75TH CONGRESS, 1st Session | SENATE | DOCUMENT No. 91

CREATION OF THE FEDERAL JUDICIARY

A REVIEW OF THE DEBATES IN THE FEDERAL AND STATE CONSTITUTIONAL CONVENTIONS; AND OTHER PAPERS

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Library of Congress

PRESENTED BY MR. SHEPPARD

JULY 22 (calendar day, JULY 27), 1937.—Referred to the Committee on Printing

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1938

SENATE RESOLUTION NO. 169

Reported by Mr. WALSH

IN THE SENATE OF THE UNITED STATES,
July 22 (calendar day, Aug. 5), 1937.

Resolved, That the manuscript entitled "Creation of the Judiciary", prepared by Dr. George J. Schulz, Director of the Legislative Reference Service, Library of Congress, be printed as a Senate document.

Attest:

EDWIN A. HALSEY,
Secretary.

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APPENDIX

CREATION OF THE FEDERAL JUDICIARY

I. PROCEEDINGS IN THE CONSTITUTIONAL CONVENTION OF 1787

On May 29, 1787, Mr. Edmund Randolph, of Virginia, presented a series of resolutions to the Convention. Those of interest in this study are as follows:

8. *Resolved*, That the Executive, and a convenient number of the national Judiciary, ought to compose a Council of Revision, with authority to examine every act of the National Legislature, before it shall operate, and every act of a particular Legislature before a negative thereon shall be final; and that the dissent of the said Council shall amount to a rejection, unless the act of the National Legislature be again passed, or that of a particular Legislature be again negatived by ——— of the members of each branch.

9. *Resolved*, That a National Judiciary be established; to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature; to hold their offices during good behaviour, and to receive punctually, at stated times, fixed compensation for their services, in which no increase or diminution shall be made, so as to affect the persons actually in office at the time of such increase or diminution. That the jurisdiction of the inferior tribunals shall be to hear and determine, in the first instance, and of the supreme tribunal to hear and determine, in the dernier resort, all piracies and felonies on the high seas; captures from an enemy; cases in which foreigners, or citizens of other States, applying to such jurisdictions, may be interested; or which respect the collection of the national revenue; impeachments of any national officers, and questions which may involve the national peace and harmony.[1]

* * * * * * *

14. *Resolved*, That the legislative, executive, and judiciary powers, within the several States ought to be bound by oath to support the Articles of Union.[2]

At the conclusion of the presentation of these resolutions it was resolved that the House would resolve itself into a Committee of the Whole on May 30; and Mr. Randolph's resolutions were referred to that Committee.

On the same day, however (May 29), Mr. Charles Cotesworth Pinckney, of South Carolina, laid before the Convention his draft of a federal government. The articles of Mr. Pinckney's draft of interest here, are as follows:

ART. VI. * * * All acts made by the Legislature of the United States, pursuant to this Constitution, and all treaties made under the authority of the United States, shall be the supreme law of the land; and all judges shall be bound to consider them as such in their decisions.[3]

ART. VIII. * * * He shall commission all the officers of the United States; and, except as to ambassadors, other ministers, and judges of the Supreme Court, he shall nominate, and, with the consent of the Senate, appoint, all other officers of the United States. * * *[4]

ART. IX. The Legislature of the United States shall have the power, and it shall be their duty, to establish such courts of law, equity, and admiralty, as shall be necessary.

[1] Madison Papers, Gilpin edition, vol. II. Washington, 1840, pp. 733-734.
[2] Same, p. 734.
[3] Same, pp. 741-742.
[4] Same, p. 742.

The judges of the courts shall hold their offices during good behaviour; and receive a compensation, which shall not be increased or diminished during their continuance in office. One of these courts shall be termed the Supreme Court; whose jurisdiction shall extend to all cases arising under the laws of the United States, or affecting ambassadors, other public ministers and consuls; to the trial of impeachment of officers of the United States; to all cases of admiralty and maritime jurisdiction. In cases of impeachment affecting ambassadors, and other public ministers, this jurisdiction shall be original; and in all other cases appellate.

All criminal offences, except in cases of impeachment, shall be tried in the State where they shall be committed. The trials shall be open and public, and shall be by jury.[5]

On May 30, the Convention, as in Committee of the Whole, proceeded to the consideration of Mr. Randolph's resolutions, Mr. Randolph moving that the first resolution be postponed in order to consider, inter alia, the following:

* * * That a *national* government ought to be established consisting of a *supreme* Legislative, Executive, and Judiciary.[6]

Mr. Read moved (and was seconded by Mr. Pinckney) to postpone the third proposition last offered by Mr. Randolph, to wit, "that a national government ought to be established, consisting of a supreme Legislative, Executive, and Judiciary,"[7] in order to take up the following:

Resolved, That, in order to carry into execution the design of the States in forming this Convention, and to accomplish the objects proposed by the Confederation, a more effective government, consisting of a Legislative, Executive, and Judiciary, ought to be established.[7]

The motion to postpone for this purpose was lost, the vote being:

Ayes: Massachusetts, Connecticut, Delaware, South Carolina, 4.

Noes: New York, Pennsylvania, Virginia, North Carolina, 4.

Mr. Butler moved, and it was resolved in the Committee of the Whole, "that a national government ought to be established, consisting of a supreme Legislative, Executive, and Judiciary," the vote being:

Ayes: Massachusetts, Pennsylvania, Delaware, Virginia, North Carolina, South Carolina, 6.

Noes: Connecticut, 1.

Divided: New York (Colonel Hamilton, aye; Mr. Yates, no).[7]

On June 2, during the discussion on the Executive, Mr. Dickinson stated that the Legislative, Executive, and Judiciary departments ought to be made as independent as possible.[8]

On June 4, the Convention considered the first clause of the eighth resolution (relating to a council of revision) in Mr. Randolph's plan.

Mr. Gerry doubted whether the Judiciary ought to form a part of such council of revision, since they would have a sufficient check against encroachments on their own department by their exposition of the laws, which involved a power of deciding on their constitutionality. In some States the judges actually had set aside laws as being against the Constitution. This was done, too, with general approbation. It was quite foreign from the nature of their office to make them judges of the policy of public measures.[9]

Mr. Gerry then moved to postpone the clause, and in this he was seconded by Mr. King, who observed that the judges ought to be able to expound the law as it should come before them, free from the bias of having participated in its formation.[9]

[5] Same, pp. 743–744.
[6] Same, p. 747.
[7] Same, p. 749.
[8] Same, p. 777.
[9] Same, p. 783.

Mr. Wilson thought that the Executive and Judiciary jointly should have an absolute negative.[10]

The question to postpone was agreed to, the vote being:

Ayes: Massachusetts, New York, Pennsylvania, North Carolina, South Carolina, Georgia, 6.

Noes: Connecticut, Delaware, Maryland, Virginia, 4.[10]

Mr. Bedford was opposed to every check on the Legislature, even by a *council of revision*. The representatives of the people were the best judges of what was for their interest and ought to be under no external control whatever.[11]

On Mr. Gerry's motion to give the Executive alone, without the Judiciary, a revisionary control on the laws, unless overruled by two-thirds of each branch, the vote stood:

Ayes: Massachusetts, New York, Pennsylvania, Delaware, Virginia, North Carolina, South Carolina, Georgia, 8.

Noes: Connecticut, Maryland, 2.[12]

Mr. Wilson moved, and was seconded by Mr. Madison, that the following amendment be made to the last resolution: after the words "national Executive" to add "and a convenient number of the national Judiciary."

Mr. Hamilton raised a point of order on the introduction of the last amendment at the time; and Mr. Madison and Mr. Wilson gave notice that they would move the same the next day; and a later day (June 6) was assigned for the reconsideration of Mr. Gerry's amendment.

It was then moved and seconded to proceed to the consideration of the ninth resolution submitted by Mr. Randolph; and a motion to agree to the first clause, to wit, "*Resolved*, That a national Judiciary be established", was agreed to, *nem. con.*

It was then moved and seconded to add these words, to wit, "to consist of one supreme tribunal and of one or more inferior tribunals." That amendment was agreed to.[13]

On June 5, the words "one or more" were struck out before "inferior tribunals."

Mr. Wilson opposed the appointment of Judges by the National Legislature. Experience showed the impropriety of such appointments by numerous bodies. Intrigue, partiality, and concealment were the necessary consequences. A principal reason for unity in the Executive was, that officers might be appointed by a single, responsible person.

Mr. Rutledge was by no means disposed to grant so great a power to any single person. The people will think we are leaning too much towards monarchy. He was against establishing any national tribunal, except a single supreme one. The State tribunals are most proper to decide in all cases in the first instance.

Doctor Franklin observed, that two modes of choosing the Judges had been mentioned, to wit, by the Legislature, and by the Executive. He wished such other modes to be suggested as might occur to other gentlemen; it being a point of great moment. He would mention one which he had understood was practised in Scotland. * * * It was here, he said, the interest of the electors to make the best choice, which should always be made the case if possible.

[10] Same, p. 784.
[11] Same, p. 787.
[12] Same, p. 791.
[13] Same, p. 791.

Mr. Madison disliked the election of the Judges by the Legislature, or any numerous body. Besides the danger of intrigue and partiality, many of the members were not judges of the requisite qualifications. The legislative talents, which were very different from those of a Judge, commonly recommended men to the favor of legislative assemblies. It was known, too, that the accidental circumstances of presence and absence, of being a member or not a member, had a very undue influence on the appointment. On the other hand, he was not satisfied with referring the appointment to the Executive. He rather inclined to give it to the Senatorial branch, as numerous enough to be confided in; as not so numerous as to be governed by the motives of the other branch; and as being sufficiently stable and independent to follow their deliberate judgments. He hinted this only, and moved that the *appointment by the Legislature* might be struck out, and a blank left, to be thereafter filled on maturer reflection.[14]

Mr. Wilson seconded Mr. Madison's motion; and on the question to strike out, the vote stood:

Ayes: Massachusetts, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, Georgia, 9.

Noes: Connecticut, South Carolina, 2.

Mr. Wilson gave notice that he should at a future day move for a reconsideration of that clause which respects "inferior tribunals."[15]

Mr. Pinckney gave notice that when the clause respecting the appointment of the Judiciary should again come before the Committee he would move to restore the language "appointment by the National Legislature."

The following clauses of the ninth resolution were agreed to, viz:

to hold their offices during good behaviour, and to receive punctually, at stated times, a fixed compensation for their services, in which no increase nor diminution shall be made so as to effect the persons actually in office at the time of such increase or diminution.[16]

The remaining clause of the ninth resolution, to wit—

* * * That the jurisdiction of the inferior tribunals shall be to hear and determine, in the first instance, and of the supreme tribunal to hear and determine, in the dernier resort, all piracies and felonies on the high seas; captures from an enemy; cases in which foreigners, or citizens of other States, applying to such jurisdictions, may be interested; or which respect the collection of the national revenue; impeachments of any national officers, and questions which may involve the national peace and harmony.[17]

was postponed.[16]

On the same day (June 5) Mr. Rutledge having obtained a rule for reconsideration of the clause for establishing *inferior* tribunals under the national authority, now moved that that part of the clause in the ninth resolution should be expunged; arguing that the State tribunals might and ought to be left in all cases to decide in the first instance, the right of appeal to the supreme national tribunal being sufficient to secure the national rights and uniformity of judgments; that it was making an unnecessary encroachment on the jurisdiction of the States, and creating unnecessary obstacles to their adoption of the new system.

Mr. Sherman seconded the motion.[18]

[14] Same, pp. 792-793.
[15] Same, p. 793.
[16] Same, p. 794.
[17] See same, p. 733.
[18] Same, p. 798.

Mr. Madison observed that unless inferior tribunals were dispersed throughout the Republic with *final* jurisdiction in *many* cases, appeals would be multiplied to a most oppressive degree; that, besides, an appeal would not in many cases be a remedy. What was to be done after improper verdicts, in State tribunals, obtained under the biased directions of a dependent judge or the local prejudices of an undirected jury? To remand the cause for a new trial at the supreme bar would oblige the parties to bring up their witnesses, though ever so distant from the seat of the court. An effective Judiciary establishment commensurate to the Legislative authority, was essential. A government without a proper Executive and Judiciary would be the mere trunk of a body, without arms or legs to act or move.[19]

Mr. Wilson opposed the motion on like grounds. He said the admiralty jurisdiction ought to be given wholly to the National Government, as it related to cases not within the jurisdiction of particular States, and to a scene in which controversies with foreigners would be most likely to happen.

Mr. Sherman was in favor of the motion. He dwelt chiefly on the supposed expensiveness of having a new set of courts, when the existing State courts would answer the same purpose.

Mr. Dickinson contended strongly that if there was to be a National Legislature there ought to be a National Judiciary, and that the former ought to have authority to institute the latter.

On the question for Mr. Rutledge's motion to strike out "inferior tribunals," the vote was as follows:

Ayes: Connecticut, New York, New Jersey, North Carolina, South Carolina, Georgia, 6.

Noes: Pennsylvania, Delaware, Maryland, Virginia, 4.

Divided: Massachusetts.[20]

Mr. Wilson and Mr. Madison then moved, in pursuance of the idea expressed above by Mr. Dickinson, to add to the ninth resolution the words following: "that the National Legislature be empowered to institute inferior tribunals." They observed that there was a distinction between establishing such tribunals absolutely, and giving a discretion to the Legislature to establish or not to establish them. They repeated the necessity of some such provision.[21]

Mr. Butler said the people will not bear such innovations. The States will revolt at such encroachments. Supposing such an establishment to be useful, we must not venture on it. We must follow the example of Solon, who gave the Athenians not the best government he could devise, but the best they would receive.

Mr. King remarked, as to the comparative expense, that the establishment of inferior tribunals would cost infinitely less than the appeals that would be prevented by them.

On this question, as moved by Mr. Wilson and Mr. Madison, the vote stood:

Ayes: Massachusetts, New Jersey,[22] Pennsylvania, Delaware, Maryland, Virginia, North Carolina, Georgia, 8.

Noes: Connecticut, South Carolina, 2.

Divided: New York.[23]

On June 6 Mr. Wilson moved to reconsider the vote excluding the Judiciary from a share in the revision of the laws, and to add, after

[19] Same, pp. 798–799.
[20] Same, p. 799.
[21] Same, pp. 799–800.
[22] In printed Journal, New Jersey, "no."
[23] Madison papers, op. cit., p. 800.

"national Executive", the words, "with a convenient number of the national Judiciary"; remarking upon the expediency of reinforcing the Executive with the influence of that department.[24]

Mr. Madison seconded the motion. * * * An association of the judges in this revisionary function would both double the advantage, and diminish the danger. It would also enable the Judiciary department the better to defend itself against legislative encroachments. Two objections had been made—first, that the judges ought not to be subject to the bias which a participation in the making of laws might give in the exposition of them; secondly, that the Judiciary department ought to be separate and distinct from the other great departments. The first objection had some weight; but it was much diminished by reflecting that a small proportion of the laws coming in question before a judge would be such wherein he had been consulted; that a small part of this proportion would be so ambiguous as to leave room for his prepossessions; and that but a few cases would probably arise in the life of a judge, under such ambiguous passages. How much good, on the other hand, would proceed from the perspicuity, the conciseness, and the systematic character which the code of laws would receive from the Judiciary talents. As to the second objection, it either had no weight, or it applied with equal weight to the Executive, and to the Judiciary revision of the laws. The maxim on which the objection was founded, required a separation of the Executive, as well as the Judiciary, from the Legislature and from each other. There would, in truth, however, be no improper mixture of these distinct powers in the present case. In England, whence the maxim itself had been drawn, the Executive had an absolute negative on the laws; and the supreme tribunal of justice (the House of Lords), formed one of the other branches of the Legislature. In short, whether the object of the revisionary power was to restrain the Legislature from encroaching on the other coordinate departments, or on the rights of the people at large; or from passing laws unwise in their principle, or incorrect in their form; the utility of annexing the wisdom and weight of the Judiciary to the Executive seemed incontestable.[25]

Mr. Gerry thought the Executive while standing alone would be more impartial than when he could be covered by the sanction and seduced by the sophistry of the Judges.

Mr. King said if the unity of the Executive was preferred for the sake of responsibility, the policy of it is as applicable to the revisionary, as to the executive, power.

Mr. Pinckney had been at first in favor of joining the heads of the principal departments, the Secretary of War, of Foreign Affairs, etc., in the Council of Revision. He had, however, relinquished the idea, from a consideration that these could be called on by the executive magistrate, whenever he pleased to consult them. He was opposed to the introduction of the judges into the business.

Colonel Mason was for giving all possible weight to the revisionary institution. The executive power ought to be well secured against legislative usurpations on it. The purse and the sword ought never to get into the same hands whether legislative or executive.[26]

Mr. Dickinson thought that secrecy, vigor, and despatch are not the principal properties required in the Executive. Important as

[24] Same, p. 809.
[25] Same, pp. 809–811.
[26] Same, p. 811.

these are, that of responsibility is more so, which can only be preserved by leaving it singly to discharge its functions. He thought, too, a junction of the Judiciary to it involved an improper mixture of powers.[27]

Mr. Wilson remarked that the responsibility required belonged to his executive duties. The revisionary duty was an extraneous one, calculated for collateral purposes.

Mr. Williamson was for substituting a clause requiring two-thirds for every effective act of the legislature, in place of the revisionary provision.

On the question for joining the judges to the Executive in the revisionary business, the vote stood:

Ayes: Connecticut, New York, Virginia, 3.

Noes: Massachusetts, New Jersey, Pennsylvania, Delaware, Maryland, North Carolina, South Carolina, Georgia, 8.[28]

On June 13 Mr. Randolph and Mr. Madison moved the following resolution respecting a National Judiciary, to wit:

that the jurisdiction of the National Judiciary shall extend to cases which respect the collection of the national revenue, impeachments of any national officers, and questions which involve the national peace and harmony.

The resolution was agreed to.

Mr. Pinckney and Mr. Sherman moved to insert, after the words, "one supreme tribunal", the words, "the judges of which to be appointed by the National Legislature."

Mr. Madison objected to an appointment by the whole Legislature. Many of them are incompetent judges of the requisite qualifications. They were too much influenced by their partialities. The candidate who was present, who had displayed a talent for business in the legislative field, who had, perhaps, assisted ignorant members in business of their own, or of their constituents, or used other winning means, would, without any of the essential qualifications for an expositor of the laws, prevail over a competitor not having these recommendations, but possessed of every necessary accomplishment. He proposed that the appointment should be made by the Senate; which, as a less numerous and more select body, would be more competent judges, and which was sufficiently numerous to justify such a confidence in them.

Mr. Sherman and Mr. Pinckney withdrew their motion, and the appointment by the Senate was agreed to, *nem. con*,[29]

On the same day Mr. Gorham made a report which contained, inter alia, the following:

1. *Resolved*, That it is the opinion of this Committee, that a national Government ought to be established, consisting of a supreme Legislative, Executive, and Judiciary.[30]

* * * * * * *

11. *Resolved*, That a national Judiciary be established, to consist of one supreme tribunal, the Judges of which shall be appointed by the second branch of the national Legislature, to hold their offices during good behaviour, and to receive punctually, at stated times, a fixed compensation for their services, in which no increase or diminution shall be made, so as to affect the persons actually in office at the time of such increase or diminution.

12. *Resolved*, That the national Legislature be empowered to appoint inferior tribunals.

[27] Same, pp. 811-812.
[28] Same, p. 812.
[29] Same, p. 855.
[30] Same, p. 858.

13. *Resolved*, That the jurisdiction of the national Judiciary shall extend to all cases which respect the collection of the national revenue, impeachments of any national officers, and questions which involve the national peace and harmony.[31]

* * * * * * *

18. *Resolved*, That the Legislative, Executive, and Judiciary powers within the several States, ought to be bound by oath to support the Articles of Union.[32]

On June 15 Mr. Patterson laid before the Convention the plan which he said several of the Deputations wished to be substituted in place of that proposed by Mr. Randolph. After some little discussion of the most proper mode of giving it a fair deliberation, it was agreed that it should be referred to a Committee of the Whole; and that, in order to place the two plans in due comparison, the other should be recommitted.[33]

Among the resolutions proposed by Mr. Patterson, of interest here, are the following:

5. *Resolved*, That a Federal Judiciary be established, to consist of a supreme tribunal, the Judges of which to be appointed by the Executive, and to hold their offices during good behaviour; to receive punctually, at stated times, a fixed compensation for their services, in which no increase nor diminution shall be made so as to affect the persons actually in office at the time of such increase or diminution. That the Judiciary so established shall have authority to hear and determine, in the first instance, on all impeachments of Federal officers; and, by way of appeal, in the dernier resort, in all cases touching the rights of ambassadors; in all cases of captures from an enemy; in all cases of piracies and felonies on the high seas; in all cases in which foreigners may be interested; in the construction of any treaty or treaties, or which may arise on any of the acts for the regulation of trade, or the collection of the Federal revenue: that none of the Judiciary shall, during the time they remain in office, be capable of receiving or holding any other office or appointment during their term of service, or for ——— thereafter.

6. *Resolved*, That all acts of the United States in Congress, made by virtue and in pursuance of the powers hereby, and by the Articles of Confederation, vested in them, and all treaties made and ratified under the authority of the United States, shall be the supreme law of the respective States, so far forth as those acts or treaties shall relate to the said States or their citizens; and that the Judiciary of the several States shall be bound thereby in their decisions, any thing in the respective laws of the individual States to the contrary notwithstanding: * * *.[34]

In discussing his plan on June 16, Mr. Patterson said, inter alia, that a distinct Executive and Judiciary were provided by his plan.

Mr. Wilson entered into a contrast of the principal points of the Virginia and the Patterson (N. J.) plan. Inter alia: In the one (9) revision of the laws is provided for; no check in the other; (10) inferior tribunals in one, none such in the other; (11) in the one, jurisdiction of national tribunals to extend, etc.; an appellate jurisdiction only allowed in the other; (12) here, the jurisdiction is to extend to all cases affecting the national peace and harmony; there, a few cases only are marked out.[35]

On June 18 Mr. Hamilton presented his plan to the Convention. The sections of interest here are as follows:

VII. The supreme Judicial authority to be vested in Judges, to hold their offices during good behaviour, with adequate and permanent salaries. This court to have original jurisdiction in all causes of capture, and an appellative jurisdiction in all causes in which the revenues of the General Government, or the citizens of foreign nations, are concerned.

* * * * * * *

IX. The Governor, Senators, and all officers of the United States, to be liable to impeachment for mal–, and corrupt conduct; and upon conviction to be removed

[31] Same, pp. 860-861.
[32] Same, p. 861.
[33] Same, p. 862.
[34] Same, pp. 865-866.
[35] Same, p. 872.

from office, and disqualified for holding any place of trust or profit: all impeachments to be tried by a Court to consists of the Chief ———, or Judge of the Superior Court of Law of each State, provided such Judge shall hold his place during good behaviour and have a permanent salary.

X. All laws of the particular States contrary to the Constitution or laws of the United States to be utterly void; and the better to prevent such laws being passed, the Governor or President of each State shall be appointed by the General Government, and shall have a negative upon the laws about to be passed in the State of which he is the Governor or President.[36]

On June 19 Mr. Madison entered into a general discussion of the plans before the Convention and said, inter alia, that the plan of Mr. Patterson, not giving even a negative on the acts of the States, left them as much at liberty as ever to execute their unrighteous projects against each other; * * * not giving to the general councils any negative on the will of the particular States, left the door open for the like pernicious machinations among ourselves.[37]

On this day came the question on reporting Mr. Randolph's proposition without alteration, which was in fact a question whether Mr. Randolph's resolutions should be adhered to as preferable to those of Mr. Patterson, the vote stood:

Ayes: Massachusetts, Connecticut, Pennsylvania, Virginia, North Carolina, South Carolina, Georgia, 7.

Noes: New York, New Jersey, Delaware, 3.

Divided: Maryland.[38]

And Mr. Randolph's plan as reported from the Committee (q. v. June 13), was then before the House.

On June 20, the first resolution of the Report of the Committee of the Whole being before the Convention, Mr. Ellsworth, seconded by Mr. Gorham, moved to alter it so as to have it read, "that the government of the United States ought to consist of a supreme Legislative, Executive, and Judiciary.[39]

Mr. Luther Martin said, inter alia, that a national judiciary, extended into the states, would be ineffectual, and would be viewed with a jealousy inconsistent with its usefulness.[40]

On July 2, General Pinckney proposed that a committee consisting of one member from each state be appointed to devise and report upon some compromise, for, according to Mr. Sherman, the Convention was at a full stop and no one intended, apparently, that it should adjourn without doing something.

The Convention having agreed to General Pinckney's proposal, a Committee consisting of the following members was elected: Mr. Gerry, Mr. Ellsworth, Mr. Yates, Mr. Patterson, Dr. Franklin, Mr. Bedford, Mr. Martin, Mr. Mason, Mr. Davie, Mr. Rutledge, Mr. Baldwin.[41]

On July 14 while the principle of representation was before the Convention, Mr. Ellsworth asked Mr. Madison whether he thought that a negative lodged with the majority of the states, even the smallest, could be more dangerous than the qualified negative proposed to be lodged in a single Executive Magistrate, who must be taken from some one State.[42]

[36] Same, pp. 891–892.
[37] Same, pp. 898, 900.
[38] Same, p. 904.
[39] Same, p. 908.
[40] Same, p. 916.
[41] Same, p. 1023.
[42] Same, p. 1106.

On July 17, the Convention considered the clause "To negative all laws passed by the several States contravening, in the opinion of the National Legislature, the Articles of Union, or any treaties subsisting under the authority of the Union."[43]

Mr. Gouverneur Morris opposed this power as likely to be terrible to the States, and not necessary if sufficient Legislative authority should be given to the General Government.

Mr. Sherman thought it unnecessary; as the Courts of the States would not consider as valid any law contravening the authority of the Union, and which the Legislature would wish to be negatived.

Mr. Luther Martin considered the power as improper and inadmissible. Shall all the laws of the States be sent up to the General Legislature before they shall be permitted to operate?

Mr. Madison considered the negative on the laws of the States as essential to the efficacy and security of the General Government. The necessity of a General Government proceeds from the propensity of the States to pursue their particular interests, in opposition to the general interest. This propensity will continue to disturb the system unless effectually controlled. Nothing short of a negative on their laws will control it. They will pass laws which will accomplish their injurious objects before they can be repealed by the General Legislature, or set aside by the National tribunals. Confidence cannot be put in the state tribunals as guardians of the National authority and interests. In all the States these are more or less dependent on the Legislatures. In Georgia they are appointed annually by the Legislature. In Rhode Island the Judges who refused to execute an unconstitutional law were displaced, and others substituted, by the Legislature, who would be the willing instruments of the wicked and arbitrary plans of their masters. A power of negativing the improper laws of the States is at once the most mild and certain means of preserving the harmony of the system. Its utility is sufficiently displayed in the British system. Nothing could maintain the harmony and subordination of the various parts of the Empire, but the prerogative by which the Crown stifles in the birth every act of every part tending to discord or encroachment. It is true the prerogative is sometimes misapplied, through ignorance or partiality to one particular part of the Empire; but we have not the same reason to fear such misapplications in our system. As to the sending all laws up to the National Legislature, that might be rendered unnecessary by some emanation of the power into the States, so far at least as to give a temporary effect to laws of immediate necessity.[44]

Mr. Gouverneur Morris was more and more opposed to the negative. The proposal of it would disgust all the States. A law that ought to be negatived, will be set aside in the Judiciary department; and if that security should fail, may be repealed by a National law.

Mr. Sherman said that such a power involves a wrong principle, to wit, that a law of a State contrary to the Articles of the Union would, if not negatived, be valid and operative.[45]

Mr. Pinckney urged the necessity of the negative.

On the question for agreeing to the power of negativing laws of States, etc., it passed in the negative, the vote being as follows:

Ayes: Massachusetts, Virginia, North Carolina, 3.

[43] Same, p. 1116-1117.
[44] Same, p. 1117-1118.
[45] Same, p. 1118.

Noes: Connecticut, New Jersey, Pennsylvania, Delaware, Maryland, South Carolina, Georgia, 7.[46]

Mr. Luther Martin moved the following resolution,

That the Legislative acts of the United States made by virtue and in pursuance of the Articles of Union, and all treaties made and ratified under the authority of the United States, shall be the supreme law of the respective States, as far as those acts or treaties shall relate to the said States, or their citizens and inhabitants; and that the Judiciaries of the several States shall be bound thereby in their decisions, anything in the respective laws of the individual States to the contrary notwithstanding;

It was agreed to *nem. con.*[47]

On July 17, while the Convention was discussing the tenure of the Executive, Mr. Madison said that if it were essential to the preservation of liberty that the Legislative, Executive, and Judiciary powers be separate, it is essential to a maintenance of the separation that they should be independent of each other. * * * Why was it determined that the Judges should not hold their places by such a tenure? Because they might be tempted to cultivate the Legislature by an undue complaisance, and thus render the Legislature the virtual expositor, as well as the maker of the laws. * * * There was an analogy between the Executive and Judiciary departments in several respects. The latter executed the laws in certain cases as the former did in others. The former expounded and applied them for certain purposes, as the latter did for others. The difference between them seemed to consist chiefly in two circumstances—first, the collective interest and security were much more in the power belonging to the Executive than in that of the Judiciary department; secondly, in the administration of the former, much greater latitude is left to opinion and discretion than in the administration of the latter. But if the second consideration proves that it will be more difficult to establish a rule sufficiently precise for trying the Executive, than the Judges, and forms an objection to the same tenure of office, both considerations prove that it might be more dangerous to suffer a union between the Executive and Legislative powers than between the Judiciary and Legislative powers. He conceived it to be absolutely necessary to a well constituted Republic that the first two should be kept distinct and independent of each other. Whether the plan proposed by the motion was a proper one was another question; as it depended on the practicability of instituting a tribunal for impeachments as certain and as adequate in the one case as in the other. On the other hand, respect for the mover entitled his proposition to a fair hearing and discussion, until a less objectionable expedient should be applied for guarding against a dangerous union of the Legislative and Executive departments.[48]

Mr. Madison said that experience had proved a tendency in our government to throw all power into the Legislative vortex. The Executives of the States are in general little more than ciphers; the Legislatures omnipotent. If no effectual check be devised for restraining the instability and encroachments of the latter, a revolution of some kind or other would be inevitable.[49]

In a marginal note on the vote on the tenure of the Executive, Mr. Madison says that an independence of the three great departments of

[46] Same, pp. 1118–1119.
[47] Same, p. 1119.
[48] Same, pp. 1126–1127.
[49] Same, p. 1128.

each other, as far as possible, and the responsibility of all to the will of the community, seemed to be generally admitted as the true basis of a well constructed Government.[50]

On July 18 the Convention considered the eleventh resolution of Mr. Randolph's plan, to wit, "that a National Judiciary shall be established to consist of one supreme tribunal." It was agreed to unanimously.

On the clause, "The judges of which to be appointed by the second branch of the National Legislature"—[51]

Mr. Gorham would prefer an appointment by the second branch to an appointment by the whole Legislature; but he thought even that branch too numerous, and too little personally responsible, to ensure a good choice. He suggested that the Judges be appointed by the Executive with the advice and consent of the second branch, in the mode prescribed by the Constitution of Massachusetts. This mode had been long practised in that country and was found to answer perfectly well.

Mr. Wilson would still prefer an appointment by the Executive; but if that could not be attained, would prefer, in the next place, the mode suggested by Mr. Gorham. He thought it his duty, however, to move in the first instance, "that the Judges be appointed by the Executive."

Mr. Gouverneur Morris seconded the motion.

Mr. Luther Martin was strenuous for an appointment by the second branch. Being taken from all the States, it would be best informed of characters and most capable of making a fit choice.

Mr. Sherman concurred in the observations of Mr. Martin, adding that the Judges ought to be diffused, which would be more likely to be attended to by the second branch than by the Executive.[52]

Mr. Mason said that the mode of appointing the Judges may depend in some degree on the mode of trying impeachments of the Executive. If the Judges were to form a tribunal for that purpose, they surely ought not to be appointed by the Executive. There were insuperable objections besides against referring the appointment to the Executive. He mentioned, as one, that as the seat of government must be in some one State, and as the Executive would remain in office for a considerable time, for four, five, or six years, at least, he would insensibly form local and personal attachments within the particular State that would deprive equal merit elsewhere of an equal chance of promotion.

Mr. Gorham remarked that as the Executive will be responsible, in point of character, at least, for a judicious and faithful discharge of his trust, he will be careful to look through all the States for proper characters. The Senators will be as likely to form their attachments at the seat of government, where they reside, as the Executive. If they cannot get the man of the particular State to which they may respectively belong, they will be indifferent to the rest. Public bodies feel no personal responsibility and give full play to intrigue and cabal. Rhode Island is a full illustration of the insensibility to character produced by a participation of numbers in dishonourable measures, and of the length to which a public body may carry wickedness and cabal.

Mr. Gouverneur Morris supposed it would be improper for an impeachment of the Executive to be tried before the Judges. The latter would in such case be drawn into intrigues with the Legislature, and

[50] Same, p. 1129.
[51] Same, p. 1130.
[52] Same, p. 1131.

an impartial trial would be frustrated. As they would be much about the seat of government, they might even be previously consulted, and arrangements might be made for a prosecution of the Executive. He thought, therefore, that no argument could be drawn from the probability of such a plan of impeachments against the motion before the House.[53]

Mr. Madison suggested that the Judges might be appointed by the Executive, with the concurrence of one-third at least of the second branch. This would unite the advantage of responsibility in the Executive, with the security afforded in the second branch against any incautious or corrupt nomination by the Executive.

Mr. Sherman was clearly for an election by the Senate. It would be composed of men nearly equal to the Executive and would of course have, on the whole, more wisdom. They would bring into their deliberations a more diffusive knowledge of characters. It would be less easy for candidates to intrigue with them than with the Executive Magistrate. For these reasons he thought there would be a better security for a proper choice in the Senate than in the Executive.

Mr. Randolph said, it is true that when the appointment of the Judges was vested in the second branch an equality of votes had not been given to it. Yet he had rather leave the appointment there than give it to the Executive. He thought the advantage of personal responsibility might be gained in the Senate by requiring the respective votes of the members to be entered on the Journal. He thought, too, that the hope of receiving appointments would be more diffusive, if they depended on the Senate, the members of which would be diffusively known, than if they depended on a single man, who could not be personally known to a very great extent; and consequently, that opposition to the system would be so far weakened.[54]

Mr. Bedford thought that there were solid reasons against leaving the appointment to the Executive. He must trust more to information than the Senate. It would put it in his power to gain over the larger States by gratifying them with a preference of their citizens. The responsibility of the Executive, so much talked of, was chimerical. He could not be punished for mistakes.

Mr. Gorham remarked that the Senate could have no better information than the Executive. They must, like him, trust to information from the Members belonging to the particular State where the candidate resided. The Executive would certainly be more answerable for a good appointment, as the whole blame of a bad one would fall on him alone. He did not mean that he would be answerable under any other penalty than that of public censure, which with honourable minds was a sufficient one.

On the question for referring the appointment of the Judges to the Executive instead of the second branch, the vote stood:

Ayes: Massachusetts, Pennsylvania, 2.

Noes: Connecticut, Delaware, Maryland, Virginia, North Carolina, South Carolina, 6.

Absent: Georgia.[55]

Mr. Gorham moved "that the Judges be nominated and appointed by the Executive, by and with the advice and consent of the second

[53] Same, p. 1132.
[54] Same, p. 1133.
[55] Same, p. 1134.

branch; and every such nomination shall be made at least ——— days prior to such appointment." This mode, he said, had been ratified by the experience of a hundred and forty years in Massachusetts. If the appointment should be left to either branch of the Legislature, it will be a mere piece of jobbing.

Mr. Gouverneur Morris seconded and supported the motion.

Mr. Sherman thought it less objectionable than an absolute appointment by the Executive; but disliked it, as too much fettering the Senate.

On the question on Mr. Gorham's motion, the vote stood:

Ayes: Massachusetts, Pennsylvania, Maryland, Virginia, 4.

Noes: Connecticut, Delaware, North Carolina, South Carolina, 4.

Absent: Georgia.[56]

Mr. Madison moved "that the Judges should be nominated by the Executive, and such nomination should become an appointment if not disagreed to within ——— days by two-thirds of the second branch."

Mr. Gouverneur Morris seconded the motion.

By common consent, consideration was postponed to July 19.

"To hold their offices during good behaviour, and to receive fixed salaries"—agreed to, *nem. con.*

"In which [salaries of Judges] no increase or diminution shall be made so as to affect the persons actually in office at the time."

Mr. Gouverneur Morris moved to strike out "or increase." He thought the Legislature ought to be at liberty to increase salaries, as circumstances might require; and that this would not create any improper dependence in the Judges.

Doctor Franklin was in favor of the motion. Money may not only become more plentiful; but the business of the Department may increase, as the country becomes more populous.[57]

Mr. Madison said that the dependence would be less if the *increase alone* should be permitted; but it would be improper even so far to permit a dependence. Whenever an increase is wished by the Judges, or may be in agitation in the Legislature, an undue complaisance in the former may be felt towards the latter. If at such a crisis there should be in court suits to which leading members of the Legislature may be parties, the Judges will be in a situation which ought not to be suffered, if it can be prevented. The variations in the value of money may be guarded against by taking for a standard wheat or some other thing of permanent value. The increase of business will be provided for by an increase of the number who are to do it. An increase of salaries may easily be so contrived as not to affect persons in office.

Mr. Gouverneur Morris said that the value of money may not only alter, but the state of society may alter. In this event, the same quantity of wheat, the same value, would not be the same compensation. The amount of salaries must always be regulated by the manners and the style of living in a country. The increase of business cannot be provided for in the supreme tribunal, in the way that has been mentioned. All the business of a certain description, whether more or less, must be done in that single tribunal. Additional labor alone in the Judges can provide for additional business. Additional compensation, therefore, ought not to be prohibited.

[56] Same, pp. 1134-1135.
[57] Same, p. 1135.

On the question for striking out, "or increase", the vote stood:

Ayes: Massachusetts, Connecticut, Pennsylvania, Delaware, Maryland, South Carolina, 6.

Noes: Virginia, North Carolina, 2.

Absent: Georgia.[58]

The whole clause, as amended, was then agreed to, *nem. con.*

The twelfth resolution,"that the National Legislature be empowered to appoint inferior tribunals", being taken up—

Mr. Butler could see no necessity for such tribunals. The State tribunals might do the business.

Mr. Luther Martin concurred. They will create jealousies and oppositions in the State tribunals, with the jurisdiction of which they will interfere.

Mr. Gorham said that there are in the States already Federal Courts with jurisdiction for trial of piracies, etc., committed on the seas. No complaints have been made by the States or the courts of the States. Inferior tribunals are essential to render the authority of the National Legislature effectual.

Mr. Randolph observed that the courts of the States cannot be trusted with the administration of the National laws. The objects of jurisdiction are such as will often place the general and local policy at variance.

Mr. Gouverneur Morris urged also the necessity of such a provision.

Mr. Sherman was willing to give the power to the Legislature, but wished them to make use of the State tribunals, whenever it could be done with safety to the general interest.

Colonel Mason thought many circumstances might arise, not now to be foreseen, which might render such power absolutely necessary.

On the question for agreeing to the twelfth resolution, empowering the National Legislature to appoint inferior tribunals—it was agreed to, *nem. con.*

The clause of "Impeachments of national officers", was struck out, on motion.[59]

The thirteenth resolution, "The jurisdiction of the National Judiciary, etc.", being then taken up, and several criticisms having been made on the definition, it was proposed by Mr. Madison so to alter it as to read: "that the jurisdiction shall extend to all cases arising under the national laws; and to such other questions as may involve the national peace and harmony"; which was agreed to, *nem. con.*[60]

On July 19, the appointment, etc., of the Executive being under consideration, Mr. Madison said that if it be a fundamental principle of free government that the Legislative, Executive, and Judiciary powers should be *separately* exercised, it is equally so that they be *independently* exercised. There is the same, and perhaps greater, reason why the Executive should be independent of the Legislature, than why the Judiciary should.[61]

On July 20 the impeachment of the Executive being under consideration Mr. King wished the House to recur to the primitive axiom, that the three great departments of government should be separate and independent; that the Executive and Judiciary should be so as well as the Legislative; that the Executive should be so equally with the Judiciary. Would this be the case if the Executive should be

[58] Same, p. 1136.
[59] Same, p. 1137.
[60] Same, pp. 1137-1138.
[61] Same, p. 1147.

impeachable? It had been said, that the Judiciary would be impeachable. But it should have been remembered, at the same time, that the Judiciary hold their places not for a limited time, but during good behaviour.[62]

Mr. Randolph said that the propriety of impeachments was a favorite principle with him. * * * and he suggested for consideration an idea which had fallen (from Colonel Hamilton), of composing a forum out of the Judges belonging to the States; and even of requiring some preliminary inquest, whether just ground of impeachment existed.[63]

On July 21 Mr. Wilson moved, as an amendment to the tenth resolution of Mr. Randolph's plan, "that the Supreme National Judiciary should be associated with the Executive in the revisionary power." This proposition had been before made, and failed; but he was so confirmed by a reflection in the opinion of its utility, that he thought it incumbent on him to make another effort. The Judiciary ought to have an opportunity of remonstrating against projected encroachments on the people as well as on themselves. It had been said that the Judges, as expositors of the laws, would have an opportunity of defending their constitutional rights. There was weight in this observation; but this power of the Judges did not go far enough.[64] Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet may not be so unconstitutional as to justify the Judges in refusing to give them effect. Let them have a share in the revisionary power, and they will have an opportunity of taking notice of those characters of a law, and of counteracting, by the weight of their opinions, the improper views of the Legislature. Mr. Madison seconded the motion.

Mr. Gorham did not see the advantage of employing the Judges in this way. As Judges they are not to be presumed to possess any peculiar knowledge of the mere policy of public measures. Nor can it be necessary as a security for their constitutional rights. The Judges in England have no such additional provision for their defence, yet their jurisdiction is not invaded. He thought it would be best to let the Executive alone be responsible, and at most to authorize him to call on the Judges for their opinions.

Mr. Ellsworth approved heartily of the motion. The aid of the Judges will give more wisdom and firmness to the Executive. They will possess a systematic and accurate knowledge of the laws, which the Executive cannot be expected always to possess. The Law of Nations also will frequently come into question. Of this the Judges alone will have competent information.[65]

Mr. Madison considered the object of the motion as of great importance to the meditated Constitution. It would be useful to the Judiciary Department by giving it an additional opportunity of defending itself against Legislative encroachments. It would be useful to the Executive, by inspiring additional confidence and firmness in exerting the revisionary power. It would be useful to the Legislature, by the valuable assistance it would give in preserving a consistency, conciseness, perspicuity, and technical propriety in the laws, qualities peculiarly necessary, and yet shamefully wanting in our Republican codes. It would, moreover, be useful to the community at large, as

[62] Same, p. 1156.
[63] Same, p. 1158.
[64] Same, p. 1161.
[65] Same, p. 1162.

an additional check against a pursuit of those unwise and unjust measures which constituted so great a portion of our calamities. If any solid objection could be urged against the motion, it must be on the supposition that it tended to give too much strength, either to the Executive or Judiciary. He did not think there was the least ground for this apprehension. It was much more to be apprehended, that, notwithstanding this co-operation of the two departments, the Legislature would still be an overmatch for them. Experience in all the States had evinced a powerful tendency in the Legislature to absorb all power into its vortex. This was the real source of danger to the American Constitutions; and suggested the necessity of giving every defensive authority to the other departments that was consistent with republican principles.

Mr. Mason said that he had always been a friend to this provision. It would give a confidence to the Executive which he would not otherwise have, and without which the revisionary power would be of little avail.[66]

Mr. Gerry did not expect to see this point, which had undergone full discussion, again revived. The object he conceived of the revisionary power was merely to secure the Executive department against Legislative encroachment. The Executive, therefore, who will best know and be ready to defend his rights, ought alone to have the defence of them. The motion was liable to strong objections. It was combining and mixing together the Legislative and the other departments. It was establishing an improper coalition between the Executive and Judiciary departments. It was making statesmen of the Judges, and setting them up as the guardians of the rights of the people. He relied, for his part, on the Representatives of the people, as the guardians of their rights and interests. It was making the expositors of the laws the legislators; which ought never to be done. A better expedient for correcting the laws would be to appoint, as had been done in Pennsylvania, a person or persons of proper skill, to draw bills for the Legislature.

Mr. Strong thought, with Mr. Gerry, that the power of making ought to be kept distinct from that of expounding the laws. No maxim was better established. The Judges in exercising the function of expositors might be influenced by the part they had taken in passing the laws.[67]

Mr. Gouverneur Morris said that some check being necessary on the Legislature, the question is, in what hands it should be lodged? On one side, it was contended, that the Executive alone ought to exercise it. He did not think that an Executive appointed for six years, and impeachable while in office, would be a very effectual check. On the other side, it was urged, that he ought to be reinforced by the Judiciary department. Against this it was objected that expositors of laws ought to have no hand in making them, and arguments in favor of this had been drawn from England. What weight was due to them might be easily determined by an attention to facts. The truth was that the Judges in England had a great share in the legislation. They are consulted in difficult and doubtful cases. They may be, and some of them are, members of the Legislature. They are, or may be, members of the Privy Council; and can there advise the Executive, as they will do with us if the motion succeeds.

[66] Same, p. 1163.
[67] Same, p. 1164.

The influence the English Judges may have, in the latter capacity, in strengthening the Executive check, cannot be ascertained, as the King, by his influence, in a manner dictates the laws. There is one difference in the two cases, however, which disconcerts all reasoning from the British to our proposed Constitution. The British Executive has so great an interest in his prerogatives, and such power for means of defending them, that he will never yield any part of them. The interest of our Executive is so inconsiderable and so transitory, and his means of defending it so feeble, that there is the most just ground to fear his want to firmness in resisting encroachments. He was extremely apprehensive that the auxiliary firmness and weight of the Judiciary would not supply the deficiency. He concurred in thinking the public liberty in greater danger from Legislative usurpations than from any other source. It had been said that the Legislature ought to be relied on as the proper guardians of liberty. The answer was short and conclusive.[68] Either bad laws will be pushed, or not. On the latter supposition, no check will be wanted. On the former, a strong check will be necessary. And this is the proper supposition. Emissions of paper-money, largesses to the people, a remission of debts, and similar measures, will at some times be popular, and will be pushed for that reason. At other times, such measures will coincide with the interests of the Legislature themselves, and that will be a reason not less cogent for pushing them. It may be thought that the people will not be deluded and misled in the latter case. But experience teaches another lesson. The press is indeed a great means of diminishing the evil; yet, it is found to be unable to prevent it altogether.

Mr. Luther Martin considered the association of the Judges with the Executive, as a dangerous innovation; as well as one that could not produce the particular advantage expected from it. A knowledge of mankind, and of Legislative affairs, cannot be presumed to belong in a higher degree to the Judges than to the Legislature. And as to the constitutionality of laws that point will come before the Judges in their official character. In this character they have a negative on the laws. Join them with the Executive in the revision, and they will have a double negative. It is necessary that the Supreme Judiciary should have the confidence of the people. This will soon be lost if they are employed in the task of remonstrating against popular measures of the Legislature. Besides, in what mode and proportion are they to vote in the Council of Revision?[69]

Mr. Madison could not discover in the proposed association of the Judges with the Executive, in the revisionary check on the Legislature, any violation of the maxim which requires the great departments of power to be kept separate and distinct. On the contrary, he thought it an auxiliary precaution, in favor of the maxim. If a constitutional discrimination of the departments on paper were a sufficient security to each against encroachments of the others, all further provisions would indeed be superfluous. But experience had taught us a distrust of that security; and that it is necessary to introduce such a balance of powers and interests as will guarantee the provisions on paper. Instead, therefore, of contenting ourselves with laying down the theory in the Constitution, that each department ought to be separate and distinct, it was proposed to add a defensive power to

[68] Same, p. 1165.
[69] Same, p. 1166.

each, which should maintain the theory in practice. In so doing, we did not blend the departments together. We erected effectual barriers for keeping them separate. The most regular example of this theory was in the British Constitution. Yet it was not only the practice there to admit the Judges to a seat in the Legislature, and in the Executive Councils, and submit to their previous examination all laws of a certain description, but it was a part of their Constitution that the Executive might negative any law whatever; a part of *their* Constitution which had been universally regarded as calculated for the preservation of the whole. The objection against a union of the Judiciary and Executive branches, in the revision of the laws, had either no foundation, or was not carried far enough.[70] If such a union was an improper mixture of powers, or such a Judiciary check on the laws was inconsistent with the theory of a free constitution, it was equally so to admit the Executive to any participation in the making of laws; and the revisionary plan ought to be discarded altogether.

Colonel Mason observed that the defence of the Executive was not the sole object of the revisionary power. He expected even greater advantages from it. Notwithstanding the precautions taken in the constitution of the Legislature, it would still so much resemble that of the individual States, that it must be expected frequently to pass unjust and pernicious laws. This restraining power was therefore essentially necessary. It would have the effect, not only of hindering the final passage of such laws, but would discourage demagogues from attempting to get them passed. It has been said (by Mr. Luther Martin), that if the Judges were joined in this check on the laws, they would have a double negative, since in their expository capacity of Judges they would have one negative. He would reply that in this capacity they could impede, in one case only, the operation of laws. They could declare an unconstitutional law void. But with regard to every law, however unjust, oppressive, or pernicious, that did not come plainly under this description, they would be under the necessity, as Judges, to give it a free course. He wished the further use to be made of the Judges of giving aid in preventing every improper law. Their aid will be the more valuable, as they are in the habit and practice of considering laws in their true principles, and in all their consequences.[71]

Mr. Wilson said that the separation of the departments does not require that they should have separate objects; but that they should act separately, though on the same objects. It is necessary that the two branches of the Legislature should be separate and distinct, yet they are both to act precisely on the same object.

Mr. Gerry had rather give the Executive an absolute negative for its own defence, than thus to blend together the Judiciary and Executive departments. It will bind them together in an offensive and defensive alliance against the Legislature, and render the latter unwilling to enter into a contest with them.

Mr. Gouverneur Morris was surprised that any defensive provision for securing the effectual separation of the departments should be considered as an improper mixture of them. Suppose that the three powers were to be vested in three persons, by compact among themselves; that one was to have the power of making, another of executing, and a third of judging, the laws. Would it not be very natural for

[70] Same, p. 1167.
[71] Same, p. 1168.

the two latter, after having settled the partition on paper, to observe, and would not candor oblige the former to admit, that, as a security against legislative acts of the former, which might easily be so framed as to undermine the powers of the two others, the two others ought to be armed with a veto for their own defence; or at least to have an opportunity of stating their objections against acts of encroachment? And would any one pretend that such a right tended to blend and confound powers that ought to be separately exercised? [72] As well might it be said that if three neighbours had three distinct farms, a right in each to defend his farm against his neighbours, tended to blend the farms together.

Mr. Gorham ~~said~~ that all agreed that a check on the Legislature is necessary. But there are two objections against admitting the Judges to share in it, which no observations on the other side seem to obviate. The first is, that the Judges ought to carry into the exposition of the laws no prepossessions with regard to them; the second, that, as the Judges will outnumber the Executive, the revisionary check would be thrown entirely out of the Executive hands, and, instead of enabling him to defend himself, would enable the Judges to sacrifice him.

Mr. Wilson said that the proposition is certainly not liable to all the objections which have been urged against it. According to Mr. Gerry, it will unite the Executive and Judiciary in an offensive and defensive alliance against the Legislature. According to Mr. Gorham, it will lead to a subversion of the Executive by the Judiciary influence. To the first gentleman the answer was obvious: that the joint weight of the two Departments was necessary to balance the single weight of the Legislature. To the first objection stated by the other gentleman it might be answered, that, supposing the prepossession to mix itself with the exposition, the evil would be over-balanced by the advantages promised by the expedient. To the second objection, that such a rule of voting might be provided, in the detail, as would guard against it.[73]

Mr. Rutledge thought the Judges of all men the most unfit to be concerned in the Revisionary Council. The Judges ought never to give their opinion on a law, till it comes before them. He thought it equally unnecessary. The Executive could advise with the officers of state, as of War, Finance, etc., and avail himself of their information and opinions.

On the question on Mr. Wilson's motion for joining the Judiciary in the revision of laws, it passed in the negative, the vote being:

Ayes: Connecticut, Maryland, Virginia, 3.

Noes: Massachusetts, Delaware, North Carolina, South Carolina, 4.

Divided: Pennsylvania, Georgia, 2.

Not present: New Jersey. [74]

The motion made by Mr. Madison, on the eighteenth of July, and then postponed, "that the Judges should be nominated by the Executive, and such nominations become appointments unless disagreed to by two-thirds of the second branch of the Legislature," was then resumed.

Mr. Madison stated as his reasons for the motion: First, that it secured the responsibility of the Executive, who would in general be more capable and likely to select fit characters than the Legislature,

[72] Same, p. 1169.
[73] Same, p. 1170.
[74] Same, p. 1171.

or even the second branch of it, who might hide their selfish motives under the number concerned in the appointment. Secondly, that in case of any flagrant partiality or error in the nomination, it might be fairly presumed that two-thirds of the second branch would join in putting a negative on it. Thirdly, that as the second branch was very differently constituted, when the appointment of the Judges was formerly referred to it, and was now to be composed of equal votes from all the States, the principle of compromise which had prevailed in other instances required in this that there should be a concurrence of two authorities, in one of which the people, in the other the States, should be represented. The Executive magistrate would be considered as a national officer, acting for and equally sympathizing with every part of the United States. If the second branch alone should have this power, the Judges might be appointed by a minority of the people, though by a majority of the States; which could not be justified on any principle, as their proceedings were to relate to the people rather than to the States; and as it would, moreover, throw the appointments entirely into the hands of the Northern States, a perpetual ground of jealousy and discontent would be furnished to the Southern States.

Mr. Pinckney was for placing the appointment in the second branch exclusively. The Executive will possess neither the requisite knowledge of characters, nor confidence of the people, for so high a trust.

Mr. Randolph would have preferred the mode of appointment proposed formerly by Mr. Gorham, as adopted in the Constitution of Massachusetts, but thought the motion pending so great an improvement of the clause as it stands, that he anxiously wished it success. He laid great stress on the responsibilty of the Executive, as a security for fit appointments. Appointments by the Legislatures have generally resulted from cabal, from personal regard, or some other consideration than a title derived from the proper qualifications.[75] The same inconveniences will proportionally prevail, if the appointments be referred to either branch of the Legislature, or to any other authority administered by a number of individuals.

Mr. Ellsworth would prefer a negative in the Executive on a nomination by the second branch, the negative to be overruled by a concurrence of two-thirds of the second branch, to the mode proposed by the motion, but preferred an absolute appointment by the second branch to either. The Executive will be regarded by the people with a jealous eye. Every power for augmenting unnecessarily his influence will be disliked. As he will be stationary, it was not to be supposed he could have a better knowledge of characters. He will be more open to caresses and intrigues than the Senate. The right to supersede his nomination will be ideal only. A nomination under such circumstances will be equivalent to an appointment.

Mr. Gouverneur Morris supported the motion. First, the States, in their corporate capacity, will frequently have an interest staked on the determination of the Judges. As in the Senate the States are to vote, the Judges ought not to be appointed by the Senate. Next to the impropriety of being judge in one's own cause, is the appointment of the Judge. Secondly, it had been said, the Executive would be uninformed of characters. The reverse was the truth. The Senate will be so. They must take the character of candidates from the flattering pictures drawn by their friends. The Executive, in the

[75] Same, p. 1172.

necessary intercourse with every part of the United States required by the nature of his administration, will or may have the best possible information. Thirdly, it had been said that a jealousy would be entertained of the Executive.[76] If the Executive can be safely trusted with the command of the army, there cannot surely be any reasonable ground of jealousy in the present case. He added that if the objections against an appointment of the Executive by the Legislature had the weight that had been allowed, there must be some weight in the objection to an appointment of the Judges by the Legislature, or by any part of it.

Mr. Gerry said that the appointment of the Judges, like every other part of the Constitution, should be so modeled as to give satisfaction both to the people and to the States. The mode under consideration will give satisfaction to neither. He could not conceive that the Executive could be as well informed of characters throughout the Union, as the Senate. It appeared to him, also, a strong objection, that two-thirds of the Senate were required to reject a nomination of the Executive. The Senate would be constituted in the same manner as Congress, and the appointments of Congress have been generally good.

Mr. Madison observed that he was not anxious that two-thirds should be necessary to disagree to a nomination. He had given this form to his motion, chiefly to vary it the more clearly from one which had just been rejected. He was content to obviate the objection last made, and accordingly so varied the motion as to let a majority reject.

Colonel Mason found it his duty to differ from his colleagues in their opinions and reasonings on this subject. Notwithstanding the form of the proposition, by which the appointment seemed to be divided between the Executive and Senate, the appointment was substantially vested in the former alone.[77] The false complaisance which usually prevails in such cases will prevent a disagreement to the first nominations. He considered the appointment by the Executive a dangerous prerogative. It might even give him an influence over the Judiciary Department itself. He did not think the difference of interest between the Northern and Southern States could be properly brought into this argument. It would operate, and require some precautions in the case of regulating navigation, commerce, and imposts; but he could not see that it had any connection with the Judiciary department.

On the question, the motion being now, "that the Executive should nominate, and such nominations should become appointments unless disagreed to by the Senate", the vote stood:

Ayes: Massachusetts, Pennsylvania, Virginia, 3.

Noes: Connecticut, Delaware, Maryland, North Carolina, South Carolina, Georgia, 6.

On the question for agreeing to the clause as it stands, by which the Judges are to be appointed by the second branch, the vote was:

Ayes: Connecticut, Delaware, Maryland, North Carolina, South Carolina, Georgia, 6.

Noes: Massachusetts, Pennsylvania, Virginia, 3.

It passed in the affirmative.[78]

On July 23, while the Convention had under consideration the ratification of the proposed Constitution, Mr. Gouverneur Morris

[76] Same, p. 1173.
[77] Same, p. 1174.
[78] Same, p. 1175.

said, inter alia, that if the Confederation is to be pursued, no alteration can be made without the unanimous consent of the Legislatures. Legislative alterations not conformable to the Federal compact would clearly not be valid. The Judges would consider them as null and void.[79]

Mr. Madison thought it clear that the Legislatures were incompetent to the proposed changes. These changes would make essential inroads on the State Constitutions; and it would be a novel and dangerous doctrine that a Legislature could change the Constitution under which it held its existence. There might indeed be some Constitutions within the Union which had given a power to the Legislature to concur in alterations of the Federal compact. But there were certainly some which had not; and in the case of these, a ratification must of necessity be obtained from the people. He considered the difference between a system founded on the Legislatures only and one founded on the people to be the true difference between a *league* or *treaty*, and a *Constitution*. The former, in point of *moral obligation*, might be as inviolable as the latter. In point of *political operation*, there were two important distinctions in favor of the latter. First, a law violating a treaty ratified by a preexisting law might be respected by the Judges as a law, though an unwise or perfidious one. A law violating a Constitution established by the people themselves would be considered by the Judges as null and void.[80]

On the same day Mr. Gerry moved that the proceedings of the Convention for the establishment of a National Government (except the part relating to the Executive) be referred to a Committee to prepare and report a Constitution conformable thereto.

The appointment of a Committee, as moved by Mr. Gerry, was agreed to, *nem. con.*[81]

On a ballot for a committee to report a Constitution conformable to the resolutions adopted by the Convention, the members chosen were: Mr. Rutledge, Mr. Randolph, Mr. Gorham, Mr. Ellsworth, Mr. Wilson.

On a motion to discharge the Committee of the Whole from the propositions submitted to the Convention by Mr. C. Pinckney as the basis of a Constitution, and to refer them to the Committee of Detail just appointed, it was agreed to, *nem. con.*

A like motion was then made and agreed to, *nem. con.*, with respect to the propositions of Mr. Patterson.[82]

On July 25 the clause relating to the Executive again being under consideration, Mr. Madison said that there were objections against every mode that had been, or perhaps could be, proposed. The election must be made, either by some existing authority under the National or State Constitutions—or by some special authority derived from the people—or by the people themselves. The two existing authorities under the National Constitution would be the Legislative and Judiciary. The latter he presumed was out of the question.[83] In discussing in detail the agencies which he had enumerated, he said, with respect to the Judiciary, that the state judiciaries

[79] Same, p. 1182.
[80] Same, pp. 1183-1184.
[81] Same, p. 1187.
[82] Same, p. 1197.
[83] Same, p. 1198.

had not been, and he presumed would not be, proposed as a proper source of appointment.[84]

On July 26 Mr. Mason moved that the constitution of the Executive, as reported by the Committee of the Whole, be reinstated, viz, "that the Executive be appointed for seven years, and be ineligible a second time." [85]

On the question, Mr. Mason's motion was adopted:

Ayes: New Hampshire, New Jersey, Maryland, Virginia, North Carolina, South Carolina, Georgia, 7.

Noes: Connecticut, Pennsylvania, Delaware, 3.

Not on the floor: Massachusetts.

Mr. Gouverneur Morris was now against the whole paragraph. In answer to Colonel Mason's position, that a periodical return of the great officers of the state into the mass of the people was the palladium of civil liberty, he would observe that on the same principle the Judiciary ought to be periodically degraded.[86]

Mr. Mason moved "that the Committee of Detail be instructed to receive a clause requiring certain qualifications of landed property, and citizenship of the United States, in members of the National Legislature; and disqualifying persons having unsettled accounts with, or being indebted to, the United States, from being members of the National Legislature." [87]

Mr. Pinckney and General Pinckney moved to insert, by way of amendment, the words, "Judiciary and Executive", so as to extend the qualifications to those Departments; which was agreed to, *nem. con.*[88]

On this day the proceedings of the week preceding were referred unanimously to the Committee of Detail; and the Convention then adjourned unanimously till August 6, in order that the Committee of Detail might have time to prepare and report the Constitution. Of the resolutions referred to the Committee, the following are of interest in this paper:

1. *Resolved*, That the Government of the United States ought to consist of a supreme Legislative, Judiciary, and Executive.[89]

* * * * * * *

7. *Resolved*, That the legislative acts of the United States, made by virtue and in pursuance of the Articles of Union, and all treaties made and ratified under the authority of the United States, shall be the supreme law of the respective States, as far as those acts or treaties shall relate to the said States, or their citizens and inhabitants; and that the Judiciaries of the several States shall be bound thereby in their decisions, any thing in the respective laws of the individual States to the contrary notwithstanding.[90]

* * * * * * *

14. *Resolved*, That a National Judiciary be established, to consist of one supreme tribunal, the Judges of which shall be appointed by the second branch of the national Legislature; to hold their offices during good behaviour; to receive punctually, at stated times, a fixed compensation for their services, in which no diminution shall be made so as to affect the persons actually in office at the time of such diminution.[91]

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[84] Same, p. 1200.
[85] Same, p. 1209.
[86] Same, p. 1210.
[87] Same, p. 1211.
[88] Same, p. 1213.
[89] Same, p. 1220.
[90] Same, pp. 1221-1222.
[91] Same, p. 1224.

15. *Resolved*, That the National Legislature be empowered to appoint inferior tribunals.[91]

16. *Resolved*, That the jurisdiction of the National Judiciary shall extend to cases arising under laws passed by the General Legislature; and to such other questions as involve the national peace and harmony.[91]

* * * * * * *

20. *Resolved*, That the Legislative, Executive, and Judiciary powers, within the several States, and of the National Government, ought to be bound, by oath, to support the Articles of Union.[92]

* * * * * * *

23. *Resolved*, That it be an instruction to the Committee to whom were referred the proceedings of the Convention for the establishment of a National Government, to receive a clause, or clauses, requiring certain qualifications of property and citizenship in the United States, for the Executive, the Judiciary, and the members of both branches of the Legislature of the United States.[92]

On August 6, Mr. Rutledge presented the report of the Committee of Detail. The articles of interest there are as follows:

ART. II. The Government shall consist of supreme Legislative, Executive, and Judicial powers.[93]

ART. VIII. The acts of the Legislature of the United States made in pursuance of this Constitution, and all treaties made under the authority of the United States, shall be the supreme law of the several States, and of their citizens and inhabitants; and the Judges in the several States shall be bound thereby in their decisions, any thing in the Constitutions or laws of the several States to the contrary notwithstanding.[94]

ART. IX. SECT. 1. The Senate of the United States shall have power to make treaties, and to appoint ambassadors, and Judges of the Supreme Court.[94]

ART. X. SECT. 2. * * * He shall be removed from his office on impeachment by the House of Representatives, and conviction, in the Supreme Court, of treason, bribery, or corruption. * * *[95]

ART. XI. SECT. 1. The Judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as shall, when necessary, from time to time, be constituted by the Legislature of the United States.

SECT. 2. The Judges of the Supreme Court, and of the inferior courts, shall hold their offices during good behaviour. They shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

SECT. 3. The jurisdiction of the Supreme Court shall extend to all cases arising under laws passed by the Legislature of the United States; to all cases affecting ambassadors, other public ministers, and consuls; to the trial of impeachments of officers of the United States; to all cases of admiralty and maritime jurisdiction; to controversies between two or more States (except such as shall regard territory or jurisdiction); between a state and citizens of another State; between citizens of different States; and between a state, or the citizens thereof, and foreign states, citizens or subjects. In cases of impeachment, cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be party, this jurisdiction shall be original. In all the other cases before-mentioned, it shall be appellate, with such exceptions, and under such regulations, as the Legislature shall make. The Legislature may assign any part of the jurisdiction above mentioned (except the trial of the President of the United States) in the manner, and under the limitations which it shall think proper, to such inferior courts as it shall constitute from time to time.

SECT. 4. The trial of all criminal offences (except in cases of impeachment) shall be in the State where they shall be committed; and shall be by jury.

SECT. 5. Judgment, in cases of impeachment, shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust, or profit, under the United States. But the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment according to law.[96]

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[91] Same, p. 1224.
[92] Same, p. 1225.
[93] Same, p. 1226.
[94] Same, p. 1234.
[95] Same, p. 1237.
[96] Same, pp. 1238–1239.

The Convention then adjourned till August 8 in order to examine the report.[97]

On August 15 the Convention had under consideration certain sections of Article VI. Mr. Madison moved the following amendment to section 13 of Article VI:

> Every bill which shall have passed the two Houses shall, before it become a law, be severally presented to the President of the United States, and to the Judges of the Supreme Court, for the revision of each. If, upon such revision, they shall approve of it, they shall respectively signify their approbation by signing it; but if, upon such revision, it shall appear improper to either, or both, to be passed into a law, it shall be returned, with the objections against it, to that House in which it shall have originated, who shall enter the objections at large on their Journal and proceed to reconsider the bill; but if, after such reconsideration, two-thirds of that House, when either the President or a majority of the judges shall object, or three-fourths, where both shall object, shall agree to pass it, it shall, together with the objections, be sent to the other House; by which it shall likewise be reconsidered, and if approved by two-thirds or three-fourths of the other House, as the case may be, it shall become a law.[98]

Mr. Wilson seconded the motion.

Mr. Pinckney opposed the interference of the Judges in the legislative business; it will involve them in parties and give a previous tincture to their opinions.

Mr. Mercer heartily approved the motion. It is an axiom that the Judiciary ought to be separate from the Legislative, but equally so that it ought to be independent of that department. The true policy of the axiom is that legislative usurpation and oppression may be obviated. He disapproved of the doctrine that the Judges, as expositors of the Constitution, should have authority to declare a law void. He thought laws ought to be well and cautiously made, and then to be uncontrollable.

Mr. Gerry said that this motion came to the same thing with what had been already negatived.

On the question on the motion of Mr. Madison, the vote stood:

Ayes: Delaware, Maryland, Virginia, 3.

Noes: New Hampshire, Massachusetts, Connecticut, New Jersey, Pennsylvania, North Carolina, South Carolina, Georgia, 8.[99]

Mr. Gouverneur Morris regretted that something like the proposed check could not be agreed to. He dwelt on the importance of public credit and the difficulty of supporting it without some strong barrier against the instability of legislative assemblies. He suggested the idea of requiring three-fourths of each House to *repeal* laws where the President should not concur. He had no great reliance on the revisionary power, as the Executive was now to be constituted (elected by Congress). The Legislature will contrive to soften down the President. He recited the history of paper emissions, and the perseverance of the legislative assemblies in repeating them, with all the distressing effects of such measures before their eyes. Were the National Legislature formed and a war was now to break out, this ruinous expedient would be again resorted to if not guarded against. The requiring three-fourths to repeal would, though not a complete remedy, prevent the hasty passage of laws and the frequency of those repeals which destroy faith in the public and which are among our greatest calamities.

Mr. Dickinson was strongly impressed with the remark of Mr. Mercer, as to the power of the Judges to set aside the law. He

[97] Same, p. 1242.
[98] Same, vol. III, p. 1332.
[99] Same, p. 1333

thought no such power ought to exist. He was, at the same time, at a loss what expedient to substitute. The Justiciary of Arragon, he observed, became by degrees the law-giver.

Mr. Gouverneur Morris suggested the expedient of an absolute negative in the Executive. He could not agree that the Judiciary, which was part of the Executive, should be bound to say that a direct violation of the Constitution was law. A control over the Legislature might have its inconveniences. But view the danger on the other side.[1] The most virtuous citizens will often, as members of a Legislative body, concur in measures which afterwards, in their private capacity, they will be ashamed of. Encroachments of the popular branch of the Government ought to be guarded against. The Ephori at Sparta became in the end absolute. The Report of the Council of Censors in Pennsylvania points out the many invasions of the Legislative department on the Executive, numerous as the latter is, within the short term of seven years; and in a State where a strong party is opposed to the Constitution, and watching every occasion of turning the public resentments against it. If the Executive be overturned by the popular branch, as happened in England, the tyranny of one man will ensue. In Rome, where the aristocracy overturned the throne, the consequence was different. He enlarged on the tendency of the Legislative authority to usurp on the Executive, and wished the section to be postponed, in order to consider of some more effectual check than requiring two-thirds only to overrule the negative of the Executive.

Mr. Sherman asked, can one man be trusted better than all the others, if they all agree? This was neither wise nor safe. He disapproved of judges meddling in politics and parties. We have gone far enough in forming the negative, as it now stands.[2]

Mr. Carroll said that when the negative to be overruled by two-thirds only was agreed to, the *quorum* was not fixed. He remarked that as a majority was now to be the quorum, seventeen in the larger, and eight in the smaller, house, might carry points. The advantage that might be taken of this seemed to call for greater impediments to improper laws. He thought the controlling power, however, of the Executive could not be well decided till it was seen how the formation of that department would be finally regulated. He wished the consideration of the matter to be postponed.

Mr. Wilson, after viewing the subject with all the coolness and attention possible, was most apprehensive of a dissolution of the Government from the Legislature swallowing up all the other powers. He remarked that the prejudices against the Executive resulted from a misapplication of the adage that the parliament was the palladium of liberty. Where the Executive was really formidable, *king* and *tyrant* were naturally associated in the minds of people; not *legislature* and *tyranny*. But where the Executive was not formidable, the two last were most properly associated. After the destruction of the King in Great Britain, a more pure and unmixed tyranny sprang up in the Parliament than had been exercised by the monarch.[3] He insisted that we had not guarded against the danger on this side by a sufficient self-defensive power, either to the Executive or Judiciary Department.

[1] Same, p. 1334.
[2] Same, p. 1335.
[3] Same, p. 1336.

Mr. Williamson moved to change "two-thirds of each House" into "three-fourths", as requisite to overrule the dissent of the President. He saw no danger in this, and preferred giving the power to the President alone to admitting the Judges into the business of legislation.

Mr. Wilson seconds the motion; referring to and repeating the ideas of Mr. Carroll.

On this motion for three-fourths, instead of two-thirds, it passed in the affirmative, the vote being:

Ayes: Connecticut, Delaware, Maryland, Virginia, North Carolina, South Carolina, 6.

Noes: New Hampshire, Massachusetts, New Jersey, Georgia, 4.

Divided: Pennsylvania.[4]

Mr. Madison, observing that if the negative of the President was confined to *bills*, it would be evaded by acts under the form and name of Resolutions, votes, etc., proposed that "or resolve", should be added after *"bill"*, in the beginning of section 13, with an exception as to votes of adjournment, etc. After a short conversation on the subject, the question was put and rejected, the vote being as follows:

Ayes: Massachusetts, Delaware, North Carolina, 3.

Noes: New Hampshire, Connecticut, New Jersey, Pennsylvania, Maryland, Virginia, South Carolina, Georgia, 8.

"Ten days (Sundays excepted)", instead of *"seven"*, were allowed to the President for returning bills with his objections—New Hampshire and Massachusetts only voting against it.

The thirteenth Section of Article 6, as amended was then agreed to.[5]

On August 17 the Convention agreed to the following clause, *nem. con.*, to wit, "to constitute inferior tribunals.[6]

On August 18 Mr. Ellsworth observed that a Council had not yet been provided for the President. He conceived there ought to be one. His proposition was that it should be composed of the President of the Senate, the Chief Justice, and the Ministers as they might be established for the departments of foreign and domestic affairs, war, finance, and marine; who should advise but not conclude the President.[7]

Mr. Gerry was against letting the heads of the Departments, particularly of finance, have anything to do in business connected with legislation. He mentioned the Chief Justice also, as particularly exceptionable. These men will also be so taken up with other matters, as to neglect their own proper duties.[8]

On August 20 Mr. Pinckney submitted to the House, in order to be referred to the Committee of Detail, certain propositions. Those of interest in this paper are as follows:

Each House shall be the judge of its own privileges, and shall have authority to punish by imprisonment every person violating the same, or who, in the place where the Legislature may be sitting and during the time of its session, shall threaten any of its members for any thing said or done in the House; or who shall assault any of them therefor; or who shall assault or arrest any witness or other person ordered to attend either of the Houses, in his way going or returning; or who shall rescue any person arrested by their order.

Each branch of the Legislature, as well as the Supreme Executive, shall have authority to require the opinions of the Supreme Judicial Court upon important questions of law, and upon solemn occasions.[9]

[4] Same, p. 1337.
[5] Same, p. 1338.
[6] Same, p. 1347.
[7] Same, pp. 1358–1359.
[8] Same, p. 1359.
[9] Same, p. 1365.

The jurisdiction of the Supreme Court shall be extended to all controversies between the United States and an individual State; or the United States and the citizens of an individual State.[10]

These propositions were referred to the Committee of Detail, without debate or consideration of them by the House.

Mr. Gouverneur Morris, seconded by Mr. Pinckney, also submitted certain propositions, which were, in like manner, referred to the Committee of Detail. Those of interest in this paper are as follows:

To assist the President in conducting the public affairs, there shall be a Council of State composed of the following officers:

1. The Chief Justice of the Supreme Court, who shall from time to time recommend such alterations of and additions to the laws of the United States, as may in his opinion be necessary to the due administration of justice; and such as may promote useful learning and inculcate sound morality throughout the Union. He shall be President of the Council, in the absence of the President.[11]

Mr. Gerry moved, "that the Committee be instructed to report proper qualifications for the President, and a mode of trying the Supreme Judges in cases of impeachment." [12]

On August 22 Mr. Rutledge, from the Committee to whom were referred, on the eighteenth and twentieth instant, the propositions of Mr. Madison and Mr. Pinckney, made the report following: [13]

The Committee report, that, in their opinion, the following additions should be made to the report now before the Convention. Those of interest in this paper are as follows:

After the second section of the tenth article insert the following as a third section: "The President of the United States shall have a Privy Council, which shall consist of the President of the Senate, the Speaker of the House of Representatives, the Chief Justice of the Supreme Court, and the principal officer in the respective departments of foreign affairs, domestic affairs, war, marine, and finance, as such departments of office shall from time to time be established; whose duty it shall be, to advise him in matters respecting the execution of his office, which he shall think proper to lay before them: but their advice shall not conclude him, nor affect his responsibility for the measures which he shall adopt."

At the end of the second section of the eleventh article add "the Judges of the Supreme Court shall be triable by the Senate, on impeachment by the House of Representatives."

Between the fourth and fifth lines of the third section of the eleventh article, after the word "controversies", insert, "between the United States and an individual State, or the United States and an individual person." [14]

On August 23 Mr. Rutledge moved to amend Article 8 to read as follows:

This Constitution, and the laws of the United States made in pursuance thereof, and all the treaties made under the authority of the United States, shall be the supreme law of the several States and of their citizens and inhabitants; and the Judges of the several States shall be bound thereby in their decisions, any thing in the Constitutions or laws of the several States to the contrary notwithstanding;

This was agreed to, *nem. con.* [15]

Article 9 being next for consideration—

Mr. Gouverneur Morris argued against the appointment of officers by the Senate. He considered the body as too numerous for that purpose; as subject to cabal; and as devoid of responsibility. If Judges were to be tried by the Senate, according to a late Report of a

[10] Same, p. 1366.
[11] Same, p. 1367.
[12] Same, p. 1369.
[13] Same, pp. 1397-1398.
[14] Same, pp. 1398-1399.
[15] Same, pp. 1408-1409.

Committee, it was particularly wrong to let the Senate have the filling of vacancies which its own decrees were to create.

Mr. Wilson was of the same opinion, and for like reasons.

Article 9 was waived.[16]

Mr. Charles Pinckney moved to add, as an additional power, to be vested in the Legislature of the United States, "to negative all laws passed by the several States interfering, in the opinion of the Legislature, with the general interests and harmony of the Union; provided that two-thirds of the members of each House assent to the same." This principle, he observed, had formerly been agreed to. He considered the precaution as essentially necessary. The objection drawn from the predominance of the large States had been removed by the equality established in the Senate.

Mr. Broom seconded the proposition.

Mr. Sherman thought it unnecessary, the laws of the General Government being supreme and paramount to the State laws, according to the plan as it now stands.

Mr. Madison proposed that it should be committed. He had been from the beginning a friend to the principle; but thought the modification might be made better.

Mr. Mason wished to know how the power was to be exercised. Are all laws whatever to be brought up? Is no road nor bridge to be established without the sanction of the General Legislature? Is this to sit constantly in order to receive and revise the State laws? He did not mean, by these remarks, to condemn the expedient; but he was apprehensive that great objections would lie against it.

Mr. Williamson thought it unnecessary; and having been already decided, a revival of the question was a waste of time.

Mr. Wilson considered this as the keystone wanted to complete the wide arch of government we are raising. The power of self-defence had been urged as necessary for the State Governments. It was equally necessary for the General Government. The firmness of Judges is not of itself sufficient. Something further is requisite. It will be better to prevent the passage of an improper law than to declare it void when passed.[17]

Article 9, Section 1, was then resumed, to wit: "The Senate of the United States shall have power to make treaties, and to appoint Ambassadors, and Judges of the Supreme Court."[18]

The second and third Sections of Article 9, then being taken up—

Mr. Rutledge said that this provision for deciding controversies between the States was necessary under the Confederation, but will be rendered unnecessary by the National Judiciary now to be established; and moved to strike it out.

Doctor Johnson seconded the motion.

Mr. Sherman concurred. So did Mr. Dayton.

Mr. Williamson was for postponing instead of striking out, in order to consider whether this might not be a good provision, in cases where the Judiciary were interested, or too closely connected with the parties.[19]

Mr. Gorham had doubts as to striking out. The Judges might be connected with the States being parties. He was inclined to think

[16] Same, p. 1409.
[17] Same, p. 1410.
[18] Same, p. 1412.
[19] Same, p. 1416.

the mode proposed in the clause would be more satisfactory than to refer such cases to the Judiciary.

On the question for postponing the second and third sections, it passed in the negative, the vote being:

Ayes: New Hampshire, North Carolina, Georgia, 3.

Noes: Massachusetts, Connecticut, New Jersey, Delaware, Maryland, Virginia, South Carolina, 7.

Absent: Pennsylvania.

Mr. Wilson urged the striking out, the Judiciary being a better provision.

On the question for striking out the second and third Sections of Article 9, the vote stood:

Ayes: New Hampshire, Connecticut, New Jersey, Delaware, Maryland, Virginia, South Carolina, Massachusetts, 8.

Noes: North Carolina, Georgia, 2.

Absent: Pennsylvania.[20]

On August 27 the Convention considered, inter alia, Article 11; and Dr. Johnson suggested that the judicial power ought to extend to equity as well as law; and moved to insert the words "both in law and equity", after the words "United States", in the first line of the first section.

Mr. Read objected to vesting these powers in the same court.

On the question, the vote was as follows:

Ayes: New Hampshire, Connecticut, Pennsylvania, Virginia, South Carolina, Georgia, 6.

Noes: Delaware, Maryland, 2.

Absent: Massachusetts, New Jersey, North Carolina.

On the question to agree to Article 11, Section 1, as amended, the States were the same as on the preceding question.[21]

Mr. Dickinson moved, as an amendment to Article 11, Section 2, after the words "good behaviour", the words "'provided that they may be removed by the Executive on the application by the Senate and House of Representatives."

Mr. Gerry seconded the motion.

Mr. Gouverneur Morris thought it a contradiction in terms to say that the Judges should hold their offices during good behaviour and yet be removable without a trial. Besides, it was fundamentally wrong to subject judges to so arbitrary an authority.

Mr. Sherman saw no contradiction or impropriety if this were made a part of the constitutional regulation of the Judiciary establishment. He observed that a like provision was contained in the British statutes.

Mr. Rutledge said that if the Supreme Court is to judge between the United States and particular States, this alone is an insuperable objection to the motion.

Mr. Wilson considered such a provision in the British Government as less dangerous than here, the House of Lords and House of Commons being less likely to concur on the same occasions. Chief Justice Holt, he remarked, had *successively* offended, by his indepednent conduct, both Houses of Parliament. Had this happened at the same time he would have been ousted. The Judges would be in a bad situation if made to depend on any gust of faction which might prevail in the two branches of our Government.

[20] Same, p. 1417.
[21] Same, p. 1435.

Mr. Randolph opposed the motion as weakening too much the independence of the Judges.[22]

Mr. Dickinson was not apprehensive that the Legislature, composed of different branches, constructed on such different principles, would improperly unite for the purpose of displacing a Judge.

On the question for agreeing to Mr. Dickinson's motion, it was negatived, the vote being as follows:

Ayes: Connecticut.

Noes: All the other States present.

On the question on Article 11, section 2, as reported, the vote stood:

Ayes: Not given.

Noes: Delaware, Maryland, 2.

Mr. Madison and Mr. McHenry moved to re-instate the words "increased or", before the word "diminished", in Article 11, section 2.

Mr. Gouverneur Morris opposed it, for reasons urged by him on a former occasion.

Colonel Mason contended strenuously for the motion. There was no weight, he said, in the argument drawn from changes in the value of the metals, because this might be provided for by an increase of salaries, so made as not to affect persons in office; and this was the only argument on which much stress seemed to have been laid.

General Pinckney said that the importance of the Judiciary will require men of the first talents: Large salaries will therefore be necessary, larger than the United States can afford in the first instance. He was not satisfied with the expedient mentioned by Colonel Mason. He did not think it would have a good effect, or a good appearance, for new Judges to come in with higher salaries than the old ones.

Mr. Gouverneur Morris said the expedient might be evaded, and therefore amounted to nothing. Judges might resign and then be reappointed to increased salaries.[23]

On the question, the vote was as follows:

Ayes: Virginia, 1.

Noes: New Hampshire, Connecticut, Pennsylvania, Delaware, South Carolina, 5.

Divided: Maryland.

Absent: Massachusetts, New Jersey, North Carolina, Georgia.[24]

Mr. Randolph and Mr. Madison then moved to add the following words to Article 11, section 2: "nor increased by any act of the Legislature which shall operate before the expiration of three years after the passing thereof."

On the question, the vote was as follows:

Ayes: Maryland, Virginia, 2.

Noes: New Hampshire, Connecticut, Pennsylvania, Delaware, South Carolina, 5.

Absent: Massachusetts, New Jersey, North Carolina, Georgia.

Article 11, section 3, being taken up, the following clause was postponed, viz: "to the trial of impeachments of officers of the United States"; by which the jurisdiction of the Supreme Court was extended to such cases.

Mr. Madison and Mr. Gouverneur Morris moved to insert, after the word "controversies", the words "to which the United States shall be a party"; which was agreed to, *nem. con.*

[22] Same, p. 1436.
[23] Same, p. 1437.
[24] Same, p. 1438.

Doctor Johnson moved to insert the words "this Constitution and the", before the word "laws."

Mr. Madison doubted whether it was not going too far, to extend the jurisdiction of the Court generally to cases arising under the Constitution, and whether it ought not to be limited to cases of a judiciary nature. The right of expounding the Constitution, in cases not of this nature, ought not to be given to that department.[24]

The motion of Doctor Johnson was agreed to, *nem. con.*, it being generally supposed, that the jurisdiction given was constructively limited to cases of a judiciary nature.

On motion of Mr. Rutledge, the words "passed by the Legislature" were struck out; and after the words "United States" were inserted, *nem. con.*, the words "and treaties made or which shall be made under their authority", conformably to a preceding amendment in another place.

The clause "in cases of impeachment" was postponed.

Mr. Gouverneur Morris wished to know what was meant by the words: "In all the cases before-mentioned it [jurisdiction] shall be appellate, with such exceptions, etc."—whether it extended to matters of fact as well as law—and to cases of common law, as well as civil law.

Mr. Wilson believed that the Committee meant facts as well as law and common as well as civil law. The jurisdiction of the Federal court of appeals had, he said, been so construed.

Mr. Dickinson moved to add, after the word "appellate", the words "both as to law and fact"; which was agreed to, *nem. con.*

Mr. Madison and Mr. Gouverneur Morris moved to strike out the beginning of the third section, "The jurisdiction of the Supreme Court", and to insert the words "the Judicial power", which was agreed to, *nem. con.*

The following motion was disagreed to, to wit, to insert: "In all the other cases before-mentioned, the judicial power shall be exercised in such manner as the Legislature shall direct." The vote was as follows:[25]

Ayes: Delaware, Virginia, 2.

Noes: New Hampshire, Connecticut, Pennsylvania, Maryland, South Carolina, Georgia, 6.

On a question for striking out the last sentence of the third Section, "The Legislature may assign, etc.", it passed, *nem. con.*

Mr. Sherman moved to insert, after the words "between citizens of different States", the words "between citizens of the same State claiming lands under grants of different States"—according to the provision in the 9th Article of the Confederation; which was agreed to, *nem. con.*

On August 28 the Convention considered Article 11, Section 3, and it was moved to strike out the words "it shall be appellate" and to insert the words "the Supreme Court shall have appellate jurisdiction"—in order to prevent uncertainty whether "it" referred to the *Supreme Court*, or to the *Judicial power*.[26]

On the question, the vote was as follows:

Ayes: New Hampshire, Massachusetts, Connecticut, Pennsylvania, Delaware, Virginia, North Carolina, South Carolina, Georgia, 9.

Noes: Maryland, 1.

Absent: New Jersey.[27]

[24] Same, p. 1438.
[25] Same, p. 1439.
[26] Same, p. 1440.
[27] Same, p. 1441.

On September 4 Mr. Brearly, from the Committee of Eleven, to whom sundry resolutions had been referred, made a report containing, inter alia, the following:

7. SECTION 4. "The President, by and with the advice and consent of the Senate, shall have power to make treaties; and he shall nominate and, by and with the advice and consent of the Senate, shall appoint ambassadors, and other public ministers, Judges of the Supreme Court, and all other officers of the United States whose appointments are not otherwise herein provided for. But no treaty shall be made without the consent of two-thirds of the members present." [28]

On September 7, the mode of constituting the Executive being under consideration, on the question on these words in the clause, viz: "He shall nominate and, by and with the advice and consent of the Senate, shall appoint ambassadors and other public ministers and consuls, and Judges of the Supreme Court", it was agreed to, *nem. con.*, the insertion of "and consuls" having first taken place.[29]

On September 8, the last report of the Committee of Eleven being under consideration, Mr. Madison objected to a trial of the President by the Senate, especially as he was to be impeached by the other branch of the Legislature; and for any act which might be called a misdemeanor. The President under these circumstances was made improperly dependent. He would prefer the Supreme Court for the trial of impeachments; or, rather, a tribunal of which that should form a part.

Mr. Gouverneur Morris thought no other tribunal than the Senate could be trusted. The Supreme Court were too few in number and might be warped or corrupted.[30]

Mr. Sherman regarded the Supreme Court as improper to try the President, because the Judges would be appointed by him.[31]

On this day a Committee was appointed to revise the style of, and arrange, the articles that had been agreed to by the House. The Committee consisted of Mr. Johnson, Mr. Hamilton, Mr. Gouverneur Morris, Mr. Madison, and Mr. King.[32]

On September 12 Dr. Johnson, from the Committee on Style, reported a digest of the plan of government. Those sections of interest here are as follows:

ART. II, SEC. 2. * * * He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senate present concur; and he shall nominate and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States whose appointments are not herein otherwise provided for. * * * [33]

ART. III, SEC. 1. The Judicial power of the United States, both in law and equity, shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. The judges both of the supreme and inferior courts shall hold their offices during good behaviour; and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

SEC. 2. The Judicial power shall extend to all cases, both 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. To all cases affecting ambassadors, other public ministers, and consuls. To all cases of admiralty and maritime jurisdiction. To controversies to which the United States shall be a party. To controversies between two or more States; between a State, and citizens of another State; between citizens of different States; between citizens of the same

[28] Same, pp. 1487–1488.
[29] Same, p. 1520.
[30] Same p. 1529.
[31] Same, p. 1530.
[32] Same, p. 1532.
[33] Same, p. 1555.

State claiming lands under grants of different States; and between a State, or the citizens thereof, and foreign States, citizens, or subjects.

In cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before-mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make. * * *[34]

The clause relating to exports being under consideration, Colonel Mason urged that the restrictions on the States would prevent the incidental duties necessary for the inspection and safe keeping of their produce, and be ruinous to the staple States, as he called the five Southern States; he moved as follows:

provided, nothing herein contained shall be construed to restrain any State from laying duties upon exports for the sole purpose of defraying the charges of inspecting, packing, storing, and indemnifying the losses in keeping the commodities in the care of public officers, before exportation.[35]

Mr. Gorham and Mr. Langdon thought there would be no security, if the proviso should be agreed to, for the States exporting through other States, against these oppressions of the latter. How was redress to be obtained, in case duties should be laid beyond the purpose expressed?

Mr. Madison said that there would be the same security as in other cases. The jurisdiction of the Supreme Court must be the source of redress. So far only had provision been made by the plan against injurious acts of the States. His own opinion was that this was insufficient. A negative on the State laws alone could meet all the shapes which these could assume. But this had been overruled.[36]

On September 17 the members of the Convention signed the Constitution. The articles of interest here are as follows:

Art. II. Sec. 2. * * * he [the President] shall nominate and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, Judges of the Supreme Court, * * *[37]

Art. III. Sec. 1. The Judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may, from time to time, ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour; and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

Sec. 2. 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; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State, claiming lands under grants of different States; and between a State, or the citizens thereof, and foreign States, citizens, or subjects.

In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before-mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make. * * *[38]

[34] Same, pp. 1556–1557.
[35] Same, p. 1566.
[36] Same, p. 1567.
[37] Same, p. 1617.
[38] Same, pp. 1618–1619.

ARTICLE VII

The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

Done in Convention, by the unanimous consent of the States present, the 17th day of September, in the year of our Lord 1787, and of the independence of the United States of America the twelfth. In witness whereof, we have hereunto subscribed our names.

GEORGE WASHINGTON,
President and Deputy from Virginia.

New Hampshire
JOHN LANGDON,
NICHOLAS GILMAN.

Massachusetts
NATHANIEL GORHAM,
RUFUS KING.

Connecticut
WILLIAM SAMUEL JOHNSON,
ROGER SHERMAN.

New York
ALEXANDER HAMILTON.

New Jersey
WILLIAM LIVINGSTON,
DAVID BREARLY,
WILLIAM PATTERSON,
JONATHAN DAYTON.

Pennsylvania
BENJAMIN FRANKLIN,
THOMAS MIFFLIN,
ROBERT MORRIS,
GEORGE CLYMER,
THOMAS FITZSIMONS.
JARED INGERSOLL,
JAMES WILSON,
GOUVERNEUR MORRIS.

Delaware
GEORGE READ,
GUNNING BEDFORD, Jr.,
JOHN DICKINSON,
RICHARD BASSETT,
JACOB BROOME.

Maryland
JAMES MCHENRY,
DANIEL of ST. THOMAS JENIFER,
DANIEL CARROLL.

Virginia
JOHN BLAIR,
JAMES MADISON, Jr.

North Carolina
WILLIAM BLOUNT,
RICHARD DOBBS SPAIGHT,
HUGH WILLIAMSON.

South Carolina
JOHN RUTLEDGE,
CHARLES COTESWORTH PINCKNEY,
CHARLES PINCKNEY,
PIERCE BUTLER.

Georgia
WILLIAM FEW,
ABRAHAM BALDWIN.

Attest:

WILLIAM JACKSON, *Secretary.*

II. PROCEEDINGS IN THE RATIFYING CONVENTIONS

FROM THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION

MASSACHUSETTS

January 23, 1788—Mr. Dalton: Mr. President, we have been but six or seven days in the discussion of the Constitution. Sir, has not paragraph after paragraph been considered and explained? Has not great light been thrown upon the articles we have considered? For my part, I profess to have received much light on them. We are now discussing the powers of Congress, sir; shall we pass them over? Shall we pass over the article of the judiciary power, without examination?—I hope, sir, it will be particularly inquired into. * * *[1]

January 30, 1788—Mr. Holmes: Mr. President, I rise to make some remarks on the paragraph under consideration, which treats of the judiciary power. * * *

It is a maxim universally admitted, that the safety of the subject consists in having a right to a trial as free and impartial as the lot of humanity will admit of. Does the Constitution make provision for such a trial? I think not; for in a criminal process, a person shall not have a right to insist on a trial in the vicinity where the fact was committed, where a jury of the peers would, from their local situation, have an opportunity to form a judgment of the character of the person charged with the crime, and also to judge of the credibility of the witnesses. There a person must be tried by a jury of strangers; a jury who may be interested in his conviction; and where he may, by reason of the distance of his residence from the place of trial, be incapable of making such a defence as he is, in justice, entitled to, and which he could avail himself of, if his trial was in the same county where the crime is said to have been committed.[2]

These circumstances, as horrid as they are, are rendered still more dark and gloomy, as there is no provision made in the Constitution to prevent the attorney-general from filing information against any person, whether he is indicted by the grand jury or not; in consequence of which the most innocent person in the commonwealth may be taken by virtue of a warrant issued in consequence of such information, and dragged from his home, his friends, his acquaintance, and confined in prison, until the next session of the court, which has jurisdiction of the crime with which he is charged, (and how frequent those sessions are to be we are not yet informed of,) and after long, tedious, and painful imprisonment, though acquitted on trial, may have no possibility to obtain any kind of satisfaction for the loss of his liberty, the loss of his time, great expenses, and perhaps cruel sufferings.

But what makes the matter still more alarming is, that the mode of criminal process is to be pointed out by Congress, and they have no

[1] Elliot's Debates on the Federal Constitution, by Jonathan Elliot. Vol. II, p. 94-95.
[2] Same, p. 109.

constitutional check on them, except that the trial is to be by a jury: but who this jury is to be, how qualified, where to live, how appointed, or by what rules to regulate their procedure, we are ignorant of as yet: whether they are to live in the county where the trial is; whether they are to be chosen by certain districts, or whether they are to be appointed by the sheriff ex officio; whether they are to be for one session of the court only, or for a certain term of time, or for good behavior, or during pleasure, are matters which we are entirely ignorant of as yet.[3]

The mode of trial is altogether indetermined; whether the criminal is to be allowed the benefit of counsel; whether he is to be allowed to meet his accuser face to face; whether he is to be allowed to confront the witnesses, and have the advantage of cross-examination, we are not yet told.

These are matters of by no means small consequence; yet we have not the smallest constitutional security that we shall be allowed the exercise of these privileges, neither is it made certain, in the Constitution, that a person charged with the crime shall have the privilege of appearing before the court or jury which is to try him.

On the whole, when we fully consider this matter, and fully investigate the powers granted, explicitly given, and specially delegated, we shall find Congress possessed of powers enabling them to institute judicatories little less inauspicious than a certain tribunal in Spain, which has long been the disgrace of Christendom: I mean that diabolical institution, the Inquisition.

What gives an additional glare of horror to these gloomy circumstances is the consideration, that Congress have to ascertain, point out, and determine, what kind of punishments shall be inflicted on persons convicted of crimes. They are nowhere restrained from inventing the most cruel and unheard-of punishments, and annexing them to crimes; and there is no constitutional check on them, but that racks and gibbets may be amongst the most mild instruments of their discipline.

There is nothing to prevent Congress from passing laws which shall compel a man, who is accused or suspected of a crime, to furnish evidence against himself, and even from establishing laws which shall order the court to take the charge exhibited against a man for truth, unless he can furnish evidence of his innocence.

I do not pretend to say Congress will do this; but, sir, I undertake to say that Congress (according to the powers proposed to be given them by the Constitution) may do it; and if they do not, it will be owing entirely—I repeat it, it will be owing entirely—to the goodness of the men, and not in the least degree owing to the goodness of the Constitution.[4]

The framers of our state constitution took particular care to prevent the General Court from authorizing the judicial authority to issue a warrant against a man for a crime, unless his being guilty of the crime was supported by oath or affirmation, prior to the warrant being granted; why it should be esteemed so much more safe to intrust Congress with the power of enacting laws, which it was deemed so unsafe to intrust our state legislature with, I am unable to conceive.[5]

January 30, 1788—Mr. Gore said (in reply to Mr. Holmes) that it had been the uniform conduct of those in opposition to the proposed form of government, to determine, in every case where it was possible

[3] Same, p. 110.
[4] Same, p. 111.
[5] Same, p. 111-112.

that the administrators thereof could do wrong, that they would do so, although it were demonstrable that such wrong would be against their own honor and interest, and productive of no advantage to themselves. On this principle alone have they determined that the trial by jury would be taken away in civil cases; when it had been clearly shown, that no words could be adopted, apt to the situation and customs of each state in this particular. Jurors are differently chosen in different states, and in point of qualification the laws of the several states are very diverse; not less so in the causes and disputes which are entitled to trial by jury. What is the result of this? That the laws of Congress may and will be conformable to the local laws in this particular, although the Constitution could not make a universal rule equally applying to the customs and statutes of the different states. Very few governments (certainly not this) can be interested in depriving the people of trial by jury, in questions of meum et tuum. In criminal cases alone are they interested to have the trial under their own control; and, in such cases, the Constitution expressly stipulates for trial by jury; but then, says the gentleman from Rochester, (Mr. Holmes,) to the safety of life it is indispensably necessary the trial of crimes should be in the vicinity; and the vicinity is construed to mean county; this is very incorrect, and gentlemen will see the impropriety, by referring themselves to the different local divisions and districts of the several states. But further, said the gentleman, the idea that the jury coming from the neighborhood, and knowing the character and circumstances of the party in trial, is promotive of justice, on reflection will appear not founded in truth. If the jury judge from any other circumstances but what are part of the cause in question, they are not impartial. The great object is to determine on the real merits of the cause, uninfluenced by any personal considerations; if, therefore, the jury could be perfectly ignorant of the person in trial, a just decision would be more probable. From such motives did the wise Athenians so constitute the famed Areopagus, that, when in judgment, this court should sit at midnight, and in total darkness, that the decision might be on the thing, and not on the person. Further, said the gentleman, it has been said, because the Constitution does not expressly provide for an indictment by grand jury in criminal cases, therefore some officer under this government will be authorized to file informations, and bring any man to jeopardy of his life, and indictment by grand jury will be disused. If gentlemen who pretend such fears will look into the constitution of Massachusetts, they will see that no provision is therein made for an indictment by grand jury, or to oppose the danger of an attorney-general filing informations; yet no difficulty or danger has arisen to the people of this commonwealth from this defect, if gentlemen please to call it so. If gentlemen would be candid, and not consider that, wherever Congress may possibly abuse power, they certainly will, there would be no difficulty in the minds of any in adopting the proposed Constitution.[6]

January 30, 1788—Mr. Dawes said he did not see that the right of trial by jury was taken away by the article. The word court does not, either by a popular or technical construction, exclude the use of a jury to try facts. When people, in common language, talk of a trial at the Court of Common Pleas, or the Supreme Judicial Court, do they not include all the branches and members of such court—the

[6] Same, p. 112-113.

jurors as well as the judges? They certainly do, whether they mention the jurors expressly or not. Our state legislators have construed the word court in the same way; for they have given appeals from a justice of peace to the Court of Common Pleas, and from thence to the Supreme Court, without saying any thing of the jury; but in cases which, almost time out of mind, have been tried without jury, there the jurisdiction is given expressly to the justices of a particular court, as may be instanced by suits upon the absconding act, so called.

Gentlemen have compared the article under consideration to that power which the British claimed, and we resisted, at the revolution; namely, the power of trying the Americans without a jury. But surely there was no parallel in the cases; it was criminal cases in which they attempted to make this abuse of power. Mr. Dawes mentioned one example of this, which, though young, he well remembered; and that was the case of Nickerson, the pirate, who was tried without a jury, and whose judges were the governors of Massachusetts and of some neighboring provinces, together with Admiral Montague, and some gentlemen of distinction. Although this trial was without a jury, yet, as it was a trial upon the civil law, there was not so much clamor about it as otherwise there might have been; but still it was disagreeable to the people, and was one of the then complaints. But the trial by jury was not attempted to be taken from civil causes. It was no object of power, whether one subject's property was lessened, while another's was increased; nor can it be now an object with the federal legislature. What interest can they have in constituting a judiciary, to proceed in civil causes without a trial by jury? In criminal causes, by the proposed government, there must be a jury. It is asked, Why is not the Constitution as explicit in securing the right of jury in civil as in criminal cases? The answer is, Because it was out of the power of the Convention. The several states differ so widely in their modes of trial, some states using a jury in causes wherein other states employ only their judges, that the Convention have very wisely left it to the federal legislature to make such regulations as shall, as far as possible, accommodate the whole. Thus our own state constitution authorizes the General Court to erect judicatories, but leaves the nature, number, and extent of them, wholly to the discretion of the legislature. The bill of rights, indeed, secures the trial by jury, in civil causes, except in cases where a contrary practice has obtained. Such a clause as this some gentlemen wish were inserted in the proposed Constitution, but such a clause would be abused in that Constitution, as has been clearly stated by the honorable gentleman from Charlestown, (Mr. Gorham), because the "exception of all cases where a jury have not heretofore been used," would include almost all cases that could be mentioned, when applied to all the states, for they have severally differed in the kinds of causes where they have tried without a jury.[7]

February 1, 1788—Mr. Bowdoin (of Dorchester): * * * All the constitutions of the states consist of three branches, except as to the legislative powers, which are chiefly vested in two. The powers of government are separated in all, and mutually check each other. * * *[8]

February 1, 1788—Mr. Adams: * * * Your excellency's first proposition is, "that it be explicitly declared, that all powers not

[7] Same, pp. 113-114.
[8] Same, p. 127.

expressly delegated to Congress are reserved to the several states, to be by them exercised." This appears, to my mind, to be a summary of a bill of rights, which gentlemen are anxious to obtain. It removes a doubt which many have entertained respecting the matter, and gives assurance that, if any law made by the federal government shall be extended beyond the power granted by the proposed Constitution, and inconsistent with the constitution of this state, it will be an error, and adjudged by the courts of law to be void. It is consonant with the second article in the present Confederation, that each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not, by this Confederation, expressly delegated to the United States in Congress assembled. I have long considered the watchfulness of the people over the conduct of their rulers the strongest guard against the encroachments of power; and I hope the people of this country will always be thus watchful. * * *[9]

February 2, 1788—Mr. Thacher: * * * These powers are a check on each other, and can never be made either dependent on one another, or independent of the people. The President is chosen by the electors, who are appointed by the people. The high courts of justice arise from the President and Senate; but yet the ministers of them can be removed only upon bad behavior. The independence of judges is one of the most favorable circumstances to public liberty; for when they become the slaves of a venal, corrupt court, and the hirelings of tyranny, all property is precarious, and personal security at an end; a man may be stripped of all his possessions, and murdered, without the forms of law. Thus it appears that all parts of this system arise ultimately from the people, and are still independent of each other. * * *[10]

On February 5, 1788, John Hancock, President of the Convention, submitted the report of the Committee.[11] Among the amendments proposed by the Committee, the following are of interest here:

* * * * * * *

Sixthly. That no person shall be tried for any crime, by which he may incur an infamous punishment, or loss of life, until he be first indicted by a grand jury, except in such cases as may arise in the government and regulation of the land and naval forces.

Seventhly. The Supreme Judicial Federal Court shall have no jurisdiction of causes between citizens of different states, unless the matter in dispute, whether it concern the realty or personalty, be of the value of three thousand dollars at the least; nor shall the federal judicial powers extend to any action between citizens of different states, where the matter in dispute, whether it concern the realty or personalty, is not of the value of fifteen hundred dollars at the least.

Eighthly. In civil actions between citizens of different states, every issue of fact, arising in actions at common law, shall be tried by a jury, if the parties, or either of them, request it.[12]

* * * * * * *

CONNECTICUT

January 7, 1788—Mr. Oliver Ellsworth: * * * This Constitution defines the extent of the powers of the general government. If the general legislature should at any time overleap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the Constitution

[9] Same, p. 131.
[10] Same, p. 145.
[11] Same (Committee to consider Amendments, etc.; p. 141).
[12] Same, p. 177.

does not authorize, it is void; and the judicial power, the national judges, who, to secure their impartiality, are to be made independent, will declare it to be void. On the other hand, if the states go beyond their limits, if they make a law which is a usurpation upon the general government, the law is void; and upright, independent judges will declare it to be so. * * *[13]

NEW YORK

June 17, 1788—Mr. Robert Livingston: * * * From hence he inferred the necessity of a federal judiciary, to which he would have referred not only the laws for regulating commerce, but the construction of treaties and other great national objects,—showing that, without this, it would be in the power of any state to commit the honor of the Union, defeat their most beneficial treaties, and involve them in a war. He next adverted to the form of the federal government. He said that, though justified when considered as a mere diplomatic body, making engagements for its respective states, which they were to carry into effect, yet, if it was to enjoy legislative, judicial, and executive powers, an attention as well to the facility of doing business as to the principles of freedom, called for a division of those powers. After commenting on each of them, and showing the mischief that would flow from their union in one House of Representatives, and those, too, chosen only by the legislatures, and neither representing the people nor the government, (which he said consisted of legislative, executive, and judicial,) he proposed the Constitution of this state as the model for the state governments. * * *[14]

June 21, 1788—Mr. Hamilton: * * * This great source of free government, popular election, should be perfectly pure, and the most unbounded liberty allowed. Where this principle is adhered to; where, in the organization of the government, the legislative, executive, and judicial branches are rendered distinct; where, again, the legislature is divided into separate houses, and the operations of each are controlled by various checks and balances, and, above all, by the vigilance and weight of the state governments,—to talk of tyranny, and the subversion of our liberties, is to speak the language of enthusiasm. This balance between the national and state governments ought to be dwelt on with peculiar attention, as it is of the utmost importance. It forms a double security to the people. If one encroaches on their rights, they will find a powerful protection in the other. Indeed, they will both be prevented from overpassing their constitutional limits, by a certain rivalship, which will ever subsist between them. I am persuaded that a firm union is as necessary to perpetuate our liberties as it is to make us respectable; and experience will probably prove that the national government will be as natural a guardian of our freedom as the state legislature themselves. * * *[15]

June 27, 1788—Mr. Hamilton: * * * In the form of this government, and in the mode of legislation, you find all the checks which the greatest politicians and the best writers have ever conceived. What more can reasonable men desire? Is there any one branch in which the whole legislative and executive powers are lodged? No. The legislative authority is lodged in three distinct branches, properly

[13] Same, p. 196.
[14] Same, p. 215.
[15] Same, p. 257.

balanced; the executive is divided between two branches; and the judicial is still reserved for an independent body, who hold their office during good behavior. This organization is so complex, so skilfully contrived, that it is next to impossible that an impolitic or wicked measure should pass the scrutiny with success. * * *[16]

July 2, 1788—Mr. Tredwell: * * * But it appears to me, that, in forming this Constitution, we have run into the same error which the lawyers and Pharisees of old were charged with; that is, while we have secured the tithes of mint, anise, and cumin, we have neglected the weightier matters of the law, judgment, mercy, and faith. Have we not neglected to secure to ourselves the weighty matters of judgment or justice, by empowering the general government to establish one supreme, and as many inferior, courts as they please, whose proceedings they have a right to fix and regulate as they shall think fit, so that we are ignorant whether they shall be according to the common, civil, the Jewish, or Turkish law? What better provisions have we made for mercy, when a man, for ignorantly passing a counterfeit continental note, or bill of credit, is liable to be dragged to a distant county, two or three hundred miles from home, deprived of the support and assistance of friends, to be tried by a strange jury, ignorant of his character, ignorant of the character of the witnesses, unable to contradict any false testimony brought against him by their own knowledge of facts, and with whom the prisoner being unacquainted, he must be deprived totally of the benefit of his challenge? and besides all that, he may be exposed to lose his life, merely for want of property to carry his witnesses to such a distance; and after all this solemn farce and mockery of a trial by jury, if they should acquit him, it will require more ingenuity than I am master of, to show that he does not hold his life at the will and pleasure of the Supreme Court, to which an appeal lies, and consequently depend on the tender mercies, perhaps, of the wicked, (for judges may be wicked;) and what those tender mercies are, I need not tell you. You may read them in the history of the Star Chamber Court in England, and in the courts of Philip, and in your Bible. * * *[17]

In this Constitution, sir, we have departed widely from the principles and political faith of '76, when the spirit of liberty ran high, and danger put a curb on ambition. Here we find no security for the rights of individuals, no security for the existence of our state governments; here is no bill of rights, no proper restriction of power; our lives, our property, and our consciences, are left wholly at the mercy of the legislature, and the powers of the judiciary may be extended to any degree short of almighty. Sir, in this Constitution we have not only neglected,—we have done worse,—we have openly violated, our faith,—that is, our public faith. * * *[18]

On July 2, 1788, the Committee proceeded to the reading of Article 3:

Mr. Jones proposed the following amendments:

Resolved, as the opinion of this committee, That nothing in the Constitution now under consideration contained shall be construed so as to authorize the Congress to constitute, ordain, or establish, any tribunals, or inferior courts, with any other than appellate jurisdiction, except such as may be necessary for trial of causes of admiralty and maritime jurisdiction, and for the trial of piracies and felonies

[16] Same, p. 348.
[17] Same, p. 399.
[18] Same, p. 401.

committed on the high seas; and in all other cases to which the judicial power of the United States extends, and in which the Supreme Court of the United States has no original jurisdiction, the cause shall be heard, tried, and determined in some of the state courts, with the right of appeal to the Supreme Court of the United States, or other proper tribunal, to be established for the purpose by the Congress, with such exceptions, and under such regulations, as the Congress shall make.

* * * * * * *

Resolve 1. "*Resolved, as the opinion of this committee,* That all appeals from any courts in this State, proceeding according to the course of the common law, are to be by writ of error, and not otherwise."

Res. 2. "*Resolved, as the opinion of this committee,* That no judge of the Supreme Court of the United States shall, during his continuance in office, hold any other office under the United States, or any of them."

Res. 3. "*Resolved, as the opinion of this committee,* That the judicial power of the United States, as to controversies between citizens of the same state, claiming lands under grants of different states, extends only to controversies relating to such lands as shall be claimed by two or more persons, under grants of different states."

Res. 4. "*Resolved, as the opinion of this committee,* That nothing in the Constitution now under consideration contained, is to be construed to authorize any suit to be brought against any state, in any manner whatever."

Res. 5. "*Resolved, as the opinion of this committee,* That the judicial power of the United States, in cases in which a state shall be a party, is not to be construed to extend to criminal prosecutions."

Res. 6. "*Resolved, as the opinion of this committee,* That the judicial power of the United States, as to controversies between citizens of different states, is not to be construed to extend to any controversy relating to any real estate not claimed under grants of different states."

Res. 7. "*Resolved, as the opinion of this committee,* That the judicial power of the United States, as to controversies between citizens of the same state, claiming lands under grants of different states, extends only to controversies relating to such lands as shall be claimed by two or more persons, under grants of different states."

Res. 8. "*Resolved, as the opinion of this committee,* That the person aggrieved by any judgment, sentence, or decree of the Supreme Court of the United States, with such exceptions, and under such regulations, as the Congress shall make concerning the same, ought, upon application, to have a commission, to be issued by the President of the United States, to such learned men as he shall nominate, and by and with the advice and consent of the Senate, appoint, not less than seven, authorizing such commissioners, or any seven or more of them, to correct the errors in such judgment, or to review such sentence and decree, as the case may be, and to do justice to the parties in the premises."

Res. 9. "*Resolved, as the opinion of this committee,* That the jurisdiction of the Supreme Court of the United States, or of any other court to be instituted by the Congress, ought not, in any case, to be increased, enlarged, or extended, by any fiction, collusion, or mere suggestion."[19]

PENNSYLVANIA

November 28, 1787,[20]—Mr. Wilson: * * * The judges are to be nominated by the President, and appointed by him, with the advice and consent of the Senate. This shows that the judges cannot exist without the President and Senate. I have already shown that the President and Senate cannot exist without the existence of the state legislatures. Have I misstated any thing? Is not the evidence indisputable, that the state governments will be preserved, or that the general government must tumble amidst their ruins? It is true, indeed, sir, although it presupposes the existence of state governments, yet this Constitution does not suppose them to be the sole power to be respected.

In the Articles of Confederation, the people are unknown, but in this plan they are represented; and in one of the branches of the

[19] Same, p. 408–409.
[20] Same, text reads "October."

legislature, they are represented immediately by persons of their own choice. * * * [21]

December 1, 1787—Mr. Wilson: * * * Another objection has been taken, that the judicial powers are coextensive with the objects of the national government. As far as I can understand the idea of magistracy in every government, this seems to be a proper arrangement; the judicial department is considered as a part of the executive authority of government. Now, I have no idea that the authority should be restricted so as not to be able to perform its functions with full effect. I would not have the legislature sit to make laws which cannot be executed. It is not meant that they shall be carefully and duly considered before they are enacted, and that then they shall be honestly and faithfully executed. This observation naturally leads to a more particular consideration of the government before us. In order, sir, to give permanency, stability, and security to any government, I conceive it of essential importance, that its legislature should be restrained; that there should not only be what we call a passive, but an active power over it; for, of all kinds of despotism, this is the most dreadful, and the most difficult to be corrected. With how much contempt have we seen the authority of the people treated by the legislature of this state! and how often have we seen it making laws in one session, that have been repealed the next, either on account of the fluctuation of party, or their own impropriety.

This could not have been the case in a compound legislature; it is therefore proper to have efficient restraints upon the legislative body. These restraints arise from different sources. I will mention some of them. In this Constitution, they will be produced, in a very considerable degree, by a division of the power in the legislative body itself. Under this system, they may arise likewise from the interference of those officers who will be introduced into the executive and judicial departments. They may spring also from another source—the election by the people; and finally, under this Constitution, they may proceed from the great and last resort—from the people themselves. I say, under this Constitution, the legislature may be restrained, and kept within its prescribed bounds, by the interposition of the judicial department. This I hope, sir, to explain clearly and satisfactorily. I had occasion, on a former day, to state that the power of the Constitution was paramount to the power of the legislature acting under that Constitution; for it is possible that the legislature, when acting in that capacity, may transgress the bounds assigned to it, and an act may pass, in the usual mode, notwithstanding that transgression; but when it comes to be discussed before the judges,—when they consider its principles, and find it to be incompatible with the superior power of the Constitution,—it is their duty to pronounce it void; and judges independent, and not obliged to look to every session for a continuance of their salaries, will behave with intrepidity, and refuse to the act the sanction of judicial authority. In the same manner, the President of the United States could shield himself, and refuse to carry into effect an act that violates the Constitution. * * *

To secure to the judges this independence, it is ordered that they shall receive for their services a compensation which shall not be diminished during their continuance in office. * * * [22]

[21] Same, p. 439-440.
[22] Same, p. 445-446.

December 4, 1787—Mr. Wilson: * * * I proceed to another objection, which was not so fully stated as I believe it will be hereafter; I mean the objection against the Judicial department. The gentleman from Westmoreland only mentioned it to illustrate his objection to the legislative department.

He said, "that the judicial powers were coextensive with the legislative powers, and extend even to capital cases." I believe they ought to be coextensive; otherwise, laws would be framed that could not be executed. Certainly, therefore, the executive and judicial departments ought to have power commensurate to the extent of the laws; for, as I have already asked, are we to give power to make laws, and no power to carry them into effect? * * *[23]

On the same day, Mr. Wilson said: The last observation respects the judges. It is said that, if they are to decide against the law, one house will impeach them, and the other will convict them. I hope gentlemen will show how this can happen; for bare supposition ought not to be admitted as proof. The judges are to be impeached, because they decide an act null and void, that was made in defiance of the Constitution! What House of Representatives would dare to impeach, or Senate to commit, judges for the performance of their duty? These observations are of a similar kind to those with regard to the liberty of the press. * * *[24]

On the same day, Mr. Wilson also said: * * * Sir, it has often been a matter of surprise, and frequently complained of even in Pennsylvania, that the independence of the judges is not properly secured. The servile dependence of the judges, in some of the states that have neglected to make proper provision on this subject, endangers the liberty and property of the citizen; and I apprehend that, whenever it has happened that the appointment has been for a less period than during good behavior, this object has not been sufficiently secured; for if, every five or seven years, the judges are obliged to make court for their appointment to office, they cannot be styled independent. This is not the case with regard to those appointed under the general government; for the judges here shall hold their offices during good behavior. I hope no further objections will be taken against this part of the Constitution, the consequence of which will be, that private property, so far as it comes before their courts, and personal liberty, so far as it is not forfeited by crimes, will be guarded with firmness and watchfulness.

It may appear too professional to descend into observations of this kind; but I believe that public happiness, personal liberty, and private property, depend essentially upon the able and upright determinations of independent judges.

Permit me to make one more remark on the subject of the judicial department. Its objects are extended beyond the bounds or power of every particular state, and therefore must be proper objects of the general government. I do not recollect any instance where a case can come before the judiciary of the United States, that could possibly be determined by a particular state, except one—which is, where citizens of the same state claim lands under the grant of different states; and in that instance, the power of the two states necessarily comes in competition; wherefore there would be great impropriety in having it determined by either. * * *[25]

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[23] Same, p. 468–469.
[24] Same, p. 478.
[25] Same, p. 480–481.

December 7, 1787—Mr. Wilson: This is the first time that the article respecting the judicial department has come directly before us. I shall therefore take the liberty of making such observations as will enable honorable gentlemen to see the extent of the views of the Convention in forming this article, and the extent of its probable operation. * * *[26]

Whenever the general government can be a party against a citizen, the trial is guarded and secured in the Constitution itself, and therefore it is not in its power to oppress the citizen. In the case of treason, for example, though the prosecution is on the part of the United States, yet the Congress can neither define nor try the crime. If we have recourse to the history of the different governments that have hitherto subsisted, we shall find that a very great part of their tyranny over the people has arisen from the extension of the definition of treason. * * *

* * * Sensible of this, the Convention has guarded the people against it, by a particular and accurate definition of treason.

It is very true that trial by jury is not mentioned in civil cases; but I take it that it is very improper to infer from hence that it was not meant to exist under this government. Where the people are represented, where the interest of government cannot be separate from that of the people, (and this is the case in trial between citizen and citizen,) the power of making regulations with respect to the mode of trial may certainly be placed in the legislature; for I apprehend that the legislature will not do wrong in an instance from which they can derive no advantage. These were not all the reasons that influenced the Convention to leave it to the future Congress to make regulations on this head.

By the Constitution of the different states, it will be found that no particular mode of trial by jury could be discovered that would suit them all. The manner of summoning jurors, their qualifications, of whom they should consist, and the course of their proceedings, are all different in the different states; and I presume it will be allowed a good general principle, that, in carrying into effect the laws of the general government by the judicial department, it will be proper to make the regulations as agreeable to the habits and wishes of the particular states as possible; and it is easily discovered that it would have been impracticable, by any general regulation, to give satisfaction to all. We must have thwarted the custom of eleven or twelve to have accommodated any one. Why do this when there was no danger to be apprehended from the omission? We could not go into a particular detail of the manner that would have suited each state.

Time, reflection, and experience, will be necessary to suggest and mature the proper regulations on this subject; time and experience were not possessed by the Convention; they left it therefore to be particularly organized by the legislature—the representatives of the United States—from time to time, as should be most eligible and proper. Could they have done better? * * *[27]

I hear no objection made to the tenure by which the judges hold their offices; it is declared that the judges shall hold them during good behavior;—nor to the security which they will have for their salaries; they shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

[26] Same, p. 486.
[27] Same, p. 487-488.

The article respecting the judicial department is objected to as going too far, and is supposed to carry a very indefinite meaning. Let us examine this: "The judicial power shall extend to all cases, in law and equity, arising under this Constitution and the laws of the United States." Controversies may certainly arise under this Constitution and the laws of the United States, and is it not proper that there should be judges to decide them? The honorable gentleman from Cumberand (Mr. Whitehill) says that laws may be made inconsistent with the Constitution; and that therefore the powers given to the judges are dangerous. For my part, Mr. President, I think the contrary inference true. If a law should be made inconsistent with those powers vested by this instrument in Congress, the judges, as a consequence of their independence, and the particular powers of government being defined, will declare such law to be null and void; for the power of the Constitution predominates. Any thing, therefore, that shall be enacted by Congress contrary thereto, will not have the force of law.

The judicial power extends to all cases arising under treaties made, or which shall be made, by the United States. * * *[28]

The power of judges extends to all cases affecting ambassadors, other public ministers, and consuls. I presume very little objection will be offered to this clause; on the contrary, it will be allowed proper and unexceptionable.

This will also be allowed with regard to the following clause: "all cases of admiralty and maritime jurisdiction."

The next is, "to controversies to which the United States shall be a party." Now, I apprehend it is something very incongruous, that, because the United States are a party, it should be urged, as an objection, that their judges ought not to decide, when the universal practice of all nations has, and unavoidably must have, admitted of this power. But, say the gentlemen, the sovereignty of the states is destroyed, if they should be engaged in a controversy with the United States, because a suiter in a court must acknowledge the jurisdiction of that court, and it is not the custom of sovereigns to suffer their names to be made use of in this manner. The answer is plain and easy: the government of each state ought to be subordinate to the government of the United States.[29]

"To controversies between two or more states." This power is vested in the present Congress; but they are unable, as I have already shown, to enforce their decisions. The additional power of carrying their decree into execution, we find, is therefore necessary, and I presume no exception will be taken to it.

"Between a state and citizens of another state." When this power is attended to, it will be found to be a necessary one. Impartiality is the leading feature in this Constitution; it pervades the whole. When a citizen has a controversy with another state, there ought to be a tribunal where both parties may stand on a just and equal footing.

"Between citizens of different states, and between a state, or the citizens thereof, and foreign states, citizens, or subjects." This part of the jurisdiction, I presume, will occasion more doubt than any other part; and, at first view, it may seem exposed to objections well founded and of great weight; but I apprehend this can be the case only at first view. Permit me to observe here, with regard to this

[28] Same, p. 489.
[29] Same, p. 490.

power, or any other of the foregoing powers given to the federal court, that they are not exclusively given. In all instances, the parties may commence suits in the courts of the several states. Even the United States may submit to such decision if they think proper. Though the citizens of a state, and the citizens or subjects of foreign states, may sue in the federal court, it does not follow that they must sue. These are the instances in which the jurisdiction of the United States may be exercised; and we have all the reason in the world to believe that it will be exercised impartially; for it would be improper to infer that the judges would abandon their duty, the rather for being independent. Such a sentiment is contrary to experience, and ought not to be hazarded. If the people of the United States are fairly represented, and the President and Senate are wise enough to choose men of abilities and integrity for judges, there can be no apprehension, because, as I mentioned before, the government can have no interest in injuring the citizens.[30]

But when we consider the matter a little further, is it not necessary, if we mean to restore either public or private credit, that foreigners, as well as ourselves, have a just and impartial tribunal to which they may resort? I would ask how a merchant must feel to have his property lie at the mercy of the laws of Rhode Island. I ask, further, How will a creditor feel who has his debts at the mercy of tender laws in other states? It is true that, under this Constitution, these particular iniquities may be restrained in future; but, sir, there are other ways of avoiding payment of debts. There have been instalment acts, and other acts of a similar effect. Such things, sir, destroy the very sources of credit.

Is it not an important object to extend our manufactures and our commerce? This cannot be done, unless a proper security is provided for the regular discharge of contracts. This security cannot be obtained, unless we give the power of deciding upon those contracts to the general government.

I will mention, further, an object that I take to be of particular magnitude, and I conceive these regulations will produce its accomplishment. The object, Mr. President, that I allude to, is the improvement of our domestic navigation, the instrument of trade between the several states. Private credit, which fell to decay from the destruction of public credit, by a too inefficient general government, will be restored; and this valuable intercourse among ourselves must give an increase to those useful improvements that will astonish the world. At present, how are we circumstanced! Merchants of eminence will tell you that they cannot trust their property to the laws of the state in which their correspondents live. Their friend may die, and may be succeeded by a representative of a very different character. If there is any particular objection that did not occur to me on this part of the Constitution, gentlemen will mention it; and I hope, when this article is examined, it will be found to contain nothing but what is proper to be annexed to the general government. The next clause, so far as it gives original jurisdiction in cases affecting ambassadors, I apprehend, is perfectly unexceptionable.[31]

It was thought proper to give the citizens of foreign states full opportunity of obtaining justice in the general courts, and this they have by its appellate jurisdiction; thereofore, in order to restore

[30] Same, p. 491.
[31] Same, p. 492.

credit with those foreign states, that part of the article is necessary. I believe the alteration that will take place in their minds when they learn the operation of this clause, will be a great and important advantage to our country; nor is it any thing but justice: they ought to have the same security against the state laws that may be made, that the citizens have; because regulations ought to be equally just in the one case as in the other. Further, it is necessary in order to preserve peace with foreign nations. Let us suppose the case, that a wicked law is made in some one of the states, enabling a debtor to pay his creditor with the fourth, fifth, or sixth part of the real value of the debt, and this creditor, a foreigner, complains to his prince or sovereign, of the injustice that has been done him. What can that prince or sovereign do? Bound by inclination, as well as duty, to redress the wrong his subject sustains from the hand of perfidy, he cannot apply to the particular guilty state, because he knows that, by the Articles of Confederation, it is declared that no state shall enter into treaties. He must therefore apply to the United States; the United States must be accountable. "My subject has received a flagrant injury: do me justice, or I will do myself justice." If the United States are answerable for the injury, ought they not to possess the means of compelling the faulty state to repair it? They ought; and this is what is done here. For now, if complaint is made in consequence of such injustice, Congress can answer, "Why did not your subject apply to the General Court, where the unequal and partial laws of a particular state would have had no force?"

In two cases the Supreme Court has original jurisdiction—that affecting ambassadors, and when a state shall be a party. It is true it has appellate jurisdiction in more, but it will have it under such restrictions as the Congress shall ordain. I believe that any gentleman, possessed of experience or knowledge on this subject, will agree that it was impossible to go further with any safety or propriety, and that it was best left in the manner in which it now stands.[32]

"In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact." The jurisdiction as to fact may be thought improper; but those possessed of information on this head see that it is necessary. We find it essentially necessary from the ample experience we have had in the courts of admiralty with regard to captures. Those gentlemen who, during the late war, had their vessels retaken, know well what a poor chance they would have had when those vessels were taken in their states and tried by juries, and in what a situation they would have been if the Court of Appeals had not been possessed of authority to reconsider and set aside the verdicts of those juries. Attempts were made by some of the states to destroy this power; but it has been confirmed in every instance.

There are other cases in which it will be necessary; and will not Congress better regulate them, as they rise from time to time, than could have been done by the Convention? Besides, if the regulations shall be attended with inconvenience, the Congress can alter them as soon as discovered. But any thing done in Convention must remain unalterable but by the power of the citizens of the United States at large.

[32] Same, p. 493.

I think these reasons will show that the powers given to the Supreme Court are not only safe, but constitute a wise and valuable part of the system.[33]

December 11, 1787—Mr. Wilson: * * * I now proceed to the judicial department; and here, Mr. President, I meet an objection, I confess, I had not expected; and it seems it did not occur to the honorable gentleman (Mr. Findley) who made it until a few days ago.

He alleges that the judges, under this Constitution, are not rendered sufficiently independent, because they may hold other offices; and though they may be independent as judges, yet their other office may depend upon the legislature. I confess, sir, this objection appears to me to be a little wire-drawn. In the first place, the legislature can appoint to no office; therefore, the dependence could not be on them for the office, but rather on the President and Senate; but then these cannot add the salary, because no money can be appropriated but in consequence of a law of the United States. No sinecure can be bestowed on any judge but by the concurrence of the whole legislature and the President; and I do not think this an event that will probably happen. * * *[34]

It is again alleged, against this system, that the powers of the judges are too extensive; but I will not trouble you, sir, with a repetition of what I had the honor of delivering the other day. I hope the result of those arguments gave satisfaction, and proved that the judicial were commensurate with the legislative powers; that they went no farther, and that they ought to go so far.

The laws of Congress being made for the Union, no particular state can be alone affected; and as they are to provide for the general purposes of the Union, so ought they to have the means of making the provisions effectual over all that country included within the Union.[35]

On the same day, Mr. Wilson discussed at some length the matter of "trial by jury." His discussion of this subject is omitted here.[36]

On the same day, Mr. McKean said: * * * Seventh. The judicial power shall be vested in one Supreme Court. An objection is made, that the compensation for the services of the judges shall not be diminished during their continuance in office; and this is contrasted with the compensation to the President, which is to be neither increased nor diminished during the period for which he shall have been elected; but that of the judges may be increased, and the judges may hold other offices of a lucrative nature, and their judgments be thereby warped.

That in all the cases enumerated, except where the Supreme Court has original jurisdiction, "they shall have appellate jurisdiction both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make." From hence is inferred that the trial by jury is not secured.

(They have jurisdiction between citizens of different states.[37])

Do gentlemen not see the reason why this difference is made? Do they not see that the President is appointed but for four years, whilst the judges may continue for life, if they shall so long behave themselves well? In the first case, little alteration can happen in the value of money; but in the course of a man's life, a very great one

[33] Same, p. 494.
[34] Same, p. 514.
[35] Same, p. 515.
[36] Same, p. 515, et seq.
[37] Same, p. 531-532.

may take place from the discovery of silver and gold mines, and the great influx of those metals; in which case an increase of salary may be requisite. A security that their compensation shall not be lessened, nor they have to look up to every session for salary, will certainly tend to make those officers more easy and independent.

"The judges may hold other offices of a lucrative nature." This part of the objection reminds me of the scheme that was fallen upon, in Pennsylvania, to prevent any person from taking up large tracts of land. A law was passed restricting the purchaser to a tract not exceeding three hundred acres; but all the difference it made was, that the land was taken up by several patents, instead of one, and the wealthy could procure, if they chose it, three thousand acres. What though the judges could hold no other office, might they not have brothers, children, and other relations, whom they might wish to see placed in the offices forbidden to themselves? I see no apprehensions that may be entertained on this account.

That, in all cases enumerated, except where the Supreme Court has original jurisdiction, "they shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make." From this it is inferred that the trial by jury is not secured; and an objection is set up to the system, because they have jurisdiction between citizens of different states. Regulations, under this head, are necessary; but the Convention could form no one that would have suited each of the United States. It has been a subject of amazement to me to hear gentlemen contend that the verdict of a jury shall be without revision in all cases. Juries are not infallible because they are twelve in number. When the law is so blended with the fact as to be almost inseparable, may not the decision of a jury be erroneous? Yet, notwithstanding this, trial by jury is the best mode that is known. Appellate jurisdiction, sir, is known in the common law, and causes are removed from inferior courts, by writs of error, into some court of appeal. It is said that the lord chancellor, in all cases, sends down to the lower courts when he wants to determine a fact; but that opinion is not well founded, because he determines nineteen out of twenty without the intervention of any jury. The power to try causes between citizens of different states was thought by some gentlemen invidious; but I apprehend they must see the necessity of it, from what has been already said by my honorable colleague.[38]

MARYLAND

A few days after the Convention of Maryland met at Annapolis (April 21, 1788) Mr. Paca submitted certain proposed amendments. Those of interest here are as follows:

2. That there shall be a trial by jury in all criminal cases, according to the course of proceeding in the state where the offence is committed; and that there be no appeal from matter of fact, or second trial after acquittal; but this provision shall not extend to such cases as may arise in the government of the land or naval forces.

3. That, in all actions on debts or contracts, and in all other controversies respecting property, of which the inferior federal courts have jurisdiction, the trial of facts shall be by jury, if required by either party; and that it be expressly declared that the state courts, in such cases, have a concurrent jurisdiction with the federal courts, with an appeal from either, only as to matter of law, to the Supreme Federal Court, if the matter in dispute be of the value of dollars.

[38] Same, p. 539-540.

4. That the inferior federal courts shall not have jurisdiction of less than dollars; and there may be an appeal, in all cases of revenue, as well to matter of fact as law; and Congress may give the state courts jurisdiction of revenue cases, for such forms, and in such manner, as they may think proper.

5. That, in all cases of trespasses done within the body of a county, and within the inferior federal jurisdiction, the party injured shall be entitled to trial by jury in the state where the injury shall be committed; and that it be expressly declared that the state courts, in such cases, shall have concurrent jurisdiction with the federal courts, and there shall be no appeal from either, except on matter of law; and that no person be exempt from such jurisdiction and trial but ambassadors and ministers privileged by the law of nations.

6. That the federal courts shall not be entitled to jurisdiction by fictions or collusion.

7. That the federal judges do not hold any other office of profit, or receive the profits of any other office under Congress, during the time they hold their commission.

The great objects of these amendments were, 1st. To secure the trial by jury in all cases, the boasted birthright of Englishmen and their descendants, and the palladium of civil liberty; and to prevent the appeal from fact, which not only destroys that trial in civil cases, but, by construction, may also elude it in criminal cases—a mode of proceeding both expensive and burdensome, and which, by blending law with fact, will destroy all check on the judiciary authority, render it almost impossible to convict judges of corruption, and may lay the foundation of that gradual and silent attack on individuals, by which the approaches of tyranny become irresistible. 2d. To give a concurrent jurisdiction to the state courts, in order that Congress may not be compelled, as they will be under the present form, to establish inferior federal courts, which, if not numerous, are very expensive; the circumstances of the people being unequal to the increased expense of double courts and double officers—an arrangement that will render the law so complicated and confused, that few men can know how to conduct themselves with safety to their persons or property, the great and only security of freemen. 3d. To give such jurisdiction to the state courts that transient foreigners, and persons from other states, committing injuries in this state, may be amenable to the state whose laws they violate and whose citizens they injure. 4th. To prevent an extension of the federal jurisdiction, which may, and in all probability will, swallow up the state jurisdictions, and consequently sap those rules of descent and regulations of personal property, by which men hold their estates. And lastly, to secure the independence of the federal judges, to whom the happiness of the people of this great continent will be so greatly committed by the extensive powers assigned them.[39]

VIRGINIA

June 5, 1788—Mr. Pendleton: * * * Government must then have its complete powers, or be ineffectual; a legislature to fix rules, impose sanctions, and point out the punishment of the transgressors of these rules; an executive to watch over officers, and bring them to punishment; a judiciary, to guard the innocent, and fix the guilty, by a fair trial. Without an executive, offenders would not be brought to punishment; without a judiciary, any man might be taken up, convicted, and punished without a trial. Hence the necessity of having these three branches. Would any gentleman in this committee

[39] Same, p. 550-551.

agree to vest these three powers in one body—Congress? No. * * *[40]

June 5, 1788—Mr. Henry: * * * The honorable gentleman has told us that these powers, given to Congress, are accompanied by a judiciary which will correct all. On examination, you will find this very judiciary oppressively constructed; your jury trial destroyed, and the judges dependent on Congress. * * *[41]

It is a fact that lands have been sold for five shillings, which were worth one hundred pounds: if sheriffs, thus immediately under the eye of our state legislature and judiciary, have dared to commit these outrages, what would they not have done if their masters had been at Philadelphia or New York? If they perpetrate the most unwarrantable outrage on your person or property, you cannot get redress on this side of Philadelphia or New York; and how can you get it there? If your domestic avocations could permit you to go thither, there you must appeal to judges sworn to support this Constitution, in opposition to that of any state, and who may also be inclined to favor their own officers. When these harpies are aided by excisemen, who may search, at anytime, your houses, and most secret recesses, will the people bear it? If you think so, you differ from me. Where I thought there was a possibility of such mischiefs, I would grant power with a niggardly hand; and here there is a strong probability that these oppressions shall actually happen. I may be told that it is safe to err on that side, because such regulations may be made by Congress as shall restrain these officers, and because laws are made by our representatives, and judged by righteous judges: but, sir, as these regulations may be made, so they may not; and many reasons there are to induce a belief that they will not. I shall therefore be an infidel on that point till the day of my death. * * *[42]

If your American chief be a man of ambition and abilities, how easy is it for him to render himself absolute! * * * If ever he violates the laws, one of two things will happen: he will come at the head of his army, to carry every thing before him; or he will give bail, or do what Mr. Chief Justice will order him. * * *[43]

June 6, 1788[44]—Mr. Randolph: * * * The trial by jury in criminal cases is secured; in civil cases it is not so expressly secured as I should wish it; but it does not follow that Congress has the power of taking away this privilege, which is secured by the constitution of each state, and not given away by this Constitution. I have no fear on this subject. Congress must regulate it so as to suit every state. I will risk my property on the certainty that they will institute the trial by jury in such manner as shall accommodate the conveniences of the inhabitants in every state. The difficulty of ascertaining this accommodation was the principal cause of its not being provided for. * * * I beg leave to differ from the honorable gentleman in another point. He dreads that great inconveniences will ensue from the federal court; that our citizens will be harassed by being carried thither. I cannot think that this power of the federal judiciary will necessarily be abused; the inconvenience here suggested being of a general nature, affecting most of the states, will, by general consent of the states, be removed; and, I trust, such

[40] Same, vol. 3, p. 39.
[41] Same, p. 57.
[42] Same, p. 58.
[43] Same, p. 59.
[44] Same, text reads June 16.

regulations shall be made in this case as will accommodate the people in every state. * * *[45]

* * * But the amendability of the Confederation seems to have great weight on the minds of some gentlemen. To what point will the amendments go? What part makes the most important figure? What part deserves to be retained? In it one body has the legislative, executive, and judicial powers; but the want of efficient powers has prevented the dangers naturally consequent on the union of these. Is this union consistent with an augmentation of their power? Will you, then, amend it by taking away one of these three powers? Suppose, for instance, you only vested it with the legislative and executive powers, without any control on the judiciary; what must be the result? Are we not taught by reason, experience, and governmental history, that tyranny is the natural and certain consequence of uniting these two powers, or the legislative and judicial powers, exclusively, in the same body? If any one denies it, I shall pass by him as an infidel not to be reclaimed. Whenever any two of these three powers are vested in one single body, they must, at one time or other, terminate in the destruction of liberty.[46]

June 9, 1788—Mr. Henry: * * * The sheriff comes to-day as a state collector. Next day he is federal. How are you to fix him? How will it be possible to discriminate oppressions committed in one capacity from those perpetrated in the other? Will not this ingenuity perplex the simple and honest planter? This will at least involve in difficulties those who are unacquainted with legal ingenuity. When you fix him, where are you to punish him? for I suppose they will not stay in our courts; they must go to the federal court; for, if I understand that paper right, all controversies arising under that Constitution, or under the laws made in pursuance thereof, are to be tried in that court. When gentlemen told us that this part deserved the least exception, I was in hopes they would prove that there was plausibility in their suggestions, and that oppression would probably not follow. Are we not told that it shall be treason to levy war against the United States? Suppose an insult offered to the federal laws at an immense distance from Philadelphia,—will this be deemed treason? And shall a man be dragged many hundred miles, to be tried as a criminal, for having, perhaps justifiably, resisted an unwarrantable attack upon his person or property? I am not well acquainted with federal jurisprudence; but it appears to me that these oppressions must result from this part of the plan. It is at least doubtful; and where there is even a possibility of such evils, they ought to be guarded against. * * *[47]

* * * If there be a real check intended to be left on Congress, it must be left in the state governments. There will be some check, as long as the judges are incorrupt. As long as they are upright, you may preserve your liberty. But what will the judges determine when the state and federal authority come to be contrasted? Will your liberty then be secure, when the congressional laws are declared paramount to the laws of your state, and the judges are sworn to support them?[48]

June 10, 1788—Mr. Randolph: * * * The judiciary is drawn up in terror. Here I have an objection of a different nature. I object to the appellate jurisdiction as the greatest evil in it. But

[45] Same, p. 68-69.
[46] Same, p. 83.
[47] Same, p. 168.
[48] Same, p. 174.

I look at the Union—the object which guides me. When I look at the Union, objects of less consideration vanish, and I hope that the inconvenience will be redressed, and that Congress will prohibit the appeal with respect to matters of fact. When it respects only matters of law, no danger can possibly arise from it. Can Congress have any interest in continuing appeals of fact? If Pennsylvania has an interest in continuing it, will not Georgia, North Carolina, South Carolina, Virginia, New York, and the Eastern States, have an interest in discontinuing it? What advantage will its continuance be to Maryland, New Jersey, or Delaware? Is there not unanimity against it in Congress almost? Kentucky will be equally opposed to it. Thus, sir, all these will be opposed to one state. If Congress wish to aggrandize themselves by oppressing the people, the judiciary must first be corrupted! No man says any thing against them; they are more independent than in England.[49]

June 10, 1788—Mr. Monroe: * * * I therefore think the general government will preponderate.

Besides its possession of all the resources of the country, there are other circumstances that will enable it to triumph in the conflict with the states. Gentlemen of influence and character, men of distinguished talents, of eminent virtue, and great endowments, will compose the general government. In what a situation will the different states be, when all the talents and abilities of the country will be against them?

* * * It will also be strongly supported by the last clause in the 8th section of the 1st article, which vests it with the power of making all laws necessary to carry its powers into effect. The correspondent judicial powers will be an additional aid. * * *[50]

* * * In developing this plan of government, we ought to attend to the necessity of having checks. I can see no real checks in it.

Let us first inquire into the probability of harmony between the general and individual governments; and, in the next place, into the responsibility of the general government, either to the people at large or to the state legislatures. As to the harmony between the governments, communion of powers, legislative and judicial, forbids it. * * *[51]

June 11, 1788—Mr. Pendleton: * * * I believe the federal courts will be as independent as the state courts. I should no more hesitate to trust my liberty and property to the one than the other. Whenever, in any country in the world, the judges are independent, property is secure. The existence of Great Britain depends on that purity with which justice is administered. When gentlemen will therefore find that the federal legislature cannot affect preexisting claims by their legislation, and the federal courts are on the same ground with the state courts, I hope there will be no ground of alarm. * * *[52]

June 11, 1788—Mr. Henry: * * * The honorable gentleman did our judiciary honor in saying that they had firmness to counteract the legislature in some cases. Yes, sir, our judges opposed the acts of the legislature. We have this landmark to guide us. They had fortitude to declare that they were the judiciary, and would oppose

[49] Same, p. 205.
[50] Same, p. 216, 217.
[51] Same, p. 219.
[52] Same, p. 303.

unconstitutional acts. Are you sure that your federal judiciary will act thus? Is that judiciary as well constructed, and as independent of the other branches, as our state judiciary? Where are your landmarks in this government? I will be bold to say you cannot find any in it. I take it as the highest encomium on this country, that the acts of the legislature, if unconstitutional, are liable to be opposed by the judiciary. * * *[53]

June 14, 1788—Mr. George Mason thought that there were few clauses in the Constitution so dangerous as that which gave Congress exclusive power of legislation within ten miles square. Implication, he observed, was capable of any extension, and would probably be extended to augment the congressional powers. But here there was no need of implication. This clause gave them an unlimited authority, in every possible case, within that district. This ten miles square, says Mr. Mason, may set at defiance the laws of the surrounding states, and may, like the custom of the superstitious days of our ancestors, become the sanctuary of the blackest crimes. Here the federal courts are to sit. We have heard a good deal said of justice.

It has been doubted whether jury trial be secured in civil cases. But I will suppose that we shall have juries in civil cases. What sort of a jury shall we have within the ten miles square? The immediate creatures of the government. What chance will poor men get, where Congress have the power of legislating in all cases whatever, and where judges and juries may be under their influence, and bound to support their operations? Even with juries the chance of justice may here be very small, as Congress have unlimited authority, legislative, executive, and judicial. * * *[54]

June 18, 1788—Mr. Pendleton: Mr. Chairman, on a former occasion, when I was considering the government at large, I mentioned the necessity of making a judiciary an essential part of the government. It is necessary, in order to arrest the executive arm, prevent arbitrary punishments, and give a fair trial, that the innocent may be guarded, and the guilty brought to just punishment, and that honesty and industry be protected, and injustice and fraud be prevented. Taking it for granted, then, that a judiciary is necessary, the power of that judiciary must be coextensive with the legislative power, and reach to all parts of society intended to be governed. They must be so arranged, that there must be some court which shall be the central point of their operations; and because all the business cannot be done in that part, there must be inferior courts to carry it on. The first clause contains an arrangement of the courts—one supreme, and such inferior as Congress may ordain and establish. This seems to me to be proper. Congress must be the judges, and may find reasons to change and vary them as experience shall dictate. It is, therefore, not only improper, but exceedingly inconvenient, to fix the arrangement in the Constitution itself, and not leave it to laws which may be changed according to circumstances. I think it highly probable that their first experiment will be, to appoint the state courts to have the inferior federal jurisdiction, because it would be best calculated to give general satisfaction, and answer economical purposes; since a small additional salary may in that case suffice, instead of competent provision for the judges. But even this eligible mode experience may furnish powerful reasons for changing, and a power to make such

[53] Same, p. 324-325.
[54] Same, p. 431.

changes ought to rest with Congress. This clause also secures an important point—the independency of the judges, both as to tenure of offices and fixing of salary. I wish the restraint had been applied to increase as well as diminution.

The 2d section points out the subjects of their jurisdiction.

1. Cases arising under the Constitution.
2. Cases arising under the laws of the federal legislature.
3. Cases arising under treaties made by them.[55]
4. All cases affecting ambassadors, ministers, and consuls.
5. All cases of maritime or admiralty jurisdiction.
6. Controversies wherein the United States shall be a party.
7. Controversies between two or more states.
8. Controversies between a state and citizens of another state.
9. Controversies between citizens of different states.
10. Controversies between citizens of the same state, claiming lands under grants of different states.
11. Controversies between a state, or its citizens, and foreign states, citizens, or subjects.

Without entering into a distinction of all its parts, I believe it will be found that they are all cases of general and not local concern. The necessity and propriety of a federal jurisdiction, in all such cases, must strike every gentleman.

The next clause settles the original jurisdiction of the Supreme Court, confining it to two cases—that of ambassadors, ministers, and consuls, and those in which a state shall be a party. It excludes its original jurisdiction in all other cases. But it appears to me that it will not restrain Congress from regulating even these, so as to permit foreign ambassadors to sue in the inferior courts, or even to compel them to do so, where their causes may be trivial, or they have no reason to expect a partial trial. Notwithstanding this jurisdiction is given to the Supreme Court, yet Congress may go farther by their laws, so as to exclude its original jurisdiction, by limiting the cases wherein it shall be exercised. They may require some satisfactory evidence that the party could not expect a fair trial in the inferior court. I am struck with this view, from considering that the legislature is not excluded, by the general jurisdiction in the Constitution, from regulating it, to accommodate the convenience of the people. Yet the legislature cannot extend its original jurisdiction, which is limited to these cases only.[56]

The next branch brings me to the appellate jurisdiction. And first, I say it is proper and necessary, in all free governments, to allow appeals, under certain restrictions, in order to prevent injustice by correcting the erroneous decisions of local subordinate tribunals, and introduce uniformity in decision. The appellate jurisdiction is, therefore, undoubtedly proper, and would not have been objected to if they had not introduced, unfortunately, in this clause, the words "both as to law and fact." Though I dread no danger, I wish these words had been buried in oblivion. If they had, it would have silenced the greatest objections against the section. I will give my free and candid sentiments on it. We find them followed by words which remove a great deal of doubt—"with such exceptions, and under such regulations, as Congress shall make"; so that Congress may

[55] Same, p. 517.
[56] Same, p. 518.

make such regulations as they may think conducive to the public convenience.

Let us consider the appellate jurisdiction if these words had been left out. The general jurisdiction must embrace decrees in chancery and admiralty, and judgments in courts of common law, in the ordinary practice of this appellate jurisdiction. When there is an appeal from the inferior court to the Court of Chancery, the appellate jurisdiction goes to law and fact, because the whole testimony appears in the record. The court proceeds to consider the circumstances of both law and fact blended together, and then decrees according to equity. This must be unexceptionable to everybody. How is it in appeals from the admiralty? That court, except in some cases, proceeds as a court of chancery. In some cases they have trials by jury. But in most cases they proceed as in chancery. They consider all the circumstances, and determine as well what the fact, as what the law, is. When this goes to the superior court, it is determined the same way.[57]

Appeals from the common-law courts involve the consideration of facts by the superior court, when there is a special verdict. They consider the fact and law together, and decide accordingly. But they cannot introduce new testimony. When a jury proceeds to try a cause in an inferior court, a question may arise on the competency of a witness, or some other testimony. The inferior court decides that question; it either admits or rejects that evidence. The party intending to object states the matter in a bill of exceptions. The jury then proceeds to try the cause, according to the judgment of the inferior court; and, on appeal, the superior court determines upon the judgment of the inferior court. They do not touch the testimony. If they determine that the evidence was either improperly admitted or rejected, they set aside the judgment, and send back the cause to be tried again by a jury in the same court. These are the only cases, in appeals from inferior courts of common law, where the superior court can even consider facts incidentally. I feel the danger, as much as any gentleman in this committee, of carrying a party to the federal court, to have a trial there. But it appears to me that it will not be the case, if that be the practice which I have now stated; and that it is the practice must be admitted. The appeals may be limited to a certain sum I make no doubt it will be so. You cannot prevent appeals without great inconveniences; but Congress can prevent that dreadful oppression which would enable many men to have a trial in the federal court, which is ruinous. There is a power which may be considered as a great security. The power of making what regulations and exceptions in appeals they may think proper may be so contrived as to render appeals, as to law and fact, proper, and perfectly inoffensive. How will this power be exercised? If I thought there was a possibility of danger, I should be alarmed.

But when I consider who this Congress are,—that they are the representatives of thirteen states, (which may become fourteen or fifteen, or a much greater number of states,) who cannot be interested, in the most remote degree, to subject their citizens to oppressions of that dangerous kind, but will feel the same inclination to guard their citizens from them,—I am not alarmed. I consider them as secured from it by the arrangement of these courts by Congress. To carry the citizens a great distance from their respective states can be of no

[57] Same, p. 519.

advantage, but a great hardship to every state, except that wherein the seat of government may be. I conceive it probable that they will, as far as they may consistently with the national good, confine these cases. But when I cast my eyes to the Southern and Eastern States, every one of which is at a greater distance than we are, I cannot entertain a doubt but what this point will be perfectly secure. Every state being concerned almost equally, we have sufficient security that, when they come to organize the Supreme Court, they will regulate it so as to exclude this danger.[58]

The fourth branch secures two important points in criminal cases—1st, that the trial shall be by jury; 2d, that it shall be in the state where the offence is committed. It does not point out where it shall be within the state, or the more exact minutiæ respecting it; but laws will be made by which it will be regulated fully and minutely. I cannot conceive what motives they can have, in forming these trials, to render them oppressive. We have this security—that our citizens shall not be carried out of the state, and that no other trial can be substituted for that by jury. * * *

June 18, 1788—Mr. Mason: * * * After having read the first section, Mr. Mason asked, What is there left to the state courts? Will any gentleman be pleased, candidly, fairly, and without sophistry, to show us what remains? There is no limitation. It goes to every thing. The inferior courts are to be as numerous as Congress may think proper. They are to be of whatever nature they please. Read the 2d section, and contemplate attentively the extent of the jurisdiction of these courts, and consider if there be any limits to it.[59]

I am greatly mistaken if there be any limitation whatsoever, with respect to the nature or jurisdiction of these courts. If there be any limits, they must be contained in one of the clauses of this section; and I believe, on a dispassionate discussion, it will be found that there is none of any check. All the laws of the United States are paramount to the laws and constitution of any single state. "The judicial power shall extend to all cases in law and equity arising under this Constitution." What objects will not this expression extend to? Such laws may be formed as will go to every object of private property. When we consider the nature of these courts, we must conclude that their effect and operation will be utterly to destroy the state governments; for they will be the judges how far their laws will operate. They are to modify their own courts, and you can make no state law to counteract them. The discrimination between their judicial power, and that of the states, exists, therefore, but in name. To what disgraceful and dangerous length does the principle of this go! For if your state judiciaries are not to be trusted with the administration of common justice, and decision of disputes respecting property between man and man, much less ought the state governments to be trusted with power of legislation. The principle itself goes to the destruction of the legislation of the states, whether or not it was intended. As to my own opinion, I most religiously and conscientiously believe that it was intended, though I am not absolutely certain. But I think it will destroy the state governments, whatever may have been the intention. There are many gentlemen in the United States who think it right that we should have one great, national, consolidated government, and that it was better to bring it about slowly and imperceptibly

[58] Same, p. 520.
[59] Same, p. 521.

rather than all at once. This is no reflection on any man, for I mean none. To those who think that one national consolidated government is best for America, this extensive judicial authority will be agreeable; but I hope there are many in this Convention of a different opinion, and who see their political happiness resting on their state governments. I know, from my own knowledge, many worthy gentlemen of the former opinion.

[Here Mr. Madison interrupted Mr. Mason, and demanded an unequivocal explanation. As these insinuations might create a belief that every member of the late federal Convention was of that opinion, he wished him to tell who the gentlemen were to whom he alluded.] [60]

* * * Mr. Mason continued: * * * I say that the general description of the judiciary involves the most extensive jurisdiction. Its cognizance, in all cases arising under the system and the laws of Congress, may be said to be unlimited. In the next place, it extends to treaties made, or which shall be made, under their authority. This is one of the powers which ought to be given them. I also admit that they ought to have judicial cognizance in all cases affecting ambassadors, foreign ministers and consuls, as well as in cases of maritime jurisdiction. There is an additional reason now to give them this last power; because Congress, besides the general powers, are about to get that of regulating commerce with foreign nations. This is a power which existed before, and is a proper subject of federal jurisdiction. The next power of the judiciary is also necessary under some restrictions. Though the decision of controversies to which the United States shall be a party may at first view seem proper, it may, without restraint, be extended to a dangerously oppressive length. The next, with respect to disputes between two or more states, is right. I cannot see the propriety of the next power, in disputes between a state and the citizens of another state. As to controversies between citizens of different states, their power is improper and inadmissible. In disputes between citizens of the same state, claiming lands under the grants of different states, the power is proper. It is the only case in which the federal judiciary ought to have appellate cognizance of disputes between private citizens. Unless this was the case, the suit must be brought and decided in one or the other state, under whose grant the lands are claimed, which would be injurious, as the decision must be consistent with the grant.

The last clause is still more improper. To give them cognizance in disputes between a state and the citizens thereof, is utterly inconsistent with reason or good policy. * * * [61]

* * * Give me leave to advert to the operation of this judicial power. Its jurisdiction in the first case will extend to all cases affecting revenue, excise, and custom-house officers. If I am mistaken, I will retract. "All cases in law and equity arising under this Constitution, and the laws of the United States," take in all the officers of the government. They comprehend all those who act as collectors of taxes, excisemen, etc. It will take in, of course, what others do to them, and what is done by them to others. In what predicament will our citizens then be? We know the difficulty we are put in by our own courts, and how hard it is to bring officers to justice even in them. If any of the federal officers should be guilty of the greatest oppres-

[60] Same, p. 521-522.
[61] Same, p. 523.

sions, or behave with the most insolent and wanton brutality to a man's wife or daughter, where is this man to get relief? If you suppose in the inferior courts, they are not appointed by the states. They are not men in whom the community can place confidence. It will be decided by federal judges. Even suppose the poor man should be able to obtain judgment in the inferior court, for the greatest injury, what justice can he get on appeal? Can he go four or five hundred miles? Can he stand the expense attending it? On this occasion they are to judge of fact as well as law. He must bring his witnesses where he is not known, where a new evidence may be brought against him, of which he never heard before, and which he cannot contradict.

The honorable gentleman who presides here has told us that the Supreme Court of appeals must embrace every object of maritime, chancery, and common-law controversy. In the two first, the indiscriminate appellate jurisdiction as to fact must be generally granted; because, otherwise, it could exclude appeals in those cases. But why not discriminate as to matters of fact with respect to common-law controversies? The honorable gentleman has allowed that it was dangerous, but hopes regulations will be made to suit the convenience of the people. But mere hope is not a sufficient security. I have said that it appears to me (though I am no lawyer) to be very dangerous. Give me leave to lay before the committee an amendment, which I think convenient, easy, and proper. * * *[62]

Thus, sir, * * * after limiting the cases in which the federal judiciary could interpose, I would confine the appellate jurisdiction to matters of law only, in common-law controversies.

It appears to me that this will remove oppressions, and answer every purpose of an appellate power.

A discrimination arises between common-law trials and trials in courts of equity and admiralty. In these two last, depositions are committed to record, and therefore, on an appeal, the whole fact goes up; the equity of the whole case, comprehending fact and law, is considered, and no new evidence requisite. Is it so in courts of common law? There evidence is only given viva voce. I know not a single case where there is an appeal of fact as to common law. But I may be mistaken. Where there is an appeal from an inferior to a superior court, with respect to matters of fact, a new witness may be introduced, who is perhaps suborned by the other party, a thousand miles from the place where the first trial was had. These are some of the inconveniences and insurmountable objections against this general power being given to the federal courts. Gentlemen will perhaps say there will be no occasion to carry up the evidence by viva voce testimony, because Congress may order it to be committed to writing, and transmitted in that manner with the rest of the record. It is true they may, but it is as true that they may not. But suppose they do; little conversant as I am in this subject, I know there is a great difference between viva voce evidence given at the bar, and testimony given in writing. I leave it to gentlemen more conversant in these matters to discuss it. They are also to have cognizance in controversies to which the United States shall be a party. This power is superadded, that there might be no doubt, and that all cases arising under the government might be brought before the federal court.[63] Gentlemen will not, I presume, deny that all revenue and excise controversies, and all

[62] Same, p. 524.
[63] Same, p. 525.

proceedings relative to the duties of the officers of government, from the highest to the lowest, may and must be brought by these means to the federal courts; in the first instance, to the inferior federal court, and afterwards to the superior court. Every fact proved with respect to these, in the court below, may be revived in the superior court. But this appellate jurisdiction is to be under the regulations of Congress. What these regulations may be, God only knows.

Their jurisdiction further extends to controversies between citizens of different states. Can we not trust our state courts with the decision of these? If I have a controversy with a man in Maryland,—if a man in Maryland has my bond for a hundred pounds,—are not the state courts competent to try it? Is it suspected that they would enforce the payment if unjust, or refuse to enforce it if just? The very idea is ridiculous. What! carry me a thousand miles from home—from my family and business—to where, perhaps, it will be impossible for me to prove that I paid it? Perhaps I have a respectable witness who saw me pay the money; but I must carry him one thousand miles to prove it, or be compelled to pay it again. Is there any necessity for this power? It ought to have no unnecessary or dangerous power. Why should the federal courts have this cognizance? Is it because one lives on one side of the Potomac, and the other on the other? Suppose I have your bond for a thousand pounds: if I have any wish to harass you, or if I be of a litigious disposition, I have only to assign it to a gentleman in Maryland. This assignment will involve you in trouble and expense. What effect will this power have between British creditors and the citizens of this state? This is a ground on which I shall speak with confidence. Every one, who heard me speak on the subject, knows that I always spoke for the payment of the British debts. I wish every honest debt to be paid. Though I would wish to pay the British creditor, yet I would not put it in his power to gratify private malice to our injury. Let me be put right if I be mistaken; but there is not, in my opinion, a single British creditor but can bring his debtors to the federal court.[64]

There are a thousand instances where debts have been paid, and yet must, by this appellate cognizance, be paid again. Are these imaginary cases? Are they only possible cases, or are they certain and inevitable? "To controversies between a state and the citizens of another state." How will their jurisdiction in this case do? Let gentlemen look at the westward. Claims respecting those lands, every liquidated account, or other claim against this state, will be tried before the federal court. Is not this disgraceful? Is this state to be brought to the bar of justice like a delinquent individual? Is the sovereignty of the state to be arraigned like a culprit, or private offender? Will the states undergo this mortification? I think this power perfectly unnecessary. But let us pursue this subject farther. What is to be done if a judgment be obtained against a state? Will you issue a fieri facias? It would be ludicrous to say that you could put the state's body in jail. How is the judgment, then, to be enforced? A power which cannot be executed ought not to be granted.

Let us consider the operation of the last subject of its cognizance. "Controversies between a state, or the citizens thereof, and foreign states, citizens, or subjects." There is a confusion in this case. This much, however, may be raised out of it—that a suit will be brought

[64] Same, p. 526.

against Virginia. She may be sued by a foreign state. What reciprocity is there in it? In a suit between Virginia and a foreign state, is the foreign state to be bound by the decision? Is there a similar privilege given to us in foreign states? Where will you find a parallel regulation? How will the decision be enforced? Only by the ultima ratio regum. A dispute between a foreign citizen or subject and a Virginian cannot be tried in our own courts, but must be decided in the federal court. Is this the case in any other country? Are not men obliged to stand by the laws of the country where the disputes are? This is an innovation which is utterly unprecedented and unheard-of. Cannot we trust the state courts with disputes between a Frenchman, or an Englishman, and a citizen; or with disputes between two Frenchmen? This is disgraceful; it will annihilate your state judiciary: it will prostrate your legislature.[65]

Thus, sir, it appears to me that the greater part of these powers are unnecessary, and dangerous, as tending to impair, and ultimately destroy, the state judiciaries, and, by the same principle, the legislation of the state governments. To render it safe, there must be an amendment, such as I have pointed out. After mentioning the original jurisdiction of the Supreme Court, which extends to but three cases, it gives it appellate jurisdiction, in all other cases mentioned, both as to law and fact, indiscriminately and without limitation. Why not remove the cause of fear and danger? But it is said that the regulations of Congress will remove these. I say that, in my opinion, they will have a contrary effect, and will utterly annihilate your state courts. Who are the court? The judges. It is a familiar distinction. We frequently speak of a court in contradistinction from a jury. I think the court are to be judges of fact and law, with such exceptions, etc., as Congress shall make. Now, give me leave to ask, Is not a jury excluded absolutely? By way of illustration, were Congress to say that a jury, instead of a court, should judge the fact, will not the court be still judges of the fact consistently with this Constitution? Congress may make such a regulation, or may not. But suppose they do; what sort of a jury would they have in the ten miles square? I would rather, a thousand times, be tried by a court than by such a jury. This great palladium of national safety, which is secured to us by our own government, will be taken from us in those courts; or, if it be reserved, it will be but in name, and not in substance. In the government of Virginia, we have secured an impartial jury of the vicinage. We can except to jurors, and peremptorily challenge them in criminal trials. If I be tried in the federal court for a crime which may affect my life, have I a right of challenging or excepting to the jury? Have not the best men suffered by weak and partial juries? This sacred right ought, therefore, to be secured. I dread the ruin that will be brought on thirty thousand of our people, with respect to disputed lands. * * *[66]

Having mentioned these things, give me leave to submit an amendment, which I think would be proper and safe, and would render our citizens secure in their possessions justly held. I mean, sir, "that the judicial power shall extend to no case where the cause of action shall have originated before the ratification of this Constitution, except in suits for debts due to the United States, disputes between states about their territory, and disputes between persons claiming lands under

[65] Same, p. 527.
[66] Same, p. 528.

grants of different states." In these cases, there is an obvious necessity for giving it a retrospective power. I have laid before you my idea on the subject, and expressed my fears, which I most conscientiously believe to be well founded.[67]

June 20, 1788—Mr. Madison: * * * With respect to the laws of the Union, it is so necessary and expedient that the judicial power should correspond with the legislative, that it has not been objected to. With respect to treaties, there is a peculiar propriety in the judiciary's expounding them.

These may involve us in controversies with foreign nations. It is necessary, therefore, that they should be determined in the courts of the general government. There are strong reasons why there should be a Supreme Court to decide such disputes. If, in any case, uniformity be necessary, it must be in the exposition of treaties. The establishment of one revisionary superintending power can alone secure such uniformity. The same principles hold with respect to cases affecting ambassadors and foreign ministers. To the same principles may also be referred their cognizance in admiralty and maritime cases. As our intercourse with foreign nations will be affected by decisions of this kind, they ought to be uniform. This can only be done by giving the federal judiciary exclusive jurisdiction. Controversies affecting the interest of the United States ought to be determined by their own judiciary, and not be left to partial, local tribunals.

The next case, where two or more states are the parties, is not objected to. Provision is made for this by the existing Articles of Confederation, and there can be no impropriety in referring such disputes to this tribunal.[68]

Its jurisdiction in controversies between a state and citizens of another state is much objected to, and perhaps without reason. It is not in the power of individuals to call any state into court. The only operation it can have, is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal court. This will give satisfaction to individuals, as it will prevent citizens, on whom a state may have a claim, being dissatisfied with the state courts. It is a case which cannot often happen, and if it should be found improper, it will be altered. But it may be attended with good effects. This may be illustrated by other cases. It is provided, that citizens of different states may be carried to the federal courts.

But this will not go beyond the cases where they may be parties. A femme covert may be a citizen of another state, but cannot be a party in this court. A subject of a foreign power, having a dispute with a citizen of this state, may carry it to the federal court; but an alien enemy cannot bring suit at all. It appears to me that this can have no operation but this—to give a citizen a right to be heard in the federal courts; and if a state should condescend to be a party, this court may take cognizance of it.

As to its cognizance of disputes between citizens of different states, I will not say it is a matter of much importance. Perhaps it might be left to the state courts. But I sincerely believe this provision will be rather salutary than otherwise. It may happen that a strong prejudice may arise, in some states, against the citizens of others, who may have claims against them. We know what tardy, and even defective, administration of justice has happened in some states.

[67] Same, p. 530.
[68] Same, p. 532.

A citizen of another state might not chance to get justice in a state court, and at all events he might think himself injured.

To the next clause there is no objection.[69]

The next case provides for disputes between a foreign state and one of our states, should such a case ever arise; and between a citizen and a foreign citizen or subject. I do not conceive that any controversy can ever be decided, in these courts, between an American state and a foreign state, without the consent of the parties. If they consent, provision is here made. The disputes ought to be tried by the national tribunal. This is consonant to the law of nations. Could there be a more favorable or eligible provision to avoid controversies with foreign powers? Ought it to be put in the power of a member of the Union to drag the whole community into war? As the national tribunal is to decide, justice will be done. It appears to me, from this review, that though, on some of the subjects of this jurisdiction, it may seldom or never operate, and though others be of inferior consideration, yet they are mostly of great importance, and indispensably necessary.

The second question which I proposed to consider, was, whether such organization be made as would be safe and convenient for the states, and the people at large. Let us suppose that the subjects of its jurisdiction are only enumerated, and power given to the general legislature to establish such courts as might be judged necessary and expedient; do not think that, in that case, any rational objection could be made to it, any more than would be made to a general power of legislation in certain enumerated cases. If that would be safe, this appears to me better and more restrictive, so far as it may be abused by extension of power. The most material part is the discrimination of superior and inferior jurisdiction, and the arrangement of its powers; as, where it shall have original, and where appellate cognizance. Where it speaks of appellate jurisdiction, it expressly provides that such regulations will be made as will accommodate every citizen, so far as practicable in any government. The principal criticism which has been made, was against the appellate cognizance as well of fact as law. I am happy that the honorable member who presides, and who is familiarly acquainted with the subject, does not think it involves any thing unnecessarily dangerous. I think that the distinction of fact, as well as law, may be satisfied by the discrimination of the civil and common law. But if gentlemen should contend that appeals, as to fact, can be extended to jury cases, I contend that, by the word regulations, it is in the power of Congress to prevent it, or prescribe such a mode as will secure the privilege of jury trial. They may make a regulation to prevent such appeals entirely; or they may remand the fact, or send it to an inferior contiguous court, to be tried; or otherwise preserve that ancient and important trial.[70]

Let me observe that, so far as the judicial power may extend to controversies between citizens of different states, and so far as it gives them power to correct, by another trial, a verdict obtained by local prejudices, it is favorable to those states which carry on commerce. There are a number of commercial states which carry on trade for other states. Should the states in debt to them make unjust regulations, the justice that would be obtained by the creditors might

[69] Same, p. 533.
[70] Same, p. 534.

be merely imaginary and nominal. It might be either entirely denied, or partially granted. This is no imaginary evil. * * *[71]

I am of opinion (and my reasoning and conclusions are drawn from facts) that, as far as the power of Congress can extend, the judicial power will be accommodated to every part of America. Under this conviction I conclude that the legislation, instead of making the Supreme Federal Court absolutely stationary, will fix it in different parts of the continent, to render it more convenient. It think this idea perfectly warrantable. * * *[72]

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Having taken this general view of the subject, I will now advert to what has fallen from the honorable gentleman who presides. His criticism is, that the judiciary has not been guarded from an increase of the salary of the judges. I wished myself to insert a restraint on the augmentation, as well as diminution, of their compensation, and supported it in the Convention. But I was overruled. I must state the reasons which were urged. They had great weight. The business must increase. If there was no power to increase their pay, according to the increase of business, during the life of the judges, it might happen that there would be such an accumulation of business as would reduce the pay to a most trivial consideration. This reason does not hold as to the President; for, in the short period in which he presides, this cannot happen. His salary ought not, therefore, to be increased. It was objected, yesterday, that there was no provision for a jury from the vicinage. If it could have been done with safety, it would not have been opposed. It might so happen that a trial would be impracticable in the country. Suppose a rebellion in a whole district; would it not be impossible to get a jury? The trial by jury is held as sacred in England as in America. There are deviations from it in England; yet greater deviations have happened here, since we established our independence, than have taken place there for a long time, though it be left to the legislative discretion. It is a misfortune in any case that this trial should be departed from; yet in some cases it is necessary. It must be, therefore, left to the discretior of the legislature to modify it according to circumstances. This is a complete and satisfactory answer.[73]

It was objected, that this jurisdiction would extend to all cases, and annihilate the state courts. At this moment of time, it might happen that there are many disputes between citizens of different states. But in the ordinary state of things, I believe that any gentleman will think that the far greater number of causes—ninety-nine out of a hundred—will remain with the state judiciaries. All controversies directly between citizen and citizen will still remain with the local courts. The number of cases within the jurisdiction of these courts is very small when compared to those in which the local tribunals will have cognizance. No accurate calculation can be made; but I think that any gentleman who will contemplate the subject at all must be struck with this truth. * * *

As to vexatious appeals, they can be remedied by Congress. It would seldom happen that mere wantonness would produce such an appeal, or induce a man to sue unjustly. If the courts were on a good footing in the states, what can induce them to take so much

[71] Same, p. 535.
[72] Same, p. 536.
[73] Same, p. 537.

trouble? I have frequently, in the discussion of this subject, been struck with one remark. It has been urged that this would be oppressive to those who, by imprudence or otherwise, come under the denomination of debtors. I know not how this can be conceived. I will venture one observation. If this system should have the effect of establishing universal justice, and accelerating it throughout America, it will be one of the most fortunate circumstances that could happen for those men. * * *[74]

June 20, 1788—Mr. Henry: Mr. Chairman, I have already expressed painful sensations at the surrender of our great rights, and I am again driven to the mournful recollection. The purse is gone; the sword is gone; and here is the only thing of any importance that is to remain with us. As I think this is a more fatal defect than any we have yet considered, forgive me if I attempt to refute the observations made by the honorable member in the chair, and last up. It appears to me that the powers in the section before you are either impracticable, or, if reducible to practice, dangerous in the extreme.

The honorable gentleman began in a manner which surprised me. It was observed that our state judges might be contented to be federal judges and state judges also. If we are to be deprived of that class of men, and if they are to combine against us with the general government, we are gone.

I consider the Virginia judiciary as one of the best barriers against strides of power—against that power which, we are told by the honorable gentleman, has threatened the destruction of liberty. Pardon me for expressing my extreme regret that it is in their power to take away that barrier. Gentlemen will not say that any danger can be expected from the state legislatures. So small are the barriers against the encroachments and usurpations of Congress, that, when I see this last barrier—the independency of the judges—impaired, I am persuaded I see the prostration of all our rights. In what a situation will your judges be, when they are sworn to preserve the Constitution of the state and of the general government! If there be a concurrent dispute between them, which will prevail? They cannot serve two masters struggling for the same object. The laws of Congress being paramount to those of the states, and to their constitutions also, whenever they come in competition, the judges must decide in favor of the former. This, instead of relieving or aiding me, deprives me of my only comfort—the independency of the judges. The judiciary are the sole protection against a tyrannical execution of the laws. But if by this system we lose our judiciary, and they cannot help us, we must sit down quietly, and be oppressed.[75]

The appellate jurisdiction as to law and fact, notwithstanding the ingenuity of gentlemen, still, to me, carries those terrors which my honorable friend described. This does not include law, in the common acceptation of it, but goes to equity and admiralty, leaving what we commonly understand by common law out altogether. We are told of technical terms, and that we must put a liberal construction on it. We must judge by the common understanding of common men. Do the expressions "fact and law" relate to cases of admiralty and chancery jurisdiction only? No, sir, the least attention will convince us that they extend to common-law cases. Three cases are contradistinguished from the rest. "In all cases affecting ambassadors, other

[74] Same, p. 538.
[75] Same, p. 539.

public ministers, and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact." Now, sir, what are we to understand by these words? What are the cases before mentioned? Cases of common law, as well as of equity and admiralty. I confess I was surprised to hear such an explanation from an understanding more penetrating and acute than mine. We are told that the cognizance of law and fact is satisfied by cases of admiralty and chancery. The words are expressly against it. Nothing can be more clear and incontestable. This will, in its operation, destroy the trial by jury. The verdict of an impartial jury will be reversed by judges unacquainted with the circumstances. But we are told that Congress are to make regulations to remedy this. I may be told that I am bold; but I think myself, and I hope to be able to prove to others, that Congress cannot, by any act of theirs, alter this jurisdiction as established. It appears to me that no law of Congress can alter or arrange it. It is subject to be regulated, but is it subject to be abolished? If Congress alter this part, they will repeal the Constitution. Does it give them power to repeal itself? What is meant by such words in common parlance? If you are obliged to do certain business, you are to do it under such modifications as were originally designed. Can gentlemen support their argument by regular or logical conclusions? [76] When Congress, by virtue of this sweeping clause, will organize these courts, they cannot depart from the Constitution; and their laws in opposition to the Constitution would be void. If Congress, under the specious pretence of pursuing this clause, altered it, and prohibited appeals as to fact, the federal judges, if they spoke the sentiments of independent men, would declare their prohibition nugatory and void. In every point of view, it seems to me that it will continue in as full force as it is now, notwithstanding any regulations they may attempt to make. What then, Mr. Chairman? We are told that, if this does not satisfy every mind, they will yield. It is not satisfactory to my mind, whatever it may be to others. The honorable gentleman has told us that our representatives will mend every defect. I do not know how often we have recurred to that source, but I can find no consolation in it. Who are they? Ourselves. What is their duty? To alter the spirit of the Constitution—to new model it? Is that their duty, or ours? It is our duty to rest our rights on a certain foundation and not trust to future contingencies.

We are told of certain difficulties. I acknowledge it is difficult to form a constitution. But I have seen difficulties conquered which were as unconquerable as this. We are told that trial by jury is difficult to be had in certain cases. Do we not know the meaning of the term? We are also told it is a technical term. I see one thing in this Constitution; I made the observation before, and I am still of the same opinion, that every thing with respect to privileges is so involved in darkness, it makes me suspicious—not of those gentlemen who formed it, but of its operations in its present form. Could not precise terms have been used? You find, by the observations of the gentleman last up, that, when there is a plenitude of power, there is no difficulty; but when you come to a plain thing, understood by all America, there are contradictions, ambiguities, difficulties, and what

[76] Same, p. 540.

not. Trial by jury is attended, it seems, with insuperable difficulties, and therefore omitted altogether in civil cases. But an idea is held out that it is secured in criminal cases. I had rather it had been left out altogether than have it so vaguely and equivocally provided for. Poor people do not understand technical terms. Their rights ought to be secured in language of which they know the meaning. As they do not know the meaning of such terms, they may be injured with impunity.[77] If they dare oppose the hands of tyrannical power, you will see what has been practiced elsewhere. They may be tried by the most partial powers, by their most implacable enemies, and be sentenced and put to death, with all the forms of a fair trial. I would rather be left to the judges. An abandoned juror would not dread the loss of character like a judge. From these, and a thousand other considerations, I would rather the trial by jury were struck out altogether. There is no common law of America, (as has been said,) nor constitution, but that on your table. If there be neither common law nor constitution, there can be no right to challenge partial jurors. Yet the right is as valuable as the trial by jury itself.

My honorable friend's remarks were right, with respect to incarcerating a state. It would ease my mind, if the honorable gentleman would tell me the manner in which money should be paid, if, in a suit between a state and individuals, the state were cast. The honorable gentleman, perhaps, does not mean to use coercion, but some gentle caution. I shall give my voice for the federal cognizance only where it will be for the public liberty and safety. Its jurisdiction, in disputes between citizens of different states, will be productive of the most serious inconveniences. The citizens of bordering states have frequent intercourse with one another. From the proximity of the states to each other, a multiplicity of these suits will be instituted. I beg gentlemen to inform me of this—in what courts are they to go and by what law are they to be tried? Is it by a law of Pennsylvania or Virginia? Those judges must be acquainted with all the laws of the different states. I see arising out of that paper a tribunal that is to be recurred to in all cases, when the destruction of the state judiciaries shall happen; and, from the extensive jurisdiction of these paramount courts, the state courts must soon be annihilated.[78]

It may be remarked that here is presented to us that which is execrated in some parts of the states—I mean a retrospective law. This, with respect to property, is as odious as an ex post facto law is with respect to persons. I look upon them as one and the same thing. The jurisdiction of controversies between citizens, and foreign subjects and citizens, will operate retrospectively. Every thing with respect to the treaty with Great Britain and other nations will be involved by it. Every man who owes any thing to a subject of Great Britain, or any other nation, is subject to a tribunal that he knew not when he made the contract. Apply this to our citizens. If ever a suit be instituted by a British creditor for a sum which the defendant does not in fact owe, he had better pay it than appeal to the federal Supreme Court. Will gentlemen venture to ruin their own citizens? Foreigners may ruin every man in this state by unjust and vexatious suits and appeals. I need only touch it, to remind every gentleman of the danger.

[77] Same, p. 541.
[78] Same, p. 542.

No objection is made to their cognizance of disputes between citizens of the same state, claiming lands under grants of different states.

As to controversies between a state and the citizens of another state, his construction of it is to me perfectly incomprehensible. He says it will seldom happen that a state has such demands on individuals. There is nothing to warrant such an assertion. But he says that the state may be plaintiff only. If gentlemen pervert the most clear expressions, and the usual meaning of the language of the people, there is an end of all argument. What says the paper? That it shall have cognizance of controversies between a state and citizens of another state, without discriminating between plaintiff and defendant. What says the honorable gentleman? The contrary—that the state can only be plaintiff. When the state is debtor, there is no reciprocity. It seems to me that gentlemen may put what construction they please on it. What! is justice to be done to one party, and not to the other? If gentlemen take this liberty now, what will they not do when our rights and liberties are in their power? He said it was necessary to provide a tribunal when the case happened, though it would happen but seldom. The power is necessary, because New York could not, before the war, collect money from Connecticut! The state judiciaries are so degraded that they cannot be trusted. This is a dangerous power which is thus instituted. For what? For things which will seldom happen; and yet, because there is a possibility that the strong, energetic government may want it, it shall be produced and thrown in the general scale of power. I confess I think it dangerous [79] Is it not the first time, among civilized mankind, that there was a tribunal to try disputes between the aggregate society and foreign nations? Is there any precedent for a tribunal to try disputes between foreign nations and the states of America? The honorable gentleman said that the consent of the parties was necessary: I say that a previous consent might leave it to arbitration. It is but a kind of arbitration at best.

To hear gentlemen of such penetration make use of such arguments, to persuade us to part with that trial by jury, is very astonishing. We are told that we are to part with that trial by jury which our ancestors secured their lives and property with, and we are to build castles in the air, and substitute visionary modes of decision for that noble palladium. I hope we shall never be induced, by such arguments, to part with that excellent mode of trial. No appeal can now be made as to fact in common-law suits. The unanimous verdict of twelve impartial men cannot be reversed. I shall take the liberty of reading to the committee the sentiments of the learned Judge Blackstone, so often quoted, on the subject.

The opinion of this learned writer is more forcible and cogent than any thing I could say. Notwithstanding the transcendent excellency of this trial, its essentiality to the preservation of liberty, and the extreme danger of substituting any other mode, yet we are now about to alienate it.

But on this occasion, as on all others, we are admonished to rely on the wisdom and virtue of our rulers. We are told that the members from Georgia, New Hampshire, etc., will not dare to infringe this privilege; that, as it would excite the indignation of the people, they would not attempt it; that is, the enormity of the offence is urged as

[79] Same, p. 543.

a security against its commission. It is so abominable that Congress will not exercise it. Shall we listen to arguments like these, when trial by jury is about to be relinquished? I beseech you to consider before you decide. I ask you, What is the value of that privilege? When Congress, in all the plenitude of their arrogance, magnificence, and power, can take it from you, will you be satisfied? Are we to go so far as to concede every thing to the virtue of Congress? Throw yourselves at once on their mercy; be no longer free than their virtue will predominate: if this will satisfy republican minds, there is an end of every thing. * * *[80]

[Mr. Henry's further observations on this subject are omitted from this presentation.]

Mr. Pendleton addressed the Convention on the subject of "trial by jury." His remarks on that subject are omitted here. "Trial by jury" was given great consideration by the members of the Convention generally. Since it is of but collateral significance in this paper full discussion is omitted. The inclusion of certain passages is for the purpose of showing merely the general trend of the debate. Mr. Pendleton then proceeded as follows:

To show the impropriety of fixing the number of inferior courts, suppose our Constitution had confined the legislature to any particular number of inferior jurisdictions; there it would remain; nor could it be increased or diminished, as circumstances would render it necessary. But as it is, the legislature can by laws change it from time to time, as circumstances will require. What would have been the consequences to the western district, if the legislature had been restrained in this particular? The emigrations to that country rendered it necessary to establish a jurisdiction there equal in rank to the General Court in this part of the state. This was convenient to them, and could be no inconvenience to us. At the same time, the legislature did not lose sight of making every part of society subject to the supreme tribunal. An appeal was allowed to the Court of Appeals here. This was necessary. Has it produced any inconvenience? I have not seen any appeal from that court.[81] Its organization has produced no inconvenience whatever. This proves that it is better to leave them unsettled, than fixed in the Constitution. With respect to the subjects of its jurisdiction, I consider them as being of a general and not local nature, and therefore as proper subjects of a federal court. I shall not enter into an examination of each part, but make some reply to the observations of the honorable gentleman.

His next objection was to the first two clauses—cases arising under the Constitution, and laws made in pursuance thereof. Are you to refer these to the state courts? Must not the judicial powers extend to enforce the federal laws, govern its own officers, and confine them to the line of their duty? Must it not protect them, in the proper exercise of duty, against all opposition, whether from individuals or state laws? No, say gentlemen, because the legislature may make oppressive laws, or partial judges may give them a partial interpretation. This is carrying suspicion to an extreme which tends to prove there should be no legislative or judiciary at all. The fair inference is, that oppressive laws will not be warranted by the Constitution, nor attempted by our representatives, who are selected for their ability

[80] Same, p. 544.
[81] Same, p. 547.

and integrity, and that honest, independent judges will never admit an oppressive construction.

But, then, we are alarmed with the idea of its being a consolidated government. It is so, say gentlemen, in the executive and legislative, and must be so in the judiciary. I never conceived it to be a consolidated government, so as to involve the interest of all America. Of the two objects of judicial cognizance, one is general and national, and the other local. The former is given to the general judiciary, and the latter left for the local tribunals. They act in cooperation, to secure our liberty. For the sake of economy, the appointment of these courts might be in the state courts. I rely on an honest interpretation from independent judges. An honest man would not serve otherwise, because it would be to serve a dishonest purpose. To give execution to proper laws, in a proper manner, is their peculiar province. There is no inconsistency, impropriety, or danger, in giving the state judges the federal cognizance. * * * [82]

The impossibility of calling a sovereign state before the jurisdiction of another sovereign state, shows the propriety and necessity of vesting this tribunal with the decision of controversies to which a state shall be a party.

But the principal objection of that honorable gentleman was, that jurisdiction was given it in disputes between citizens of different states. I think, in general, those decisions might be left to the state tribunals; especially as citizens of one state are declared to be citizens of all. I think it will, in general, be so left by the regulations of Congress. But may no case happen in which it may be proper to give the federal courts jurisdiction in such a dispute? Suppose a bond given by a citizen of Rhode Island to one of our citizens. The regulations of that state being unfavorable to the claims of the other states, if he is obliged to go to Rhode Island to recover it, he will be obliged to accept payment of one third, or less, of his money. He cannot sue in the Supreme Court, but he may sue in the federal inferior court; and on judgment to be paid one for ten, he may get justice by appeal. Is it an eligible situation? Is it just that a man should run the risk of losing nine tenths of his claim? Ought he not to be able to carry it to that court where unworthy principles do not prevail? Paper money and tender laws may be passed in other states, in opposition to the federal principle, and restriction of this Constitution, and will need jurisdiction in the federal judiciary, to stop its pernicious effects.

Where is the danger, in the case put, of malice producing an assignment of a bond to a citizen of a neighboring state—Maryland? I have before supposed that there would be an inferior federal court in every state. Now, this citizen of Maryland, to whom this bond is assigned, cannot sue out process from the supreme federal court to carry his debtor thither. He cannot carry him to Maryland. He must sue him in the inferior federal court in Virginia. He can only go farther by appeal. The creditor cannot appeal. He gets a judgment. An appeal can be had only on application of the defendant, who thus gains a privilege instead of an injury; so that the observation of the honorable gentleman is not well founded.[83] It was said by the honorable gentleman to-day, that no regulation Congress would make could prevent from applying to common-law cases matters of law and fact. In the construction of general words of this sort, they will

[82] Same, p. 548.
[83] Same, p. 549.

apply concurrently to different purposes. We give them that distributive interpretation, and liberal explication, which will not make them mischievous; and if this can be done by a court, surely it can by a legislature. When it appears that the interpretation made by legislative bodies, in carrying acts into execution, is thus liberal and distributive, there is no danger here. The honorable gentleman was mistaken when he supposed that I said, in cases where the competency of evidence is questioned, the fact was to be changed in the superior court. I said, the fact was not at all to be affected. I described how the superior court was to proceed, and, when it settled that point, if another trial was necessary, they sent the cause back, and then it was tried again in the inferior court.

The honorable gentleman has proposed an amendment which he supposes would remove those inconveniences. I attended to it, and it gave great force to my opinion that it is better to leave it to be amended by the regulations of Congress. What is to be done in cases where juries have been introduced in the admiralty and chancery? In the admiralty, juries sometimes decide facts. Sometimes in chancery, when the judges are dissatified, from the want of testimony or other cause, they send it to be tried by a jury. When the jury determines, they settle it. Let the gentleman review his amendment. It strikes me forcibly that it would be better to leave it to Congress than to introduce amendments which would not answer. I mentioned yesterday that, from the situation of the states, appeals could not be abused. The honorable gentleman to-day said it was putting too much confidence in our agents and rulers. I leave it to all mankind, whether it be not a reasonable confidence. Will the representatives of any twelve states sacrifice their own interest, and that of their fellow-citizens, to answer no purpose? But suppose we should happen to be deceived; have we no security? So great is the spirit of America, that it was found sufficient to oppose the greatest power in the world. Will not the American spirit protect us against any danger from our own representatives? It being now late, I shall add no more.[84]

June 20, 1788.—Mr. Mason: Mr. Chairman, the objection I made, respecting the assignment of a bond from a citizen of this state to a citizen of another state, remains still in force. The honorable gentleman has said that there can be no danger, in the first instance, because it is not within the original jurisdiction of the Supreme Court; but that the suit must be brought in the inferior federal court of Virginia. He supposes there can never be an appeal, in this case, by the plaintiff, because he gets a judgment on his bond; and that the defendant alone can appeal, who therefore, instead of being injured, obtains a privilege. Permit me to examine the force of this. By means of a suit, on a real or fictitious claim, the citizens of the most distant states may be brought to the supreme federal court. Suppose a man has my bond for a hundred pounds, and a great part of it has been paid, and, in order fraudulently to oppress me, he assigns it to a gentleman in Carolina or Maryland. He then carries me to the inferior federal court. I produce my witnesses, and judgment is given in favor of the defendant. The plaintiff appeals, and carries me to the superior court, a thousand miles, and my expenses amount to more than the bond.

The honorable gentleman recommends to me to alter my proposed amendment. I would as soon take the advice of that gentleman as

[84] Same, p. 550.

any other; but, though the regard which I have for him be great, I cannot assent on this great occasion.

There are not many instances of decisions by juries in the admiralty or chancery, because the facts are generally proved by depositions. When that is done, the fact, being ascertained, goes up to the superior court, as part of the record; so that there will be no occasion to revise that part.[85]

On the same day, Mr. John Marshall: Mr. Chairman, this part of the plan before us is a great improvement on that system from which we are now departing. Here are tribunals appointed for the decision of controversies which were before either not at all, or improperly, provided for. That many benefits will result from this to the members of the collective society, every one confesses. Unless its organization be defective, and so constructed as to injure, instead of accommodating, the convenience of the people, it merits our approbation. After such a candid and fair discussion by those gentlemen who support it,—after the very able manner in which they have investigated and examined it,—I conceived it would be no longer considered as so very defective, and that those who opposed it would be convinced of the impropriety of some of their objections. But I perceive they still continue the same opposition. Gentlemen have gone on an idea that the federal courts will not determine the causes which may come before them with the same fairness and impartiality with which other courts decide. What are the reasons of this supposition? Do they draw them from the manner in which the judges are chosen, or the tenure of their office? What is it that makes us trust our judges? Their independence in office, and manner of appointment. Are not the judges of the federal court chosen with as much wisdom as the judges of the state governments? Are they not equally, if not more independent? If so, shall we not conclude that they will decide with equal impartiality and candor? If there be as much wisdom and knowledge in the United States as in a particular state, shall we conclude that the wisdom and knowledge will not be equally exercised in the selection of judges?

The principle on which they object to the federal jurisdiction seems, to me, to be founded on a belief that there will not be a fair trial had in those courts. If this committee will consider it fully, they will find it has no foundation, and that we are as secure there as any where else. What mischief results from some causes being tried there? Is there not the utmost reason to conclude that judges, wisely appointed, and independent in their office, will never countenance any unfair trial? What are the subjects of its jurisdiction? Let us examine them with an expectation that causes will be as candidly tried there as elsewhere, and then determine. The objection which was made by the honorable member who was first up yesterday (Mr. Mason) has been so fully refuted that it is not worth while to notice it. He objected to Congress having power to create a number of inferior courts, according to the necessity of public circumstances. I had an apprehension that those gentlemen who placed no confidence in Congress would object that there might be no inferior courts. I own that I thought those gentlemen would think there would be no inferior courts, as it depended on the will of Congress, but that we should be dragged to the centre of the Union.[86] But I did not conceive that the power of

[85] Same, p. 551.
[86] Same, p. 551-552.

increasing the number of courts could be objected to by any gentleman, as it would remove the inconvenience of being dragged to the centre of the United States. I own that the power of creating a number of courts is, in my estimation, so far from being a defect, that it seems necessary to the perfection of this system. After having objected to the number and mode, he objected to the subject matter of their cognizance. [Here Mr. Marshall read the 2d section.]

These, sir, are the points of federal jurisdiction to which he objects, with a few exceptions. Let us examine each of them with a supposition that the same impartiality will be observed there as in other courts, and then see if any mischief will result from them. With respect to its cognizance in all cases arising under the Constitution and the laws of the United States, he says that, the laws of the United States being paramount to the laws of the particular states, there is no case but what this will extend to. Has the government of the United States power to make laws on every subject? Does he understand it so? Can they make laws affecting the mode of transferring property, or contracts, or claims, between citizens of the same state? Can they go beyond the delegated powers? If they were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard. They would not consider such a law as coming under their jurisdiction. They would declare it void. It will annihilate the state courts, says the honorable gentleman. Does not every gentleman here know that the causes in our courts are more numerous than they can decide, according to their present construction? Look at the dockets. You will find them crowded with suits, which the life of man will not see determined. If some of these suits be carried to other courts, will it be wrong? They will still have business enough.[87]

Then there is no danger that particular subjects, small in proportion, being taken out of the jurisdiction of the state judiciaries, will render them useless and of no effect. Does the gentleman think that the state courts will have no cognizance of cases not mentioned here? Are there any words in this Constitution which exclude the courts of the states from those cases which they now possess? Does the gentleman imagine this to be the case? Will any gentleman believe it? Are not controversies respecting lands claimed under the grants of different states the only controversies between citizens of the same state which the federal judiciary can take cognizance of? The case is so clear, that to prove it would be a useless waste of time. The state courts will not lose the jurisdiction of the causes they now decide. They have a concurrence of jurisdiction with the federal courts in those cases in which the latter have cognizance.

How disgraceful is it that the state courts cannot be trusted! says the honorable gentleman. What is the language of the Constitution? Does it take away their jurisdiction? Is it not necessary that the federal courts should have cognizance of cases arising under the Consitution, and the laws, of the United States? What is the service or purpose of a judiciary, but to execute the laws in a peaceable, orderly manner, without shedding blood, or creating a contest, or availing yourselves of force? If this be the case, where can its jurisdiction be more necessary than here?

[87] Same, p. 553.

To what quarter will you look for protection from an infringement on the Constitution, if you will not give the power to the judiciary? There is no other body that can afford such a protection. But the honorable member objects to it, because he says that the officers of the government will be screened from merited punishment by the federal judiciary. The federal sheriff, says he, will go into a poor man's house and beat him, or abuse his family, and the federal court will protect him. Does any gentleman believe this? Is it necessary that the officers will commit a trespass on the property or persons of those with whom they are to transact business? Will such great insults on the people of this country be allowable? Were a law made to authorize them, it would be void. The injured man would trust to a tribunal in his neighborhood. To such a tribunal he would apply for redress, and get it. There is no reason to fear that he would not meet that justice there which his country will be ever willing to maintain. But, on appeal, says the honorable gentleman, what chance is there to obtain justice? This is founded on an idea that they will not be impartial. There is no clause in the Constitution which bars the individual member injured from applying to the state courts to give him redress. He says that there is no instance of appeals as to fact in common-law cases.[88] The contrary is well known to you, Mr. Chairman, to be the case in this commonwealth. With respect to mills, roads, and other cases, appeals lie from the inferior to the superior court, as to fact as well as law. Is it a clear case, that there can be no case in common law in which an appeal as to fact might be proper and necessary? Can you not conceive a case where it would be productive of advantages to the people at large to submit to that tribunal the final determination, involving facts as well as law? Suppose it should be deemed for the convenience of the citizens that those things which concerned foreign ministers should be tried in the inferior courts; if justice could be done, the decision would satisfy all. But if an appeal in matters of facts could not be carried to the superior court, then it would result that such cases could not be tried before the inferior courts, for fear of injurious and partial decisions.

But, sir, where is the necessity of discriminating between the three cases of chancery, admiralty, and common law? Why not leave it to Congress? Will it enlarge their powers? Is it necessary for them wantonly to infringe your rights? Have you any thing to apprehend, when they can in no case abuse their power without rendering themselves hateful to the people at large? When this is the case, something may be left to the legislature freely chosen by ourselves, from among ourselves, who are to share the burdens imposed upon the community, and who can be changed at our pleasure. Where power may be trusted, and there is no motive to abuse it, it seems to me to be as well to leave it undetermined as to fix it in the Constitution.[89]

With respect to disputes between a state and the citizens of another state, its jurisdiction has been decried with unusual vehemence. I hope that no gentleman will think that a state will be called at the bar of the federal court. Is there no such case at present? Are there not many cases in which the legislature of Virginia is a party, and yet the state is not sued? It is not rational to suppose that the

[88] Same, p. 554.
[89] Same, p. 555.

sovereign power should be dragged before a court. The intent is, to enable states to recover claims of individuals residing in other states. I contend this construction is warranted by the words. But, say they, there will be partiality in it if a state cannot be defendant—if an individual cannot proceed to obtain judgment against a state, though he may be sued by a state. It is necessary to be so, and cannot be avoided. I see a difficulty in making a state defendant, which does not prevent its being plaintiff. If this be only what cannot be avoided, why object to the system on that account? If an individual has a just claim against any particular state, is it to be presumed that, on application to its legislature, he will not obtain satisfaction? But how could a state recover any claim from a citizen of another state, without the establishment of these tribunals?

The honorable member objects to suits being instituted in the federal courts, by the citizens of one state, against the citizens of another state. Were I to contend that this was necessary in all cases, and that the government without it would be defective, I should not use my own judgment. But are not the objections to it carried too far? Though it may not in general be absolutely necessary, a case may happen, as has been observed, in which a citizen of one state ought to be able to recur to this tribunal, to recover a claim from the citizen of another state. What is the evil which this can produce? Will he get more than justice there? The independence of the judges forbids it. What has he to get? Justice. Shall we object to this, because the citizen of another state can obtain justice without applying to our state courts? It may be necessary with respect to the laws and regulations of commerce, which Congress may make. It may be necessary in cases of debt, and some other controversies. In claims for land, it is not necessary, but it is not dangerous. In the court of which state will it be instituted? said the honorable gentleman. It will be instituted in the court of the state where the defendant resides, where the law can come at him, and nowhere else. By the laws of which state will it be determined? said he. By the laws of the state where the contract was made. According to those laws, and those only, can it be decided. Is this a novelty? No; it is a principle in the jurisprudence of this commonwealth. If a man contracted a debt in the East Indies, and it was sued for here, the decision must be consonant to the laws of that country. Suppose a contract made in Maryland, where the annual interest is at six per centum, and a suit instituted for it in Virginia; what interest would be given now, without any federal aid?[90] The interest of Maryland most certainly; and if the contract had been made in Virginia, and suit brought in Maryland, the interest of Virginia must be given, without doubt. It is now to be governed by the laws of that state where the contract was made. The laws which governed the contract at its formation govern it in its decision. To preserve the peace of the Union only, its jurisdiction in this case ought to be recurred to. Let us consider that, when citizens of one state carry on trade in another state, much must be due to the one from the other, as is the case between North Carolina and Virginia. Would the federal judiciary swerve from their duty in order to give partial and unjust decisions?

The objection respecting the assignment of a bond to a citizen of another state has been fully answered. But suppose it were to be tried, as he says; what would be given more than was actually due in

[90] Same, p. 556.

the case he mentioned? It is possible in our courts, as they now stand, to obtain a judgment for more than justice. But the court of chancery grants relief. Would it not be so in the federal court? Would not depositions be taken to prove the payments; and if proved, would not the decision of the court be accordingly?

He objects, in the next place, to its jurisdiction in controversies between a state and a foreign state. Suppose, says he, in such a suit, a foreign state is cast; will she be bound by the decision? If a foreign state brought a suit against the commonwealth of Virginia, would she not be barred from the claim if the federal judiciary thought it unjust? The previous consent of the parties is necessary; and, as the federal judiciary will decide, each party will acquiesce. It will be the means of preventing disputes with foreign nations. On an attentive consideration of these points, I trust every part will appear satisfactory to the committee.[91]

The exclusion of trial by jury, in this case, he urged to prostrate our rights. Does the word court only mean the judges? Does not the determination of a jury necessarily lead to the judgment of the court? Is there any thing here which gives the judges exclusive jurisdiction of matters of fact? What is the object of a jury trial? To inform the court of the facts. When a court has cognizance of facts, does it not follow that they can make inquiry by a jury? It is impossible to be otherwise. I hope that in this country, where impartiality is so much admired, the laws will direct facts to be ascertained by a jury. But, says the honorable gentleman, the juries in the ten miles square will be mere tools of parties, with which he would not trust his person or property; which, he says, he would rather leave to the court. Because the government may have a district of ten miles square, will no man stay there but the tools and officers of the government? Will nobody else be found there? Is it so in any other part of the world, where a government has legislative power? Are there none but officers, and tools of the government of Virginia, in Richmond? Will there not be independent merchants, and respectable gentlemen of fortune, within the ten miles square? Will there not be worthy farmers and mechanics? Will not a good jury be found there, as well as any where else? Will the officers of the government become improper to be on a jury? What is it to the government whether this man or that man succeeds? It is all one thing. Does the Constitution say that juries shall consist of officers, or that the Supreme Court shall be held in the ten miles square? It was acknowledged, by the honorable member, that it was secure in England. What makes it secure there? Is it their constitution? What part of their constitution is there that the Parliament cannot change? As the preservation of this right is in the hands of Parliament, and it has ever been held sacred by them, will the government of America be less honest than that of Great Britain? Here a restriction is to be found. The jury is not to be brought out of the state. There is no such restriction in that government; for the laws of Parliament decide every thing respecting it. Yet gentlemen tell us that there is safety there, and nothing here but danger. It seems to me that the laws of the United States will generally secure trials by a jury of the vicinage, or in such manner as will be most safe and convenient for the people.[92]

[91] Same, p. 557.
[92] Same, p. 558.

But it seems that the right of challenging the jurors is not secured in this Constitution. Is this done by our own Constitution, or by any provision of the English government? Is it done by their Magna Charta, or bill of rights? This privilege is founded on their laws. If so, why should it be objected to the American Constitution, that it is not inserted in it? If we are secure in Virginia without mentioning it in our Constitution, why should not this security be found in the federal court?

The honorable gentleman said much about the quitrents in the Northern Neck. I will refer it to the honorable gentleman himself. Has he not acknowledged that there was no complete title? Was he not satisfied that the right of the legal representatives of the proprietor did not exist at the time he mentioned? If so, it cannot exist now. I will leave it to those gentlemen who come from that quarter. I trust they will not be intimidated, on this account, in voting on this question. A law passed in 1782, which secures this. He says that many poor men may be harassed and injured by the representatives of Lord Fairfax. If he has no right, this cannot be done. If he has this right, and comes to Virginia, what laws will his claims be determined by? By those of this state. By what tribunals will they be determined? By our state courts. Would not the poor man, who was oppressed by an unjust prosecution, be abundantly protected and satisfied by the temper of his neighbors, and would he not find ample justice? What reason has the honorable member to apprehend partiality or injustice? He supposes that, if the judges be judges of both the federal and state courts, they will incline in favor of one government. If such contests should arise, who could more properly decide them than those who are to swear to do justice? If we can expect a fair decision any where, may we not expect justice to be done by the judges of both the federal and state governments? But, says the honorable member, laws may be executed tyrannically. Where is the independency of your judges? If a law be exercised tyrannically in Virginia, to what can you trust? To your judiciary. What security have you for justice? Their independence. Will it not be so in the federal court?[93]

Gentlemen ask, What is meant by law cases, and if they be not distinct from facts? Is there no law arising on cases of equity and admiralty? Look at the acts of Assembly. Have you not many cases where law and fact are blended? Does not the jurisdiction in point of law as well as fact, find itself completely satisfied in law and fact? The honorable gentleman says that no law of Congress can make any exception to the federal appellate jurisdiction of facts as well as law. He has frequently spoken of technical terms, and the meaning of them. What is the meaning of the term exception? Does it not mean an alteration and diminution? Congress is empowered to make exceptions to the appellate jurisdiction, as to law and fact, of the Supreme Court. These exceptions certainly go as far as the legislature may think proper for the interest and liberty of the people. Who can understand this word, exception, to extend to one case as well as the other? I am persuaded that a reconsideration of this case will convince the gentleman that he was mistaken. This may go to the cure of the mischief apprehended. Gentlemen must be satisfied that this power will not be so much abused as they have said.

[93] Same, p. 559.

The honorable member says that he derives no consolation from the wisdom and integrity of the legislature, because we call them to rectify defects which it is our duty to remove. We ought well to weigh the good and evil before we determine. We ought to be well convinced that the evil will be really produced before we decide against it. If we be convinced that the good greatly preponderates, though there be small defects in it, shall we give up that which is really good, when we can remove the little mischief it may contain, in the plain, easy method pointed out in the system itself? * * * [94]

* * * As it is late, I shall not mention all the gentleman's argument, but some parts of it are so glaring that I cannot pass them over in silence. He says that the establishment of these tribunals, and more particularly in their jurisdiction of controversies between citizens of these states and foreign citizens and subjects, is like a retrospective law. Is there no difference between a tribunal which shall give justice and effect to an existing right, and creating a right that did not exist before? The debt or claim is created by the individual. He has bound himself to comply with it. Does the creation of a new court amount to a retrospective law?

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The honorable gentleman says that unjust claims will be made, and the defendant had better pay them than go to the Supreme Court. Can you suppose such a disposition in one of your citizens, as that, to oppress another man, he will incur great expenses? What will he gain by an unjust demand? Does a claim establish a right? He must bring his witnesses to prove his claim. If he does not bring his witnesses, the expenses must fall upon him.[95] Will he go on a calculation that the defendant will not defend it, or cannot produce a witness? Will he incur a great deal of expense, from a dependence on such a chance? Those who know human nature, black as it is, must know that mankind are too well attached to their interest to run such a risk. I conceive that this power is absolutely necessary, and not dangerous; that, should it be attended by little inconveniences, they will be altered, and that they can have no interest in not altering them. Is there any real danger? When I compare it to the exercise of the same power in the government of Virginia, I am persuaded there is not. The federal government has no other motive, and has every reason for doing right which the members of our state legislature have. Will a man on the eastern shore be sent to be tried in Kentucky, or a man from Kentucky be brought to the eastern shore to have his trial? A government, by doing this, would destroy itself. I am convinced the trial by jury will be regulated in the manner most advantageous to the community.

June 20, 1788—Gov. Randolph declared that the faults which he once saw in this system he still perceived. It was his purpose, he said, to inform the committee in what his objections to this part consisted. He confessed some of the objections against the judiciary were merely chimerical; but some of them were real, which his intention of voting in favor of adoption would not prevent him from developing.[96]

June 21, 1788—Mr. Grayson: * * * With respect to the judiciary, my grand objection is, that it will interfere with the state

[94] Same, p. 560.
[95] Same, p. 561.
[96] Same, p. 562.

judiciaries, in the same manner as the exercise of the power of direct taxation will interfere with the same power in the state governments; there being no superintending central power to keep in order these two contending jurisdictions. This is an objection which is unanswerable in its nature.

In England they have great courts, which have great and interfering powers. But the controlling power of Parliament, which is a central focus, corrects them. But here each party is to shift for itself. There is no arbiter or power to correct their interference. Recurrence can be only had to the sword. I shall endeavor to demonstrate the pernicious consequences of this interference. It was mentioned, as one reason why these great powers might harmonize, that the judges of the state courts might be federal judges. The idea was approbated, in my opinion, with a great deal of justice. They are the best check we have. They secure us from encroachments on our privileges. They are the principal defence of the states. How improper would it be to deprive the state of its only defensive armor! I hope the states will never part with it. There is something extremely disgraceful in the idea. How will it apply in the practice? The independent judges of Virginia are to be subordinate to the federal judiciary. Our judges in chancery are to be judges in the inferior federal tribunals. Something has been said of the independency of the federal judges. I will only observe that it is on as corrupt a basis as the art of man can place it. The salaries of the judges may be augmented. Augmentation of salary is the only method that can be taken to corrupt a judge.[97]

It has been a thing desired by the people of England for many years, that the judges should be independent. This independency never was obtained till the second or third year of the reign of George III. It was omitted at the revolution by inattention. Their compensation is now fixed, and they hold their offices during good behavior. But I say that our federal judges are placed in a situation as liable to corruption as they could possib y be. How are judges to be operated upon? By the hopes of reward, and not the fear of a diminution of compensation. Common decency would prevent lessening the salary of a judge. Throughout the whole page of history, you will find the corruption of judges to have always arisen from that principle—the hope of reward. This is left open here. The flimsy argument brought by my friend, not as his own, but as supported by others, will not hold. It would be hoped that the judges should get too much rather than too little, and that they should be perfectly independent. What if you give six hundred or a thousand pounds annually to a judge? It is but a trifling object, when, by that little money, you purchase the most invaluable blessing that any country can enjoy.

There is to be one Supreme Court—for chancery, admiralty, common pleas, and exchequer, (which great cases are left in England to four great courts,) to which are added criminal jurisdiction, and all cases depending on the law of nations—a most extensive jurisdiction. This court has more power than any court under heaven. One set of judges ought not to have this power—and judges, particularly, who have temptation always before their eyes. The court thus organized are to execute laws made by thirteen nations, dissimilar in their customs, manners, laws, and interests. If we advert to the customs

[97] Same, p. 563.

of these different sovereignties, we shall find them repugnant and dissimilar. Yet they are all forced to unite and concur in making these laws. They are to form them on one principle, and on one idea, whether the civil law, common law, or law of nations. The gentleman was driven, the other day, to the expedient of acknowledging the necessity of having thirteen different tax laws. This destroys the principle, that he who lays a tax should feel it and bear his proportion of it.[98]

This has not been answered: it will involve consequences so absurd, that, I presume, they will not attempt to make thirteen different codes. They will be obliged to make one code. How will they make one code, without being contradictory to some of the laws of the different states?

It is said there is to be a court of equity. There is no such thing in Pennsylvania, or in some other states in the Union. A nation, in making a law, ought not to make it repugnant to the spirit of the Constitution or the genius of the people. This rule cannot be observed in forming a general code. I wish to know how the people of Connecticut would agree with the lordly pride of your Virginia nobility. Its operation will be as repugnant and contradictory, in this case, as in the establishment of a court of equity. They may inflict punishments where the state governments will give rewards. This is not probable; but still it is possible. It would be a droll sight, to see a man on one side of the street punished for a breach of the federal law, and on the other side another man rewarded by the state legislature for the same act. Or suppose it were the same person that should be thus rewarded and punished at one time for the same act; it would be a droll sight, to see a man laughing on one side of his face, and crying on the other. I wish only to put this matter in a clear point of view; and I think that if thirteen states, different in every thing, shall have to make laws for the government of the whole, they cannot harmonize, or suit the genius of the people; there being no such thing as a spirit of laws, or a pervading principle, applying to every state individually. The only promise, in this respect, is, that there shall be a republican government in each state. But it does not say whether it is to be aristocratical or democratical.

My next objection to the federal judiciary is, that it is not expressed in a definite manner. The jurisdiction of all cases arising under the Constitution and the laws of the Union is of stupendous magnitude.[99]

It is impossible for human nature to trace its extent. It is so vaguely and indefinitely expressed, that its latitude cannot be ascertained. Citizens or subjects of foreign states may sue citizens of the different states in the federal courts. It is extremely impolitic to place foreigners in a better situation than our own citizens. This was never the policy of other nations. It was the policy, in England, to put foreigners on a secure footing. The statute merchant and statute staple were favorable to them. But in no country are the laws more favorable to foreigners than to the citizens. If they be equally so, it is surely sufficient. Our own state merchants would be ruined by it, because they cannot recover debts so soon in the state courts as foreign merchants can recover of them in the federal courts. The consequence would be inevitable ruin to commerce. It will induce foreigners to decline becoming citizens. There is no reciprocity in it.

How will this apply to British creditors? I have ever been an advocate for paying the British creditors, both in Congress and else-

[98] Same, p. 564.
[99] Same, p. 565.

where. But here we do injury to our own citizens. It is a maxim in law, that debts should be on the same original foundation they were on when contracted. I presume, when the contracts were made, the creditors had an idea of the state judiciaries only. The procrastination and delays of our courts were probably in contemplation by both parties. They could have no idea of the establishment of new tribunals to affect them. Trial by jury must have been in the contemplation of both parties, and the venue was in favor of the defendant. From these premises it is clearly discernible that it would be wrong to change the nature of the contracts. Whether they will make a law other than the state laws, I cannot determine.

But we are told that it is wise, politic, and preventive of controversies with foreign nations. The treaty of peace with Great Britain does not require that creditors should be put in a better situation than they were, but that there should be no hinderance to the collection of debts. It is therefore unwise and impolitic to give those creditors such an advantage over the debtors. But the citizens of different states are to sue each other in these courts. No reliance is to be put on the state judiciaries. The fear of unjust regulations and decisions in the states is urged as the reason of this jurisdiction. Paper money in Rhode Island has been instanced by gentlemen. There is one clause in the Constitution which prevents the issuing of paper money. If this clause should pass, (and it is unanimously wished by every one that it should not be objected to,) I apprehend an execution in Rhode Island would be as good and effective as in any state in the Union.[1]

A state may sue a foreign state, or a foreign state may sue one of our states. This may form a new, American law of nations. Whence the idea could have originated, I cannot determine, unless from the idea that predominated in the time of Henry IV. and Queen Elizabeth. They took it into their heads to consolidate all the states in the world into one great political body. Many ridiculous projects were imagined to reduce that absurd idea into practice; but they were all given up at last. My honorable friend, whom I much respect, said that the consent of the parties must be previously obtained. I agree that the consent of foreign nations must be had before they become parties; but it is not so with our states. It is fixed in the Constitution that they shall become parties. This is not reciprocal. If the Congress cannot make a law against the Constitution, I apprehend they cannot make a law to abridge it. The judges are to defend it. They can neither abridge nor extend it. There is no reciprocity in this, that a foreign state should have a right to sue one of our states, whereas a foreign state cannot be sued without its own consent. The idea to me is monstrous and extravagant. It cannot be reduced to practice.

Suppose one of our states objects to the decision; arms must be recurred to. How can a foreign state be compelled to submit to a decision? Pennsylvania and Connecticut had like, once, to have fallen together concerning their contested boundaries. I was convinced that the mode provided in the Confederation, for the decision of such disputes, would not answer. The success which attended it, with respect to settling bounds, has proved to me, in some degree, that it would not answer in any other case whatever. The same difficulty must attend this mode in the execution. This high court has not a very extensive original jurisdiction. It is not material.

[1] Same, p. 566.

But its appellate jurisdiction is of immense magnitude; and what has it in view, unless to subvert the state governments? The honorable gentleman who presides has introduced the high court of appeals. I wish the federal appellate court was on the same foundation. If we investigate the subject, we shall find this jurisdiction perfectly unnecessary. It is said that its object is to prevent subordinate tribunals from making unjust decisions, to defraud creditors. I grant the suspicion is in some degree just. But would not an appeal to the state courts of appeal, or supreme tribunals, correct the decisions of inferior courts? Would not this put every thing right? Then there would be no interference of jurisdiction.[2]

But a gentleman (Mr. Marshall) says, we ought certainly to give this power to Congress, because our state courts have more business than they can possibly do. A gentleman was once asked to give up his estate because he had too much; but he did not comply. Have we not established district courts, which have for their object the full administration of justice? Our courts of chancery might, by our legislature, be put in a good situation; so that there is nothing in this observation.

But the same honorable gentleman says, that trial by jury is preserved by implication. I think this was the idea. I beg leave to consider that, as well as other observations of the honorable gentleman. After enumerating the subjects of its jurisdiction, and confining its original cognizance to cases affecting ambassadors and other public ministers, and those in which a state shall be a party, it expressly says, that, "in all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact." I would beg the honorable gentleman to turn his attention to the word appeal, which I think comprehends chancery, admiralty, common law, and every thing. But this is with such exceptions, and under such regulations, as Congress shall make. This, we are told, will be an ample security. Congress may please to make these exceptions and regulations, but they may not, also. I lay it down as a principle, that trial by jury is given up to the discretion of Congress. If they take it away, will it be a breach of this Constitution? I apprehend not; for, as they have an absolute appellate jurisdiction of facts, they may alter them as they may think proper. It is possible that Congress may regulate it properly; but still it is at their discretion to do it or not. There has been so much said of the excellency of the trial by jury, that I need not enlarge upon it. The want of trial by jury in the Roman republic obliged them to establish the regulation of patron and client. I think this must be the case in every country where this trial does not exist. The poor people were obliged to be defended by their patrons. * * *[3]

The interference of the federal judiciary and the state courts will involve the most serious and even ludicrous consequences. Both courts are to act on the same persons and things, and cannot possibly avoid interference. As to connection or coalition, it would be incestuous. How could they avoid it, on an execution from each court, either against the body or effects? How will it be with respect to mortgaged property? Suppose the same lands or slaves mortgaged to two different persons, and the mortgages foreclosed, one in the federal and another in the state court; will there be no interference in

[2] Same, p. 567.
[3] Same, p. 568.

this case? It will be impossible to avoid interference in a million of cases. I would wish to know how it can be avoided; for it is an insuperable objection in my mind. I shall no longer fatigue the committee, but shall beg leave to make some observations another time.[4]

June 21, 1788—Governor Randolph: Mr. Chairman, I shall state to the committee in what cases the federal judiciary appears to me to deserve applause, and where it merits dispraise. It has not yet been denied that a federal judiciary is necessary to a certain extent. Every government necessarily involves a judiciary as a constituent part. If, then, a federal judiciary be necessary, what are the characters of its powers? That it shall be auxiliary to the federal government, support and maintain harmony between the United States and foreign powers, and between different states, and prevent a failure of justice in cases to which particular state courts are incompetent. If this judiciary be reviewed as relative to these purposes, I think it will be found that nothing is granted which does not belong to a federal judiciary. Self-defence is its first object. Has not the Constitution said that the states shall not use such and such powers, and given exclusive powers to Congress? If the state judiciaries could make decisions conformable to the laws of their states, in derogation to the general government, I humbly apprehend that the federal government would soon be encroached upon. If a particular state should be at liberty, through its judiciary, to prevent or impede the operation of the general government, the latter must soon be undermined. It is, then, necessary that its jurisdiction should "extend to all cases in law and equity arising under this Constitution and the laws of the United States."

Its next object is to perpetuate harmony between us and foreign powers. The general government, having the superintendency of the general safety, ought to be the judges how the United States can be most effectually secured and guarded against controversies with foreign nations. I presume, therefore, that treaties and cases affecting ambassadors, other public ministers, and consuls, and all those concerning foreigners, will not be considered as improper subjects for a federal judiciary. Harmony between the states is no less necessary than harmony between foreign states and the United States. Disputes between them ought, therefore, to be decided by the federal judiciary. Give me leave to state some instances which have actually happened, which prove to me the necessity of the power of deciding controversies between two or more states. The disputes between Connecticut and Pennsylvania, and Rhode Island and Connecticut, have been mentioned. I need not particularize these. Instances have happened in Virginia. There have been disputes respecting boundaries. Under the old government, as well as this, reprisals have been made by Pennsylvania and Virginia on one another. Reprisals have been made by the very judiciary of Pennsylvania on the citizens of Virginia. Their differences concerning their boundaries are not yet perhaps ultimately determined. The legislature of Virginia, in one instance, thought this power right. In the case of Mr. Nathan, they thought the determination of the dispute ought to be out of the state, for fear of partiality.

It is with respect to the rights of territory that the state judiciaries are not competent. If the claimants have a right to the territories

[4] Same, p. 569–570.

claimed, it is the duty of a good government to provide means to put them in possession of them. If there be no remedy, it is the duty of the general government to furnish one.

Cases of admiralty and maritime jurisdiction cannot, with propriety, be vested in particular state courts. As our national tranquility and reputation, and intercourse with foreign nations, may be affected by admiralty decisions; as they ought, therefore, to be uniform; and as there can be no uniformity if there be thirteen distinct, independent jurisdictions,—this jurisdiction ought to be in the federal judiciary. On these principles, I conceive the subjects themselves are proper for the federal judiciary.

Although I do not concur with the honorable gentlemen that the judiciary is so formidable, yet I candidly admit that there are defects in its construction, among which may be objected too great an extension of jurisdiction. I cannot say, by any means, that its jurisdiction is free from fault, though I conceive the subjects to be proper. It is ambiguous in some parts, and unnecessarily extensive in others. It extends to all cases in law and equity arising under the Constitution. What are these cases of law and equity? Do they not involve all rights, from an inchoate right to a complete right, arising from this Constitution? Notwithstanding the contempt gentlemen express for technical terms, I wish such were mentioned here. I would have thought it more safe, if it had been more clearly expressed. What do we mean by the words *arising under the Constitution*? What do they relate to? I conceive this to be very ambiguous. If my interpretation be right, the word *arising* will be carried so far that it will be made use of to aid and extend the federal jurisdiction.

As to controversies between the citizens of different states, I am sure the general government will make provision to prevent men being harassed to the federal court. But I do not see any absolute necessity for vesting it with jurisdiction in these cases.

With respect to that part which gives *appellate jurisdiction*, both as to law and fact, I concur with the honorable gentleman who presides, that it is unfortunate, and my lamentation over it would be incessant, were there no remedy. I can see no reason for giving it jurisdiction with respect to fact as well as law; because we find, from our own experience, that appeals as to fact are not necessary. My objection would be unanswerable, were I not satisfied that it contains its own cure, in the following words: "with such exceptions and under such regulations as Congress shall make." It was insisted on by gentlemen that these words could not extend to law and fact, and that they could not separate the fact from the law. This construction is irrational; for, if they cannot separate the law from the fact, and if the exceptions are prevented from applying to law and fact, these words would have no force at all. It would be proper to refer here to any thing that could be understood in the federal court. They may except generally both as to law and fact, or they may except as to the law only, or fact only. Under these impressions, I have no difficulty in saying that I consider it as an unfortunate clause. But when I thus impeach it, the same candor which I have hitherto followed calls upon me to declare that it is not so dangerous as it has been represented. Congress can regulate it properly, and I have no doubt they will. * * *[5]

[5] Same, p. 570–573.

* * * The appellate jurisdiction might be corrected, as to matters of fact, by the exceptions and regulations of Congress, but certainly will be removed by the amendatory provision in the instrument itself; so that we do not depend on the virtue of our representatives only, but the sympathy and feelings between the inhabitants of the states. On the same grounds, the sum on which appeals will be allowed may be limited to a considerable amount, in order to prevent vexatious and oppressive appeals. The appellate jurisdiction, as to fact, and in trivial sums, are the two most material defects. If it be not considered too early, as ratification has not yet been spoken of, I beg leave to speak of it. If I did believe, with the honorable gentleman, that all power not expressly retained was given up by the people, I would detest this government. * * *[6]

On June 23, 1788—Mr. Henry: * * * proceeded to state the cases which might arise under the proposed plan of government, and the probable *interference of the federal judiciary with the state judiciaries;* * * *[7]

He then proceeded to state (further) the appellate jurisdiction of the judicial power, both as to law and fact, with such exceptions and under such regulations as Congress shall make. He observed, that, as Congress had a right to organize the federal judiciary, they might or might not have recourse to a jury, as they pleased. He left it to the candor of the honorable gentleman to say whether those persons who were at the expense of taking witnesses to Philadelphia, or wherever the federal judiciary may sit, could be certain whether they were to be heard before a jury or not. * * *[8]

[At this point Mr. Henry referred at some length to trial by jury. His remarks on that subject are omitted.]

On the same day, Mr. Monroe said: Mr. Chairman, I am satisfied of the propriety of closing this subject, sir; but I must beg leave to trouble the committee a little further. We find, sir, that two different governments are to have concurrent jurisdiction in the same object. May not this bring on a conflict in the judiciary? And if it does, will it not end in the ruin of one or the other? There will be two distinct judiciaries—one acting under the federal authority, the other the state authority. May it not also tend to oppress the people by having suits going on against them in both courts for the same debt?[9]

Mr. George Mason said: Mr. Chairman, I should not have troubled the committee again on this subject, were there not some arguments in support of that plan, sir, that appear to me totally unsatisfactory. With respect to concurrent jurisdiction, sir, the honorable gentleman has observed, that county courts had exercised this right without complaint. Have Hanover and Henrico the same objects? Can an officer in either of those counties serve a process in the other? The federal judiciary has concurrent jurisdiction throughout the states, and therefore must interfere with the state judiciaries. Congress can pass a law constituting the powers of the federal judiciary throughout the states; they may also pass a law vesting the federal power in the state judiciaries. These laws are *permanent*, and cannot be controverted by any law of the state.

If we are forming a general government, and not states, I think we should perfectly comply with the genius of the paper before you; but

[6] Same, p. 576.
[7] Same, p. 577.
[8] Same, p. 578.
[9] Same, p. 582.

of we mean to form one great national government for thirteen states, the arguments which I have heard hitherto in support of this part of the plan do not apply at all. We are willing to give up all powers which are necessary to preserve the peace of the Union, so far as respects foreign nations, or our own preservation; but we will not agree to a federal judiciary, which is not necessary for this purpose, because the powers there granted will tend to oppress the middling and lower class of people. A poor man seized by the federal officers, and carried to the federal court,—has he any chance under such a system as this? Justice itself may be bought too dear; yet this may be the case. It may cost cost a man five hundred pounds to recover one hundred pounds. These circumstances are too sacred to leave undefined; and I wish to see things certain, positive, and clear. * * * [10]

NORTH CAROLINA

July 24, 1788, Mr. Davie: * * * It may be also proper to observe, that the executive is separated in its functions from the legislature, as well as the nature of the case would admit, and the judiciary from both.[11]

On this day, the Convention considered the impeachment clause of the Constitution, and during the course of discussion on that subject, Mr. Iredell said: * * * As it is to be presumed that inferior tribunals will be constituted, there will be no occasion for going always to the Supreme Court, even in cases where the federal courts have exclusive jurisdiction. * * *[12]

While discussing the election of representatives to Congress, Mr. Steele said: * * * The judicial power of that government is so well constructed as to be a check. There was no check in the old Confederation. Their power was, in principle and theory, transcendent. If the Congress make laws inconsistent with the Constitution, independent judges will not uphold them, nor will the people obey them. A universal resistance will ensue. In some countries, the arbitrary disposition of rules may enable them to overturn the liberties of the people; but in a country like this, where every man is his own master, and where almost every man is a freeholder, and has the right of election, the violations of a constitution will not be passively permitted.[13]

July 26, 1788—Mr. Iredell: One great alteration proposed by the Constitution—and which is a capital improvement on the Articles of Confederation—is, that the executive, legislative, and judicial powers should be separate and distinct. The best writers, and all the most enlightened part of mankind, agree that it is essential to the preservation of liberty, that such distinction and separation of powers should be made. But this distinction would have very little efficacy if each power had no means to defend itself against the encroachment of the others.[14]

July 28—Mr. Spencer: Mr. Chairman, I rise to declare my disapprobation of this, likewise. It is an essential article in our Constitution, that the legislative, the executive, and the supreme judicial powers, of government, ought to be forever separate and distinct from each other. * * * [15]

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[10] Same, p. 583-584.
[11] Elliot's Debates on the Federal Constitution, by Jonathan Elliot. Vol. IV, p. 21.
[12] Same, p. 37.
[13] Same, p. 71-72.
[14] Same, p. 73-74.
[15] Same, p. 116.

* * * The first is, that the whole executive department, being separate and distinct from that of the legislative and judicial, would be amenable to the justice of the land: the President and his council, or either or any of them, might be impeached, tried, and condemned, for any misdemeanor in office. Whereas, on the present plan proposed, the Senate, who are to advise the President, and who, in effect, are possessed of the chief executive powers, let their conduct be what it will, are not amenable to the public justice of their country: if they may be impeached, there is no tribunal invested with jurisdiction to try them. It is true that the proposed Constitution provides that, when the President is tried, the chief justice shall preside. * * * [16]

Another important consequence of the plan I wish had taken place is that, the office of the President being thereby unconnected with that of the legislative, as well as the judicial, he would have that independence which is necessary to form the intended check upon the acts passed by the legislature before they obtain the sanction of laws. * * * [17]

On the same day, Mr. Davie said: * * * It is true, the great Montesquieu, and several other writers, have laid it down as a maxim not to be departed from, that the legislative, executive, and judicial powers should be separate and distinct. But the idea that these gentlemen had in view has been misconceived or misrepresented. An absolute and complete separation is not meant by them. It is impossible to form a government upon these principles. Those states who had made an absolute separation of these three powers their leading principle, have been obliged to depart from it. It is a principle, in fact, which is not to be found in any of the state governments. In the government of New York, the executive and judiciary have a negative similar to that of the President of the United States. This is a junction of all the three powers, and has been attended with the most happy effects. In this state, and most of the others, the executive and judicial powers are dependent on the legislature. Has not the legislature of this state the power of appointing the judges? Is it not in their power also to fix their compensation? What independence can there be in persons who are obliged to be obsequious and cringing for their office and salary? Are not our judges dependent on the legislature for every morsel they eat? It is not difficult to discern what effect this may have on human nature. The meaning of this maxim I take to be this—that the whole legislative, executive, and judicial powers should not be exclusively blended in any one particular instance. The Senate try impeachments. This is their only judicial cognizance. As to the ordinary objects of a judiciary—such as the decision of controversies, the trial of criminals, etc.—the judiciary is perfectly separate and distinct from the legislative and executive branches. The House of Lords, in England, have great judicial powers; yet this is not considered as a blemish in their constitution. Why? Because they have not the whole legislative power. Montesquieu, at the same time that he laid down this maxim, was writing in praise of the British government. At the very time he recommended this distinction of powers, he passed the highest eulogium on a constitution wherein they were all partially blended. So that the meaning of the maxim, as laid down by him and other writers, must be, that these three branches must not be entirely blended in one

[16] Same, p. 117.
[17] Same, p. 118.

body. And this system before you comes up to the maxim more completely than the favorite government of Montesquieu.[18]

On the same day, the Convention having Article III under consideration, Mr. Spencer discussed generally the jurisdiction of the federal courts and the need for a bill of rights. He was followed by other members of the Convention. Only such passages of this general discussion as may be of significance in this paper are abstracted.

On August 1, 1788, the Convention adopted a resolution containing several paragraphs relating to the judiciary. They are as follows:

5. That the legislative, executive, and judiciary powers of government should be separate and distinct, and that the members of the two first may be restrained from oppression by feeling and participating the public burdens: they should, at fixed periods, be reduced to a private station, return into the mass of the people, and the vacancies be supplied by certain and regular elections, in which all or any part of the former members to be eligible or ineligible, as the rules of the constitution of government and the laws shall direct.[19] * * *

15. That the judicial power of the United States shall be vested in one Supreme Court, and in such courts of admiralty as Congress may from time to time ordain and establish in any of the different states. The judicial power shall extend to all cases in law and equity arising under treaties made, or which shall be made, under the authority of the United States; to all cases affecting ambassadors, other foreign ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states, and between parties claiming lands under the grants of different states. In all cases affecting ambassadors, other foreign ministers, and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction as to matters of law only, except in cases of equity, and of admiralty and maritime jurisdiction, in which the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make: but the judicial power of the United States shall extend to no case where the cause of action shall have originated before the ratification of this Constitution, except in disputes between states about their territory, disputes between persons claiming lands under the grants of different states, and suits for debts due to the United States.[20] * * *

25. That Congress shall not, directly or indirectly, either by themselves or through the judiciary, interfere with any one of the states in the redemption of paper money already emitted and now in circulation, or in liquidating and discharging the public securities of any one of the states; but each and every state shall have the exclusive right of making such laws and regulations, for the above purposes, as they shall think proper.[21] * * *

SOUTH CAROLINA

The South Carolina Convention met on January 16, 1788. Mr. Charles Pinckney addressed the Convention on that day, and, among other things, said: The judicial he conceived to be at once the most important and intricate part of the system. That a supreme federal jurisdiction was indispensable, cannot be denied. It is equally true that, in order to insure the administration of justice, it was necessary to give it all the powers, original as well as appellate, the Constitution has enumerated; without it we could not expect a due observance of treaties—that the state judiciary would confine themselves within their proper sphere, or that general sense of justice pervade the Union which this part of the Constitution is intended to introduce and protect—that much, however, would depend upon the wisdom of the legislatures who are to organize it—that, from the extensiveness of its powers, it may be easily seen that, under a wise management, this

[18] Same, p. 121-122.
[19] Same, p. 243.
[20] Same, p. 246.
[21] Same, p. 247.

department might be made the keystone of the arch, the means of connecting and binding the whole together, of preserving uniformity in all the judicial proceedings of the Union—that, in republics, much more (in time of peace) would always depend upon the energy and integrity of the judicial than on any other part of the government—that, to insure these, extensive authorities were necessary; particularly so were they in a tribunal constituted as this is, whose duty it would be not only to decide all national questions which should arise within the Union, but to control and keep the state judicials within their proper limits whenever they shall attempt to interfere with its power.* * * [22]

On the subject of juries, in civil cases, the Convention were anxious to make some declaration; but when they reflected that all courts of admiralty and appeals, being governed in their propriety by the civil law and the laws of nations, never had, or ought to have, juries, they found it impossible to make any precise declaration upon the subject; they therefore left it as it was, trusting that the good sense of their constituents would never induce them to suppose that it could be the interest or intention of the general government to abuse one of the most invaluable privileges a free country can boast; in the loss of which, themselves, their fortunes and connections, must be so materially involved, and to the deprivation of which, except in the cases alluded to, the people of this country would never submit. * * * [23]

The Speaker, Hon. John Julius Pringle, referring to the making of treaties by the President and the Senate, said, inter alia: * * * No such dangers as the gentleman apprehends can ensue from vesting it with the President and Senate. Although the treaties they make may have the force of laws when made, they have not, therefore, legislative power. It would be dangerous, indeed, to trust them with the power of making laws to affect the rights of individuals; for this might tend to the oppression of individuals, who could not obtain redress. All the evils would, in that case, flow from blending the legislative, executive, and judicial powers.[24]

Here, as in the several Conventions generally, considerable discussion was devoted to trial by jury. The subject is withheld for special treatment later.

On May 14, 1788, Mr. Charles Pinckney, addressing the Convention generally, said, inter alia: In Pennsylvania and Georgia, the whole powers of government are lodged in a legislative body, of a single branch, over which there is no control; nor are their executives or judicials, from their connection and necessary dependence on the legislature, capable of strictly executing their respective offices. In all the other states, except Maryland, Massachusetts, and New York, they are only so far improved as to have a legislature with two branches, which completely involve and swallow up all the powers of their government. In neither of these are the judicial or executive placed in that firm or independent situation which can alone secure the safety of the people or the just administration of the laws. In Maryland, one branch of their legislature is a Senate, chosen, for five years, by electors chosen by the people. The knowledge and firmness which this body have, upon all occasions, displayed, not only in the exercise of their legislative duties, but in withstanding and defeating such of the projects of the other house as appeared to them founded in local and

[22] Same, p. 257–258.
[23] Same, p. 260.
[24] Same, p. 269.

personal motives, have long since convinced me that the Senate of Maryland is the best model of a senate that has yet been offered to the Union; that it is capable of correcting many of the vices of the other parts of their Constitution, and, in a great measure, atoning for those defects which, in common with the states I have mentioned, are but too evident in their execution—the want of stability and independence in the judicial and executive departments.

In Massachusetts, we find the principle of legislation more improved by the revisionary power which is given to their governor, and the independence of their judges.

In New York, the same improvement in legislation has taken place as in Massachusetts; but here, from the executive's being elected by the great body of the people; holding his office for three years, and being reeligible; from the appointment to offices being taken from the legislature and placed in a select council,—I think their Constitution is, upon the whole, the best in the Union. Its faults are the want of permanent salaries to their judges, and giving to their executive the nomination to offices, which is, in fact, giving him the appointment.

It does not, however, appear to me, that this can be called a vice of their system, as I have always been of opinion that the insisting upon the right to nominate was a usurpation of their executive's, not warranted by the letter or meaning of their Constitution.

These are the outlines of their various forms, in few of which are their executive or judicial departments wisely constructed, or that solid distinction adopted between the branches of their legislative which can alone provide for the influence of different principles in their operation.[25]

[25] Same, p. 324-325.

III. APPENDIX*

THE FEDERALIST.

(Number LXXVIII, New York, June 17, 20, 1788.)

HAMILTON.

A VIEW OF THE CONSTITUTION OF THE JUDICIAL DEPARTMENT, IN RELATION TO THE TENURE OF GOOD BEHAVIOUR.

We proceed now to an examination of the judiciary department of the proposed government.

In unfolding the defects of the existing confederation, the utility and necessity of a federal judicature have been clearly pointed out. It is the less necessary to recapitulate the considerations there urged; as the propriety of the institution in the abstract is not disputed: The only questions which have been raised being relative to the manner of constituting it, and to its extent. To these points, therefore, our observations shall be confined.

The manner of constituting it seems to embrace these several objects: 1st. The mode of appointing the judges: 2d. The tenure by which they are to hold their places: 3d. The partition of the judiciary authority between different courts, and their relations to each other.

First. As to the mode of appointing the judges: This is the same with that of appointing the officers of the union in general, and has been so fully discussed in the two last numbers, that nothing can be said here which would not be useless repetition.

Second. As to the tenure by which the judges are to hold their places: This chiefly concerns their duration in office; the provisions for their support; the precautions for their responsibility.

According to the plan of the convention, all the judges who may be appointed by the United States are to hold their offices *during good behaviour;* which is conformable to the most approved of the state constitutions—among the rest, to that of this state. Its propriety having been drawn into question by the adversaries of that plan, is no light symptom of the range for objection, which disorders their imaginations and judgments. The standard of good behaviour for the continuance in office of the judicial magistracy, is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy, it is an excellent barrier to the despotism of the prince: in a republic, it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.

Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated

*NOTE.--The Appendix contains among other selections several contributions by the staff of the Legislative Reference Service.

from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honours, but holds the sword of the community: The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated: The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm for the efficacious exercise even of this faculty.

This simple view of the matter suggests several important consequences: it proves incontestibly, that the judiciary is, beyond comparison, the weakest of the three departments of power,[1] that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves, that, though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter: I mean so long as the judiciary remains truly distinct from both the legislature and executive. For I agree, that "there is no liberty, if the power of judging be not separated from the legislative and executive powers." [2] It proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments; that, as all the effects of such an union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as, from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed or influenced by its co-ordinate branches; that, as nothing can contribute so much to its firmness and independence as PERMANENCY IN OFFICE, this quality may therefore be justly regarded as an indispensable ingredient in its constitution; and, in a great measure, as the CITADEL of the public justice and the public security.

The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

Some perplexity respecting the right of the courts to pronounce legislative acts void, because contrary to the constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void, must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the grounds on which it rests cannot be unacceptable.

[1] Montesquieu, speaking of them, says, "of the three powers above mentioned, the JUDICIARY is next to nothing." Spirit of Laws, vol. 1, page 186.

[2] Idem. page 181.

There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men, acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.

If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the constitution. It is not otherwise to be supposed, that the constitution could intend to enable the representatives of the people to substitute their *will* to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. "A constitution is, in fact, and must be, regarded by the judges as a fundamental law." It must therefore belong to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; in other words, the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Nor does the conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.

This exercise of judicial discretion, in determining between two contradictory laws, is exemplified in a familiar instance. It not uncommonly happens, that there are two statutes existing at one time, clashing in whole or in part with each other, and neither of them containing any repealing clause or expression. In such a case, it is the province of the courts to liquidate and fix their meaning and operation: So far as they can, by any fair construction be reconciled to each other, reason and law conspire to dictate that this should be done: Where this is impracticable, it becomes a matter of necessity to give effect to one, in exclusion of the other. The rule which has obtained in the courts for determining their relative validity is, that the last in order of time shall be preferred to the first. But this is a mere rule of construction, not derived from any positive law, but from the nature and reason of the thing. It is a rule not enjoined upon the courts by legislative provision, but adopted by themselves, as consonant to truth and propriety, for the direction of their conduct as interpreters of the law. They thought it reasonable, that between

the interfering acts of an *equal* authority, that which was the last indication of its will, should have the preference.

But in regard to the interfering acts of a superior and subordinate authority, of an original and derivative power, the nature and reason of the thing indicate the converse of that rule as proper to be followed. They teach us, that the prior act of a superior, ought to be preferred to the subsequent act of an inferior and subordinate authority; and that, accordingly, whenever a particular statute contravenes the constitution, it will be the duty of the judicial tribunals to adhere to the latter, and disregard the former.

It can be of no weight to say, that the courts, on the pretence of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it proved any thing, would prove that there ought to be no judges distinct from that body.

If then the courts of justice are to be considered as the bulwarks of a limited constitution, against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges, which must be essential to the faithful performance of so arduous a duty.

This independence of the judges is equally requisite to guard the constitution and the rights of individuals, from the effects of those ill humours which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the mean time, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community. Though I trust the friends of the proposed constitution will never concur with its enemies,[3] in questioning that fundamental principle of republican government, which admits the right of the people to alter or abolish the established constitution whenever they find it inconsistent with their happiness; yet it is not to be inferred from this principle, that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents incompatible with the provisions in the existing constitution, would, on that account, be justifiable in a violation of those provisions; or that the courts would be under a greater obligation to connive at infractions in this shape, than when they had proceeded wholly from the cabals of the representative body. Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge of their sentiments, can warrant their representative in a departure from it, prior to such an act. But it is easy to see, that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the constitution, where legislative invasions of it had been instigated by the major voice of the community.

[3] Vide Protest of the minority of the convention of Pennsylvania, Martin's speech, &c.

But it is not with a view to infractions of the constitution only, that the independence of the judges may be an essential safe-guard against the effects of occasional ill humours in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity, and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of an iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled by the very motives of the injustice they meditate, to qualify their attempts. This is a circumstance calculated to have more influence upon the character of our governments, than but few may imagine. The benefits of the integrity and moderation of the judiciary have already been felt in more states than one; and though they may have displeased those whose sinister expectations they may have disappointed, they must have commanded the esteem and applause of all the virtuous and disinterested. Considerate men, of every description, ought to prize whatever will tend to beget or fortify that temper in the courts; as no man can be sure that he may not be to-morrow the victim of a spirit of injustice, by which he may be a gainer to-day. And every man must now feel that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence, and to introduce in its stead universal distrust and distress.

That inflexible and uniform adherence to the rights of the constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence. If the power of making them was committed either to the executive or legislature, there would be danger of an improper complaisance to the branch which possessed it: if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the constitution and the laws.

There is yet a further and a weighty reason for the permanency of judicial offices; which is deducible from the nature of the qualifications they require. It has been frequently remarked, with great propriety, that a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government. To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived, from the variety of controversies which grow out of the folly and wickedness of mankind, that the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them. Hence it is, that there can be but few men in the society, who will have sufficient skill in the laws to qualify them for the stations of judges. And making the proper deductions for the ordinary depravity of human nature, the

number must be still smaller, of those who unite the requisite integrity with the requisite knowledge. These considerations apprize us, that the government can have no great option between fit characters; and that a temporary duration in office, which would naturally discourage such characters from quitting a lucrative line of practice to accept a seat on the bench, would have a tendency to throw the administration of justice into hands less able, and less well qualified, to conduct it with utility and dignity. In the present circumstances of this country, and in those in which it is likely to be for a long time to come, the disadvantages on this score would be greater than they may at first sight appear; but it must be confessed, that they are far inferior to those which present themselves under the other aspects of the subject.

Upon the whole, there can be no room to doubt, that the convention acted wisely in copying from the models of those constitutions which have established *good behaviour* as the tenure of judicial offices, in point of duration; and that, so far from being blameable on this account, their plan would have been inexcusably defective, if it had wanted this important feature of good government. The experience of Great Britain affords an illustrious comment on the excellence of the institution.

PUBLIUS.

THE FEDERALIST

(Number LXXIX, New York, June 24, 1788.)

HAMILTON

A FURTHER VIEW OF THE JUDICIAL DEPARTMENT, IN RELATION TO THE PROVISIONS FOR THE SUPPORT AND RESPONSIBILITY OF THE JUDGES

Next to permanency in office, nothing can contribute more to the independence of the judges, than a fixed provision for their support. The remark made in relation to the president, is equally applicable here. (In the general course of human nature, *a power over a man's subsistence amounts to a power over his will.*) And we can never hope to see realized in practice the complete separation of the judicial from the legislative power, in any system, which leaves the former dependent for pecuniary resource on the occasional grants of the latter. The enlightened friends to good government, in every state, have seen cause to lament the want of precise and explicit precautions in the state constitutions on this head. Some of these indeed have declared that *permanent* [1] salaries should be established for the judges; but the experiment has in some instances shown, that such expressions are not sufficiently definite to preclude legislative evasions. Something still more positive and unequivocal has been evinced to be requisite. The plan of the convention accordingly has provided, that the judges of the United States "shall at *stated times* receive for their services a compensation, which shall not be *diminished* during their continuance in office."

This, all circumstances considered, is the most eligible provision that could have been devised. It will readily be understood, that the fluctuations in the value of money, and in the state of society, ren-

[1] Vide Constitution of Massachusetts, Chap. 2, Sect. 1, Art. 13.

dered a fixed rate of compensation in the constitution inadmissible. What might be extravagant to-day, might in half a century become penurious and inadequate. It was therefore necessary to leave it to the discretion of the legislature to vary its provisions in conformity to the variations in circumstances; yet under such restrictions as to put it out of the power of that body to change the condition of the individual for the worse. A man may then be sure of the ground upon which he stands, and can never be deterred from his duty by the apprehension of being placed in a less eligible situation. The clause which has been quoted combines both advantages. The salaries of judicial offices may from time to time be altered, as occasion shall require, yet so as never to lessen the allowance with which any particular judge comes into office, in respect to him. It will be observed that a difference has been made by the convention between the compensation of the president and of the judges. That of the former can neither be increased nor diminished. That of the latter can only not be diminished. This probably arose from the difference in the duration of the respective offices. As the president is to be elected for no more than four years, it can rarely happen that an adequate salary, fixed at the commencement of that period, will not continue to be such to its end. But with regard to the judges, who if they behave properly, will be secured in their places for life, it may well happen, especially in the early stages of the government, that a stipend, which would be very sufficient at their first appointment, would become too small in the progress of their service.

This provision for the support of the judges bears every mark of prudence and efficacy; and it may be safely affirmed that, together with the permanent tenure of their offices, it affords a better prospect of their independence than is discoverable in the constitutions of any of the states, in regard to their own judges.

The precautions for their responsibility, are comprised in the article respecting impeachments. They are liable to be impeached for malconduct by the house of representatives, and tried by the senate, and if convicted, may be dismissed from office and disqualified for holding any other. This is the only provision on the point, which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own constitution in respect to our own judges.

The want of a provision for removing the judges on account of inability, has been a subject of complaint. But all considerate men will be sensible that such a provision would either not be practised upon, or would be more liable to abuse, than calculated to answer any good purpose. The mensuration of the faculties of the mind has, I believe, no place in the catalogue of known arts. An attempt to fix the boundary between the regions of ability and inability, would much oftener give scope to personal and party attachments and enmities, than advance the interests of justice, or the public good. The result, except in the case of insanity, must for the most part be arbitrary; and insanity, without any formal or express provision, may be safely pronounced to be a virtual disqualification.

The constitution of New York, to avoid investigations that must forever be vague and dangerous, has taken a particular age as the criterion of inability. No man can be a judge beyond sixty. I believe there are few at present who do not disapprove of this provision. There is no station, in relation to which, it is less proper than

to that of a judge. The deliberating and comparing faculties generally preserve their strength much beyond that period, in men who survive it; and when, in addition to this circumstance, we consider how few there are who outlive the season of intellectual vigour, and how improbable it is that any considerable proportion of the bench, whether more or less numerous, should be in such a situation at the same time, we shall be ready to conclude that limitations of this sort have little to recommend them. In a republic, where fortunes are not affluent, and pensions not expedient, the dismission of men from stations in which they have served their country long and usefully, on which they depend for subsistence, and from which it will be too late to resort to any other occupation for a livelihood, ought to have some better apology to humanity, than is to be found in the imaginary danger of a superannuated bench.

PUBLIUS.

THE FEDERALIST

(Number LXXX, New York, June 27 and July 1, 1788)

HAMILTON

A FURTHER VIEW OF THE JUDICIAL DEPARTMENT, IN RELATION TO THE EXTENT OF ITS POWERS

To judge with accuracy of the due extent of the federal judicature, it will be necessary to consider, in the first place, what are its proper objects.

It seems scarcely to admit of controversy, that the judiciary authority of the union ought to extend to these several descriptions of cases. 1st. To all those which arise out of the laws of the United States, passed in pursuance of their just and constitutional powers of legislation; 2d. To all those which concern the execution of the provisions expressly contained in the articles of unions; 3d. To all those in which the United States are a party; 4th. To all those which involve the PEACE of the CONFEDERACY, whether they relate to the intercourse between the United States and foreign nations, or to that between the States themselves; 5th. To all those which originate on the high seas, and are of admiralty or maritime jurisdiction; and lastly, to all those in which the state tribunals cannot be supposed to be impartial and unbiassed.

The first point depends upon this obvious consideration, that there ought always to be a constitutional method of giving efficacy to constitutional provisions. What, for instance, would avail restrictions on the authority of the state legislatures, without some constitutional mode of enforcing the observance of ,them? The states, by the plan of the convention, are prohibited from doing a variety of things; some of which are incompatible with the interests of the union; others, with the principles of good government. The imposition of duties on imported articles, and the emission of paper money, are specimens of each kind. No man of sense will believe that such prohibitions would be scrupulously regarded, without some effectual power in the government to restrain or correct the infractions of them. This power must either be a direct negative on the state laws, or an authority in the federal courts, to over-rule such as might be in mani-

fest contravention of the articles of union. There is no third course that I can imagine. The latter appears to have been thought by the convention preferable to the former, and I presume will be most agreeable to the states.

As to the second point, it is impossible, by any argument or comment, to make it clearer than it is in itself. If there are such things as political axioms, the propriety of the judicial power of a government being co-extensive with its legislative, may be ranked among the number. The mere necessity of uniformity in the interpretation of the national laws, decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed.

Still less need be said in regard to the third point. Controversies between the nation and its members or citizens, can only be properly referred to the national tribunals. Any other plan would be contrary to reason, to precedent, and to decorum.

The fourth point rests on this plain proposition, that the peace of the WHOLE, ought not to be left at the disposal of a PART. The union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury, ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, is with reason classed among the just causes of war, it will follow, that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. This is not less essential to the preservation of the public faith, than to the security of the public tranquillity. A distinction may perhaps be imagined, between cases arising upon treaties and the laws of nations, and those which may stand merely on the footing of the municipal law. The former kind may be supposed proper for the federal jurisdiction, the latter for that of the states. But it is at least problematical, whether an unjust sentence against a foreigner, where the subject of controversy was wholly relative to the *lex loci*, would not, if unredressed, be an aggression upon his sovereign, as well as one which violated the stipulations of a treaty, or the general law of nations. And a still greater objection to the distinction would result from the immense difficulty, if not impossibility, of a practical discrimination between the cases of one complexion and those of the other. So great a proportion of the controversies in which foreigners are parties, involve national questions, that it is by far most safe, and most expedient, to refer all those in which they are concerned to the national tribunals.

The power of determining causes between two states, between one state and the citizens of another, and between the citizens of different states, is perhaps not less essential to the peace of the union, than that which has been just examined. History gives us a horrid picture of the dissentions and private wars which distracted and desolated Germany, prior to the institution of the IMPERIAL CHAMBER by Maximilian, towards the close of the fifteenth century: and informs us, at the same time, of the vast influence of that institution, in appeasing the disorders, and establishing the tranquillity of the empire. This was a court invested with authority to decide finally all differences among the members of the Germanic body.

A method of terminating territorial disputes between the states, under the authority of the federal head, was not unattended to, even

in the imperfect system by which they have been hitherto held together. But there are other sources, besides interfering claims of boundary, from which bickerings and animosities may spring up among the members of the union. To some of these we have been witnesses in the course of our past experience. It will readily be conjectured, that I allude to the fraudulent laws which have been passed in too many of the states. And though the proposed constitution establishes particular guards against the repetition of those instances, which have heretofore made their appearance, yet it is warrantable to apprehend, that the spirit which produced them, will assume new shapes that could not be foreseen, nor specifically provided against. Whatever practices may have a tendency to disturb the harmony of the states, are proper objects of federal superintendence and control.

It may be esteemed the basis of the union, that "the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states." And if it be a just principle, that every government *ought to possess the means of executing its own provisions, by its own authority*, it will follow, that in order to the inviolable maintenance of that equality of privileges and immunities, to which the citizens of the union will be entitled, the national judiciary ought to preside in all cases, in which one state or its citizens are opposed to another state or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal, which, having no local attachments, will be likely to be impartial, between the different states and their citizens, and which, owing its official existence to the union, will never be likely to feel any bias inauspicious to the principles on which it is founded.

The fifth point will demand little animadversion. The most bigotted idolizers of state authority, have not thus far shown a disposition to deny the national judiciary the cognizance of maritime causes. These so generally depend on the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace. The most important part of them are, by the present confederation, submitted to federal jurisdiction.

The reasonableness of the agency of the national courts, in cases in which the state tribunals cannot be supposed to be impartial, speaks for itself. No man ought certainly to be a judge in his own cause, or in any cause, in respect to which he has the least interest or bias. This principle has no inconsiderable weight in designating the federal courts, as the proper tribunals for the determination of controversies between different states and their citizens. And it ought to have the same operation, in regard to some cases, between the citizens of the same state. Claims to land under grants of different states, founded upon adverse pretensions of boundary, are of this description. The courts of neither of the granting states could be expected to be unbiassed. The laws may have even prejudged the question, and tied the courts down to decisions in favour of the grants of the state to which they belonged. And where this had not been done, it would be natural that the judges, as men, should feel a strong predilection to the claims of their own government.

Having thus laid down and discussed the principles which ought to regulate the constitution of the federal judiciary, we will proceed to test, by these principles, the particular powers of which, according

to the plan of the convention, it is to be composed. It is to comprehend "all cases in law and equity arising under the constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state, claiming lands under grants of different states; and between a state or the citizens thereof, and foreign states, citizens and subjects." This constitutes the entire mass of the judicial authority of the union. Let us now review it in detail. It is then to extend,

First. To all cases in law and equity, *arising under the constitution* and *the laws of the United States.* This corresponds with the two first classes of causes, which have been enumerated, as proper for the jurisdiction of the United States. It has been asked, what is meant by "cases arising under the constitution," in contra-distinction from those "arising under the laws of the United States?" The difference has been already explained. All the restrictions upon the authority of the state legislatures furnish examples. They are not, for instance, to emit paper money; but the interdiction results from the constitution, and will have no connexion with any law of the United States. Should paper money, notwithstanding, be emitted, the controversies concerning it would be cases arising under the constitution, and not under the laws of the United States, in the ordinary signification of the terms. This may serve as a sample of the whole.

It has also been asked, what need of the word "equity?" What equitable causes can grow out of the constitution and laws of the United States? There is hardly a subject of litigation, between individuals, which may not involve those ingredients of *fraud, accident, trust,* or *hardship,* which would render the matter an object of equitable, rather than of legal jurisdiction, as the distinction is known and established in several of the states. It is the peculiar province, for instance, of a court of equity to relieve against what are called hard bargains: These are contracts, in which, though there may have been no direct fraud or deceit, sufficient to invalidate them in a court of law; yet there may have been some undue and unconscionable advantage taken of the necessities or misfortunes of one of the parties, which a court of equity would not tolerate. In such cases, where foreigners were concerned on either side, it would be impossible for the federal judicatories to do justice without an equitable, as well as a legal jurisdiction. Agreements to convey lands claimed under the grants of different states, may afford another example of the necessity of an equitable jurisdiction in the federal courts. This reasoning may not be so palpable in those states where the formal and technical distinction between LAW and EQUITY is not maintained, as in this state, where it is exemplified by every day's practice.

The judiciary authority of the union is to extend—

Second. To treaties made, or which shall be made, under the authority of the United States, and to all cases affecting ambassadors, other public ministers and consuls. These belong to the fourth class of the enumerated cases, as they have an evident connexion with the preservation of the national peace.

Third. To cases of admiralty and maritime jurisdiction. These form, althogether, the fifth of the enumerated classes of causes, proper for the cognizance of the national courts.

Fourth. To controversies to which the United States shall be a party. These constitute the third of those classes.

Fifth. To controversies between two or more states; between a state and citizens of another state; between citizens of different states. These belong to the fourth of those classes, and partake, in some measure, of the nature of the last.

Sixth. To cases between the citizens of the same state, *claiming lands under grants of different states.* These fall within the last class, and *are the only instances in which the proposed constitution directly contemplates the cognizance of disputes between the citizens of the same state.*

Seventh. To cases between a state and the citizens thereof, and foreign states, citizens or subjects. These have been already explained to belong to the fourth of the enumerated classes; and have been shown to be, in a peculiar manner, the proper subjects of the national judicature.

From this review of the particular powers of the federal judiciary, as marked out in the constitution, it appears, that they are all conformable to the principles which ought to have governed the structure of that department, and which were necessary to the perfection of the system. If some partial inconveniences should appear to be connected with the incorporation of any of them into the plan, it ought to be recollected, that the national legislature will have ample authority to make such *exceptions*, and to prescribe such regulations, as will be calculated to obviate or remove these inconveniences. The possibility of particular mischiefs can never be viewed, by a well-informed mind, as a solid objection to a principle which is calculated to avoid general mischiefs, and to obtain general advantages.

PUBLIUS.

THE FEDERALIST.

Number LXXXI.

New York, July 4, 8, 1788.

HAMILTON.

A FURTHER VIEW OF THE JUDICIAL DEPARTMENT, IN RELATION TO THE DISTRIBUTION OF ITS AUTHORITY.

Let us now return to the partition of the judiciary authority between different courts, and their relations to each other.

"The judicial power of the United States is to be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish." [1] That there ought to be one court of supreme and final jurisdiction, is a proposition which is not likely to be contested. The reasons for it have been assigned in another place, and are too obvious to need repetition. The only question that seems to have been raised concerning it, is, whether it

[1] Article 3. Sect. 1.

ought to be a distinct body, or a branch of the legislature. The same contradiction is observable in regard to this matter, which has been remarked in several other cases. The very men who object to the senate as a court of impeachments, on the ground of an improper intermixture of powers, are advocates, by implication at least, for the propriety of vesting the ultimate decision of all causes, in the whole, or in a part of the legislative body.

The arguments, or rather suggestions, upon which this charge is founded, are to this effect: "The authority of the supreme court of the United States, which is to be a separate and independent body, will be superior to that of the legislature. The power of construing the laws according to the *spirit* of the constitution, will enable that court to mould them into whatever shape it may think proper; especially as its decisions will not be in any manner subject to the revision or correction of the legislative body. This is as unprecedented as it is dangerous. In Britain, the judicial power in the last resort, resides in the house of lords, which is a branch of the legislature; and this part of the British Government has been imitated in the state constitutions in general. The parliament of Great Britain, and the legislatures of the several states, can at any time rectify by law, the exceptionable decisions of their respective courts. But the errors and usurpations of the supreme court of the United States, will be uncontrolable and remediless." This, upon examination, will be found to be altogether made up of false reasoning upon misconceived fact.

In the first place, there is not a syllable in the plan, which *directly* empowers the national courts to construe the laws according to the spirit of the constitution, or which gives them any greater latitude in this respect, than may be claimed by the courts of every state. I admit, however, that the constitution ought to be the standard of construction for the laws, and that wherever there is an evident opposition, the laws ought to give place to the constitution. But this doctrine is not deducible from any circumstance peculiar to the plan of the convention; but from the general theory of a limited constitution; and as far as it is true, is equally applicable to most, if not to all the state governments. There can be no objection, therefore, on this account, to the federal judicature, which will not lie against the local judicatures in general, and which will not serve to condemn every constitution that attempts to set bounds to legislative discretion.

But perhaps the force of the objection may be thought to consist in the particular organization of the supreme court; in its being composed of a distinct body of magistrates, instead of being one of the branches of the legislature, as in the government of Great Britain and in that of this state. To insist upon this point, the authors of the objection must renounce the meaning they have laboured to annex to the celebrated maxim, requiring a separation of the departments of power. It shall, nevertheless, be conceded to them, agreeably to the interpretation given to that maxim in the course of these papers that it is not violated by vesting the ultimate power of judging in a *part* of the legislative body. But though this be not an absolute violation of that excellent rule; yet it verges so nearly upon it, as on this account alone, to be less eligible than the mode preferred by the convention. From a body which had had even a partial agency in passing bad laws, we could rarely expect a disposition to temper and moderate them in the application. The same spirit which had operated in making them, would be too apt to influence their construction: Still less could it be

expected, that men who had infringed the constitution, in the character of legislators, would be disposed to repair the breach in that of judges. Nor is this all: Every reason which recommends the tenure of good behaviour for judicial offices, militates against placing the judiciary power, in the last resort, in a body composed of men chosen for a limited period. There is an absurdity in referring the determination of causes, in the first instance, to judges of permanent standing; in the last, to those of a temporary and mutable constitution. And there is a still greater absurdity in subjecting the decisions of men selected for their knowledge of the laws, acquired by long and laborious study, to the revision and control of men who, for want of the same advantage, cannot but be deficient in that knowledge. The members of the legislature will rarely be chosen with a view to those qualifications which fit men for the stations of judges; and as, on this account, there will be great reason to apprehend all the ill consequences of defective information; so, on account of the natural propensity of such bodies to party divisions, there will be no less reason to fear, that the pestilential breath of faction may poison the fountains of justice. The habit of being continually marshalled on opposite sides, will be too apt to stifle the voice both of law and of equity.

These considerations teach us to applaud the wisdom of those states who have committed the judicial power, in the last resort, not to a part of the legislature, but to distinct and independent bodies of men. Contrary to the supposition of those who have represented the plan of the convention, in this respect, as novel and unprecedented, it is but a copy of the constitutions of New-Hampshire, Massachusetts, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia; and the preference which has been given to these models is highly to be commended.

It is not true, in the second place, that the parliament of Great Britain, or the legislatures of the particular states, can rectify the exceptionable decisions of their respective courts, in any other sense than might be done by a future legislature of the United States. The theory neither of the British nor the state constitutions, authorizes the revisal of a judicial sentence by a legislative act. Nor is there any thing in the proposed constitution, more than in either of them by which it is forbidden. In the former, as in the latter, the impropriety of the thing, on the general principles of law and reason, is the sole obstacle. A legislature, without exceeding its province, cannot reverse a determination once made, in a particular case; though it may prescribe a new rule for future cases. This is the principle, and it applies, in all its consequences, exactly in the same manner and extent, to the state governments, as to the national government now under consideration. Not the least difference can be pointed out in any view of the subject.

It may in the last place be observed, that the supposed danger of judiciary encroachments on the legislative authority, which has been upon many occasions reiterated, is, in reality, a phantom. Particular misconstructions and contraventions of the will of the legislature, may now and then happen; but they can never be so extensive as to amount to an inconvenience, or in any sensible degree to affect the order of the political system. This may be inferred with certainty from the general nature of the judicial power; from the objects to which it relates; from the manner in which it is exercised; from its comparative weakness; and from its total incapacity to sup-

port its usurpations by force. And the inference is greatly fortified by the consideration of the important constitutional check, which the power of instituting impeachments in one part of the legislative body, and of determining upon them in the other, would give to that body upon the members of the judicial department. This is alone a complete security. There never can be danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body intrusted with it, while this body was possessed of the means of punishing their presumption, by degrading them from their stations. While this ought to remove all apprehensions on the subject, it affords, at the same time, a cogent argument for constituting the senate a court for the trial of impeachments.

Having now examined, and I trust removed, the objections to the distinct and independent organization of the supreme court; I proceed to consider the propriety of the power of constituting inferior courts,[2] and the relations which will subsist between these and the former.

The power of constituting inferior courts, is evidently calculated to obviate the necessity of having recourse to the supreme court in every case of federal cognizance. It is intended to enable the national government to institute or *authorize* in each state or district of the United States, a tribunal competent to the determination of matters of national jurisdiction within its limits.

But why, it is asked, might not the same purpose have been accomplished by the instrumentality of the state courts? This admits of different answers. Though the fitness and competency of these courts should be allowed in the utmost latitude: yet the substance of the power in question, may still be regarded as a necessary part of the plan, if it were only to authorize the national legislature to commit to them the cognizance of causes arising out of the national constitution. To confer upon the existing courts of the several states the power of determining such causes, would perhaps be as much "to constitute tribunals," as to create new courts with the like power. But ought not a more direct and explicit provision to have been made in favour of the state courts? There are, in my opinion, substantial reasons against such a provision: The most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes; whilst every man may discover, that courts constituted like those of some of the states, would be improper channels of the judicial authority of the union. State judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws. And if there was a necessity for confiding to them the original cognizance of causes arising under those laws, there would be a correspondent necessity for leaving the door of appeal as wide as possible. In proportion to the grounds of confidence in, or distrust of the subordinate tribunals, ought to be the facility or difficulty of appeals. And well satisfied as I am of the propriety of the appellate jurisdiction, in the several classes of causes to which it is extended by the plan of the convention, I should con-

[2] This power has been absurdly represented as intended to abolish all the county courts in the several states, which are commonly called inferior courts. But the expressions of the constitution are to constitute "tribunals INFERIOR TO THE SUPREME COURT," and the evident design of the provision is, to enable the institution of local courts, subordinate to the supreme, either in states or larger districts. It is ridiculous to imagine, that county courts were in contemplation.

sider every thing calculated to give, in practice, an *unrestrained course* to appeals, as a source of public and private inconvenience.

I am not sure but that it will be found highly expedient and useful, to divide the United States into four or five, or half a dozen districts; and to institute a federal court in each district, in lieu of one in every state. The judges of these courts may hold circuits for the trial of causes in the several parts of the respective districts. Justice through them may be administered with ease and dispatch; and appeals may be safely circumscribed within a narrow compass. This plan appears to me at present the most eligible of any that could be adopted, and in order to it, it is necessary that the power of constituting inferior courts should exist in the full extent in which it is seen in the proposed constitution.

These reasons seem sufficient to satisfy a candid mind, that the want of such a power would have been a great defect in the plan. Let us now examine in what manner the judicial authority is to be distributed between the supreme and the inferior courts of the union.

The supreme court is to be invested with original jurisdiction only "in cases affecting ambassadors, other public ministers and consuls, and those in which A STATE shall be a party." Public ministers of every class, are the immediate representatives of their sovereigns. All questions in which they are concerned, are so directly connected with the public peace, that as well for the preservation of this, as out of respect to the sovereignties they represent, it is both expedient and proper, that such questions should be submitted in the first instance to the highest judicatory of the nation. Though consuls have not in strictness a diplomatic character, yet as they are the public agents of the nations to which they belong, the same observation is in a great measure applicable to them. In cases in which a state might happen to be a party, it would ill suit its dignity to be turned over to an inferior tribunal.

Though it may rather be a digression from the immediate subject of this paper, I shall take occasion to mention here a supposition which has excited some alarm upon very mistaken grounds: It has been suggested that an assignment of the public securities of one state to the citizens of another, would enable them to prosecute that state in the federal courts for the amount of those securities. A suggestion, which the following considerations prove to be without foundation.

It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its consent*. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of state sovereignty, were discussed in considering the article of taxation, and need not be repeated here. A recurrence to the principles there established will satisfy us, that there is no colour to pretend that the state governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals, are only binding on the conscience of the sovereign, and have no pretension to

a compulsive force. They confer no right of action, independent of the sovereign will. To what purpose would it be to authorize suits against states for the debts they owe? How could recoveries be enforced? It is evident that it could not be done, without waging war against the contracting state: and to ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the state governments, a power which would involve such a consequence, would be altogether forced and unwarrantable.

Let us resume the train of our observations; we have seen that the original jurisdiction of the supreme court would be confined to two classes of causes, and those of a nature rarely to occur. In all other cases of federal cognizance, the original jurisdiction would appertain to the inferior tribunals, and the supreme court would have nothing more than an appellate jurisdiction, "with such *exceptions*, and under such *regulations*, as the congress shall make."

The propriety of this appellate jurisdiction has been scarcely called in question in regard to matters of law; but the clamours have been loud against it as applied to matters of fact. Some well-intentioned men in this state, deriving their notions from the language and forms which obtain in our courts, have been induced to consider it as an implied supersedure of the trial by jury, in favour of the civil law mode of trial, which prevails in our courts of admiralty, probates, and chancery. A technical sense has been affixed to the term "appellate," which in our law parlance, is commonly used in reference to appeals in the course of the civil law. But if I am not misinformed, the same meaning would not be given to it in any part of New-England. There an appeal from one jury to another, is familiar both in language and practice, and is even a matter of course, until there have been two verdicts on one side. The word "appellate," therefore, will not be understood in the same sense in New-England, as in New-York, which shows the impropriety of a technical interpretation derived from the jurisprudence of a particular state. The expression taken in the abstract, denotes nothing more than the power of one tribunal to review the proceedings of another, either as to the law or fact, or both. The mode of doing it may depend on ancient custom or legislative provision; in a new government it must depend on the latter, and may be with or without the aid of a jury, as may be judged advisable. If, therefore, the re-examination of a fact, once determined by a jury, should in any case be admitted under the proposed constitution, it may be so regulated as to be done by a second jury, either by remanding the cause to the court below for a second trial of the fact, or by directing an issue immediately out of the supreme court.

But it does not follow, that the re-examination of a fact once ascertained by a jury, will be permitted in the supreme court. Why may it not be said, with the strictest propriety, when a writ of error is brought from an inferior to a superior court of law in this state, that the latter has jurisdiction [3] of the fact, as well as the law? It is true it cannot institute a new inquiry concerning the fact, but it takes cognizance of it as it appears upon the record, and pronounces the law arising upon it. This is jurisdiction of both fact and law, nor is it even possible to separate them. Through the common law courts of this state ascertain disputed facts by a jury, yet they unquestionably have jurisdiction of both fact and law; and accordingly, when the

[3] This word is a compound of JUS and DICTIO, juris, dictio, or a speaking or pronouncing of the law.

former is agreed in the pleadings, they have no recourse to a jury, but proceed at once to judgment. I contend, therefore, on this ground, that the expressions, "appellate jurisdiction, both as to law and fact," do not necessarily imply a re-examination in the supreme court of facts decided by juries in the inferior courts.

The following train of ideas may well be imagined to have influenced the convention, in relation to this particular provision. The appellate jurisdiction of the supreme court, it may have been argued, will extend to causes determinable in different modes, some in the course of the COMMON LAW, others in the course of the CIVIL LAW. In the former, the revision of the law only will be, generally speaking, the proper province of the supreme court; in the latter, the re-examination of the fact is agreeable to usage, and in some cases, of which prize causes are an example, might be essential to the preservation of the public peace. It is therefore necessary, that the appellate jurisdiction should, in certain cases, extend in the broadest sense to matters of fact. It will not answer to make an express exception of cases which shall have been originally tried by a jury, because in the courts of some of the states, *all causes* are tried in this mode;[1] and such an exception would preclude the revision of matters of fact, as well where it might be proper, as where it might be improper. To avoid all inconveniences, it will be safest to declare generally, that the supreme court shall possess appellate jurisdiction, both as to law and *fact*, and that this jurisdiction shall be subject to such *exceptions* and regulations as the national legislature may prescribe. This will enable the government to modify it in such a manner as will best answer the ends of public justice and security.

This view of the matter, at any rate, puts it out of all doubt, that the supposed *abolition* of the trial by jury, by the operation of this provision, is fallacious and untrue. The legislature of the United States would certainly have full power to provide, that in appeals to the supreme court there should be no re-examination of facts, where they had been tried in the original causes by juries. This would certainly be an authorized exception; but if, for the reason already intimated, it should be thought too extensive, it might be qualified with a limitation to such causes only as are determinable at common law in that mode of trial.

The amount of the observations hitherto made on the authority of the judicial department is this: That it has been carefully restricted to those causes which are manifestly proper for the cognizance of the national judicature; that, in the partition of this authority, a very small portion of original jurisdiction has been reserved to the supreme court, and the rest consigned to the subordinate tribunals; that the supreme court will possess an appellate jurisdiction, both as to law and fact, in all the cases referred to them, but subject to any *exceptions* and *regulations* which may be thought advisable; that this appellate jurisdiction does, in no case, *abolish* the trial by jury; and that an ordinary degree of prudence and integrity in the national councils, will insure us solid advantages from the establishment of the proposed judiciary, without exposing us to any of the inconveniences which have been predicted from that source.

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[1] I hold, that the states will have concurrent jurisdiction with the subordinate federal judicatories, in many cases of federal cognizance, as will be explained in my next paper.

THE FEDERALIST.

(Number LXXXII. New York, July 11, 1783.)

HAMILTON.

A FURTHER VIEW OF THE JUDICIAL DEPARTMENT, IN REFERENCE TO SOME MISCELLANEOUS QUESTIONS.

The erection of a new government, whatever care or wisdom may distinguish the work, cannot fail to originate questions of intricacy and nicety; and these may, in a particular manner, be expected to flow from the establishment of a constitution founded upon the total or partial incorporation of a number of distinct sovereignties. Time only can mature and perfect so compound a system, liquidate the meaning of all the parts, and adjust them to each other in a harmonious and consistent WHOLE.

Such questions accordingly have arisen upon the plan proposed by the convention, and particularly concerning the judiciary department. The principal of these respect the situation of the state courts, in regard to those causes which are to be submitted to federal jurisdiction. Is this to be exclusive, or are those courts to possess a concurrent jurisdiction? If the latter, in what relation will they stand to the national tribunals? These are inquiries which we meet with in the mouths of men of sense, and which are certainly entitled to attention.

The principles established in a former paper[1] teach us, that the states will retain all *pre-existing* authorities, which may not be exclusively delegated to the federal head; and that this exclusive delegation can only exist in one of three cases; where an exclusive authority is, in express terms, granted to the union; or where a particular authority is granted to the union, and the exercise of a like authority is prohibited to the states; or, where an authority is granted to the union, with which a similar authority in the states would be utterly incompatible. Though these principles may not apply with the same force to the judiciary, as to the legislative power; yet I am inclined to think, that they are in the main, just with respect to the former, as well as the latter. And under this impression I shall lay it down as a rule, that the state courts will *retain* the jurisdiction they now have, unless it appears to be taken away in one of the enumerated modes.

The only thing in the proposed constitution, which wears the appearance of confining the causes of federal cognizance, to the federal courts, is contained in this passage: "The JUDICIAL POWER of the United States *shall be vested* in one supreme court, and in *such* inferior courts as the congress shall from time to time ordain and establish." This might either be construed to signify, that the supreme and subordinate courts of the union should alone have the power of deciding those causes, to which their authority is to extend; or simply to denote, that the organs of the national judiciary should be one supreme court, and as many subordinate courts, as congress should think proper to appoint; in other words, that the United States should exercise the judicial power with which they are to be invested, through one supreme tribunal, and a certain number of inferior ones, to be

[1] No. XXXII.

instituted by them. The first excludes, the last admits, the concurrent jurisdiction of the state tribunals: And as the first would amount to an alienation of state power by implication, the last appears to me the most defensible construction.

But this doctrine of concurrent jurisdiction, is only clearly applicable to those descriptions of causes, of which the state courts have previous cognizance. It is not equally evident in relation to cases which may grow out of, and be *peculiar* to, the constitution to be established: For not to allow the state courts a right of jurisdiction in such cases, can hardly be considered as the abridgement of a pre-existing authority. I mean not therefore to contend, that the United States, in the course of legislation upon the objects intrusted to their direction, may not commit the decision of causes arising upon a particular regulation, to the federal courts solely, if such a measure should be deemed expedient; but I hold that the state courts will be divested of no part of their primitive jurisdiction, further than may relate to an appeal; and I am even of opinion, that in every case in which they were not expressly excluded by the future acts of the national legislature, they will of course take cognizance of the causes to which those acts may give birth. This I infer from the nature of judiciary power, and from the general genius of the system. The judiciary power of every government looks beyond its own local or municipal laws, and in civil cases, lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe. Those of Japan, not less than of New York, may furnish the objects of legal discussion to our courts. When in addition to this we consider the state governments and the national governments, as they truly are, in the light of kindred systems, and as parts of ONE WHOLE, the inference seems to be conclusive, that the state courts would have a concurrent jurisdiction in all cases arising under the laws of the union, where it was not expressly prohibited.

Here another question occurs; what relation would subsist between the national and state courts in these instances of concurrent jurisdiction? I answer, that an appeal would certainly lie from the latter, to the supreme court of the United States. The constitution in direct terms, gives an appellate jurisdiction to the supreme court in all the enumerated cases of federal cognizance, in which it is not to have an original one; without a single expression to confine its operation to the inferior federal courts. The objects of appeal, not the tribunals from which it is to be made, are alone contemplated. From this circumstance, and from the reason of the thing, it ought to be construed to extend to the state tribunals. Either this must be the case, or the local courts must be excluded from a concurrent jurisdiction in matters of national concern, else the judiciary authority of the union may be eluded at the pleasure of every plaintiff or prosecutor. Neither of these consequences ought, without evident necessity, to be involved; the latter would be entirely inadmissible, as it would defeat some of the most important and avowed purposes of the proposed government, and would essentially embarrass its measures. Nor do I perceive any foundation for such a supposition. Agreeably to the remark already made, the national and state systems are to be regarded as ONE WHOLE. The courts of the latter will of course be natural auxiliaries to the execution of the laws of the union, and an

appeal from them will as naturally lie to that tribunal, which is destined to unite and assimilate the principles of national justice and the rules of national decision. The evident aim of the plan of the convention is, that all the causes of the specified classes shall, for weighty public reasons, receive their original or final determination in the courts of the union. To confine, therefore, the general expressions which give appellate jurisdiction to the supreme court, to appeals from the subordinate federal courts, instead of allowing their extension to the state courts, would be to abridge the latitude of the terms, in subversion of the intent, contrary to every sound rule of interpretation.

But could an appeal be made to lie from the state courts, to the subordinate federal judicatories? This is another of the questions which have been raised, and of greater difficulty than the former. the following considerations countenance the affimative. The plan of the convention, in the first place, authorizes the national legislature "to constitute tribunals inferior to the supreme court." [2] It declares in the next place, that "the JUDICIAL POWER of the United States *shall be vested* in one supreme court, and in such inferior courts as congress shall ordain and establish;" and it then proceeds to enumerate the cases, to which this judicial power shall extend. It afterwards divides the jurisdiction of the supreme court into original and appellate, but gives no definition of that of the subordinate courts. The only outlines described for them are, that they shall be "inferior to the supreme court," and that they shall not exceed the specified limits of the federal judiciary. Whether their authority shall be original or appellate, or both, is not declared. All this seems to be left to the discretion of the legislature. And this being the case, I perceive at present no impediment to the establishment of an appeal from the state courts, to the subordinate national tribunals; and many advantages attending the power of doing it may be imagined. It would diminish the motives to the multiplication of federal courts, and would admit of arrangements calculated to contract the appellate jurisdiction of the supreme court. The state tribunals, may then be left with a more entire charge of federal causes; and appeals in most cases in which they may be deemed proper, instead of being carried to the supreme court, may be made to lie from the state courts, to district courts of the union.

PUBLIUS.

THE FEDERALIST

(Number LXXXIII, New York, July 15, 18, 22, 25, 1788)

HAMILTON

A FURTHER VIEW OF THE JUDICIAL DEPARTMENT, IN RELATION TO THE TRIAL BY JURY

THE objection to the plan of the convention, which has met with most success in this state, is relative to *the want of a constitutional provision* for the trial by jury in civil cases. The disingenuous form in which this objection is usually stated, has been repeatedly adverted to and exposed; but continues to be pursued in all the conversations

[2] Section 8th, Article 1st.

and writings of the opponents of the plan. The mere silence of the constitution in reagrd to *civil causes*, is represented as an abolition of the trial by jury; and the declamations to which it has afforded a pretext, are artfully calculated to induce a persuasion that this pretended abolition is complete and universal; extending not only to every species of civil, but even to *criminal causes*. To argue with respect to the latter, would be as vain and fruitless, as to attempt to demonstrate any of those propositions which, by their own internal evidence, force conviction when expressed in language adapted to convey their meaning.

With regard to civil causes, subtleties almost too contemptible for refutation, have been employed to countenance the surmise that a thing, which is only *not provided for*, is entirely *abolished*. Every man of discernment must at once perceive the wide difference between *silence* and *abolition*. But as the inventors of this fallacy have attempted to support it by certain *legal maxims* of interpretation, which they have perverted from their true meaning, it may not be wholly useless to explore the ground they have taken.

The maxims on which they rely are of this nature, "a specification of particulars, is an exclusion of generals;" or, "the expression of one thing, is the exclusion of another." Hence, say they, as the constitution has established the trial by jury in criminal cases, and is silent in respect to civil, this silence is an implied prohibition of trial by jury, in regard to the latter.

The rules of legal interpretation, are rules of *common sense*, adopted by the courts in the construction of the laws. The true test, therefore, of a just application of them, is its conformity to the source from which they are derived. This being the case, let me ask if it is consistent with common sense to suppose, that a provision obliging the legislative power to commit the trial of criminal causes to juries, is a privation of its right to authorize or permit that mode of trial in other cases? Is it natural to suppose, that a command to do one thing, is a prohibition to the doing of another, which there was a previous power to do, and which is not incompatible with the thing commanded to be done? If such a supposition would be unnatural and unreasonable, it cannot be rational to maintain, that an injunction of the trial by jury, in certain cases, is an interdiction of it in others.

A power to constitute courts, is a power to prescribe the mode of trial; and consequently, if nothing was said in the constitution on the subject of juries, the legislature would be at liberty either to adopt that institution, or to let it alone. This discretion, in regard to criminal causes, is abridged by an express injunction; but it is left at large in relation to civil causes, for the very reason that there is a total silence on the subject. The specification of an obligation to try all criminal causes in a particular mode, excludes indeed the obligation of employing the same mode in civil causes, but does not abridge *the power* of the legislature to appoint that mode, if it should be thought proper. The pretence, therefore, that the national legislature would not be at liberty to submit all the civil causes of federal cognizance to the determination of juries, is a pretence destitute of all foundation.

From these observations, this conclusion results, that the trial by jury in civil cases would not be abolished, and that the use attempted to be made of the maxims which have been quoted, is contrary to reason, and therefore inadmissible. Even if these maxims had a precise technical sense, corresponding with the ideas of those who employ

them upon the present occasion, which, however, is not the case, they would still be inapplicable to a constitution of government. In relation to such a subject, the natural and obvious sense of its provisions, apart from any technical rules, is the true criterion of construction.

Having now seen that the maxims relied upon will not bear the use made of them, let us endeavour to ascertain their proper application. This will be best done by examples. The plan of the convention declares, that the power of congress, or in other words of the *national legislature*, shall extend to certain enumerated cases. This specification of particulars evidently excludes all pretension to a general legislative authority; because an affirmative grant of special powers would be absurd as well as useless, if a general authority was intended.

In like manner, the authority of the federal judicatures, is declared by the constitution to comprehend certain cases particularly specified. The expression of those cases, marks the precise limits beyond which the federal courts cannot extend their jurisdiction; because the objects of their cognizance being enumerated, the specification would be nugatory, if it did not exclude all ideas of more extensive authority.

These examples are sufficient to elucidate the maxims which have been mentioned, and to designate the manner in which they should be used.

From what has been said, it must appear unquestionably true that trial by jury is in no case abolished by the proposed constitution: and it is equally true, that in those controversies between individuals in which the great body of the people are likely to be interested, that institution will remain precisely in the situation in which it is placed by the state constitutions. The foundation of this assertion is, that the national judiciary will have no cognizance of them, and of course they will remain determinable as heretofore by the state courts only, and in the manner which the state constitutions and laws prescribe. All land causes, except where claims under the grants of different states come into question, and all other controversies between the citizens of the same state, unless where they depend upon positive violations of the articles of union, by acts of the state legislatures, will belong exclusively to the jurisdiction of the state tribunals. Add to this, that admiralty causes, and almost all those which are of equity jurisdiction, are determinable under our own government without the intervention of a jury, and the inference from the whole will be, that this institution, as it exists with us at present, cannot possibly be affected, to any great extent, by the proposed alteration in our system of government.

The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury: or if there is any difference between them, it consists in this; the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government. For my own part, the more the operation of the institution has fallen under my observation, the more reason I have discovered for holding it in high estimation; and it would be altogether superfluous to examine to what extent it deserves to be esteemed useful or essential in a representative republic, or how much more merit it may be entitled to, as a defence against the oppressions of an hereditary monarch, than as a barrier to the tyranny of popular magistrates in a popular government. Discussions of this kind would be more curious than beneficial,

as all are satisfied of the utility of the institution, and of its friendly aspect to liberty. But I must acknowledge, that I cannot readily discern the inseparable connexion between the existence of liberty, and the trial by jury in civil cases. Arbitrary impeachments, arbitrary methods of prosecuting pretended offences, arbitrary punishments upon arbitrary convictions, have ever appeared to me the great engines of judicial despotism; and all these have relation to criminal proceedings. The trial by jury in criminal cases, aided by the *habeas corpus* act, seems therefore to be alone concerned in the question. And both of these are provided for, in the most ample manner, in the plan of the convention.

It has been observed, that trial by jury is a safeguard against an oppressive exercise of the power of taxation. This observation deserves to be canvassed.

It is evident that it can have no influence upon the legislature, in regard to the *amount* of the taxes to be laid, to the *objects* upon which they are to be imposed, or to the *rule* by which they are to be apportioned. If it can have any influence, therefore, it must be upon the mode of collection, and the conduct of the officers intrusted with the execution of the revenue laws.

As to the mode of collection in this state, under our own constitution, the trial by jury is in most cases out of use. The taxes are usually levied by the more summary proceeding of distress and sale, as in cases of rent. And it is acknowledged on all hands, that this is essential to the efficacy of the revenue laws. The dilatory course of a trial at law to recover the taxes imposed on individuals, would neither suit the exigencies of the public, nor promote the convenience of the citizens. It would often occasion an accumulation of costs, more burthensome than the original sum of the tax to be levied.

And as to the conduct of the officers of the revenue, the provision in favour of trial by jury in criminal cases, will afford the desired security. Wilful abuses of a public authority, to the oppression of the subject, and every species of official extortion, are offences against the government; for which, the persons who commit them, may be indicted and punished according to the circumstances of the case.

The excellence of the trial by jury in civil cases, appears to depend on circumstances foreign to the preservation of liberty. The strongest argument in its favour is, that it is a security against corruption. As there is always more time, and better opportunity, to tamper with a standing body of magistrates, than with a jury summoned for the occasion, there is room to suppose, that a corrupt influence would more easily find its way to the former than to the latter. The force of this consideration is, however, diminished by others. The sheriff, who is the summoner of ordinary juries, and the clerks of courts who have the nomination of special juries, are themselves standing officers, and acting individually, may be supposed more accessible to the touch of corruption than the judges, who are a collective body. It is not difficult to see, that it would be in the power of those officers to select jurors, who would serve the purpose of the party, as well as a corrupted bench. In the next place, it may fairly be supposed, that there would be less difficulty in gaining some of the jurors promiscuously taken from the public mass, than in gaining men who had been chosen by the government for their probity and good character. But making every deduction for these considerations, the trial by jury must still

be a valuable check upon corruption. It greatly multiplies the impediments to its success. As matters now stand, it would be necessary to corrupt both court and jury; for where the jury have gone evidently wrong, the court will generally grant a new trial, and it would be in most cases of little use to practise upon the jury, unless the court could be likewise gained. Here then is a double security; and it will readily be perceived, that this complicated agency tends to preserve the purity of both institutions. By increasing the obstacles to success, it discourages attempts to seduce the integrity of either. The temptations to prostitution, which the judges might have to surmount, must certainly be much fewer, while the cooperation of a jury is necessary, than they might be, if they had themselves the exclusive determination of all causes.

Notwithstanding, therefore, the doubts I have expressed, as to the essentiality of trial by jury in civil suits to liberty, I admit that it is in most cases, under proper regulations, an excellent method of determining questions of property; and that on this account alone, it would be entitled to a constitutional provision in its favour, if it were possible to fix with accuracy the limits within which it ought to be comprehended. This, however, is in its own nature an affair of much difficulty; and men not blinded by enthusiasm, must be sensible, that in a federal government, which is a composition of societies whose ideas and institutions in relation to the matter, materially vary from each other, the difficulty must be not a little augmented. For my own part, at every new view I take of the subject, I become more convinced of the reality of the obstacles, which we are authoritatively informed, prevented the insertion of a provision on this head in the plan of the convention.

The great difference between the limits of the jury trial in different states, is not generally understood. And as it must have considerable influence on the sentence we ought to pass upon the omission complained of, in regard to this point, an explanation of it is necessary. In this state, our judicial establishments resemble more nearly, than in any other, those of Great Britain. We have courts of common law, courts of probates (analogous in certain matters to the spiritual courts in England) a court of admiralty, and a court of chancery. In the courts of common law only, the trial by jury prevails, and this with some exceptions. In all the others, a single judge presides, and proceeds in general either according to the course of the canon or civil law, without the aid of a jury.[1] In New-Jersey there is a court of chancery which proceeds like ours, but neither courts of admiralty, nor of probates, in the sense in which these last are established with us. In that state, the courts of common law have the cognizance of those causes, which with us are determinable in the courts of admiralty and of probates, and of course the jury trial is more extensive in New-Jersey, than in New-York. In Pennsylvania, this is perhaps still more the case, for there is no court of chancery in that state, and its common law courts have equity jurisdiction. It has a court of admiralty, but none of probates, at least on the plan of ours. Delaware has in these respects imitated Pennsylvania. Maryland approaches more nearly to New-York, as does also Virginia, except that the latter has a plurality

[1] It has been erroneously insinuated, with regard to the court of chancery, that this court generally tries disputed facts by a jury. The truth is, that references to a jury in that court rarely happen, and are in no case necessary but where the validity of a devise of land comes into question.

of chancellors. North-Carolina bears most affinity to Pennsylvania; South-Carolina to Virginia. I believe however, that in some of those states which have distinct courts of admiralty, the causes depending in them are triable by juries. In Georgia there are none but common law courts, and an appeal of course lies from the verdict of one jury to another, which is called a special jury, and for which a particular mode of appointment is marked out. In Connecticut they have no distinct courts, either of chancery or of admiralty, and their courts of probates have no jurisdiction of causes. Their common law courts have admiralty, and, to a certain extent, equity jurisdiction. In cases of importance, their general assembly, is the only court of chancery. In Connecticut, therefore, the trial by jury extends in *practice* further than in any other state yet mentioned. Rhode-Island is, I believe, in this particular, pretty much in the situation of Connecticut. Massachusetts and New-Hampshire, in regard to the blending of law, equity, and admiralty jurisdictions, are in a similar predicament. In the four eastern states, the trial by jury not only stands upon a broader foundation than in the other states, but it is attended with a peculiarity unknown, in its full extent, to any of them. There is an appeal *of course* from one jury to another, till there have been two verdicts out of three on one side.

From this sketch it appears, that there is a material diversity as well in the modification as in the extent of the institution of trial by jury in civil cases in the several states; and from this fact, these obvious reflections flow. First, that no general rule could have been fixed upon by the convention which would have corresponded with the circumstances of all the states; and secondly, that more, or at least as much might have been hazarded, by taking the system of any one state for a standard, as by omitting a provision altogether, and leaving the matter as has been done to legislative regulation.

The propositions which have been made for supplying the omission, have rather served to illustrate, than to obviate the difficulty of the thing. The minority of Pennsylvania have proposed this mode of expression for the purpose, "trial by jury shall be as heretofore;" and this I maintain would be inapplicable and indeterminate. The United States, in their collective capacity, are the OBJECT to which all general provisions in the constitution must be understood to refer. Now, it is evident, that though trial by jury, with various limitations, is known in each state individually, yet in the United States, *as such*, it is, strictly speaking, unknown; because the present federal government has no judiciary power whatever; and consequently there is no antecedent establishment, to which the term *heretofore* could properly relate. It would therefore be destitute of precise meaning, and inoperative from its uncertainty.

As on the one hand, the form of the provision would not fulfil the intent of its proposers; so on the other, if I apprehend that intent rightly, it would be in itself inexpedient. I presume it to be, that causes in the federal courts should be tried by jury, if in the state where the courts sat, that mode of trial would obtain in a similar case in the state courts—that is to say, admiralty causes should be tried in Connecticut by a jury, in New-York without one. The capricious operation of so dissimilar a method of trial in the same cases, under the same government, is of itself sufficient to indispose every well regulated judgment towards it. Whether the cause should be tried

with or without a jury, would depend, in a great number of cases, on the accidental situation of the court and parties.

But this is not, in my estimation, the greatest objection. I feel a deep and deliberate conviction, that there are many cases in which the trial by jury is an ineligible one. I think it so particularly, in suits which concern the public peace with foreign nations; that is in most cases where the question turns wholly on the laws of nations. Of this nature, among others, are all prize causes. Juries cannot be supposed competent to investigations, that require a thorough knowledge of the laws and usages of nations; and they will sometimes be under the influence of impressions which will not suffer them to pay sufficient regard to those considerations of public policy, which ought to guide their inquiries. There would of course be always danger, that the rights of other nations might be infringed by their decisions, so as to afford occasions of reprisal and war. Though the true province of juries be to determine matters of fact, yet in most cases, legal consequences are complicated with fact in such a manner, as to render a separation impracticable.

It will add great weight to this remark, in relation to prize causes, to mention, that the method of determining them has been thought worthy of particular regulation in various treaties between different powers of Europe, and that, pursuant to such treaties, they are determinable in Great Britain in the last resort before the king himself in his privy council, where the fact as well as the law, undergoes a re-examination. This alone demonstrates the impolicy of inserting a fundamental provision in the constitution which would make the state systems a standard for the national government in the article under consideration, and the danger of incumbering the government with any constitutional provisions, the propriety of which is not indisputable.

My convictions are equally strong, that great advantages result from the separation of the equity from the law jurisdiction; and that the causes which belong to the former, would be improperly committed to juries. The great and primary use of a court of equity, is to give relief *in extraordinary cases*, which are *exceptions* [2] to general rules. To unite the jurisdiction of such cases, with the ordinary jurisdiction, must have a tendency to unsettle the general rules, and to subject every case that arises to a *special* determination: While a separation between the jurisdictions, has the contrary effect of rendering one a sentinel over the other, and of keeping each within the expedient limits. Besides this, the circumstances that constitute cases proper for courts of equity, are in many instances so nice and intricate, that they are incompatible with the genius of trials by jury. They require often such long and critical investigation, as would be impracticable to men called occasionally from their occupations, and obliged to decide before they were permitted to return to them. The simplicity and expedition which form the distinguishing characters of this mode of trial require, that the matter to be decided should be reduced to some single and obvious point; while the litigations usual in chancery, frequently comprehend a long train of minute and independent particulars.

[2] It is true that the principles by which that relief is governed are now reduced to a regular system; but it is not the less true that they are in the main applicable to SPECIAL circumstances, which form exceptions to general rules.

It is true, that the separation of the equity from the legal jurisdiction, is peculiar to the English system of jurisprudence; the model which has been followed in several of the states. But it is equally true, that the trial by jury has been unknown in every instance in which they have been united. And the separation is essential to the preservation of that institution in its pristine purity. The nature of a court of equity will readily permit the extension of its jurisdiction to matters of law, but it is not a little to be suspected, that the attempt to extend the jurisdiction of the courts of law to matters of equity, will not only be unproductive of the advantages which may be derived from courts of chancery, on the plan upon which they are established in this state, but will tend gradually to change the nature of the courts of law, and to undermine the trial by jury, by introducing questions too complicated for a decision in that mode.

These appear to be conclusive reasons against incorporating the systems of all the states, in the formation of the national judiciary; according to what may be conjectured to have been the intent of the Pennsylvania minority. Let us now examine how far the proposition of Massachusetts is calculated to remedy the supposed defect.

It is in this form: "In civil actions between citizens of different states, every issue of fact, arising in *actions at common law*, may be tried by a jury, if the parties, or either of them, request it."

This, at best, is a proposition confined to one description of causes; and the inference is fair either that the Massachusetts convention considered that as the only class of federal causes, in which the trial by jury would be proper; or that, if desirous of a more extensive provision, they found it impracticable to devise one which would properly answer the end. If the first, the omission of a regulation respecting so partial an object, can never be considered as a material imperfection in the system. If the last, it affords a strong corroboration of the extreme difficulty of the thing.

But this is not all: If we advert to the observations already made respecting the courts that subsist in the several states of the union, and the different powers exercised by them, it will appear, that there are no expressions more vague and indeterminate than those which have been employed to characterize *that* species of causes which it is intended shall be entitled to a trial by jury. In this state, the boundaries between actions at common law and actions of equitable jurisdiction, are ascertained in conformity to the rules which prevail in England upon that subject. In many of the other states, the boundaries are less precise. In some of them, every cause is to be tried in a court of common law, and upon that foundation every action may be considered as an action at common law, to be determined by a jury, if the parties, or either of them, choose it. Hence the same irregularity and confusion would be introduced by a compliance with this proposition, that I have already noticed as resulting from the regulation proposed by the Pennsylvania minority. In one state a cause would receive its determination from a jury, if the parties, or either of them, requested it; but in another state, a cause exactly similar to the other, must be decided without the intervention of a jury, because the state tribunals varied as to common law jurisdiction.

It is obvious, therefore, that the Massachusetts proposition cannot operate as a general regulation, until some uniform plan, with respect to the limits of common law and equitable jurisdictions, shall be adopted

by the different states. To devise a plan of that kind, is a task arduous in itself, and which it would require much time and reflection to mature. It would be extremely difficult, if not impossible, to suggest any general regulation that would be acceptable to all the states in the union, or that would perfectly quadrate with the several state institutions.

It may be asked, why could not a reference have been made to the constitution of this state, taking that, which is allowed by me to be a good one, as a standard for the United States? I answer, that it is not very probable the other states should entertain the same opinion of our institutions which we do ourselves. It is natural to suppose that they are more attached to their own, and that each would struggle for the preference. If the plan of taking one state as a model for the whole had been thought of in the convention, it is to be presumed that the adoption of it in that body, would have been rendered difficult by the predilection of each representation in favour of its own government; and it must be uncertain which of the states would have been taken as the model. It has been shown, that many of them would be improper ones. And I leave it to conjecture whether under all circumstances, it is most likely that New-York, or some other state, would have been preferred. But admit that a judicious selection could have been effected in the convention, still there would have been great danger of jealousy and disgust in the other states, at the partiality which had been shown to the institutions of one. The enemies of the plan would have been furnished with a fine pretext, for raising a host of local prejudices against it, which perhaps might have hazarded, in no inconsiderable degree, its final establishment.

To avoid the embarrassments of a definition of the cases which the trial by jury ought to embrace, it is sometimes suggested by men of enthusiastic tempers, that a provision might have been inserted for establishing it in all cases whatsoever. For this, I believe no precedent is to be found in any member of the union; and the considerations which have been stated in discussing the proposition of the minority of Pennsylvania, must satisfy every sober mind, that the establishment of the trial by jury in *all* cases, would have been an unpardonable error in the plan.

In short, the more it is considered, the more arduous will appear the task of fashioning a provision in such a form, as not to express too little to answer the purpose, or too much to be advisable; or which might not have opened other sources of opposition, to the great and essential object, of introducing a firm national government.

I cannot but persuade myself on the other hand, that the different lights in which the subject has been placed in the course of these observations, will go far towards removing in candid minds, the apprehensions they may have entertained on the point. They have tended to show, that the security of liberty is materially concerned only in the trial by jury in criminal cases, which is provided for in the most ample manner in the plan of the convention; that even in far the greatest proportion of civil cases, those in which the great body of the community is interested, that mode of trial will remain in full force, as established in the state constitutions, untouched and unaffected by the plan of the convention: That it is in no case abolished [3]

[3] Vide No. LXXXI, in which the supposition of its being abolished by the appellate jurisdiction in matters of fact being vested in the supreme court, is examined and refuted.

by that plan; and that there are great, if not insurmountable difficulties in the way of making any precise and proper provision for it, in a constitution for the United States.

The best judges of the matter will be the least anxious for a constitutional establishment of the trial by jury in civil cases, and will be the most ready to admit, that the changes which are continually happening in the affairs of society, may render a different mode of determining questions of property, preferable in many cases, in which that mode of trial now prevails. For my own part, I acknowledge myself to be convinced that, even in this state, it might be advantageously extended to some cases to which it does not at present apply, and might as advantageously be abridged in others. It is conceded by all reasonable men, that it ought not to obtain in all cases. The examples of innovations which contract its ancient limits, as well in these states as in Great Britain, afford a strong presumption that its former extent has been found inconvenient; and give room to suppose that future experience may discover the propriety and utility of other exceptions. I suspect it to be impossible in the nature of the thing, to fix the salutary point at which the operation of the institution ought to stop; and this is with me a strong argument for leaving the matter to the discretion of the legislature.

This is now clearly understood to be the case in Great Britain, and it is equally so in the state of Connecticut; and yet it may be safely affirmed, that more numerous encroachments have been made upon the trial by jury in this state since the revolution, though provided for by a positive article of our constitution, than has happened in the same time either in Connecticut or Great Britain. It may be added, that these encroachments have generally originated with the men who endeavour to persuade the people they are the warmest defenders of popular liberty, but who have rarely suffered constitutional obstacles to arrest them in a favourite career. The truth is, that the general GENIUS of a government is all that can be substantially relied upon for permanent effects. Particular provisions, though not altogether useless, have far less virtue and efficacy than are commonly ascribed to them; and the want of them, will never be with men of sound discernment, a decisive objection to any plan which exhibits the leading characters of a good government.

It certainly sounds not a little harsh and extraordinary to affirm, that there is no security for liberty in a constitution which expressly establishes the trial by jury in criminal cases, because it does not do it in civil also; while it is a notorious fact that Connecticut, which has been always regarded as the most popular state in the union, can boast of no constitutional provision for either.

PUBLIUS.

THE JUDICIARY ACT OF 1789

[From U. S. Statutes at Large, Vol. I]

CHAP. XX.—*An Act to establish the Judicial Courts of the United States.*[1]

STATUTE I.
Sept. 24, 1789.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States in Congress assembled,* That the supreme court of the United States shall consist of a chief justice and five associate justices,[2] any four of whom shall be a quorum, and shall hold annually at the seat of government two sessions, the one commencing the first Monday of February, and the other the first Monday of August. That the associate justices shall have precedence according to the date of their commissions, or when the commissions of two or more of them bear date on the same day, according to their respective ages.

Supreme court to consist of a chief justice, and five associates.

Two sessions annually.

Precedence.

SEC. 2. *And be it further enacted,* That the United States shall be, and they hereby are divided into thirteen districts, to be limited and called as follows, to wit: one to consist of that part of the State of Massachusetts which lies easterly of the State of New Hampshire, and to be called Maine District; one to consist of the State of New Hampshire, and to be called New Hampshire District;[3] one to consist of the remaining part of the

Thirteen districts.

Maine.

N. Hampshire.

[1] The 3d article of the Constitution of the United States enables the judicial department to receive jurisdiction to the full extent of the constitution, laws and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only where the subject is submitted to it by a party who asserts his right in a form presented by law. It then becomes a case. Osborn et al. *v.* The Bank of the United States, 9 Wheat. 738; 5 Cond. Rep. 741.

[2] By the act of Feb. 24, 1807, chap. 31, the Supreme Court was declared to consist of a Chief Justice and six associate Justices, and by the act of March 3, 1837, chap. 34, it was made to consist of a Chief Justice and eight associate Justices.

By the act of April 29, 1802, chap. 31, the provision of the act of September 24, 1789, requiring two annual sessions of the Supreme Court, was repealed, and the 2d section of that act required that the associate Justice of the fourth circuit should attend at Washington on the first Monday of August annually, to make all necessary rules and orders, touching suits and actions depending in the court. This section was repealed by the 7th section of the act of February 28, 1839, chap. 36.

By an act passed May 4, 1826, chap. 37, the sessions of the Supreme Court were directed to commence on the second Monday in January annually, instead of the first Monday in February; and by an act passed June 17, 1844, the sessions of the Supreme Court were directed to commence on the first Monday in December annually.

[3] The jurisdiction and powers of the District Courts have been declared and established by the following acts of Congress: Act of September 24, 1789; act of June 5, 1794, sec. 6; act of May 10, 1800; act of December 31, 1814; act of April 16, 1816; act of April 20, 1818; act of May 15, 1820; act of March 3, 1793.

The decisions of the Courts of the United States on the jurisdiction of the District Courts have been: The Thomas Jefferson, 10 Wheat. 428; 6 Cond. Rep. 173. M'Donough *v.* Danery, 3 Dall. 188; 1 Cond. Rep. 94. United States *v.* La Vengeance, 3 Dall. 297; 1 Cond. Rep. 132. Glass et al. *v.* The Betsey, 3 Dall. 6; 1 Cond. Rep. 10. The Alerta *v.* Blas Moran, 9 Cranch, 359; 3 Cond. Rep. 425. The Merino et al., 9 Wheat. 391; 5 Cond. Rep. 623. The Josefa Segunda, 10 Wheat. 312; 6 Cond. Rep. 111. The Bolina, 1 Gallis. C. C. R. 75. The Robert Fulton, Paine's C. C. R. 620. Jansen *v.* The Vrow Christiana Magdalena, Bee's D. C. R. 11. Jennings *v.* Carson, 4 Cranch, 2; 2 Cond. Rep. 2. The Sarah, 8 Wheat. 391; 5 Cond. Rep. 472. Penhallow et al. *v.* Doane's Adm'rs, 3 Dall. 54; 1 Cond. Rep. 21. The United States *v.* Richard Peters, 3 Dall. 121; 1 Cond. Rep. 60. M'Lellan *v.* the United States, 1 Gallis. C. C. R. 227. Hudson et al. *v.* Guestier, 6 Cranch, 281; 2 Cond. Rep. 374. Brown *v.* The United States, 8 Cranch, 110; 3 Cond. Rep. 56. De Lovio *v.* Boit et al., 2 Gallis. Rep. 398. Burke *v.* Trevitt, 1 Mason, 96. The Amiable Nancy, 3 Wheat. 546; 4 Cond. Rep. 322. The Abby, 1 Mason, 360. The Little Ann, Paine's C. C. R. 40. Slocum *v.* Mayberry et al., 2 Wheat. 1; 4 Cond. Rep. 1. Southwick *v.* The Postmaster General, 2 Peters, 442. Davis *v.* A New Brig., Gilpin's D. C. R. 473. Smith *v.* The Pekin, Gilpin's D. C. R. 203. Peters' Digest, "Courts," "District Courts of the United States."

The 3d section of the act of Congress of 1789, to establish the Judicial Courts of the United States, which provides that no summary writ, return of process, judgment, or other proceedings in the courts of the United States shall be abated, arrested or quashed for any defect or want of form, &c., although it does not include verdicts, eo nomine, but judgments are included; and the language of the provision, "writ, declaration, judgment or other proceeding, in court causes," and further "such writ, declaration, pleading, process, judgment or other proceeding whatsoever," is sufficiently comprehensive to embrace every conceivable step to be taken in a court, from the emanation of the writ, down to the judgment. Roach *v.* Hulings, 16 Peters, 319.

Massachusetts. State of Massachusetts, and to be called Massachusetts district; one to consist of the State of Connecticut, and Connecticut. to be called Connecticut District; one to consist of the New York. State of New York, and to be called New York District; one to consist of the State of New Jersey, and to be New Jersey. called New Jersey District; one to consist of the State Pennsylvania. of Pennsylvania, and to be called Pennsylvania District; one to consist of the State of Delaware, and to be called Delaware. Delaware District; one to consist of the State of Mary- Maryland. land, and to be called Maryland District; one to consist of the State of Virginia, except that part called the Virginia. District of Kentucky, and to be called Virginia District; one to consist of the remaining part of the State of Kentucky. Virginia, and to be called Kentucky District; one to consist of the State of South Carolina, and to be called South Carolina. South Carolina District; and one to consist of the State Georgia. of Georgia, and to be called Georgia District.

A district court in each district. SEC. 3. *And be it further enacted*, That there be a court called a District Court, in each of the afore mentioned districts, to consist of one judge, who shall reside in the district for which he is appointed, and shall be called a Four sessions annually in a district; and when held. District Judge, and shall hold annually four sessions, the first of which to commence as follows, to wit: in the districts of New York and of New Jersey on the first, in the district of Pennsylvania on the second, in the district of Connecticut on the third, and in the district of Delaware on the fourth, Tuesdays of November next; in the districts of Massachusetts, of Maine, and of Maryland, on the first, in the district of Georgia on the second, and in the districts of New Hampshire, of Virginia, and of Kentucky, on the third Tuesdays of December next; and the other three sessions progressively in the respective districts on the like Tuesdays of every third calendar month afterwards, and in the district of South Carolina, on the third Monday in March and September, the first Monday in July, and the second Monday in December Special district courts. of each and every year, commencing in December next; Stated district courts; where holden. and that the District Judge shall have power to hold special courts at his discretion. That the stated District Court shall be held at the places following, to wit: in the district of Maine, at Portland and Pownalsborough alternately, beginning at the first; in the district of New Hampshire, at Exeter and Portsmouth alternately, beginning at the first; in the district of Massachusetts, at Boston and Salem alternately, beginning at the first; in the district of Connecticut, alternately at Hartford and New Haven, beginning at the first; in the district of New York, at New York; in the district of New Jersey, alternately at New Brunswick and Burlington, beginning at the first; in the district of Pennsylvania, at Philadelphia and York Town alternately, beginning at the first; in the district of Delaware, alternately at Newcastle and Dover, beginning at the first; in the district of Maryland, alternately at Baltimore and Easton, be-

ginning at the first; in the district of Virginia alternately at Richmond and Williamsburgh, beginning at the first; in the district of Kentucky, at Harrodsburgh; in the district of South Carolina, at Charleston; and in the district of Georgia, alternately, at Savannah and Augusta, beginning at the first; and that the special courts shall be held at the same place in each district as the stated courts, or in districts that have two, at either of them, in the discretion of the judge, or at such other place in the district, as the nature of the business and his discretion shall direct. And that in the districts that have but one place for holding the District Court, the records thereof shall be kept at that place; and in districts that have two, at that place in each district which the judge shall appoint.

Special courts, where held.

Where records kept.

SEC. 4. *And be it further enacted*, That the before mentioned districts, except those of Maine and Kentucky, shall be divided into three circuits, and be called the eastern, the middle, and the southern circuit. That the eastern circuit shall consist of the districts of New Hampshire, Massachusetts, Connecticut and New York; that the middle circuit shall consist of the districts of New Jersey, Pennsylvania, Delaware, Maryland and Virginia; and that the southern circuit shall consist of the districts of South Carolina and Georgia, and that there shall be held annually in each district of said circuits, two courts, which shall be called Circuit Courts, and shall consist of any two justices of the Supreme Court, and the district judge of such districts, any two of whom shall constitute a quorum: *Provided*, That no district judge shall give a vote in any case of appeal or error from his own decision; but may assign the reasons of such his decision.

Three circuits, and how divided. [Obsolete.]

SEC. 5. *And be it further enacted*, That the first session of the said circuit court in the several districts shall commence at the times following, to wit: in New Jersey on the second, in New York on the fourth, in Pennsylvania on the eleventh, in Connecticut on the twenty-second, and in Delaware on the twenty-seventh, days of April next; in Massachusetts on the third, in Maryland on the seventh, in South Carolina on the twelfth, in New Hampshire on the twentieth, in Virginia on the twenty-second, and in Georgia on the twenty-eighth, days of May next, and the subsequent sessions in the respective districts on the like days of every sixth calendar month afterwards, except in South Carolina, where the session of the said court shall commence on the first, and in Georgia where it shall commence on the seventeenth day of October, and except when any of those days shall happen on a Sunday, and then the session shall commence on the next day following. And the sessions of the said circuit court shall be held in the district of New Hampshire, at Portsmouth and Exeter alternately, beginning at the first; in the district of

First session of the circuit courts; when holden.

Where holden.

Massachusetts, at Boston; in the district of Connecticut, alternately at Hartford and New Haven, beginning at the last; in the district of New York, alternately at New York and Albany, beginning at the first; in the district of New Jersey, at Trenton; in the district of Pennsylvania, alternately at Philadelphia and Yorktown, beginning at the first; in the district of Delaware, alternately at New Castle and Dover, beginning at the first; in the district of Maryland, alternately at Annapolis and Easton, beginning at the first; in the district of Virginia, alternately at Charlottesville and Williamsburgh, beginning at the first; in the district of South Carolina, alternately at Columbia and Charleston, beginning at the first; and in the district of Georgia, alternately at Savannah and Augusta, beginning at the first. And the circuit courts shall have power to hold special sessions for the trial of criminal causes at any other time at their discretion, or at the discretion of the Supreme Court.[4]

Circuit courts. Special sessions.

Supreme court adjourned by one or more justices; circuit courts adjourned.

SEC. 6. *And be it further enacted*, That the Supreme Court may, by any one or more of its justices being present, be adjourned from day to day until a quorum be convened; and that a circuit court may also be adjourned from day to day by any one of its judges, or if none are present, by the marshal of the district until a quorum be convened;[5] and that a district court, in case of the inability of the judge to attend at the commencement of a session, may by virtue of a written order from the said judge, directed to the marshal of the district, be adjourned by the said marshal to such day, antecedent to the next stated session of the said court,

District courts adjourned.

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[4] The sessions of the Circuit Courts have been regulated by the following acts: In ALABAMA—act of March 3, 1837. In ARKANSAS—act of March 3, 1837. In CONNECTICUT—act of September 24, 1789; act of April 13, 1792; act of March 2, 1793; act of March 3, 1797; act of April 29, 1802; act of May 13, 1826. In DELAWARE—act of September 24, 1789; act of March 3, 1797; act of April 29, 1802; act of March 24, 1804; act of March 3, 1837. In GEORGIA—act of September 24, 1789; act of August 11, 1790; act of April 13, 1792; act of March 3, 1797; act of April 20, 1802; act of May 13, 1826; act of Jan. 21, 1829. KENTUCKY—act of March 3, 1801; act of March 8, 1802; act of March 2, 1803; act of Feb. 27, 1807; act of March 22, 1808; April 22, 1824. LOUISIANA—act of March 3, 1837. MAINE—act of March 3, 1801; act of March 8, 1802; act of March 30, 1820. MARYLAND—act of Sept. 24, 1789; act of March 3, 1797; act of April 29, 1802; act of Feb. 11, 1830; act of March 3, 1837. MASSACHUSETTS—act of Sept. 24, 1789; act of March 3, 1791; act of June 9, 1794; act of March 2, 1793; act of March 3, 1797; act of March 3, 1801; act of March 8, 1802; act of April 29, 1802; act of March 26, 1812. MISSOURI—act of March 3, 1837. MISSISSIPPI—act of March 3, 1839. NEW HAMPSHIRE—act of Sept. 24, 1789; act of March 3, 1791; act of April 13, 1792; act of March 2, 1793; act of March 3, 1797; act of March 3, 1801; act of April 20, 1802; act of March 6, 1812. NEW JERSEY—act of September 24, 1789; act of March 3, 1797; act of April 2, 1802. NEW YORK—act of September 24, 1789; act of March 3, 1791; act of April 13, 1792; act of March 2, 1793; act of March 3, 1797; act of April 29, 1802; act of March 3, 1825; act of February 10, 1832; act of May 13, 1836; act of March 3, 1837. NORTH CAROLINA—act of September 24, 1789; act of April 13, 1792; act of March 2, 1793; act of March 31, 1796; act of March 3, 1797; act of July 5, 1797; act of April 29, 1802; act of March 8, 1806; act of February 4, 1807. OHIO—act of February 24, 1807; act of March 22, 1808; act of April 22, 1824; act of May 20, 1826. PENNSYLVANIA—act of September 24, 1789; act of May 12, 1796; act of March 3, 1797; act of December 24, 1799; act of April 29, 1802; act of March 3, 1837. RHODE ISLAND—act of June 23, 1790; act of March 3, 1791; act of March 2, 1793; act of May 22, 1796; act of March 3, 1797; act of March 3, 1801; act of March 8, 1802; act of April 29, 1802; act of March 26, 1812. SOUTH CAROLINA—act of September 24, 1789; act of August 11, 1790; act of March 3, 1797; act of April 29, 1802; act of April 14, 1816; act of May 25, 1824; act of March 3, 1825; act of May 4, 1826; act of February 5, 1829. TENNESSEE—act of February 24, 1807; act of March 22, 1808; act of March 10, 1812; act of January 13, 1831. VERMONT—act of March 2, 1791; act of March 2, 1793; act of May 27, 1796; act of March 3, 1797; act of April 29, 1802; act of March 22, 1816. VIRGINIA—act of September 24, 1789; act of March 3, 1791; act of April 13, 1792; act of March 3, 1797; act of April 29, 1802; act of March 2, 1837. See the General Index.

By the act of March 10, 1838, the Justice of the Supreme Court is required to attend but one circuit in the districts of Indiana, Illinois, and Michigan.

By an act passed in 1844, the Justices of the Supreme Court are empowered to hold but one session of the Circuit Court in each district in their several circuits. The Judges of the District Courts hold the other sessions of the Circuit Court in their several districts.

[5] The provisions of law on the subject of the adjournments of the Supreme Court in addition to the 6th section of this act, are, that in case of epidemical disease, the court may be adjourned to some other place than the seat of government. Act of February 25, 1799.

as in the said order shall be appointed; and in case of the death of the said judge, and his vacancy not being supplied, all process, pleadings and proceedings of what nature soever, pending before the said court, shall be continued of course until the next stated session after the appointment and acceptance of the office by his successor.

The courts have power to appoint clerks.

SEC. 7. *And be it* [*further*] *enacted*, That the Supreme Court, and the district courts shall have power to appoint clerks for their respective courts,[6] and that the clerk for each district court shall be clerk also of the circuit court in such district, and each of the said clerks shall, before he enters upon the execution of his office, take the following oath or affirmation, to wit: "I, A. B., being appointed clerk of , do solemnly swear, or affirm, that I will truly and faithfully enter and record all the orders, decrees, judgments and proceedings of the said court, and that I will faithfully and impartially discharge and perform all the duties of my said office, according to the best of my abilities and understanding. So help me God." Which words, so help me God, shall be omitted in all cases where an affirmation is admitted instead of an oath. And the said clerks shall also severally give bond, with sufficient sureties, (to be approved of by the Supreme and district courts respectively) to the United States, in the sum of two thousand dollars, faithfully to discharge the duties of his office, and seasonably to record the decrees, judgments and determinations of the court of which he is clerk.

Their oath or affirmation.

Oath of justices of supreme court and judges of the district court.

SEC. 8. *And be it further enacted*, That the justices of the Supreme Court, and the district judges, before they proceed to execute the duties of their respective offices, shall take the following oath or affirmation, to wit: "I, A. B., do solemnly swear or affirm, that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as , according to the best of my abilities and understanding, agreeably to the constitution and laws of the United States. So help me God."

District courts exclusive jurisdiction.

SEC. 9. *And be it further enacted*, That the district courts[7] shall have, exclusively of the courts of the several States, cognizance of all crimes and offences that shall be cognizable under the authority of the United States, committed within their respective districts, or upon the

[6] By the 2d section of the act entitled "an act in amendment of the acts respecting the judicial system of the United States," passed February 28, 1839, chap. 36, it is provided "that all the circuit courts of the United States shall have the appointment of their own clerks, and in case of disagreement between the judges, the appointment shall be made by the presiding judge of the court." See ex parte Duncan N. Hennen, 13 Peters, 230.

[7] The further legislation on the subject of the jurisdiction and powers of the District Courts are: the act of June 5, 1794, ch. 50, sec. 6; act of May 10, 1800, chap. 51, sec. 5; act of February 24, 1807, chap. 13; act of February 24, 1807, chap. 16; act of March 3, 1815; act of April 16, 1816, chap. 56, sec. 6; act of April 20, 1818, chap. 88; act of May 15, 1820, chap. 106, sec. 4; act of March 3, 1823, chap. 72.

[Acts of June 5, 1794, sect. 6; act of Feb. 13, 1807, act of March 3, 1815, sect. 4.] Original cognizance in maritime causes and of seizure under the laws of the United States.

high seas; where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted; and shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas;[8] saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it; and shall also have exclusive original cognizance of all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred, under the laws of the United States.[9] And shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.[10] And shall also have cognizance, concurrent as last mentioned, of all suits at common law where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum or value of one hundred dollars. And shall also have jurisdiction exclusively of the courts of the several States, of all suits against consuls or vice-consuls, except for offences above the description aforesaid.[11] And the trial of issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury.

Concurrent jurisdiction.

Trial of fact by jury.

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[8] Jurisdiction of the District Courts in cases of admiralty seizures, under laws of impost, navigation and trade. M'Donough *v.* Danery, 3 Dall. 188; 1 Cond. Rep. 94. The United States *v.* La Vengeance, 3 Dall. 297; 1 Cond. Rep. 132. Glass et al. *v.* The Betsey, 3 Dall. 6; 1 Cond. Rep. 10. The Alerta, 9 Cranch, 359; 3 Cond. Rep. 425. The Merino et al., 9 Wheat. 391; 5 Cond. Rep. 623. The Josefa Segunda, 10 Wheat. 312; 6 Cond. Rep. 111. Jennings *v.* Carson, 4 Cranch, 2; 2 Cond. Rep. 2. The Sarah, 8 Wheat. 391; 5 Cond. Rep. 472. Penhallow et al. *v.* Doane's Adm'rs, 3 Dall. 54; 1 Cond. Rep. 21. United States *v.* Richard Peters, 3 Dall. 121; 1 Cond. Rep. 60. Hudson et al. *v.* Guestier, 6 Cranch, 281; 2 Cond. Rep. 374. Brown *v.* The United States, 8 Cranch, 110; 3 Cond. Rep. 56. The Sarah, 8 Wheat. 391; 5 Cond. Rep. 472. The Amiable Nancy, 3 Wheat. 546; 4 Cond. Rep. 322. Slocum *v.* Mayberry, 2 Wheat. 1; 4 Cond. Rep. 1. Gelston et al. *v.* Hoyt, 3 Wheat. 246; 4 Cond. Rep. 244. The Bolina, 1 Gallis. C. C. R. 75. The Robert Fulton, 1 Paine's C. C. R. 620; Bee's D. C. R. 11. De Lovio *v.* Boit et al., 2 Gallis. C. C. R. 398. The Abby, 1 Mason's Rep. 360. The Little Ann, Paine's C. C. R. 40. Davis *v.* A New Brig. Gilpin's D. C. R. 473. The Catharine, 1 Adm. Decis. 104.

[9] An information against a vessel under the act of Congress of May 22, 1794, on account of an alleged exportation of arms, is a case of admiralty and maritime jurisdiction; and an appeal from the District to the Circuit Court, in such a case is sustainable. It is also a civil cause, and triable without the intervention of a jury, under the 9th section of the judicial act. The United States *v.* La Vengeance, 3 Dall. 297; 1 Cond. Rep. 132. The Sarah, 8 Wheat. 391; 5 Cond. Rep. 472. The Abby, 1 Mason, 360. The Little Ann, Paine's C. C. R. 40.

When the District and State courts have concurrent jurisdiction, the right to maintain the jurisdiction attaches to that tribunal which first exercises it, and obtains possession of the thing. The Robert Fulton, Paine's C. C. R. 620.

[10] Burke *v.* Trevitt, 1 Mason, 96. The courts of the United States have exclusive jurisdiction of all seizures made on land or water, for a breach of the laws of the United States, and any intervention of State authority, which by taking the thing seized out of the hands of the officer of the United States, might obstruct the exercise of this jurisdiction, is unlawful. Slocum *v.* Mayberry et al., 2 Wheat. 1; 4 Cond. Rep. 1.

[11] Davis *v.* Packard, 6 Peters, 41. As an abstract question, it is difficult to understand on what ground a State court can claim jurisdiction of civil suits against foreign consuls. By the Constitution, the judicial power of the United States extends to all cases affecting ambassadors, other public ministers and consuls; and the judiciary act of 1789 gives to the district courts of the United States, exclusively of the courts of the several States, jurisdiction of all suits against consuls and vice consuls, except for certain offences enumerated in this act. Davis *v.* Packard, 7 Peters, 276.

If a consul, being sued in a State court, omits to plead his privilege of exemption from the suit, and afterwards, on removing the judgment of the inferior court to a higher court by writ of error, claims the privilege, such an omission is not a waiver of the privilege. If this was to be viewed merely as a personal privilege, there might be grounds for such a conclusion. But it cannot be so considered; it is the privilege of the country or government which the consul represents. This is the light in which foreign ministers are considered by the law of nations; and our constitution and law seem to put consuls on the same footing in this respect. *Ibid.*

Kentucky district court.

1807, ch. 16.

Maine district court. [Obsolete.]

SEC. 10. *And be it further enacted*, That the district court in Kentucky district shall, besides the jurisdiction aforesaid, have jurisdiction of all other causes, except of appeals and writs of error, hereinafter made cognizable in a circuit court, and shall proceed therein in the same manner as a circuit court, and writs of error and appeals shall lie from decisions therein to the Supreme Court in the same causes, as from a circuit court to the Supreme Court, and under the same regulations.[12] And the district court in Maine district shall, besides the jurisdiction hereinbefore granted, have jurisdiction of all causes, except of appeals and writs of error hereinafter made cognizable in a circuit court, and shall proceed therein in the same manner as a circuit court: And writs of error shall lie from decisions therein to the circuit court in the district of Massachusetts in the same manner as from other district courts to their respective circuit courts.

Original cognizance of circuit court.

SEC. 11. *And be it further enacted*, That the circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs, or petitioners; or an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State.[13] And shall have exclu-

[12] By an act passed February 24, 1807, the Circuit Court jurisdiction of the District Court of Kentucky was abolished.

[13] The amount laid in the declaration is the sum in controversy. If the plaintiff receive less than the amount so claimed, the jurisdiction of the court is not affected. Green *v.* Liter, 8 Cranch, 229. Gordon *v.* Longest, 16 Peters, 97. Lessee of Hartshon *v.* Wright, Peters' C. C. R. 64.

By the 5th section of the act of February 21, 1794, "an act to promote the progress of the useful arts," &c., jurisdiction in actions for violations of patent rights, is given to the Circuit Courts. Also by the act of February 15, 1819, original cognizance, as well in equity as at law, is given to the Circuit Courts of all actions, and for the violation of copy rights. In such cases appeals lie to the Supreme Court of the United States. So also in cases of interest, or disability of a district judge. Act of May 8, 1792, sec. 11; act of March 2, 1809, sec. 1; act of March 3, 1821.

Jurisdiction in cases of injunctions on Treasury warrants of distress. Act of May 15, 1820, sec. 4.

Jurisdiction in cases removed from State courts. Act of February 4, 1815, sec. 8; act of March 3, 1815, sec. 6.

Jurisdiction in cases of assigned debentures. Act of March 2, 1799.

Jurisdiction of crimes committed within the Indian territories. Act of March 30, 1830, sec. 15; act of April 30, 1816, sec. 4; act of March 3, 1817, sec. 2.

Jurisdiction in bankruptcy. Act of August 19, 1841, chap. 9, [repealed.]

Jurisdiction in cases where citizens of the same State claim title to land under a grant from a State other than that in which the suit is pending in a State court. Act of September 24, 1789, sec. 12. See Colson *v.* Lewis, 2 Wheat. 377; 4 Cond. Rep. 168.

Jurisdiction where officers of customs are parties. Act of February 4, 1815, sec. 8; act of March 3, 1815, sec. 6; act of March 3, 1817, sec. 2.

A circuit court though an inferior court in the language of the constitution, is not so in the language of the common law; nor are its proceedings subject to the scrutiny of those narrow rules, which the caution or jealousy of the courts at Westminster long applied to courts of that denomination; but are entitled to as liberal intendments and presumptions in favour of their regularity, as those of any supreme court. Turner *v.* The Bank of North America, 4 Dall. 8; 1 Cond. Rep. 205.

The Circuit Courts of the United States have cognizance of all offences against the United States. What those offences are depends upon the common law applied to the sovereignty and authorities confided to the United States. The United States *v.* Coolidge, 1 Gallis. C. C. R. 488, 495.

Where the jurisdiction of the federal courts has once attached, no subsequent change in the relation or condition of the parties in the progress of the cause, will oust that jurisdiction. The United States *v.* Meyers, 2 Brocken. C. C. R. 516.

All the cases arising under the laws of the United States are not, per se, among the cases comprised within the jurisdiction of the Circuit Court, under the provisions of the 11th section of the judiciary act of 1789. The Postmaster General *v.* Stockton and Stokes, 12 Peters, 524.

Jurisdiction of the Circuit Courts of the United States in suits between aliens and citizens of another State than that in which the suit is brought:

The courts of the United States will entertain jurisdiction of a cause where all the parties are aliens, if none of them object to it. Mason et al. *v.* The Blaireau, 2 Cranch, 240; 1 Cond. Rep. 397.

The Supreme Court understands the expressions in the act of Congress, giving jurisdiction to the courts of the United States "where an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State," to mean that each distinct interest should be represented by

Exclusive cognizance of circuit courts.

sive cognizance of all crimes and offences cognizable under the authority of the United States,[14] except where this act otherwise provides, or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the district courts of the crimes and offences cognizable therein. But no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court.[15] And no civil suit shall be brought before either of said courts against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ, nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favour of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange.[16] And the circuit courts shall also have appellate jurisdiction from the district courts under the regulations and restrictions hereinafter provided.[17]

No person to be arrested in one district for trial in another on any civil suit. Limitation as to civil suits. Actions on promissory notes.

Circuit courts shall also have appellate jurisdiction.

Matter in dispute above 500 dollars. Removal of causes from state courts.

SEC. 12. *And be it further enacted*, That if a suit be commenced in any state court against an alien, or by a citizen of the state in which the suit is brought against a citizen of another state, and the matter in dispute exceeds the aforesaid sum or value of five hundred dollars, exclusive of costs, to be made to appear to the satisfaction of the court; and the defendant shall, at the time of entering his appearance in such state court, file a petition for the removal of the cause for trial into the next circuit court, to be held in the district where the suit is pending, or if in the district of Maine to the district

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persons, all of whom have a right to sue, or may be sued in the federal courts: that is, when the interest is joint, each of the persons concerned in that interest must be competent to sue or be liable to be sued in those courts. Strawbridge *v.* Curtis, 3 Cranch, 267; 1 Cond. Rep. 523.

Neither the Constitution nor the act of Congress regards the subject of the suit, but the parties to it. Mossman's Ex'ors *v.* Higginson, 4 Dall. 12; 1 Cond. Rep. 210.

When the jurisdiction of the Circuit Court depends on the character of the parties, and such party consists of a number of individuals, each one must be competent to sue in the courts of the United States, or jurisdiction cannot be entertained. Ward *v.* Arredendo et al., Paine's C. C. R. 410. Strawbridge *v.* Curtis, 3 Cranch, 267; 1 Cond. Rep. 523.

The courts of the United States have not jurisdiction, unless it appears by the record that it belongs to them, as that the parties are citizens of different States. Wood *v.* Wagnon, 2 Cranch, 9; 1 Cond. Rep. 335.

Where the parties to a suit are such as to give the federal courts jurisdiction, it is immaterial that they are administrators or executors, and that those they represent were citizens of the same State. Chappedelaine et al. *v.* Decheneaux, 4 Cranch, 306; 2 Cond. Rep. 116. Childress et al. *v.* Emory et al., 8 Wheat. 642; 5 Cond. Rep. 547. See also Brown *v.* Strode, 5 Cranch, 303; 2 Cond. Rep. 265. Bingham *v.* Cabot, 3 Dall. 382; 1 Cond. Rep. 170. Gracie *v.* Palmer, 8 Wheat. 699; 5 Cond. Rep. 561. Massie *v.* Watts, 6 Cranch, 148; 2 Cond. Rep. 332. Sere et al. *v.* Pitot et al., 6 Cranch, 332; 2 Cond. Rep. 389. Shute *v.* Davis, Peters' C. C. R. 431. Flanders *v.* The Aetna Ins. Com., 3 Mason. C. C. R. 158. Kitchen *v.* Sullivan et al., 4 Wash. C. C. R. 81. Briggs *v.* French, 2 Sumner's C. C. R. 252.

[14] The Circuit Courts of the United States have jurisdiction of a robbery committed on the high seas under the 8th section of the act of April 30, 1790, although such robbery could not, if committed on land, be punished with death. The United States *v.* Palmer et al., 3 Wheat. 610; 4 Cond. Rep. 352. See The United States *v.* Coolidge et al., 1 Gallis. C. C. R. 488, 495. The United States *v.* Coombs, 12 Peters, 72.

The Circuit Courts have no original jurisdiction in suits for penalties and forfeitures arising under the laws of the United States, but the District Courts have exclusive jurisdiction. Ketland *v.* The Cassius, 2 Dall. 365.

[15] The petitioner was arrested in Pennsylvania, by the marshal of the district of Pennsylvania, under an attachment from the Circuit Court of Rhode Island, for a contempt in not appearing in that court, after a monition, served upon him in the State of Pennsylvania, to answer in a prize cause as to a certain bale of goods condemned to the captors, which had come into the possession of Peter Graham, the petitioner. Held, that the circuit and district courts of the United States cannot, either in suits at law or equity, send their process into another district, except where specially authorized so to do by some act of Congress. Ex parte Peter Graham, 3 Wash. C. C. R. 456.

[16] Bean *v.* Smith, 2 Mason's C. C. R. 252. Young *v.* Bryan, 6 Wheat. 146; 5 Cond. Rep. 44. Mollan *v.* Torrance, 9 Wheat. 537; 5 Cond. Rep. 666.

[17] Smith *v.* Jackson, Paine's C. C. R. 453.

court next to be holden therein, or if in Kentucky district to the district court next to be holden therein, and offer good and sufficient surety for his entering in such court, on the first day of its session, copies of said process against him, and also for his there appearing and entering special bail in the cause, if special bail was originally requisite therein, it shall then be the duty of the state court to accept the surety, and proceed no further in the cause, and any bail that may have been originally taken shall be discharged, and the said copies being entered as aforesaid, in such court of the United States, the cause shall there proceed in the same manner as if it had been brought there by original process.[18] And any attachment of the goods or estate of the defendant by the original process, shall hold the goods or estate so attached, to answer the final judgment in the same manner as by the laws of such state they would have been holden to answer final judgment, had it been rendered by the court in which the suit commenced. And if in any action commenced in a state court, the title of land be concerned, and the parties are citizens of the same state, and the matter in dispute exceeds the sum or value of five hundred dollars, exclusive of costs, the sum or value being made to appear to the satisfaction of the court, either party, before the trial, shall state to the court and make affidavit if they require it, that he claims and shall rely upon a right or title to the land, under a grant from a state other than that in which the suit is pending, and produce the original grant or an exemplification of it, except where the loss of public records shall put it out of his power, and shall move that the adverse party inform the court, whether he claims a right or title to the land under a grant from the state in which the suit is pending; the said adverse [party] shall give such information, or otherwise not be allowed to plead such grant, or give it in evidence upon the trial, and if he informs that he does claim under such grant, the party claiming under the grant first mentioned may then, on motion, remove the cause for trial to the next circuit court to be holden in such district, or if in the district of Maine, to the court next to be holden therein; or if in Kentucky district, to the district court next to be holden therein; but if he is the defendant, shall do it under the same regulations as in the beforementioned case of the removal of a cause into such court by an alien; and neither party removing the cause, shall be allowed to plead or give evidence of any other title than that by him stated as aforesaid, as the ground of his claim; and the trial of

Special bail.

Attachment of goods holden to final judgment.

Title of land where value exceeds 500 dollars.

If in Maine and Kentucky, where causes are removable. [Obsolete.]

[18] The Judge of a State Court to which an application is made for the removal of a cause into a court of the United States must exercise a legal discretion as to the right claimed to remove the cause; the defendant being entitled to the right to remove the cause under the law of the United States, on the facts of the case, (the judge of the State court could not legally prevent the removal;) the application for the removal having been made in proper form, it was the duty of the State court to proceed no further in the cause. Gordon *v.* Longest, 16 Peters, 97.

One great object in the establishment of the courts of the United States, and regulating their jurisdiction, was to have a tribunal in each State presumed to be free from local influence, and to which all who were non-residents or aliens, might resort for legal redress; and this object would be defeated if a judge in the exercise of any other than a legal discretion, may deny to the party entitled to it, a removal of his cause. *Ibid.*

Issues in fact by jury.

issues in fact in the circuit courts shall, in all suits, except those of equity, and of admiralty, and maritime jurisdiction, be by jury.[19]

Supreme court exclusive jurisdiction.

SEC. 13. *And be it further enacted*, That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction.[20] And shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul, or vice consul, shall be a party.[21] And the trial of issues in fact in the Supreme Court, in all actions at law against citizens of the United States, shall be by jury. The Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several states, in the cases herein after specially provided for;[22] and shall have power to issue writs of prohibition [23] to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of *mandamus*,[24] in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.

Proceedings against public ministers.

Issues of fact.

Sup. Court appellate jurisdiction.

Writs of Prohibition.

Of Mandamus.

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[19] The provisions of the laws of the United States relating to juries, and trials by jury are:—*Trial by jury*—act of September 24, 1789, chap. 20, sec. 10, sec. 12, sec. 15.—*Exemption from attending on juries*—act of May 7, 1800, chap. 46, sec. 4. *Choice of jurors and qualification of juries*—act of September 24, 1789, chap. 20, sec. 29; act of May 13, 1800; act of July 20, 1840; act of March 3, 1841, chap. 19. Expired as to juries in Pennsylvania. Special jury act of April 29, 1802, chap. 31, sec. 30.—*Jury in criminal cases*—act of September 24, 1789, chap. 20, sec. 29; act of April 30, 1790, chap. 9.- *Manner of summoning jurors*—act of September 24, 1789, sec. 29; act of April 29, 1802, chap. 31. *Jurymen de talibus*—act of September 24, 1789, chap. 20.

[20] As to cases in which States, or alleged States, are parties, the following cases are referred to: The Cherokee Nation *v.* The State of Georgia, 5 Peters, 1. New Jersey *v.* The State of New York, 5 Peters, 284. Ex parte Juan Madrazzo, 7 Peters, 627. The State of Rhode Island *v.* The State of Massachusetts, 12 Peters, 657. Cohens *v.* The State of Virginia, 6 Wheat. 264; 5 Cond. Rep. 90. New York *v.* Connecticut, 4 Dall. 3. Fowler *v.* Lindsay et al., 3 Dall. 411.

[21] The United States *v.* Ortega, 11 Wheat. 467; 6 Cond. Rep. 394. Davis *v.* Packard, 6 Peters, 41.

[22] As to the appellate jurisdiction of the Supreme Court, see the cases collected in Peters's Digest, "Supreme Court," "Appellate Jurisdiction of the Supreme Court," and the following cases: The United States *v.* Goodwin, 7 Cranch, 108; 2 Cond. Rep. 434. Wiscart *v.* Dauchy, 3 Dall. 321; 1 Cond. Rep. 144. United States *v.* Moore, 3 Cranch, 159; 1 Cond. Rep. 480. Owings *v.* Norwood's Lessee, 5 Cranch, 344; 2 Cond. Rep. 275. Martin *v.* Hunter's Lessee, 1 Wheat. 304; 3 Cond. Rep. 575. Gordon *v.* Caldcleugh, 3 Cranch, 268; 1 Cond. Rep. 524. Ex parte Kearney, 7 Wheat. 38; 5 Cond. Rep. 225. Smith *v.* The State of Maryland, 6 Cranch, 286; 2 Cond. Rep. 377. Inglee *v.* Coolidge, 2 Wheat. 363; 4 Cond. Rep. 155. Nicholls et al. *v.* Hodges Ex'ors, 1 Peters, 562. Buel et al. *v.* Van Ness, 8 Wheat 312; 5 Cond. Rep. 445. Miller *v.* Nicholls, 4 Wheat. 311; 4 Cond. Rep. 465. Matthews *v.* Zane et al., 7 Wheat. 164; 5 Cond. Rep. 265. M'Cluny *v.* Silliman, 6 Wheat. 598; 5 Cond. Rep. 197. Houston *v.* Moore, 3 Wheat. 433; 3 Cond. Rep. 286. Montgomery *v.* Hernandez et al., 12 Wheat. 129; 6 Cond. Rep. 475. Cohens *v.* Virginia, 6 Wheat. 264; 5 Cond. Rep. 90. Gibbons *v.* Ogden, 6 Wheat. 448; 5 Cond. Rep. 134. Weston et al. *v.* The City Council of Charleston, 2 Peters, 449. Hickie *v.* Starke et al., 1 Peters, 94. Satterlee *v.* Matthewson, 2 Peters, 380. M'Bride *v.* Hoey, 11 Peters, 167. Ross *v.* Barland et al., 1 Peters, 655. The City of New Orleans *v.* De Armas, 9 Peters, 224. Crowell *v.* Randell, 10 Peters, 368. Williams *v.* Norris, 12 Wheat. 117; 6 Cond. Rep. 462. Menard *v.* Aspasia, 5 Peters, 505. Worcester *v.* The State of Georgia, 6 Peters, 515. The United States *v.* Moore, 3 Cranch, 159; 1 Cond. Rep. 480.

[23] Prohibition. Where the District Court of the United States has no jurisdiction of a cause brought before it, a prohibition will be issued from the Supreme Court to prevent proceedings. The United States *v.* Judge Peters, 3 Dall. 121; 1 Cond. Rep. 60.

[24] Mandamus. The following cases have been decided on the power of the Supreme Court to issue a mandamus. Marbury *v.* Madison, 1 Cranch, 137; 1 Cond. Rep. 267. M'Cluny *v.* Silliman, 2 Wheat. 369; 4 Cond. Rep. 162. United States *v.* Lawrence, 3 Dall. 42; 1 Cond. Rep. 19. United States *v.* Peters, 3 Dall. 121; 1 Cond. Rep. 60. Ex parte Burr, 9 Wheat. 529; 5 Cond. Rep. 660. Parker *v.* The Judges of the Circuit Court of Maryland, 12 Wheat. 561; 6 Cond. Rep. 644. Ex parte Roberts et al., 6 Peters, 216. Ex

Courts may issue writs scire facias, habeas corpus, &c.

Act of 1793, ch. 22; act of 1807, ch. 13; act of 1818, ch. 83; act of Feb. 1819; act of May 20, 1826, ch. 124.

Limitation of writs of habeas corpus.

SEC. 14. *And be it further enacted*, That all the beforementioned courts of the United States, shall have power to issue writs of *scire facias, habeas corpus*,[25] and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment.—*Provided*, That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.

Parties shall produce books and writings.

SEC. 15. *And be it further enacted*, That all the said courts of the United States, shall have power in the trial of actions at law, on motion and due notice thereof being given, to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery; and if a plaintiff shall fail to comply with such order, to produce books or writings, it shall be lawful for the courts respectively, on motion, to give the like judgment for the defendant as in cases of nonsuit; and if a defendant shall fail to comply with such order, to produce books or writings, it shall be lawful for the courts respectively on

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parte Davenport, 6 Peters, 661. Ex parte Bradstreet, 12 Peters, 174; 7 Peters, 634; 8 Peters, 588. Life and Fire Ins. Comp. of New York *v.* Wilson's heirs, 8 Peters, 291.

On a mandamus a superior court will never direct in what manner the discretion of the inferior tribunal shall be exercised; but they will, in a proper case, require an inferior court to decide. *Ibid.* Life and Fire Ins. Comp. of New York *v.* Adams, 9 Peters, 571. Ex parte Story, 12 Peters, 339. Ex parte Jesse Hoyt collector, &c., 13 Peters, 279.

A writ of mandamus is not a proper process to correct an erroneous judgment or decree rendered in an inferior court. This is a matter which is properly examinable on a writ of error, or an appeal to a proper appellate tribunal. *Ibid.*

Writs of mandamus from the Circuit Court of the United States. A Circuit Court of the United States has power to issue a mandamus to a collector, commanding him to grant a clearance. Gilchrist et al. *v.* Collector of Charleston, 1 Hall's Admiralty Law Journal, 429.

The power of the Circuit Court to issue the writ of mandamus is confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction. M'Intire *v.* Wood, 7 Cranch, 504; 2 Cond. Rep. 588.

The Circuit Court of the United States have no power to issue writs of mandamus after the practice of the King's Bench; but only where they are necessary for the exercise of their jurisdiction. Smith *v.* Jackson, Paine's C. C. R. 453.

[25] Habeas Corpus. Ex parte Burford, 3 Cranch, 448; 1 Cond. Rep. 594; Ex parte Bollman, 4 Cranch, 75; 2 Cond. Rep. 33.

The writ of habeas corpus does not lie to bring up a person confined in the prison bounds upon a capias ad satisfaciendum, issued in a civil suit. Ex parte Wilson, 6 Cranch, 52; 2 Cond. Rep. 300. Ex parte Kearney, 7 Wheat. 38; 5 Cond. Rep. 225.

The power of the Supreme Court to award writs of habeas corpus is conferred expressly on the court by the 14th section of the judicial act, and has been repeatedly exercised. No doubt exists respecting the power. No law of the United States prescribes the cases in which this great writ shall be issued, nor the power of the court over the party brought up by it. The term used in the constitution is one which is well understood, and the judicial act authorizes the court, and all other courts of the United States and the judges thereof to issue the writ "for the purpose of inquiring into the cause of commitment." Ex parte Tobias Watkins, 3 Peters, 201. (See also 7 Peters, 568.)

As the jurisdiction of the Supreme Court is appellate, it must be shown to the court that the court has power to award a habeas corpus, before one will be granted. Ex parte Milburn, 9 Peters, 704.

The act of Congress authorizing the writ of habeas corpus to be issued "for the purpose of inquiring into the cause of commitment," applies as well to cases of commitment under civil as those of criminal process, See Chief Justice Marshall, 2 Brocken. C. C. R. 447. Ex parte Cabrera, 1 Wash. C. C. R. 232. United States *v.* French, 1 Gallis. C. C. R. 2. Holmes *v.* Jennison, Governor of the State of Vermont, 14 Peters, 540.

motion as aforesaid, to give judgment against him or her by default.[26]

Suits in equity limited.

SEC. 16. *And be it further enacted*, That suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law.[27]

Courts may grant new trials.

SEC. 17. *And be it further enacted*, That all the said courts of the United States shall have power to grant new trials, in cases where there has been a trial by jury for reasons for which new trials have usually been granted in the courts of law;[28] and shall have power to impose and administer all necessary oaths or affirmations, and to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same;[29] and to make and establish all necessary rules for the orderly conducting business in the said courts, provided such rules are not repugnant to the laws of the United States.

Act of March 2, 1831, ch. 99.

Oaths.

Contempts.

Execution may be stayed on conditions.

SEC. 18. *And be it further enacted*, That when in a circuit court, judgment upon a verdict in a civil action shall be entered, execution may on motion of either party, at the discretion of the court, and on such conditions for the security of the adverse party as they may judge proper, be stayed forty-two days from the time of entering judgment, to give time to file in the clerk's office of said court, a petition for a new trial. And if such petition be there filed within said term of forty-two days, with a certificate thereon from either of the judges of such court, that he allows the same to be filed, which certificate he may make or refuse at his discretion, execution shall of course be further stayed to the next session of said court.[30] And if a new trial be granted, the former judgment shall be thereby rendered void.

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[26] It is sufficient for one party to suggest that the other is in possession of a paper, which he has, under the act of Congress, given him notice to produce at the trial, without offering other proof of the fact; and the party so called upon must discharge himself of the consequences of not producing it, by affidavit or other proof that he has it not in his power to produce it. Hylton *v.* Brown, 1 Wash. C. C. R. 298.

The court will not, upon a notice of the defendant to the plaintiff to produce a title paper to the land in dispute, which is merely to defeat the plaintiff's title, compel him to do so; unless the defendant first shows title to the land. Merely showing a right of possession is not sufficient to entitle him to the aid of a court of chancery, or of the Supreme Court, to compel a discovery of papers which are merely to defeat the plaintiff's title without strengthening the defendant's. It is sufficient, in order to entitle him to call for papers to show the title to the land, although none is shown in the papers. *Ibid.*

Where one party in a cause wishes the production of papers supposed to be in the possession of the other, he must give notice to produce them; if not produced, he may give inferior evidence of their contents. But if it is his intention to nonsuit the plaintiff, or if the plaintiff requiring the papers means to obtain a judgment by default, under the 15th section of the judicial act, he is bound to give the opposite party notice that he means to move the court for an order upon him to produce the papers, or on a failure so to do, to award a nonsuit or judgment, as the case may be. Bas *v.* Steele, 3 Wash. C. C. R. 381.

No advantage can be taken of the non-production of papers, unless ground is laid for presuming that the papers were, at the time notice was given, in the possession or power of the party to whom notice was given, and that they were pertinent to the issue. In either of the cases, the party to whom notice was given may be required to prove, by his own oath, that the papers are not in his possession or power; which oath may be met by contrary proof according to the rules of equity. *Ibid.*

To entitle the defendant to nonsuit the plaintiff for not obtaining papers which he was noticed to produce, the defendant must first obtain an order of the court, under a rule that they should be produced. But this order need not be absolute when moved for, but may be nisi, unless cause be shown at the trial. Dunham *v.* Riley, 4 Wash. C. C. R. 126.

Notice to the opposite party to produce on the trial all letters in his possession, relating to monies received by him under the award of the commissioners under the Florida treaty, is sufficiently specific as they described their subject matter. If to such notice the party answer on oath that he has not a particular letter in his possession, and after diligent search could find none such, it is sufficient to prevent the offering of secondary proof of its contents. The party cannot be asked or compelled to answer whether he ever had such a letter in his possession. Vasse *v.* Mifflin, 4 Wash. C. C. R. 519.

[27] The equity jurisdiction of the courts of the United States is independent of the local law of any State, and is the same in nature and extent as the equity jurisdiction of England from which it is derived. There-

Facts to appear on record.

SEC. 19. *And be it further enacted*, That it shall be the duty of circuit courts, in causes in equity and of admiralty and maritime jurisdiction, to cause the facts on which they found their sentence or decree, fully to appear upon the record either from the pleadings and decree itself, or a state of the case agreed by the parties, or their counsel, or if they disagree by a stating of the case by the court.

Altered by act of March 3, 1803, chap. 40.

Costs, as affected by the amount recovered.

SEC. 20. *And be it further enacted*, That where in a circuit court, a plaintiff in an action, originally brought there, or a petitioner in equity, other than the United States, recovers less than the sum or value of five hundred dollars, or a libellant, upon his own appeal, less than the sum or value of three hundred dollars, he shall not be allowed, but at the discretion of the court, may be adjudged to pay costs.

Appeals from the district to the circuit court where matter in dispute exceeds 300 dolls.

SEC. 21. *And be it further enacted*, That from final decrees in a district court in causes of admiralty and maritime jurisdiction, where the matter in dispute exceeds the sum or value of three hundred dollars, exclusive of costs, an appeal shall be allowed to the next circuit court, to be held in such district. *Provided nevertheless*, That all such appeals from final decrees as aforesaid, from the district court of Maine, shall be made to the circuit court, next to be holden after each appeal in the district of Massachusetts.

Altered by the 2d section of the act of March 3, 1803, chap. 40. [Obsolete.]

Final decrees re-examined above 50 dollars. Altered by the 2d section of the act of March 3, 1803, chap. 40.

SEC. 22. *And be it further enacted*, That final decrees and judgments in civil actions in a district court, where the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs, may be re-examined, and reversed or affirmed in a circuit court, holden in the same district, upon a writ of error, whereto shall be annexed and returned therewith at the day and place therein mentioned, an authenticated transcript of the record, an assignment of errors, and prayer for reversal, with a citation to the adverse party, signed by the judge of such district court, or a justice of the Supreme Court,

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fore it is no objection to this jurisdiction, that there is a remedy under the local law. Gordon *v.* Hobart, 2 Sumner's C. C. R. 401.

If a case is cognizable at common law, the defendant has a right of trial by jury, and a suit upon it cannot be sustained in equity. Baker *v.* Biddle, 1 Baldwin's C. C. R. 405.

There cannot be concurrent jurisdiction at law and equity, where the right and remedy are the same; but equity may proceed in aid of the remedy at law, by incidental and auxiliary relief; if the remedy at law is complete. Its jurisdiction is special, limited and defined; not as in England, where it depends on usage. *Ibid.*

The 16th section of the judiciary law is a declaratory act settling the law as to cases of equity jurisdiction, in the nature of a proviso, limitation or exception to its exercise. If the plaintiff have a plain, adequate and complete remedy at law, the case is not a suit in equity, under the constitution, or the judiciary act. *Ibid.*

Though the rules and principles established in English Chancery at the revolution, are adopted in the federal courts, the changes introduced there since, are not followed here; especially in matters of jurisdiction, as to which the 16th section of the act of 1789 is imperative. *Ibid.*

[18] New trials. Calder *v.* Bull and Wife, 3 Dall. 386; 1 Cond. Rep. 172. Arnold *v.* Jones, Bee's Rep. 104.

[19] Contempt of court. The courts of the United States have no common law jurisdiction of crimes against the United States. But independent of statutes, the courts of the United States have power to fine for contempts, and imprison for contumacy, and to enforce obedience to their orders, &c. The United States *v.* Hudson et al., 7 Cranch, 32; 2 Cond. Rep. 405.

By an act passed March 2, 1831, chap. 99, it is enacted, that the power of the courts of the United States to punish for contempts shall not extend to any cases, except to misbehaviour in the presence of the court, or so near to the court as to obstruct the administration of justice, or the misbehaviour of the officers of the court in their official transactions, and disobedience or resistance by any officer of the court, party, juror, witness or any person to any writ, process, order or decree of the court. Indictments may be presented against persons impeding the proceedings of the court, &c. See the statute.

[20] Execution. The 14th section of the Judiciary act of September 24, 1789, chap. 20, authorizes the courts of the United States to issue writs of execution upon judgments which have been rendered. This section provides only for the issuing of the writ, and directs no mode of proceeding by the officer obeying its command. Bank of the United States *v.* Halstead, 10 Wheat. 51; 6 Cond. Rep. 22.

And suits or action, exceeding 2000 dollars in value.

1844, ch. 31.

the adverse party having at least twenty days' notice.[31] And upon a like process, may final judgments and decrees in civil actions, and suits in equity in a circuit court, brought there by original process, or removed there from courts of the several States, or removed there by appeal from a district court where the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs, be re-examined and reversed or affirmed in the Supreme Court, the citation being in such case signed by a judge of such circuit court, or justice of the Supreme Court, and the adverse party having at least thirty days' notice.[32] But there shall be no reversal in either court on such writ of error for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or such plea to a petition or bill in equity, as is in the nature of a demurrer, or for any error in fact. And writs of error shall not be brought but within five years after rendering or passing the judgment or decree complained of, or in case the person entitled to such writ of error be an infant, *feme covert*, *non compos mentis*, or imprisoned, then within five years as aforesaid, exclusive of the time

Writs of error limited.

[31] The rules, regulations and restrictions contained in the 21st and 22d sections of the judiciary act of 1789, respecting the time within which a writ of error shall be brought, and in what instances it shall operate as a supersedeas, the citation to the opposite party, the security to be given by the plaintiff in error, and the restrictions on the appellate court as to reversals in certain enumerated cases, are applicable to the act of 1803, and are to be substantially observed; except that where the appeal is prayed for at the same time when the decree or sentence is pronounced, a citation is not necessary. The San Pedro, 2 Wheat. 132; 4 Cond. Rep. 65.

By the 2d section of the act of March 3, 1803, chap. 40, appeals are allowed from all final judgments or decrees in any of the District courts, where the matter in dispute, exclusive of costs, shall exceed the sum or value of fifty dollars. Appeals from the Circuit Court to the Supreme Court are allowed when the sum or value, exclusive of costs exceeds $2000. This section repeals so much of the 19th and 20th sections of the act of 1789, as comes within the purview of those provisions.

By the provisions of the act of April 2, 1816, chap. 39, appeals from the Circuit Court of the United States for the District of Columbia, are allowed when the matter in dispute in the cause exceeds $1000, exclusive of costs.

[32] The following cases have been decided on the questions which have arisen as to the value in controversy, in a case removed by writ of error or appeal.

The verdict and judgment do not ascertain the matter in dispute between the parties. To determine this, recurrence must be had to the original controversy; to the matter in dispute when the action was instituted. Wilson *v.* Daniel, 3 Dall. 401; 1 Cond. Rep. 185.

Where the value of the matter in dispute did not appear in the record, in a case brought by writ of error, the court allowed affidavits to be taken to prove the same, on notice to the opposite party. The writ of error not to be a supersedeas. Course *v.* Stead's Ex'ors, 4 Dall. 22; 1 Cond. Rep. 217; 4 Dall. 20; 1 Cond. Rep. 215.

The Supreme Court will permit viva voce testimony to be given of the value of the matter in dispute, in a case brought up by a writ of error or by appeal. The United States *v.* The Brig Union et al., 4 Cranch, 216; 2 Cond. Rep. 91.

The plaintiff below claimed more than $2000 in his declaration, but obtained a verdict for a less sum. The appellate jurisdiction of the Supreme Court depends on the sum or value in dispute between the parties, as the case stands on the writ of error in the Supreme Court; not on that which was in dispute in the Circuit Court. If the writ of error be brought by the plaintiff below, then the sum the declaration shows to be due may still be recovered, should the judgment for a smaller sum be reversed; and consequently the whole sum claimed is in dispute. Smith *v.* Honey, 3 Peters, 469; Gordon *v.* Ogden, 3 Peters, 33.

In cases where the demand is not for money, and the nature of the action does not require the value of the thing to be stated in the declaration, the practice of the courts of the United States has been to allow the value to be given in evidence. Ex parte Bradstreet, 7 Peters, 634.

The onus probandi of the amount in controversy, to establish the jurisdiction of the Supreme Court in a case brought before it by writ of error, is upon the party seeking to obtain the revision of the case. He may prove that the value exceeds $2000, exclusive of costs. Hagan *v.* Folson, 10 Peters, 160.

The Supreme Court has no jurisdiction in a case in which separate decrees have been entered in the Circuit Court for the wages of seamen, the decree in no one case amounting to $2000, although the amount of the several decrees exceed that sum, and the seamen in each case claimed under the same contract. Oliver *v.* Alexander, 6 Peters, 143. See Scott *v.* Lunt's Adm'rs, 6 Peters, 349.

The Supreme Court will not compel the hearing of a cause unless the citation be served thirty days before the first day of the term. Welsh *v.* Mandeville, 5 Cranch, 321; 2 Cond. Rep. 268.

A citation must accompany the writ of error. Lloyd *v.* Alexander, 1 Cranch, 365; 1 Cond. Rep. 334.

When an appeal is prayed during the session of the court, a citation to the appellee is not necessary. Riley, appellant, *v.* Lamar et al., 2 Cranch, 344; 1 Cond. Rep. 419.

of such disability.[33] And every justice or judge signing a citation on any writ of error as aforesaid, shall take good and sufficient security, that the plaintiff in error shall prosecute his writ to effect, and answer all damages and costs if he fail to make his plea good.[34]

Plaintiff to give security. Act of December 12, 1794, chap. 3.

SEC. 23. *And be it further enacted*, That a writ of error as aforesaid shall be a supersedeas and stay execution in cases only where the writ of error is served, by a copy thereof being lodged for the adverse party in the clerk's office where the record remains, within ten days, Sundays exclusive, after rendering the judgment or passing the decree complained of. Until the expiration of which term of ten days, executions shall not issue in any case where a writ of error may be a supersedeas; and whereupon such writ of error the Supreme or a circuit court shall affirm a judgment or decree, they shall adjudge or decree to the respondent in error just damages for his delay, and single or double costs at their discretion.[35]

Writ of error a supersedeas.

SEC. 24. *And be it further enacted*, That when a judgment or decree shall be reversed in a circuit court, such court shall proceed to render such judgment or pass such decree as the district court should have rendered or passed; and the Supreme Court shall do the same on reversals therein, except where the reversal is in favour of the plaintiff, or petitioner in the original suit, and the damages to be assessed, or matter to be decreed, are uncertain, in which case they shall remand the cause for a final decision. And the Supreme Court shall not issue execution in causes that are removed before them by writs of error, but shall send a special mandate to the circuit court to award execution thereupon.

Judgment or decree reversed.

Supreme court not to issue execution but mandate.

SEC. 25. *And be it further enacted*, That a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour

Cases in which judgment and decrees of the highest court of a state may be examined by the supreme court, on writ of error.

[33] An appeal under the judiciary acts of 1789 and 1803, was prayed for and allowed within five years; held to be valid, although the security was not given within five years. The mode of taking the security and the time of perfecting it, are exclusively within the control of the court below. The Dos Hermanos, 10 Wheat. 306; 6 Cond. Rep. 109.

[34] By the act of December 12, 1794, chap. 3, the security required to be taken on signing a citation on any writ of error which shall not be a supersedeas, and stay execution, shall only be for an amount which will be sufficient to answer for costs.

[35] Supersedeas. The Supreme Court will not quash an execution issued by the court below to enforce its decree, pending a writ of error, if the writ be not a supersedeas to the decree. Wallen *v.* Williams, 7 Cranch, 278; 2 Cond. Rep. 491.

of such their validity,[36] or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error, the citation being signed by the chief justice, or judge or chancellor of the court rendering or passing the judgment or decree complained of, or by a justice of the Supreme Court of the United States, in the same manner and under the same regulations, and the writ shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a circuit court, and the proceeding upon the reversal shall also be the same, except that the Supreme Court, instead of remanding the cause for a final decision as before pro-

Proceedings on reversal.

[36] In delivering the opinion of the Supreme Court in the case of Fisher *v.* Cockrell, 5 Peters, 248, Mr. Chief Justice Marshall said: "In the argument the court has been admonished of the jealousy with which the States of the Union view the revising power entrusted by the constitution and laws to this tribunal. To observations of this character the answer uniformly has been that the course of the judicial department is marked out by law. We must tread the direct and narrow path prescribed for us. As this court has never grasped at ungranted jurisdiction, so it never will, we trust, shrink from that which is conferred upon it."

The appellate power of the Supreme Court of the United States extends to cases pending in the State courts; and the 25th section of the judiciary act, which authorizes the exercise of this jurisdiction in the specified cases by writ of error, is supported by the letter and spirit of the constitution. Martin *v.* Hunter's Lessee, 1 Wheat. 304; 3 Cond. Rep. 575.

Under the 25th section of the judiciary act of 1789, where the construction of any clause in the constitution or any statute of the United States is drawn in question, in any suit in a State court, the decision must be against the title or right set up by the party under such clause in the constitution or statute; otherwise the Supreme Court has no appellate jurisdiction in the case. It is not sufficient that the construction of the statute was drawn in question, and that the decision was against the title. It must appear that the title set up depended on the statute. Williams *v.* Norris, 12 Wheat. 117; 6 Cond. Rep. 462.

If the construction or validity of a treaty of the United States is drawn in question in the State courts, and the decision is against its validity, or against the title set up by either party under the treaty, the Supreme Court has jurisdiction to ascertain that title, and to determine its legal meaning; and is not confined to the abstract construction of the treaty itself. *Ibid.*

The 2d article of the constitution of the United States enables the Supreme Court to receive jurisdiction to the full extent of the constitution, laws and treaties of the United States, when any question respecting them shall assume such form that the judicial power is capable of acting upon it. That power is capable of acting only when the subject is submitted to it by a party who asserts his right in the form prescribed by law. It then becomes a case. Osborn *v.* The Bank of the United States, 9 Wheat. 738; 5 Cond. Rep. 741.

The Supreme Court has no jurisdiction under the 25th section of the act of 1789, unless the judgment or decree of the State court be a final judgment or decree. A judgment reversing that of an inferior court, and awarding a scire facias de novo, is not a final judgment. Houston *v.* Moore, 3 Wheat. 433; 4 Cond. Rep. 286.

The Supreme Court has no appellate jurisdiction under the 25th section of the judiciary act, unless the right, title, privilege, or exemption under a statute or commission of the United States be specially set up by the party claiming it in the State court, and the decision be against the same. Montgomery *v.* Hernandez, 12 Wheat. 129; 6 Cond. Rep. 475.

It is no objection to the exercise of the appellate jurisdiction under this section, that one party is a State, and the other a citizen of that State. Cohens *v.* The State of Virginia, 6 Wheat. 264; 5 Cond. Rep. 90.

In order to bring a case for a writ of error or an appeal to the Supreme Court from the highest court of a State within the 25th section of the judiciary act, it must appear on the face of the record: 1. That some of the questions stated in that section did arise in the State court. 2. That the question was decided in the State court as required in the section.

It is not necessary that the question shall appear in the record to have been raised, and the decision made in direct and positive terms, ipsissimis verbis; but it is sufficient if it appears by clear and necessary intendment that the question must have been raised, and must have been decided, in order to induce the judgment. It is not sufficient to show that a question might have arisen and been applicable to the case, unless it is further shown, on the record, that it did arise and was applied by the State Court to the case. Crowell *v.* Randall, 10 Peters, 368. See also Williams *v.* Norris, 12 Wheat. 117; 6 Cond. Rep. 462. Jackson *v* Lamphire, 3 Peters, 280. Menard *v.* Aspasia, 5 Peters, 505. Fisher *v.* Cockrell, 5 Peters, 248. Gelston *v.* Hoyt, 3 Wheat. 246; 4 Cond. Rep. 244. Gordon *v.* Caldcleugh et al., 3 Cranch, 268; 1 Cond. Rep. 524. Owings *v.* Norwood's Lessee, 5 Cranch, 344; 2 Cond. Rep. 275. Buel et al. *v.* Van Ness, 8 Wheat. 312; 5 Cond. Rep. 445. Miller *v.* Nicholls, 4 Wheat. 311; 4 Cond. Rep. 465. Matthews *v.* Zane et al., 7 Wheat. 164; 5 Cond. Rep. 265. Gibbons *v.* Ogden, 6 Wheat. 448; 5 Cond. Rep. 134.

Under the 25th section of the judiciary act of 1789, three things are necessary to give the Supreme Court jurisdiction of a case brought up by writ of error or appeal: 1. The validity of a statute of the United States, or of authority exercised under a State, must be drawn in question. 2. It must be drawn in question on the ground that it is repugnant to the constitution, treaties and laws of the United States. 3. The decision of the State court must be in favour of its validity. The Commonwealth Bank of Kentucky *v.* Griffith et al., 14 Peters, 56. See also Pollard's heirs *v.* Kibbe, 14 Peters, 353. M'Cluny *v.* Silliman, 6 Wheat. 598; 5 Cond. Rep. 197. Weston et al *v.* The City Council of Charleston, 2 Peters, 449. Hickie *v.* Starke et al., 1 Peters, 94. Satterlee *v.* Matthewson, 2 Peters, 380. Wilson et al. *v.* The Blackbird Creek Marsh Association, 2 Peters, 245. Harris *v.* Dennie, 3 Peters, 292. M'Bride *v.* Hoey, 11 Peters, 167. Winn's heirs *v.* Jackson et al., 12 Wheat. 135; 6 Cond. Rep. 479. City of New Orleans *v.* De Armas, 9 Peters, 224. Davis *v.* Packard, 6 Peters, 41.

vided, may at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution. But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before mentioned questions of validity or construction of the said constitution, treaties, statutes, commissions, or authorities in dispute.[37]

No writs of error but as above mentioned.

SEC. 26. *And be it further enacted*, That in all causes brought before either of the courts of the United States to recover the forfeiture annexed to any articles of agreement, covenant, bond, or other speciality, where the forfeiture, breach or non-performance shall appear, by the default or confession of the defendant, or upon demurrer, the court before whom the action is, shall render judgment therein for the plaintiff to recover so much as is due according to equity. And when the sum for which judgment should be rendered is uncertain, the same shall, if either of the parties request it, be assessed by a jury.

In cases of forfeiture the courts may give judgment according to equity.

Jury to assess damages when the sum is uncertain.

SEC. 27. *And be it further enacted*, That a marshal shall be appointed in and for each district for the term of four years, but shall be removable from office at pleasure, whose duty it shall be to attend the district and circuit courts when sitting therein, and also the Supreme Court in the district in which that court shall sit.[38] And to execute throughout the district, all lawful precepts directed to him, and issued under the authority of the United States, and he shall have power to command all necessary assistance in the execution of his duty, and to appoint as there shall be occasion, one or more deputies,[39] who shall be removable from office by the judge of the district court, or the circuit court sitting within the district, at the pleasure of either; and before he enters on the duties of his office, he shall become bound for the faithful performance of the same, by himself and by his deputies before the judge of the district court to the United States, jointly and severally, with two good and sufficient sureties, inhabitants and freeholders of such district, to be approved by the district judge, in the sum of twenty thousand dollars, and shall take before said judge, as shall also his deputies, before they enter on the duties of their appointment, the following oath of office: "I, A. B., do solemnly swear or affirm, that I will faithfully

Marshal to be appointed.

Duration of office.

Act of May 15, 1820, ch. 102; 107, sec. 8.

Deputies removable by the district and circuit courts.

Sureties.

Oath of marshal, and of his deputies.

[37] Williams *v.* Norris, 12 Wheat. 117; 6 Cond. Rep. 462.

[38] A marshal is not removed by the appointment of a new one, until he receives notice of such appointment. All acts done by the marshal after the appointment of a new one, before notice, are good; but his acts subsequent to notice are void. Wallace's C. C. R. 119.

It is the duty of a marshal of a court of the United States to execute all process which may be placed in his hand, but he performs this duty at his peril, and under the guidance of law. He must, of course, exercise some judgment in the performance. Should he fail to obey the exegit of the writ without a legal excuse, or should he in its letter violate the rights of others, he is liable to the action of the injured party. Life and Fire Ins. Comp. of New York *v.* Adams, 9 Peters, 573.

[39] A marshal is liable on his official bond for the failure of his deputies to serve original process, but the measure of his liability is the extent of the injury received by the plaintiff, produced by his negligence. If the loss of the debt be the direct legal consequence of a failure to serve the process, the amount of the debt is the measure of the damages; but not so if otherwise. The United States *v.* Moore's Adm'rs, 2 Brocken. C. C. R. 317. See San Jose Indiano, 2 Gallis. C. C. R. 311. Ex parte Jesse Hoyt, collector, &c., 13 Peters, 279.

execute all lawful precepts directed to the marshal of the district of under the authority of the United States, and true returns made, and in all things well and truly, and without malice or partiality, perform the duties of the office of marshal (or marshal's deputy, as the case may be) of the district of , during my continuance in said office, and take only my lawful fees. So help me God."

If marshal, or his deputy, a party to a suit, process to be directed to a person selected by the court.

SEC. 28. *And be it further enacted*, That in all causes wherein the marshal or his deputy shall be a party, the writs and precepts therein shall be directed to such disinterested person as the court, or any justice or judge thereof may appoint, and the person so appointed, is hereby authorized to execute and return the same. And

Deputies to continue in office on the death of the marshal.

in case of the death of any marshal, his deputy or deputies shall continue in office, unless otherwise specially removed; and shall execute the same in the name of the deceased, until another marshal shall be appointed and

Defaults of deputies.

sworn: And the defaults or misfeasances in office of such deputy or deputies in the mean time, as well as before, shall be adjudged a breach of the condition of the bond

Powers of the executor or administrator of deceased marshals.

given, as before directed, by the marshal who appointed them; and the executor or administrator of the deceased marshal shall have like remedy for the defaults and misfeasances in office of such deputy or deputies during such interval, as they would be entitled to if the marshal had continued in life and in the exercise of his said office, until his successor was appointed, and sworn or affirmed: And every marshal or his deputy when removed from office, or when the term for which the marshal is appointed shall expire, shall have power notwithstanding to execute all such precepts as may be in their hands respectively at the time of such removal or expiration of office; and the

Marshal's power after removal.

marshal shall be held answerable for the delivery to his successor of all prisoners which may be in his custody at the time of his removal, or when the term for which he is appointed shall expire, and for that purpose may retain such prisoners in his custody until his successor shall be appointed and qualified as the law directs.[40]

Trial of cases punishable with death to be had in county.

SEC. 29. *And be it further enacted*, That in cases punishable with death, the trial shall be had in the county where the offence was committed, or where that cannot be done without great inconvenience, twelve petit jurors at least shall be summoned from thence.[41] And jurors in all cases to serve in the courts of the United States shall be designated by lot or otherwise in each State respectively according to the mode of forming juries therein now practised, so far as the laws of the same shall render such designation practicable by the courts or marshals of the

Jurors by lot. Act of May 13, 1800, ch. 61.

United States; and the jurors shall have the same qualifications as are requisite for jurors by the laws of the

[40] If a debtor committed to the State jail under process of the courts of the United States escapes, the marshal is not liable. Randolph *v.* Donnaldson, 9 Cranch, 76; 3 Cond. Rep. 280.

[41] The Circuit Courts of the United States are bound to try all crimes committed within the district, which are duly presented before it; but not to try them in the county where they have been committed. The United States *v.* Wilson and Porter, Baldwin's C. C. R. 78.

State of which they are citizens, to serve in the highest courts of law of such State, and shall be returned as there shall be occasion for them, from such parts of the district from time to time as the court shall direct, so as shall be most favourable to an impartial trial, and so as not to incur an unnecessary expense, or unduly to burthen the citizens of any part of the district with such services. And writs of *venire facias* when directed by the court shall issue from the clerk's office, and shall be served and returned by the marshal in his proper person, or by his deputy, or in case the marshal or his deputy is not an indifferent person, or is interested in the event of the cause, by such fit person as the court shall specially appoint for that purpose, to whom they shall administer an oath or affirmation that he will truly and impartially serve and return such writ. And when from challenges or otherwise there shall not be a jury to determine any civil or criminal cause, the marshal or his deputy shall, by order of the court where such defect of jurors shall happen, return jurymen *de talibus circumstantibus* sufficient to complete the pannel; and when the marshal or his deputy are disqualified as aforesaid, jurors may be returned by such disinterested person as the court shall appoint.

Writs of venire facias from clerk's office.

Juries de talibus, &c.

SEC. 30. *And be it further enacted*, That the mode of proof by oral testimony and examination of witnesses in open court shall be the same in all the courts of the United States, as well in the trial of causes in equity and of admiralty and maritime jurisdiction, as of actions at common law. And when the testimony of any person shall be necessary in any civil cause depending in any district in any court of the United States, who shall live at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of such district, and to a greater distance from the place of trial than as aforesaid, before the time of trial, or is ancient or very infirm, the deposition of such person may be taken *de bene esse* before any justice or judge of any of the courts of the United States, or before any chancellor, justice or judge of a supreme or superior court, mayor or chief magistrate of a city, or judge of a county court or court of common pleas of any of the United States, not being of counsel or attorney to either of the parties, or interested in the event of the cause, provided that a notification from the magistrate before whom the deposition is to be taken to the adverse party, to be present at the taking of the same, and to put interrogatories, if he think fit, be first made out and served on the adverse party or his attorney as either may be nearest, if either is within one hundred miles of the place of such caption, allowing time for their attendance after notified, not less than at the rate of one day, Sundays exclusive, for

Mode of proof.

Act of April 29, 1802, ch. 31, § 25.

Depositions de bene esse.

Adverse party to be notified.

Notice in admiralty and maritime causes.

every twenty miles travel.[42] And in causes of admiralty and maritime jurisdiction, or other cases of seizure when a libel shall be filed, in which an adverse party is not named, and depositions of persons circumstanced as aforesaid shall be taken before a claim be put in, the

Agent notified.

like notification as aforesaid shall be given to the person having the agency or possession of the property libelled at the time of the capture or seizure of the same, if known to the libellant. And every person deposing as aforesaid shall be carefully examined and cautioned, and sworn or affirmed to testify the whole truth, and shall subscribe the testimony by him or her given after the same shall be reduced to writing, which shall be done only by the magistrate taking the deposition, or by the

Depositions retained.

deponent in his presence. And the depositions so taken shall be retained by such magistrate until he deliver the same with his own hand into the court for which they are taken, or shall, together with a certificate of the reasons as aforesaid of their being taken, and of the notice if any given to the adverse party, be by him the said magistrate sealed up and directed to such court, and remain under his seal until opened in court.[43] And

Persons may be compelled to appear and testify. When the testimony may be reduced to writing.

any person may be compelled to appear and depose as aforesaid in the same manner as to appear and testify in court. And in the trial of any cause of admiralty or maritime jurisdiction in a district court, the decree in which may be appealed from, if either party shall suggest to and satisfy the court that probably it will not be in his power to produce the witnesses there testifying before the circuit court should an appeal be had, and shall move that their testimony be taken down in writing,

Act of March 3, 1803, ch. 40.

it shall be so done by the clerk of the court.[44] And if an appeal be had, such testimony may be used on the trial of the same, if it shall appear to the satisfaction of the

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[42] The following cases have been decided relating to depositions taken under the provisions of this act:

That the deponent is a seaman on board a gun-boat in the harbour, and liable to be ordered to some other place, and not to be able to attend the court at the time of sitting, is not a sufficient reason for taking his deposition under the act of September 24, 1789, chap. 20.

If it appear on the face of the deposition taken under the act of Congress, that the officer taking the same, was authorized by the act, it is sufficient in the first instance, without any proof that he was such officer. Ruggles *v.* Bucknor, 1 Paine's C. C. R. 358.

Objections to the competency of the witness whose deposition is taken under the act of 1789, should be made at the time of taking the deposition, if the party attend, and the objections are known to him, in order that they may be removed; otherwise he will be presumed to waive them. United States *v.* Hairpencils, 1 Paine's C. C. R. 400.

A deposition taken under the 30th section of the act of 1789 cannot be made on evidence, unless the judge before whom it was taken, certify that it was reduced to writing by himself, or by the witness in his presence. Pettibone *v.* Derringer, 4 Wash. C. C. R. 215. See United States *v.* Smith, 4 Day, 121. North Carolina Cases, 81.

The authority given by the act of 1789, to take depositions of witnesses in the absence of the opposite party, is in derogation of the rules of common law, and has always been construed strictly; and therefore it is necessary to establish that all the requisities have been complied with, before such testimony can be admitted. Bell *v.* Morrison et al., 1 Peters, 351. The Patapsco Ins. Comp. *v.* Southgate, 5 Peters, 604. The United States *v.* Coolidge, 1 Gallis. C. C. R. 488. Evans *v.* Hettick, 3 Wash. C. C. R. 408. Thomas and Henry *v.* The United States, 1 Brocken. C. C. R. 367.

The provisions of the 30th section of the act of 1789, as to taking depositions, de bene esse, does not apply to cases pending in the Supreme Court, but only to cases in the Circuit and District Courts. The Argo, 2 Wheat. 287; 4 Cond. Rep. 119.

Where there is an attorney on record, notice must in all cases be given to him. *Ibid.*

The deposition of a person residing out of the State, and more than one hundred miles from the place of trial, cannot be read in evidence. Bleeker *v.* Bond, 3 Wash. C. C. R. 529. See Buddicum *v.* Kirke, 3 Cranch, 293; 1 Cond. Rep. 535.

[43] It is a fatal objection to a deposition taken under the 30th section of the act of 1789, that it was opened out of court. Beale *v.* Thompson, 8 Cranch, 70; 3 Cond. Rep. 35.

[44] Since the act of March 3, 1803, chap. 40, in admiralty as well as in equity cases carried up to the Supreme Court by appeal, the evidence goes with the cause, and it must consequently be in writing. 1 Gallis. C. C. R. 25; 1 Sumner's C. C. R. 328.

court which shall try the appeal, that the witnesses are then dead or gone out of the United States, or to a greater distance than as aforesaid from the place where the court is sitting, or that by reason of age, sickness, bodily infirmity or imprisonment, they are unable to travel and appear at court, but not otherwise. And unless the same shall be made to appear on the trial of any cause, with respect to witnesses whose depositions may have been taken therein, such depositions shall not be admitted or used in the cause. *Provided*, That nothing herein shall be construed to prevent any court of the United States from granting a *dedimus potestatem* to take depositions according to common usage, when it may be necessary to prevent a failure or delay of justice,[45] which power they shall severally possess, nor to extend to depositions taken in *perpetuam rei memoriam*, which if they relate to matters that may be cognizable in any court of the United States, a circuit court on application thereto made as a court of equity, may, according to the usages in chancery direct to be taken.

Depositions used in case of sickness, death, &c.

Dedimus potestatem as usual.

SEC. 31. *And be it [further] enacted*, That where any suit shall be depending in any court of the United States, and either of the parties shall die before final judgment, the executor or administrator of such deceased party who was plaintiff, petitioner, or defendant, in case the cause of action doth by law survive, shall have full power to prosecute or defend any such suit or action until final judgment; and the defendant or defendants are hereby obliged to answer thereto accordingly; and the court before whom such cause may be depending, is hereby empowered and directed to hear and determine the same, and to render judgment for or against the executor or administrator, as the case may require. And if such executor or administrator having been duly served with a *scire facias* from the office of the clerk of the court where such suit is depending, twenty days beforehand, shall neglect or refuse to become a party to the suit, the court may render judgment against the estate of the deceased party, in the same manner as if the executor or administrator had voluntarily made himself a party to the suit.[46] And the executor or administrator who shall become a party as aforesaid, shall, upon motion to the court where the suit is depending, be entitled to a continuance of the same until the next term of the said court. And if there be two or more plaintiffs or defendants, and one or more of them shall

Executor or administrator may prosecute and defend.

Neglect of executor or administrator to become a party to the suit, judgment to be rendered.

Executor and administrator may have continuance.

Two plaintiffs.

[45] When a foreign government refuses to suffer the commission to be executed within its jurisdiction, the Circuit Court may issue letters rogatory for the purpose of obtaining testimony according to the forms and practice of the civil law. Nelson et al. *v.* The United States, Peters' C. C. R. 255. See Buddicum *v.* Kirke, 3 Cranch, 293; 1 Cond. Rep. 535.

Depositions taken according to the proviso in the 30th section of the judiciary act of 1789, under a dedimus potestatem, according to common usage, when it may be necessary to prevent a failure or delay of justice, are, under no circumstances, to be considered as taken de bene esse. Sergeant's Lessee *v.* Biddle, 4 Wheat. 508; 4 Cond. Rep. 522.

[46] This statute embraces all cases of death before final judgment, and of course is more extensive than the 17 Car. 2, and 8 and 9 W. 3. The death may happen before or after plea pleaded, before or after issue joined, before or after verdict, or before or after interlocutory judgment; and in all these cases the proceedings are to be exactly as if the executor or administrator were a voluntary party to the suit. Hatch *v.* Eustis, 1 Gallis. C. C. R. 160.

Surviving plaintiff may continue suit.

die, if the cause of action shall survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the writ or action shall not be thereby abated; but such death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff or plaintiffs against the surviving defendant or defendants.[47]

Writs shall not abate for defect of form.

SEC. 32. *And be it further enacted*, That no summons, writ, declaration, return, process, judgment, or other proceedings in civil causes in any of the courts of the United States, shall be abated, arrested, quashed or reversed, for any defect or want of form, but the said courts respectively shall proceed and give judgment according as the right of the cause and matter in law shall appear unto them, without regarding any imperfections, defects, or want of form in such writ, declaration, or other pleading, return, process, judgment, or course of proceeding whatsoever, except those only in cases of demurrer, which the party demurring shall specially sit down and express together with his demurrer as the cause thereof. And the said courts respectively shall and may, by virtue of this act, from time to time, amend all and every such imperfections, defects and wants of form, other than those only which the party demurring shall express as aforesaid, and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as the said courts respectively shall in their discretion, and by their rules prescribe.[48]

Exceptions.

Courts may amend imperfections.

Criminals against U. S. arrested by any justice of the peace.

Act of March 2, 1793, ch. 22.

Act of July 16, 1798, ch. 83.

Recognizance to be returned to the clerk's office.

SEC. 33. *And be it further enacted*, That for any crime or offence against the United States, the offender may, by any justice or judge of the United States, or by any justice of the peace, or other magistrate of any of the United States where he may be found agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested, and imprisoned or bailed, as the case may be, for trial before such court of the United States as by this act has cognizance of the offence.[49] And copies of the process shall be returned as speedily as may be into the clerk's

[47] In real and personal actions at common law, the death of the parties before judgment abates the suit, and it requires the aid of some statutory provision to enable the suit to be prosecuted by or against the personal representatives of the deceased, where the cause of action survives. This is effected by the 31st section of the judiciary act of 1789, chap. 20. Green *v.* Watkins, 6 Wheat. 260; 5 Cond. Rep. 87.

In real actions the death of either party before judgment, abates the suit. The 31st section of the judiciary act of 1789, which enables the action to be prosecuted by or against the representatives of the deceased, when the cause of action survives, is clearly confined to personal actions. Macker's heirs *v.* Thomas, 7 Wheat. 530; 5 Cond. Rep. 334.

[48] The 32d section of the act of 1789, allowing amendments, is sufficiently comprehensive to embrace courses of appellate as well as original jurisdiction; and there is nothing in the nature of an appellate jurisdiction, proceeding according to the common law, which forbids the granting of amendments. 1 Gallis. C. C. R. 22.

If the amendment is made in the Circuit Court, the cause is heard and adjudicated in that court, and upon appeal by the Supreme Court on the new allegation. But if the amendment is allowed by the Supreme Court, the cause is remanded to the Circuit Court, with directions to allow the amendment to be made. The Mariana Flora, 11 Wheat. 1; 6 Cond. Rep. 201.

By the provisions of the act of Congress a variance which is merely matter of form may be amended at any time. Scull *v.* Biddle, 2 Wash. C. C. R. 200. See Smith *v.* Jackson, 1 Paine's C. C. R. 486. Ex parte Bradstreet, 7 Peters, 634. Randolph *v.* Barrett, 16 Peters, 136. Hozey *v.* Buchanan, 16 Peters, 215. Woodward *v.* Brown, 13 Peters, 1.

[49] The Supreme Court of the United States has jurisdiction, under the constitution and laws of the United States, to bail a person committed for trial on a criminal charge by a district judge of the United States. The United States *v.* Hamilton, 3 Dall. 17.

The circumstances of the case must be very strong, which will, at any time, induce a court to admit a person to bail, who stands charged with high treason. The United States *v.* Stewart, 2 Dall. 343.

office of such court, together with the recognizances of the witnesses for their appearance to testify in the case; which recognizances the magistrate before whom the examination shall be, may require on pain of imprisonment. And if such commitment of the offender, or the witnesses shall be in a district other than that in which the offence is to be tried, it shall be the duty of the judge of that district where the delinquent is imprisoned, seasonably to issue, and of the marshal of the same district to execute, a warrant for the removal of the offender, and the witnesses, or either of them, as the case may be, to the district in which the trial is to be had. And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which cases it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion therein, regarding the nature and circumstances of the offence, and of the evidence, and the usages of law. And if a person committed by a justice of the supreme or a judge of a district court for an offence not punishable with death, shall afterwards procure bail, and there be no judge of the United States in the district to take the same, it may be taken by any judge of the supreme or superior court of law of such state.

Offender may be removed by warrant.

Bail admitted.

Bail, how taken.

SEC. 34. *And be it further enacted*, That the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.[50]

Laws of States rules of decision.

[50] The 34th section of the judiciary act of 1789, does not apply to the process and practice of the courts. It merely furnishes a decision, and is not intended to regulate the remedy. Wayman *v.* Southard, 10 Wheat. 1; 6 Cond. Rep. 1.

In construing the statutes of a State, infinite mischief would ensue, should the federal courts observe a different rule from that which has long been established in the State. M'Keen *v.* Delancy's lessee, 5 Cranch, 22; 2 Cond. Rep. 179.

In cases depending on the statutes of a State, and more especially in those respecting the titles to land, the federal courts adopt the construction of the State, where that construction is settled or can be ascertained. Polk's Lessee *v.* Wendall, 9 Cranch, 87; 3 Cond. Rep. 286.

The Supreme Court uniformly acts under a desire to conform its decisions to the State courts on their local law. Mutual Assurance Society *v.* Watts, 1 Wheat. 279; 3 Cond. Rep. 570.

The Supreme Court holds in the highest respect, decisions of State Courts upon local laws, forming rules of property. Shipp et al. *v.* Miller's heirs, 2 Wheat. 316; 4 Cond. Rep. 132.

When the construction of the statute of the State relates to real property, and has been settled by any judicial decision of the State where the land lies, the Supreme Court, upon the principles uniformly adopted by it, would recognize the decision as part of the local law. Gardner *v.* Collins, 2 Peters, 58.

In construing local statutes respecting real property, the courts of the Union are governed by the decisions of State tribunals. Thatcher et al. *v.* Powell, 6 Wheat. 119; 5 Cond. Rep. 28.

The courts of the United States, in cases depending on the laws of a particular State, will in general adopt the construction given by the courts of the State, to those laws. Elmendorf *v.* Taylor, 10 Wheat. 152; 6 Cond. Rep. 47.

Under the 34th section of the judiciary act of 1789, the acts of limitation of the several States where no special provision has been made by Congress, form rules of the decision in the courts of the United States; and the same effect is given to them as is given in the State courts. M'Cluny *v.* Silliman, 3 Peters, 270.

The statute laws of the States must furnish the rules of decision to the federal courts, as far as they comport with the laws of the United States, in all cases arising within the respective States; and a fixed and received construction of these respective statute laws in their own courts, makes a part of such statute law. Shelby et al. *v.* Guy, 11 Wheat. 361; 6 Cond. Rep. 345.

The Supreme Court adopts the local law of real property as ascertained by the decisions of State courts; whether those decisions are grounded on the construction of the statutes of the State, or from a part of the unwritten law of the State, which has become a fixed rule of property. Jackson *v.* Chew, 12 Wheat. 153; 6 Cond. Rep. 489.

Soon after the decision of a case in the Circuit Court for the district of Virginia, a case was decided in the court of appeals of the State, on which the question on the execution laws of Virginia was elaborately argued,

Parties may manage their own cause.

SEC. 35. *And be it further enacted*, That in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct causes therein. And there shall be appointed in each district a meet person learned in the law to act as attorney for the United States in such district, who shall be sworn or affirmed to the faithful execution of his office, whose duty it shall be to prosecute in such district all delinquents for crimes and offences, cognizable under the authority of the United States, and all civil actions in which the United States shall be concerned, except before the supreme court in the district in which that court shall be holden. And he shall receive as a compensation for his services such fees as shall be taxed therefor in the respective courts before which the suits or prosecutions shall be. And there shall also be appointed a meet person, learned in the law, to act as attorney-general for the United States, who shall be sworn or affirmed to a faithful execution of his office; whose duty it shall be to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments, and shall receive such compensation for his services as shall by law be provided.[51]

Attorney of the U. S. for each district.

His duties.

Compensation.

Attorney General of the U. S.

Duties.

Act of May 29, 1830, ch. 153.

Compensation.

APPROVED, September 24, 1789.

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and deliberately decided. The Supreme Court, according to its uniform course, adopts the construction of the act, which is made by the highest court of the State. The United States *v.* Morrison, 4 Peters, 124.

The Supreme Court has uniformly adopted the decisions of the State tribunals, respectively, in all cases where the decision of a State court has become a rule of property. Green *v.* Neal, 6 Peters, 291.

In all cases arising under the constitution and laws of the United States, the Supreme Court may exercise a revising power, and its decisions are final and obligatory on all other tribunals, State as well as federal. A State tribunal has a right to examine any such questions, and to determine thereon, but its decisions must conform to those of the Supreme Court, or the corrective power of that court may be exercised. But the case is very different when the question arises under a local law. The decision of this question by the highest tribunal of a State, should be considered as final by the Supreme Court; not because the State tribunal has power, in such a case, to bind the Supreme Court, but because, in the language of the court in Shelby *v.* Guy, 11 Wheat. 361, a fixed and received construction by a State, in its own courts, makes a part of the statute law. *Ibid.* See also Smith *v.* Clapp, 15 Peters, 125. Watkins *v.* Holman et al., 16 Peters, 25. Long *v.* Palmer, 16 Peters, 65. Golden *v.* Price, 3 Wash. C. C. R. 313. Campbell *v.* Claudius, Peters' C. C. R. 484. Henderson and Wife *v.* Griffin, 5 Peters, 151. Coates' executrix *v.* Muse's adm'or, 1 Brocken. C. C. R. 539. Parsons *v.* Bedford et al., 3 Peters, 433.

[51] The acts relating to the compensation of the Attorney General of the United States are: Act of March 2, 1797; act of March 2, 1799, chap. 38; act of February 20, 1804, chap. 12; act of February 20, 1819, chap. 27; act of May 29, 1830, chap. 153, sec. 10; act of 1789, ch. 18.

THE DOCTRINE OF JUDICIAL REVIEW AS EXPRESSED IN MARBURY *v.* MADISON

(February Term, 1803)

WILLIAM MARBURY *v.* JAMES MADISON, Secretary of State of the United States

Constitutional law—Jurisdiction—Mandamus—Appointment and removal of officer—Commission

The supreme court of the United States has not power to issue a *mandamus* to the secretary of state of the United States, it being an exercise of original jurisdiction not warranted by the constitution.

Congress have not power to give original jurisdiction to the supreme court, in other cases than those described in the constitution.

An act of congress, repugnant to the constitution, cannot become a law.

The courts of the United States are bound to take notice of the constitution.

It seems, that a commission is not necessary to the appointment of an officer by the executive.

A commission is only evidence of an appointment.

Delivery is not necessary to the validity of letters-patent.

The president cannot authorize the secretary of state to omit the performance of those duties which are enjoined by law.

A justice of peace, in the District of Columbia, is not removable at the will of the president.

When a commission for an officer, not holding his office at the will of the president, is by him signed and transmitted to the secretary of state, to be sealed and recorded, it is irrevocable; the appointment is complete.

A *mandamus* is the proper remedy, to compel the secretary of state to deliver a commission to which the party is entitled.

AT the last term, viz., December term 1801, William Marbury, Dennis Ramsay, Robert Townsend Hooe and William Harper, by their counsel, Charles Lee, Esq., late attorney-general of the United States, severally moved the court for a rule on James Madison, secretary of state of the United States, to show cause why a *mandamus* should not issue, commanding him to cause to be delivered to them, respectively, their several commissions as justices of the peace in the district of Columbia.

This motion was supported by affidavits of the following facts; that notice of this motion had been given to Mr. Madison; that Mr. Adams, the late president of the United States, nominated the applicants to the senate, for their advice and consent, to be appointed justices of the peace of the district of Columbia; that the senate advised and consented to the appointments; that commissions in due form were signed by the said president, appointing them justices, &c., and that the seal of the United States was in due form affixed to the said commissions, by the secretary of state; that the applicants have requested Mr. Madison to deliver them their said commissions, who has not complied with that request; and that their said commissions are withheld from them; that the applicants have made application to Mr. Madison, as secretary of state of the United States, at his office, for information whether the commissions were signed and sealed as aforesaid; that explicit and satisfactory explanation has not been given, in answer to that inquiry, either by the secretary of state, or any officer in the department of state; that application has been made to the secretary of the senate, for a certificate of the nomination of the applicants, and of the advice and consent of the senate, who has declined giving such a certificate. Whereupon, a rule was laid, to

show cause on the fourth day of this term; this rule having been duly served—

Mr. Lee, in support of the rule, observed, that it was important to know on what ground a justice of peace in the district of Columbia holds his office, and what proceedings are necessary to constitute an appointment to an office, not held at the will of the president. However notorious the facts are, upon the suggestion of which this rule has been laid, yet the applicants have been much embarrassed in obtaining evidence of them. Reasonable information has been denied at the office of the department of state. Although a respectful memorial has been made to the senate, praying them to suffer their secretary to give extracts from their executive journals respecting the nomination of the applicants to the senate, and of their advice and consent to the appointments, yet their request has been denied, and their petition rejected. They have, therefore, been compelled to summon witnesses to attend in court, whose voluntary affidavits they could not obtain. Mr. Lee here read the affidavit of Dennis Ramsay, and the printed journals of the senate of 31st January 1803, respecting the refusal of the senate to suffer their secretary to give the information requested. He then called Jacob Wagner and Daniel Brent, who had been summoned to attend the court, and who had, as it is understood, declined giving a voluntary affidavit. They objected to being sworn, alleging that they were clerks in the department of state, and not bound to disclose any facts relating to the business or transactions in the office.

Mr. Lee observed, that to show the propriety of examining these witnesses, he would make a few remarks on the nature of the office of secretary of state. His duties are of two kinds, and he exercises his functions in two distinct capacities; as a public ministerial officer of the United States, and as agent of the president. In the first, his duty is to the United States or its citizens; in the other, his duty is to the president; in the one, he is an independent and an accountable officer; in the other, he is dependent upon the president, is his agent, and accountable to him alone. In the former capacity, he is compellable by *mandamus* to do his duty; in the latter, he is not. This distinction is clearly pointed out by the two acts of congress upon this subject. The first was passed 27th July 1789 (1 U. S. Stat. 28), entitled "an act for establishing an executive department, to be denominated the department of foreign affairs." The first section ascertains the duties of the secretary, so far as he is concerned as a mere executive agent. It is in these words, "there shall be an executive department, to be denominated the department of foreign affairs, and that there shall be a principal officer therein, to be called the secretary of the department of foreign affairs, who shall perform and execute such duties as shall, from time to time, be enjoined on, or intrusted to him by the president of the United States, agreeable to the constitution, relative to correspondences, commissions or instructions to or with public ministers or consuls from the United States; or to negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers, or other foreigners, or to such other matters respecting foreign affairs as the president of the United States shall assign to the said department; and furthermore, that the said principal officer shall conduct the business of the said department in such manner as the president of the United States shall, from time to time, order or instruct."

The second section provides for the appointment of a chief clerk; the third section prescribes the oath to be taken, which is simply, "well and faithfully to execute the trust committed to him;" and the fourth and last section gives him the custody of the books and papers of the department of foreign affairs under the old congress. Respecting the powers given, and the duties imposed, by this act, no *mandamus* will lie: the secretary is responsible only to the president.

The other act of congress respecting this department was passed at the same session on the 15th September 1789 (1 U. S. Stat. 68), and is entitled "An act to provide for the safe-keeping of the acts, records and seal of the United States, and for other purposes." The first section changes the name of the department and of the secretary, calling the one the department, and the other the secretary, of state. The second section assigns new duties to the secretary, in the performance of which, it is evident, from their nature, he cannot be lawfully controlled by the president, and for the nonperformance of which, he is not more responsible to the president than to any other citizen of the United States. It provides, that he shall receive from the president all bills, orders, resolutions and votes of the senate and house of representatives, which shall have been approved and signed by him; and shall cause them to be published, and printed copies to be delivered to the senators and representatives, and to the executives of the several states; and makes it his duty carefully to preserve the originals; and to cause them to be recorded in books to be provided for that purpose. The third section provides a seal of the United States. The fourth makes it his duty to keep the said seal, and to make out and record, and to affix the seal of the United States to all civil commissions, after they shall have been signed by the president. The fifth section provides for a seal of office, and that all copies of records and papers in his office, authenticated under that seal, shall be as good evidence as the originals. The sixth section establishes fees for copies, &c. The seventh and last section gives him the custody of the papers of the office of the secretary of the old congress. Most of the duties assigned by this act are of a public nature, and the secretary is bound to perform them, without the control of any person. The president has no right to prevent him from receiving the bills, orders, resolutions and votes of the legislature, or from publishing and distributing them, or from preserving or recording them. While the secretary remains in office, the president cannot take from his custody the seal of the United States, nor prevent him from recording and affixing the seal to civil commissions of such officers as hold not their offices at the will of the president, after he has signed them and delivered them to the secretary for that purpose. By other laws, he is to make out and record in his office, patents for useful discoveries, and patents of lands granted under the authority of the United States. In the performance of all these duties, he is a public ministerial officer of the United States. And the duties being enjoined upon him by law, he is, in executing them, uncontrollable by the president; and if he neglects or refuses to perform them, he may be compelled by *mandamus*, in the same manner as other persons holding offices under the authority of the United States.

The president is no party to this case. The secretary is called upon to perform a duty over which the president has no control, and in regard to which he has no dispensing power, and for the neglect of

which he is in no manner responsible. The secretary alone is the person to whom they are entrusted, and he alone is answerable for their due performance. The secretary of state, therefore, being in the same situation, as to these duties, as every other ministerial officer of the United States, and equally liable to be compelled to perform them, is also bound by the same rules of evidence. These duties are not of a confidential nature, but are of a public kind, and his clerks can have no exclusive privileges. There are, undoubtedly, facts, which may come to their knowledge by means of their connection with the secretary of state, respecting which they cannot be bound to answer. Such are the facts concerning foreign correspondences, and confidential communications between the head of the department and the president. This, however, can be no objection to their being sworn, but may be a ground of objection to any particular question. Suppose, I claim title to land under a patent from the United States: I demand a copy of it from the secretary of state: he refuses. Surely, he may be compelled by *mandamus* to give it. But in order to obtain a *mandamus*, I must show that the patent is recorded in his office; my case would be hard indeed, if I could not call upon the clerks in the office to give evidence of that fact. Again, suppose a private act of congress had passed for my benefit: it becomes necessary for me to have the use of that act in a court of law: I apply for a copy: I am refused. Shall I not be permitted, on a motion for a *mandamus*, to call upon the clerks in the office to prove that such an act is among the rolls of the office, or that it is duly recorded? Surely, it cannot be contended, that although the laws are to be recorded, yet no access is to be had to the records, and no benefit to result therefrom.

The Court ordered the witnesses to be sworn, and their answers taken in writing, but informed them, that when the questions were asked, they might state their objections to answering each particular question, if they had any.

Mr. Wagner being examined upon interrogatories, testified, that at this distance of time he could not recollect whether he had seen any commission in the office, constituting the applicants, or either of them, justices of the peace. That Mr. Marbury and Mr. Ramsay called on the secretary of state respecting their commissions. That the secretary referred them to him; he took them into another room, and mentioned to them, that two of the commissions had been signed, but the other had not. That he did not know that fact of his own knowledge, but by the information of others. Mr. Wagner declined answering the question, "who gave him that information;" and the court decided, that he was not bound to answer it, because it was not pertinent to this cause. He further testified, that some of the commissions of the justices, but he believed not all, were recorded. He did not know whether the commissions of the applicants were recorded, as he had not had recourse to the book, for more than twelve months past.

Mr. Daniel Brent testified, that he did not remember certainly the names of any of the persons in the commissions of justices of the peace, signed by Mr. Adams; but he believed, and was almost certain, that Mr. Marbury's and Col. Hooe's commissions were made out, and that Mr. Ramsay's was not; that he made out the list of names, by which the clerk who filled up the commissions was guided; he believed, that the name of Mr. Ramsay was pretermitted by mistake, but to the best of his knowledge, it contained the names of the other two; he believed,

none of the commissions for justices of the peace, signed by Mr. Adams, were recorded. After the commissions for justices of the peace were made out, he carried them to Mr. Adams, for his signature. After being signed, he carried them back to the secretary's office, where the seal of the United States was affixed to them. That commissions are not usually delivered out of the office, before they are recorded; but sometimes they are, and a note of them only is taken, and they are recorded afterwards. He believed, none of those commissions of justices were ever sent out, or delivered to the persons for whom they were intended; he did not know what became of them, nor did he know that they are now in the office of the secretary of state.

Mr. Lincoln, attorney-general, having been summoned, and now called, objected to answering. He requested that the questions might be put in writing, and that he might afterwards have time to determine whether he would answer. On the one hand, he respected the jurisdiction of this court, and on the other, he felt himself bound to maintain the rights of the executive. He was acting as secretary of state, at the time when this transaction happened. He was of opinion, and his opinion was supported by that of others whom he highly respected, that he was not bound, and ought not to answer, as to any facts which came officially to his knowledge while acting as secretary of state.

The questions being written, were then read and handed to him. He repeated the ideas he had before suggested, and said his objections were of two kinds. 1st. He did not think himself bound to disclose his official transactions while acting as secretary of state; and 2d. He ought not to be compelled to answer anything which might tend to criminate himself.

Mr. Lee, in reply, repeated the substance of the observations he had before made in answer to the objections of Mr. Wagner and Mr. Brent. He stated, that the duties of a secretary of state were two-fold. In discharging one part of those duties, he acted as a public ministerial officer of the United States, totally independent of the president, and that as to any facts which came officially to his knowledge, while acting in this capacity, he was as much bound to answer as a marshal, a collector or any other ministerial officer. But that in the discharge of the other part of his duties, he did not act as a public ministerial officer, but in the capacity of an agent of the president, bound to obey his orders, and accountable to him for his conduct. And that as to any facts which came officially to his knowledge, in the discharge of this part of his duties, he was not bound to answer. He agreed that Mr. Lincoln was not bound to disclose anything which might tend to criminate himself.

Mr. Lincoln thought it was going a great way, to say that every secretary of state should, at all times, be liable to be called upon to appear as a witness in a court of justice, and testify to facts which came to his knowledge officially. He felt himself delicately situated between his duty to this court, and the duty he conceived he owed to an executive department; and hoped the court would give him time to consider of the subject.

THE COURT said, that if Mr. Lincoln wished time to consider what answers he should make, they would give him time; but they had no doubt he ought to answer. There was nothing confidential required to be disclosed. If there had been, he was not obliged to answer it; and if he thought that anything was communicated to him in confidence, he

was not bound to disclose it; nor was he obliged to state anything which would criminate himself; but that the fact whether such commissions had been in the office or not, could not be a confidential fact; it is a fact which all the world have a right to know. If he thought any of the questions improper, he might state his objections.

Mr. Lincoln then prayed time until the next day, to consider of his answers, under this opinion of the court.

THE COURT granted it, and postponed further consideration of the cause until the next day.

At the opening of the court, on the next morning, *Mr. Lincoln* said, he had no objection to answering the questions proposed, excepting the last, which he did not think himself obliged to answer fully. The question was, what had been done with the commissions? He had no hesitation in saying, that he did not know that they ever came to the possession of Mr. Madison, nor did he know that they were in the office, when Mr. Madison took possession of it. He prayed the opinion of the court, whether he was obliged to disclose what had been done with the commissions.

THE COURT were of opinion, that he was not bound to say what had become of them; if they never came to the possession of Mr. Madison, it was immaterial to the present cause, what had been done with them by others.

To the other questions, he answered, that he had seen commissions of justices of the peace of the district of Columbia, signed by Mr. Adams, and sealed with the seal of the United States. He did not recollect, whether any of them constituted Mr. Marbury, Col. Hooe or Col. Ramsay, justices of the peace; there were, when he went into the office, several commissions for justices of peace of the district made out; but he was furnished with a list of names to be put into a general commission, which was done, and was considered as superseding the particular commissions; and the individuals whose names were contained in this general commission, were informed of their being thus appointed. He did not know that any one of the commissions was ever sent to the person for whom it was made out, and did not believe that any one had been sent.

Mr. Lee then read the affidavit of James Marshall, who had been also summoned as a witness. It stated, that on the 4th of March 1801, having been informed by some person from Alexandria, that there was reason to apprehend riotous proceedings in that town, on that night, he was induced to return immediately home, and to call at the office of the secretary of state, for the commissions of the justices of the peace; that as many as twelve, as he believed, commissions of justices for that county were delivered to him, for which he gave a receipt, which he left in the office. That finding he could not conveniently carry the whole, he returned several of them, and struck a pen through the names of those, in the receipt, which he returned. Among the commissions so returned, according to the best of his knowledge and belief, was one for Col. Hooe, and one for William Harper.

Mr. Lee then observed, that having proved the existence of the commissions, he should confine such further remarks as he had to make in support of the rule, to three questions: 1st. Whether the supreme court can award the writ of *mandamus* in any case? 2d. Whether it will lie to a secretary of state, in any case whatever? 3d. Whether, in the present

case, the court may award a *mandamus* to James Madison, secretary of state?

1. The argument upon the first question is derived not only from the principles and practice of that country from whence we derive many of the principles of our political institutions, but from the constitution and laws of the United States. This is the *supreme* court, and by reason of its supremacy, must have the superintendence of the inferior tribunals and officers, whether judicial or ministerial. In this respect, there is no difference between a judicial and a ministerial officer. From this principle alone, the court of king's bench in England derives the power of issuing the writs of *mandamus* and prohibition. 3 Inst. 70, 71. Shall it be said, that the court of king's bench has this power, in consequence of its being the supreme court of judicature, and shall we deny it to this court, which the constitution makes the *supreme* court? It is a beneficial, and a necessary power; and it can never be applied, where there is another adequate, specific, legal remedy.

The second section of the third article of the constitution gives this court appellate jurisdiction, in all cases in law and equity arising under the constitution and laws of the United States (except the cases in which it has original jurisdiction), with such exceptions, and under such regulations, as congress shall make. The term "appellate jurisdiction" is to be taken in its largest sense, and implies in its nature the right of superintending the inferior tribunals. Proceedings in nature of appeals are of various kinds, according to the subject matter. 3 Bl. Com. 402. It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress. 3 Bl. Com. 109. There are some injuries which can only be redressed by a writ of *mandamus*, and others by a writ of prohibition. There must, then, be a jurisdiction somewhere, competent to issue that kind of process. Where are we to look for it, but in that court which the constitution and laws have made supreme, and to which they have given appellate jurisdiction? Blackstone, vol. 3, p. 110, says, that a writ of *mandamus* is "a command, issuing in the king's name, from the court of king's bench, and directed to any person, corporation or inferior court, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court has previously determined, or at least supposes, to be consonant to right and justice. It is a writ of a most extensively remedial nature, and issues in all cases where the party has a right to have anything done, and has no other specific means of compelling its performance."

In the Federalist, vol. 2, p. 239, it is said, that the word "appellate" is not to be taken in its technical sense, as used in reference to appeals in the course of the civil law, but in its broadest sense, in which it denotes nothing more than the power of one tribunal to review the proceedings of another, either as to law or fact, or both. The writ of *mandamus* is in the nature of an appeal as to fact as well as law. It is competent for congress to prescribe the forms of process by which the supreme court shall exercise its appellate jurisdiction, and they may well declare a *mandamus* to be one. But the power does not depend upon implication alone: it has been recognised by legislative provision, as well as in judicial decisions in this court. Congress, by a law passed at the very first session after the adoption of the constitution (1 U. S. Stat. 80, § 13), have expressly given the supreme court the power of

issuing writs of *mandamus*. The words are, "the supreme court shall also have appellate jurisdiction from the circuit courts, and courts of the several states, in the cases hereinafter specially provided for; and shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction; and writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States." Congress is not restrained from conferring original jurisdiction in other cases than those mentioned in the constitution. 2 Dall. 298.

The court has entertained jurisdiction on a *mandamus* in one case, and on a prohibition in another. In the case of *The United States* v. *Judge Lawrence*, 3 Dall. 42, a *mandamus* was moved for by the attorney-general, at the instance of the French minister, to compel Judge Lawrence to issue a warrant against Captain Barre, commander of the French ship of war Le Perdrix, grounded on an article of the consular convention with France. In this case, the power of the court to issue writs of *mandamus* was taken for granted, in the arguments of counsel on both sides, and seems to have been so considered by the court. The *mandamus* was refused, because the case in which it was required was not a proper one to support the motion. In the case of *The United States* v. *Judge Peters*, a writ of prohibition was granted. 3 Dall. 121, 129. This was the celebrated case of the French corvette, the Cassius, which afterwards became a subject of diplomatic controversy between the two nations. On the 5th February 1794, a motion was made to the supreme court, in behalf of one John Chandler, a citizen of Connecticut, for a *mandamus* to the secretary at war, commanding him to place Chandler on the invalid pension list. After argument, the court refused the *mandamus*, because the two acts of congress respecting invalids did not support the case on which the applicant grounded his motion. The case of *The United States* v. *Hopkins*, at February term 1794, was a motion for a *mandamus* to Hopkins, loan-officer for the district of Virginia, to command him to admit a person to subscribe to the United States' loan.. Upon argument, the *mandamus* was refused, because the applicant had not sufficiently established his title. In none of these cases, nor in any other, was the power of this court to issue a *mandamus* ever denied. Hence, it appears, there has been a legislative construction of the constitution upon this point, and a judicial practice under it, for the whole time since the formation of the government.

2. The second point is, can a *mandamus* go to a secretary of state, in any case? It certainly cannot in all cases; nor to the president, in any case. It may not be proper to mention this position; but I am compelled to do it. An idea has gone forth, that a *mandamus* to a secretary of state, is equivalent to a *mandamus* to the president of the United States. I declare it to be my opinion, grounded on a comprehensive view of the subject, that the president is not amenable to any court of judicature, for the exercise of his high functions, but is responsible only in the mode pointed out in the constitution. The secretary of state acts, as before observed, in two capacities. As the agent of the president, he is not liable to a *mandamus;* but as a recorder of the laws of the United States, as keeper of the great seal, as recorder of deeds of land, of letters-patent, and of commissions, &c., he is a ministerial officer of the people of the United States. As such, he has

duties assigned him by law, in the execution of which he is independent of all control but that of the laws. It is true, he is a high officer, but he is not above law. It is not consistent with the policy of our political institutions, or the manners of the citizens of the United States, that any ministerial officer, having public duties to perform, should be above the compulsion of the law, in the exercise of those duties. As a ministerial officer, he is compellable to do his duty, and if he refuses, is liable to indictment. A prosecution of this kind might be the means of punishing the officer, but a specific civil remedy to the injured party can only be obtained by a writ of *mandamus*. If a *mandamus* can be awarded by this court, in any case, it may issue to a secretary of state: for the act of congress expressly gives the power to award it, "in cases warranted by the principles and usages of law, to any persons holding offices under the authority of the United States."

Many cases may be supposed, in which a secretary of state ought to be compelled to perform his duty specifically. By the 5th and 6th sections of the act of congress (1 U. S. Stat. 69), copies under seal of the office of the department of state are made evidence in courts of law, and fees are given for making them out. The intention of the law must have been, that every person needing a copy should be entitled to it. Suppose, the secretary refuses to give a copy, ought he not to be compelled? Suppose, I am entitled to a patent for lands purchased of the United States; it is made out and signed by the president, who gives a warrant to the secretary to affix the great seal to the patent; he refuses to do it; shall I not have a *mandamus* to compel him? Suppose, the seal is affixed, but the secretary refuses to record it: shall he not be compelled? Suppose, it recorded, and he refuses to deliver it; shall I have no remedy? In this respect, there is no difference between a patent for lands, and the commission of a judicial officer. The duty of the secretary is precisely the same.

Judge PATERSON inquired of *Mr. Lee*, whether he understood it to be the duty of the secretary, to deliver a commission, unless ordered so to do by the president?

Mr. Lee replied, that after the president has signed a commission for an office, not held at his will, and it comes to the secretary to be sealed, the president has done with it, and nothing remains, but that the secretary perform those ministerial acts which the law imposes upon him. It immediately becomes his duty to seal, record and deliver it, on demand. In such a case, the appointment becomes complete, by the signing and sealing; and the secretary does wrong, if he withholds the commission.

3. The third point is, whether, in the present case, a writ of *mandamus* ought to be awarded to James Madison, secretary of state?

The justices of the peace in the district of Columbia are judicial officers, and hold their office for five years. The office is established by the act of congress passed the 27th of February 1801, entitled "An act concerning the district of Columbia" (1 U. S. Stat. 107, § 11, 14). They are authorized to hold courts, and have cognisance of personal demands of the value of twenty dollars. The act of May 3d, 1802 (1 U. S. Stat. 194, § 4), considers them as judicial officers, and provides the mode in which execution shall issue upon their judgments. They hold their offices independent of the will of the president. The appointment of such an officer is complete, when the president has nominated him to the senate, and the senate have

advised and consented, and the president has signed the commission, and delivered it to the secretary to be sealed. The president has then done with it; it becomes irrevocable. An appointment of a judge, once completed, is made forever: he holds under the constitution. The requisites to be performed by the secretary are ministerial, ascertained by law, and he has no discretion, but must perform them; there is no dispensing power. In contemplation of law, they are as if done.

These justices exercise part of the judicial power of the United States: they ought, therefore, to be independent. Mr. Lee begged leave again to refer to the Federalist, vol. 2, Nos. 78 and 79, as containing a correct view of this subject. They contained observations and ideas which he wished might be generally read and understood. They contained the principles upon which this branch of our constitution was constructed. It is important to the citizens of this district, that the justices should be independent; almost all the authority immediately exercised over them, is that of the justices. They wish to know whether the justices of this district are to hold their commissions at the will of a secretary of state. This cause may seem trivial at first view, but it is important in principle. It is for this reason that this court is now troubled with it. The emoluments or the dignity of the office, are no objects with the applicants. They conceive themselves to be duly appointed justices of the peace, and they believe it to be their duty to maintain the rights of their office, and not to suffer them to be violated by the hand of power. The citizens of this district have their fears excited, by every stretch of power, by a person so high in office as the secretary of state.

It only remains now to consider, whether a *mandamus*, to compel the delivery of a commission by a public ministerial officer, is one of "the cases warranted by the principles and usages of law." It is the general principle of law, that a *mandamus* lies, if there be no other adequate, specific legal remedy. *King* v. *Barker et al.*, 3 Burr. 1267. This seems to be the result of a view of all the cases on the subject. The case of *Rex* v. *Borough of Midhurst*, 1 Wils. 283, was a *mandamus* to compel the presentment of certain conveyances to purchasers of burgage tenements, whereby they would be entitled to vote for members of parliament. In the case of *Rex* v. *Dr. Hay*, 1 W. Bl. 640, a *mandamus* issued to admit one to administer an estate.

A *mandamus* gives no right, but only puts the party in a way to try his right. Sid. 286: It lies to compel a ministerial act which concerns the public (1 Wils. 283; 1 Bl. Rep. 640); although there be a more tedious remedy; 2 Str. 1082; 4 Burr. 2188; 2 Ibid. 1045. So, if there be a legal right, and a remedy in equity. 3 T. R. 652. A *mandamus* lies to obtain admission into a trading company. *Rex* v. *Turkey Company*, 2 Burr. 1000; Carth. 448; 5 Mod. 402. So, it lies to put the corporate seal to an instrument. 4 T. R. 699. To commissioners of the excise, to grant a permit. 2 Ibid. 381. To admit to an office. 3 Ibid. 575. To deliver papers which concern the public. 2 Sid. 31. A *mandamus* will sometimes lie in a doubtful case (1 Lev. 113), to be further considered on the return. 2 Ibid. 14; 1 Sid. 169. It lies to be admitted a member of a church. 3 Burr. 1265, 1043. The process is as ancient as the time of Edw. II. 1 Lev. 23.

The first writ of *mandamus* is not peremptory, it only commands the officer to do the thing, or show cause why he should not do it. If

the cause returned be sufficient, there is an end of the proceeding; if not, a peremptory *mandamus* is then awarded. It is said to be a writ of discretion. But the discretion of a court always means a sound, legal discretion, not an arbitrary will. If the applicant makes out a proper case, the court are bound to grant it: they can refuse justice to no man.

On a subsequent day, and before the court had given an opinion, *Mr. Lee* read the affidavit of Hazen Kimball, who had been a clerk in the office of the secretary of state, and had been to a distant part of the United States, but whose return was not known to the applicant until after the argument of the case.

It stated, that on the 3d of March 1801, he was a clerk in the department of state. That there were in the office, on that day, commissions made out and signed by the president, appointing William Marbury a justice of peace for the county of Washington; and Robert T. Hooe, a justice of the peace for the county of Alexandria, in the district of Columbia.

Afterwards, on the 24th February, the following opinion of the court was delivered by the Chief Justice:

Opinion of the Court.—At the last term, on the affidavits then read and filed with the clerk, a rule was granted in this case, requiring the secretary of state to show cause why a *mandamus* should not issue, directing him to deliver to William Marbury his commission as a justice of the peace for the county of Washington, in the district of Columbia.

No cause has been shown, and the present motion is for a *mandamus*. The peculiar delicacy of this case, the novelty of some of its circumstances, and the real difficulty attending the points which occur in it, require a complete exposition of the principles on which the opinion to be given by the court is founded. These principles have been, on the side of the applicant, very ably argued at the bar. In rendering the opinion of the court, there will be some departure in form, though not in substance, from the points stated in that argument.

In the order in which the court has viewed this subject, the following questions have been considered and decided: 1st. Has the applicant a right to the commission he demands? 2d. If he has a right, and that right has been violated, do the laws of his country afford him a remedy? 3d. If they do afford him a remedy, is it a *mandamus* issuing from this court?

The first object of inquiry is—Has the applicant a right to the commission he demands? His right originates in an act of congress passed in February 1801, concerning the district of Columbia. After dividing the district into two counties, the 11th section of this law enacts, "that there shall be appointed in and for each of the said counties, such number of discreet persons to be justices of the peace, as the president of the United States shall, from time to time, think expedient, to continue in office for five years.

It appears, from the affidavits, that, in compliance with this law, a commission for William Marbury, as a justice of peace for the county of Washington, was signed by John Adams, then President of the United States; after which, the seal of the United States was affixed to it; but the commission has never reached the person for whom it was made out. In order to determine whether he is entitled to this commission, it becomes necessary to inquire whether he has been

appointed to the office. For if he has been appointed, the law continues him in office for five years, and he is entitled to the possession of those evidences of office, which, being completed, became his property.

The 2d section of the 2d article of the constitution declares, that "the president shall nominate, and by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, and all other officers of the United States, whose appointments are not otherwise provided for." The 3d section declares, that "he shall commission all the officers of the United States."

An act of congress directs the secretary of state to keep the seal of the United States, "to make out and record, and affix the said seal to all civil commissions to officers of the United States, to be appointed by the president, by and with the consent of the senate, or by the president alone; provided, that the said seal shall not be affixed to any commission, before the same shall have been signed by the president of the United States.

These are the clauses of the constitution and laws of the United States, which affect this part of the case. They seem to contemplate three distinct operations: 1st. The nomination: this is the sole act of the president, and is completely voluntary. 2d. The appointment: this is also the act of the president, and is also a voluntary act, though it can only be performed by and with the advice and consent of the senate. 3d. The commission: to grant a commission to a person appointed, might, perhaps, be deemed a duty enjoined by the constitution. "He shall," says that instrument, "commission all the officers of the United States."

1. The acts of appointing to office, and commissioning the person appointed, can scarcely be considered as one and the same; since the power to perform them is given in two separate and distinct sections of the constitution. The distinction between the appointment and the commission, will be rendered more apparent, by adverting to that provision in the second section of the second article of the constitution, which authorizes congress "to vest, by law, the appointment of such inferior officers, as they think proper, in the president alone, in the courts of law, or in the heads of departments;" thus contemplating cases where the law may direct the president to commission an officer appointed by the courts, or by the heads of departments. In such a case, to issue a commission would be apparently a duty distinct from the appointment, the performance of which, perhaps, could not legally be refused.

Although that clause of the constitution which requires the president to commission all the officers of the United States, may never have been applied to officers appointed otherwise than by himself, yet it would be difficult to deny the legislative power to apply it to such cases. Of consequence, the constitutional distinction between the appointment to an office and the commission of an officer who has been appointed, remains the same, as if, in practice, the president had commissioned officers appointed by an authority other than his own. It follows, too, from the existence of this distinction, that if an appointment was to be evidenced by any public act, other than the commission, the performance of such public act would create the officer; and if he was not removable at the will of the president, would either give him a right to his commission, or enable him to perform the duties without it.

These observations are premised, solely for the purpose of rendering more intelligible those which apply more directly to the particular case under consideration.

This is an appointment made by the president, by and with the advice and consent of the senate, and is evidenced by no act but the commission itself. In such a case, therefore, the commission and the appointment seem inseparable; it being almost impossible to show an appointment, otherwise than by providing the existence of a commission; still the commission is not necessarily the appointment, though conclusive evidence of it.

But at what stage, does it amount to this conclusive evidence? The answer to this question seems an obvious one. The appointment being the sole act of the president, must be completely evidenced, when it is shown that he has done everything to be performed by him. Should the commission, instead of being evidence of an appointment, even be considered as constituting the appointment itself; still, it would be made, when the last act to be done by the president was performed, or, at farthest, when the commission was complete.

The last act to be done by the president is the signature of the commission: he has then acted on the advice and consent of the senate to his own nomination. The time for deliberation has then passed: he has decided. His judgment, on the advice and consent of the senate, concurring with his nomination, has been made, and the officer is appointed. This appointment is evidenced by an open unequivocal act; and being the last act required from the person making it, necessarily excludes the idea of its being, so far as respects the appointment, an inchoate and incomplete transaction.

Some point of time must be taken, when the power of the executive over an officer, not removable at his will, must cease. That point of time must be, when the constitutional power of appointment has been exercised. And this power has been exercised, when the last act, required from the person possessing the power, has been performed: this last act is the signature of the commission. This idea seems to have prevailed with the legislature, when the act passed converting the department of foreign affairs into the department of state. By that act, it is enacted, that the secretary of state shall keep the seal of the United States, "and shall make out and record, and shall affix the said seal to all civil commissions to officers of the United States, to be appointed by the president;" "provided, that the said seal shall not be affixed to any commission, before the same shall have been signed by the President of the United States; nor to any other instrument or act, without the special warrant of the president therefor."

The signature is a warrant for affixing the great seal to the commission; and the great seal is only to be affixed to an instrument which is complete. It attests, by an act, supposed to be of public notoriety, the verity of the presidential signature. It is never to be affixed, until the commission is signed, because the signature, which gives force and effect to the commission, is conclusive evidence that the appointment is made.

The commission being signed, the subsequent duty of the secretary of state is prescribed by law, and not to be guided by the will of the president. He is to affix the seal of the United States to the commission, and is to record it. This is not a proceeding which may be varied, if the judgment of the executive shall suggest one more eligible; but is

a precise course accurately marked out by law, and is to be strictly pursued. It is the duty of the secretary of state to conform to the law, and in this he is an officer of the United States, bound to obey the laws. He acts, in this respect, as has been very properly stated at the bar, under the authority of law, and not by the instructions of the president. It is a ministerial act, which the law enjoins on a particular officer for a particular purpose.

If it should be supposed, that the solemnity of affixing the seal is necessary, not only to the validity of the commission, but even to the completion of an appointment, still, when the seal is affixed, the appointment is made, and the commission is valid. No other solemnity is required by law; no other act is to be performed on the part of government. All that the executive can do, to invest the person with his office, is done; and unless the appointment be then made, the executive cannot make one without the co-operation of others.

After searching anxiously for the principles on which a contrary opinion may be supported, none have been found, which appear of sufficient force to maintain the opposite doctrine. Such as the imagination of the court could suggest, have been very deliberately examined, and after allowing them all the weight which it appears possible to give them, they do not shake the opinion which has been formed. In considering this question, it has been conjectured, that the commission may have been assimilated to a deed, to the validity of which delivery is essential. This idea is founded on the supposition, that the commission is not merely evidence of an appointment, but is itself the actual appointment; a supposition by no means unquestionable. But for the purpose of examining this objection fairly, let it be conceded, that the principle claimed for its support is established.

The appointment being, under the constitution, to be made by the president, personally, the delivery of the deed of appointment, if necessary to its completion, must be made by the president also. It is not necessary, that the delivery should be made personally to the grantee of the office: it never is so made. The law would seem to contemplate, that it should be made to the secretary of state, since it directs the secretary to affix the seal to the commission, after it shall have been signed by the president. If, then, the act of delivery be necessary to give validity to the commission, it has been delivered, when executed and given to the secretary, for the purpose of being sealed, recorded, and transmitted to the party.

But in all cases of letters-patent, certain solemnities are required by law, which solemnities are the evidences of the validity of the instrument: a formal delivery to the person is not among them.[1] In cases of commissions, the sign manual of the president, and the seal of the United States are those solemnities. This objection, therefore, does not touch the case.

It has also occurred as possible, and barely possible, that the transmission of the commission, and the acceptance thereof, might be deemed necessary to complete the right of the plaintiff. The transmission of the commission is a practice, directed by convenience, but not by law. It cannot, therefore, be necessary to constitute the appointment, which must precede it, and which is the mere act of the president. If the executive required that every person appointed to an office should himself take means to procure his commission, the

[1] But a pardon is a deed, to which delivery and acceptance are essential. United States *v.* Wilson, 7 Pet. 150; Ex parte De Puy, 3 Ben. 307. And see Commonwealth *v.* Halloway, 44 Penn. St. 210.

appointment would not be the less valid on that account. The appointment is the sole act of the president; the transmission of the commission is the sole act of the officer to whom that duty is assigned, and may be accelerated or retarded by circumstances which can have no influence on the appointment. A commission is transmitted to a person already appointed; not to a person to be appointed or not, as the letter inclosing the commission should happen to get into the post-office and reach him in safety, or to miscarry.

It may have some tendency to elucidate this point, to inquire, whether the possession of the original commission be indispensably necessary to authorize a person, appointed to any office, to perform the duties of that office. If it was necessary, then a loss of the commission would lose the office. Not only negligence, but accident or fraud, fire or theft, might deprive an individual of his office. In such a case, I presume, it could not be doubted, but that a copy from the record of the office of the secretary of state would be, to every intent and purpose, equal to the original: the act of congress has expressly made it so. To give that copy validity, it would not be necessary to prove that the original had been transmitted and afterwards lost. The copy would be complete evidence that the original had existed, and that the appointment had been made, but not that the original had been transmitted. If, indeed, it should appear, that the original had been mislaid in the office of state, that circumstance would not affect the operation of the copy. When all the requisites have been performed, which authorize a recording officer to record any instrument whatever, and the order for that purpose has been given, the instrument is, in law, considered as recorded, although the manual labor of inserting it in a book kept for that purpose may not have been performed. In the case of commissions, the law orders the secretary of state to record them. When, therefore, they are signed and sealed, the order for their being recorded is given; and whether inserted in the book or not, they are in law recorded.

A copy of this record is declared equal to the original, and the fees to be paid by a person requiring a copy are ascertained by law. Can a keeper of a public record erase therefrom a commission which has been recorded? Or can he refuse a copy thereof to a person demanding it on the terms prescribed by law? Such a copy would, equally with the original, authorize the justice of peace to proceed in the performance of his duty, because it would, equally with the original, attest his appointment.

If the transmission of a commission be not considered as necessary to give validity to an appointment, still less is its acceptance. The appointment is the sole act of the president; the acceptance is the sole act of the officer, and is, in plain common sense, posterior to the appointment. As he may resign, so may he refuse to accept: but neither the one nor the other is capable of rendering the appointment a nonentity.

That this is the understanding of the government, is apparent from the whole tenor of its conduct. A commission bears date, and the salary of the officer commences, from his appointment; not from the transmission or acceptance of his commission. When a person appointed to any office refuses to accept that office, the successor is nominated in the place of the person who has declined to accept, and not in the place of the person who had been previously in office, and had created the original vacancy.

It is, therefore, decidedly the opinion of the court, that when a commission has been signed by the president, the appointment is made; and that the commission is complete, when the seal of the United States has been affixed to it by the secretary of state.

Where an officer is removable at the will of the executive, the circumstance which completes his appointment is of no concern; because the act is at any time revocable; and the commission may be arrested, if still in the office. But when the officer is not removable at the will of the executive, the appointment is not revocable, and cannot be annulled: it has conferred legal rights which cannot be resumed. The discretion of the executive is to be exercised, until the appointment has been made. But having once made the appointment, his power over the office is terminated, in all cases where, by law, the officer is not removable by him. The right to the office is then in the person appointed, and he has the absolute unconditional power of accepting or rejecting it.

Mr. Marbury, then, since his commission was signed by the president, and sealed by the secretary of state, was appointed; and as the law creating the office, gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable, but vested in the officer legal rights, which are protected by the laws of his country. To withhold his commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right.

2. This brings us to the second inquiry; which is: If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain, the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.

In the 3d vol. of his Commentaries (p. 23), Blackstone states two cases in which a remedy is afforded by mere operation of law. "In all other cases," he says, "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded." And afterwards (p. 109, of the same vol.), he says, "I am next to consider such injuries as are cognisable by the courts of the common law. And herein I shall, for the present, only remark, that all possible injuries whatsoever, that did not fall within the exclusive cognisance of either the ecclesiastical, military or maritime tribunals, are, for that very reason, within the cognisance of the common-law courts of justice; for it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress."

The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right. If this obloquy is to be cast on the jurisprudence of our country, it must arise from the peculiar character of the case.

It behooves us, then, to inquire whether there be in its composition any ingredient which shall exempt it from legal investigation, or exclude the injured party from legal redress. In pursuing this inquiry,

the first question which presents itself is, whether this can be arranged with that class of cases which come under the description of *damnum absque injuria;* a loss without an injury. This description of cases never has been considered, and it is believed, never can be considered, as comprehending offices of trust, of honor or of profit. The office of justice of peace in the district of Columbia is such an office; it is, therefore, worthy of the attention and guardianship of the laws. It has received that attention and guardianship: it has been created by special act of Congress, and has been secured, so far as the laws can give security, to the person appointed to fill it, for five years. It is not, then, on account of the worthlessness of the thing pursued, that the injured party can be alleged to be without remedy.

Is it in the nature of the transaction? Is the act of delivering or withholding a commission to be considered as a mere political act, belonging to the executive department alone, for the performance of which entire confidence is placed by our constitution in the supreme executive; and for any misconduct respecting which, the injured individual has no remedy? That there may be such cases is not to be questioned; but that every act of duty, to be performed in any of the great departments of government, constitutes such a case, is not to be admitted.

By the act concerning invalids, passed in June 1794 (1 U. S. Stat. 392), the secretary at war is ordered to place on the pension list, all persons whose names are contained in a report previously made by him to congress. If he should refuse to do so, would the wounded veteran be without remedy? Is it to be contended, that where the law, in precise terms, directs the performance of an act, in which an individual is interested, the law is incapable of securing obedience to its mandate? Is it on account of the character of the person against whom the complaint is made? Is it to be contended that the heads of departments are not amenable to the laws of their country? Whatever the practice on particular occasions may be, the theory of this principle will certainly never be maintained. No act of the legislature confers so extraordinary a privilege, nor can it derive countenance from the doctrines of the common law. After stating that personal injury from the king to a subject is presumed to be impossible, Blackstone (vol. 3, p. 255), says, "but injuries to the rights of property can scarcely be committed by the crown, without the intervention of its officers; for whom the law, in matters of right, entertains no respect or delicacy; but furnishes various methods of detecting the errors and misconduct of those agents, by whom the king has been deceived and induced to do a temporary injustice."

By the act passed in 1796, authorizing the sale of the lands above the mouth of Kentucky river (1 U. S. Stat. 464), the purchaser, on paying his purchase-money, becomes completely entitled to the property purchased; and on producing to the secretary of state the receipt of the treasurer, upon a certificate required by the law, the president of the United States is authorized to grant him a patent. It is further enacted, that all patents shall be countersigned by the secretary of state, and recorded in his office. If the secretary of state should choose to withhold this patent; or, the patent being lost, should refuse a copy of it; can it be imagined, that the law furnishes to the injured person no remedy? It is not believed, that any person whatever would attempt to maintain such a proposition.

It follows, then, that the question, whether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend on the nature of that act. If some acts be examinable, and others not, there must be some rule of law to guide the court in the exercise of its jurisdiction. In some instances, there may be difficulty in applying the rule to particular cases; but there cannot, it is believed, be much difficulty in laying down the rule.

By the constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders. In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political: they respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived, by adverting to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the president: he is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts. But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot, at his discretion, sport away the vested rights of others.

The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the president, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear, than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear, that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.[2]

If this be the rule, let us inquire, how it applies to the case under the consideration of the court. The power of nominating to the senate, and the power of appointing the person nominated, are political powers, to be exercised by the president, according to his own discretion. When he has made an appointment, he has exercised his whole power, and his discretion has been completely applied to the case. If, by law, the officer be removable at the will of the president, then a new appointment may be immediately made, and the rights of the officer are terminated. But as a fact which has existed, cannot be made never to have existed, the appointment cannot be annihilated; and consequently, if the officer is by law not removable at the will of the president, the rights he has acquired are protected by the law, and are not resumable by the president. They cannot be extinguished by executive authority, and he has the privilege of asserting them in like manner, as if they had been derived from any other source.

[2] See Gaines *v.* Thompson, 7 Wall. 347.

The question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority. If, for example, Mr. Marbury had taken the oaths of a magistrate, and proceeded to act as one; in consequence of which, a suit has been instituted against him, in which his defence had depended on his being a magistrate, the validity of his appointment must have been determined by judicial authority. So, if he conceives that, by virtue of his appointment, he has a legal right either to the commission which has been made out for him, or to a copy of that commission, it is equally a question examinable in a court, and the decision of the court upon it must depend on the opinion entertained of his appointment. That question has been discussed, and the opinion is, that the latest point of time which can be taken as that at which the appointment was complete, and evidenced, was when, after the signature of the president, the seal of the United States was affixed to the commission.

It is, then, the opinion of the Court: 1st. That by signing the commission of Mr. Marbury, the President of the United States appointed him a justice of peace for the county of Washington, in the district of Columbia; and that the seal of the United States, affixed thereto by the secretary of state, is conclusive testimony of the verity of the signature, and of the completion of the appointment; and that the appointment conferred on him a legal right to the office for the space of five years. 2d. That, having this legal title to the office, he has a consequent right to the commission; a refusal to deliver which is a plain violation of that right, for which the laws of his country afford him a remedy.

3. It remains to be inquired whether he is entitled to the remedy for which he applies? This depends on—1st. The nature of the writ applied for; and 2d. The power of this court.

1st. The nature of the writ. Blackstone, in the 3d volume of his Commentaries, page 110, defines a *mandamus* to be "a command issuing in the king's name, from the court of king's bench, and directed to any person, corporation or inferior court of judicature, within the king's dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court of king's bench has previously determined, or at least supposes, to be consonant to right and justice."

Lord MANSFIELD, in 3 Burr. 1267, in the case of *The King* v. *Baker et al.*, states, with much precision and explicitness, the cases in which this writ may be used. "Whenever," says that very able judge, "there is a right to execute an office, perform a service, or exercise a franchise (more especially if it be in a matter of public concern, or attended with profit), and a person is kept out of possession, or dispossessed of such right, and has no other specific legal remedy, this court ought to assist by *mandamus*, upon reasons of justice, as the writ expresses, and upon reasons of public policy, to preserve peace, order and good government." In the same case, he says, "this writ ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one." In addition to the authorities now particularly cited, many others were relied on at the bar, which show how far the practice has conformed to the general doctrines that have been just quoted.

This writ, if awarded, would be directed to an officer of government, and its mandate to him would be, to use the words of Blackstone,

"to do a particular thing therein specified, which appertains to his office and duty, and which the court has previously determined, or at least supposes, to be consonant to right and justice." Or, in the words of Lord MANSFIELD, the applicant, in this case, has a right to execute an office of public concern, and is kept out of possession of that right. These circumstances certainly concur in this case.

Still, to render the *mandamus* a proper remedy, the officer to whom it is to be directed, must be one to whom, on legal principles, such writ may be directed; and the person applying for it must be without any other specific and legal remedy.

1. With respect to the officer to whom it would be directed. The intimate political relation subsisting between the president of the United States and the heads of departments, necessarily renders any legal investigation of the acts of one of those high officers peculiarly irksome, as well as delicate; and excites some hesitation with respect to the propriety of entering into such investigation. Impressions are often received, without much reflection or examination, and it is not wonderful, that in such a case as this, the assertion, by an individual, of his legal claims in a court of justice, to which claims it is the duty of that court to attend, should at first view be considered by some, as an attempt to intrude into the cabinet, and to intermeddle with the prerogatives of the executive.

It is scarcely necessary for the court to disclaim all pretensions to such a jurisdiction. An extravagance, so absurd and excessive, could not have been entertained for a moment. The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.[3]

But, if this be not such a question; if, so far from being an intrusion into the secrets of the cabinet, it respects a paper which, according to law, is upon record, and to a copy of which the law gives a right, on the payment of ten cents; if it be no intermeddling with a subject over which the executive can be considered as having exercised any control; what is there, in the exalted station of the officer, which shall bar a citizen from asserting, in a court of justice, his legal rights, or shall forbid a court to listen to the claim, or to issue a *mandamus*, directing the performance of a duty, not depending on executive discretion, but on particular acts of congress, and the general principles of law?

If one of the heads of departments commits any illegal act, under color of his office, by which an individual sustains an injury, it cannot be pretended, that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law. How then, can his office exempt him from this particular mode of deciding on the legality of his conduct, if the case be such a case as would were any other individual the party complained of, authorize the process?

It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a *mandamus* is to be determined. Where the head of a

[3] Gelston *v.* Hoyt, 3 Wheat. 247; United States *v.* Palmer, Id. 610; Garcia *v.* Lee, 12 Pet. 511; Williams *v.* Suffolk Ins. Co., 13 Id. 415; Scott *v.* Jones, 5 How. 343; Luther *v.* Borden, 7 Id. 1; Kennett *v.* Chambers, 14 Id. 38; Clark *v.* Braden, 16 Id. 635; Fellows *v.* Blacksmith, 19 Id. 366; United States *v.* Holliday, 3 Wall 407; Georgia *v.* Stanton, 6 Id. 50.

department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated, that any application to a court to control, in any respect, his conduct would be rejected without hesitation. But where he is directed by law to do a certain act, affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the president, and the performance of which the president cannot lawfully forbid, and therefore, is never presumed to have forbidden; as, for example, to record a commission or a patent for land, which has received all the legal solemnities; or to give a copy of such record; in such cases, it is not perceived, on what ground the courts of the country are further excused from the duty of giving judgment that right be done to an injured individual, than if the same services were to be performed by a person not the head of a department.

This opinion seems not now, for the first time, to be taken up in this country. It must be well recollected, that in 1792, an act passed, directing the secretary at war to place on the pension list such disabled officers and soldiers as should be reported to him, by the circuit courts, which act, so far as the duty was imposed on the courts, was deemed unconstitutional;[4] but some of the judges, thinking that the law might be executed by them in the character of commissioners, proceeded to act, and to report in that character. This law being deemed unconstitutional, at the circuits, was repealed, and a different system was established; but the question whether those persons who had been reported by the judges, as commissioners, were entitled, in consequence of that report, to be placed on the pension list, was a legal question, properly determinable in the courts, although the act of placing such persons on the list was to be performed by the head of a department.

That this question might be properly settled, congress passed an act, in February 1793, making it the duty of the secretary of war, in conjunction with the attorney-general, to take such measures as might be necessary to obtain an adjudication of the supreme court of the United States on the validity of any such rights, claimed under the act aforesaid. After the passage of this act, a *mandamus* was moved for, to be directed to the secretary of war, commanding him to place on the pension list, a person stating himself to be on the report of the judges. There is, therefore, much reason to believe, that this mode of trying the legal right of the complainant was deemed, by the head of a department, and by the highest law-officer of the United States, the most proper which could be selected for the purpose. When the subject was brought before the court, the decision was, not that a *mandamus* would not lie to the head of a department, directing him to perform an act, enjoined by law, in the performance of which an individual had a vested interest; but that a *mandamus* ought not to issue in that case; the decision necessarily to be made, if the report of the commissioners did not confer on the applicant a legal right. The judgment, in that case, is understood to have decided the merits of all claims of that description; and the persons, on the report of the commissioners, found it necessary to pursue the mode prescribed by the law, subsequent to that which had been deemed unconstitutional, in order to place themselves on the pension list. The doctrine, therefore, now advanced, is by no means a novel one.

[4] Hayburn's case, 2 Dall. 410 n; United States v. Todd, 13 How. 52 n.

It is true, that the *mandamus*, now moved for, is not for the performance of an act expressly enjoined by statute. It is to deliver a commission; on which subject, the acts of congress are silent. This difference is not considered as affecting the case. It has already been stated, that the applicant has, to that commission, a vested legal right, of which the executive cannot deprive him. He has been appointed to an office, from which he is not removable at the will of the executive; and being so appointed, he has a right to the commission which the secretary has received from the president for his use. The act of congress does not indeed order the secretary of state to send it to him, but it is placed in his hands for the person entitled to it; and cannot be more lawfully withheld by him, than by any other person.

It was at first doubted, whether the action of *detinue* was not a specific legal remedy for the commission which has been withheld from Mr. Marbury; in which case, a *mandamus* would be improper. But this doubt has yielded to the consideration, that the judgment in *detinue* is for the thing itself, *or* its value. The value of a public office, not to be sold, is incapable of being ascertained; and the applicant has a right to the office itself, or to nothing. He will obtain the office by obtaining the commission, or a copy of it, from the record.

This, then, is a plain case for a *mandamus*, either to deliver the commission, or a copy of it from the record; and it only remains to be inquired, whether it can issue from this court?

The act to establish the judicial courts of the United States authorizes the supreme court, "to issue writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed or persons holding office, under the authority of the United States." The secretary of state, being a person holding an office under the authority of the United States, is precisely within the letter of this description; and if this court is not authorized to issue a writ of *mandamus* to such an officer, it must be because the law is unconstitutional, and therefore, absolutely incapable of conferring the authority, and assigning the duties which its words purport to confer and assign.

The constitution vests the whole judicial power of the United States in one supreme court, and such inferior courts as congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and consequently, in some form, may be exercised over the present case; because the right claimed is given by a law of the United States.

In the distribution of this power, it is declared, that "the supreme court shall have original jurisdiction, in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the supreme court shall have appellate jurisdiction." It has been insisted, at the bar, that as the original grant of jurisdiction to the supreme and inferior courts, is general, and the clause, assigning original jurisdiction to the supreme court, contains no negative or restrictive words, the power remains to the legislature, to assign original jurisdiction to that court, in other cases than those specified in the article which has been recited; provided those cases belong to the judicial power of the United States.

If it had been intended to leave it in the discretion of the legislature, to apportion the judicial power between the supreme and inferior courts, according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial

power, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage—is entirely without meaning, if such is to be the construction. If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance. Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them, or they have no operation at all.[5]

It cannot be presumed, that any clause in the constitution is intended to be without effect; and therefore, such a construction is inadmissible, unless the words require it. If the solicitude of the convention, respecting our peace with foreign powers, induced a provision that the supreme court should take original jurisdiction in cases which might be supposed to affect them; yet the clause would have proceeded no further than to provide for such cases, if no further restriction on the powers of congress had been intended. That they should have appellate jurisdiction in all other cases, with such exceptions as congress might make, is no restriction; unless the words be deemed exclusive of original jurisdiction.

When an instrument organizing, fundamentally, a judicial system, divides it into one supreme, and so many inferior courts as the legislature may ordain and establish; then enumerates its powers, and proceeds so far to distribute them, as to define the jurisdiction of the supreme court, by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction, the plain import of the words seems to be, that in one class of cases, its jurisdiction is original, and not appellate; in the other, it is appellate, and not original. If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to their obvious meaning. To enable this court, then, to issue a *mandamus*, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction.

It has been stated at the bar, that the appellate jurisdiction may be exercised in a variety of forms, and that if it be the will of the legislature that a *mandamus* should be used for that purpose, that will must be obeyed. This is true, yet the jurisdiction must be appellate, not original. It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, therefore, a *mandamus* may be directed to courts, yet to issue such a writ to an officer, for the delivery of a paper, is, in effect, the same as to sustain an original action for that paper, and therefore, seems not to belong to appellate, but to original jurisdiction. Neither is it necessary in such a case as this, to enable the court to exercise its appellate jurisdiction. The authority, therefore, given to the supreme court by the act establishing the judicial courts of the United States, to issue writs of *mandamus* to public officers, appears not to be warranted by the constitution; and it becomes necessary to inquire, whether a jurisdiction so conferred can be exercised.

The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the

[5] See Gittings *v.* Crawford, Taney's Dec. 1.

United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognise certain principles, supposed to have been long and well established, to decide it. That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental: and as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments. The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or that the legislature may alter the constitution by an ordinary act.

Between these alternatives, there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act, contrary to the constitution, is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature, illimitable.

Certainly, all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void. This theory is essentially attached to a written constitution, and is, consequently, to be considered, by this court, as one of the fundamental principles of our society. It is not, therefore, to be lost sight of, in the further consideration of this subject.

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow, in fact, what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is, emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So, if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court

must either decide that case, conformable to the law, disregarding the constitution; or conformable to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case: this is of the very essence of judicial duty. If then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply

Those, then, who controvert the principle, that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law. This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure. That it thus reduces to nothing, what we have deemed the greatest improvement on political institutions, a written constitution, would, of itself, be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favor of its rejection. The judicial power of the United States is extended to all cases arising under the constitution. Could it be the intention of those who gave this power, to say that in using it, the constitution should not be looked into? That a case arising under the constitution should be decided, without examining the instrument under which it arises? This is too extravagant to be maintained. In some cases, then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or to obey?

There are many other parts of the constitution which serve to illustrate this subject. It is declared, that "no tax or duty shall be laid on articles exported from any state." Suppose, a duty on the export of cotton, of tobacco or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? ought the judges to close their eyes on the constitution, and only see the law?

The constitution declares "that no bill of attainder or *ex post facto* law shall be passed." If, however, such a bill should be passed, and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavors to preserve?

"No person," says the constitution, "shall be convicted of treason, unless on the testimony of two witnesses to the same *overt* act, or on confession in open court." Here, the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these, and many other selections which might be made, it is apparent, that the framers of the constitution contemplated that in-

strument as a rule for the government of courts, as well as of the legislature. Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: "I do solemnly swear, that I will administer justice, without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as ———, according to the best of my abilities and understanding, agreeably to the constitution and laws of the United States." Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? if it is closed upon him, and cannot be inspected by him? If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States, generally, but those only which shall be made in pursuance of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.

The rule must be discharged.

CASES IN WHICH THE SUPREME COURT OF THE UNITED STATES HAS HELD PROVISIONS OF FEDERAL LAW UNCONSTITUTIONAL*

ANALYSIS OF CASES

LISTED BY DATE OF ACT AFFECTED

1. Act of September 24, 1789 (1 Stat. 81 § 13, in part).

* * * [The Supreme Court] shall have power to issue * * * writs of mandamus, in cases warranted by the principles and usages of law, to any * * * person holding office, under the authority of the United States. * * *

MARBURY v. MADISON, 1 Cranch 137 (February 24, 1803).

(Opinion by Chief Justice MARSHALL; 6 Justices sitting; unanimous.)

Original motion by a private citizen of the District of Columbia for a writ of mandamus to compel the Secretary of State to deliver a commission as justice of the peace, duly made out and signed by the President.

Held: Rule to show cause why mandamus should not issue, discharged.

*From: Provisions of Federal Law held Unconstitutional, by W. C. Gilbert, 1937.

The provision cited, insofar as it would in terms have sustained the motion at bar, was an attempt to enlarge the original jurisdiction of the Court, prescribed in Art. III, § 2 and there limited to "cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party." It is worth noting briefly that the Court in this case reversed the apparently logical order of argument; it "decided", first, that Marbury was entitled to his commission, and that mandamus was the proper remedy when that right was violated—and then actually *held* that the jurisdiction of the Supreme Court to issue that mandamus, although authorized by the act of Congress cited, was not warranted by the Constitution, and could not be exercised in the particular case. Decision on this one proposition certainly was required and would seem to have been decisive of the case at bar—without jurisdiction to proceed in the premises, the question as to the merits was apparently not strictly before the court. Regardless, then, of its authority on the questions of Presidential appointments, etc., first argued, the case is authoritative on the constitutional power of Congress to extend the original jurisdiction of the Supreme Court, and the effect of an act passed without constitutional warrant.

2. Act of February 20, 1812 (2 Stat. 677, c. 22).

> The register and receiver of public monies of the land office at Kaskaskia * * * are hereby authorized to examine and inquire into the validity of claims to land in the district of Kaskaskia, which are derived from confirmations made, or pretended to have been made, by the governors of the North West and Indiana territory, respectively. They * * * shall, in relation to the claims aforesaid, have, in every respect, the same powers which had been vested in the commissioners appointed to ascertain the claims to land in the said district. * * *

REICHART *v.* FELPS, 6 Wall. 160 (March 16, 1868).

(Opinion by Justice Grier; 8 Justices sitting; unanimous.)

Writ of error to Supreme Court of Illinois, in a case of ejectment for certain land claimed by defendant's predecessor and confirmed to him in 1799 by Governor St. Clair, under authority of an act of the Continental Congress of June 20, 1788. Suit was brought by a person who purchased from the United States after the original claim had been rejected under the act of 1812 cited, and the land again exposed for sale and duly patented in 1838 and 1853. It was argued that since there was no seal on the Governor's confirmation it was not valid as a patent.

Held: Judgment for defendant affirmed.

The question in this case was whether at the time of patent to Reichart, the land had been previously granted, reserved, or appropriated by reason of the confirmation issued by Governor St. Clair; and the Court held such confirmation conclusive on the point—the absence of a seal being immaterial, since it was not technically a grant requiring seal. Decision in favor of the validity of such confirmation necessarily meant that the act of 1812 was invalid; "Congress * * * had no power to organize a board of revision to nullify titles confirmed many years before by the authorized agents of the Government."

3. Act of March 6, 1820 (3 Stat. 548 § 8, first proviso).

> **That in all that territory ceded by France to the United States under the name of Louisiana which lies north of 36°30′ north latitude, not included within the limits of the state [Missouri], contemplated by this act slavery**

and involuntary servitude, otherwise than in the punishment of crimes, whereof the parties shall have been duly convicted, shall be, and is hereby, forever prohibited * * *

DRED SCOTT *v.* SANDFORD, 19 How. 393 (March 6, 1857).

(Opinion by Chief Justice Taney; 9 Justices sitting; Justices McLean and Curtis dissenting from the constitutional holding, and Justice Nelson not passing on the question.)

Writ of error to circuit court for Missouri. Action of trespass was instituted by a Negro who had been taken as a slave from Missouri to Illinois and to Upper Louisiana Territory, and thence back to Missouri, where he had been sold to Sandford. The declaration averred diversity of citizenship, as bringing the case within jurisdiction of a Federal court—Sandford was a citizen of New York. To this declaration, Sandford pleaded in abatement that Scott was not a citizen of the United States and the case was therefore exclusively within the jurisdiction of the State courts. The court sustained a demurrer to the plea, however, and Sandford then pleaded in bar of the action, that Scott was a slave, the property of the defendant; and on this plea judgment was given for the defendant.

Held in the Supreme Court: (1) That the circuit court was without jurisdiction. Accordingly, mandate was issued, to dismiss the case; (2) the circuit court committed error in giving judgment on the merits, because the record showed that Scott was a slave. The Missouri Compromise, which would have prevented Scott being held in Upper Louisiana Territory as a slave, was void as "not warranted by the Constitution." Art. IV, § 3, cl. 2 ["Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; * * *"] does not apply to territory acquired from a foreign country subsequent to the treaty of peace with England. Such territory may only be acquired and held preliminary to admission to the Union; and in governing it Congress has no greater powers over individual property than it has constitutionally in the States.

4. Acts of February 25, 1862 (12 Stat. 345, § 1); July 11, 1862 (12 Stat. 532, § 1); March 3, 1863 (12 Stat. 711, § 3)—all in part only.

The "legal tender clause": "* * * such notes herein authorized [i. e., non-interest-bearing United States notes] * * * shall also be lawful money and a legal tender in payment of all debts, public and private, within the United States, except duties on imports and interest as aforesaid * * *". The clause was identical in the first two acts cited, and repeated with only a verbal difference in the act of 1863.

HEPBURN *v.* GRISWOLD, 8 Wall. 603 (February 7, 1870—decided in conference November 27, 1869).

(Opinion by Chief Justice Chase; 7 Justices sitting—Justice Grier, who had participated in the actual decision, in 1869, resigned February 1, 1870; Justices Miller, Swayne, and Davis dissenting.)

Writ of error to Court of Appeals of Kentucky. Suit was on a promissory note made before the date of the act, on which a tender of notes issued under the act of 1862 had been rejected by the creditor.

Held: Judgment of the State court (reversing judgment for the promissor) affirmed.

The provision cited was applicable as well to past as to future contracts; and as an attempt by Congress to make a credit currency a legal tender in payment of debts previously contracted, it was "not a means appropriate, plainly adapted, really calculated to carry into

effect any express power vested in Congress" (specifically excluding as a possible basis the powers found in Art. I, § 8: to coin money, regulate the value thereof, and of foreign coin, to borrow money on the credit of the United States, to regulate commerce with foreign nations, or to declare war) and was "inconsistent with the spirit of the Constitution" as displayed in Art I, § 10 (against impairment of obligation of contracts) and Amendment 5 (due process, and taking of private property without compensation). "We confess ourselves unable to perceive any solid distinction between such an act [an hypothetical act enforcing the acceptance of 50 or 75 acres of land in satisfaction of a contract to convey a hundred] and an act compelling all citizens to accept, in satisfaction of all contracts for money, half or three quarters or any other proportion less than the whole of the value actually due, according to their terms. It is difficult to conceive what act would take private property without process of law if such an act would not."

By an act of April 10, 1869 (16 Stat. 44, c. 22) the Supreme Court had been enlarged from eight to nine members, and that number was reached with the appointment of Justice Strong on February 18, and Justice Bradley on March 21, 1870.[1] This full court, by a five to four vote, ordered argument in the cases of *Knox* v. *Lee*, and *Parker* v. *Davis* then pending, on the following questions:

1. Is the act of Congress known as the Legal Tender Act constitutional as to contracts made before its passage?

2. Is it valid as applicable to transactions since its passage?

And in the decision of those cases (*Legal Tender cases*, 12 Wall. 457) by a five to four vote the Court overruled "so much of what was decided in *Hepburn* v. *Griswold* as ruled the acts unwarranted by the Constitution so far as they apply to contracts made before their enactment", and held the acts constitutional as applied to contracts made either before or after their passage. The newly appointed Justices, Strong and Bradley, concurred with the minority of the *Hepburn case* to form a majority here.

The following excerpts are suggestive of the argument:

(P. 529): "If it be held by this court that Congress has no constitutional power, under any circumstances, or in any emergency, to make Treasury notes, a legal tender for the payment of all debts * * * the Government is without those means of self-preservation which * * * may, in certain contingencies, become indispensable * * * It is also clear that if we hold the acts invalid as applicable to debts incurred or transactions which have taken place since their enactment, our decision must cause, throughout the country, great business derangement, widespread distress, and the rankest injustice."

(P. 530): "And there is no well-founded distinction to be made between the constitutional validity of an act of Congress declaring Treasury notes a legal tender for the payment of debts contracted after its passage and that of an act making them a legal tender for the discharge of all debts, as well those incurred before as those made after its enactment. There may be a difference in the effects produced by the acts, and in the hardship of their operation, but in both cases the fundamental question, that which tests the validity of the legislation, is, can Congress constitutionally give to Treasury notes the character and qualities of money?"

(P. 533): "That would appear, then, to be a most unreasonable construction of the Constitution which denies to the Government created by it, the right to employ freely every means, not prohibited, necessary for its preservation,

[1] It is significant to note that President Grant nominated both Justice Strong and Justice Bradley on Feb. 7—the day the decision in the *Hepburn case* was announced. (*See* Senate Executive Journal, v. XVII, pp. 359, 360.)

and for the fulfillment of its acknowledged duties. Such a right, we hold, was given by the last clause of the eighth section of its first article."

(P. 534): "The existence of a power claimed for the Federal Government 'may be deduced from more than one of the substantive powers expressly defined, or from them all combined.'"

(P. 544-545): "It is insisted that the spirit of the Constitution was violated by the enactment. Here those who assert the unconstitutionality of the acts mainly rest their argument. * * * Whatever power there is over the currency is vested in Congress. If the power to declare what is money is not in Congress it is annihilated."

(P. 548-549): "The obligation of a contract to pay money is to pay that which the law shall recognize as money when the payment is to be made. * * * Every contract for the payment of money, simply, is necessarily subject to the constitutional power of the Government over the currency, whatever that power may be, and the obligation of the parties is, therefore, assumed with reference to that power. * * * There is a wide distinction between a tender of quantities, or of specified articles, and a tender of legal values."

(P. 551): The provision against taking of property without due process of law "has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals."

(P. 553): "The legal tender acts do not attempt to make paper a standard of value. We do not rest their validity upon the assertion that their emission is coinage, or any regulation of the value of money; nor do we assert that Congress may make anything which has no value money. What we do assert is, that Congress has power to enact that the Government's promises to pay money shall be, for the time being, equivalent in value to the representative of value determined by the coinage acts, or to multiples thereof."

5. Act of March 3, 1863 (12 Stat. 756, c. 81, § 5, in part).

> That if any suit * * * has been or shall be commenced in any State court against any officer * * * for any arrest or imprisonment made * * * at any time during the present rebellion, by virtue of any authority derived from * * * any act of Congress * * * it shall be lawful in any such action * * * after final judgment, for either party to remove and transfer, by appeal, such case * * * from such court to the next circuit court of the United States to be held in the district * * *."

THE JUSTICES *v.* MURRAY, 9 Wall. 274 (March 14, 1870).

(Opinion by Justice Nelson; 9 Justices sitting; unanimous.)

Error to circuit court for New York. Action was brought in a New York court against a United States marshal for trespass and false imprisonment. Jury trial was had, and judgment given for plaintiff. The State court refused to comply with a writ issued under the act of 1863 for removal of the case to the Federal court; thereafter, by consent, an alternative mandamus issued and return was made, setting up the trial and judgment in the State court. Demurrer was sustained and peremptory mandamus issued.

Held: Judgment reversed. "* * * So much of the fifth section [of the act above cited] as provides for the removal of a judgment in a State court, and in which the cause was tried by a jury, to the circuit court of the United States for a retrial on the facts and law, is not in pursuance of the Constitution and is void", in view of the Seventh Amendment ["No fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the common law * * *"]—removal not being a common-law procedure.

Legislative effect.—It will be noted that the provision in the act of 1863 was in terms limited to causes arising during "the present rebellion." An act of 1866 (14 Stat. 46, § 1), extending the scope of the act of 1863, was limited to acts done before May 11, 1866; but § 3 of the same act referred to the right of removal and its exercise under the earlier act without intimating any time limit. And the Revised

Statutes of 1874 included in § 641 the main provision of the act of 1863 as to removal of causes—omitting the clause invalidated in *The Justices* v. *Murray*, presumably in answer to that decision. This inclusion of a part (whether warranted under the circumstances, or not) at any rate operated as a repeal of the remainder (see R. S. 5596).

6. Act of March 3, 1863 (12 Stat. 766, c. 92, § 5).

This section of an act relative to the court of claims authorized either party to a suit to "appeal to the Supreme Court of the United States from any final judgment or decree * * * under such regulations as the said Supreme Court may direct * * *."

GORDON *v.* UNITED STATES, 2 Wall. 561 (March 10, 1865).

(Opinion by Chief Justice Chase; court of 10 Justices; Justices Miller and Field dissenting.)

Appeal from an adverse judgment of the court of claims was dismissed for want of jurisdiction. Section 14 of the act above cited provided that "no money shall be paid out of the Treasury for any claim passed upon by the court of claims till after an appropriation therefor shall be estimated for by the Secretary of the Treasury." While no opinion as such is given in 2 Wall. 561, the Lawyers' Edition of the reports (stated to be taken from the clerk's records) report a short opinion in the following language (17 L. Ed. 921, 922): "* * * We think that the authority given to the head of an executive department by necessary implication in the fourteenth section of the amended Court of Claims Act, to revise all the decisions of that court requiring payment of money, denies to it the judicial power from the exercise of which alone appeals can be taken to this court. The reasons which necessitate this conclusion may be more fully announced hereafter * * *."

A draft of an opinion prepared by Chief Justice Taney shortly before his death, was considered by the remaining judges in their decision of the case, and was presumably to form the basis for the opinion which the court suggested might follow later. This draft, constituting Chief Justice Taney's last judicial utterance, was printed in 117 U. S. 697, Appendix.

7. Act of June 30, 1864 (13 Stat. 311, c. 174, § 13, in part).

This was an act regulating prize proceedings and the distribution of prize money, making district instead of circuit courts the primary prize courts, with appeal direct to the Supreme Court. Section 13 provided in part that "any prize cause now pending in any circuit court shall, on the application of all parties in interest * * * be transferred by that court to the Supreme Court * * *."

THE ALICIA, 7 Wall. 571 (January 25, 1869).

(Opinion by Chief Justice Chase; 8 Justices sitting; unanimous.)

Motion to docket and dismiss a prize cause brought originally in the district court for Florida. Decree of condemnation was entered in January 1863, and appeal allowed to the circuit court; but before any further action had been taken in that court, transfer to the Supreme Court was ordered under the act cited.

Held: Case sent back to circuit court for further proceedings.

The transfer of a case, provided by § 13 cited, is not appellate procedure; and the Supreme Court's prize jurisdiction, prescribed by Art. III, § 2, cannot be extended by Congress to include a case transferred, in which there is no judicial determination or order subsisting upon which an appeal might take effect.

8. Act of January 24, 1865 (13 Stat. 424, c. 20).

"That no person, after the date of this act, shall be admitted to the bar of the Supreme Court, or * * * to the bar of any circuit or district court of the United States or of the Court of Claims, as an attorney or counselor of such court, or shall be allowed to appear and be heard in any such court, by virtue of any previous admission * * * unless he shall have first taken and subscribed the oath prescribed in [the act of July 2, 1862] * * *" The oath (12 Stat. 502) was designed to exclude all persons who had held office under the Confederate government, or supported it in any way.

EX PARTE GARLAND, 4 Wall. 333 (January 14, 1867).

(Opinion by Justice Field; 9 Justices sitting; Chief Justice Chase and Justices Miller, Swayne, and Davis dissenting.)

Petition by an attorney, Garland, a citizen of Arkansas, who had been duly admitted to the bar of the Supreme Court in 1860, for permission to continue to practice without taking the test oath, which he was now disqualified to take—he having served in the Confederate congress during the war. He had, however, received a full pardon from the President for his participation in the Rebellion, direct or implied.

Held: Petition granted.

While Garland (who, incidentally, later became a Senator and Attorney General under President Cleveland) was in the very strongest position to contest the act, the reasoning of the case would seem to be independent of the fact that he had been admitted to the bar before the act was passed, or even of the fact that he had been pardoned by the President. "Attorneys and counsellors are not officers of the United States * * * They are officers of the court * * * The order of admission is the judgment of the court that the parties possess the requisite qualifications * * * Their admission or their exclusion is not the exercise of a mere ministerial power. It is the exercise of judicial power * * * It [the right which the office confers upon an attorney] is a right of which he can only be deprived by the judgment of the court, for moral or professional delinquency."

It may be doubted, however, whether the actual facts required the full implications of this language. The question in the case was "not as to the power of Congress to prescribe qualifications [for the office of attorney of a Federal court, which general right was admitted], but whether that power has been exercised as a means for the infliction of punishment, against the prohibition of the Constitution" (*i. e.*, Art. I, § 9: "No bill of attainder or ex post facto law shall be passed"). "Exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct. The exaction of the oath is the mode provided for ascertaining the parties upon whom the act is intended to operate." The act therefore "partakes" of the nature of a bill of pains and penalties—subject to the constitutional prohibition against bills of attainder. Further, by excluding from practice as an attorney, it imposes a punishment for "some of the acts specified" which were not punishable when committed—and thus amounts to an ex post facto law as applied to Garland. This decision was merely "strengthened" by the further decision that the requirement of the act was in his case an infringement of the constitutional powers of the Executive under Art. II, § 2 ("* * * [the President] shall have power to grant reprieves and

pardons for offenses against the United States except in cases of impeachment"). Such a pardon "blots out of existence the guilt", removes all disability and restores all civil rights; and it cannot be fettered by legislative restrictions.

9. Act of July 13, 1866 (14 Stat. 138), amending act of June 30, 1864 (13 Stat. 284, c. 173, § 122).

Any railroad * * * company, indebted for any money for which bonds * * * have been issued * * * upon which interest is stipulated to be paid * * * shall be subject to and pay a tax of 5% on the amount of all such interest * * * to whatsoever party or person the same shall be payable * * *; the company to deduct the tax from interest payments.

UNITED STATES *v.* RAILROAD CO., 17 Wall. 322 (April 3, 1873).

(Opinion by Justice Hunt; 9 Justices sitting; Justices Clifford and Miller dissenting, and Bradley withholding judgment on the constitutional question.)

Writ of error to circuit court for Maryland. The United States sued the Baltimore & Ohio Railroad for the amount of tax at 5 percent on the interest of certain bonds issued by the city of Baltimore, with consent of the State, for the benefit of said railroad. Payment had been refused on the ground (1) that the tax was not on the railroad, but on the creditor; and (2) that the creditor, a municipal corporation, was not subject to taxation by the Federal Government.

Held: Judgment for the company affirmed.

The tax in question was not paid out of the property of the railroad; it was merely diverted from the interest otherwise payable to the creditor. Where that creditor is a municipal corporation, the right to tax depends upon the character of the function involved. In the present case the transaction (the bond issue under authority of a State law) was an exercise of sovereign authority. That is, a bond issue by a city, the proceeds to be advanced to a railroad corporation in hope of bringing additional business into the city, "was not a loan for the benefit of the railroad; it was for the benefit of the city solely"; it was a transaction "within the range of the municipal duties of the city" and could not be interfered with by the Federal Government by taxing the interest payments on the bonds issued.

The dissenting justices insisted that the railroad bonds here owned by the city were property "never used or intended to be used as means or instruments for conducting the public affairs of the municipality."

10. Act of March 2, 1867 (14 Stat. 477, c. 169, § 13), amending act of June 30, 1864 (13 Stat. 281, § 116), as already amended March 3, 1865 (13 Stat. 479).

There shall be levied, collected, and paid upon the * * * income of every person residing in the United States * * * whether derived from * * * salaries * * * or from any other source whatever, a tax of 5% on the amount so derived over $1,000. * * *

THE COLLECTOR *v.* DAY, 11 Wall. 113 (April 3, 1871).

(Opinion by Justice Nelson; 9 Justices sitting; Justice Bradley dissenting.)

Writ of error to circuit court for Massachusetts. Action was brought by Day, a probate judge, to recover tax assessed under the acts cited, for the years 1866 and 1867, and paid under protest.

Held: Judgment for plaintiff, affirmed.

The tax, as applied to income of a State judge, was an unwarranted interference with the reserved power of the States to maintain a judi-

cial department; the exemption in such case is not a matter of express constitutional prohibition but "rests upon necessary implication, and is upheld by the great law of self-preservation" (p. 127). The case is the converse of *Dobbins* v. *The Commissioners of Erie County*, 16 Peters 435 (which held that the States could not tax the salary of a Federal officer) and is rested upon the same base, namely, the necessary existence and independent authority of the States as well as of the Federal Government, under the Constitution.

Justice Bradley dissented on the ground that the tax was not on governmental instrumentalities but on individuals, and "no man ceases to be a citizen of the United States by being an officer under the State government."

11. Act of March 2, 1867 (14 Stat. 484, c. 169, § 29).

No person shall mix for sale, naphtha and illuminating oils * * * or shall sell * * * oil made from petroleum for illuminating purposes, inflammable at less temperature or fire test than 110° Fahrenheit, and any person so doing shall * * * on conviction * * * in any court of the United States * * * be punished by a fine of not less than $100 * * *.

UNITED STATES *v.* DEWITT, 9 Wall. 41 (February 21, 1870).

(Opinion by Chief Justice Chase; 9 Justices sitting; unanimous.)

Certificate of division of opinion, from circuit court for Michigan, on an indictment for a sale of oil contrary to the statute. The following questions were certified:

1. Whether the facts charged in the indictment constituted any offense under any valid and constitutional law of the United States?

2. Whether the aforesaid § 29 of the act of March 2, 1867, was a valid and constitutional law of the United States?

It was argued that the act might have been passed in aid of the collection of excise taxes or for protection of interstate carriers of oil—in either of which cases, it would be constitutional as incidental to the exercise of an unquestioned power.

Held: Question (1) answered in the negative; and question (2) in the negative "except so far as the section named operates within the United States but without the limits of any State."

The prohibition of the section cannot be upheld as in aid of the power to regulate commerce—which "has always been understood as limited by its terms" [to interstate commerce] nor in aid of the taxing power, since no tax is imposed on the oils in question, and the effect on the sale of other oils subject to tax is altogether too remote and uncertain. Moreover, the section is plainly a police regulation and as such is limited to places within the exclusive legislative authority of Congress—*e. g.* the District of Columbia.

12. Act of May 31, 1870 (16 Stat. 140, c. 114, § 3, 4).

Section 1 of the act provided that all citizens, without distinction of race, etc., should be given equal right to vote at all elections; and section 2 required election officers to afford equal opportunity for qualifying to vote similarly without distinction of race.

§ 3. Whenever * * * under the laws of any State * * * any act is * * * required to be done by any citizen as a prerequisite to qualify or entitle him to vote, the offer of any such citizen to perform the act required to be done as aforesaid shall, if it fail to be carried into execution by reason of the wrongful act or omission aforesaid of the person * * * charged with the duty * * * of permitting such * * * offer to perform, or acting thereon, be deemed * * * a performance in law of such act * * * and any inspector, or other officer of election

whose duty it is * * * to receive * * * the vote of any such citizen who shall wrongfully refuse or omit to receive * * * the vote of such citizen * * * shall * * * be fined * * *.

§ 4. * * * If any person, by force * * * intimidation, or other unlawful means, shall hinder * * * or shall combine and confederate with others to hinder * * * any citizen from doing any act required to be done to qualify him to vote, or from voting at any election as aforesaid, such person shall * * * be fined * * *.

UNITED STATES *v.* REESE ET AL., 92 U. S. 214 (March 27, 1876).

(Opinion by Chief Justice Waite; 9 Justices sitting; Justice Hunt dissenting, Justice Clifford concurring in result, but dissenting from the constitutional holding as to § 3, and not passing on the validity of § 4.)

Writ of error to circuit court for Kentucky, "by reason of a division of opinion between the judges." Indictment was brought against two inspectors of a municipal election, for refusing to receive the vote of a Negro, otherwise qualified, simply on account of his race. On demurrers the judges were divided in opinion; and judgment was given for defendants in accordance with the vote of the presiding judge (under R. S. 650). On the writ of error, the United States rested its case exclusively on the Fifteenth Amendment ["The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race * * *"].

Held: Judgment affirmed.

The Fifteenth Amendment created a new constitutional right, viz, the right of exemption from discrimination on account of race, in the exercise of the elective franchise. That delimits the extent of the power of Congress to legislate in regard to State elections. But the language of the act, while exactly covering the case at bar, went further. While § 2 of the act specifically penalizes any State officer, charged with duties in connection with the qualification of voters, who should refuse to permit any citizen to qualify, solely on the ground of race, etc., § 3 and § 4 above cited contain no such specific limitation. Section 4 is in perfectly general language, and the only possible tangible indication in § 3 that the offense there condemned is discrimination on account of race, is the use of the words "as aforesaid", which might conceivably refer back to § 2. This argument the Court rejects; § 3 and § 4 would apply to any interference with exercise of the elective franchise—a field largely beyond the constitutional authority of Congress. They are not, therefore, "appropriate legislation" for the enforcement of the Fifteenth Amendment. And the Court refuses to apply the act, thus partially exceeding the constitutional limits, to a case within the power of Congress to regulate.

Justice Hunt, in dissenting, insisted that § 3 and § 4 could and should be read as incorporating the provisions of the second section respecting race and color, so as to warrant the indictment in the present case.

13. Act of July 12, 1870 (16 Stat. 235, c. 251 in part).

Provisions in an appropriation act [probably added in consequence of the decision of the Supreme Court in the *Padelford case* (9 Wall. 531, April 30, 1870), holding that an oath taken under the amnesty proclamation of December 8, 1863 cured participation in the Rebellion]: "* * * no pardon or amnesty granted by the President * * * nor any acceptance of such pardon or amnesty, nor oath taken * * * shall be admissible

in evidence on the part of any claimant in the court of claims as evidence in support of any claim against the United States * * * nor shall any such pardon * * * heretofore offered * * * on behalf of any claimant * * * be used * * * by said court, or by the appellate court * * * in deciding upon the claim of said claimant, or any appeal therefrom * * * but the proof of loyalty required [under the Abandoned Property Act, etc., namely: proof of ownership and an oath of nonsupport of the Confederacy] shall be made * * * irrespective of the effect of any executive * * * pardon, amnesty * * *. And in all cases where judgment shall have been heretofore rendered in the court of claims in favor of any claimant, on any other proof of loyalty than such as is above required * * * the Supreme Court shall, on appeal, have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction." The act declared further, in substance, that the acceptance of a pardon without an express disclaimer of participation in the rebellion, therein recited, was to be conclusive evidence of such offense, and ground for dismissal of claim by the Court of Claims.

UNITED STATES *v.* KLEIN, 13 Wall. 128 (January 29, 1872).

(Opinion by Chief Justice Chase; 9 Justices sitting; Justices Miller and Bradley dissenting.)

Motion to remand a case appealed from the Court of Claims, with mandamus to that Court to dismiss for want of jurisdiction. Claim had been filed by an administrator to recover the proceeds of cotton abandoned to the United States by the original owner, who later availed himself of the amnesty proclaimed in 1863. Decree was entered in favor of plaintiff; and the United States appealed in December 1869. Upon passage of the act cited, in 1870, the United States sought to have the case dismissed.

Held: Motion denied, and judgment of Court of Claims affirmed.

The provision cited "inadvertently passed the limit which separates the legislative from the judicial power." To declare that the court should have jurisdiction until it should find the existence of a certain state of facts, when it must dismiss for want of jurisdiction, is an attempt by Congress to prescribe a rule of decision. Further, the attempt to restrict the effect of a pardon is an infringement on the constitutional power of the Executive under Constitution Art. II, § 2.

14. Act of June 22, 1874 (18 Stat. 187, § 5 in part).

That in all * * * proceedings other than criminal arising under any of the revenue-laws of the United States, the attorney representing the Government, whenever, in his belief, any business * * * paper * * * under the control of the defendant or claimant, will tend to prove any allegation made by the United States, may make written motion * * * and the court * * * may * * * issue a notice * * * to produce such * * * paper in court * * * and if the defendant or claimant shall fail * * * to produce such * * * paper * * * the allegations stated in the said motion shall be taken as confessed * * *.

BOYD *v.* UNITED STATES, 116 U. S. 616 (February 1, 1886).

(Opinion by Justice Bradley; 9 Justices sitting; Justices Waite and Miller dissenting from the argument under the Fourth Amendment.)

Writ of error to circuit court for southern district of New York. In a proceeding for forfeiture of certain imports of plate glass, information was obtained under the act cited and over protest of the importer, as to the value of certain goods previously imported. From a judgment of forfeiture, affirmed by the circuit court, Boyd prosecuted writ of error.

Held: Judgment reversed.

The provision cited, in allowing allegations to be taken as confessed if papers were not produced, was equivalent to compulsory production; and that, as applied in a case for forfeiture under the customs laws, is within the prohibition of the Fourth Amendment ["The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *"]; and further, is in violation of the Fifth Amendment ["no person shall be compelled in any criminal case to be a witness against himself"]—since the proceeding for a forfeiture, though in form civil, is in its nature criminal.

15. R. S. 1977 (Act of May 31, 1870, 16 Stat. 144).

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts * * * as is enjoyed by white citizens * * *.

R. S. 5508 provided a punishment for conspiracy to intimidate "any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States * * *." This section was admittedly constitutional, in view of *Ex parte Yarbrough*, 110 U. S. 651, and *Motes* v. *United States*, 178 U. S. 458.

HODGES *v.* UNITED STATES, 203 U. S. 1 (May 28, 1906)

(Opinion by Justice Brewer; 9 Justices sitting; Justices Harlan and Day dissenting.)

Writ of error to district court for Arkansas. Indictment against Hodges and others charged in substance that they had by threats, etc., intimidated certain Negroes "in the free exercise and enjoyment of rights and privileges secured to them * * * by the Constitution and laws of the United States"—in that they had interfered with the performance of certain private contracts of labor—and this solely because of their African descent.

Demurrer, on the ground that the offense created by R. S. 1977 and 5508 under which the indictment was found, was not within Federal jurisdiction, was overruled, and defendants were tried and convicted. In the Supreme Court the Government rested its case on the Thirteenth Amendment alone, and contended that the Amendment was designed "to secure to the colored race practical freedom", and so justified enactment of R. S. 1977. Argument contra was, that R. S. 1977, when taken and construed with R. S. 5508 "insofar as it creates offenses and imposes penalties, is in violation of the Constitution."

Held: Judgment reversed; demurrer to be sustained.

Federal jurisdiction of the offense charged is not supported by the Fourteenth or Fifteenth Amendments, which relate only to action by the States. "Congressional legislation directed against individual action which was not warranted before the Thirteenth Amendment must find authority in it." But the "slavery or involuntary servitude" therein denounced is the condition ordinarily understood by that term—it does not extend to the infliction of an injury by one private citizen upon another, such as interference with the general right of contract. The Thirteenth Amendment was not adopted solely for the protection of the African race. The persons charged to have been wronged in the present case do not take any more protection, because they were of African descent, than would white persons in similar case.

The dissenting Justices considered that R. S. 1977 was "not, perhaps, vital to the decision of the present case"; and upheld the indictment as describing an offense within R. S. 5508—*i. e.*, they held

that the right of contract essential in earning a living is a fundamental ingredient of the freedom conferred by the Thirteenth Amendment.

16. R. S. 4937–4947 (Act of July 8, 1870, 16 Stat. 210); and Act of August 14, 1876 (19 Stat. 141).

The trade-mark law of 1870, carried into the Revised Statutes, provided that "any person or firm domiciled in the United States * * * entitled to the exclusive use of any lawful trade mark, or who intend to adopt and use any trade mark for exclusive use within the United States, may obtain protection for such lawful trade mark, by complying with the following requirements * * *" followed by detailed regulations.

The act of 1876 punished the fraudulent use, sale, and counterfeiting of trade marks registered "pursuant to the statutes of the United States."

TRADE-MARK CASES, 100 U. S. 82 (November 17, 1879).

(Opinion by Justice Miller; 8 Justices sitting; unanimous.)

Certificates of division of opinion, in three separate prosecutions under the act of 1876 (2 in circuit court for New York and 1 in Ohio). On demurrer in each case, the judges were divided on the question whether the act of 1876 was constitutional.

Held: Questions answered in the negative.

A trade mark is neither an invention, discovery, nor writing within the meaning of Art. I, § 8, granting Congress power to secure to "authors and inventors" the "exclusive right to their respective writings and discoveries." Further, the Revised Statutes sections cited, being unlimited in terms, went beyond the constitutional power of Congress to regulate "commerce with foreign nations, and among the several States, and the Indian tribes." The court adopted the doctrine of the *Reese case*, that it would not introduce words of limitation into a general penal statute so as to make it specific and within the power of Congress to enact, and therefore declared the substantive act of 1870 (R. S. 4937–4947) entirely void; and the penal act of 1876, intended solely to protect the rights defined in the earlier act, fell with it.

17. R. S. 5132, subdivision 9 (Act of March 2, 1867, 14 Stat. 539).

The section declared punishable by imprisonment for 3 years any person respecting whom proceedings in bankruptcy were commenced, "who, within 3 months before the commencement of proceedings in bankruptcy, under * * * pretense of carrying on business and dealing in the ordinary course of trade * * * obtains on credit from any person any goods or chattels with intent to defraud."

UNITED STATES *v.* FOX, 95 U. S. 670 (January 7, 1878).

(Opinion by Justice Field; 9 Justices sitting; unanimous.)

Certificate of division of opinion, from circuit court for southern district of New York. Fox was indicted under the section cited, and convicted. On motion in arrest of judgment, the judges certified the following question: "If a person shall engage in a transaction which, at the time of its occurrence, is not a violation of any law of the United States, to wit, the obtaining goods upon credit by false pretenses, and if, subsequently thereto, proceedings in bankruptcy shall be commenced respecting him, is it within the constitutional limits of congressional legislation to subject him to punishment for such transaction considered in connection with the proceedings in bankruptcy?"

Held: Question answered in the negative.

The power of Congress under Constitution Art. I, § 8 to establish "uniform laws on the subject of bankruptcies throughout the United

States" includes "whatever may be deemed important to a complete and effective bankrupt system." It might therefore include penalties for fraud in connection with the objects sought by bankruptcy proceedings; but the language of the ninth subdivision, cited, is not so limited; under it, an act "which may have no relation to proceedings in bankruptcy becomes criminal, according as such proceedings may or may not be subsequently taken, either by the party or by another." So far as appears on the face of the law, the offense here involved concerned only the State; the Court will not supply qualifications.

18. R. S. 5507 (Act of May 31, 1870, 16 Stat. 141, § 4).

> Every person who prevents, hinders, controls, or intimidates another from exercising * * * the right of suffrage, to whom that right is guaranteed by the Fifteenth Amendment * * * by means of bribery * * * shall be punished * * *.

JAMES *v.* BOWMAN, 190 U. S. 127 (May 4, 1903).

(Opinion by Justice Brewer; 8 Justices sitting; Justices Harlan and Brown dissenting.)

Appeal from district court for Kentucky. Indictment charged that defendants had by bribery unlawfully prevented certain "men of African descent, colored men, Negroes and not white men", citizens of the State, from voting at an election for Representative in Congress. It did not allege that the bribery was on account of race or color. Defendant Bowman (who was a private individual) being held in default of bail, sued out a writ of habeas corpus. District court granted the writ.

Held: Judgment affirmed.

The Fifteenth Amendment provides that the right of citizens to vote "shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." It is limited to protection against action by the United States or a State, and against discrimination on account of color, etc. R. S. 5507 therefore is not supported by it. Further, as R. S. 5507 is in terms directed to the punishment of bribery, at any election, of voters protected by the Fifteenth Amendment, it cannot be construed as an exercise of the general power of Congress over Federal elections, under Art. I, § 4, which would, as to such elections, clearly include the power to punish bribery.

19. R. S. 5519 (Act of April 20, 1871, 17 Stat. 13, c. 22, § 2).

> If two or more persons in any State * * * conspire * * * for the purpose of depriving, either directly or indirectly, any person * * * of the equal protection of the laws or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State * * * from giving or securing to all persons within such State * * * the equal protection of the laws; each of such persons shall be punished * * *.

A. UNITED STATES *v.* HARRIS, 106 U. S. 629 (January 22, 1883).

(Opinion by Justice Woods; 9 Justices sitting; Justice Harlan dissenting).

Certificate of division of opinion, from circuit court for Tennessee. Indictment charged conspiracy by several individuals to deprive certain prisoners of equal protection of the laws. On demurrer, the judges "being divided in opinion on the point of the constitutionality of the section of the Revised Statutes of the United States on which

the said indictment is based * * *" directed that point to be certified to the Supreme Court.

Held: Question decided against the constitutionality of the law.

Section 5519 was in terms directed against individual action, and cannot therefore be supported by the Fourteenth or Fifteenth Amendment or Art. IV, § 2 ["The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States"]. And as it would include any conspiracy against a person of any race to deprive him of any right accorded him by State or Federal law, it cannot be supported by the Thirteenth Amendment which is directed only against slavery and involuntary servitude. "These provisions of the law, which are broader than is warranted by the article of the Constitution by which they are supposed to be authorized, cannot be sustained."

B. BALDWIN *v.* FRANKS, 120 U. S. 678 (March 7, 1887).

(Opinion by Chief Justice Waite; 8 Justices sitting; Justice Harlan dissenting.)

Writ of error to circuit court for California. Indictment charged conspiracy to deprive certain Chinese subjects of the equal protection of the laws, etc. Circuit court refused writ of habeas corpus, and certified several questions, no. 4 presenting the case under R. S. 5519: whether a conspiracy by individuals in California to deprive Chinese subjects of the right to live and pursue lawful vocations in that State is a violation of R. S. 5519, and whether that section so far as it makes such acts an offense, is valid?

Held: Second part of question no. 4 answered in the negative; and judgment of circuit court reversed.

The section is not separable; it cannot be invalid as to conspiracy against citizens, and valid for punishment of conspiracy against aliens. "The point to be determined in all such cases is whether the unconstitutional provisions are so connected with the general scope of the law as to make it impossible, if they are stricken out, to give effect to what appears to have been the intent of the legislature."

Legislative effect.—This section was, like R. S. 5507, omitted from and repealed by the Criminal Code of 1909 because of the decision noted. It will be observed, however, that the section read: "If two or more persons in any State or Territory conspire * * * for the purpose of depriving any person * * * of the equal protection of the laws * * *." *United States* v. *Harris* involved conspiracy against citizens, within a State; and *Baldwin* v. *Franks* held that the section was not severable so as to be valid for the protection of aliens within a State. The validity of the section within a Territory was therefore not decided; to this extent the repeal went beyond the necessary consequences of the decisions. As a practical matter, such a provision limited to the Territories would in 1909 have been of small consequence, being applicable within the continental United States only to Arizona and New Mexico.

20. Revised Statutes of the District of Columbia, § 1064 (from Act of June 17, 1870, 16 Stat. 154, § 3).

"Prosecutions in the police court shall be by information under oath, without indictment by grand jury or trial by petit jury." Section 773 provided that appeals from the police court should be tried by jury in the Supreme Court of the District.

CALLAN *v.* WILSON, 127 U. S. 540 (May 14, 1888).

(Opinion by Justice Harlan; 8 Justices sitting; unanimous.)

Appeal from the supreme court of the District of Columbia. Callan was prosecuted in the police court, on information, for conspiring to prevent certain persons in the District from pursuing their calling as musicians. Demurrer was overruled and Callan tried and sentenced to pay a fine of $25, or serve 30 days. Having refused to pay the fine, he was committed to custody of the marshal. The District supreme court refused a writ of habeas corpus.

In the United States Supreme Court it was argued that the clause of the Constitution, Art. III, requiring that "the trial of all crimes, except in cases of impeachment, shall be by jury * * * and * * * when not committed within any State, the trial shall be at such place * * * as the Congress may by law have directed" was superseded by the Sixth Amendment, providing that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed"—and that this Amendment applied only in the States and was not effective in the District of Columbia.

Held: Judgment reversed—appellant to be discharged from custody.

Article III is not superseded by the Sixth Amendment—"there is no necessary conflict between them"—and is to be read as applying in the District of Columbia. Further, it is not to be limited to felonies but extends to various lesser crimes involving liberty of the person, including conspiracy. And it guarantees jury trial in the first instance when that liberty is at stake—jury on appeal is not sufficient.

The law providing for prosecution in the police court on information could not therefore be applied in the present case. [It is interesting to note that 15 years before the decision, District Judge Blatchford held this same act unconstitutional as applied to a case of libel (*Ex parte Dana*, 7 Ben. 1). That case, however, specifically passed up the question of the interrelation of Art. III and the Sixth Amendment.]

21. Act of March 1, 1875 (18 Stat. 336, § 1, 2).

Section 1 provided, "That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude." Section 2 prescribed a penalty.

A. CIVIL RIGHTS CASES, 109 U. S. 3 (October 15, 1883).

(Opinion by Justice Bradley; 9 Justices sitting; Justice Harlan dissenting.)

Five cases, from circuit courts for Kansas, California, Missouri, New York, and Tennessee; two on writ of error, and three on certificate of division of opinion. Two of the prosecutions involved denial of hotel accommodations; two, theater privileges; and one, transportation facilities.

Held: Judgments for defendants in two cases affirmed; and "the answer to be given [in the three cases of division] will be that the

first and second sections of the act of Congress of March 1, 1875 * * * are unconstitutional and void, and that judgment should be rendered upon the several indictments in those cases accordingly."

The law in effect declared that colored citizens or citizens of other races should have the same privileges at inns, etc., as enjoyed by white citizens. But the Fourteenth Amendment is directed only to State action and the power of Congress to enforce the Amendment is limited to legislation "for correcting the effects of such prohibited State laws and State acts, and thus to render them effectually null, void, and innocuous." [It will be noted that the court draws a distinction between the present act and the Enforcement Act of 1870 (R. S. 1977) on the ground that the latter is "clearly corrective in its character, intended to counteract and furnish redress against State laws and proceedings, and customs having the force of law, which sanction the wrongful acts specified." But in *Hodges* v. *United States*, decided 23 years later, R. S. 1977 was itself held invalid as a basis for prosecution for interference with performance of personal contracts.] Civil rights such as are guaranteed by the Constitution cannot be impaired by the wrongful acts of individuals unsupported by State authority—whether or not the right to enjoyment of equal privileges in public conveyances, etc., is such a right is not determined.

Finally, a deprivation of privileges at inns, etc., penalized by the act, cannot be considered "slavery" within the meaning of the Thirteenth Amendment.

B. BUTTS V. MERCHANTS' AND MINERS' TRANSPORTATION CO., 230 U. S. 126 (June 16, 1913).

(Opinion by Justice Van Devanter; 9 Justices sitting; unanimous.)

Writ of error to district court for Massachusetts. Action to recover penalties for refusing to a colored woman, who was traveling on a first-class ticket between Norfolk and Boston, equal privileges on board ship with white persons. Judgment for defendant, on demurrer.

Held: Judgment affirmed. "The real question is, whether the sections in question, being in part—by far the greater part—in excess of the power of Congress, are invalid in their entirety." And, especially in view of the act being a penal statute, the court felt unable to separate the provisions, and hold the act valid and enforcible upon the high seas, in the District of Columbia, etc., when by its terms it applied generally throughout the jurisdiction of the United States.

22. Act of March 3, 1875 (18 Stat. 479, c. 144, § 2, in part).

After providing in § 1 for punishment of persons embezzling property of the United States, the act in § 2 prescribed penalties upon persons receiving or concealing property so stolen, and provided finally, in case the trial for receiving followed a conviction for the original embezzlement, then "the judgment against him [*i. e.*, the embezzler] shall be conclusive evidence in the prosecution against such receiver that the property of the United States therein described has been embezzled, stolen, or purloined."

KIRBY *v.* UNITED STATES, 174 U. S. 47 (April 11, 1899).

(Opinion by Justice Harlan; 8 Justices sitting; Justices Brown and McKenna dissenting.)

Writ of error to district court for South Dakota. Kirby was indicted for receiving certain postage stamps charged to have been stolen from the post office at Highmore. Over objection, the court admitted in evidence the record of the conviction of three persons for stealing property from the Highmore post office, and this was the

only evidence that the stamps in Kirby's possession had been stolen. The trial judge charged the jury they might consider the record of conviction as a prima facie case—sufficient under the circumstances. Kirby was found guilty.

Held, by Supreme Court: Judgment reversed, new trial to be had.

The provision cited, authorizing a conclusive presumption of fact (viz, that property described in an indictment against a receiver was stolen from the United States) from the mere production of a record of conviction in another case, is in violation of the Sixth Amendment ["in all criminal prosecutions the accused shall * * * be confronted with the witnesses against him"].

Nor was the difficulty cured by the judge's charge that such record made a prima facie case only—except for the necessary exception in the case of dying declarations, the requirement of the Sixth Amendment is not met, in a prosecution for a distinct and separate crime which can primarily be established only by witnesses, by anything less than witnesses whom the accused can look in the face and cross-examine.

23. Act of July 12, 1876 (19 Stat. 80, § 6, in part).

> **Postmasters of the first, second, and third classes shall be appointed and may be removed by the President by and with the advice and consent of the Senate, and shall hold their offices for 4 years unless sooner removed or suspended according to law. * * ***

MYERS, ADMX. *v.* UNITED STATES, 272 U. S. 52 (October 25, 1926).

(Opinion by Chief Justice Taft; 9 Justices sitting; Justices Holmes, Brandeis, and McReynolds dissenting.)

Appeal from Court of Claims. Myers, the intestate, was appointed postmaster at Portland, Oreg. (an office of the first class) for a 4-year term, and about a year before expiration of his term, without charges against him and without the consent of the Senate, was removed by the Postmaster General (acting with the consent of the President). He protested, and drew no pay for any other services, nor was a successor nominated during the remainder of his term. He did not, however, bring suit for his official salary for about 9 months after his removal; and the Court of Claims gave judgment against him on the ground of delay in presenting his claim.

In the Supreme Court, Held: Judgment affirmed, not on ground of laches but on constitutional grounds alone.

The provision was plainly worded to mean that postmasters of the first class were to hold for 4 years unless removed by the President acting with the consent of the Senate. This constitutes a restriction in violation of Constitution Art. II, § 1 ["The executive Power shall be vested in a President of the United States of America"]. While the power of removal is not specifically conferred on the President by the Constitution, neither is it restricted, and in the absence of restriction, the power of appointment carries with it the power to remove.

Art. II, § 1, constitutes a grant of "general administrative control of those executing the laws, including the power of appointment and removal of executive officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed" (p. 164). The grant to the Senate, in Article II, § 2, of power to reject appointments does not make the Senate a part of the removing power—its participation in that function is limited by the further provision—"but Congress may by law vest the appointment of such

inferior officers, as they think proper in the President alone, in the courts of law, or in the heads of departments"—which confers the right to regulate removals (*United States* v. *Perkins*, 116 U. S. 483). This is equivalent to an exception, and the plain implication is that aside from this one exception the power of the President is unaffected.

Chief reliance was placed upon the "legislative construction" of 1789 (when Congress passed the bill establishing a Department of Foreign Affairs—in the course of which the question of the President's power to remove the head of such department was argued at great length by persons generally conversant with the proceedings of the Constitutional Convention).

24. Act of August 14, 1876 (19 Stat. 141, entire act).

For comment, *see* notes on R. S. 4937, above.

25. Act of August 11, 1888 (25 Stat. 411, in part).

Clause, in a provision of a river and harbor appropriation act, authorizing purchase of certain improvements made by the Monongahela Navigation Co. in the Monongahela River and condemnation in event of failure to purchase at a set price, that "in estimating the sum to be paid by the United States, the franchise of said corporation to take tolls shall not be considered * * *."

MONONGAHELA NAVIGATION CO. *v.* UNITED STATES, 148 U. S. 312 (March 27, 1893).

(Opinion by Justice Brewer; 6 Justices sitting; unanimous.)

Appeal from, and writ of error to, circuit court for western district of Pennsylvania. In condemnation proceedings brought as contemplated by the provision cited, evidence as to the value of tolls, received and prospective, was rejected, and decree entered for $209,000 "not considering or estimating in this decree the franchise of this company to take tolls."

Held: Judgment reversed, new trial to be had.

The case falls within the Fifth Amendment ["nor shall private property be taken for public use, without just compensation"]. This means "a full and perfect equivalent for the property taken." By the legislation cited, "Congress seems to have assumed the right to determine what shall be the measure of compensation" (p. 327). But that is a judicial inquiry—entirely distinct from the determination as to the necessity or propriety of the taking. Coming then to the question of just compensation as a judicial inquiry, the Court holds the franchise to take tolls is property within the protection of the Fifth Amendment—*i. e.*, the undoubted power of Congress to condemn the works in question under the commerce clause is still subject to the restrictions of the Fifth Amendment.

26. Act of May 5, 1892 (27 Stat. 25, c. 60, § 4, in part).

This section of a Chinese exclusion act provided: "That any such Chinese person or person of Chinese descent convicted and adjudged to be not lawfully entitled to be or remain in the United States shall be imprisoned at hard labor for a period of not exceeding 1 year and thereafter removed from the United States as hereinbefore provided."

The removal "hereinbefore provided" refers back to § 1 and § 2 of the Act: Section 1 extended for 10 years the existing laws "prohibiting and regulating the coming into this country of Chinese persons"—and § 2 provided for removal of Chinese "convicted or adjudged under any of said laws" to be unlawfully in the United States. One of the laws thus extended (25 Stat. 479, § 13) provided that Chinese found unlawfully in the United States were subject to arrest on warrant issued "by any justice, judge, or commissioner" and returnable before any such officer, and on conviction "upon a hearing" were to be deported.

WONG WING *v.* UNITED STATES, 163 U. S. 228 (May 18, 1896).
(Opinion by Justice Shiras; 8 Justices sitting; unanimous.)

Appeal from circuit court for Michigan. Wong Wing and others were brought before a United States commissioner; the commissioner found they were not entitled to remain in the United States, and adjudged that they be imprisoned at hard labor in the Detroit house of correction for 60 days and then deported. Writ of habeas corpus was discharged by the circuit court.

Held: Judgment reversed, without prejudice to detention for deportation.

Detention as a means necessary to give effect to provisions for deportation would be valid. But the detention imposed by § 4, cited, is something distinct and additional. It is punishment, by imprisonment at hard labor, preliminary to deportation. Such punishment was decided in *Ex parte Wilson* (114 U. S. 428) to be infamous; it is within the protection of the Fifth Amendment ["No person shall be held to answer for * * * infamous crime, unless on a presentment or indictment of a grand jury"] and of the Sixth Amendment ["In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury"]. Since the law cited authorizes such detention (by necessary implication) to be adjudged by a United States commissioner upon summary hearing, it is in violation of the Amendments—which protect all aliens as well as citizens within the jurisdiction of the United States.

27. Joint Resolution of August 4, 1894 (28 Stat. 1018, No. 41).

> The Secretary of the Interior be * * * authorized to approve * * * that certain lease made and executed by Mon-Si-Moh * * * to Ray W. Jones of Lot (1) * * * [etc.] in the county of Polk and State of Minnesota * * *.

JONES *v.* MEEHAN 175 U. S. 1 (October 30, 1899).
(Opinion by Justice Gray; 9 Justices sitting; unanimous.)

Appeal from circuit court for Minnesota. Suit to quiet title to certain land included in a tract set apart to an Indian chief under a treaty with the Chippewas. Mon-Si-Moh, one of the chief's sons, had leased to Meehan, but subsequently, the land having increased in value, leased to Jones, which second lease was confirmed by the Secretary of the Interior under the joint resolution cited. Circuit court held the first lease valid.

Held: Judgment affirmed.

The primary question was the nature of the title acquired by the Indian chief under the treaty, and the court held that the treaty in and of itself vested title in fee simple with full power of alienation. Having further decided that the land descended to the son involved in this case, the court passed on the effect of the resolution of 1894 as follows:

> * * * title to the strip of land in controversy * * * passed by the lease executed * * * in 1891 to the plaintiffs for the term of that lease; and their rights under that lease could not be divested by any subsequent action of the lessor, or of Congress, or of the Executive Departments. The construction of treaties is the peculiar province of the judiciary; and, except in cases purely political, Congress has no constitutional power to settle the rights under a treaty, or to affect titles already granted by the treaty itself * * *. Citing, among other cases, *Reichart* v. *Felps*, 6 Wall. 160.

28. Act of August 27, 1894 (28 Stat. 553–560, §§ 27–37).

These sections constituted an income tax law incorporated in the tariff and revenue act of 1894. Section 27 laid a tax of 2% "upon the gains, profits, and income [over $4,000] received * * * by every citizen of the United States, whether residing at home or abroad, and every person residing therein, whether * * * derived from any kind of property, rents, interest, dividends, or salaries, or from any profession, trade, employment, or vocation carried on in the United States or elsewhere * * *" Section 32 imposed a tax of 2% on the "net profits or income * * * of all banks, banking institutions, trust companies * * * but not including partnerships." Net profits were to include amounts paid to shareholders, expended in enlargement of plant, etc.; but the tax was not to apply to States, counties, or municipalities nor to charitable organizations, mutual savings banks, etc. The other sections made detailed regulations for returns, collection, etc.

POLLOCK *v.* FARMERS' LOAN & TRUST CO., 157 U. S. 429 (April 8, 1895); 158 U. S. 601 (May 20, 1895).

(Opinion by Chief Justice Fuller; 8 Justices sitting; Justices White and Harlan dissenting. On reargument; opinion by Chief Justice Fuller; 9 Justices sitting; Justices Harlan, Brown, Jackson, and White dissenting.)

Appeal from circuit court for New York. Bill in equity was filed by a stockholder of the trust company to prevent compliance with the law by the filing of returns and paying of tax on net profits, including income from certain real estate and from bonds of New York City, owned or held in trust. Circuit court dismissed the bill, on demurrer. Appeal was taken direct to Supreme Court on the constitutional questions, Pollock contending that: (1) the law in imposing a tax on income of real estate, imposed a tax on the real estate itself; and in imposing tax on interest of bonds, etc., imposed a tax on the personal estate itself; that such tax was a direct tax and void because not apportioned; and therefore the whole law was void; (2) (in view of the various exemptions in the act) the law was invalid because imposing indirect taxes in violation of the constitutional requirement of uniformity and the implied limitation that tax laws must apply equally and uniformly to all similarly situated; (3) the law was invalid so far as imposing a tax on income from State and municipal bonds.

Held: Decree of circuit court reversed, and cause remanded with directions to enter decree for complainant preventing voluntary payment of tax on income from real estate and municipal bonds owned or held in trust by the trust company.

Specifically, a tax on rent or income from real estate is held a direct tax, which to be valid must be apportioned under Constitution Art. I, § 2. ["* * * direct taxes shall be apportioned among the several States * * * according to their respective numbers * * *."] And a tax on the interest from municipal bonds is a tax on the power of a State instrumentality to borrow money, and repugnant to the Constitution (under the doctrine of *United States* v. *Railroad Co. and other cases*).

The Justices were evenly divided, and therefore the case did not decide the questions whether the whole act was invalidated, whether the act was invalid insofar as it taxed income from personal property as such, and whether any part of the act, aside from being a direct tax, was void for want of uniformity.

About a month later, Justice Jackson being able to participate, the court on suggestion of the parties ordered reargument, to cover the whole case, including those questions on which the court was divided. The result of the rehearing (158 U. S. 601, May 20, 1895) went be-

yond the first case, in holding that "taxes on personal property or on the income of personal property are * * * direct taxes"; and that "The tax imposed by § 27 to § 37, inclusive * * * so far as it falls on the income of real estate and of personal property, being a direct tax within the meaning of the Constitution, and, therefore, unconstitutional and void because not apportioned according to representation, all those sections, constituting one entire scheme of taxation, are necessarily invalid."

29. Act of January 30, 1897 (29 Stat. 506, c. 109, in part).

That any person who shall sell * * * any malt, spirituous, or vinous liquor * * * to any Indian to whom allotment of land has been made while the title to the same shall be held in trust by the Government * * * shall be punished * * *.

MATTER OF HEFF, 197 U. S. 488 (April 10, 1905); overruled in *United States v. Nice*, 241 U. S. 591 (1916).

(Opinion by Justice Brewer; 9 Justices sitting; Justice Harlan dissenting. *United States* v. *Nice* was unanimous.)

Original application for writ of habeas corpus. Heff was indicted under the act for sale of liquor to an allottee Indian off his allotment. He was convicted in district court for Kansas and sentenced to jail. The Court of Appeals of that circuit having decided the constitutional question adversely, in another case (*Farrell* v. *United States*, 110 Fed. 942), Heff applied to the Supreme Court direct, for release on habeas corpus.

Held: Prisoner entitled to discharge.

The Indian involved had received a trust patent to an allotment, under the General Allotment Act of 1887. That act provided in § 6 that "every Indian born within the territorial limits of the United States to whom allotments shall have been made under * * * the act * * * is hereby declared to be a citizen of the United States and is entitled to all the rights, privileges, and immunities of such citizens." It was argued that this provision did not take effect until final patent issued, but the Court held otherwise (p. 502–503) partly upon their feeling of what Congress would naturally have done if they had intended such deferment, and partly upon a technical construction of the language, distinguishing between allottee and patentee, etc.

The Indian being a citizen at the time of the sale of liquor here involved, the prohibition of such sale by the United States constituted a police regulation invading State jurisdiction. Liquor licenses required by the United States under the revenue acts are to be distinguished—their object being wholly in aid of the collection of revenue.

Furthermore, the act is not supported by the power under Art. I, § 8, to regulate commerce with the Indian tribes; the United States released itself from the obligations of guardianship by the grant of citizenship to Indian allottees. The restriction on alienation of allotted land for a period of 25 years affects property rights but not the Indians' civil status.

In *United States* v. *Nice*, the Court upheld an indictment under the same act, on the ground that the Allotment Act taken as a whole and fortified by collateral evidence showed that the tribal relation was not immediately broken up by the grant of an allotment; that the Indian allottees still remained, during the period of their trust

patents, in a dependent relation to the United States, in which situation the act of 1897 was supported by Art. I, § 8 [power to regulate commerce with the Indian tribes]. "We recognize that a different construction was placed upon § 6 * * * in *Matter of Heff* * * * but after reexamining the question in the light of other provisions in the act and of many later enactments clearly reflecting what was intended by Congress, we are constrained to hold that the decision in that case is not well grounded."

30. Act of June 1, 1898 (30 Stat. 428, § 10).

That any employer subject to the provisions of this Act [*i. e.*, "engaged in the transportation of passengers or property * * * from one State * * * to any other State * * *"] and any * * * agent * * * of such employer who * * * shall threaten any employee with loss of employment * * * because of his membership in such a labor corporation, association, or organization * * * is hereby declared to be guilty of a misdemeanor and upon conviction thereof in any court of the United States of competent jurisdiction * * * shall be punished * * *.

ADAIR v. UNITED STATES, 208 U. S. 161 (January 27, 1908).

(Opinion by Justice Harlan; 8 Justices sitting; Justices McKenna and Holmes dissenting.)

Writ of error to district court for Kentucky. Indictment charged that Adair, as agent of an interstate carrier subject to the act, discharged an employee because of membership in a labor union. Demurrer was overruled, and defendant tried and convicted.

Held: Judgment reversed.

The section cited, restricting the right to make contracts for purchase of the labor of others, is "an invasion of the personal liberty, as well as of the right of property, guaranteed by the [Fifth] Amendment." The contract rights thus guaranteed are subject to reasonable restrictions for protection of the public interests and the common good; but the section here in question is an attempt to compel employers against their will, to retain persons in their service, which cannot be done by the Government but only by valid contract between the parties.

Further, the act is not a regulation of interstate commerce within the meaning of the Constitution; the Court sees no "possible legal or logical connection" between membership in a labor organization and the carrying on of interstate commerce. And in any event, power under the commerce clause could not be exerted in violation of fundamental constitutional rights.

31. Act of June 13, 1898 (30 Stat. 451, 459, in part).

Section 6 (p. 451) of the War Revenue Act of 1898 provided, "That * * * there shall be levied, collected and paid, for and in respect of the several * * * documents * * * mentioned * * * in Schedule A * * * or for or in respect of the vellum, parchment, or paper upon which such instruments * * * shall be written or printed, by any person * * * who shall make, sign, or issue the same * * * the several taxes * * * specified * * * in the said schedule."

Schedule A (p. 459) included "bills of lading or receipt (other than charter party) for any goods * * * to be exported * * * to any foreign port or place, ten cents."

FAIRBANK v. UNITED STATES, 181 U. S. 283 (April 15, 1901).

(Opinion by Justice Brewer; 9 Justices sitting; Justices Harlan, Gray, White, and McKenna dissenting.)

Writ of error to district court for Minnesota. Fairbank, an agent of the Northern Pacific Railway, was convicted of issuing an export

bill of lading without affixing the stamp as required by the act cited. Review was sought solely on the constitutional question, whether the act so far as it imposed a tax on bills of lading for exports was in conflict with Art. I, § 9 ["no tax or duty shall be laid on articles exported from any State"].

Held: Judgment reversed.

The tax on the bill of lading was "in substance and effect equivalent to a tax on the articles included in the bill of lading."

Dissenting Justices held that the tax was on the vellum or paper on which the bill was written. It is interesting to compare the early act of 1797 (1 Stat. 527, c. 11): "* * * that there shall be levied * * * the several stamp duties following, to wit: For every skin or piece of vellum or parchment; or sheet or piece of paper upon which shall be written * * * any charter-party * * * $1; * * * any policy of insurance * * * 25 cents." The majority in the *Fairbank case* discounted this as a precedent on the ground that the constitutional meaning (of the act of 1898, above cited) was clear and not to be overthrown by legislative act, though repeated and not challenged; also noting that the earlier tax was small, and exports were few.

32. Same, p. 451, 460, in part.

The item of Schedule A: "Contract or agreement for the charter of any ship * * * if the registered tonnage of such ship * * * does not exceed three hundred tons, $2. * * * Exceeding three hundred tons and not exceeding six hundred tons, $5. * * * Exceeding six hundred tons, $10."

UNITED STATES *v.* HVOSLEF, 237 U. S. 1 (March 22, 1915).

(Opinion by Justice Hughes; 8 Justices sitting; unanimous.)

Writ of error to district court for southern district of New York. Suit was brought in district court, under the Tucker Act, to recover stamp taxes paid on certain charter parties relating solely to carriage to foreign ports. The act of 1898 having been repealed in 1902, the present suit was based on an act of July 27, 1912 (37 Stat. 240) extending to January 1, 1914 the time for claiming refunds of taxes "alleged to have been erroneously or illegally assessed or collected" under the act of 1898. Demurrer on other than constitutional grounds being overruled, the court gave judgment for claimant.

Held: Judgment affirmed.

Tax on charter parties was in substance a tax on exportation and, therefore, on the exports, within the inhibition of Art. I, § 9.

33. Same, p. 451, 461, in part.

The item of Schedule A: "Each policy of insurance * * * by which insurance shall be made or renewed upon property of any description * * * whether against peril by sea or on inland waters * * * upon the amount of premium charged, one half of 1 cent on each dollar or fraction thereof."

THAMES & MERSEY MARINE INSURANCE CO., LTD., *v.* UNITED STATES, 237 U. S. 19 (April 5, 1915).

(Opinion by Justice Hughes; 8 Justices sitting; unanimous.)

Writ of error to district court for southern district of New York, in a suit for a refund of taxes paid on policies of insurance of certain exports against marine risks, brought under the same act of 1912 as the *Hvoslef case*. District court held taxes valid and dismissed the case.

Held: Judgment reversed.

Insurance against marine risks is so vitally connected with exporting that the tax on the policies is essentially a tax on the exportation itself.

34. Act of June 6, 1900 (31 Stat. 359, § 171, in part).

Proviso to a section of the Alaska Code of Civil Procedure: "That hereafter in trials for misdemeanors six persons shall constitute a legal jury."

RASSMUSSEN *v.* UNITED STATES, 197 U. S. 516 (April 10, 1905).

(Opinion by Justice White; 9 Justices sitting; unanimous—Justices Harlan and Brown dissenting from the argument of the opinion only, but concurring in the decision.)

Writ of error to district court for Alaska. Rassmussen was indicted for an offense under § 127 of the Alaska Code, and, over his objection, tried by a jury of six and convicted.

Held: Judgment reversed.

Alaska was "incorporated" into the United States—in view of the terms of the treaty of cession, action of Congress thereunder in extending revenue laws, navigation laws, etc., and decisions of the Supreme Court (*e. g.*, *Binns* v. *United States*, 194 U. S. 486). The Constitution therefore applies, and provision for a six-person jury is invalid, as repugnant to the Sixth Amendment ["in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."], the "jury" so intended being 12 men.

35. Act of March 3, 1901 (31 Stat. 1341 § 935, in part).

This section of the District of Columbia Code provided: "In all criminal prosecutions the United States or the District of Columbia, as the case may be, shall have the same right of appeal that is given to the defendant, including the right to a bill of exceptions: *Provided*, That if on such appeal it shall be found that there was error in the rulings of the court during the trial, a verdict in favor of the defendant shall not be set aside."

UNITED STATES *v.* EVANS, 213 U. S. 297 (April 19, 1909).

(Opinion by Chief Justice Fuller; 9 Justices sitting; unanimous.)

Certiorari to District of Columbia Court of Appeals. Evans was tried for murder in District of Columbia Supreme Court, and found not guilty. The United States appealed to the Court of Appeals under the section cited, assigning error on exceptions to the exclusion of certain evidence. The Court of Appeals dismissed the appeal for want of jurisdiction.

Held: Writ of certiorari to review this judgment, quashed.

When the defendant was acquitted, he had no further interest in the case; the appeal, therefore, was in effect an attempt to take an advisory opinion. Such a proceeding is not an exercise of judicial power under Constitution, Art. III ["The judicial power shall extend to all cases in law and equity * * *; to controversies to which the United States shall be a party * * *"]. An argument by the Solicitor General, that Art. III did not apply to the courts of the District of Columbia, was disregarded.

36. Act of June 11, 1906 (34 Stat. 232, c. 3073, in part).

Sec. 1 provided: "That every common carrier engaged in * * * commerce in the District of Columbia, or in any Territory, or between the several States * * * shall be liable to any of its employees, or, in the case of his death, to his personal representative for the benefit of his widow * * * for all damages which may result from the negligence of any of its officers * * * or by reason of any defect or insufficiency due to its

negligence in its cars [etc.] * * *." The rest of the act prescribed procedure, etc.

EMPLOYERS' LIABILITY CASES (*Howard* v. *Illinois Central R. R. Co.*, and *Brooks, Admx.* v. *Southern Pacific Co.*), 207 U. S. 465 (January 6, 1908).

(Opinion by Justice White; 9 Justices sitting; Justices Moody, Harlan, McKenna, and Holmes dissenting.)

Writs of error to circuit courts for Tennessee and Kentucky. Two cases were brought to recover damages on account of death of firemen actually serving on trains moving in interstate commerce. Demurrers on ground of unconstitutionality of the act were sustained in both cases.

Held: Judgments affirmed.

The act cited, "whilst it embraces subjects within the authority of Congress to regulate commerce, also includes subjects not within its constitutional power"—*i. e.*, the language "any of its employees" is construed as possibly including employees whose services were limited within a single State; and insofar it is beyond the power of Congress under the commerce clause, which may deal with the relation of master and servant, "to the extent [and only to the extent] that regulations adopted by Congress on that subject are solely confined to interstate commerce."

The further question was whether the words "any of its employees" could be read as meaning "any of its employees when engaged only in interstate commerce." And it was held that this was impossible, since that change would restrict the scope of the act as respects the District of Columbia and Territories, whereas the power of Congress within these jurisdictions is plenary and not drawn from the commerce clause. Valid parts of an act may be separated from invalid so as to stand alone, only "where it is plain that Congress would have enacted the legislation with the unconstitutional provisions eliminated." In the present case, "we are unable to say that the statute would have been enacted had its provisions been restricted to the limited relations of that character which it was within the power of Congress to regulate."

[NOTE.—The act was held valid as a regulation of carriers within the District of Columbia, in *Hyde* v. *Southern Railway Co.* (31 App. D. C. 466)—the court saying "no apparent reason appears why Congress would not have extended this relief to them [railroad employees in the District] unless coupled with the relief which it sought ineffectively to extend to others." It was held valid in the Territories, in *El Paso & Northeastern Railway Co.* v. *Gutierres* (215 U. S. 87), the court citing the *Hyde case* with approval.]

37. Act of June 16, 1906 (34 Stat. 269, § 2, in part).

In the course of the Oklahoma Enabling Act occurred this provision: "The capital of said State shall temporarily be at the city of Guthrie, in the present Territory of Oklahoma and shall not be changed therefrom previous to anno Domini nineteen hundred and thirteen, but said capital shall, after said year, be located by the electors * * *."

COYLE *v.* OKLAHOMA, 221 U. S. 559 (May 29, 1911).

(Opinion by Justice Lurton; 9 Justices sitting; Justices McKenna and Holmes dissenting.)

Writ of error to Supreme Court of Oklahoma. This was a proceeding by a taxpayer and property holder in Guthrie to determine the legality of a State law providing for the relocation of the capital prior to the date fixed in the act of Congress cited. It was claimed that the State law was void not only on grounds involving con-

struction of the State constitution but because so inconsistent with the Federal law. This latter claim being decided adversely, the case was taken to the Supreme Court.

Held: Judgment affirmed (*i. e.*, State law upheld).

The power of Congress in the matter of admission of new States is simply "new States may be admitted by the Congress into this Union" (Constitution, IV, § 3), the only restriction being in relation to States formed from two or more States, etc. Giving full weight to each word of this clause, it means that Congress can admit States only "equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself" (p. 567). The power being discretionary only, Congress may impose conditions effective at the time of admission. It might further include in enabling legislation provisions referable, *e. g.*, to the commerce power, which should be effective in the future as an exercise of that power. But the relocation of a State capital subsequent to admission is not referable to any specific constitutional power and cannot be implied from the power to admit new States; "the power to locate its own seat of government and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly State powers" (p. 565).

38. Act of February 20, 1907 (34 Stat. 899, § 3, in part).

This section of the Immigration Act of 1907 provided in part that "whoever * * * shall keep, maintain, control, support, or harbor in any house or other place, for the purpose of prostitution * * * any alien woman or girl, within 3 years after she shall have entered the United States shall * * * be deemed guilty of a felony * * *."

KELLER *v.* UNITED STATES } 213 U. S. 138 (April 5, 1909).
ULLMAN *v.* UNITED STATES }

(Opinion by Justice Brewer; 9 Justices sitting; Justices Holmes, Harlan, and Moody dissenting.)

Writ of error to district court for Illinois. Defendants were indicted for keeping in prostitution an alien woman who had entered the United States within 3 years. They were tried and convicted.

Held: Judgments reversed, with instructions to quash indictments.

The provision in question was an attempt by Congress to punish the keeping of a disorderly house—an exercise of police power generally reserved to the States. It was not supported by treaty nor by the general and admitted power of Congress to control the coming in or removal of aliens. It was not directed against assisting the importation of prostitutes. The offense charged "has no significance" either (1) as materially affecting the conditions upon which alien women may be permitted to remain in this country and the grounds which warrant their exclusion; or (2) as having any general effect upon the importation and exclusion of aliens; it was simply a dealing of a citizen with a resident alien. If Congress can punish such an act, then "the power of Congress is broad enough to take cognizance of all dealings of citizens with aliens."

39. Act of March 1, 1907 (34 Stat. 1028, in part).

Provision in an Indian Appropriation Act, "That William Brown and Levi B. Gritts, on their own behalf and on behalf of all other Cherokee citizens, having like interests * * *, and David Muskrat and J. Henry Dick, on their own behalf, and on behalf of all Cherokee citizens enrolled as such for allotment as of September 1, 1902, be * * * empowered to

institute their suits in the Court of Claims to determine the validity of any acts of Congress passed since [July 1, 1902] insofar as said acts * * * attempt to increase or extend the restrictions upon alienation * * * of lands of Cherokee citizens, or to increase the number of persons entitled to share in the final distribution * * * beyond those enrolled as of September 1, 1902 * * *. And jurisdiction is hereby conferred upon the Court of Claims, with the right of appeal, by either party, to the Supreme Court of the United States to hear, determine and adjudicate each of said suits."

BROWN AND GRITTS *v.* UNITED STATES
MUSKRAT *v.* UNITED STATES } 219 U. S. 346 (January 23, 1911.)

(Opinion by Justice Day; 7 Justices sitting; unanimous.)

Appeals from Court of Claims, in suits duly brought under authority of the act cited, to declare void three acts of Congress (33 Stat. 65, c. 505; 34 Stat. 137, c. 1876, 325, c. 3504) so far as they purported to increase the number of persons enrolled as Cherokees, extend restrictions on alienation of allotments, etc. The Court of Claims sustained the validity of the acts questioned and dismissed the petitions.

Held: Judgment reversed with instructions to dismiss petitions for want of jurisdiction.

The Supreme Court, from the time of *Hayburn's case*, has consistently refused to exercise any other than strictly judicial powers. The judicial power is restricted by the Constitution, Art. III, § 2, to "cases" and "controversies"; and the rule applies equally where the constitutionality of Federal legislation is questioned. In the present instance, Congress was attempting "to provide for a judicial determination, final in this court, of the constitutional validity of an act of Congress", in a suit "not arising between parties concerning a property right necessarily involved in the decision in question, but in a proceeding against the Government in its sovereign capacity, and concerning which the only judgment required is to settle the doubtful character of the legislation in question." The attempt was invalid so far as the Supreme Court was concerned, and as a Supreme Court decision was the real purpose of the act, the Court refused to find in it an intent to confer jurisdiction on the Court of Claims separately.

40. Act of May 27, 1908 (35 Stat. 313, § 4, in part).

This section of an act to remove restrictions on alienation of lands by Indian allottees of the Five Civilized Tribes, provided in part: "That all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes."

CHOATE *v.* TRAPP, 224 U. S. 665 (May 13, 1912).

(Opinion by Justice J. R. Lamar; 8 Justices sitting; unanimous.)

Writ of error to Supreme Court of Oklahoma. According to the terms of the Atoka Agreement, embodied in the Curtis Act of June 28, 1898, under which the lands of the Choctaws and Chickasaws were allotted, "all the lands allotted shall be nontaxable while the title remains in the original allottee, but not to exceed 21 years from date of patent * * *." On admission of Okahoma in 1907, the State constitution provided that property exempt from tax by virtue of treaties and Federal laws should remain exempt accordingly. But in 1908, following passage of the act of Congress cited, the State authorities began proceedings for the assessment of taxes on

certain Indian lands from which alienation restrictions had been removed. The Indians sought an injunction, which was denied.

Held: Decree reversed.

Congress has plenary power over tribal property of Indians; but the Indians in the present case acquired individually a vested right to tax exemption, upon acceptance of allotment in accordance with the terms of the Curtis Act. That vested right is protected by the Fifth Amendment, and could not be disturbed by Congress.

41. Act of August 19, 1911 (37 Stat. 28, in part).

This act, amending the Corrupt Practices Act of 1910, provided in part: "No candidate for * * * Senator of the United States shall give, contribute, expend, use, or promise or cause to be given * * * in procuring his nomination and election, any sum in the aggregate, in excess of the amount which he may lawfully give * * * under the laws of the State * * * *Provided*, That * * * no candidate for Senator of the United States shall give, contribute, expend, use, or promise any sum, in the aggregate, exceeding $10,000 in any campaign for his nomination and election."

NEWBERRY *v.* UNITED STATES, 256 U. S. 232 (May 2, 1921).

(Opinion by Justice McReynolds; 9 Justices sitting; Chief Justice White and Justices Pitney, Brandeis, and Clarke dissenting on the constitutional question, though concurring in the decision.)

Writ of error to district court for Michigan. Newberry and others were indicted for conspiracy to violate the statute by contributing and expending, etc., more than $10,000 in the course of the campaign for procuring the nomination and election of Newberry to the United States Senate. The district court overruled a demurrer, interposed on ground of unconstitutionality, and Newberry was convicted.

Held: Judgment reversed, cause remanded for further proceedings.

The Constitutional power of Congress in the matter of elections is found only in Art. I, § 4 ["The times, places, and manner of holding elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators."] The Seventeenth Amendment (adopted subsequent to the statute here involved) did not change the meaning of the term "election"—viz. "final choice of an officer by the duly qualified electors." Primaries are not included. The question, then, is whether the power of Congress to "regulate the manner of holding elections" extends to regulation of primaries as one of the prerequisites to election—and the Court finds that this is beyond the intent of the Constitution and not necessary in order to effectuate the power expressly granted.

42. Act of June 18, 1912 (37 Stat. 136, § 8, in part).

"That the juvenile court of the District of Columbia is hereby given * * * *concurrent jurisdiction with the Supreme Court of the District of Columbia in all cases arising under the act* [of March 23, 1906, noted below]."

UNITED STATES *v.* MORELAND, 258 U. S. 433 (April 17, 1922).

(Opinion by Justice McKenna; 8 Justices sitting; Chief Justice Taft and Justices Holmes and Brandeis dissenting.)

Certiorari to the Court of Appeals of the District of Columbia. Pursuant to the act cited, Moreland was prosecuted in juvenile court

for neglect to support his children, under act of March 23, 1906. That act (34 Stat. 86) made desertion and nonsupport misdemeanors, punishable by fine or imprisonment in the workhouse at hard labor for not more than 12 months. Prosecution was instituted on information, in accordance with the law governing the juvenile court (34 Stat. 73, § 12): "That prosecution in the juvenile court shall be on information by the corporation counsel or his assistant." Moreland being found guilty, was sentenced to the workhouse for 6 months. The court of appeals reversed this judgment with directions to dismiss the complaint, on authority of *Wong Wing* v. *United States* (163 U. S. 228).

Held: Judgment affirmed.

The right of an accused person to presentment by a grand jury, under the Fifth Amendment, accrues whenever he "is in danger of an infamous punishment if convicted." Imprisonment at hard labor is "infamous"; and could only be adjudged after presentment or indictment. The act of 1912, therefore, so far as it purports to give the juvenile court concurrent jurisdiction of offenses which might (although in the alternative) subject the offender to an infamous punishment, is invalid.

The dissenting Justices insist that the *Wong Wing case* is not authority for the proposition that commitment to a workhouse at hard labor constitutes an infamous punishment; that it is "imprisonment in a penitentiary which now renders a crime infamous."

43. Act of March 4, 1913 (37 Stat. 988, part of ¶ 64).

Section 8 of this District of Columbia Appropriation Act constituted the Public Utilities Act for the District. After authorizing the utilities commission to value the various utility properties, ¶ 64 provided "That any public utility * * * dissatisfied with any order or decision of the commission fixing any valuation * * * may commence a proceeding in equity in the Supreme Court of the District of Columbia against the commission, as defendants, to vacate, set aside, or modify any such * * * order on the ground that the valuation * * * fixed in such order is unlawful, inadequate, or unreasonable * * *. Any party, including said commission, may appeal from the order or decree of said court to the Court of Appeals of the District of Columbia and therefrom to the Supreme Court of the United States, which shall thereupon have and take jurisdiction in every such appeal."

KELLER ET AL. *v.* POTOMAC ELECTRIC POWER CO. ET AL., 261 U. S. 428 (April 9, 1923).

(Opinion by Chief Justice Taft; 9 Justices sitting; unanimous.)

Appeal from District of Columbia Court of Appeals. The power company, as authorized by the act cited, filed a bill against the Utilities Commission in the District of Columbia Supreme Court to enjoin an order fixing valuation of its property at $11,231,170.43. The supreme court dismissed the bill, upholding the findings of the commission. The court of appeals sustained an appeal. The Supreme Court declined to consider the merits and ordered argument on the constitutional questions—whether Congress could vest such jurisdiction in the Supreme Court, and whether, if so, appeal was intended only from a final decree.

Held: Appeal dismissed.

The power conferred on the District Supreme Court was more than judicial; the court was to "revise the legislative discretion of the Commission by considering the evidence * * * and entering the order it deems the Commission ought to have made." Such

power may constitutionally be vested in the courts of the District of Columbia, under the power granted in Art. I, § 8, cl. 17: ["To exercise exclusive legislation in all cases whatsoever over such District as may * * * become the seat of government."] But the act goes further. By providing an appeal, conforming to equity procedure, from the District courts to the Supreme Court of the United States, it attempts to vest in the Supreme Court a like power to review evidence and make such order as it deems proper. This the Congress may not do (citing *Hayburn's case*, *U. S.* v. *Ferreira*, *Muskrat* v. *U. S.*, *Gordon* v. *U. S.*, etc.). Invalidity in this respect does not, however, invalidate the whole section, even without the aid of the separability clause in ¶ 92. "We think Congress would have given the appeals to the courts of the District even if it had known that the appeal to this Court could not stand."

Decision on this first part made it unnecessary to pass on the next question argued—*i. e.*, whether appeal under the act must be from a final decree.

The apparent principle of this case—that the courts of the District of Columbia are legislative and not constitutional courts—must be whittled down to the facts of the case, in view of the recent case of *O'Donoghue* v. *United States* (289 U. S. 516). That case holds specifically "that the Supreme Court and the Court of Appeals of the District of Columbia are constitutional courts of the United States, ordained and established under Art. III of the Constitution" [and therefore that the compensation of judges of such courts is protected from diminution during their continuance in office] (p. 551). The decision is reconciled with *Keller* v. *Power Co.* on the ground that the *Keller case* held simply "that in virtue of its dual power over the District, Congress may vest nonjudicial functions in the courts of the District." It decides, over vigorous protest by Chief Justice Hughes and Justices Van Devanter and Cardozo, that these two courts of the District of Columbia, insofar as they are vested with jurisdiction of cases falling within the judicial power of the United States, receive it as inferior courts of the United States, under Art. III.

44. Act of September 1, 1916 (39 Stat. 675, c. 432, entire).

This was the original child labor law. The main substantive provision was contained in § 1 as follows: "That no producer, manufacturer, or dealer shall ship * * * in interstate or foreign commerce * * * any article or commodity the product of any mill * * * situated in the United States, in which within 30 days prior to the removal of such product therefrom children under the age of 14 years have been employed or permitted to work, or children between the ages of 14 and 16 years have been employed or permitted to work more than 8 hours in any day, or more than 6 days in any week, or after the hour of 7 o'clock postmeridian, or before the hour of 6 o'clock antemeridian * * *."

HAMMER, U. S. ATTORNEY FOR WESTERN DISTRICT OF N. C. *v.* DAGENHART, 247 U. S. 251 (June 3, 1918).

(Opinion by Justice Day; 9 Justices sitting; Justices Holmes, McKenna, Brandeis, and Clarke dissenting.)

Appeal from district court for North Carolina. Bill was filed by a father, on behalf of two minor sons, under 16 years of age, to enjoin enforcement of the act. The district court decreed an injunction on the ground the act was unconstitutional, and the case was appealed to the Supreme Court direct. There were 3 grounds of attack: (1)

It is not a regulation of commerce; (2) it contravenes the Tenth Amendment; (3) it conflicts with the Fifth Amendment.

Held: Decree affirmed.

The evident purpose of the act was, not to prohibit interstate commerce in certain classes of articles because of some inherently vicious character, but to "standardize the ages at which children may be employed in mining and manufacturing within the States." But manufacture, the production of goods for interstate commerce, is not in itself interstate commerce, but a matter for local regulation. Nor can the constitutional power of Congress over commerce be used to equalize competitive conditions in the various States.

It is interesting to compare the dissenting opinion. The majority say: "In each of these instances [referring to laws against interstate shipment of lottery tickets, intoxicating liquor, etc.—which have been upheld] the use of interstate transportation was necessary to the accomplishment of harmful results." The dissenting Justices state: "It is enough that in the opinion of Congress the transportation encourages the evil."

45. Act of September 8, 1916 (39 Stat. 756–757, in part).

The Income Tax Act of 1916 laid taxes "upon the entire net income received * * * from all sources by every individual, a citizen or resident of the United States * * *." Section 2 (a), defining income, provided "That the term 'dividends' * * * shall be held to mean any distribution made * * * by a corporation * * * out of its earnings or profits accrued since March 1, 1913, and payable to its shareholders, whether in cash or in stock of the corporation * * * which stock dividend shall be considered income, to the amount of its cash value."

EISNER *v.* MACOMBER, 252 U. S. 189 (March 8, 1920).

(Opinion by Justice Pitney; 9 Justices sitting; Justices Holmes, Day, Clarke, and Brandeis dissenting.)

Writ of error to district court for New York. The collector of internal revenue assessed a tax against Macomber on so much of a stock dividend declared by the Standard Oil Co. of California as was attributable to the period subsequent to March 1, 1913. The tax was paid under protest; subsequently suit was brought to recover the amount, and judgment was given for claimant.

Held: Judgment affirmed.

The Sixteenth Amendment (effective Feb. 25, 1913) did not extend the taxing power of Congress—it is still mandatory that direct taxes shall be apportioned. The legislative definition cited, therefore, "cannot conclude the matter" since Congress cannot by legislation alter the Constitution; unless stock dividends are in fact income, within the meaning of that term as used in the Amendment, any tax thereon must be apportioned, under Art. I, § 2. cl. 3, and § 9, cl. 4. The definition of income in *Doyle* v. *Mitchell Bros. Co.* (247 U. S. 179, 185) is adopted: "Income may be defined as the gain derived from capital, from labor, or from both combined." But a stock dividend is not a gain derived by the stockholder—it is not a realization of profits; and the act of 1916, so far as it imposed a tax without apportionment, is invalid.

Justice Holmes, dissenting, remarked tersely: "The known purpose of this [16th] Amendment was to get rid of nice questions as to what might be direct taxes, and I cannot doubt that most people not lawyers would suppose when they voted for it that they put a question like the present to rest."

46. Act of October 3, 1917 (40 Stat. 302, § 4): Additional tax on "income received * * * by every corporation * * *"; page 303 § 201: War excess profits taxes on "income of every corporation * * *"; page 333 § 1206 (amending 39 Stat. 765, § 10): "There shall be levied * * * upon the total net income received * * * by every corporation * * * organized in the United States, * * * a tax of 2 percent upon such income * * *."

Act of February 24, 1919 (40 Stat. 1075, § 230): Tax on "net income of every corporation" (computation of net income involves § 213 and 233); and 1088, § 301: War and excess-profits taxes on "net income of every corporation."

BURNET *v.* CORONADO OIL & GAS CO., 285 U. S. 393 (April 11, 1932).
(Opinion by Justice McReynolds; 9 Justices sitting; Justices Stone, Brandeis, Roberts, and Cardozo dissenting.)

Certiorari to District of Columbia Court of Appeals. Petition for redetermination of income and profits taxes assessed for the years 1917, 1918, and 1919 on income from oil produced from lands granted by the United States to Oklahoma for the support of schools, and by it leased to respondent. The Board of Tax Appeals upheld the tax, and District of Columbia Court of Appeals reversed that decision.

Held: Judgment affirmed. "When Oklahoma undertook to lease her public lands for the benefit of the public schools she exercised a function strictly governmental in character"; and "to tax the income of the lessee arising therefrom would amount to an imposition upon the lease itself", and cannot be done constitutionally within the principle of *Collector* v. *Day*, etc.

Tax acts which "in terms include the character of income in question" may not constitutionally be given effect as against income from leases of public lands which have been granted to a State for maintenance of public schools.

Legislative effect.—The unconstitutionality here declared was the application of the act in a particular case within its general terms. Presumably, this constituted so unusual and minor an exception that Congress thought it unnecessary to write it into subsequent law. At any rate, the excess-profits tax was abolished with the calendar year 1921, but revived in 1933 (48 Stat. 208, § 216), while income taxes on corporations have been continued in the successive revenue acts, the current tax being § 13 of the act of June 22, 1936 (49 Stat. 1648, 1655), "upon the normal-tax net income of every corporation."

47. Act of October 3, 1917 (40 Stat. 316, § 600 (f)).

There shall be levied, assessed, collected and paid—(f) Upon all tennis rackets, golf clubs, baseball bats * * * balls of all kinds, including baseballs * * * sold by the manufacturer, producer, or importer, a tax equivalent to 3 per centum of the price for which so sold.

SPALDING & BROS. *v.* EDWARDS, 262 U. S. 66 (April 23, 1923).
(Opinion by Justice Holmes; 9 Justices sitting; unanimous.)

Writ of error to district court for southern district of New York. Claim was filed to recover money, assessed and paid as a tax on certain baseball equipment, upon sale by the manufacturer, Spalding, to a commission merchant for the express purpose of exportation. Complaint was dismissed below.

Held: Judgment reversed.

The delivery of the articles to the carrier under the circumstances not only consummated the sale by the plaintiff but constituted a step in exportation. And in such case a tax could not constitutionally be laid, under Art. I, § 9 ["No tax or duty shall be laid on articles exported from any State"].

48. Act of October 6, 1917 (40 Stat. 395, c. 97, in part).

This act amended the law granting jurisdiction to United States district courts (Judicial Code, § 24) by adding a saving clause as noted: "Third. Of all civil causes of admiralty and maritime jurisdiction, saving * * * to claimants the rights and remedies under the workmen's compensation law of any State." It added the same clause in § 256, relating to exclusive jurisdiction.

KNICKERBOCKER ICE CO. v. STEWART, 253 U. S. 149 (May 17, 1920).

(Opinion by Justice McReynolds; 9 Justices sitting; Justice Holmes, Pitney, Brandeis, and Clarke dissenting.)

Writ of error to supreme court of New York, appellate division, third judicial department. Claim was filed under the New York Workmen's Compensation Law by the widow of a bargeman who, while in employ of the ice company and on work of maritime nature, was drowned. State court granted an award, on the ground it was authorized by the saving clause cited.

Held: Judgment reversed.

The Court declared that, in view of Art. III, § 2 ["The judicial power shall extend to * * * all cases of admiralty and maritime jurisdiction"] and Art. I, § 8 [Congress may make necessary and proper laws for carrying out granted powers]—"The Constitution itself adopted and established as part of the laws of the United States approved rules of the general maritime law, and empowered Congress to legislate in respect of them * * *. Moreover, it took from the States all power * * * to interfere with its proper harmony and uniformity in its international and interstate relations." Reading the saving clause in the light of the accompanying circumstances, it was an attempt "to sanction action by the States in prescribing and enforcing, as to all parties concerned, rights, obligations, liabilities, and remedies designed to provide compensation for injuries suffered by employees engaged in maritime work." As such it was invalid, since Congress cannot transfer its legislative power.

49. Act of September 19, 1918 (40 Stat. 960, c. 174, in part).

This was the Minimum Wage Law for the District of Columbia, establishing a Minimum Wage Board with authority (§ 9) "to ascertain and declare * * * the following things: (a) Standards of minimum wages for women in any occupation within the District of Columbia, and what wages are inadequate to supply the necessary cost of living to any such women workers to maintain them in good health and to protect their morals; and (b) standards of minimum wages for minors * * *." Later sections required compliance with established rates, and penalized violation by employers.

ADKINS ET AL. v. CHILDREN'S HOSPITAL,
ADKINS ET AL. v. LYONS, } 261 U. S. 525 (April 9, 1923).

(Opinion by Justice Sutherland; 8 Justices sitting; Chief Justice Taft, and Justices Holmes and Sanford dissenting.)

Appeals from District of Columbia Court of Appeals. Two suits were brought against the Wage Board to enjoin enforcement of the act, one by an employer, the other by an employee. In both cases the employees involved were women of full age. The District of Columbia courts issued permanent injunctions.

Held: Decree affirmed.

Freedom of contract is included in the liberty guaranteed by the Fifth Amendment; and "the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circum-

stances." Thus, *e. g.*, laws fixing hours of labor in particular occupations may be upheld for protection of the health of employees. But the law cited applies to all occupations and attempts to fix minimum wages, on the basis not of work performed but of cost of living. The standard prescribed, "necessary to maintain them in good health", etc., is too vague for practical application; and there is "no such prevalent connection between [morality and wages] as to justify a broad attempt to adjust the latter with reference to the former."

50. Act of February 24, 1919 (40 Stat. 1065, c. 18, § 213, in part).

This section of the Income Tax Act defined "gross income" as including "gains, profits, and income derived from salaries, wages or compensation for personal service (including in the case of the President of the United States, the Judges of the Supreme and inferior courts of the United States * * * the compensation received as such * * *."

A. EVANS *v.* GORE, 253 U. S. 245 (June 1, 1920).

(Opinion by Justice Van Devanter; 9 Justices sitting; Justices Holmes and Brandeis dissenting.)

Writ of error to district court for Kentucky. Evans, a United States district judge, paid under protest a tax computed on his income including his salary as a judge, and brought suit to recover amount paid (excluding his official salary he would not have been liable to any tax at all).

Held: Judgment for United States reversed.

Constitution Art. III states: "The judges both of the supreme and inferior courts * * * shall at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office." That provision was intended to secure the independence of the Federal judiciary; it is to be construed not as a private grant, but as a limitation imposed in the public interest—*i. e.*, liberally. Accordingly, an indirect diminution through exercise of the taxing power, as in the act cited, is in violation of the spirit of the Constitution and not supported by the Sixteenth Amendment.

Dissent went on ground there was "no reason for exonerating [a judge] from the ordinary duties of a citizen, which he shares with all others"; also that the Sixteenth Amendment authorized such a tax.

B. MILES *v.* GRAHAM, 268 U. S. 501 (June 1, 1925).

(Opinion by Justice McReynolds; 9 Justices sitting; Justice Brandeis dissenting).

Writ of error to district court for Maryland. By act of February 25, 1919 (1 day after the Revenue Act) the salary of judges of the Court of Claims was fixed at $7,500. Graham was appointed to the court on September 1, 1919. Having paid under protest a tax on his income including official salary, he sued to recover, and district court gave judgment for him.

It was argued that the diminution did not occur during Graham's term of office.

Held: Judgment affirmed.

The question was stated on p. 508: "Does the circumstance that defendant in error's appointment came after the taxing Act require a different view concerning his right to exemption" [from that laid down in *Evans* v. *Gore*]? The answer was held to depend upon the meaning of "compensation", as used in Constitution, Art. III, § 1. That section was found to "impose upon Congress the duty definitely

to declare what sum shall be received by each judge out of the public funds." In the instant case that sum was the $7,500 fixed by the act of February 25; and to exact a tax "in respect of this" would be unconstitutional within the rule of the Evans case. This result would be reached regardless of the relative dates of the taxing act and the basic salary act (p. 509): "if the dates were reversed it would be impossible to construe the former as an amendment which reduced salaries by the amount of the tax imposed * * *. The plain purpose was to require all judges to return their compensation as an item of "gross income", and to tax this as other salaries."

51. Act of February 24, 1919 (40 Stat. 1097, § 402 (c)).

Title IV of the Revenue Act of 1918 laid a graduated tax "upon the transfer of the net estate of every decedent" dying after passage of the act; and provided in § 402 that gross estate, for purposes of computation of this tax, should include the value, at time of death, of all property "(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he had at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this act) except in case of a bona fide sale * * *."

NICHOLS, COLLECTOR *v.* COOLIDGE ET AL., EXECUTORS, 274 U. S. 531 (May 31, 1927).

(Opinion by Justice McReynolds; 9 Justices sitting; Justices Holmes, Brandeis, Sanford, and Stone concurring in result.)

Writ of error to district court for Massachusetts. Executors of Mrs. Coolidge omitted from their return the value of certain properties transferred before passage of the act: (1) in 1907 to trustees, to pay income to settlors (Mr. Coolidge joining in the deed) for life, and at death to distribute among their children; (2) in 1917 to the children directly, with an understanding that grantors should have, under annually renewable leases, the use of the property for residence so long as they desired. The Commissioner of Internal Revenue included this property in gross estate under § 402 (c) above cited, and assessed an additional tax, which was paid under protest. In suit by executors to recover, the district court held: (1) that the transfer of 1917 was on its facts an absolute transfer not in contemplation of death, and therefore not within the terms of the statute; (2) that the transaction of 1907 was intended "to take effect in possession or enjoyment" at the death of the settlors, and that as applied to such a situation § 402 (c) was unconstitutional.

Held: Judgment affirmed.

The transfer in 1907 was not even claimed to have been made in contemplation of death or to evade taxation. It was not in fact testamentary; and the provision of § 402 (c) was therefore as applied to this transfer an attempt to impose an excise, in an amount determined by "past lawful transactions, not testamentary in character and beyond recall"; and "in so far as it requires that there shall be included in the gross estate the value of property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious, and amounts to confiscation", contrary to the Fifth Amendment (citing *Brushaber* v. *Union Pac. R. R.* (240 U. S. 1, 24).

52. Act of February 24, 1919 (40 Stat. 1138, Title XII, entire).

The Child Labor Tax Act, providing in substance that "every person * * * operating * * * (b) any * * * factory [etc.] * * * in which children under the age of 14 years have been employed or permitted to work * * * shall pay * * * in addition to all other taxes imposed by law, an excise tax equivalent to 10% of the entire net profits received * * * for such year from the sale * * * of the product of such * * * factory."

BAILEY v. DREXEL FURNITURE CO. (*Child Labor Tax Case*), 259 U. S. 20 (May 15, 1922).

(Opinion by Chief Justice Taft; 9 Justices sitting; Justice Clarke dissenting.)

Writ of error to district court for North Carolina. The furniture company paid under protest a tax assessed for having employed a boy under 14. In suit to recover amount paid, judgment was given for plaintiff. In the Supreme Court, it was argued that the tax imposed was none the less a tax because practically prohibitive; that the taxing power comprehends all taxable objects and may be exercised at the discretion of Congress, subject only to specific limitations of the Constitution; that it is not limited even to the raising of revenue; and that the motive of Congress is immaterial.

Held: Judgment affirmed.

The act, while imposing a so-called tax, was on its face designed to stop the employment of children within prescribed age limits—a matter solely within State authority. "Its prohibitory and regulatory effect and purpose are palpable." What is called a tax is really a penalty to enforce compliance; it exhibits this purpose "by adopting the criteria of wrong-doing and imposing its principal consequence on those who transgress its standard."

53. Act of October 22, 1919 (41 Stat. 298, § 2), amending act of August 10, 1917 (40 Stat. 277, § 4).

SEC. 4 of the Lever Act was amended to provide in part: "* * * That it is hereby made unlawful for any person wilfully * * * to destroy any necessaries for the purpose of enhancing the price * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries * * *", followed by a penalty.

UNITED STATES *v.* COHEN GROCERY CO., 255 U. S. 81 (February 28, 1921).

(Opinion by Chief Justice White; 8 Justices sitting; Justices Pitney and Brandeis concurring in result but not on the constitutional question.)

Writ of error to district court for Missouri. Indictment under this section charged that the Cohen company made an unjust and unreasonable rate and charge in dealing, etc., in sugar, by making certain sales at unreasonable prices. Demurrer was sustained; and appeal taken on constitutional grounds.

Held: Judgment, quashing indictment, affirmed.

The majority of the Court held, first, that the language of the section "make any * * * unreasonable rate or charge in handling or dealing in"—includes charging an unreasonable price on sale. But as a penal provision, the words "unjust or unreasonable rate or charge" do not set up an ascertainable standard of guilt, within the requirement of the Sixth Amendment. The dissenting Justices, on a more detailed examination of the wording of the section, considered the question one of statutory construction. In view, inter alia, of the use of the specific term "price" in other clauses of the section, they held that the variation in the particular clause here involved must rea-

sonably mean something else than price. At the same time, they conceded that it was "not altogether evident" just what the clause was intended to include; and presumably would have concurred in holding it unconstitutional in a case within its scope (see p. 96).

NOTE.—The principle of this and the *Weeds case*, below, was explained in *Small Co.* v. *American Sugar Refining Co.*, 267 U. S. 233, where section 4 was set up as a defense to a breach of contract for sale of sugar. It will be noticed that grammatically the section consists of a simple declaration that certain acts are unlawful (the sentence quoted above), and a penalty. In the *Small Co. case*, it was contended that under this provision the refining company was not entitled to "more than a reasonable profit"; but demurrer to this defense was sustained. The Court said that the principle of the *Cohen case* was not applicable to criminal proceedings alone. "It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all. Any other means of exaction, such as declaring the transaction unlawful or stripping a participant of his rights under it, was equally within the principle of those cases."

It further quotes with approval the New York Court of Appeals in *Standard Chemicals Corp.* v. *Waugh Chemicals Corp.*, 231 N. Y. 51, 54, referring to the *Cohen case*: "The prohibition was declared a nullity because too vague to be intelligible * * *. If this is the rationale of the decision, its consequences are not limited to criminal prosecutions * * *"

Concluding its statements on this point, the Supreme Court declares (p. 242): "As section 4 was invalid, whether taken as a civil regulation or as a criminal statute, it follows that in so far as the special defenses were based on it the demurrers were rightly sustained." This specific language of the *Small Co. case* might seem to imply that the Court is therein holding § 4 invalid, and the case is in fact sometimes so listed. But certainly the constitutional argument is directed solely to brushing away attempted distinctions between this and the *Cohen case*; no new grounds are advanced, it is simply determined that the earlier decision is broad enough to apply. *Small Co.* v. *American Sugar Refining Co.* is therefore not listed here.

54. Act of October 22, 1919 (41 Stat. 298, Sec. 2).

The section construed in the *Cohen Grocery Co. case* further declared it unlawful "to conspire, combine, agree, or arrange with any other person to * * * exact excessive prices for any necessaries."

WEEDS, INC., *v.* UNITED STATES, 255 U. S. 109 (February 28, 1921).

(Opinion by Chief Justice White; 8 Justices sitting; Justices Pitney and Brandeis dissenting on the constitutional question, though concurring in result.)

Writ of error to district court for New York. Indictment charged conspiracy under the section, to exact excessive prices for certain necessaries. Demurrer was overruled below.

Held: Judgment reversed, on authority of *Cohen case*.

Dissent held that "excessive" meant higher than standard fair market value; and that the clause was separable and valid, even without the aid of the separability clause.

Legislative effect.—See note to *Cohen Grocery Co. case*, above.

55. Act of August 24, 1921 (42 Stat. 187, c. 86, with minor exceptions).

This was the Future Trading Act, containing the following salient provisions:

SEC. 3: "That in addition to the taxes now imposed by law, there is hereby levied a tax amounting to 20 cents per bushel on each bushel involved therein, whether the actual commodity is intended to be delivered or only nominally referred to, upon each * * * option for a contract either of purchase or sale of grain * * *."

SEC. 4: "That in addition to the taxes now imposed by law, there is hereby levied a tax of 20 cents a bushel on every bushel involved therein, upon each contract of sale of grain for future delivery", except when seller is owner at the time, or when made through designated boards of trade, etc., and evidenced by written memorandum, etc.

Section 5 provided that boards of trade might be designated as "contract markets" only when * * * (b) provision was made for permanent record of all cash sales as well as transactions for future delivery—to be preserved for three years; (c) when the governing board "prevents the dissemination, by the board or any member thereof, of false, misleading, or inaccurate report, concerning crop or market information or conditions that affect or tend to affect the price of commodities"; (e) when it admits "to membership thereof and all privileges thereon on such boards of trade any duly authorized representative of any lawfully formed and conducted cooperative association of producers having adequate financial responsibility."

A. HILL ET AL. *v.* WALLACE ET AL., 259 U. S. 44 (May 15, 1922).

(Opinion by Chief Justice Taft; 9 Justices sitting; unanimous.)

Appeal from district court for northern district of Illinois. Bill was filed by eight members of the Chicago Board of Trade against the Secretary of Agriculture, the Commissioner and local collector of internal revenue, the district attorney, and the Board of Trade, to enjoin enforcement of or compliance with the act. District court dismissed the bill for want of equity.

Held: Decree reversed; injunction to be granted against the collector and district attorney, so far as section 4 is concerned, and the regulations of the act interwoven with it.

"The act is in essence and on its face a complete regulation of boards of trade, with a penalty of 20 cents a bushel on all 'futures' to coerce boards of trade and their members into compliance." There is no constitutional support in Art. I, Sec. 8 for the "tax" therein imposed. And the act does not purport to rest on the commerce clause, as indeed it could not; sales for future delivery are not in themselves interstate commerce. In spite of the separability clause in section 11, the regulations of the act, connected with the tax in section 4, fall with that section. But—"There are sections of the act to which under section 11 the reasons for our conclusions as to section 4 and the interwoven regulations do not apply. Such is section 9 authorizing investigations by the Secretary of Agriculture and his publication of results. Section 3, too, would not seem to be affected by our conclusion."

B. TRUSLER *v.* CROOKS, 269 U. S. 475 (January 11, 1926).

(Opinion by Justice McReynolds; 9 Justices sitting; unanimous.)

Writ of error to district court for Missouri. Trusler sued to recover amount paid under protest for revenue stamps affixed to an "indemnity"—an option for a contract for sale of grain within the terms of section 3. Judgment for defendant.

Held: Judgment reversed.

Section 3 was a mere feature of the general plan of the act to regulate future trading in grain; it had no separate purpose.

56. Act of November 23, 1921 (42 Stat. 261, sec. 245, part).

Section 243 of the Revenue Act of 1921 provided in part: "That * * * there shall be levied * * * upon the net income of every life insurance company a tax as follows: (1) In the case of a domestic life insurance company, the same percentage of its net income as is imposed upon other corporations by section 230 [10% for 1921; 12½% thereafter]." Net income of life insurance companies was defined in sec. 245 as "gross income" less (1) interest on tax-exempt securities; and (2) an amount equal to the excess over this interest on tax-exempts of 4% of the mean reserves.

"Gross income" was defined in sec. 244 as the gross amount received from interest, dividends, and rents. Section 213 of the act exempted from tax the interest on State, municipal, and Federal obligations, etc.

NATIONAL LIFE INSURANCE CO. *v.* UNITED STATES, 277 U. S. 508 (June 4, 1928).

(Opinion by Justice McReynolds; 9 Justices sitting; Justices Brandeis, Holmes, and Stone dissenting.)

Certiorari to the Court of Claims. The insurance company sought to recover a tax assessed in accordance with the terms of section 245; that is, from gross income (including interest on tax-exempt securities) had been deducted, under section 245 (1), the same amount of interest on tax-exempts; and under section 245 (2) the difference only between this amount and 4 percent of the mean reserves. In practical effect, it meant that the petitioner company was assessed exactly the same tax upon a gross income, about one-third of which was interest on tax-exempt securities, that would have been payable if its entire income had been derived from tax-exempts. The company insisted, (1) that this was in effect taxing the income of the tax-free securities, and (2) that it was discriminatory as between insurance companies and individuals, and between various companies themselves. The court dismissed the petitions.

Held: Judgment reversed.

Section 245 (2) diminished the deduction otherwise allowable, by the exact amount of interest on tax-exempt securities. This "if permitted, * * * would destroy the guaranteed exemption. One may not be subjected to greater burdens upon his taxable property solely because he owns some that is free. No device or form of words can deprive him of the exemption for which he has lawfully contracted."

57. Act of June 10, 1922 (42 Stat. 634, c. 216).

This was a second amendment of § 24 of the Judicial Code, granting admiralty jurisdiction to United States courts, by adding to the clause saving to suitors the right of a common-law remedy the following: "* * * saving * * * to claimants for compensation for injuries to or death of persons other than the master or members of the crew of a vessel their rights and remedies under the workmen's compensation law of any State, District, Territory, or possession of the United States, which rights and remedies when conferred by such law shall be exclusive * * * Provided, That the jurisdiction of the district courts shall not extend to causes arising out of injuries to or death of persons other than the master or members of the crew, for which compensation is provided by the workmen's compensation law of any State."

WASHINGTON *v.* DAWSON AND CO., and INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA *v.* ROLPH CO. ET AL., 264 U. S. 219 (February 25, 1924).

(Opinion by Justice McReynolds; 9 Justices sitting; Justices Holmes and Brandeis dissenting.)

Writs of error to the supreme courts of Washington and California. In the first case, the State court dismissed a complaint brought by the State to recover a contribution to the accident fund; in the second, it annulled an award by the State Industrial Accident Commission to the dependents of an employee dying from injuries sustained while working as a stevedore on a vessel in San Francisco Bay.

Held: Both judgments affirmed, on authority of *Knickerbocker Ice Co.* v. *Stewart;* the clause was an attempt to delegate legislative power to the States. The proviso must be read as supplementary to the saving clause—consequently it falls with it.

58. Act of June 2, 1924 (43 Stat. 313, pt. II, in part).

The Gift Tax provisions of the Revenue Act of 1924 read (p. 313, sec. 319): "For the calendar year 1924 and each calendar year thereafter, a tax * * * is hereby imposed upon the transfer * * * of any property situated within the United States whether made directly or indirectly * * *"; followed by rates, regulations, etc.

UNTERMYER *v.* ANDERSON, COLLECTOR, 276 U. S. 440 (April 9, 1928).

(Opinion by Justice McReynolds; 9 Justices sitting; Justices Holmes, Brandeis, and Stone dissenting.)

Certiorari to Court of Appeals, second circuit. Suit was brought in district court to recover tax paid on account of a gift made on May 23, 1924, while the conference report on the bill which became the act of June 2, was pending. Judgment for collector was affirmed by Circuit Court of Appeals.

Held: Judgment reversed.

A majority of the court held that the act applied, according to its terms, to gifts made at any time during the calendar year; and that as to gifts fully consummated before final passage of the act, the tax was invalid under the due process clause of the Fifth Amendment. The argument is somewhat more detailed in *Blodgett* v. *Holden*, in the opinion of the four Justices who held this same act invalid as to gifts made in January 1924 (275 U. S. 142, 147):

As to the gifts which Blodgett made during January 1924 [*i. e.*, before the Gift Tax bill was presented in Congress] we think the challenged enactment is arbitrary and for that reason invalid. It seems wholly unreasonable that one who, in entire good faith and without the slightest premonition of such consequence, made absolute disposition of his property by gifts should thereafter be required to pay a charge for so doing.

Justice Sanford who concurred with Justices Holmes, Brandeis, and Stone in reading the act as constitutional, "concurred in the result" here. Dissent stressed the fact that most tax acts are retroactive anyway.

59. Act of June 2, 1924 (43 Stat. 322, sec. 600), Excise Tax on Sporting Goods, in part:

"* * * There shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer * * * a tax equivalent to the following percentage of the price for which so sold or leased—

(2) * * * motor cycles (including tires, inner tubes * * * sold on or in connection therewith or with the sale thereof) * * * 5 per centum * * *."

INDIAN MOTOCYCLE CO. v. UNITED STATES, 283 U. S. 570 (May 25, 1931).

(Opinion by Justice Van Devanter; 9 Justices sitting; Justices Stone and Brandeis dissenting.)

Certificate from Court of Claims, in suit to recover tax paid by manufacturer on sale of a motorcycle to the city of Westfield, Mass., for police purposes. The question was, in substance, whether the transaction noted could be taxed under section 600 "consistently with the constitutional immunity of the State and her governmental agencies from Federal taxation."

Held: Question answered in the negative.

The tax was an excise on the sale, and hence not a direct tax. But it amounts in the present case to an interference with "instrumentalities, means, and operations whereby the States exert the govern-

mental powers belonging to them", and is in violation of the constitutional immunity established by the cases beginning with *Collector v. Day*. "We think it follows * * * [especially from *Panhandle Oil Co. v. Knox*, 277 U. S. 218] that the sale of motorcycles to a State agency, such as a municipal corporation, for use in the police service is not subject to taxation by the United States."

60. Act of February 26, 1926 (44 Stat. 70, sec. 302, in part).

This section of the Estate Tax, defining value of gross estate, provided in part, that it should include transfers in contemplation of death; and that "where, within two years prior to his death but after the enactment of this Act, and without such a consideration [in money or money's worth] the decedent has made a transfer or transfers, by trust or otherwise, of any of his property, or an interest therein, not admitted or shown to have been made in contemplation of or intended to take effect in possession or enjoyment at or after his death, and the value or aggregate value, at the time of such death, of the property or interest so transferred to any one person is in excess of $5,000, then to the extent of such excess, such transfer or transfers shall be deemed and held to have been made in contemplation of death within the meaning of this title."

HEINER, COLLECTOR *v.* DONNAN, 285 U. S. 312 (March 21, 1932).

(Opinion by Justice Sutherland; 8 Justices sitting; Justices Stone and Brandeis dissenting.)

Certificate from Circuit Court of Appeals, Third Circuit. Donnan had made irrevocable gifts of money and securities to or for his children, on March 1, 1927, within 2 years of his death. The value of these gifts was included in gross estate and taxed accordingly, under section 302, cited. Suit was brought in district court by executors to recover amount of tax attributable to such gifts. Trial court found transfers not made in contemplation of death, and gave judgment for executors. On appeal, the Circuit Court of Appeals certified the question whether the sentence of section 302 above quoted was in violation of the due process clause of the Constitution.

Held: Question answered in the affirmative.

A transfer of property, begun and completed wholly by and between the living, is taxable as a gift, but is "obviously not subject to any form of death duty, since it bears no relation whatever to death * * * no interest of any kind remains to pass to one or cease in the other in consequence of the death which happens afterward." While Congress might include in a death tax transfers made in contemplation of death, the provision cited attempts to create a conclusive presumption of such intent, without regard to actualities. The result is not taxation but spoliation, without due process of law. Nor can the provision be upheld as a gift tax: That would be contrary to the expressed intent, and would still constitute an unreasonable classification in violation of the Fifth Amendment.

61. Act of February 26, 1926 (Revenue Act of 1926), 44 Stat. 95, § 701.

"On and after July 1, 1926, there shall be * * * paid annually, in lieu of the tax imposed by § 701 of the Revenue Act of 1924, a special excise tax of $1,000 in the case of every person carrying on the business of a brewer, distiller, wholesale liquor dealer, retail liquor dealer * * * contrary to the laws of such State * * * or in any place therein in which carrying on such business is prohibited by local or municipal law * * *." The section further provided that payment of such special tax was not to exempt from penalty under local law or to authorise the carrying on of such business; and a further "penalty" of $1,000 for continuing such business without payment of the special tax.

UNITED STATES *v.* CONSTANTINE, 296 U. S. 287 (December 9, 1935).

(Opinion by Justice Roberts; 9 Justices sitting; Justices Cardozo, Brandeis, and Stone dissenting.)

Certiorari to review judgment of Fifth Circuit Court of Appeals.

Constantine was prosecuted in November 1934 for carrying on business as a retail dealer in malt liquor without paying special tax under § 701, and contrary to the laws of Alabama. Conviction in district court was reversed in circuit court of appeals on the ground that the section fell with the repeal of the Eighteenth Amendment.

Held: Judgment affirmed.

The Supreme Court grounded its decision on the one point that "where, in addition to the normal and ordinary tax fixed by law, an additional sum is to be collected by reason of conduct of the taxpayer violative of the law, and this additional sum is grossly disproportionate to the amount of the normal tax, the conclusion must be that the purpose is to impose a penalty as a deterrent and punishment of unlawful conduct"; and as such penalty, its only support was the Eighteenth Amendment (repealed Dec. 5, 1933). The Court expressly passed by the grounds relied upon below—viz, the legislative history and administrative interpretation of the section, and the question as to uniformity of operation, if considered as a tax.

The minority, on the other hand, held that reasonable bases were not wanting for the section as a tax measure—and that, in accordance with the doctrine that every possible presumption must be indulged in favor of validity, the court should not read beneath the surface to impute a purpose beyond the power of Congress. To do so, is to extend the "process of psychoanalysis" to "unaccustomed fields."

The validity of § 701 was similarly involved in *United States* v. *Kesterson*, 296 U. S. 299, which was decided upon the reasoning of the *Constantine case* and with the same dissent.

In view of the circumstances of this case, no legislative action is to be looked for.

62. Act of March 20, 1933 (48 Stat. 11, sec. 17).

"* * * all laws granting or pertaining to yearly renewable term insurance are hereby repealed * * *." This was followed by several provisos excepting from the operation of the repeal "payments heretofore made or hereafter to be made under contracts of yearly renewable term insurance which have matured prior to the date of enactment of this Act, and under which payments have been commenced, or on any judgment heretofore rendered in a court of competent jurisdiction in any suit on a contract of * * * insurance, or which may hereafter be rendered in any such suit now pending."

LYNCH *v.* UNITED STATES, 292 U. S. 571 (June 4, 1934), decided together with *Wilner* v. *United States*.

(Opinion by Justice Brandeis; 9 Justices sitting; unanimous.)

Certiorari to Circuit Courts of Appeals, Fifth and Seventh Circuits, to review judgments sustaining dismissals by district courts of actions brought, after March 20, 1933, to recover under outstanding policies of term insurance.

Held: Judgments reversed. Policies of war-risk insurance, though not made for gain, are legal obligations possessing the same legal incidents as other contracts of the United States. They create vested rights, protected by the Fifth Amendment. And while, under the principle of immunity of a sovereign from suit without its

consent, the United States may at will withdraw the remedy from an obligation, the repeal in the act of March 20 was "intended to take away the right", and is invalid, under the due process clause, to affect existing contracts.

63. Agricultural Adjustment Act of May 12, 1933 (48 Stat. 31).

The act stated a policy, to establish and maintain such balance between production and consumption of agricultural commodities and such marketing conditions as would reestablish prices to farmers giving them purchasing power equivalent to that during the period 1909–1914. To effectuate such policy, it empowered the Secretary of Agriculture in his discretion to enter into voluntary agreements with producers for reduction of acreage or of production, and for rental or benefit payments in connection therewith. Revenue for making such payments was to be raised by processing taxes ("at such rate as equals the difference between the current average farm price for the commodity and the fair exchange value") effective upon proclamation by the Secretary and subject to adjustment by him. The proceeds of such taxes were specifically appropriated for expenses under the act, rental and benefit payments, refunds, etc.

UNITED STATES v. WM. M. BUTLER ET AL., Receivers of Hoosac Mills Corp., 297 U. S. 1 (Jan. 6, 1936).

(Opinion by Justice Roberts; 9 Justices sitting; Justices Stone, Brandeis, and Cardozo dissenting).

Suit by United States to enforce payment of processing and floor taxes on cotton. District court ordered payment; Circuit Court of Appeals, First Circuit, reversed the order.

On writ of certiorari, judgment affirmed.

The Court first upheld the right of respondent to challenge the validity of the tax—on the ground that the suit was not merely to restrain expenditure of public moneys but a challenge to the tax as an integral part of an entire unauthorized plan. It is impossible to dissect the act into two separate parts, a tax and an independent appropriation. The whole act clearly shows the absolute interrelation of the tax on any particular commodity and the benefits, etc., to producers of that commodity. The exaction ("processing tax") is, therefore, in no real sense a tax—for the support of the Government.

However, the real question is not as to the character of the exaction—but whether the plan of which it is a part is an expedient regulation of a subject falling within the granted powers of Congress—*i. e.*, Art. I, § 8—the power "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States." The United States did not contend that this means unlimited power to provide for the general welfare; and the Court expressly adopts the view that it does mean the power to tax for the purpose of making provision for the general welfare. The Government's argument was that the taxing power of Congress was cooextensive with a liberal construction of "general welfare"—which would include the processing taxes in question.

But the Court—while stating clearly that the power to tax implied corresponding power to spend the resulting funds—and that this power of appropriation was not to be restricted by the enumerated grants of power, but by the terms of its own clause alone—viz, the common defense and general welfare—determines the instant case without deciding whether agricultural relief is or is not within the

scope of that term. It holds that the act invades the reserved powers of the States.

Further, it holds that the plan of the act, though normally voluntary, is in fact compulsory through the coercion of economic pressure; but that even if purely voluntary, it would be equally invalid, as the United States cannot expend moneys to purchase action in a field in which it has no authority to act directly.

Dissenting Justices distinguish the processing tax from the taxes invalidated in the *Child Labor Tax case*, etc.—where the tax itself constituted the "regulation" of matters within State control—holding that here, no appreciable effect on the business of processors can be ascribed to the processing taxes. They affirm that a tax does not become something other than a tax because it is a step in a larger plan. They point out that the "economic pressure" involved herein and relied on by the majority is the reverse of the ordinary meaning of that phrase—*i. e.*, there is here a hope of gain, not a threat of loss.

Further they claim that "the power of Congress to spend is inseparable from persuasion to action over which Congress has no legislative control"—citing numerous examples, as far back as the allotments to agricultural colleges (1862); and they hold that if the object of an expenditure be itself in promotion of the general welfare (and the relief of farmers aimed at by the A. A. A. is, they maintain, within this term) the constitutional grant of power—necessarily implied in the power to appropriate—carries with it the power to impose conditions reasonably adapted to insuring attainment of the constitutional object.

64. Joint Resolution of June 5, 1933 (48 Stat. 113, § 1).

> That (a) every provision contained in * * * any obligation which purports to give the obligee a right to require payment in gold * * * or in an amount in money of the United States measured thereby, is declared to be against public policy * * * any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is hereby repealed * * *.

PERRY *v.* UNITED STATES, 294 U. S. 330 (February 18, 1935).

(Opinion by Chief Justice Hughes; 9 Justices sitting; Justices McReynolds, Van Devanter, Sutherland, and Butler dissent from decision, and Justice Stone from the constitutional holding.)

Perry, as owner of a Fourth Liberty Loan 4¼% bond containing a "gold clause", was refused payment in gold or in legal tender currency to an amount greater than the face of the bond. He thereupon sued in the Court of Claims, and that Court certified the following two questions:

(1) Is the claimant [owner of a bond as noted] entitled to receive from the United States an amount in legal tender currency in excess of the face amount of the bond?

(2) Is the United States [as obligor in such a bond] liable to respond in damages in a suit in the Court of Claims on such bond as an express contract, by reason of Public Resolution, No. 10, Seventy-third Congress, abrogating the gold clause in all obligations?

Held: Question No. 1 answered "No", and therefore it was unnecessary to answer No. 2.

The opinion declared: "The question is necessarily presented whether the Joint Resolution of June 5, 1933, is a valid enactment so far as it applies to the obligations of the United States." The repeal of the gold clause in an obligation of the Government constituted a

repudiation violating the pledge implicit in Art. I, § 8 ["to borrow money on the credit of the United States"], and within the prohibition of the Fourteenth Amendment ["The validity of the public debt * * * shall not be questioned"]. But the Court found that plaintiff's claim, for legal tender currency in an amount above face of the bond corresponding to the relative value of gold in 1918 and 1934, would, under the present circumstances—[*i. e.*, with payments and dealings in gold restricted, etc.]—constitute "not a recoupment of loss in any proper sense but an unjustified enrichment." Therefore, plaintiff was not entitled to recover (since Court of Claims has no jurisdiction of merely nominal damages).

The four Justices who "dissented" were agreed that the resolution was unconstitutional, but they objected to the result of the majority opinion—*i. e.* the practical effectuation of the gold-clause abrogation by holding that plaintiff was not damaged. "Obligations cannot be legally avoided by prohibiting the creditor from receiving the thing promised. The promise was to pay in gold, standard of 1900, otherwise to discharge the debt by paying the value of the thing promised in currency. One of these things was not prohibited. The Government may not escape the obligation of making good the loss incident to repudiation by prohibiting the holding of gold * * *. There would be no serious difficulty in estimating the value of 25.8 grains of gold in the currency now in circulation" (p. 378).

But Justice Stone, though concurring in decision, thought it unnecessary to go further than to hold plaintiff not entitled to recover, under the circumstances. "It would seem that this would suffice to dispose of the present case, without attempting to prejudice the rights of other bond holders and of the Government under other conditions which may never occur." The decision is therefore apparently 8 to 1 on the bare constitutional question.

65. Act of June 16, 1933 (48 Stat. 195, Title I, in part).

Section 3 (a) provided in substance: Upon application by one or more trade or industrial groups, the President may approve a code of fair competition for the trade or industry represented, if he finds (1) that such groups impose no inequitable restrictions on admission to membership therein, and are truly representative of such trades and (2) that such code is not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy of this title: *Provided*, That such code shall not permit monopolies or monopolistic practices. The President may, as a condition of his approval of any such code, impose such conditions (including requirements for the making of reports and the keeping of accounts) for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest, and may provide such exceptions to and exemptions from the provisions of such code, as in his discretion he deems necessary to effectuate the policy herein declared.

SCHECHTER POULTRY CORP. ET AL. *v.* UNITED STATES, and UNITED STATES *v.* SCHECHTER POULTRY CORP. ET AL., 295 U. S. 495 (May 27, 1935).

(Opinion by Chief Justice Hughes; 9 Justices sitting; unanimous—Justices Cardozo and Stone in a concurring opinion.)

Certiorari to Circuit Court of Appeals, Second Circuit.

The Schechter Corporation was a slaughterhouse operator, purchasing live poultry in the New York (and Philadelphia) wholesale markets—largely brought there through interstate channels—trucking it to their place of business in Brooklyn, selling to retailers, and slaughtering before delivery. Indictment charged violations of the "Code of Fair Competition for the Live-Poultry Industry of

the metropolitan area in and about the city of New York"—and also conspiracy to so violate. Defendant raised three objections to the code, by demurrer: (1) Delegation of legislative power; (2) interference with intrastate commerce; (3) violation of due process. Out of the 60 counts in the indictment, 27 were dismissed, on 14 the defendant was acquitted, and on 19 was convicted. The Circuit Court of Appeals sustained the conviction on all 19, except on 2 counts charging violation of code requirements as to minimum wages and maximum hours—holding that on these points Congress had no constitutional power of regulation.

Held: Conviction reversed (and reversal below on the counts relating to wages and hours of labor, affirmed).

(1) Section 3 (a) constituted an absolute, affirmative grant of legislative power to the President. His authority in the approval of codes is not limited to the prevention of "unfair methods of competition" but is as broad as the "policy of this title", which is expressed in section 1 as follows:

> It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources.

This gives the President "virtually unfettered" discretion.

(2) Even apart from the invalidity as a delegation of legislative power the particular code in question goes beyond the commerce power of Congress, and is invalid on that score. Defendant's operations took place after the poultry had ended its interstate transportation; they had, therefore, at most only an indirect effect on interstate commerce and indirect effect is not sufficient to justify Congressional interference.

(3) The conclusions reached on the question of delegation of legislative power, etc., render unnecessary any discussion of due process.

Doubtless in view of his dissent in the *Panama Oil Refining case* (see below) Justice Cardozo concurred specially in the instant case, distinguishing it on the ground that in the *Oil case* the President was limited to a single definite act—namely, a restriction on the interstate shipment of "hot oil", while in respect of codes of fair competition there is no such limitation—so far from being a single negative, a code under section 3 (a) looks to affirmative action, "the planning of improvements as well as the extirpation of abuses."

66. Act of June 16, 1933 (48 Stat. 200, sec. 9 (c)).

> Section 9 was distinct from the body of title I (primarily relating to industrial codes). It was given a separate subject heading—"Oil Regulation." Subsection (c) provided that "the President is authorized to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any State law or valid regulation * * * thereunder * * *. Any violation of any order of the President issued under the provisions of this subsection shall be punishable by fine of not to exceed $1,000 * * *."

PANAMA REFINING CO., ET AL. *v.* RYAN ET AL.; and AMAZON PETROLEUM CORP. ET AL. *v.* RYAN ET AL., 293 U. S. 388 (January 7, 1935).

(Opinion by Chief Justice Hughes; 9 Justices sitting; Justice Cardozo dissenting.)

Certiorari to Circuit Court of Appeals, Fifth Circuit. Suit was brought by the oil companies to enjoin enforcement of certain Executive Orders, and administrative regulations issued thereunder, based on section 9 (c). District court ordered the injunctions; Circuit Court of Appeals reversed. Grounds of challenge were (1) delegation of power; (2) violation of commerce clause. The *Amazon case*, in addition, challenged the Petroleum Code, Art. III, sec. 4, which limited production through an allocation of quotas.

Held: Decree reversed, and permanent injunction to be issued. As the provision of the Petroleum Code in question had been eliminated by a subsequent Executive Order (of which notice had apparently not been given) the decision was limited substantively to section 9 (c). And this was held defective as a delegation of power—without passing on its validity under the commerce clause. The section attempted to authorize the President to pass a prohibitory law with a heavy penalty, without anywhere defining a policy, even by implication. It simply defined the subject—viz, interstate transportation of "hot oil"—but "there is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed. If section 9 (c) were held valid, it would be idle to pretend that anything would be left of limitations upon the power of Congress to delegate its lawmaking functions."

Justice Cardozo, dissenting, felt that a standard [for action under sec. 9 (c)] might reasonably be implied from a view of the act as a whole. Page 435: "There has been no grant to the Executive of any roving commission to inquire into evils and then, upon discovering them, do anything he pleases." Page 440: "I am persuaded that a reference, express or implied to the policy of Congress as declared in section 1 is a sufficient definition of a standard to make the statute valid."

67. Act of June 16, 1933 (48 Stat. 307, sec. 13).

For the period of the fiscal year ending June 30, 1933, remaining after the date of the enactment of this Act, and during the fiscal year ending June 30, 1934, the retired pay of Judges (whose compensation, prior to retirement or resignation, could not, under the Constitution, have been diminished) is reduced by 15 per centum.

BOOTH *v.* UNITED STATES (decided together with AMIDON *v.* UNITED STATES), 291 U. S. 339 (Feb. 5, 1934).

(Opinion by Justice Roberts; 9 Justices sitting; unanimous.)

Suits in Court of Claims by a circuit judge and a district judge, each retired for age after more than 10 years' service, under the provisions of section 260 of the Judicial Code, for the difference between their salaries as fixed by law ($12,000 and $10,000, respectively) and the amounts paid subsequent to June 15, 1933 (*i. e.*, for the deductions made under the act of June 16, above cited).

Two questions were certified by the Court of Claims: (1) Whether a judge retired under Judicial Code, section 260, as amended, continues in office within the meaning of Constitution, Art. III, sec. 1, forbidding reduction of salaries of judges? (2) Whether a reduction, subsequent to retirement under section 260, to a point not below salary at date of original appointment (there having been an

intervening increase) constitutes a diminution of compensation within the meaning of Constitution, Art. III, sec. 1?

Held: Both questions answered, Yes.

(1) Section 260 of the Judicial Code originally authorized retirement in the strict sense. But by the amending act of March 1, 1929 (45 Stat. 1422), a judge, having served 10 years and reached the age of 70, "instead of resigning * * * may retire, upon the salary of which he is then in receipt, from regular active service on the bench * * * but a judge so retiring may nevertheless be called upon by the senior circuit judge of that circuit and be by him authorized to perform such judicial duties in such circuit as such retired judge may be willing to undertake * * *." This, the Court holds, gives a judge so retiring from regular service and yet performing occasional judicial duties, the continuing status of judge. "It is a contradiction in terms to assert that one who has retired in accordance with the statute may continue to function as a Federal judge and yet not hold the office of a judge."

(2) The constitutional prohibition against diminution of salary of judges must be construed as referring to salary payable at date of appointment, irrespective of any intermediate increase.

68. Act of June 13, 1933 (48 Stat. 134, § 5 (i)) as amended April 27, 1934 (48 Stat. 646, § 6)—provided that "any member of a Federal Home Loan Bank may convert itself into a Federal Savings and Loan Association under this Act upon a vote of 51% or more of the votes cast at a legal meeting called to consider such action" [in original act—upon a vote of its stockholders as provided by the law under which it operates]—thereafter to be entitled to benefits of the section, and subject to examination and regulation as other associations under the Act.

HOPKINS FEDERAL SAVINGS AND LOAN ASSOCIATION *v.* CLEARY, 296 U. S. 315 (Dec. 9, 1935); also *Reliance Building and Loan Association* v. *Cleary*, and *Northern Building and Loan Association* v. *Cleary*.

(Opinion by Justice Cardozo; 9 Justices sitting; unanimous.)

Certiorari to Supreme Court of Wisconsin in three cases—one brought by the State banking commission, the other two by particular local building and loan associations, to annul and enjoin, respectively, proceedings for conversion under the section. In each case, while the change was approved by a large majority of the shares, there were a considerable number of shares not represented.

The State Supreme Court decreed in favor of the banking commission, but to avoid constitutional questions decided the cases on the ground that the provisions of § 5 (i) were subject to an implied condition—namely, that 51 percent was a minimum, but not exclusive of further State regulation.

Held: Decree affirmed. The basis of decision below was disapproved—especially in view of the change of wording from the act of 1933—but the Home Owners' Loan Act "to the extent that it permits the conversion of state associations into Federal ones in contravention of the laws of the place of their creation, is an unconstitutional encroachment upon the reserved power of the States." State law prescribes in detail, as matter of public policy, conditions under which building and loan associations may be created, maintained, and dissolved—as quasi-public instrumentalities. Entirely aside from the question of the power of the Federal Government to charter building associations as provided in the Home Loan Act, for the Federal Government to attempt to regulate State-chartered associations in these

matters—there being involved no obstruction of the legitimate activities of the Federal associations, and no exclusive power in the central government, as *e. g.*, under the commerce clause—constitutes an infringement of State sovereignty under the Tenth Amendment.

Legislative effect.—No action appears to have been taken, to date, in specific answer to the decision. The conversion here provided for appears to have been a rather unimportant part of the whole scheme of the Home Owners' Loan Corporation Act, which is simply functioning without recourse to subsection (i). Furthermore, the act is strictly temporary—the Corporation's substantive powers being limited to 3 years.

69. Act of May 24, 1934 (48 Stat. 798, adding Chap. LX, §§ 78–80 to the Bankruptcy Act).

The Act authorizes municipalities or other political subdivisions of States, specifically including improvement districts, to readjust their indebtedness, by petition to Federal district court. Such petition must contain a plan approved by creditors holding—in case of a water improvement district—30% of the district's obligations. If, after hearing, the court finds that such plan is equitable, not unduly discriminatory, and is accepted by creditors holding two-thirds of the indebtedness of the district, it is to be confirmed, and binding upon the district and all creditors, secured or unsecured.

C. L. ASHTON ET AL. *v.* CAMERON COUNTY WATER IMPROVEMENT DISTRICT NO. 1 (May 25, 1936, No. 859).

(Opinion by Justice McReynolds; 9 Justices sitting—Chief Justice Hughes and Justices Cardozo, Brandeis, and Stone dissenting.)

Certiorari to Circuit Court of Appeals, Fifth Circuit.

The improvement district, organized under State law, filed a petition claiming to be insolvent, and proposing a plan for readjustment of about $800,000 of bonds on the basis of about 49.8 cents on the dollar—funds therefor to be borrowed from the Reconstruction Finance Corporation. District court dismissed petition for lack of jurisdiction, on the ground Congress had no power to interfere with the contracts of a State agency.

Circuit Court of Appeals reversed, holding the act an exercise of the bankruptcy power of Congress.

Held: Judgment of Circuit Court of Appeals reversed, and cause returned to district court for further action. Assuming that the act was "adequately related" to the general subject of bankruptcies, the bankruptcy power of Congress must be considered, like the power of taxation, as limited by the doctrine of noninterference with State sovereignty—and Congress could not, under the decisions have imposed a tax on the bonds of the improvement district in question.

Further, if the bankruptcy power can be extended to voluntary proceedings involving political subdivisions, it might be extended to States—and to involuntary proceedings, and in such case approval of a readjustment might then amount to an interference with contract obligations; and not only may a State not, by itself, impair the obligation of a contract, but it may not accomplish that end by granting consent to Congress to do so—it may not surrender any sovereignty essential to its proper functioning.

The dissenting Justices, speaking by Justice Cardozo, contended that while such involuntary proceedings might well dislocate the required balance between State and Federal Governments, in the present case there is no violation of local law or public policy, since the action of the improvement district was taken voluntarily and

was expressly authorized by State law, and by analogy with the taxing power the bankruptcy power should be allowed to extend to State instrumentalities with their own consent—to refuse in such a case is to make dignity (State sovereignty) "a doubtful blessing." Further, the Constitution does not prohibit impairment of contracts except by a State itself. Here the impairment, if any, is effected by action of a Federal court—interference by the State is indirect and remote. Whether the power might constitutionally be extended to States is not here in question—but local governmental units are not even quasi-sovereign; they may be brought into court against their will and subjected to equitable remedies.

No legislative action in response to this decision is noted to date.

70 Act of June 27, 1934 (48 Stat. 1283, c. 868).

The Railroad Retirement Act established a compulsory system of retirement for employees of carriers subject to the Interstate Commerce Act—applicable retroactively to employees who had been in the service of a carrier "within one year before the enactment hereof." The purpose was stated in section 2, viz: "providing adequately for the satisfactory retirement of aged employees and promoting efficiency and safety in interstate transportation, and to make possible greater employment opportunity and more rapid advancement of employees * * *." Pensions were to be paid from a railroad retirement fund established in the Treasury of the United States from contributions by employees and carriers (the latter at double the rate required of employees). The fund was to be administered and paid out by a Retirement Board—an independent agency of three members. The act authorized the substitution of the new system for existing voluntary pension arrangements.

RAILROAD RETIREMENT BOARD ET AL. *v.* THE ALTON RAILROAD CO. ET AL., 295 U. S. 330 (May 6, 1935).

(Opinion by Justice Roberts; 9 Justices sitting; Chief Justice Hughes and Justices Brandeis, Stone, and Cardozo dissenting.)

Certiorari to Court of Appeals for District of Columbia. Suit was brought by 134 separate railroads to enjoin enforcement of the act. District supreme court granted injunction. Certiorari was issued before hearing on the appeal.

Held: Judgment affirmed.

While stating that "broadly the record presents the question whether a statutory requirement that retired employees shall be paid pensions is regulation of commerce between the States within Art. I, section 8", the majority opinion first considers several features of the act which it finds "highly unreasonable and arbitrary"; *e. g.*, the extension of retirement to employees formerly in service, but not so at the date of the act; the pooling principle, under which all the railroads are treated as a single employer, so that, regardless of individual circumstances and conditions, all are "not only liable for their own contributions but are, in a measure, made insurers of those of the employees" and "solvent railroads must furnish the money necessary to meet the demands of the system upon insolvent carriers, since the very purpose of the act is that the pension fund itself shall be kept solvent and able to answer all the obligations placed upon it."

And the Court felt that these features "so affect the dominant aim of the whole statute as to carry it down with them."

Finally, it is held that "The act is not in purpose or effect a regulation of interstate commerce within the meaning of the Constitution." Petitioners' view, it said, "is that safety and efficiency are promoted by two claimed results of the plan: The abolition of

excessive superannuation and the improvement of morale." In view of the conflict of opinion, the claim as to the promotion of safety is practically discounted, and "In the final analysis, the petitioners' sole reliance is the thesis that efficiency depends upon morale and morale, in turn, upon assurance of security for the worker's old age." Contentment and assurance of security are the major purpose of the act, and a pension plan dictated to this end by statute "is in no proper sense a regulation of the activity of interstate transportation."

The dissenting justices deprecated the argument of the majority "that a pension measure, however sound and reasonable as such, is per se outside the pale of the regulation of interstate carriers, because such a plan could not possibly have a reasonable relation to the ends which Congress is entitled to serve." They hold that the question of the effect of superannuation on efficiency of service is primarily a question of fact upon which "Congress was entitled to form a legislative judgment." The adoption of voluntary pension systems by carriers shows in itself the reasonableness of pensions as a matter of regulation of commerce; and to argue that Congress may compel the elimination of aged employees but may not require reasonable provision for their old age "pays insufficient attention to the responsibilities which inhere in the carriers' enterprise."

71. Act of June 28, 1934 (48 Stat. 1289, c. 869)—Frazier-Lemke Act.

This amendment, adding subsection (s) to section 75 of the Bankruptcy Act, was enacted to take care of existing cases where farmers applying for compositions under the original section 75 (act of March 3, 1933; 47 Stat. 1473) failed to obtain acceptance of a majority in number and amount of all creditors affected by the proposed composition. It provided, essentially, in paragraph 3: That bankrupts, with the consent of mortgagees, might purchase the property at its then appraised value, acquiring immediate possession, and eventual title, with no down payment, the appraised value to be spread in instalments over a period of six years, carrying interest at 1 percent. In paragraph 7: If creditors refused consent to such purchase under paragraph 3, then "the court * * * shall stay all proceedings for a period of five years, during which five years the debtor shall retain possession of all or any part of his property, under the control of the court, provided he pays a reasonable rental annually for that part of the property of which he retains possession; * * * such rental to be distributed among the secured and unsecured creditors, as their interests may appear * * * . At the end of five years, or prior thereto, the debtor may pay into court the appraised price of the property of which he retains possession * * *" and proceed to secure full discharge; or if debtor fails to comply with the law, the court may then order sale by trustee.

LOUISVILLE JOINT STOCK LAND BANK *v.* WILLIAM W. RADFORD, 295 U. S. 555 (May 27, 1935).

(Opinion by Justice Brandeis; 9 Justices sitting; unanimous.)

The case squarely involved the whole act. Radford having defaulted on his mortgage, the mortgagee bank sued to foreclose. Radford secured a stay, and sought a composition under section 75. Failing to obtain consent of a majority of creditors, he applied for relief under the newly enacted subsection (s). Objection by the bank on the ground the act was unconstitutional was overruled, and the court appointed a referee. The bank refused its consent to purchase of the mortgaged property by Radford under the terms of paragraph 3, and the referee thereupon ordered a stay of proceedings, etc., under paragraph 7. His orders being affirmed by district court and Circuit Court of Appeals, the case went to the Supreme Court on certiorari.

Held: Decree reversed. In view of the exclusively retroactive effect of subsection (s), the Court stated: "We have no occasion to decide in this case whether the bankruptcy clause confers upon Congress generally the power to abridge the mortgagee's rights in specific property * * * another provision of the Constitution is controlling", namely the Fifth Amendment. While Congress is not prohibited from impairing the obligation of contracts, and may therefore discharge a debtor's personal obligation, "the effect of the act here complained of is not the discharge of Radford's personal obligation. It is the taking of substantive rights in specific property acquired by the bank prior to the act." The act, as applied in the instant case, took from the mortgagee the following property rights, recognized by the law of Kentucky:

(1) the right to retain the lien until the indebtedness thereby secured is paid;
(2) the right to realize upon the security by a judicial public sale;
(3) the right to determine when such sale shall be held, subject only to the discretion of the court;
(4) the right to bid at such sale whenever held, and thus assure having the mortgaged property devoted primarily to the satisfaction of the debt, either through receipt of the proceeds of a fair competitive sale or by taking the property itself;
(5) the right to control the property during period of default, subject only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt.

This constitutes a violation of the Fifth Amendment.

72. Act of Aug. 24, 1935 (49 Stat. 750, c. 641, Title I, in part).

Out of 62 sections in Title 1, §§ 1–31, 33–36, 38 are amendments (or partial repeals) of the A. A. A. The amendment of § 9 established a specific rate of 1 cent per pound for the processing tax on rice, for the period from April 1, 1935, to July 31, 1936—and the act in general provided for the adjustment of taxes in relation to fair-exchange value of products.

RICKERT RICE MILLS, INC. *v.* FONTENOT, COLLECTOR OF INTERNAL REVENUE, 297 U. S. 110 (Jan. 13, 1936)—one of eight companion cases.

(Opinion by Justice Roberts; 9 Justices sitting—unanimous.)

Certiorari to Court of Appeals, Fifth Circuit. Petitioner filed a bill to restrain collection of processing tax on rice for September 1935 and subsequent months, under the A. A. A. as amended. From a decree dismissing bill, petitioner appealed. Temporary injunction was denied both in district court and Court of Appeals, on ground of an adequate remedy at law under § 21 (d) and that injunction was prohibited by § 21 (a). The Supreme Court allowed certiorari on condition petitioner pay current taxes into a depository subject to order of court.

Held: Order of district court vacated, and case remanded with order to enter the injunction.

The "processing tax" under the amendatory act of 1935 "still lacks the quality of a true tax." It remains a means for effectuating the regulation of agricultural production, a matter not within the powers of Congress. It was therefore necessary to decide whether § 21 (d) afforded an adequate remedy at law.

73. Act of August 30, 1935 (49 Stat. 991, c. 824). The Guffey Coal Act, predicated upon the declaration that "the mining of bituminous coal and its distribution by the producers thereof in and throughout the United States are affected with a national public interest; that the service of bituminous

coal * * * the conservation of bituminous coal deposits * * * the maintenance of just and rational relations between the public, owners, producers, and employees; the right of the public to constant and ample supplies of coal at reasonable prices; and the general welfare of the Nation require that the bituminous coal industry be regulated as herein provided." The act proposed in essence a tax on coal of 15% of sale price at mine—with drawback of 90% to producers who should comply with a Code to be set up, under which district boards were empowered to classify coals and establish minimum prices, and a Commission was authorized, under certain conditions, to set maximum prices. It further required Code members to accept specified conditions as to labor—such as right of employees to organize and bargain through representatives of their own choosing, and to select their own check weighmen, adjudication of disputes by a labor board in Department of Labor, and finally (Pt. III (g)) that maximum hours of labor agreed upon between producers of two-thirds of national tonnage for preceding year and representatives of more than one-half of the workers employed should become binding upon all Code members; and similarly, minimum wages determined in each district by producers of two-thirds of tonnage and a majority of employees should be obligatory as minimum wages upon Code members throughout the district.

CARTER *v.* CARTER COAL CO. (together with TWAY COAL CO. *v.* GLENN and CLARK *v.* TWAY COAL CO.)—Nos. 636, 649, 650, 651—Decided May 18, 1936.

(Opinion by Justice Sutherland; 9 Justices sitting; Chief Justice Hughes in a separate opinion, and Justices Cardozo, Brandeis, and Stone, all dissenting in part.)

On writs of certiorari—those involving the Carter Co. (No. 636, 651) to the District of Columbia Court of Appeals—the other to Circuit Court of Appeals for Kentucky. Carter brought suit to restrain the Carter Co. from accepting the Code, paying the tax, etc., as provided in the act, while Clark sought to require compliance by the Tway Co. Carter's action further sought to enjoin collection of the tax by the United States, as did also the bill in *Tway Co.* v. *Glenn.* The District of Columbia Supreme Court held that the labor provisions of the act were unconstitutional, but that the price-fixing provisions were separable and valid, and consequently the tax could stand. The Kentucky court held the act valid as a whole. In all three cases, the Supreme Court granted writs of certiorari without waiting for hearing and submission in the appellate courts.

The Supreme Court reversed the decrees below so far as they were based on finding of constitutionality; and affirmed the decree in the Carter case enjoining collection of the "tax" accrued during suit.

The "tax" imposed is not a tax but a penalty (*Child Labor case; United States* v. *Constantine; United States* v. *Butler*), and in any case, as admitted by the Government, must stand or fall with the labor and price-fixing features. Recital in § 1 of the reasons for the enactment do not take the place of constitutional power; promotion of general welfare is not a power granted by the Constitution (*United States* v. *Butler*). The question, then, is whether power for the enactment is to be found in the commerce clause. But the distinction between production and commerce is clear (*Kidd* v. *Pearson*, 128 U. S. 1; *Schechter Corp.* v. *U. S.*, 295 U. S. 495), and "the effect of the labor provisions of the act, including those in respect of minimum wages, wage agreements, collective bargaining and the Labor Board and its powers, primarily falls upon production and not upon commerce." Moreover, the labor provisions cannot be sustained because of any "direct" effect on interstate commerce—the directness of effect depends not on extent, but on the manner in which the effect is brought about,

i. e., whether proximate or remote. And the act violates the due process clause, by delegating to stated majorities of coal producers and miners power to regulate minimum hours of labor of the minority—*i. e.*, the accepted labor standard is compulsory upon code members, and code membership is compelled by the 15 percent tax with no rebate to producers failing to join (*Schechter Corp.* v. *U. S.*, 295 U. S. at 537). The price-fixing provisions cannot be separated from the labor provisions, and therefore fall with them, so that no decision as to their constitutionality as such is necessary.

NUMBER OF CASES, AS COMPARED WITH NUMBER OF PROVISIONS HELD UNCONSTITUTIONAL

76 cases in 147 years:

1 case in the first 50 years
19 cases in the next 50 years
56 cases in the last 47 years
} out of approximately 40,000 cases decided by the Supreme Court

64 different acts construed (*i. e.*, acts in the technical sense):

3 enacted between 1789 and 1839, out of a total of 5,741;
22 enacted between 1839 and 1889, out of a total of 15,964;
39 enacted from 1889 through the Seventy-fourth Congress, out of a total of 36,676.

84 different provisions of law in some respect invalidated, ranging from an entire act to the necessary implication of a single phrase.

HOW MANY "ACTS HELD UNCONSTITUTIONAL?"

In common parlance, the 76 cases above listed "hold acts of Congress unconstitutional." It is obvious, and yet worth emphasizing, that such a conception is not strictly accurate. Considering the prestige rightly inhering in a pronouncement of the Supreme Court,[1] the expression "acts held unconstitutional" is one to be handled with circumspection, in fairness to both the Congress and the Court. Clearly, not all of the cases listed hold unconstitutional entire acts of Congress in the technical sense of enactments passed by Congress under a particular bill number, beginning with an enacting clause and ending "approved." *E. g.*, the famous case of *Marbury* v. *Madison* involved a single phrase out of a judiciary act of 35 sections. The vastly important case of *Hepburn* v. *Griswold* held invalid only three or four lines of a three-page act; the Dred Scott decision related to a part only of one section in an eight-section enabling act for Missouri. In fact, there appear to be but eight instances where an entire act, in the technical sense, has been held unconstitutional by the Supreme Court:[2]

[1] The language of W. M. Meigs, Relation of the Judiciary to the Constitution (p. 211), applies to decisions of the Supreme Court with especial force: "Nor is even this [their force as precedents] all that gives strength to the opinions of the courts. From their very nature and method, they have the most persuasive influence on all the world. The earnest effort to reach an impartial conclusion, the extensive arguments of counsel, in leading cases sure to be men of brilliant intellect and of vast experience, who have ransacked the world in the search for knowledge of the subject from all points of view, and the carefully weighed decisions—the gist, in important cases, of all the long history of mankind—properly give to judicial opinions a persuasive weight, which belongs to but few things of human origin."

[2] It may be noted that 2 further acts have been held wholly invalid by inferior courts, which decisions were accepted by the United States: 33 Stat. 12, c. 156, in *McGuire* v. *District of Columbia* (27 D. C. Appls. 68); and 33 Stat. 693, c. 255, in *Hubbard* v. *Lowe* (226 Fed. 135.)

19 Stat. 141, c. 274—enforcement of trade-mark law (*Trade-mark cases*);
28 Stat. 1018 no. 41—a joint resolution authorizing lease of specific land of a named Indian (*Jones* v. *Meehan*);
39 Stat. 675, c. 432—the first Child Labor Act (*Hammer* v. *Dagenhart*);
48 Stat. 31—the original A. A. A. (*United States* v. *Butler*);
48 Stat. 798, c. 345—provisions for adjusting municipal indebtedness (*Ashton* v. *Cameron County Water Improvement District No. 1*);
48 Stat. 1283, c. 868—compulsory plan for retirement of railroad employees (*Railroad Retirement Board* v. *The Alton R. R. et al.*);
48 Stat. 1289, c. 869—conversion of State building and loan associations (*Hopkins Federal Savings & Loan Association* v. *Cleary*);
49 Stat. 991, c. 824—the Guffey Coal Act (*Carter* v. *Carter Coal Co.*).
A further act sometimes listed as invalidated entire is the Grain Futures Act (42 Stat. 187, c. 86). But, as noted above, *Hill* v. *Wallace* distinctly excepted section 9 and section 3 from the holding in that case.

Even this technically limited statement is somewhat misleading. For chapter 869 (48 Stat. 1289) though itself an entire act, was merely an amendment of one comparatively unimportant section of the Home Owners' Loan Corporation Act. Again, the *Trade-mark cases* struck down not only the enforcement act of 1876 but R. S. 4937–4947, and while those 11 sections formed only a small part of the act of June 22, 1874, known as the Revised Statutes, they constituted an entire Trade-mark Act of July 8, 1870 (minus provision for enforcement) and the decision might well be accounted as disposing of two acts of Congress.

This illustrates the purely formal significance which may attach to the term "act." It is not necessary to cite instances of "riders" to realize that an "act" may contain independent legislative ideas without raising any question of separability. Indeed, under the modern practice, acts are frequently subdivided into "titles" under separate names, and "act" is thus by legislative fiat given a more restricted and more logical significance.

Examining the cases from this standpoint, it is apparent that there are several further instances where complete legislative proposals (whether titled or not) have been held invalid, *e. g.:*

16 Stat. 235—the provisos, attached to the appropriation for payment of judgments of the Court of Claims, which made affirmative requirements as to the conduct of cases in that court—in *United States* v. *Klein;*
R. S. 4937–4947 (title LX, c. 2)—the trade-mark law as incorporated in the Revised Statutes—in the *Trade-mark cases;*
28 Stat. 553–560, secs. 27–37—constituting the income-tax law of 1894—in *Pollock* v. *Farmers' Loan & Trust Co.;*
34 Stat. 1028, pars. 2–5—constituting a proposal, in the midst of an Indian appropriation act, for securing an advisory opinion on the validity of certain legislation—in *Muskrat* v. *United States;*
40 Stat. 1138, title XII—constituting the child labor tax law—in *Bailey* v. *Drexel Furniture Co.;*
48 Stat. 195, title I—so far as it related to codes of fair competition—was invalidated by *Schechter Poultry Corp. et al.* v. *United States*—the remainder (*i. e.* § 9, "Oil regulation") by *Panama Refining Co.* v. *Ryan.*

Only a shade behind these are the cases which involve what is in fact the most important part of a given act, which yet can be deleted and leave standing an intelligible legislative enactment: such, *e. g.*, as the *Civil Rights cases*, which invalidated the first two sections of a five-section act, leaving one less-important substantive section, with two sections of regulations applicable alike to this and the invalidated sections.

In the majority of cases, however, the "act" involved is merely an isolated, more or less incidental, provision—a section, clause, or

phrase. Naturally, then, considering the variety of provisions to be found in a single statutory enactment, different parts of the same act are frequently considered in independent suits, on entirely independent grounds; *e. g.*, Revenue Act of March 2, 1867 (14 Stat. 471, c. 169) in *Collector* v. *Day* and *United States* v. *Dewitt;* act of May 31, 1870 (16 Stat. 140, c. 114) in *United States* v. *Reese* and (as embodied in the Revised Statutes) in *Hodges* v. *United States* and *James* v. *Bowman.* Sometimes even clauses of the same section have been separately invalidated; as, War Revenue Act of June 13, 1898 (30 Stat. 448, c. 448), in *Fairbank* v. *United States, United States* v. *Hvoslef*, and *Thames & Mersey Insurance Co.* v. *United States;* Food Control Act of August 10, 1917 (40 Stat. 276, c. 53, § 4), in *United States* v. *Cohen Grocery Co.* and *Weeds, Inc.* v. *United States.* On the other hand, occasionally a decision merely extends the scope of a prior decision; *e. g.*, *Baldwin* v. *Franks, Miles* v. *Graham, Pollock case* rehearing.

A further difficulty arises in those cases where the act directly involved is an amendment of an earlier provision, or is one of several distinct but similar provisions. Are the amended or similar provisions to be counted as invalidated along with the principal act? Considering that a decision of the Supreme Court may reach backward and declare invalid an act long since obsolete, a brief examination of the point is in order for purposes of tabulation.

(1) The first instance was *Hepburn* v. *Griswold*—which is sometimes listed as invalidating the "Legal Tender Acts" generally. These were three acts of 1862 and 1863 (12 Stat. 345, 532, and 709), each authorizing the issue of United States notes and each containing a provision that such notes should be a legal tender in payment of all debts, public and private, within the United States, except for duties on imports and interest on the public debt. As a matter of record, the *Hepburn case* involved only notes actually issued under the first of these acts, but it would seem that the decision would unquestionably have applied to the later acts—and warrant a statement that they were "held invalid." However, the question is largely academic, as the decision was almost immediately reversed.

(2) *United States* v. *Railroad Co.* Here, the provision involved was section 122 of the Internal Revenue Act of 1864 as amended in 1866 "to read as follows"—the language of the latter act being inclusive of the earlier. It is not clear from the case whether the United States was actually claiming taxes due under the earlier act, but if it was, the decision is a declaration of its invalidity.

(3) *Collector* v. *Day.* This case is sometimes listed as invalidating all four of the Civil War income tax provisions. The tax was first laid by section 116 of the act of June 30, 1864. But this section was amended "to read as follows" by act of March 3, 1865; was further amended on July 13, 1866, by adding a proviso making it applicable to nonresidents; and finally amended again "to read as follows" on March 2, 1867. *Collector* v. *Day* involved tax payments for the years 1866 and 1867. In these circumstances it would seem reasonable to conclude that the act of 1866 was not affected by the decision; but that the act of 1865, though superseded, was declared invalid as the authority under which tax was demanded for the year 1866.

(4) *Newberry* v. *United States.* Here, the provision involved was a new section 8 added to the Corrupt Practices Act of 1910—setting maximum limits to campaign expenditures. It would seem wholly misleading, then, to cite the case, as is sometimes done, as affecting the act of 1910, which contained nothing remotely resembling the provisions of the new section 8.

(5) *Knickerbocker Ice Co.* v. *Stewart* and *Washington* v. *Dawson & Co.* each present the case of a saving clause added to sections 24 and 256 of the Judicial Code. And invalidation of such added matter would not seem to affect the rest of the provision, though it then produces the rather absurd result of an act standing on the books as an amendment of existing law, in precisely the terms of the original.

(6) *United States* v. *Cohen Grocery Co.* and *Weeds, Inc.*, v. *United States* involved section 4 of the act of August 10, 1917, as amended "to read as follows" by act of October 22, 1919. Similarly *Hopkins Federal Savings & Loan Association* v. *Cleary* arose under act of June 13, 1933, as amended and superseded April 27, 1934; while the *Rickert Rice Mills case* settled the constitutionality of the Agricultural Adjustment Act amendments, specifically passed by in the decision of the *Butler case.*

(7) *Burnet* v. *Coronado Oil & Gas Co.* was a proceeding for a redetermination of income and profits taxes for the years 1917, 1918, and 1919, under laws long since repealed. Further, the complainant corporation was included in the scope of those laws only in general language. The result was that the Supreme Court discussed the general principle of immunity from Federal taxation of the governmental instrumentalities of States, without specifically referring to precise clauses of the tax laws at all. In the list above, the substantive provisions under which the taxes must have been assessed for the years named have therefore been noted as suggested by the opinions below and apparently required by the nature of the case.

It is evident, then, that a mere numerical count will not suffice to determine surely how many "acts of Congress have been held unconstitutional." The question is rather, how many provisions of law have been affected—and a tabulation will depend to a considerable degree on the extent to which the several acts are broken down. In arriving at 84 as the number of "provisions" held unconstitutional, the following classification has been adopted in some of the more doubtful cases:

(a) *Burnet* v. *Coronado Oil & Gas Co.* is considered as invalidating five distinct provisions; *Hepburn* v. *Griswold*, three; and *Collector* v. *Day*, two.

(b) Three provisions are counted as invalidated in *Fairbank* v. *United States*, *United States* v. *Hvoslef*, and *Thames & Mersey Insurance Co.* v. *United States;* and two provisions in *United States* v. *Cohen Grocery Co.* and *Weeds, Inc.* v. *United States*—though in both instances the clauses involved were parts of the same section.

(c) On the other hand, the Grain Futures Act of 1921 is counted as one provision—since *Trusler* v. *Crooks*, involving § 3 specifically, invalidated it as simply a part of the general scheme of the act.

(d) Revised Statutes sections are treated as though separate acts—except that R. S. 4937–4947 are counted together as one, and R. S. 1977 and 5507 are from the same act already considered in *United States* v. *Reese.*

(e) Section 9 (c) of the N. I. R. A. (invalidated in the *Panama Refining Co. case*) is counted as a provision separate from the sections relating to codes held unconstitutional in the *Schechter case.* While the latter case involved primarily section 3 (a), the exact scope of the decision is a matter of considerable argument (*cf.* debates in Congress, especially June 7). Without here going into detail, the more or less indefinite portion of title I relating to the approval and enforcement of codes by the President is counted as one provision, for purposes of tabulation.

(f) The portion of the A. A. A. invalidated by the Butler decision—constituting various sections relating to processing taxes, are counted in their entirety as a single provision of law; and similarly the amendments involved in the *Rickert Rice Mills case.*

JUSTICES OF THE SUPREME COURT OF THE U. S.

There have been 76 Justices upon the Supreme Court to date. Nineteen of this number have never participated in a decision holding an act of Congress unconstitutional, though Justices Blair and Wilson took part in *Hayburn's case* on circuit. The following table shows the record of the 57 Justices who have together decided the 76 cases listed (counting the *Pollock case* rehearing separately); including the number of cases in which they dissented on the constitutional question, and the number in which they delivered the opinion of the Court.

Justice	Term	No. cases	Dissents	Cases in which delivering opinion of court
Cushing	1789-1810	1	0	0.
Paterson	1793-1806	1	0	0.
Chase, Samuel	1796-1811	1	0	0.
Washington	1798-1829	1	0	0.
Moore	1799-1804	1	0	0.
Marshall, C. J	1801-1835	1	0	1—*Marbury* v. *Madison.*
McLean	1829-1861	1	1	0.
Wayne	1835-1867	3	0	0.
Taney, C. J	1836-1864	1	0	1—*Dred Scott* v. *Sandford.*
Catron	1837-1865	2	0	0.
Daniel	1841-1860	1	0	0.
Nelson	1845-1872	10	0	2—*Justices* v. *Murray; Collector* v. *Day.*
Grier	1846-1870	6	0	1—*Reichart* v. *Felps.*
Curtis	1851-1857	1	1	0.
Campbell	1853-1861	1	0	0.
Clifford	1858-1881	13	2	0.
Swayne	1861-1881	13	2	0.
Miller	1862-1890	18	5	1—*Trade Mark cases.*
Davis	1862-1877	11	2	0.
Field	1863-1897	22	0	2—*Ex parte Garland; United States* v. *Fox.*
Chase, C. J	1864-1873	10	1	5—*Gordon* v. *United States; The Alicia; Hepburn* v. *Griswold; United States* v. *Dewitt; United States* v. *Klein.*
Strong	1870-1880	8	0	0.
Bradley	1870-1892	13	2	2—*Boyd* v. *United States; Civil Rights cases.*
Hunt	1872-1882	8	1	1—*United States* v. *Railroad Co.*
Waite, C. J	1874-1888	7	1	2—*United States* v. *Reese; Baldwin* v. *Franks.*
Harlan	1877-1911	23	10	3—*Callan* v. *Wilson; Kirby* v. *United States; Adair* v. *United States.*
Woods	1880-1887	3	0	1—*United States* v. *Harris.*
Matthews	1881-1889	5	0	0.
Gray	1881-1902	12	1	1—*Jones* v. *Meehan.*
Blatchford	1882-1893	6	0	0.
Lamar, L. Q. C	1888-1893	1	0	0.
Fuller, C. J	1888-1910	15	0	3—*Pollock* (twice); *United States* v. *Evans.*
Brewer	1889-1910	13	0	6—*Monongahela Navigation Co.* v. *United States; Fairbank* v. *United States; James* v. *Bowman; Matter of Heff; Hodges* v. *United States; Keller* v. *United States.*
Brown	1890-1906	11	3	0.
Shiras	1892-1903	6	0	1—*Wong Wing* v. *United States.*
Jackson	1893-1895	1	1	0.
White	1894-1910	14	3	2—*Rasmussen* v. *United States: Employers' Liability cases.*
(as C. J.)	1910-1921	13	1	2—*United States* v. *Cohen Grocery Co.; Weeds, Inc.,* v. *United States.*
Peckham	1896-1909	12	0	0.
McKenna	1898-1925	30	6	1—*United States* v. *Moreland*
Holmes	1902-1932	35	14	1—*Spalding & Bros.* v. *Edwards.*
Day	1903-1922	22	2	2—*Muskrat* v. *United States; Hammer* v. *Dagenhart.*
Moody	1906-1910	3	2	0.
Lurton	1910-1914	4	0	1—*Coyle* v. *Oklahoma.*
Hughes	1910-1916	6	0	2—*United States* v. *Ivoslef; Thames, etc., Ins. Co.* v. *United States.*
(as C. J.)	1930-	16	3	3—*Schechter Poultry Corp.* v. *United States; Panama Refining Co.* v. *Ryan; Perry* v. *United States.*
Van Devanter	1911-	41	[1] 0	3—*Butts* v. *Transportation Co.; Evans* v. *Gore; Indian Motocycle Co.* v. *United States.*
Lamar, J. R	1911-1916	5	0	1—*Choate* v. *Trapp.*
Pitney	1912-1922	13	1	1—*Eisner* v. *Macomber.*
McReynolds	1914-	36	[1] 1	9—*Knickerbocker Ice Co.* v. *Stewart; Newberry* v. *United States; Washington* v. *Dawson & Co.; Miles* v. *Graham; Trusler* v. *Crooks; Nichols* v. *Coolidge; Untermyer* v. *Anderson; National Life Insurance Co.* v. *United States; Ashton* v. *Cameron County Water Improvement District.*
Brandeis	1916-	35	21	2—*Lynch* v. *United States; Louisville Joint Stock Land Bank* v. *Radford.*
Clarke	1916-1922	9	5	0.
Taft, C. J	1921-1930	13	2	4—*Bailey* v. *Drexel Furniture Co.; Keller* v. "*Pepco.*"; *Hill* v. *Wallace; Myers* v. *United States.*
Sutherland	1922-	26	[1] 0	3—*Adkins* v. *Children's Hospital; Heiner* v. *Donnan; Carter* v. *Carter Coal Co.*
Butler	1922-	26	[1] 0	0.
Sanford	1923-1930	10	1	0.
Stone	1925-	22	10	0.
Roberts	1930-	16	1	5—*Booth* v. *United States; R. R. Retirement Bd.* v. *The Alton R. R. Co. et al.; United States* v. *Butler; United States* v. *Constantine; Rickert Rice Mills* v. *Fontenot.*
Cardozo	1932-	14	4	1—*Hopkins Federal Savings & Loan Association* v. *Cleary.*

[1] Not counting dissent in the *Perry case* which went to the decision only, while agreeing that the provision was unconstitutional.

Two or three points may be noted:

(1) The 19 Justices who never participated in such a decision completed their service on the bench before the Civil War.

(2) The opinions in the 76 cases have been delivered by 31 different Justices. Only 10 Justices have delivered more than 2 opinions, Justice McReynolds heading the list with 9. In 21 cases the opinion has been delivered by the Chief Justice.

(3) Three Justices only have dissented on every occasion they have participated in a decision declaring an act invalid, viz: Justices McLean, Curtis, and Jackson—who each took part in just one of the cases listed.

(4) Twenty-five Justices have been on the prevailing side in each case in which they have taken part; ranging from 10 who have taken part in but 1 case, to Justice Van Devanter, who has 41 to his account.

PROVISIONS OF CONSTITUTION INVOKED

In the broadest sense, all of the cases here listed hold some provision of law in violation of the Constitution. But that violation is of several degrees, so to speak. To illustrate:

Art. III, § 1 reads: "The judges * * * shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office." The act of February 24, 1919, § 213, was held in *Evans* v. *Gore* to do exactly this forbidden thing—namely, lessen the stated compensation of Federal judges, under the guise of taxation on income specifically including their official salaries.

Art. I, § 9, cl. 5 prohibits taxes on articles exported from any State. The act of October 3, 1917, laid a tax in general terms on sporting goods "sold by the manufacturer, producer, or importer." There was no thought that it was intended to tax exports, yet *Spalding & Bros.* v. *Edwards* held that as the language did in fact include all sales, it would strictly apply to a sale for exportation, and insofar was a violation of Art. I, § 9.

In *United States* v. *Reese*, the Government attempted to base the challenged enactment solely on the Fifteenth Amendment; and the decision held it not completely supported by that Article. It was not a violation of any specific provision, but was based on a misconception of the scope of the amendment, and was therefore in excess of constitutional authority.

Other cases are based on doctrines of constitutional construction assumed rather than drawn from any specific clause—such as the idea of a constitutional immunity from Federal taxation in favor of State agencies or officers. The leading case of *Collector* v. *Day* indicates this clearly enough. It is true that the Court starts with the premise, drawn from the Tenth Amendment, that the sovereign powers of the States are left unimpaired by the Constitution, except as specifically granted to the United States. But it is a long step from the declaration of the Tenth Amendment to a decision that a Federal income tax including in its scope State judges along with all other classes of citizens is unconstitutional. And it is justified by the Court "as a reasonable, if not a necessary consequence" of the necessary existence of the States, as contemplated by the Constitution, admitting that "there is no express provision in the Constitution that prohibits the General Government from taxing the means and instrumentalities of the States" and that the exemption "rests upon necessary implication and is upheld by the great law of self-preservation."

So, the doctrine that Congress cannot delegate its legislative power is assumed rather than based on authority. Presumably this conclu-

sion is reached from a consideration of Art. I, § 1: "All legislative powers herein granted shall be vested in a Congress of the United States * * *." But the cases do not argue on that line; they accept it as somehow inherent in the constitutional scheme of things. As early as 1825, it was stated by Chief Justice Marshall in *Wayman* v. *Southard* (10 Wheat. 1, 42): "It will not be contended that Congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative." And a half century later *In re Rahrer* (140 U. S. 545, 560) and *Field* v. *Clark* (143 U. S. 649, 692) state as established doctrine, beyond the need of authority or argument: "It does not admit of argument that Congress can neither delegate its own powers nor enlarge those of a State"; "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."

The implied negatives on congressional authority are perhaps less conspicuous, however, than the implied powers. The first of the cases listed to examine this field was *Hepburn* v. *Griswold*, in determining whether Congress had authority to make notes a legal tender in payment of previously contracted debts. After stating that beyond argument there was not "in the Constitution any express grant of legislative power to make any description of credit currency a legal tender in payment of debts" the Court proceeded to apply Chief Justice Marshall's rule as to implied powers, laid down in *McCulloch* v. *Maryland:* "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional." The implied power in this case was referred to the three express grants, to carry on war, regulate commerce, and borrow money. The Court found none of these an adequate basis, and finally came to the question, whether the power was "consistent with the spirit of the Constitution"—and the negative answer to this question it considered "decisive."

The cases, then, seem to fall into two general groups—(1) those which hold a law in direct violation of some constitutional provision; (2) those which hold a law unconstitutional because in excess of authority (either total or partial). In each group are cases which argue from specific clauses—and other cases where the exact constitutional basis must be a matter of inference. Or, to put it another way, there are cases which deny that an admitted general power of Congress can constitutionally be exercised in the particular fashion attempted; and others which deny the fundamental power of Congress to act in the premises at all. In the first sort, the party challenging the enactment sets up the constitutional provision as a standard which has been deviated from; in the other, the proponents of the legislation attempt to find in some clause or inference of the Constitution a primary authority for action. It is also to be borne in mind that many cases involve more than one provision of the Constitution; the following table does not purport to be a complete notation of all constitutional provisions involved in the several cases, but only the more significant. With these preliminary cautions, the cases are tentatively classified as follows:

I. Constitutional provisions specifically invoked or necessarily considered by the Supreme Court in holding provisions of Federal law void as in affirmative violation of the Constitution:

Art. I, § 2, cl. 3: *Pollock* v. *Farmers' Loan & Trust Co.*, *Eisner* v. *Macomber.*
§ 4, cl. 1: *Newberry* v. *United States.*
§ 9, cl. 3: *Ex parte Garland.*
§ 9, cl. 4: *Pollock* v. *Farmers' Loan & Trust Co.*, *Eisner* v. *Macomber.*
§ 9, cl. 5: *Fairbank* v. *United States*, *United States* v. *Hvoslef*, *Thames & Mersey Insurance Co.* v. *United States*, *Spalding & Bros* v. *Edwards.*
Art. II, § 1, cl. 1: *Myers* v. *United States* (*see also* § 2, cl. 2, and § 3).
§ 2, cl. 1: *Ex parte Garland*, *United States* v. *Klein.*
Art. III, § 1: *Evans* v. *Gore*, *Miles* v. *Graham*, *Booth* v. *United States.*
§ 2, cl. 2: *Marbury* v. *Madison*, *The Alicia*, *United States* v. *Evans*, *Muskrat* v. *United States*, *Keller* v. *Potomac Electric Power Co.*
§ 2, cl. 3: *Callan* v. *Wilson.*
Art. IV, § 3, cl. 1: *Coyle* v. *Oklahoma.*
Amend. 4: *Boyd* v. *United States.*
Amend. 5: *Reichart* v. *Felps*, *Dred Scott* v. *Sandford*, *Monongahela Navigation Co.* v. *United States*, *Boyd* v. *United States*, *Wong Wing* v. *United States*, *Jones* v. *Meehan*, *Adair* v. *United States*, *Choate* v. *Trapp*, *United States* v. *Moreland*, *Adkins* v. *Children's Hospital*, *Nichols* v. *Coolidge*, *United States* v. *Cohen Grocery Co.*, *Weeds, Inc.* v. *United States*, *Untermyer* v. *Anderson*, *Heiner* v. *Donnan*, *Lynch* v. *United States*, *Louisville Joint Stock Land Bank* v. *Radford.*
Amend. 6: *Rassmussen* v. *United States*, *Wong Wing* v. *United States*, *Kirby* v. *United States*, *United States* v. *Cohen Grocery Co.*, *Weeds, Inc.* v. *United States.*
Amend. 7: *The Justices* v. *Murray.*
Amend. 14, § 4: *Perry* v. *United States.*

II. Constitutional provisions expressly or implicitly relied on as congressional authority in certain cases, and held insufficient:

Amend. 10 states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people." In accordance with this amendment, it is a recognized principle that legislation for which authority is not expressly granted nor fairly deducible is unconstitutional as an invasion of the reserved powers of the States. The principle is fundamental and pervasive; it constitutes, so to speak, a prima facie case against any legislation which cannot produce satisfactory constitutional authority, either from some direct grant or from the combined grants of the Constitution. This was the situation in the following cases; authority sought directly or indirectly from the Constitution as noted was held insufficient, and the legislation accordingly fell, under the restriction of the Tenth Amendment:

Art. I, § 8, cl. 1: *United States* v. *Dewitt*, *Bailey* v. *Drexel Furniture Co.*, *Hill* v. *Wallace*, *Trusler* v. *Crooks*, *United States* v. *Butler*, *Rickert Rice Mills* v. *Fontenot.*
cl. 2: *Perry* v. *United States.*
cl. 3: *Trade-mark cases*, *Matter of Heff*, *Employers' Liability cases*, *Keller* v. *United States*, *Hammer* v. *Dagenhart*, *Railroad Retirement Board* v. *Alton R. R. Co. et al.*, *Carter* v. *Carter Coal Co.*
cl. 4: *United States* v. *Fox*, *Ashton* v. *Cameron County Water Improvement District.*
cl. 5: *Hopkins Federal Savings & Loan Association* v. *Cleary.*
cl. 8: *Trade-Mark cases.*
Amend. 13: *Hodges* v. *United States*, *United States* v. *Harris*, *Baldwin* v. *Franks*, *Civil Rights cases*, *Butts* v. *Merchants' & Miners' Transportation Co.*
Amend. 14: *United States* v. *Harris*, *Baldwin* v. *Franks*. *Civil Rights cases*, *Butts* v. *Merchants' & Miners' Transportation Co.*
Amend. 15: *United States* v. *Reese*, *James* v. *Bowman*, *United States* v. *Harris*, *Baldwin* v. *Franks.*

Amend. 16: *Evans* v. *Gore.*

III. Constitutional doctrines not based on specific clauses, which have been the basis for holding Federal legislation unconstitutional:

(1) Spirit of the Constitution (in connection with a negative on various suggested sources of implied power): *Hepburn* v. *Griswold, Evans* v. *Gore.*

(2) Judicial finality: *Gordon* v. *United States.*

(3) Nondelegability of legislative power: *Knickerbocker Ice Co.* v. *Stewart, Washington* v. *Dawson & Co., Panama Refining Co.* v. *Ryan, Schechter Poultry Corporation* v. *United States.*

(4) Constitutional immunity of State instrumentalities from Federal taxation: *Collector* v. *Day, United States* v. *Railroad Co., Indian Motocycle Co.* v. *United States, Burnet* v. *Coronado Oil & Gas Co., National Life Insurance Co.* v. *United States.*

[NOTE.—*National Life Insurance Co.* v. *United States* seems to involve two separate propositions: (1) Power to tax State obligations; (2) power to repudiate tax exemption in Federal obligations and exact a tax notwithstanding. As to (1) the decision seems in accord with the cases, that the United States cannot directly tax State agencies (it finds that refusing the deduction in this case is equivalent to such a direct tax); as to (2), however, although the insurance company expressly raised the question of power, the Court stated (p. 521): "How far the United States might repudiate their agreement not to tax we need not stop to consider"—on the ground that the act expressly disavowed any intent to subject Federal obligations to any greater burdens than those of the States, and "counsel do not claim that here State obligations should have more favorable treatment than is accorded to those of the Federal Government."]

IV. *United States* v. *Constantine* presents an exceptional case—where a tax so large as to amount to a penalty was sustained by the Eighteenth Amendment, but fell with its repeal.

ANALYTICAL TABLE OF CASES

Case and year of decision	Administration at date of act	Interval since act [1]	Gist of act involved	Nature of action	How jurisdiction invoked	Disposition of case	Number judges sitting	Dissent	Opinion by—	Page in analysis
Marbury v. *Madison*—1803.	Washington	14 years	Grant of general power to issue mandamus.	Petition for mandamus to Secretary of State.	Original	Rule discharged.	6		Marshall, C. J.	1
Dred Scott v. *Sandford*—1857.	Monroe	37 years	Missouri Compromise.	Trespass	Error to circuit court.	Reversed	9	[2] 2	Taney, C. J.	3
Gordon v. *U. S.*—1865	Lincoln	2 years	Court of Claims Act—payment of judgments subject to estimate by Secretary of Treasury.	Money claim v. U. S.	Appeal from Court of Claims.	Dismissed	10	2	Chase, C. J.	8
Ex parte Garland—1867	do	do	Test oath, applicable to persons already admitted to bar.	Petition for authority to practice without oath.	Original	Granted	9	4	Field	10
Reichart v. *Felps*—1868	Madison	56 years	Examination of land claims confirmed by territorial governors.	Ejectment	Error to State court.	Affirmed	8		Grier	2
The Alicia—1869	Lincoln	5 years	Transfer of pending prize causes to Supreme Court.	Prize proceedings	On motion to docket and dismiss.	Sent back to circuit court.	8		Chase, C. J.	9
Hepburn v. *Griswold*—1870.	do	8 (7) years [3]	Making paper money legal tender.	Suit on promissory note.	Error to State court.	Affirmed	8	3	do	5
U. S. v. *Dewitt*—1870	Johnson	3 years	Regulating sale of illuminating oil.	Criminal prosecution.	Certificate of division, circuit court.	Question answered.	9		do	13
Justices v. *Murray*—1870	Lincoln	7 years	Removal of suits from State courts after final judgment.	Trespass and false imprisonment.	Error to circuit court.	Reversed	9		Nelson	7
Collector v. *Day*—1871	Johnson	6 (4) years [3]	Income tax on State officers.	Suit to recover tax paid.	do	Affirmed	9	1	do	12
U. S. v. *Klein*—1872	Grant	18 months	Restricting effect of pardon (Civil War claims).	Money claim v. U. S.	Appeal from Court of Claims.	do	9	2	Chase, C. J.	16
U. S. v. *R. R. Co.*—1873	Johnson	6 years	Tax on corporate bonds collectible out of interest payments.	Suit for collection of tax.	Error to circuit court.	do	9	[4] 2	Hunt	12

[1] Intervals over 2 years, to nearest year; under 2 years, to nearest month.
[2] A third Justice dissented without passing on constitutional question.
[3] 2 separate acts involved.
[4] A third Justice concurred, withholding judgment on constitutional question.

Analytical table of cases—Continued

Case and year of decision	Administration at date of act	Interval since act [1]	Gist of act involved	Nature of action	How jurisdiction invoked	Disposition of case	Number judges sitting	Dissent	Opinion by—	Page in analysis
U. S. v. *Reese*—1876	Grant	6 years	Penalty for interfering with qualification of voters generally.	Criminal prosecution.	Error to circuit court.	Affirmed	9	2	Waite, C. J.	14
U. S. v. *Fox*—1878	Johnson	10 years	Punishment of fraud prior to bankruptcy proceedings.	do	Certificate of division from circuit court.	Question answered.	9		Field	21
Trade-mark cases—1879	Grant	9 (3) years [2]	Trade-mark law, applicable to marks for "use within the United States."	do	do	do	8		Miller	20
U. S. v. *Harris*—1883	do	11 years	Penalizing conspiracy by individuals to deprive of equal protection of laws.	do	do	do	9	1	Woods	22
Civil Rights cases—1883	do	8 years	Guaranteeing individuals equal rights at inns, etc.	do	Two on error and three on certificate of division from circuit courts.	Affirmed	9	1	Bradley	25
Boyd v. *U. S.*—1886	do	11 years	Effect of failure to produce papers in proceedings under revenue laws.	Forfeiture under customs laws.	Error to circuit court.	Reversed	9	2	do	17
Baldwin v. *Franks*—1887	do	16 years	Same act as *U. S.* v. *Harris*.	Criminal prosecution.	do	do	8	1	Waite, C. J.	23
Callan v. *Wilson*—1888	do	17 years	Trial by District of of Columbia police court to be on information.	Prosecution on information.	Appeal from District of Columbia Supreme Court.	Reversed	8		Harlan	23
Monongahela Navigation Co. v. *U. S.*—1893.	Cleveland	4 years	Restricting price payable under certain eminent domain proceedings.	Eminent domain	Appeal from and error to circuit court.	do	6		Brewer	28
Pollock v. *Farmers' Loan & Trust Co.*—1895.	do	7½ months	Income-tax law	Bill by stockholder to prevent compliance.	Appeal from circuit court.	do	8	2	Fuller, C. J.	21
Same—Rehearing—1895	do	8¾ months	do	do	do	do	9	4	do	32
Wong Wing v. *U. S.*—1896	Harrison	4 years	Imprisonment of aliens prior to detention, without judicial trial.	Habeas corpus	do	do	8		Shiras	29

Kirby v. *U. S.*—1899	Grant	24 years	Making judgment against embezzler conclusive of theft, in suit against receiver.	Criminal prosecution.	Error to district court.	do	8	2	Harlan	
Jones v. *Meehan*—1899	Cleveland	5 years	Approval of specific lease while another outstanding.	Suit to quiet title	Appeal from circuit court.	Affirmed	9		Gray	30
Fairbank v. *U. S.*—1901	McKinley	3 years	Tax on export bills of lading.	Criminal prosecution.	Error to district court.	Reversed	9	4	Brewer	36
James v. *Bowman*—1903	Grant	32 years	Penalizing individuals interfering with exercise of franchise.	do	Appeal from district court.	Affirmed	8	2	do	22
Matter of Heff—1905	Cleveland	8 years	Penalizing sale of liquor to allotted Indians.	do	Original habeas corpus.	Prisoner discharged.	9	1	do	33
Rasmussen v. *U. S.*—1905	McKinley	4 years	Six-person jury for misdemeanor trials in Alaska.	do	Error to district court.	Reversed	9	[2] 2	White	37
Hodges v. *U. S.*—1906	Grant	35 years	Guaranteeing equality of contractual rights.	do	do	do	9	2	Brewer	18
Employers' Liability cases—1908.	T. Roosevelt	19 months	Liability on part of interstate carriers for injury to any employee.	Damage suits	Error to circuit courts.	Affirmed	9	4	White	39
Adair v. *U. S.*—1908	McKinley	9 years	Penalizing discharge of "any employee" by interstate carriers on account of union activity.	Criminal prosecution.	Error to district court.	Reversed	8	2	Harlan	35
Keller v. *U. S.*—1909	T. Roosevelt	2 years	Harboring aliens for purposes of prostitution up to 3 years after entry.	do	do	do	9	3	Brewer	42
U. S. v. *Evans*—1909	McKinley	8 years	Appeal by United States in criminal cases (D. C.) without disturbing verdict for defendant.	Appeal by United States following acquittal of murder.	Certiorari	Quashed	9		Fuller, C. J.	38
Muskrat v. *U. S.*—1911	T. Roosevelt	4 years	Authorizing suit to determine validity of certain acts.	Suit in Court of Claims.	Appeal	Reversed	7		Day	43
Coyle v. *Oklahoma*—1911	do	5 years	Restriction on relocation of capital, in Oklahoma Enabling Act.	Suit to determine validity of State law in violation.	Error to State court.	Affirmed	9	2	Lurton	41
Choate v. *Trapp*—1912	do	3 years	Removal of tax exemption guaranteed by an Indian treaty.	State assessment proceedings.	do	Reversed	8		Lamar, J. R.	44

[1] Intervals over 2 years, to nearest year; under 2 years, to nearest month.

[2] 2 separate acts involved.

[4] From argument only.

Analytical table of cases—Continued

Case and year of decision	Administration at date of act	Interval since act [1]	Gist of act involved	Nature of action	How jurisdiction invoked	Disposition of case	Number judges sitting	Dissent	Opinion by—	Page in analysis
Butts v. *Merchants' and Miners' Transportation Co.*—1913.	Grant	38 years	Same as in *Civil Rights cases.*	Suit for penalty	Error to district court.	Affirmed	9		Van Devanter.	25
U. S. v. *Hvoslef*—1915	McKinley	16 years	Tax on contracts for hire of vessels.	Suit to recover taxes paid.	do	do	8		Hughes	36
Thames and Mersey Insurance Co. v. *U. S.*—1915.	do	do	Tax on insurance policies (vessel cargo).	Suit for refund of taxes.	do	Reversed	8		do	37
Hammer v. *Dagenhart*—1918.	Wilson	21 months	Prohibiting interstate shipments from factories employing child labor.	Injunction against enforcement.	Appeal from district court.	Affirmed	9	4	Day	49
Knickerbocker Ice Co. v. *Stewart*—1920.	do	3 years	Authorizing application of State workmen's compensation laws to maritime injuries.	Suit under New York Compensation Act.	Error to State court.	Reversed	9	4	McReynolds	53
Eisner v. *Macomber*—1920	do	3½ years	Stock dividends declared income.	Suit to recover taxes paid.	Error to district court.	Affirmed	9	4	Pitney	51
Evans v. *Gore*—1920	do	15 months	Income tax on salaries of Federal judges.	Recovery of taxes paid.	do	Reversed	9	2	Van Devanter.	56
U. S. v. *Cohen Grocery Co.*—1921.	do	16 months	Penalizing the making of "unjust or unreasonable" rates in dealing with necessaries.	Criminal prosecution.	do	Affirmed	8	2	White, C. J.	61
Weeds, Inc. v. *U. S.*—1921	do	16 months	Penalizing conspiracy to exact "excessive prices."	do	do	Reversed	8	2	do	62
Newberry v. *U. S.*—1921	Taft	9 years	Regulating senatorial campaign expenditures.	do	do	do	9	4	McReynolds	46
U. S. v. *Moreland*—1922	do	10 years	Granting District of Columbia Juvenile Court jurisdiction of desertion cases.	Prosecution on information.	Certiorari to District of Columbia Court of Appeals.	Affirmed	8	3	McKenna	47
Child Labor Tax Case—1922.	Wilson	3 years	Child Labor Tax Act	Suit to recover taxes paid.	Error to district court.	do	9	1	Taft, C. J.	60
Hill v. *Wallace*—1922	Harding	9 months	Future Trading Act	Suit to prevent enforcement.	Appeal from district court.	Reversed	9		do	63

Keller v. *P. E. P. Co.*—1923.	Taft	10 years	Court review of rates fixed by District of Columbia Public Utilities Commission.	Injunction against Commission.	Appeal from District of Columbia Court of Appeals.	Dismissed	9		do	48
Adkins et al. v. *Children's Hospital*—1923.	Wilson	5 years	Minimum wage for women in District of Columbia.	Suit to prevent enforcement.	do	Affirmed	8	3	Sutherland	55
Spalding v. *Edwards*—1923.	do	6 years	Tax on manufacturers of sporting goods.	Suit to recover taxes paid.	Error to district court.	Reversed	9		Holmes	52
Washington v. *Dawson*—1924. *Industrial Accident Commission of California* v. *Ralph Co. et al.*	Harding	21 months	Application of State Workmen's Compensation laws to maritime injuries other than to crew.	Suit for contribution to State accident fund; and annulment of award of Accident Commission.	Error to State courts.	Affirmed	9	2	McReynolds	65
Miles v. *Graham*—1925	Wilson	5 years	Same as *Evans* v. *Gore*.	Suit to recover tax paid.	Error to district court.	do	9	1	do	57
Trusler v. *Crooks*—1926	Harding	4 years	Same act as *Hill* v. *Wallace* (tax on grain options).	do	do	Reversed	9		do	63
Myers v. *U. S.*—1926	Grant	50 years	Requiring consent of Senate to removal of first-class postmasters.	Money claim v. U. S. for balance of salary.	Appeal from Court of Claims.	Affirmed	9	3	Taft, C. J.	27
Nichols v. *Coolidge*—1927	Wilson	8 years	Tax on transfers made "at any time" before death.	Recovery of taxes paid.	Error to district court.	do	9	(6)	McReynolds	58
Untermyer v. *Anderson*—1928.	Coolidge	4 years	Gift tax retroactive to Jan. 1 of year of passage.	Suit to recover tax paid.	Certiorari to Circuit Court of Appeals.	Reversed	9	[7] 3	do	66
National Life Insurance Co. v. *U. S.*—1928.	Harding	7 years	Partial exemption only of tax-exempts held by insurance companies.	do	Certiorari to Court of Claims.	do	9	3	do	64
Indian Motocycle Co. v. *U. S.*—1931.	Coolidge	7 years	Motorcycle manufacturers tax.	do	Question certified from Court of Claims.	Question answered.	9	2	Van Devanter	67
Heiner v. *Donnan*—1932	do	6 years	Transfers within 2 years of death conclusively subject to death duty.	do	Question certified from Circuit Court of Appeals.	do	8	2	Sutherland	68
Burnet v. *Coronado Oil and Gas Co.*—1932.	Wilson	15 (13) years[3]	Taxation of income from State lands under lease.	Suit to redetermine taxes.	Certiorari to District of Columbia Court of Appeals.	Affirmed	9	4	McReynolds	52

[1] Intervals over 2 years, to nearest year; under 2 years, to nearest month.
[3] Two separate acts involved.
[6] Four justices concurring in result.
[7] A fourth justice concurred in result.

Analytical table of cases—Continued

Case and year of decision	Administration at date of act	Interval since act [1]	Gist of act involved	Nature of action	How jurisdiction invoked	Disposition of case	Number judges sitting	Dissent	Opinion by—	Page in analysis
Booth v. *U. S.*—1934	F. Roosevelt	8 months	Reduction of retired pay of judges.	Suit to recover amount of reductions.	Question certified from Court of Claims.	Question answered.	9		Roberts	77
Lynch v. *U. S.*—1934	do	14 months	Repeal of laws relating to yearly renewable term insurance.	Suit on a policy	Certiorari to Circuit Court of Appeals.	Reversed	9		Brandeis	70
Panama Refining Co. v. *Ryan et al.*—1935.	do	19 months	N. R. A. (oil regulation).	Suit to enjoin enforcement.	do	do	9	1	Hughes, C. J.	76
Perry v. *U. S.*—1935	do	20 months	Abrogation of gold clause in Government obligations.	Claim for payment under terms of bond.	Question certified from Court of Claims.	Question answered.	9	[2] 4	do	72
Railroad Retirement Bd. v. *Alton R. R.*—1935.	do	10 months	Railroad Retirement Act.	Suit to enjoin enforcement.	Certiorari to District of Columbia Court of Appeals.	Affirmed	9	4	Roberts	80
Schechter Poultry Corp. v. *U. S.*—1935.	do	23 months	N. R. A. (code provisions).	Criminal prosecution.	Certiorari to Circuit Court of Appeals.	Reversed	9		Hughes, C. J.	74
Louisville Joint Stock Land Bank v. *Radford*—1935.	do	11 months	Frazier-Lemke Farm Bankruptcy Act.	Application for relief under the act.	do	do	9		Brandeis	82
U. S. v. *Constantine*—1935.	Coolidge	10 years	Tax of $1,000 on liquor dealers violating State law; and penalty for nonpayment.	Criminal prosecution.	do	Affirmed	9	3	Roberts	69
Hopkins Federal Savings and Loan Association v. *Cleary*—1935.	F. Roosevelt	19 months	Conversion of State into Federal savings and loan associations.	Suit to enjoin conversion.	Certiorari to State court.	do	9		Cardozo	78
U. S. v. *Butler*—1936	do	2 years, 8 months.	A. A. A. (original)	Suit for collection of tax.	Certiorari to Circuit Court of Appeals.	do	9	3	Roberts	71
Rickert Rice Mills v. *Fontenot*—1936.	do	5 months	A. A. A. (amendments).	Suit to enjoin collection of tax.	do	Reversed	9		do	83

Carter v. *Carter Coal Co.*—1936	----do----	9 months----	Guffey Coal Act----	Suits to enjoin (and compel) compliance.	Certiorari to Circuit Court of Appeals and District of Columbia Court of Appeals.	----do----	9	4	Sutherland----	85
Ashton v. *Cameron County Water Improvement District*—1936.	----do----	2 years----	Municipal Bankruptcy Act.	Petition for adjustment under the act.	Certiorari to Circuit Court of Appeals.	----do----	9	4	McReynolds--	79

[1] Intervals over 2 years, to nearest year; under 2 years, to nearest month.

[2] Formal dissent was from the decision; a fifth justice did not pass on constitutional question.

DECISIONS HOLDING PROVISIONS OF FEDERAL LAW UNCONSTITUTIONAL LISTED ALPHABETICALLY

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Hopkins Federal Savings & Loan Association v. Cleary	296 U. S. 315	78
Indian Motocycle Co. v. United States	283 U. S. 570	67
James v. Bowman	190 U. S. 127	22
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SUPREME COURT DECISIONS INVOLVING THE CONSTITUTIONALITY OF LEGISLATION ENACTED SINCE MARCH 4, 1933

I. In the following cases, the Supreme Court has considered the validity of laws passed since March 4, 1933, and held the same unconstitutional in whole or in part:

1. *Booth* v. *United States* (291 U. S. 339) (unanimous): Provision in the Independent Offices Appropriation Act of June 16, 1933 (48 Stat. 307, sec. 13), reducing the salary of retired Federal judges who under section 260 of the Judicial Code remained subject to call to judicial service.

2. *Lynch* v. *United States* (292 U. S. 571) (unanimous): Part of section 17 of the Economy Act of March 20, 1933 (48 Stat. 11), repealing all laws granting or pertaining to yearly renewable term insurance.

3. *Panama Refining Company* v. *Ryan* (293 U. S. 388) (1 dissent): Section 9 (c) of the National Industrial Recovery Act of June 16, 1933 (48 Stat. 200), dealing with oil regulation.

4. *Perry* v. *United States* (294 U. S. 330) (4 Justices dissenting from the judgment denying recovery and a fifth concurring in the judgment but dissenting on the constitutional holding): The Gold Clause Resolution of June 5, 1933 (48 Stat. 113, sec. 1), so far as applicable to the gold clause in Government obligations (but recovery was denied because plaintiff did not show "damages").

5. *Railroad Retirement Board* v. *The Alton Railroad Company et al.* (295 U. S. 330) (4 dissents): The Railroad Retirement Act of June 27, 1934 (48 Stat. 1283, ch. 868).

6. *Schechter Poultry Corporation* v. *United States* (295 U. S. 495) (unanimous): The code provisions of the National Industrial Recovery Act (48 Stat. 195, title 1, in part).

7. *Louisville Joint Stock Land Bank* v. *Radford* (295 U. S. 555) (unanimous): The Frazier-Lemke Farm Bankruptcy Act of June 28, 1934 (48 Stat. 1289, ch. 869).

8. *Hopkins Federal Savings and Loan Association* v. *Cleary* (296 U. S. 315) (unanimous): Section 5 (i) of the Home Owners Loan Act, as amended April 27, 1934 (48 Stat. 646, sec. 6), providing for the conversion of State loan associations into Federal associations upon vote of 51 percent of the votes cast at a legal meeting called for the purpose.

9. *United States* v. *Butler* (297 U. S. 1) (3 dissents): The agricultural processing taxes under the Agricultural Adjustment Act of May 12, 1933 (48 Stat. 31).

10. *Rickert Rice Mills* v. *Fontenet* (297 U. S. 110) (unanimous): The Agricultural Adjustment Act amendments of August 24, 1935 (49 Stat. 750, title 1, in part).

11. *Carter* v. *Carter Coal Company* (298 U. S. 238) (4 Justices dissenting in part): The Guffey Coal Act of August 30, 1935 (49 Stat. 991, ch. 824), regulating mining and distribution of bituminous coal.

12. *Ashton* v. *Cameron County Water Improvement District* (298 U. S. 513) (4 dissents): The Municipal Bankruptcy Act of May 24, 1934 (48 Stat. 798), adding chapter 60, sections 78–80 to the Bankruptcy Act and authorizing readjustment of indebtedness by political subdivisions of States.

II. In the following cases the Supreme Court has passed on the validity of acts passed since March 4, 1933, and sustained the legislation:

1. *Woodson* v. *Deutsche, etc., Vormals* (292 U. S. 449) (unanimous): Act of March 28, 1934 (48 Stat. 510), restricting suits against the Alien Property Custodian, the Treasurer of the United States, or the United States for recovery of deductions for administrative expenses made from alien property held by the Custodian—upheld against the argument that the United States may not constitutionally deprive former alien enemies of property rights hitherto vested in them.

2. *Norman* v. *B. and O. Railroad Company* (294 U. S. 240) (4 dissents): The Gold Clause Resolution (48 Stat. 113, sec. 1) abrogating gold-clause stipulations as applied to private contracts.

3. *Nortz* v. *United States* (294 U. S. 317) (4 dissents): The Gold Clause Resolution, in its requirement that holders of gold certificates accept therefor legal-tender currency of equal face amount.

4. *United States* v. *Wood* (No. 34, decided Dec. 7, 1936) (Law Ed. Adv. Ops., vol. 81, p. 80) (3 dissents): Act of August 22, 1935 (49 Stat. 682, ch. 605), specifically making Government employees, pensioners, etc., in the District of Columbia subject to jury duty.

5. *United States* v. *Curtiss-Wright Export Corporation* (No. 98, decided Dec. 21, 1936) (1 Justice dissenting): Joint resolution of May 28, 1934 (48 Stat. 811, ch. 365), authorizing the President to restrict sale of munitions to countries engaged in war in the Chaco, upheld as against the argument that it constituted a delegation of legislative power to the President.

6. *Kuehner* v. *Irving Trust Company* (No. 354, decided Jan. 4, 1937) (unanimous): Part of section 77B, subsection (b) (10) of the Bankruptcy Act, enacted June 7, 1934 (48 Stat. 911, 915), which limits claims of landlords for indemnity under covenants in a lease, to 3 years' rent, upheld as not in violation of the fifth amendment.

7. *Kentucky Whip and Collar Company* v. *Illinois Central Railroad Company* (No. 138, decided Jan. 4, 1937) (unanimous): The Ashurst-Sumners Act of July 24, 1935 (49 Stat. 494), prohibiting interstate transportation of convict-made goods etc., intended to be used, etc., in violation of State law, upheld as a regulation of interstate commerce, against the argument that it violated the fifth amendment, and constituted a delegation of legislative power.

8. *United States* v. *Hudson* (No. 97, decided Jan. 11, 1937) (unanimous): Section 8 of the Silver Purchase Act of June 19, 1934 (48 Stat. 1178, ch. 674), taxing certain transfers of silver within 35 days of passage, upheld, in its retroactive operation, as not in violation of the fifth amendment.

9. *Cummings, Atty. Gen.* v. *Deutsche Bank and Disconto Gesellschaft* (No. 254, decided Feb. 1, 1937) (unanimous): Public Resolution No. 53 of June 27, 1934 (48 Stat. 1267), in postponing deliveries of property seized under Trading with the Enemy Act of 1917, is not repugnant to the fifth amendment.

10. *Holyoke Water Power Co.* v. *American Writing Paper Co., Inc.* (No. 180, decided Mar. 1, 1937) (4 dissents): The Gold Clause Resolution of June 5, 1933 (48 Stat. 113), abrogating a gold clause stipulation contained in a lease, does not violate the fifth amendment.

11. *Aetna Life Insurance Co.* v. *Haworth et al* (No. 446, decided Mar. 1, 1937) (unanimous): The Federal Declaratory Judgment Act of June 14, 1934 (48 Stat. 955), falls within the ambit of congressional power when confined to cases of actual controversy.

12. *Virginian Railway Co.* v. *System Federation No. 40* (No. 324, decided Mar. 29, 1937) (unanimous): The Railway Labor Act of 1926 (as amended by Act of June 21, 1934, ch. 691, 48 Stat. 1185), which requires a railroad company to "treat with" authorized representatives of its employees is not unconstitutional in its application to mechanical "backshop" employees.

13. *Robert Page Wright* v. *Vinton Branch of the Mountain Trust Bank of Roanoke, Virginia* (No. 530, decided Mar. 29, 1937) (unanimous): Subsection (s) of section 75 of the Bankruptcy Act, as amended by the Frazier-Lemke Act of 1935, does not violate the due process clause of the fifth amendment.

14. *Max Sonzinsky* v. *United States* (No. 614, decided Mar. 29, 1937) (unanimous): Section 2 of the National Firearms Act of 1934 (48 Stat. 1236), which requires dealers in firearms to register with collector of internal revenue and pay a $200 excise tax annually is a valid exercise of the taxing power of Congress.

15. *The Associated Press* v. *National Labor Relations Board* (No. 365, decided Apr. 12, 1937) (4 dissents): The National Labor Relations Act of 1935 (49 Stat. 449), when applied to the Associated Press and employees in its New York news office, is a valid exercise of the commerce power, and does not infringe freedom of the press nor due process of law.

16. *National Labor Relations Board* v. *Jones and Laughlin Steel Corporation* (No. 419, decided Apr. 12, 1937) (4 dissents): The National Labor Relations Act of 1935 (49 Stat. 449), when applied to a steel corporation and its production employees, is a valid exercise of the commerce power, and is not in violation of the fifth or seventh amendment.

17. *National Labor Relations Board* v. *Fruehauf Trailer Co.* (Nos. 420 and 421, decided Apr. 12, 1937) (4 dissents): The National Labor Relations Act of 1935 (49 Stat. 449), when applied to a manufacturer of automobile trailers (80 percent of whose products are sold in other States), does not violate article I, section 1, the first, fifth, seventh, and tenth amendments of the Constitution.

18. *National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co.* (Nos. 422 and 423, decided Apr. 12, 1937) (4 dissents): National Labor Relations Act of 1935 (49 Stat. 449), when applied to a manufacturer of men's clothing (who shipped in 99 percent of his raw materials, and shipped out 82 percent of the finished product to other States), does not violate the reserve power of the States.

19. *Washington, Virginia and Maryland Coach Co.* v. *National Labor Relations Board* (No. 469, decided Apr. 12, 1937) (unanimous): National Labor Relations Act as applied to an interstate motor bus company, is a valid exercise of the commerce power, and does not violate the fifth and seventh amendments.

III. In several cases, the Supreme Court has specifically refused to pass on the constitutionality of legislation, deciding the cases before them on other grounds, e. g.:

Wilshire Oil Company v. *United States* (295 U. S. 100): Where the Court held that a decision of a circuit court of appeals on the validity of the National Industrial Recovery Act was unnecessary; and refused to review the question on certificate.

Moor v. *Texas and New Orleans Railroad Company* (297 U. S. 101): The Court dismissed a writ of certiorari to review this refusal of the lower court to grant a mandatory injunction to compel carriage of

cotton, on which the tax under the Cotton Control Act had not been paid, where plaintiff claimed the act was unconstitutional.

In a further case the Court held that a decision of a circuit court of appeals holding invalid subsection (b) (5) of section 77B of the Bankruptcy Act, was "premature", and affirmed the judgment on another "entirely adequate ground" without expressing any opinion on the constitutionality of the Bankruptcy Act: *Tennessee Publishing Company* v. *American National Bank* (290 U. S. 18) (unanimous).

In *Ashwander* v. *Tennessee Valley Authority* (297 U. S. 288), the Court carefully confined its opinion to the particular contract before it, which called for sale of power generated at the Wilson Dam, constructed under the National Defense Act of 1916. "We express no opinion as to the validity * * * of the T. V. A. Act or of the claims made in the pronouncements of the Authority" apart from the particular contract.

IV. Two cases involving the validity of action by the President (*Humphrey's Executor* v. *United States*, 295 U. S. 602) and by the Securities Exchange Commission (*Jones* v. *Securities Exchange Commission*, 298 U. S. 1) are to be distinguished in that no question of the constitutionality of legislation was involved in the decisions.

PROPOSED AMENDMENTS TO THE CONSTITUTION PROVIDING FOR THE POPULAR ELECTION OF FEDERAL JUDGES, 1881–1937 [1]

1881: December 13; Senate Joint Resolution 14, Forty-seventh Congress, first session; Mr. Voorhees of Indiana; election of judges of Federal district courts by voters living in districts.

1882: January 18; Senate Joint Resolution 25, Forty-seventh Congress, first session; Mr. George of Mississippi; popular election of judges of inferior Federal courts.

1883: December 10; Senate Joint Resolution 24, Forty-eighth Congress, first session; Mr. Voorhees of Indiana; election of judges of Federal district courts by voters resident in districts.

1897: December 18; House Joint Resolution 107; Fifty-fifth Congress, second session; Mr. Cooper of Texas; judges of all Federal courts to be elected or appointed as Congress may by law direct.

1898: January 7; Senate Joint Resolution 79; Fifty-fifth Congress, second session; Mr. Butler of North Carolina; popular election of all Federal judges.

1899: December 20; Senate Joint Resolution 47; Fifty-sixth Congress, first session; Mr. Butler of North Carolina; popular election of all Federal judges.

1901: December 13; House Joint Resolution 77, Fifty-seventh Congress, first session; Mr. Cooper of Texas; judges of all Federal courts to be elected or appointed as Congresss may direct.

1903: November 17; House Joint Resolution 38, Fifty-eighth Congress, first session; Mr. Cooper of Texas; judges of all Federal courts to be elected or appointed as Congress may direct.

[1] There were no proposed amendments to the Constitution relative to the popular election of Federal judges prior to December 13, 1881.

1904: January 27; House Joint Resolution 93, Fifty-eighth Congress, second session; Mr. Russell of Texas; election of judges of Federal district courts by voters resident in districts.

1907: January 24; House Joint Resolution 226, Fifty-ninth Congress, second session; Mr. Lamar of Florida; election of all Federal judges by voters in respective circuits and districts.

1907: February 22; House Joint Resolution 249, Fifty-ninth Congress, second session; Mr. Russell of Texas; popular election of judges of Federal district courts by voters resident in districts.

1907: December 2; House Joint Resolution 15, Sixtieth Congress, first session; Mr. Russell of Texas; (*a*) for election of judges of United States district courts and district attorneys by people of States in which duties are performed and (*b*) term of office of Justices of Supreme Court to be 12 years; justices of circuit courts of appeal to be 8 years; justices of district courts to be 6 years.

1907: December 3; House Joint Resolution 27, Sixtieth Congress, first session; Mr. Cooper of Texas; judges of all Federal courts to be elected or appointed as Congress may direct.

1907: December 5; House Joint Resolution 42, Sixtieth Congress, first session; Mr. W. W. Kitchin of North Carolina; for popular election of justices of circuit and district courts.

1907: December 9; House Joint Resolution 50, Sixtieth Congress, first session; Mr. Lamar of Florida; (*a*) for popular election of Justices of the United States Supreme Court and inferior Federal courts and (*b*) to hold office for term of 8 years.

1909: December 10; House Joint Resolution 80, Sixty-first Congress, second session; Mr. Russell of Texas; election of judges of Federal district courts by voters resident in districts.

1912: January 17; House Joint Resolution 214, Sixty-second Congress, second session; Mr. Jackson of Kansas; popular election of judges of Federal district courts.

1912: January 24; House Joint Resolution 227, Sixty-second Congress, second session; Mr. Lafferty of Oregon; popular election of all Federal judges.

1912: February 20; House Joint Resolution 246, Sixty-second Congress, second session; Mr. Dickinson of Missouri; popular election of judges of inferior Federal courts.

1912: April 6; House Joint Resolution 290, Sixty-second Congress, second session; Mr. Neely of Kansas; (*a*) popular election of judges of Federal district courts and (*b*) to hold office for term of 6 years.

1912: June 3; House Joint Resolution 324, Sixty-second Congress, second session; Mr. Cullop of Indiana; (*a*) popular election of judges of United States Supreme Court for terms of 4 and 8 years and (*b*) popular election of judges of inferior Federal courts for term of 6 years.

1912: July 10; House Joint Resolution 336, Sixty-second Congress, second session; Mr. Dickinson of Missouri; popular election of judges of inferior Federal courts.

1913: April 7; House Joint Resolution 17, Sixty-third Congress, first session; Mr. Neely of Kansas; election of judges of Federal district courts every 6 years by voters in the judicial districts.

1913: April 7; House Joint Resolution 26, Sixty-third Congress, first session; Mr. Lafferty of Oregon; popular election and recall of all Federal judges.

1914: January 15; House Joint Resolution 195, Sixty-third Congress, second session; Mr. Dickinson of Missouri; election or appointment of judges of inferior Federal courts under congressional regulation.

1914: July 29; House Joint Resolution 309, Sixty-third Congress, second session; Mr. Moon of Tennessee; popular election of judges of inferior Federal courts.

1914: September 21; House Joint Resolution 349, Sixty-third Congress, second session; Mr. Reilly of Wisconsin; election of judges of United States district courts by voters resident in the districts.

1914: October 12; House Joint Resolution 369, Sixty-third Congress, second session; Mr. Vaughan of Texas; popular election of judges of inferior Federal courts for terms of 4 years.

1915: December 6; House Joint Resolution 12, Sixty-fourth Congress, first session; Mr. Dickinson of Missouri; election or appointment of judges of inferior Federal courts under congressional regulation.

1916: April 18; House Joint resolution 204, Sixty-fourth Congress, first session; Mr. Abercrombie of Alabama; popular election of judges of inferior Federal courts.

1920: March 19; Senate Joint Resolution 173, Sixty-sixth Congress, second session; Mr. La Follette of Wisconsin; popular election of all Federal judges for term of 10 years.

1924: March 10; Senate Joint Resolution 93, Sixty-eighth Congress, first session; Mr. Dill; election and qualification of judges.

1926: April 28; Senate Joint Resolution 103, Sixty-ninth Congress, first session; Mr. Dill; election and qualification of judges.

1930: January 6; Senate Joint Resolution 126, Seventy-first Congress, second session; Mr. Dill, of Washington; (1) providing that the judges of the Supreme Court shall be appointed from the elected judges of the inferior courts and shall hold office during good behavior unless otherwise provided by Congress; (2) providing that judges of inferior courts shall be elected by the qualified electors of the districts over which they have jurisdiction and for such term of office as Congress shall provide; (3) providing that Congress may delegate the appointment of appellate judge to the President; (4) providing that the compensation of all judges of all United States courts shall be determined by Congress; referred to Committee on the Judiciary.

1931: December 15; Senate Joint Resolution 52, Seventy-second Congress, first session; Mr. Dill of Washington; (1) providing for the appointment of Supreme Court judges, who shall hold office during good behavior, from among the judges of the inferior courts who shall have been elected by the electors of district over which they have jurisdiction in such manner and for such term of office as Congress shall provide; (2) providing that Congress may delegate the appointment of appellate court judges to the President; (3) providing that Congress shall fix the salaries of all judges of

the United States Courts; referred to Committee on the Judiciary.

1933: May 31; Senate Joint Resolution 58, Seventy-third Congress, first session; Mr. Dill; election and qualification of judges.

1936: April 27; House Joint Resolution 574, Seventy-fourth Congress, second session; Mr. Cannon of Wisconsin; popular election of Federal judges.

1937: January 12; House Joint Resolution 109, Seventy-fifth Congress, first session; Mr. Cannon of Wisconsin; popular election of judges.

AGE AT RETIREMENT AND PERIOD OF SERVICE OF JUSTICES OF THE SUPREME COURT

Name of Justice	Place of birth	Date of birth	State from which appointed	Date of commission	Termination of service	Age at retirement	Period of service	Date of death
							Years	
Baldwin, Henry	Connecticut	Jan. 14, 1780	Pennsylvania	Jan. 6, 1830	Apr. 21, 1844	64	14	Apr. 21, 1844
Barbour, Philip P	Virginia	May 25, 1783	Virginia	Mar. 15, 1836	Feb. 25, 1841	58	5	Feb. 25, 1841
Blair, John	do	1732	do	Sept. 26, 1789	Jan. 27, 1796 [2]	64	6	Aug. 31, 1800
Blatchford, Samuel	New York	Mar. 9, 1820	New York	Mar. 22, 1882	July 7, 1893	73	11	July 7, 1893
Bradley, Joseph	do	Mar. 14, 1813	New Jersey	Mar. 21, 1870	Jan. 22, 1892	79	22	Jan. 22, 1892
Brandeis, Louis D	Kentucky	Nov. 13, 1856	Massachusetts	June 5, 1916				
Brewer, David J	Smyrna, Asia Minor.	June 20, 1837	Kansas	Jan. 6, 1890	Mar. 28, 1910	73	20	Mar. 28, 1910
Brown, Henry B	Massachusetts	Mar. 2, 1836	Michigan	Dec. 29, 1890	May 28, 1906 [2]	70	15	Sept. 4, 1913
Butler, Pierce	Minnesota	Mar. 17, 1886	Minnesota	Jan. 2, 1923				
Campbell, John A	Georgia	June 24, 1811	Alabama	Mar. 22, 1853	May 1, 1861 [3]	50	8	Mar. 12, 1889
Cardozo, Benjamin N	New York	May 24, 1870	New York	Mar. 14, 1932				
Catron, John	Pennsylvania or Virginia(?).	1786	Tennessee	Mar. 8, 1837	May 30, 1865	79	28	May 30, 1865
Chase, Salmon P	New Hampshire	Jan. 13, 1808	Ohio	Dec. 6, 1864	May 7, 1873	65	8	May 7, 1873
Chase, Samuel [1]	Maryland	Apr. 17, 1741	Maryland	Jan. 27, 1796	June 19, 1811	70	15	June 19, 1811
Clarke, John H	Ohio	Sept. 18, 1857	Ohio	Oct. 9, 1916	Sept. 18, 1922 [2]	65	6	
Clifford, Nathan	New Hampshire	Aug. 18, 1803	Maine	Jan. 12, 1858	July 25, 1881	78	23	July 25, 1881
Curtis, Benjamin R	Massachusetts	Nov. 4, 1809	Massachusetts	Sept. 22, 1851	Sept. 30, 1857 [2]	48	6	Sept. 15, 1874
Cushing, William	do	Mar. 1, 1732	do	Sept. 26, 1789	Sept. 13, 1810	7	21	Sept. 13, 1810
Daniel, Peter V	Virginia	Apr. 24, 1784	Virginia	Mar. 3, 1841	June 30, 1860	76	19	June 30, 1860
Davis, David	Maryland	Mar. 9, 1815	Illinois	Oct. 17, 1862	Mar. 4, 1877 [4]	62	14	June 26, 1886
Day, William R	Ohio	Apr. 17, 1849	Ohio	Mar. 2, 1903	Nov. 13, 1922 [2]	74	19	July 9, 1923
Duval, Gabriel	Maryland	Dec. 6, 1752	Maryland	Nov. 18, 1811	Jan. ?, 1835 [2]	82	23	Mar. 6, 1844
Ellsworth, Oliver [1]	Connecticut	Apr. 29, 1745	Connecticut	Mar. 4, 1796	Sept. 30, 1800 [2]	55	4	Nov. 26, 1807
Field, Stephen J	do	Nov. 4, 1816	California	Mar. 10, 1863	Dec. 1, 1897 [2]	81	35	Apr. 9, 1899
Fuller, Melville W. [1]	Maine	Feb. 11, 1833	Illinois	July 20, 1888	July 4, 1910	77	22	July 4, 1910
Gray, Horace	Massachusetts	Mar. 24, 1828	Massachusetts	Dec. 20, 1881	Sept. 15, 1902	74	21	Sept. 15, 1902
Grier, Robert C	Pennsylvania	Mar. 5, 1794	Pennsylvania	Aug. 4, 1844	Jan. 31, 1870 [2]	76	25	Sept. 25, 1870
Harlan, John M	Kentucky	June 1, 1833	Kentucky	Nov. 29, 1877	Oct. 14, 1911	78	34	Oct. 14, 1911
Holmes, Oliver Wendell	Massachusetts	Mar. 8, 1841	Massachusetts	Dec. 8, 1902	Jan. 12, 1932 [2]	91	29	Mar. 6, 1935
Hughes, Charles Evans [1]	New York	Apr. 11, 1862	New York	Oct. 10, 1910 [3] Feb. 24, 1930	June 10, 1916 [2]			
Hunt, Ward	do	June 14, 1810	do	Dec. 11, 1872	Jan. 7, 1882 [2]	72	9	Mar. 24, 1886
Iredell, James	England	Oct. 5, 1751	North Carolina	Feb. 10, 1790	Oct. 20, 1799	48	10	Oct. 20, 1799
Jackson, Howell E	Tennessee	Apr. 8, 1832	Tennessee	Feb. 18, 1893	Aug. 8, 1895	63	2	Aug. 8, 1895
Jay, John [1]	New York	Dec. 12, 1745	New York	Sept. 26, 1789	June 29, 1795 [2]	50	6	May 17, 1829
Johnson, Thomas	Maryland	Nov. 4, 1732	Maryland	Nov. 7, 1791	Mar. 4, 1793 [2]	60	1	Oct. 26, 1819
Johnson, William	South Carolina	Dec. 27, 1771	South Carolina	Mar. 26, 1804	Aug. 11, 1834	63	30	Aug. 11, 1834
Lamar, Joseph R	Georgia	Oct. 14, 1857	Georgia	Jan. 3, 1911	Jan. 2, 1916	58	5	Jan. 2, 1916
Lamar, L. Q. C	do	Sept. 17, 1825	Mississippi	Jan. 16, 1888	Jan. 23, 1893	67	5	Jan. 23, 1893
Livingston, Henry B	New York	Nov. 25, 1757	New York	Jan. 16, 1807	Mar. 18, 1823	65	16	Mar. 18, 1823

Lurton, Horace H.	Kentucky	Feb. 26, 1844	Tennessee	Jan. 3, 1910	July 12, 1914	70	5	July 12, 1914
McKenna, Joseph	Pennsylvania	Aug. 10, 1843	California	Jan. 1, 1898	Jan. 5, 1925[2]	81	27	Nov. 21, 1926
McKinley, John	Virginia	May 1, 1780	Alabama	Apr. 22, 1837	July 19, 1852	72	15	July 19, 1852
McLean, John	New Jersey	Mar. 11, 1785	Ohio	Mar. 7, 1829	Apr. 4, 1861	76	32	Apr. 4, 1861
McReynolds, James C.	Kentucky	Feb. 3, 1862	Tennessee	Oct. 12, 1914				
Marshall, John[1]	Virginia	Sept. 24, 1755	Virginia	Jan. 31, 1801	July 6, 1835	80	34	July 6, 1835
Matthews, Stanley	Ohio	July 21, 1824	Ohio	May 12, 1881	Mar. 22, 1889	65	8	Mar. 22, 1889
Miller, Samuel F.	Kentucky	Apr. 5, 1816	Iowa	July 16, 1862	Oct. 13, 1890	75	28	Oct. 13, 1890
Moody, William H.	Massachusetts	Dec. 23, 1853	Massachusetts	Dec. 17, 1906	Nov. 20, 1910[2]	57	4	July 2, 1917
Moore, Alfred	North Carolina	May 21, 1755	North Carolina	Dec. 10, 1799	Feb. —, 1804[2]	49	4	Oct. 15, 1810
Nelson, Samuel	New York	Nov. 10, 1792	New York	Feb. 13, 1845	Nov. 28, 1872[2]	80	28	Dec. 13, 1873
Paterson, William	Ireland	Dec. 24, 1745	New Jersey	Mar. 4, 1793	Sept. 9, 1806	61	14	Sept. 9, 1806
Peckham, Rufus W.	New York	Nov. 8, 1836	New York	Dec. 9, 1895	Oct. 24, 1909	71	14	Oct. 24, 1909
Pitney, Mahlon	New Jersey	Feb. 5, 1858	New Jersey	Mar. 18, 1912	Dec. 31, 1922[2]	65	11	Dec. 9, 1924
Roberts, Owen J.	Pennsylvania	May 2, 1875	Pennsylvania	June 2, 1930				
Rutledge, John[1]	South Carolina	Sept. —, 1739	South Carolina	Sept. 26, 1789	Dec. 15, 1795[2]	56	6	July 18, 1800
Sanford, Edward T.	Tennessee	July 23, 1865	Tennessee	Feb. 19, 1923	Mar. 8, 1930	65	7	Mar. 8, 1930
Shiras, George, Jr.	Pennsylvania	Jan. 23, 1832	Pennsylvania	July 19, 1892	Feb. 23, 1903[2]	71	11	Aug. 2, 1924
Stone, Harlan F.	New Hampshire	Oct. 11, 1872	New York	Mar. 2, 1925				
Story, Joseph	Massachusetts	Sept. 18, 1779	Massachusetts	Nov. 18, 1811	Sept. 10, 1845	66	34	Sept. 10, 1845
Strong, William	Connecticut	May 6, 1808	Pennsylvania	Feb. 18, 1870	Dec. 14, 1880[2]	73	11	Aug. 19, 1895
Sutherland, George	England	Mar. 25, 1862	Utah	Oct. 2, 1922				
Swayne, Noah H.	Virginia	Dec. 7, 1804	Ohio	Jan. 27, 1862	Jan. 24, 1881[2]	76	19	June 8, 1884
Taft, William H.[1]	Vermont	Sept. 15, 1857	do	Oct. 3, 1921	Feb. 4, 1930[2]	72	8	Mar. 8, 1930
Taney, Roger Brooke[1]	Maryland	Mar. 17, 1777	Maryland	Mar. 15, 1836	Oct. 12, 1864	88	29	Oct. 12, 1864
Thompson, Smith	New York	Jan. 17, 1768	New York	Dec. 8, 1823	Dec. 18, 1843	76	20	Dec. 18, 1843
Todd, Thomas	Virginia	Jan. 23, 1765	Kentucky	Mar. 2, 1807	Feb. 7, 1826	51	19	Feb. 7, 1826
Trimble, Robert	do	1777	do	May 9, 1826	Aug. 25, 1828	51	2	Aug. 25, 1828
Van Devanter, Willis	Indiana	Apr. 17, 1859	Wyoming	Jan. 3, 1911				
Waite, Morrison R.[1]	Connecticut	Nov. 29, 1816	Ohio	Jan. 21, 1874	Mar. 23, 1888	70	13	Mar. 23, 1888
Washington, Bushrod	Virginia	June 5, 1762	Virginia	Dec. 20, 1796	Nov. 26, 1829	67	31	Nov. 26, 1829
Wayne, James M.	Georgia	1790	Georgia	Jan. 9, 1835	July 5, 1867	77	32	July 5, 1867
White, Edward P.[1]	Louisiana	Nov. 3, 1845	Louisiana	Feb. 19, 1894	May 19, 1921	76	17	May 19, 1921
Wilson, James	Scotland	Sept. 14, 1742	Pennsylvania	Sept. 26, 1789	Aug. 28, 1798	56	9	Aug. 28, 1798
Woodbury, Levi	New Hampshire	Dec. 22, 1789	New Hampshire	Sept. 20, 1845	Sept. 4, 1851	62	6	Sept. 4, 1851
Woods, William B.	Ohio	Aug. 3, 1824	Georgia	Dec. 21, 1880	May 14, 1887	63	6	May 14, 1887

[1] Chief Justice.
[2] Resigned.
[3] Resigned June 10, 1916, to become Republican candidate for president. Reappointed Feb. 24, 1930.

NOTE.—Age at retirement and period of service are determined to the nearest whole year. Obviously neither of the above can be ascertained for the present Justices of the Court.
Sources: List furnished by the Supreme Court: "Information Concerning the * * * Justices of the Supreme Court of the United States," Dictionary of American Biography, edited by Dumas Malone. Who's Who in America. United States Reports.

THE ORGANIZATION OF THE SUPREME COURT

By the Judiciary Act of 1789 the Supreme Court was constituted with a bench of a Chief Justice and five Associate Justices (1 Stat. at L. 73). By act of 1801 the number of Associate Justices was decreased to four (2 Stat. at L. 89) but, by an act passed only a year later (2 Stat. at L. 132), the number was again made five. By act of 1807 (2 Stat. at L. 420) this number was increased to six; by act of 1837 (5 Stat. at L. 176), to eight, and, by act of 1863 (12 Stat. at L. 794), to nine. By act of 1866 it was provided that no vacancies in the position of Associate Justice should be filled until the number should be reduced to six, which number, when attained, should be maintained. By act of 1869, the number of Associate Justices was again raised to eight, a number which has not been since changed.

The Supreme Court holds annual terms beginning in October and lasting until the end of May.

Source: Willoughby on the Constitution of the United States, vol. 2, second edition, p. 1255, §783.

NUMBER OF SUPREME COURT JUSTICES APPOINTED BY THE SEVERAL PRESIDENTS OF THE UNITED STATES

Washington	[1] 11	Lincoln	5
John Adams	3	Grant	4
Jefferson	3	Hayes	2
Madison	2	Garfield	1
Monroe	1	Arthur	2
J. Q. Adams	1	Cleveland	4
Jackson	5	Benjamin Harrison	4
Van Buren	3	McKinley	1
William Henry Harrison	0	Theodore Roosevelt	3
Tyler	1	Taft	[2] 6
Polk	2	Wilson	3
Fillmore	1	Harding	4
Pierce	1	Coolidge	1
Buchanan	1	Hoover	[3] 3

[1] John Rutledge was twice commissioned by Washington, once as Associate and once as Chief Justice.
[2] Edward D. White was promoted from Associate Justice to Chief Justice.
[3] Charles E. Hughes was appointed Chief Justice after an interval following service as an Associate Justice.

PRESIDENTIAL TERMS IN WHICH THERE HAVE BEEN NO APPOINTMENTS TO THE SUPREME COURT

No appointments to the Supreme Court were made by the following Presidents: William H. Harrison (served only 1 month); Zachary Taylor (served a year and 4 months); Andrew Johnson (served practically a full term).

Further, no appointments were made by the following Presidents during the course of a complete (first or second) term: Madison,[1] second term (1813–17); Monroe,[1] first term (1817–21); Wilson,[1] second term (1917–21); Franklin D. Roosevelt, first term (1933–37).

[1] Please note the information for Presidents Madison, Monroe, and Wilson is for the term specifically indicated.

FIVE-TO-FOUR DECISIONS OF THE SUPREME COURT OF THE UNITED STATES AFFECTING ACTS OF CONGRESS

I. The Supreme Court, divided five to four, has held acts of Congress unconstitutional in the following cases:

1. *Ex parte Garland*, 4 Wall. 333 (December term, 1866). Oath for lawyers invalid, 13 Stat. 424, ch. 20.

2. *Pollock* v. *Farmers' Loan and Trust Co.*, 158 U. S. 601 (1895). Income tax statute invalid on reargument, 28 Stat. 555, secs. 27–33.

3. *Fairbank* v. *United States*, 181 U. S. 283 (1901). Stamp tax invalid, 30 Stat. 451, 459.

4. *Employers' Liability Cases*, 207 U. S. 463 (1908). 34 Stat. 232 invalid.

5. *Hammer* v. *Dagenhart*, 247 U. S. 251 (1918). Forbidding interstate transportation of goods produced by child labor invalid, 39 Stat. 675, ch. 432.

6. *Eisner* v. *Macomber*, 252 U. S. 189 (1920). Income tax of 1916 invalid, 39 Stat. 756, 759.

7. *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149 (1920). Delegation of admiralty matters to the States invalid, 40 Stat. 395, ch. 97.

8. *Newberry* v. *United States*, 256 U. S. 232 (1921). Corrupt Practice Act as applied to primaries invalid, 36 Stat. 822, ch. 392, sec. 8.

9. *Burnet* v. *Coronado Oil and Gas Co.*, 285 U. S. 393 (1932). Attempt to tax income of land leased by State invalid, 40 Stat. 302.

10. *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330 (1935). Railroad Retirement Act invalid, 48 Stat. 1283, ch. 868.

II. The Supreme Court, divided five to four, has held acts of Congress constitutional in the following cases:

1. *Legal Tender Cases*, 12 Wall. 457 (1872). Legal Tender Acts valid, 12 Stat. 345, sec. 1.

2. *Dooley* v. *United States*, 183 U. S. 151 (1901). Foraker Act valid, 31 Stat. 77.

3. *Champion* v. *Ames*, 188 U. S. 321 (1903). Prohibiting traffic in lotteries valid, 28 Stat. 963, ch. 191.

4. *Wilson* v. *New*, 243 U. S. 332 (1917). Minimum wage railroad law sustained, 39 Stat. 721, ch. 436.

5. *United States* v. *Doremus*, 249 U. S. 86 (1919). Narcotic Drug Act valid, 38 Stat. 785, sec. 1.

6. *Webb* v. *United States*, 249 U. S. 96 (1919). Narcotic Drug Act valid, 38 Stat. 785, sec. 2.

7. *Ruppert* v. *Caffey*, 251 U. S. 264 (1920). National Prohibition Act sustained, 41 Stat. 305, ch. 85.

8. *Calhoun* v. *Massie*, 253 U. S. 170 (1920). Limitation on attorney fees in Omnibus Claims Act valid, 38 Stat. 962, ch. 140.

9. *Ft. Smith and West. R. R. Co.* v. *Mills*, 253 U. S. 206 (1920). Adamson Act valid; cf. *Wilson* v. *New*, supra.

10. *Block* v. *Hirsh*, 256 U. S. 135 (1921). Rents Act for D. C. valid, 41 Stat. 297, ch. 80, title II.

11. *Lambert* v. *Yellowley*, 272 U. S. 581 (1926). Liquor prescription limitation in National Prohibition Act valid, 41 Stat. 305, 311, ch. 8, title II, sec. 7.

12. *Casey* v. *United States*, 276 U. S. 413 (1928). Anti-Narcotic Act as amended sustained, 40 Stat. 1057, 1130, 1131, ch. 18, sec. 1006.

13. *Burnet* v. *Wells*, 289 U. S. 670 (1933). Computation of net income valid, 43 Stat. 253, ch. 234, sec. 219 (h); 44 Stat. 9, ch. 27.

14. *Norman* v. *B. and O. Co.*, 294 U. S. 240 (1935). Gold clause resolution valid, 48 Stat. 112.
15. *Nortz* v. *United States*, 294 U. S. 317 (1935). Gold clause resolution valid, 48 Stat. 112.
16. *Perry* v. *United States*, 294 U. S. 330 (1935). Gold clause resolution valid, 48 Stat. 112.

A LIST OF SUPREME COURT CASES DECIDED BY A MAJORITY OF ONE

The principle involved in a 5–4 decision by the Supreme Court is simply "majority rule." It is therefore equally illustrated by a 4–3 decision, when two Justices of a nine-Justice court are for any reason not participating in the particular case, or when four Justices constitute an actual majority of a seven-Justice court. The present list accordingly goes back to the beginning, when, it will be remembered, the Supreme Court consisted of at first six, and later seven Justices.

Strictly, a *decision* of the Court is its action in passing on and disposing of the case in litigation before it—i. e., in rendering judgment. From this standpoint, the cases have been carefully checked, and the list is, it is hoped, substantially complete and accurate. But in view of the fact that the doctrines enunciated by the Supreme Court have an especial standing in the development of the law, and that *opinions* are constantly cited for the expositions of law contained therein, it is important to note that the Court often divides not only on the judgment, but on the reasons assigned; and not infrequently the grounds for the judgment of the majority represent the views of a minority only. It is obvious that such divisions do not have the weight of divisions in the matter of judgment; and on the other hand it cannot be assumed that simply because no dissent is noted, all the Justices are unanimous on all questions involved. Clearly, it depends on the individual Justice, whether or not he considers any particular point worth a separate dissent. In short, statistics of dissents formally noted in the reports, are at best inadequate representations of the thought of the Justices. But it seemed worth while, in connection with the check for *decisions* by a bare majority, to note instances of the various sorts of divisions short of that; and the following list, accordingly, gives numerous examples which may be of interest in a consideration of the whole subject. They do not purport to be complete.

2 Dall. 415 (February 1793) *Georgia* v. *Brailsford*. Five Justices (Johnson not sitting); Tredell and Blair dissenting (holding that Georgia's *bill in equity* should be sustained); the majority held that the State should sue *at law*.

3 Dall. 19 (February 27, 1795) *Bingham* v. *Cabot*. Four Justices sitting, were evenly divided on 1 of 2 points in the case, so that "no writ of venire facias de novo was awarded."

3 Dall. 415 (February term, 1799) *Clark* v. *Russel*. Five Justices sitting; the Chief Justice announced a 3–2 division on 1 of 3 points in case (and that, not necessary to the decision).

4 Cranch 59 (Feb. 14, 1807) *Oneale* v. *Long*. Five Justices sitting; it was noted that *the judges did not all agree*.

4 Cranch 293 (Mar. 2, 1808) *Hudson* v. *Guestier*. Seven Justices sitting; Chase and Livingston dissented, and Johnson concurred on different grounds.

4 Cranch 346 (Mar. 9, 1808) *Peisch* v. *Ware*. Three of seven Justices dissented from the opinion in part, but acquiesced in result.

6 Cranch 1 (Feb. 7, 1810) *Scott* v. *Negro Ben*. Five Justices sitting; decided by a "majority of the Court."

6 Cranch 7 (Feb. 12, 1810) *Field* v. *Holland*. Same as next above.

6 Cranch 307 (Mar. 15, 1810) *Durousseau* v. *United States*. Five Justices sitting; Marshall announced the result, but the other four, while concurring in judgment, disagreed with the reasoning.

8 Cranch 253 (Mar. 12, 1814) *The Venus*. Six Justices (Story not sitting); Washington delivered the opinion of "a majority of the Court", but Marshall and Livingston dissented, and Johnson "declined giving an opinion."

3 Wheat. 59 (Feb. 10, 1818) *The New York*. 4–3; Marshall, C. J., Washington, and Johnson dissenting.

6 Wheat. 1 (Feb. 22, 1821) *The Amiable Isabella*. Three of seven Justices dissented from part of opinion.

7 Wheat. 356 (March 1822) *Evans* v. *Eaton*. 4–3; Livingston, Johnson, and Duvall dissenting.

11 Wheat. 59 (Mar. 16, 1826) *Etting* v. *U. S. Bank*. Affirmed by a divided Court (3–3).

12 Wheat. 212 (Feb. 19, 1827) *Ogden* v. *Saunders*. On first hearing (constitutionality of the New York statute) and second hearing (disposition of case) the Court divided 4–3, two ways—Justice Johnson being on the majority each time.

1 Peters 263 (January term, 1828) *Schimmelpennich et al.* v. *Bayard et al.* Seven Justices on Court. "The decision of a majority of this Court * * * will be certified"; but no actual dissent noted.

1 Peters 343 (January term, 1828) *Spratt* v. *Spratt*. Same as above.

1 Peters 351, 374 (January term, 1828) *Bell* v. *Morrison*. "It is to be understood that this opinion is not unanimous, but of the majority of the Court"; no actual dissent noted.

2 Peters 556 (January term, 1829) *Connolly* v. *Taylor*. Affirmed by a divided Court (3–3).

5 Peters 1 (January term, 1831) *Cherokee Nation* v. *Georgia*. Seven Justices; Thompson and Story dissented; Baldwin concurred on other grounds.

5 Peters 90 (January term, 1831) *Livingston* v. *Smith*. "A majority of the Court are of opinion the demurrers were rightly sustained" (therefore, judgment affirmed); but *no dissent noted*.

5 Peters 292, 303 (January term, 1831) *Smith* v. *United States*. "Although on each of the principal objections relied * * * a majority of the members of this court think there is no error, yet the judgment of the district court must be reversed, as on the question of reversal, the minorities unite and constitute a majority of the court."

11 Peters 420 (January term, 1837) *Charles River Bridge* v. *Warren Bridge*. 4–3; Story and Thompson dissented, and McLean held Court had no jurisdiction.

12 Peters 27 (January term, 1838) *Benton* v. *Woolsey*. Affirmed by a divided Court (Thompson not sitting).

12 Peters 102 (January term, 1838) *Beaston* v. *Farmers' Bank*. Eight Justices; Story, Baldwin, and McLean dissented from opinion; and

it was announced that Barbour was of same opinion before leaving the bench.

12 Peters 410 (January term, 1838) *Strother* v. *Lucas*. Eight Justices sitting; Wayne, McKinley, and McLean dissented, and Catron concurred in judgment on other grounds.

NOTE.—From this point on the Court, except as otherwise noted, has consisted of nine justices; and the cases cited, are therefore 5-4 decisions.

14 Peters 540 (January term, 1840) *Holmes* v. *Jennison*. Court divided 4–4 (McKinley absent) on question of jurisdiction; so the writ of error was dismissed.

16 Peters 539 (January term, 1842) *Prigg* v. *Pennsylvania*. Taney, Baldwin, Daniel, and McLean, though concurring in judgment, dissented on some of the grounds of the opinion.

7 Howard 283 (January term, 1849) *Passenger Cases*. Taney, Woodbury, Daniel, and Nelson dissenting.

7 Howard 833 (January term, 1849) *United States* v. *King*. McLean, Wayne, McKinley, and Grier dissenting.

10 Howard 190 (December term, 1850) *Woodruff* v. *Trapnall*. Catron, Daniel, Nelson, and Grier dissenting.

10 Howard 311 (December term, 1850) *Henderson* v. *Tennessee*. McLean, Wayne, Woodbury, and McKinley dissenting.

11 Howard 397 (December term, 1850) *Clements* v. *Berry*. Taney, Catron, Daniel, and Nelson dissenting.

11 Howard 528 (December term, 1850) *Gill* v. *Oliver's Executors et al.* Taney, McLean, Wayne, and Woodbury dissenting.

11 Howard 587 (December term, 1850) *Hogg* v. *Emerson*. Taney, Catron, Daniel, and Grier dissenting.

11 Howard 609 (December term, 1850) *United States* v. *Philadelphia and New Orleans*. McLean, Wayne, Grier, and McKinley dissenting.

11 Howard 662 (December term, 1850) *United States* v. *Turner et al.* McLean, Wayne, Grier, and McKinley dissenting.

14 Howard 103 (December term, 1852) *In re Kaine*. Eight justices; Taney, Daniel, and Nelson dissented, and Curtis, on independent grounds, held the Court had no jurisdiction.

15 Howard 14 (December term, 1853) *United States* v. *D'Auterieve*. Curtis, McLean, Wayne, and Campbell disagreed with form of judgment.

15 Howard 330 (December term, 1853) *Winans* v. *Denmead*. Taney, Catron, Daniel, and Campbell dissenting.

16 Howard 621 (December term, 1853) *Deshler* v. *Dodge*. Taney, Catron, Daniel, and Campbell dissenting.

17 Howard 478 (December term, 1854) *Florida* v. *Georgia*. McLean, Daniel, Curtis, and Campbell dissenting.

18 Howard 421 (December term, 1855) *Pa.* v. *Wheeling and Belmont Bridge Co.* Nelson, Wayne, Grier, and Curtis dissented on question of attachment for contempt.

20 Howard 558 (December term, 1857) *Irvine* v. *Marshall*. Catron, Grier, Campbell, and Nelson dissenting.

20 Howard 583 (December term, 1857) *Taylor* v. *Carryl*. Taney, Wayne, Grier, and Clifford dissenting.

67 U. S. 635 (December term, 1862) *Prize Cases*. Taney, Catron, Clifford, and Nelson dissenting.

2 Wall. 450 (December term, 1864) *Steamship Co.* v. *Joliffe*. 4–3 (Catron and Davis not sitting); Miller, Wayne, and Clifford dissenting.

2 Wall. 609 (December term, 1864) *Minn. Co.* v. *St. Paul Co.* 4–3 (Catron and Davis not sitting); Nelson, Clifford, and Field dissenting.

3 Wall. 654 (December term, 1865) *Rogers* v. *Burlington.* Field, Chase, Grier, and Miller dissenting.

4 Wall. 2 (December term, 1866) *Ex parte Milligan.* Chase, Wayne, Swayne, and Miller concurred in the order of the court, but were unable to concur in some important particulars with the opinion.

4 Wall. 277 (December term, 1866) *Cummings* v. *Missouri.* Chase, Swayne, Davis, and Miller dissenting.

4 Wall. 333 (December term, 1866) *Ex parte Garland.* Chase, Swayne, Davis, and Miller dissenting.

10 Wall. 224 (December term, 1869) *Hornsby* v. *United States.* 4–3 (Chase, C. J., and Nelson not sitting); Davis, Clifford, and Swayne dissenting.

12 Wall. 457 (Jan. 15, 1872) *Legal Tender Cases.* Chase, C. J., Clifford, Field, and Nelson dissenting.

82 U. S. 300 (December term, 1872) *Case of the State Tax on Foreign-Held Bonds.* Davis, Clifford, Miller, and Hunt dissenting. (And the same division on the same day in two other cases mentioned in a note, viz, the Pittsburg, Fort Wayne and Chicago, and the Delaware, Lackawanna and Western Railroads.)

16 Wall. 36 (Apr. 14, 1873) *Slaughter-House Cases.* Field, Swayne, Bradley, and Chase, C. J., dissenting.

16 Wall. 130 (December term, 1872) *Bradwell* v. *State.* Chase, C. J., dissented; and Bradley, Swayne, and Field concurred in judgment for other reasons than majority.

16 Wall. 366 (December term, 1872) *Taylor* v. *Taintor.* 4–3 (Davis and Hunt not sitting); Field, Clifford, and Miller dissenting.

17 Wall. 191 (December term, 1872) *La peyre* v. *United States.* Hunt, Miller, Field, and Bradley dissenting.

17 Wall. 294 (December term, 1872) *Barnes* v. *Railroad Co.* Strong, Chase, C. J., Davis, and Field dissenting.

18 Wall. 5 (October term, 1873) *Railroad* v. *Peniston.* Eight Justices; Bradley, Field, and Hunt dissented; Swayne concurred in judgment, but not entirely in opinion.

19 Wall. 287 (October term, 1873) *Mitchell* v. *Tilghman.* 4–3 (Chief Justiceship vacant, Davis not sitting); Swayne, Strong, and Bradley dissenting.

19 Wall. 468 (October term, 1873) *Mayor* v. *Ray.* Eight Justices sitting; Clifford, Swayne, and Strong dissented, and Hunt concurred in judgment but not "in some of the grounds" of the opinion.

88 U. S. 65 (October term, 1874) *Clinkenbeard* v. *United States.* Clifford, Swayne, Davis, and Strong dissenting.

88 U. S. 652 (October term, 1874) *United States* v. *Boecker.* Bradley, Davis, Clifford, and Strong dissenting.

89 U. S. 497 (October term, 1874) *Pratt's Administrator* v. *United States.* Bradley, Swayne, Davis, and Hunt dissenting.

91 U. S. 540 (October term, 1875) *Barnes* v. *District of Columbia.* Swayne and Strong dissented, and Field and Bradley dissented "from the judgment." The same division held in the cases of *Maxwell* v. *D. C.* and *Dant* v. *D. C.* (both 91 U. S. 557).

92 U. S. 484 (October term, 1875) *Town of Coloma* v. *Eaves.* Miller, Davis, and Field dissenting, and Bradley concurring on one ground of opinion only.

93 U. S. 24 (October term, 1876) *New York Life Ins. Co.* v. *Statham.* Clifford and Hunt dissented, Strong concurred in judgment but dissented from opinion entirely, and Waite, C. J., dissented from part of the *judgment.*

93 U. S. 567 (October term, 1876) *County of Calloway* v. *Foster.* Miller, Davis, Field, and Bradley dissenting.

94 U. S. 288 (October term, 1876) *Fuller* v. *Yentzer.* Waite, C. J., Miller, Strong, and Bradley dissenting.

96 U. S. 37 (October term, 1877) *United States* v. *Clark.* Harlan, Clifford, Swayne, and Strong dissenting.

96 U. S. 659 (October term, 1877) *Ketchum* v. *Duncan.* Harlan, Clifford, Swayne, and Miller dissenting.

98 U. S. 104 (October term, 1878) *Bradley* v. *United States.* Miller, Field, Strong, and Harlan dissenting.

106 U. S. 196 (October term, 1882) *United States* v. *Lee.* Gray, Waite, C. J., Bradley, and Woods dissenting.

107 U. S. 221 (October term, 1882) *Kring* v. *Missouri.* Matthews, Waite, C. J., Bradley, and Gray dissenting.

108 U. S. 379 (Apr. 30, 1883) *Boese* v. *King.* Matthews, Miller, Gray, and Blatchford dissenting.

111 U. S. 276 (Apr. 7, 1884) *Rector* v. *Gibbon.* Waite, C. J., Harlan, Woods, and Blatchford dissenting.

112 U. S. 377 (Dec. 8, 1884) *Chicago, Milwaukee and St. Paul Ry. Co.* v. *Ross.* Matthews, Gray, Blatchford, and Bradley dissenting.

114 U. S. 269 (Apr. 20, 1885, and May 4, 1885) *Virginia Coupon Cases.* Waite, C. J., Miller, Bradley, and Gray dissenting.

115 U. S. 29 (May 4, 1885) *Wheeler* v. *New Brunswick, etc., R. R. Co.* Field, Harland, Matthews, and Blatchford dissenting.

116 U. S. 642 (Feb. 1, 1886) *Northern Pacific R. R. Co.* v. *Herbert.* Blatchford, Bradley, Matthews, and Gray dissenting.

116 U. S. 665 (Mar. 1, 1886) *Vicksburg, Shreveport and Pac. R. R. Co.* v. *Dennis.* Field, Miller, Bradley, and Waite, C. J., dissenting.

117 U. S. 181 (Mar. 1, 1886) *Graffam* v. *Burgess.* Miller, Woods, Matthews, and Gray dissenting.

117 U. S. 210 (Mar. 1, 1886) *Patch* v. *White.* Woods, Matthews, Gray, and Blatchford dissenting.

118 U. S. 468, *The City of Norwich*
118 U. S. 507, *The Scotland*
118 U. S. 520, *The Great Western*
} (May 10, 1886.)
Matthews, Miller, Harlan, and Gray dissenting.

119 U. S. 99 (Nov. 1, 1886) *Vicksburg and Meridian R. R. Co.* v. *O'Brien.* Waite, C. J., Miller, Field, and Blatchford dissenting.

119 U. S. 245 (Nov. 15, 1886) *Cunard S. S. Co.* v. *Carey.* Affirmed by a divided Court. So also *Schmidt* v. *Cobb* (119 U. S. 286), *Chicago, etc., Ry.* v. *McLaughlin* (119 U. S. 566) and *U. S.* v. *Ramsay* (120 U. S. 214).

125 U. S. 465 (Mar. 19, 1888) *Bowman* v. *Chicago, etc., Ry Co.* Eight Justices (Lamar not sitting); Waite, C. J., Harland, and Gray dissenting; Field concurring in judgment and "greater part of the opinion."

126 U. S. 1 (Mar. 19, 1888) *The Telephone Cases.* 4–3 (Gray not sitting, and Lamar not yet on the bench); Field, Bradley, and Harlan dissenting.

141 U. S. 132 (May 25, 1891) *Briggs* v. *Spaulding.* Harland, Gray, Brewer, and Brown dissenting.

142 U. S. 217 (Dec. 14, 1891) *Maine* v. *Grand Trunk Ry. Co.* Bradley, Harland, Lamar, and Brown dissenting.
143 U. S. 135 (Feb. 1, 1892) *Boyd* v. *Thayer.* Field dissented, and Harland, Gray, and Brown concurred in the conclusion of the court "upon the latter course of reasoning only."
146 U. S. 387 (Dec. 5, 1892) *Illinois Central R. R.* v. *Illinois.* 4–3 (Fuller, C. J., and Blatchford not sitting); Shiras, Gray, and Brown dissenting.
153 U. S. 391 (May 14, 1894) *Brass* v. *Stoeser.* Brewer, Field, Jackson, and White dissenting.
153 U. S. 486 (May 14, 1894) *Mobile and Ohio R. R.* v. *Tennessee.* Fuller, C. J., Gray, Brewer, and Shiras dissenting.
156 U. S. 51 (Jan. 21, 1895) *Sparf and Hansen* v. *United States.* Brewer, Brown, Gray, and Shiras dissenting.
158 U. S. 601 (May 20, 1895) *Pollock* v. *Farmers' Loan and Trust Co.* (reargument). Harlan, Brown, Jackson, and White dissenting.
159 U. S. 113 (June 3, 1895) *Hilton* v. *Guyot.* Fuller, C. J., Harland, Brewer, and Jackson dissenting.
161 U. S. 446 (Mar. 9, 1896) *Swearingen* v. *United States.* Harlan, Gray, Brown, and White dissenting.
161 U. S. 591 (Mar. 23, 1896) *Brown* v. *Walker.* Shiras, Gray, White, and Field dissenting.
164 U. S. 54 (Oct. 26, 1896) *Saltonstall* v. *Birtwell.* Fuller, C. J., Field, Harlan, and Brewer dissenting.
165 U. S. 194, *Adams Express Co.* v. *Ohio*
165 U. S. 255, *Adams Express Co.* v. *Indiana* } (Feb. 1, 1897)
White, Field, Harlan, and Brown dissenting.
166 U. S. 150 (Mar. 15, 1897) *Henderson Bridge Co.* v. *Kentucky.* White, Field, Harlan, and Brown dissenting.
166 U. S. 171 (Mar. 15, 1897) *Adams Express Co.* v. *Kentucky.* White, Field, Harlan, and Brown dissenting.
166 U. S. 290 (Mar. 22, 1897) *U. S.* v. *Trans-Missouri Freight Association.* White, Field, Gray, and Shiras dissenting.
170 U. S. 537 (May 9, 1898) *Westinghouse* v. *Boyden Power Brake Co.* Shiras, Brewer, Gray, and McKenna dissenting.
170 U. S. 681 (May 23, 1898) *United States* v. *Coe.* Brewer, Brown, Shiras, and Peckhan dissenting (also, Gray concurred in result only).
171 U. S. 260 (May 31, 1898) *Northern Pacific R. R. Co.* v. *Smith.* Harlan dissented outright—Gray and White concurred only on the first ground of the opinion—and Brewer concurred specially, not agreeing with all the conclusions, nor the direction to enter judgment for defendant.
172 U. S. 434 (Jan. 9, 1899) *Keck* v. *United States.* Fuller, C. J.; Brown, Harlan, and Brewer dissenting.
172 U. S. 589 (Jan. 23, 1899) *Northern Pacific Ry. Co.* v. *Myers.* Brewer, Shiras, White, and Peckham dissenting.
173 U. S. 65 (Feb. 20, 1899) *Dunlap* v. *United States.* Brown, White, Peckham, and McKenna dissenting.
173 U. S. 131 (Feb. 20, 1899) *Merrill* v. *National Bank of Jacksonville.* White, Harlan, McKenna, and Gray dissenting.
173 U. S. 285 (Feb. 20, 1899) *Lake Shore and Michigan Southern Ry.* v. *Ohio.* Shiras, Brewer, Peckham, and White dissenting.
174 U. S. 96 (Apr. 17, 1899) *Atchison, Topeka, and Santa Fe R. R. Co.* v. *Matthews.* Harlan, Brown, Peckham, and McKenna dissenting.

175 U. S. 354 (Dec. 11, 1899) *The Pedro.* White, Brewer, Shiras, and Peckham dissenting.
176 U. S. 126 (Jan. 15, 1900) *Lindsay and Phelps Co.* v. *Mullen.* Peckham, Harlan, Brown, and White dissenting.
176 U. S. 361 (Feb. 26, 1900) *The Adula.* Shiras, Gray, White, and Peckham dissenting.
177 U. S. 104 (Mar. 26, 1900) *United States* v. *Elder.* Shiras and McKenna dissent—Brewer and Brown "concur in result."
177 U. S. 471 (Apr. 16, 1900) *Adams* v. *Cowen.* Harlan, Gray, Brown, and White dissenting.
178 U. S. 496 (May 2, 1900) *May* v. *New Orleans.* Fuller, C. J., Brewer, Shiras, and Peckham dissenting.
178 U. S. 548 (May 21, 1900) *Taylor and Marshall* v. *Beckham* (No. 1). Harlan, Brewer, and Brown dissent—McKenna concurs in result.
179 U. S. 141 (Nov. 12, 1900) *Scranton* v. *Wheeler.* Shiras, Gray, and Peckham dissent—Brewer concurs in result.
179 U. S. 302 (Dec. 10, 1900) *Duluth and Iron Range R. R. Co.* v. *St. Louis County.* Fuller, C. J., Brewer, Shiras, and Peckham concur in result.
179 U. S. 343 (Nov. 19, 1900) *Austin* v. *Tennessee.* Fuller, C. J., Brewer, Shiras, and Peckham dissenting.
179 U. S. 405 (Dec. 17, 1900) *Tyler* v. *Judges of Court of Registration.* Fuller, C. J., Harlan, Brewer, and Shiras dissenting.
179 U. S. 552 (Dec. 24, 1900) *Workman* v. *New York City.* Gray, Brewer, Shiras, and Peckham dissenting.
180 U. S. 552 (Mar. 25, 1901) *Throckmorton* v. *Holt.* Harlan, White, and McKenna dissent from all except first and second grounds of opinion; Brown concurs in result.
180 U. S. 587, *Freeport Water Co.* v. *Freeport City*
180 U. S. 619, *Danville Water Co.* v. *Danville City* } (Mar. 25, 1901).
180 U. S. 624, *Rogers Park Water Co.* v. *Fergus*
White, Brown, Brewer, and Peckham dissenting.
181 U. S. 283 (Apr. 15, 1901) *Fairbank* v. *United States.* Harlan, Gray, White, and McKenna dissenting.
182 U. S. 1, *De Lima* v. *Bidwell.*
182 U. S. 222, *Dooley* v. *United States* } (May 27, 1901).
McKenna, Shiras, Gray, and White dissenting.
182 U. S. 244 (May 27, 1901) *Downes* v. *Bidwell.* Fuller, C. J., Harlan, Brewer, and Peckham dissenting.
182 U. S. 438 (May 27, 1901) *Pirie* v. *Chicago Title and Trust Co.* Fuller, C. J., Shiras, White, and Peckham dissenting.
182 U. S. 595 (May 27, 1901) *Glavey* v. *United States.* Fuller, C. J., Brown, Peckham, and McKenna dissenting.
183 U. S. 79 (Nov. 25, 1901) *Cotting* v. *Kansas City Stockyards Co. and Kansas.* Brewer announced the conclusions and judgment of the court—Harlan, Gray, Brown, Shiras, White, and McKenna concurred in judgment, but not in one of the two grounds of Justice Brewer's opinion.
183 U. S. 151 (Dec. 2, 1901) *Dooley* v. *United States.* Fuller, C. J., Harlan, Brewer, and Peckham dissenting.
183 U. S. 176 (Dec. 2, 1901) *Fourteen Diamond Rings* v. *United States.* Gray, White, Shiras, and McKenna dissenting.
183 U. S. 191 (Dec. 9, 1901) *Wilson* v. *Nelson.* Fuller, C. J., Shiras, Brewer, and Peckham dissenting.

183 U. S. 424 (Jan. 6, 1902) *Tucker* v. *Alexandroff*. Fuller, C. J., Gray, Harlan, and White dissenting.
185 U. S. 403 (May 5, 1902) *Carnegie Steel Co.* v. *Cambria Iron Co.* Fuller, C. J., White, Harlan and Brewer dissenting.
186 U. S. 238 (June 2, 1902) *Chesapeake and Potomac Telephone Co.* v. *Manning*. 4–3 (Gray and Brown not sitting); White, Harlan, and McKenna dissenting.
188 U. S. 321 (Feb. 23, 1903) *Champion* v. *Ames—The Lottery Case*. Fuller, C. J., Brewer, Shiras, and Peckham dissenting.
188 U. S. 445 (Feb. 23, 1903) *United States* v. *Lynah*. Fuller, C. J., White, and Harlan dissenting—Brown concurring, but dissenting on ground of jurisdiction.
190 U. S. 197 (June 1, 1903) *Hawaii* v. *Mankichi*. Fuller, C. J., Harlan, Brewer, and Peckham dissenting.
191 U. S. 17 (Oct. 26, 1903) *The Robert W. Parsons*. Brewer, Fuller, C. J., Peckham, and Harlan dissenting.
191 U. S. 70 (Nov. 9, 1903) *Hubbert* v. *Campbellsville Lumber Co.* Harlan, Brown, and Peckham dissenting; White and McKenna concurring in result.
191 U. S. 499 (Dec. 14, 1903) *Deposit Bank* v. *Frankfort*. Fuller, C. J., Brewer, Brown, and Peckham dissenting.
192 U. S. 286 (Feb. 1, 1904) *South Dakota* v. *North Carolina*. White, Fuller, C. J., McKenna, and Day dissenting.
193 U. S. 197 (Mar. 14, 1904) *Northern Securities Co.* v. *United States*. White, Fuller, C. J., Holmes, and Peckham dissenting (also, Brewer concurring in judgment, but dissenting from part of opinion).
194 U. S. 338 (May 16, 1904) *Northern Pacific Ry. Co.* v. *Dixon*. White, Fuller, C. J., Harlan, and McKenna dissenting.
194 U. S. 497 (May 31, 1904) *Public Clearing House* v. *Coyne*. Peckham dissenting; Brewer, White, and Holmes concurring in result.
195 U. S. 65 (May 31, 1904) *Schick* v. *United States*. Harland dissents outright—Fuller, C. J., Brown, and Peckham dissent from *judgment*, but concur in opinion.
195 U. S. 100, *Kepner* v. *United States*.
195 U. S. 158, *Secundo Mendezona* v. *United States* } (May 31, 1904). Holmes, White, McKenna, and Brown dissenting.
196 U. S. 239 (Jan. 16, 1905) *Madisonville Traction Co.* v. *St. Bernard Mining Co.* Holmes, Fuller, C. J., Brewer, and Peckham dissenting.
197 U. S. 70 (Feb. 27, 1905) *San Francisco National Bank* v. *Dodge*. Fuller, C. J., Brewer, Brown, and Peckham dissenting.
197 U. S. 356 (Apr. 3, 1905) *Keppel* v. *Tiffin Savings Bank*. Day, Harlan, Brewer, and Brown dissenting.
197 U. S. 545 (Apr. 10, 1905) *Muhlker* v. *New York and Harlem R. R. Co.* Holmes, Fuller, C. J., White, and Peckham dissenting.
198 U. S. 17 (Apr. 17, 1905) *Pabst Brewing Co.* v. *Crenshaw*. Brown, Brewer, Day, and Fuller, C. J., dissenting.
198 U. S. 45 (Apr. 17, 1905) *Lochner* v. *New York*. Harlan, White, Day, and Holmes dissenting.
198 U. S. 390 (May 15, 1905) *Birrell* v. *New York and Harlem R. R. Co.* Fuller, C. J., White, Peckham, and Holmes dissenting.
199 U. S. 119 (Oct. 30, 1905) *The Eliza Lines*. Brown, Harlan, Day, and McKenna dissenting.

199 U. S. 521 (Dec. 4, 1905) *Trono* v. *United States.* Harlan, McKenna, White, and Fuller, C. J., dissenting.
200 U. S. 22 (Jan. 2, 1906) *Knoxville Water Co.* v. *Knoxville.* Brown, White, Peckham, and Holmes dissenting.
200 U. S. 226 (Jan. 8, 1906) *Armour Packing Co.* v. *Lacy.* Brown and Peckham, and White and McKenna dissenting (two separate grounds).
200 U. S. 561 (Mar. 5, 1906) *Chicago, Burlington and Quincy R. R. Co.* v. *Drainage Commissioners.* Brewer dissenting, and Holmes, White, and McKenna concurring "in the main with the judgment of the court."
201 U. S. 43 (Mar. 12, 1906) *Hale* v. *Henkel.* Brewer and Fuller, C. J., dissenting—Harlan and McKenna concurring, but dissenting in part from grounds of opinion.
201 U. S. 302 (Apr. 2, 1906) *De la Rama* v. *De la Rama.* White, Day, Holmes, and Peckham dissenting on the point of jurisdiction.
201 U. S. 506 (Apr. 9, 1906) *West Chicago Railroad* v. *Chicago.* Fuller, C. J., Brewer, White, and McKenna dissenting.
201 U. S. 562 (Apr. 12, 1906) *Haddock* v. *Haddock.* Brown, Harlan, Brewer, and Holmes dissenting.
204 U. S. 103 (Jan. 7, 1907) *American Smelting Co.* v. *Colorado.* Fuller, C. J., Harlan, Holmes, and Moody dissenting.
205 U. S. 1 (Mar. 4, 1907) *Schlemmer* v. *Buffalo, Rochester, etc., R. R. Co.* Brewer, Peckham, McKenna, and Day dissenting.
207 U. S. 463 (Jan. 6, 1908) *Employees' Liability Cases.* Harlan, McKenna, Moody, and Holmes dissenting.
210 U. S. 217 (May 18, 1908) *Galveston, Harrisburg and San Antonio R. R. Co.* v. *Texas.* Harlan, Fuller, C. J., White, and McKenna dissenting.
210 U. S. 230 (May 18, 1908) *Fauntleroy* v. *Lum.* White, Harlan, McKenna, and Day dissenting.
211 U. S. 45 (Nov. 9, 1908) *Berea College* v. *Kentucky.* Harlan and Day dissenting; Holmes and Moody concurring in judgment.
212 U. S. 227 (Feb. 1, 1909) *Continental Wall Paper Co.* v. *Voight and Sons Co.* Holmes, Brewer, White, and Peckham dissenting.
215 U. S. 1 (Nov. 1, 1909) *Fall* v. *Eastin.* Seven Justices sitting; Harlan and Brewer dissenting—Holmes *not* dissenting from judgment, but differing with the opinion.
215 U. S. 349 (Jan. 3, 1910) *Kuhn* v. *Fairmont Coal Co.* 4–3 (Moody absent and Lurton not participating); Holmes, White, and McKenna dissenting.
215 U. S. 515 (Jan. 17, 1910) *Flaherty* v. *Hanson.* 4–3 (Moody absent and Lurton not sitting); Fuller, C. J., Holmes, and McKenna dissenting.
216 U. S. 1 (Jan. 17, 1910) *Western Union Telegraph Co.* v. *Kansas.* Eight Justices participating; Holmes, McKenna, and Fuller, C. J., dissenting—Peckham took part in consideration of case before his death, and *agreed with the minority*—and White, while not dissenting from principle of majority opinion, concurs on a narrower ground.
218 U. S. 88 (May 31, 1910) *Interstate Commerce Commission* v. *Chicago, Rock Island and Pacific Ry.* 4–3 (Moody absent, Hughes not participating); White, Holmes, and Lurton dissenting.
218 U. S. 205 (May 31, 1910) *Hertz* v. *Woodman.* 4–3 (same court as next above); McKenna, Day, and Fuller, C. J., dissenting.

218 U. S. 611 (Dec. 12, 1910) *Thompson* v. *Thompson.* 4–3 (Moody absent, Chief Justiceship vacant); Harlan, Holmes, and Hughes dissenting.

218 U. S. 624 (Dec. 12, 1910) *Memphis* v. *Cumberland Telephone Co.* 4–3 (same court as next above); White, McKenna, and Hughes dissenting.

224 U. S. 1 (Mar. 11, 1912) *Henry* v. *A. B. Dick.* 4–3 (Day absent, 1 vacancy); White, C. J., Hughes, and Lamar dissenting.

225 U. S. 347, *Hyde and Schneider* v. *United States.*
225 U. S. 392, *Brown* v. *Elliott.* } (June 10, 1912).
Holmes, Lurton, Hughes, and Lamar dissenting.

228 U. S. 243 (Apr. 7, 1913) *Donnelly* v. *United States.* Holmes, Lurton, and Hughes dissenting—Van Devanter concurring in result.

228 U. S. 364 (Apr. 21, 1913) *Slocum* v. *New York Life Insurance Co.* Hughes, Holmes, Lurton, and Pitney dissenting.

228 U. S. 482 (Apr. 28, 1913) *Northern Pacific Ry.* v. *Boyd.* Lurton, White, C. J., Holmes and Van Devanter dissenting.

229 U. S. 1 (May 26, 1913) *Bauer* v. *O'Donnell.* Holmes, McKenna, Van Devanter, and Lurton dissenting.

230 U. S. 58 (June 16, 1913) *Owensboro* v. *Cumberland Tel. and Tel. Co.* Day, McKenna, Hughes, and Pitney dissenting.

233 U. S. 434 (Apr. 20, 1914) *Wheeler* v. *New York.* Lamar, White, C. J., and Van DeVanter dissenting; McKenna and Pitney dissent from reasoning without some modification.

235 U. S. 151 (Nov. 30, 1914) *McCabe* v. *A. T. and S. F. Ry. Co.* White, C. J., Holmes, Lamar, and McReynolds concurring in result.

235 U. S. 461, *Lankford* v. *Platte Iron Works.*
235 U. S. 496, *American Water Softener Co.* v. *Lankford.* } (Jan. 5, 1915.)
235 U. S. 498, *Farish* v. *State Banking Board.*
Pitney, Day, Van Devanter, and Lamar dissenting.

237 U. S. 447 (May 10, 1915) *Cumberland Glass Mfg. Co.* v. *De Witt.* White, C. J., Hughes, Lamar, and McReynolds dissenting.

238 U. S. 586 (June 21, 1915) *Brand* v. *Union Elev. R. R. Co.* Day, McKenna, Lamar, and Pitney dissenting.

242 U. S. 60 (Dec. 4, 1916) *Louisville and Nashville R. R.* v. *United States.* Pitney, Day, Brandeis, and Clarke dissenting.

243 U. S. 219 (Mar. 6, 1917) *Mountain Timber Co.* v. *Washington.* White, C. J., McKenna, McReynolds, and Van Devanter dissenting.

243 U. S. 332 (Mar. 19, 1917) *Wilson* v. *New.* Day, Pitney, Van Devanter, and McReynolds dissenting.

243 U. S. 502 (Apr. 9, 1917) *Motion Picture Co.* v. *Universal Film Co.* Holmes, McKenna, and Van Devanter dissenting; McReynolds concurring in result.

244 U. S. 205, *Southern Pacific Co.* v. *Jensen.*
244 U. S. 255, *Clyde S. S. Co.* v. *Walker.* } (May 21, 1917).
Holmes, Pitney, Brandeis, and Clarke dissenting.

244 U. S. 459 (June 11, 1917) *Paine Lumber Co.* v. *Neal.* Pitney, McKenna, McReynolds, and Van Devanter dissenting.

244 U. S. 590 (June 11, 1917) *Adams* v. *Tanner.* McKenna, Brandeis, Holmes, and Clarke dissenting.

246 U. S. 357 (Apr. 1, 1918) *New York Life Insurance Co.* v. *Dodge.* Brandeis, Day, Pitney, and Clark dissenting.

247 U. S. 32 (May 20, 1918) *United States* v. *United Shoe Machinery Co.* 4–3 (McReynolds and Brandeis not sitting); Day, Pitney, and Clarke dissenting.
247 U. S. 251 (June 3, 1918) *Hammer* v. *Dagenhart.* Holmes, McKenna, Brandeis, and Clarke dissenting.
247 U. S. 372 (June 3, 1918) *Chelentis* v. *Luckenbach S. S. Co.* Pitney, Brandeis, and Clarke dissenting; Holmes concurring in result.
248 U. S. 185, *Sandbert* v. *McDonald.*
248 U. S. 205, *Neilson* v. *Rhine Shipping Co.* } (Dec. 23, 1918).
McKenna, Holmes, Brandeis, and Clarke dissenting.
249 U. S. 86, *United States* v. *Doremus.*
249 U. S. 96, *Webb* v. *United States.* } (Mar. 3, 1919).
White, C. J., McKenna, McReynolds, and Van Devanter dissenting.
249 U. S. 217 (Mar. 10, 1919) *B. and O. R. R.* v. *Leach.* Clarke and McKenna dissenting; Pitney and Brandeis concurring in result.
249 U. S. 275 (Mar. 24, 1919) *Union Tank Line Co.* v. *Wright.* Pitney, Brandeis, and Clarke dissenting; Day concurring in result.
250 U. S. 400 (June 9, 1919) *Arizona Employers' Liability Cases.* McReynolds, White, C. J., McKenna, and Van Devanter dissenting.
250 U. S. 465 (June 9, 1919) *Erie R. R. Co.* v. *Shuart.* Clarke, McKenna, Day, and Brandeis dissenting.
250 U. S. 478 (June 9, 1919) *Tex. and Pac. Ry. Co. et al.* v. *Leatherwood.* McKenna, Pitney, and Clarke dissenting; McReynolds and Van Devanter concurring in judgment but dissenting from broad statement in opinion.
250 U. S. 519 (Oct. 27, 1919) *Central of Georgia R. R. Co.* v. *Wright.* McKenna, Brandeis, Clarke, and Pitney dissenting.
250 U. S. 525 (Oct. 27, 1919) *Maxwell* v. *Bugbee.* Holmes, White, C. J., Van Devanter, and McReynolds dissenting.
251 U. S. 264 (Jan. 5, 1920) *Ruppert* v. *Caffey.* McReynolds, Day, Van Devanter, and Clarke dissenting.
251 U. S. 326 (Jan. 12, 1920) *The Mail Divisor Cases.* Eight Justices (McReynolds not sitting); Holmes announced judgment of Court; Day and Van Devanter dissent, and Pitney and McKenna concur on different grounds.
251 U. S. 417 (Mar. 1, 1920) *United States* v. *U. S. Steel Corp.* 4–3 (McReynolds and Brandeis not sitting); Day, Pitney, and Clarke dissenting.
251 U. S. 532 (Mar. 1, 1920) *Fort Smith Lumber Co.* v. *Arkansas.* McKenna, McReynolds, Day, and Van Devanter dissenting.
252 U. S. 189 (Mar. 8, 1920) *Eisner* v. *Macomber.* Holmes, Day, Brandeis, and Clarke dissenting.
253 U. S. 149 (May 17, 1920) *Knickerbocker Ice Co.* v. *Stewart.* Holmes, Pitney, Brandeis, and Clarke dissenting.
253 U. S. 170 (May 17, 1920) *Calhoun* v. *Massie.* McReynolds, McKenna, Van Devanter, and Pitney dissenting.
253 U. S. 206 (June 1, 1920) *Ft. Smith and West. R. R. Co.* v. *Mills.* Day, Van Devanter, Pitney, and McReynolds concurring in judgment (limiting scope of Adamson Act), but expressly adhere to their dissent, expressed in *Wilson* v. *New,* on the constitutionality of the act.
254 U. S. 135 (Nov. 22, 1920) *Horning* v. *D. C.* McReynolds, Brandeis, White, C. J., and Day dissenting.
254 U. S. 498 (Jan. 3, 1921) *Director General of Railroads* v. *Viscose Co.* McKenna, McReynolds, Van Devanter, and Pitney dissenting.

255 U. S. 113 (Feb. 28, 1921) *Vandalia R. R. Co.* v. *Schnull.* Day, Pitney, Brandeis, and Clarke dissenting.

256 U. S. 135, *Block* v. *Hirsh.*
256 U. S. 170, *Marcus Brown Holding Co.* v. *Feldman.* } (Apr. 18, 1921). McKenna, McReynolds, White, C. J., and Van Devanter dissenting.

256 U. S. 232 (May 2, 1921) *Newberry* v. *United States.* White dissents from opinion, but concurs in judgment, with a modification; McKenna concurs in opinion, but reserves judgment as to effect of seventeenth amendment; Pitney, Brandeis, and Clarke concur in judgment upon fundamentally different grounds from majority.

257 U. S. 312 (Dec. 19, 1921) *Truax* v. *Corrigan.* Holmes, Pitney, Brandeis, and Clarke dissenting.

257 U. S. 441 (Jan. 3, 1922) *Federal Trade Commission* v. *Beech-Nut Co.* Holmes, Brandeis, McKenna, and McReynolds dissenting.

266 U. S. 209 (Nov. 17, 1924) *Panama Railroad Co.* v. *Rock.* Holmes, Taft, C. J., McKenna, and Brandeis dissenting.

268 U. S. 536 (June 21, 1925) *Marr* v. *United States.* Van Devanter, Butler, McReynolds, and Sutherland dissenting.

269 U. S. 204 (Nov. 23, 1925) *Edwards* v. *Douglas.* Van Devanter, McReynolds, Sutherland, and Butler dissenting.

272 U. S. 517 (Nov. 23, 1926) *Deutsche Bank* v. *Humphrey.* Sutherland, McReynolds, Butler, and Sanford dissenting.

272 U. S. 554 (Nov. 23, 1926) *Federal Trade Commission* v. *Western Meat Co.* Taft, C. J., Brandeis, Holmes, and Stone dissenting.

272 U. S. 581 (Nov. 29, 1926) *Lambert* v. *Yellowley.* Sutherland, McReynolds, Butler, and Stone dissenting.

273 U. S. 418 (Feb. 28, 1927) *Tyson and Brother* v. *Banton.* Holmes, Brandeis, Stone, and Sanford dissenting.

275 U. S. 142 (Nov. 21, 1927) (Modified by 276 U. S. 594) *Blodgett* v. *Holden.* Eight Justices (Sutherland not sitting) were evenly divided on the proper construction of the act in question, but all agreed on result in particular case.

276 U. S. 413 (Apr. 9, 1928) *Casey* v. *United States.* McReynolds, Butler, Brandeis, and Sanford dissenting.

276 U. S. 469 (Apr. 9, 1928) *Lamborn* v. *National Bank of Commerce of Norfolk.* Stone, McReynolds, Sutherland, and Sanford dissenting.

277 U. S. 32 (Apr. 30, 1928) *Louisville Gas Co.* v. *Coleman.* Holmes, Brandeis, Sanford, and Stone dissenting.

277 U. S. 142 (May 14, 1928) *Long* v. *Rockwood.* Holmes, Brandeis, Sutherland, and Stone dissenting.

277 U. S. 218 (May 14, 1928) *Panhandle Oil Co.* v. *Knox.* Holmes, Brandeis, Stone, and McReynolds dissenting.

277 U. S. 438 (June 4, 1928) *Olmstead* v. *United States.* Holmes, Brandeis, Butler, and Stone dissenting.

278 U. S. 41 (Nov. 19, 1928) *Boston Sand and Gravel Co.* v. *United States.* Sutherland, Butler, Sanford, and Stone dissenting.

282 U. S. 251 (Jan. 5, 1931) *O'Gorman and Young* v. *Hartford Fire Insurance Co.* Van Devanter, McReynolds, Sutherland, and Butler dissenting.

282 U. S. 582 (Feb. 24, 1931) *Coolidge* v. *Long.* Roberts, Holmes, Brandeis, and Stone dissenting.

283 U. S. 527 (May 18, 1931) *State Tax Commissioners* v. *Jackson.* Sutherland, Van Devanter, McReynolds, and Butler dissenting.

283 U. S. 605, *United States* v. *Macintosh*
283 U. S. 636, *United States* v. *Bland* } (May 25, 1931)
Hughes, C. J., Holmes, Brandeis, and Stone dissenting.
283 U. S. 697 (June 1, 1931) *Near* v. *Minnesota*. Butler, Van Devanter, McReynolds, and Sutherland dissenting.
285 U. S. 393 (Apr. 11, 1932) *Burnet* v. *Coronado Oil and Gas Co.* Stone, Roberts, Brandeis, and Cardozo dissenting.
286 U. S. 73 (May 2, 1932) *Nixon* v. *Condon*. McReynolds, Van Devanter, Sutherland, and Butler dissenting.
287 U. S. 178 (Nov. 21, 1932) *Interstate Commerce Commission* v. *N. Y., N. H. and H. R. R. Co.* 4-3 (Hughes, C. J., and Butler not sitting); Van Devanter, McReynolds, and Sutherland dissenting.
289 U. S. 627 (May 29, 1933) *Texas and Pacific R. R. Co.* v. *United States*. Stone, Hughes, C. J., Brandeis, and Cardozo dissenting.
289 U. S. 670 (May 29, 1933) *Burnet* v. *Wells*. Sutherland, Van Devanter, McReynolds, and Butler dissenting.
290 U. S. 117 (Nov. 13, 1933) *Krauss Bros. Co.* v. *Dimon S. S. Corp.* McReynolds, Sutherland, Butler, and Roberts dissenting.
290 U. S. 398 (Jan. 8, 1934) *Home Building and Loan Association* v. *Blaisdell*. Sutherland, McReynolds, Van Devanter, and Butler dissenting.
291 U. S. 97 (Jan. 8, 1934) *Snyder* v. *Mass*. Roberts, Brandeis, Sutherland, and Butler dissenting.
291 U. S. 503 (Mar. 5, 1934) *Nebbia* v. *New York*. McReynolds, Van Devanter, Sutherland, and Butler dissenting.
291 U. S. 587 (Mar. 12, 1934) *Arrow-Hart and Hegeman Co.* v. *Fed. Trade Commission*. Hughes, C. J., Cardozo, Brandeis, and Stone dissenting.
292 U. S. 190 (Apr. 30, 1934) *Sanders* v. *Armour Fertilizer Works*. Hughes, C. J., Cardozo, Brandeis, and Stone dissenting.
293 U. S. 474 (Jan. 7, 1935) *Dimick* v. *Schiedt*. Hughes, C. J., Stone, Brandeis, and Cardozo dissenting.
294 U. S. 87 (Jan. 14, 1935) *Fox* v. *Standard Oil Co. of N. J.* Van Devanter, McReynolds, Sutherland, and Butler dissenting.
294 U. S. 240, 317, 330, *Gold-Clause Cases* (Feb. 18, 1935) (including *Norman* v. *B. and O. R. R. Co., Nortz* v. *U. S.* and *Perry* v. *U. S.*). McReynolds, Van Devanter, Sutherland, and Butler dissenting.
294 U. S. 580 (Mar. 18, 1935) *Metropolitan Casualty Ins. Co.* v. *Brownell*. Van Devanter, McReynolds, Sutherland, and Butler dissenting.
295 U. S. 301 (Apr. 29, 1935) *Atlantic Coast Line R. Co.* v. *Florida*. Roberts, Hughes, C. J., Brandeis, and Stone dissenting.
295 U. S. 330 (May 27, 1935) *Railroad Retirement Board et al.* v. *The Alton Railroad Co. et al.* Hughes, C. J., Brandeis, Stone, and Cardozo dissenting.
296 U. S. 48 (Nov. 11, 1935) *Becker* v. *St. Louis Union Trust Co. et al.* Hughes, C. J., Brandeis, Stone, and Cardozo dissenting.
296 U. S. 85 (Nov. 11, 1935) *Helvering* v. *City Bank Farmers Trust Co.* Van Devanter, McReynolds, Sutherland, and Butler dissenting.
296 U. S. 140 (Nov. 11, 1935) *McCandless* v. *Furlaud et al.* Roberts, McReynolds, Sutherland, and Butler dissenting.
297 U. S. 251 (Feb. 10, 1936) *Borden's Farm Products Co., Inc.* v. *Ten Eyck, Commissioner of Agriculture and Markets of New York*,

et al. McReynolds, Van Devanter, Sutherland, and Butler dissenting.

297 U. S. 288 (Feb. 17, 1936) *Ashwander et al.* v. *Tennessee Valley Authority et al.* McReynolds dissenting; Brandeis, Stone, Roberts, and Cardozo dissenting on the question of jurisdiction only.

298 U. S. 513 (May 25, 1936) *Ashton* v. *Cameron County Water Improvement District No. One.* Cardozo, Hughes, C. J., Brandeis, and Stone dissenting.

298 U. S. 587 (June 1, 1936) *Morehead, Warden* v. *New York ex rel Tipaldo.* Hughes, C. J., Stone, Brandeis, and Cardozo dissenting.

299 U. S. (Adv. op. vii) (Nov. 23, 1936) Nos. 49, 50, and 64; *Chamberlin, Inc.* v. *Andrews; Stearns and Co.* v. *Andrews; Associated Industries of New York, Inc.* v. *Andrews.* Affirmed by an equally divided (4–4) Court.

ACTS OF CONGRESS RESTRICTING APPELLATE JURISDICTION OF THE SUPREME COURT

Judiciary Act of September 24, 1789 (1 Stat. 84, sec. 22). Review of circuit-court cases limited to those where the value in controversy exceeds $2,000, exclusive of costs; writs of error not to be brought after 5 years from judgment or decree complained of. This act also provides (p. 85, sec. 23) that, in case a judgment or decree is affirmed on writ of error, the Supreme Court must allow the respondent in error "just damages for his delay, and single or double costs at their discretion;" also (p. 85, sec. 23) that the Supreme Court must render judgment in case of reversal, as the lower court should have done, except that where the reversal is in favor of the plaintiff and the amount of damages, etc., is uncertain the case must be remanded to the lower court; execution not to issue from the Supreme Court but from the circuit court on special mandate.

Same (pp. 85–87, sec. 25). Where writs of error to State courts on Federal questions are allowed by the Supreme Court, "no other error shall be assigned or regarded as a ground for reversal in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before-mentioned questions of validity or construction of the said constitution, treaties, statutes, commissions, or authorities in dispute."

Act of February 13, 1801 (2 Stat. 99, sec. 33, 34). Review of circuit-court cases limited to those where the matter in dispute exceeds $2,000, exclusive of costs. No new evidence to be received in the Supreme Court on appeal in equity and admiralty cases.

Act of March 3, 1803 (2 Stat. 244, c. 40, sec. 2). Review of circuit court, equity, and admiralty cases (or cases from district courts acting as circuit courts) limited to those where the matter in dispute exceeds $3,000, exclusive of costs. No new evidence to be received in the Supreme Court on appeal except in admiralty cases.

Act of March 3, 1863 (12 Stat. 766, sec. 5). Appeals from Court of Claims limited (except in certain cases where the government appeals) to cases involving over $3,000; appeal must be taken within 90 days after judgment or decree rendered.

Act of June 30, 1864 (13 Stat. 310, sec. 13). Appeals from district courts in prize cases to be made within 30 days after decree appealed

from, unless time extended by the court; such appeals "may be claimed whenever the amount in controversy exceeds two thousand dollars, and, in other cases, on the certificate of the district judge that the adjudication involves a question of general importance."

Act of February 5, 1867 (14 Stat. 386, sec. 1, 387, sec. 2). Appellate jurisdiction in habeas-corpus cases "not to apply to the case of any person who is or may be held in the custody of the military authorities of the United States, charged with any military offense, or with having aided or abetted rebellion against the Government of the United States prior to the passage of this act."

Act of March 2, 1867 (14 Stat. 520, sec. 9). In bankruptcy cases "no appeal or writ of error shall be allowed in any case from the circuit courts to the Supreme Court of the United States, unless the matter in dispute in such case shall exceed two thousand dollars."

Act of March 27, 1868 (15 Stat. 44, c. 34, sec. 2). So much of act of February 5, 1867, above, as "authorizes an appeal from the judgment of the circuit court to the Supreme Court of the United States, or the exercise of any such jurisdiction by said Supreme Court on appeals which have been or may hereafter be taken, be, and the same is, hereby repealed." (Passed over veto of President Johnson.)

Act of June 1, 1872 (17 Stat. 196, c. 255, sec. 2). Judgments, decrees and orders of circuit and district courts not to "be reviewed by the Supreme Court of the United States, on writ of error or appeal, unless the writ of error be sued out, or the appeal be taken, within 2 years after the entry of such judgment, decree, or order."

Act of February 16, 1875 (18 Stat. 315, c. 77). Review of admiralty judgments and decrees of circuit courts on appeal "limited to a determination of the questions of law arising upon the record, and to such rulings of the circuit court, excepted to at the time, as may be presented by a bill of exceptions, prepared as in actions at law."

Same (p. 316, sec. 3). Judgments and decrees of circuit courts in ordinary cases not to be "reexamined in the Supreme Court unless the matter in dispute shall exceed the sum or value of five thousand dollar, exclusive of costs."

Act of February 25, 1879 (20 Stat. 321, sec. 4). Review of judgments and decrees of District of Columbia Supreme Court limited to cases involving over $2,500, exclusive of costs.

Act of March 3, 1885 (23 Stat. 443, c. 355). Appeals and writs of error from judgments and decrees of supreme courts of District of Columbia or Territories, with certain exceptions, not to be allowed "unless the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars."

Act of February 4, 1887 (24 Stat. 385, sec. 16). Appeals from circuit courts in interstate commerce cases limited to cases involving $2,000 or over.

Act of March 3, 1887 (24 Stat. 507, sec. 10). Appeals and writs of error in claims cases limited to 6 months from judgment or decree.

Acts of March 3, 1887 (24 Stat. 553, sec. 2) and August 13, 1888 (25 Stat. 435). No appeal or writ of error to be allowed from the decision of a circuit court remanding a case to a State court from whence it was improperly removed.

Act of February 6, 1889 (25 Stat. 656, sec. 6). Writs of error in capital cases not to "be sued out or granted unless a petition therefor shall have been filed with the clerk of the court in which the trial shall have been had during the same term or within such time, not exceeding 60 days next after the expiration of the term of the court at which the trial shall have been had, as the court may for cause allow by order entered of record."

Act of February 25, 1889 (25 Stat. 693, c. 236). In case of review of judgments and decrees of circuit courts where jurisdiction of circuit court questioned, "where the decree or judgment does not exceed the sum of five thousand dollars the Supreme Court shall not review any question raised upon the record except such question of jurisdiction."

Act of March 2, 1889 (25 Stat. 860–861). Same as act of February 4, 1887, above; in such cases where there is a right of trial by jury, appeals must be taken within 20 days after judgment rendered by the circuit court.

Act of June 10, 1890 (26 Stat. 138, sec. 15). Decisions of circuit courts reviewing decisions of board of general appraisers to be final "unless such court shall be of opinion that the question is of such importance as to require a review of such decision by the Supreme Court", in which case appeal within 30 days may be allowed; but in all cases the Attorney General is entitled to an appeal within 30 days.

Act of March 3, 1891 (26 Stat. 827, sec. 5). Appeals and writs of error from district or circuit courts direct to the Supreme Court allowed only in certain specified classes of cases.

Same (p. 828, sec. 6). Decisions of circuit courts of appeals in certain specified classes of cases made final, subject to certification of questions to the Supreme Court, and to writ of certiorari. In other cases review allowed if over $1,000 besides costs involved, but appeal must be taken or writ of error sued out within one year.

Act of February 9, 1893 (27 Stat. 436, sec. 8). Review of judgments and decrees of District of Columbia Court of Appeals, with certain exceptions, limited to cases involving over $5,000, exclusive of costs.

Act of March 3, 1893 (27 Stat. 751, c. 226). Habeas-corpus appeals not to be had or allowed after 6 months from the date of the judgment or order complained of.

Act of January 21, 1896 (29 Stat. 3, c. 5). On appeals from judgments and orders of District of Columbia Court of Appeals under Permanent Highway Act, Supreme Court may "determine only the questions of constitutionality involved in the case."

Act of June 1, 1898 (30 Stat. 553, sec. 25). Appeals in bankruptcy cases limited to (1) cases involving over $2,000, where question involved could have been taken from State courts to the Supreme Court; and (2) cases where a Supreme Court Justice certifies that the appeal is needed to insure uniformity of construction of the Bankruptcy Act.

Act of July 1, 1898 (30 Stat. 591). Appeals from United States courts in Indian Territory must be perfected within 60 days from final judgment.

Act of June 6, 1900 (31 Stat. 415, sec. 505). Judgments of circuit court of appeals in cases coming from Alaska to be final, except for certification of questions to the Supreme Court.

Same (sec. 506). Appeals or writs of error in Alaska cases must be taken or sued out within 1 year after entry of the order or judgment.

Act of March 3, 1901 (31 Stat. 1227, sec. 233). Practically same as act of February 9, 1893, above.

Act of July 1, 1902 (32 Stat. 695, sec. 10). Review of judgments and decrees of Philippine Supreme Court limited to (1) cases involving Federal questions; and (2) cases involving over $25,000.

Act of February 11, 1903 (32 Stat. 823, sec. 2). Appeals in anti-trust and interstate commerce equity cases must be taken within 60 days.

Act of March 3, 1905 (33 Stat. 1035, ch. 1465, sec. 3). Writs of error and appeals from Supreme Court of Hawaii limited to cases involving over $5,000, exclusive of costs.

Act of June 29, 1906 (34 Stat. 592, sec. 5). Appeals from injunctions against Interstate Commerce Commission to be taken within 30 days.

Act of March 2, 1907 (34 Stat. 1246, ch. 2564). Writs of error by United States in criminal cases must be taken within 30 days after judgment; not allowed after verdict in favor of defendant.

Act of March 10, 1908 (35 Stat. 40, ch. 76). Appeals from habeas-corpus decisions involving State imprisonment not to be allowed unless the lower court or a Supreme Court Justice certifies that there is probable cause for such allowance.

Act of June 18, 1910 (36 Stat. 542, sec. 2). Appeals from commerce court must be taken within 60 days; within 30 days in case of injunctions against Interstate Commerce Commission.

Judicial Code of March 3, 1911 (36 Stat. 1095, sec. 28). No appeal or writ of error to be allowed from the decision of a district court remanding a case to a State court from whence it was improperly removed.

Same (p. 1133, sec. 128; p. 1157, sec. 239–241). Practically same as section 6 of act of March 3, 1891, above.

Same (p. 1150, sec. 210). Practically same as act of June 18, 1910, above.

Same (p. 1157, secs. 242, 243). Practically same as act of March 3, 1863, above.

Same (p. 1157, sec. 244). Review of judgments and decrees of Supreme Court of Puerto Rico limited to (1) cases involving Federal questions, and (2) cases involving over $5,000, exclusive of costs.

Same (p. 1158, secs. 245, 246). Practically same as section 244, in respect to Supreme Courts of Arizona, New Mexico, and Hawaii.

Same (p. 1158, sec. 248). Practically same as act of July 1, 1902, above.

Same (p. 1159, sec. 250). Decisions of District of Columbia Court of Appeals made final except in cases where review by the Supreme Court of the United States is expressly provided for.

Act of July 15, 1913 (38 Stat. 107, sec. 8). Practically same as act of June 1, 1898, above.

Act of October 22, 1913 (38 Stat. 220). Appeals from district courts in interstate commerce cases must be taken within 60 days; from orders granting or denying interlocutory injunctions, within 30 days.

Act of September 26, 1913 (38 Stat. 720). Judgments and decrees of circuit courts of appeals in Federal Trade Commission cases made final, subject to certiorari.

Act of October 15, 1914 (38 Stat. 735). Judgments and decrees of circuit courts of appeals in antitrust cases made final, subject to certiorari.

Act of January 28, 1915 (38 Stat. 803–804, sec. 2). Amends sections 128 and 246 of the Judicial Code, above; certiorari petitions limited to 6 months, where Supreme Courts of Hawaii and Puerto Rico involved.

Same (p. 804, sec. 4). Judgments and decrees of ercuit courts of appeals in bankruptcy cases made final, subject to certiorari if petition filed within 3 months.

Act of August 29, 1916 (39 Stat. 555, sec. 27). Practically same as act of July 1, 1902, above.

Act of September 6, 1916 (39 Stat. 727, sec. 3). Amends section 4 of act of January 28, 1915, to include various interstate commerce cases.

Same (p. 727, sec. 5). Judgments and decrees of Philippine Supreme Court reviewable by certiorari only.

Same (p. 727, sec. 6). Writs of error, certiorari, and appeals allowable only within 3 months; certiorari to Philippine Supreme Court, within 6 months.

Act of February 13, 1925 (43 Stat. 938, sec. 238). Direct review of judgments and decrees of district courts limited to five specific classes of cases.

Same (p. 938–940). Review of decisions of circuit courts of appeals and District of Columbia Court of Appeals limited to certified questions and certiorari.

Same (p. 940, sec. 7). Certiorari to Philippine Supreme Court limited to (1) cases involving Federal questions and (2) cases involving over $25,000.

Same (p. 940, sec. 8). Practically same as section 6 of act of September 6, 1916, above; time may be extended by a Supreme Court Justice not over 60 days if good cause shown.

Act of February 26, 1926 (44 Stat. 110, sec. 1003). Judgments of circuit courts of appeals and District of Columbia Court of Appeals reviewing decisions of Board of Tax Appeals made final, subject to certiorari.

Act of March 20, 1933 (48 Stat. 9, sec. 5). No "court of the United States shall have jurisdiction to review by mandamus or otherwise" decisions of the Administrator of Veterans' Affairs under the Economy Act of March 20, 1933.

Act of June 6, 1934 (48 Stat. 902, sec. 25). Judgments and decrees of District of Columbia Court of Appeals as to orders of Securities and Exchange Commission made final, subject to certiorari or certification.

OCCUPATIONS OF JUSTICES OF THE UNITED STATES SUPREME COURT PRECEDING APPOINTMENT

Name and State (Chief Justices in Italic)	Occupations
John Jay, New York	Chief Justice of New York; President, Continental Congress; Minister to Spain; Secretary Foreign Affairs, Continental Congress.
John Rutledge, South Carolina	Governor of South Carolina; Member, Continental Congress; Minister to Holland; delegate, Constitutional Convention.
William Cushing, Massachusetts	Chief Justice, Massachusetts Supreme Court.
James Wilson, Pennsylvania	Member, Continental Congress; delegate Constitutional Convention.
John Blair, Virginia	Chief Justice, Court of Appeals, Virginia.
James Iredell, North Carolina	Judge, Superior Court, North Carolina; attorney general, North Carolina.
Thomas Johnson, Maryland	Member, Continental Congress; Governor of Maryland; chief justice, General Court, Maryland.
William Paterson, New Jersey	Attorney general, New Jersey; United States Senator; Governor of New Jersey.
John Rutledge, South Carolina	Governor of South Carolina; Member Continental Congress; Minister to Holland; delegate Constitutional Convention; Justice United States Supreme Court.
Samuel Chase, Maryland	Maryland legislator; chief justice, General Court of Maryland.
Oliver Ellsworth, Connecticut	Member, Continental Congress; delegate, Constitutional Convention; United States Senator.
Bushrod Washington, Virginia	Virginia legislator.
Alfred Moore, North Carolina	Attorney general, North Carolina; judge, Superior Court, North Carolina.
John Marshall, Virginia	X Y Z mission; Member of Congress.
William Johnson, South Carolina	Judge, Court of Common Pleas, South Carolina.
H. B. Livingston, New York	Justice, Supreme Court, New York.
Thomas Todd, Kentucky	Chief justice, Court of Appeals, Kentucky.
Joseph Story, Massachusetts	Massachusetts legislator; law professor Harvard; Member of Congress; Speaker of Massachusetts Legislature.
Gabriel Duval, Maryland	Member of Congress; justice, Supreme Court of Maryland; Comptroller of the Treasury, United States.
Smith Thompson, New York	New York legislator; district attorney, United States; chief justice, Supreme Court, New York; Secretary of the Navy.
Robert Trimble, Kentucky	Kentucky legislator; justice, Court of Appeals, Kentucky; district attorney, United States; district judge, United States.
John McLean, Ohio	Member of Congress; justice, Ohio Supreme Court; Postmaster General; Member of Congress.
Henry Baldwin, Pennsylvania	Member of Congress.
James M. Wayne, Georgia	Georgia legislator; judge, Superior Court, Georgia; Member of Congress.
Roger B. Taney, Maryland	Attorney General, United States; Secretary of Treasury.
Philip P. Barbour, Virginia	Virginia, legislator; Member of Congress and Speaker of House; judge, Virginia General Court; circuit judge, United States.
John Catron, Tennessee	Chief justice, Tennessee Supreme Court.
John McKinley, Alabama	Member of Congress; United States Senator.
Peter V. Daniel, Virginia	Virginia legislator; Lieutenant Governor of Va.; district judge, United States.
Samuel Nelson, New York	Chief justice, Supreme Court, New York.
Levi Woodbury, New Hampshire.	Judge, Superior Court, New Hampshire; Governor of New Hampshire; Speaker of New Hampshire House of Representatives; United States Senator; Secretary of Navy; Secretary of Treasury.
Robert C. Grier, Pennsylvania	Judge, District Court of Allegheny County, Pa.
Benj. R. Curtis, Massachusetts	Law professor, Harvard; assistant legislator.
John A. Campbell, Alabama	Alabama legislator.
Nathan Clifford, Maine	Maine legislator; attorney general of Maine; Member of Congress; Attorney General, United States; Minister to Mexico.
Noah H. Swayne, Ohio	Ohio legislator; district attorney, United States.
Samuel F. Miller, Iowa	Doctor of medicine; justice of peace; judge, county court, Iowa.
David Davis, Illinois	Illinois legislator; justice, circuit court, Illinois.
Stephen J. Field, California	California legislator; justice California Supreme Court; circuit judge, United States.
Salmon P. Chase, Ohio	United States Senator; Governor of Ohio; United States Senator; Secretary of Treasury.
William Strong, Pennsylvania	Member of Congress; justice, Supreme Court, Pennsylvania.
Joseph P. Bradley, New Jersey	Patent, commercial, and corporation lawyer.
Ward Hunt, New York	New York legislator; chief justice, Court of Appeals, New York.
Morrison R. Waite, Ohio	Ohio legislator; American Counsel Geneva Arbitration; president of Ohio constitutional convention.
John M. Harlan, Kentucky	Colonel, U. S. Army; attorney general, Kentucky; Louisiana Commission.
William B. Woods, Georgia	Ohio legislator and Speaker of House; brevet major general of Ohio Infantry; circuit judge, United States at Atlanta, Ga.
Stanley Matthews, Ohio	Ohio Senate; judge, superior court, Cincinnati; United States Senator.
Horace Gray, Massachusetts	Chief justice, Massachusetts Supreme Court.
Samuel Blatchford, New York	New York legislator; district and circuit judge, United States.
Lucius Q. C. Lamar, Mississippi	Georgia legislator; Member of Congress; law professor, Mississippi University; United States Senator; Secretary of Interior.
Melville W. Fuller, Illinois	Illinois constitutional convention; Illinois legislator; leader in many national Democratic conventions.
David J. Brewer, Kansas	Justice, Supreme Court, Kansas; circuit judge, United States.

Occupations of Justices of the United States Supreme Court preceding appointment—Continued

Name and State (Chief Justices in italic)	Occupations
Henry B. Brown, Michigan	Assistant United States district attorney; judge, Wayne County, Mich.; district judge, United States.
George Shiras, Jr., Pennsylvania	Practicing attorney.
Howell E. Jackson, Tennessee	Tennessee legislator; Tennessee Court of Arbitration; United States Senator; circuit judge, United States.
Edward D. White, Louisiana	Louisiana Senate; justice, Louisiana Supreme Court; United States Senator.
Rufus W. Peckham, New York	Justice, Supreme Court, New York; justice, Court of Appeals, New York.
Joseph McKenna, California	Member of Congress; circuit judge, United States; Attorney General United States.
Oliver W. Holmes, Massachusetts.	Law professor Harvard; chief justice, Supreme Judicial Court, Massachusetts.
William R. Day, Ohio	Secretary of state; circuit judge, United States.
William H. Moody, Massachusetts.	Member of Congress; Secretary of Navy; Attorney General, United States.
Horace H. Lurton, Tennessee	Law dean, Vanderbilt University; chief justice, Supreme Court, Tennessee; circuit judge, United States.
Charles E. Hughes, New York	Law professor, Cornell and New York Law School; assistant to Attorney General, United States; Governor of New York.
Willis Van Devanter, Wyoming	Chief justice, Supreme Court of Wyoming; Assistant Attorney General United States; circuit judge, United States.
Joseph R. Lamar, Georgia	Georgia legislator; justice, George Supreme Court.
Edward D. White, Louisiana	Louisiana senator; justice, Louisiana Supreme Court; United States Senator; Justice, Supreme Court of United States.
Mahlon Pitney, New Jersey	New Jersey Senate; justice, Supreme Court, New Jersey; chancelor, New Jersey.
Jas. C. McReynolds, Tennessee	Assistant Attorney General, United States; Attorney General, United States.
Louis D. Brandeis, Massachusetts.	Special counsel, Interstate Commerce Commission in the second advance freight-rate case; special counsel for the Government in the *Riggs National Bank case;* counsel for the people in proceedings involving constitutionality of Oregon and Illinois 10-hour laws, Ohio 9-hour law, California 8-hour law, and Oregon minimum-wage law.
John H. Clarke, Ohio	District judge, United States.
William H. Taft, Connecticut	Judge, Superior Court, Ohio; Solicitor General, United States; circuit judge, United States; president of the Philippine Commission; Secretary of War; President of the United States; law professor, Yale; member, National War Labor Board.
George Sutherland, Utah	Utah Senate; Member of Congress; United States Senator.
Pierce Butler, Minnesota	General practice; counsel for railroads.
Edward T. Sanford, Tennessee	Assistant Attorney General, United States; district judge, United States.
Harlan F. Stone, New York	Dean, Columbia Law School; Attorney General, United States.
Charles E. Hughes, New York	Law professor, Cornell and New York Law School; Assistant Attorney General, United States; Governor of New York; Justice, Supreme Court of the United States; Secretary of State; Permanent Court of Arbitration; Permanent Court of International Justice.
Owen J. Roberts, Pennsylvania	Professor, Law University of Pennsylvania; Deputy Attorney General, United States; director of City Trusts, Philadelphia, Pa.
Benjamin N. Cardozo, New York.	Justice, Supreme Court, New York.

Source: Dictionary of American Biography, 1932; Who's Who in America, 1934-35, vol. 18.

JUSTICES OF THE SUPREME COURT OF THE UNITED STATES WHO RESIGNED FROM OFFICE

1791. John Rutledge. Appointed September 24, 1789; resigned February 1791.

On the 16th of February 1791 he was elected by the Legislature of South Carolina, Chief Justice of the Court of Common Pleas and Sessions. He accepted this post, and resigned his seat on the Federal bench (H. Flanders, The Lives and Times of the Chief Justices * * *, 1875, vol. 1, p. 622).

1793. Thomas Johnson. Resigned 1793.

Johnson was regularly confirmed on the 7th of November 1791, and took his seat in the following August term, but resigned in less than 18 months on account of failing health (H. L. Carson, The Supreme Court of the United States: Its History, 1892, pt. 1, p. 162).

1795. John Jay. Appointment confirmed September 26, 1789 (Flanders, vol. 1, p. 383.)

On February 16, 1792, at a meeting of his friends in New York City' Jay was nominated for Governor in opposition to Clinton, who had held office continuously since June 1777. He accepted the nomination, stipulating, however, that he should not be required to take any active part in the campaign. "I made it a rule", he wrote to a friend, "neither to begin correspondence nor conversation upon the subject" (American Statesman Series, John Jay, 1890, p. 268.)

• JAY'S ELECTION AS GOVERNOR OF NEW YORK 1795

He was in England and it appears that his friends put him in nomination without his knowledge or consent. However, as he yielded to their wishes at the previous election, they were warranted in supposing that he would do no less at the ensuing one.

His former competitor, Governor Clinton, declined a reelection. His present one was Chief Justice Yates. Jay was elected by a large majority. The result was officially declared on the 26th of May (Flanders, vol. 1, p. 415).

On May 28 Jay arrived in New York as during the period of his mission he had continued to hold the position of Chief Justice, he refused any compensation except for actual expenses. The treaty was not published till July 2, the day after Jay's inauguration as Governor * * * American Statesman, John Jay, p. 314.)

The Constitution of 1777 (New York) did not specify the time when the Governor should enter on the duties of his office. Governor Clinton was declared elected July 9 and qualified on the above day. On the 13th day of February 1787 an act was passed for regulating elections, which provided that the Governor and Lieutenant Governor should enter on the duties of their respective offices on the 1st of July after their election (New York, Legislative Manual, 1914, note, p. 414).

Resigned June 29, 1795.

To the puzzled astonishment of the general public, Chief Justice Jay, after presiding over the Supreme Court of the United States for 5 years, stepped down from that office to go to England, as the plenipotentiary of the United States, and execute a new treaty.

This happened in April 1794. "* * * no appointment," wrote Jay on April 17, of that year to his wife, referring to his selection as special envoy, "ever operated more unpleasantly upon me; * * *" As the sequel proved, Jay's quitting the Chief Justiceship amounted to a de facto resignation, although he did not formally resign until June 29, 1795, after his return from England (J. Myers, History of the Supreme Court of the United States, 1912, p. 197).

1795 John Rutledge. Nominated Chief Justice July 1, 1795; nomination rejected by the Senate December 15, 1795 (Carson, pt. 1, p. 184.)

When Jay resigned the Chief Justiceship of the Supreme Court, John Rutledge of South Carolina was appointed to succeed him. Rutledge's appointment was what might be termed an untimely anticipation of a period not yet arrived. So stanchly did Rutledge represent the interests of the large Southern slaveholders that in the Federal Constitutional Convention, he had, to quote the words of a eulogist, "stood firm and unyielding to what he esteemed the substantial interests of his section of the country."[1] He had been one of the delegates refusing to concede to the proposal for the immediate prohibition of the importation of Negro slaves. "The people of North Carolina, South Carolina, and Georgia," he had then declared, "will never agree to the proposed Constitution, unless their right to import slaves be untouched." He had finally acceded in the Convention, however, to the proposal that the importation of slaves should not be prohibited prior to the year 1808.[2]

[1] Van Santvoord's Chief Justices, p. 194.
[2] Madison Papers, vol. III, 1536.

But although representing the great slave-owning landed proprietors of the South, Rutledge was not, at this juncture, viewed with approval by the great landowners of the North, who by force of more numerical representation in the Senate, dominated the Government.

Already the great economic struggle between the two conflicting capitalist systems—that of so-called free white labor in the North, and that in the South of Negro slavery—had begun. While the Southern capitalists were demanding that the right to import slaves be continued, the Northern capitalists were, as we have seen, as early as 1775, deliberately and with the most careful calculation, setting out to utilize woman and child labor in factories, as a system, knowing it to be cheaper than slave labor.

The conflict between these divergent systems had not, at the time of Rutledge's appointment, widened into the threatening stage that it did later, when it became so acute that the Southern slaveholders exerted every influence to dominate the Government, especially the Supreme Court of the United States. Rutledge, moreover, had made himself obnoxious to the majority of the United States Senate by denouncing the Jay Treaty. This he opposed because it contained no provision indemnifying slaveholders for Negroes appropriated by the British, and because that treaty would stop the exportation of cotton.

The Senate rejected Rutledge's appointment.[3] For some years his mind had showed symptoms of impairment; when the news of his rejection reached Rutledge, it totally gave way, and he soon died. (Myers, p. 218–219.)

1795. John Blair. Appointed September 30, 1789; resigned 1795.

Justice Blair's last opinion was filed at the February term, 1795; he resigned shortly after, his successor being commissioned January 27, 1796. His death occurred in August 1800. He was distinguished alike for the ability he displayed upon the bench and the virtues which adorned his private character (Indexed Digest of U. S. Supreme Court Reports, 1894, vol. 1, p. xxix).

His resignation was tendered in 1796, immediately after which he retired to private life. The cause of his retirement or resignation of office is uncertain, as his age at the time, about 64 years, was not so great as to justify a belief in infirmities occasioned by age, in the absence of any positive evidence upon the subject. His retirement to private life was so complete that nothing broke that seclusion until his death which occurred on August 31, 1800 (W. D. Luckenbach, Current Comment and Legal Miscellany, 1891, p. 75.)

1800. Oliver Ellsworth. Appointed March 4, 1796; resigned November 1800.

In October 1799, Ellsworth had been commissioned one of the three envoys extraordinary and ministers plenipotentiary to France, and resigned the office of Chief Justice from Paris in November 1800 (Carson, pt. 1, p. 191).

Member of Governor's Council, Connecticut.

Although Ellsworth had determined to pass his remaining life in retirement, yet, when in the year following his return from Europe, he was elected a member of the Governor's Council. * * * His seat in the council made him, ex officio, a member of the board of fellows of Yale College; and he entered very zealously into all the concerns and interests of that highly respectable and important institution. His official duties were the more laborious, because, during the time in which he held a seat in the council, that body exercised the double powers of a constituent branch of the legislature, and of the final court of appeals from all inferior State jurisdictions. He was particularly attentive to this latter department of his duty.

The decisions of the council, acting as a supreme court of errors, are collected in Day's Connecticut Reports (Flanders. vol. 2, pp. 268–269).

[3] The appointment of Rutledge was a recess appointment. The note in III Dallas' Reports, 121, reads: "A commission bearing date the 1st July 1795, was read by which, during the recess of Congress, John Rutledge, Esq., was appointed Chief Justice, till the end of the next session of the Senate." Before the rejection of his nomination, Rutledge presided as Chief Justice in the determination of at least one case, that of *Talbot v. Jackson.*

Oliver Ellsworth's name first appears as a member of the Governor's Council in Green's Almanack and Register for the State of Connecticut, in 1803, page 45.

1804. Alfred Moore. Appointed December 10, 1799; resigned 1804.

In the beginning of the year 1804, Justice Moore resigned his office on account of ill health. For some time previous to his resignation he was not present at the sessions of the court. He died in 1810 (Indexed Digest of the U. S. Supreme Court Reports. 1894. vol. 1, p. xxxvii).

1835. Gabriel Duval. Appointed November 18, 1811; resigned January 1835 (Indexed Digest of the U. S. Supreme Court Reports, 1894, vol. 1, p. xlii).

In December 1802, he was appointed Comptroller of the Currency and held the office until the 18th of November 1811, when he was appointed by President Madison an Associate Justice of the Supreme Court. His opinions as a judge are not characterized by either remarkable learning or great reasoning powers, but are respectable. He was the only dissentient in the *Dartmouth College case*. Owing to the infirmity of deafness he was compelled to resign his place * * *. (H. L. Carson, The Supreme Court of the United States: Its History, pt. 1, p. 234).

1857. Benjamin R. Curtis. Appointed September 22, 1851; resigned September 30, 1857.

His resignation from the bench soon followed, taking place in 1857. The reasons which led to it were stated to be the insufficiency of his salary and his inability to support a large family upon his income; but the reader of the correspondence, which became somewhat embittered, between Chief Justice Taney and himself, in relation to an important change in the language and matter of the opinion of the Chief Justice, made after it had been delivered but before it had been filed, by which the Chief Justice inserted 18 new pages in reply to the illustrations and objections urged by Judge Curtis in his dissenting opinion, will perceive the probable reason for his withdrawal from the Court (H. L. Carson, The Supreme Court of the United States: Its History, pt. 1, p. 349).

He was one of the few Justices, in good or bad health, who ever resigned from the Supreme Court; his son tells us that from the date of his resignation in 1857, to his death in 1874, he gathered in about $650,000 from professional fees (Myer, p. 448).

1861. John A. Campbell. Appointed March 22, 1853; resigned May 1, 1861 (Indexed Digest of the U. S. Supreme Court Reports, 1894, vol. 1, p. lix).

Resigned in 1861 to take up the cause of the Southern Confederacy (Myer, note on p. 480).

1872. Samuel Nelson. Appointed February 14, 1845; Resigned December 1, 1872.

On December 1, 1872 he tendered his resignation on account of failing health * * * (Indexed Digest of the U. S. Supreme Court Reports, 1894, vol. 1, p. lii).

1877. David Davis. Appointed December 8, 1862; resigned March 4, 1877.

Judge Davis held the position until he was elected United States Senator in 1877, commencing his senatorial career on March 4, of that year (Indexed Digest of the U. S. Supreme Court Reports, 1894, v. 1, p. lxvii).

1906. William H. Moody. Appointed December 17, 1906; retired by special act of Congress (36 Stat. 1861).

1916. Charles E. Hughes. Appointed May 2, 1910; resigned June 10, 1916, to become Republican candidate for the office of President of the United States.

APPOINTMENT OF JOSEPH STORY TO THE SUPREME COURT

On the 18th of November 1811, he was commissioned as an Associate Justice of the Supreme Court of the United States to fill the vacancy created by the death of Mr. Justice Cushing, who had occupied the place since the organization of the Government. The appointment was a surprise, made, it seems, at the suggestion of Mr. Bacon, a Member of Congress from Massachusetts. As the annual salary was then but $3,500, its acceptance involved no slight pecuniary sacrifice. The opportunity of pursuing juridical studies, the high honor of the place, the permanence of the tenure, and the prospect of meeting the great men of the Nation, were considerations which he could not resist.

Story was then but 32 years of age—the youngest judge, except Mr. Justice Buller, who was ever called to the highest judicial station either in England or America. His labors upon circuit were onerous indeed, owing to the immense accumulation of business in consequence of the age and infirmities of his predecessor (H. L. Carson, The Supreme Court of the United States: Its History, pt. 1, p. 236).

A search through the Annals of Congress of date, November 18, 1811, and the Senate Journal show no objection to the appointment of Joseph Story.

In the Executive Journal of the Senate of the United States the following letter was received from President Madison on Friday, November 15, 1811:

To the Senate of the United States:

John Q. Adams having declined the appointment of Associate Justice of the Supreme Court of the United States, I nominate Joseph Story, of Massachusetts, to fill that vacancy.

I nominate Gabriel Duval, of Maryland, to be an Associate Justice of the Supreme Court of the United States, in the room of Samuel Chase, deceased.

JAMES MADISON.

NOVEMBER 15, 1811.

On the following Monday, November 18, 1811;

The Senate took into consideration the message of the President of the United States, of yesterday, nominating Joseph Story and Gabrial Duval to office; and resolved that they do advise and consent to the appointments, agreeably, to the nominations respectfully (Executive Journal, U. S. Senate, vol. 2, pp. 189–190).

DECISIONS OF THE SUPREME COURT OF THE UNITED STATES IN WHICH THE COURT WAS INFLUENCED BY THE INTENT OF CONGRESS

The Supreme Court has been influenced by the intent of Congress in many cases. It held in *McLean* v. *United States* (226 U. S. 274) that reports of committees of the House or Senate may be consulted as an aid in ascertaining the motive of Congress in passing a statute. In the following cases Congressional reports were taken into consideration by the Court:

Church of the Holy Trinity v. *U. S.* (143 U. S. 457).
St. Louis, I. M. & S. R. Co. v. *Craft* (237 U. S. 648).
U. S. v. *St. Paul, M. & M. Co.* (247 U. S. 310).
Wm. Cramp & Sons Ship & Engine Bldg. Co. v. *International Curtis Marine Turbine Co.* (246 U. S. 28).
Duplex Printing Press Co. v. *Deering* (254 U. S. 443).
Oceanic Steam Nav. Co. v. *Stranahan* (214 U. S. 320).
Penna. R. R. Co. v. *International Coal Mining Co.* (230 U. S. 184).
Graham v. *Goodcell* (282 U. S. 409, 418–419).
U. S. v. *Flores* (289 U. S. 137).
Matson Nav. Co. v. *U. S.* (284 U. S. 352).
Indian Motocycle Co. v. *U. S.* (283 U. S. 570).
Richbourg Motor Co. v. *U. S.* (281 U. S. 528).

In the last three volumes of Supreme Court Reports there are eight cases, decided in 1934 and 1935, in which the Court in its opinion either quotes from or cites Congressional reports.

Helvering v. *Stockholms, etc., Bank* (293 U. S. 84, 84–94).
Helvering v. *Morgan's, Inc.* (293 U. S. 121, 129).
Helvering v. *Bliss* (293 U. S. 144, 147–151).
Warner v. *Goltra* (293 U. S. 155, 159–162).
Helvering v. *Twin Bell Syndicate* (293 U. S. 312, 322).
Helvering v. *Insurance Co.* (294 U. S. 686, 689).
Hartley v. *Commissioner of Internal Revenue* (295 U. S. 216).
Humphrey's Executor v. *U. S.* (295 U. S. 602, 624–626).

Mere debates in Congress have not been considered by the Supreme Court, as a rule, but statements made by sponsors of bills, the general trend of debate in both Houses and the legislative history of bills, have been taken into consideration in determining the meaning of acts.

Blake v. *National City Bank* (23 Wallace 307, 317–319).
U. S. v. *St. Paul, M. & M. R. Co.* (247 U. S. 310).
Richbourg Motor Co. v. *U. S.* (281 U. S. 528).
McCaughn v. *Hershey Chocolate Co.* (283 U. S. 488).
Federal Trade Comm. v. *Raladam Co.* (283 U. S. 643).
Atlantic Cleaners & Dyers v. *U. S.* (286 U. S. 427, 435).
U. S. v. *Great Northern Ry. Co.* (287 U. S. 144, 155).

In the recent case of *Humphrey's Executor* v. *U. S.* (295 U. S. 602, 624–626), cited above, decided May 27, 1935, the Court quotes congressional reports in its opinion and refers to debates in both Houses to show congressional intent. The Court summarizes the policy of the Court as to debates in these words:

> While the general rule precludes the use of these debates to explain the meaning of the words of the statute, they may be considered as reflecting light upon its general purposes and the evils which it sought to remedy.

The intention of Congress has also influenced the decisions of the Supreme Court in the most recent cases of *Helvering* v. *City Bank Farmers Trust Co.* (Nov. 11, 1935), *U. S.* v. *Hastings* (Dec. 9, 1935) and *U. S.* v. *Safety Car Heating & Lighting Co., etc.* (Jan. 6, 1936) and in the minority opinions in *U. S.* v. *Constantine* (Dec. 9, 1935) and *U. S.* v. *Butler* (Jan. 6, 1936).

SUPREME COURT DECISIONS INTERPRETING ACTS OF CONGRESS ENACTED SUBSEQUENT TO MARCH 4, 1933 [1]

[An asterisk (*) before a case indicates that the constitutionality of the act was passed upon]

Act of March 9, 1933 (48 Stat. 5) as amended by act of March 24, 1933 (48 Stat. 20) and act of June 15, 1933 (48 Stat. 147)

Baltimore National Bank v. *State Tax Commission of Maryland* (297 U. S. 209): State tax on national-bank shares owned by the Reconstruction Finance Corporation and collected from the bank not prohibited. Decision, 9–0, rendered by Justice Cardozo.

Economy Act of March 20, 1933 (48 Stat. 8)

1. *Hines* v. *Stein* (298 U. S. 94): Administrative orders under act limiting fees of attorneys in pension matters held not applicable to allowances by State court to attorney representing incompetent

[1] Includes decisions through Mar. 1, 1937.

veteran in a claim before the Veterans' Administration. Decision, 9–0, rendered by Justice McReynolds.

2. **Lynch* v. *United States* (292 U. S. 571): Policies of yearly renewable term insurance issued under the War Risk Insurance Act are contracts which cannot be repudiated, rights thereunder having vested. Decision, 9–0, rendered by Justice Brandeis.

Agricultural Adjustment Act of May 12, 1933 (48 Stat. 31)

**United States* v. *Butler* (297 U. S. 1): Agricultural processing taxes invalid. Decision, 6–3, rendered by Justice Roberts; Justices Stone, Brandeis, and Cardozo dissenting.

Tennessee Valley Authority Act of May 18, 1933 (48 Stat. 58) as amended by act of August 31, 1935 (49 Stat. 1075)

Ashwander v. *Tennessee Valley Authority* (297 U. S. 288): The contract of the Authority to sell power generated at the Wilson Dam constructed under the National Defense Act of June 3, 1916 (39 Stat. 166) is not invalid; the court expressed no opinion as to the constitutionality of the Tennessee Valley Authority Act. Decision, 8–1, by Chief Justice Hughes (separate opinion by Justice Brandeis concurred in by Justices Stone, Roberts, and Cardozo), Justice McReynolds dissenting.

Securities Act of May 27, 1933 (48 Stat. 74), as amended by act of June 6, 1934 (48 Stat. 881)

Jones v *Securities and Exchange Commission* (298 U. S. 1): The registration statement of a petitioner filed with the Commission may be withdrawn by him, and the Commission's stop-order proceedings and inquisition are ended thereby. Decision, 6–3, rendered by Justice Sutherland; Justices Brandeis, Stone, and Cardozo dissenting.

Gold-Clause Resolution of June 5, 1933 (48 Stat. 112)

1. **Norman* v. *Baltimore and Ohio Railroad Company* (294 U. S. 240): Upholds power of Congress to abrogate gold-clause stipulations in private contracts. Decision, 5–4, rendered by Chief Justice Hughes; Justices McReynods, Van Devanter, Sutherland and Butler dissenting.

2. **Nortz* v. *United States* (294 U. S. 317): Upholds power of Congress to require holders of gold certificates to accept therefor legal-tender currency of equal face amount. Decision, 5–4, rendered by Chief Justice Hughes; Justices McReynolds, Van Devanter, Sutherland, and Butler dissenting.

3. **Perry* v. *United States* (294 U. S. 330): Denies power of Congress to nullify gold clause in Government obligations (but plaintiff was unable to show "damages"). Decision, 5–4, rendered by Chief Justice Hughes (concurring opinion by Justice Stone); Justices McReynolds, Van Devanter, Sutherland, and Butler dissenting.

4. **Holyoke Water Power Company* v. *American Writing Paper Company, Inc.* (300 U. S. 324) [Mar. 1, 1937]: Upholds power of Congress to abrogate gold-clause stipulation in a lease calling for payment of

a quantity of gold which shall be equal in amount to $1,500 of gold coin of the standard of weight and fineness of 1894, or its equivalent in currency. Decision, 5–4, rendered by Justice Cardozo; Justices Van Devanter, McReynolds, Sutherland, and Butler dissenting.

Home Owners' Loan Act of June 13, 1933 (48 Stat. 134, sec. 5 (i)) as amended by act of April 27, 1934 (48 Stat. 646, sec. 6)

**Hopkins Federal Savings and Loan Association* v. *Cleary* (296 U. S. 315): Conversion of State savings and loan associations into Federal associations in contravention of State law is unconstitutional. Decision, 9–0, rendered by Justice Cardozo.

Emergency Railroad Transporation Act of June 16, 1933 (48 Stat. 211)

1. *Florida* v. *United States* (292 U. S. 1): The power of the Interstate Commerce Commission to increase intrastate rates was not withdrawn or diminished by this act. Decision, 9–0, rendered by Chief Hustice Hughes.

2. *Texas* v. *United States* (292 U. S. 522): Authority of Interstate Commerce Commission to approve a railroad lease which provides for removing the general offices, etc., of a railroad from Texas, upheld. Decision, 9–0, rendered by Chief Justice Hughes.

Independent Offices Appropriation Act of June 16, 1933 (48 Stat. 307, sec. 13)

**Booth* v. *United States* (291 U. S. 339): Attempt to reduce pay of retired Federal judges invalid. Decision, 9–0, rendered by Justice Roberts.

National Industrial Recovery Act of June 16, 1933 (48 Stat. 195)

1. **Panama Refining Company* v. *Ryan* (293 U. S. 388): "Hot Oil" regulation under sec. 9 (c) invalid. Decision, 8–1, rendered by Chief Justice Hughes; Justice Cardozo dissenting.

2. *United States* v. *Arizona* (295 U. S. 174): Act did not repeal requirement of 1910 act that irrigation projects be approved by the President, nor requirement of Rivers and Harbors Acts that recommendations of Chief of Engineers be based on surveys and submitted to Congress. Decision, 9–0, rendered by Justice Butler.

3. **A. L. A. Schechter Poultry Corporation* v. *United States* (295 U. S. 495): Title I (industrial codes) is an unconstitutional delegation of legislative power and exceeds power of Congress to regulate interstate commerce. Decision, 9–0, rendered by Chief Justice Hughes.

Act of June 16, 1933 (48 Stat. 256) amending act of March 4, 1925 (43 Stat. 1260)

Escoe v. *Zerbst* (295 U. S. 490): The requirement of the 1933 act (same as in 1925 act) that upon the arrest of a probationer, he "shall forthwith be taken before the court", is mandatory in meaning as well as in form. Decision, 9–0, rendered by Justice Cardozo.

Civil Service Retirement Act of June 30, 1933 (48 Stat. 283, sec. 8 (a))

Dismuke v. *United States* (297 U. S. 167): District courts have jurisdiction under the Tucker Act (U. S. C. 28:41), permitting suits against the United States, of a claim to an annuity founded on section 8 of the Civil Service Retirement Act. Decision, 9–0, rendered by Justice Stone.

Philippine Independence Act of March 24, 1934 (48 Stat. 464, sec. 15)

Asiatic Petroleum Company, Ltd. v. *Insular Collector of Customs* (297 U. S. 666): This section did not repeal the Philippine Tariff Act of 1909. Decision, 9–0, rendered by Justice Roberts.

Amendment to section 24 of the Trading With the Enemy Act, March 28, 1934 (48 Stat. 510)

**Woodson* v. *Deutsche, etc., Vormals* (292 U. S. 449): Prohibition on suits to recover certain property taken under the Trading With the Enemy Act, is not unconstitutional. Decision, 9–0, rendered by Justice Butler.

Cotton Control Act of April 21, 1934 (48 Stat. 598)

Moor v. *Texas and New Orleans Railroad Company* (297 U. S. 101): Writ of certiorari dismissed where plaintiff, challenging constitutionality of law, failed to make a case for equitable relief when seeking a mandatory injunction. Decision, 9–0, per curiam.

Johnson Act of May 14, 1934 (48 Stat. 775)

1. *Corporation Commission of Oklahoma* v. *Cary* (296 U. S. 452): The statute restricting right of district courts to restrain enforcement of orders of State boards fixing utility rates is inapplicable where the existence of an effective judicial remedy in the State courts is uncertain. Decision, 9–0, per curiam.

2. *Mountain States Power Company* v. *Public Service Commission of Montana* (299 U. S. 167): The act, restricting jurisdiction of Federal courts to enjoin enforcement of State rate orders, does not apply when State statute continues in effect all such rate orders until final court determination of their invalidity. Decision, 8–0, rendered by Justice McReynolds; Justice Stone took no part in the consideration or decision.

Federal Kidnaping Act amendment of May 18, 1934 (48 Stat. 781)

Gooch v. *United States* (297 U. S. 124): The transportation in interstate commerce of an officer unlawfully seized and carried away to prevent the arrest of his captor is a violation of the act. Decision, 9–0, rendered by Justice McReynolds.

Municipal Bankruptcy Act of May 24, 1934 (48 Stat. 798)

**Ashton* v. *Cameron County Water Improvement District No. One* (298 U. S. 513): Entire act unconstitutional. Decision, 5–4, rendered

by Justice McReynolds; Chief Justice Hughes, and Justices Brandeis, Stone, and Cardozo dissenting.

Joint resolution of May 28, 1934 (48 Stat. 811)

**United States* v. *Curtiss-Wright Export Corporation* (299 U. S. 304): Delegation of power to President to put in force prohibition against sale of arms to foreign belligerents is not unconstitutional. Decision, 7–1, rendered by Justice Sutherland, Justice McReynolds dissenting; Justice Stone took no part in the consideration or decision.

Bankruptcy Act of June 7, 1934 (corporate reorganization) (48 Stat. 911, sec. 77B)

1. *Meyer* v. *Kenmore Granville Hotel Company* (297 U. S. 1601): Orders of district court denying petition for dismissal of reorganization proceedings is not appealable as of right under section 77B (k). Decision, 8–0, rendered by Justice Stone; Justice Van Devanter took no part in the consideration or decision.

2. *Duparquet Huot and Moneuse Company* v. *Evans* (297 U. S. 216): Receiver in foreclosure is not within meaning of "equity receivership" under section 77B. Decision, 8–0, rendered by Justice Cardozo; Justice Van Devanter took no part in the consideration or decision of this case.

3. *Callaghan* v. *Reconstruction Finance Corporation* (297 U. S. 464): Allowances to trustees and compensation of referees where bankruptcy superseded by reorganization proceeding, is determined by section 40 of the Bankruptcy Act, and not governed by section 77B (i). Decision, 9–0, rendered by Justice Stone.

4. *City Bank Farmers Trust Company* v. *Irving Trust Company* (299 U. S. 433): Relates to a lessor's claim for damages from rejection of lease by trustee in bankruptcy proceedings pending prior to proceedings for reorganization under section 77B of Bankruptcy Act. Decision, 7–0, rendered by Justice Roberts; Justices Brandeis and Stone took no part in the consideration or decision of this case.

5. **Kuehner* v. *Irving Trust Company* (299 U. S. 445): Provising limiting the claim of a landlord for indemnity, under a covenant in a lease, to an amount not to exceed 3 year's rent, is not unconstitutional. Decision, 7–0, rendered by Justice Roberts; Justices Brandeis and Stone took no part in the consideration or decision of this case.

6. *Schwartz* v. *Irving Trust Company* (299 U. S. 456): Relates to provability of lessor's claim for damages from rejection of lease by trustee in bankruptcy proceedings pending prior to proceedings for reorganization under section 77B of Bankruptcy Act. Decision, 7–0, rendered by Justice Roberts; Justices Brandeis and Stone took no part in the consideration or decision.

7. *Meadows* v. *Irving Trust Company* (299 U. S. 464): Relates to provability of lessor's claim for damages through rejection of lease by trustee in bankruptcy proceedings pending prior to proceedings for reorganization under section 77B of Bankruptcy Act. Decision, 7–0, rendered by Justice Roberts; Justices Brandeis and Stone took no part in the consideration or decision.

8. *O'Conner* v. *Mills* (299 U. S. 536, Feb. 1, 1937): An order of a district court dismissing a creditor's petition for reorganization may

be appealed as a matter of right to the circuit court of appeals, under section 77B (k). Decision, 9–0, per curiam.

9. *Wayne United Gas Company* v. *Owens-Illinois Gas Company*, (299 U. S. 528, Feb. 1, 1937): A bankruptcy court may set aside its order dismissing a reorganization petition and rehear the cause after expiration of the time allowed for appeal from the order. Decision, 9–0, rendered by Justice Roberts.

Declaratory Judgment Act of June 14, 1934, (48 Stat. 955)

1. *United States* v. *West Virginia* (295 U. S. 463): The act is applicable only in cases of actual controversy, and does not purport to alter the character of the controversies which are the subject of the judicial power under the Constitution. Decision, 8–1, rendered by Justice Stone; Justice Brandeis being of the opinion that the State should be granted leave to amend its bill (an original proceeding in the Supreme Court).

2. *Ashwander* v. *Tennessee Valley Authority* (297 U. S. 285 (325)): The act applies to cases of actual controversy of a justiciable nature, thus excluding advisory decrees upon a hypothetical state of facts. Decision, 8–1, rendered by Chief Justice Hughes (separate opinion by Justice Brandeis concurred in by Justices Stone, Roberts, and Cardozo), Justice McReynolds dissenting. *Note.*—The principal point in controversy was the validity of a contract for the sale of electric power at Wilson Dam.

3. *Aetna Life Insurance Company* v. *Haworth* (299 U. S. 536, Mar. 1, 1937): Held applicable to life-insurance company's suit for adjudication as to whether a policy has lapsed. Decision, 9–0, rendered by Chief Justice Hughes.

Communications Act of June 19, 1934 (48 Stat. 1064)

American Telephone and Telegraph Company v. *United States* (299 U. S. 232): Evidence does not show that an order of the Federal Communications Commission, requiring revision of accounts, lays an unreasonable burden of expense upon telephone companies. Decision, 8–0, rendered by Justice Cardozo; Justice Stone took no part in the consideration or decision.

Silver Purchase Act of June 16, 1934 (48 Stat. 1178)

**United States* v. *Hudson* (299 U. S. 498): Retroactive tax on profits from sales of silver bullion held not unconstitutional. Decision, 8–0, rendered by Justice Van Devanter; Justice Stone took no part in the consideration or decision.

Public Resolution No. 53 of June 27, 1934 (48 Stat. 1267) amending War Claims Act of 1928

**Cummings* v. *Deutsche Bank and Disconto Gesellschaft* (299 U. S. 527, Feb. 1, 1937): The resolution, in postponing deliveries of property seized under the Trading with the Enemy Act, so long as Germany is in arrears in respect to certain obligations, is not unconstitutional. Decision, 8–0, rendered by Justice Butler; Justice Roberts took no part in the consideration or decision.

Railroad Retirement Act of June 27, 1934 (48 Stat. 1283)

**Railroad Retirement Board* v. *Alton Railroad* (295 U. S. 330): Compulsory pension provisions are unconstitutional and being inseparable, the entire act falls. Decision, 5–4, rendered by Justice Roberts; Chief Justice Hughes and Justices Brandeis, Stone, and Cardozo dissenting.

Frazier-Læmpke Farm Bankruptcy Act of June 28, 1934 (48 Stat. 1289)

**Louisville Joint Stock Land Bank* v. *Radford* (295 U. S. 555): Farm-mortgage moratorium unconstitutional. Decision, 9–0, rendered by Justice Brandeis.

Ashurst-Sumners Act of July 24, 1935 (49 Stat. 494)

**Kentucky Whip and Collar Company* v. *Illinois Central Railroad* (299 U. S. 334): Upholds power of Congress to prohibit or restrict interstate transportation of convict-made goods. Decision, 8–0, rendered by Chief Justice Hughes; Justice Stone took no part in the consideration or decision.

Act of August 22, 1935 (49 Stat. 682)

**United States* v. *Wood* (299 U. S. 123): Upholds validity of statute declaring governmental employees eligible as jurors in criminal cases in the District of Columbia. Decision, 5–3, rendered by Chief Justice Hughes, Justices Reynolds, Sutherland, and Butler dissenting; Justice Stone took no part in the consideration or decision.

Agricultural Adjustment Act Amendments of August 24, 1935 (49 Stat. 750)

**Rickert Rice Mills, Inc.* v. *Fontenot* (297 U. S. 110): The infirmities of the amended act were not cured by the amendments. Decision, 9–0, rendered by Justice Roberts.

Bituminous Coal Conservation Act of August 30, 1935 (49 Stat. 991)

**Carter* v. *Carter Coal Company* (298 U. S. 238): Labor provisions unconstitutional, and being inseparable from the remainder of the act, the entire act is void. Decision, 5–1–3, rendered by Justice Sutherland (separate opinion by Chief Justice Hughes), Justices Brandeis, Stone, and Cardozo dissenting.

CHANGES IN NUMBER OF JUSTICES OF THE SUPREME COURT

Constitutional provision (art. III, sec. 1):

> The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may, from time to time, ordain and establish.

[Nothing said as to number.]

Act of September 24, 1789 (1 Stat. 73, sec. 1):

The supreme court of the United States shall consist of a chief justice and five associate justices, any four of whom shall be a quorum.

Act of February 13, 1801 (2 Stat. 89, sec. 3):

From and after the next vacancy that shall happen in the said court, it shall consist of five justices only; that is to say, of one chief justice and four associate justices.

[No change in number needed for a quorum.] This act was repealed March 8, 1802 (2 Stat. 132, c. 8, sec. 1), before any vacancy had occurred.

Act of February 24, 1807 (2 Stat. 421, sec. 5):

The supreme court of the United States shall hereafter consist of a chief justice and six associate justices, any law to (the) contrary notwithstanding. And for this purpose there shall be appointed a sixth associate justice.

[Nothing said as to quorum.]

Act of March 3, 1837 (5 Stat. 176, c. 34):

The Supreme Court of the United States shall hereafter consist of a chief justice and eight associate justices, any five of whom shall constitute a quorum; and for this purpose there shall be appointed two additional justices of said court.

Act of March 3, 1863 (12 Stat. 794, sec. 1):

The supreme court of the United States shall hereafter consist of a chief justice and nine associate justices, any six of whom shall constitute a quorum; and for this purpose there shall be appointed one additional associate justice of said court.

Act of July 23, 1866 (14 Stat. 209, c. 210, sec. 1):

No vacancy in the office of associate justice of the supreme court shall be filled by appointment until the number of associate justices shall be reduced to six; and thereafter the said supreme court shall consist of a chief justice of the United States and six associate justices, any four of whom shall be a quorum.

Act of April 10, 1869 (16 Stat. 44, c. 22, sec. 1):

The Supreme Court of the United States shall hereafter consist of the Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum; and for the purposes of this act there shall be appointed an additional associate justice of said court.

Revised Statutes of June 22, 1874, sec. 673; Judicial Code of March 3, 1911 (36 Stat. 1152, sec. 215; U. S. Code 28: 321).

The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum.

CITATIONS TO CONGRESSIONAL DEBATE ON ACTS OF CONGRESS CHANGING THE NUMBER OF JUSTICES OF THE SUPREME COURT

Act of September 24, 1789 (1 Stat. 73, sec. 1):

An act to establish the judicial courts of the United States.

'The Supreme Court of the United States shall consist of a chief justice and five associate justices, any four of whom shall be a quorum.

(Annals of Congress, vol. 1, pp. 781–784, 829–831.)

Act of February 13, 1801 (2 Stat. 89, sec. 3):

An act to provide for the more convenient organization of the courts of the United States.

From and after the next vacancy that shall happen in the said court it shall consist of five justices only; that is to say of one chief justice, and four associate justices.

(No change in number needed for a quorum.) No congressional debate.

Act of March 8, 1802 (2 Stat. 132, c. 8, sec. 1):

An act to repeal certain acts respecting the organization of the courts of the United States, etc.

(Annals of Congress, vol. 10, pp. 96–102, 647–649.)

Act of February 24, 1807 (2 Stat. 421, sec. 5):

An act establishing circuit courts and abridging the jurisdiction of district courts * * * in Kentucky, Tennessee, and Ohio.

The Supreme Court of the United States shall hereafter consist of a chief justice and six associate justices, any law to (the) contrary notwithstanding and for this purpose there shall be appointed a sixth associate justice.

(Nothing said as to quorum.)

(Annals of Congress, vol. 16, pp. 1260–1262.)

Act of March 3, 1837 (5 Stat. 176, c. 34):

An act supplementary to the act entitled "An act to amend the judicial system of the United States, etc."

The Supreme Court of the United States shall hereafter consist of a chief justice and eight associate justices, any five of whom shall constitute a quorum; and for this purpose there shall be appointed two additional justices of said court.

(Congressional Globe, vol. 4, pp. 120, 122, 193–198, 203.)

Act of March 3, 1863 (12 Stat. 794, sec. 1):

An act to provide circuit courts for the district of California and Oregon, etc.

The Supreme Court of the United States shall hereafter consist of a chief justice and nine associate justices, any six of whom shall constitute a quorum; and for this purpose there shall be appointed one additional associate justice of said court.

(Congressional Globe, vol. 33, pp. 1300–1301.)

Act of July 23, 1866 (14 Stat. 209, c. 210, sec. 1):

An act to fix the number of justices of the Supreme Court * * * and to change certain judicial districts.

No vacancy in the office of associate justice of the Supreme Court shall be filled by appointment until the number of associate justices shall be reduced to six; and thereafter the said Supreme Court shall consist of a chief justice of the United States and six associate justices, any four of whom shall be a quorum.

(Congressional Globe, vol. 36, pp. 1259, 3697–3699, 3909.)

Act of April 10, 1869 (10 Stat. 44, c. 22, sec. 1):

An act to amend the judical system of the United States.

The Supreme Court of the United States shall hereafter consist of the chief justice of the United States and eight associate justices, any six of whom shall constitute a quorum; and for the purposes of this act there shall be appointed an additional associate justice of said court.

(Congressional Globe, vol. 41, pp. 192–193, 207–217, 336–345, 574–576, 630, 646–647, 649–650.)

A LIST OF ACTS OF CONGRESS RELATING TO THE ORGANIZATION OF THE FEDERAL JUDICIARY.

(Subsequent to Judiciary Act of 1789)

Act of April 13, 1792 (1 Stat. 253, c. 21, sec. 3):
Allotment of Supreme Court justices to circuits.
See also 2 Stat. 158 and 14 Stat. 433.

Act of May 8, 1792 (1 Stat. 279, c. 36, sec. 11):
Certification of district court cases to circuit court when district judge interested in case.
See also 2 Stat. 534–535, c. 27, and 3 Stat. 643, c. 51.

Act of March 2, 1793 (1 Stat. 334–335, c. 22, sec. 5):
Restriction on granting of writs of ne exeat and injunctions; no injunctions to stay proceedings in State courts.

Act of February 13, 1801 (2 Stat. 89, c. 4, sec. 3):
Supreme Court reduced to *five* justices: three circuit judges to be appointed for each circuit, etc. (Repealed by Act of March 8, 1802, 2 Stat. 132, c. 8, sec. 1, 3).

Act of April 29, 1802 (2 Stat. 159–160, c. 31, sec. 6):
Certification of cases from circuit courts to Supreme Court in cases of division of opinion, etc.
See also 17 Stat. 196–197.

Act of February 13, 1807 (2 Stat. 418, c. 13):
Granting of injunctions by district judges authorized.

Act of February 24, 1807 (2 Stat. 420–421, c. 16):
Seventh circuit constituted; Supreme Court increased to *seven* justices.

Act of March 3, 1837 (5 Stat. 176–178, c. 34):
Supreme Court increased to *nine* justices; second to *ninth* circuits constituted, etc.

Act of February 28, 1839 (5 Stat. 322, c. 36, sec. 8):
Certification of circuit court cases to another circuit on account of interest, etc., of judge.
See also 12 Stat. 768, c. 93.

Act of August 23, 1842 (5 Stat. 518, c. 188, sec. 6):
Supreme Court to prescribe procedure in district and circuit courts.

Act of July 29, 1850 (9 Stat. 442–443, c. 30):
Provisions for holding district or circuit courts in case of disability of judge, etc.
See also 12 Stat. 318–319, c. 59; 12 Stat. 768, c. 93; 16 Stat. 494–495, c. 113, sec. 3; 34 Stat. 1417, c. 2940.

Act of April 2, 1852 (10 Stat. 5, c. 20):
Provision for additional district court judge in case of accumulation of business, etc.

Act of February 24, 1855 (10 Stat. 612–614, c. 122):
Court of Claims established.

Act of March 3, 1863 (12 Stat. 765–768, c. 92):
Court of Claims reorganized: two additional judges; chief justice; appeals to Supreme Court when amount in controversy exceeds $3,000, etc.

Act of March 3, 1863 (12 Stat. 794–795):
Supreme Court enlarged to ten justices; tenth circuit constituted.

Act of July 23, 1866 (14 Stat. 209, c. 210):
Supreme Court reduced to seven justices, etc.
Act of February 5, 1867 (14 Stat. 385–386, c. 28, sec. 1):
U. S. courts authorized to grant writs of habeas corpus in all cases of restraint of liberty in violation of the Constitution, etc.
Act of June 25, 1868 (15 Stat. 80, c. 81):
Senior justice of Supreme Court to act as Chief Justice in case of vacancy, etc.
Act of April 10, 1869 (16 Stat. 44–45, c. 22):
Supreme Court increased to nine justices; provision for *resignation* of U. S. judges, with salary for life. (Incorporated in Judicial Code, sec. 260, 36 Stat. 1143.)
Act of June 1, 1872 (17 Stat. 196–197, c. 255, sec. 5):
Procedure in circuit and district courts, in other than equity and admiralty causes, to conform to State practice.
Act of March 3, 1875 (18 Stat. 470–473, c. 137):
Procedure for removal of causes from State courts to circuit courts.
See also 24 Stat. 552–555, c. 373 and 25 Stat. 433–437, c. 866.
Act of February 25, 1889 (25 Stat. 693, c. 236):
Supreme Court to review only question of jurisdiction of circuit court cases reviewed involving less than $5,000.
Act of March 3, 1891 (26 Stat. 826–830, c. 517):
Circuit courts of appeal established: appointment of additional circuit judge for each circuit; court to consist of three judges (Supreme Court Justice and two circuit judges, with assignment of district court judges to court to make full court in absence of any of the three).
Appellate jurisdiction of circuit courts discontinued.
Appeals from district and circuit courts to courts of appeal or to Supreme Court direct in certain cases.
Decisions of circuit courts of appeals to be final in certain instances, but in such cases certificate of instruction or certiorari from Supreme Court authorized.
Remanding of cases to lower courts.
Act of February 11, 1903 (32 Stat. 823, c. 544):
Provision for trial of certain equity cases in circuit courts by three judges, and certification of case to Supreme Court in case of division of opinion; appeal from final decision in such cases direct to Supreme Court.
Act of March 2, 1907 (34 Stat. 1246, c. 2564):
Direct review of district or circuit court cases by Supreme Court in certain criminal cases.
Act of August 5, 1909 (36 Stat. 105–108, c. 6, sec. 29):
Court of Customs Appeals established; finality of decisions; designation of district or circuit judges to fill temporary vacancies.
Act of June 18, 1910 (36 Stat. 539–557, c. 309):
Commerce court established (Note: abolished by act of October 22, 1913; 38 Stat. 219, c. 32).
Interlocutory injunctions suspending State statutes to be heard by *three* judges, one to be either Supreme Court Justice or circuit judge, and majority to concur in granting same; notice to governor and attorney-general of State, etc.; appeal direct to

Supreme Court from order granting or denying same (sec. 17). (*Note:* Sec. 17 restated in Judicial Code sec. 266 (36 Stat. 1163) and repealed by same act sec. 297 (p. 1169); sec. 266 of Judicial Code amended by act of March 4, 1913; 37 Stat. 1013–1014, c. 160; further amended by act of February 13, 1925 (43 Stat. 938) below.

Judicial Code of March 3, 1911 (36 Stat. 1087–1169, c. 231):

The Judicial Code is a restatement of law in force with few new provisions, but

The circuit courts are abolished (sec. 289) and their powers and duties transferred to the district courts (sec. 291).

Act of October 22, 1913 (38 Stat. 208–233, c. 32):

P. 219, Commerce Court abolished.

P. 220–222, Interlocutory injunctions or final hearings on suits in district courts, to suspend, etc., orders of Interstate Commerce Commission to be heard by *three* judges, one of whom to be a circuit judge, etc.; notice to Interstate Commerce Commission, Attorney General, etc.; appeal direct to Supreme Court. *See also* Act of August 15, 1921, 42 Stat. 168 c. 64, sec. 316.

Act of August 22, 1914 (38 Stat. 703, c. 267):

Certiorari from Supreme Court to Court of Customs Appeals authorized in certain cases. (Judicial Code, sec. 195.)

Act of October 15, 1914 (38 Stat. 738–739, c. 323, sec. 21–23).

Provisions for jury trial in certain contempt cases.

Act of December 23, 1914 (38 Stat. 790, c. 2):

Certiorari from Supreme Court to State courts authorized even though State decision *in favor* of validity of federal law, etc., or *against* validity of State statute, etc., or *in favor* or right, etc., claimed under the Constitution, etc. (Judicial Code, sec. 237.)

Act of September 6, 1916 (39 Stat. 726–727, c. 448, sec. 2):

Extends authority of Supreme Court to issue certiorari to State courts, to cases in which right, etc., claimed under Constitution, etc., and decision in favor *or against* such right (review by writ of error only, in case of decisions *against* such right formerly). (Judicial Code, sec. 237.)

Act of February 25, 1919 (40 Stat. 1157, c. 29, sec. 6):

Amends Judicial Code, sec. 260 (which restated act of April 10, 1869, noted above), by adding to provision that federal judges (except Supreme Court justices) may *retire*, when qualified to resign, with full pay, etc.; judge so retiring to be subject to be called for certain duties.

President authorized to appoint additional district or circuit judge when incapacitated judge entitled to retire neither resigns nor retires, etc. (Amended by act of March 1, 1929, 45 Stat. 1422–1423, c. 419.) *See also* act of March 1, 1937 (50 Stat. 24, c. 21).

Act of September 14, 1922 (42 Stat. 839–840, c. 306, sec. 3–5):

Assignment of district judges to other district courts in cases of disability of judge, urgency of business, etc. (Judicial Code, sec. 13); designation of circuit judges to hold district courts, etc. (Judicial Code, sec. 18.) *See also* act of August 19, 1935, (49 Stat. 659, c. 558); act of August 24, 1937 (50 Stat.— Public No. 352.)

Appointment of additional district judges authorized.
Provision for conference of senior circuit judges.

Act of February 13, 1925 (43 Stat. 936–942, c. 229):
Appellate jurisdiction of Federal courts materially changed.
All appeals and writs of error from circuit courts of appeals to the Supreme Court abolished, with one exception; but Supreme Court review of any civil or criminal cause by certiorari or certification authorized. (Judicial Code, sec. 239, 240.)
Direct review of district court cases by Supreme Court authorized in five instances *only:* (in criminal cases under act of March 2, 1907, "providing for writs of error in certain criminal cases," where district court decision is adverse to U. S. and in four types of civil cases in which the presence of three judges in the district courts is required). (Judicial Code, sec. 238.)
Restatement of provisions for review of State court cases by Supreme Court, with little change (certiorari for all final decisions in highest court of State involving Federal questions; and writs of error in some instances). (Judicial Code, sec. 237.)
D. C. Court of Appeals and Court of Claims cases to be reviewed by Supreme Court, *only* by certification or certiorari. (Judicial Code, sec. 239, 240, 180.)
Provision that cases shall not be dismissed solely because of error in procedure. (Judicial Code, sec. 237, c, sec. 240, b.)
Circuit courts of appeals to review by appeal or writ of error *final* decisions of district courts in all cases except where direct review may be had in Supreme Court, etc. (Judicial Code, sec. 128.)
Miscellaneous provisions of less importance.

Act of February 26, 1926 (44 Stat. 109–110, c. 27, sec. 1001–1004):
Review of decisions of Board of Tax Appeals by Circuit Court of Appeals, etc., final; certiorari from Supreme Court.

Act of January 31, 1928 (45 Stat. 54, c. 14). Amended by act of April 26, 1928 (45 Stat. 466, c. 440):
Writs of error abolished and appeals substituted.

Act of April 11, 1928 (45 Stat. 422, c. 354):
Circuit courts of appeals to review *interlocutory* orders and decrees of district courts. (Judicial Code, sec. 128, b.)

Act of February 28, 1929 (45 Stat. 1346–1348):
Tenth circuit created. (Judicial Code, sec. 116.)

Act of March 23, 1932 (47 Stat. 70–73):
Restrictions on issuance of injunctions by U. S. courts in labor disputes.

Act of March 1, 1937 (50 Stat. 24, c. 21, Public No. 10):
Retirement of Supreme Court justices provided for; President to appoint successor.

Act of August 24, 1937 (50 Stat. — Public No. 352, H. R. 2260):
U. S. courts to notify Attorney General when constitutionality of any act of Congress is involved in a case to which United States is not a party: right of Attorney General to intervene.
Direct appeal to Supreme Court in all cases in federal courts in which United States has intervened and in which decision is against constitutionality of act.

Interlocutory or permanent injunctions suspending operation of acts of Congress on ground of unconstitutionality to be heard in district courts by three judges, one of whom to be circuit judge; five days' notice to Attorney General required; direct appeal to Supreme Court.

Assignment of district court judges to other districts under sec. 13 of Judicial Code made mandatory.

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