

Anti-Federalist No. XI

Robert Yates
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Brutus argues that the Supreme Court will have the power to define the meaning of the Constitution; hence, it will gradually come to dominate the other branches at the federal level. The state governments will suffer the same fate as they will have no higher authority to which they may appeal for justice under the written law. They will be bound by the decisions of federal judiciary, regardless of the arbitrariness of those decisions. The judiciary is to be placed in a position of authority unprecedented among free nations.

The nature and extent of the judicial power of the United States, proposed to be granted by this constitution, claims our particular attention.

Much has been said and written upon the subject of this new system on both sides, but I have not met with any writer, who has discussed the judicial powers with any degree of accuracy. And yet it is obvious, that we can form but very imperfect ideas of the manner in which this government will work, or the

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effect it will have in changing the internal police and mode of distributing justice at present subsisting in the respective states, without a thorough investigation of the powers of the judiciary and of the manner in which they will operate. This government is a complete system, not only for making, but for executing laws. And the courts of law, which will be constituted by it, are not only to decide upon the constitution and the laws made in pursuance of it, but by officers subordinate to them to execute all their decisions. The real effect of this system of government, will therefore be brought home to the feelings of the people, through the medium of the judicial power. It is, moreover, of great importance, to examine with care the nature and extent of the judicial power, because those who are to be vested with it, are to be placed in a situation altogether unprecedented in a free country. They are to be rendered totally independent, both of the people and the legislature, both with respect to their offices and salaries. No errors they may commit can be corrected by any power above them, if any such power there be, nor can they be removed from office for making ever so many erroneous adjudications.

The only causes for which they can be displaced, is, conviction of treason, bribery, and high crimes and misdemeanors.

This part of the plan is so modelled, as to authorise the courts, not only to carry into execution the powers expressly given, but where these are wanting or ambiguously expressed, to supply what is wanting by their own decisions.

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That we may be enabled to form a just opinion on this subject, I shall, in considering it,

1st. Examine the nature and extent of the judicial powers—and

2d. Enquire, whether the courts who are to exercise them, are so constituted as to afford reasonable ground of confidence, that they will exercise them for the general good.

With a regard to the nature and extent of the judicial powers, I have to regret my want of capacity to give that full and minute explanation of them that the subject merits. To be able to do this, a man should be possessed of a degree of law knowledge far beyond what I pretend to. A number of hard words and technical phrases are used in this part of the system, about the meaning of which gentlemen learned in the law differ.

Its advocates know how to avail themselves of these phrases. In a number of instances, where objections are made to the powers given to the judicial, they give such an explanation to the technical terms as to avoid them.

Though I am not competent to give a perfect explanation of the powers granted to this department of the government, I shall yet attempt to trace some of the leading features of it, from which I presume it will appear, that they will operate to a total subversion of the state judiciaries, if not, to the legislative authority of the states.

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In article 3d, sect. 2d, it is said, "The judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority, &c."

The first article to which this power extends, is, all cases in law and equity arising under this constitution.

What latitude of construction this clause should receive, it is not easy to say. At first view, one would suppose, that it meant no more than this, that the courts under the general government should exercise, not only the powers of courts of law, but also that of courts of equity, in the manner in which those powers are usually exercised in the different states. But this cannot be the meaning, because the next clause authorises the courts to take cognizance of all cases in law and equity arising under the laws of the United States; this last article, I conceive, conveys as much power to the general judicial as any of the state courts possess.

The cases arising under the constitution must be different from those arising under the laws, or else the two clauses mean exactly the same thing.

The cases arising under the constitution must include such, as bring into question its meaning, and will require an explanation of the nature and extent of the powers of the different departments under it.

This article, therefore, vests the judicial with a power to resolve all questions that may arise on any

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case on the construction of the constitution, either in law or in equity.

1st. They are authorised to determine all questions that may arise upon the meaning of the constitution in law. This article vests the courts with authority to give the constitution a legal construction, or to explain it according to the rules laid down for construing a law.—These rules give a certain degree of latitude of explanation. According to this mode of construction, the courts are to give such meaning to the constitution as comports best with the common, and generally received acceptance of the words in which it is expressed, regarding their ordinary and popular use, rather than their grammatical propriety. Where words are dubious, they will be explained by the context. The end of the clause will be attended to, and the words will be understood, as having a view to it; and the words will not be so understood as to bear no meaning or a very absurd one.

2d. The judicial are not only to decide questions arising upon the meaning of the constitution in law, but also in equity.

By this they are empowered, to explain the constitution according to the reasoning spirit of it, without being confined to the words or letter.

“From this method of interpreting laws (says Blackstone) by the reason of them, arises what we call equity;” which is thus defined by Grotius, “the correction of that, wherein the law, by reason of its universality, is deficient”; for since in laws all cases cannot

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be foreseen, or expressed, it is necessary, that when the decrees of the law cannot be applied to particular cases, there should some where be a power vested of defining those circumstances, which had they been foreseen the legislator would have expressed; and these are the cases, which according to Grotius, "*lex non exacte definit, sed arbitrio boni viri permittet.*"

The same learned author observes, "That equity, thus depending essentially upon each individual case, there can be no established rules and fixed principles of equity laid down, without destroying its very essence, and reducing it to a positive law."

From these remarks, the authority and business of the courts of law, under this clause, may be understood.

They will give the sense of every article of the constitution, that may from time to time come before them. And in their decisions they will not confine themselves to any fixed or established rules, but will determine, according to what appears to them, the reason and spirit of the constitution. The opinions of the supreme court, whatever they may be, will have the force of law; because there is no power provided in the constitution, that can correct their errors, or controul their adjudications. From this court there is no appeal. And I conceive the legislature themselves, cannot set aside a judgment of this court, because they are authorised by the constitution to decide in the last resort. The legislature must be controuled by the constitution, and not the constitution by them. They have therefore no more right to set aside any

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judgment pronounced upon the construction of the constitution, than they have to take from the president, the chief command of the army and navy, and commit it to some other person. The reason is plain; the judicial and executive derive their authority from the same source, that the legislature do theirs; and therefore in all cases, where the constitution does not make the one responsible to, or controulable by the other, they are altogether independent of each other.

The judicial power will operate to effect, in the most certain, but yet silent and imperceptible manner, what is evidently the tendency of the constitution:—I mean, an entire subversion of the legislative, executive and judicial powers of the individual states. Every adjudication of the supreme court, on any question that may arise upon the nature and extent of the general government, will affect the limits of the state jurisdiction. In proportion as the former enlarge the exercise of their powers, will that of the latter be restricted.

That the judicial power of the United States, will lean strongly in favour of the general government, and will give such an explanation to the constitution, as will favour an extension of its jurisdiction, is very evident from a variety of considerations.

1st. The constitution itself strongly countenances such a mode of construction. Most of the articles in this system, which convey powers of any considerable importance, are conceived in general and indefinite terms, which are either equivocal, ambiguous, or which require long definitions to unfold the extent of

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their meaning. The two most important powers committed to any government, those of raising money, and of raising and keeping up troops, have already been considered, and shewn to be unlimited by any thing but the discretion of the legislature. The clause which vests the power to pass all laws which are proper and necessary, to carry the powers given into execution, it has been shewn, leaves the legislature at liberty, to do every thing, which in their judgment is best. It is said, I know, that this clause confers no power on the legislature, which they would not have had without it—though I believe this is not the fact, yet, admitting it to be, it implies that the constitution is not to receive an explanation strictly, according to its letter; but more power is implied than is expressed. And this clause, if it is to be considered, as explanatory of the extent of the powers given, rather than giving a new power, is to be understood as declaring, that in construing any of the articles conveying power, the spirit, intent and design of the clause, should be attended to, as well as the words in their common acceptance.

This constitution gives sufficient colour for adopting an equitable construction, if we consider the great end and design it professedly has in view—these appear from its preamble to be, “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 posterity.” The design of this system is here expressed, and it is proper to give such a meaning to the various parts, as will best promote the

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accomplishment of the end; this idea suggests itself naturally upon reading the preamble, and will countenance the court in giving the several articles such a sense, as will the most effectually promote the ends the constitution had in view—how this manner of explaining the constitution will operate in practice, shall be the subject of future enquiry.

2d. Not only will the constitution justify the courts in inclining to this mode of explaining it, but they will be interested in using this latitude of interpretation. Every body of men invested with office are tenacious of power; they feel interested, and hence it has become a kind of maxim, to hand down their offices, with all its rights and privileges, unimpaired to their successors; the same principle will influence them to extend their power, and increase their rights; this of itself will operate strongly upon the courts to give such a meaning to the constitution in all cases where it can possibly be done, as will enlarge the sphere of their own authority. Every extension of the power of the general legislature, as well as of the judicial powers, will increase the powers of the courts; and the dignity and importance of the judges, will be in proportion to the extent and magnitude of the powers they exercise. I add, it is highly probable the emolument of the judges will be increased, with the increase of the business they will have to transact and its importance. From these considerations the judges will be interested to extend the powers of the courts, and to construe the constitution as much as possible, in such a way as to favour it; and that they will do it, appears probable.

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3d. Because they will have precedent to plead, to justify them in it. It is well known, that the courts in England, have by their own authority, extended their jurisdiction far beyond the limits set them in their original institution, and by the laws of the land.

The court of exchequer is a remarkable instance of this. It was originally intended principally to recover the king's debts, and to order the revenues of the crown. It had a common law jurisdiction, which was established merely for the benefit of the king's accountants. We learn from Blackstone, that the proceedings in this court are grounded on a writ called *quo minus*, in which the plaintiff suggests, that he is the king's farmer or debtor, and that the defendant hath done him the damage complained of, by which he is less able to pay the king. These suits, by the statute of Rutland, are expressly directed to be confined to such matters as specially concern the king, or his ministers in the exchequer. And by the *articuli super cartas*, it is enacted, that no common pleas be thenceforth held in the exchequer contrary to the form of the great charter: but now any person may sue in the exchequer. The surmise of being debtor to the king being matter of form, and mere words of course; and the court is open to all the nation.

When the courts will have a precedent before them of a court which extended its jurisdiction in opposition to an act of the legislature, is it not to be expected that they will extend theirs, especially when there is nothing in the constitution expressly against it? and they are authorised to construe its meaning, and are not under any controul?

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This power in the judicial, will enable them to mould the government, into almost any shape they please.—The manner in which this may be effected we will hereafter examine.

BRUTUS

Anti-Federalist No. XV

Robert Yates
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The judicial branch holds a place superior to that of the legislative under the proposed Constitution. Holding office during good behavior is not a sufficient check against the political mischief of the courts. In England, the House of Lords serves as a corrective to the erroneous judgments, but under this Constitution judges cannot be removed from office except for high crimes and misdemeanors. The Federal Congress may work in conjunction with the judiciary to divest the states of their legitimate rights and powers.

I said in my last number [XIV], that the supreme court under this constitution would be exalted above all other power in the government, and subject to no controul. The business of this paper will be to illustrate this, and to shew the danger that will result from it. I question whether the world ever saw, in any period of it, a court of justice invested with such immense powers, and yet placed in a situation so little responsible. Certain it is, that in England, and in the several states, where we have been taught to believe,

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the courts of law are put upon the most prudent establishment, they are on a very different footing.

The judges in England, it is true, hold their offices during their good behaviour, but then their determinations are subject to correction by the house of lords; and their power is by no means so extensive as that of the proposed supreme court of the union.—I believe they in no instance assume the authority to set aside an act of parliament under the idea that it is inconsistent with their constitution. They consider themselves bound to decide according to the existing laws of the land, and never undertake to controul them by adjudging that they are inconsistent with the constitution—much less are they vested with the power of giving an equitable construction to the constitution.

The judges in England are under the controul of the legislature, for they are bound to determine according to the laws passed by them. But the judges under this constitution will controul the legislature, for the supreme court are authorised in the last resort, to determine what is the extent of the powers of the Congress; they are to give the constitution an explanation, and there is no power above them to set aside their judgment. The framers of this constitution appear to have followed that of the British, in rendering the judges independent, by granting them their offices during good behaviour, without following the constitution of England, in instituting a tribunal in which their errors may be corrected; and without adverting to this, that the judicial under this

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system have a power which is above the legislative, and which indeed transcends any power before given to a judicial by any free government under heaven.

I do not object to the judges holding their commissions during good behaviour. I suppose it a proper provision provided they were made properly responsible. But I say, this system has followed the English government in this, while it has departed from almost every other principle of their jurisprudence, under the idea, of rendering the judges independent; which, in the British constitution, means no more than that they hold their places during good behaviour, and have fixed salaries, they have made the judges independent, in the fullest sense of the word. There is no power above them, to controul any of their decisions. There is no authority that can remove them, and they cannot be controuled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself. Before I proceed to illustrate the truth of these assertions, I beg liberty to make one remark -- Though in my opinion the judges ought to hold their offices during good behaviour, yet I think it is clear, that the reasons in favour of this establishment of the judges in England, do by no means apply to this country.

The great reason assigned, why the judges in Britain ought to be commissioned during good behaviour, is this, that they may be placed in a situation, not to be influenced by the crown, to give such decisions,

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as would tend to increase its powers and prerogatives. While the judges held their places at the will and pleasure of the king, on whom they depended not only for their offices, but also for their salaries, they were subject to every undue influence. If the crown wished to carry a favorite point, to accomplish which the aid of the courts of law was necessary, the pleasure of the king would be signified to the judges. And it required the spirit of a martyr, for the judges to determine contrary to the king's will.—They were absolutely dependent upon him both for their offices and livings. The king, holding his office during life, and transmitting it to his posterity as an inheritance, has much stronger inducements to increase the prerogatives of his office than those who hold their offices for stated periods, or even for life. Hence the English nation gained a great point, in favour of liberty. When they obtained the appointment of the judges, during good behaviour, they got from the crown a concession, which deprived it of one of the most powerful engines with which it might enlarge the boundaries of the royal prerogative and encroach on the liberties of the people. But these reasons do not apply to this country, we have no hereditary monarch; those who appoint the judges do not hold their offices for life, nor do they descend to their children. The same arguments, therefore, which will conclude in favor of the tenor of the judge's offices for good behaviour, lose a considerable part of their weight when applied to the state and condition of America. But much less can it be shewn, that the nature of our government requires that the courts should be placed beyond

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all account more independent, so much so as to be above controul.

I have said that the judges under this system will be independent in the strict sense of the word: To prove this I will shew—That there is no power above them that can controul their decisions, or correct their errors. There is no authority that can remove them from office for any errors or want of capacity, or lower their salaries, and in many cases their power is superior to that of the legislature.

1st. There is no power above them that can correct their errors or controul their decisions—The adjudications of this court are final and irreversible, for there is no court above them to which appeals can lie, either in error or on the merits.—In this respect it differs from the courts in England, for there the house of lords is the highest court, to whom appeals, in error, are carried from the highest of the courts of law.

2d. They cannot be removed from office or suffer a dimunition of their salaries, for any error in judgement or want of capacity.

It is expressly declared by the constitution,—“That they shall at stated times receive a compensation for their services which shall not be diminished during their continuance in office.”

The only clause in the constitution which provides for the removal of the judges from office, is that which declares, that “the president, vice-president, and all civil officers of the United States, shall be re-

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moved from office, on impeachment for, and conviction of treason, bribery, or other high crimes and misdemeanors." By this paragraph, civil officers, in which the judges are included, are removable only for crimes. Treason and bribery are named, and the rest are included under the general terms of high crimes and misdemeanors.—Errors in judgement, or want of capacity to discharge the duties of the office, can never be supposed to be included in these words, high crimes and misdemeanors. A man may mistake a case in giving judgment, or manifest that he is incompetent to the discharge of the duties of a judge, and yet give no evidence of corruption or want of integrity. To support the charge, it will be necessary to give in evidence some facts that will shew, that the judges committed the error from wicked and corrupt motives.

3d. The power of this court is in many cases superior to that of the legislature. I have shewed, in a former paper, that this court will be authorised to decide upon the meaning of the constitution, and that, not only according to the natural and obvious meaning of the words, but also according to the spirit and intention of it. In the exercise of this power they will not be subordinate to, but above the legislature. For all the departments of this government will receive their powers, so far as they are expressed in the constitution, from the people immediately, who are the source of power. The legislature can only exercise such powers as are given them by the constitution, they cannot assume any of the rights annexed to the judicial, for this plain reason, that the same authority

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which vested the legislature with their powers, vested the judicial with theirs—both are derived from the same source, both therefore are equally valid, and the judicial hold their powers independently of the legislature, as the legislature do of the judicial.—The supreme court then have a right, independent of the legislature, to give a construction to the constitution and every part of it, and there is no power provided in this system to correct their construction or do it away. If, therefore, the legislature pass any laws, inconsistent with the sense the judges put upon the constitution, they will declare it void; and therefore in this respect their power is superior to that of the legislature. In England the judges are not only subject to have their decisions set aside by the house of lords, for error, but in cases where they give an explanation to the laws or constitution of the country, contrary to the sense of the parliament, though the parliament will not set aside the judgement of the court, yet, they have authority, by a new law, to explain a former one, and by this means to prevent a reception of such decisions. But no such power is in the legislature. The judges are supreme—and no law, explanatory of the constitution, will be binding on them.

From the preceding remarks, which have been made on the judicial powers proposed in this system, the policy of it may be fully developed.

I have, in the course of my observation on this constitution, affirmed and endeavored to shew, that it was calculated to abolish entirely the state governments, and to melt down the states into one entire

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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 ensure 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 mean time all the art and address of those who wish for the change will be employed to make con-

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verts to their opinion. The people will be told, that their state officers, and state legislatures are a burden and expence without affording any solid advantage, for 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 left with the legislature, they would have explained it at their peril; if they exceed 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, and do themselves right; and 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

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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 chuse 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 controul them but with a high hand and an outstretched arm.

BRUTUS