Aristides: Remarks on the Proposed Plan, 31 January 1788

The objections against the judiciary are probably more sincere. The article has been generally misconceived, or misrepresented; and after bestowing much attention, I am not certain, that I fully comprehend it. I am, however, at length satisfied, that no rational construction can be given to this part of the proposed plan, either to warrant a rejection of the whole, or to place matters on a worse footing, than they are at present.

The judiciary power is to be vested in one supreme court, fixed at the seat of government; and, for the advantage of government, with the ease and convenience of the people, the congress may hereafter appoint inferior courts in each of the states. The jurisdiction of this supreme court is to be partly original, and partly appellate. With respect to the extent of either, there can be no possible doubt, as there is neither ambiguity nor uncertainty in the relative expressions.

The original jurisdiction of the supreme court extends

1. To all cases, in which may be concerned an ambassador, any other public minister, or a consul.

2. To all cases whatever, in which a state may be a party.—This second division may be branched into 1. Cases between the United States, and one or more of the individual states. 2. Cases between two or more states. 3. Cases between a state, and its own citizens. 4. Cases between a state, and the citizens of another state. 5. Cases between a state, and a foreign state. 6. Cases between a state, and the citizens, or subjects, of a foreign state.

The appellate jurisdiction of the supreme court extends

1. To all cases whatever between parties of every kind, in law and equity, arising under this constitution, and the laws of congress, passed agreeably thereto, and to treaties already, or hereafter to be, made.

2. To all cases of admiralty or maritime jurisdiction.

3. To all cases, in which the United States shall be a party.

4. To all cases between citizens of different states.

5. To all cases between citizens of the same state, claiming lands under the grants of different states.

6. To all cases between citizens of a state, and foreign states, or their citizens or subjects.

One doubt arising on the judiciary article is, whether in these cases of appellate jurisdiction, the appeal lies both from the state courts, and the inferior federal courts, or only from the former, or only from the latter.

Another doubt is, whether the inferior federal courts are to be branches of the supreme court, constituted for convenience, and having equal jurisdiction, both original and appellate, with the supreme court; or whether the inferior courts are to be confined to an *original* jurisdiction in those cases, wherein the supreme court has *appellate* jurisdiction.

I shall not presume to decide absolutely on the genuine construction of an article, which is said to have caused much private debate and perplexity. I am however fully

persuaded, that, as the article speaks of an original and appellate jurisdiction, of a supreme court, and inferior courts; and, as there is no intimation of appeals from the several state tribunals, the inferior federal courts are intended to have original jurisdiction in all cases, wherein the supreme court has appellate jurisdiction; and the appeal lies only from them. I can, almost, with confidence, maintain, that, as there is no express clause, or necessary implication, to oust the jurisdiction of state courts, an action, after the adoption of the plan, may be instituted in any court, having, at this time, a jurisdiction. And if an action be brought in a state court, I do not, at present, perceive, that it can, in any manner, be transferred to the supreme or inferior federal court.

According then to the best of my judgment the affair stands thus. The supreme federal court will have an exclusive original jurisdiction in all cases relative to the rights of ambassadors, other ministers, and consuls; because, as I humbly conceive, the several state governments have at this time nothing to do with these cases. With respect to the cases, in which a state may be party, the supreme federal court, and the several state courts, will have, I conceive, concurrent original jurisdiction, *provided a state may, at this time, institute an action in its own name, in the courts of another state.* The inferior federal courts, and the state courts, will, I conceive, have concurrent original jurisdiction in all the enumerated cases, wherein an appeal lies to the supreme court, *except only the cases created by or under the proposed constitution, in which, as they do not now exist, the inferior federal courts will have exclusive jurisdiction.* From the state inferior courts, I further apprehend, that an appeal will lie, in all cases, to their own high courts of appeal, as heretofore.

A choice of jurisdictions has been ever esteemed a valuable right, even where there are both of the same kind. The purpose of extending so far the jurisdiction of the federal judiciary, is to give every assurance to the general government, of a faithful execution of its laws, and to give citizens, states, and foreigners, an assurance of the impartial administration of justice. Without this salutary institution, the federal government might frequently be obstructed, and its servants want protection. It is calculated not as an engine of oppression, but to secure the blessings of peace and good order. The provisions respecting different states, their citizens, and foreigners, if not absolutely necessary, are much to be applauded. The human mind is so framed, that the slightest circumstance may prevent the most upright and well known tribunal from giving complete satisfaction; and there may happen a variety of cases, where the distrust and suspicion may not be altogether destitute of a just foundation.—

On these principles, an appeal as to fact is no less proper, than the appeal from judges of law. A jury, whose legal qualifications are only property and ripe age, may more probably incur the imputation of weakness, partiality, or undue influence. But in regard to appeals, it is very material to remark, that congress is to make such regulations and exceptions, as upon mature deliberation, it shall think proper. And indeed, before such regulations and exceptions shall be made, the manner of appeal will not be ascertained. Is it then to be presumed, that, in making regulations and exceptions, this appellate jurisdiction shall be calculated as an engine of oppression, or to serve only the purposes of vexation and delay.—

As the rod of Aaron once swallowed up the rods of the Egyptian *magi,* so also is it feared, that these federal courts will, at length, swallow up the state tribunals. A miracle, in one case, is as necessary, as in the other.

But let not the officers of state courts be overmuch alarmed! The causes, which, by possibility, may be instituted in the federal courts bear no comparison to the rest. In the course of ten years, not one action, that I know of, in Maryland, has concerned either another state, or an ambassador, consul, or other minister. It is hoped, that actions by foreigners will, in a few years, become much rarer than at any time heretofore, and these may still be determined in the state courts.—

A gentleman, as it is conjectured, in the law department of a neighbouring state, has been pleased to infer, that fictions, similar to those in the king's bench and exchequer of England, will be contrived, to draw causes into the federal courts. He seems not aware, that, even in England, the established fictions of law are not of modern date. They were ingenious devices, to remedy defects in the common law, *without the aid of parliament.* The fundamental principle however, with respect to their adoption, was, that they *consist with equity, and be requisite for the advancement of justice.* Now every man, who would establish over his cause a jurisdiction in a federal court, must shew, that such cause comes under the description of the constitution. If he do not, there will be wanting that equity, which is the support of legal fiction. But can any man seriously imagine, that fiction will be permitted, to give the judges a power of legislation, denied to congress itself? Wherefore should the judges, holding their commissions during good behaviour, be guilty of such gross falshood, perjury, and breach of trust? Would there not be a general revolt against such barefaced impudent innovations? Away then with your trumpery of fictions! Accuse not the illustrious members of the convention of having in their contemplation such sophistry, pettifogging and chicane! But another fear is, that whatever actions may be instituted in the federal courts will there seek an admission, on account of a more speedy decision. That man alone, "on whose brow shame is ashamed to sit," will avow his opposition to a more speedy administration of justice.

The institution of the trial by jury has been sanctified by the experience of ages. It has been recognised by the constitution of every state in the union. It is deemed the birthright of Americans; and it is imagined, that liberty cannot subsist without it. The proposed plan expressly adopts it, for the decision of all criminal accusations, except impeachment; and is silent with respect to the determination of facts in civil causes.

The inference, hence drawn by many, is not warranted by the premises. By recognising the jury trial in criminal cases, the constitution effectually provides, that it shall prevail, so long as the constitution itself shall remain unimpaired and unchanged. But, from the great variety of civil cases, arising under this plan of government, it would be unwise and impolitic to say ought about it, in regard to these. Is there not a great variety of cases, in which this trial is taken away in each of the states? Are there not many more cases, where it is denied in England? For the convention to ascertain in what cases it shall prevail, and in what others it may be expedient to prefer other modes, was impracticable. On this subject, a future congress is to decide; and I see no foundation under Heaven for the opinion, that congress will despise the known prejudices and

inclination of their countrymen. A very ingenious writer of Philadelphia has mentioned the objections without deigning to refute that, which he conceives to have originated "in sheer malice."—

I proceed to attack the whole body of anti-federalists in their strong hold. The proposed constitution contains no *bill of rights.*

Consider again the nature and intent of a federal republic. It consists of an assemblage of distinct states, each completely organized for the protection of its own citizens, and the whole consolidated, by express compact, under one head, for their general welfare and common defence.

Should the compact authorise the sovereign, or head, to do all things it may think necessary and proper, then is there no limitation to its authority; and the liberty of each citizen in the union has no other security, than the sound policy, good faith, virtue, and perhaps proper interests, of the head.

When the compact confers the aforesaid general power, making nevertheless some special reservations and exceptions, then is the citizen protected further, so far as these reservations and exceptions shall extend.

But, when the compact ascertains and defines the power delegated to the federal head, then cannot this government, without manifest usurpation, exert any power not expressly, or by *necessary* implication, conferred by the compact.

This doctrine is so obvious and plain, that I am amazed any good man should deplore the omission of a bill of rights. When we were told, that the celebrated Mr. Wilson had advanced this doctrine in effect, it was said, Mr. Wilson would not dare to speak thus to a constitutionalist. With talents inferior to that gentleman's, I will maintain the doctrine against any constitutionalist who will condescend to enter the lists, and behave like a gentleman.—

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