

## *Judges vs. Constitution*

### **Our American Leviathan Unbound:**

**The Judicial Perversion of Freedom,** by Robert L. Macey, *Brooklyn, N. Y.: Theodore Gaus' Sons, Inc., 1974.*

*xix + 94 pp.*

IN THIS SHORT but historically incisive book, Robert L. Macey reinvigorates the battle over the structural relationship between the founding states and their agent and creation, the national government. He does this by reviewing the concept behind the words in the Tenth Amendment that "the powers not delegated to the United States by the Constitution, nor prohibited to it by it to the States, are reserved to the States respectively, or to the people." The concept and the literal words of the Constitution, and especially Article I, Section 8 (the empowering clause) are analyzed by Macey to see if legislation such as the Social Security Act of the New Deal would really pass close constitutional scrutiny.

Macey points out that the advocates of the all-powerful national government derive their historical warm feelings from Chief Justice Marshall's opinion (1819) in *McCulloch v. Maryland*, which echoed and patterned itself on Alexander Hamilton's earlier advocacy in 1791 of the Bank of the United States charter by act of Congress. It is Hamilton's position on the Bank, and Marshall's opinion in *McCulloch*, on which the antecedents to the New Deal Court "welfare" opinions in *United States v. Butler* (1936) and *Helvering v. Davis* (1937) are based. Macey's close analysis of the Bank controversy clearly shows the faulty logic behind those supports.

Hamilton as Secretary of the Treasury had early in 1791 succeeded in getting Congress to charter the Bank of the United States. The Bank was to have a capital of \$10,000,000, or a sum close to five times the combined capital stock of the three existing private banks and about twice the to-

tal expenditures of the federal government in 1792. Hamilton had to persuade President George Washington to sign the charter, despite the fact that less than five years earlier the Federal Convention had *rejected* a proposal to give Congress the power to form corporations or banks! Furthermore, while it was being chartered supposedly as a constitutional means to carry into effect one or more enumerated powers in the Constitution, the preamble to the Bank bill contained no reference to any such constitutional provisions.

Macey insists that to understand the argument about the scope of a congressional power under the Constitution it is necessary to view the document in its entirety rather than plucking a clause or two out of context. First, then, the preamble:

We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity do ordain and establish this Constitution for the United States of America.

The preamble is devoted solely to a statement of the purpose or ends for which the new government was created to attain. To secure the blessings of freedom is *the* purpose with which all the other purposes must be coordinate. As Macey asserts:

In the preamble there is no room for cross purposing. Freedom cannot be taken to mean *one* thing, and the general welfare something else. Political freedom is the all-controlling purpose. Anything the government does that violates freedom, violates also the Constitution, and is unconstitutional.

Article I, Section 8 is the portion of the Constitution that invests the government with the principal powers or means needed to accomplish the preamble's purposes or ends:

The Congress shall have power to lay and collect taxes, duties, imposts and excises to pay debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

To borrow money. . .

To coin money. . .

To establish postoffices. . .

[etc.] and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers vested by this Constitution in the Government of the United States.

Macey points out the little noticed but crucial fact that this great empowering section is, actually, *one* very long and complex *sentence* consisting of an introductory clause followed by numerous adverbial infinitive phrases of purpose plus one minor modifying clause. Because of the heavy use of semicolons, as Macey reminds us, "the thought conveyed by the sentence is not complete until one reaches the period at the end." Thus to learn what in Article I, Section 8 is meant by "the common defense and general welfare" one must read the delegated and specifically enumerated powers limiting the scope of the Government of the United States so as "to secure the blessings of liberty."

The new government was to be one of limited sovereignty "to do for the federated community only the things that sovereign federating states could not do for themselves—that is, in the name of a more perfect union," than had been the case under the Articles of Confederation. The colonists who had smarted under the various repressive British taxes were now alarmed that they might be turning over to their new government too unrestrained a taxing power. Federalist Paper No. 41 (January, 1788) was to help reassure them. Some had argued, wrote James Madison, that Article I, Section 8's taxing power "amounts to an unlimited commission to exercise every power which may be alleged to be neces-

sary for the common defense or general welfare." But this was a "misconstruction," for

. . . What color can the objection have when the specification of the objects alluded to by these general terms immediately follows, and is not even separated by a longer pause than a semicolon? . . . For what purpose could the enumeration of particular powers be asserted, if these and all others were meant to be included in the preceding general power? Nothing is more natural nor common than first to use a general phrase, and then to explain and qualify it by a recital of particulars.

It was in this background setting, says Macey, that President Washington requested from Attorney General Randolph, Secretary of State Jefferson and Secretary of the Treasury Hamilton their opinions of the Bank Charter. Jefferson relied on the Tenth Amendment as "the foundation" of the Constitution in providing that "all powers not delegated to the United States" it cannot exercise. To hold otherwise, he said, would "reduce the whole instrument to a single phrase—that of instituting a Congress with power to do whatever would be for the good of the United States." He further pointed out that the powers of Section 8 could all be carried out (as they are today) without a national bank and, therefore, the bank was not necessary, though to Hamilton it may have been "convenient," or desirable.

To Hamilton, however, "every power vested in a government is in its nature SOVEREIGN, and included by force of the term a right to employ all means requisite and fairly applicable to the attainment of the ends of such power." Hamilton in his letter to Washington (included with Jefferson's in the helpful appendix to Macey's book) chose to ignore the preamble as if it did not exist and as if the implementing was an end in and of itself rather than a means to implement the purpose of the document. To him the enumerated powers

were the ends to be accomplished. He read "necessary" to mean "incidental, useful, or conducive," while the key dictionary definition at the time comported with Jefferson's view—"indispensable." Hamilton said further that in construing a constitution "it ought to be construed liberally, in advancement of the public good." Or as Chief Justice Marshall later put it, we must remember "that it is a constitution" that we are construing. Such statements, I feel, miss wide the mark, for it is the Constitution of the United States of America that was at issue, premised on delegated and limited sovereignty, and not merely "a constitution," as if it were Tanzania's or Peru's.

Washington sided with Hamilton and the result was that an incidental or "implied" power was created that exceeded in size and scope the very enumerated power it was to implement! The Jacksonian Supreme Court under Taney and Courts thereafter did *not* follow the Hamilton-Marshall view until the 1936 decision of *United States v. Butler* (297 U. S. 1), while recognizing that each contention about Article I, Section 8, "had the support of those whose views are entitled to weight," nonetheless held that:

It results that the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.

"Thus, by fiat," as Macey states it,

. . . did the Supreme Court dislodge and abandon political freedom as the ultimate goal of the American people—and of the Constitution of the United States—and put general welfare in its place.

The resultant growth in Welfare State legislation out of Congress since 1936 has cut deeply into the rôle that the states were to enjoy (10th Amendment) and the limited rôle of federal government (Article I, Section 8). Macey describes this as a judicial perversion of our freedom and in the latter portion of his book provides a de-

tailed analysis of the Social Security Act and the "philosophical illusion" upon which the Welfare State is based. He concludes with an evaluation of the "evils that follow from infractions of rules and disciplines" and makes a theological case against the constitutionality of the welfare society launched in the nineteen thirties.

To ignore the lesson set forth in Macey's book and to alter the scheme of our governmental system as the Supreme Court did in 1936 reduces our Constitution to a blank sheet of paper. As James J. Kilpatrick wrote about the *Butler* logic:

It arrogates to judges and to congressmen the bumptious authority claimed by Humpty-Dumpty, to whom words meant what he chose them to mean, and neither more or less. If all powers were delegated to the central government, then none remained exclusively with the States; the bulk of the Constitution is mere surplusage, and the Tenth Amendment is a fraud; the authors of *The Federalist* were masters of deceit, and the written English language is become the babble of idiots.

Reviewed by CHARLES G. DOUGLAS III