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CONSTITUTIONAL LAW-FEDERAL COURTS-DIVERSITY JURISDICTION- DISTRICT OF COLUMBIA CITIZENS

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CONSTITUTIONAL LAW—FEDERAL COURTS—DIVERSITY JURISDICTION—DISTRICT OF COLUMBIA CITIZENS—The Act of Congress of April 20, 1940,[1] provided that district courts should exercise original jurisdiction over actions "between citizens of different States, or citizens of the District of Columbia, the Territory of Hawaii, or Alaska, and any State or Territory. . . ." The committee report[2] and the title[3] indicate the purpose to extend to citizens of the District of Columbia and the territories the right to sue in federal district courts on grounds solely of diversity of citizenship. Although the committee reports indicated no constitutional difficulties, the majority of the lower federal courts which considered the problem declared the act unconstitutional[4] on the ground that the limitations of Article III prevented the exercise of such jurisdiction.

[1] 54 Stat. L. 143 (1940), 28 U.S.C. (1948) §1332.

[2] H. Rep. 1756, 76th Cong., 3d sess. (1940).

[3] "An Act to extend original jurisdiction to district courts in civil suits between citizens of the District of Columbia, the Territories of Hawaii or Alaska, and any state or territory."

[4] Ruled unconstitutional: Central States Cooperatives v. Watson Bros., (C.C.A. 7th, 1947) 165 F. (2d) 392; Willis v. Dennis, (D.C. Va. 1947) 72 F. Supp. 853; Feeley v. Sidney S. Schupper Interstate Hauling System, (D.C. Md. 1947) 72 F. Supp. 663; Wilson v. Guggenheim, (D.C. S.C. 1947) 70 F. Supp. 417; Ostrow v. Samuel Brilliant Co., (D.C. Mass. 1946) 66 F. Supp. 593; Behlert v. James Foundation of New York, (D.C. N.Y. 1945) 60 F. Supp. 706; McGarry v. City of Bethlehem, (D.C. Pa. 1942) 45 F. Supp. 385. *Contra:* Glaeser v. Acacia Mut. Life Assn., (D.C. Cal. 1944) 55 F. Supp. 925; Winkler v. Daniels, (D.C. Va. 1942) 43 F. Supp. 265.

In the case of *National Mutual Insurance Co. v. Tidewater Transfer Co.*,[5] a combination of differing minorities in the Supreme Court declared the act constitutional, in so far at least as it extended diversity jurisdiction to include District of Columbia citizens. Justice Jackson, for himself and Justices Black and Burton, concluded that, while Article III gave no Congressional authority to grant the jurisdiction in question, the act represented an appropriate exercise of Congressional power under Article I to legislate for the District of Columbia,[6] and was hence valid. Such extensions of jurisdiction under Article I powers had, it was maintained, often been sanctioned previously, as numerous decisions of the Court demonstrated. Thus the conception that Article III embodied the entire range of federal jurisdiction appropriate to courts to which it applied, had already been effectively discarded. (At the same time, certain requirements, such as the requirement that an action be judicial in nature, remained.) Emphasis was placed upon the other possible avenues by which Congress might have accomplished a basically similar result. Justice Jackson apparently deduced that the conflict in the case was essentially one of method, of more or less minor significance.[7]

On behalf of Justice Murphy and himself, Justice Rutledge vigorously dissented from the reasoning of the "majority." Article III was thus effectively read out of the Constitution and its original function of limitation completely disregarded, with the result that federal jurisdiction in Article III courts might now be extended to all matters which might constitutionally be dealt with by Congress under Article I powers. Nevertheless, within the limits of Article III itself, it was sound to conclude that the District of Columbia was a "state" within the meaning of the term as there used, in spite of a long and consistent line of

[5] 337 U.S. 582, 69 S.Ct. 1173 (1949). The suit was brought in the district court for Maryland by a District of Columbia corporation against a corporation licensed to do business in Maryland, solely on grounds of diversity of citizenship under the act. On the question whether a corporation should be considered a citizen for purposes of the diversity clause, see McGovney, "A Supreme Court Fiction," 56 HARV. L. REV. 853, 1090, 1225 (1943). The doctrine of corporate citizenship is founded on the cases of Louisville, C. & C. R. Co. v. Letson, 2 How. (43 U.S.) 497 (1844); Marshall v. B. & O. R. Co., 16 How. (57 U.S.) 314 (1854); and Nashua & Lowell R. Corp. v. Boston & Lowell R. Corp., 136 U.S. 356, 10 S.Ct. 1004 (1890). The principal case is considered in note, 44 ILL. L. REV. 541 (1949).

[6] U.S. CONST., Art. I, §8, cl. 17: "[The Congress shall have Power] ... to exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the seat of the Government of the United States...."

[7] "Before concentrating on detail, it may be well to place the general issue in a larger perspective. This constitutional issue affects only the mechanics of administering justice in our federation." Justice Jackson, 337 U.S. 582 at 585.

authority asserting the contrary. Mere "naked precedent" could not prevent a conclusion which produced such an appealing result and was in harmony with other interpretations of "state" as used in the Constitution.

Justice Frankfurter, whose views on diversity jurisdiction have been sincerely unsympathetic,[8] dissented from the rationale of both opinions, Justice Reed concurring. As to the Jackson opinion, the premise that Article III could ever be exceeded in dealing with federal jurisdiction of a court subject to its terms was completely erroneous, and based upon a misconstruction of numerous cases employed by the "majority." As to the Rutledge opinion, a "decent respect for unbroken history," for "contemporaneous interpretation," and for "the capacity of the distinguished lawyers among the framers" could only lead to the result that "states" as used in Article III meant that and nothing more, and certainly did not include the District of Columbia.

Chief Justice Vinson and Justice Douglas joined this condemnation of the Rutledge opinion, and added additional grounds for disregarding the Jackson opinion. Particular emphasis was laid on the entire overriding concept of the delegation of powers by the states to the federal government, which basic characteristic clearly indicated the limitation function of Article III. This concept, coupled with the separation of powers explicitly provided for throughout the Constitution, could justify only the result that Article III represented the sum total of federal judicial power, which could not be exceeded in any circumstances with reference to courts to which it applied.

This comment will be concerned with the validity of the views adopted by the minorities which, in combination, upheld the validity of the act.

I. *Is the District of Columbia a "State" Within the Meaning of Article III?*

The leading case of *Hepburn and Dundas v. Ellzey*[9] was the first to construe the meaning of the term "states" as employed in Article III.

[8] See Frankfurter, "Distribution of Judicial Power Between United States and State Courts," 13 CORN. L. Q. 499 (1928). Justice Frankfurter's attitude was made plain in the principal case: "By withdrawing the meretricious advantages which diversity jurisdiction afforded one of the parties in some types of litigation, *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, has happily eliminated some practical but indefensible reasons for its retention. An Act for the elimination of diversity jurisdiction could fairly be called an Act for the relief of the federal courts." 337 U.S. 582 at 651.

[9] 2 Cranch (6 U.S.) 445 (1805).

A citizen of the District of Columbia, relying on the diversity provisions of the Judiciary Act of 1789,[10] endeavored to sue a citizen of the state of Virginia in the federal circuit court of that state. Chief Justice Marshall, in construing the statutory term "state," concluded that it possessed the same meaning in its usage there as it did in the Constitution, and that that meaning did not encompass the District of Columbia. The case has long been considered controlling on the constitutional question with relation to the District of Columbia[11] and has founded a similar conclusion with relation to territories.[12]

With reference to other provisions, however, the District of Columbia has apparently been considered a "state." Under the interstate commerce clause,[13] the full faith and credit clause,[14] and certain treaties,[15] the District is included within the meaning of "state." Rights of District citizens founded on the Sixth Amendment may also, it has been said, be supported by reference to the third clause of Article III, Section 2,[16] which purports to deal with "states."[17] There is, similarly, some indication of a broader construction in the handling of a somewhat related problem raised by the interpleading of a District citizen under the Federal Interpleader Act.[18] The sum of these decisions is sufficient to cast some doubt on the correctness of the *Hepburn* rule, particularly since Marshall's conclusions rest upon what was apparently a fairly limited examination of the Constitution.[19]

[10] Act of Sept. 24, 1789, c. 20, 1 Stat. L. 73.

[11] Barney v. Baltimore, 6 Wall. (73 U.S.) 280 (1867); Hooe v. Jamieson, 166 U.S. 395, 17 S.Ct. 596 (1897). In Watson v. Brooks, (C.C. Ore. 1882) 13 F. 540, the doctrine of the Hepburn case was vigorously denounced, though the court followed it on the principle of stare decisis.

[12] Corporation of New Orleans v. Winter, 1 Wheat. (14 U.S.) 91 (1816).

[13] Hanley v. Kansas City Southern Ry. Co., 187 U.S. 617, 23 S.Ct. 214 (1902); Stoutenburgh v. Hennick, 129 U.S. 141, 9 S.Ct. 256 (1889).

[14] Embrey v. Palmer, 107 U.S. 3, 2 S.Ct. 25 (1882).

[15] Geofroy v. Riggs, 133 U.S. 258, 10 S.Ct. 295 (1890).

[16] U.S. CONST., Art. III, §2, cl. 3: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

[17] Callan v. Wilson, 127 U.S. 540, 8 S.Ct. 1301 (1888). See also: District of Columbia v. Clawans, 300 U.S. 617, 57 S.Ct. 660 (1937); Capital Traction Co. v. Hof, 174 U.S. 1, 19 S.Ct. 580 (1899); United States v. Wood, 299 U.S. 123, 57 S.Ct. 177 (1936).

[18] See Mutual Life Ins. Co. v. Lott, (D.C. Cal. 1921) 275 F. 365. The case is discussed in Chafee, "Federal Interpleader Since the Act of 1936," 49 YALE L. J. 377 (1940). Contrast Chafee's earlier view in "The Federal Interpleader Act of 1936," 45 YALE L. J. 963 (1936).

[19] "When the same term which has been used plainly in this limited sense in the articles respecting the legislative and executive departments, is also employed in that which

Particularly with reference to those cases dealing with rights under the Sixth Amendment, however, it is significant that the conception of the District of Columbia as a "state" is not essential to the decision. In none of the cases mentioned may we say that there are not at least some supporting grounds for the decision, independent of the conclusion that the District is a "state." The rather limited validity of these cases as indicating a departure from Marshall's conclusion must then be borne in mind in the determination of the question presently before us.

Very plausible argument may be made that the view of Marshall ought currently to be overruled. In so far as it was founded solely on a question of statutory interpretation, the remarks about constitutional meaning must be considered as dictum. We are familiar with the principle that the statutory meaning of a term may be more restricted than its constitutional meaning.[20] Marshall himself admonished against accepting dictum as the sole basis for later decisions.[21] If, then, his examination was a limited one, we may consider again the question of the meaning of the term as here employed, since the entire line of authority stems directly from obvious dictum.

Granting that the term "states" is not to be included within the list of expanding concepts, but is possessed of static meaning, what is that meaning? Does not the use of the term with somewhat broader meaning in other provisions indicate the possibility of its use here with such

respects the judicial department, it must be understood as retaining the sense originally given to it." Hepburn & Dundas v. Ellzey, 2 Cranch (6 U.S.) 445 at 453 (1805). Although mention is made of "other passages," it appears that principal reliance was placed upon use of the term with respect to the legislative and executive departments. See editorial note, 16 GEO. WASH. L. REV. 381 (1948) for an analysis and criticism of the Hepburn case. Note, 32 MINN. L. REV. 818, 820 (1948).

The significance of the Hepburn decision is also challenged by the following remark in 29 GEO. L. J. 193 at 195 (1940): "The word 'state' is used in the Constitution more than forty times. Uniformity is lacking in the various cases determining whether or not the District of Columbia and the territories are, or are not, 'states' within the meaning of the different sections. All that can be said is that for some purposes they are, for others they are not."

[20] Lamar v. United States, 240 U.S. 60, 65, 36 S.Ct. 255 (1916); Towne v. Eisner, 245 U.S. 418, 425, 38 S.Ct. 158 (1918). See also, Treines v. Sunshine Mining Co., 308 U.S. 66, 60 S.Ct. 44 (1939), where the possibility of different statutory and constitutional meanings in this field is discussed. Note, 32 MINN. L. REV. 818, 820 (1948).

[21] "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." Cohens v. Virginia, 6 Wheat. (19 U.S.) 264 at 399 (1821). Cited in Dykes and Keeffe, "The 1940 Amendment to the Diversity of Citizenship Clause," 21 TULANE L. REV. 171 (1946).

broad meaning? If the fact that the District had not been formed at the time of the Constitution be a factor, it must be recognized that this factor has not been considered determinative with reference to the other provisions dealing with the term "states."

Especially if one takes the view that the projected extension of diversity jurisdiction is desirable, the argument thus made possesses a certain amount of appeal. Two principal objections, however, militate against adopting a rule founded on such a slender basis. First, it would have been a matter of great simplicity for the framers to include the District within the diversity clause, since formation of the District was anticipated by them. Indeed, as emphasized by Justice Frankfurter, the great precision of statement of the Judiciary Clause itself militates strongly against inclusion within its compass of anything not expressly stated in it. Secondly, the "broader meaning" argument is founded on cases which can hardly claim to be more persuasive than Marshall's decision, since they also deal with dictum on this subject. The Marshall view is to be preferred because it was closer to the question here presented, and because it was made at a time when the purposes of the framers may perhaps have been somewhat more clear. There has been, in recent years, a considerable amount of debate over the essential purposes underlying the diversity clause.[22]

Taking into account the long adherence to the Marshall view, the evidence presented to overrule that view is slender indeed. Although it may seem unfortunate to deprive the District citizen of resort to federal courts on diversity grounds, the virtues of diversity jurisdiction are not so clear as to indicate that the "right" in question is of great significance.[23] It is, however, of great importance that some substantial basis be provided to justify overruling of long-established doctrines.

[22] The following materials will indicate some of the varied views on the purposes of the diversity clause: Frank, "Historical Bases of the Federal Judicial System," 13 LAW AND CONTEM. PROB. 3 (1948); Friendly, "The Historic Basis of Diversity Jurisdiction," 41 HARV. L. REV. 483 (1928); Ball, "Revision of Federal Diversity Jurisdiction," 28 ILL L. REV. 356 (1933).

[23] The conflict on the merits of diversity jurisdiciton clearly appears in: Warren, "New Light on the History of the Federal Judiciary Act of 1789," 37 HARV. L. REV. 49 (1923); Frankfurter, "Distribution of Judicial Power Between United States and State Courts," 13 CORN. L. Q. 499 (1928); Weschsler, "Federal Jurisdiction and the Revision of the Judicial Code," 13 LAW AND CONTEM. PROB. 216 (1948); Yntema, "The Jurisdiction of the Federal Courts in Controversies Between Citizens of Different States," 19 A.B.A.J. 71, 149, 265 (1933); Clark, "State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins," 55 YALE L. J. 267 (1946). See Richardson v. Comr., (C.C.A. 2d, 1942) 126 F. (2d) 562.

II. *Is it Within the Power of Congress to Grant the Questioned Jurisdiction as an Exercise of Its Article I Power over the District of Columbia?*

The establishment of inferior tribunals under specific Article I power to create them[24] has always been assumed to be subject to the limitations of Article III.[25] Since there is little question that Congress may act beyond the bounds of the District under its authority over the District,[26] the scope of those limitations becomes an appropriate subject for consideration.

Certain of the requirements of Article III are clearly mandatory in nature. In courts to which this article applies, there must be presented a case or controversy.[27] Compensation of judges may not be reduced, nor may they be dismissed so long as they are of "good behavior."[28] With relation to jurisdiction, equally positive expressions have controlled the field, until the basic question has seemed well settled. Although Congress may exercise discretion in establishing inferior tribunals and in fixing the limits of their jurisdiction,[29] it may not confer any jurisdiction beyond that enumerated in Article III, Section 2.[30] So often has this principle been reiterated that to question it appears at first glance presumptuous.

The opinion of Justice Jackson, however, flies precisely in the face of this long and consistent interpretation of Article III. To reach his

[24] U.S. CONST., Art. I, §8, cl. 9: "[The Congress shall have Power] to constitute Tribunals inferior to the Supreme Court."

[25] Katz, "Federal Legislative Courts," 43 HARV. L. REV. 894 (1930).

[26] Cohens v. Virginia, 6 Wheat. (19 U.S.) 264, 427 (1821); Lyons v. Bank of Discount of City of New York, (C.C. N.Y. 1907) 154 F. 391; Rogge v. Michael Del Balso, (D.C. N.Y. 1936) 15 F. Supp. 499.

[27] Muskrat v. United States, 219 U.S. 346, 31 S.Ct. 250 (1911). See also: Postum Cereal Co. v. California Fig Nut Co., 272 U.S. 693, 47 S.Ct. 284 (1927); Federal Radio Comm. v. General Electric Co., 281 U.S. 464, 50 S.Ct. 389 (1930); Hayburn's Case, 2 Dall. (2 U.S.) 409 (1793); and United States v. Yale Todd, reported in footnote to United States v. Ferreira, 13 How. (54 U.S.) 40, 52 (1851).

[28] O'Donoghue v. United States, 289 U.S. 516, 53 S.Ct. 740 (1933); Evans v. Gore, 253 U.S. 245, 40 S.Ct. 550 (1920).

[29] The Mayor v. Cooper, 6 Wall. (73 U.S.) 247 (1867); United States v. Hudson and Goodwin, 7 Cranch (11 U.S.) 32 (1812); Sheldon v. Sill, 8 How. (49 U.S.) 441 (1850); Lauf v. E. G. Shinner & Co., 303 U.S. 323, 58 S.Ct. 578 (1938); Lockerty v. Phillips, 319 U.S. 182, 63 S.Ct. 1019 (1943).

[30] "Turn to the article of the constitution of the United States, for the statute cannot extend the jurisdiction beyond the limits of the constitution." Hodgson and Thompson v. Bowerbank, 5 Cranch (9 U.S.) 303 at 304 (1809). See also: Mossman v. Higginson, 4 Dall. (4 U.S.) 12 (1800); Sheldon v. Sill, 8 How. (49 U.S.) 441 (1850); Kline v. Burke Construction Co., 260 U.S. 226, 43 S.Ct. 79 (1922); Ex parte Bakelite Corp., 279 U.S. 438, 49 S.Ct. 411 (1929); and Martin v. Hunter's Lessee, 1 Wheat. (14 U.S.) 304 (1816).

result, since he would not eliminate the requirement that the action be "judicial" in nature,[31] it is necessary to declare either that Article III is controlling with relation to some of its provisions, but not as to others, or that it serves little or no function save as it implicitly establishes or reinforces the doctrine of separation of powers. It is upon the latter conception of the article that Justice Jackson takes his stand. The net result would then be an effective elimination of the function of limitation long believed to constitute one of the significant purposes behind Article III and the introduction of numerous problems which hinge upon that elimination. Besides the necessity of deciding whether the express "limitations" of Article III are simply declaratory of the doctrine of separation of powers, we must further decide whether that doctrine itself is not primarily and in large part a logical deduction from the explicit limitations long considered to exist in Article III.

Without detailing the whole of Justice Jackson's opinion, it is proposed to examine several lines of judicial development which have led to the present problem, and to test their worth in terms of the support they give to the thesis set forth by Justice Jackson. Broadly speaking, the problem has been raised in two more or less independent spheres. The first has been concerned with conflicting decisions relating to the "constitutional court," "legislative court" distinction.[32] The second has primarily resulted from lack of clear definition of the meaning of "federal question" jurisdiction.

A. The concept of "legislative" courts, as opposed to those "constitutional" courts exercising the "judicial power" of the United States, was introduced in the case of *The American Insurance Co. v. Canter*,[33] by Chief Justice Marshall. It was held that territorial courts were "legislative" courts, incapable of exercising the "judicial power." Hence the provisions of Article III did not extend to such courts, either by way of protection or limitation. Since courts subject to Article III were incapable of exercising anything other than the judicial power as de-

[31] "Of course there are limits to the nature of duties which Congress may impose on the constitutional courts vested with the federal judicial power. The doctrine of separation of powers is fundamental in our system. It arises, however, not from Art. III nor any other single provision of the Constitution, but because 'behind the words of the constitutional provisions are postulates which limit and control.'" Justice Jackson, 337 U.S. 582 at 590-1.

[32] On this general subject, see: Katz, "Federal Legislative Courts," 43 HARV. L. REV. 894 (1930); comment, 43 YALE L. J. 316 (1933); and HARRIS, THE JUDICIAL POWER OF THE UNITED STATES, c. 4 (1940).

[33] 1 Pet. (26 U.S.) 511 (1828).

fined by that article,[34] the range of jurisdiction of each type of court appeared to be clearly exclusive of that of the other. As a corollary, it was said that appellate review by the Supreme Court could extend only to cases which represented an exercise of the judicial power.[35] The conceptual structure thus wrought would appear to be invulnerable, save that numerous cases have presented problems in the solution of which the doctrines thus established have been somewhat warped and twisted.

It is partially the question whether the conceptual structure thus neatly molded must remain so with which we are ultimately concerned. Does the definition of "judicial power" properly include both the meeting of the requirements of Article III *and* the bringing of the case in an Article III court? May we recognize certain limitations on the clear-cut principles originally enunciated, without surrendering the basic proposition that Article III serves to limit the allowable scope of jurisdiction of the district courts?

1. *District of Columbia courts.* As late as 1908, it was held that District of Columbia courts could not be given powers inconsistent with Article III.[36] In other cases it was recognized that such powers had in fact been bestowed on and exercised by the courts of the District.[37] More recent decisions have openly acknowledged the power of Congress to grant to these courts jurisdiction over matters subject to subsequent executive or administrative action; accordingly, courts of the District have been classified as "legislative."[38] Appellate review, consistently refused in cases where no final order could be entered in the court below, has been assumed in all other cases from District courts.

There would appear to be little doubt that, for many purposes, the District courts exercise jurisdiction over cases which would be within the "judicial power" if brought in Article III courts.[39] If they are "leg-

[34] See cases cited in notes 27 and 30, supra.

[35] Gordon v. United States, 2 Wall. (69 U.S.) 561 (1864), as explained in United States v. Jones, 119 U.S. 477, 7 S.Ct. 850 (1886).

[36] In re McFarland, 30 App. D.C. 365 (1908).

[37] Butterworth v. Hoe, 112 U.S. 50, 5 S.Ct. 25 (1884); Frasch v. Moore, 211 U.S. 1, 29 S.Ct. 6 (1908); Atkins & Co. v. Moore, 212 U.S. 285, 29 S.Ct. 390 (1909); Baldwin Co. v. R. S. Howard Co., 256 U.S. 35, 41 S.Ct. 405 (1921).

[38] Kline v. Burke Construction Co., 260 U.S. 266, 43 S.Ct. 79 (1922); Keller v. Potomac Electric Power Co., 261 U.S. 428, 43 S.Ct. 445 (1923); Postum Cereal Co. v. California Fig Nut Co., 272 U.S. 693, 47 S.Ct. 284 (1927); Ex parte Bakelite Corp., 279 U.S. 438, 49 S.Ct. 411 (1929).

[39] "It has been the evident intention of Congress that laws generally applicable to enforcement of what may be called federal law in the United States generally should have

islative" courts, this exercise appears to be inconsistent with the *Canter* case; if they are not, the performance of administrative functions is inappropriate under Article III. The difficulty posed in this instance has been intensified by a direct decision in the case of *O'Donoghue v. United States*[40] that for purposes of determining whether a judge's compensation may be reduced, District of Columbia courts are "constitutional" courts. While the decision clearly indicates that it does not purport to extend to all federal courts, the clear conflict between the conception of courts of the District as "legislative" in one instance and "constitutional" in the other raises a grave question whether the original exclusive cast given federal jurisdictional questions is properly applicable to the present structure of the court system.[41]

2. *The Court of Claims.*[42] Originally, the court of claims was a purely advisory body.[43] Hence, there is little doubt that it was intended to serve a "legislative" function. For many years, however, the court was regarded as a "constitutional" court.[44] As late as 1925, it was concluded that the salary of a judge could not be reduced.[45] Appellate review had been refused on the ground that the decision of the court, under the early statute, was subject to action of executive officers.[46] Revision of the statute corrected the defect, and the Supreme Court expressly held itself entitled to hear appeals as provided for by the

the same effect within the District of Columbia as elsewhere. For this purpose the courts of the District of Columbia are federal courts of the United States." Federal Trade Commission v. Klesner, 274 U.S. 145 at 154, 47 S.Ct. 557 (1927) citing Keller v. Potomac Electric Power Co., 261 U.S. 428, 43 S.Ct. 445 (1923). See also Fehlhaber Pile Co., Inc. v. T.V.A., (App. D.C. 1946) 155 F. (2d) 864.

[40] 289 U.S. 516, 53 S.Ct. 740 (1933).

[41] Note, 21 TEX. L. REV. 656 (1948). But see note, 55 YALE L. J. 600, 602 (1946).

[42] The court of claims was originally established by the Act of Feb. 24, 1855, 10 Stat. L. 612.

[43] The purely advisory function of the court under the original act was altered by the Act of March 3, 1863, 12 Stat. L. 765. Decisions of the court were thereby made final. The degree of finality may be questioned in specific instances. See comment, 43 YALE L. J. 316 (1933).

[44] "While the United States as a government may not be sued without its consent, yet with its consent it may be sued, and the judicial power of the United States extends to such a controversy. Indeed, the whole jurisdiction of the Court of Claims rests upon this proposition." Minnesota v. Hitchcock, 185 U.S. 373 at 386, 22 S.Ct. 650 (1902). The court of claims considered itself a "constitutional" court. Sanborn v. United States, 27 Ct. Cl. 485 (1892); James v. United States, 38 Ct. Cl. 615 (1903). BLACK, CONSTITUTIONAL LAW, 4th ed., §98 (1927); 2 WATSON, THE CONSTITUTION OF THE UNITED STATES, 2d ed., §789 (1929).

[45] Miles v. Graham, 268 U.S. 501, 45 S.Ct. 601 (1925).

[46] Gordon v. United States, 2 Wall. (69 U.S.) 561 (1864).

statute.[47] The inferences thus established were rudely dealt with in the case of *Ex parte Bakelite Corporation,*[48] where, in deciding that the court of customs appeals was a "legislative" court, the Supreme Court referred to the court of claims as having been always regarded as a "legislative" court. Shortly thereafter, the dictum was supported by direct decision in the case of *Williams v. United States,*[49] where it was held that the salary of a judge of the court of claims could be reduced, because the court was "legislative," and hence outside provisions of Article III.

The sudden reversal of an apparently well-settled line of authority was in itself productive of some difficulties, since it highlighted the rather thin line to be drawn in some instances between "constitutional" and "legislative" courts. Furthermore, by the Tucker Act,[50] Congress had conferred on the district courts the jurisdiction to hear certain classes of claims cases. In exercising this jurisdiction, the district courts were, it was said, sitting as courts of claims.[51] A concurrency of jurisdiction was thus established. If district courts can exercise only the "judicial power" of the United States, the question whether the hearing of such cases is "legislative" or within the "judicial power" apparently rests then upon whether the matter is heard in one court or the other. The result thus fashioned seems clearly in conflict with the early decisions that "constitutional" and "legislative" courts exercise mutually exclusive jurisdiction.

Justice Jackson's opinion relies upon the *O'Donoghue* decision, and upon the several decisions relating to concurrent jurisdiction of the court of claims and of the district courts under the Tucker Act, as indicating a departure from the original view of Article III as embodying the entire range of the "judicial power" of the United States, and as constituting a recognition that Article I power may properly be exercised to confer jurisdiction upon Article III courts.

The position assumed on the basis of these apparently conflicting cases represents an improper application of the principles to be deduced

[47] United States v. Jones, 119 U.S. 477, 7 S.Ct. 850 (1886). Previously such appellate jurisdiction had been assumed without comment. De Groot v. United States, 5 Wall. (72 U.S.) 419 (1866); Langford v. United States, 101 U.S. 341 (1880).

[48] 279 U.S. 438, 49 S.Ct. 411 (1929).

[49] 289 U.S. 553, 53 S.Ct. 751 (1933), overruling Miles v. Graham, 268 U.S. 501, 45 S.Ct. 601 (1925).

[50] 24 Stat. L. 505 (1887), 28 U.S.C. §1346(a)2.

[51] United States v. Sherwood, 312 U.S. 584, 61 S.Ct. 767 (1941); Pope v. United States, 323 U.S. 1, 66 S.Ct. 334 (1944); United States v. Shaw, 309 U.S. 495, 60 S.Ct. 659 (1940).

from the decisions. No justification appears, with regard to cases concerning the concurrent jurisdiction question, for assuming that a particular case may not be the subject properly of two powers—one "judicial" and one "legislative." Without considering those cases where the treatment given *must* be judicial, it is still apparent that numerous situations can arise where judicial treatment is not essential (within the framework of the judicial department), situations where some *exercise* of legislative power may be appropriately applied through the mechanism of a court. That a case *might* be within the judicial power does not mean that it must *necessarily* be,[52] or that fundamental principles have been surrendered by allowing its treatment in a court not sanctioned directly by, or subject to the limitations of, Article III. The expanded use of legislative courts, as of administrative agencies, to some extent involves problems of practical administration of the law.[53] Lines drawn to indicate the degree to which legislative courts may consider matters which *could* be brought within the scope of the judicial power have no validity when employed to undermine long-settled concepts of jurisdictional limitations imposed by Article III.

In dealing with the court of claims, for example, the fact that treatment may be given such claims in a "legislative" court should not obscure principles which allow treatment as an exercise of the judicial power.[54] We may, for example, consider that such suits come within the Article III provision concerning "controversies to which the United States may be a party." Although such a conception is rendered difficult to adopt because of the principle that suits against the sovereign are positively barred, there being no right against the sovereign save by consent, it is not entirely inappropriate to take the suggested view of the matter. Futhermore, if there be no independent right, then the

[52] "At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." Murray's Lessee v. Hoboken Land and Improvement Co., 18 How. (59 U.S.) 272 at 284 (1855). See also: Crowell v. Benson, 285 U.S. 22, 50, 52 S.Ct. 285 (1932); Ex parte Bakelite Corp., 279 U.S. 438, 49 S.Ct. 411 (1929).

The materials cited in note 32, supra, deal in part with the question of overlapping between the judicial and legislative powers in this area.

[53] HARRIS, THE JUDICIAL POWER OF THE UNITED STATES, c. 4 (1940).

[54] In Williams v. United States, 289 U.S. 553, 53 S.Ct. 751 (1933), it was said that the sole source of jurisdiction of the court of claims and of the judicial power it exercises is Art. I Congressional power. This statement, however, can hardly foreclose consideration of appropriate heads of jurisdiction which might bring district court suits within Art. III. See Pope v. United States, 323 U.S. 1, 66 S.Ct. 334 (1944).

entire right of recovery arises from an act of Congress. Such a right being based upon a law of the United States, the grant of jurisdiction to an Article III court would appear to be entirely appropriate.

The question of appellate review poses no more difficult problem. So long as the case may appropriately be considered within the judicial power at the time of its treatment in the Supreme Court, it would appear to have satisfied the requirements of Article III.[55] No restriction may be found in Article III limiting the right of review of the Supreme Court to cases which have arisen in inferior tribunals constituted under Article III. The action of the Supreme Court in reviewing represents an exercise of the judicial power, regardless of the fact that the case did not originate in the district courts. Just as the judicial power of the United States may extend to cases originating in state courts, it may extend to those which arise in legislative courts, so long as all the elements required for an exercise of the judicial power (as that there be a case or controversy) are present.

Much this same analysis applies basically to the problems raised by the status of the District of Columbia courts. In addition, such courts have long been recognized to be dual in nature, exercising both federal and local functions. The power of Congress has been declared to be as extensive over such courts as is the power of a state over its judicial machinery.[56] At the same time, it has been consistently recognized that the situation thus created is a most unusual one. This was clearly pointed out in the *O'Donoghue* case. A decision which represents a practical effort to afford some of the protections of Article III in a situation where they might theoretically not apply, ought not to be extended beyond the limits that the court itself explicitly imposed upon the meaning of its decision.

Indeed, nearly all the cases which are cited by Justice Jackson with reference to this particular problem, and the background cases which have led to the conceptual problem in this field, suffer the defect that they do not relate directly to the jurisdictional question. The very collateral nature of such cases ought to be in itself a warning against the

[55] Cases allowing appeals from legislative courts and administrative tribunals are legion. These do not of course conclusively establish that the appeals thus heard come within Art. III, but the very number of such cases is an excellent indication that the court at no time considered this appellate function inconsistent with Art. III.

[56] O'Donoghue v. United States, 289 U.S. 516, 53 S.Ct. 740 (1933); Postum Cereal Co. v. California Fig Nut Co., 272 U.S. 693, 47 S.Ct. 284 (1927); Keller v. Potomac Electric Power Co., 261 U.S. 428, 43 S.Ct. 445 (1923); Kendall v. United States ex rel. Stokes, 12 Pet. (37 U.S.) 524 (1838).

derivation from them of principles which can be used to upset long-standing jurisdictional and constitutional concepts.

B. In conjunction with the above-mentioned mode of attack upon the problem, Justice Jackson concluded that the sum of several decisions relating to federal question jurisdiction necessarily established that Article I powers could be employed to expand the jurisdiction of district courts beyond the limits of Article III. His analysis of the problem may be summed up as follows: There is no federal question unless there is, on the face of the plaintiff's pleading, a clear question which turns upon the construction of the Constitution or laws of the United States.[57] The mere ability to sue (to sue in some court) is not of significance, if the actual right asserted does not depend in some manner upon such construction.[58] The case of *Gully v. First National Bank*[59] asserted this proposition, and allowed for the single exception of suit by a federally chartered corporation or bank.[60] At the same time, suit is allowed in district courts in the case of a trustee in bankruptcy, suing under Section 23(b) of the Bankruptcy Act[61] to recover on behalf of the bankrupt's estate, in spite of the fact that no question of federal law is presented, and no other ground of federal jurisdiction exists. So long as the defendant consents, there is no significance to the fact that the legal questions are solely questions of state law. General statements in the cases of *Schumacher v. Beeler*[62] and *Williams v. Austrian*[63] emphasize the point. Since the bankruptcy law merely gives the trustee the ability to sue, according to Justice Jackson, these decisions, taken in the light of *Gully v. First National Bank*, clearly indicate that jurisdiction cannot be fitted within Article III limitations, and must consequently depend upon the Article I power to deal with bankruptcy.[64] There

[57] Shoshone Mining Co. v. Rutter, 177 U.S. 505, 20 S.Ct. 726 (1900); Bankers Casualty Co. v. Minn. St. P. & C. Ry. Co., 192 U.S. 371, 24 S.Ct. 325 (1904); Louisville and Nashville R. Co. v. Mottley, 211 U.S. 149, 29 S.Ct. 42 (1908).

[58] Puerto Rico v. Russell & Co., 288 U.S. 476, 53 S.Ct. 477 (1933).

[59] 299 U.S. 109, 57 S.Ct. 96 (1936).

[60] Osborn v. Bank of United States, 9 Wheat. (22 U.S.) 738 (1824); Pacific Railroad Removal Cases, 115 U.S. 2, 5 S.Ct. 1113 (1885); Sowell v. Fed. Reserve Bank of Dallas, 268 U.S. 449, 45 S.Ct. 528 (1925).

[61] 30 Stat. L. 544 (1898), as amended by 52 Stat. L. 840 (1938), 11 U.S.C.A. §46 (b).

[62] 293 U.S. 367, 55 S.Ct. 230 (1934).

[63] 331 U.S. 642, 67 S.Ct. 1443 (1947).

[64] Justice Jackson refers to the case of Continental Illinois Natl. Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry. Co., 294 U.S. 648, 55 S.Ct. 595 (1935) as follows: "Congress also is given power in Art. I to make uniform laws on the subject of bankruptcies. That this, and not the judicial power under Art. III, is the source of our system of reorganizations and bankruptcy is obvious." 337 U.S. 582 at 594. It is noteworthy that the question primarily considered by the Court in the Rock Island case was the validity of Congressional

appears to be a clear conflict between the abstracted statements set forth by Justice Jackson and the principle that Article III embodies limitations binding upon the courts subject to it terms.

It is not, however, clear that the statements thus abstracted deal with the question of constitutional limitation. As has been emphasized earlier in this comment, the range of jurisdiction granted, so long as it be within permissible limits, is a matter for Congressional determination.[65] Consequently, statements which apply limitations to the scope of jurisdiction may have application either to the statutory framework established by Congress or to constitutional limitations. The court, in several of the cited cases, clearly considered that the constitutional powers had not been exhausted,[66] whatever the result in terms of statutory interpretation. The statements relied upon were, then, made simply with reference to the statutory question, since they did not purport to lay down a complete rule as to the permissible constitutional scope of jurisdiction.[67]

If, however, we are to sustain the traditional conception of Article III, and find adequate grounds for rejecting Justice Jackson's departure therefrom, some distinction must be found between the exercise of power in authorizing suit under Section 23(b) of the Bankruptcy Act and that involved in endeavoring, under the current act, to allow the District of Columbia resident to sue in a federal court on diversity grounds. For, the intent being plain to allow such suit, the question becomes one of constitutional limitation.

In dealing with federally chartered corporations and banks,[68] the Court has declared that Congress may vest jurisdiction in an Article

action in enacting §77 of the Bankruptcy Act. It is of course true that Congressional control over bankruptcy stems from Art. I power. However, the source of Congressional power over the subject matter should not be confused with the jurisdictional question. This case, dealing with the question whether Congress had power under Art. I to control railroad reorganizations, has no proper relation to the instant problem, whether suit under the act represents an exercise of federal question jurisdiction. As an example of confusion of power over subject matter and power over jurisdiction, see note, 44 ILL. L. REV. 541 (1949), which follows closely Justice Jackson's analysis.

[65] See cases cited note 29, supra.

[66] Shoshone Mining Co. v. Rutter, 177 U.S. 505, 20 S.Ct. 726 (1900). In Gully v. First Nat. Bank, 299 U.S. 109, 57 S.Ct. 96 (1936), the question was stated in terms of bringing "a case within the statute."

[67] See Forrester, "The Nature of a 'Federal Question,'" 16 TULANE L. REV. 362 (1942). The tendency to interpret these jurisdictional questions in terms of statutory tests has been much fostered by Congressional limitations upon the doctrines of the Osborn case. These limitations are referred to in note 71, infra.

[68] American Bank & Trust Co. v. Federal Res. Bank of Atlanta, 256 U.S. 350, 41 S.Ct. 499 (1921). See also cases cited in note 60, supra.

III court where the capacity to sue (that is, the capacity to sue at all) is founded upon federal law. Since the very existence (and hence the capacity to sue) of the corporation rests upon federal law, or some question of capacity to act is necessarily related to the act which forms the basis for suit, an ultimate federal question is inextricably woven into the case. Even when this aspect is not questioned, and even when, from the standpoint of substance, the questions of state law form the only significant issue, these federal questions are sufficient to authorize the conferring of jurisdiction on Article III courts. This rule of constitutional scope of Congressional power clearly includes the trustee suit authorized under Section 23(b), for all the rights of the trustee stem from Congressional authorization.

But no other federal question than the validity or construction of the grant of jurisdiction can enter into the controversy which is the substance of the principal case. The situation was anticipated by Chief Justice Marshall in the case of *Osborn v. Bank of the United States*,[69] where he answered the criticism that, if a federally chartered corporation could be allowed to sue, for that reason alone, in a federal court, a naturalized citizen could also be allowed to sue simply because he was naturalized under act of Congress.

As Marshall pointed out, the naturalized citizen may be made a citizen by act of Congress, but that act does not "proceed to give, to regulate, or to prescribe his capacities."[70] In a suit founded upon an act allowing the naturalized citizen to resort to federal courts solely because he was a naturalized citizen, there would be presented no such question of capacity as is presented in the case of a federally chartered corporation. The case of the naturalized citizen, indeed, is stronger than that of the District citizen, who does not receive his status from act of Congress, save in the most indirect manner. At best, he receives nothing more than status, the meaning of which is the result of forces altogether outside the act which creates the status. Just as Congress has no authority to prescribe the full capacities of the naturalized citizen, it has no such power to prescribe the capacities of citizens of the District of Columbia.

The distinction drawn between status and capacity constitutes sound ground for distinguishing the case of the District citizen from that of the trustee in bankruptcy, acting under Section 23(b). It is,

[69] 9 Wheat. (22 U.S.) 738 (1824).
[70] Osborn v. Bank of the United States, 9 Wheat. (22 U.S.) 738, 827 (1824).

therefore, improper to deduce from the *Austrian* and *Beeler* cases, that Article I power may be employed to expand the jurisdiction of courts which are subject to the provisions of Article III.[71]

Justice Jackson also indicates that the failure, in the *Austrian* and *Beeler* cases, to indicate the source of the Congressional power to confer jurisdiction is of considerable significance. Since, he argues, the general language refers to absence of the usual requirements for jurisdiction under Article III, the source of power in the mind of the court was Article I. Such an inference is too tenuous to be considered of importance.

Conclusion

That Article III constitutes a limitation on the power of the courts subject to its terms has been considered settled for many years. In part, this view proceeds from the conclusion that, the Constitution representing a grant of power from the states, the terms of the grant cannot be exceeded. Certainly this view has been taken with regard to Article III.[72] The surrender of this underlying philosophy and the rules which have been based on it would constitute a significant alteration in basic constitutional theory. As has been indicated, the attack made by Justice Jackson is founded upon cases which are not inconsistent with the fundamental principle that Article III does limit jurisdiction of district courts. But even though some minor discrepancies may be found between the broad principle and some of the specific applications cited by Justice Jackson, it is perhaps the wiser policy to discard the discrepancies, rather than to eliminate a point of view which has made such a significant contribution to the structure of the judicial system.[73]

John D. McLeod, S.Ed.

[71] The tendency of the Court has been to interpret the Osborn rule somewhat narrowly as a matter of construing statutes. Forrester, "The Nature of a 'Federal Question,'" 16 TULANE L. REV. 362 (1942). This has been in part at least the result of restrictive statutes enacted by Congress in limitation of the rule. See Gay v. Ruff, 292 U.S. 25, 54 S.Ct. 608 (1934). Examples of the statutory limitations thus imposed are: Act of Jan. 28, 1915, §5, 38 Stat. L. 803, 804 (federally incorporated railroads); Act of Feb. 13, 1925, §12, 43 Stat. L. 936, 941. As revised, 28 U.S.C.A. §1349 (dealing with federal incorporation in general); and Act of March 3, 1911, §24, ¶16, 36 Stat. L. 1091, 1092. As revised, 28 U.S.C.A. §1348 (1949) (national banks).

[72] Healy v. Ratta, 292 U.S. 263, 54 S.Ct. 700 (1934); Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 61 S.Ct. 868 (1941). See note, 53 YALE L. J. 788 (1944).

[73] Note, 22 TULANE L. REV. 656 (1948); note, 55 YALE L. J. 500 (1946).