

The State of the Union under a failed Constitution

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Rebuttal to the legal profession's arguments against exclusion from elective office in the legislative and executive branches of government. Part 2.

Federalists 86 and 87 identified the cause of the failure of the Constitution by asserting and proving that: Members of the legal profession unconstitutionally control all government.¹ Additional evidence of the constitutional violation by members of the legal profession will be provided by answering the following questions:

1. **Was the Constitution written to make certain that no single 'same hands' group controls all government?**² And if so:
2. **Does Madison's concept of 'same hands'**³ **include the members of the legal profession, as one potential 'same hands' group?**

Affirmative answers to both questions would require evidence in the Constitution and/or the Federalist Papers respecting: a) a concern by Madison, (who wrote the Constitution) about the danger of 'same hands' control; b) the existence of language sufficient to identify members of the legal profession as one 'same hands' group; c) an outline of proposed corrective measures; and d) proof that the Constitution was written to implement the proposed corrective measures. *All of the necessary evidence is there, stated as clearly as the English language and the genius of man's mind allow. I. A historical overview of the fear of a 'same hands' control group.* An examination of the political context of the times will serve to give the modern reader a better sense of the concerns and motivations that led to the writing of the Constitution, and of the great fear, prevalent at the time, of granting government the power to oppress. The historical facts are undisputed. The Nation declared its independence in 1776 from a despotic British monarchy. It agreed to be governed by a document called The Articles of Confederation, ratified a few years later. However the fear of even a popularly elected government oppressing the people caused the Articles to be written granting the government insufficient power to govern.⁴ In 1787 delegates from the several States gathered in Philadelphia to correct the problem. They believed that the essence of good government over a free people required the proper balance between: individual freedom and security for all.⁵ To achieve that end, government had to be granted *sufficient power to govern but insufficient to oppress*. There had never before been a government of the people, for the people and by the people. If free men were to agree to grant more power to their own government over them, *they wanted to make as sure as the power of the human mind and the*

*clarity of the English language could guarantee,⁶ that the additional power granted would still be insufficient to oppress. The general fear of government oppression translated into a specific fear that a single 'same hands' group would acquire control of government, and whether elected, appointed or otherwise empowered, would become corrupt and oppressive.⁷ History teaches us that, prior to 1776,⁸ only four 'groups' had, from time to time, successfully usurped enough power from the people to control government and become oppressive. These 'groups' were: 1. The monarchy;⁹ 2. The aristocracy; 3. The military; and 4. The State sanctioned religion, (the Church). The Constitution neutralized the four 'groups' identified as potential oppressors as follows: 1. The nation was organized as a republic, so there could be no threat from a monarch. 2. Planned constitutional prohibitions against titles of nobility would protect the nation from a potential aristocracy.¹⁰ 3. The Constitution would make the elected civilian President also Commander-in-Chief of the Armed Forces, thus neutralizing any potential threat from the military.¹¹ 4. The planned first amendment to the Bill of Rights¹² would prohibit Congress from passing any law respecting the establishment of religion, or prohibiting the free exercise thereof, thus protecting the nation from oppression by any State sanctioned religion. **Still the fear persisted that any group united by a common interest, in control of all government and however acquiring power, would become corrupt and oppressive.** The nation believed what Lord Acton, the British statesman, had said: 'Power tends to corrupt and absolute power corrupts absolutely.' **It was thus necessary to protect against that danger above all other considerations.** The first step in doing so required a clear and comprehensive definition of the specific nature of the danger. The next step required writing a constitution and structuring a system of government that provided maximum protection against that danger. II. Defining the danger of 'same hands' control. Madison explained his specific concerns in the Federalist Papers. He first defined the problem as the need for a 'well constructed Union... **to break and control the violence of faction.**'¹³ He then defined '**faction**' as 'a number of citizens, ... who are united and actuated by some common ... interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.'¹⁴ Madison repeated the same concept many times and in many different ways. He condemned the result of a 'same hands' control by declaring that:... *the accumulation of all powers, legislative, executive and judiciary **in the same hands,** may justly be pronounced the very definition of tyranny.*¹⁵ He reaffirmed the danger of 'same hands' control by quoting the French philosopher Montesquieu, who said: 'There can be no liberty where the legislative and executive powers are united in the same person or body of magistrates.'¹⁶ In which respect he was echoed by Hamilton who said: '... there is no liberty, if the power of judging be*

not separated from the legislative and executive powers.¹⁷ Madison also quoted Jefferson, the author of the Declaration of Independence, as follows: 'All the powers of government, legislative, executive and judiciary result to the legislative body. The concentrating (of) these in the same hands is precisely the definition of despotic government.'¹⁸ To make certain he was understood, he restated the concept from a different perspective, by defining the government of a republic as one in which: 'It is essential ... that it be derived from the great body of society, not from an inconsiderable proportion, or a favored class of it.'¹⁹ **Recognizing the danger of even duly elected individuals becoming corrupt**, Madison articulated the case for the **separation of powers** concept: 'An *elective despotism*, was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others.'²⁰ (Emphasis original). **III. The steps taken to prevent the danger of 'same hands' control.** Madison first made the case against any 'same hands' control. He then outlined the necessary steps for making sure that such control never occur, by writing a constitution implementing the concept of the **separation of powers** on several levels. **First** there was to be a union of independent states. Each State would have its own republican government. That would institute **the first level of the separation of powers**, between the individual states on the one hand and the federal government on the other. *That means that any 'same hands' group would need to control both the individual state's government and the federal government.* **Second**, there was to be **a second level of separation of powers** in the federal and in each individual state government. *Every government would be divided into three separate branches, the legislative, the executive and the judiciary branches, with the necessary prohibitions against any single individual holding power in more than one branch at a time.* **Third**, within the legislative branch, a bi-cameral system would be set up. This would implement **a third level of separation of powers**. Each chamber would have different powers. Both chambers would have to agree on all laws passed by the legislative branch. *Thus any 'same hands' group would need to control both chambers of all legislative branches of the nation.* **Fourth**, the right to vote would be granted to as numerous an electorate as the times allowed²¹ to insure that as many different interests/factions as possible would be represented in government, to reduce the potential danger of the formation of any '*same hands*' group. **Fifth**, a Bill of Rights would be passed as soon as possible after the Constitution's ratification. It would outline particular rights that the people, (as original owners of all rights), would specifically retain, from and against, their government, Madison had thus set up what seemed like a fool proof

system against any 'same hands' group ever acquiring effective control of all government. To overcome these obstacles a 'same hands' group would have to accomplish most, or a very substantial part of, all of the following:

- 1. Acquire control of both legislative houses in the federal and every state government,**
- 2. Acquire control of the judiciary branch in the federal and every state government,**
- 3. Acquire control of the executive branch in the federal and every state government,**
- 4. Acquire control through the elective process in violation of the Constitution,**
- 5. Do so with the people being generally unaware of what was happening,**
- 6. Do so in violation of the oath of office mandatory for every elected official.**

A most unlikely scenario indeed! **Yet that is precisely what has happened.**

IV. Defining members of the legal profession as a 'same hands' group. The Federalist Papers informs us that Madison feared all of the following: a) any 'same hands, whether of one, a few or many;' b) 'factions' defined as 'a number of citizens,... united and actuated by a common interest, adverse to the rights of other citizens;' and c) a government 'drawn from an inconsiderable proportion of society or a favored class.' Did he mean to include members of the legal profession as a 'same hands' group? Let us examine his statements.

A. Any 'same hands, whether of one, a few or many.' The word 'hands' is unambiguous, as are the words 'a few or many.'²² The word 'same' means: 'Similar in kind or quality.' The word 'kind' is defined as: 'a number of persons or things of the same character; a class.' The word 'character' is defined as: 'the combination of qualities distinguishing any class of persons.' The word 'quality' is defined as: 'a distinguishing characteristic.' So 'same hands' means '**hands of a class of persons similar in characteristics that distinguish them.**' Certainly membership in the legal profession is a **similar distinguishing characteristic of a class of persons.** Therefore Madison's definition includes all such members.

B. Citizens united by a common interest, adverse to the rights of other citizens. Members of every professional organization are *united by a common interest, adverse to the rights of other citizens.* That is the reason that individuals band together and organize on the basis of their profession. They do so first and foremost in pursuit of their own financial interests. Thus, regardless of any other activities they might pursue of general interest to the public, the members of the legal profession qualify under Madison's concept of 'same hands'.

C. A government

composed of citizens drawn from an inconsiderable proportion of society or a favored class. The legal profession exercises complete control over the judiciary branch of government, and effective control over all others. Alone among the professions, it controls its own discipline. That is enough evidence to characterize the members of the legal profession as a 'favored class.' The profession represents less than one third of one per cent of the population which is certainly an 'inconsiderable proportion' of society. Thus a government controlled by members of the legal profession fails on both counts to meet Madison's definition of 'republican government'. *That brings members of the legal profession within the meaning of the 'same hands' definition and constitutes an independent violation of the constitution on the additional count of failing to meet the definition of republican government.* V. **Thus all the evidence supports the conclusions that the Constitution was written to ensure that no 'same hands' group control all government, and that the members of the legal profession qualify many time over as a 'same hands' group.**

PUBLIUS II
(Ronald Bibace)

About the author: *This writer is a constitutional scholar. He has written Federalist numbers 86 and 87 in defense of the Constitution. He is like Madison, a non-lawyer who loves the law, and like Hamilton an immigrant and naturalized American.*

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1. The constitutional principles are discoverable through the text of the written constitution itself, and the Federalist Papers. The Constitution is a short document that mandates but does not explain. The intent of the Constitution is discoverable through the 85 articles written to defend the Constitution and promote its ratification, known as the Federalist Papers.
 2. Although every high school graduate should know that the answer is yes, asking the question in the present context provides the opportunity for a more thorough review of the issue.
 3. In which statement Madison declares that: '*...the accumulation of all powers ... in the same hands ... may justly be pronounced the very definition of tyranny.*' Federalist # 47, (1787)
 4. For example, Congress had the power to borrow money, but no source of revenue to repay. Congress had no power to enforce payment from the States for its needs. It could do nothing to prevent the States from 'trespassing on each other'. It could do nothing to compel delegates to attend and thus frequently lacked a quorum to conduct its business. Walter Berns, *Taking the Constitution Seriously*, (1992) Madison Books, ISBN 0-8191-7970-1
 5. Warren Burger, Chief Justice of the United States, 1969-1986, Foreword to the US Constitution
 6. '*... no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas...*' James Madison, Federalist # 37. (January 11, 1788)
 7. Montesquieu, *The Spirit of Laws*.
 8. Between 1776 and the modern era a fifth group arose, so far in the US only. That group consists of the members of the legal profession.

9. Or its national equivalent: The Russian Czar, the German Kaiser, the Roman Emperors, etc.
10. US Constitution, Article I, Section 9.
11. US Constitution Article II, Section 2.
12. Amendment I to the Constitution of the United States, ratified effective December 15, 1791, as part of the first ten Amendments (Bill of Rights).
13. James Madison, Federalist # 10, November 22, 1787
14. *Ibid.*
15. James Madison, Federalist # 47, Jan 30, 1788.
16. *Ibid.*
17. Alexander Hamilton, Federalist # 78, May 28, 1788.
18. James Madison, Federalist # 48, February 1, 1788.
19. James Madison, Federalist # 39, January 16, 1788.
20. *Ibid.*
21. The nation had not implemented the universal right to vote. Women and slaves had no vote.
22. All dictionary definitions are from *Funk & Wagnalls, New Comprehensive International Dictionary of the English Language*. The Publishers Guild Press, New York (1975)