered by observing that a fundamental principle of the proposed Constitution is that, as the number of each States' representatives will be determined by a federal rule based on its population, each State has the right to decide what proportion of the population to apply.

The qualifications for the right of suffrage vary among the States. In some, the differences are significant. Every State constitution excludes a certain proportion of inhabitants that will be included in the census the federal Constitution prescribes for apportioning representatives.

To this the Southern States might retort that the principle the convention laid down requires that the States' policies toward their citizens be disregarded; consequently, if a State so chooses, the full number of its slaves should be included in the census with other disenfranchised inhabitants.

But those who would benefit by this would be its least vigorous supporters: They ask only that both sides accept the Constitutional compromise that regards a slave as an inhabitant minus two-fifths the value of a man.

Another perspective: Up to now we have presumed that representation relates to persons only, and not at all to property. But is this fair?

Government exists to protect both property and individual people. Both may therefore be considered constituents of the House of Representatives.

On this principle, several States (notably New York) designate a government branch the "guardian" of property, elected by the part of society most interested in governmental purpose. The federal Constitution avoids this policy and commits property and personal rights to the same hands. But we should pay some attention to which hands are responsible for property.

There is yet another reason votes in the House of Representatives should be proportioned to the States' comparative wealth. States, unlike individuals, do not hold influence over each other based on relative wealth. A rich

citizen's vote for a representative will often influence other voters' choices and, thereby, make property rights a factor in electing representatives.

A State can exert no such influence over other States. The richest State in the Confederacy could not sway the choice of a single representative in any other State. Nor will the larger, richer States have any advantage beyond their delegations' justifiably greater voting strength.

This is one factor that makes the new Constitution different from the confederation governments wherein the value of federal resolutions depends on their constituent states' responses to and support of federal initiatives. As a result, those "parts," though casting equal votes, have unequal power in activating or stifling those actions.

Under the proposed Constitution, federal acts will take effect without the States' intervention, but merely on the majority of votes in Congress. Consequently each vote, from a big or little, rich or poor State will have equal weight. The only exception might result from the personal character or prestige of an outstanding member, regardless of his district's size or strength.

This is how an advocate for the Southern interests might reason on this issue and, though strained on some points, on the whole it justifies my support of the formula for representation the convention has established.

In one way, establishing one measure for representation and taxation will be useful. As the accuracy of the census Congress must conduct will rely on the States' disposition, if not on their cooperation, we should give them as little incentive as possible to "adjust" their numbers.

If their share of representation alone were to be governed by this rule, they would want to exaggerate their counts. If their share of taxation alone were the issue, the opposite temptation would prevail. By applying the rule to both representation and taxes, the States will have opposite interests, which will control and balance each other, and produce the required impartiality.

**Publius.**

## Membership of the House of Representatives Hamilton or Madison

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

JUDGING BY the passion of its critics, this is the most carefully-studied article in the Constitution. Their main charges are that House members (1) will be too few to safely manage public affairs, (2) will not know enough of the voters' circumstances, (3) will try to elevate the few by depressing the many and (4) will not increase in number proportionally as the population grows.

No political problem is more difficult to solve than one relating to the membership of a representative legislature. Nor is there any point on which the States disagree more, as indicated by the many ways their assemblies differ from each other and the way they apportion seats to population. Ignoring differences between the smallest and largest States (Delaware, whose largest chamber has 21 members versus Massachusetts' 300 to 400) there are big variances between those of similar size. Pennsylvania's "House" is  $\frac{1}{5}$  the size of Massachusetts'. New York, with 20% more people than South Carolina, has  $\frac{1}{3}$  as many representatives. The disparity between Rhode Island and Georgia or Delaware is just as great.

In addition, the ratio between representatives and people should not be the same whether population is large or small. Given the same proportion as Rhode Island, Virginia would have 400 to 500 State representatives today, and 1,000 in 20 to 30 years. On the other hand, Pennsylvania, given the same ratio as Delaware, would have a popular assembly of to seven or eight members.

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*Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative ...*

Article I Section 2 [3] of the United States Constitution

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Nothing makes less sense than basing political calculations on arithmetic. Sixty or 70 men can be more properly trusted with a given degree of power than six or seven. But it does not follow that, proportionally, 600 or 700 would do a better job. And if we extrapolate to 6,000 or 7,000, the argument should be reversed.

The truth is that we need a certain minimum number to protect the benefits of free consultation and discussion and "complicate" abuse of power. And the maximum number should be limited to avoid confusion and over-government. In all very large assemblies, passion always

overpowers reason. Even if every Athenian had been a Socrates, every Athenian assembly would have been a mob.

We should remember our arguments for biennial elections. For the same reason the House's limited powers and the control of the State legislatures justify relatively infrequent elections, we need fewer Representatives than if they had total legislative power.

That in mind, let us weigh the objections against the proposed smaller membership.

Some say we cannot trust so few – 56, at the outset – with so much power. *But ...* within three years we will take a census, which may add one seat for every 30,000 inhabitants. Then there will be a census every ten years, presumably adding more representatives.

The first census, at the rate of one seat per 30,000 population, could raise the membership to at least 100. Factoring negroes as  $\frac{3}{5}$  of a free inhabitant, the United States could, if it does not already, have three million people. In 25 years, according to the computed growth rate, there will be 200 representatives; in 50 years, 400. That number, I believe, will end fears of Congressional smallness.

I expect that House membership will be expanded from time to time as the Constitution prescribes. But the real issue is whether the temporarily small number is dangerous to public liberty.

Can 65 members for a few years and 100 or 200 for a few more protect the United States' legislative power? I personally have faith that the American people will not elect, and every second year re-elect, 65 or 100 men ready and able to plan and inflict tyranny or treachery. I cannot conceive that the State legislatures, with so many reasons to beware and so many ways to act, would fail to detect or defeat a Congressional conspiracy against our liberties.

Nor can I imagine that there are or will be 65 or 100 American men able to present themselves for election and, within two years, betray their trust. How circumstances, time, and a larger population might change our country, I cannot predict. But from today's conditions and those likely to arise in the foreseeable future, I pronounce the liberties of America safe in the number of hands the Constitution proposes.

From where could danger arise? From foreign bribes? If foreign gold could so easily corrupt our federal officials, how have we become a free and independent nation?

The Congress which governed through the Revolution was smaller than its successors will be. It was not elected by or accountable to the citizens. Though appointed from year to year, and recallable at pleasure, members generally served three years, and before ratification of the Articles of Confederation, for a longer term. They always met in secret and had total power to deal with foreign

nations. Through the war, they wielded more power than our future representatives, hopefully, ever will.

And from the value of the prize at stake and the eagerness of the British to keep it, we may suppose that means other than military force were never considered. Yet we know through experience, the Congress did not betray the public trust.

Is the danger envisioned from the President, the Senate, or both? How? I do not believe their compensation will, unless all the Representatives are already corrupted, support such purposes. Nor can their private fortunes.

Their only means to corrupt will be through appointments. And sometimes we are told that the President will exhaust this source in trying to seduce the Senate. Will the other House's fidelity be the next victim? The improbability of a conspiracy between the executive, legislature, et. al. – each with different Constitutional structures and full accountability to the people – should quiet that fear.

And, fortunately, the Constitution provides yet another safeguard: rendering members of Congress ineligible for civil offices that may be created and for pay raises during their terms.

*No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States shall be a member of either House during his continuance in office.*

Article I Section 6 [2] of the United States Constitution

Therefore, the only offices they can attain are those that become vacant by ordinary attrition. To suppose such appointments would suffice to corrupt the guardians of the people, elected by the people, is illogical. Friends of liberty who make such arguments injure their own cause.

Mankind has enough depravity to require some suspicion and distrust, and other qualities to justify respect and confidence. More than any other form of government, republicanism presupposes that they exist, in quantity. Were the pictures drawn by the politically jealous accurate likenesses of the human character, there would not be enough virtue among us for self-government, and nothing less than tyranny could keep us from destroying and devouring one another.

**Publius**

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## FEDERALIST No. 56

# Membership of the House of Representatives – #2 Hamilton or Madison

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

SOME CHARGE that the House of Representatives' membership will be too small to know its constituents' interests. This idea apparently comes from comparing the proposed House membership with the United States' great size, population and diverse interests, without considering the unique features that will distinguish Congress from other legislatures. So the best retort is a brief explanation of these peculiarities.

Of course, a representative should be familiar with his constituents' interests and circumstances. But the rule applies only to issues related to his authority and responsibilities: commerce, taxation, and the militia.

Effectively regulating commerce requires a great deal of State and local information, but conveying and relating it to the federal councils would actually require very few informed members.

Most taxes will consist of duties on commerce, and this also requires few representatives. Controlling internal collections requires broad State knowledge, but this, too, can be accumulated and conveyed by a few intelligent men elected from its various parts. Divide the largest State into 10 or 12 districts, and none will have unique interests unknown to its representative.

*for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;*

Article I Section 8 [1] of the United States Constitution

*No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.*

Article I Section 9 [4] of the United States Constitution

*No tax or duty shall be laid on articles exported from any State.*

Article I Section 9 [5] of the United States Constitution

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In addition, State tax laws, framed by representatives from every part – will be an accurate information source. Every State enacts tax regulations that leave little more for the federal legislature to do than to review and refine them in one general act.

One skilled person, using only local codes, could compile many subjects into one tax law for the whole Union. Writing internal taxes to cover all the States will demand simple, not complex, information.

To fully understand the State codes' value to federal tax legislation, imagine our State divided into districts, each with its own legislative authority. When similar State laws are called for, the local legislators' work in framing taxes will cut the task and the number of representatives needed to do it. The Congress will also benefit from its members' service in State assemblies, where local knowledge and interests are collected for easy conveyance to the United States capital.

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*[D]irect taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers ...*

Article I Section 1 [3] of the United States Constitution

*The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide*

The Federalist Papers ... In Other Words • Paraphrased by Marshall Overstedt age 84

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*To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions.*

Article I Section 8 [15] of the United States Constitution  
*To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of officers, and the authority of training the militia according to the discipline prescribed by Congress.*

Article I Section 8 [16] of the United States Constitution

Our taxation arguments apply even more forcefully to the militia. However rules of discipline may differ between States, they are uniform within them and depend on conditions that can differ little from part to part. The logic that proves the need for a relative few representatives supports the argument about the extent of representatives' knowledge and the time needed to acquire it.

Local knowledge is necessary and difficult because of different *interstate*, not *intrastate*, laws. Internally, the laws and interests are the same, so a few can learn what is needed to represent them. Given simple, uniform interests and affairs, knowing one part is to know all, and one person from any section can ably represent the whole State.

But the different States' laws are very dissimilar and interrelated to federal legislative issues, all of which federal representatives should know and understand. So, while a few representatives from each State may bring the Congress due knowledge of their own States, each needs to learn a great deal about the others.

Industrial and social progress, as years pass, will help unify the States, but not the States' internal affairs. Today, few are advanced in the kinds of industry that make a nation diverse and complex. But these enterprises will ultimately result from their future population growth and social progress and will then require more representatives. Accordingly, the convention has tied membership in the House of Representatives to population growth.

Consider Great Britain's experience. The populations of England and Scotland exceed eight million, who are represented by 558 seats in the House of Commons. Of these,  $\frac{1}{9}$  are elected by 364 persons and half by 5,723. The half thus elected, who do not even live among the people at large, cannot add either to the people's security against the government or to the legislature's knowledge of their circumstances and interests. On the contrary, we know that they more often speak for the executive class than for popular rights: they do not reside among their constituents, are barely connected with them and know little of their needs.

With all these concessions, only 279 persons will protect the safety, interests, and happiness of eight million. That is, one representative will protect and speak for 28,670 constituents – in an assembly under the full weight of executive influence and with authority overall legislative issues in a highly complex nation. Still, freedom is largely unscathed and British code defects are only minimally blamed on the legislature's ignorance of the people's needs.

From this example, it seems we can trust that one representative for every 30,000 inhabitants will safely and ably protect our interests.

**Publius.**

## FEDERALIST No. 57

# Will Congress Favor the Few Over the Many? Hamilton or Madison

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

SOME CHARGE that the House of Representatives will attract members who will sacrifice the many to benefit the few. Of all objections to the Constitution, this is the most extraordinary. It attacks a pretended oligarchy, but strikes at the root of republican government.

Every constitution aims, or should aim, to empower rulers with the most wisdom to discern, and the most virtue to pursue, the society's common good, and then to take the most effective measures to keep them virtuous while they hold their public trust.

Election of rulers is characteristic of republican government. Its means for preventing their decadence are many and various; most effective is limiting terms of office to maintain a proper responsibility to the people.

Nothing in the organization of the House violates republican principles or favors the elevation of the few at the expense of the many? Every particular strictly

conforms to these principles without bias to the rights and aspirations of all citizens?

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*Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three; Massachusetts, eight; Rhode Island and Providence Plantations, one; Connecticut, five; New York, six; New Jersey, four; Pennsylvania, eight; Delaware, one;*

Who will elect the federal representatives? The great body of the people of the United States. The same people who elect all the State legislatures.

Who will be elected? Any citizen whose merit recommends him to his country's esteem and confidence. No qualification of wealth, birth, religious faith, or civil profession is allowed to hamper the people's judgment or frustrate their will.

If we examine the lives and careers of men likely to win their fellow citizens' votes, we will find reasons to assure their fidelity to the electorate.

First, as they will have been honored by their selection to candidacy, we can presume that they display qualities that entitle them to it and reflect a sincere respect for public service.

Second, they will enter public service with their constituents' affection. We all respond to symbols of honor, favor, esteem, and confidence which bode grateful, benevolent future service. Moreover, ingratitude is unfailingly publicly noticed and discussed.

Third, the honors and distinctions that bind representatives to their constituents would weaken rapidly without the pressure of frequent elections.

Fourth, the House of Representatives is designed to constantly remind members of their dependence on the people. Before the thrill of election fades into the routine of wielding power, those frequent elections, unless they use it to satisfy the voters' expectations will force them to look ahead to the moment their power will cease.

Fifth, the House rules will restrain them from oppressive measures; i.e., they can make no law that will not affect themselves, their friends and all of society.

This has always been one of the strongest bonds between rulers and the people. It unites them in a rare communion of interests and sentiments without which government degenerates into tyranny.

If someone asks, what will restrain representatives from favoring themselves and one class of citizens, I answer: *the genius of the whole system; the nature of just, constitutional laws; and above all, the vigilant and manly spirit which actuates the people of America, a spirit which nourishes freedom, and in return is nourished by it.*

If this spirit ever tolerates a law not binding on both the legislature and the people, the people will be ready to tolerate anything but liberty. That will be the heart of the relationship between the House of Representatives and its constituents. Duty, gratitude, interest and ambition itself are the chords that will bind the elected to the great mass of the people.

All these restraints may be unable to control men's caprice and wickedness. But they are all that government will allow and prudence can devise. They are the genuine, intrinsic means republican government uses to protect the people's liberty and happiness. And they are the means on which every State government relies to attain these ends.

What then is the meaning of the "few-at-the-expense-of-many" objection? What can we say to those who profess zeal for republicanism but impeach its basic principle; who pretend to champion the people's right and ability to choose their rulers, but will only support those who will infallibly betray the trust committed to them?

Were the objection read by one who had not seen the Constitution's prescription for electing representatives, he could only suppose that it linked some unreasonable property qualification to the right of suffrage, or that eligibility was reserved for particular persons, families or fortunes – or at least that it conflicts with the State constitutions' election clauses.

The only real difference between the State and federal cases is that each United States representative will be elected by 5,000 or 6,000 citizens; their State counterparts by <sup>1</sup>/10 as many. Should we pretend this difference justifies preference for the State governments, and abhorrence for the federal? If this is the objectors' point, it deserves to be examined.

*Is it supported by reason?* Then the "reason" would be that 5,000 or 6,000 citizens are less able to choose a fit representative, or more corruptable by an unfit one, than 500 or 600. Reason, in fact, assures us that the greater number would most likely find the right candidate and would also be less likely to be distracted from him by intrigues of the ambitious or bribes from the rich.

*Would the result of this idea, if reasonable, be acceptable?* If we say that no more than 500 to 600 can vote *en bloc*, shouldn't we refuse to allow them to choose their public servants whenever government operations do not require that many?

*Is it supported by facts?* In the British House of Commons, real representation is very near one seat per 30,000 inhabitants. Besides many powerful causes favoring the British elite, a candidate for county representative must own real estate clearly valued at £600 sterling per year. To represent a city or borough, requires a £300 estate. Anyone voting for a county representative must have a freehold estate with annual value, at contemporary rates, of over £20 pounds sterling.

Notwithstanding these requirements and some very unequal British laws, no one can say our representatives have elevated the few at the expense of the many.

Much nearer to home, the New Hampshire districts in which senators are directly elected are nearly as large as her proposed Congressional districts. Massachusetts' are even larger and New York's bigger still. In New York, calculating total Congressional seats at 65, Assembly members for New York and Albany cities and counties are elected by nearly as many voters as will be entitled to representatives. In some senatorial districts and counties, representatives are voted for by each voter at once. If the same voters can choose four or five representatives at once, they must be able to choose one.

Pennsylvania is another example. Some counties, which elect her State representatives, are almost as large as her federal districts will be. Philadelphia has 50,000 to 60,000 souls. It will therefore form nearly two federal districts – though it comprises only one county – where each elector votes for each of its State representatives. An even better example: the whole city actually elects one

executive council member, and this is true in all other counties.

Do not these facts prove the fallacy being used against the federal House of Representatives? Have the senators of New Hampshire, Massachusetts, and New York, or the executive council of Pennsylvania, or the members of the Assembly in the two last States displayed any peculiar inclination to sacrifice the many to the few, or in any way

proved less worthy of their offices than those appointed in other States by small population segments?

But there are stronger cases than any I have noted. In one chamber of the Connecticut legislature, each member is elected by the whole State. So are several governors. I challenge any man to show that one of these “diffusive” modes of choosing people’s representatives tends to elevate traitors and undermine liberty.

**Publius.**

## FEDERALIST No. 58

# Congressional Expansion to Meet Population Growth Madison

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

THE remaining charge against the House supposes the number of seats will not rise as population growth may demand. If supported, it would have great weight. But this paper will show that it reflects a partial view, discolored by jealousy.

1. The objectors forget that, in assuring membership growth, the plan complies with the State constitutions.

The number to prevail at the first session is limited to only three years. Every ten years there will be a census of inhabitants. The purposes are to adjust the apportionment of representatives to the number of inhabitants (with the exception that each State have at least one seat) and to add members at specified times, with the limitation that the total shall not exceed one for every 30,000 population.

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*The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative ...*

Article I Section 2 [3] of the United States Constitution

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Some State constitutions are silent on this. Others agree with the federal Constitution, that the most effective protection is a simple, direct provision.

2. Generally speaking, the numbers of State representatives have at least kept pace with population growth, and legislatures have been as ready to comply as the voters have been to call for compliance.

3. A feature in the Constitution insures that the people and their legislators will attend to the need for accurate apportionment: The specification that one house will represent the citizens, the other the States.

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*The House of Representatives shall be composed of members chosen ... by the people of the several States ...*  
Article I Section 2 [1] of the United States Constitution

In the “People’s chamber,” larger States will have most weight. The “States’ chamber” will favor the smaller. From this we can infer that larger States will advocate increasing “their” chamber’s size and weight.

It so happens that the total votes of only four of the largest States will comprise a majority in the House. Should the small States’ representatives oppose an orderly membership adjustment, a few States could join to overrule them. Such a coalition, notwithstanding rivalries and local prejudices that might normally preclude it, would occur whenever justified by Constitutional principles.

Some may believe that like motives might drive the Senate to an opposing coalition, and defeat the House of Representatives’ just measures. This is probably the source of the most serious fears of the numerous-representation advocates. But it vanishes on close inspection.

The following reflections, I believe, will conclude argument on this point. Notwithstanding the two chambers’ equal legislative authority (except originating money bills) the House, when supported by the more powerful States and speaking the true sense of a majority of the people, will have the largest number of members. In any question demanding firmness, this will be a major advantage, which will be strengthened when the Representatives’ arguments are supported by right, reason and the Constitution.

Further, there are several middle-sized States which, though likely to align themselves with the smaller delegations, are too small in area and population to lead opposition to their legitimate objectives. Hence it is not certain that a majority of votes, even in the Senate, would oppose proper additions in House membership.

It is not too early to note that Senators from new States may be won over to the Representatives’ just views by an obvious expedient. As these States’ populations will grow rapidly for a long time, they will advocate frequent reapportionment to the number of inhabitants. The large, powerful States will naturally make reapportionment and augmentation conditions of each other, while the fastest-

growing States' Senators will argue for augmentation in support of their interest in reapportionment.

These "checks" seem sufficient to allay all the doubts and fears surrounding the growth issue. But they cannot subdue unjust campaigns by smaller States, or their disproportionate influence in the Senate. Still the larger States have a constitutional advantage that will allow them to achieve their just goals. The House of Representatives can refuse, and can alone propose, funds required to support the government.

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*All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.*

Article I Section 7 [1] of the United States Constitution

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They, in short, hold the purse – that powerful instrument by which, in the history of the British Constitution, naive and humble representatives of the people gradually expanded their spheres of activity and importance and, finally, overpowered all the other branches' overgrown prerogatives. This power over the purse may, in fact, be the most complete, effective weapon any constitution can give the people's representatives to redress grievances and enact just, beneficial measures.

Further, the smaller the number of men in power, and the more permanent and prominent their stations, the stronger their personal interests in whatever concerns the government. We credit the British House of Commons' continual triumph over the other government branches whenever it has applied the power of a money bill. In such confrontations under our system, neither the Senate or the President can amass enough power to resist a House of Representatives supported by constitutional and patriotic principles and the power of the purse.

One other observation, I believe, requires attention. In all legislative assemblies the larger the membership, the

fewer the men who actually wield power, and the more passion will overpower reason. Also, the larger the number, the greater the proportion of members with limited intellect and ability: the characters on which those few activists will exert their eloquence and influence.

In ancient republics, where all the people assembled in person, one artful orator or statesman could rule with the authority of a king. On the same principle, the larger a representative assembly, the more it will take on the character weakness of those popular meetings. Ignorance will be the dupe of cunning, and passion the slave of sophistry and clever oration.

The people can never err more than in supposing an over-large popular assembly to prevent a government of a few. Experience teaches that every redundant member they add works against their interests. The government may seem more democratic, but its animating soul will be more oligarchic. The machine will be bigger, but the power sources will be fewer and often more secret.

Some say that more than a majority should be required for a quorum and, in important cases, for a decision. This precaution may, indeed, provide extra protection for some vital ends and help prevent hasty, partial measures. But whenever justice or the general good require new laws or other action, it would reverse the fundamental principle of free government. The majority that would no longer rule; power would shift to the minority.

Were the defensive privilege limited to issues favoring "special" factions, an interested minority might use it to screen themselves from fair and just sacrifices for the general good or, in particular emergencies, to extort unreasonable favoritism.

Lastly, it would aid and abet secessions; a practice seen even in States where only a majority is required, that subverts all principles of order and regular government and leads more directly than any other to public convulsions and the ruin of popular governments.

**Publius.**

## **FEDERALIST No. 59**

# **Congress' Power to Regulate its Elections Hamilton**

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

THE PLAN specifies that "The times, places, and manner of (electing) senators and representatives shall be prescribed in each State by the legislature thereof; but the Congress may, at any time, by law, make or alter such regulations, except as to the places of choosing senators." [Article I Section 4 [1] of the United States Constitution]

This provision has been criticized by many, yet it is one of the most defensible articles in the plan. After all, every government should contain in itself the means to preserve itself. Even if warranted, we will regret any departure because any departure could sow the seed of future weakness, perhaps anarchy.

No election law can be framed and included in the Constitution that can always apply to every situation. Therefore, I believe that a discretionary power over elections should exist somewhere. Others, I presume, readily concede that this power can be assigned in only three ways: (1) wholly in the national legislature, (2) wholly in the State legislatures or (3) primarily in the States and ultimately in the federal sphere.

The convention, with reason, preferred the third option. It assigned regulation of federal elections for the federal government, first, to the State legislators, which, when no improper views prevail, should be most convenient and



satisfactory. But it gave Congress a right to intervene in extraordinary, hazardous circumstances.

It is evident that an exclusive State power to regulate national elections would leave the Union's very existence entirely at the States' mercy. They could annihilate it by failing to nominate, elect or employ persons to administer federal affairs. It is pointless to say that this could not happen. To allow this risk to exist without a remedial provision would be unpardonable. And there is no reason to incur that risk.

If we presume that abuses of power will occur, it is as fair to presume them on the State governments' as on the general government's part. And it is more practical to trust the Union with its own care than to any other hands. If abuses of power are to be hazarded on one side or the other, it is most sensible to hazard them where the power would naturally reside.

Suppose the Constitution empowered the United States to regulate State elections. Would anyone not condemn it as an unwarrantable transfer of power to deliberately destroy the State governments? It would be as unjust as subjecting the national government's existence entirely to the State's pleasure. As far as possible, each should take responsibility for its own preservation.

One could argue that the plan for appointing the national Senate fully incurs the same danger as exclusive State-legislature power over House elections, pointing out that the States might refuse to appoint Senators and thereby kill the Union. So far as this may threaten the Union, it is an evil, but one we could not avoid without denying the States a national political role. Many would see that as a dereliction of duty that would deprive the States of the protection Senate appointments will afford them.

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*The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof for six years; and each Senator shall have one vote.*

Article I Section 3 [2] of the United States Constitution  
*Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen by resignation or otherwise during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill the vacancies.*

Article I Section 3 [2] of the United States Constitution

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The national government has more to fear from the State legislatures' power over House elections than their authority to appoint Senators. Senators are to serve for six years and one-third of the seats will be vacated and refilled every two years. No State can have more than two Senators. A Senate quorum will consist of sixteen members.

As a result, it is not possible for a few states – led by, say, prominent, ambitious legislators – to conspire to interfere with Senatorial appointments and thereby annul or impair the body's existence. Nor need we fear a general, permanent coalition of States arising from public disaffection because it will either never exist or will proceed from general-government incompetence.

The entire House of Representatives will be elected every two years. If the State legislatures had sole power to regulate these elections, and the leaders of a few important States conspired against it, each would be a national crisis that could dissolve the Union. I believe that each State's need to be federally represented will prevent such abuse. But this security will seem weak to those who recognize the difference between the people's interests and their local rulers' attachment to their offices' and power.

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*The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.*

Article I Section 2 [1] of the United States Constitution

The American people may feel a patriotic empathy with the Union at the same time covetous State officials, backed by strong factions, decide to challenge it. We can already see such conflicts in some States.

The scheme of separate confederacies, which would be fruitful grounds for ambition, will always attract influential characters in the State administrations who place their own advancement above the public good. Armed with the exclusive power to regulate national elections, a few of them in important States (where the temptation is always strongest) might destroy the Union using some casual public dissatisfaction to interrupt selection of the federal House of Representatives.

A firm Union under a strong, efficient government will probably inspire jealousy in European nations. Indeed, intrigues to subvert it will sometimes originate or be supported there. We should commit the Union's preservation to protect those with an immediate interest in the faithful and vigilant performance of the trust.

**Publius.**

## FEDERALIST No. 60

# Congress' Power to Regulate Elections – #2 Hamilton

To the People of the State of New York

SOME ALLEGE that the Union might manipulate elections to benefit some favorite class to the exclusion of others, by confining polling places to places only “friendly” voters could reach.

We cannot imagine that such violent, extraordinary conduct could happen in our enlightened national councils. If it did, it would cause an immediate popular revolt, led by the State governments.

Moreover, the major differences between the branches of the proposed new government, and the ways in which each will function, would make it difficult to organize a conspiracy to “manage” elections. Also, the people’s varying wealth, opinions, manners, habits and geographic loyalties would create, *not* special-interest blocs, but a diverse national culture. Governing together will cause these differences to gradually assimilate; still, certain influences will keep certain biases alive.

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*The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.*

Article I Section 2 [1] of the United States Constitution  
*The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof for six years; and each Senator shall have one vote.*

Article 1 Section 3 [1] of the United State Constitution  
*[To elect the President] each State shall appoint, in such manner as the legislature thereof may direct, a number of Electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress ...*

Article 2 Section 1 [2] of the United States Constitution

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But the most important influence will be the dissimilar modes of choosing the House of Representatives, the Senate and the President. Representatives’ immediate election by the people, Senators’ appointment by State legislatures, and the President’s selection by electors chosen for that purpose by the people would prevent a common interest that could unite them behind any particular voter class.

*The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.*

Article I Section 4 [1] of the United States Constitution  
(To elect the President) each State shall appoint, in such manner as the legislature thereof may direct, a number of Electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress ...

Article II Section 1 [2] of the United States Constitution

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As to the Senate, no choice of “time, place and manner,” could change individual or collective legislator-electors’ opinions. Why would the Senate initiate an “enterprise” it could not control? And run such a scheme in one chamber that cannot apply to the other? After the

election, the composition of one would counteract that of the other.

No one could seize control of Senatorial appointments without the State legislatures’ cooperation, which makes immaterial the question whether they or the federal government run the elections.

But what would be the purpose of planting an elitist bias in the federal legislature? Would it be used to advance one industrial or political sector over the others? Would it favor the landed, moneyed, mercantile or manufacturing interests? Or, in the language of the Constitution’s adversaries, will it elevate “the wealthy and well-born,” to exclude and debase everyone else?

A bias favoring industrialists would pit them against both property owners and merchants. Whichever faction would win, it would certainly take control of the States before seizing the federal government. The inference is that giving either sector undue control over one or more States is far more dangerous than the influence it could exert in Congress.

The States, to various degrees, depend on agriculture and commerce. In most, if not all, agriculture predominates. But in a few, commerce wields considerable influence. The proportion in which, say, commerce exerts local influence will be transferred to and reflected in the makeup of local Congressional delegations. But in Congress, it will be absorbed into a conglomeration of many varied interests, operating in much more various proportions than in any single State. As a result, *any* special interest’s ability to bully others will be limited – probably nonexistent.

In a country that consists chiefly of farmers and practices equal representation, farmers must dominate the government. As long as farmers prevail in most State legislatures, they will maintain correspondent superiority in the national Senate, which will generally copy the majorities in the farmer-dominated State assemblies. We cannot therefore presume that the Congress will ever favor, say, merchants over agrarians. Nor can we presume, judging from the condition of the country, that the State legislatures can be corrupted by any outside influence. And that presumption, given our population’s heavily-agrarian makeup, applies equally to at least the federal House of Representatives.

In order to fairly and fully consider the “bias” objection, one may ask: Isn’t there also danger that a bias in the national government might try to give farmers a monopoly over its operations? My answer is “no,” because, again ...

- It is less likely that any special interest would take over the Congress than any State legislature.

- There would be no temptation to violate the Constitution in favor of farmers as they would naturally enjoy all the “domination” they could want.

- Those who understand the sources of large scale public prosperity understand too well the value of commerce to inflict on it a wound deep enough to exclude from government those who know best how to manage it. The importance of commerce, for revenue’s sake alone, will effectively protect it against official enmity.

I only briefly discuss the question of bias between the economic sectors because the objectors envision a

different kind of discrimination. They seem to believe the beneficiaries of the preference with which they try to alarm us will be “the wealthy and well-born.” Under the bias they suppose, this elite will be elevated over all the rest of us. One of their arguments is that this elevation will inevitably result from the smallness of the House. Another is that it will be effected by preventing the people at large from voting for representatives.

But by what logic would anyone choose election places accessible only to the “correct” voters? Do the wealthy and well-born only live in one or more particular spots? No, they are scattered throughout the country. So, obviously a policy of confining election places to certain localities would defeat its own purpose.

The only way to guarantee the rich the preference envisioned is to prescribe property qualifications to anyone who may elect or be elected. But the national government has no such power; its authority would be expressly restricted to regulating the times, places and manner of elections. Candidate and voter qualifications, as noted in other places, are defined and fixed in the Constitution, unalterable by the legislature.

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No person shall be a Representative who shall not have attained the age of twenty-five years, and have been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

Article I Section 1 [2] of the United States Constitution

## FEDERALIST No. 61

# Congress’ Power to Regulate Elections – #3 Hamilton

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

HONEST opponents of the convention’s Congressional election proposal sometimes concede its value, with one qualification: to prevent abuses of power, it should require that candidates may only be elected in their home counties. Such a clause would add little or no security against the abuse. As discussed in the two preceding papers, if liberty ever falls to political ambition, Congress’ power over elections will not be to blame.

The State constitutions’ election language is little stricter than the proposed national plan. New York’s, for example, provides only that Assembly members be elected in their counties and Senators in their districts. Obviously, it would be as easy for the New York legislature as for Congress to defeat the citizens’ suffrage with isolated polling places. Should the city of Albany be named the county’s and district’s sole election place, Albanians alone would elect their Senator and Assemblymen. And to vote for their federal Representatives, they would be as willing to journey to New York City as Albany.

The alarming indifference to elections we see under the Articles of Confederation reveals a ready answer to

No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

Article I Section 3 [3] of the United States Constitution

No person except a natural-born citizen or citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

Article II Section 1 [2] of the United States Constitution

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But, for argument’s sake, assume that restricting polling places might work and that all the national rulers could be corrupted to this cause. The enterprise could never be executed without help from an army large enough to defeat the great body of people. We have already discussed and demonstrated its improbability, but suppose it should exist. Would the persons commanding it find time for the ridiculous task of fabricating election laws to secure preference to a preferred class? Would they not, rather, use all that power to aggrandize *themselves* in one decisive act of usurpation? Would they not fear that tenacious, freedom-conscious citizens would march to the polls from all corners of their States to replace the tyrants with men who would avenge the people’s violated majesty?

Publius

this question. And, experience teaches, the attitude will be the same whether the distance to the polls is 20 or 20,000 miles. The same argument holds true in most other States.

If you say that defects in the State constitutions are no excuse for those in the proposed national plan, I will answer that, as no one has ever found the State documents “inattentive” in protecting freedom, how can you find the same fault in the federal law? “Innocent omissions” in the State constitutions cannot honestly be called unpardonable blemishes in the convention plan. Tell me why the representatives of the people in one State should be more immune to power lust or other sinister motives than the representatives of the people of the United States. If you cannot, you should at least prove that it is easier to subvert the liberties of 3 million people than of 200,000. You should also convince us that a dominant, ambitious faction in a single State is less likely than representatives of all 13 States – spread over a vast territory with diverse local conditions, prejudices and interests. – to empower a particular class of electors to perpetuate its power.

As to the proposed uniform time of elections for the federal House of Representatives, it may turn out to be an effective guard against a stagnation of spirit in that body and a cure for the diseases of faction. If each State could set its own election schedule, there could be at least that many elections as months in the year. State election times, which are now set for local purposes, range between March and November. On that schedule, we could never see a total dissolution or renovation of the body at one time. If a bad political spirit should inflict the House, it could infect all new members as they take their seats. The main body of the membership would likely stay nearly the same, term after term. I believe that three times the duration in office, providing that the total body would dissolve at once, might be less dangerous to liberty than one third the duration with gradual, successive transitions.

Uniform election times seem required, too, for establishing regular rotations in the Senate and for

conveniently assembling the entire legislature at a stated period each year.

You may ask, "Why, then, is a time not fixed in the Constitution? As this State's most zealous convention-plan adversaries are equally zealous admirers of the State constitution, I may retort, "Why not in the State constitution?" There is no better answer than that it can safely be entrusted to legislative discretion and that, if a time had been set, it might, through experience, prove less convenient than some other time. The same answer applies on the other side. And I might add that, as the supposed danger of gradual change is merely speculative, it would be hardly advisable to establish a schedule that would deprive the States of the convenience of having elections for their own and federal offices on the same day.

**Publius.**

## FEDERALIST No. 62

# The Senate Hamilton or Madison

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

HAVING examined the makeup of the House of Representatives, and answered the worthy objections to it, I will examine the Senate, under the headings:

- I. Senators' qualifications.
- II. Their appointment by State legislatures.
- III. The equality of representation in the Senate.
- IV. The number of senators, and their terms of election.
- V. The Senate's vested powers.

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*No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.*

Article I Section 3 [3] of the United States Constitution

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I. As to their qualifications for office, Senators must be at least 30 years old (a Representative, 25) and citizens nine years (versus Representatives' seven years). The differences are justified because the senatorial trust requires more knowledge and more stable character and Senators should have lived long enough to acquire this maturity. Moreover, as Senators participate directly in transactions with foreign nations, they should be old enough to have outgrown prepossessions and habits derived from foreign birth and education. The nine-year citizenship requirement appears a prudent middle course between barring appropriately meritorious, talented adopted citizens and indiscriminately and hastily admitting them (along with undo foreign influence) into the national councils.

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*The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof...*

Article I Section 3 [1] of the United States Constitution

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II. Of the available formats for choosing Senators, appointment by the State legislatures seems most agreeable with public opinion. Also, it creates opportunity to select the best-qualified candidates and gives the State governments a vital role in forming the federal government that will assure them considerable authority within it and a strong bond to it.

III. Regarding the "equal representation" feature: If it is correct that every State in the Union should share equally in the common councils, it is reasonable that a compound government with both a national and federal character should combine proportional *and* equal representation. But it is excessive to apply the standard of theory to a part of the Constitution that everyone agrees is indispensable, not in theory, but due to our unique, precarious political situation. A common government, with powers equal to its purposes, is called for by the voice of America and still more loudly by the crisis at hand. The smaller States are not likely to accept a government formed to satisfy the larger States, whose only option would then be a government between the one we propose and an even less satisfactory one. Under this alternative, the prudent choice must be the lesser evil; and, rather than speculate on the advantage that might justify the sacrifice.

The equal Senate vote the Constitution would allow each State recognizes and preserves its remaining

portion of sovereignty. This equality should be as acceptable to the large as to the small States, as they are equally attentive in guarding against improper consolidation into one simple republic.

Another advantage of equal Senate representation is that no law or resolution can pass without the agreement, first of a majority of the people (via the House) and then of the States (represented by the Senate). This complicated legislative check may sometimes hinder as well as help. And it creates a peculiar defense favoring interests shared by the smaller States. But as larger States will always have the power of numbers to defeat lesser States' unreasonable applications of this prerogative, and as excessive law-making seems to be a government disease, this part of the Constitution could be more useful than we suppose.

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*The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof for six years; and each Senator shall have one vote.*

.Article I Section 3 [1] of the United States Constitution

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IV. In order to accurately assign the correct number of Senators and their proper term of office, we must define the Senate's intrinsic purposes. And in order to assign the right purposes, we must isolate the problems a republic will suffer without it.

First. In republican governments, though less often than in others, administrators may forget their obligations to their constituents and neglect their important trust. In this context, a Senate, as a second legislative chamber distinct from but sharing power with the first, must in all cases be a useful check on the government. It doubles the people's security by requiring that two distinct bodies agree (where only one would otherwise be required) to execute a disloyal conspiracy. I need only add that as the improbability of conspiracy occurs in proportion to each body's unique genius, it is necessary to distinguish one from the other by every means available.

Secondly. The Senate's existence is necessitated by the tendency of large, unicameral assemblies (like the House) to yield to sudden, violent passions and be seduced by factious leaders intemperate, ruinous acts. There are many examples of this in our and other countries' history. All I need add is that a body obligated to correct this weakness should itself be free from it. Consequently, it should have fewer members. And it should have great firmness and, consequently, hold its authority for a considerable period.

Thirdly. Another lack the Senate will fill is a due familiarity with legislative purposes and principles. We cannot expect an assembly of Representatives pulled from private life for so brief a term to laboriously study the country's laws, affairs and comprehensive interests without making important legislative errors. No small share of America's present embarrassments is chargeable to government blunders that have come from the authors' heads, not their hearts. The bad laws that fill and disgrace our voluminous codes are monuments to

deficient wisdom that urges us to *demand* a well-constituted Senate.

A good government implies (1) fidelity to its purpose, which is the people's happiness, and (2) knowledge of the means to assure it. Some governments lack both qualities; most lack the first. I assert that American governments have paid too little attention to the last. The federal Constitution avoids this error and, most notably, fosters knowledge of ways to secure the people's happiness in a way that protects the government's purposes.

Fourthly. The public councils' instability from rapid turn-over of members points up the need for some more constant part of government. Every election in the States changes half the Representatives. This turnover brings constant changes in philosophies and measures. And constant change of even good measures contradicts every rule of prudence and every prospect of success. This is true in private life and even more so in national business.

Government instability weakens other governments' respect and confidence, and all the advantages of good national character. We see an inconstant person as a victim to his own unsteadiness and folly. Friendly neighbors may pity him, but not connect their fortunes with his; many will try to exploit him. One nation is to another what one person is to another, except that nations lacking wisdom and stability may expect to be victimized by wiser neighbors. But America, under the Articles of Confederation, is her own best example. Her friends disrespect her, she is derided by her enemies and she is prey to every nation interested in speculating on her fluctuating leaders and their embarrassed affairs.

Unstable policy is even more ruinous to domestic affairs. It poisons liberty itself. It means little to the people that the laws are made by men of their own choice if the laws are too verbose and incoherent to be read or understood; if they are repealed or amended before they take affect or change so often that no one who knows the law today can guess what it will be tomorrow. Law is defined as a rule of action, but how can a little-known, less-fixed rule have potency?

Public instability also gives unjust advantages to the clever, ambitious and moneyed few over the industrious mass of the people. Every new commercial, revenue or monetary regulation creates new opportunities for those who watch the changes and can trace its results – opportunities created, not by themselves, but by their fellow citizens' toils and cares. This is a situation wherein laws are made for the few, not for the many.

Additionally, lack of confidence in the public councils defeats every useful undertaking whose success and profit depends on constant governance. What prudent businessman will hazard his fortunes in any new enterprise when he cannot be assured that his plans may become illegal before he can execute them?

But the most deplorable effect is the reduction of public attachment and reverence toward a political system with so many ways to dispel hope. No government is respected without true respectability, nor is truly respectable without order and stability.

**Publius.**

## The Senate – #2 Hamilton or Madison

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

A FIFTH reason to establish a Senate, is the country's need for a due sense of national character. Without a select, stable branch of government, our weak, wavering policies will cost us the respect of foreign powers. Moreover, under the Articles of Confederation, the national councils cannot form that sensibility to world opinion necessary to merit its respect and confidence.

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*For the most convenient management of the general interests of the United States, delegates shall be annually appointed in such manner as the legislatures of each State shall direct, to meet in Congress on the first Monday in November, in every year, with a power reserved to each State to re-call its delegates, or any of them, at any time within the year, and to send others in their stead for the remainder of the year.*

Article V of the Articles of Confederation

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Other nations' opinions are important because (1) it is desirable that they believe our plans and measures are based on wise, honorable policies and (2) where our national councils may be warped by strong or momentary passion, they may be our best guide. How many past foreign-policy mistakes could we have avoided by first testing our ideas on a group of unbiased foreigners.

But a sense of national character is incompatible with our large, ever-changing present Congress. It can only come to a body small enough that praise and blame for public measures may be shared by each member, or one so trusted that the members' pride and consequence combine with the community's reputation and prosperity.

My sixth defect is the lack, in some important cases, of a due government responsibility to the people, arising from too-frequent elections. This remark may seem paradoxical, but it is as undeniable as it is important.

Responsibility must be limited to ends within the responsible party's reach and related to operations the people can properly judge. Government purposes may be divided into: those that (a) can be activated by single, direct measures and (b) depend on progressions of well-chosen, well-connected measures operating gradually and, often, unobserved. An assembly elected so briefly as to be unable to connect more than one or two links in a chain of crucial measures should not be responsible for the final result, any more than an employee of one year should answer for results only achievable over several years. Nor can the people calculate their annual assemblies' shares of influence on events evolving over several years.

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*The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature*

*thereof for six years; and each Senator shall have one vote.*

Article I Section 33 [1] of the United States Constitution

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The remedy is an additional legislative body – a Senate – permanent enough to address problems requiring continued attention and a train of measures, so that we can justly credit or blame it with success or failure.

Further, a Senate may sometimes be a necessary defense against the people's own temporary errors and delusions. As the community's cool, deliberate sense should always over-power its rulers' views, there are times in public affairs when the people, aroused by irregular passions, illicit advantage or misrepresentations of artful politicians may call for action that they later lament and condemn. In these critical moments, they will welcome intervention by a temperate, respectable body of citizens acting to check the misguided campaign and stop the people from injuring themselves and restore authority over the public mind. The Athenians suffered from the tyranny of their own passions because their government had no such safeguard.

A people spread over an wide area may not, like crowded city dwellers, be infected by violent passions or victimized by unjust laws. I have tried in an earlier paper to show that this is a major benefit of a confederated republic. At the same time, this advantage should not supersede the use of auxiliary precautions. The same extended situation, which will free Americans from some of the dangers in lesser republics, will oblige them to stay longer under the influence of conspiring men's misrepresentations.

There has never been a long-lived republic which did not have a senate. In fact, only Sparta, Rome and Carthage can be called "long-lived." Sparta and Rome had senates for life. The makeup of Carthage's version is unclear; it was probably similar to the other two. We are certain that it had some quality that made it an anchor against popular fluctuations and that a smaller council, drawn from the Senate, was appointed not only for life, but itself filled vacancies. These examples, though unfit for imitation and repugnant to Americans, teach us the need for *some* institution able to combine stability with liberty.

I am familiar with the differences between ours and other popular governments, ancient and modern. Many deficiencies that can only be cured by a senate are common to large, popularly-elected assemblies (like our present Congress) and to the body politic. Others, which are peculiar to large assemblies, require the control of such an institution. The people never willingly betray their

own interests, but their representatives may betray them. And the danger is greater where all legislative power is lodged in one body than where two separate, dissimilar bodies must agree on in every public act.

The most visible difference between the American and ancient republics lies in the principle of representation. In America, it is the pivot on which government turns; in the others it is supposed to have been unknown.

In the purest Greek democracies, many executive functions were performed, not by the people, but by “representatives” they elected.

Before the reform of Solon, Athens was governed by nine Archons, annually elected at large. The degree of their delegated power is obscure. After that period, we find an annually-elected assembly, first of 400 then 600 members, who partially represented them in legislative matters. The senate of Carthage, whatever its powers or duration in office, appears to have been elected, as were most ancient popular governments.

In Sparta we meet the Ephori and in Rome the Tribunes: two small bodies annually elected by all the people and considered their representatives. The Cosmi of Crete were also annually elected and are considered analogous to the Spartan and Roman assemblies, with one difference: In their elections, only part of the people were allowed to vote. From this history it is clear that the principle of representation was known to the ancients and accounted for in their political constitutions.

The true difference between the typical senate in antiquity and in America today is not that the ancients excluded the people’s representatives from administrative functions but that in America, the people, collectively, are excluded from electing Senators. This qualified difference gives the United States a significant advantage. But to exploit this advantage, we must be careful not to separate it from our other advantage: a large territory. For no form of representative government can succeed within the Greek democracies’ narrow geographic confines.

In answer to all these arguments, the jealous adversary of the Constitution will probably repeat that a senate not elected directly by the people, in office for six years, must ultimately become a tyrannical aristocracy. To this, I reply that liberty may be endangered by abuses of liberty as well as by abuse of power, of which there are many examples. Also, I would argue that, in the United States, abuse of liberty is the greater threat.

But before launching such a revolution, the Senate must first corrupt itself, then the State legislatures, then the House of Representatives and finally the people at large. Obviously, the Senate must be corrupted before it can try to institute tyranny. Without corrupting the State legislatures, it cannot execute the plan because, otherwise, their frequent elections would soon create a

whole new body. Without successfully corrupting the House of Representatives, that coequal assembly would inevitably defeat the enterprise. And without corrupting the people, a succession of new representatives would quickly restore Constitutional order. Does anyone seriously believe that the proposed Senate can, by any possible human means achieve such a goal over all these formidable obstacles?

The Maryland constitution gives us a relevant example. Its Senate, as the federal model will be, is indirectly elected, but for a five-year term. It also has the power to fill its own vacancies within its electoral term and, at the same time, is not controlled by regular rotation, as the federal Senate would be. Therefore, if the federal Senate presented the danger proclaimed, a like danger should have appeared in Maryland. It has not. Indeed, the Maryland constitution is gaining, from the benefit of its indirectly-elected Senate, a unrivalled reputation.

A better example: The British House of Lords. Instead of being elected for six years and unconfined to “approved” families or fortunes, it is an hereditary assembly of nobles. The House of Commons, instead of being for two years by the whole body of the people, serves seven years, and by a smaller proportion than in our proposed plan. Here we should see the aristocratic usurpations and tyranny of which our opponents warn us. In fact, British history reveals the hereditary House of Lords to be unable to defend itself against Commons’ encroachments. Indeed, it once lost the King’s support, then was quickly crushed by the weight of the popular branch.

Ancient examples are also at hand. In Sparta, the Ephori, the people’s annual representatives, overpowered the senate for life and took all power into its own hands. The Tribunes of Rome, who also represented the people, prevailed in almost every contest with the senate for life. This is remarkable in that every Tribune act required a unanimous vote. It proves the irresistible force of the branch of free government with the people on its side. I might add the example of Carthage, whose senate, Polybius testified, failed to take over power but, at the start of the second Punic War, lost almost all of its original authority.

The facts attest that the federal Senate will never be able to evolve itself into an independent aristocratic body. And we are justified in believing that if an unexpected revolution should occur, the House of Representatives, with the people on its side, will be able to bring back the Constitution to its original form and principles. Against the force of the people’s direct representatives, even the Senate’s constitutional power can be overcome.

**Publius**

## **FEDERALIST No. 64**

# **Senate Treaty-Making Powers** **Jay**

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



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*(“The President) shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur ...*

Article II Section 2 [1] of the United States Constitution

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THE TREATY-MAKING power is crucial, especially as it relates to war, peace and commerce. It should be delegated only in a way that will assure it will be exercised by the most qualified officers for the greatest public good. To those ends, the convention directed that the President be chosen by select bodies of electors (collectively called “the Electoral College”) deputed by the people for that purpose.

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*(For the purpose of electing the President), (e)ach State shall appoint, in such manner as the legislature thereof may direct, a number of Electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress ...*

Article II Section 2 [2] of the United States Constitution

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And it committed Senators’ appointments to the State legislatures.

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*The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof for six years; and each Senator shall have one vote.*

Article I Section 3 [1] of the United States Constitution

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This method is superior to direct elections by the people, typified by party zeal that exploits the apathy, ignorance, and the hopes and fears of the unwary and “interested,” and often puts men in office by small proportions of the votes.

As the electoral college that would choose the President, and the State legislatures that would appoint the Senators, will include the most enlightened and respectable citizens, we can presume that they will direct their attention and votes to the candidates most distinguished by their abilities and virtue. Further, by excluding citizens under 35 years of age from the Presidency and those under 30 from the Senate, the Constitution confines the electors’ attention to candidates the people have had time to judge.

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*No person ... shall be eligible to the office of President ... who shall not have attained to the age of thirty-five years ...*

Article II Section 1 [5] of the United States Constitution

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*No person shall be a Senator who shall not have attained to the age of thirty years ...*

Article I Section 3 [3] of the United States Constitution

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They will not be deceived by appearances of genius and patriotism which, like meteors, sometimes mislead as well as dazzle. If it is true that wise kings are always served by able ministers, we can argue, that an assembly of select electors will have, in greater degree than kings, the wide, accurate knowledge to judge candidates’ character. And we can naturally infer that the President and Senators chosen will always be among those who can best understand our national interests, whether related to the States or to foreign nations, who can best promote those interests, and whose reputations for integrity inspires and merits confidence. With such men we can safely lodge the treaty-making power.

Everyone knows that systematization is necessary to any business. Yet the public does not recognize its importance in national affairs. Anyone who would commit Senatorial-level power to a popular assembly with members constantly coming and going forgets that such a body is *necessarily* incapable of attaining those great purposes. Such issues must be considered at length and in depth in all their consequences and circumstances. They can only be addressed with talents supported by exact information applied over enough time to become closely acquainted with our national concerns and to form and introduce a system to manage them. The term of office it prescribes will give them opportunity to extend their political knowledge and make their combined experience more and more beneficial to their country.

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*Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen by resignation or otherwise during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill the vacancies.*

Article I Section 3 [2] of the United States Constitution

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The convention prudently scheduled Senatorial elections in a way that prevents the inconvenience of frequently transferring those great affairs entirely to a new body. Leaving two-thirds of the Senators in place after each election preserves uniformity and order, as well as a constant succession of official information.

Few will not agree that we need a carefully formed, diligently pursued system to regulate affairs of trade and navigation, or that treaties and laws should conform to and promote that system. And we must carefully maintain that conformity and promotion, which is a major purpose of requiring Senate agreement in all treaties and laws. In negotiating treaties, secrecy and speed are often required. Secrecy opens opportunities to gain useful intelligence by relieving knowledgeable parties, whether driven by mercenary or sympathetic urges, of fear of discovery. These sources would likely rely on the discretion of the President, but not confide in a large, politically-driven popular Assembly. The convention has done well by requiring the President to treat with the Senate’s advice and consent but

allowing him to manage the business of intelligence as he sees fit.

Human affairs move in “tides,” which are very irregular in duration, strength and direction. “Reading” and profiting by these tides in national affairs is the business of those who preside over them, and they inform us that often days, even hours, are critical. A battle lost, a prince’s death, a minister’s removal, or other events that can turn a favorable tide into a disaster. These moments must be seized as they occur, and whoever “manages” them must be allowed to turn them to the nation’s benefit or, at least, minimize damage. So often and so painfully have we suffered from the lack of secrecy and speed that the Constitution would be useless if the convention had neglected these needs. Matters which in negotiations usually require the most secrecy and the greatest speed are the preparatory and secondary measures that are otherwise nationally unimportant, but facilitate attainment of the goals under discussion. For these, the President will easily provide, and should any issue arise requiring the Senate’s advice and consent, he can convene it at any time. This is why the Constitution provides that treaty negotiations will take advantage, on one hand, of available talents, knowledge, integrity and deliberate investigations and, on the other, of secrecy and speed.

But to this plan, as to most, objections are contrived.

Some protest that, because treaties are to have the force of law, they must be made only by the legislature. They seem to forget that the judgments of our State courts and the governor’s constitutional commissions are as valid and binding on us all as laws passed by our legislature. All constitutional executive and judicial acts have as much legal validity as legislation and, therefore, whatever we name the treaty power, or however obligatory treaties may be, the people may confidently commit it to a distinct legislative, executive or judicial body. It does not follow that, because we give the legislative power to make laws that we should give it power to do every act by which the citizens will be bound.

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*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, anything in the Constitution or laws of any State to the contrary notwithstanding.*

Article VI [2] of the United States Constitution

Others, who agree that treaties should be made in the way proposed, oppose their being the supreme laws of the

land. They insist that treaties should be repealable at pleasure. This idea seems to be new and unique to this country. They should reflect that a treaty is only another name for a bargain, and no nation would make a bargain with us that would bind them absolutely but us only as long as we want to be bound. They who make laws may, without doubt, amend or repeal them; and no one will dispute that they who make treaties may alter or cancel them. But let us not forget that treaties are made by both contracting parties. Consequently, as the consent of both is essential to their formation, so must it be to alter or cancel them. The proposed Constitution, therefore, has not extended the obligation of treaties. They are just as binding and just as far beyond the legislature’s reach now as they will be any time in the future under any form of government.

Some jealous citizens fear that the President and Senate may make treaties that fail to serve all the States’ interests equally. Others suspect that two-thirds will oppress the remaining third. They ask whether the Constitution makes the treaty-makers’ conduct accountable enough; whether, if they deal corruptly, they can be punished; and how are we to get rid of the disadvantageous treaties they make?

As all the States are equally represented in the Senate, by men most able and willing to promote their interests, they will have equal influence in that body – especially if each one takes care to appoint proper people to the Senate and insist on their punctual attendance. As the United States assume a national form and character, the government will pay more and more attention to the good of the whole. Indeed, only a very weak government would forget that the good of the whole can be promoted only by advancing the good of all of its parts. The President and Senate will not have the power to make treaties that will not bind and affect themselves, their families and estates, along with the rest of the community. And, having no private interests apart from the nation’s, they will not be tempted to neglect its interests.

As to corruption, it is unthinkable that the President and two-thirds of the Senate will ever be capable of unworthy treaty-making conduct. But if it should ever happen, the treaty so obtained would, like all other fraudulent contracts, be null and void by the law of nations.

With respect to the Senators’ responsibility, it is difficult to conceive how it could be increased. All influences over human conduct – honor, oath, reputation, conscience, love of country and family – guard their loyalty. As the Constitution takes care that Senators shall be talented, honest citizens, we have reason to believe the treaties to which they will advise and consent will be as advantageous as possible. If not, the fear of punishment and disgrace is amply afforded by the article on impeachments.

**Publius.**

## FEDERALIST No. 65

# Senate Impeachment Powers Hamilton

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

THE remaining powers that the convention plan distinctly allots to the Senate are (1) participation with the

executive in office appointments and (2) operation as a trial court for impeachments. In the appointment process, the

executive will be the principal agent; we will discuss the relevant provisions in our examination of that branch.

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*The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present.*

Article I Section 3 [6] of the United States Constitution  
*Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office or honor, trust or profit under the United States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment, according to law.*

Article I Section 3 [7] of the United States Constitution

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Establishing a well-constituted impeachment court is difficult in a wholly-elected government. Its jurisdiction covers offenses involving public misconduct (i.e. abuse or violation of some public trust), which are basically political in nature, as they relate mainly to direct injuries to society itself. Prosecuting them, therefore, invariably agitates community passions for or against the accused. Often prosecution will connect itself with current public issues and will, on one side or the other, unleash animosity, prejudice, influence and interest. The greatest danger is that verdicts will depend more by the parties' relative political strength than on determination of innocence or guilt.

The delicacy and magnitude of this trust concerns the political reputation and existence of everyone engaged in public administration. It is easy to understand the difficulty of assigning it to the correct agency, considering that the most conspicuous characters in it will often be the leaders or tools of the shrewdest or largest faction – a force no one expects to be neutral.

The convention thought the Senate the best repository of this important trust. Those who discern the issue's intrinsic difficulty will support that decision and allow due weight to the arguments that may have influenced it.

Essentially, impeachment is a method of national investigation into the conduct of public men. Therefore, the nation's most proper inquisitors are its representatives. It is agreed that we should lodge the power to originate the inquiry – in other words, to “refer the impeachment” – to one house of the legislature. For the same reasons, the House of Representatives should join the inquiry.

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*The House of Representatives ... shall have the sole power of impeachment.*

Article I Section 3 [5] of the United States Constitution

The model for this institution was borrowed from the British Parliament, where the House of Commons refers impeachments and the House of Lords hears the evidence and renders the verdict. Several State constitutions follow the example. The British and State constitutions – rightly – regard impeachments as a tool with which the legislature can check and balance the executive.

As a tribunal, only the Senate can be sufficiently dignified and independent. No other body would feel confident enough to preserve the necessary neutrality

between the accused and the accusers, who are the people's representatives.

I doubt that even the Supreme Court Justices would always have the fortitude for so difficult a task or the prestige and authority to reconcile the people to a decision contradicting an accusation brought by their direct representatives. A lack of fortitude would be fatal to the accused; a lack of prestige would undermine the decision's acceptability and thereby endanger public order. We can only avoid both hazards by expanding the Supreme Court beyond its true value to the country. The nature of the proceeding also dictates the need for a large impeachment court. An impeachment trial cannot be tied down by the strict rules for the prosecution's presentation of charges or the judges' construction of them we apply in common cases. There would be no jury between the judges who pronounce the sentence and the party to suffer it. The impeachment court must have the discretion to acquit or condemn the country's most distinguished citizens. This forbids committing the trust to a small number of people. These considerations alone justify the conclusion that the Supreme Court would be an improper substitute for the Senate.

Furthermore, the sentence resulting from a Senate conviction will not end the impeached offender's punishment. After having been sentenced to perpetual ostracism from the nation's esteem and confidence, and the honors and rewards of public office, he will still be liable to prosecution and punishment in the ordinary course of law. Should those who had, in one trial, taken away his fame and his most valuable rights as a citizen take away, in another for the same offense, his life and fortune? Would there not be reason to fear that an error in the first sentence would beget another in the second? The strong bias of one decision would likely overrule the influence of any new arguments that might affect the complexion of another decision. Those who understand human nature will agree and immediately see that by making the same persons judges in both cases would deprive the defendant of the intended double security of a double trial. The loss of life and wealth would often be virtually included in a sentence which added nothing more than dismissal and disqualification from office.

It may be said that, in the second trial, the addition of a jury would obviate the danger. But juries are often influenced by judges' opinions and induced to find verdicts that refer the main question back to the court for a decision. Who would stake his life and estate on the verdict of a jury acting under judges who had predetermined his guilt?

Would the plan have been better if it joined the Supreme Court and the Senate in an impeachment court? This would have created several advantages, which would have been offset by the disadvantage of possibly trying the defendant twice by the same judges. To an extent, the union's benefits will arise from making the Chief Justice the president of the impeachment court, as is proposed in the convention plan, which avoids the inconveniences of incorporating the two branches.

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*When the President of the United States is tried, the Chief Justice shall preside ...*

Or should the convention have formed the impeachment court of people wholly independent of the Senate or the Supreme Court? There are arguments for and against this idea. Some will object that it could increase the complexity of the political machine and give the government a dubious new aspect. An equally worthy objection is that such a court would incur heavy expense and/or create a variety of problems. It must consist either of (a) permanent officers, stationed at the seat of government and entitled to regular salaries or (b) certain State officials to be summoned whenever an impeachment was pending. As the court should be large, "(a)" will be protested by everyone who compares the size of public wants with the means to fill them, while "(b)" will be suspected by those who seriously consider the difficulty of recruiting men from all over the Union, the injury to these innocent functionaries from charges they might face years later, the advantage to the guilty from opportunities to delay the proceedings, the States' loss from prolonged inactivity of men whose firm,

faithful attention to duty might expose them to persecution from an intemperate or designing majority in the House of Representatives. Though this last supposition may seem harsh, and may not often be verified, we should remember that faction, at times, afflicts all large bodies.

But that some other idea might seem preferable to the convention's impeachment plan does not mean that the Constitution should be rejected. If people were to reject every government until every part of it meets the most exact standard of perfection, society would soon become a scene of anarchy, and the world a desert. Where will we find that standard of perfection? Who will undertake to unite the community's discordant opinions in agreement to it and convince one conceited objector to renounce his "infallible" standard for the "fallible" standard of his more conceited neighbor? To answer their purpose, the Constitution's adversaries should have to prove, not merely that particular provisions are not the best imaginable, but that the whole plan is bad and dangerous.

**Publius.**

## Objections to Senate Impeachment Power Hamilton

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

AN HONEST REVIEW of the main objections against the proposed impeachment-trial court should eradicate any remaining unfavorable attitudes toward this institution.

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*The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present.*

Article I Section 3 [6] of the United States Constitution

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The first objection is that the provision mixes legislative and judiciary powers in the same body, violating the requirement for separation between the different branches. We have already shown this maxim to be compatible with a partial mixture of branches for special purposes, keeping them, in the main, unconnected. Indeed, this partial blending is sometimes proper and necessary to the various branches' defense against each other. Able political scientists confirm that an absolute or qualified check by one branch against the others is an indispensable barrier against encroachment. Dividing the impeachment-trial power between the two houses of Congress – making one the accuser and the other the judge – avoids the problem of making the same persons both accusers and judges. It also guards against persecution of dissenters by a prevalent faction in either House. As a two-thirds Senate agreement will be required for conviction, the protection of innocence will be as complete as can be.

It is curious to observe the vehemence with which men who say they admire our (New York) State constitution attack this part of the plan. New York makes the Senate, with the chancellor and the Supreme Court, not only an impeachment court but its highest civil and criminal tribunal. The numerical proportion of the chancellor and judges to the senators is so insignificant that the New York judicial authority, in the last resort, may be said to reside in its Senate. If the convention is guilty of departing from the separation maxim, how much more culpable must be our State constitution?

A second objection to the Senate as an impeachment court is that it gives the body undue power, tending to make the government too aristocratic. The Senate is to share the treaty-making and appointment authority with the President. If, say the objectors, we add the prerogative of deciding all impeachment cases, it will give the Senate a decided predominance. To such an imprecise objection it is difficult to frame a precise answer. By what standard can we determine whether the Senate has too much, too little or exactly the correct amount of power? Will it not be safer, and simpler, to examine each power on its own merits to

decide where best to assign it? This would give us a clearer, if not to more definite, answer.

Our remarks on Senators' terms of office, along with examples from history, show that every republic's most popular branch (in ours, the House of Representatives), by virtue of its election by the people, will have power to at least balance every other branch.

But, to secure the equilibrium of the national House of Representatives, the convention plan gives it several important ways to counterbalance the Senate's power, namely the sole right to:

- originate money bills;
  - institute impeachments; and
  - "umpire" all Presidential elections that fail to achieve majorities – the possibility of which will give it major influence.
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*[The President] ... shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.*

Article II Section 2 [2] of the United States Constitution

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A third objection to the Senate's impeachment power relates to its appointment function. Objectors imagine it would judge the candidates' and appointees' conduct too strictly. It is just as believable to allege that Senate favoritism would always protect officeholders' misbehavior. But that would presume that the Senators' interest in and responsibility for the appointees' fitness will always inspire them to expel those whose conduct proves them unworthy of their trusts. This presumption, if true, would destroy the supposition that a Senate that would merely "rubber-stamp" the Executive's choices and even ignore evidence of guilt so extraordinary as to compel the people's representatives to bring it forward.

If we need further arguments to show the improbability of such a bias, we should watch the way the Senate will participate in the appointment process.

It will be the President's task to nominate and, with Senate advice and consent, to appoint. The Senate may not present candidates; it can only ratify or reject the President's choice, then oblige him to make another.

The Senators might prefer someone else while approving the one proposed, because there is no constitutional way for them to oppose him. And they could not be sure that a rejected nominee would be replaced with their own favorite or someone they believe more meritorious. This means that a Senate majority could hardly

have any opinion, preference or bias toward an appointee beyond the evidence presented of his merit and ability.

A fourth objection to the Senate as a court of impeachments comes from its union with the President in the treaty-making power. Should the Senators enact a treaty in a corrupt or perfidious way, say objectors, the Constitution would make them their own judges. After conspiring with the Executive in a treasonous, ruinous treaty, how could we punish the Senators if they alone had the power to try their own impeachments.

This objection, honest and sincere as it is, rests on an erroneous foundation. The Constitution intends that the numbers and good character of the treaty makers will protect against corruption and treachery. The joint action of the President and two-thirds of the body chosen by the State legislatures is designed to bond those two parties in a pledge of fidelity. The convention might have justly considered punishing the Executive for deviating from the Senate's instructions or a lack of integrity during negotiations. It might also have discussed punishing a few Senate leaders for prostituting their influence to foreign corruption. But it could no more have contemplated impeaching and punishing two-thirds of the Senate for consenting to an improper treaty than of a majority of the House for approving an unconstitutional law. How, in fact,

could a majority in the House of Representatives impeach itself? No better, obviously, than two-thirds of the Senate might try themselves. And yet should either escape punishment for corruption or disloyalty? The truth is, in all such cases, it is essential to a legislature's freedom and necessary independence that its members should be exempt from punishment for collective acts. Moreover, the nation's security depends on the care taken to place this trust in proper hands, to make it the legislators' interest to execute it with fidelity, and to make it as difficult as possible for them to conspire against the public good.

Concerning an Executive perversion of the Senate's instructions or contravention of its views, we need not fear a lack of that body's will to punish abuses of its trust or vindicate its own authority. Our experience demonstrates that we can rely on Congressional pride, if not its virtue. And concerning corruption of leading Senators, who might seduce the majority into odious measures: Given satisfactory proof of that corruption, we will naturally conclude that there would normally be an abundance of enthusiasm for diverting public resentment from itself by sacrificing the authors of their mismanagement and disgrace.

**Publius.**

## FEDERALIST No. 67

# The Executive Branch Hamilton

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

NO PART of the new system has been more difficult to organize than the Executive. And none has been criticized less candidly or intelligently.

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*The executive power shall be vested in a President of the United States. He shall hold his office during the term of four years, and together with the Vice-President, chosen for the same term ...*

Article II Section 1 [1] of the United States Constitution

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Adversaries have tried to use Americans' hatred for the British monarchy against the intended Presidency of the United States, portraying the office as its direct descendant. To make the connection, they fictitiously magnify executive powers beyond royal prerogatives. They decorate the President with attributes superior in dignity and splendor to the King's. They show him with the crown sparkling on his brow and the imperial purple flowing in his train. They seat him on a throne surrounded with minions and mistresses, giving audience to envoys of foreign potentates with supercilious pomp. They teach us to tremble at the terrible scowls of murdering henchmen, and to blush at the unveiled mysteries of a future harem. We must defeat such attempts to transform the office.

One example of the critics' audacity gives the President of the United States a power the Constitution expressly reserves for the governors of the States: Filling casual vacancies in the Senate.

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The convention plan empowers the President "to nominate, and by and with the advice and consent of the Senate, to appoint certain important officers."

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*He ... shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.*

Article II Section 2 [2] of the United States Constitution

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And it authorizes the President to make appointments on his own when the Senate is in recess. This is the "source" of that "power" to appoint Senators.

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*The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.*

Article II Section 2 [3] of the United States Constitution

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The first of these two clauses only provides a way to appoint officers, "whose appointments are not otherwise provided for in the Constitution, and which shall be established by law." It *cannot* include appointments of

Senators, which are established and provided for elsewhere (Article I Section 3) in the Constitution.

The second clause cannot be construed to establish a Presidential power to fill Senate vacancies, because:

- A. Its relation to Art. I Sec. 2 [2], establishes it as a mere supplement to the same, providing an auxiliary appointment method when the general method is not available. The ordinary appointment power (applying, for example, to cabinet officers and Supreme Court Justices) is shared by the President and Senate and can therefore only be exercised when the Senate is in session. But the Senate cannot properly be obliged to stay in session "in case" an appointment will be needed – and there will be times when they will be required *post haste* during recesses. So Art. I Sec. 2 [2] was written to authorize the President, alone, to make temporary appointments which will expire at the end of the next Senate session.
- B. If we consider this clause supplementary to the one before, the subject of vacancies we must construe it to relate to the "officers" described there; and this, we have seen, excludes Senators.
- C. The period when the power is to operate – "during the recess of the Senate" – and that confining the appointments "to the end of the next session" clarify the provision's real purpose. If it were to apply to Senators, it would naturally refer the temporary appointment power to recesses of the State legislatures, which are to make the permanent appointments – *not* to recesses of the national Senate, which is to have no part in them. It would

also extend the temporary Senators' terms to the next legislative session of the States the vacancies affect, instead of at the end of the ensuing national Senate session. The status of the body authorized to ratify permanent appointments would, of course, govern use of a power relating to temporary appointments. The United States Senate is the *only* body so empowered.

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*The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof for six years; and each Senator shall have one vote.*

Article I Section 3 [1] of the United States Constitution  
*... if vacancies happen by resignation or otherwise during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill the vacancies.*

Article I Section 3 [2] of the United States Constitution

- D. The above clauses destroy the pretext for misconception. Here an express power is clearly given to the State governors to temporarily fill casual Senate vacancies, which invalidates the supposition that Art. II Sec. 2 [2] could be intended to give that power to the President. It also proves this supposition must be intended to deceive the people.

**Publius.**

## FEDERALIST NO. 68

# Electing the President and Vice President Hamilton

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

I VENTURE that if the system for appointing the Chief Magistrate of the United States is not perfect, it is at least excellent. It combines all the advantages we could wish for.

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*The executive power shall be vested in a President of the United States. He shall hold his office during the term of four years, and together with the Vice-President, chosen for the same term, be elected as follows:*

Article II Section 1 [1] of the United States Constitution  
*Each State shall appoint, in such manner as the legislature thereof may direct, a number of Electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States shall be appointed an Elector.*

Article II Section 1 [3] of the United States Constitution  
*The Electors shall meet in their respective States and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of Electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the*

*House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the Electors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice-President.*

Article II Section 1 [3] of the United States Constitution  
*The Congress may determine the time of choosing the Electors and the day on which they shall give their votes, which day shall be the same throughout the United States.*

Article II Section 1 [4] of the United States Constitution

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The convention determined to:

1. Involve the sense of the people in the choice of the person who will hold this trust. To that end, it committed the right to make the choice, not to an existing body, but to men chosen by the people and composed into an "Electoral College" for that specific purpose at that specific time.

2. Ensure that the direct election would be made by men best qualified to analyze the qualities the office requires, acting in circumstances favoring deliberation, supported by logic and incentives that fit the task. A few persons, elected

by the citizens, will most likely have the knowledge and judgment such complicated inquiries require.

3. That there will be as little opportunity as possible for the kinds of tumult and disorder justifiably feared in the election of the most important officer in the United States government. And the precautions written into the convention plan promise to alleviate this fear. Electing an intermediate body of electors will be much less likely to convulse the community than using the entire electorate to elect one central figure. And as the electors will vote in the States that choose them – instead of gathering in one place – they will be much less exposed to passion and ferment.

4. To purge the system of special interests, conspiracy and corruption. Many expect these enemies of republican government to appear from many quarters, mainly from foreign powers trying to influence our government by, for example, elevating their own candidate to the Presidency.

The convention prudently and judiciously shielded us from this sort of danger by not making the Presidential election dependent on a preexisting body with established members that might be tampered with before the vote. Rather, it entrusted the decision, first, to a direct vote of the American people, cast, not for the candidates, but to appoint the electors. Moreover, it excluded those (Senators, Representatives and all others holding government power) who might be overly devoted to the sitting President. This means the Electoral College members will enter and complete the process without prejudice or diversion.

Corrupting a large, diverse body requires time and means. It would be difficult, in the time between its election and the vote for President, to combine it in causes that, though not truly corrupt, might distract from its duty.

An equally important requirement of the convention: The Executive should depend for re-election *only* on the people. Otherwise, he might be tempted to sacrifice his duty to those whose support would assure continuance in office. The Electoral College also secures this advantage.

All these advantages are gathered in the proposed Constitution, which specifies that the people of each State will choose a body of electors equal in number to the total of its national Senatorial and House members, which will assemble within the State and vote for some fit person as President. Their votes will be transmitted to the seat of the national government and the person for whom the majority of the whole number of votes is cast will be the President.

But it is possible that one candidate will not gain a majority of Electoral College votes, and it might be unsafe to permit only a plurality to be decisive. So the Constitution provides, in such a case, that the House of Representatives will choose from the five candidates with the highest

number of votes, the man the members believe best qualified for the office.

This proposed election process assures us that the Presidency will never fall to an unqualified candidate. While a talent for non-controversy and popularity alone may suffice to elect a man to, say, the governorship of a State, elevation to the Presidency of the United States will require other talents and a different kind of merit.

The Vice-President will be chosen in the same way as the President, except that, in the event there is no Electoral College majority, the Senate, rather than the House of Representatives, will select the victor.

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*The Vice-President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.*

Article I Section 3 [4] of the United States Constitution  
*The Senate shall choose their own officers and also a President pro tempore in the absence of the Vice-President, or when he shall exercise the office of the President of the United States.*

Article I Section 3 [5] of the United States Constitution  
*In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President ...*

Article II Section 1 [6] of the United States Constitution

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The appointment of an outstanding citizen as Vice-President has been called superfluous, if not mischievous. Some would prefer that the Senate elect one of its own members to that office. But two considerations seem to justify the ideas of the convention in this respect.

One is that, to ensure a definite resolution on an election or any question, the President of the Senate – who will also be the Vice-President of the United States – must be able, if necessary, to cast the deciding vote. To transfer a Senator of any State to the Senate Presidency would deprive the State from which he came a constant contingent vote.

The other consideration is that the Vice-President may occasionally substitute for (or replace) the President. Therefore, the Vice-President should have all the same qualifications as the President.

It is remarkable that on this issue, as on others, the objection is against our State constitution. We have a Lieutenant-Governor, chosen by the people at large, who presides in the Senate and is the constitutional substitute for the Governor in circumstances similar to those that would authorize the Vice-President to assume the President's powers and duties.

**Publius.**

## FEDERALIST No. 69

# The Real Character of the Executive Hamilton

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

THERE IS CONCERN that the Constitution gives the Executive too much power. But, compared to the King of

Great Britain, the Grand Seignior, the khan of Tartary or the Man of the Seven Mountains, his power is greatly limited.



His authority is better related to that of the governor of New York.

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*The executive power shall be vested in a President of the United States. He shall hold his office during the term of four years ... together with the Vice-President, chosen for the same term ...*

Article II Section 2 [1] of the United States Constitution

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The President is to be elected for four years and may be re-elected as many times as the American people think him worth of their confidence.

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*No person shall be elected to the office of President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of President more than once ...*

Amendment XII of the United States Constitution, Adopted 2/26/1951

On this count, there is no similarity whatever between him and the king – an hereditary monarch who “owns” the crown and may pass it to his heirs. But there is a similarity to a governor of New York, who is elected for three years and has unlimited re-electability. If we consider how much less time it would take to establish a dangerous influence in one State than throughout the United States, we must conclude that a four-year Presidential term of office is less to be feared.

“The President, (as well as the) Vice-President and all civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors.” Art. II Sec. 4

“Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office or honor, trust or profit under the United States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment, according to law.” Art. I Sec. 3 [7]

The person of the king of Great Britain is inviolable and, without a national revolution, subject to no constitutional tribunal or punishment. On this delicate and important question, the President is no more invulnerable than a governor of New York and less so than the governors of Maryland and Delaware.

The President of the United States is to have power to return a bill, passed by both houses of Congress, for reconsideration. The vetoed bill can still become law if passed by two-thirds of both houses.

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*Every bill which shall have passed the House of Representatives and the Senate shall, before it becomes law, be presented to the President of the United States; if he approves he shall sign it, but if not he shall return it, with his objections, to the House in which it shall have originated, who shall enter the objections at large on their journal and proceed to reconsider it. If after such reconsideration two-thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by*

*which it shall likewise be considered, and if approved by two-thirds of that House it shall become a law. ...*

Article I Section 7 [2] of the United States Constitution

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The king of Great Britain, for his part, has absolute veto power over acts of both houses of Parliament. Disusing that power, no matter for how long, will not affect that authority. It is “justified” wholly by the sovereign’s ability to substitute influence for authority, or to gain and maintain a majority in one or both houses. And changing it would require considerable national agitation.

The President’s qualified veto differs widely from the king’s, and matches exactly the revisionary authority of New York State’s council of revision, of which the governor is a member. In this respect the President’s power would exceed our governor’s. This is because the President alone would have authority the governor must share with the chancellor and judges. But it would be precisely the same as the veto power of the governor of Massachusetts, from whose constitution this article seems to have been copied.

The President is to be the “commander-in-chief of the United States army, navy and the States’ militia when called into actual national service (See Art II Sec. 2 [1]).

He is to have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment (See Art II Sec. 2 [1]) and to recommend to Congress’ consideration measures he believes necessary and expedient.

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*He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient...*

Article II Section 3 of the Constitution of the United States.

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On extraordinary occasions, the President may convene either or both houses of Congress and, in case they disagree on a time to adjourn, to adjourn them to a time he deems to be proper (Art. II Sec.3).

He is also entrusted to take care that the laws are faithfully executed and to commission all officers of the United States Art. II Sec.3].

Most of these powers resemble those of the king and the governor of New York. The most significant differences are:

First. The President will only occasionally command whatever part of the militia the Congress may call into service. The British king and the governor of New York at all times command all the militia in their jurisdictions.

Secondly. The President is to be commander-in-chief of the United States army and navy – authority superficially the same as the king’s, but actually inferior to it. It would amount to no more than the supreme command and direction of military forces, while the king may declare war and raise and regulate of fleets and armies – all of which the Constitution assigns to the Congress. The governor of New York, on the other hand, is the constitutional commander of its militia and navy. But the constitutions of several other States expressly declare their governors commanders-in-chief of the army and navy, and New Hampshire and Massachusetts, in particular, award their governors more powers than a President can claim.

Thirdly. The President's pardoning power would cover all cases except impeachments. Our governor may pardon all crimes (including impeachments) except treason and murder. Clearly, the governor's pardoning authority exceeds the President's? Through pardoning, conspiracies and plots against the government that grow into actual treason may be screened from *all* punishment. If a governor of New York were to lead such a plot he could, until actual hostility occurred, insure his accomplices and adherents complete impunity. But a President could not shelter any offender from impeachment and conviction.

It seems that the possibility of total protection from the first steps of prosecution would be a greater temptation to undertake and carry out a plot against public liberty than the mere prospect, should the enterprise miscarry, of exemption from death and confiscation. That expectation would lose its influence if the person able to exempt might himself be implicated and therefore unable to deliver impunity?

The best way to judge this issue is to bear in mind that the proposed Constitution confines treason "to levying war upon the United States, and adhering to their enemies, giving them aid and comfort."

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*Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.*

Article III Section 3 [1] of the United States Constitution

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Fourthly. The President can adjourn the Congress only in the event of disagreement about the time of adjournment. The British king may discontinue, postpone or even dissolve the Parliament. Our governor may also discontinue the legislature for a limited time for very important purposes.

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*[The President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur ...*

Article II Section 2 [2] of the United States Constitution

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The President can make treaties if two-thirds of Senators present agree. The king is Britain's absolute representative in all foreign transactions: treaties of peace, commerce, alliance and for every other purpose. Some insinuate that his treaty-making authority is not conclusive and that his agreements with foreign powers are subject to the revision and ratification of Parliament. But I believe this doctrine arose only recently. Every British jurist, and everyone else acquainted with its Constitution, knows that treaty power resides in the crown in great abundance and that compacts entered by royal authority are completely, perfectly valid and untouchable by any other sanction. True, the Parliament sometimes alters existing laws to conform to stipulations of a new treaty, and this may incite some to imagine that its cooperation is necessary to execute

treaties. But this parliamentary interposition derives from a different cause: the necessity to adjust an artificial, intricate system of revenue and commercial laws to changes necessary to make a treaty work and to add new provisions and precautions to keep the machine from running into trouble. So there is no comparison between the President's intended power and the actual power of the king. What the king can do alone, the President can do only with the Senate's agreement. On the other hand, the federal Executive's power still would exceed that of any State governor. But this arises naturally from the sovereign power that relates to treaties. If the Union were to dissolve, it would become a question whether the governors would possess this sensitive, vital prerogative.

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*(The President) shall ... receive ambassadors and other public ministers ...*

Article II Section 3 of the United States Constitution

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The President's authority to receive ambassadors and other public ministers, often declaimed, is more a matter of ceremony than of authority. It will have no effect on the administration of the government. It was so written because it is more convenient to arrange visitations this way than to convene Congress on the arrival of every foreign minister.

The President is to nominate, and, with the advice and consent of the senate, appoint ambassadors and other public ministers, judges of the Supreme Court, and in general all officers of the United States established by law, and whose appointments are not otherwise provided for by the Constitution. (Article II Section 2 [2] of the United States Constitution) The king of Great Britain appoints to all offices and can even create offices. He can confer titles of nobility at pleasure and may appoint and promote Church of England officials. Compared to that, the President's appointment power is inferior; in fact, the governor of New York has more appointment authority. He uses it as a member of a council, with four Senators chosen by the State Assembly. The governor frequently nominates, and is entitled to a tie-breaking vote for nominees. In the national government, if the Senate should be tied, no appointment could be made. In New York, the governor can confirm his own nomination.

If we compare the publicity which must attend appointments by the President and an entire House of Congress with the privacy in the New York process – with the governor closeted in a secret apartment with at most four and often two persons – and if we also consider how much easier it must be to influence those few council members, there is no doubt the governor's power outweighs the President's.

So it seems that, except for his treaty-making power, it would be difficult to determine whether the President or our governor would have more power. There is no question the British king has far more authority and the contrast is more striking in this light:

- The President of the United States would be elected for four years; the king is a perpetual, hereditary prince.

- The President would be subject to personal punishment and disgrace; the king's person is sacred and inviolable.
- The President would have a qualified veto over Acts of Congress; the king's veto is absolute.
- The President would command the national army and navy; so does the king, who can also declare war and raise and regulate fleets and armies.
- The President would share treaty-making power with the Senate; the king alone has that power.
- The President would also share authority to appoint officers; the king makes all appointments.
- The President can confer no privileges whatever; the king can grant citizenship to aliens, noblemen of commoners and erect corporations with all their incident rights.

- The President can prescribe no rules concerning national commerce or currency; the king is in many ways the arbiter of commerce, and can establish markets and fairs, regulate weights and measures, lay embargoes, coin money, authorize or prohibit circulation of foreign coin.
- The President has no religious authority; the king is the supreme head and governor of the national church.

How shall we answer those who claim that things so unlike resemble each other? The same way as those who tell us that a government, the whole power of which would be in the hands of the people's elective, periodical servants is an aristocracy, a monarchy, and a despotism.

**Publius.**

## FEDERALIST No. 70

# The Executive Branch – #2 Hamilton

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

*The executive power shall be vested in a President of the United States.*

Article II Section 1 [1] of the United States Constitution

SOME CONSIDER a vigorous Executive inconsistent with republican government. Republicans cannot accept this supposition without condemning of their own principles.

Executive energy is a leading feature of good government. It is essential in defending against foreign attacks, enforcing the laws and protecting property and liberty.

The Roman republic was often forced to take refuge in the absolute power of a dictator against the intrigues of ambitious forces who threatened the existence of all government, as well as invasions of external enemies. There have been many such crises through the ages.

A feeble Executive implies feeble administration, which is another phrase for bad government.

Taking for granted, therefore, that all sensible men agree on the necessity of an energetic Executive, we need only ask: what are the ingredients of this energy? How can and should they be mixed with the ingredients of "safety" in the republican sense? And how does this combination relate to the plan reported by the convention?

The ingredients of Executive energy are:

- Unity.
- Duration.
- Public support.
- Competent powers.

A republican's definition of "safety" includes:

- ☞ A due dependence on the people.
- ☞ A due responsibility.

Politicians and statesmen most celebrated for their sound principles and just views favor a single Executive and a large legislature. They, rightly, consider energy the most vital Executive qualification and believe it is best applied by a single hand. Also rightly, they consider a large legislature best adapted to deliberation and wisdom, and best designed to earn and hold the people's confidence and protect their rights and interests.

That unity generates energy is not disputed. Decision, activity, secrecy and speed generally characterize the

actions of one man; the opposite is true of a "committee." As a body's size grows, these qualities shrink.

This unity can be destroyed two ways: (1) by vesting the power in two or more magistrates with equal standing and authority and (2) by vesting it ostensibly in one man subject, in whole or part, to others' (i.e. counselors') control and co-operation. (Illustrating the first are the two Consuls of Rome; the second, the constitutions of several States. New York and New Jersey, I believe, are the only States that entrust executive authority wholly to individuals.)

Each method of destroying Executive unity has its supporters, but the "executive council's" devotees are the most numerous.

Other nations' limited experience teaches us not to be enamoured of a "plural" Executive.

We have seen that the Achaeans, based on their experience with two leaders, were driven to abolish one. Roman history records many "mischiefs" to the republic from dissensions between the Consuls and the military Tribunes, who sometimes were substituted for the Consuls; but it tells us of no advantages of plural magistrates. That the conflicts between them were not more frequent or fatal is astonishing until we recall the Romans' prudent decision to divide the government between them. The patricians perpetually fought with the plebeians to preserve their ancient power and stature; the Consuls, who were generally chosen from among the patricians, were united by their personal interest in the defense of their order's privileges. Beyond this reason to unite, after the republic's armies had greatly expanded its empire, the Consuls customarily divided the administration between themselves by lot: one of them staying at Rome to govern the city and the other taking the command of the distant provinces. This distance probably prevented those collisions from embroiling the republic.

But quitting historical research and purely applying reason and common sense, we see much better reasons to reject the plural Executive – no matter what.

Wherever two or more people engage in any common effort, expect differences of opinion. If it is a public trust or office, in which they have equal prestige and power, bitter dissensions are apt to spring, that lessen their respectability, weaken their authority and distract them from their plans and operations. If dissension attacks a plural supreme executive magistracy, it can impede or frustrate the government's most important measures at times of

critical state emergencies. Worse, they can split the community into violent, irreconcilable factions under the Executive's separate power centers.

People often oppose measures merely because they have had no part in planning them or because they were planned by those they dislike. If they *are* consulted, and disapprove, they feel bound in honor, and by all their human faults to defeat them. Too often society's great interests are sacrificed to the conceit, the obstinacy of those with the power to inflict their passions and caprices on the rest of mankind. Perhaps the present controversy surrounding the Articles of Confederation will, when resolved, further prove the damaging power of this despicable human weakness.

In the interests of free government, division and controversy *must* be part of the legislative process. But it is unwise to include them in the makeup of the Executive. In the legislature, a speedy decision is more often a bane than a benefit. Though differences of opinion and partisan jarrings in the legislature may sometimes obstruct the legislative process, they often also serve to check the majority's excesses. Once a bill is resolved, opposition must end because the resolution is a law and resisting it is punishable.

But there are no advantages to Executive dissension because it never stops operating. It only embarrasses and weakens the plans and measures it invades, from start to finish. It constantly counteracts the Executive qualities most necessary to vigor and expedition, and there is no counterbalancing good. In the conduct of war, in which Executive energy is the bulwark of national security, plurality would halt the effort.

These observations apply most directly to the proposal for a plurality of equally-empowered officers – a scheme that is not likely to attract many supporters. They also apply, though not equally, to the idea of a council that would ostensibly "advise," but actually control, the Executive. An artful cabal in the council could distract and weaken the whole administration. Even without such intrigue, all those conflicting opinions could laden the executive authority with a spirit of habitual feebleness and foot-dragging.

But one of the strongest objections to a plural Executive is that it tends to conceal character flaws and destroy executive responsibility to censure and punishment. The first is the more important, especially in an elective office. People in public trust will more often act in a way to make them unworthy of further trust than subject to legal punishment. But pluralizing the Executive complicates detection in either case. It often becomes impossible, amid mutual accusations, to determine who deserves the blame or punishment for a deadly act. Blame is so skillfully and believably shifted from one to another that the public cannot detect the real culprit. Circumstances that may lead to a national miscarriage or misfortune are sometimes so complicated that, when a number of actors may have had different degrees and kinds of culpability (though we can see that there has been mismanagement) we may not be able to determine who is truly chargeable. "I was overruled by my council. The council was so divided that it was impossible to get a better resolution." These and similar true and false pretexts are always at hand. And who will either take the trouble to thoroughly investigate the case? Should we find a citizen zealous enough to undertake that unpromising task? When there is collusion between the parties concerned, it is very easy to camouflage the situation with so much ambiguity that no one can be certain of the precise conduct of any of the parties.

When our governor was coupled with a council to fill key offices, scandalous appointments were made. When they were investigated, the governor blamed the council members who blamed his nomination. Meanwhile, the

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people were at a loss to determine who committed their interests to such unqualified hands.

From this we can see that the plural Executive deprives the people of their two greatest assurances of faithful exercise of delegated power: (1) the restraints of public opinion (which also loosens when accountability must be divided among culprits) and (2) the opportunity to uncover misconduct by the persons they trust.

In England, the king is a perpetual officer, unaccountable for his administration, and sacred in his person. Nothing, therefore, can be wiser than annexing him to a constitutional council responsible to the nation for the advice it gives. Without this, there would be no responsibility in the executive department, an unacceptable idea in a free government. But the king is not bound by the resolutions of his council, though it is answerable for the advice it gives.

But in a republic, where every officer should be personally responsible for his official behavior, the reason for the British council not only does not exist but turns against the institution. In the British monarchy, it furnishes a substitute for the personal responsibility of the chief officer, which is the public's guarantee of his good behavior. In the American republic, the council would destroy, or greatly diminish, the President's intended, necessary accountability.

The idea of a council to the Executive, so common in State constitutions, is derived from the antirepublicans' maxim that power is safer in a body than in a single man. If I were to admit the maxim applies to the case, I would argue that the advantage on that side would not counterbalance the many disadvantages on the other. But I do not think the rule applies the Executive power. I believe executive power is more easily confined when it is in one person, that it is far safer to have one "target" for the people's jealousy and watchfulness and that executive plurality is more dangerous than friendly to liberty.

With a little thought, we can see that the kind of security sought in a multiple Executive is unattainable. There would need to be so many members that organizing them would be difficult at best, or they would be more a source of danger than security. The united credit and influence of several individuals must be more threatening to liberty than their separate credit and influence. So, when power is given to so few men that a clever leader can combine their interests and views in "common enterprise," it becomes easier to abuse. And the abuse becomes more dangerous than when lodged in one man. For, because he acts alone, he will be more closely watched and cannot amass as large a conspiratorial body as when associated with others.

The Decemvirs of Rome were more feared as usurpers than any one of them would have been. No one would propose an Executive much larger than that body: the number suggested for the council is six to twelve. This body would not be too large for easy manipulation, from which America would have more to fear than from the ambition of any individual. A council to an officer, who is responsible for what he does, will only clog his good intentions, will often become his instrument and accomplice in bad enterprises and almost always hide his faults.

As to expense, obviously, the council would need to be large enough to serve its intended purposes. This means the salaries of the members, who must move to live at the seat of government, would amount to a "serious" figure. I will only add that, before the appearance of the Constitution, I rarely met an intelligent man from any State who did not admit that, from experience, the unity of the New York executive is one of the best features of our constitution.

**Publius**

## Executive Term of Office

# Hamilton

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

*The executive power shall be vested in a President of the United States. He shall hold his office during the term of four years ...*

Article II Section 1 [1] of the United States Constitution

TERM OF office is the second requisite of Executive energy. This relates to the Chief Executive's personal firmness in executing his constitutional powers and to the firmness of the administrative program he is to institute.

As to personal firmness, obviously, the longer the tenure the greater the probability of acquiring a solid grasp of Presidential power. It is a principle of human nature that a man is interested in what he possesses in proportion to "solidity" of the contract by which he holds it. He will be more attached to what he holds at length for an assured period than in anything he enjoys briefly and uncertainly. And, of course, he is willing to risk more to attain and retain the first than the second.

This remark is as applicable to a political privilege, or honor or trust as to a piece of property. It implies that a man holding the Presidency, aware that soon he must leave it, will lose interest in risky, frustrating ventures that test his powers' limits and could start arguments with the people or a dominant Congressional faction. If the law requires that he leave office unless re-elected, and if he desires to be returned to office, his wishes and fears would conspire to corrupt his integrity or debase his fortitude. In either case, the results must be feebleness and irresolution.

Some regard an Executive pliantly beholden to a fashionable current or Congress as a positive thing. But they little understand the true reason we are instituting our own government in our own way: to promote public happiness. Republican principle demands that the community's deliberate sense should govern the conduct of those we entrust with our political affairs.

But it does not require unqualified executive quavering before every sudden breeze of passion or to every transient impulse by which artful politicians tempt the people to betray their real interests. It is true that the people generally support the public good, though sometimes mistakenly. But, using their good sense, they would despise toadies pretending that they always know how to promote the public good. They know from experience that they sometimes err and the wonder is that they make as few mistakes as they do, beset as they always are by wily, ambitious parasites and sycophants out to win their support but not deserve it. When the people's interests conflict with the inclinations of those entrusted to protect them, it is the protectors' duty to resist temporary delusions and take the time to deliberate coolly and sedately. I can cite instances when this kind of conduct has saved the people from fatal consequences of their own mistakes and has earned lasting gratitude to the men with enough courage and magnanimity to serve at the risk of public wrath.

But however inclined we might be to insist on unbounded Executive complaisance to the people's inclinations, we cannot properly argue for a like complaisance to the moods of Congress. The Congress may sometimes oppose the President, and at other times the people may be neutral. In either supposition, it is desirable that the Executive be free to act vigorously and decisively on his own convictions.

The same rule that teaches the wisdom of separating the government branches teaches us to design the separation to make them independent of each other. Why separate the executive or the judiciary from the legislative, if they will be devoted to the legislative? Such a separation could not protect the people's happiness. It is one thing to obey the laws; another to obey the law makers. The first conforms with and the last violates the fundamental principles of good government and, under any constitutional form, destroys the separation of powers. We have illustrated legislatures' intrinsic tendency to absorb all other branches. In pure republics, it is irresistible. The people's representatives sometimes seem to fancy that they *are* the people and show impatience and disgust with any seemed opposition, as if the exercise of legislative powers by the executive or judiciary violates the legislature's privilege. They often appear ready to seize control of the other branches. Moreover, as the representatives generally have the people on their side, the momentum that gathers makes it difficult for the other branches to maintain constitutional balance.

How can a short tenure affect presidential independence from Congress, unless Congress has the power to appoint or replace him? One answer may lie in the principle that, from the slight interest he takes in a short-lived advantage, a man finds little incentive to expose himself to any discomfort or risk. Another answer derives from the legislature's influence over the people, which it might use to prevent re-election of a man whose resistance to its projects makes him obnoxious in its eyes.

We may also ask whether a four-year term would answer our purpose and, if not, whether a shorter period, offering more protection against ambitious Presidential designs, would be preferable to a longer period – which was still too short to inspire Executive firmness and independence.

It cannot be affirmed that a four-year term, or any other limited tenure, would completely suffice, but it would contribute enough firmness and independence to materially influence the government's spirit and character. During such a term, there would be a considerable interval in which the chances of annihilation would be remote enough to guide the conduct of a man with sufficient fortitude. During that period, he might promise himself that there would be enough time to convince the nation of the propriety of the measures he intends to pursue. Though it is probable that, as a new election approaches, confidence in his conduct and firmness would decline, he would derive support from the opportunities afforded in the closing term to earn his constituents' respect and goodwill.

On one hand, a four-year tenure will help strengthen Executive firmness enough to make it a valuable element of the office. On the other, it is not long enough to justify fear for our liberty. The British House of Commons, from the mere power of agreeing or disagreeing to a new tax, has rapidly reduced the crown's prerogatives and the nobility's privileges to levels compatible with the principles of a free government. At the same time, it raised itself to the rank and importance of a coequal branch of the legislature. If it has been able, in one instance, to abolish both the royalty and the aristocracy, and to overturn all the ancient church and state establishments; if it has been able, as it recently has been, to make the king tremble at the prospect of an innovation it attempted, what are we to fear from a four-year elective Presidential term working with the Constitution to confine the President's powers? Except

that he might not be equal to the task the Constitution assigns him? If his term of office creates doubt of his

firmness, that doubt is inconsistent with a fear of his encroachments.

**Publius.**

## FEDERALIST NO. 72

# Re-Election of the Executive Alexander Hamilton

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

*The ... President of the United States ... shall hold his office during the term of four years ...*

Article II Section 1 [1] of the United States Constitution

GOVERNMENT administration includes all operations of the body politic: legislative, executive and judiciary. But at the everyday citizen's level, it amounts to countless details handled by the executive branch. Among them are actual foreign relations, financial planning, application for and spending of public moneys in compliance with Congressional appropriations, organization of the army and navy, war-making and like matters that constitute what most people understand as "government." The officials to whom its day-to-day management is committed should be considered the chief executive's assistants and, therefore, should gain their offices from his appointment or, at least, his nomination, and be subject to his supervision. This view suggests an intimate connection between the President's term in office and the stability and quality of his governance.

Reversing and undoing his predecessor's works is often an executive's best proof of his ability and worthiness. Further, as the change in philosophy and program results from a popular choice, the new executive is justified in supposing his predecessor's dismissal was caused by a dislike of his measures, so the less resemblance between the two, the more the new leader deserves his constituents' favor.

These suppositions and the influence of personal relationships would induce every new President to place his own people in the subordinate offices, which will dangerously destabilize the flow of administration.

A term that is (1) set and (2) long enough to achieve the executive's objectives has direct effects on the issue of re-electability. The set term gives to the officer incentive and resolution to fill the Presidential role and the nation time to judge his ideas' direction, depth and merit. The four-year duration enables the people to form reasons to approve or disapprove his conduct and decide whether to continue benefiting from his talents and virtues. This, in turn, gives the government the advantage of extending a wise administrative system into a second term.

Nothing seems more reasonable at first sight or more ill-founded on close inspection than to keep the chief magistrate in office for a certain time and then exclude him from it. Temporary or permanent, exclusion would do more harm than good.

One ill effect of exclusion would be fewer incentives for good behavior. Few men would not feel less zeal toward a duty if they knew the advantages of fulfilling it could last only a predetermined period. The best guarantee of a person's fidelity is to connect personal interests with official duty. Even the prospect of great fame, which prompts men to plan and undertake ambitious, arduous, long-term enterprises for the public good would not be enough to keep them at the task if the law forced them to quit before completion. They would resent having to commit the work, and their reputations, to hands that might be unequal or unfriendly to their vision. In such a situation, the best we can expect from the majority of men is that they would do no harm rather than to do positive good.

Another ill effect: A greedy person, who might happen into the office aware of its short duration, would simply enjoy the opportunity while it lasted and then seek ways to profit from it.

Would it promote peace or governmental stability to have half a dozen former Presidents wandering among us, frustrated that they can never again rise to the top?

Exclusion would also deprive the nation of continuing to profit from the chief executive's experience in office. Experience *is* the parent of wisdom. What is more desirable or more essential than wise governors? And where is wisdom more desirable or essential than in the nation's chief executive? Why should the Constitution ban this essential quality and declare once it is acquired, its acquirer must abandon the office in which it was acquired, and to which it is adapted? But this is the precise meaning of regulations that exclude men, who have earned the Presidency and learned its most vital lessons, from serving further.

Furthermore, exclusion would banish men from the Presidency during emergencies requiring their Presidential skills and experience. All nations, at one time or another, require the services of particular men in particular situations – it may not be too strong to say to preserve their political existence. How unwise, then, are self-denying ordinances that prohibit a nation from using its own citizens in the manner best suited to its crises and circumstances! Never mind a President's personal strengths; obviously, replacing a chief executive at the outbreak of war or a similar crisis, with another, even of equal merit, always endangers national security. That would substitute inexperience for experience and tend to unhinge an established administration.

Exclusion from re-election would constitutionally *disallow* administrative stability. Necessitating change in the nation's first office necessitates changes of programs. We need not

fear there will be too much stability while we have the choice of changing or not changing. And why would we want to prohibit the people from continuing to place their confidence where they think it safest and where they may avoid the problems of fluctuating councils and policies.

Exclusion's disadvantages apply most forcibly to the scheme of a permanent ban on Presidential terms. But even a partial or temporary ban would always make re-election remote and precarious.

What advantages would counterbalance them? They are said to be: first, greater Presidential independence; second, greater security to the people.

But unless exclusion is permanent, there is no reason to infer the first advantage. And even then, may the chief executive have no purpose beyond his office to which to sacrifice his independence? May he have no connections, no friends, for whom to sacrifice it? May he not be less willing to take beneficial actions that would create personal enemies when he sees the time fast approaching when he not only may, but *must* face them on an equal or inferior, footing? It is not easy to determine whether that arrangement would strengthen or impair his independence.

As to the second supposed advantage, there is still greater reason to doubt it. If exclusion were permanent, a man of excessive ambition who would, in any case, merit

suspicion, would reluctantly vacate the post in which his passion for power and pre-eminence had become an addiction. And if he had been able to gain the people's goodwill, he might induce them to consider a law that would deprive them of the right to vote for their favorite. Someone may conceive a situation where public disgust, seconding such a favorite's thwarted ambition, might create greater danger to liberty than could ever come from continuation in office by the exercise of a constitutional privilege.

There is an excess of refinement in a plan to prohibit the people to continue in office men they believe entitled to their approval and confidence. Its advantages are at best theoretical and uncertain, and are overbalanced by far more decisive and certain disadvantages.

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*No person shall be elected to the office of President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of President more than once. ...*  
Amendment XXII to the United States Constitution, adopted February 26, 1951

## FEDERALIST No. 73

# Executive Support and the Veto Power Hamilton

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

THE third requirement for executive vigor is adequate compensation. Without it, we cannot separate the legislative and executive branches, and prevent the Congress from using its power over the President's salary and benefits to dominate his politics and actions.

There are people too honest to be forced or seduced to walk away from their duty, but they are rare. Generally, taking control over someone's income also gives you control over his will. Many executives have been intimidated and "bought" by legislatures. The Constitution addresses this issue in the language:

*The President of the United States shall, at stated times, receive for his services a compensation which shall neither be increased nor diminished during the period for which he shall have been elected; and he shall not receive within that period any other emolument from the United States, or any of them.* Art. II Sec. 1 [7]

The Congress, upon a President's inauguration, would fix his salary for the duration of his term: it cannot raise or lower his compensation until a new term begins. This way, Congress cannot weaken him by cutting his salary or "bribe" him with raises. That gives the Chief Executive no monetary incentive to renounce or desert the independence the Constitution intends him to have.

The last requisite to energy is an array of competent powers. First, the "veto" power ...

*Every bill which shall have passed the House of Representatives and the Senate shall, before it becomes law, be presented to the President of the United States; if he approves he shall sign it, but if not he shall return it, with his objections, to the House in which it shall have originated ...* Art. I Sec. 7 [2]

In other papers, we have discussed legislatures' tendency to usurp other branches' powers. We have also mentioned the need to constitutionally arm the Executive and Judiciary in their own defense.

These realities justify the Executive's "negative" over acts of Congress. Without an absolute or limited veto, the President could not defend himself against Congress' attacks. Successive resolutions or a single vote could strip him of his powers. And, one way or another, legislative and executive authority could fall into the same hands.

But the veto power also protects the nation against improper laws. It checks legislative factionalism, impulsiveness and other Congressional impulses unfriendly to the public good.

Some ask how one person can have more virtue and wisdom than a large national assembly and argue, therefore, that we should not give the Chief Executive any control over the Congress.

This observation is specious. In arguing for the veto power, we presume, not superior Presidential wisdom or

virtue, but Congressional fallibility. We acknowledge that power lust may induce it to grab other branches' rights; that faction may pervert its deliberations; and that momentary impulses may rush it into measures that, on clear reflection, it would condemn.

Someone could say that the power to prevent bad laws can also prevent good ones. But this objection has little weight with those who understand problems possible from our highly changeable laws, which are government's greatest blemishes. They will consider institutions like the veto, designed to prevent overzealous law-making as more likely to do good than harm because they support legislative stability. Any injury from the defeat of a few good bills will be compensated by the benefit of preventing bad laws.

Furthermore, the legislature's superior weight and influence in a free government, and the threat it presents to Executive power, should satisfy us that the veto would generally be used cautiously. In fact, we may expect the President to be charged more often with timidity than rashness. A king of Great Britain, with all his sovereign attributes and all the influence he draws from a thousand sources would, today, hesitate to veto a joint resolution of the Houses of Parliament. He would certainly do his best to strangle a disagreeable measure on its way for his signature. Because he would want to avoid the dilemma of allowing it to take effect or of risking the nation's displeasure by opposing the sense of its representatives. Proof: It has been a long time since the Crown has used its negative power.

If the all-powerful, heavily-protected King of England has second thoughts about using the veto, how much more cautious will be a President of the United States in power for four short years in a purely republican government?

Obviously, it would be more likely that he would not use the veto when necessary than that he would wield it too often or too much. In fact, some have called the veto odious in appearance but useless in practice. But it does not follow that because it might be rarely applied it would

never be applied. In the case for which it is chiefly designed – an attack upon the President's or the public's legal rights – a reasonably firm Executive would attend to his duty and avail himself of his constitutional defenses.

Some Presidents will be courageous enough to "do their duty" under any circumstances. But the convention pursued a middle ground in order to encourage both judicious veto use and legislative common sense in the actions it takes. Instead of an absolute negative, it proposes a qualified veto, which would be much more readily exercised. Someone who might be afraid to kill a law with one veto might not hesitate to return it "for reconsideration," subject to final rejection by a vote of over one third of each House agreeing with his action. He would be encouraged by the realization that, to make his veto permanent would take a considerable portion of the Congress supporting his wisdom before the court of public opinion.

A direct, categorical veto appears more likely to irritate the Congress than the suggestion of argumentative objections it can either approve or defeat. And, as a limited veto would be less apt to offend, it would be more apt to be used and, therefore, more effective.

We hope that two-thirds votes of both Houses against the President will be rare. (Certainly, they will be less rare than bare majority votes.) Such an Executive power will often operate very forcibly, though silently and invisibly. When men, engaged in unjustifiable pursuits, realize that obstruction may come from an office they cannot control, just the fear of opposition will often keep them from doing what they would otherwise fearlessly dash into.

New York State vests the limited veto in a council consisting of the governor, the chancellor and any two Supreme Court judges. It has been freely used on a variety of occasions, often successfully. And its value is so obvious that people who violently opposed it while framing the State constitution have, through experience, become its vocal supporters.

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## **FEDERALIST No. 74**

# **Military and Naval Command and Executive Pardoning Power Hamilton**

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

THE President is to be "commander-in-chief of the army and navy of the United States, and of the militia of the several States when called into the actual service of the United States." (Art. II. Sec. 2 [2]) This provision is self-evidently correct; indeed it conforms to most State constitutions. Even objectors who would tie the Chief Executive to a council generally agree to give him total military authority.

Of all government concerns, the direction of war demands that power be wielded by a single hand. After all, direction of our common strength is a normal, essential part of the executive authority.

"The President may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices." (Art. II. Sec. 2 [2]) I consider this redundant, as the right it provides would result from the office itself.

He would also be authorized to grant "reprieves and pardons for offenses against the United States, except in cases of impeachment." (Art. II. Sec. 2 [2]) Humanity and good policy dictate that the pardoning power should be as unencumbered and uncomplicated as possible. Every country's criminal code is necessarily severe. Without an allowance for exceptions – such as unintended guilt (by



association, for example) – the face of justice would be too blood-covered and cruel. As sense of responsibility is always strongest when we must face decisions and consequences on our own, one person is always most ready to rule for a necessary and just easing of the law, and least ready to give in to political decisions calculated to give shelter from the law's vengeance. The realization that a human being's fate depends on an order only he can give inspires painstaking caution. And the fear of being accused of weakness or connivance begets equal care, though of a different kind.

On the other hand, as people generally find comfort and strength in numbers, a collective may confidently resolve to be uncompromising and unfearing of suspicion or censure for an injudicious joint decision. For that reason, too, one man seems a better dispenser of the government's mercy.

The wisdom of Presidential pardoning power has, as I recall, only been challenged in relation to treason. This should, some say, require agreement of one or both Houses of Congress. I agree that there are strong reasons to do this. As treason is a direct offense against society, once the law has determined the offender's guilt, it seems fitting to refer an act of mercy towards him to the legislature's judgment, but still the President should have a part.

But there are also strong objections to that idea. No one doubts that, in these delicate situations, one prudent, sensible man is better fitted than any large body to balance arguments for and against remitting punishment. Treason,

we must not forget, is often connected with seditions involving large segments of the population, as we saw recently in Massachusetts. In such cases, we should expect the people's representatives to be tainted with the same spirit as the offense. And when the factions are fairly equally matched, we should expect the condemned's secret friends and admirers, using others' weakness and good nature, to bestow impunity when society requires the terror of an example. On the other hand, when sedition arises from resentments in the major party, the factions are often unyielding when, actually, forbearance and clemency are in order.

But the main reason to repose the pardoning power in the President is this: in times of insurrection or rebellion, there are often critical moments when a well-timed offer of pardon to the insurgents or rebels may restore peace. Furthermore, if we allow that opportunity to slip away, we may not get another and the slow-paced process of convening the House and/or the Senate to gain its sanction invites that loss.

If we occasionally grant the President a discretionary power to deal with such contingencies, we may be told that it is questionable whether a limited Constitution can allow that power to be delegated. We may also hear that it would generally be impolitic to take any step beforehand that might hold out hope of impunity. Normally, this would be seen as weakness and tend to embolden the guilty.

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## FEDERALIST NO. 75

# The President's Treaty Making Power Hamilton

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

THE President is to have power, "by and with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur." (Art. II Sec. 2 [2])

Though this clause has been violently attacked, I say it is one of the best written and least arguable parts of the plan. Some tritely object to a supposed "intermixture of powers"; others contend that either the President or the Senate alone should be empowered to make treaties. Another objection is that too few people can make a treaty and that the House of Representatives should be involved. Still another: we should substitute two-thirds of *all* Senate members for two-thirds of those "present."

I believe my observations elsewhere in these papers place it in a favorable light. So I will offer only some supplementary remarks in answer to the above objections.

As to the "intermixture of powers," explanations in other places tell the true meaning of the Separation doctrine on which this objection rests, taking for granted that joining the President and Senate in the article on treaties does not infringe on it. Furthermore, the unique nature of the treaty power demonstrates the clause's unique practicality.

Though several writers on government place it among Executive powers, this is obviously an arbitrary assignment, for if we carefully study its operation, we will find that it has more a legislative than executive character (though it does not strictly fall within the definition of either).

The essence of legislative authority is to enact laws, e.g. to prescribe rules to regulate society. Executing those laws using public force for that purpose or for the common defense, comprise all the Executive's functions. Making treaties is, plainly, neither one nor the other. Its purposes are *contracts* with foreign nations that have the force of law derived from obligations of good faith. They are not rules applied by the government to the citizenry but agreements between government and government.

Treaty power, then, seems a separate, unique function that belongs neither to the Legislature or the Executive. The indispensable qualities for managing foreign negotiations make the Executive most fit to handle them, while the importance of applying treaties as laws demands that all or part of the Congress participate in making them.

In hereditary monarchies, it seems safe and proper that a King who rules for life should have total treaty-making

power. But it would be utterly unsafe and improper to entrust it to a politician who holds office for only four years. An hereditary monarch, though he often oppresses his people, has personally too much stake in the government to be corruptible by foreign powers. But a man raised from private life to the Presidency, backed by a moderate or slender fortune and looking forward to a time not far off when he must step down, might sometimes be tempted to sacrifice his duty to his interest.

A greedy President might be tempted to betray the nation's interests to gain wealth. An ambitious man might make his own aggrandizement, aided by a foreign power, the price of betraying his constituents. Human history does not justify committing a nation's delicate, vital interests to a single elected officer.

To entrust the treaty power to the Senate alone would mean surrendering the benefits of a constitutional Presidential role in foreign relations. It is true that the Senate could choose to employ him or not in this capacity. Moreover, the President, serving as the Senate's "ministerial servant," could not enjoy the same international confidence, respect or effectiveness. Meanwhile, the Union would lose a major foreign-policy advantage and the people would lose the security resulting from the President's cooperation.

It is clear that creating a joint treaty power promises greater security than an Executive or Senate one. And whoever understands the qualifications for the Presidency knows it will always be filled by a man whose wisdom and integrity can add to the agreements' quality.

As to inclusion of the House of Representatives, I have already declared the those qualities incompatible with such a large, fluctuating body. Nor will the House supply the necessary accurate, thorough knowledge of foreign politics; the steady and systematic worldview; the nice, uniform sensibility to national character; the decisiveness, *secrecy* and expeditiousness.

Complicating the process, by requiring agreement by so many bodies, would inspire a solid objection. The House's more frequent calls, the added time needed to keep it together to obtain its approval through the various stages of a treaty would be so inconvenient and expensive it could kill the entire project.

The one remaining objection would substitute a vote of two-thirds of all the Senators for the proposed two-thirds' vote of those present. We have shown that all acts requiring more than a majority in any body's resolutions tend to hinder government operations and to indirectly subordinate the majority to the minority. As applied to treaty-making, this reality shows the convention has gone as far as possible to involve public bodies and opinion. If two-thirds of all the Senators were required, it would often – because some non-attendance is inevitable – mandate unanimity. And the history of every political establishment that has applied this principle is replete with tales of impotence, confusion, and disorder. If our experience under the Articles of Confederation is not enough to prove the point, examine the Roman Tribuneship, the Polish Diet, and the Netherlands' States-General.

To require a fixed proportion of the whole Senate to approve a treaty would punish punctual attendance. Mandating a proportion that may vary rewards it and tends to keep the body complete. As a result, its resolutions would generally be decided in this case by as large a number as in the other, with fewer delays. We should remember that, under the existing Confederation, two members *may*, and usually *do*, represent a State. And that Congress, which now exercises *all* the Union's powers, rarely consists of more people than would compose the intended Senate. Add to this that, as members vote by States and that when only one member from a State attends, his vote is lost. This justifies the supposition that active voices in the Senate, where members are to vote individually, would rarely fall short of the number in the existing Congress. When we also take into account the President's participation, we can foresee that the American people, under the new Constitution, would have greater protection against improper use of the treaty power than they have today. And when we look forward to the Senate's probable growth with the addition of new States, we have reason for confidence in the members we will elect and to conclude that a body far larger than the Senate will always be would be unfit for this trust.

**Publius.**

## FEDERALIST NO. 76

# Executive Appointment Power Hamilton

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

THE PRESIDENT "... shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the

courts of law, or in the heads of departments. (Art. II Sec. 2 [2])

In an earlier paper, we observed that "the true test of a good government is its ability and willingness to produce a good administration." If so, the process of appointing United States officers defined in the above clauses is commendable. It is not easy to conceive a better plan to judiciously choose men to fill Union offices, whose

performance will also depend on the quality of those who appoint them.

All agree that the appointment power, in ordinary cases, should be vested either (a) in a single man, (b) in a select, moderate-sized assembly or (c) in one person with the agreement of such an assembly. Appointment by the people at large, admittedly, is impractical as they would have little time to do anything else.

Therefore, by “assembly” we mean a select body similar to the “Electoral College” that would appoint the President. This is because the people are too numerous and widely dispersed. On the other hand, they cannot be easily controlled by the spirit of cabal and intrigue which many fear could take root in a close-knit appointive assembly.

Those who understand the President’s appointment power, I believe, will agree that the office would probably always be filled by someone of ability, worthy of respect. Based on that presumption, submit as a rule the simple truth that one discerning man is better equipped to analyze and evaluate the offices’ unique qualifications than an equally, or even more, discerning assembly.

One well-directed man, with one point of view, cannot be distracted and warped by the conflicting views, feelings, and interests that often distract and warp committee decisions. There is nothing more powerful than the human ego when political preferences are at stake. Hence, any time an assembly is assigned to appoint public officials, it will fully display private and collective prejudices. The final choice will be the result either of a victory of one party over the other or of a compromise between them. Either way, the candidate’s merit will often be ignored. First, the qualifications that best serve the party’s prejudices will be more considered than those that fit the person for the office. Second, the compromise will usually turn on the equivalent of “Give us the man we want for this office, and you shall have the one you want for that.” Rarely will advancement of public service be the primary objective of either a party victory or party-to-party negotiations.

The most intelligent of the objectors to this clause contend that the President alone should be authorized to make federal-government appointments. But every advantage from that system would derive from his proposed nominating power, while several of its disadvantages would be avoided. In nominating, the President’s judgment alone would rule and, as only he would name the man to whom the Senate should award an office, his responsibility would be as complete as if he were to make the final appointment.

There is, in this view, no difference between nominating and appointing. The same motives would influence either or both. And as no man could be appointed without being nominated, every appointee would be his choice.

But might not the Senate overrule the President’s nomination? Yes, but then he would merely nominate another. The person finally appointed will be his choice, although perhaps not his first choice.

Senate overrule will probably be rare. It would have little incentive to reject one in favor of another because it could not be sure the President would nominate its choice. It could not even be certain that a future nominee would be in any way more acceptable, and as its dissent might stigmatize the individual rejected and reflect poorly on the President’s judgment, it would require strong, special reasons.

Then why require the Senate’s cooperation? Because it would help prevent appointment of characters named only out of favoritism. Furthermore, it would help to stabilize the administration. It is clear that, unless required to explain his choices to an independent body – which happens to be the Upper House of Congress – the President would be governed mainly by his personal abilities and interests. Under the proposed plan, the chance of rejection would argue strongly to take care to nominate the “right” candidates. For exhibiting favoritism or self interest to a body whose opinion would have great weight on the public could threaten both his reputation and political future. He would be ashamed and afraid to name candidates with no merit beyond a personal connection to him or a willingness to “follow orders.”

Some object that the President may use the nominating power to coerce the Senate to accept his views. This is as erroneous as supposing universal righteousness. Delegating national political power implies acceptance that there are virtue and honor among men that may justify our confidence, and experience validates the theory. We have seen it in the most corrupt periods of the most corrupt governments. The British House of Commons has long been justifiably accused of venality. But it always has a large number of independent, influential, public-spirited members. As result, that body is generally perceived to control the king’s inclinations regarding men and measures.

Though we might justly suppose that the Executive might occasionally influence some Senators, it is improbable that he could routinely buy the whole body’s integrity. Anyone who views human nature as it is, without flattering its virtues or exaggerating its vices, can feel confident enough in the Senate’s integrity to doubt the Executive can corrupt or seduce a majority. He will also see the need for its cooperation in the business of appointments as a restraint on the President’s conduct.

But beyond Senate integrity, the Constitution provides an important guard against the danger of Executive influence over the Congress in declaring that: “No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States shall be a member of either House during his continuance in office.” (Art. I Sec. 7 [2])

**Publiu**

## **FEDERALIST NO. 77**

# **Appointing Authority and Other Executive Powers Hamilton**

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

The Senate's participation in the appointment process, some say, will contribute to a stable Executive branch.

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*He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; and he shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.*

Article II Section 2 [2] of the United States Constitution

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It would be needed to approve as well as disapprove. Therefore, changing Chief Executives would not cause such violent officer turnover as we might otherwise expect if the President had sole appointment power. Should a new President try to replace an effective officer with one of his own, the Senate could frustrate the move and embarrass the administration. Those who value management continuity will value a constitutional clause that connects the actions of public men to the agreement or disagreement of the federal government's most constant body.

Some say this link between the President and the Senate would give the President undue power over the Senate. Others claim it will do the opposite – which proves neither is correct.

Properly stating the first idea amounts to this: "the President would improperly influence the Senate because the Senate would have the power to restrain him." This is self-contradictory. It ignores the fact that having total appointment power would allow the President to set up a dangerous control over the Senate.

The converse proposition claims that "the Senate would influence the Executive." As I have ready remarked, the objection's incoherence forbids a coherent answer. How will the Senate exert this influence? To what will it relate? The ability to influence someone implies the ability to benefit him. How could the Senate benefit the President by applying its veto over his nominations? If we say they might sometimes approve a favorite nominee when the public good requires a "no" vote, I answer that instances wherein the President could be personally interested would be too few to matter. The authority to originate honors and rewards is more apt to attract than to be attracted by the power to obstruct them. If by influencing the President we mean restraining him, this is precisely the intent. Furthermore, that restraint would benefit the nation and not destroy a single advantage of an uncontrolled Presidential appointment power. In fact, his right to nominate would produce the same advantages of appointment and avoid its evils.

A careful comparison shows the convention's proposed appointment power is superior to the provision in the New

York State constitution, which gives the governor total nominating power. For example, as every federal nomination would need to be approved by the entire Senate, the circumstances surrounding each one would be heavily publicized and the public could easily recognize the actors and actions at every stage of the process. The blame for a bad nomination would fall totally on the President; for rejecting a good one, at the Senate door, aggravated by a public view that it counteracted the President's good intentions. If a bad nomination wins Senate approval, both, for specific reasons, would share the disgrace.

In New York, the appointment council consists of three to five persons, including the governor. This small body executes its trust while locked in a private apartment, impenetrable to the public eye. The governor claims the nomination right on the strength of some ambiguous expressions in the constitution, but we cannot know how and to what extent he uses it, nor when he is contradicted or opposed. Blame for a bad appointment, because of the authors' uncertainty or lack of a defined purpose, is unnoticed and brief. Opportunities for connivance are unlimited; accountability is lost. The most the public can know is that (a) the governor claims the right of nomination, (b) two out of four people can be easily managed, (c) if some members of a particular council should not comply, it is often impossible to avoid their opposition by scheduling meetings at inconvenient times and (d) many improper appointments are made. We can only speculate whether a governor uses this delicate, important function to appoint the most qualified men or advances persons for their devotion to his will and to support his personal influence.

In every council of appointment cabal and intrigue will be at work. We must make sure they never grow large enough to facilitate collusion. As each member will have friends and allies to provide for, the desire of mutual gratification will bring a scandalous bidding for votes and bargaining for places. One man's political wants might easily be satisfied, but to satisfy those of a dozen or 20 would concentrate all the major government positions in a few families, and lead more directly than any other route to aristocracy or oligarchy.

If, to keep the council manageable, we were to change the membership often, we would soon see all the problems of unstable administration. Such a council would also be more open to executive influence than the Senate because it would be fewer in number and less subject to public inspection. As a substitute for the convention plan, that kind of council would raise costs, multiply the evils of favoritism and intrigue, reduce administrative stability and diminish security against undue Executive influence. Yet it has been recommended as essential to the proposed Constitution.

I could not conclude my observations on appointments without taking notice of the idea of including the House of Representatives in the process. But I will do little more than mention it as I believe it unlikely to be very popular. A body so large and changeable cannot properly exercise that power. Its unfitness will be obvious to all who remember

that in half a century, the House may have 300 or 400 members. Its inclusion would defeat the advantages of Executive and Senate stability and cause infinite delays and embarrassments. The examples of most States' constitutions encourages us to reject the idea.

The only Executive powers left to discuss are those contained in Article II Section III of the proposed Constitution:

*He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all officers of the United States.*

Art. II Sec. 3

Except some quibbling about the power of convening Congress and receiving ambassadors, no one is objecting to these powers. Nor should anyone.

As to convening the Congress, at least in respect to the Senate, there is good reason to include it. As this body shares the treaty power with the Executive, it might often be

necessary to call it together to give its advise and consent. I have commented in another paper on the authority to receive ambassadors.

We have now completed a survey of the proposed Executive branch's structure and powers, which, I have tried to show, combine all the republican requisites to energy. The question remaining is: "Does it also, in a republican sense, combine the requisites to safety, a due dependence on the people and a due responsibility?"

This question is answered in our inquiry into the Executive's other characteristics, and is deducible from ...

- The President's election once in four years by persons immediately chosen by the people for that purpose;
- His being at all times liable to impeachment, trial, dismissal from office, incapacity to serve in any other capacity and to forfeiture of life and estate by later prosecution in the common course of law.

But these are not the only precautions the convention has provided for the public security. In the only instances in which abuse of Executive authority is to be feared, the President of the United States would be subject to control by a branch of the legislature. What more could an enlightened, reasonable people desire?

**Publius.**

## The Judiciary Branch Hamilton

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

In exposing the defects of the existing Confederation, we have pointed out the value and necessity of a national-level administration of justice.

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*The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.*

Article III Section 1 [1] of the United States Constitution

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The importance of such an institution in the abstract is not disputed; the only questions relate to its organization and extent.

By organization, we mean:

- The method of appointing the judges.
- Their tenure of office.
- The separation of judiciary powers between different courts, and their relationships with each other.

**First.** Judges will be appointed in the same manner as most other officers of the Union, as discussed previously.

**Second.** All federal judges are to serve during good behavior, which conforms to most State constitutions, including New York's. The opposition created by its adversaries is a clear sign of the negativism that clouds their judgments.

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*The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.*

Article III Section 1 [1] of the United States Constitution

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The judicial tenure standard of "good behavior" is one of the most valuable features of modern government. In a monarchy it effectively bars despotism by the prince; in a republic it protects against legislative encroachments and oppressions. It is the best means to assure steady, upright, impartial administration of the laws.

In governments that separate the branches, the judiciary is always the least dangerous to constitutional political rights because it has the least power to injure them. The Executive dispenses the community's honors *and* holds its sword. The legislature commands the purse *and* prescribes the rules that regulate citizens' duties and rights. But the judiciary has no such control or influence and can take no resolute action. It may truly be said to have neither force nor will, but only judgment, and ultimately depends on help from the Executive to affect its judgments.

This analysis proves that the judiciary is by far the weakest of the three government branches; that it can never successfully attack the other two; and that great care is needed to enable it to defend itself against their attacks.

It equally proves that, while the courts may inflict isolated injustices, they can – as long as they remain truly separate from the Congress and Presidency – never endanger liberty.

Finally, it proves that as liberty is safe from the judiciary alone, it would be threatened if the courts were joined with either of the other branches. All the effects of such a combination would result from the courts' dependence – for appointments, for salaries, etc. The judiciary's natural weakness would put it in constant danger of being subdued by its coordinate branches.

Furthermore, nothing can strengthen its firmness and independence more than the judges' permanent terms of office, which is justly regarded as indispensable to the institution; as the citadel of public justice and security.

The courts' total independence is uniquely essential under a Constitution containing certain exceptions to legislative authority. For example, under the proposed Constitution, Congress may pass no bills of attainder, no ex-post-facto laws, and the like.

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*No bill of attainder or ex post facto law shall be passed.*

Article I Section 9 [3] of the United States Constitution

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These kinds of protections can be preserved only through the judiciary, which must void acts contrary to the language of the Constitution. Otherwise, all constitutional protection of particular rights or privileges would amount to nothing.

Some confused critics say the courts' power to void unconstitutional acts would imply judiciary superiority over the legislature because, they contend, such an authority must be superior to that of the branch whose acts may be voided. As this doctrine is important in all American constitutions, a brief discussion of the issue is in order.

The fundamental principal here is that no legislative act that is contrary to the Constitution can be valid. To deny this, would affirm:

1. that a deputy is greater than his superior,
2. that the servant is above his master,
3. that the people's representatives are superior to the people themselves,
4. that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid.

The idea that the legislature is the constitutional judge of its own powers, and that its interpretation overrules the other branches, cannot be construed from any language in the Constitution. Therefore no one can suppose that the Constitution intends to allow substitution of the people's representatives' for their constituents'. It is more rational to

suppose the courts were designed to stand between the people and the legislature in order to confine the legislature within the limits of its assigned authority.

Interpreting the laws is the courts' proper, unique province. The judges must regard the Constitution as a fundamental law. They, therefore, own the power to determine the meaning of the Constitution and any legislative act. If the Constitution and an Act of Congress happen to conflict, the Constitution should be preferred to the statute: the people's intention is superior to the intentions of their agents.

But this does not imply judicial superiority over legislative power. It only means that the power of the people is superior to both and that where the will of the legislature, declared in its statutes, opposes the people's, declared in the Constitution, the judges should be governed by the Constitution rather than by the statutes. Their decisions should be ruled by the fundamental law, rather than those that are not fundamental.

Often there are two existing statutes that clash with each other. In such cases, the courts are required to fix their meanings and operation. Reason and law dictate that, as far as a court can fairly reconcile two statutes to each other, it should do so. Where this is impracticable, the court must give effect to one and exclude the other. To determine which law stands, the courts traditionally prefer the newest to the oldest. This is not derived from any written law but from the nature and reason of the thing. They reason that, between conflicting acts of the same authority, the last expression of it should have preference.

But as to conflicting acts of superior and subordinate authorities, reason mandates the opposite rule: that the prior act of a superior should be preferred to the newer act of a subordinate authority and that, accordingly, whenever a statute conflicts with the Constitution, it will be the court's duty to accept the latter and reject the former.

It is pointless to say a court may arbitrarily substitute its own reasoning for the legislature's constitutional intentions. The courts must declare the sense of the law because any time they decide to exercise will instead of judgment, they will be substituting their pleasure for the legislative body's.

The concept of the courts as bulwarks of a limited Constitution against legislative encroachments argues strongly for permanent judicial tenure: nothing will contribute more to the independent spirit essential to a judge's faithful performance of his arduous duty.

The judges' independence also guards the Constitution and individual rights against the artful acts of designing politicians and crises that tend to unleash tumult and oppression. I trust the proposed Constitution's friends not to join its enemies in questioning the basic republican principle that gives the people the right to amend or abolish the established Constitution when it endangers their happiness. But from this we should not infer – whenever an ill political fashion momentarily captures a majority of the citizenry – that the legislature would be justified in violating those protections. Nor should we infer that the courts would be more obligated to overlook those infractions than when they rise from legislative or executive intrigues. Until the people, by a formal, authoritative act, annul or change the

established form, it is binding on them. Moreover, before such amendment, no presumption or knowledge of their sentiments can warrant the Congress to depart from it. But it would require uncommonly strong-willed judges to faithfully guard the Constitution against legislative invasions instigated by the majority of the nation.

Independent judges are also essential sentries against unjust and partial laws. Here also judicial firmness is important in relieving and confining damage from such laws. It moderates the results of those already passed and checks the legislature from passing more of them. Legislators, learning to expect the courts to erect obstacles to self-serving schemes, are compelled by their own motives to qualify their attempts. This aspect is calculated to have more influence upon the character of our governments than most of us foresee.

The benefits of judicial integrity and moderation have already been felt in a number States, and they are respected and appreciated by everyone but those they thwart. All considerate people should value whatever encourages that temper in the courts. After all, no one can be sure he will not tomorrow be the victim of an unjust spirit that enriches him today. Such a spirit will inevitably undermine the foundations of public and private confidence and bring universal distrust and distress.

We cannot trust "temporary" judges to exert the inflexible, uniform adherence to the Constitution and individual rights that we see as indispensable to justice. Whichever branch appointed them would likely feel complaisant toward the task. If both the Executive and Legislature hold the power, each would be unwilling to risk the other's displeasure. If the people or a special elected body made the choices, they would be tempted to act for popularity's, rather than the Constitution's, sake.

A weightier reason for judicial permanency derives from the qualifications for judgeship. A voluminous code of laws is a necessary inconvenience of free government. To avoid arbitrary judgment in the courts, judges should be bound to strict rules and precedents defining their duty in every case they hear. Mankind's folly and wickedness is certain to swell those precedents to a huge bulk, understanding which will demand long, laborious study. Also obviously, few men in the nation will have legal skills to qualify for the bench, and those with the necessary integrity will be even fewer.

Consequently, the government has no alternative – in order to attract men of such high ability and character from lucrative law practices onto the bench – to permanent tenure. To do otherwise would throw the administration of justice into less able, less qualified hands. In the country's present condition, which will be with us for a long time to come, the disadvantages of such compromises would be greater than we now realize.

On the whole, the convention acted wisely in copying from those constitutions wherein good behavior is the basis of judicial officers' tenure. Indeed, the plan would have been defective without this feature of good government.

**Publius**

## The Judiciary Branch – #2

### Hamilton

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

NEXT TO permanent tenure, nothing can strengthen judges' independence more than a fixed, politically invulnerable provision for their compensation, similar to the clause on Presidential remuneration. Again: control of a person's income amounts to control of his will. We cannot truly separate the judiciary and legislature if the former is dependent on the latter's occasional grants. Good government's enlightened friends lament the lack of precise language on this issue in the State constitutions. Indeed, some demand permanent salaries for judges. Obviously, we require something still more positive and unequivocal. The convention plan accordingly, and intelligently, provides that United States judges "*shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office.*" (Art. III Sec. 1 [1])

We all understand that fluctuations in the value of money and the state of society make a fixed constitutional compensation rate impractical. Therefore, the convention gave the Congress discretion to vary salaries to meet changing conditions, but denied it power to lower them. This way the judges will always know, financially, where they stand and should not be discouraged from doing what is right for fear of losing income. The quoted clause combines both advantages.

Please observe that the convention made a distinction between the President's and the judges' compensation. The President's salary can neither be raised or lowered during a term of office; the judges' can only not be lowered. This is probably because of the difference in their tenures. As the President is to be elected only for four years, rarely will a salary fixed at the start of a term not suffice until its end. But the judges, if they behave properly, will remain on the Federal bench for life. So a stipend that is very adequate at first could become too small as time passes.

This provision for Federal judges' support appears both prudent and beneficial and, along with their permanent

tenure, should more effectively insure their independence than relevant clauses in any of the State constitutions.

The article respecting impeachments contains precautions for their responsibility.

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*The President, Vice-President and all civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors.*

Article II Section 4 of the United States Constitution

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Federal judges may be impeached for misconduct by the House of Representatives, and tried by the Senate; and, if convicted, dismissed from office, and disqualified for holding another. This is the only constitutional provision relating to judicial independence and the only one in our Constitution that affects judges.

Some complain that there is no clause to remove judges for incompetence. But such a provision would either not be applied or, more likely, abused. Measuring their mental faculties would more often serve personal and party interests than justice or the public good. The result, except in insanity cases, would be arbitrary; and insanity, without any formal or written standard, may be safely pronounced a virtual disqualification from the Federal bench.

The New York constitution, to avoid dangerously vague investigations, specifically states that no man can be a judge beyond sixty. Few, I believe, support this provision. There is no station to which it is less proper than a judgeship. Generally, our abilities to deliberate and compare last longer than our lives. And when we consider how few people outlive their intellectual vigor, and how few jurists would be in such a situation at one time, such laws have little value.

**Publius**

## Judiciary Powers

### Hamilton

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

To accurately define the proper extent of Federal judiciary power, we must first define its proper purposes. Everyone agrees that the judiciary authority of the Union should extend to the following classes of controversies.

**1. Cases arising out of the laws of the United States, passed in accordance with Constitutional legislative authority.**

All agree that there should always be a constitutional method of giving potency to constitutional provisions. Why place restrictions, for example, on State legislatures without some constitutional way to enforce them? The convention plan prohibits the States from doing a variety of things, some incompatible with Union interests and others with principles of good government. Imposing duties on imported articles and issuing paper money are examples of



each. No sensible person believes such prohibitions would be observed without some effective government power to stop or correct infractions of them. This power must either be a direct veto on State laws or an authority in the Federal courts to overrule any that contradict the Constitution. The convention gave the Federal courts the power to void State laws it declares “unconstitutional” which, I presume, will be most agreeable to the States.

## **2. Cases concerning execution of provisions expressly contained in the Constitution.**

This provision cannot be clearer than it is. If there are such things as political axioms, they should include the practicality of giving equal – but not intersecting – powers to the judiciary and the legislature. The inarguable need to consistently, uniformly interpret the national laws decides the question. Thirteen independent “supreme” courts ruling on the same cases arising from the same laws can only produce contradiction and confusion.

## **3. Cases in which the national government is a party.**

Questions between the nation and the States or its citizens, can be referred only to the national tribunals.

## **4. Cases involving the peace of the confederacy, whether they relate to commerce between the United States and foreign nations or between the States themselves.**

This point rests on the plain proposition that the peace of the whole should not depend on the whim of a part. The Union must answer to foreign powers for the States’ conduct. And responsibility for injury should always be accompanied by the means to prevent it. Denying or perverting justice by court decisions or in any other manner is reasonably considered a just cause of war. So it follows that the Federal judiciary should be aware of all court cases concerning other countries’ citizens. This is as vital to preserving public faith as to the security of public peace.

Some may imagine a difference between cases involving treaties and national laws and those standing merely on municipal law. They may suppose the former to come properly under Federal jurisdiction and the latter under a State’s. But it is at least questionable whether an unjust sentence against a foreigner would not amount to aggression against his nation’s sovereignty, as well as a violation of a treaty or international law. And we would hear even greater objection to the difficulty of distinguishing between cases of one or another character. So many cases involving foreigners also involve national questions that it is safest and most practical by far to refer them to the national courts.

The power to decide issues between two States, between one State and citizens of another, and between citizens of different States, is equally essential to Union peace. Dissensions and private wars distracted and desolated Germany before Maximilian, around 1500, instituted the court known as the Imperial Chamber. Restoring the peace required all of the Chamber’s vast influence. This court was invested with final authority to decide all differences between the members of the Germanic body.

Even the Articles of Confederation contain a Federal capability to terminate territorial disputes between States.

But, besides border claims, there are many sources of interstate animosity. I refer to fraudulent laws passed by too many States. Though the proposed Constitution specifically guards against them, we can expect the spirit that produced them to take on unforeseen, unaddressed new forms. But *all* practices tending to cause disharmony between the States are proper targets of Federal attention and control.

We rightly regard the principle that “the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States” as the basis of the Union. And if it is just for every government to have the means to execute its own laws by its own authority, it follows that, to keep inviolable our citizens’ just equality of privileges and immunities, our national judiciary should preside over all cases in which one State or its citizens oppose another State or its citizens.

To protect this fundamental provision against evasion and subterfuge, we must commit its interpretation to a court which owes its existence to the Union and therefore will have no (a) local attachments, (b) partiality toward any State or citizen or (c) bias in conflict with its founding principles.

## **5. Cases originating on the high seas, of admiralty or maritime jurisdiction.**

The bigoted idolizers of State authority have not yet tried to deny the national judiciary authority over maritime causes. Because they generally depend on international law and affect foreigners’ rights, they relate strongly to public peace. The Articles of Confederation commits the most important parts of them to Federal jurisdiction.

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*The United States in Congress assembled, shall have the sole and exclusive right and power ... (of) appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures, provided that no member of Congress shall be appointed a judge of any of the said courts.*

Article IX of the Articles of Confederation

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## **6. Cases in which the State tribunals cannot be presumed impartial and unbiased.**

No man should be a judge at his own trial or in any proceeding in which he has an interest. This principle has considerable influence in assigning the federal courts controversies between different States and their citizens, between citizens of the same State and claims to land under grants of different States. Neither granting State’s court could be thought unbiased. Some State laws may have even tied the courts to decisions favoring their own grants. In any event, it would be natural for judges, as men, to lean strongly toward their own governments’ claims.

Having laid down and discussed the principles to regulate the organization of the federal judiciary, we will apply them to the powers prescribed in the convention plan, according to this language:

*The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be*

*made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign states, citizens, or subjects.* Article III Section 2 [1] of the United States Constitution

This clause constitutes the entire mass of Union judicial authority. Let us now review it in detail.

**First.** “... all cases, in law and equity, arising under the constitution and the laws of the United States” corresponds to classes #1 and #2 above. Some ask the meaning of “cases arising under the Constitution,” as opposed to those “arising under the laws of the United States.” All the restrictions on the State legislatures’ authority contain examples of it. They may not, for instance, issue paper money, but the ban rises from the Constitution, unconnected to any United States law. Should a State issue paper money anyway, the court cases concerning it would arise under the Constitution and not the laws of the United States, in the ordinary meaning of the terms.

Others ask what equitable cases can grow out of the Constitution and laws of the United States? There is hardly a subject of litigation between individuals that does not involve fraud, accident, trust or hardship – ingredients that make the case an “equitable” rather than “legal” matter, as the distinction is established in several States. For example, courts of equity have unique jurisdiction over contracts containing no direct, court-actionable fraud or deceit, but give one party an undue, unconscionable advantage over the other. In cases concerning foreigners on either side, it would be impossible for the federal judges to do justice without both equity and legal jurisdiction.

## FEDERALIST. NO. 81

# Judiciary Powers – #2 Hamilton

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

“The judicial power of the United States is” (by the convention plan) “to be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish.” Article III Section 1 [1] of the U.S. Constitution

No one opposes the proposition that there should be one court of supreme, final jurisdiction; only whether it should be separate or an arm of Congress – which is a contradiction. The people who object that the Senate as an impeachment court “mixes powers” would give the ultimate decision of all cases in whole or part to the legislature.

The arguments are based on the idea that, “The authority of the proposed Supreme Court – a separate and independent body – will be superior to that of the

Agreements to convey lands claimed under the grants of different States may also show the need for Federal equity jurisdiction. But this reasoning may not be so clear in States (including New York) that do not maintain a formal, technical difference between law and equity.

**Second.** “... treaties made, or which shall be made, under their authority; (and) to all cases affecting ambassadors, other public ministers, and consuls” relates to the fourth class named above, as these circumstances are obviously connected to preservation of national peace.

**Third.** “...all cases of admiralty and maritime jurisdiction” form the fifth class.

**Fourth.** “... controversies to which the United States shall be a party” belong in third class.

**Fifth.** “...controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign states, citizens, or subjects” belong to class #4.

**Sixth.** “... controversies between two or more States; between a State and citizens of another State; between citizens of different State” fall in the last class, and are the only cases in which the proposed constitution directly deals with disputes between citizens of one state.

From this review of the proposed Federal judicial powers, it appears that they all conform to the principles which should govern the structure of that branch and are necessary to its effectiveness and efficiency. If they should create partial inconveniences, the Congress will have power to remove them. The well-informed will never view the mere *possibility* of particular mischiefs as solid objections to general principles created to avoid general mischiefs and gain general advantages.

**Publius.**

legislature. The power of interpreting the laws according to the spirit of the Constitution will empower it to mold them into whatever shape it may think proper, especially as its decisions will in no way be subject to Congressional revision or correction. This is as unprecedented as it is dangerous. In Britain, the last-resort judicial power resides in the House of Lords, which many State Constitutions have imitated. Parliament and the State legislatures can, by law, at any time, ‘correct’ debatable or objectionable court decisions. But our Supreme Court’s errors and usurpations will be uncontrollable and remediless.”

This is false reasoning of misconceived fact.

In the first place, the plan hasn’t one syllable that directly empowers the national courts to interpret the laws

according to the spirit of the Constitution, or that gives them any greater interpretive freedom than the State courts may claim. I do agree that the Constitution should be the standard of construction for the laws and that wherever there is an evident conflict, the laws should conform to the Constitution. But this argument arises, not from the convention plan, but from the general theory of a limited Constitution. Further, as far as it is true, it applies equally to State governments. On this subject, therefore, no one can object to the proposed federal judiciary, which will not depend in any way on the State courts or condemn constitutions that try to limit legislative discretion.

But perhaps the real objection is to the Supreme Court's organization as a distinct body of judges rather than a branch of the legislature. To stand on this argument, the objectors must renounce their belabored "Separation of Powers." I will, nevertheless, concede to them that, according to the "Federalist" interpretation of the maxim, giving final judgment power to a part of the legislature does not violate "Separation." Still, it verges so closely on violation, as it relates to interpreting laws, that it is less acceptable than the convention proposal.

If the Congress passes a bad law, we can hardly expect it to be temperate when it comes to applying it. The same attitudes that attend the drafting and passage also operate in interpreting it. Why would we believe that legislators who infringe on the Constitution will rush to repair the damage when they act as "judges?"

In addition: All the reasons to tenure judges during good behavior argue against giving judiciary power to a body elected to a limited term. It is absurd, in the first place, to allow permanent judges to decide legal issues and then give final authority to those who are temporary. It is even more absurd to subject decisions of men selected for their legal knowledge – acquired by long, laborious study – to revision and control by men who notably lack that knowledge.

Legislators are rarely chosen for their judicial ability. Therefore, we can expect defective results from their defective information – particularly in light of legislatures' natural bent to partisanship – including poisoning justice with the pestilential breath of faction. The habit of always being marshaled on opposite sides will too likely stifle both the voice of law and equity.

So we should applaud the States that have assigned final legal judgments to distinct, independent courts of law. Contrary to the objectors' supposition that the convention's judicial plan is novel and unprecedented, it copies the constitutions of New Hampshire, Massachusetts, Delaware, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, and Georgia.

It is also not true that the British Parliament or the State legislatures can correct their respectable courts' mistakes more readily than a future United States Congress. Neither the British or any State constitution authorizes legislative revision of judicial sentences. Nor does the proposed Constitution forbid it. Under all three systems, the sole obstacle is the impropriety of allowing lawmakers to tamper with judicial matters: a legislature cannot, without exceeding its authority, reverse a particular decision; but it can pass a new law to apply in future cases. This principle applies in exactly the same manner and extent to the State and proposed national governments.

Further: The supposed danger of judiciary encroachment on legislative authority is a phantom. Isolated infringements may happen, but they can never be serious enough to materially affect political order. This is guaranteed by the general nature of judicial power, its purposes and the way they are served, the courts' comparative weakness and their total inability to support their usurpations by force. This inference is strengthened by the power in one House of Congress to bring impeachments and in the other to try them. This, by itself, is a complete security. The judges would never try to usurp legislative authority while the Congress can punish them by removing them from office. This should dispel all fears of judicial activism and of making the Senate the impeachment-trial court.

I will now consider the lower courts' organization and powers, and their relations with the Supreme Court.

Establishing these is intended to eliminate the need to refer all federal cases to the Supreme Court. It will allow the national government to institute or authorize, in the States or in "districts," tribunals able to determine matters of national jurisdiction that arise within their limits.

But why could the State courts not accomplish the same purpose? There are several reasons. Though we should make these courts as fit and competent as possible, we must still create the proposed Federal District Courts, if only to deal with "local" cases arising out of the national Constitution. To assign this authority to the existing State courts would amount as much to "reconstituting" them as to creating new ones with similar power. But shouldn't we make a more direct, straightforward provision favoring the State courts? There are, in my opinion, substantial arguments against this: no one can foresee to what extent a State court's "local spirit" might disqualify it from hearing national issues. Furthermore, some State courts are organized in ways that ill-equip them to assume Federal judicial authority. State judges, whether serving during pleasure or year to year, are too dependent on "the system" they serve to reliably execute national laws. Anytime we need to explain to a State judge the full meaning of a federal case, we would invite an appeal. Indeed, the availability of appeal should be in proportion to the federal government's degree of trust or distrust in those subordinate tribunals.

I am satisfied with the appellate jurisdiction as set forth in the convention plan. I consider every provision and action taken to assure unrestrained access to the appeals process an important source of public and private wellbeing.

I believe we may be properly, usefully divide the United States into four, five or six districts and to institute a federal court in each district, instead of one per State. The judges of these courts, with the aid of State judges, may hold circuits to try cases in several places within each district. Through these courts, we can administer justice easily and speedily, and narrowly limit grounds for appeal. At present, this plan appears to me the most practical available, but it requires that we give the lower courts all the powers prescribed by the proposed Constitution. These arguments show that the lack of such power would greatly weaken the plan.

Now let us examine the way in which the judicial authority is to be distributed between the United States Supreme Court and the inferior courts.

In the words of the Constitution itself:

*In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make. Article II Section 2 [2] of the United States Supreme Court*

Public ministers of every class (including consuls, though they are not strictly of diplomatic stature) are direct representatives of their nations. All questions concerning them are so directly connected with the public peace that it is only proper that we submit them directly to the Union's highest judiciary authority. Neither should we turn over to an lower court a case in which a State is a party.

Some people mistakenly believe that assigning one State's public securities to citizens of another would enable prosecution of the issuing State in the Federal courts for the amount of those securities. The truth is that no individual may sue a government without its consent. All of our State governments enjoy this exemption under the Articles of Confederation and they will keep it unless they surrender it in ratifying the convention plan. Contracts between a nation and individuals exert no right of action, independent of the sovereign will. What would be the purpose of allowing suits against States for their debts? How could recoveries be enforced without waging war? To assign such a power to the federal courts, by implication and in violation of the State's pre-existing right, would be forced and unwarrantable.

Returning to the Supreme Court's original jurisdiction: It would be confined to two rarely-occurring classes of cases. In other cases, original jurisdiction would fall to lower courts and the Supreme Court would have only appellate authority, "with such exceptions and under such regulations as the Congress shall make." (Art. III Sec. 2 [2])

The correctness of this appellate jurisdiction is rarely questioned in regard to matters of law, but there are loud clamors against it regarding matters of fact. Some well-intentioned New Yorkers, based on language and forms used in our present court system, believe it implies the replacement of trial by jury by the civil-law trial mode prevailing in our admiralty, probate and chancery courts. They have attached a technical definition to "appellate" that differs from New Englanders' understanding of the term (which shows the impropriety of borrowing a technical interpretation from any particular State's jurisprudence).

"Appellate," in the abstract, merely denotes one court's power to review another's proceedings, either as to the law or fact, or both. The method used may depend on ancient custom or new legislation and may or may not involve the aid of a jury. If, under the proposed Constitution, we permit re-examination of a fact already established by a jury, a second jury may be impaneled by (a) remanding the case to the lower court for a second trial or (2) directing an issue immediately out of the Supreme Court.

But it does not follow that a retrial by the Supreme Court of a fact ascertained by a jury will be permitted. Why, when

a writ of error is brought from an lower to a superior New York court cannot the superior court exercise jurisdiction of both fact and law? True, it cannot initiate a new inquiry into the fact, but it recognizes it as it appears on the record and pronounces the law relating to it. This is jurisdiction of both fact and law and they are inseparable. Though our State's common-law courts use juries to ascertain disputed facts, they unquestionably have fact and law jurisdiction and, when the former is agreed in the pleadings, they must proceed at once to judgment, with no recourse to a jury. On this ground, I contend, therefore, that the expression, "appellate jurisdiction, both as to law and fact," does not necessarily imply a retrial in the Supreme Court of facts decided by juries in lower courts.

The following train of ideas may well have influenced the convention on this point:

**First:** Supreme Court appellate jurisdiction will extend to cases determinable under both the common law and civil law.

**Second:** In common-law cases, revising the law will be the exclusive province of the Supreme Court.

**Third:** In civil-law cases, the re-examination might be essential to preserve the public peace.

**Fourth:** Therefore, in certain cases, we must extend the appellate jurisdiction, in the broadest sense, to matters of fact. It will not suffice to except cases originally tried by juries because, in some States, all are tried that way and such an exception would prevent proper and/or improper revision of matters of fact.

**Fifth:** It is safest to assign the Supreme Court appellate jurisdiction both as to law and fact, subject to such exceptions and regulations as the Congress may prescribe. This will enable the government to modify it in any way that serves public justice and security.

This view proves, at any rate, that this provision does not abolish the trial by jury. The United States legislature would certainly have full power to provide that, in appeals to the Supreme Court, there should be no re-examination of facts originally tried by juries. This would be an allowed exception but if it is thought too time and labor intensive, it might be limited to cases that can be decided by the common-law trial method.

To summarize the above observations on the authority of the judicial branch:

- It is carefully limited to issues that obviously belong before the national courts.
- A very small portion of original jurisdiction has been reserved for the Supreme Court.
- The balance of cases would be assigned to subordinate federal tribunals.
- The Supreme Court will have appellate jurisdiction, both as to law and fact, in all the cases referred to it, subject to necessary exceptions and regulations.
- This appellate jurisdiction in no way abolishes the right to trial by jury.

In short, given normal prudence and integrity in the national councils, establishing the proposed judiciary will insure us solid advantages, with none of the inconveniences predicted by some objectors.

**Publius.**

## Judiciary Powers – #3 Hamilton

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

CONSTRUCTING a new government, no matter how wisely or carefully, cannot fail to inspire complex, delicate questions – particularly if the Constitution is to establish a system made up of several distinct sovereignties (i.e., Federal and State). Only time can adjust the necessary parts into a harmonious, consistent whole.

Unsurprisingly, we are hearing such questions concerning the judiciary branch. Most center on the issue of submitting State court cases to Federal jurisdiction. Would this be exclusive, or would those courts exercise equal, parallel authority? If equal and parallel, how will the local courts relate to the national tribunals?

In an earlier paper, we revealed that the States will retain all pre-existing authorities the Constitution would not specifically delegate to the Federal head. But this exclusive delegation would exist only when it grants to the Union an authority that (1) is exclusive to it, (2) is prohibited to the States, or (3) would be incompatible with the States. Though these principles may not apply with equal force to the courts as to the Congress, I believe that they are just with respect to both branches. On that basis, I proclaim it a rule, that the State courts will keep the power they now have, unless it appears to be taken away in one of the three formulas listed above.

The Constitution only proposes the following.

The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.

Article III Section 1 [1]

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This may be read to mean that (a) only the Supreme and lower Federal courts may decide cases specified under their Constitutional authority or (b) the United States judiciary should consist of one Supreme Court and as many lower courts as Congress may decide to appoint. The first reading excludes, while the second includes, concurrent State court jurisdiction. Further, as the first implies alienation of State power, the second seems the most logical interpretation.

But, clearly, the States' concurrent jurisdiction would apply only to cases over which the State courts would have previous knowledge. It does not relate to cases growing out of and peculiar to the proposed Constitution, for not giving State courts authority over those events cannot abridge their already-existing authority.

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*The judicial power shall extend to all cases, in law and equity, arising under this Constitution [and] the laws of the United States ...*

Article III Section 2 [1] of the United States Constitution

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I am not arguing, therefore, that the United States, in the course of its legitimate legislative duties, could not, if practical, refer solely to Federal courts cases arising from a particular regulation. I merely pointing out that the State courts will not lose any part of their pre-Constitutional authority, except that, on appeal, certain cases will move up to the Federal level. Further, unless specifically excluded by future national legislation, they will take notice of cases that legislation will create. This I infer from the nature of judiciary power and, specifically, of the proposed system.

Every government's judiciary looks beyond its own local laws, including litigation subjects between parties in its purview, though the causes of dispute relate to laws of distant parts of the globe. Laws of Japan, no less than New York, may furnish subjects for our courts to discuss. When we also consider the State and national governments to be parts of one whole, we must conclude the State courts should have concurrent jurisdiction in all cases arising under Union laws where they are not expressly prohibited.

Here another question arises: In instances involving concurrent jurisdiction, how would the national and State courts relate to each other? I answer, that appeals would move from the State court to the Supreme Court. The Constitution explicitly gives the Supreme Court appellate jurisdiction in all the specified federal cases in which it does not have original authority and there is no language to confine its operation to the lower federal courts.

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*In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.*

Article III Section 2 [2] of the United States Constitution

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Note that the language covers only subjects of appeals, not the courts making them. The context and simple reasoning indicate that the State courts are also covered. Otherwise, they cannot exercise concurrent jurisdiction in cases affecting national concerns and every plaintiff and prosecutor would have unlimited, direct access to the Federal courts. Neither result, unless absolutely necessary, should be allowed. Direct attorney access would defeat some of the proposed government's most important avowed purposes and would essentially obstruct its actions, and there is no justification for this. Again, the national and State systems are designed to comprise ONE WHOLE.

The Federal courts will be auxiliaries to execution of Union laws and appeals resulting from them will naturally be heard in the court created to unite and assimilate the principles of national justice and the rules of national decisions. The convention's obvious goal is that cases that meet national standards will, for substantial public reasons, be determined originally and finally in the national courts.

Therefore, to limit the Supreme Court's appellate jurisdiction to appeals from the lower federal courts – excluding State tribunals – would restrict and narrow the

meanings of the term and subvert its intent, contradicting every sound rule of legal interpretation.

But could a decision made in a State court be appealed to a subordinate Federal tribunal? The answer is “yes” because:

1. The convention plan authorizes the national legislature “to constitute tribunals inferior to the Supreme Court.”
2. It declares that “the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress shall ordain and establish.”
3. It then lists the kinds of cases this judicial power shall encompass.
4. It divides the Supreme Court's power into “original” and “appellate.”
5. It does *not* define the subordinate courts' original, appellate or other authority, prescribing only that they will be “inferior to the Supreme Court,” and that they will not exceed the federal judiciary's specified limits. All this seems to be left to the legislature's discretion.
6. Therefore, I see nothing in the Constitution to impede appeals from State courts to the subordinate national tribunals.

There are many advantages to this structure. It would limit incentives to multiply the number of federal courts. It would also define and confine the Supreme Court's appellate jurisdiction. This would give the State tribunals more complete understanding of and control over the Federal cases they are called on to decide. And appeals from State courts, rather than automatically moving to the Supreme Court, can then be heard in the Federal District Courts.

**Publius.**

## FEDERALIST NO. 83

# Judiciary Powers – #4 Hamilton

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

THE most successful objection to the convention plan relates to the absence of explicit language authorizing civil trials by jury. By its silence on the subject, objectors infer that it abolishes both civil and criminal jury trials absolutely.

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The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

Article III Section 2 [3] of the United States Constitution

Every discerning person must recognize the difference between silence and abolition. But as the inventors of this fallacy try to support it with certain legal interpretations, whose true meanings they pervert, it may be useful to explore the ground they hold.

The maxims on which they rely are of this nature: “A specification of particulars is an exclusion of generals” or

“The expression of one thing is the exclusion of another.” Hence, say they, as the Constitution has established the trial by jury in criminal cases, and is silent in respect to civil, this silence is an implied prohibition of trial by jury.

The rules the courts follow to interpret the laws are based on common sense. Therefore, a true test of their application is conformity to their original legal source. This being the case, does it make sense to suppose that a Constitutional provision requiring the Congress to commit criminal trials to juries erases its right to allow jury trials in others? Is it natural to suppose that a command to do one thing prohibits doing another for which there is an existing power and which does not conflict with the act commanded? If not, no one can rationally maintain that commanding jury trial in certain cases bans it in others.

A power to establish and organize courts is a power to prescribe the trial mode. Consequently, if the Constitution

says nothing about juries, the legislature is free either to adopt the institution or let it alone. Of course, Congress would have no choice in the matter of criminal-trial juries, as the Constitution would require them. But in civil cases, the convention was silent; therefore the option is available. An obligation to try all criminal causes in a particular way, indeed, excludes the need to employ the same mode in civil causes, but does not limit the legislature's power to apply that method if it is considered proper. Therefore, the pretense that Congress would not be fully free to submit all Federal civil causes to jury determination is unfounded.

I conclude, then, that:

- A. Civil jury trials would not be abolished.
- B. The attempted use of the quoted maxims contradicts reason and common sense and is inadmissible.

Even if the objectors could show a precise technical reason for their arguments – which they cannot – they would not apply to the Constitution. The natural, obvious sense of its provisions, apart from technical rules, is the true test of interpretation.

Having seen that the maxims the objectors rely on do not support their position, let us try, using examples, to determine their proper use and true meaning.

The convention plan declares that Congress' power will encompass certain specified cases.

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- [1] *The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;*
  - [2] *To borrow money on the credit of the United States;*
  - [3] *To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;*
  - [4] *To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;*
  - [5] *To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;*
  - [6] *To provide for the punishment of counterfeiting the securities and current coin of the United States;*
  - [7] *To establish post offices and post roads;*
  - [8] *To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;*
  - [9] *To constitute tribunals inferior to the Supreme Court;*
  - [10] *To define and punish piracies and felonies committed on the high seas and offenses against the law of nations;*
  - [11] *To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;*
  - [12] *To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;*
  - [13] *To provide and maintain a navy;*
  - [14] *To make rules for the government and regulation of the land and naval forces;*
  - [15] *To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;*
  - [16] *To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of officers, and the authority of training the militia according to the discipline prescribed by Congress;*
  - [17] *To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square), by cession of particular States and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings;*

[18] *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 officer thereof.*

Article I Section 8 of the United States Constitution

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This specificity obviously eliminates any pretense to a general legislative authority.

In like manner the Constitution gives the federal courts authority to act on certain specified cases.

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- [1] *The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign states, citizens, or subjects.*
- [2] *In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.*
- [3] *the trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.*

Article III Section 2 of the United States Constitution

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This language marks the judiciary powers' precise limits. In other words, all the purposes of their deliberations are listed in the Constitution. Excluding any powers would invalidate the entire provisions.

These examples suffice to explain the abovementioned maxims and specify how they should be used. But to prevent misunderstanding on this subject, I add one more example to demonstrate their proper use, and the abuse made of them.

Suppose that New York law prevents a married woman from conveying her estate, and the legislature, recognizing the injustice of the situation, enacts a law explicitly allowing her to dispose of her property by deed executed in the presence of a magistrate. This provision would effectively exclude all other modes of conveyance. But suppose further that an earlier clause in the same act prohibited women from disposing of substantial estates without consent and signatures on the deeds of three of their nearest relatives. Could we infer from this law that a married woman could not legally procure her relatives' approval to convey property of *inferior* value? This is too absurd to merit argument; yet this is the argument of objectors contending that specifying juries in criminal trials abolishes them in civil cases.

From this it is obvious: The proposed Constitution in no way abolishes trial by jury. And in controversies between individuals that interest the great body of the people, trial by jury will remain as the State constitutions specify after the Constitution is ratified. I base this on the fact that the

national courts will have no authority over the State courts, which alone can have jurisdiction as the State constitutions and laws prescribe.

All land cases, except those questioning claims under grants of different States, and all other controversies between citizens of the same State (unless dependent on violations of Federal law) belong, in accordance to the State laws, under the State tribunals' jurisdictions.

Add to this that all admiralty cases and most cases involving equity will be decided *without juries* by the Federal courts and it is clear that the institution will not change when our new system of government takes effect.

The friends and foes of the convention plan agree on the importance of trial by jury. Supporters regard it a valuable safeguard to liberty; dissenters as the protector of free government. I personally hold it in high esteem, but believe it would be superfluous to examine how useful or essential it is in a representative republic, or how much more effective it will be against oppressions of an hereditary monarch than as a barrier to tyranny by elected officials in a popular government. But I cannot readily see a connection between the existence of liberty and civil trials by jury. Arbitrary impeachments, arbitrary methods of prosecuting pretended offenses, and arbitrary punishments after arbitrary convictions seem to me to be the great engines of judicial despotism, and these all relate to criminal proceedings. Only criminal trial by jury, aided by the *habeas-corpus* act, seems relevant to the issue, and the convention provided for both.

It has been observed that trial by jury protects against oppressive taxation power. This deserves examination.

Obviously, it cannot influence the legislature in regard to the amount of taxes to be laid, to the purposes for which they are imposed or to their apportionment. Therefore, it can only influence the collection mode, and the conduct of officers trusted to execute the revenue laws. As to the collection mode in this State, under our constitution, trial by jury is generally out of use. Taxes are usually enforced by threatening property seizure and sale, which is recognized as essential to the effectiveness of revenue laws. The slow, delaying course of a trial to recover individuals' taxes would not solve public problems or promote citizen convenience. It would often cost more than it would yield.

And as to revenue officers' conduct, providing for criminal jury trial will create the security sought. Willful abuses of public authority, including oppression of citizens and official extortion, are indictable, punishable offenses.

The quality of civil jury trial seems unrelated to preserving liberty. The strongest favoring argument is that it guards against corruption. As there is always more time and better opportunity to tamper with a standing body of officials than with a jury impaneled for the occasion, it could be easier to corrupt the bureaucrats than the jurors.

But this consideration is weakened by others. The sheriff who summons ordinary juries and court clerks who nominate special juries are themselves permanent officers who, acting individually, may be more vulnerable to corruption than judges, who form a collective body. Officers who select jurors could work to abet one of the parties or a corrupt bench. And it would be easier to gain some jurors randomly drawn from the public than men chosen by the government for their honesty and good character. But even allowing for these concerns, jury trial is an effective check

against corruption. As matters stand, it would be necessary to corrupt both court and jury, for when jurors obviously err, courts generally grant new trials, so it is usually futile to take over the jury unless the court, too, could be bought. This is a complicated double security we can use to protect both institutions' purity. By raising obstacles to corruption, it discourages attempts to seduce either. Temptations to prostitution that judges might need to overcome – which also require the juries' cooperation – are much fewer than if they alone had the power to decide cases.

Notwithstanding my doubts about civil trial by jury, properly regulated it is an excellent way to settle property disputes. On this account alone it would merit a favorable constitutional provision if it were possible to fix clear limits within which it would function. But this is always very difficult and men not blinded by enthusiasm must realize that in a federal government, which is a composite of societies with widely varying ideas and institutions, this difficulty is even greater. This is why the convention included no such provision in the proposed plan.

Not everyone understands the great differences between the limits of the jury trial in different States, which will have considerable influence on this issue. This State's judicial establishments resemble, more than any others, those of Great Britain. We have courts of common law, of probate (analogous in certain matters to England's spiritual courts), of admiralty and of chancery. In the courts of common law only, jury trial, with some exceptions, prevails. In all the others single judges, without juries, preside, generally according to canon or civil law.

New Jersey has a similar court of chancery but no analogous courts of admiralty or probates. Its common law courts hear cases New York relegates to its admiralty and probates tribunals. As one would expect, jury trial is more common there than in New York. In Pennsylvania, this is more the case, for it has no court of chancery and its common-law courts have equity jurisdiction. It has a court of admiralty, but none of probates. Delaware, in these respects, imitates Pennsylvania. Maryland and Virginia resemble New York except the latter has a plurality of chancellors. North Carolina is most like Pennsylvania; South Carolina like Virginia. But I believe that in some of those States with distinct courts of admiralty, cases there may be tried by juries. Georgia has only common-law courts, and a verdict by one jury is appealable to a "special" jury with a special mode of appointment. Connecticut has no distinct chancery or admiralty courts and its probate courts have no jurisdiction of cases, while common-law courts have admiralty and, to a certain extent, equity jurisdiction. In important cases, the General Assembly serves as court of chancery. In other words, Connecticut extends trial by jury further than any State mentioned. Rhode Island, in this sense, is much like Connecticut, as are Massachusetts and New Hampshire, in regard to blending law, equity, and admiralty jurisdictions. In the four Eastern States, jury trial stands on a broader base than in the others, but has a peculiarity: appeals are jury-to-jury and continue until two verdicts favor one side.

So there is considerable diversity of modification and extent in State jury trials, which inspires these observations:

1. The convention could fix no general rule that would conform to circumstances in all the States.



2. It would have been at least, if not more, risky to take any one State's system for a standard than to omit civil jury trial from the plan and leave the matter – as the convention did – to legislative regulation.

Proposals to fill this supposed need illustrate the issue's difficulty. The minority of Pennsylvania has proposed the phrase, "Trial by jury shall be as heretofore" and this I maintain would be senseless. The United States form the entity to which all general provisions in the Constitution must refer. But though jury trial, with wide variation, exists in every State, nation-wide it is now unknown because the present federal government has no judiciary power. So there is no precedent to which "heretofore" could relate. It would therefore be meaningless to fulfill the proposers' intent and, if I understand that intent correctly, would be unworkable. My reading is that they intend Federal cases to be tried by jury if that is the method that would be used in similar cases in the courts of the State wherein a given Federal court would sit. That is, in Connecticut admiralty cases should be tried by a jury, in New York without one. The idea of one government using so many trial variations should be opposed by every well-regulated observer. Whether a case should be tried with or without a jury would depend, in a great number of cases, on pure accident.

But this is not, to me, the greatest objection. I feel a deep, deliberate conviction that many cases should not be tried by juries. In particular, I refer to cases concerning the public peace with foreign nations, *most* of which turn wholly on international law. These include all prize cases. Juries cannot be supposed competent to carry out inquiries requiring thorough knowledge of other countries' laws and usages, and they will sometimes be influenced by impressions that will not allow them to sufficiently apply public-policy subtleties and nuances that should guide them. We could easily unknowingly infringe on another nation's rights at the risk of reprisal and war. Though a jury's task is to determine fact, in most cases legal consequences are complicated with the kinds of fact that render honest, informed judgment impracticable.

It deserves mention that the different European powers have a method of determining prize cases worthy of particular regulation within various treaties. Pursuant to such treaties, in Britain these issues are decided, in the last resort, before the king himself in his privy council, where the fact, as well as the law, is reexamined. This alone shows the wisdom of omitting a basic constitutional clause that would make the State systems a national standard, and encumber the government with questionable provisions.

I feel just as strongly that (a) there are advantages in separating the equity from the law jurisdiction, and that (b) cases of law are not properly committed to juries. The great, primary use of a court of equity is to give relief in cases that are exceptions to general rules. Combining authority for such with the ordinary jurisdiction tends to unsettle the general rules and subject all cases to "special" determination, while a separation of the one from the other makes one a sentinel over the other, keeping both within their rightful limits. Additionally, aspects that make certain cases proper for equity courts are often so precise and intricate that they are incompatible with the jury-trial spirit. They require long, deliberate, critical investigation that makes it impracticable to call men from their occupations

and require them to render complex decisions before returning to them.

It is true that separate equity and legal jurisdictions are peculiar to the English system – the model followed in several States. And trial by jury is unknown in all cases in which they have been combined, while separation is necessary to preserve the institution's purity. The nature of a court of equity permits its jurisdiction to be extended to matters of law, but trying to extend the jurisdiction of courts of law to equity issues will not only void the advantages enjoyed in courts of chancery (as established in this State), but will gradually change the nature of the law courts and undermine jury trials by introducing questions too complicated to be decided in that format.

These reasons seem conclusive against combining all the States' systems in the national judiciary, according to what is believed to be the purpose of the Pennsylvania minority.

Now, here is Massachusetts' proposal to remedy the supposed defect: "In civil actions between citizens of different States, every issue of fact, arising in actions at common law, may be tried by a jury if the parties, or either of them request it."

This, at best, addresses one kind of case, and from it I infer that the Massachusetts convention either considered it the only class of federal cases proper for jury trial or, desiring a more extensive provision, found it impracticable to devise one to fill the purpose. If the first, omitting a regulation respecting such a fragmentary purpose can never be considered a material imperfection in the system. If the last, it strongly corroborates the task's extreme difficulty.

But this is not all: from the State courts' widely varying powers, it is obvious that no one has clearly defined any one kind of case deserving of trial by jury. In this State, the boundaries between common-law and equity actions are governed by England's rules on the subject. In many other States, the limits are less precise. In some, all cases are tried in common-law courts and, on that basis, every action can be considered a common-law action, to be decided – should either or both parties so choose – by a jury. And this creates the same irregularity and confusion resulting from the regulation proposed by the Pennsylvania minority. In one State a case would go before a jury, if requested, but in another State, an identical issue must be tried otherwise because its courts differ on common-law jurisdiction.

It is obvious, therefore, that the Massachusetts solution cannot serve as our general regulation. All the States adopt some uniform standard for common-law and equity jurisdiction. Simply devising that kind of plan is arduous and time-consuming. It would be nearly impossible to propose a general regulation acceptable to all the States or that would perfectly coordinate with all the existing State definitions.

You may be ask, Why not make the standard in the New York Constitution the national civil-jury-trial standard? I answer that the other States would not likely accept that standard. Naturally, they prefer and would fight for their own. If the convention had thought of making one State a model for the whole, no one can say which State would be chosen. Many would be improper; even so, every delegate would argue for his own State's version. Assuming the convention could make a proper, fair choice, there would still have been much interstate controversy, giving

objectors a pretext to raise a host of local prejudices against it – which might have imperiled the entire Constitution.

To avoid all these problems, some would require trial by jury in all cases whatsoever. I do not believe there is a precedent for this anywhere in the Union, and the arguments for and against the Pennsylvania-minority proposal show that this would have been an unpardonable error.

In short, the more we consider the issue, the more arduous appears the task of writing a provision that does not say too little or too much, or could generate even more opposition to the entire proposed Constitution.

On the other hand, I believe that the many different arguments presented so far will help allay our concerns on this point. They tend to show that only criminal jury trial – for which the Constitution amply provides – materially serves to protect liberty. With or without the convention plan, in the vast majority of civil cases and those involving

the great body of the community, jury trial will remain in full force, guaranteed by the State constitutions. But there are problems in including it in the national Constitution.

Those who understand the question best are the least anxious to constitutionally establish civil trial by jury. They are also the most ready to admit that constant changes in the nation's affairs may recommend a non-jury method of deciding property cases. Reasonable men concede that jury trial is not appropriate in all cases, and new ideas may soon begin replacing it. I believe the nature of this issue makes it impossible to fix a point favorable to all where civil juries should stop; to me, this argues for leaving the matter for legislative discretion.

It is rather odd to state that a constitution is a threat to liberty because it expressly establishes criminal, but not civil, trial by jury. Particularly when that of Connecticut, regarded our most liberal State, provides for neither.

**Publius.**

## FEDERALIST NO. 84

# Answers to Miscellaneous Objections Hamilton

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

IN THIS review of the Constitution, I have tried to answer most of the objections against it. But a few were not included.

Most notable of these is that it contains no bill of rights. Among the reasons: several States' constitutions have the same lack. New York's is among them, yet many who say they admire it demand that it be filled. They allege that (1) though our State constitution has no bill of rights attached to it, the body of it provides for privileges and rights that amount to the same thing and (2) it adopts Britain's common and statute law, which protects many others.

To (1) I answer that the proposed Constitution contains a number of the same provisions. Besides those relating to the structure of the government, we find:

■ "Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment according to law."

Article I Section 3 [7]

■ "The privilege of the writ of *habeas corpus* shall not be suspended, unless when cases of rebellion or invasion the public safety may require it."

Article I Section 9 [2]

■ "No bill of attainder or *expost-facto* law shall be passed."

Article I Section 9 [3]

■ "No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state."

Article I, section 3 [8]

■ "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed."

Article III, section 2 [3] ■ "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court."

Article III, section 3 [1]

■ "The Congress shall have power to declare the punishment of treason; but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attained."

Article III Section 3 [2]

On the whole, these may be as important as any in the State constitution. Establishing the writ of *habeas corpus*, prohibiting *expost-facto* laws and titles of nobility, which New York does not do, are perhaps greater securities to liberty and republicanism than anything it does. Creating crimes after the fact, or, in other words, punishing men for things that, when committed, breached no law, and arbitrary imprisonments, are tyranny's favorite, most formidable instruments. Of them, the jurist Blackstone observed:

*"To bereave a man of life, says he, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly hurrying him*

*to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government."*

As a remedy, he suggests the *habeas-corpus* act, calling it "the bulwark of the British Constitution."

Prohibiting titles of nobility may truly be called the cornerstone of republicanism, as it insures the government will always belong to the people.

The pretended establishments of the common and state law by the Constitution are expressly subject "to such alterations and provisions as the legislature shall from time to time make concerning the same." They are therefore subject to repeal and have no constitutional sanction. The declaration was only to recognize the ancient law and remove doubts created by the Revolution. So this cannot be considered part of a declaration of rights, which under our constitutions must be intended to limit the power of the government itself.

Bills of rights originated as stipulations between kings and subjects to reserve rights not surrendered to the crown. Such was MAGNA CARTA, obtained by the barons, sword in hand, from King John. Such were its later affirmations by succeeding princes. Such was the petition of right agreed to by Charles I at the onset of his reign. Such, also, was the Declaration of Right presented by the Lords and Commons to the Prince of Orange in 1688, and later formed into an act of parliament called the Bill of Rights. It is obvious, then, that they do not apply to constitutions based on the power of the people and executed by their direct representatives and servants. Here, strictly speaking, the people surrender nothing and, as they retain everything, they have no need of particular reservations. "We, the people of the United States, to secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America." Preamble to the United States Constitution Here is a better recognition of popular rights, than all the aphorisms in several of our State bills of rights.

But a minute listing of particular rights is far less applicable to a Constitution like that proposed, which would merely regulate the nation's general political interests, than one that would regulate every personal and private concern. If, therefore, the clamors against the convention plan are well founded, no epithets can be too strong for this State's constitution. But, in fact, both contain all, in relation to this subject, that can be desired.

Furthermore, I contend that bills of rights, in the sense and to the extent for which they are contended, are not only unnecessary in the proposed Constitution, but would be dangerous. They except powers not granted and, thereby, create a pretext to claim more than were granted. Why declare that things shall not be done for which there is no power? Why, for instance, should we say that freedom of the press will not be restricted when no power is given to impose restrictions.

I am not saying that such a provision would confer a regulating power, but it would give men disposed to usurp a plausible excuse to claim it. They might reasonably urge that the Constitution should not be blamed for the absurdity of protecting against abuse of an authority that was not given, and that prohibiting restraint of press freedom clearly

implies an "intended" Federal power to prescribe "proper" regulations. This may be one example of many opportunities for "constructive powers" that can come from indulging injudicious zeal for a bill of rights.

As to freedom of the press, in the first place, there is not a syllable about it in our State constitution; in the next, I contend that whatever has been said by that of any other State, amounts to nothing. What does it mean to declare that "the liberty of the press shall be inviolably preserved?" What is the freedom of the press? Who can give it a definition the government cannot easily evade? I say it is impracticable and by this I mean that its security, whatever any constitution might say respecting it, must depend on public opinion and on the general spirit of the people and of the government. And here, as always, is the only solid basis of all our rights.

There is one remaining view of this matter. After all is said, the Constitution is itself, in every rational sense, and to every useful purpose, a bill of rights. Great Britain's several bills of rights form its Constitution, just as each State's constitution is its bill of rights. And the proposed Constitution, if adopted, will be the Union's bill of rights.

Is not one purpose of a bill of rights to announce and specify the citizens' political privileges in the structure and operation of the government? This is amply, precisely done in the convention plan, including various precautions for public security not found in any State constitution.

Is not another purpose to define certain immunities and ways to proceed relating to personal and private interests? This is attended to, in a variety of cases.

It is thus absurd to say the Constitution does not answer a bill of rights' substantial purpose. You may say that it does not go far enough, though you could not easily prove it. It is immaterial what form is used to declare the citizens' rights if they appear in any part of the instrument establishing the government. So it must be apparent, that much of what is said on this issue rests on totally irrelevant distinctions.

Another oft-repeated objection: "It is improper to confer such large powers, as are proposed, on the national government, because the seat of that government must be too remote from many States to facilitate constituents' to follow their representatives conduct." This argues that there should be no general government. For the powers which everyone agrees the Union should have cannot be safely entrusted to a body that we cannot control.

Most of the arguments relating to distance rest on illusion. What are the information sources the people in, say, Montgomery County must use to judge their representatives work in the State legislature? They cannot use personal observation unless they can be on the spot. So they must depend on information from trustworthy intelligent "conveyors." And how must these "conveyors" gain the information they convey? Obviously from accounts of public measures in public prints, from correspondence with their representatives, and with other observer/conveyors who live at the seat of government. This applies to all the counties at any significant distance from the scene.

It is equally obvious that the same sources would be available to report on Federal representatives' conduct, and the impediments to rapid long-distance communication will be overbalanced by the constant vigilance and intelligence

resources of the State governments which, out of self-interest, will always be aware of the behavior of their constituents' national representatives and servants. We can rely on their willingness and ability to inform the people of prejudicial outside interests. That insures that the people will be better informed on their national representatives' activities than they are now regarding the State legislatures.

We should also remember that citizens who reside at and near the seat of government will share the interests of those who do not and will be ready to sound the alarm against the corrupt and treasonous.

Among many strange Constitutional objections, the strangest and most deceptive derives from the lack of a provision addressing debts due the United States. This is represented as a tacit abandonment of those debts and a screen for public defaulters. The newspapers have published inflammatory railings on this issue, yet it is clear that the suggestion is void of foundation beyond ignorance and dishonesty. In addition to remarks I have made elsewhere, I observe that it is a common-sensical, established doctrine of political law that "states neither lose any of their rights, nor are discharged from any of their obligations, by a change in the form of their civil government."

The last significant objection relates to expenses. Even if adopting the proposed government would considerably increase national expenses, the objection should be ignored.

Justifiably, the great body of Americans are convinced that Union is the basis of their political happiness. Sensible men of all parties, with few exceptions, agree that the present system cannot preserve it without radical changes, that we should grant the national government new, wider powers under a different organization because it is unsafe to repose such authorities in a single body.

Conceding all this, we must give up the question of expense, for it is impossible to safely narrow the foundation on which the system must stand.

First, the legislature's two houses are to have only 65 members – the same number Congress, under today's articles, may contain. True, we intend to raise this number, to keep pace with national population and business growth. Obviously, fewer members would, even in the first instance, be unsafe and continuing the present total would, in a larger population, represent the people inadequately.

From where will the dreaded increase in expenses spring? Some expect a multiplication of offices. Let us examine this.

The new administration will require the same principle departments as today's. These include a Secretary of War, a Secretary of Foreign Affairs, a Secretary for Domestic Affairs, a three-person Board of Treasury, a Treasurer, assistants, clerks, etc. – all indispensable under any system. As to ambassadors, other ministers and agents in foreign countries, the proposed Constitution can only make their offices, where they reside, more respectable, and their services more useful. We will need more revenue collectors, but they will not necessarily cost more as, in most cases, it will entail only an exchange of State for national officers. And there is no reason to suppose the number of collectors or their salaries will be greater than before.

Yes, it may cost more to support the judges of the new Federal courts. But not to pay the President, because there is now a president of Congress whose salary approximates that proposed for the proposed United States President.

Counterbalancing any extra expense will be the following.

The President will transact the great business volume that now keeps Congress sitting through the year. This includes management of foreign negotiations, with Senate advice and consent. So it is evident that the new House of Representatives and the Senate will need to meet only part of the year, although the Senate's treaty and appointment responsibilities may extend this period. But until we expand the House, the shortened legislative year should generate a considerable saving.

But there is one change that will make an important economic difference. Today, the business of the United States occupies the State legislatures and Congress. Congress makes requisitions which the States must provide for. This approximately doubles the State legislative sessions beyond the time needed to execute their local business. Today there are over 2,000 State legislators performing what will, under the proposed system, require as few as 65 and no more than 500 Federal Representatives.

The proposed Congress will, by itself, handle all the United States' business. The State legislatures would then use only the time, and spend only the funds, required for local affairs. The savings may equal the cost of any additional operations the new system will create.

To conclude: The proposed Constitution will generate much lower expenses than many imagine, counterbalanced by considerable savings.

**Publius.**

## **FEDERALIST NO. 85**

# **Concluding Remarks Hamilton**

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

THERE REMAIN two points for discussion: (1) a comparison of the proposed government to our own New York State constitution, and (2) the additional security its

adoption will give republican government, liberty and property.

It is remarkable how closely the convention plan resembles our State constitution both as to supposed

defects and real excellences. Among the shared “defects” are the President’s re-electability, a lack of a Presidential advisory council, a formal bill of rights and a clause re freedom of the press. To be consistent, a man who rails at one must rail at the other. Indeed, there is no better proof of the insincerity of those who attack the plan furiously but ignore the same faults in New York government.

The new constitutional safeguards to republican government, liberty and property result mainly from its value in preserving the Union. These include:

- Restraining powerful, ambitious individuals from extorting or bribing enough power in their States to subjugate the people.
- Restricting opportunities to foreign intrigue that dissolution of the Union would invite and facilitate.
- Preventing extensive military establishments which would grow out of wars between our disunited States.
- A guaranteed republican form of government to each State.
- Absolutely excluding titles of nobility.
- Guarding against repetition of those State government practices that have undermined the foundations of property and credit, planted mutual distrust in all classes and have caused an almost total moral breakdown.

I have thus completed the task I assigned myself; how successfully, the citizens’ votes on ratification will determine. I have calmly addressed my arguments purely to the judgments of the Constitution’s opponents, studiously avoiding the harshness they employ. Their indiscriminate charge of a conspiracy against liberty is too wanton and malignant not to excite public indignation. The endless charges against the wealthy, the well-born, and the great have inspired the disgust of all sensible men. And their dishonest efforts to keep the truth from the public eye demand the condemnation of all honest men. These “influences” may have occasionally lured me into intemperate expressions which I did not intend.

Have I satisfactorily vindicated the proposed Constitution from the slander thrown on it and shown it to be worthy of public approval and necessary to public safety and prosperity? You must answer to yourself, according to your conscience and understanding, and then act on the genuine, sober dictates of your judgment. This is a duty you must meet. And in meeting it, avoid partisanship, reflect that on your decision depends the nation’s very existence. And remember that a majority of America has given its sanction to the plan which you are to approve or reject.

I am entirely confident in my arguments recommending the proposed system to your adoption, and I cannot discern any real force in those opposing it. I believe it is the best plan that our political situation, habits and opinions will accept, and superior to any the Revolution has produced.

Concessions on the part of the plan’s friends, that it cannot claim absolute perfection, have given its enemies an important weapon. “Why,” they say, “should we adopt an imperfect thing? Why not amend it and make it perfect before we irrevocably establish it?” In the first place, the concessions’ magnitude is greatly exaggerated. They do not admit that the plan is radically defective, or that only with material alterations can we safely confide the community’s rights and the interests to it. This perverts the meaning of those making the concessions. You cannot find

an advocate of the measure who will not declare that the system, though not perfect in every part, is, on the whole, a good one; is the best that the country’s present views and situation will permit, with every kind of security a reasonable people can desire.

Next ... I consider it extremely imprudent to prolong the precarious state of our national affairs by exposing the Union to the dangers of more experimentation in pursuit of a “perfect plan.” I never expect to see a perfect work from imperfect man. All collective deliberations must be an amalgam of the errors, prejudices, good sense and wisdom of the individuals who create them. The compacts which are to bind 13 distinct States in friendship and unity must be a compromise of 13 dissimilar interests. How can you make perfection from such imperfect ingredients?

No one should expect a new convention as favored by circumstances as the one just concluded.

There is, however, one remaining point to consider on the subject of amendments, which the public has not seen.

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*The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which in either case shall be valid to all intents and purposes as part of this Constitution, when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year 1808 shall in any manner affect the first and fourth clauses in the Ninth Section of the First Article; and that no State, without its consent shall be deprived of its equal suffrage in the State.*

Article V of the United States Constitution

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I believe that it will be far easier to pass future Constitutional amendments than to form the original document. The moment an alteration is made in the present plan, it becomes a new plan that must undergo a new approval process in every State. To establish it throughout the Union, will therefore require agreement by all the States. But if the States should ratify the proposed Constitution as it stands, amendments may be enacted by the vote of only nine States.

This is not all. Any “Constitution of the United States of America” will inevitably contain a wide variety of particulars that must accommodate the independent States’ interests and opinions. We may expect to see, in any body charged with forming it, very different combinations of the States lining up on different points. Many members of a majority on one issue may become the minority on a second; a totally different coalition might gather on a third. Hence the need to mold and arrange all the parts of the whole in a manner satisfactory to all the parties.

But every amendment, once established, would be a single proposition, brought forward singly. Then we would not need the same kind of giving and taking. The will of the required number of votes would quickly decide the issue. As a result, whenever three-fourths of the States unite on an amendment, it must take place. There is, therefore, no

comparison between the task of enacting an amendment and establishing a complete Constitution.

In opposing amendments, it is said that national government administrators will not willingly give up any of their authority. I am convinced that useful, well-considered amendments will apply, not to the mass of the government's powers, but to its organization and, on this basis, I see no validity in the above observation. I also believe that the intrinsic difficulty of governing 13 States will constantly force the national rulers to accommodate their constituents' reasonable expectations. Furthermore, the national administration, whenever three-fourths of the States agree, will have no choice but to comply. According to Article V, the Congress must, on application of two-thirds of the State legislatures call a convention to propose amendments, which will become part of the Constitution when ratified by three-fourths of the State legislatures or by conventions in three-fourths of the States. The words of this article are not debatable or discretionary: The Congress "shall call a convention." All argument about whether to do so then vanishes. But we can rely on the State legislatures to erect barriers against encroachments by the national government.

This is one of those rare instances when a political truth can be mathematically tested. Those who agree with me, however supportive of amendments they may be, must agree that previous adoption is the straightest road to their goal.

Pre-ratification zeal to amend the Constitution must fade before the truth of the following ingenious observations:

*To balance a large state or society whether monarchical or republican, on general laws, is a work of so great difficulty, that no human genius, however comprehensive, is able, by the mere dint of reason and reflection, to effect it. The judgments of many must unite in the work; experience must guide their labor; time must bring it to perfection, and the feeling of inconveniences must correct the mistakes which they inevitably fall into in their first trials and experiments.*

Therein is a lesson in moderation for sincere lovers of the Union, which should put them on guard against anarchy, civil war, perpetual alienation among the States and possible military despotism of a victorious demagogue as they pursue what only time and experience can give them. I may be wrong, but I cannot share the complacency of those who see as imaginary the dangers of continuing our present situation.

A nation without a national government, is, in my view, an awful spectacle. Establishing a Constitution, in time of profound peace, by the voluntary consent of a whole people, is a phenomenon, to the completion of which I look forward with trembling anxiety. I can reconcile with no rules of prudence to let go the hold we now have, in so arduous an enterprise, upon seven out of the 13 States, and after having passed over so considerable a part of the ground, to recommence the course. I dread more the consequences of new attempts because I know that powerful individuals in this and other States are enemies to a general national government in every possible shape.

**Publius.**