

# Judicial Independence

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## Part I – the Historical Context

### I. From the Magna Charta to the American Revolution

#### A. Early British history – emergence of an independent judiciary

##### 1. Magna Charta

In 1178 Henry II chose five members of his personal household, two clergy and three lay, "to hear all the complaints of the realm and to do right." These embryo judges were to carry out their work as part of the King's court (in another meaning of that word), and their activities were to be supervised by the "King and the wiser men of the realm." This was the origin of the Court of Common Pleas.

In 1215, the *Magna Charta* announced the first substantial step toward a rule of law by declaring, "We [will not] proceed against or prosecute him [a free man], except by the lawful judgment of his peers and by the law of the land." The notion of a rule of law was the first step, and a necessary one, toward judicial independence, and away from the expectation that the judge was the delegate of the crown or of some other body, enforcing the will of that authority—rather than the rule of law.

##### 2. The British "Constitution"

The *Magna Charta* was the first of several decrees and Acts over the centuries that collectively became known as the British Constitution. Each ensuing "constitutive" Act further engrained the idea of judicial independence in British jurisprudence.

##### a) *Bill of Rights 1689*

Article 3 of the Bill of Rights (1689) provided "*that the commission for erecting the late court of commissioners for ecclesiastical causes, and all other commissions and courts of like nature are illegal and pernicious.*" This served as an opening salvo in the long fight to create an independent judiciary that would execute the laws as written rather than imposing the will of the King. Though the Court of Commissioners For Ecclesiastical Causes was particularly unpopular with the English people, the Court of Kings Bench had been likewise made a tool of the king, which failed to uphold the rights of English subjects. Particularly while under the control of the dreaded Lord Jeffreys, the Court of Kings Bench and the Court of Chancery became completely ineffective at protecting the rights of English subjects.

b) *Habeas Corpus Act*

*Habeas corpus* originated not as a protection for the individual, but as a procedure for the judiciary to issue a command to the executive in the person of the sheriff. As *habeas corpus* evolved into a process to examine the basis of a person's detention, the real target of the writ was not the detainee, but the government officer called on to justify the basis of his or her authority to detain. By the seventeenth century, Parliament, motivated by its desire to place limits on the authority of the king, took steps to strengthen the judicially developed writ of *habeas corpus*. It issued the Petition of Right and passed the Habeas Corpus Act of 1640, which expressly allowed anyone imprisoned by the king or his agents to file a *habeas corpus* petition. The seeds of separation of powers and checks and balances were sown as the legislature endorsed judicial review of executive actions. The full arrival of *habeas corpus* occurred at the end of the century. The significance of the Habeas Corpus Act of 1679 was not simply the protections it gave for individuals. Its enactment marked a major milestone, perhaps only matched by the signing of the *Magna Charta*, in the submission of the king to the rule of law.

**B. Blackstone**

It was not until the middle of the next century that Blackstone was to articulate the governing principles in their modern form. In the first volume of the Commentaries, Blackstone wrote:

In the distinct and separate existence of the judicial power, in a peculiar body of men ... consists one main preservative of the public liberty; which cannot subsist long in any state, unless the administration of common justice be in some degree separated both from the legislative and also from the executive power. Were it joined with the legislative, the life, liberty, and property, of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law ... Were it joined with the executive, this union might soon be an overbalance for the legislative.

Blackstone firmly rejected any notion that a court could disregard or set aside an act of Parliament; for him judicial independence depended not at all on any power of judicial review of legislation. In that respect, Blackstone differed from his American disciples. From *The Federalist* on, the Founders cited the courts' power of constitutional review as one of the rationales for judicial independence. However, the Founders followed Blackstone in identifying other factors as crucial to the case for judicial independence.

Blackstone defined the value of judicial independence primarily in terms of the dangers of its absence. If the judicial power were "joined with the legislative," he warned, "life, liberty, and property ... would be in the hands of arbitrary judges," and decisions would be "regulated only by [the] opinions" of the decision makers "and not by any fundamental principles of law." Blackstone commented, to be sure, that "legislators may depart from, yet judges are bound to observe" the "fundamental principles of law," but Blackstone didn't have a concept of judicial review of legislation, and if the legislators

enact arbitrary or oppressive laws, the judges' only choice, in his view, would be to enforce those laws. A bit later in this passage, Blackstone expressed the danger that the assimilation or subordination of the judiciary to the executive would incline the judges "to pronounce that for law, which was most agreeable to the prince or his officers." For Blackstone, Judicial independence is grounded in a more general view of the necessary separation of powers, in what he called a bit later in his discussion "a free constitution."

All of Blackstone's arguments for judicial independence are picked up and amplified by leading American Founders, including the link we've just seen between judicial independence and the overall goal of separating and dividing governmental power.

### **C. Declaration of Independence**

The Declaration of Independence was addressed to the world, but it focused on the acts of a single man, King George III. It was, thus, the tyranny imposed by an all-powerful King that led to the American Revolution, and it was the need to ensure against any such future tyranny that molded the United States Constitution. A century before Lord Acton was to utter in Parliament his famous phrase, "Power tends to corrupt, and absolute power corrupts absolutely," our forefathers already knew that it was essential to divide and separate the powers of government.

Of all the grievances detailed in the Declaration of Independence, none was greater than the total dependence of Colonial judges upon King George: "He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." English judges were assured life tenure during their "good behavior" by the Act of Settlement of 1700, but their Colonial counterparts served at the pleasure of the King. Their salaries were subject to his whims. Judges beholden to the King, not surprisingly, often ruled as he pleased, no matter how unfairly. Our post-Revolution government needed to ensure an independent judiciary.

In 1780, nearly a decade before the United States Constitution was ratified; John Adams drafted as the introductory provision of the Massachusetts Constitution a Declaration of Rights, Article XXIX of which provided in part:

It is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit.

The concept of judicial independence, that judges should decide cases, faithful to the law, without "fear or favor" and free from political or external pressures, remains one of the fundamental cornerstones of our political and legal systems, both federal and state.

## **II. Plan of the Constitution for Separated Powers and an Independent Judiciary**

## **A. Madison's Notes of the Federal Convention**

### **1. Proposals at the Federal Convention**

The Federal Convention began its discussion of a new constitution with consideration of the so-called Virginia Plan submitted by Edmund Randolph and drafted by James Madison. Madison proposed that the legislature be authorized to establish one or more supreme courts (perhaps with different jurisdiction) that would hear appeals of cases of national interest, and inferior courts that would serve as trial courts for national issues. Judges of these courts would hold office during good behavior, be appointed by the Congress, and receive a fixed salary that could not be increased or decreased during their service. A council of revision, made up of the executive and some federal judges, would review state and federal laws and veto those they believed violated the Constitution or even those they considered harmful.

### **2. Defining the Judiciary**

Early in the Convention, delegates agreed that there would be a single supreme court and one or more inferior courts, but that decision about inferior courts was soon reversed. During the remaining three months of the Convention, the delegates engaged in recurring debates on questions related to the federal judiciary: Who would appoint judges? What would be the term of office for judges? What provisions would be made for judges' salaries? Who would exercise judicial review of state and federal laws? And what would be the relationship between federal and state courts?

#### *a) Appointment*

Some delegates, like James Wilson of Pennsylvania, recommended appointment by the executive as a protection against the intrigues associated with a large legislature. Many more supported appointment by the legislature or by the Senate alone. John Rutledge of South Carolina, who later served as a Supreme Court justice, feared that concentrating the appointment power in the hands of a single executive would lead to monarchy. Roger Sherman of Connecticut thought appointment by the Senate would ensure that judges were drawn from every part of the country. Madison feared that many members of the full Congress would not have the experience to assess the qualifications for a judge, and he initially preferred appointment by the more exclusive membership of the Senate.

Nathaniel Gorham, a delegate from Massachusetts, suggested the mode of judicial appointment that his state had used since the colonial period: nomination by the executive and approval by the smaller branch of the legislature. Once the convention decided that the Senate would represent states equally, Madison suggested that the President be authorized to appoint judges but that the Senate be given the right to veto the appointment by a vote of two-thirds of the members. Only in the final two weeks of the convention did the delegates agree that federal judges, like ambassadors and other appointed officers, would be appointed by the President with the advice and consent of the Senate.

#### *b) Tenure and removal*

The delegates generally agreed that judges should have tenure with good behavior, but it was more difficult to decide what was the proper standard of good behavior and who would determine when judges did not meet that standard. Many of the early state constitutions followed the British model and provided for the removal of judges by the executive branch upon recommendation of the legislature. When John Dickinson of Delaware proposed a similar removal process for federal judges, several delegates worried that the judges would then be vulnerable to political pressures. Governor Morris of New York thought removal of judges for violation of a standard of good behavior required some form of trial. With no further debate in the full convention, the authors of the final draft of the Constitution inserted a provision for removal of judges only through impeachment by the House of Representatives and conviction of “high crimes and misdemeanors” in a trial conducted by the Senate.

*c) Salary*

The delegates understood that the salary provisions for judges would be a key to protecting judicial independence, and the Virginia Plan proposed that judges would receive a fixed, regular salary that could not be increased or reduced. No one challenged the provision to protect judges from any reduction in salary, which was seen as an essential protection against political pressure from the legislature. But the absence of pay increases also could make the judges dependent, warned Governor Morris, who believed that judicial salaries must be regulated by the costs of living, or, as he put it, “the manners & the style of the living in a Country.” Benjamin Franklin wanted the option of increasing judges’ salaries if the business of the courts increased. Charles Cotesworth Pinckney of South Carolina argued that large salaries would be necessary to attract “men of the first talents.” Madison feared that if a pay raise for judges were pending before the Congress, judges might be reluctant to rule against the government or the interests of individual members of Congress. Madison suggested judicial pay might be pegged to the price of a familiar commodity like wheat, but a large majority of state delegations insisted on leaving open an option for judicial pay raises.

*d) Judicial Review*

The Convention’s longest debate involving the judiciary focused on Madison’s proposal for a council of revision. Following the model of the New York state constitution, Madison envisioned a council made up of the President and a group of judges who would review all legislation and have the authority to suggest revisions or to veto an act. The council would also have had authority to review Congress’s recommendation for the disallowance of state legislation. Madison, who believed that the natural tendency of a republican legislature was “to absorb all power into its vortex,” thought it was essential to bring the executive and judicial branches together as a check on improper or unjust legislation. He so strongly advocated this role of the judiciary that he brought the motion up twice after the Convention had rejected it.

Many delegates thought it would violate the separation of powers to join the executive and the judicial in this way. Judges should not have a role in the formation of policy, said Nathaniel Gorham. Caleb Strong of Massachusetts feared that the judges’

role on a council of revision would undermine their credibility when they reviewed laws that were challenged in court. John Rutledge thought judges should never give an opinion on legislation until it was law. The Convention repeatedly rejected Madison's proposal and left the President with the sole authority to veto legislation. Although the Constitution made no reference to judicial review, the debate on the council of revision made clear that many delegates believed the council was unnecessary because they expected the federal judiciary to exercise the power of judicial review to declare laws invalid.

e) *Organization and Jurisdiction*

The proposed Constitution defined the potential jurisdiction of the Supreme Court and the federal judiciary, but left unanswered many of the questions that had divided the delegates. Madison's original plan proposed a series of inferior federal courts to serve as trial courts, but many delegates, like William Paterson, proposed that the state courts serve as the courts of first instance, or trial courts, in cases raising federal issues. After the delegates rejected a proposal to establish inferior federal courts, they accepted the proposal of Madison and James Wilson to give the Congress authority to establish inferior courts, thus leaving open the option that state courts might serve as trial courts for many questions arising under federal laws or the Constitution. It would be up to the new Congress to organize the court system.

The Constitution's grant of jurisdiction to federal courts extended to all cases "in law and equity" arising under the Constitution, federal laws, and treaties. Federal jurisdiction also included cases related to foreign diplomats, admiralty and maritime issues, disputes between states, and disputes between citizens of different states. With little recorded debate, the delegates in the closing days of the Convention accepted language that guaranteed a trial by jury in criminal trials, but the delegates rejected pleas to extend the guarantee of jury trials to civil cases. Also with little debate, the delegates accepted a provision for appeals to the Supreme Court "both as to Law and Fact." By defining the range of federal jurisdiction, the Convention implicitly recognized that state courts would retain full jurisdiction over many legal questions.

**B. Ratification Debates and Federalist Papers**

The United States Constitution, as Alexander Hamilton explained in Federalist 78, is "limited." In contrast to the British theory of government that its powers were granted by the King, the powers of our government were granted by "We, the People." Unless the point of the Revolution was simply to substitute one form of tyranny for another, it was essential that no single person or body be vested with unlimited power. The People, from whom all power to govern was derived, made limited grants of power to the various branches. What was not so granted was reserved to the People. Thus, Congress may enact laws, but only within its limited grant of authority. The Executive may exercise powers, but only within constitutional limits. And it was to the Courts that the People entrusted oversight to ensure that the other branches do not exceed their limited powers. Hamilton

went on to explain:

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 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.

**a) *Control on Judicial Conduct***

The fundamental debate that Hamilton and his Anti-Federalist rival "Brutus" addressed was over the degree of independence to be granted to federal judges, and the level of accountability to be imposed upon them. In England, a judge can be removed from office "upon the address of both Houses of Parliament." Moreover, as the Act of Settlement 1701 was a mere law, the judicial independence it provided could be abrogated wholesale by an act of Parliament. Similarly, English judges were beholden to Parliament, in the sense that their judgments can be overturned by that body. Brutus took the position that the Constitution should adopt the English system *in toto* (with minor modifications); Hamilton defended the present system.

**b) *Legislative Review Of Judicial Decisions***

The primary point of contention between Hamilton and Brutus was in the well-founded concern that judges would substitute their will for the plain text of the Constitution, as exemplified by the Supreme Court's *de facto* revision of the Eleventh Amendment. Hamilton conceded that no federal judge had the legal authority to impose his or her will on the people in defiance of the Constitution:

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. ... 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.

Brutus pointed out that the Constitution did not provide an effective mechanism for controlling judicial caprice:

There is no power above them, to control any of their decisions. There is no authority that can remove them, and they cannot be controlled by the laws of the legislature. In short, they are independent of the people, of the legisla-

ture, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself.

Hamilton viewed this apparent flaw in constitutional design as more of a virtue than a vice:

But it is not with a view to infractions of the Constitution only, that the independence of the judges may be an essential safeguard against the effects of occasional ill humors 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 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 be aware of.

It appears that Hamilton is relying on the efficacy of the writ of *scire facias*, coupled with a presumption that other branches of government will not ignore unconstitutional judicial decisions, as a control upon judicial misconduct.

*c) Judicial Review:*

Federalist No. 78 describes the process of judicial review, in which the federal courts review statutes to determine whether they are consistent with the Constitution. Federalist No. 78 indicates that under the Constitution, the legislature is not the judge of the constitutionality of its own actions. Rather, it is the responsibility of the federal courts to protect the people by restraining the legislature from acting inconsistently with the Constitution:

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.

According to Federalist No. 78, the federal courts have a duty to interpret and apply the Constitution, and to disregard any statute that is inconsistent with the Constitution:

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 therefore belongs 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; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents. . . .

[W]here 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.

[W]henever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.

Federalist No. 78 therefore indicates that the federal judiciary has the power to determine whether statutes are constitutional, and to find them invalid if in conflict with the Constitution. This principle of judicial review was affirmed by the Supreme Court in the case of *Marbury v. Madison* (1803).

### **III. From *Marbury v. Madison* to *Cooper v. Aaron***

#### **A. Federalist Period**

##### **1. Confirming Judicial Supremacy**

The framers' hopes for judicial independence were quickly challenged by the unexpected emergence of political parties in the 1790s. By the end of the decade, nominations of judges and any legislation relating to the courts became intertwined with the intense political struggle between Federalists and Republicans. After passage of the Sedition Act of 1798, Federalists used prosecutions in the federal courts to silence political opposition, and in 1801 the Federalist majority in Congress expanded federal jurisdiction at the expense of state courts and created new courts with additional judgeships that were filled by the lame-duck President, John Adams. Republicans came into power soon thereafter determined to curb what they saw as the partisan bias of federal judges. The Republican Congress abolished the new courts and judgeships and impeached two highly partisan judges. Republicans argued that the Constitution granted Congress full authority to establish the judicial system and that the constitutional protections of tenure during good behavior and undiminished salary did not prevent Congress from abolishing courts that were no longer needed. Republicans also argued that the partisan actions of Federalist judges, particularly in the Sedition Act prosecutions, had undermined all pretenses of impartiality and judicial independence.

Federalists meanwhile decried what they saw as an assault on the constitutional guarantee of tenure during good behavior. The Constitution, they declared, made the judges independent so as “to control the fiery zeal, and to quell the fierce passions” of a newly elected party. Repeal of the Judiciary Act of 1801 and the precedent of depriving judges of their office, Federalists warned, would render all judges the tools of political parties and bring about the collapse of constitutional government.

Despite the private doubts of Chief Justice John Marshall and other justices, the Supreme Court in 1803 issued a decision that let stand the law abolishing the courts and judgeships established in 1801. Republican fears about the judiciary were heightened, however, by the Supreme Court’s decision one week earlier, in which Chief Justice Marshall, in *Marbury v. Madison*, asserted the judiciary’s right to declare an act of Congress unconstitutional and, more alarming to Republicans, the Court’s authority to compel executive compliance with an act of Congress. After the Senate failed to convict Supreme Court Justice Samuel Chase in his impeachment trial of 1805, a truce of sorts fell into place as Republicans abandoned their impeachment plans and the most overtly partisan Federalist judges, like Chase, curtailed their political activity. The temporary lull in public debates, however, did not signify a consensus on the proper measure of judicial independence. Throughout the early decades of the nineteenth century, unpopular decisions in the Supreme Court and, more often, in the federal trial courts, sparked recurring demands for restricting judicial tenure or limiting federal jurisdiction.

## **2. Impeachment of Samuel Chase**

Samuel Chase served as a justice of the U.S. Supreme Court from 1796 to 1811. In 1804 the U.S. House of Representatives voted to impeach Chase. However, the Senate did not uphold the House’s action and Chase continued to serve on the Court until his death. Chase remains the only Justice who has been the subject of impeachment proceedings. Chase’s decisions set several precedents for the Supreme Court, among them opinions establishing the supremacy of federal treaties over state laws and the establishment of judicial review, which is the Court’s power to void legislation it deems unconstitutional, a power that makes the judiciary one of the three primary branches of the federal government (the other two branches being Congress and the president).

In 1800 the political atmosphere in Washington, D.C., changed when Jefferson defeated Adams for the presidency of the United States. In 1803 Chase got into trouble with the Jeffersonian Democratic-Republicans when he severely criticized their policies in front of a Baltimore grand jury. Chase explained that he objected to recent changes in Maryland law that gave more men the privilege of voting. Such changes as these advanced by Democratic-Republicans, Chase exclaimed, would:

“Rapidly destroy all protection to property, and all security to personal liberty, and our Republican Constitution [would] sink into mobocracy, the worst of all possible governments. The modern doctrines by our late reformers, that all men in a state of society are entitled to enjoy equal liberty and equal rights, have brought this mighty mischief upon us, and I fear that it will rapidly destroy progress, until peace and order, freedom and property shall be destroyed.”

This angered Jefferson and other Democratic-Republicans and in 1804 the U.S. House of Representatives voted to impeach Chase on charges of misconduct and bias in the sedition cases and of seditious criticism of Jefferson in the 1803 Baltimore grand jury charge. In 1805, the Democratic-Republican–controlled U.S. Senate moved to impeach Chase. Democratic-Republican senators charged that Chase had been guilty of judicial misconduct and that his partisan acts showed that he lacked political objectivity. Federalists defending Chase argued that he had committed no crime and that he could not be convicted under the constitutional definition of high crimes and misdemeanors. The Senate failed to achieve the two-thirds majority necessary to impeach Chase and he remained on the Court until his death.

Chase's acquittal set an important precedent for the Court—no Supreme Court justice could be removed simply because of his or her political beliefs. The failure to impeach Chase allowed Chief Justice Marshall to assert and define the powers of the Court in future decisions with more confidence. It was thus a step in the process of defining the independence of the Supreme Court as one of the three primary branches of U.S. government.

## **B. Non-Acquiescence – Presidential Disagreement with the Supreme Court**

### **1. Andrew Jackson’s Defiance of the Supreme Court in *Worcester v. State of Georgia***

In the 1820s, the State of Georgia purported to assert authority over the Cherokees despite treaties with the U.S. proclaiming them a “nation.” The Supreme Court declared that effort unconstitutional in *Worcester v. Georgia* (1832).<sup>1</sup> Georgia refused to comply with the Court’s decision and President Andrew Jackson declined to enforce the judgment. This implicitly gave his support to state nullification of the federal decision. “The decision of the supreme court has fell still born . . . The arm of the Government is not sufficiently strong to preserve [the Indians] from destruction.”<sup>2</sup>

Jackson’s action had two immediate ramifications. First, it emboldened States’ rights advocates throughout the South. Second, it led to the forced relocation of tens of thousands of American Indians to eastern Oklahoma, an event dubbed “the Trail of Tears” because of the many who did not survive the journey.

### **2. Andrew Jackson’s veto of the Second Bank of the United States**

Four months after the *Worcester* decision, Jackson challenged the Supreme Court again. The first Congress had created the Bank of the United States on Treasury Secretary Alexander Hamilton’s urging. The Bank’s 20-year charter expired in 1811 and

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<sup>1</sup> The Court held “The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the States; and provide that all intercourse with them shall be carried on exclusively by the government of the Union.”

<sup>2</sup> [cite]

was not renewed. The absence of a central bank proved problematic in setting monetary policy and financing the War of 1812. In the wake of those difficulties, Congress chartered the Second Bank of the United States in 1816 over States' rights objections. The Supreme Court upheld the constitutionality of the Bank in the seminal case *McCulloch v. Maryland* (1819). In response to the argument that chartering a Bank was not one of Congress' enumerated powers, Chief Justice John Marshall stated the Bank was both "necessary and proper" to the implementation of Congress' "great powers."

When the Second Bank's charter came up for renewal in 1832, President Jackson vetoed the bill. He stated that the Bank was "unnecessary" and "unauthorized by the Constitution." Indeed, to Jackson, the Bank was "subversive of the rights of the States," the very argument rejected by the Supreme Court.<sup>3</sup> Jackson clearly disagreed with Marshall. By doing so, did he defy the Court, or merely refuse to act within the latitude that the Court had given to the political branches?

Not only did Marshall use the *McCulloch* case to craft the rational basis test,<sup>4</sup> he also used it to explain the respective powers of the judicial and political branches:

"to undertake here to inquire into the degree of [the Bank's] necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power."<sup>5</sup>

So, when Jackson vetoed the Bank's extension, he was merely expressing his political opinion (indeed, one he ran on for President), not taking a legal stance in defiance of the Supreme Court. Still, Jackson is remembered for his very public disagreements with the Court, as was Abraham Lincoln, whom we consider next.

### **3. Abraham Lincoln's rejection of the *Dred Scott* decision**

From his earliest days in politics, Abraham Lincoln evaluated national policies in constitutional terms, and he demanded that the government justify its actions by pointing to the legal authority that supported them. While running for Senate against Stephen Douglas, Lincoln rejected the *Dred Scott* decision as a final resolution of the constitutional issue of the status of slaves. In his debate with Douglas, he criticized the decision's claims about constitutional history and precedent with technical sophistication, and by his first inaugural address Lincoln insisted that the decision was constitutionally binding on the parties concerned, but not necessarily on the country as a whole.

In his speech on *Dred Scott* at Springfield in 1857, Lincoln conceded explicitly that judicial decisions are binding in this case-specific sense, but then quickly proceeded to question whether they are binding in any other sense: "Judicial decisions have two uses

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<sup>3</sup> Once the Bank's charter expired, we were left without a central bank until the Federal Reserve was created 75 years later.

<sup>4</sup> See 17 U.S. 316, 421 (1819) ("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 consist with the letter and spirit of the constitution, are constitutional").

<sup>5</sup> *Id.* at 423.

- first, to absolutely determine the case decided, and secondly, to indicate to the public how other similar cases will be decided when they arise. Lincoln's concern was with that second use of judicial decisions: the force of precedent, as a judicial matter and as a political matter, apart from deciding the specific case before the Court. Lincoln said:

“We believe, as much as Judge Douglas, (perhaps more) in obedience to, and respect for the judicial department of government. We think its decisions on Constitutional questions, when fully settled, should control, not only the particular cases decided, but the general policy of the country, subject to be disturbed only by amendments of the Constitution as provided in that instrument itself. More than this would be revolution.”

“But we think the *Dred Scott* decision is erroneous. We know the court that made it, has often overruled its own decisions, and we shall do what we can to have it to over-rule this.

We offer no resistance to it. Judicial decisions are of greater or less authority as precedents, according to circumstances. That this should be so, accords both with common sense, and the customary understanding of the legal profession....

But when, as it is true we find it wanting in ... public confidence, it is not resistance, it is not factious, it is not even disrespectful, to treat it as not having yet quite established a settled doctrine for the country.”

Lincoln's formulation of *stare decisis* in the Springfield speech is thus best understood as stating a "safe harbor" in which disagreement with Supreme Court precedent is unquestionably legitimate. His discussion of the status of judicial precedent is best stated as a negative proposition about when precedent is not binding. For Lincoln, the Court's authority to interpret the law was not, as Douglas had suggested, exclusive and supreme in the sense that no other political authority legitimately could contest it. To disagree with the Court on a constitutional matter of fundamental importance; to resist its decision as precedent binding for all political purposes; to seek to have it overruled, was not, for Lincoln, a "blow" to republican government or a call for "passion, anarchy and violence." To contest the authority and finality of *Dred Scott* as a rule binding the government, and to make a political issue of disagreement, was not merely to be an enemy of the Constitution; it was to be an enemy of the Supreme Court's decision. For Lincoln, there was nothing at all improper about such a stance.

In sum, both Jackson and Lincoln well understood the difference between political disagreements with the Supreme Court and the defiance of judicial authority. Neither, no matter how strongly they disagreed, took steps to undermine judicial independence, even in the midst of looming constitutional crises.

### **C. Secession States Challenge Judicial Authority**

Andrew Jackson's Vice-President, John Calhoun, went on to develop the doctrine of "nullification" – where a State could resist a federal law or judicial decision if, in the State's opinion, it was unconstitutional. As legal doctrine, "nullification" never succeeded. But it did result in Civil War.

### **1. Confederate Constitution (State supremacy over federal judges)**

Directly tied to southern States' attitudes on the limitations of the national government was a respect for States' rights. Some scholars have argued that the Confederate Constitution was so extreme on this issue that the Confederacy was doomed to lose the war. Others dispute this point. In any event, even a cursory glance at the document shows that in respecting States' rights-- and simultaneously limiting the power of the central government--the Confederate Constitution created a government that was quite different from that in place in the Union.

The States' rights tone was set in the preamble, which added to "We, the people of the Confederate States," the significant phrase "*each State acting in its sovereign and independent character.*" Article I allowed the states to impeach "any judicial or other Federal officer, resident and acting solely within the limits of any state," and the Confederate Senate would then try such an officer. This provision was never implemented during the life of the Confederacy. Nevertheless, the threat of impeachment may have undermined the ability of Confederate officials to enforce unpopular laws and policies in their state. Article I, Section 10, also allowed states to impose their own import and export duties, something prohibited to the states remaining in the Union.

Southern distrust for the national judiciary was apparent in the drafting of Article III of the Confederate document. A key provision of the U.S. Constitution is the clause creating diversity jurisdiction by giving the federal courts the power to hear cases "between Citizens of different States." The Confederate Constitution lacked such a provision, which in practice meant that civil suits between citizens of different states would have to be litigated in State courts. This undermined the nationalization of law and jurisprudence, and had the Confederacy survived, it probably would have led to unnecessary complications in litigation and complaints about the failure of litigants to get a fair trial in a neutral forum. Moreover, in a nation that was predicated on States' rights and local interests, the abolition of diversity jurisdiction could have led to a judicial and business climate that would have hampered economic development. The Confederate Constitution also failed to include the phrase "law and equity" in granting jurisdiction to the national courts. This is generally seen as a concession to the civil law system in Louisiana and its vestiges in Texas. A final bow to States' rights, and one that could have led to enormous instability was a provision allowing a constitutional convention to be called on the demand of just three States.

The crisis of union surrounding the Civil War brought new challenges to judicial independence. Unionists and supporters of the anti-slavery movement were highly suspicious of the federal courts because of decisions in support of slavery and particularly because of the Supreme Court's 1857 *Dred Scott* decision, which, among other things, denied all African Americans any rights under the Constitution. Following the close of

the Civil War, Republicans in Congress feared that the federal courts would disallow much of their ambitious legislation designed to ensure full citizenship rights for freed slaves and all other African Americans. Congress debated numerous proposals to strip the federal courts of specific jurisdiction and to reorganize the courts. Congress redrew circuit boundaries to ensure that Southern states would no longer hold a majority of seats on the Supreme Court. In 1868, the Congress repealed the Supreme Court's jurisdiction over appeals of habeas corpus petitions, thus preventing former Confederates from challenging the custody of military courts. Without a functioning court system, which the Constitution would have allowed but did not mandate, the Davis administration and the Confederate military could only respond to these manifestations of States' rights with suspensions of martial law. The House of Representatives in 1868 approved legislation that would have required a majority of seven justices for the Supreme Court to disallow any congressional statute, although the Senate Committee on the Judiciary failed to report the bill.

## **2. U.S. v. Klein (Congress usurps judicial authority)**

On December 8, 1863, President Abraham Lincoln issued a proclamation offering a pardon to any person who had supported or fought for the Confederate Army, with full restoration of property rights, subject only to taking an oath of allegiance. The United States Congress had passed an act in 1863 that permitted an owner of property confiscated during the war to receive the proceeds from the sale of the confiscated property. Based on the statute and the President's proclamation, V.F. Wilson took the oath of allegiance and honored it until his death on July 22, 1865. Mr. John A. Klein, administrator of Mr. Wilson's estate, then applied, properly, to the Court of Claims to recover the proceeds of the sale of property seized from Mr. Wilson.

Congress repealed the statute in 1867. The Court of Claims, in 1869, decided that Mr. Wilson's estate was entitled to the proceeds from the sale of his property. Then, in 1870, Congress passed a law that prohibited the use of a Presidential pardon as the basis for claiming sale proceeds, and further said that acceptance of such a pardon was evidence that the person pardoned did provide support to the South and was ineligible to recover sale proceeds. The United States appealed to the Supreme Court, based on the 1870 statute, which provided that since Mr. Wilson had accepted a Presidential pardon, his estate was not entitled to the sale proceeds. The Supreme Court ruled that the 1870 statute was unconstitutional and that Congress had exceeded its power by invading the province of the judicial branch by prescribing the rule of decision in a particular cause. The Court also ruled that Congress had impermissibly infringed the power of the executive branch by limiting the effect of a Presidential pardon. The Supreme Court declared that:

“It seems to us that it is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power. What is this but to prescribe a rule for the decision of a cause in a particular way? Can we do so without allowing that the legislature may prescribe rules of decision to the Judicial Department or the government in cases pending before it? We think not. We must think that Congress has

inadvertently passed the limit, which separates the legislature from the judicial power.”

Broadly speaking, *Klein* stands for the proposition that the legislative branch cannot impair the exclusive powers of another branch. Put another way, *Klein* recognizes and supports the fundamental value of separation of powers defined by the Constitution. Specifically, *Klein* means that Congress may not direct the outcome of a case by prescribing the rule of decision, nor may Congress impair the power and effect of a Presidential pardon. Read more broadly, *Klein* suggests, but does not state, that Congress may not use the Exceptions Clause to cripple the Court's ability to be the final arbiter of what the Constitution means.

#### **D. Roosevelt’s Court-Packing Plan**

President Franklin Roosevelt’s battle with Congress and the American people over his 1937 proposal to reorganize the Supreme Court by increasing the number of justices, often referred to as the “court packing scheme,” was an event of considerable significance in both legal and political terms. Even though Roosevelt lost this particular fight, the interplay of events surrounding the battle ultimately assured the safety of such important New Deal programs as the Social Security and the National Labor Relations Acts. In addition, while some historians such as Barry Cushman found evidence that the Court’s move to a more expansive interpretation of the Constitution actually pre-dated the court-packing debate, it is still a tenable argument that the national dialogue resulting from the aftermath of FDR’s bombshell proposal effectively solidified the shift. For the next 50 years no significant piece of socioeconomic legislation, either state or national, would be subsequently overturned on appeal.

Despite the dire conditions of the Great Depression of the 1930s, Franklin D. Roosevelt was faced with several legal and political obstacles to the passage of the New Deal. In response to a conservative Supreme Court that overturned Congressional legislation on such issues as child labor and minimum wage for women, FDR proposed a Judicial Branch Reorganization act, which would “pack the courts” with younger, New Deal-friendly justices. The proposal backfired, causing the ire of Southern Democrats and citizens who held the Supreme Court as a sacred institution. But although Roosevelt’s proposal failed, a judicial revolution followed when the Supreme Court itself decided to defer to Congress on matters of socioeconomic reform, and passed FDR’s New Deal programs.

#### **E. Eisenhower backs up the Supreme Court with federal troops**

In *Brown v. Board of Education* (1954), the Supreme Court did no more than announce that segregation violated the Equal Protection Clause of the Constitution. Recognizing that implementing this decree would be difficult, the Court invited the southern states and the federal government to suggest what course should be followed. In

what is known as *Brown II*, the Court called upon the southern States to desegregate their schools with "all deliberate speed."

The Supreme Court has the power neither of the sword nor the purse, and so it relies upon its moral authority for enforcement of its decrees, or on the aid of the president and Congress. In the years following the two *Brown* decisions, however, neither the executive nor the legislative branches moved to assist the Court; President Dwight Eisenhower believed that the federal government should not interfere in State matters, while southerners in Congress prevented any action by that body. The southern States adopted a variety of measures to delay desegregation or to evade the decree altogether.

But finally President Eisenhower was forced to act. Following *Brown*, southern white resistance mounted. A showdown occurred in the autumn of 1957, when angry mobs in Little Rock, Arkansas, prevented nine black pupils from attending the all-white Central High School. When the governor of the state refused to provide proper protection, President Eisenhower backed up the federal court by sending in federal troops. Under their protective bayonets the African-American pupils attended the school, despite disagreeable incidents. President Eisenhower addressed the American people on a nationwide radio and television hookup, explaining why he had regrettably resorted to drastic action:

“Whenever normal agencies prove inadequate to the task and it becomes necessary for the Executive Branch of the Federal Government to use its powers and authority to uphold Federal Courts, the President's responsibility is inescapable.

In accordance with that responsibility, I have today issued an Executive Order directing the use of troops under Federal authority to aid in the execution of Federal law at Little Rock, Arkansas. This became necessary when my Proclamation of yesterday was not observed, and the obstruction of justice still continues. Our personal opinions about the decision have no bearing on the matter of enforcement; the responsibility and authority of the Supreme Court to interpret the Constitution are very clear. Mob rule cannot be allowed to override the decisions of our courts.

Now, let me make it very clear that Federal troops are not being used to relieve local and state authorities of their primary duty to preserve the peace and order of the community.... In the present case the troops are there, pursuant to law, solely for the purpose of preventing interference with the orders of the Court.”

In *Cooper v. Aaron* (1958), the State had argued that it was not bound by the Court's decision, since it had not been a party to the original suit. Beyond that, Arkansas claimed that a governor of a State had the same power to interpret the Constitution as did the Supreme Court. If this seemed reminiscent of the antebellum “nullification” debates, that was likely its intent. The Supreme Court not only reaffirmed the ruling in *Brown* that segregation was unconstitutional, but also reasserted its authority as the ultimate

interpreter of the Constitution. In the only Supreme Court decision ever signed by all sitting Justices, the Court reminded Arkansas and the nation that, since 1803, it had been, in Chief Justice John Marshall's phrase, "the province and duty of the judicial department to say what the law is." In the end, Arkansas complied.

#### **IV. Recent Threats to Judicial Independence**

##### **A. Impeachment efforts**

The authority for impeachment is set out in the Constitution:

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.

*The Constitution of the United States, Article. III, Section. 1.*

A judge may be impeached only for certain specific and extraordinary acts as set forth in Article II, section 4 of the Constitution:

Shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Judicial independence is implicated when impeachment is threatened in response to an unpopular decision. Even an "incorrect" decision is not grounds for impeachment. Only 13 federal judges have been impeached in the history of the United States, and of those, only 7 were convicted.

Former Rep. Robert Kastenmaier (D) of Wisconsin explained the proper role of impeachment as it regards federal judges: "Federal judges should not and cannot be impeached for judicial decision making, even if a decision is an erroneous one. The conduct . . . entering a judgment and order—is an act that judges are required to do under the Constitution . . . If this was otherwise, the impeachment remedy would become merely another avenue for judicial review."

Certain processes are in place to prevent or correct erroneous decisions. One method is the appeals process, which is the process by which higher courts review the decisions of lower courts for error—whether legal, factual, or judicial. A high court can reverse, or overturn, or otherwise alter a decision of a lower court. The appeals process protects litigants against error committed by trial judges, attorneys, and jurors.

Also, judicial misconduct is dealt with through judicial councils. The Judicial Councils Reform and Judicial Conduct and Disabilities Act of 1980 govern complaints about the misconduct of a federal judge. The Act sets out procedures for filing a complaint against a judge, and provides avenues for discipline of a judge if the council

deems necessary after reviewing a complaint. There is a judicial council in every federal circuit.

Hon. Abner J. Mikva has emphasized the role of the judiciary, explaining that, “The U.S. Constitution gives federal judges an anti-majoritarian role to play in our political system. It is the judges who are expected to protect our liberties, even against laws passed by Congress in response to popular demand.” If judges have cause to fear impeachment for legally correct but unpopular decisions, they will become interested parties and their ability to render impartial decisions will be compromised.

## **B. Court stripping**

Court stripping is "an effort to take jurisdiction or discretion away from a court or a particular judge, often to deny a particular group access to the courts. Politicians increasingly use court stripping to reverse decisions, punish judges, or even avoid future rulings they may not like. Sometimes they seek to eliminate jurisdiction altogether. In other instances, they shuffle lawsuits between state and federal courts to achieve political ends."

Federal courts, which have been essential in expanding and preserving individual rights, are being stripped of their power to review the actions of federal law enforcement agencies, state courts, and state prisons. Court stripping, regularly decried by civil libertarians, represents a wholesale assault on liberty and due process, not to mention the constitutional system of checks and balances: if courts lose jurisdiction to hear cases involving constitutional violations, they lose the power to police Congress and enforce the Bill of Rights.

There are at least three different types of 'court-stripping' proposals: 1) limiting the jurisdiction of the inferior federal courts, 2) limiting the jurisdiction of all federal courts, and 3) limiting the jurisdiction of both state and federal courts together.

While the Congress has broad authority under Article III of the Constitution to regulate the jurisdiction, procedures and remedies available in state and federal courts, this power is generally not used as a means to affect substantive law. Consequently, the federal courts have only rarely faced the question of what happens when the Congress acts under Article III to limit substantive litigation, and the Supreme Court has not squarely faced a modern law limiting jurisdiction to affect or influence litigation of constitutional questions.

Congress's authority to limit the jurisdiction of inferior federal courts appears relatively broad, so that laws limiting the jurisdiction of the lower federal courts would appear to raise fewer constitutional issues. Significant constitutional questions arise, however, with regard to whether Congress could eliminate both inferior federal court and Supreme Court review of constitutional matters. Further, elimination of review of constitutional issues by any court – state or federal court – seems the least likely to survive constitutional scrutiny. Various commentators, however, have suggested that

limiting jurisdiction for any court for a particular class of cases raises questions regarding both the separation of powers doctrine and the Equal Protection Clause.

### **C. Constitution Restoration Act**

The Constitution Restoration Act of 2005 was designed as a severe limitation on judicial authority and independence. It stripped federal courts of jurisdiction to hear any case challenging a government or official's action that was based on "that entity's, officer's, or agent's acknowledgment of God as the sovereign source of law, liberty, or government." It also set up rules of decision for federal courts.

In interpreting and applying the Constitution of the United States, a court of the United States may not rely upon any constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency, other than English constitutional and common law up to the time of the adoption of the Constitution of the United States.

Disregarding the Act's dictates was an impeachable offense:

To the extent that a justice of the Supreme Court of the United States or any judge of any Federal court engages in any activity that exceeds the jurisdiction of the court ... shall be deemed to constitute the commission of—(1) an offense for which the judge may be removed upon impeachment and conviction; and (2) a breach of the standard of good behavior required by article III, section 1 of the Constitution.

Although the Act has yet to be (and arguably never will be) enacted, its introduction provides an opportunity to examine some difficulties associated with congressional control of judicial decision-making.

The Constitution Restoration Act purported to enforce its substantive provisions by subjecting those who violated its terms to removal from office. Most famously associated with Gerald Ford, the proposition that impeachment is a purely political process proves most helpful. Discussing the proposed impeachment of William O. Douglas, Ford asserted that the grounds for impeachment were "whatever a majority of the House of Representatives considers them to be at a given moment in history." The rejection of that proposition appears to be one fixed point in impeachment law. Which is to say, impeachment is a process that at least combines politics and law, so that Representatives must have some argument that a judge's performance constitutes bad behavior (or a high crime or misdemeanor), as a predicate for impeachment. Or, to put it more forcefully, there is something appropriately called a law of impeachment.

Further, there is a fixed point in impeachment law, emerging from the failed impeachment of Samuel Chase. That failure has been taken to establish the legal proposition that Congress may not remove a federal judge from office merely on the basis of disa-

greement with the judge's rulings. Recent impeachments of federal judges suggest that they can be removed from office only for the commission of offenses that violate existing criminal statutes.

One might think that the Chase precedent shows that the enforcement provisions of the Constitution Restoration Act are insufficient to provide the legal basis for impeaching a judge who relies upon non-U.S. law in constitutional interpretation. After all, are not members of Congress who would vote to remove a judge for relying upon non-U.S. law simply disagreeing about the propriety of the judge's rulings? Not quite. I think it at least fairly arguable -- a term that will be important in a moment -- that the existence of a statute changes the picture, making removal for violation of the Act removal for something other than "mere" disagreement with the judge's rulings. After the adoption of the Constitution Restoration Act, a member of Congress can say of a judge who relies on non-U.S. law, "I am not simply disagreeing with the reliance on non-U.S. law, which is bad enough. Worse, this judge defied the law, which certainly ought to be ground for removal."

Now, considering the Constitution Restoration Act of 2005 and its possible unconstitutionality, it is clear that those who believe the targeted judges should not be removed will certainly argue that the statute is an unconstitutional intrusion on core judicial functions. Those who support impeachment will deploy legal arguments about statutory and constitutional interpretation to counter their opponents. Put another way, the existence of the Constitution Restoration Act allows representatives who support impeachment to explain both that they are not overriding the Chase precedent and that they are acting in a manner consistent with the rejection of the Ford position because they have a legal rather than a merely political basis for their actions. Opponents of impeachment will make their own legal arguments: that what is really going on is an attempt to remove judges with whom the proponents disagree, contrary to the Chase precedent, that the targets did not in fact violate the badly written Constitution Restoration Act, and that the Act is unconstitutional anyway.

How will this legal controversy be resolved? In the course of the impeachment proceeding itself. That is, the rejection of the Ford position means that those supporting impeachment must have some plausible legal arguments for their actions -- but those arguments need not be "correct" in some sense external to the impeachment process itself. If that is so, though, have not we actually returned to the Ford position? Again, not quite. The Ford position failed to acknowledge that impeachment (like the rest of constitutional law, I believe) is simultaneously political and legal -- that constitutional law is a special kind of law, a political law. The toolkits, so to speak, of adjudicated law and political law (the law of impeachment) are the same. Perhaps adjudicated law uses a wrench -- reference to precedent, for example -- more often than political law does, although the Chase example shows that political law uses precedent too. And perhaps political law uses a screwdriver -- reference to sound public policy -- more often than adjudicated law does, although judges sometimes predicate their legal interpretations on judgments of what would be good public policy. Despite these differences around the edges, the two domains are not categorically different.

## **V. The Right to Jury Trial**

### **A. Pre-Constitution**

Jury trials became an explicit right afforded to English citizens through the Magna Carta in 1215. It stated:

“No free man shall be captured, and or imprisoned, or disseised of his freehold, and or of his liberties, or of his free customs, or be outlawed, or exiled, or in any way destroyed, nor will we proceed against him by force or proceed against him by arms, but by the lawful judgment of his peers, and or by the law of the land.”

Juries in England were essential to counterbalance the tyranny of judges who were under the influence of the King. While English judges won their independence from the King in 1701, American colonial judges still served under the pleasure of the King. King George III then abolished trial by jury in the Colonies because colonial juries continuously acquitted colonists who disobeyed the Navigation Acts. Trial by jury was later a main grievance mentioned in the Declaration of Independence (“depriving us in many cases, of the benefits of Trial by Jury”) and was guaranteed in the 1787 Northwest Ordinance (“The inhabitants of the said territory shall always be entitled to the benefits of the writ of habeas corpus, and of the trial by jury”).

### **B. Philadelphia Convention and Ratification**

Judicial power, as a whole, was not a priority at the Philadelphia convention. Civil jury trials were hardly discussed and then intentionally left out of the final draft of the Constitution. But the omission caused concern among the Anti-Federalists that the Constitution would abolish civil jury trials in one swoop.

The convention was in session from May 25 to July 26 and from August 6 to September 17 of 1787. On September 12, when the Constitution was in the final stages of drafting, Mr. Williamson of North Carolina took to the floor and observed, “No provision was yet made for juries in civil cases” and suggested the necessity of it. The comment elicited some debate: some thought it would be impossible to determine for which cases juries were proper and that the responsibility should be left to the representatives of the people; others believed that juries were necessary to guard against corrupt judges; while others realized the difficulties in specifying jury cases, but believed a general provision would be sufficient. On September 15 a formal motion was made to add to the Article III guarantee of jury trials in criminal cases the following: “And a trial by jury shall be preserved as usual in civil cases.” The motion failed under concerns that the rules for trials and juries were different in different states.

The omission of a right to civil jury trials, which was universally considered important, alarmed the Anti-Federalists and was often quoted during the ratification process as a right that was too important to be left out of the Constitution. Alexander Hamilton’s Federalist Paper #83 addressed the question directly, hoping to calm the

storm. Hamilton explained that due to the diversity of state civil practices, no single formula would satisfy everyone and could seem disingenuous since all states had function civil jury trials tailored to their jurisdiction. While Hamilton conceded that juries were a way to guard against corrupt judges he also pointed out that juries themselves could be vessels of corruption.

As the ratification process continued on, the debate about civil jury trials was raised at each state's ratification convention. Massachusetts ratified the Constitution with a proposed amendment to account for civil jury trials. New Hampshire, Virginia, New York, and Rhode Island made similar recommendations. The state's voices were heard, and a guarantee of right to jury in civil cases was one of the amendments passed in Congress' first session as part of the Bill of Rights.

### **C. The Seventh Amendment**

The Seventh Amendment seems virtually self-explanatory on initial reading.

“In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.”

But along with other seemingly simple phrases in the Constitution, the Seventh Amendment has presented its share of interpretative and logical difficulties.

#### **1. “Incorporation”**

Beginning in 1833 with the case of Livingston v. Moore, the Supreme Court established that the Seventh Amendment did not of its own force require juries in non-federal civil actions. This decision set the tone and parameters in which the Amendment would function. Later that term, Chief Justice Marshall wrote in Barron v. Mayor & City Council of Baltimore (1833) that the Bill of Rights overall did not by their own terms apply to the States. However, with the passage of the 14<sup>th</sup> amendment the courts began to “incorporate” protections afforded by the Bill of Rights to the States through the Due Process clause of the 14<sup>th</sup> Amendment.

However, “incorporation” was only “selective;” i.e., partial. In 1876 in Walker v. Sauvinet, the Court held that the Seventh Amendment was not made applicable to the states through the Privileges or Immunities or the Due Process clauses. Despite the failure of incorporation, all States preserve the right to a jury trial in almost all civil cases (a common exception being small claims courts).<sup>6</sup>

#### **2. “Suits at Common Law”**

Another initial problem presented by the Seventh Amendment was the meaning of “common law”. The United States v. Wonson, 28 F. Cas. 745 (C.C.D. Mass. 1812) addressed this problem holding, “For purposes of the seventh amendment, the common

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<sup>6</sup> While Louisiana does not preserve the right to a civil jury trial in its state constitution, due to its civil law tradition rather than the common law tradition of other states, the right to a civil jury trial is found in Louisiana Revised Statutes.

law is not the common law of any individual state but the common law of England.” It was then established that the right to a jury would be determined by reference to the category of cases that were eligible for jury trials in England. Thompson v. Utah (1898) further explained that the controlling common law was the “view of English common law at the time the seventh amendment was ratified, 1791.” Thus, applying English common law, juries were allotted for matters of law, but not matter of equity. Furthermore, the Amendment does not apply to cases in admiralty and maritime jurisdiction, nor does it extend to statutory proceedings unknown to common law, such as enforcement of an equity order of an administrative body.

### 3. Merger of Law and Equity

The adoption of the Federal Rules of Civil Procedure in 1938 merged law and equity into a single civil jurisdiction. But the traditional distinction between law and equity still existed for determining when there was a constitutional right to trial by jury. This process led to some difficulty, but in Ross v. Bernhard (1970), the Supreme Court shed some light. The Court held that the right to a jury trial depends on the nature of the issue to be tried rather than the procedural framework in which it is raised. Because the 1938 merger of law and equity in federal courts eliminated any procedural obstacles to hearing law and equity issues in a single hearing, the legal issue can be heard in front of a jury even if there is a separate equitable issue.

While juries for civil trials are still meant as a safeguard and a fundamental right, they are still only available for those matters that were tried by a jury in England in 1791. When new rights and remedies are created, the right of action is analogized to its historical counterpart at law or equity in order to determine whether there is right of jury trial. This is known as the “historical test”. This antiquated view has and will most likely continue to cause interpretational problems for courts for years to come.

Courts recognize that it is more logical and appropriate to apply the rationale that underlies the distinction between law and equity rather than merely refer to a predetermined list of causes of action. Notably, since the 1980’s there has been a question whether there is a “complex case” exception to the Seventh Amendment; that is, whether there are cases so complex that jurors cannot be expected to have the capacity to rationally decide them, so that submitting such cases to a jury would violate the Due Process Clause. The complexity issue is seen mostly in patent law. As patentable inventions become more technologically advanced, it becomes increasingly difficult for lay jurors to perform their tasks properly due to the complexity of the facts underlying the legal issues. Another possible exception to the right for a civil jury trial could be determined by the possible length of the trial i.e. is it reasonable to expect a juror to be available for a 4-week trial? While these are issues that face the Seventh Amendment right to civil jury trials, the Supreme Court has not directly spoken on either of these topics or about a modified “historical test” approach. It remains unclear what direction Seventh Amendment jurisprudence will go, but it seems likely to further developments can be expected.

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