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The Power of the Judiciary. (Part 3)

Part 1: from the 12th essay by "Brutus" from the February 7th & 14th (1788) issues of The New-York Journal. Part 2: Taken from the first half of the 14th essay February 28, 1788.

In my last, I showed, that the judicial power of the United States under the first clause of the second section of article eight, 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.

I shall now proceed to show how this power will operate in its exercise to effect these purposes. . . . First, let us inquire how the judicial power will effect an extension of the legislative authority.

Perhaps the judicial power will not be able, by direct and positive decrees, ever to direct the legislature, because it is not easy to conceive how a question can be brought before them in a course of legal discussion, in which they can give a decision, declaring, that the legislature have certain powers which they have not exercised, and which, in consequence of the determination of the judges, they will be bound to exercise. But it is easy to see, that in their adjudication they may establish certain principles, which being received by the legislature will enlarge the sphere of their power beyond all bounds.

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.

In determining these questions, the court must and will assume certain principles, from which they will reason, in forming their decisions. These principles, whatever they may be, when they become fixed by a course of decisions, will be adopted by the legislature, and will be the rule by which they will explain their own powers. This appears evident from this consideration, that if the legislature pass laws, which, in the judgment of the court, they are not authorized to do by the constitution, the court will not take notice of them; for it will not be denied, that the constitution is the highest or supreme law. And the courts are vested with the supreme and uncontrollable power, to determine in all cases that come before them, what the constitution means. They cannot, therefore, execute a law, which in their judgment, opposes the constitution, unless we can suppose they can make a superior law give way to an inferior. The legislature, therefore, will

not go over the limits by which the courts may adjudge they are confined. And there is little room to doubt but that they will come up to those bounds, as often as occasion and opportunity may offer, and they may judge it proper to do it. For as on the one hand, they will not readily pass laws which they know the courts will not execute, so on the other, we may be sure they will not scruple to pass such as they know they will give effect, as often as they may judge it proper.

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.

What the principles are, which the courts will adopt, it is impossible for us to say. But taking up the powers as I have explained them in my last number, which they will possess under this clause, it is not difficult to see, that they may, and probably will, be very liberal ones.

We have seen, that they will be authorized to give the constitution a construction according to its spirit and reason, and not to confine themselves to its letter.

To discover the spirit of the constitution, it is of the first importance to attend to the principal ends and designs it has in view. These are expressed in the preamble, in the following words, viz., "We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution," etc. If the end of the government is to be learned from these words, which are clearly designed to declare it, it is obvious it has in view every object which is embraced by any government. The preservation of internal peace -- the due admission of justice -- and to provide for the defense of the community -- seems to include all the objects of government. But if they do not, they are certainly comprehended in the words, "to provide for the general welfare." If it be further considered, that this constitution, if it is ratified, will not be a compact entered into by states, in their corporate capacities, but an agreement of the people of the United States as one great body politic, no doubt can remain but that the great end of the constitution, if it is to be collected from the preamble, in which its end is declared, is to constitute a government which is to extend to every case for which any government is instituted, whether external or internal. The courts, therefore, will establish this as a principle in expounding the constitution, and will give every part of it such an explanation as will give latitude to every department under it, to take cognizance of every matter, not only that affects the general and national concerns of the union, but also of such as relate to the administration of private justice, and to regulating the internal and local affairs of the different parts.

Such a rule of exposition is not only consistent with the general spirit of the preamble, but it will stand confirmed by considering more minutely the different clauses of it.

The first object declared to be in view, is "To form a more perfect union." It is to be observed, it is not an union of states or bodies corporate; had this been the case the existence of the state governments might have been secured. But it is a union of the people of the United States considered as one body, who are to ratify this constitution if it is adopted. Now to make a union of this kind perfect, it is necessary to abolish all inferior governments, and to give the general one complete legislative, executive and judicial powers to every purpose. The courts therefore

will establish it as a rule in explaining the constitution; to give it such a construction as will best tend to perfect the union or take from the state governments every power of either making or executing laws. The second object is "to establish justice." This must include not only the idea of instituting the rule of justice, or of making laws which shall be the measure or rule of right, but also of providing for te application of this rule or of administering justice under it. And under this the courts will in their decisions extend the power of the government to all cases they possibly can, or otherwise they will be restricted in doing what appears to be the intent of the constitution they should do, to wit, pass laws and provide for the execution of them, for the general distribution of justice between man and man. Another end declared is "to insure domestic tranquility." This comprehends a provision against all private breaches of the peace, as well as against all public commotions or general insurrections; and to attain the object of this clause fully, the government must exercise the power of passing laws in these subjects, as well as of appointing magistrates with authority to execute them. And the courts will adopt these ideas in their expositions. I might proceed to the other clause, in the preamble, and it would appear by a consideration of all of them separately, as it does by taking them together, that if the spirit of this system is to be known from its declared end and design in the preamble, its spirit is to subvert and abolish all the powers of the state governments, and to embrace every object to which any government extends.

As it sets out in the preamble with this declared intention, so it proceeds in the different parts with the same idea. Any person, who will peruse the 5th section with attention, in which most of the powers are enumerated, will perceive that they either expressly or by implication extend to almost every thing about which any legislative power can be employed. If this equitable mode of construction is applied to this part of the constitution, nothing can stand before it.

This will certainly give the first clause in that article a construction which I confess I think the most natural and grammatical one, to authorize the Congress to do any thing which in their judgment will tend to provide for the general welfare, and this amounts to the same thing as general and unlimited powers of legislation in all cases.

This same manner of explaining the constitution, will fix a meaning, and a very important one too, to the 12th clause of the same section, which authorizes the Congress to make all laws which shall be proper and necessary for carrying into effect the foregoing powers, etc. A voluminous writer in favor of this system, has taken great pains to convince the public, that this clause means nothing: for that the same powers expressed in this, are implied in other parts of the constitution. Perhaps it is so, but still this will undoubtedly be an excellent auxiliary to assist the courts to discover the spirit and reason of the constitution, and when applied to any and every of the other clauses granting power, will operate powerfully in extracting the spirit from them.

I might instance a number of clauses in the constitution, which, if explained in an equitable manner, would extend the powers of the government to every case, and reduce the state legislatures to nothing. But, I should draw out my remarks to an undue length, and I presume enough has been said to show, that the courts have sufficient ground in the exercise of this power, to determine, that the legislature have no bounds set to them by this constitution, by any supposed right the legislatures of the respective states may have to regulate any of their local concerns.

I proceed, 2nd, to inquire, in what manner this power will increase the jurisdiction of the courts.

I would here observe, that the judicial power extends, expressly, to all civil cases that may arise save such as arise between citizens of the same state, with this exception to those of that description, that the judicial of the United States have cognizance of cases between citizens of the same state, claiming lands under grants of different states. Nothing more, therefore, is necessary to give the courts of law, under this constitution, complete jurisdiction of all civil causes, but to comprehend cases between citizens of the same State not included in the foregoing exception.

I presume there will be no difficulty in accomplishing this. Nothing more is necessary than to set forth in the process, that the party who brings the suit is a citizen of a different state from the one against whom the suit is brought and there can be little doubt but that the court will take cognizance of the matter. And if they do, who is to restrain them? Indeed, I will freely confess, that it is my decided opinion, that the courts ought to take cognizance of such causes under the powers of the constitution. For one of the great ends of the constitution is, "to establish justice." This supposes that this cannot be done under the existing governments of the states; and there is certainly as good reason why individuals, living in the same state, should have justice, as those who live in different states. Moreover, the constitution expressly declares, that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states," It will therefore be no fiction, for a citizen of one state to set forth, in a suit, that he is a citizen of another; for he that is entitled to all the privileges and immunities of a country, is a citizen of that country. And in truth, the citizen of one state will, under this constitution, be a citizen of every state....

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 t see, that in proportion as the general government acquires power and jurisdiction, by the liberal construction which the judges may give the constitution, those of the states will lose their rights, until they become so trifling and unimportant, as not to be worth having. I am much mistaken, if this system will not operate to effect this with as much celerity, as those who have the administration of it will think prudent to suffer it. The remaining objections of the judicial power shall be considered in a future paper.

The second paragraph of sect. 2, art. 3, is in these words: "In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."

Although it is proper that the courts of the general government should have cognizance of all matters affecting ambassadors, foreign ministers, and consuls, yet I question much the propriety of giving the supreme court original jurisdiction in all cases of this kind.

Ambassadors, and other public ministers, claim, and are entitled by the law of nations, to certain privileges, and exemptions, both for their persons and their servants. The meanest servant of an ambassador is exempted by the law of nations from being sued for debt. Should a suit be brought against such an one by a citizen, through inadvertency or want of information, he will be subject to an action in the supreme court. All the officers concerned in issuing or executing the process will be liable to like actions. Thus may a citizen of a state be compelled, at great expense and inconveniency, to defend himself against a suit, brought against him in the supreme court, for inadvertently commencing an action against the most menial servant of an ambassador for a just debt.

The appellate jurisdiction granted to the supreme court, in this paragraph, has justly been considered as one of the most objectionable parts of the constitution. Under this power, appeals may be had from the inferior courts to the supreme, in every case to which the judicial power extends, except in the few instances in which the supreme court will have original jurisdiction.

By this article, appeals will lie to the supreme court, in all criminal as well as civil causes. This I know, has been disputed by some; but I presume the point will appear clear to any one, who will attend to the connection of this paragraph with the one that precedes it. In the former, all the cases, to which the power of the judicial shall extend, whether civil or criminal, are enumerated. There is no criminal matter, to which the judicial power of the United States will extend, but such as are included under some one of the cases specified in this section. For this section is intended to define all cases, of every description, to which the power of the judicial shall reach. But in all these cases it is declared, the supreme court shall have appellate jurisdiction, except in those which affect ambassadors, other public ministers and consuls, and those in which a state shall be a party. If then this section extends the power of the judicial, to criminal cases, it allows appeals in such cases. If the power of the judicial is not extended to criminal matters by this section, I ask, by what part of this system does it appear, that they have any cognizance of them?

I believe it is a new and unusual thing to allow appeals in criminal matters. It is contrary to the sense of our laws, and dangerous to our lives and liberties. . . . As our taw now stands, a person charged with a crime has a right to a fair and impartial trial by a jury of his country, and their verdict is final. If be is acquitted no other court can call upon him to answer for the same crime. But by this system, a man may have had ever so fair a trial, have been acquitted by ever so respectable a jury of his country, and still the officer of the government who prosecutes may appeal to the supreme court. The whole matter may have a second hearing. By this means, persons who may have disobliged those who execute the general government, may be subjected to intolerable oppression. They may be kept in long and ruinous confinement, and exposed to heavy and insupportable charges, to procure the attendance of witnesses, and provide the means of their defense, at a great distance from their places of residence.

I can scarcely believe there can be a considerate citizen of the United States that will approve of this appellate jurisdiction, as extending to criminal cases, if they will give themselves time for

reflection.

Whether the appellate jurisdiction as it respects civil matters, will not prove injurious to the rights of the citizens, and destructive of those privileges which have ever been held sacred by Americans, and whether it will not render the administration of justice intolerably burdensome, intricate, and dilatory, will best appear, when we have considered the nature and operation of this power.

It has been the fate of this clause, as it has of most of those against which unanswerable objections have been offered, to be explained different ways, by the advocates and opponents to the constitution. I confess I do not know what the advocates of the system would make it mean, for I have not been fortunate enough to see in any publication this clause taken up and considered. It is certain however, they do not admit the explanation which those who oppose the constitution give it, or otherwise they would not so frequently charge them with want of candor, for alleging that it takes away the trial by jury. Appeals from an inferior to a superior court, as practiced in the civil law courts, are well understood. In these courts, the judges determine both on the law and the fact; and appeals are allowed from the inferior to the superior courts, on the whole merits; the superior tribunal will re-examine all the facts as well as the law, and frequently new facts will be introduced, so as many times to render the cause in the court of appeals very different from what it was in the court below.

If the appellate jurisdiction of the supreme court, be understood in the above sense, the term is perfectly intelligible. The meaning then is, that in an the civil case enumerated, the supreme court shall have authority to reexamine the whole merits of the case, both with respect to the facts and the law which may arise under it, without the intervention of a jury; that this is the sense of this part of the system appears to me clear, from the express words of it, "in all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, etc." Who are the supreme court? Does it not consist of the judges? . . . They will therefore have the same authority to determine the fact as they will have to determine the law, and no room is left for a jury on appeals to the supreme court.

If we understand the appellate jurisdiction in any other way, we shall be left utterly at a loss to give it a meaning. The common law is a, stranger to any such jurisdiction: no appeals can lie from any of our common law courts, upon the merits of the case. The only way in which they can go up from an inferior to a superior tribunal is by habeas corpus before a hearing, or by certiorari, or writ of error, after they are determined in the subordinate courts. But in no case, when they are carried up, are the facts re-examined, but they are always taken as established in the inferior court.

BRUTUS