The Debates in the Convention of the Commonwealth of Virginia on the Adoption of the Federal Constitution

In Convention, Richmond, Friday, June 20, 1788

[The 1st and 2d sections of the 3d article still under consideration.]

Mr. MADISON. Mr. Chairman, permit me to make a few observations, which may place this part in a more favorable light than the gentleman placed it in yesterday. It may be proper to remark that the organization of the general government for the United States was, in all its parts, very difficult. There was a peculiar difficulty in that of the executive. Every thing incident to it must have participated in that difficulty. That mode which was judged most expedient was adopted, till experience should point out one more eligible. This part was also attended with difficulties. It claims the indulgence of a fair and liberal interpretation. I will not deny that, according to my view of the subject, a more accurate attention might place it in terms which would exclude some of the objections now made to it. But if We take a liberal construction, I think we shall find nothing dangerous or inadmissible in it. In compositions of this kind, it is difficult to avoid technical terms which have the same meaning. An attention to this may satisfy gentlemen that precision was not so easily obtained as may be imagined. I will illustrate this by one thing in the Constitution. There is a general power to provide courts to try felonies and piracies committed on the high seas. Piracy is a word which may be considered as a term of the law of nations. Felony is a word unknown to the law of nations, and is to be found in the British laws, and from thence adopted in the laws of these states. It was thought dishonorable to have recourse to that standard. A technical term of the law of nations is therefore used, that we should find ourselves authorized to introduce it into the laws of the United States. The first question which I shall consider is, whether the subjects of its cognizance be proper subjects of a federal jurisdiction. The second will be, whether the provisions respecting it be consistent with safety and propriety, will answer the purposes intended, and suit local circumstances.

The first class of cases to which its jurisdiction extends are those which may arise under the Constitution; and this is to extend to equity as well as law. It may be a misfortune that, in organizing any government, the explication of its authority should be left to any of its coordinate branches. There is no example in any country where it is otherwise. There is a new policy in submitting it to the judiciary of the United States. That causes of a federal

nature will arise, will be obvious to every gentleman who will recollect that the states are laid under restrictions, and that the rights of the Union are secured by these restrictions. They may involve equitable as well as legal controversies: With respect to the laws of the Union, it is so necessary and expedient that the judicial power should correspond with the legislative, that it has not been objected to. With respect to treaties, there is a peculiar propriety in the judiciary's expounding them.

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

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

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

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

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

To the next clause there is no objection.

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

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

may remand the fact, or send it to an inferior contiguous court, to be tried; or otherwise preserve that ancient and important trial.

Let me observe that, so far as the judicial power may extend to controversies between citizens of different states, and so far as it gives them power to correct, by another trial, a verdict obtained by local prejudices, it is favorable to those states which carry on commerce. There are a number of commercial states which carry on trade for other states. Should the states in debt to them make unjust regulations, the justice that would be obtained by the creditors might be merely imaginary and nominal. It alight be either entirely denied, or partially granted. This is no imaginary evil. Before the war, New York was to a great amount a creditor of Connecticut. While it depended on the laws and regulations of Connecticut, she might withhold payment. If I be not misinformed, there were reasons to complain. These illiberal regulations and causes of complaint obstruct commerce. So far as this power may be exercised, Virginia will be benefited by it. It appears to me, from the most correct view, that, by the word regulations, authority is given them to provide against the inconveniences; and so far as it is exceptionable, they can remedy it. This they will do if they be worthy of the trust we put in them. I think them worthy of that confidence which that paper puts in them. Were I to select a power which might be given with confidence, it would be judicial power. This power cannot be abused, without raising the indignation of all the people of the states. I cannot conceive that they would encounter this odium. Leaving behind them their character and friends, and carrying with them local prejudices, I cannot think they would run such a risk. That men should be brought from all parts of the Union to the seat of government, on trivial occasions, cannot reasonably be supposed. It is a species of possibility; but there is every degree of probability against it. I would as soon believe that, by virtue of the power of collecting taxes or customs, they would compel every man to go and pay the money for his taxes, with his own hands, to the federal treasurer, as I would believe this. If they would not do the one, they would not the other.

I am of opinion (and my reasoning and conclusions are drawn from facts) that, as far as the power of Congress can extend, the judicial power will be accommodated to every part of America. Under this conviction I conclude that the legislation, instead of making the Supreme Federal Court absolutely stationary, will fix it in different parts of the continent, to render it more convenient. I think this idea perfectly warrantable. There is an example, within our knowledge, which illustrates it. By the Confederation, Congress have an exclusive right of establishing rules for deciding, in all cases, what captures should be legal, and establishing courts for determining such cases finally. A court was established for that purpose, which was at first stationary. Experience, and the desire of accommodating the decision of this court to the convenience of the citizens of the different parts of America, had this effect—it soon became a regulation that this court should be held in different parts of America, and it was held accordingly. If such a regulation was made, when only the interest

of the small number of people who are concerned with captures was affected, will not the public convenience be consulted, when that of a very considerable proportion of the people of America will be concerned? It will be also in the power of Congress to vest this power in the state courts, both inferior and superior. This they will do, when they find the tribunals of the states established on a good footing.

Another example will illustrate this subject further. By the Confederation, Congress are authorized to establish courts for trying piracies and felonies committed on the high seas. Did they multiply courts unnecessarily in this case? No, sir; they invested the admiralty courts of each state with this jurisdiction. Now, sir, if there will be as much sympathy between Congress and the people as now, we may fairly conclude that the federal cognizance will be vested in the local tribunals.

I have observed that gentlemen suppose that the general legislature will do every thing mischievous they possibly can, and that they will omit to do every thing good which they are authorized to do. If this were a reasonable supposition, their objections would be good. I consider it reasonable to conclude that they will as readily do their duty as deviate from it; nor do I go on the grounds mentioned by gentlemen on the other side—that we are to place unlimited confidence in them, and expect nothing but the most exalted integrity and sublime virtue. But I go on this great republican principle, that the people will have virtue and intelligence to select men of virtue and wisdom. Is there no virtue among us? If there be not, we are in a wretched situation. No theoretical checks, no form of government, can render us secure. To suppose that any form of government will secure liberty or happiness without any virtue in the people, is a chimerical idea. If there be sufficient virtue and intelligence in the community,it will be exercised in the selection of these men; so that we do not depend on their virtue, or put confidence in our rulers, but in the people who are to choose them.

Having taken this general view of the subject, I will now advert to what has fallen from the honorable gentleman who presides. His criticism is, that the judiciary has not been guarded from an increase of the salary of the judges. I wished myself to insert a restraint on the augmentation, as well as diminution, of their compensation, and supported it in the Convention. But I was overruled. I must state the reasons which were urged. They had great weight. The business must increase. If there was no power to increase their pay, according to the increase of business, during the life of the judges, it might happen that there would be such an accumulation of business as would reduce the pay to a most trivial consideration. This reason does not hold as to the President; for, in the short period in which he presides, this cannot happen. His salary ought not, therefore, to be increased. It was objected, yesterday, that there was no provision for a jury from the vicinage. If it could have been done with safety, it would not have been opposed. It might so happen that a trial would be impracticable in the country. Suppose a rebellion in a whole district; would it not be

impossible to get a jury? The trial by jury is held as sacred in England as in America. There are deviations from it in England; yet greater deviations have happened here, since we established our independence, than have taken place there for a long time, though it be left to the legislative discretion. It is a misfortune in any case that this trial should be departed from; yet in some cases it is necessary. It must be, therefore, left to the discretion of the legislature to modify it according to circumstances. This is a complete and satisfactory answer.

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

As to vexatious appeals, they can be remedied by Congress. It would seldom happen that mere wantonness would produce such an appeal, or induce a man to sue unjustly. If the courts were on a good footing in the states, what can induce them to take so much trouble? I have frequently, in the discussion of this subject, been struck with one remark. It has been urged that this would be oppressive to those who, by imprudence or otherwise, come under the denomination of debtors. I know not how this can be conceived. I will venture one observation. If this system should have the effect of establishing universal justice, and accelerating it throughout America, it will be one of the most fortunate circumstances that could happen for those men. With respect to that class of citizens, compassion is their due. To those, however, who are involved in such encumbrances, relief cannot be granted. Industry and economy are the only resources. It is vain to wait for money, or temporize. The great desiderata are public and private confidence. No country in the world can do without them. Let the influx of money be ever so great, if there be no confidence, property will sink in value, and there will be no inducement or emulation to industry. The circulation of confidence is better than the circulation of money. Compare the situation of nations in Europe, where justice is administered with celerity, to that of those where it is refused, or administered tardily. Confidence produces the best effects in the former. The establishment of confidence will raise the value of property, and relieve those who are so unhappy as to be involved in debts. If this be maturely considered, I think it will be found that, as far as it will establish uniformity of justice, it will be of real advantage to such persons. I will not enter into those considerations which the honorable gentleman added. I hope some other gentleman will undertake to answer.

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

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

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

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

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

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

understand technical terms. Their rights ought to be secured in language of which they know the meaning. As they do not know the meaning of such terms, they may be injured with impunity. If they dare oppose the hands of tyrannical power, you will see what has been practised elsewhere. They may be tried by the most partial powers, by their mst implacable enemies, and be sentenced and put to death, with all the forms of a fair trial. I would rather be left to the judges. An abandoned juror would not dread the loss of character like a judge. From these, and a thousand other considerations, I would rather the trial by jury were struck out altogether. There is no right of challenging partial jurors. There is no common law f America, (as has been said,) nor constitution, but that on your table. If there be neither common law nor constitution, there can be no right to challenge partial jurors. Yet the right is as valuable as the trial by jury itself.

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

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

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

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

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

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

But on this occasion, as on all others, we are admonished to rely on the wisdom and virtue of our rulers. We are told that the members from Georgia, New Hampshire, &c., will not dare to infringe this privilege; that, as it would excite the indignation of the people, they would not attempt it: that is, the enormity of the offence is urged as a security against its commission. It is so abominable that Congress will not exercise it. Shall we listen to arguments like these, when trial by.jury is about to be relinquished? I beseech you to consider before you decide. I ask you, What is the value of that privilege? When Congress, in all the plenitude of their arrogance, magnificence, and power, can take it from you, will you be satisfied? Are we to go so far as to concede every thing to the virtue of Congress? Throw yourselves at once on their mercy; be no longer free than their virtue will predominate: if this will satisfy republican minds, there is an end of every thing. I disdain to hold any thing of any man. We ought to cherish that disdain America viewed with indignation the idea of holding her rights of England. The Parliament gave you the most solemn assurances that they would not exercise this power. Were you satisfied with their promises? No. Did you trust any man on earth? No. You answered that you disdained to hold your innate, indefeasible rights of any one. Now, you are called upon to give an exorbitant and most alarming power. The genius of my countrymen is the same now that it was then. They have the same feelings. They are equally martial and bold. Will not their answer therefore be the same? I hope that gentlemen will, on a fair investigation, be candid, and not on every occasion recur to the virtue of our representatives.

When deliberating on the relinquishment of the sword and purse, we have a right to some other reason than the possible virtue of our rulers. We are informed that the strength and energy of the government call for the surrender of this right. Are we to make our country strong by giving up our privileges? I tell you that, if you judge from reason, or the experience of other nations, you will find that your country will be great and respectable according as you will preserve this great privilege. It is prostrated by that paper. Juries from the vicinage being not secured, this right is in reality sacrificed; All is gone. And why? Because a rebellion may arise. Resistance will come from certain countries, and juries will come from the same countries.

I trust the honorable gentleman, on a better recollection, will be sorry for this observation. Why do we love this trial by jury? Because it prevents the hand of oppression from cutting you off. They may call any thing rebellion, and deprive you of a fair trial by an impartial jury of your neighbors. Has not your mother country magnanimously preserved this noble privilege upwards of a thousand years? Did she relinquish a jury of the vicinage because there was a possibility of resistance to oppression? She has been magnanimous enough to resist every attempt to take away this privilege. She has had magnanimity enough to rebel when her rights were infringed. That country had juries of hundredors for many generations. And shall Americans give up that which nothing could induce the English

people to relinquish? The idea is abhorrent to my mind. There was a time when we should have spurned at it. This gives me comfort—that, as long as I have existence, my neighbors will protect me. Old as I am, it is probable I may yet have the appellation of rebel. I trust that I shall see congressional oppression crushed in embryo. As this government stands, I despise and abhor it. Gentlemen demand it, though it takes away the trial by jury in civil cases, and does worse than take it away in criminal cases. It is gone unless you preserve it now. I beg pardon for speaking so long. Many more observations will present themselves to the minds of gentlemen when they analyze this part. We find enough, from what has been said, to come to this conclusion—that it was not intended to have jury trials at all; because, difficult as it was, the name was known, and it might have been inserted. Seeing that appeals are given, in matters of fact, to the Supreme Court, we are led to believe that you must carry your witnesses an immense distance to the seat of government, or decide appeals according to the Roman law. I shall add no more, but that I hope that gentlemen will recollect what they are about to do, and consider that they are going to give up this last and best privilege.

Mr. PENDLETON. Mr. Chairman, before I enter upon the objections made to this part, I will observe that I should suppose, if there were any person in this audience who had not read this Constitution, or who had not heard what has been said, and should have been told that the trial by jury was intended to be taken away, he would be surprised to find, on examination, that there was no exclusion of it in civil cases, and that it was expressly provided for in criminal cases. I never could see such intention, or any tendency towards it. I have not heard any arguments of that kind used in favor of the Constitution. If there were any words in it which said that trial by jury should not be used, it would be dangerous. I find it secured in criminal cases, and that the trial is to be had in the state where the crime shall have been committed. It is strongly insisted that the privilege of challenging, or excepting to the jury, is not secured. When the Constitution says that the trial shall be by jury, does it not say that every incident will go along with it? I think the honorable gentleman was mistaken yesterday in his reasoning on the propriety of a jury from the vicinage.

He supposed that a jury from the neighborhood is had from this view—that they should be acquainted with the personal character of the person accused. I thought it was with another view—that the jury should have some personal knowledge of the fact, and acquaintance with the witnesses, who will come from the neighborhood. How is it understood in this state? Suppose a man, who lives in Winchester, commits a crime at Norfolk; the jury to try him must come, not from Winchester, but from the neighborhood of Norfolk. Trial by jury is secured by this system in criminal cases, as are all the incidental circumstances relative to it. The honorable gentleman yesterday made an objection to that clause which says that the judicial power shall be vested in one Supreme Court, and such inferior courts as Congress may ordain and establish. He objects that there is an unlimited power of appointing inferior courts. I refer to that gentleman, whether it would have been proper to limit this power.

Could those gentlemen who framed that instrument have extended their ideas to all the necessities of the United States, and seen every case in which it would be necessary to have an inferior tribunal? By the regulations of Congress, they may be accommodated to public convenience and utility. We may expect that there will be an inferior court in each state; each state will insist on it; and each, for that reason, will agree to it.

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

His next objection was to the first two clauses—cases arising under the Constitution, and laws made in pursuance thereof. Are you to refer these to the state courts? Must not the judicial powers extend to enforce the federal laws, govern its own officers, and confine them to the line of their duty? Must it not protect them, in the proper exercise of duty, against all opposition, whether from individuals or state laws? No, say gentlemen, because the legislature may make oppressive laws, or partial judges may give them a partial interpretation. This is carrying suspicion to an extreme which tends to prove there should be no legislative or judiciary at all. The fair inference is, that oppressive laws will not be warranted by the Constitution, nor attempted by our representatives, who are selected for their ability and integrity, and that honest, independent judges will never admit an oppressive construction.

But, then, we are alarmed with the idea of its being a consolidated government. It is so, say gentlemen, in the executive and legislative, and must be so in the judiciary. I never conceived it to be a consolidated government, so as to involve the interest of all America. Of the two objects of judicial cognizance, one is general and national, and the other local. The former is given to the general judiciary, and the latter left for the local tribunals. They act in cooperation, to secure our liberty. For the sake of economy, the appointment of these courts

might be in the state courts. I rely on an honest interpretation from independent judges. An honest man would not serve otherwise, because it would be to serve a dishonest purpose. To give execution to proper laws, in a proper manner, is their peculiar province. There is no inconsistency, impropriety, or danger, in giving the state judges the federal cognizance. Every gentleman who beholds my situation, my infirmity, and various other considerations, will hardly suppose I carry my view to an accumulation of power. Ever since I had any power, I was more anxious to discharge my duty than to increase my power.

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

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

Where is the danger, in the case put, of malice producing an assignment of a bond to a citizen of a neighboring state—Maryland? I have before supposed that there would be an inferior federal court in every state. Now, this citizen of Maryland, to whom this bond is assigned, cannot sue out process from the supreme federal court to carry his debtor thither. He cannot carry him to Maryland. He must sue him in the inferior federal court in Virginia. He can only go farther by appeal. The creditor cannot appeal. He gets a judgment. An appeal can be had only on application of the defendant, who thus gains a privilege instead of an injury; so that the observation of the honorable gentleman is not well founded. It was said by the honorable gentleman to-day, that no regulation Congress would make could prevent from applying to common-law cases matters of law and fact. In the construction of general words of this sort, they will apply concurrently to different purposes. We give them that distributive interpretation, and liberal explication, which will not make them mischievous; and if this can be done by a court, surely it can by a legislature. When it appears that the interpretation made by legislative bodies, in carrying acts into execution, is thus liberal and

distributive, there is no danger here. The honorable gentleman was mistaken when he supposed that I said, in cases where the competency of evidence is questioned, the fact was to be changed in the superior court. I said, the fact was not at all to be affected. I described how the superior court was to proceed, and, when it settled that point, if another trial was necessary, they sent the cause back, and then it was tried again in the inferior court.

The honorable gentleman has proposed an amendment which he supposes would remove those inconveniences. 1 attended to it, and it gave great force to my opinion that it is better to leave it to be amended by the regulations of Congress. What is to be done in cases where juries have been introduced in the admiralty and chancery? In the admiralty, juries sometimes decide facts. Sometimes in chancery, when the judges are dissatisfied, from the want of testimony or other cause, they send it to be tried by a jury. When the jury determines, they settle it. Let the gentleman review his amendment. It strikes me forcibly that it would be better to leave it to Congress than to introduce amendments which would not answer. I mentioned yesterday that, from the situation of the states, appeals could not be abused. The honorable gentleman to-day said it was putting too much confidence in our agents and rulers. I leave it to all mankind, whether it be not a reasonable confidence, Will the representatives of any twelve states sacrifice their own interest, and that of their fellow.citizens, to answer no purpose? But suppose we should happen to be deceived; have we no security? So great is the spirit of America, that it was found sufficient to oppose the greatest power in the world. Will not the American spirit protect us against any danger from our own representatives? It being now late, I shall add no more.

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

The honorable gentleman recommends to me to alter my proposed amendment. I would as soon take the advice of that gentleman as any other; but, though the regard which I have for him be great, I cannot assent on this great occasion.

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

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

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

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

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

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

How disgraceful is it that the state courts cannot be trusted! says the honorable gentleman. What is the language of the Constitution? Does it take away their jurisdiction? Is it not necessary that the federal courts should have cognizance of cases arising under the Constitution, and the laws, of the United States? What is the service or purpose of a

judiciary, but to execute the laws in a peaceable, orderly manner, without shedding blood, or creating a contest, or availing yourselves of force? If this be the case, where an its jurisdiction be more necessary than here?

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

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

With respect to disputes between a state and the citizens of another state, its jurisdiction has been decried with unusual vehemence. I hope that no gentleman will think that a state will be called at the bar of the federal court. Is there no such case at present? Are there not many cases in which;the legislature of Virginia is a party, and yet the state is not sued? It is not rational to suppose that the sovereign power Should be dragged before a court. The intent is, to enable states to recover claims of individuals residing in other states. I contend this construction is warranted by the words. But, say they, there will be partiality in it if a state cannot be defendant—if an individual cannot proceed to obtain judgment against a state, though he may be sued by a state. It is necessary to be so, and cannot be avoided. I see a difficulty in making a state defendant, which does not prevent its being plaintiff. If this be only what cannot be avoided, why object to the system on that account? If an individual has a just claim against any particular state, is it to be presumed that, on application to its legislature, he will not obtain satisfaction? But how could a state recover any claim from a citizen of another state, without the establishment of these tribunals?

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

of one state carry on trade in another state, much must be due to the one from the other, as is the case between North Carolina and Virginia. Would not the refusal of justice to our citizens, from the courts of North Carolina, produce disputes between the states? Would the federal judiciary swerve from their duty in order to give partial and unjust decisions?

The objection respecting the assignment of a bond to a citizen of another state has been fully answered. But suppose it were to be tried, as he says; what would be given more than was actually due in the case he mentioned? It is possible in our courts, as they now stand, to obtain a judgment for more than justice. But the court of chancery grants relief. Would it not be so in the federal court? Would not depositions be taken to prove the payments; and if proved, would not the decision of the court be accordingly?

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

The exclusion of trial by jury, in this case, he urged to prostrate our rights. Does the word court only mean the judges? Does not the determination of a jury necessarily lead to the.judgment of the court? Is there any thing here which gives the judges exclusive jurisdiction of matters of fact? What is the object of a jury trial? To inform the court of the facts. When a court has cognizance of facts, does it not follow that they can make inquiry by a jury? It is impossible to be otherwise. I hope that in this country, where impartiality is so much admired, the laws will direct facts to be ascertained by a jury. But, says the honorable gentleman, the juries in the ten miles square will be mere tools of parties, with which he would not trust his person or property; which, he says, he would rather leave to the court. Because the government may have a district of ten miles square, will no man stay there but the tools and officers of the government? Will nobody else be found there? Is it so in any other part of the world, where a government has legislative power? Are there none but officers, and tools of the government of Virginia, in Richmond? Will there not be independent merchants, and respectable gentlemen of fortune, within the ten miles square? Will there not be worthy farmers and mechanics? Will not a good jury be found there, as well as any where else? Will the officers of the government become improper to be on a jury? What is it to the government whether this man or that man succeeds? It is all one thing. Does the Constitution say that juries shall consist of officers, or that the Supreme Court shall be held in the ten miles square? It was acknowledged, by the honorable member, that it was secure in England. What makes it secure there? Is it their constitution? What part of their constitution is there that the Parliament cannot change? As the preservation of

this right is in the hands of Parliament, and it has ever been held sacred by them, will the government of America be less honest than that of Great Britain? Here a restriction is to be found. The jury is not to be brought out of the state. There is no such restriction in that government; for the laws of Parliament decide every thing respecting it. Yet gentlemen tell us that there is safety there, and nothing here but danger. It seems to me that the laws of the United States will generally secure trials by a jury of the vicinage, or in such manner as will be most safe and convenient for the people.

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

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

Gentlemen ask, What is meant by law cases, and if they be not distinct from facts? Is there no law arising on cases of equity and admiralty? Look at the acts of Assembly. Have you not many cases where law and fact are blended? Does not the jurisdiction in point of law as well as fact, find itself completely satisfied in law and tact? The honorable gentleman says that no law of Congress can make any exception to the federal appellate jurisdiction of facts as

well as law. He has frequently spoken of technical terms, and the meaning of them. What is the meaning of the term exception? Does it not mean an alteration and diminution? Congress is empowered to make exceptions to the appellate jurisdiction, as to law and fact, of the Supreme Court. These exceptions certainly go as far as the legislature may think proper for the interest and liberty of the people. Who can understand this word, exception, to extend to one case as well as the other? I am persuaded that a reconsideration of this case will convince the gentleman that he was mistaken. This may go to the cure of the mischief apprehended. Gentlemen must be satisfied that this power will not be so much abused as they have said.

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

I was astonished when I heard the honorable gentleman say that he wished the trial by jury to be struck out entirely. Is there no justice to be expected by a jury of our fellow-citizens? Will any man prefer to be tried by a court, when the jury is to be of his countrymen, and probably of his vicinage? We have reason to believe the regulations with respect to juries will be such as shall be satisfactory. Because it does not contain all, does it contain nothing? But I conceive that this committee will see there is safety in the case, and that there is no mischief to be apprehended.

He states a case, that a man may be carried from a federal to an anti-federal corner, (and vice versa) where men are ready to destroy him. Is this probable? Is it presumable that they will make a law to punish men who are of different opinions in politics from themselves? Is it presumable that they will do it in one single case, unless it be such a case as must satisfy the people at large? The good opinion of the people at large must be consulted by their representatives; otherwise, mischiefs would be produced which would shake the government to its foundation. As it is late, I Shall not mention all the gentleman's argument, but some parts of it are so glaring that I cannot pass them over in silence. He says that the establishment of these tribunals, and more particularly in their jurisdiction of controversies between citizens of these states and foreign citizens and subjects, is like a retrospective law. Is there no difference between a tribunal which shall give justice and effect to an existing right, and creating a right that did not exist before? The debt or claim is created by the individual. He has bound himself to comply with it. Does the creation of a new court amount to a retrospective law?

We are satisfied with the provision made in this country on the subject of trial by jury. Does our Constitution direct trials to be by jury? It is required in our bill of rights, which is not a part of the Constitution. Does any security arise from hence? Have you a jury when a judgment is obtained on a replevin bond, or by default? Have you a jury when a motion is made for the commonwealth against an individual; or when a motion is made by one joint obligor against another, to recover sums paid as security? Our courts decide in all these cases, without the intervention of a jury; yet they are all civil cases. The bill of rights is merely recommendatory. Were it otherwise, the consequence would be that many laws which are found convenient would be unconstitutional. What does the government before you say? Does it exclude the legislature from giving a trial by jury in civil cases? If it does not forbid its exclusion, it is on the same footing on which your state government stands now. The legislature of Virginia does not give a trial by jury where it is not necessary, but gives it wherever it is thought expedient. The federal legislature will do so too, as it is formed on the same principles.

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

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