**Brutus**

*Brutus was the pen name chosen by an Anti-federalist who authored sixteen editorials that appeared in two New York City newspapers between August 1787 and October 1788. While many Anti-federalists offered general broadsides filled with exaggerated claims when critiquing the Constitution, not so with Brutus. The Brutus pieces lay out arguments against the ratification of the Constitution that are carefully crafted, reveal a close reading of the text of the Constitution, and draw reasonable inferences to make a persuasive case that the Constitution should be rejected because the federal government would prove to be tyrannical.*

*Brutus’s most trenchant criticisms of the Constitution begin with the federal judiciary, showing how the judiciary would prove to be an anti-democratic branch of the government that would work in concert with Congress to undermine liberty at the state level. The Brutus pieces were powerful and compelling. Federalists realized that Brutus had to be forcefully answered and so Alexander Hamilton took up the challenge and sought to rebut Brutus in Federalists 78-81. We will leave it to you to judge who got the better of the other in this exchange.*

*We still don’t know the author of the Brutus essays. Speculation has focused on three possibilities: Robert Yates, Melancton Smith, and John Williams. While all three had the experience, outlook, and skill to have written the essays there also might have been some cooperation among some number of them that yielded the final result.*

*Regardless of who the actual author was, the Brutus pieces reveal an author who has extensive experience seeing how courts actually operate, a mature conceptualization of popular sovereignty probably gleaned from years in politics, and an understanding of how laws are crafted and enforced through judicial systems almost surely gained from studying the law.*

*As you read this piece below, which is an amalgamation of Brutus’s essays XII, XIII, and XVI, ask yourself these questions:*

1. *What is Brutus’s view of the Court’s powers? Does it have the power of judicial review and, if so, what will the effect of this power be upon freedom?*
2. *Checks and balances and separation of powers are viewed as two structural mechanisms to restrain power. What is Brutus’s view of these as he explains the Constitution? Will they in fact work as Federalists describe?*
3. *How would Brutus propose to fix the problems he sees in the Constitution?*

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It is to be observed, that the supreme court has the power, in the last resort, to determine all questions that may arise in the course of legal discussion, on the meaning and construction of the constitution. This power they will hold under the constitution, and independent of the legislature. The latter can no more deprive the former of this right, than either of them, or both of them together, can take from the president, with the advice of the senate, the power of making treaties, or appointing ambassadors. The legislature, therefore, will not go over the limits by which the courts may adjudge they are confined.

From these observations it appears, that the judgment of the judicial, on the constitution, will become the rule to guide the legislature in their construction of their powers.

Every extension of the power of the general legislature, as well as of the judicial powers, will increase the powers of the courts; and the dignity and importance of the judges, will be in proportion to the extent and magnitude of the powers they exercise.

The judicial power will operate to effect, in the most certain, but yet silent and imperceptible manner, what is evidently the tendency of the constitution: — I mean, an entire subversion of the legislative, executive and judicial powers of the individual states. Every adjudication of the supreme court, on any question that may arise upon the nature and extent of the general government, will affect the limits of the state jurisdiction. In proportion as the former enlarge the exercise of their powers, will that of the latter be restricted. . . .The judicial power of the United States . . . would be authorized to explain the constitution, not only according to its letter, but according to its spirit and intention; and having this power, they would strongly incline to give it such a construction as to extend the powers of the general government, as much as possible, to the diminution, and finally to the destruction, of that of the respective states.

And in their decisions they will not confine themselves to any fixed or established rules, but will determine, according to what appears to them, the reason and spirit of the constitution. The opinions of the supreme court, whatever they may be, will have the force of law; because there is no power provided in the constitution, that can correct their errors, or control their adjudications. From this court there is no appeal.

They will give the sense of every article of the constitution, that may from time to time come before them. And I conceive the legislature themselves, cannot set aside a judgment of this court, because they are authorized by the constitution to decide in the last resort. The legislature must be controlled by the constitution, and not the constitution by them.

This power in the judicial, will enable them to mould the government, into almost any shape they please. It is obvious that these courts will have authority to decide upon the validity of the laws of any of the states, in all cases where they come in question before them. Where the constitution gives the general government exclusive jurisdiction, they will adjudge all laws made by the states, in such cases, void ab initio. Where the constitution gives them concurrent jurisdiction, the laws of the United States must prevail, because they are the supreme law. In such cases, therefore, the laws of the state legislatures must be repealed, restricted, or so construed, as to give full effect to the laws of the union on the same subject. From these remarks it is easy to see, that in proportion as the general government acquires power and jurisdiction, by the liberal construction which the judges may give the constitution, will those of the states lose its rights, until they become so trifling and unimportant, as not to be worth having.

The real effect of this system of government, will therefore be brought home to the feelings of the people, through the medium of the judicial power. It is, moreover, of great importance, to examine with care the nature and extent of the judicial power, because those who are to be vested with it, are to be placed in a situation altogether unprecedented in a free country. They are to be rendered totally independent, both of the people and the legislature, both with respect to their offices and salaries. No errors they may commit can be corrected by any power above them, if any such power there be, nor can they be removed from office for making ever so many erroneous adjudications.

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Hence it is that the true policy of a republican government is, to frame it in such manner, that all persons who are concerned in the government, are made accountable to some superior for their conduct in office. — This responsibility should ultimately rest with the People. To have a government well administered in all its parts, it is requisite the different departments of it should be separated and lodged as much as may be in different hands. The legislative power should be in one body, the executive in another, and the judicial in one different from either — But still each of these bodies should be accountable for their conduct.

When great and extraordinary powers are vested in any man, or body of men, which in their exercise, may operate to the oppression of the people, it is of high importance that powerful checks should be formed to prevent the abuse of it.

This supreme controling power should be in the choice of the people, or else you establish an authority independent, and not amenable at all, which is repugnant to the principles of a free government.

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The judges in England are under the control of the legislature, for they are bound to determine according to the laws passed by them. But the judges under this constitution will control the legislature, for the supreme court are authorized in the last resort, to determine what is the extent of the powers of the Congress; they are to give the constitution an explanation, and there is no power above them to set aside their judgment.

The supreme court then have a right, independent of the legislature, to give a construction to the constitution and every part of it, and there is no power provided in this system to correct their construction or do it away. If, therefore, the legislature pass any laws, inconsistent with the sense the judges put upon the constitution, they will declare it void; and therefore in this respect their power is superior to that of the legislature. In England the judges are not only subject to have their decisions set aside by the house of lords, for error, but in cases where they give an explanation to the laws or constitution of the country, contrary to the sense of the parliament, though the parliament will not set aside the judgment of the court, yet, they have authority, by a new law, to explain a former one, and by this means to prevent a reception of such decisions. But no such power is in the legislature. The judges are supreme — and no law, explanatory of the constitution, will be binding on them.

There is no power above them, to control any of their decisions. There is no authority that can remove them, and they cannot be controlled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven.

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