

Brutus XIII

21 February 1788

Having in the two preceding numbers, examined the nature and tendency of the judicial power, ***as it respects the explanation of the constitution***, I now proceed to the consideration of the other matters, of which it has cognizance. — The next paragraph ***extends its authority, to all cases, in law and equity, arising under the laws of the United States. This power, as I understand it, is a proper one***. The proper province of the judicial power, in any government, is, as I conceive, to declare what is the law of the land. To explain and enforce those laws, which the supreme power or legislature may pass; ***but not to declare what the powers of the legislature are***. I suppose the cases in equity, under the laws, must be so construed, as to give the supreme court not only a legal, but equitable jurisdiction of cases which may be brought before them, or in other words, so, as to give them, not only the powers which are now exercised by our courts of law, but those also, which are now exercised by our court of chancery. If this be the meaning, I have no other objection to the power, than what arises from the undue extension of the legislative power. For, I conceive that the judicial power should be commensurate with the legislative. Or, in other words, the supreme court should have authority to determine questions arising under the laws of the union.

The next paragraph which gives a power to decide in law and equity, on all cases arising under treaties, is unintelligible to me. I can readily comprehend what is meant by deciding a case under a treaty. For as treaties will be the law of the land, every person who have rights or privileges secured by treaty, will have aid of the courts of law, in recovering them. But I do not understand, what is meant by equity arising under a treaty. I presume every right which can be claimed under a treaty, must be claimed by virtue of some article or clause contained in it, which gives the right in plain and obvious words; or at least, I conceive, that the rules for explaining treaties, are so well ascertained, that there is no need of having recourse to an equitable construction. If under this power, the courts are to explain treaties, according to what they conceive are their spirit, which is nothing less than a power to give them whatever extension they may judge proper, it is a dangerous and improper power. The cases affecting ambassadors, public ministers, and consuls — of admiralty and maritime jurisdiction; controversies to which the United States are a party, and

controversies between states, it is proper should be under the cognizance of the courts of the union, because none but the general government, can, or ought to pass laws on their subjects. But, I conceive the clause which extends the power of the judicial to controversies arising between a state and citizens of another state, improper in itself, and will, in its exercise, prove most pernicious and destructive.

It is improper, because it subjects a state to answer in a court of law, to the suit of an individual. This is humiliating and degrading to a government, and, what I believe, the supreme authority of no state ever submitted to.

The states are now subject to no such actions. All contracts entered into by individuals with states, were made upon the faith and credit of the states; and the individuals never had in contemplation any compulsory mode of obliging the government to fulfil its engagements.

The evil consequences that will flow from the exercise of this power, will best appear by tracing it in its operation. The constitution does not direct the mode in which an individual shall commence a suit against a state or the manner in which the judgement of the court shall be carried into execution, but it gives the legislature full power to pass all laws which shall be proper and necessary for the purpose. And they certainly must make provision for these purposes, or otherwise the power of the judicial will be nugatory. For, to what purpose will the power of a judicial be, if they have no mode, in which they can call the parties before them? Or of what use will it be, to call the parties to answer, if after they have given judgement, there is no authority to execute the judgment? We must, therefore, conclude, that the legislature will pass laws which will be effectual in this head. An individual of one state will then have a legal remedy against a state for any demand he may have against a state to which he does not belong. Every state in the union is largely indebted to individuals. For the payment of these debts they have given notes payable to the bearer. At least this is the case in this state. Whenever a citizen of another state becomes possessed of one of these notes, he may commence an action in the supreme court of the general government; and I cannot see any way in which he can be prevented from recovering. It is easy to see, that when this once happens, the notes of the state will pass rapidly from the hands of citizens of the state to those of other states.

And when the citizens of other states possess them, they may bring suits against the state for them, and by this means, judgments and executions may be obtained against the state for the whole amount of the state debt. It is certain the state, with the utmost exertions it can make, will not be able to discharge the debt she owes, under a considerable number of years, perhaps with the best management, it will require twenty or thirty years to discharge it. This new system will protract the time in which the ability of the state will enable them to pay off their debt, because all the funds of the state will be transferred to the general government, except those which arise from internal taxes.

The situation of the states will be deplorable. By this system, they will surrender to the general government, all the means of raising money, and at the same time, will subject themselves to suits at law, for the recovery of the debts they have contracted in effecting the revolution.

The debts of the individual states will amount to a sum, exceeding the domestic debt of the United States; these will be left upon them, with power in the judicial of the general government, to enforce their payment, while the general government will possess an exclusive command of the most productive funds, from which the states can derive money, and a command of every other source of revenue paramount to the authority of any state.

It may be said that the apprehension that the judicial power will operate in this manner is merely visionary, for that the legislature will never pass laws that will work these effects. Or if they were disposed to do it, they cannot provide for levying an execution on a state, for where will the officer find property whereon to levy?

To this I would reply, if this is a power which will not or cannot be executed, it was useless and unwise to grant it to the judicial. For what purpose is a power given which it is imprudent or impossible to exercise? If it be improper for a government to exercise a power, it is improper they should be vested with it. And it is unwise to authorise a government to do what they cannot effect.

As to the idea that the legislature cannot provide for levying an execution on a state, I believe it is not well founded. I presume the last paragraph of the 8th section of article 1, gives the Congress express power to pass any

laws they may judge proper and necessary for carrying into execution the power vested in the judicial department. And they must exercise this power, or otherwise the courts of justice will not be able to carry into effect the authorities with which they are invested. For the constitution does not direct the mode in which the courts are to proceed, to bring parties before them, to try causes, or to carry the judgment of the courts into execution. Unless they are pointed out by law, how are these to proceed, in any of the cases of which they have cognizance? They have the same authority to establish regulations in respect to these matters, where a state is a party, as where an individual is a party. The only difficulty is, on whom shall process be served, when a state is a party, and how shall execution be levied. With regard to the first, the way is easy, either the executive or legislative of the state may be notified, and upon proof being made of the service of the notice, the court may proceed to a hearing of the cause. Execution may be levied on any property of the state, either real or personal. The treasury may be seized by the officers of the general government, or any lands the property of the state, may be made subject to seizure and sale to satisfy any judgment against it. Whether the estate of any individual citizen may not be made answerable for the discharge of judgments against the state, may be worth consideration. In some corporations this is the case.

If the power of the judicial under this clause will extend to the cases above stated, it will, if executed, produce the utmost confusion, and in its progress, will crush the states beneath its weight. And if it does not extend to these cases, I confess myself utterly at a loss to give it any meaning. For if the citizen of one state, possessed of a written obligation, given in pursuance of a solemn act of the legislature, acknowledging a debt due to the bearer, and promising to pay it, cannot recover in the supreme court, I can conceive of no case in which they can recover. And it appears to me ridiculous to provide for obtaining judgment against a state, without giving the means of levying execution.

Brutus.