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The FŒDERALIST. No. XXXI.
To the People of the State of New-York.

Although I am of opinion that there would be no real danger of the consequences, which seem to be apprehended to the State Governments, from a power in the Union to controul them in the levies of money; because I am persuaded that the sense of the people, the extreme hazard of provoking the resentments of the State Governments, and a conviction of the utility and necessity of local administrations, for local purposes, would be a complete barrier against the oppressive use of such a power: Yet I am willing here to allow in its full extent the justness of the reasoning, which requires that the individual States should possess an independent and uncontrolable authority to raise their own revenues for the supply of their own wants. And making this concession I affirm that (with the sole exception of duties on imports and exports) they would under the plan of the Convention retain that authority in the most absolute and unqualified sense; and that an attempt on the part of the national Government to abrige them in the exercise of it would be a violent assumption of power unwarranted by any article or clause of its Constitution.

An intire consolidation of the States into one complete national sovereignty would imply an intire subordination of the parts; and whatever powers might remain in them would be altogether dependent on the general will. But as the plan of the Convention aims only at a partial Union or consolidation, the State Governments would clearly retain all the rights of sovereignty which they before had and which were not by that act *exclusively* delegated to the United States. This exclusive delegation or rather this alienation of State sovereignty would only exist in three cases; where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*. I use these terms to distinguish this last case from another which might appear to resemble it; but which would in fact be essentially different; I mean where the exercise of a concurrent jurisdiction might be productive of occasional interferences in the *policy* of any branch of administration, but would not imply any direct contradiction or repugnancy in point of constitutional authority.

These three cases of exclusive jurisdiction in the Fœderal Government may be exemplified by the following instances: The last clause but one in the 8th. section of the 1st. article provides expressly that Congress shall exercise "*exclusive legislation*" over the district to be appropriated as the seat of government. This answers to the first case. The first clause of the same section impowers Congress "*to lay and collect taxes, duties, imposts and excises*" and the 2d. clause of the 10th. section of the same article declares that "*no State shall* without the consent of Congress, *lay any imposts or duties on imports or exports* except for the purpose of executing its inspection laws." Hence would result an exclusive power in the Union to lay duties on imports and exports with the particular exception mentioned; but this power is abriged by another clause which declares that no tax or duty shall be laid on articles exported from any State; in consequence of which qualification it now only extends to the *duties on imports*. This answers to the second case. The third will be found in that clause, which declares that Congress shall have power "to establish an UNIFORM RULE of naturalization throughout the United States." This must necessarily be exclusive; because if each State had power to prescribe a DISTINCT RULE there could not be no UNIFORM RULE.

A case which may perhaps be thought to resemble the latter, but which is in fact widely different, affects the question immediately under consideration. I mean the power of imposing taxes on all articles other than exports and imports. This, I contend, is manifestly a concurrent and coequal authority in the United States and in the individual States. There is plainly no expression in the granting clause which makes that power *exclusive* in the Union. There is no independent clause or sentence which prohibits the States from exercising it. So far is this from being the case, that a plain and conclusive argument to the contrary is to be deduced from the restraint laid upon the States in relation to duties on imports and exports. This restriction implies an admission, that if it were not inserted the States would possess the power it excludes, and it implies a further admission, that as to all other taxes the authority of the States remains undiminished. In any other view it would be both unnecessary and dangerous; it would be unnecessary because if the grant to the Union of the power of laying such duties implied the exclusion of the States, or even their subordination in this particular there could be no need of such a restriction; it would be dangerous because the introduction of it leads directly to the conclusion which has been mentioned and which if the reasoning of the objections be just, could not have been intended; I mean that the States in all cases to which the restriction did not apply would have a concurrent power of taxation with the Union. The restriction in question amounts to what lawyers call a NEGATIVE PREGNANT; that is a *negation* of one thing and an *affirmance* of another; a negation of the authority of the States to impose taxes on imports and exports, and an affirmance of their authority to impose them on all other articles. It would be mere sophistry to argue that it was meant to exclude them *absolutely* from the imposition of taxes of the former kind, and to leave them at liberty to lay others *subject to the controul* of the national Legislature. The restraining or prohibitory clause only says, that they shall not *without the consent of Congress* lay such duties; and if we are to understand this in the sense last mentioned, the Constitution would then be made to introduce a formal provision for the sake of a very absurd conclusion; which is that the States *with the consent* of the national Legislature might tax imports and exports; and that they might tax every other article *unless controuled* by the same body. If this was the intention why not leave it in the first instance to what is alleged to be the natural operation of the original

clause conferring a general power of taxation upon the Union? It is evident that this could not have been the intention and that it will not bear a construction of the kind.

As to a supposition of repugnancy between the power of taxation in the States and in the Union, it cannot be supported in that sense which would be requisite to work an exclusion of the States. It is indeed possible that a tax might be laid on a particular article by a State which might render it *inexpedient* that thus a further tax should be laid on the same article by the Union; but it would not imply a constitutional inability to impose a farther tax. The quantity of the imposition, the expediency or inexpediency of an increase on either side, would be mutually questions of prudence; but there would be involved no direct contradiction of power. The particular policy of the national and of the State systems of finance might now and then not exactly coincide, and might require reciprocal forbearances. It is not however a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy, that can by implication alienate and extinguish a pre-existing right of sovereignty.

The necessity of a concurrent jurisdiction in certain cases results from the division of the sovereign power; and the rule that all authorities of which the States are not explicitly divested in favour of the Union remain with them in full vigour, is not only a theoretical consequence of that division, but is clearly admitted by the whole tenor of the instrument which contains the articles of the proposed constitution. We there find that notwithstanding the affirmative grants of general authorities, there has been the most pointed care in those cases where it was deemed improper that the like authorities should reside in the States, to insert negative clauses prohibiting the exercise of them by the States. The tenth section of the first article consists altogether of such provisions. This circumstance is a clear indication of the sense of the Convention, and furnishes a rule of interpretation out of the body of the act which justifies the position I have advanced, and refutes every hypothesis to the contrary.[1]

The last clause of the eighth section of the first article of the plan under consideration, authorises 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 sources of much virulent invective and petulant declamation against the proposed constitution, they have been held up to the people, in all the exaggerated colours 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 clamour, 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 Fœderal 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?

This simple train of enquiry 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 calum[n]iated 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, authorises 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 legitimate authorities of the Union. The Convention probably foresaw that 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 Fœderal 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 Fœderal 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 pretence of an interference with its revenues, it should undertake to abrogate a land tax 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 intirely due to those reasoners, who, in the imprudent zeal of their animosity to the plan of the Convention, have laboured to invelope 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 entrusted 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 government; which is only another word for POLITICAL POWER AND SUPREMACY. But it will not follow from this doctrine that acts of the larger 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 Fœderal 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 for laying a tax for the use of the United States would be supreme in its nature, and could not legally be opposed or controuled; yet a law for abrogating or preventing the collection of a tax laid by the authority of a State (unless upon imports and exports) would not be the supreme law of the land, but an 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. The inference from the whole is—that the individual States would, under the proposed constitution, retain an independent and uncontroulable 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 shewn in the next paper [see *The Federalist* 34] that this

CONCURRENT JURISDICTION in the article of taxation was the only admissible substitute for an intire subordination, in respect to this branch of power, of the State authority to that of the Union.

1. At this point in the M'Lean edition, essay 32 ends, and essay 33 is introduced with the phrase: "The residue of the argument against the provisions in the Constitution, in respect to taxation, is ingrafted upon the following clauses."

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