ADEF 2017-2018

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1. Separation of Powers & The American Revolution

1.1 Thomas Paine, Common Sense

About this Text

We tend to think of the separation of powers as a quintessentially American idea. In fact, though, not everyone embraced the idea a the time of the American Revolution. In this excerpt from *Common Sense*, Thomas Paine praises the virtue of simplicity in all things, including government. He argues accordingly for a simple government consisting of one legislative assembly that chooses a very limited number of what we might think of as executive officials. To this basic simplicity, Paine contrasts the complexity of the British constitution, which divides and separates power. The British may *claim* that this complexity protects liberty checking any tendency towards accumulating too much power in any one place, but Paine thinks otherwise.

Common Sense was published anonymously in January 1776. By then, open hostilities had been underway between colonists and the British army and Navy for nine months, since the battles of Lexington and Concord and the 'shot heard round the world' in April 1775. Many if not most colonists, though, had yet to embrace the idea of independence, with the Continental Congress still appealing to King George III to check what they described as an abusive Parliament. In *Common Sense*, Paine has plenty of criticism for Parliament, but he attacks George III as well. Indeed, he rejects the entire British Constitutional system.

Thomas Paine

excerpts from *Common Sense* (source)

OF THE ORIGIN AND DESIGN OF GOVERNMENT IN GENERAL,
WITH CONCISE REMARKS ON THE ENGLISH CONSTITUTION.

Some writers have so confounded society with government, as to leave little or no distinction between them; whereas they are not only different, but have different origins. Society is produced by our wants, and government by our wickedness; the former promotes our happiness positively by uniting our affections, the latter negatively by restraining our vices. The one encourages intercourse,

the other creates distinctions. The first a patron, the last a punisher.

Society in every state is a blessing, but government even in its best state is but a necessary evil; in its worst state an intolerable one; for when we suffer, or are exposed to the same miseries by a government, which we might expect in a country without government, our calamity is heightened by reflecting that we furnish the means by which we suffer. Government, like dress, is the badge of lost innocence; the palaces of kings are built on the ruins of the bowers of paradise. For were the impulses of conscience clear, uniform, and irresistibly obeyed, man would need no other lawgiver; but that not being the case, he finds it necessary to surrender up a part of his property to furnish means for the protection of the rest; and this he is induced to do by the same prudence which in every other case advises him out of two evils to choose the least. Wherefore, security being the true design and end of government, it unanswerably follows that whatever form thereof appears most likely to ensure it to us, with the least expence and greatest benefit, is preferable to all others.

"Society in every state is a blessing, but government even in its best state is but a necessary evil."

Stop & Think

Paine makes a great deal of the distinction between society and government, praising the former and calling the later a "necessary evil." *Does this distinction make sense today?*

In order to gain a clear and just idea of the design and end of government, let us suppose a small number of persons settled in some sequestered part of the earth, unconnected with the rest, they will then represent the first peopling of any country, or of the world. In this state of natural liberty, society will be their first thought. A thousand motives will excite them thereto, the strength of one man is so unequal to his wants, and his mind so unfitted for perpetual solitude, that he is soon obliged to seek assistance and relief of another, who in his turn requires the same. Four or five united would be able to raise a tolerable dwelling in the midst of a wilderness, but one man might labour out of the common period of life without accomplishing any thing; when he had felled his timber he could not remove it, nor erect it after it was removed; hunger in the mean time would urge him from his work, and every different want

call him a different way. Disease, nay even misfortune would be death, for though neither might be mortal, yet either would disable him from living, and reduce him to a state in which he might rather be said to perish than to die.

Thus necessity, like a gravitating power, would soon form our newly arrived emigrants into society, the reciprocal blessings of which, would supersede, and render the obligations of law and government unnecessary while they remained perfectly just to each other; but as nothing but heaven is impregnable to vice, it will unavoidably happen, that in proportion as they surmount the first difficulties of emigration, which bound them together in a common cause, they will begin to relax in their duty and attachment to each other; and this remissness, will point out the necessity, of establishing some form of government to supply the defect of moral virtue.

Some convenient tree will afford them a State-House, under the branches of which, the whole colony may assemble to deliberate on public matters. It is more than probable that their first laws will have the title only of Regulations, and be enforced by no other penalty than public disesteem. In this first parliament every man, by natural right, will have a seat.

But as the colony increases, the public concerns will increase likewise, and the distance at which the members may be separated, will render it too inconvenient for all of them to meet on every occasion as at first, when their number was small, their habitations near, and the public concerns few and trifling. This will point out the convenience of their consenting to leave the legislative part to be managed by a select number chosen from the whole body, who are supposed to have the same concerns at stake which those who appointed them, and who will act in the same manner as the whole body would act were they present. If the colony continue increasing, it will become necessary to augment the number of the representatives, and that the interest of every part of the colony may be attended to, it will be found best to divide the whole into convenient parts, each part sending its proper number; and that the elected might never form to themselves an interest separate from the electors, prudence will point out the propriety of having elections often; because as the elected might by that means return and mix again with the general body of the electors in a few months, their fidelity to the public will be secured by the prudent reflexion of not making a rod for themselves. And as this frequent interchange will establish a common interest with every part of the community,

they will mutually and naturally support each other, and on this (not on the unmeaning name of king) depends the strength of government, and the happiness of the governed.

Here then is the origin and rise of government; namely, a mode rendered necessary by the inability of moral virtue to govern the world; here too is the design and end of government, viz. freedom and security. And however our eyes may be dazzled with show, or our ears deceived by sound; however prejudice may warp our wills, or interest darken our understanding, the simple voice of nature and of reason will say, it is right.

I draw my idea of the form of government from a principle in nature, which no art can overturn, viz. that the more simple any thing is, the less liable it is to be disordered;

"the more simple any thing is, the less liable it is to be disordered"

and the easier repaired when disordered; and with this maxim in view, I offer a few remarks on the so much boasted constitution of England. That it was noble for the dark and slavish times in which it was erected, is granted. When the world was over run with tyranny the least remove therefrom was a glorious rescue. But that it is imperfect, subject to convulsions, and incapable of producing what it seems to promise, is easily demonstrated.

Absolute governments (tho' the disgrace of human nature) have this advantage with them, that they are simple; if the people suffer, they know the head from which their suffering springs, know likewise the remedy, and are not bewildered by a variety of causes and cures. But the constitution of England is so exceedingly complex, that the nation may suffer for years together without being able to discover in which part the fault lies, some will say in one and some in another, and every political physician will advise a different medicine.

Stop & Think

Notice that pain praises simplicity in general while acknowledging that absolute governments are themselves simple. *Do you think he would prefer the the simplicity of an absolute government to the complexity of the English government? Why or why not?*

I know it is difficult to get over local or long standing prejudices, yet if we will suffer ourselves to examine the component parts of the English constitution, we shall find them to be the base remains

of two ancient tyrannies, compounded with some new republican materials.

First.–The remains of monarchical tyranny in the person of the king.

Secondly.–The remains of aristocratical tyranny in the persons of the peers.

Thirdly.–The new republican materials, in the persons of the commons, on whose virtue depends the freedom of England.

The two first, by being hereditary, are independent of the people; wherefore in a constitutional sense they contribute nothing towards the freedom of the state.

To say that the constitution of England is a union of three powers reciprocally checking each other, is farcical, either the words have no meaning, or they are flat contradictions.

To say that the commons is a check upon the king, presupposes two things:

First.–That the king is not to be trusted without being looked after, or in other words, that a thirst for absolute power is the natural disease of monarchy.

Secondly.–That the commons, by being appointed for that purpose, are either wiser or more worthy of confidence than the crown.

But as the same constitution which gives the commons a power to check the king by withholding the supplies, gives afterwards the king a power to check the commons, by empowering him to reject their other bills; it again supposes that the king is wiser than those whom it has already supposed to be wiser than him. A mere absurdity!

There is something exceedingly ridiculous in the composition of monarchy; it first excludes a man from the means of information, yet empowers him to act in cases where the highest judgment is required. The state of a king shuts him from the world, yet the business of a king requires him to know it thoroughly; wherefore the different parts, by unnaturally opposing and destroying each other, prove the whole character to be absurd and useless.

Some writers have explained the English constitution thus; the king, say they, is one, the people another; the peers are an house in behalf of the king; the commons in behalf of the people; but this hath all the distinctions of a house divided against itself; and

though the expressions be pleasantly arranged, yet when examined they appear idle and ambiguous; and it will always happen, that the nicest construction that words are capable of, when applied to the description of some thing which either cannot exist, or is too incomprehensible to be within the compass of description, will be words of sound only, and though they may amuse the ear, they cannot inform the mind, for this explanation includes a previous question, viz. How came the king by a power which the people are afraid to trust, and always obliged to check? Such a power could not be the gift of a wise people, neither can any power, which needs checking, be from God; yet the provision, which the constitution makes, supposes such a power to exist.

But the provision is unequal to the task; the means either cannot or will not accomplish the end, and the whole affair is a felo de se; for as the greater weight will always carry up the less, and as all the wheels of a machine are put in motion by one, it only remains to know which power in the constitution has the most weight, for that will govern; and though the others, or a part of them, may clog, or, as the phrase is, check the rapidity of its motion, yet so long as they cannot stop it, their endeavors will be ineffectual; the first moving power will at last have its way, and what it wants in speed is supplied by time.

That the crown is this overbearing part in the English constitution needs not be mentioned, and that it derives its whole consequence merely from being the giver of places and pensions is self-evident, wherefore, though we have been wise enough to shut and lock a door against absolute monarchy, we at the same time have been foolish enough to put the crown in possession of the key.

The prejudice of Englishmen, in favour of their own government by king, lords and commons, arises as much or more from national pride than reason. Individuals are undoubtedly safer in England than in some other countries, but the will of the king is as much the law of the land in Britain as in France, with this difference, that instead of proceeding directly from his mouth, it is handed to the people under the more formidable shape of an act of parliament. For the fate of Charles the first, hath only made kings more subtle–not more just.

Wherefore, laying aside all national pride and prejudice in favour of modes and forms, the plain truth is, that it is wholly owing to the constitution of the people, and not to the constitution of the

government that the crown is not as oppressive in England as in Turkey.

An inquiry into the constitutional errors in the English form of
government is at this time highly necessary, for as we are never in
a proper condition of doing justice to others, while we continue
under the influence of some leading partiality, so neither are we
capable of doing it to ourselves while we remain fettered by any obstinate prejudice. And as a man, who is attached to a prostitute, is unfitted to choose or judge of a wife, so any prepossession in favour of a rotten constitution of government will disable us from discerning a good one.

"... it is wholly owing to the constitution of the people, and not to the constitution of the government that the crown is not as oppressive in England as in Turkey."

Stop & Think

Paine argues that the "constitution of the people" of England saves them from the oppression that the "Constitutional errors in the English form of government" would allow or at least not prevent. *What do you think he means by the 'constitution of the people?' Does the constitution of the people exist prior to and separate from the form of government? Does this distinction between the constitution of the people and the constitution of the form of government make sense in the United States today?*

1.2 John Adams, Thoughts on Government

About This Text

John Adams wrote *Thought on Government* in 1776, while serving in the Continental Congress. Like Paine, Adams was a strong advocate for independence. Unlike Paine, Adams found much to admire in the British constitution, including the kind of "complexity" derided by Paine. This difference is on display in the excerpts below, as Adams adamantly rejects a single legislative assembly as dangerous to liberty and virtue. Adams isn't just making a theoretical point here. He wrote *Thoughts on Government* as part of his response requests from multiple colonies for his advice about constitution writing. Independence, after all, meant more than breaking away from Britain. It also meant forming new governments for what would become the American states. Adams–and many of his colleagues–considered this work every bit as important as writing the *Declaration.* In *Thoughts on Government*, Adams begins by asserting that only a republican form of government will do, then argues that in a proper republican government, power must be divided among different institutions or else the people "cannot be long free."

John Adams

excerpts from *Thoughts on Government* (source)

As good government, is an empire of laws, how shall your laws be made? In a large society, inhabiting an extensive country, it is impossible that the whole should assemble, to make laws: The first necessary step then, is, to depute power from the many, to a few of the most wise and good. But by what rules shall you chuse your Representatives? Agree upon the number and qualifications of persons, who shall have the benefit of choosing, or annex this priviledge to the inhabitants of a certain extent of ground.

The principal difficulty lies, and the greatest care should be employed in constituting this Representative Assembly. It should be in miniature, an exact portrait of the people at large. It should think, feel, reason, and act like them. That it may be the interest of this Assembly to do strict justice at all times, it should be an equal representation, or in other words equal interest among the people should have equal interest in it. Great care should be taken to effect this, and to prevent unfair, partial, and corrupt elections. Such regulations, however, may be better made in times of greater tranquility than the present, and they will spring up of themselves naturally, when all the powers of government come to be in the hands of the people's friends. At present it will be safest to proceed in all established modes to which the people have been familiarised by habit.

A representation of the people in one assembly being obtained, a question arises whether all the powers of government, legislative, executive, and judicial, shall be left in this body? I think a people cannot be long free, nor ever happy, whose government is in one Assembly.
My reasons for this opinion are as follow.

"I think a people cannot be long free, nor ever happy, whose government is in one Assembly."

1. A single Assembly is liable to all the vices, follies and frailties of an individual. Subject to fits of humour, starts of passion, flights of enthusiasm, partialities of prejudice, and consequently productive of hasty results and absurd judgments: And all these errors ought to be corrected and defects supplied by some controuling power.

2. A single Assembly is apt to be avaricious, and in time will not scruple to exempt itself from burthens which it will lay, without compunction, on its constituents.

3. A single Assembly is apt to grow ambitious, and after a time will not hesitate to vote itself perpetual. This was one fault of the long parliament, but more remarkably of Holland, whose Assembly first voted themselves from annual to septennial, then for life, and after a course of years, that all vacancies happening by death, or otherwise, should be filled by themselves, without any application to constituents at all.

4. A Representative Assembly, altho' extremely well qualified, and absolutely necessary as a branch of the legislature, is unfit to exercise the executive power, for want of two essential properties, secrecy and dispatch.

5. A Representative Assembly is still less qualified for the judicial power; because it is too numerous, too slow, and too little skilled in the laws.

6. Because a single Assembly, possessed of all the powers of government, would make arbitrary laws for their own interest, execute all laws arbitrarily for their own interest, and adjudge all controversies in their own favour.

But shall the whole power of legislation rest in one Assembly? Most of the foregoing reasons apply equally to prove that

"the legislative power ought to be more complex"

the legislative power ought to be more complex–to which we may add, that if the legislative power is wholly in one Assembly, and the executive in another, or in a single person, these two powers will oppose and enervate upon each other, until the contest shall end in war, and the whole power, legislative and executive, be usurped by the strongest.

Stop & Think

Notice that in the preceding paragraph Adams explicitly embraces greater complexity. *How do you think Paine, with this professed love of simplicity, might respond to the particular points Adams makes against a simple single assembly?*

The judicial power, in such case, could not mediate, or hold the balance between the two contending powers,

because the legislative would undermine it. And this shews the necessity too, of giving the executive power a negative upon the legislative, otherwise this will be continually encroaching upon that.

To avoid these dangers let a [distinct] Assembly be constituted, as a mediator between the two extreme branches of the legislature, that which represents the people and that which is vested with the executive power.

Let the Representative Assembly then elect by ballot, from among themselves or their constituents, or both, a distinct Assembly, which for the sake of perspicuity we will call a Council. It may consist of any number you please, say twenty or thirty, and should have a free and independent exercise of its judgment, and consequently a negative voice in the legislature.

These two bodies thus constituted, and made integral parts of the legislature, let them unite, and by joint ballot choose a Governor, who, after being stripped of most of those badges of domination called prerogatives, should have a free and independent exercise of his judgment, and be made also an integral part of the legislature. This I know is liable to objections, and if you please you may make him only President of the Council, as in Connecticut: But as the Governor is to be invested with the executive power, with consent of Council, I think he ought to have a negative upon the legislative. If he is annually elective, as he ought to be, he will always have so much reverence and affection for the People, their Representatives and Councillors, that although you give him an independent exercise of his judgment, he will seldom use it in opposition to the two Houses, except in cases the public utility of which would be conspicuous, and some such cases would happen.

In the present exigency of American affairs, when by an act of Parliament we are put out of the royal protection, and consequently discharged from our allegiance; and it has become necessary to assume government for our immediate security, the Governor, Lieutenant-Governor, Secretary, Treasurer, Commissary, Attorney-General, should be chosen by joint Ballot, of both Houses. And these and all other elections, especially of Representatives, and Councillors, should be annual, there not being in the whole circle of the sciences, a maxim more infallible than this, “Where annual elections end, there slavery begins.”

These great men, in this respect, should be, once a year

“Like bubbles on the sea of matter borne, They rise, they break, and to that sea return.”

This will teach them the great political virtues of humility, patience, and moderation, without which every man in power becomes a ravenous beast of prey.

This mode of constituting the great offices of state will answer very well for the present, but if, by experiment, it should be found inconvenient, the legislature may at its leisure devise other methods of creating them, by elections of the people at large, as in Connecticut, or it may enlarge the term for which they shall be chosen to seven years, or three years, or for life, or make any other alterations which the society shall find productive of its ease, its safety, its freedom, or in one word, its happiness.

A rotation of all offices, as well as of Representatives and Councillors, has many advocates, and is contended for with many plausible arguments.

It would be attended no doubt with many advantages, if the society has a sufficient number of suitable characters to supply the great number of vacancies which would be made by such a rotation, I can see no objection

“A rotation of all offices, as well as of

to it. These persons may be allowed to serve for three years, and then excluded three years, or for any longer or shorter term.

Representatives and Councillors, has many advocates, and is contended for with many plausible arguments."

Stop & Think

Adams here calls for a "rotation in offices," to be produced by annual elections and a kind of term limits. *How do these proposed institutional arrangements for electing government officials relate to the general idea of separation of powers? If power is sufficiently separated inside the government, why would we need to worry so much about how officials are chosen to serve in that government?*

Any seven or nine of the legislative Council may be made a Quorum, for doing business as a Privy Council, to advise the Governor in the exercise of the executive branch of power, and in all acts of state.

The Governor should have the command of the militia, and of all your armies. The power of pardons should be with the Governor and Council.

Judges, Justices and all other officers, civil and military, should be nominated and appointed by the Governor, with the advice and consent of Council, unless you choose to have a government more popular; if you do, all officers, civil and military, may be chosen by joint ballot of both Houses, or in order to preserve the independence and importance of each House, by ballot of one House, concurred by the other. Sheriffs should be chosen by the freeholders of counties–so should Registers of Deeds and Clerks of Counties.

All officers should have commissions, under the hand of the Governor and seal of the Colony.

The dignity and stability of government in all its branches, the morals of the people and every blessing of society, depends so much upon an upright and skillful administration of justice, that the judicial power ought to be distinct from both the legislative and executive, and independent upon both, that so it may be a check upon both, as both should be checks upon that. The Judges therefore should always be men of learning and experience in the laws, of exemplary morals, great patience, calmness, coolness and attention. Their minds should not be distracted with jarring interests; they should not be dependant upon any man or body of men. To these ends they should hold estates for life in their offices, or in other words their commissions should be during good behaviour, and their salaries ascertained and established by law. For misbehaviour the grand inquest of the Colony, the House of Representatives, should impeach them before the Governor and Council, where they should have time and opportunity to make their defence, but if convicted should be removed from their offices, and subjected to such other punishment as shall be thought proper.

2. Harmony and Division in Ancient Greek Thought

2.1 Plato, Republic

About This Text

Though more formal theorizing about the separation of executive, legislative and judicial powers will emerge in early modern European thought, questions about harmony, unity and division in political life go back to ancient Athens in the 5th century B.C.E. Here, then, we turn to excerpts from Plato's *Republic*. The *Republic* reports a conversation between Socrates and several of his young followers (including Plato's brothers) as the group searches for an understanding of justice. To understand justice in the individual soul, Socrates argues, we must first understand justice in the city. In the passage below, Socrates describes justice as a proper ordering of the city, in which every group in the city performs its proper task and only its proper task. Plato, that is, sees justice as involving a division of civic and political labor. Note, though, that far from involving conflict or competition, this kind of division produces perfect harmony in the just city.

Plato

excerpts from *Republic* (source)

Translated by Benjamin Jowett

Book IV

Why, my good sir, at the beginning of our enquiry, ages ago, there was justice tumbling out at our feet, and we never saw her; nothing could be more ridiculous. Like people who go about looking for what they have in their hands—that was the way with us—we looked not at what we were seeking, but at what was far off in the distance; and therefore, I suppose, we missed her.

What do you mean?

I mean to say that in reality for a long time past we have been talking of justice, and have failed to recognise her.

I grow impatient at the length of your exordium.

Well then, tell me, I said, whether I am right or not: You remember the original principle which we were always laying down at the foundation of the State,

“one man should practise one thing only, the thing to which his nature was best adapted”

that one man should practise one thing only, the thing to which his nature was best adapted;—now justice is this principle or a part of it.

Yes, we often said that one man should do one thing only.

Quick Explainer

Plato here reminds the reader that early in the process of describing the perfectly good and just city, Socrates and his friends had introduced the ideas of division of labor and specializations. What started as a way to ensure that the city had all the material goods it required now becomes the foundation of justice in the city.

Further, we affirmed that justice was doing one’s own business, and not being a busybody; we said so again and again, and many others have said the same to us.

Yes, we said so.

Then to do one’s own business in a certain way may be assumed to be justice. Can you tell me whence I derive this inference?

I cannot, but I should like to be told.

Because I think that this is the only virtue which remains in the State when the other virtues of temperance and courage and wisdom are abstracted; and, that this is the ultimate cause and condition of the existence of all of them, and while remaining in them is also their preservative; and we were saying that if the three were discovered by us, justice would be the fourth or remaining one.

That follows of necessity.

If we are asked to determine which of these four qualities by its presence contributes most to the excellence of the State, whether the agreement of rulers and subjects, or the preservation in the soldiers of the opinion which the law ordains about the true nature of dangers, or wisdom and watchfulness in the rulers, or whether this other which I am mentioning, and which is found in children and women, slave and freeman, artisan, ruler, subject,—the quality, I mean, of every one doing his own work, and not being a busybody, would claim the palm—the question is not so easily answered.

Certainly, he replied, there would be a difficulty in saying which.

Then the power of each individual in the State to do his own work appears to compete with the other political virtues, wisdom, temperance, courage.

Yes, he said.

And the virtue which enters into this competition is justice?

Exactly.

Let us look at the question from another point of view: Are not the rulers in a State those to whom you would entrust the office of determining suits at law?

Certainly.

And are suits decided on any other ground but that a man may neither take what is another's, nor be deprived of what is his own?

Yes; that is their principle.

Which is a just principle?

Yes.

Then on this view also justice will be admitted to be the having and doing what is a man's own, and belongs to him?

Very true.

"Then on this view also justice will be admitted to be the having and doing what is a man's own, and belongs to him?"

Think, now, and say whether you agree with me or not. Suppose a carpenter to be doing the business of a cobbler, or a cobbler of a carpenter; and suppose them to exchange their implements or their duties, or the same person to be doing the work of both, or whatever be the change; do you think that any great harm would result to the State?

Not much.

But when the cobbler or any other man whom nature designed to be a trader, having his heart lifted up by wealth or strength or the number of his followers, or any like advantage, attempts to force his way into the class of warriors, or a warrior into that of legislators and guardians, for which he is unfitted, and either to take the implements or the duties of the other; or when one man is trader, legislator, and warrior all in one, then I think you will agree with me in saying that this interchange and this meddling of one with another is the ruin of the State.

Most true.

Seeing then, I said, that there are three distinct classes, any meddling of one with another, or the change of one into another, is the greatest harm to the State, and may be most justly termed evil-doing?

Precisely.

And the greatest degree of evil-doing to one's own city would be termed by you injustice?

Certainly.

"when the trader, the auxiliary, and the guardian each do their own business, that is justice, and will make the city just"

This then is injustice; and on the other hand when the trader, the auxiliary, and the guardian each do their own business, that is justice, and will make the city just.

I agree with you.

Stop & Think

Plato argues here that varying human abilities and talents require a sharp division of labor, not only economically but socially and politically as well. To stray from this proper division of labor would be unjust. *What do you think is the strongest counterargument to the claims Plato makes about justice in the passage? What assumptions about human nature does Plato make and how might a critic of Plato's respond? What might be an argument for justice that rejects a social and political division of labor?*

2.2 Aristotle, Politics

About This Text

Aristotle, Plato's most famous student, agreed with his teacher on many things. In general, though, Aristotle's surviving works demonstrate a greater willingness to engage with the messy realities of politics of the world around us. This is certainly true if we compare Aristotle's *Politics* to Plato's *Republic*. Where Plato devotes nearly all his energy to describing the perfectly just soul and city, Aristotle offers a nuanced exploration of the actually existing types of regimes. In the excerpt below, Aristotle does turn to consider the question of the best possible type of regime, but notice that he does so with one foot still rooted firmly in empirical reality. Most notably, he begins by positing the unavoidable presence of socioeconomic and so political divisions between the rich, the poor, and those who fall in "the mean." As you read, pay particular attention to the role these divisions play in Aristotle's arguments about oligarchy and democracy, and think about how Aristotle's analysis of political conflict might relate to (and differ from) the idea of separation of powers.

Aristotle

excerpts from *Politics* (source)

Translated by Benjamin Jowett

Book IV, Chapter XI

We have now to inquire what is the best constitution for most states, and the best life for most men, neither assuming a standard of virtue which is above ordinary persons, nor an education which is exceptionally favored by nature and circumstances, nor yet an ideal state which is an aspiration only, but having regard to the life in which the majority are able to share, and to the form of government which states in general can attain. As to those aristocracies, as they are called, of which we were just now speaking, they either lie beyond the possibilities of the greater number of states, or they approximate to the so-called constitutional government, and therefore need no separate discussion. And in fact the conclusion at which we arrive respecting all these forms rests upon the same

grounds. For if what was said in the Ethics is true, that the happy life is the life according to virtue lived without impediment, and that virtue is a mean, then

the life which is in a mean, and in a mean attainable by every one, must be the best. And the same principles of virtue and vice are characteristic of cities and of constitutions; for the constitution is in a figure the life of the city.

"the life which is in a mean, and in a mean attainable by every one, must be the best"

Quick Explainer

In the *Nicomachean Ethics*, Aristotle lays out his understanding of virtue as a mean between extremes. The virtue of moderation is particularly central to his argument. Broadly speaking, moderation in anything (eating, say) falls between the extremes of 'too little' and 'too much.' All the moral virtues, according to Aristotle, take this basic form. Thus courage is a mean between rashness and cowardice. Aristotle now brings this thinking about the mean to his examination of the best form of regime.

Now in all states there are three elements: one class is very rich, another very poor, and a third in a mean. It is admitted that moderation and the mean are best, and therefore it will clearly be best to possess the gifts of fortune in moderation; for in that condition of life men are most ready to follow rational principle. But he who greatly excels in beauty, strength, birth, or wealth, or on the other hand who is very poor, or very weak, or very much disgraced, finds it difficult to follow rational principle. Of these two the one sort grow into violent and great criminals, the others into rogues and petty rascals. And two sorts of offenses correspond to them, the one committed from violence, the other from roguery. Again, the middle class is least likely to shrink from rule, or to be over-ambitious for it; both of which are injuries to the state. Again, those who have too much of the goods of fortune, strength, wealth, friends, and the like, are neither willing nor able to submit to authority. The evil begins at home; for when they are boys, by reason of the luxury in which they are brought up, they never learn, even at school, the habit of obedience. On the other hand, the very poor, who are in the opposite extreme, are too degraded. So that the one class cannot obey, and can only rule despotically; the other knows not how to command and must be ruled like slaves. Thus arises a city, not of freemen, but of masters and slaves, the one despising, the other envying; and nothing can be more fatal to friendship and good fellowship in states than this: for good fellowship springs from friendship; when men are at enmity with one another, they would rather not even share the same path. But a city ought to be composed, as far as possible, of equals and similars; and these are generally the middle classes.

Wherefore the city which is composed of middle-class citizens is necessarily best constituted in respect of the elements of which we say the fabric of the state naturally consists. And this is the class of citizens which is most secure in a state, for they do not, like the poor, covet their neighbors' goods; nor do others covet theirs, as the poor covet the goods of the rich;and as they neither plot against others, nor are themselves plotted against, they pass through life safely. Wisely then did Phocylides pray- 'Many things are best in the mean; I desire to be of a middle condition in my city.'

"the city which is composed of middle-class citizens is necessarily best constituted"

Stop & Think

Aristotle starts from the assumption that there will always be some citizens who are very rich and some who are very poor. *Do you think this is a reasonable assumption to make? Why or why not?*

Thus it is manifest that the best political community is formed by citizens of the middle class, and that those states are likely to be well-administered in which the middle class is large, and stronger if possible than both the other classes, or at any rate than either singly; for the addition of the middle class turns the scale, and prevents either of the extremes from being dominant. Great then is the good fortune of a state in which the citizens have a moderate and sufficient property; for where some possess much, and the others nothing, there may arise an extreme democracy, or a pure oligarchy; or a tyranny may grow out of either extreme- either out of the most rampant democracy, or out of an oligarchy; but it is not so likely to arise out of the middle constitutions and those akin to them. I will explain the reason of this hereafter, when I speak of the revolutions of states. The mean condition of states is clearly best, for no other is free from faction; and where the middle class is large, there are least likely to be factions and dissensions. For a similar reason large states are less liable to faction than small ones, because in them the middle class is large; whereas in small states it is easy to divide all the citizens into two classes who are either rich or poor, and to leave nothing in the middle. And democracies are safer and more permanent than oligarchies, because they have a middle class which is more numerous and has a greater share in the government; for when there is no middle class, and the poor greatly exceed in number, troubles arise, and the state soon comes to an end. A proof of the superiority of the middle dass is that the best legislators have been of a middle condition; for example, Solon, as his own verses testify; and Lycurgus, for he was not a king; and Charondas, and almost all legislators.

Stop & Think

There is a great deal of talk about the middle class in the contemporary United States. In surveys, most people describe themselves as belonging to the middle class, and political rhetoric is full of praise for the middle class. *How do contemporary discussions of the middle class compare to the way in which Aristotle describes the middle class?*

These considerations will help us to understand why most governments are either democratical or oligarchical. The reason is that the middle class is seldom numerous in them, and whichever party, whether the rich or the common people, transgresses the mean and predominates, draws the constitution its own way,

"the middle class is seldom numerous … and whichever party, whether the rich or the common people, transgresses the mean and predominates, draws the constitution its own way"

and thus arises either oligarchy or democracy. There is another reason- the poor and the rich quarrel with one another, and whichever side gets the better, instead of establishing a just or popular government, regards political supremacy as the prize of victory, and the one party sets up a democracy and the other an oligarchy. Further, both the parties which had the supremacy in Hellas looked only to the interest of their own form of

government, and established in states, the one, democracies, and the other, oligarchies; they thought of their own advantage, of the public not at all. For these reasons the middle form of government has rarely, if ever, existed, and among a very few only. One man alone of all who ever ruled in Hellas was induced to give this middle constitution to states. But it has now become a habit among the citizens of states, not even to care about equality; all men are seeking for dominion, or, if conquered, are willing to submit.

What then is the best form of government, and what makes it the best, is evident; and of other constitutions, since we say that there are many kinds of democracy and many of oligarchy, it is not difficult to see which has the first and which the second or any other place in the order of excellence, now that we have determined which is the best. For that which is nearest to the best must of necessity be better, and that which is furthest from it worse, if we are judging absolutely and not relatively to given conditions: I say 'relatively to given conditions,' since a particular government may be preferable, but another form may be better for some people.

Stop & Think

Consider what Plato and Aristotle have to say about divisions of various sorts in the city. *Recalling Paine and Adams, do Plato and Aristotle fall closer to Paine's praise for "simplicity" or Adams embrace of "complexity?*

3. Unity and Faction in the Republican Tradition

3.1 Machiavelli, Discourses

About this Text

In *Thoughts on Government*, from which we previously had an excerpt, John Adams firmly asserts that the only good government is *republican* government. In 1776, that was in some ways still a controversial position; by 1787–when the U.S. Constitution was written–it was taken for granted by most Americans. The word "republic" comes form the Latin *res publica*, meaning "the public thing" (thought some scholars trace the roots of republicanism to Greece and Aristotle). Theorists in the republican tradition of political thought thus argued that politics was about creating, nurturing and protecting that which held the citizens together as a public or community. We generally think of republicans, that is, as concerned first and foremost with the common good. In that context, classical republicans most often described division or "faction" in the body politic as a threat to civic harmony and so to the common good. By contrast, in the excerpts below, Machiavelli argues that factional division is in fact necessary to republican liberty–or at least that it was in Rome.

Machiavelli

excerpts from *Discourses on Livy* **(source)**

BOOK I, CHAPTER IV: THAT DISUNION OF THE PLEBS AND THE ROMAN SENATE MADE THAT REPUBLIC FREE AND POWERFUL

I do not want to miss discoursing on these tumults that occurred in Rome from the death of the Tarquins to the creation of the Tribunes; and afterwards I will discourse on some things contrary to the opinions of many who say that Rome was a tumultuous Republic and full of so much confusion, that if good fortune and military virtu had not supplied her defects, she would have been inferior to every other Republic.

"Rome was a tumultuous Republic"

I cannot deny that fortune and the military were the causes of the Roman Empire; but it indeed seems to me that this would not happen except when military discipline is good, it happens that where order is good, (and) only rarely there may not be good fortune accompanying. But let us come to the other particulars of that City. I say that those who condemn the tumults between the nobles and the plebs, appear to me to blame those things that

were the chief causes for keeping Rome free, and that they paid more attention to the noises and shouts that arose in those tumults than to the good effects they brought forth, and that they did not consider that in every Republic there are two different viewpoints, that of the People and that of the Nobles; and that all the laws that are made in favor of liberty result from their disunion, as may easily be seen to have happened in Rome, for from Tarquin to the Gracchi which was more than three hundred years, the tumults of Rome rarely brought forth exiles, and more rarely blood. Nor is it possible therefore to judge these tumults harmful, nor divisive to a Republic, which in so great a time sent into exile no more than eight or ten of its citizens because of its differences, and put to death only a few, and condemned in money (fined) not very many: nor can a Republic in any way with reason be called disordered where there are so many examples of virtu, for good examples result from good education, good education from good laws, and good laws from those tumults which many inconsiderately condemn; for he who examines well the result of these, will not find that they have brought forth any exile or violence prejudicial to the common good, but laws and institutions in benefit of public liberty. And if anyone should say the means were extraordinary and almost savage, he will see the People together shouting against the Senate, The Senate against the People, running tumultuously throughout the streets, locking their stores, all the Plebs departing from Rome, all of which (things) alarm only those who read of them; I say, that every City ought to have their own means with which its People can give vent to their ambitions,

"every City ought to have their own means with which its People can give vent to their ambitions"

and especially those Cities which in important matters, want to avail themselves of the People; among which the City of Rome had this method, that when those people wanted to obtain a law, either they did some of the things mentioned before or they would not enroll their names to go to war, so that to placate them it was necessary (for the Senate) in some part to satisfy them: and the desires of a free people rarely are pernicious to liberty, because they arise either from being oppressed or from the suspicion of going to be oppressed. And it these opinions should be false, there is the remedy of haranguing (public assembly), where some upright man springs up who through oratory shows them that they deceive themselves; and the people (as Tullius Cicero says) although they are ignorant, are capable of (appreciating) the truth, and easily give in when the truth is given to them by a trustworthy man.

Stop & Think

Consider how Machiavelli understands the relationship between the people and the nobles in Rome in the context of what Plato and Aristotle have to say about divisions within the city. *Why does Machiavelli think it is both necessary and desirable to have divisions and 'tumult?' How would Plato and Aristotle respond?*

One ought therefore to be more sparing in blaming the Roman government, and to consider that so many good effects which came from that Republic, were not caused except for the best of reasons: And if the tumults were the cause of creation of Tribunes, they merit the highest praise, for in addition to giving the people a part in administration, they were established for guarding Roman liberty, as will be shown in the next chapter.

3.2 Rousseau, On Social Contract

About This Text

Like most in the republican tradition, and unlike Machiavelli, Rousseau argued that factional conflict was dangerous to a republic. In *On Social Contract,* Rousseau argues that to be legitimate political power must be exercised in accord with the general will, which we might think of as analogous to the common good or "public thing." The general will comes into being when individuals form a community, and the general will is expressed by the people gathered in a deliberative assembly. In the passage below, Rousseau argues that the general will is "indivisible." To imagine the general will divided among different individuals or groups is to imagine it as something other than truly *general*. Far from preserving the republic, as Machiavelli argued, divisions or factions destroy the general will and so destroy the republic itself. Machiavelli and Rousseau, then, offer two different republican visions, one which welcomes division or faction, one which portrays division or faction as an existential threat. In the American context, Madison's argument in *Federalist #10* that factions are dangerous but unavoidable forms part of the backdrop to his particular version of the separation of powers.

Rousseau

excerpts from *On Social Contract* (source)

Translated by C.D.H. Cole

BOOK II

1. THAT SOVEREIGNTY IS INALIENABLE

THE first and most important deduction from the principles we have so far laid down is that the general will alone can direct the State according to the object for which it was instituted, i.e., the common good: for if the clashing of particular interests made the establishment of societies necessary, the agreement of these very interests made it possible. The common element in these different interests is what forms the social tie; and, were there no point of agreement between them all, no society could exist. It is solely on the basis of this common interest that every society should be governed.

I hold then that Sovereignty, being nothing less than the exercise of the general will, can never be alienated, and that the Sovereign, who is no less than a collective being, cannot be represented except by himself: the power indeed may be transmitted, but not the will.

"the Sovereign … cannot be represented except by himself"

Stop & Think

The *Declaration of Independence* says that certain rights are "inalienable," meaning that they cannot be given away by or taken away from individuals. *What do you think Rousseau means when he says that the Sovereignty cannot be alienated? How does this inalienability of the general will relate to the fact that it cannot be "represented?*

In reality, if it is not impossible for a particular will to agree on some point with the general will, it is at least impossible for the agreement to be lasting and constant; for the particular will tends, by its very nature, to partiality, while the general will tends to equality. It is even more impossible to have any guarantee of this agreement; for even if it should always exist, it would be the effect not of art, but of chance. The Sovereign may indeed say: "I now will actually what this man wills, or at least what he says he wills"; but it cannot say: "What he wills tomorrow, I too shall will" because it is absurd for the will to bind itself for the future, nor is it incumbent on any will to consent to anything that is not for the good of the being who wills. If then the people promises simply to obey, by that very act it dissolves itself and loses what makes it a people; the moment a master exists, there is no longer a Sovereign, and from that moment the body politic has ceased to exist.

This does not mean that the commands of the rulers cannot pass for general wills, so long as the Sovereign, being free to oppose them, offers no opposition. In such a case, universal silence is taken to imply the consent of the people. This will be explained later on.

2. THAT SOVEREIGNTY IS INDIVISIBLE

SOVEREIGNTY, for the same reason as makes it inalienable, is indivisible; for will either is, or is not, general; it is the will either of the body of the people, or only of a part of it. In the first case, the will, when declared, is an act of Sovereignty and constitutes law: in the second, it is merely a particular will, or act of magistracy — at the most a decree.

But our political theorists, unable to divide Sovereignty in principle, divide it according to its object: into force and will; into legislative power and executive power; into rights of taxation, justice and war; into internal administration and power of foreign treaty. Sometimes they confuse all these sections, and sometimes they distinguish them; they turn the Sovereign into a fantastic being composed of several connected pieces: it is as if they were making man of several bodies, one with eyes, one with arms, another with feet, and each with nothing besides. We are told that the jugglers of Japan dismember a child before the eyes of the spectators; then they throw all the members into the air one after another, and the child falls down alive and whole. The conjuring tricks of our political theorists are very like that; they first dismember the Body politic by an illusion worthy of a fair, and then join it together again we know not how.

This error is due to a lack of exact notions concerning the Sovereign authority, and to taking for parts of it what

are only emanations from it. Thus, for example, the acts of declaring war and making peace have been regarded as acts of Sovereignty; but this is not the case, as these acts do not constitute law, but merely the application of a law, a particular act which decides how the law applies, as we shall see clearly when the idea attached to the word law has been defined.

"whenever Sovereignty seems to be divided, there is an illusion"

If we examined the other divisions in the same manner, we should find that, whenever Sovereignty seems to be divided, there is an illusion: the rights which are taken as being part of Sovereignty are really all subordinate, and always imply supreme wills of which they only sanction the execution.

Stop & Think

Suppose Rousseau were to study the political system of the United States by carefully reading the U.S. Constitution. *Where would Rousseau say sovereignty should be located in the U.S.? Where would he say it is in fact located? Would he critique the Constitution for trying to divide sovereignty?*

4. The English Context

4.1 Hobbes, Leviathan

About This Text

Thomas Hobbes lived through the English Civil War. The long and bloody struggle between the parliament and crown motivated and shaped his political ideas. In *Leviathan,* Hobbes famously imagines human beings in a state of nature where life is "solitary, poor, nasty, brutish and short." People will, Hobbes argues, quickly flee such a terrible condition, creating for their own protection a mighty Sovereign. If it is to save human beings from their own nature, the sovereign must have nearly total power, must never be question and, Hobbes argues in the passage below, must possess "indivisible" rights. Hobbes, that is to say, is no fan of the idea of separated political powers.

Hobbes

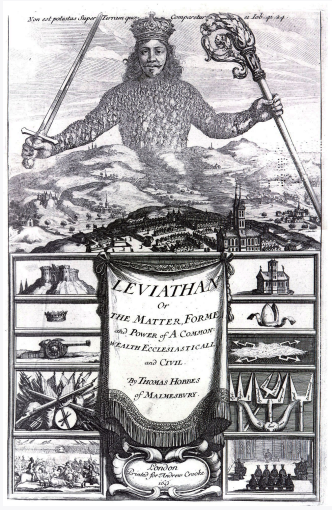
excerpts from *Leviathan* (source)

CHAPTER XVIII. OF THE RIGHTS OF SOVERAIGNES BY INSTITUTION

The Act Of Instituting A Common-wealth, What

A Common-wealth is said to be Instituted, when a Multitude of men do Agree, and Covenant, Every One With Every One, that to whatsoever Man, or Assembly Of Men, shall be given by the major part, the Right to Present the Person of them all, (that is to say, to be their Representative;) every one, as well he that Voted For It, as he that Voted Against It, shall Authorise all the Actions and Judgements, of that Man, or Assembly of men, in the same manner, as if they were his own, to the end, to live peaceably amongst themselves, and be protected against other men.

Quick Explainer



This is the image found on the frontispiece of *Leviathan.* The figure with the sword and scepter is the Sovereign. The body of the Sovereign consists of the multitude of individuals who have, by surrendering their rights and powers, created the Sovereign as a unified, nearly all powerful entity that each agrees to obey in all things.

These Rights Are Indivisible

These are the Rights, which make the Essence of Soveraignty; and which are the markes, whereby a man may discern in what Man, or Assembly of men, the Soveraign Power is placed, and resideth. For these are incommunicable, and inseparable. The Power to coyn Mony; to dispose of the estate and persons of Infant heires; to have praeemption in Markets; and all other Statute Praerogatives, may be transferred by the Soveraign; and yet the Power to protect his Subject be retained. But if he transferre the Militia, he retains the Judicature in vain, for want of execution of the Lawes; Or if he grant away the Power of raising Mony; the Militia is in vain: or if he give away the government of doctrines, men will be frighted into rebellion with the feare of Spirits. And so if we consider any one of the said Rights, we shall presently see, that the holding of all the rest, will produce no effect, in the conservation of Peace and Justice,

"A kingdome divided in it selfe cannot stand"

the end for which all Common-wealths are Instituted. And this division is it, whereof it is said, "A kingdome divided in it selfe cannot stand:" For unlesse this division precede, division into opposite Armies can never happen. If there had not first been an opinion received of the greatest part of England, that these Powers were divided between the King, and the Lords, and the House of Commons, the people had never been divided, and fallen into this Civill Warre; first between those that disagreed in Politiques; and after between the Dissenters about the liberty of Religion; which have so instructed men in this point of Soveraign Right, that there be few now (in England,) that do not see, that these Rights are inseparable, and will be so generally acknowledged, at the next return of Peace; and so continue, till their miseries are forgotten; and no longer, except the vulgar be better taught than they have hetherto been.

Stop & Think

Hobbes' English is a bit challenging. So, take a minute and identify 2 or 3 specific arguments he makes against dividing sovereign rights or power. *How compelling are these arguments in the context of the widespread embrace of separation of powers in the United States today?*

4.2 Locke, Second Treatise of Government

About this Text

John Locke wrote nearly 50 years after Hobbes at the time time of the "Glorious Revolution" of 1688. His *Two Treatises of Government* offered a vision of properly limited government that worked to protect individual liberty. In making this argument, Locke drew on a vision of the state of nature that, far from the violent state of war imagined by Hobbes, was generally peaceful. The absence of government being "inconvenient," though, Locke argued that people would move into civil society, but only if they retained their rights and governmental power was strictly limited. This doesn't mean that Locke was in favor of 'democracy.' In fact, he supported the rise of William and Mary as the new British monarchs. Unlike Hobbes, though, Locke insists in the passage below that in all "well-framed governments" the "Legislative and Executive Power are in distinct hands." Locke, that is, imagined a version of the separation of powers in a limited monarchy.

Locke

Excerpts from *Second Treatise of Government* (source)

143. The *Legislative* Power is that which has a right *to direct* how *the Force of the Commonwealth* shall be imploy'd for preserving the Community and the Members of it. But because those Laws which are constantly to be Executed, and whose force is always to continue, may be made in a little time; therefore there is no need, that the *Legislative* should be always in being, not having always business to do. And because it may be too great a temptation to humane frailty apt to grasp at Power, for the same Persons who have the Power of making Laws, to have also in their hands the power to execute them, whereby they may exempt themselves from Obedience to the Laws they make, and suit the Law, both in its making and execution, to their own private advantage, and thereby come to have a distinct interest from the rest of the Community, contrary to the end of Society and Government: Therefore in well order'd Commonwealths, where the good of the whole is so considered, as it ought, the *Legislative* Power is put into the hands of divers Persons

"it may be too great a temptation to humane frailty apt to grasp at Power, for the same Persons who have the Power of making Laws, to have also in their hands the power to execute them"

who duly Assembled, have by themselves, or jointly with others, a Power to make Laws, which when they have done, being separated again, they are themselves subject to the Laws, they have made; which is a new and near tie upon them, to take care, that they make them for the publick good.

144. But because the Laws, that are at once, and in a short time made, have a constant and lasting force, and need a *perpetual Execution*, or an attendance thereunto: Therefore 'tis necessary there should be a *Power always in being*, which should see to the *Execution* of the Laws that are made, and remain in force. And thus the *Legislative* and *Executive Power* come often to be separated.

150. In all Cases, whilst the Government subsists, the *Legislative is the Supream Power*. For what can give Laws to another, must needs be superiour to him: and since the Legislative is no otherwise Legislative of the Society, but by the right it has to make Laws for all the parts and for every Member of the Society, prescribing Rules to their actions, and giving power of Execution, where they are transgressed, the *Legislative* must needs be the *Supream*, and all other Powers in any Members or parts of the Society, derived from and subordinate to it.

Stop & Think

What does Locke mean by "the Legislative of the Society?" Why does he think it "must needs be the Supream" power?

159. Where the Legislative and Executive Power are in distinct hands, (as they are in all moderated Monarchies, and well-framed Governments) there the good of the Society requires, that several things should be left to the discretion of him, that has the Executive Power. For the Legislators not being able to foresee, and provide, by Laws, for all, that may be useful to the Community, the Executor of the Laws, having the power in his hands, has by the common Law of Nature, a right to make use of it, for the good of the Society, in many Cases, where the municipal Law has given no direction, till the Legislative can conveniently be Assembled to provide for it. Many things there are, which the Law can by no means provide for, and those must necessarily be left to the discretion of him, that has the Executive Power in his hands, to be ordered by him, as the publick good and advantage shall require: nay, 'tis fit that the Laws themselves should in some Cases give way to the Executive Power, or rather to this Fundamental Law of Nature and Government, *viz.* That as much as may be, *all* the Members of the Society are to be *preserved*.

Stop & Think

What is Locke's basic argument for separation of powers?

5. The "Celebrated Montesquieu"

5.1 Montesquieu, Spirit of the Laws

About this Text

As we have seen, the tradition of political thinking drawn upon by the architects of the United States' political system was centrally concerned with questions regarding unity and division in the political community and with the concentration or distribution of political power. When Madison and others talked specifically about the doctrine of "separation of powers," though, they had in mind first and foremost the French thinker Montesquieu. In the passage below, Montesquieu discusses separation of powers in the context of the Constitution of England.

Montesquieu

Excerpts from *Spirit of the Laws* (source)

In every government there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law.

By virtue of the first, the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have been already enacted. By the second, he makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions. By the third, he punishes criminals, or determines the disputes that arise between individuals. The latter we shall call the judiciary power, and the other simply the executive power of the state.

The political liberty of the subject is a tranquillity of mind arising from the opinion each person has of his safety. In order to have this liberty, it is requisite the government be so constituted as one man need not be afraid of another.

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because

"When the legislative and executive powers are united in the same person, or

apprehensions may arise lest the same monarch or senate should enact tyrannical laws, and execute them in a tyrannical manner.

in the same body of magistrates, there can be no liberty"

Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.

Stop & Think

Montesquieu links separation of powers to liberty. How does his argument here compare to Machiavelli's argument about 'tumults' and liberty? To Locke's argument for separation of powers?

The judiciary power ought not to be given to a standing senate; it should be exercised by persons taken from the body of the people at certain times of the year, and consistently with a form and manner prescribed by law, in order to erect a tribunal that should last only so long as necessity requires.

By this method the judicial power, so terrible to mankind, not being annexed to any particular state or profession, becomes, as it were, invisible. People have not then the judges continually present to their view; they fear the office, but not the magistrate.

In accusations of a deep and criminal nature, it is proper the person accused should have the privilege of choosing, in some measure, his judges, in concurrence with the law; or at least he should have a right to except against so great a number that the remaining part may be deemed his own choice.

The other two powers may be given rather to magistrates or permanent bodies, because they are not exercised on any private subject; one being no more than the general will of the state, and the other the execution of that general will.

But though the tribunals ought not to be fixed, the judgments ought; and to such a degree as to be ever conformable to the letter of the law. Were they to be the private opinion of the judge, people would then live in society, without exactly knowing the nature of their obligations.

The judges ought likewise to be of the same rank as the accused, or, in other words, his peers; to the end that he may not imagine he is fallen into the hands of persons inclined to treat him with rigor.

If the legislature leaves the executive power in possession of a right to imprison those subjects who can give security for their good behavior, there is an end of liberty; unless they are taken up, in order to answer without delay to a capital crime, in which case they are really free, being subject only to the power of the law.

But should the legislature think itself in danger by some secret conspiracy against the state, or by a correspondence

with a foreign enemy, it might authorize the executive power, for a short and limited time, to imprison suspected persons, who in that case would lose their liberty only for a while, to preserve it forever.

And this is the only reasonable method that can be substituted to the tyrannical magistracy of the Ephori, and to the state inquisitors of Venice, who are also despotic.

As in a country of liberty, every man who is supposed a free agent ought to be his own governor; the legislative power should reside in the whole body of the people. But since this is impossible in large states, and in small ones is subject to many inconveniences, it is fit the people should transact by their representatives what they cannot transact by themselves.

The inhabitants of a particular town are much better acquainted with its wants and interests than with those of other places; and are better judges of the capacity of their neighbors than of that of the rest of their countrymen. The members, therefore, of the legislature should not be chosen from the general body of the nation; but it is proper that in every considerable place a representative should be elected by the inhabitants.

The great advantage of representatives is, their capacity of discussing public affairs. For this the people collectively are extremely unfit,
which is one of the chief inconveniences of a democracy.

“The great advantage of representatives is, their capacity of discussing public affairs. For this the people collectively are extremely unfit”

It is not at all necessary that the representatives who have received a general instruction from their constituents should wait to be directed on each particular affair, as is practised in the diets of Germany.
True it is that by this way of proceeding the speeches of the deputies might with greater propriety be called the voice of the nation; but, on the other hand, this would occasion infinite delays; would give each deputy a power of controlling the assembly; and, on the most urgent and pressing occasions, the wheels of government might be stopped by the caprice of a single person.

When the deputies, as Mr. Sidney well observes, represent a body of people, as in Holland, they ought to be accountable to their constituents; but it is a different thing in England, where they are deputed by boroughs.

All the inhabitants of the several districts ought to have a right of voting at the election of a representative, except such as are in so mean a situation as to be deemed to have no will of their own.

One great fault there was in most of the ancient republics, that the people had a right to active resolutions, such as require some execution, a thing of which they are absolutely incapable. They ought to have no share in the government but for the choosing of representatives, which is within their reach. For though few can tell the exact degree of men’s capacities, yet there are none but are capable of knowing in general whether the person they choose is better qualified than most of his neighbors.

Neither ought the representative body to be chosen for the executive part of government, for which it is not so fit; but for the enacting of laws, or to see whether the laws in being are duly executed, a thing suited to their abilities, and which none indeed but themselves can properly perform.

In such a state there are always persons distinguished by their birth, riches, or honors; but were they to be confounded with the common people, and to have only the weight of a single vote like the rest, the common liberty would be their slavery, and they would have no interest in supporting it, as most of the popular resolutions would be against them. The share they have, therefore, in the legislature ought to be proportioned to their other advantages in the state; which happens only when they form a body that has a right to check the licentiousness of the people, as the people have a right to oppose any encroachment of theirs.

The legislative power is therefore committed to the body of the nobles, and to that which represents the people, each having their assemblies and deliberations apart, each their separate views and interests.

Of the three powers above mentioned, the judiciary is in some measure next to nothing: there remain, therefore, only two; and as these have need of a regulating power to moderate them, the part of the legislative body composed of the nobility is extremely proper for this purpose.

The body of the nobility ought to be hereditary. In the first place it is so in its own nature; and in the next there must be a considerable interest to preserve its privileges–privileges that in themselves are obnoxious to popular envy, and of course in a free state are always in danger.

But as a hereditary power might be tempted to pursue its own particular interests, and forget those of the people, it is proper that where a singular advantage may be gained by corrupting the nobility, as in the laws relating to the supplies, they should have no other share in the legislation than the power of rejecting, and not that of resolving.

By the power of resolving I mean the right of ordaining by their own authority, or of amending what has been ordained by others. By the power of rejecting I would be understood to mean the right of annulling a resolution taken by another; which was the power of the tribunes at Rome. And though the person possessed of the privilege of rejecting may likewise have the right of approving, yet this approbation passes for no more than a declaration, that he intends to make no use of his privilege of rejecting, and is derived from that very privilege.

The executive power ought to be in the hands of a monarch, because this branch of government, having need of despatch, is better administered by one than by many: on the other hand, whatever depends on the legislative power is oftentimes better regulated by many than by a single person.

But if there were no monarch, and the executive power should be committed to a certain number of persons selected from the legislative body, there would be an end then of liberty; by reason the two powers would be united, as the same persons would sometimes possess, and would be always able to possess, a share in both.

Stop & Think

Montesquieu continues along similar lines, reflecting on the details of various constitutions and the implications for thinking about separation of powers. *Which of the specific details the preceding paragraphs seems most interesting or relevant to the U.S. Constitution and U.S. political practice?*

6. Madison on Separation of Powers

6.1 Madison, Federalist 51

About This Text

We'll conclude our August on campus discussions by returning to a familiar text: Federalist 51, reconsidering Madison's arguments against the backdrop of the foregoing thinkers, from Plato to Montesquieu.

Madison

Federalist 51 (source)

The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments

To the People of the State of New York:

TO WHAT expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments, as laid down in the Constitution? The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places. Without presuming to undertake a full development of this important idea, I will hazard a few general observations, which may perhaps place it in a clearer light, and enable us to form a more correct judgment of the principles and structure of the government planned by the convention. In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that

"each department should have a will of its own"

each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others. Were this principle rigorously adhered to, it would require that all the appointments for the supreme executive, legislative,

and judiciary magistracies should be drawn from the same fountain of authority, the people, through channels having no communication whatever with one another.

Stop & Think

Why does Madison think each 'department' or branch "should have a will of its own?" How does he propose to give each department or branch its own will?

Perhaps such a plan of constructing the several departments would be less difficult in practice than it may in contemplation appear. Some difficulties, however, and some additional expense would attend the execution of it. Some deviations, therefore, from the principle must be admitted. In the constitution of the judiciary department in particular, it might be inexpedient to insist rigorously on the principle: first, because peculiar qualifications being essential in the members, the primary consideration ought to be to select that mode of choice which best secures these qualifications; secondly, because the permanent tenure by which the appointments are held in that department, must soon destroy all sense of dependence on the authority conferring them. It is equally evident, that the members of each department should be as little dependent as possible on those of the others, for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be merely nominal. But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack.

Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but 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. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

"Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place."

Stop & Think

What does Madison have in mind when he says that "ambition must be made to counteract ambition?" How does this relate to the idea of separation of powers?

A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions. This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see

it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State. But it is not possible to give to each department an equal power of self-defense. In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit. It may even be necessary to guard against dangerous encroachments by still further precautions. As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified. An absolute negative on the legislature appears, at first view, to be the natural defense with which the executive magistrate should be armed. But perhaps it would be neither altogether safe nor alone sufficient. On ordinary occasions it might not be exerted with the requisite firmness, and on extraordinary occasions it might be perfidiously abused. May not this defect of an absolute negative be supplied by some qualified connection between this weaker department and the weaker branch of the stronger department, by which the latter may be led to support the constitutional rights of the former, without being too much detached from the rights of its own department? If the principles on which these observations are founded be just, as I persuade myself they are, and they be applied as a criterion to the several State constitutions, and to the federal Constitution it will be found that if the latter does not perfectly correspond with them, the former are infinitely less able to bear such a test. There are, moreover, two considerations particularly applicable to the federal system of America, which place that system in a very interesting point of view. First. In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself. Second. It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure. There are but two methods of providing against this evil: the one by creating a will in the community independent of the majority that is, of the society itself; the other, by comprehending in the society so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable. The first method prevails in all governments possessing an hereditary or self-appointed authority. This, at best, is but a precarious security; because a power independent of the society may as well espouse the unjust views of the major, as the rightful interests of the minor party, and may possibly be turned against both parties. The second method will be exemplified in the federal republic of the United States. Whilst all authority in it will be derived from and dependent on the society, the

“society itself will be broken”

society itself will be broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority. In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects; and this may be presumed to depend on the extent of country and number of people comprehended under the same government.

Quick Explainer

Notice that the idea of a broken society links back to Madison's argument in Federalist 10 that the ultimate solution to factional conflict is to have a multitude of factions competing with one another in a large (or 'extended') republic. Here Madison sounds more like Machiavelli than like Rousseau.

This view of the subject must particularly recommend a proper federal system to all the sincere and considerate friends of republican government, since it shows that in exact proportion as the territory of the Union may be formed into more circumscribed Confederacies, or States oppressive combinations of a majority will be facilitated: the best security, under the republican forms, for the rights of every class of citizens, will be diminished: and consequently the stability and independence of some member of the government, the only other security, must be proportionately increased. Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit. In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger; and as, in the latter state, even the stronger individuals are prompted, by the uncertainty of their condition, to submit to a government which may protect the weak as well as themselves; so, in the former state, will the more powerful factions or parties be gradually induced, by a like motive, to wish for a government which will protect all parties, the weaker as well as the more powerful. It can be little doubted that if the State of Rhode Island was separated from the Confederacy and left to itself, the insecurity of rights under the popular form of government within such narrow limits would be displayed by such reiterated oppressions of factious majorities that some power altogether independent of the people would soon be called for by the voice of the very factions whose misrule had proved the necessity of it. In the extended republic of the United States, and among the great variety of interests, parties, and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good; whilst there being thus less danger to a minor from the will of a major party, there must be less pretext, also, to provide for the security of the former, by introducing into the government a will not dependent on the latter, or, in other words, a will independent of the society itself. It is no less certain than it is important, notwithstanding the contrary opinions which have been entertained, that the larger the society, provided it lie within a practical sphere, the more duly capable it will be of self-government. And happily for the **republican cause**, the practicable sphere may be carried to a very great extent, by a judicious modification and mixture of the **federal principle**.

Publius.

7. The Presidential Pardon Power

7.1 Federalist Paper #70

Federalist #70
The Executive Department Further Considered
From *The New York Packet*
Tuesday, March 18, 1788
To the People of the State of New York:

THERE is an idea, which is not without its advocates, that a vigorous Executive is inconsistent with the genius of republican government. The enlightened well-wishers to this species of government must at least hope that the supposition is destitute of foundation; since they can never admit its truth, without at the same time admitting the condemnation of their own principles. Energy in the Executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy. Every man the least conversant in Roman story, knows how often that republic was obliged to take refuge in the absolute power of a single man, under the formidable title of Dictator, as well against the intrigues of ambitious individuals who aspired to the tyranny, and the seditions of whole classes of the community whose conduct threatened the existence of all government, as against the invasions of external enemies who menaced the conquest and destruction of Rome.

There can be no need, however, to multiply arguments or examples on this head. A feeble Executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government.

Taking it for granted, therefore, that all men of sense will agree in the necessity of an energetic Executive, it will only remain to inquire, what are the ingredients which constitute this energy? How far can they be combined with those other ingredients which constitute safety in the republican sense? And how far does this combination characterize the plan which has been reported by the convention?

The ingredients which constitute energy in the Executive are, first, unity; secondly, duration; thirdly, an adequate provision for its support; fourthly, competent powers.

The ingredients which constitute safety in the repub lican sense are, first, a due dependence on the people, secondly, a due responsibility.

Those politicians and statesmen who have been the most celebrated for the soundness of their principles and for the justice of their views, have declared in favor of a single Executive and a numerous legislature. They have with great propriety, considered energy as the most necessary qualification of the former, and have regarded this as most applicable to power in a single hand, while they have, with equal propriety, considered the latter as best adapted to deliberation and wisdom, and best calculated to conciliate the confidence of the people and to secure their privileges and interests.

That unity is conducive to energy will not be disputed. Decision, activity, secrecy, and despatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished.

This unity may be destroyed in two ways: either by vesting the power in two or more magistrates of equal dignity and authority; or by vesting it ostensibly in one man, subject, in whole or in part, to the control and co-operation of others, in the capacity of counsellors to him. Of the first, the two Consuls of Rome may serve as an example; of the last, we shall find examples in the constitutions of several of the States. New York and New Jersey, if I recollect right, are the only States which have intrusted the executive authority wholly to single men.1 Both these methods of destroying the unity of the Executive have their partisans; but the votaries of an executive council are the most numerous. They are both liable, if not to equal, to similar objections, and may in most lights be examined in conjunction.

The experience of other nations will afford little instruction on this head. As far, however, as it teaches any thing, it teaches us not to be enamoured of plurality in the Executive. We have seen that the Achaeans, on an experiment of two Praetors, were induced to abolish one. The Roman history records many instances of mischiefs to the republic from the dissensions between the Consuls, and between the military Tribunes, who were at times substituted for the Consuls. But it gives us no specimens of any peculiar advantages derived to the state from the circumstance of the plurality of those magistrates. That the dissensions between them were not more frequent or more fatal, is a matter of astonishment, until we advert to the singular position in which the republic was almost continually placed, and to the prudent policy pointed out by the circumstances of the state, and pursued by the Consuls, of making a division of the government between them. The patricians engaged in a perpetual struggle with the plebeians for the preservation of their ancient authorities and dignities; the Consuls, who were generally chosen out of the former body, were commonly united by the personal interest they had in the defense of the privileges of their order. In addition to this motive of union, after the arms of the republic had considerably expanded the bounds of its empire, it became an established custom with the Consuls to divide the administration between themselves by lot one of them remaining at Rome to govern the city and its environs, the other taking the command in the more distant provinces. This expedient must, no doubt, have had great influence in preventing those collisions and rivalships which might otherwise have embroiled the peace of the republic.

But quitting the dim light of historical research, attaching ourselves purely to the dictates of reason and good se se, we shall discover much greater cause to reject than to approve the idea of plurality in the Executive, under any modification whatever.

Wherever two or more persons are engaged in any common enterprise or pursuit, there is always danger of difference of opinion. If it be a public trust or office, in which they are clothed with equal dignity and authority, there is peculiar danger of personal emulation and even animosity. From either, and especially from all these causes, the most bitter dissensions are apt to spring. Whenever these happen, they lessen the respectability, weaken

the authority, and distract the plans and operation of those whom they divide. If they should unfortunately assail the supreme executive magistracy of a country, consisting of a plurality of persons, they might impede or frustrate the most important measures of the government, in the most critical emergencies of the state. And what is still worse, they might split the community into the most violent and irreconcilable factions, adhering differently to the different individuals who composed the magistracy.

Men often oppose a thing, merely because they have had no agency in planning it, or because it may have been planned by those whom they dislike. But if they have been consulted, and have happened to disapprove, opposition then becomes, in their estimation, an indispensable duty of self-love. They seem to think themselves bound in honor, and by all the motives of personal infallibility, to defeat the success of what has been resolved upon contrary to their sentiments. Men of upright, benevolent tempers have too many opportunities of remarking, with horror, to what desperate lengths this disposition is sometimes carried, and how often the great interests of society are sacrificed to the vanity, to the conceit, and to the obstinacy of individuals, who have credit enough to make their passions and their caprices interesting to mankind. Perhaps the question now before the public may, in its consequences, afford melancholy proofs of the effects of this despicable frailty, or rather detestable vice, in the human character.

Upon the principles of a free government, inconveniences from the source just mentioned must necessarily be submitted to in the formation of the legislature; but it is unnecessary, and therefore unwise, to introduce them into the constitution of the Executive. It is here too that they may be most pernicious. In the legislature, promptitude of decision is oftener an evil than a benefit. The differences of opinion, and the jarrings of parties in that department of the government, though they may sometimes obstruct salutary plans, yet often promote deliberation and circumspection, and serve to check excesses in the majority. When a resolution too is once taken, the opposition must be at an end. That resolution is a law, and resistance to it punishable. But no favorable circumstances palliate or atone for the disadvantages of dissension in the executive department. Here, they are pure and unmixed. There is no point at which they cease to operate. They serve to embarrass and weaken the execution of the plan or measure to which they relate, from the first step to the final conclusion of it. They constantly counteract those qualities in the Executive which are the most necessary ingredients in its composition, vigor and expedition, and this without anycounterbalancing good. In the conduct of war, in which the energy of the Executive is the bulwark of the national security, every thing would be to be apprehended from its plurality.

It must be confessed that these observations apply with principal weight to the first case supposed that is, to a plurality of magistrates of equal dignity and authority a scheme, the advocates for which are not likely to form a numerous sect; but they apply, though not with equal, yet with considerable weight to the project of a council, whose concurrence is made constitutionally necessary to the operations of the ostensible Executive. An artful cabal in that council would be able to distract and to enervate the whole system of administration. If no such cabal should exist, the mere diversity of views and opinions would alone be sufficient to tincture the exercise of the executive authority with a spirit of habitual feebleness and dilatoriness.

But one of the weightiest objections to a plurality in the Executive, and which lies as much against the last as the first plan, is, that it tends to conceal faults and destroy responsibility. Responsibility is of two kinds to censure and to punishment. The first is the more important of the two, especially in an elective office. Man, in public trust, will much oftener act in such a manner as to render him unworthy of being any longer trusted, than in such a manner as to make him obnoxious to legal punishment. But the multiplication of the Executive adds to the difficulty of detection in either case. It often becomes impossible, amidst mutual accusations, to determine on whom the blame

or the punishment of a pernicious measure, or series of pernicious measures, ought really to fall. It is shifted from one to another with so much dexterity, and under such plausible appearances, that the public opinion is left in suspense about the real author. The circumstances which may have led to any national miscarriage or misfortune are sometimes so complicated that, where there are a number of actors who may have had different degrees and kinds of agency, though we may clearly see upon the whole that there has been mismanagement, yet it may be impracticable to pronounce to whose account the evil which may have been incurred is truly chargeable. “I was overruled by my council. The council were so divided in their opinions that it was impossible to obtain any better resolution on the point.” These and similar pretexts are constantly at hand, whether true or false. And who is there that will either take the trouble or incur the odium, of a strict scrunity into the secret springs of the transaction? Should there be found a citizen zealous enough to undertake the unpromising task, if there happen to be collusion between the parties concerned, how easy it is to clothe the circumstances with so much ambiguity, as to render it uncertain what was the precise conduct of any of those parties?

In the single instance in which the governor of this State is coupled with a council that is, in the appointment to offices, we have seen the mischiefs of it in the view now under consideration. Scandalous appointments to important offices have been made. Some cases, indeed, have been so flagrant that ALL PARTIES have agreed in the impropriety of the thing. When inquiry has been made, the blame has been laid by the governor on the members of the council, who, on their part, have charged it upon his nomination; while the people remain altogether at a loss to determine, by whose influence their interests have been committed to hands so unqualified and so manifestly improper. In tenderness to individuals, I forbear to descend to particulars.

It is evident from these considerations, that the plurality of the Executive tends to deprive the people of the two greatest securities they can have for the faithful exercise of any delegated power, first, the restraints of public opinion, which lose their efficacy, as well on account of the division of the censure attendant on bad measures among a number, as on account of the uncertainty on whom it ought to fall; and, secondly, the opportunity of discovering with facility and clearness the misconduct of the persons they trust, in order either to their removal from office or to their actual punishment in cases which admit of it.

In England, the king is a perpetual magistrate; and it is a maxim which has obtained for the sake of the pub lic peace, that he is unaccountable for his administration, and his person sacred. Nothing, therefore, can be wiser in that kingdom, than to annex to the king a constitutional council, who may be responsible to the nation for the advice they give. Without this, there would be no responsibility whatever in the executive department an idea inadmissible in a free government. But even there the king is not bound by the resolutions of his council, though they are answerable for the advice they give. He is the absolute master of his own conduct in the exercise of his office, and may observe or disregard the counsel given to him at his sole discretion.

But in a republic, where every magistrate ought to be personally responsible for his behavior in office the reason which in the British Constitution dictates the propriety of a council, not only ceases to apply, but turns against the institution. In the monarchy of Great Britain, it furnishes a substitute for the prohibited responsibility of the chief magistrate, which serves in some degree as a hostage to the national justice for his good behavior. In the American republic, it would serve to destroy, or would greatly diminish, the intended and necessary responsibility of the Chief Magistrate himself.

The idea of a council to the Executive, which has so generally obtained in the State constitutions, has been derived from that maxim of republican jealousy which considers power as safer in the hands of a number of men than of

a single man. If the maxim should be admitted to be applicable to the case, I should contend that the advantage on that side would not counterbalance the numerous disadvantages on the opposite side. But I do not think the rule at all applicable to the executive power. I clearly concur in opinion, in this particular, with a writer whom the celebrated Junius pronounces to be “deep, solid, and ingenious,” that “the executive power is more easily confined when it is ONE”;2 that it is far more safe there should be a single object for the jealousy and watchfulness of the people; and, in a word, that all multiplication of the Executive is rather dangerous than friendly to liberty.

A little consideration will satisfy us, that the species of security sought for in the multiplication of the Executive, is nattainable. Numbers must be so great as to render combination difficult, or they are rather a source of danger than of security. The united credit and influence of several individuals must be more formidable to liberty, than the credit and influence of either of them separately. When power, therefore, is placed in the hands of so small a number of men, as to admit of their interests and views being easily combined in a common enterprise, by an artful leader, it becomes more liable to abuse, and more dangerous when abused, than if it be lodged in the hands of one man; who, from the very circumstance of his being alone, will be more narrowly watched and more readily suspected, and who cannot unite so great a mass of influence as when he is associated with others. The Decemvirs of Rome, whose name denotes their number,3 were more to be dreaded in their usurpation than any ONE of them would have been. No person would think of proposing an Executive much more numerous than that body; from six to a dozen have been suggested for the number of the council. The extreme of these numbers, is not too great for an easy combination; and from such a combination America would have more to fear, than from the ambition of any single individual. A council to a magistrate, who is himself responsible for what he does, are generally nothing better than a clog upon his good intentions, are often the instruments and accomplices of his bad and are almost always a cloak to his faults.

I forbear to dwell upon the subject of expense; though it be evident that if the council should be numerous enough to answer the principal end aimed at by the institution, the salaries of the members, who must be drawn from their homes to reside at the seat of government, would form an item in the catalogue of public expenditures too serious to be incurred for an object of equivocal utility. I will only add that, prior to the appearance of the Constitution, I rarely met with an intelligent man from any of the States, who did not admit, as the result of experience, that the UNITY of the executive of this State was one of the best of the distinguishing features of our constitution.

PUBLIUS.

7.2 Federalist Paper #69

Federalist Paper #69

The Real Character of the Executive
From the New York Packet.
Friday, March 14, 1788.

Hamilton

To the People of the State of New York:

I PROCEED now to trace the real characters of the proposed Executive, as they are marked out in the plan of the convention. This will serve to place in a strong light the unfairness of the representations which have been made in regard to it.

The first thing which strikes our attention is, that the executive authority, with few exceptions, is to be vested in a single magistrate. This will scarcely, however, be considered as a point upon which any comparison can be grounded; for if, in this particular, there be a resemblance to the king of Great Britain, there is not less a resemblance to the Grand Seignior, to the khan of Tartary, to the Man of the Seven Mountains, or to the governor of New York.

That magistrate is to be elected for FOUR years; and is to be re-eligible as often as the people of the United States shall think him worthy of their confidence. In these circumstances there is a total dissimilitude between HIM and a king of Great Britain, who is an HEREDITARY monarch, possessing the crown as a patrimony descendible to his heirs forever; but there is a close analogy between HIM and a governor of New York, who is elected for THREE years, and is re-eligible without limitation or intermission. If we consider how much less time would be requisite for establishing a dangerous influence in a single State, than for establishing a like influence throughout the United States, we must conclude that a duration of FOUR years for the Chief Magistrate of the Union is a degree of permanency far less to be dreaded in that office, than a duration of THREE years for a corresponding office in a single State.

The President of the United States would be liable to be impeached, tried, and, upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law. The person of the king of Great Britain is sacred and inviolable; there is no constitutional tribunal to which he is amenable; no punishment to which he can be subjected without involving

the crisis of a national revolution. In this delicate and important circumstance of personal responsibility, the President of Confederated America would stand upon no better ground than a governor of New York, and upon worse ground than the governors of Maryland and Delaware.

The President of the United States is to have power to return a bill, which shall have passed the two branches of the legislature, for reconsideration; and the bill so returned is to become a law, if, upon that reconsideration, it be approved by two thirds of both houses. The king of Great Britain, on his part, has an absolute negative upon the acts of the two houses of Parliament. The disuse of that power for a considerable time past does not affect the reality of its existence; and is to be ascribed wholly to the crown's having found the means of substituting influence to authority, or the art of gaining a majority in one or the other of the two houses, to the necessity of exerting a prerogative which could seldom be exerted without hazarding some degree of national agitation. The qualified negative of the President differs widely from this absolute negative of the British sovereign; and tallies exactly with the revisionary authority of the council of revision of this State, of which the governor is a constituent part. In this respect the power of the President would exceed that of the governor of New York, because the former would possess, singly, what the latter shares with the chancellor and judges; but it would be precisely the same with that of the governor of Massachusetts, whose constitution, as to this article, seems to have been the original from which the convention have copied.

The President is to be the "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. He is to have power to grant reprieves and pardons for offenses against the United States, EXCEPT IN CASES OF IMPEACHMENT; to recommend to the consideration of Congress such measures as he shall judge necessary and expedient; to convene, on extraordinary occasions, both houses of the legislature, or either of them, and, in case of disagreement between them WITH RESPECT TO THE TIME OF ADJOURNMENT, to adjourn them to such time as he shall think proper; to take care that the laws be faithfully executed; and to commission all officers of the United States." In most of these particulars, the power of the President will resemble equally that of the king of Great Britain and of the governor of New York. The most material points of difference are these:

First. The President will have only the occasional command of such part of the militia of the nation as by legislative provision may be called into the actual service of the Union. The king of Great Britain and the governor of New York have at all times the entire command of all the militia within their several jurisdictions. In this article, therefore, the power of the President would be inferior to that of either the monarch or the governor.

Secondly. The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the DECLARING of war and to the RAISING and REGULATING of fleets and armies, all which, by the Constitution under consideration, would appertain to the legislature.[1] The governor of New York, on the other hand, is by the constitution of the State vested only with the command of its militia and navy. But the constitutions of several of the States expressly declare their governors to be commanders-in-chief, as well of the army as navy; and it may well be a question, whether those of New Hampshire and Massachusetts, in particular, do not, in this instance, confer larger powers upon their respective governors, than could be claimed by a President of the United States.

Thirdly. The power of the President, in respect to pardons, would extend to all cases, EXCEPT THOSE OF

IMPEACHMENT. The governor of New York may pardon in all cases, even in those of impeachment, except for treason and murder. Is not the power of the governor, in this article, on a calculation of political consequences, greater than that of the President? All conspiracies and plots against the government, which have not been matured into actual treason, may be screened from punishment of every kind, by the interposition of the prerogative of pardoning. If a governor of New York, therefore, should be at the head of any such conspiracy, until the design had been ripened into actual hostility he could insure his accomplices and adherents an entire impunity. A President of the Union, on the other hand, though he may even pardon treason, when prosecuted in the ordinary course of law, could shelter no offender, in any degree, from the effects of impeachment and conviction. Would not the prospect of a total indemnity for all the preliminary steps be a greater temptation to undertake and persevere in an enterprise against the public liberty, than the mere prospect of an exemption from death and confiscation, if the final execution of the design, upon an actual appeal to arms, should miscarry? Would this last expectation have any influence at all, when the probability was computed, that the person who was to afford that exemption might himself be involved in the consequences of the measure, and might be incapacitated by his agency in it from affording the desired impunity? The better to judge of this matter, it will be necessary to recollect, that, by the proposed Constitution, the offense of treason is limited “to levying war upon the United States, and adhering to their enemies, giving them aid and comfort”; and that by the laws of New York it is confined within similar bounds.

Fourthly. The President can only adjourn the national legislature in the single case of disagreement about the time of adjournment. The British monarch may prorogue or even dissolve the Parliament. The governor of New York may also prorogue the legislature of this State for a limited time; a power which, in certain situations, may be employed to very important purposes.

The President is to have power, with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur. The king of Great Britain is the sole and absolute representative of the nation in all foreign transactions. He can of his own accord make treaties of peace, commerce, alliance, and of every other description. It has been insinuated, that his authority in this respect is not conclusive, and that his conventions with foreign powers are subject to the revision, and stand in need of the ratification, of Parliament. But I believe this doctrine was never heard of, until it was broached upon the present occasion. Every jurist2 of that kingdom, and every other man acquainted with its Constitution, knows, as an established fact, that the prerogative of making treaties exists in the crown in its utomst plentitude; and that the compacts entered into by the royal authority have the most complete legal validity and perfection, independent of any other sanction. The Parliament, it is true, is sometimes seen employing itself in altering the existing laws to conform them to the stipulations in a new treaty; and this may have possibly given birth to the imagination, that its co-operation was necessary to the obligatory efficacy of the treaty. But this parliamentary interposition proceeds from a different cause: from the necessity of adjusting a most artificial and intricate system of revenue and commercial laws, to the changes made in them by the operation of the treaty; and of adapting new provisions and precautions to the new state of things, to keep the machine from running into disorder. In this respect, therefore, there is no comparison between the intended power of the President and the actual power of the British sovereign. The one can perform alone what the other can do only with the concurrence of a branch of the legislature. It must be admitted, that, in this instance, the power of the federal Executive would exceed that of any State Executive. But this arises naturally from the sovereign power which relates to treaties. If the Confederacy were to be dissolved, it would become a question, whether the Executives of the several States were not solely invested with that delicate and important prerogative.

The President is also to be authorized to receive ambassadors and other public ministers. This, though it has been a rich theme of declamation, is more a matter of dignity than of authority. It is a circumstance which will be without consequence in the administration of the government; and it was far more convenient that it should be arranged in this manner, than that there should be a necessity of convening the legislature, or one of its branches, upon every arrival of a foreign minister, though it were merely to take the place of a departed predecessor.

The President is to nominate, and, WITH THE ADVICE AND CONSENT OF THE SENATE, to 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. The king of Great Britain is emphatically and truly styled the fountain of honor. He not only appoints to all offices, but can create offices. He can confer titles of nobility at pleasure; and has the disposal of an immense number of church preferments. There is evidently a great inferiority in the power of the President, in this particular, to that of the British king; nor is it equal to that of the governor of New York, if we are to interpret the meaning of the constitution of the State by the practice which has obtained under it. The power of appointment is with us lodged in a council, composed of the governor and four members of the Senate, chosen by the Assembly. The governor CLAIMS, and has frequently EXERCISED, the right of nomination, and is ENTITLED to a casting vote in the appointment. If he really has the right of nominating, his authority is in this respect equal to that of the President, and exceeds it in the article of the casting vote. In the national government, if the Senate should be divided, no appointment could be made; in the government of New York, if the council should be divided, the governor can turn the scale, and confirm his own nomination.[3] If we compare the publicity which must necessarily attend the mode of appointment by the President and an entire branch of the national legislature, with the privacy in the mode of appointment by the governor of New York, closeted in a secret apartment with at most four, and frequently with only two persons; and if we at the same time consider how much more easy it must be to influence the small number of which a council of appointment consists, than the considerable number of which the national Senate would consist, we cannot hesitate to pronounce that the power of the chief magistrate of this State, in the disposition of offices, must, in practice, be greatly superior to that of the Chief Magistrate of the Union.

Hence it appears that, except as to the concurrent authority of the President in the article of treaties, it would be difficult to determine whether that magistrate would, in the aggregate, possess more or less power than the Governor of New York. And it appears yet more unequivocally, that there is no pretense for the parallel which has been attempted between him and the king of Great Britain. But to render the contrast in this respect still more striking, it may be of use to throw the principal circumstances of dissimilitude into a closer group.

The President of the United States would be an officer elected by the people for FOUR years; the king of Great Britain is a perpetual and HEREDITARY prince. The one would be amenable to personal punishment and disgrace; the person of the other is sacred and inviolable. The one would have a QUALIFIED negative upon the acts of the legislative body; the other has an ABSOLUTE negative. The one would have a right to command the military and naval forces of the nation; the other, in addition to this right, possesses that of DECLARING war, and of RAISING and REGULATING fleets and armies by his own authority. The one would have a concurrent power with a branch of the legislature in the formation of treaties; the other is the SOLE POSSESSOR of the power of making treaties. The one would have a like concurrent authority in appointing to offices; the other is the sole author of all appointments. The one can confer no privileges whatever; the other can make denizens of aliens, noblemen of commoners; can erect corporations with all the rights incident to corporate bodies. The one can prescribe no rules concerning the commerce or currency of the nation; the other is in several respects the

arbiter of commerce, and in this capacity can establish markets and fairs, can regulate weights and measures, can lay embargoes for a limited time, can coin money, can authorize or prohibit the circulation of foreign coin. The one has no particle of spiritual jurisdiction; the other is the supreme head and governor of the national church! What answer shall we give to those who would persuade us that things so unlike resemble each other? The same that ought to be given to those who tell us that a government, the whole power of which would be in the hands of the elective and periodical servants of the people, is an aristocracy, a monarchy, and a despotism.

PUBLIUS.

7.3 Cato, Letter #67

Various Fears Concerning the Executive Department

The New-York Journal

November 8, 1787

From the “CATO” letters of George Clinton

I shall begin with observations on the executive branch of this new system; and though it is not the first in order, as arranged therein, yet being the chief, is perhaps entitled by the rules of rank to the first consideration. The executive power as described in the 2d article, consists of a president and vice- president, who are to hold their offices during the term of four years; the same article has marked the manner and time of their election, and established the qualifications of the president; it also provides against the removal, death, or inability of the president and vice- president – regulates the salary of the president, delineates his duties and powers; and, lastly, declares the causes for which the president and vice-president shall be removed from office.

Notwithstanding the great learning and abilities of the gentlemen who composed the convention, it may be here remarked with deference, that the construction of the first paragraph of the first section of the second article is vague and inexplicit, and leaves the mind in doubt as to the election of a president and vice-president, after the expiration of the election for the first term of four years; in every other case, the election of these great officers is expressly provided for; but there is no explicit provision for their election which is to set this political machine in motion; no certain and express terms as in your state constitution, that statedly once in every four years, and as often as these offices shall become vacant, by expiration or otherwise, as is therein expressed, an election shall be held as follows, etc.; this inexplicitness perhaps may lead to an establishment for life.

It is remarked by Montesquieu, in treating of republics, that in all magistracies, the greatness of the power must be compensated by the brevity of the duration, and that a longer time than a year would be dangerous. It is, therefore, obvious to the least intelligent mind to account why great power in the hands of a magistrate, and that power connected with considerable duration, may be dangerous to the liberties of a republic. The deposit of vast trusts in the hands of a single magistrate enables him in their exercise to create a numerous train of dependents. This tempts his ambition, which in a republican magistrate is also remarked, to be pernicious, and the duration of his office for any considerable time favors his views, gives him the means and time to perfect and execute

his designs; he therefore fancies that he may be great and glorious by oppressing his fellow citizens, and raising himself to permanent grandeur on the ruins of his country. And here it may be necessary to compare the vast and important powers of the president, together with his continuance in office, with the foregoing doctrine-his eminent magisterial situation will attach many adherents to him, and he will be surrounded by expectants and courtiers. His power of nomination and influence on all appointments; the strong posts in each state comprised within his superintendence, and garrisoned by troops under his direction; his control over the army, militia, and navy; the unrestrained power of granting pardons for treason, which may be used to screen from punishment those whom he had secretly instigated to commit the crime, and thereby prevent a discovery of his own guilt; his duration in office for four years-these, and various other principles evidently prove the truth of the position, that if the president is possessed of ambition, he has power and time sufficient to ruin his country.

Though the president, during the sitting of the legislature, is assisted by the senate, yet he is without a constitutional council in their recess. He will therefore be unsupported by proper information and advice, and will generally be directed by minions and favorites, or a council of state will grow out of the principal officers of the great departments, the most dangerous council in a free country. . . . The language and the manners of this court will be what distinguishes them from the rest of the community, not what assimilates them to it; and in being remarked for a behavior that shows they are not meanly born, and in adulation to people of fortune and power.

The establishment of a vice-president is as unnecessary as it is dangerous. This officer, for want of other employment, is made president of the senate, thereby blending the executive and legislative powers, besides always giving to some one state, from which he is to come, an unjust pre-eminence.

It is a maxim in republics that the representative of the people should be of their immediate choice; but by the manner in which the president is chosen, he arrives to this office at the fourth or fifth hand. Nor does the highest vote, in the way he is elected, determine the choice-for it is only necessary that he should be taken from the highest of five, who may have a plurality of votes. . . .

And wherein does this president, invested with his powers and prerogatives, essentially differ from the king of Great Britain (save as to name, the creation of nobility, and some immaterial incidents, the offspring of absurdity and locality)? The direct prerogatives of the president, as springing from his political character, are among the following: It is necessary, in order to distinguish him from the rest of the community, and enable him to keep, and maintain his court, that the compensation for his services, or in other words, his revenue, should be such as to enable him to appear with the splendor of a prince. He has the power of receiving ambassadors from, and a great influence on their appointments to foreign courts; as also to make treaties, leagues, and alliances with foreign states, assisted by the Senate, which when made becomes the supreme law of land. He is a constituent part of the legislative power, for every bill which shall pass the House of Representatives and Senate is to be presented to him for approbation. If he approves of it he is to sign it, if he disapproves he is to return it with objections, which in many cases will amount to a complete negative; and in this view he will have a great share in the power of making peace, coining money, etc., and all the various objects of legislation, expressed or implied in this Constitution. For though it may be asserted that the king of Great Britain has the express power of making peace or war, yet he never thinks it prudent to do so without the advice of his Parliament, from whom be is to derive his support -and therefore these powers, in both president and king, are substantially the same. He is the generalissimo of the nation, and of course has the command and control of the army, navy and militia; he is the general conservator of the peace of the union-he may pardon all offenses, except in cases of impeachment, and the principal fountain of all offices and employments. Will not the exercise of these powers therefore tend

either to the establishment of a vile and arbitrary aristocracy or monarchy? The safety of the people in a republic depends on the share or proportion they have in the government; but experience ought to teach you, that when a man is at the head of an elective government invested with great powers, and interested in his re-election, in what circle appointments will be made; by which means an imperfect aristocracy bordering on monarchy may be established. You must, however, my countrymen, beware that the advocates of this new system do not deceive you by a fallacious resemblance between it and your own state government [New York] which you so much prize; and, if you examine, you will perceive that the chief magistrate of this state is your immediate choice, controlled and checked by a just and full representation of the people, divested of the prerogative of influencing war and peace, making treaties, receiving and sending embassies, and commanding standing armies and navies, which belong to the power of the confederation, and will be convinced that this government is no more like a true picture of your own than an Angel of Darkness resembles an Angel of Light.

CATO

8. The Power to Tax

8.1 For the Stamp Act

The Regulations Lately Made Concerning the Colonies and the Taxes Imposed on Them

Thomas Whately

1765

source

The Revenue that may be raised by the Duties which have been already, or by these [stamp dates] if they should be hereafter imposed, are all equally applied by Parliament, towards defraying the necessary Expenses of defending, protecting, and securing, the British Colonies and Plantations in America: Not that on the one hand an American Revenue might not have been applied to different Purposes; or on the other, that Great Britain is to contribute nothing to these: The very Words of the Act of Parliament and of the Resolution of the House of Commons imply, that the whole of the Expense is not to be charged upon the Colonies: They are under no Obligation to provide for this or any other particular national Expense; neither can they claim any Exemption from general Burthens; but being a part of the British Dominions, are to share all necessary Services with the rest. This in America does indeed first claim their Attention: They are immediately, they are principally concerned in it; and the Inhabitants of their Mother-Country would justly and loudly complain, if after all their Efforts for the Benefit of the Colonies, when every Point is gained, and every wish accomplished, they, and they alone should be called upon still to answer every additional Demand, that the Preservation of these Advantages and the Protection of the Colonies from future Dangers, may occasion: Great Britain has a Right at all Times, she is under a Necessity, upon this Occasion to demand their Assistance; but still she requires it in the Manner most suitable to their Circumstances; for by appropriating this Revenue towards the Defense and Security of the Provinces where it is raised, the Produce of it is kept in the Country, the People are not deprived of the Circulation of it is kept in the Country, the People are not deprived of the Circulation of what Cash they have amongst themselves, and hereby the severest Oppression of an American Tax, that of draining the Plantations of Money which they can so ill spare, is avoided. What part they ought to bear of the national Expense, that is necessary for their Protection, must depend upon their Ability, which is not yet sufficiently known: to the whole they are certainly unequal, that would include all the military and all the naval Establishment, all Fortifications which it may be thought proper to erect, the Ordnance and Stores that must be furnished, and the Provisions which it is necessary to supply; but surely a Part of this great Disbursement, a large Proportion at least of some particular Branches of it, cannot be an intolerable Burthen upon a Number of Subjects, upon a Territory so extensive, and upon the Wealth which they collectively possess. As to the Quota which each Individual must pay, it will be difficult to persuade the Inhabitants of this Country, where the neediest Cottager pays out of his Pittance, however scanty, and how hardly soever earned, our high Duties and Customs and Excise in the Price of all his Consumption; it will be difficult I say, to persuade those who see, who suffer, or who relieve such Oppression; that the West Indian out of his Opulence, and the North American out of his Competency, can contribute no more than it is now pretended they can afford towards the Expence of Services, the Benefit of which, as a Part of this Nation they share, and as Colonists they peculiarly enjoy. They have indeed their own civil Governments besides to support; but Great Britain has her civil Government too; she has also a large Peace Establishment to maintain; and the national Debt, tho’ so great a Part, and that the heaviest Part of it has been incurred by a Was undertaken for the Protection of the Colonies, lies solely still upon her.

Stop and Think

What does Whately say about the purposes for which taxes are raised? Can we or should we separate the questions of *how* taxes are raised and *how much* is raised from the question of *why* or for what purpose taxes are being raised?

The Reasonableness, and even the Necessity of requiring an American Revenue being admitted, the Right of the Mother Country to impose such a Duty upon her Colonies, if duly considered, cannot be questioned: they claim it is true the Privilege, which is common to all British Subjects, of being taxed only with their own Consent, given by their Representatives; and may they ever enjoy the Privilege in all its Extent: May this sacred Pledge of Liberty be preserved inviolate, to the utmost Verge of our Dominions, and to the latest Page of our History! but let us not limit the legislative Rights of the British People to Subjects of Taxation only: No new Law whatever can bind us that is made without the Concurrence of our Representatives. The Acts of Trade and Navigation, and all other Acts that relate either to ourselves or to the Colonies, are founded upon no other Authority; they are not obligatory if a Stamp Act is not, and every Argument in support of an Exemption from the Superintendance of the British Parliament in the one Case, is equally applicable to the others. The Constitution knows no Distinction; the Colonies have never attempted to make one; but have acquiesced under several parliamentary Taxes. The 6 Geo. II. c. 13. Which has been already refered to, lays heavy Duties on all foreign Rum, Sugar, and Melasses, imported into the British Plantations: the Amount of the Impositions has been complained of; the Policy of the Laws has been objected to; but the Right of making such a Law, has never been questioned. These however, it may be said, are Duties upon Imports only, and there some imaginary Line has been supposed to be drawn; but had it ever existed, it was passed long before, for by 25 Charles II. c. 7. enforced by 7 and 8 Wil. and Mary, c. 22. and by 1 Geo. I. c. 12. The Exports of the West Indian Islands, not the Merchandize purchased by the Inhabitants, nor the Profits they might make by their Trade, but the Property they had at the Time, the Produce of their Lands, was taxed, by the Duties then imposed upon Sugar, Tobacco, Cotton, Indigo, Ginger, Logwood, Fustick, and Cocoa, exported from one British Plantation to another.

It is in vain to call these only Regulations of Trade; the Trade of British Subjects may not be regulated by such Means, without the Concurrence of their Representatives. Duties laid for these Purposes, as well as for the Purposes of Revenue, are still Levies of Money upon the Peole. The Constitution again knows no Distinction between Impost Duties and internal Taxation; and if some speculative Difference should be attempted to be made, it certainly is contradicted by Fact; for an internal Tax also was laid on the Colonies by the Establishment of a Post Office there; which, however it may be represented, upon a Perusal of 9 Anne c. 10. Appear to be essentially a Tax, and that of the most authoritative Kind; for it is enforced by Provisions, more peculiarly prohibitory and compulsive, than others are usually attended with: The Conveyance of Letters thro' any other Channel is forbidden, by which Restrictions, the Advantage which might be made by public Carriers and others of this Branch of their Business is taken away; and the Passage of Ferries is declared to be free for the Post, the Ferrymen being compellable immediately on Demand to give their Labour without pay, and the Proprietors being obliged to furnish the Means of Passage to the Post without Recompence. These Provisions are indeed very proper, and even necessary; but certainly Money levied by such Methods, the Effect of which is intended to be a Monopoly of the Carriage of Letters to the Officers of this Revenue, and by Means of which the People are forced to pay the Rates imposed upon all their Correspondence, is a public Tax to which they must submit, and not merely a Price

required of them for a private Accomodation. The Act treats this and the British Postage upon exactly the same Footing, and expressly calls them both a Revenue. The Preamble of it declares, that the new Rates are fixed in the Manner therein specified with a View to enable her Majesty in some Measure to carry on and furnish the War. The Sum of 700l. per Week out of all the Duties arising from time to time by virtue of this Act is appropriated for that Purpose, and for other necessary Occasions; the Surplus after other Deductions, was made part of the civil List Revenues; it continued to be thus applied during the Reign of George I: and George II. and on his present Majesty's Accession to the Throne, when the Civil List was put upon a different Establishment, the Post Office Revenues were carried with the others to the aggregate Fund, to be applied to the Uses, to which the said Fund is or shall be applicable. If all these Circumstances do not constitute a Tax, I do not know what do: the Stamp Duties are not marked with stronger Characters, to entitle them to that Denomination; and with respect to the Application of the Revenue, the Power of the Parliament of Great Britain over the Colonies was then held up much higher than it has been upon the present Occasion. The Revenue arising from the Postage in America is blended with that of England, is applied in Part to the carrying on of a continental War, and other public Purposes; the Remainder of it the Support of the Civil List; and now the whole of it to the Discharge of the National Debt by Means of the aggregate Fund; all these are Services that are either national or particular to Great Britain; but the Stamp Duties and the others that were laid last Year, are appropriated to such Services only as more particularly relate to the Colonies; and surely if the Right of the British Parliament to impose the one be acknowledged; that of laying on the other cannot be disputed. The Post-Office has indeed been called a meer Convenience; which therefore the People always cheerfully pay for. After what has been said, this Observation requires very little Notice; I will not call the Protection and Security of the Colonies, to which the Duties in question are applied, by so low a Name as a Convenience.

The instances that have been mentioned prove, that the Right of the Parliament of Great Britain to impose Taxes of every Kind on the Colonies, has been always admitted; but were there no Precendents to support the Claim, it would still be incontestable, being founded on the Principles of our Constitution; for the Fact is, that the Inhabitants of the Colonies are represented in Parliament: they do not indeed chuse the Members of that Assembly; neither are Nine Tenths of the People of Britain Electors; for the Right of Election is annexed to certain Species of Property, to peculiar Franchises, and to Inhabitancy in some particular Places; but these Descriptions comprehend only a very small Part of the Land, the Property, and the People of this Island: all Copyhold, all Leasehold Estates, under the Crown, under the Church, or under private Person, tho' for Terms ever so long; all landed Property in short, that is not Freehold, and all monied Property whatsoever are excluded: the Possessors of these have no Votes in the Election of Members of Parliament; Women and Persons under Age be their Property ever so large, and all of it Freehold, have none. The Merchants of London, a numerous and respectable Body of Men, whose Opulence exceeds all that America could collect; the Proprietors of that vast Accumulation of Wealth, the public Funds; the Inhabitants of Leeds, of Halifax, of Birmingham, and of Manchester, Towns that are each of them larger than the Largest in the Plantations; many of less Note that are yet incorporated; and that great Corporation the East India Company, whose Rights over the Countries they possess, fall little short of Sovereignty, and whose Trade and whose Fleets are sufficient to constitute them a maritime Power, are all in the same Circumstances; none of them chuse their Representatives; and yet are they not represented in Parliament? Is their vast Property subject to Taxes without their Consent? Are they all arbitrarily bound by Laws to which they have not agreed? The Colonies are in exactly the same Situation: All British Subjects are really in the same; none are actually, all are virtually represented in Parliament; for every Member of Parliament sits in the House, not as Representative of his own Constituents, but as one of that august Assembly by which the Commons of Great Britain are represented. Their Rights and their Interests, however his own Borough may be affected by general

Dispositions, ought to be the great Objects of his Attention, and the only Rules for his Conduct; and sacrifice these to a partial Advantage in favour of the Place where he was chosen, would be a Departure from his Duty: if it were otherwise, Old Sarum would enjoy Privileges essential to Liberty, which are denied to Birmingham and to Manchester; but as it is, they and the Colonies and all British Subjects whatever, have an equal Share in the general Representation of the Commons of Great Britain, and are bound by the Consent of the Majority of that House, whether their own particular Representatives consented to or opposed the Measures there taken, or whether they had or had not particular Representatives there.

Stop and Think

How does Whately understand the idea of "representation" and how does he apply it to the colonies? Do you think he accepts or rejects the basic idea that people should not be subject to taxes unless they are represented in the legislature that raises taxes?

The Inhabitants of the Colonies however have by some been supposed to be excepted, because they are represented in their respective Assemblies. So are the Citizens of London in their Common Council; and yet so far from excluding them from the national Representation, it does not impeach their Right to chuse Members of Parliament: it is true, that the Powers vested in the Common Council of London, are not equal to those which the Assemblies in the Plantation enjoy; but still they are legislative Powers, to be exercised within their District, and over their Citizens; yet not exclusively of the general SUperintendance of the great Council of the Nation: The Subjects of a By-law and of an Act of Parliament may possibly be the same; yet it never was imagined that the Privileges of London were incompatible with the Authority of Parliament; and indeed what Contradiction, what Absurdity, does a double Representation imply? What difficulty is there in allowing both, tho' both should even be vested with equal legislative Powers, if the one is to be exercised for local, and the other for general Purposes? and where is the Necessity that the Subordinate Power must derogate from the superior Authority? It would be a singular Objection to a Man's Vote for a Member of Parliament, that being represented in a provincial, he cannot be represented in a national Assembly; and if this is not sufficient Ground for an Objection, neither is it for an Exemption, or for any Pretence of an Exclusion.

The Charter and the Proprietary Governments in America, are in this Respect, on the same Footing with the Rest. The comprehending them also, both in a provincial and national Representation, is not necessarily attended with any Inconsistency, and nothing contained in their Grants can establish one; for all who took those Grants were British Subjects, inhabiting British Dominions, and who at the Time of taking, were indisputably under the Authority of Parliament; no other Power can abridge that Authority, or dispense with the Obedience that is due to it: those therefore, to whom the Charters were originally given, could have no Exemption granted to them: and what the Fathers never received, the Children cannot claim as an Inheritance; nor was it ever in Idea that they should; even the Charters themselves, so far from allowing guard against the Supposition.

And after all, does any Friend to the Colonies desire the Exemption? he cannot, if he will reflect but a Moment on the Consequences. We value the Right of being represented in the national Legislature as the dearest Privilege we enjoy; how justly would the Colonies complain, if they alone were deprived of it? They acknowledge Dependence upon their Mother Country; but that Dependence would be Slavery not Connection, if they bore no Part in the Government of the whole: they would then indeed be in a worse Situation than the Inhabitants of Britain, for these

are all of them virtually, tho’ few of them are actually represented in the House of Commons; if the Colonies were not, they could not expect that their Interests and their Privileges would be any otherwise considered there, than as subservient to those of Great Britain; for to deny the Authority of a Legislature, is to surrender all claims to a Share in its Councils; and if this were the Tenor of their Charters, a Grant more insidious and more replete with Mischief, could not have been invented: a permanent Title to a Share in national Councils would be exchanged for a precarious Representation in a provincial Assembly; and a Forfeiture of their Rights would be couched under the Appearance of Privileges; they would be reduced from Equality to Subordination, and be at the same Time deprived of the Benefits, and liable to the Incoveniences, both of Independency and of Connection. Happily for them, this is not their Condition. They are on the contrary a Part, and an important Part of the Commons of Great Britain: they are represented in Parliament in the same Manner as those Inhabitants of Britain are, who have not Voices in Elections; and they enjoy, with the Rest of their Fellow-subjects the inestimable Privilege of not being bound by any Laws, or subject to any Taxes, to which the Majority of the Representatives of the Commons have not consented.

If there really were any Inconsistency between a national and a provincial Legislature, the Consequence would be the Abolition of the latter; for the Advantages that attend it are purely local: the District it is confined to might be governed without it, by means of the national Representatives; and it is unequal to great general Operations; whereas the other is absolutely necessary for the Benefit and Preservation of the whole: But so far are they from being incompatible, that they will be seldom found to interfere with one another: The Parliament will not often have occasion to exercise its Power over the Colonies except for those Purposes, which the Assemblies cannot provide for. A general Tax is of this Kind; the Necessity for it, the Extent, the Application of it, are Matters which Councils limited in their Views and in their Operations cannot properly judge of; and when therefore the national Council determine these Particulars, it does not pretend to, never claimed, or wished, nor can ever be vested with: The latter remains in exactly the same State as it was before, providing for the same Services, by the same Means, and on the same Subjects; but conscious of its own Inability to answer greater Purposes than those for which it was instituted, it leaves the care of more general Concerns to that higher Legislature, in whose Province alone the Direction of them always was, is, and will be. The Exertion of that Authority which belongs to its universal Superintedance, neither lowers the Dignity, nor deprecates the Usefulness of more limited Powers: They retain all that they ever had, and are really incapable of more.

The Concurrence therefore of the provincial Representatives cannot be necessary in great public Measures to which none but the national Representatives are equal: The Parliament of Great Britain not only may but must tax the Colonies, when the public Occasions require a Revenue there: The present Circumstances of the Nation require one now; and a Stamp Act, of which we have had so long an Experience in this, and which is not unknown in that Country, seems an eligible Mode of Taxation. From all these Considerations, and from many others which will occur upon Reflexion and need not be suggested, it must appear proper to charge certain Stamp Duties in the Plantations to be applied towards defraying the necessary Expences of defending, protecting, and securing the British Colonies and Plantations in America. This Vote of the House of Commons closed the Measures taken last Year on the Subject of the Colonies: They appear to have been founded upon true Principles of Policy, of Commerce, and of Finance; to be wise with respect to the Mother-Country; just and even beneficial to the Plantations; and therefore it may reasonably be expected that either in their immediate Operations, or in their distant Effects, they will improve the Advantages we possess, confirm the Blessings we enjoy, and promote the public Welfare.

8.2 Against the Stamp Act

Considerations on the Propriety of Imposing Taxes in the British Colonies, for the Purpose of raising a Revenue, by Act of Parliament

Daniel Dulaney

1765

source

I shall undertake to disprove the supposed similarity of situation, whence the same kind of Representation is deduced of the inhabitants of the colonies, and of the British non-electors; and, if I succeed, the Notion of a virtual representation of the colonies must fail, which, in Truth is a mere cob-web, spread to catch the unwary, and intangle the weak. I would be understood. I am upon a question of propriety, not of power; and though some may be inclined to think it is to little purpose to discuss the one, when the other is irresistible, yet are they different considerations; and, at the same time that I invalidate the claim upon which it is founded, I may very consistently recommend a submission to the law, whilst it endures. .

Stop and Think

What does Dulaney mean by "non-electors?" Who are the "non-electors" in England? How does their situation compare to that of the colonists? What does all this have to do with "virtual representation?"

Lessees for years, copyholders, proprietors of. the public funds, inhabitants of Birmingham, Leeds, Halifax and Manchester, merchants of the City of London, or members of the corporation of the East India Company, are, as such, under no personal incapacity to be electors; for they may acquire the right of election, and there are *actually* not only a considerable number of electors in each of the classes of lessees for years etc., but in many of them, if not all, even members of Parliament. The interests therefore of the nonelectors, the electors, and the representatives, are individually the same; to say nothing of the connection among neighbours, friends and

relations. The security of the non-electors against oppression, is that their oppression will fall also upon the electors and the representatives. The one can't be injured and the other indemnified.

Further, if the nonelectors should not be taxed by the British Parliament, they would not be taxed *at all*; and it would be iniquitous, as well as a solecism in the political system, that they should partake of all the benefits resulting from the imposition and application of taxes, and derive an immunity from the circumstances of not being qualified to vote. Under this Constitution then, a double or virtual representation may be reasonably supposed.

There is not that intimate and inseparable relation between the electors of Great-Britain and the inhabitants of the colonies, which must inevitably involve both in the same taxation; on the contrary, not a single actual elector in England, might be immediately affected by a taxation in America, imposed by a statute which would have a general operation and effect, upon the properties of the inhabitants of the colonies . . . wherefore the relation between the British Americans, and the English electors, is a knot too infirm to be relied on. . .

It appears to me, that there is a clear and necessary Distinction between an Act imposing a tax for the *single purpose of revenue*, and those Acts which have been made for the *regulation of trade*, and have produced some revenue in consequence of their effect and operation as regulations of trade.

Stop and Think

How does Dulaney distinguish between revenue raising taxes and taxes that are regulations of trade? Does this distinction make sense? Can you apply it to different types of taxes today?

The colonies claim the privileges of British subjects -It has been proved to be inconsistent with those privileges, to tax them without their own consent, and it hath been demonstrated that a tax imposed by Parliament, is a tax without their consent.

The subordination of the colonies, aid the authority of Parliament to preserve it, have been fully acknowledged. Not only the welfare, but perhaps the existence of the mother country, as an independent kingdom, may depend upon her trade and navigation, and these so far upon her intercourse with the colonies, that if this should be neglected, there would soon be an end to that commerce, whence her greatest wealth is derived, and upon whichhich her maritime power is principally founded. From these considerations, the right of the *British Parliament* to regulate the trade of the colonies, may be justly deduced; a denial of it would contradict the admission of the subordination, and of the authority to preserve it, resulting from the nature of the relation between the mother country and her colonies. It is a common, and frequently the most proper method to regulate trade by duties on imports and exports. The authority of the mother country to regulate the trade of the colonies being unquestionable, what regulations are the most proper, are to be of course submitted to the determination of the Parliament; and if an *incidental revenue*, should be produced by such regulations; these are not therefore unwarrantable.

A right to impose an internal tax on the colonies, without their consent *for the single purpose of revenue*, is denied, a right to regulate their trade without their consent is admitted. The imposition of a duty may, in some

instances, be the proper regulation. If the claims of the mother country and the colonies should seem on such an occasion to interfere, and the point of right to be doubtful, (which I take to be otherwise) it is easy to guess that the determination will be on the side of power, and the inferior will be constrained to submit.[1]

1. null

8.3 Brutus, Essay 6

Brutus

Essay VI

27 December 1787

source

It is an important question, whether the general government of the United States should be so framed, as to absorb and swallow up the state governments? or whether, on the contrary, the former ought not to be confined to certain defined national objects, while the latter should retain all the powers which concern the internal police of the states?

I have, in my former papers, offered a variety of arguments to prove, that a simple free government could not be exercised over this whole continent, and that therefore we must either give up our liberties and submit to an arbitrary one, or frame a constitution on the plan of confederation. Further reasons might be urged to prove this point — but it seems unnecessary, because the principal advocates of the new constitution admit of the position. The question therefore between us, this being admitted, is, whether or not this system is so formed as either directly to annihilate the state governments, or that in its operation it will certainly effect it. If this is answered in the affirmative, then the system ought not to be adopted, without such amendments as will avoid this consequence. If on the contrary it can be shewn, that the state governments are secured in their rights to manage the internal police of the respective states, we must confine ourselves in our enquiries to the organization of the government and the guards and provisions it contains to prevent a misuse or abuse of power. To determine this question, it is requisite, that we fully investigate the nature, and the extent of the powers intended to be granted by this constitution to the rulers.

In my last number I called your attention to this subject, and proved, as I think, uncontrovertibly, that the powers given the legislature under the 8th section of the 1st article, had no other limitation than the discretion of the Congress. It was shewn, that even if the most favorable construction was given to this paragraph, that the advocates for the new constitution could wish, it will convey a power to lay and collect taxes, imposts, duties, and excises, according to the discretion of the legislature, and to make all laws which they shall judge proper and necessary to carry this power into execution. This I shewed would totally destroy all the power of the state

governments. To confirm this, it is worth while to trace the operation of the government in some particular instances.

The general government is to be vested with authority to levy and collect taxes, duties, and excises; the separate states have also power to impose taxes, duties, and excises, except that they cannot lay duties on exports and imports without the consent of Congress. Here then the two governments have concurrent jurisdiction; both may lay impositions of this kind. But then the general government have supperadded to this power, authority to make all laws which shall be necessary and proper for carrying the foregoing power into execution. Suppose then that both governments should lay taxes, duties, and excises, and it should fall so heavy on the people that they would be unable, or be so burdensome that they would refuse to pay them both — would it not be necessary that the general legislature should suspend the collection of the state tax? It certainly would. For, if the people could not, or would not pay both, they must be discharged from the tax to the state, or the tax to the general government could not be collected. — The conclusion therefore is inevitable, that the respective state governments will not have the power to raise one shilling in any way, but by the permission of the Congress. I presume no one will pretend, that the states can exercise legislative authority, or administer justice among their citizens for any length of time, without being able to raise a sufficiency to pay those who administer their governments.

If this be true, and if the states can raise money only by permission of the general government, it follows that the state governments will be dependent on the will of the general government for their existence.

What will render this power in Congress effectual and sure in its operation is, that the government will have complete judicial and executive authority to carry all their laws into effect, which will be paramount to the judicial and executive authority of the individual states: in vain therefore will be all interference of the legislatures, courts, or magistrates of any of the states on the subject; for they will be subordinate to the general government, and engaged by oath to support it, and will be constitutionally bound to submit to their decisions.

Stop and Think

Notice the first sentence of this paragraph, in which Brutus imagines the legislative, judicial and executive powers working together. The federalists would likely respond by referring to the separation of powers (think here of Madison in FP #51). What do you think Brutus would say about the separation of powers in the Constitution?

The general legislature will be empowered to lay any tax they chuse, to annex any penalties they please to the breach of their revenue laws; and to appoint as many officers as they may think proper to collect the taxes. They will have authority to farm the revenues and to vest the farmer general, with his subalterns, with plenary powers to collect them, in any way which to them may appear eligible. And the courts of law, which they will be authorized to institute, will have cognizance of every case arising under the revenue laws, the conduct of all the officers employed in collecting them; and the officers of these courts will execute their judgments. There is no way, therefore, of avoiding the destruction of the state governments, whenever the Congress please to do it, unless the people rise up, and, with a strong hand, resist and prevent the execution of constitutional laws. The fear of this, will, it is presumed, restrain the general government, for some time, within proper bounds; but it will not

be many years before they will have a revenue, and force, at their command, which will place them above any apprehensions on that score.

How far the power to lay and collect duties and excises, may operate to dissolve the state governments, and oppress the people, it is impossible to say. It would assist us much in forming a just opinion on this head, to consider the various objects to which this kind of taxes extend, in European nations, and the infinity of laws they have passed respecting them. Perhaps, if leisure will permit, this may be essayed in some future paper.

It was observed in my last number, that the power to lay and collect duties and excises, would invest the Congress with authority to impose a duty and excise on every necessary and convenience of life. As the principal object of the government, in laying a duty or excise, will be, to raise money, it is obvious, that they will fix on such articles as are of the most general use and consumption; because, unless great quantities of the article, on which the duty is laid, is used, the revenue cannot be considerable. We may therefore presume, that the articles which will be the object of this species of taxes will be either the real necessaries of life; or if not these, such as from custom and habit are esteemed so. I will single out a few of the productions of our own country, which may, and probably will, be of the number.

Cider is an article that most probably will be one of those on which an excise will be laid, because it is one, which this country produces in great abundance, which is in very general use, is consumed in great quantities, and which may be said too not to be a real necessary of life. An excise on this would raise a large sum of money in the United States. How would the power, to lay and collect an excise on cider, and to pass all laws proper and necessary to carry it into execution, operate in its exercise? It might be necessary, in order to collect the excise on cider, to grant to one man, in each county, an exclusive right of building and keeping cider-mills, and oblige him to give bonds and security for payment of the excise; or, if this was not done, it might be necessary to license the mills, which are to make this liquor, and to take from them security, to account for the excise; or, if otherwise, a great number of officers must be employed, to take account of the cider made, and to collect the duties on it.

Porter, ale, and all kinds of malt-liquors, are articles that would probably be subject also to an excise. It would be necessary, in order to collect such an excise, to regulate the manufactory of these, that the quantity made might be ascertained or otherwise security could not be had for the payment of the excise. Every brewery must then be licensed, and officers appointed, to take account of its product, and to secure the payment of the duty, or excise, before it is sold. Many other articles might be named, which would be objects of this species of taxation, but I refrain from enumerating them. It will probably be said, by those who advocate this system, that the observations already made on this head, are calculated only to inflame the minds of the people, with the apprehension of dangers merely imaginary. That there is not the least reason to apprehend, the general legislature will exercise their power in this manner. To this I would only say, that these kinds of taxes exist in Great Britain, and are severely felt. The excise on cider and perry, was imposed in that nation a few years ago, and it is in the memory of every one, who read the history of the transaction, what great tumults it occasioned.

This power, exercised without limitation, will introduce itself into every comer of the city, and country — It will wait upon the ladies at their toilett, and will not leave them in any of their domestic concerns; it will accompany them to the ball, the play, and the assembly; it will go with them when they visit, and will, on all occasions, sit beside them in their carriages, nor will it desert them even at church; it will enter the house of every gentleman, watch over his cellar, wait upon his cook in the kitchen, follow the servants into the parlour, preside over the table, and note down all he eats or drinks; it will attend him to his bed-chamber, and watch him while he sleeps; it will

take cognizance of the professional man in his office, or his study; it will watch the merchant in the counting-house, or in his store; it will follow the mechanic to his shop, and in his work, and will haunt him in his family, and in his bed; it will be a constant companion of the industrious farmer in all his labour, it will be with him in the house, and in the field, observe the toil of his hands, and the sweat of his brow; it will penetrate into the most obscure cottage; and finally, it will light upon the head of every person in the United States. To all these different classes of people, and in all these circumstances, in which it will attend them, the language in which it will address them, will be GIVE! GIVE!

Stop and Think

What do you think those last two all-caps words (GIVE! GIVE!) tell us about how Brutus thinks about human nature and about the realities of government?

A power that has such latitude, which reaches every person in the community in every conceivable circumstance, and lays hold of every species of property they possess, and which has no bounds set to it, but the discretion of those who exercise it[,] I say, such a power must necessarily, from its very nature, swallow up all the power of the state governments.

I shall add but one other observation on this head, which is this — It appears to me a solecism, for two men, or bodies of men, to have unlimited power respecting the same object. It contradicts the scripture maxim, which saith, "no man can serve two masters," the one power or the other must prevail, or else they will destroy each other, and neither of them effect their purpose. It may be compared to two mechanic powers, acting upon the same body in opposite directions, the consequence would be, if the powers were equal, the body would remain in a state of rest, or if the force of the one was superior to that of the other, the stronger would prevail, and overcome the resistance of the weaker.

But it is said, by some of the advocates of this system, "That the idea that Congress can levy taxes at pleasure, is false, and the suggestion wholly unsupported: that the preamble to the constitution is declaratory of the purposes of the union, and the assumption of any power not necessary to establish justice, &c. to provide for the common defence, &c. will be unconstitutional. Besides, in the very clause which gives the power of levying duties and taxes, the purposes to which the money shall be appropriated, are specified, viz. to pay the debts, and provide for the common defence and general welfare."[1] I would ask those, who reason thus, to define what ideas are included under the terms, to provide for the common defence and general welfare? Are these terms definite, and will they be understood in the same manner, and to apply to the same cases by every one? No one will pretend they will. It will then be matter of opinion, what tends to the general welfare; and the Congress will be the only judges in the matter. To provide for the general welfare, is an abstract proposition, which mankind differ in the explanation of, as much as they do on any political or moral proposition that can be proposed; the most opposite measures may be pursued by different parties, and both may profess, that they have in view the general welfare; and both sides may be honest in their professions, or both may have sinister views. Those who advocate this new constitution declare, they are influenced by a regard to the general welfare; those who oppose it, declare they are moved by the same principle; and I have no doubt but a number on both sides are honest in their professions; and yet nothing is more certain than this, that to adopt this constitution, and not to adopt it, cannot both of them be promotive of the general welfare.

It is as absurd to say, that the power of Congress is limited by these general expressions, “to provide for the common safety, and general welfare,” as it would be to say, that it would be limited, had the constitution said they should have power to lay taxes, &c. at will and pleasure. Were this authority given, it might be said, that under it the legislature could not do injustice, or pursue any measures, but such as were calculated to promote the public good, and happiness. For every man, rulers as well as others, are bound by the immutable laws of God and reason, always to will what is right. It is certainly right and fit, that the governors of every people should provide for the common defence and general welfare; every government, therefore, in the world, even the greatest despot, is limited in the exercise of his power. But however just this reasoning may be, it would be found, in practice, a most pitiful restriction. The government would always say, their measures were designed and calculated to promote the public good; and there being no judge between them and the people, the rulers themselves must, and would always, judge for themselves.

There are others of the favourers of this system, who admit, that the power of the Congress under it, with respect to revenue, will exist without limitation, and contend, that so it ought to be.

It is said, “The power to raise armies, to build and equip fleets, and to provide for their support, ought to exist without limitation, because it is impossible to foresee, or to define, the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them.[“]

This, it is said, “is one of those truths which, to correct and unprejudiced minds, carries its own evidence along with it. It rests upon axioms as simple as they are universal: the means ought to be proportioned to the end; the person, from whose agency the attainment of any end is expected, ought to possess the means by which it is to be attained.”[2]

This same writer insinuates, that the opponents to the plan promulgated by the convention, manifests a want of candor, in objecting to the extent of the powers proposed to be vested in this government; because he asserts, with an air of confidence, that the powers ought to be unlimited as to the object to which they extend; and that this position, if not self-evident, is at least clearly demonstrated by the foregoing mode of reasoning. But with submission to this author’s better judgment, I humbly conceive his reasoning will appear, upon examination, more specious than solid. The means, says the gentleman, ought to be proportioned to the end: admit the proposition to be true it is then necessary to enquire, what is the end of the government of the United States, in order to draw any just conclusions from it. Is this end simply to preserve the general government, and to provide for the common defence and general welfare of the union only? certainly not: for beside this, the state governments are to be supported, and provision made for the managing such of their internal concerns as are allotted to them. It is admitted, “that the circumstances of our country are such, as to demand a compound, instead of a simple, a confederate, instead of a sole government,” that the objects of each ought to be pointed out, and that each ought to possess ample authority to execute the powers committed to them. The government then, being complex in its nature, the end it has in view is so also; and it is as necessary, that the state governments should possess the means to attain the ends expected from them, as for the general government. Neither the general government, nor the state governments, ought to be vested with all the powers proper to be exercised for promoting the ends of government. The powers are divided between them — certain ends are to be attained by the one, and other certain ends by the other; and these, taken together, include all the ends of good government. This being the case, the conclusion follows, that each should be furnished with the means, to attain the ends, to which they are designed.

To apply this reasoning to the case of revenue; the general government is charged with the care of providing for

the payment of the debts of the United States; supporting the general government, and providing for the defence of the union. To obtain these ends, they should be furnished with means. But does it thence follow, that they should command all the revenues of the United States! Most certainly it does not. For if so, it will follow, that no means will be left to attain other ends, as necessary to the happiness of the country, as those committed to their care. The individual states have debts to discharge; their legislatures and executives are to be supported, and provision is to be made for the administration of justice in the respective states. For these objects the general government has no authority to provide; nor is it proper it should. It is clear then. that the states should have the command of such revenues, as to answer the ends they have to obtain. To say, “that the circumstances that endanger the safety of nations are infinite,” and from hence to infer, that all the sources of revenue in the states should be yielded to the general government, is not conclusive reasoning: for the Congress are authorized only to controul in general concerns, and not regulate local and internal ones; and these are as essentially requisite to be provided for as those. The peace and happiness of a community is as intimately connected with the prudent direction of their domestic affairs, and the due administration of justice among themselves, as with a competent provision for their defence against foreign invaders, and indeed more so.

Upon the whole, I conceive, that there cannot be a clearer position than this, that the state governments ought to have an uncontroulable power to raise a revenue, adequate to the exigencies of their governments; and, I presume, no such power is left them by this constitution.

Brutus

8.4 Federalist #33

The Same Subject Continued
Concerning the General Power of Taxation

From the Daily Advertiser.

January 3, 1788.

HAMILTON

source

To the People of the State of New York:

THE residue of the argument against the provisions of the Constitution in respect to taxation is ingrafted upon the following clause. The last clause of the eighth section of the first article of the plan under consideration authorizes the national legislature “to make all laws which shall be NECESSARY and PROPER for carrying into execution THE POWERS by that Constitution vested in the government of the United States, or in any department or officer thereof”; and the second clause of the sixth article declares, “that the Constitution and the laws of the United States made IN PURSUANCE THEREOF, and the treaties made by their authority shall be the SUPREME LAW of the land, any thing in the constitution or laws of any State to the contrary notwithstanding.”

These two clauses have been the source of much virulent invective and petulant declamation against the proposed Constitution. They have been held up to the people in all the exaggerated colors of misrepresentation as the pernicious engines by which their local governments were to be destroyed and their liberties exterminated; as the hideous monster whose devouring jaws would spare neither sex nor age, nor high nor low, nor sacred nor profane; and yet, strange as it may appear, after all this clamor, to those who may not have happened to contemplate them in the same light, it may be affirmed with perfect confidence that the constitutional operation of the intended government would be precisely the same, if these clauses were entirely obliterated, as if they were repeated in every article. They are only declaratory of a truth which would have resulted by necessary and unavoidable implication from the very act of constituting a federal government, and vesting it with certain

specified powers. This is so clear a proposition, that moderation itself can scarcely listen to the railings which have been so copiously vented against this part of the plan, without emotions that disturb its equanimity.

What is a power, but the ability or faculty of doing a thing? What is the ability to do a thing, but the power of employing the MEANS necessary to its execution? What is a LEGISLATIVE power, but a power of making LAWS? What are the MEANS to execute a LEGISLATIVE power but LAWS? What is the power of laying and collecting taxes, but a LEGISLATIVE POWER, or a power of MAKING LAWS, to lay and collect taxes? What are the proper means of executing such a power, but NECESSARY and PROPER laws?

Stop and Think

The necessary and proper clause was of great concern to the anti-federalists. Hamilton argues here that the necessary and proper clause isn't particularly significant — it just makes explicit what is implicit in the granting of the power to tax to Congress. What do you think? Would the power to tax be different if the necessary and proper clause wasn't in the Constitution?

This simple train of inquiry furnishes us at once with a test by which to judge of the true nature of the clause complained of. It conducts us to this palpable truth, that a power to lay and collect taxes must be a power to pass all laws NECESSARY and PROPER for the execution of that power; and what does the unfortunate and culumniated provision in question do more than declare the same truth, to wit, that the national legislature, to whom the power of laying and collecting taxes had been previously given, might, in the execution of that power, pass all laws NECESSARY and PROPER to carry it into effect? I have applied these observations thus particularly to the power of taxation, because it is the immediate subject under consideration, and because it is the most important of the authorities proposed to be conferred upon the Union. But the same process will lead to the same result, in relation to all other powers declared in the Constitution. And it is EXPRESSLY to execute these powers that the sweeping clause, as it has been affectedly called, authorizes the national legislature to pass all NECESSARY and PROPER laws. If there is any thing exceptionable, it must be sought for in the specific powers upon which this general declaration is predicated. The declaration itself, though it may be chargeable with tautology or redundancy, is at least perfectly harmless.

But SUSPICION may ask, Why then was it introduced? The answer is, that it could only have been done for greater caution, and to guard against all cavilling refinements in those who might hereafter feel a disposition to curtail and evade the legitimatb authorities of the Union. The Convention probably foresaw, what it has been a principal aim of these papers to inculcate, that the danger which most threatens our political welfare is that the State governments will finally sap the foundations of the Union; and might therefore think it necessary, in so cardinal a point, to leave nothing to construction. Whatever may have been the inducement to it, the wisdom of the precaution is evident from the cry which has been raised against it; as that very cry betrays a disposition to question the great and essential truth which it is manifestly the object of that provision to declare.

But it may be again asked, Who is to judge of the NECESSITY and PROPRIETY of the laws to be passed for executing the powers of the Union? I answer, first, that this question arises as well and as fully upon the simple grant of those powers as upon the declaratory clause; and I answer, in the second place, that the national government, like every other, must judge, in the first instance, of the proper exercise of its powers, and its

constituents in the last. If the federal government should overpass the just bounds of its authority and make a tyrannical use of its powers, the people, whose creature it is, must appeal to the standard they have formed, and take such measures to redress the injury done to the Constitution as the exigency may suggest and prudence justify. The propriety of a law, in a constitutional light, must always be determined by the nature of the powers upon which it is founded. Suppose, by some forced constructions of its authority (which, indeed, cannot easily be imagined), the Federal legislature should attempt to vary the law of descent in any State, would it not be evident that, in making such an attempt, it had exceeded its jurisdiction, and infringed upon that of the State? Suppose, again, that upon the pretense of an interference with its revenues, it should undertake to abrogate a landtax imposed by the authority of a State; would it not be equally evident that this was an invasion of that concurrent jurisdiction in respect to this species of tax, which its Constitution plainly supposes to exist in the State governments? If there ever should be a doubt on this head, the credit of it will be entirely due to those reasoners who, in the imprudent zeal of their animosity to the plan of the convention, have labored to envelop it in a cloud calculated to obscure the plainest and simplest truths.

But it is said that the laws of the Union are to be the SUPREME LAW of the land. But what inference can be drawn from this, or what would they amount to, if they were not to be supreme? It is evident they would amount to nothing. A LAW, by the very meaning of the term, includes supremacy. It is a rule which those to whom it is prescribed are bound to observe. This results from every political association. If individuals enter into a state of society, the laws of that society must be the supreme regulator of their conduct. If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers intrusted to it by its constitution, must necessarily be supreme over those societies, and the individuals of whom they are composed. It would otherwise be a mere treaty, dependent on the good faith of the parties, and not a goverment, which is only another word for POLITICAL POWER AND SUPREMACY. But it will not follow from this doctrine that acts of the large society which are NOT PURSUANT to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies, will become the supreme law of the land. These will be merely acts of usurpation, and will deserve to be treated as such. Hence we perceive that the clause which declares the supremacy of the laws of the Union, like the one we have just before considered, only declares a truth, which flows immediately and necessarily from the institution of a federal government. It will not, I presume, have escaped observation, that it EXPRESSLY confines this supremacy to laws made PURSUANT TO THE CONSTITUTION; which I mention merely as an instance of caution in the convention; since that limitation would have been to be understood, though it had not been expressed.

Though a law, therefore, laying a tax for the use of the United States would be supreme in its nature, and could not legally be opposed or controlled, yet a law for abrogating or preventing the collection of a tax laid by the authority of the State, (unless upon imports and exports), would not be the supreme law of the land, but a usurpation of power not granted by the Constitution. As far as an improper accumulation of taxes on the same object might tend to render the collection difficult or precarious, this would be a mutual inconvenience, not arising from a superiority or defect of power on either side, but from an injudicious exercise of power by one or the other, in a manner equally disadvantageous to both. It is to be hoped and presumed, however, that mutual interest would dictate a concert in this respect which would avoid any material inconvenience.

Stop and Think

Notice here Hamilton's response to the possibility of "an improper accumulation of taxes on the same object." What do you think he means by this? Notice, too, that he says such an improper accumulation will be an "injudicious exercise of power" and that "mutual interest" will prevent it from occurring. What do you think Hamilton is saying here about the real limits on the power of taxation?

The inference from the whole is, that the individual States would, under the proposed Constitution, retain an independent and uncontrollable authority to raise revenue to any extent of which they may stand in need, by every kind of taxation, except duties on imports and exports. It will be shown in the next paper that this CONCURRENT JURISDICTION in the article of taxation was the only admissible substitute for an entire subordination, in respect to this branch of power, of the State authority to that of the Union.

PUBLIUS.