Diversity Jurisdiction for Citizens of The District of Columbia

The Constitution of the United States provides that "The judicial Power shall extend . . . to Controversies . . . between Citizens of different States."[1] As to the inferior federal courts,[2] this provision is not self-executing;[3] Congress must act to distribute the judicial power among the courts and to confer upon them jurisdiction.[4] The legislative discretion is so wide that Congress could withhold all diversity jurisdiction.[5] Indeed, Congress was under no constitutional obligation to create the district courts or any inferior federal courts.[6] But the first session of the first Congress did create inferior federal courts and did grant jurisdiction based on diversity of citizenship.[7]

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[1] U. S. CONST. ART. III, § 2 (1).

[2] The Constitution does, of course, grant directly to the Supreme Court judicial power and jurisdiction which Congress is powerless to withdraw. Kline v. Burke Construction Co., 260 U.S. 226 (1922), and cases there cited. 1 HUGHES, FEDERAL PRACTICE §95 (1931).

[3] *In re* Higdon, 269 Fed. 150 (D. Mo. 1920); Mutual Insurance Co. v. Champlin, 21 Fed. 85, 89 (C.C.N.Y. 1884).

[4] People v. Bruce, 129 F. 2d 421 (C.C.A. 9th 1942), *cert. denied*, 317 U.S. 678, *rehearing denied*, 317 U.S. 710 (1942); *Ex parte* Wisner, 203 U.S. 449 (1906); Kentucky v. Powers, 201 U.S. 1 (1905); Turner v. Bank of North America, 4 Dall. 10 (U.S. 1800); Dewar v. Brooks, 16 F. Supp. 636 (D. Nev. 1936); *In re* Higdon, 269 Fed. 150 (D. Mo. 1920); 1 HUGHES, FEDERAL PRACTICE §235 (1931).

[5] Feely v. Schupper Interstate Hauling System, 72 F. Supp. 663 (D. Md. 1947); Lockerty v. Phillips, 319 U.S. 182 (1943); Lauf v. Shinner & Co., 303 U.S. 323 (1938); Kline v. Burke Construction Co., 260 U.S. 226 (1922); Sheldon v. Sill, 8 How. 441 (U.S. 1850); Cary v. Curtis, 3 How. 236, 244-245 (U.S. 1845). And Congress could take away jurisdiction once granted, even as to cases already commenced as cognizable actions. Kline v. Burke Construction Co.,*supra*, citing Assessors v. Osborne (Gates v. Osborne), 9 Wall. 567, 575 (U.S. 1869). See note 2 *supra*. *But see* Winkler v. Daniels, 43 F. Supp. 265, 266 where District Judge Way quotes, *arguendo*, from H. R. REP. No. 1756, 76th Cong., 3d Sess. (1940): "The Constitution guarantees to certain persons the right to demand the exercise of these powers under certain circumstances. For example, a citizen of a State may do so when involved in a case or controversy with a citizen of another State. The mere fact that the Constitution guarantees this right to the citizens of a State in no way prohibits the Congress from extending that same privilege to others who are not technically citizens of a State." This argument is effectively attacked by Judge Coleman in Feely v. Schupper Interstate Hauling System, *supra* at 666.

[6] Lockerty v. Phillips, 319 U.S. 182 (1943); Kline v. Burke Construction Co., 260 U.S. 226 (1922); Sheldon v. Sill, 8 How. 441 (U.S. 1850); United States v. Hudson, 7 Cranch 32, 33 (U.S. 1812).

[7] 1 STAT. 73 (1789).

The grant of diversity jurisdiction illustrates the use of legislative discretion, for Congress has always required a minimum "amount in controversy" as a condition to the vesting of jurisdiction based on diversity of citizenship.[8] This jurisdictional amount has been increased,[9] so that today diversity jurisdiction attaches only ". . . where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000 . . . ."[10] This amount is required also where the basis of jurisdiction is a "federal question."[11] The purpose of the requirement of a minimum amount in controversy is to prevent an excessive burden of relatively small cases on the dockets of the federal courts, where state courts exercise concurrent jurisdiction.[12] The reason generally given for diversity jurisdiction is that fairness requires that the central government provide a forum in which all litigants will receive equal justice, and that no person should be forced to leave his home state and to submit his interests to the possible prejudice of a distant state court.[13] In cases involving a federal question, then, jurisdiction attaches ac-

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[8] 1 STAT. 78 (1789).

[9] The original Judiciary Act placed the minimum at $500 exclusive of costs. Note 8 *supra.* Almost a hundred years later Congress increased the amount to $2,000 exclusive of interests and costs. 24 STAT. 552 (1887), 25 STAT. 433 (1888). In 1912 the amount was further increased to $3,000 as quoted in the text above. 36 STAT. 1091 (1912), 28 U.S.C. §41 (1) (1940). A bill was introduced in Congress in 1928 which would have increased the amount further from $3,000 to $10,000. BREWSTER, FEDERAL PROCEDURE 41, n. 35 (1940).

[10] 36 STAT. 1091 (1912), 28 U.S.C. §41 (1) (1940).

[11] Note 10 *supra.* BREWSTER, *op. cit. supra,* §61. But an exception arises under the FEDERAL TORT CLAIMS ACT, 60 STAT. 843 (1946) as amended 61 STAT. 722 (1947).

[12] "It has been repeatedly held . . . that the intent of all the legislation since the enactment of the judiciary act of 1789 has been, by the provision as to amounts, merely to prevent the dockets of the federal courts from being crowded with small cases . . . ." Judge Townsend in Davis v. Mills, 99 Fed. 39, 40 (C.C. Conn. 1900). *Compare* Healy v. Ratta, 292 U.S. 263 (1934).

But ". . . congressional increases in the jurisdictional amount have given only the most temporary relief to the district court." DOBIE, FEDERAL PROCEDURE 184 (1928).

[13] Dodge v. Woolsey, 18 How. 331, 354 (U.S. 1855); Bank of the United States v. Deveaux, 5 Cranch 61, 87 (U.S. 1809); Whelan v. New York, L.E.&W. Ry., 35 Fed. 849 (C.C. N.D. Ohio 1888); BREWSTER, FEDERAL PROCEDURE §64 (1940); DOBIE, FEDERAL PROCEDURE 184 (1928); Friendly, *The Historic Basis of Diversity Jurisdiction,* 41 HARV. L. REV. 483 (1928).

Hamilton seemed to argue at one point that diversity jurisdiction was necessary to enforce the privileges and immunities clause of the Constitution. But in the same essay he wrote that the jurisdiction of federal courts ought to comprehend ". . . all those [cases] in which the State tribunals cannot be supposed to be impartial and unbiased." THE FEDERALIST No. 80 at 494 (Lodge ed. 1888).

cording to the nature of the matter to be litigated, while in diversity cases, jurisdiction depends upon the character of the parties.[14]

When the Constitution was adopted and the Judiciary Act of 1789 was passed, a separate geographical subdivision had not been created for a capital city; those who dwelt at the seat of the national government retained citizenship in one of the states.[15] After the establishment of the District of Columbia,[16] however, capital residents were denied access to federal courts where jurisdiction depended upon diversity of citizenship. In the landmark case, *Hepburn and Dundas v. Ellzey*,[17] the Supreme Court was faced with the question: is the District of Columbia a state within the meaning of the statute conferring diversity jurisdiction?[18] Chief Justice Marshall,[19] observing that the Judiciary Act used language similar

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[14] BUNN, JURISDICTION AND PRACTICE OF THE COURTS OF THE UNITED STATES 21-46 (4th ed. 1939); SIMKINS, FEDERAL PRACTICE §22 (3d ed., Schweppe, 1938).

This distinction is emphasized here as an aid to clear delimitation of the discussion to follow, which will be limited to diversity jurisdiction.

[15] "This District had been a part of the States of Maryland and Virginia. It had been subject to the Constitution, and was a part of the United States. The Constitution had attached to it irrevocably. . . . The mere cession of the District of Columbia to the Federal government relinquished the authority of the states, but it did not take it out of the United States or from under the aegis of the Constitution. . . . Indeed, it would have been a fanciful construction to hold that territory which had been once a part of the United States ceased to be such by being ceded directly to the Federal government." Downes v. Bidwell, 182 U.S. 244, 260-261 (1901).

"It is important to bear constantly in mind that the District was made up of portions of two of the original states of the Union, and was not taken out of the Union by the cession. Prior thereto its inhabitants were entitled to all the rights, guaranties, and immunities of the Constitution . . . ." O'Donoghue v. United States, 289 U.S. 516, 540 (1933).

[16] An Act of July 16, 1790, provided for the establishment of the District of Columbia, and for the transfer of the seat of government from Philadelphia to this District in December, 1800. The act provided that state laws should remain in force in the District until December, 1800, and a further act of Congress. 1 STAT. 130 (1790). See also 2 STAT. 103 (1801), which provided for the further continuation in force of state laws in the District of Columbia.

[17] 2 Cranch 445 (U.S. 1805).

[18] The plaintiffs, both citizens and residents of the District of Columbia, brought an action against a citizen and resident of Virginia in the Circuit Court for the Virginia district. The judges could not agree whether there was or was not diversity jurisdiction of the cause, and the question was certified to the Supreme Court whether the action could be maintained or should be dismissed for want of jurisdiction. The plaintiffs argued that since the District of Columbia was a separate, organized political society it was a state as that term is used by writers on general law.

[19] Marshall, C. J. delivered the opinion of the court. Others present were Cushing, Paterson, Chase, and Washington, JJ.

to[20] and in reference to the Constitution, looked to that instrument and concluded that the District of Columbia was not a state within the meaning of the Constitution.[21]

Chief Justice Marshall then significantly added the following:

> It is true, that as citizens of the United States and of that particular district which is subject to the jurisdiction of Congress, it is extraordinary that the courts of the United States, which are open to aliens and to the citizens of every state in the union, should be closed upon them. *But this is a subject for legislative, not for judicial consideration.*[22] (Emphasis supplied.)

The *Hepburn* decision was followed in a long line of cases[23] and for more than a century it was considered settled that citizens of the District of Columbia and the territories could not sue or be sued in the federal courts on the ground of diversity of citizenship.[24] That the leading case was followed so consistently, however, may be attributed to the doctrine of stare decisis. The opinion of Judge Deady in *Watson v. Brooks*,[25] for example, contains a sharp criticism of the Marshall view:

> But it is very doubtful if this ruling would now be made if the question was one of first impression; and it is to be hoped it may yet be reviewed and overthrown.
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> By it, and upon a narrow and technical construction of the word 'state', unsupported by any argument worthy of the able and distinguished judge who announced the opinion of the court, the large and growing population of American citizens resident in the District of Columbia and the eight territories of the United States are deprived of the privilege accorded to all other American citizens, as

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[20] The Judiciary Act of 1789, §11, added two qualifications not found in the language of the Constitution: (1) the minimum amount in controversy and (2) a requirement that the action be brought in a state of which one of the parties was a citizen. 1 STAT. 78 (1789).

[21] The opinion reasons that if the District of Columbia is excluded under the terms of the articles governing the legislative and executive branches, the same result must follow in the interpretation of the judicial article. This reasoning has not been carried to a logical conclusion, even by Chief Justice Marshall. *See, e.g.*, Loughborough v. Blake, 5 Wheat. 317 (U.S. 1820).

[22] Hepburn & Dundas v. Ellzey, 2 Cranch at 453.

[23] Hooe v. Jamieson, 166 U.S. 395 (1897); Barney v. Baltimore, 6 Wall. 280 (U.S. 1867); New Orleans v. Winter, 1 Wheat. 89 (U.S. 1816); Watson v. Brooks, 13 Fed. 540 (C.C.D. Ore. 1882); *Cf.* Hodgson & Thompson v. Bowerbank, 5 Cranch 303 (U.S. 1809).

[24] "Nothing is better settled than that a citizen of the United States residing in a territory or the District of Columbia cannot sustain as plaintiff or defendant an action based upon diversity of citizenship in the federal courts." WILLIAMS, JURISDICTION AND PRACTICE OF FEDERAL COURTS 65 (1917).

[25] 13 Fed. 540 (C.C.D. Ore. 1882).

> well as aliens, of going into the national courts when obliged to assert or defend their legal rights away from home.[26]

In 1940 Congress acted. An amendment to the Judicial Code made the pertinent section read: "The district courts shall have original jurisdiction . . . of all suits of a civil nature . . . where the matter in controversy exceeds . . . three thousand dollars, and . . . is between citizens of different States, *or citizens of the District of Columbia, the Territory of Hawaii, or Alaska, and any State or Territory . . .*"[27] (Amendment in italics.)

This amendment touched off a sequence of spirited litigation in which the old cases have been rather thoroughly reexamined. Eleven district court cases[28] and two circuit court of appeals cases[29] have decided the question[30] of the constitutionality of the 1940 amendment. In the district courts the score has been eight to three against constitutionality.[31] Both circuit courts have held the statute

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[26] *Id.* at 544.

[27] 54 STAT. 143, 28 U.S.C. §41(1)(b) (1940).

[28] Willis v. Dennis, 72 F. Supp. 853 (W.D. Va. 1947) *unconstitutional*; Duze v. Wooley, 72 F. Supp. 422 (D. Hawaii 1947) *constitutional*; Feely v. Schupper Interstate Hauling System, 72 F. Supp. 663 (D. Md. 1947) *unconstitutional*; Wilson v. Guggenheim, 70 F. Supp. 417 (E.D.S.C. 1947) *unconstitutional*; Ostrow v. Samuel Brilliant Co., 66 F. Supp. 593 (D. Mass. 1946) *unconstitutional*; Behlert v. James Foundation, 60 F. Supp. 706 (S.D. N.Y. 1945) *unconstitutional*; Federal Deposit Insurance Corp. v. George-Howard, 55 F. Supp. 921 (W.D. Mo. 1944) *unconstitutional by implication*; Glaesar v. Acacia Mutual Life Association, 55 F. Supp. 925 (N.D. Cal. 1944) *constitutional*; McGarry v. City of Bethlehem, 45 F. Supp. 385 (E.D. Pa. 1942) *unconstitutional*; Winkler v. Daniels, 43 F. Supp. 265 (E.D. Va. 1942) *constitutional*; National Mutual Insurance Co. v. Tidewater Transfer Co., unreported (D. Md. 1947), *aff'd*, 165 F. 2d 531 (C.C.A. 4th 1947) *unconstitutional.*

[29] National Mutual Insurance Co. v. Tidewater Transfer Co., 165 F. 2d 531 (C.C.A. 4th 1947); Central States Co-operatives v. Watson Bros. Transportation Co., 165 F. 2d 392 (C.C.A. 7th 1947). The question of constitutionality was raised for the first time in the latter case in the appellate court. It was raised on motion of the defendant, who had invoked the jurisdiction of the district court by removal from a municipal court of Chicago, in which he had been sued by a corporation of the District of Columbia.

[30] "The question involved is not a theoretical one, but one of great practical significance. To deny to a citizen of the District the right to resort to the federal courts, means that he must seek justice in a court of the state of his adversary, where he will find, in many of the states, that trial by jury has been stripped of many of its safeguards and the judge has been denied the common law powers necessary to the proper administration of justice." Circuit Judge Parker, dissenting in National Mutual Insurance Co. v. Tidewater Transfer Co., *supra* note 27 at 536 n.

[31] See note 27 *supra.*

invalid over the vigorous dissent of the senior judge in each circuit.[32]

The language of this amendment is ambiguous.[33] It might be literally interpreted to mean, for example, that a citizen of the District of Columbia could now sue a state in the federal courts. If such were the meaning, the act would contravene the Eleventh Amendment, which provides that "the Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any Foreign State."[34] The purpose of the amendment, however, has been quite clear, *viz.*, to put citizens of the District of Columbia and the named territories in the same position with regard to diversity jurisdiction as a citizen of one of the forty-eight states.[35] The courts have given the amendment a meaning consistent with such a purpose.[36]

The divergent views on the question of constitutionality may be brought into sharp focus by a summary statement of an argument in support of each.[37]

1. The view that the amendment is unconstitutional:

A federal court is classified under the Constitution according to the particular part of that basic instrument from which came the authority for its creation.[38] A court which was contemplated by the Judicial Article of the Constitution is denominated a constitutional court.[39] On the other hand, a court which was created by Congress under powers granted in other parts of the Constitution is a legislative court.[40] Congress may assign to legislative courts administrative and legislative functions,[41] but constitutional

[32] Circuit Judge Parker in the 4th Circuit, 165 F. 2d 531, 536; Circuit Judge Evans in the 7th Circuit, 165 F. 2d 392, 398.

[33] Several possible interpretations of this amendment are examined, and more precise language is suggested in Dykes and Keeffe, *The 1940 Amendment to the Diversity of Citizenship Clause*, 21 TULANE L. REV. 171, 177-180 (1946).

[34] *See* McGarry v. City of Bethlehem, 45 F. Supp. 385, 386 (E.D. Pa. 1942). If a state were a party plaintiff, the 11th Amendment would be avoided. But a state is not a citizen under diversity jurisdiction provisions. 7 WORDS & PHRASES 218-219 (1940) and cases there collected.

[35] H. R. REP. No. 1756, 76th Cong., 3d Sess. (1940).

[36] See notes 26, 27, and 32 *supra*.

[37] No attempt is made here to analyze, evaluate, or summarize the opinions of the courts, but rather to state briefly the main points on which the clear-cut difference of opinion on this subject is rested.

[38] BREWSTER, FEDERAL PROCEDURE §§85, 86 (1940) and cases there cited.

[39] *Ex parte* Bakelite Corp., 279 U.S. 438, syl. 3 (1929).

[40] *Id.* syl. 4.

[41] Examples are the Court of Claims, the Court of Customs and Patent Appeals, the United States Customs Court, and the United States Court for China. See note 38 *supra*.

courts are limited to the hearing and decision of cases in the constitutional sense, that is, limited to purely judicial functions. This is true because the powers which may be granted to a constitutional court are expressly limited by the very same article which authorizes the creation of the court.[42]

Since the federal district courts clearly are constitutional courts, their jurisdiction is limited by Article III. Does the judicial article permit the jurisdiction which Congress intended to add by this amendment? It does, only if a citizen of the District of Columbia is a citizen of a state. But it has been settled since the time of John Marshall that in Article III, Section 2, the word "state" excludes this unique district and the territories.[43] It is inescapable, then, that Congress is without power so to extend the jurisdiction of the district courts — unless another provision of the Constitution so conditions the restraint of the judicial article as to allow the Congress an increment of power.

It is said that Congress here acted under its plenary power to legislate for the District of Columbia granted by Article I, Section 8.[44] It is conceded that by this provision the national legislature has sweeping powers over the District,[45] but it is insisted that this prerogative is limited to the District. Companion provisions of the Constitution must be interpreted so as to harmonize them, to make each effective in its proper sphere. It is a spurious argument which says that a power to legislate over an area ten miles square is sufficient to authorize an extension of the jurisdiction of the federal courts in every state in the Union when the article governing the judicial power expressly forbids.

The case of *O'Donoghue v. United States*[46] is not an authority for the opposite view. That case did hold that constitutional courts in the District of Columbia could be given jurisdiction under Article I, Section 8. But the opinion of Mr. Justice Sutherland expressly denies that such powers could be extended to the constitutional courts outside the District of Columbia.[47]

The position taken by Chief Justice Marshall on this question negatives the idea that he would suggest that a statute could change this "extraordinary" situation. It is wholly consistent with his recorded views to say that he believed that the Constitution must be

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[42] See notes 38 and 39 *supra.*

[43] See notes 22 and 23 *supra.*

[44] H. R. REP. No. 1756, 76th Cong., 3d Sess. (1940).

[45] *See* Neild v. District of Columbia, 110 F. 2d 246, 249-251 (App. D.C. 1940).

[46] 289 U.S. 516 (1933).

[47] Id. at 551. *See* National Mutual Insurance Co. v. Tidewater Transfer Co., 165 F. 2d at 535.

changed to accomplish this end. To amend the Constitution is a legislative, not a judicial function. "Turn to the article of the Constitution of the United States, for the statute cannot extend the jurisdiction beyond the limits of the Constitution."[48]

2. The view that the amendment is constitutional:

Precedent has been so powerful in this area that few arguments have been made to suggest that the District of Columbia might now be called a state within the meaning of this one clause of the Constitution. In the five recent opinions in support of the 1940 amendment there are four bows to precedent on this score.[49] For the present purpose, then, it is assumed that the District of Columbia is not a state within the meaning of Article III, Section 2.

The position of the District of Columbia has been described as "extraordinary",[50] "anomolous",[51] "unique."[52] The framers of the Constitution sought to provide for this situation with the very broad grant of power to legislate concerning the District[53] and a "necessary and proper" clause.[54] Surely, one of the primary obligations of government is to secure justice for its people. Does the Constitution prevent Congress's securing equal justice for these citizens because the District of Columbia is not a state? There is every reason to believe that the framers intended to give to the legislature all the power necessary to the effective government of the federal district. It is clear that Congress can create courts under authority other than the article on the judiciary;[55] for example courts could be established the nation over to handle litigation involving citizens of the District. Cannot these cases be handled in the courts already existing?[56]

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[48] Chief Justice Marshall in Hodgson & Thompson v. Bowerbank, Cranch 303 (U.S. 1809)

[49] Only the opinion of Circuit Judge Evans argues that the District of Columbia should now be called a state under the diversity clause. The opinion distinguishes the Hepburn case, limiting the latter to an interpretation of a statute. "Our first case controls, if it be in point. It was decided by the Supreme Court. Justice Marshall spoke for the Court. That alone is sufficient to paralyze any doubting Thomas unless he can distinguish it." 165 F 2d at 398.

[50] Chief Justice Marshall in Hepburn & Dundas v. Ellzey, 2 Cranch 445.

[51] Judge Waring in Wilson v. Guggenheim, 70 F Supp. 417, 42 (E.D.S.C. 1947)

[52] *Ibid.*

[53] U. S. CONST. Art. I, §8(17)

[54] U. S. CONST. Art. I, §8(18)

[55] See note 41 *supra.*

[56] See opinion of Circuit Judge Parker, dissenting in National Mutual Insurance Co. v. Tidewater Transfer Co., 165 F 2d at 537.

O'Donoghue v. United States[57] held that a constitutional court in the District of Columbia can be given non-judicial powers and functions under provisions of the Constitution other than the judicial article. Surely, then, the other constitutional courts can be given judicial power under provisions other than Article III. The power here sought to be conferred is judicial in the strict or constitutional sense. It is not even suggested that Congress could give the federal courts in all the states non-judicial power under Article I, Section 8. This act seeks to grant to the district courts only the same type of jurisdiction the courts have always had, that is, jurisdiction where the parties are citizens of the United States, but not citizens of the same state.

The question of constitutionality must be answered by reference to the whole Constitution. Article III, Section 2 may not include a grant of this power. But is the entire charter of our government so drawn that Congress is powerless to treat all American citizens alike when they assert their legal rights?

Chief Justice Marshall thought it was extraordinary that all were not treated alike — "But this is a subject for legislative . . . consideration."[58] If, by that, the great chief justice meant to say that an act of the legislature would be void and a constitutional amendment would be necessary, he would have chosen more revealing words.

Alexander Hamilton must have believed that this type of change in jurisdiction was authorized by the Constitution. In writing on the provisions for the federal judiciary he concluded:

> From this review of the particular powers of the federal judiciary, as marked out in the Constitution, it appears that they are all conformable to the principles which ought to have governed the structure of that department, and which were necessary to the perfection of the system. If some partial inconveniences should appear to be connected with the incorporation of any of them into the plan, it ought to be recollected that the national legislature will have ample authority to make such exceptions, and to prescribe such regulations as will be calculated to obviate or remove these inconveniences. The possibility of particular mischiefs can never be viewed, by a well-informed mind, as a solid objection to a general principle, which is calculated to avoid general mischiefs and to attain general advantages.[59]

To hold that the Constitution does not allow this act is to impute to the framers an intent which few, if any, Americans had thought they had. It is unbelievable that the framers of our gov-

[57] 289 U.S. 516 (1933).

[58] 2 Cranch 445 (U.S. 1805).

[59] THE FEDERALIST No. 80 at 501 (Lodge ed. 1888).

ernment really intended to treat some citizens one way and others another way, when all were seeking justice.

The arguments sketched above would seem to present a rather well-defined choice for the Supreme Court, should this question go there for a final answer. But it is believed that the Supreme Court would not be restricted to one or the other of these general approaches. Whereas the judicial arguments to date have, with one exception,[60] conceded that the District of Columbia is not a state, it does not seem unreasonable to consider the possibility that the highest court may answer the problem with the simple assertion that the District of Columbia is a state for purposes of diversity jurisdiction. The 80th Congress may enact a bill, already passed by the House, which would seek to accomplish this by adding to the pertinent section of the Judicial Code: "The word 'States,' as used in this section, includes the Territories and the District of Columbia."[61] Such a statutory change would not resolve the constitutional difficulty — it would persist. A judicial revision of this definition would settle the problem.

To treat the District of Columbia as a state is not at all extraordinary. Yet it is admittedly extraordinary that citizens of the District are denied equal rights of access to the courts of the only government to which they owe allegiance.

The District of Columbia has been held to be one of the "states of the Union" within the meaning of treaties with foreign countries.[62] The same result has been reached in dealing with statutes; for example, the District is a state within the meaning of the Bankruptcy Act[63] and a federal statute authorizing each "state" to tax national bank shares.[64] It has been called a state by federal courts[65] and state courts[66] alike. And it is a recognized principle of consti-

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[60] See opinion of Circuit Judge Evans, dissenting in Central States Co-operatives v. Watson Bros. Transportation Co., 165 F. 2d at 298.

[61] H. R. 3214, 80th Cong., 1st Sess. §1332 (1947).

[62] Geofroy v. Riggs, 133 U.S. 258 syl. 3 (1890). *See* Downes v. Bidwell, 182 U.S. 244, 270 (1901), where it is said "That the District of Columbia and the territories are States, as that word is used in treaties with foreign powers, with respect to the ownership, disposition, and inheritance of property."

[63] *In re* Vidal, 233 Fed. 733, 735 (1916).

[64] "REV. STAT. §5219, as amended, U.S.C. Supp., Title 12, §741, defining and limiting the permitted taxation of national banks and their shares by States applies to Puerto Rico." Domenech v. National City Bank, 294 U.S. 199, syl. 4 (1935).

[65] See notes 63 and 64 *supra.*

[66] *See* Symons v. Eichelberger, 110 Ohio St. 224, 230, 144 N.E. 279, 280 (1924). An Illinois statute provides that the word "state" may be construed to include the District of Columbia and the territories. ILL. REV. STAT. c. 131, §1.14 (1945).

tutional interpretation that a provision of a constitution is generally given a broader meaning than that of a statute.[67]

The word "state" as it appears in the Constitution has been held to include the District of Columbia. Trial by jury is guaranteed to citizens of the federal District by Article III, Section 2, the article on the judiciary.[68] The commerce clause in Article I reads, "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[69] The District of Columbia is a state under the commerce clause.[70] Yet Chief Justice Marshall argued that since Articles I and II on the legislative and executive departments did not embrace the District of Columbia, the same result should follow in Article III.[71]

But Marshall himself was hardly consistent. Congress levied a direct tax in the apportionment of which the District of Columbia was included as well as the states.[72] Article I of the Constitution provided that "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union according to their respective numbers . . . ."[73] It was argued before the Supreme Court that the District was not included in the terms of this provision, because Columbia is not a state under the Constitution. Chief Justice Marshall delivered the opinion of the Court, which held: "Congress has authority to impose a direct tax on the District of Columbia *in proportion to the census* directed to be taken by the constitution."[74] (Emphasis supplied) In the same case he wrote "If, then, the language of the Constitution be construed to comprehend territories and the District of Columbia, as well as the states, that language confers on Congress the power of taxing the district and territories as well as the states."[75]

It has been said that in the majority of cases arising under the Constitution, the District of Columbia has been treated as a state.[76]

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[67] *See* Lamar v. United States, 240 U.S. 60 (1916).

[68] Callan v. Wilson, 127 U.S. 540 (1888).

[69] U. S. CONST. ART. I, §8 (3).

[70] Hanley v. Kansas C.S. Ry, 187 U.S. 617 (1903); Stoutenburgh v. Hennick, 129 U.S. 141 (1889).

[71] Hepburn & Dundas v. Ellzey, 2 Cranch 445 (U.S. 1805).

[72] DILLON, MARSHALL, COMPLETE CONSTITUTIONAL DECISIONS ANNO. 340 (1903).

[73] U. S. CONST. ART I, §2 (3). This provision was amended by AMEND. XIV, §2, and AMEND. XVI.

[74] Loughborough v. Blake, 5 Wheat. 317, syl. 1 (U.S. 1820).

[75] *Id.* at 323.

[76] "If a numerical recapitulation were made of the instances in which the word 'state' has been considered as including the District of Columbia and the territories and of the instances in which it has not, undoubtedly the former would be the larger of the totals." Comment, 29 GEO. L. J. 193, 198 (1940). *See* 46 COL. L. REV. 125, 126 n. 6 (1946).

It is believed that the courts generally have included the District as a state where that was necessary in order to reach a proper result, a result consistent with the spirit of our democratic government. Equality of citizens is a foundation stone of the American government. This may be a situation in which the Supreme Court will include the citizens of the District of Columbia as equals of their fellow citizens in this respect, without deserting the principles of the constitutional Union.

Charles W. Davidson, Jr.

The Power of the District Courts of the United States To Remand or Dismiss as Affected by H. R. 3214

H.R. 3214, the proposed revision of title 28 of the United States Code,[1] omits the present Section 80[2] which reads as follows:

> If in any suit commenced in a district court or removed from a state court to a district court of the United States, it shall appear to the satisfaction of said district court, at any time after such suit has been brought or removed thereto, that such a suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, or that the parties to said suit have been improperly or collusively joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said district court shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just.

H.R. 3214 provides that the district court shall "not have jurisdiction of a civil action in which any party . . . has been improperly or collusively . . . joined to invoke the jurisdiction of such court,"[3] but omits the provision that the district court shall dismiss or remand a suit when it appears that it "does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court."[4]

Will this omission affect the power of the district court to dismiss cases coming before it for lack or loss of jurisdiction? The Committee on the Judiciary of the House of Representatives evidently thought not for in referring to this omission it stated:

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[1] Title 28 of the United States Code is being revised by the Congress of the United States. This bill, which will replace the present title 28 was passed by the House of Representatives as H.R. 3214 on July 7, 1947, and was referred to the Senate Committee on the Judiciary.

[2] 36 STAT. 1090 (1911), 28 U.S.C. §80 (1940).

[3] H.R. 3214 §1359.

[4] 18 STAT. 470 (1875).