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Brutus XII

New York Journal, 7 February 1788 (excerpt)

. . . 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 authorised 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 defence, promote the general welfare, and

secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution,” &c. 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 administration of justice—and to provide for the defence 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 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 compleat 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 the 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 on 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 government, 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 8th 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. But 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 authorise 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.

(To be continued.)

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