a clear denunciation of this dispossessing power on the part of the Crown was inserted in their Bill of Rights; and yet the power assumed by President Grant in his message was to execute so much of the law as he approved and dispense with the residue. President Grant, with a view to enabling the President to veto certain appropriations in a general bill while sanctioning others, recommended an amendment to the Constitution to that effect, which was also done by President Cleveland in a later administration. The question was referred to the Committee on Judiciary in the 49th Congress in the form of resolutions to amend the Constitution so as to give authority to the President, when a bill contains more than one appropriation, and has passed both Houses, to veto any of the appropriations and approve the others. The committee reported against such an amendment, and the grounds upon which it was done may be seen by reference to the report.[1] The prominent reason urged by the committee against such an amendment (which was incorporated into the Constitution of the Confederate States) was that appropriations may be made by Congress for various purposes, all of which in their opinion it was proper to make, and which are voted for by members as dependent appropriations; the combining them in one bill is intended to prevent the partial exercise of powers for expenditures in one State which were proper to be made in other States and sections. The vote of Congress for any one of them is therefore secured for all on condition that each shall be valid. If the President, therefore, could by the veto power separate these dependent appropriations, and allow one class while the other classes were vetoed, it would give to him enormous and dangerous powers, against the will of Congress, to make partial and unjust discriminations between the different sections of the country.

[1] Report H. R. No. 1779, 49th Cong., 1st Sess.

CHAPTER XIII.

THE JUDICIAL DEPARTMENT.

§ 364. In the orderly arrangement of the Constitution, the first and second articles have prescribed the Constitution and defined the powers of the Legislative and Executive Departments; the third article relates to the Judicial Department. The language of the first section is as follows: "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office." This clause may be read in connection with the clause "to constitute tribunals inferior to the Supreme Court."[1] As was declared in reference to the other two departments, this declares the judicial power of the United States shall be vested in one Supreme Court. "Judicial power," not legislative or executive power. These three articles therefore seem to indicate the clear intention to keep the three departments of government in distinct hands, according to the famous maxim of Baron Montesquieu. The framers of the Constitution, looking to the independence of the judiciary and the independence of all the departments of the government, as well as to the passions and opinions of the people, following the precedent of the English government in the third year of William and Mary, made the tenure of the judicial office "during good behavior,"[2] so that there is no power to remove a judge except under the clause in respect to impeachment.

[1] Const. U. S., Art. I, sec. 8, clause 9. [2] 3 Madison Papers, 1365, 1458–59.

Again, the Judicial Department, as an independent one, is essential to the paramount force of the Constitution. It was the intention of the framers of the Constitution that the judicial power should be the protector of the Constitution against violation by either of the other departments, or by the States. Mr. Hamilton, in the *Federalist*,[1] discusses this point, upon reason which only foreshadowed the masterly judgment of the great Chief Justice in the case of *Marbury v. Madison*,[2] which rests upon the simple proposition that, as between two laws or between two authorities, the supreme must have effect given to it over the subordinate, in order to preserve the integrity of the Constitution. The court does not assume superiority over the legislative or executive departments. By its judgment it gives it supremacy which is superior to all over the *ultra vires* acts of either of the departments, or of any officer or State. Without such a judicial power the paramount force of the Constitution would have been paralyzed, and the departments of government would have held practical supremacy over the supreme law of the land. In fact, it is the essential attribute of judicial power, wherever vested, whether in the Supreme Court or a justice of the peace, to give effect to the paramount law, and where the supreme law and the subordinate law come into conflict, to declare that the former shall have effect and that the latter shall be null and void. The clause goes on to insure this independence by requiring that these judges shall not only hold their offices by the tenure of good behavior, but shall receive for their services a compensation which shall not be diminished during their continuation in office. It may be increased, if Congress shall see proper to add compensation for services inadequately compensated, but it shall not be diminished. The power that holds the purse strings shall not starve a judge into compliance with its demands. This is distinguished from the provision as to the President. His compensation shall neither be increased nor diminished during the term of office. It

[1] No. LXXVIII. [2] 1 Cr. 176.

remains to consider in whom this judicial power is vested. The legislative powers were vested in a Congress; the executive powers in a President. In whom shall the judicial power be vested?

§ **365.** (*a*) In one Supreme Court. The unity of the court is assured in order to its supremacy. It is a constitutional court; not created by law, nor to be dispensed with by law, but to be organized by law under the terms of the co-efficient power. The Constitution does not prescribe of how many members it shall consist, hence Congress must make the laws necessary and proper to carry into execution the power vested in this one Supreme Court, in whom the Constitution of the United States vested the judicial power.[1] It will be noted that the Constitution says nothing of the Chief Justice at all, but in a previous provision it is declared that the Chief Justice shall preside when the President of the United States is tried upon impeachment. This by clear inference enjoins upon Congress, in the organization of the Supreme Court, the creation of the office of Chief Justice. (*b*) The judicial power of the United States shall be vested not alone in one Supreme Court, but "in such inferior courts as the Congress may from time to time ordain and establish;" and as already shown, this clause corresponds to a previous article of the Constitution.[2] (*c*) As nothing is said in this clause as to the number of judges in the Supreme Court, Congress must, by law organizing the court, determine this question; accordingly, the Judicial Act of 1789, drawn by the master hand of Oliver Ellsworth, prescribed all of the particulars in the organization of the Supreme Court; but it must be well noted that the jurisdiction of the Supreme Court is constitutional. Its organization is defined by law, but when once organized it is the reception for all of the powers supplied from the judicial reservoir of the Constitution itself, from which Constitution, and not from Congress, save through the medium of the co-efficient power of Congress, it derives all of its authority.

[1] Const. U. S., Art. I, sec. 8, clause 18. [2] Id., Art. I, sec. 8, clause 9.

What this authority is, vested in it by the Constitution, will be noted later.

The jurisdiction of the inferior courts not being prescribed by the Constitution itself must be fixed and defined by Congress under the co-efficient clause, so often referred to. It will thus be noted that while the Constitution itself defines the jurisdiction of the Supreme Court, the jurisdiction of the inferior courts is prescribed and defined by law of Congress. As to the latter Congress has full discretion; as to the former it has none, except as a subsequent clause gives qualified power to Congress to make regulations.

Under this power to ordain and establish inferior courts, as well as to make laws to organize the Supreme Court, there have been constituted and now exist, as the judicature of the United States, the following courts: First, a Supreme Court, now consisting of a Chief Justice and eight other associate justices. Second, circuit courts, district courts and intermediate courts of appeal. Third, a court of claims, as to suits against the United States, established originally in 1853, with jurisdiction enlarged and qualified by the act of 1887. Fourth, courts in the Territories, which have been decided not to be United States courts, where therefore the judges hold at pleasure and not during good behavior.[1] It will be perceived, therefore, that if Congress had not by law exercised this co-efficient power above referred to, there would have been no Supreme Court of the United States of any kind, and the State courts would have been left as the judicial conservators of the Constitution of the United States against unconstitutional laws by Congress or the States, and would have held all the jurisdiction which by the Constitution is intended to be conferred upon the Federal judicature; and so now, except so far as the judicial power has been delegated to and vested in the Federal courts by the Constitution and the acts of Congress, and is not prohibited by it to the States, the latter have the complete reserve power to deal with all

[1] American Ins. Co. v. Canter, 1 Pet. 511; Cooley on Const. Law, 52, 53.

such questions under the tenth amendment to the Constitution of the United States.

Further, the jurisdiction of the Supreme Court is defined by a subsequent clause of the Constitution in these words: "In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned (that is, mentioned in a previous clause which has not yet been referred to) the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make."[1]

Thus as far as the original jurisdiction is concerned, that is vested by the Constitution itself, without power of Congress to qualify or regulate it. But as to its appellate jurisdiction, the Supreme Court holds it both as to law and fact, with such exceptions and under such regulations as the Congress shall make, thus giving to Congress a very large discretion in the limitation of the jurisdiction of the Supreme Court and in the regulation of such as it generally exercises. Accordingly in the act of 1789, and of the other acts of Congress upon this subject, the discretion of Congress has been largely exercised in limiting and excepting from its appellate jurisdiction a large number of the cases that are mentioned in the previous clause. So that the appellate jurisdiction of the Supreme Court and the original jurisdiction of other Federal courts is capable, under the Constitution, of greater enlargement than has been prescribed in the acts of Congress. This will be explained as we proceed.

The general nature of the judicial power of the United States is described in the second section and first clause of this third article of the Constitution. The language will be quoted in full: "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting am-

[1] Const. U. S., Art. III, sec. 2, clause 2.

bassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States, between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens, or subjects." This general system has always been analyzed into, first, cases which belong to the jurisdiction of the Federal courts because of subject-matter; second, to cases which belong to the Federal jurisdiction because of parties. The word "cases," here used, and the word "controversies," several times used in the above-quoted clause, may be defined as "where parties litigate before a court as to rights of property or person." Judge Tucker[1] distinguishes between cases and controversies thus: "Cases here seems to include all cases, criminal as well as civil, and controversies only such as are of the civil nature;" and this distinction of Judge Tucker is in accord with the opinion of Justice Iredell in *Chisholm v. Georgia*,[2] and by Judge Story in his Commentaries.[3] Now the jurisdiction extends to all cases in law or equity; this obviously fixed in the organism of the Federal judicature the two jurisdictions of common law and chancery. These jurisdictions were parts of the law of every one of the original States, and that made this distinction between law and equity a part of the Constitution of the United States. These constitutional branches of the Federal judicial procedure, and the new procedure which ignores this distinction in some of the States and the civil-law system in Louisiana, which never recognized it, will not be always left to ignore the distinction between these two branches of jurisdiction in any cases arising in a Federal court, though it may in a State where law and equity are not recognized as distinct jurisdictions.[4] The cases in law

[1] 1 Tucker's Blackstone, Appendix, 420–21.

[2] 2 Dall. 419, 431–32.

[3] Story's Com., sec. 1668.

[4] Thompson v. Railroads, 6 Wall. 134; Hunt v. Hollinsworth, 100 U. S. 100; Northern Pacific R. R. v. Paine, 119 id. 561, and many cases cited.

or equity arising in the Federal jurisdiction on account of subject-matter may be arranged under the following heads: First, cases arising under the Constitution of the United States; as where a law of the United States or one of the States is repugnant thereto, and a right protected by the Constitution is violated by the law, and in like cases where the executive power trenches upon the personal and constitutional right of the citizen. Second, cases arising under treaties made under the authority of the United States; as where a right secured to a party under a treaty made under such authority is violated, the party may assert his right in a Federal court. Third, cases arising under the United States laws; and United States laws made in pursuance of the Constitution are the supreme law of the land.[1] A personal right secured under such law of the United States, if violated, may be the subject of a suit for its vindication. That is a case for Federal jurisdiction arising under the laws of the United States; thus, cases in bankruptcy, cases of patents, copyrights, and so on. In the case of *Boyd v. Nebraska*,[2] Boyd claimed, under the naturalization law of the United States, that he was eligible to the office of Governor of Nebraska. The State denied it to him, and he asserted his right before the Federal courts, and the Supreme Court adjudicated in his favor. It was a case of right to a State office, arising under the law of the United States, and yet denied to him by the State. Fourth, admiralty and maritime jurisdiction. The vindication of this jurisdiction being vested in the Federal courts will be found strongly stated in the *Federalist*.[3] A word may be added in respect to it. To have left the final arbitrament of cases involving the repugnance of the law of Congress or of the State to the Constitution of the Union, or any right secured by the Constitution of the United States to a person, or by a treaty made under its authority, or of the law made in pursuance thereof, to the jurisdiction of the local courts of the States, would have not only subjected this class of ques-

[1] Const. U. S., Art. VI, clause 2.

[2] 143 U. S. 135.

[3] No. LXXX.

tions to as many contrary decisions as there were States in the Union, but would have paralyzed the essential force of the Constitution itself, by subjecting the extent of its operations to the judgment of local courts. It was therefore reasonable to confer upon the courts, created under the authority of the United States power to vindicate in their full integrity the provisions of the Constitution itself as well as the laws and treaties made under its authority. Again, as admiralty and maritime jurisdiction belongs to the realm of commerce, and must be under the supervision of the power which regulates foreign and interstate commerce, it would become a necessity to subject the construction of the laws made by Congress in reference to commerce and the general questions of commercial relations with foreign nations and among the several States, not to the local tribunals of the several States, but to judicial tribunals who held their authority under all the States in their united character.

§ 366. As to the jurisdiction which grows out of the character of the parties without regard to subject-matter, that may be defined as follows: First, where ambassadors, other public ministers and consuls are affected. Every government, by international law, is responsible to foreign nations for the treatment of their ambassadors, public ministers and consuls. Improper treatment may be a *casus belli*. The government which receives them and deals with them is responsible for their treatment, and should have in its own organization the means to meet the demands which international duty imposes. To leave cases affecting these public officers of foreign nations, sent to deal with the government of the United States, to the jurisdiction of the State courts would be an anomaly in our system. The courts for the trial of such cases should, therefore, be those of the United States, and that irrespective of the subject-matter of the case. Second, "to controversies to which the United States shall be a party." Cases in which the United States are interested could not properly be left to the jurisdiction of the local courts of the place. There might be as many diverse decisions in respect to the rights as there were States in the Union. The rights of the United States can therefore only properly be asserted and vindicated in the courts of the Union. Third, "to controversies between two or more States." How could a fair and just arbitrament of such controversies be found in the courts of either of the States involved in the controversy, and where could a fair and impartial arbitration be sought but in the courts of the whole Union. Fourth, "between a State and citizens of another State." If the other State courts were left to decide such a controversy, could the opposing State hope for impartiality? The courts of the Union are therefore selected as those which must decide such a controversy. Fifth, "between citizens of different States." The same danger of partiality would arise here, for the court of the State of the defendant would naturally be inclined to favor the defendant against the stranger plaintiff. The court of the Union, though held in the State of the defendant, is therefore selected as the fairest tribunal for the trial of the controversy. Sixth, "between citizens of the same State, claiming lands under grants of different States." The courts of either of the States granting the land might naturally be supposed to support the title conferred by the State to which they belonged, and hence the jurisdiction for such cases was sought in the more impartial attitude of the courts of the Union. Seventh, "between a State, or the citizens thereof, and foreign States, citizens or subjects." In this case the same reason would apply to give to the United States courts the jurisdiction instead of the courts of the State whose own interest, or that of their citizen, was in controversy with a foreign State or a foreign citizen or subject.

It will thus be seen by this brief review that the framers of the Constitution were sagacious in selecting the Federal tribunals for the decision of cases where the character of the parties would make the decision of the State tribunals less fair and impartial in the decision of these controversies than the local courts of the States. So that we see, in the

reason of the thing, the vindication of the wisdom of the Constitution, which vested in the judicial power of the United States the decision of these two great classes of cases. First, where the subject-matter of the case, without regard to the character of the parties; and second, where relations of the parties, without regard to the subject-matter in controversy, make it proper to vest the jurisdiction in the Federal rather than in the State courts.

The language of the clause extends the judicial power to all cases arising under the Constitution, etc.; to all cases affecting ambassadors, etc.; to all cases of admiralty and maritime jurisdiction; and then changes the phraseology as to the other classes of cases already referred to, extending the Federal jurisdiction to those cases, but not to all such cases. The insertion of the word "all" as to some of these, and the exclusion of it as to others, would seem to indicate, as a fair construction of the whole, that those cases where the word "all" is used may, by the action of Congress in defining the jurisdiction of the inferior courts which it is authorized to ordain and establish, and in those cases where the Supreme Court's appellate jurisdiction is to be subject to such exceptions and regulations as Congress shall make, be exclusively given to the United States courts. But as to those where the word "all" is not used, the State judiciary may be left to have concurrent jurisdiction with the Federal courts, but subject to the power of Congress to bring them within the Federal jurisdiction. It has been held in a number of cases that in these cases of concurrent jurisdiction, whichever court, Federal or State, gets jurisdiction first of the subject-matter or of the parties, will hold it against the interference of the other.[1]

The scheme of the judicial department was obviously, first, to make the judicial power commensurate with the ex-

[1] Smith v. McIver, 9 Wheat. 532; Hagan v. Lucas, 10 Pet. 400; Shelby v. Bacon, 10 How. 56; Ableman v. Booth, 21 id. 506; Freeman v. Howe, 24 id. 450; Noonan v. Bradley, 9 Wall. 404; Covill v. Heyman, 111 U. S. 175; Rio Grande R. R. v. Gonida, 132 id. 478.

ecutive and legislative powers of the government. Second, to make all cases which concern all of the States, or any of the States, or the citizens of the different States, cognizable by the Federal courts, and not leave them to the adjudication of any one of the States. Third, to provide that what concerns the relations of each of the States to foreign nations, or to the people of foreign nations, must be adjudged by the tribunals constituted by all of the States, and not by those constituted by any one State. All being interested in the results of the adjudication in such cases, the rights of all should not be subject to the capricious or partial action of any one.

§ 367. We will proceed now to consider these various branches of jurisdiction in consecutive order. First, all cases arising under the Constitution, etc., shall be within the scope of the judicial power of the United States. From what has been already said, it will be seen that it is of the nature of judicial power to decide upon the constitutionality of any law or act of the government. The supremacy of the Constitution over all such laws and acts is admitted in theory; but how shall this supremacy be made effectual, if in the decision of controversies arising, etc., the courts trying the question cannot give practical supremacy to the Constitution by declaring the law or act of the government inoperative, null and void? It is therefore of the very nature of judicial power to subordinate the laws and acts of the government to the Constitution by declaring such acts to be null and void where they conflict with the Constitution.

The leading case of *Marbury v. Madison*,[1] in which the masterly judgment of Chief Justice Marshall has exhausted the reasons for this principle, is all that need here be referred to. That such a power was contemplated by the Constitution is evident from the writings in the *Federalist*.[2] It is obvious, however, that the judicial power of one State, in deciding upon a case arising under the Constitution, might be in favor of the constitutionality of the law or act of the government, and the decision in another State might

[1] 1 Cr. 137, 176. [2] Nos. LXXX, LXXXI, LXXXII.

be against it. The effect of these diverse decisions upon the same class of cases arising under the Constitution, while conclusive as to the particular controversy, would make the Constitution in effect different in the different States and in its application to these various cases. The Constitution itself, therefore, declared to be the supreme law of the land, would be one thing in one State and a different thing in another State. This would be not only an anomaly in our system, but a great grievance; for instead of one uniform Constitution operating alike upon all the States and the people of the entire Union, we should have as many Constitutions, in effect, as there were diverse opinions among the State judges deciding upon such questions. It was therefore of the first importance that some means should be devised, and that through the judicial department, for making the Constitution uniform in its operation by uniform decisions as to its meaning in every State in the Union and binding upon all the people of all the states. How is this uniformity to be reached?

Some device must be invented by which these diverse decisions may at least be brought to the arbitrament of the one Supreme Court in which the judicial power of the United States is vested. This would make the Constitution uniform in its effect, as it is in theory, and in no other way can it be done. Several modes of doing this were possible. Congress might so constitute the inferior Federal courts as to give them exclusive jurisdiction over such cases as by the Constitution were within the scope of their jurisdiction. But this would be a great evil, *e. g.:* a suit by a citizen of New York against a citizen of Virginia is between citizens of different States, and therefore within the jurisdiction of the Federal courts. But to make it exclusive in these courts would require a suit for $5, as well as a suit for $100,000, to be brought in the United States court, which, looking to the distance of these courts, in many cases, from the parties and witnesses whose attendance would be necessary, would make the expenses of litigation too onerous to be borne. Besides, every lawyer will see at once that the

Federal question, wherein the cases may be said to arise under the Constitution, may never emerge in the course of the controversy until upon the trial of the cases, which would be after the court had taken jurisdiction. In other words, the State court *in limine* would seem to have full jurisdiction, but the constitutional question, supervening in the course of the trial, would show that the Federal court might have had jurisdiction. Hence, in the Judiciary Act of 1789, this exclusiveness of jurisdiction in the Federal courts was rejected and the limit of that jurisdiction is found in cases where the amount involved in controversy was $500, and now by the act of 1887 raised to $2,000. This first method, therefore, was never adopted, as being impracticable. Second, another method might have been adopted: to authorize a removal of a case begun in the State court to the Federal court whenever a constitutional question was involved; but this was inconvenient and impossible for the reason already suggested, that the constitutional question might not emerge until the trial of the case was begun. The original jurisdiction, therefore, could not by anticipation be fixed in the Federal court, because *non constat* the Federal question might ever arise. But this process of removal has been adopted from the beginning where the character of the controversy involving a constitutional question was apparent before trial. This will be referred to hereafter. Third, it might have been made lawful to litigate in the United States court a controversy once adjudged in the State court, when it was apparent that such adjudication involved a constitutional question proper for the judgment of the Federal court; but this would be very awkward and inconvenient. Fourth, another method was adopted by the act of 1789 and has continued until this day. The twenty-fifth section of that act provided that when the highest appellate court of the State decided adversely to a right claimed under the Constitution of the United States, or under a treaty or law of the United States, the party so decided against might appeal from the supreme appellate court of the State to the Supreme Court of