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The Power of the Judiciary. (Part 4)

Part 1: Part 2 of "Brutus" 14th essay (from the March 6, 1788, New-York Journal).
Part 2: The final segment of the 15th essay (March 20, 1788 New York Journal).

It may still be insisted that this clause [on appellate jurisdiction] does not take away the trial by jury on appals, but that this may be provided for by the legislature, under that paragraph which authorizes them to form regulations and restrictions for the court in the exercise of this power.

The natural meaning of this paragraph seems to be no more than this, that Congress may declare, that certain cases shall not be subject to the appellate jurisdiction, and they may point out the mode in which the court shall proceed in bringing up the causes before them, the manner of their taking evidence to establish the facts, and the method of the court's proceeding. But I presume they cannot take from the court the right of deciding on the fact, any more than they can deprive them of the right of determining on the law, when a cause is once before them; for they have the same jurisdiction as to fact, as they have as to the law. But supposing the Congress may under this clause establish the trial by jury on appeals. It does not seem to me that it will render this article much less exceptionable. An appeal from one court and jury, to another court and jury, is a thing altogether unknown in the laws of our state [New York], and in most of the states in the union. A practice of this kind prevails in the eastern states: actions are there commenced in the inferior courts, and an appeal lies from them on the whole merits to the superior courts. The consequence is well known. Very few actions are determined in the lower courts; it is rare that a case of any importance is not carried by appeal to the supreme court, and the jurisdiction of the inferior courts is merely nominal; this has proved so burdensome to the people in Massachusetts, that it was one of the principal causes which excited the insurrection in that state, in the year past. [There are] very few sensible and moderate men in that state but what will admit, that the inferior courts are almost entirely useless, and answer very little purpose, save only to accumulate costs against the poor debtors who are already unable to pay their just debts.

But the operation of the appellate power in the supreme judicial of the United States, would work infinitely more mischief than any such power can do in a single state.

The trouble and expense to the parties would be endless and intolerable. No man can say where the supreme court are to hold their sessions; the presumption is, however, that it must be at the seat of the general government. In this case parties must travel many hundred miles, with their witnesses and lawyers, to prosecute or defend a suit. No man of middling fortune, can sustain the expense of such a law suit, and therefore the poorer and middling class of citizens will be under the necessity of submitting to the demands of the rich and the lordly, in cases that will come under the cognizance of this court. If it be said, that to prevent this oppression, the supreme court will sit in different parts of the union, it may be replied, that this would only make the oppression somewhat more tolerable, but by no means so much as to give a chance of justice to the poor and

middling class. It is utterly impossible that the supreme court can move into so many different parts of the Union, as to make it convenient or even tolerable to attend before them with witnesses to try causes from every part of the United States. If to avoid the expense and inconvenience of calling witnesses from a great distance, to give evidence before the supreme court, the expedient of taking the deposition of witnesses in writing should be adopted, it would not help the matter. It is of great importance in the distribution of justice that witnesses should be examined face to face, that the parties should have the fairest opportunity of cross examining them in order to bring out the whole truth. There is something in the manner in which a witness delivers his testimony which can not be committed to paper, and which yet very frequently gives a complexion to his evidence, very different from what it would bear if committed to writing. Besides, the expense of taking written testimony would be, enormous. Those who are acquainted with the costs that arise in the courts, where all the evidence is taken in writing, well know that they exceed beyond all comparison those of the common law courts, where witnesses are examined viva voce.

The costs accruing in courts generally advance with the grade of the courts. Thus the charges attending a suit in our common pleas, is much less than those in the supreme court, and these are much lower than those in the court of chancery. Indeed, the costs in the last mentioned court, are in many cases so exorbitant and the proceedings so dilatory that the suitor had almost as well give up his demand as to prosecute his suit. We have just reason to suppose, that the costs in the supreme general court will exceed either of our courts. The officers of the general court will be more dignified than those of the states, the lawyers of the most ability will practice in them, and the trouble and expense of attending them will be greater. From all these considerations, it appears, that the expense attending suits in the supreme court will be so great, as to put it out of the power of the poor and middling class of citizens to contest a suit in it.

From these remarks it appears, that the administration of justice under the powers of the judicial will be dilatory; that it will be attended with such an heavy expense as to amount to little short of a denial of justice to the poor and middling class of people who in every government stand most in need of the protection of the law; and that the trial by jury, which has so justly been the boast of our forefathers as well as ourselves is taken away under them.

These extraordinary powers in this court are the more objectionable, because there does not appear the least necessity for them, in order to secure a due and impartial distribution of justice.

The want of ability or integrity, or a disposition to render justice to every suitor, has not been objected against the courts of the respective states. So far as I have been informed, the courts of justice in all the states have ever been found ready to administer justice with promptitude and impartiality according to the laws of the land. It is true in some of the states, paper money has been made, and the debtor authorized to discharge his debts with it, at a depreciated value; in others, tender laws have been passed, obliging the creditor to receive on execution other property than money in discharge of his demand; and in several of the states laws have been made unfavorable to the creditor and tending to render property insecure.

But these evils have not happened from any defect in the judicial departments of the states. The courts indeed are bound to take notice of these laws, and so will the courts of the general

government be under obligation to observe the laws made by the general legislature not repugnant to the constitution. But so far have the judicial been from giving undue latitude of construction to laws of this kind, that they have invariably strongly inclined to the other side. All the acts of our legislature, which have been charged with being of this complexion, have uniformly received the strictest construction by the judges, and have been extended to no cases but to such as came within the strict letter of the law. In this way, have our courts, I will not say evaded the law, but so limited its operation as to work the least possible injustice. The same thing has taken place in Rhode-Island, which has justly rendered herself infamous, by tenaciously adhering to her paper money system. The judges there gave a decision, in opposition to the words of the statute, on this principle: that a construction according to the words of it would contradict the fundamental maxims of their laws and constitution.

No pretext therefore can be formed, from the conduct of the judicial courts [of the states], which will justify giving such powers to the supreme general court. For their decisions have been such as to give just ground of confidence in them, that they will finally adhere to the principles of rectitude; and there is no necessity of lodging these powers in the [federal] courts, in order to guard against the evils justly complained of, on the subject of security of property under this constitution. For it has provided, "that no state shall emit bills of credit, or make any thing but gold and silver coin a tender in payment of debts." It has also declared, that "no state shall pass any law impairing the obligation of contracts." These prohibitions give the most perfect security against those attacks upon property which I am sorry to say some of the states have but too wantonly made, . . . For "this constitution will be the supreme law of the land, and the judges in every state will be bound thereby; any thing in the constitution and laws of any state to the contrary notwithstanding."

The courts of the respective states might therefore have been securely trusted with deciding all cases between man and man, whether citizens of the same state or of different states, or between foreigners and citizens. Indeed, for ought I see, every case that can arise under the constitution or laws of the United States ought in the first instance to be tried in the court of the state, except those which might arise between states, such as respect ambassadors, or other public ministers, and perhaps such as call in question the claim of lands under grants from different states. The state courts would be under sufficient control, if writs of error were allowed from the state courts to the supreme court of the union, according to the practice of the courts in England and of this state, on all cases in which the laws of the union are concerned, and perhaps to all cases in which a foreigner is a party.

This method would preserve the good old way of administering justice, would bring justice to every man's door, and preserve the inestimable right of trial by jury. It would be following, as near as our circumstances will admit, the practice of the courts in England, which is almost the only thing I would wish to copy in their government.

But as this system now stands, there is to be as many inferior courts as Congress may see fit to appoint, who are to be authorized to originate and in the first instance to try all the cases falling under the description of this article. There is no security that a trial by jury shall be had in these courts, but the trial here will soon become, as it is in Massachusetts' inferior courts, [a] mere matter of form; for an appeal may be had to the supreme court on the whole merits. This court is

to have power to determine in law and in equity, on the law and the fact, and this court is exalted above all other power in the government, subject to no control; and so fixed as not to be removable, but upon impeachment, which is much the same thing as not to be removable at all.

To obviate the objections made to the judicial power, it has been said, that the Congress, in forming the regulations and exceptions which they are authorized to make respecting the appellate jurisdiction, will make provision against all the evils which are apprehended from this article. On this I would remark, that this way of answering the objection made to the power, implies an admission that the power is in itself improper without restraint; and if so, why not restrict it in the first instance.

The just way of investigating any power given to a government, is to examine its operation supposing it to be put in exercise. If upon inquiry, it appears that the power, if exercised, would be prejudicial, it ought not to be given. For to answer objections made to a power given to a government, by saying it will never be exercised, is really admitting that the power ought not to be exercised, and therefore ought not to be granted.

I have, in the course of my observation on this constitution, affirmed and endeavored to show, that it was calculated to abolish entirely the state governments, and to melt down the states into one entire government, for every purpose as well internal and local, as external and national. In this opinion the opposers of the system have generally agreed -- and this has been uniformly denied by its advocates in public. Some individuals indeed, among them, will confess that it has this tendency, and scruple not to say it is what they wish; and I will venture to predict, without the spirit of prophecy, that if it is adopted without amendments, or some such precautions as will insure amendments immediately after its adoption, that the same gentlemen who have employed their talents and abilities with such success to influence the public mind to adopt this plan, will employ the same to persuade the people, that it will be for their good to abolish the state governments as useless and burdensome.

Perhaps nothing could have been better conceived to facilitate the abolition of the state governments than the constitution of the judicial. They will be able to extend the limits of the general government gradually, and by insensible degrees, and to accommodate themselves to the temper of the people. Their decisions on the meaning of the constitution will commonly take place in cases which arise between individuals, with which the public will not be generally acquainted. One adjudication will form a precedent to the next, and this to a following one. These cases will immediately affect individuals only, so that a series of determinations will probably take place before even the people will be informed of them. In the meantime all the art and address of those who wish for the change will be employed to make converts to their opinion. The people will be told that their state officers, and state legislatures, are a burden and expense without affording any solid advantage; that all the laws passed by them might be equally well made by the general legislature. If to those who will be interested in the change, be added those who will be under their influence, and such who will submit to almost any change of government which they can be persuaded to believe will ease them of taxes, it is easy to see the party who will favor the abolition of the state governments would be far from being inconsiderable. In this situation, the general legislature might pass one law after another, extending the general and abridging the state jurisdictions, and to sanction their proceedings

would have a course of decisions of the judicial to whom the constitution has committed the power of explaining the constitution. If the states remonstrated, the constitutional mode of deciding upon the validity of the law is with the supreme court; and neither people, nor state legislatures, nor the general legislature can remove them or reverse their decrees. Had the construction of the constitution been less [more?] with the legislature, they would have explained it at their peril. If they exceed[ed] their powers, or sought to find in the spirit of the constitution, more than was expressed in the letter, the people from whom they derived their power could remove them, . . . Indeed, I can see no other remedy that the people can have against their rulers for encroachments of this nature. A constitution is a compact of a people with their rulers; if the rulers break the compact, the people have a right and ought to remove them and do themselves justice. But in order to enable them to do this with the greater facility, those whom the people choose at stated periods should have the power in the last resort to determine the sense of the compact. If they determine contrary to the understanding of the people, an appeal will lie to the people at the period when the rulers are to be elected, and they will have it in their power to remedy the evil. But when this power is lodged in the hands of men independent of the people, and of their representatives, and who are not constitutionally accountable for their opinions, no way is left to control them but with a high hand and an outstretched arm.

BRUTUS