

Timoleon, *New York Journal*, Extraordinary, 1 November 1787

After some judicious reflections on this subject, which tended to shew the necessity of the most plain and unequivocal language in the all important business of constituting government, which necessarily conveying great powers, is always liable (from the natural tendency of power to corrupt the human heart and deprave the head) to great abuse; by perverse and subtle arguments calculated to extend dominion over all things and all men. One of the club supposed the following case:—A gentleman, *in the line of his profession* is appointed a *judge* of the supreme court under the new Constitution, and the *rulers*, finding that the rights of conscience and the freedom of the press were exercised in such a manner, by *preaching* and *printing* as to be troublesome to the new government—which event would probably happen, if the rulers finding themselves possessed of great power, should so use it as to oppress and injure the community.—In this state of things the *judge* is called upon, *in the line of his profession*, to give his opinion—whether the *new Constitution* admitted of a legislative act to *suppress the rights of conscience*, and *violate the liberty of the press*? The answer of the learned *judge* is conceived in didactic mode, and expressed in learned phrase; thus,—In the 8th section of the first article of the *new Constitution*, the Congress have power given *to lay and collect taxes for the general welfare of the United States*. By this power, the right of taxing is co-extensive with the *general welfare*, and the *general welfare* is as unlimited as actions and things are that may disturb or benefit that general welfare. A right being given to *tax* for the general welfare, necessarily includes the right of judging what is for the general welfare, and a right of judging what is for the general welfare, as *necessarily* includes a power of protecting, defending, and promoting it by all such laws and means as are fitted to that end; for, *qui dat finem dat media ad finem necessaria*, who gives the end gives the means necessary to obtain the end. The Constitution must be so construed as not to involve an absurdity, which would clearly follow from allowing the end and denying the means. A right of *taxing* for the general welfare being the highest and most important mode of providing for it, cannot be supposed to exclude inferior modes of effecting the same purpose, because the rule of law is, that, *omne majus continet in se minus*.

From hence it clearly results, that, if *preachers* and *printers* are troublesome to the new government; and that in the opinion of its rulers, it shall be for the general welfare to restrain or suppress both the one and the other, it may be done consistently with the new Constitution. And that this was the opinion of the community when they consented to it, is evident from this consideration; that although the all comprehending power of the new legislature is fixed, by its acts being made the *supreme law* of the land, any thing in the *Constitutions* or laws of any state to the contrary notwithstanding: Yet no *express* declaration in favor of the *rights of conscience* or *liberty* of the *press* is to be found in the new Constitution, as we see was carefully done in the *Constitutions* of the states composing this union—Shewing clearly, that what was *then* thought necessary to be specially reserved from the pleasure of power, is *now* designed to be yielded to its will.

A grave old gentleman of the club, who had sat with his head reclined on his hand, listening in pensive mood to the argument of the *judge*, said, “I verily believe, that neither the logic or the law of that opinion will be hereafter doubted by the professors of power, who, through the

history of human nature, have been for enlarging the sphere of their authority. And thus the dearest rights of men and the best security of civil liberty may be sacrificed by the sophism of a lawyer, who, Carneades like, can to day shew that to be necessary, before the people, which tomorrow he can likewise shew to be unnecessary and useless—For which reason the sagacious Cato advised, that such a man should immediately be sent from the city, as a person dangerous to the morals of the people and to society.” The old gentleman continued, “I now plainly see the necessity of express declarations and reservations in favor of the great, unalienable rights of mankind, to prevent the oppressive and wicked extension of power to the ruin of human liberty. For the opinion above stated, absolutely refutes the sophistry of ‘that being retained which is not given,’ where the words conveying power admit of the most extensive construction that language can reach to, or the mind conceive, as is the case in this new Constitution. By which we have already seen how logically it may be proved, that both *religion* and *the press* can be made to bend before the views of power. With as little ceremony, and similar constructive doctrine, the inestimable trial by jury can likewise be depraved and destroyed—because the Constitution in the 2d section of the 3d article, by expressly assuming the trial by jury in *criminal cases*, and being silent about it in *civil causes*, evidently declares it to be unnecessary in the latter. And more strongly so, by giving the supreme court jurisdiction in appeals, ‘*both as to law and fact.*’ If to this be added, that the trial by jury in criminal cases is only stipulated to be ‘*in the state,*’ not in the county where the crime is supposed to have been committed; one excellent part of the jury trial, from the vicinage, or at least from the county, is even in criminal cases rendered precarious, and at the mercy of rulers under the new Constitution.—Yet the danger to liberty, peace, and property, from restraining and injuring this excellent mode of trial, will clearly appear from the following observations of the learned Dr. Blackstone, in his commentaries on the laws of England, Art. Jury Trial Book 3. chap. 33.—‘The establishment of jury trial was always so highly esteemed and valued by the people, that no conquest, *no change of government*, could ever prevail to abolish it. In magna charta it is more than once insisted upon *as the principal bulwark of our liberties*—And this is a species of knowledge most absolutely necessary for every gentleman; as well, because he may be frequently called upon to determine in this capacity the rights of others, his fellow subjects; as, *because his own property, his liberty, and his life, depend upon maintaining in its legal force the trial by jury*—In settling and adjusting a question of *fact*, when intrusted to any single magistrate, partiality and injustice have an ample field to range in; either by boldly asserting that to be proved which is not so, or by more artfully suppressing some circumstances, stretching and warping others, and distinguishing away the remainder. Here therefore a competent number of sensible and upright jurymen, *chosen from among those of the middle rank, will be found the best investigators of truth, and the surest guardians of public justice.* For the most powerful individual in the state will be cautious of committing any flagrant invasion of another’s right, when he knows that the *fact* of his oppression must be examined and decided by twelve indifferent men, not appointed until the hour of trial; and that when once *the fact* is ascertained, *the law must*, of course, redress it. *This, therefore, preserves in the hands of the people that share, which they ought to have in the administration of public justice, and prevents the encroachments of the more powerful and wealthy citizens. Every new tribunal, erected for the decision of facts, without the intervention of a jury* (whether composed of justices of the peace, commissioners of the revenue, judges of a court of conscience, or any other standing

magistrates) *is a step towards establishing aristocracy, the most oppressive of absolute governments.* And in every country as the trial by jury has been *gradually disused*, so the great have increased in power, until the state has been torn to pieces by rival factions, and oligarchy in effect has been established, though under the shadow of regal government; unless where the miserable people have taken shelter under absolute monarchy, as the lighter evil of the two. And, particularly, it is worthy of observation, that in Sweden the trial by jury, that bulwark of liberty, continued long in its full force, but is now fallen into disuse; and that there, though the regal power is in no country so closely limited, yet the liberties of the commons are extinguished, and the government is degenerated into a mere aristocracy. *It is therefore upon the whole, a duty which every man owes to his country, his friends, his posterity, and himself, to maintain, to the utmost of his power, this valuable trial by jury in all its rights.*” Thus far the learned Dr. Blackstone.—“Could the Doctor, if he were here, at this moment,” continued the old gentleman, “have condemned those parts of the new Constitution in stronger terms, which give the supreme court jurisdiction both as to law and *fact*; and which have weakened the jury trial in criminal cases, and which have discountenanced it in all civil causes? At first I wondered at the complaint that some people made of this new Constitution, because it led to the government of a few; but it is fairly to be concluded, from this injury to the trial by jury, that *some* who framed this new system, saw with Dr. Blackstone, how operative jury trial was in preventing the tyranny of the great ones, and therefore frowned upon it, as this new Constitution does. But we may hope that our fellow citizens will not approve of this new plan of government, before they have well considered it, and that they will insist on such amendments to it, as will secure from violation the just rights and liberty of the people.” The club listened, with great attention, to the worthy old gentleman, and joined him in hearty wishes, that the people may be upon their guard, and not suffer themselves to be deprived of liberty, under the notion of strong federal government—because the design of all government should be the happiness of the people, and it is not necessary for the purpose of securing happiness, that power should be given rulers to destroy happiness. I was an attentive hearer, Mr. Greenleaf, of what passed in this honest club, and I have given it to you as nearly as my memory (which is not a bad one) enables me to do. I confess to you, that I felt my mind much informed upon this all important business, the new Constitution, which, when first I saw it, and hastily read it, I found my imagination quickly taken with the good parts of it, and so passed over those great and fundamental errors, which, if agreed to, must inevitably convert the people of this free country into hewers of wood and drawers of water for the few great ones, into whose hands all power will be thereby unwarily delivered.

New York, October 24, 1787.

Cite as: The Documentary History of the Ratification of the Constitution Digital Edition, ed. John P. Kaminski, Gaspare J. Saladino, Richard Leffler, Charles H. Schoenleber and Margaret A. Hogan. Charlottesville: University of Virginia Press, 2009. Original source: Commentaries on the Constitution, Volume XIII: Commentaries on the Constitution, No. 1