PROGRAM TITLE

A Meeting with the Barristers: The Influence of English Law on American Common Law Jurisprudence and a Comparison of Current English and American Law in the Areas of Defamation and Criminal Law

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Honorable Norman St. George

Deputy Chief Administrative Judge
Courts Outside New York City

Hon. Norman St. George was appointed as Deputy Chief Administrative Judge for Courts Outside New York City effective September 1, 2021. The appointment was made by Chief Administrative Judge Lawrence K. Marks, with the consultation and approval of Chief Judge Janet DiFiore and the Presiding Justices of the Appellate Divisions of the Second, Third and Fourth Judicial Departments.

Judge St. George is responsible for managing the day-to-day operations of all trial-level courts in the 57 counties outside of New York City, which includes over 640 Judges and over 6000 non-judicial employees. He works with local Administrative Judges in overseeing implementation of the court system's programs and initiatives and in optimizing allocation of personnel and other court resources to meet the needs and goals of those courts. Additionally, he is responsible for oversight of New York's local Town and Village Courts.

Judge St. George is an elected Justice of the Supreme Court for the 10th Judicial District. Judge St. George served as the District Administrative Judge for all courts in Nassau County from 2019 through August of 2021. In that capacity, Judge St. George oversaw the Supreme Court, County Court, Family Court, Surrogate Court, District Court, and all City and Village Courts. From 2013 through 2018, Judge St. George served as the Supervising Judge of the Nassau County District Court. He was appointed to that position by Chief Administrative Judge A. Gail Prudenti. The Nassau County District Court is comprised of both criminal and civil courts and it is one of the busiest courts in New York State, handling over one hundred thousand criminal and civil cases per year.

Judge St. George served as an elected Nassau County Court Judge and an Acting Supreme Court Justice from 2008 to 2018. In 2018, Judge St. George established Nassau County's Youth Part under New York State's Raise the Age Law. While presiding over the Youth Part, Judge St. George published cases of first impression interpreting the Raise the Age Law, which have become models for other counties throughout the state. Judge St. George has presided over serious felony criminal cases, commercial cases, medical malpractice cases, and oversaw the Integrated Domestic Violence Court, the Domestic Violence Court and the Sex Offense Court.

Prior to his election to the County Court in 2008, Judge St. George served as an elected District Court Judge from 2004 to 2008. In addition to presiding over criminal and civil cases, Judge St. George was charged with the responsibility of establishing Nassau County's first misdemeanor Domestic Violence Court. Judge St. George also established and presided over a Driving While Intoxicated Court. Over thirty of Judge St. George's written decisions have been published by the Official Court Reporter and the New York Law Journal. Judge St. George has presided over two hundred and fifty jury trials, including numerous high-profile press cases. He lectures at the Judicial Institute to other Judges and at various Bar Associations on criminal and civil trial practice.

Prior to ascending to the bench, Judge St. George practiced law for sixteen years as a federal and state trial attorney. After graduating from law school, he worked as a Tax Attorney with Arthur Anderson and Company. He then began his litigation training at the Garden City law firm of Reisch, Simoni, Bythewood & Gleason. Judge St. George handled an extensive caseload of criminal and civil cases including major Federal Criminal and Civil RICO actions.

After leaving Reisch, Simoni, Bythewood & Gleason, Judge St. George served as an Assistant District Attorney for the County of Nassau under District Attorney Denis Dillon. He served in the District Court Bureau, Felony Screening Bureau, Grand Jury Bureau and County Court Bureau.

Judge St. George left the Nassau County District Attorney's Office to become a partner in the Wall Street firm of Jackson, Brown, Powell and St. George, LLP. In addition to being responsible for all the firm's civil and criminal litigation, Judge St. George served as the managing partner. Thereafter, Judge St. George set up his own law firm with offices in Mineola and Manhattan. Judge St. George successfully tried numerous federal and state criminal cases, federal copyright infringement cases, commercial litigation cases, and personal injury cases. Two of Judge St. George's trial verdicts were reported by the Jury Verdict Reporter, which reports significant Jury trial verdicts. Judge St. George frequently appeared on Court Television as a trial commentator.

Hon. Andrea Phoenix

Andrea Phoenix was elected to the Nassau County District Court in 2006 and was re-elected to a third term in 2018. Previously, Judge Phoenix was an attorney concentrating in Family Law and was an active member of the New York State Law Guardian Panel now known as the Attorneys for Children Program. Judge Phoenix was appointed to preside over the Drug Treatment Court and the Mental Health Court. As an Acting County Court Judge, she adjudicates both misdemeanor and felony matters. Judge Phoenix serves on the Unified Court System Family Violence Task Force and the Nassau County Family Court Children's Center Advisory Committee. Presently, the Judge serves as Co-Chair of the Nassau County Committee on Equal Justice in the Courts along with the Administrative Judge of Nassau County, Honorable Vito M. DeStefano.

Judge Phoenix received her undergraduate degree from Hampton University and her graduate degree from The Ohio State University. She earned her law degree from Hofstra University School of Law, where she was Editor-in-Chief of the *Environmental Law Digest*. She has remained involved in alumni activities and was inducted into the law school's Hall of Fame last year.

Judge Phoenix is the president of the Nassau Lawyers' Association of Long Island. She is a recent past president of the Theodore Roosevelt American Inn of Court. She is also a past president of the Women's Bar Association of the State of New York, the Nassau County Women's Bar Association and the New York Chapter of the Association of Family and Conciliation Courts. Notably, the Judge was the first African American president of all three organizations. Judge Phoenix sits on the WE CARE Advisory Board of the Nassau County Bar Association. She holds membership in the Nassau County Women's Bar Foundation, the Nassau County Criminal Courts Bar Association of Nassau County, Amistad Long Island Black Bar Association, the Jewish Lawyers Association of Nassau County and the Long Island Hispanic Bar Association. Over the years, she has been active in many other community and public service organizations. These include Antioch Baptist of Hempstead where she serves on the Board of Trustees, the Nassau Alumnae Chapter of Delta Sigma Theta Sorority, Inc., the Empire City Moles, and the Long Island Chapter of the Links, Incorporated, where the judge is the chair of International Trends and Services Facet, and she is the immediate past chair of the National LIFE Committee.

The Judge has received various awards and accolades stemming from her organizational involvement. She is the recipient of both the Nassau County Women's Bar Association's Bessie Ray Geffner, Esq. Memorial Award and the Virginia C. Duncombe, Esq. Scholarship Award. Judge Phoenix also received the organization's distinguished Rona Seider Award. She received the Stephen Gassman Award from the Nassau County Bar Association's WE CARE Advisory Board. In 2020, Judge Phoenix received the Visionary Award from Operation Get Ahead, Inc. and she received the Hon. Alfred S. Robbins Memorial Award jointly from the Amistad Long Island Black Bar Association and the Nassau County Courts' Black History Committee. In 2022, Judge Phoenix received a Lifetime Achievement Award at the International Human Rights Commission's Annual Gala. Most recently, in 2023, Judge Phoenix was honored

with the Judith S. Kaye Access to Justice Award from the Women's Bar Association of the State of New York. She is listed in *Who's Who in Black New York City*.

Lois Carter Schlissel

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Practice Areas

Employment Law

Education

University of Buffalo
J.D.

State University of New York Oswego
B. A., *magna cum laude*

Memberships

Adelphi University Board of Trustees

Northwell Health Board of Overseers

Huntington Hospital Board of Directors

Touro Law Center Board of Governors

Theodore Roosevelt American Inn of Court

New York State Bar Foundation Fellow

Admissions

New York State

U.S. Court of Appeals, Federal Circuit

U.S. District Court, Southern District of New York

U.S. District Court, Eastern District of New York

U.S. District Court, Northern District of New York

Lois Carter Schlissel served as the firm's Managing Attorney from 2002-2017. She is Of Counsel of the firm's Employment Law practice and has counseled clients with respect to federal and state employment laws, compliance issues, and personnel matters and handles claims arising under Title VII, the Age Discrimination in Employment Act, the Americans With Disabilities Act, and the Family Medical Leave Act.

Mrs. Schlissel is a member of the Adelphi University Board of Trustees, the Board of Overseers of Northwell Health System, and is on the Board of Directors of Huntington Hospital.

In 2018, Mrs. Schlissel received the Executive Circle Award from *Long Island Business News*. She is rated "AV Preeminent" by Martindale-Hubbell, the highest level of professional excellence. She was honored for her "extraordinary service to the community and superb lawyering" by the Nassau County Bar Association, We Care Fund in 2012. She was also recognized by *Long Island Pulse Magazine* in 2010 and 2011 as one of the region's "Top Legal Eagles". In 2007, Mrs. Schlissel was recognized as one of the Best Attorneys on Long Island by the *Long Island Press*. She was named by *Long Island Business News (LIBN)* as one of Long Island's Top 50 Most Influential Women, and was admitted into the *LIBN* Top 50 Hall of Fame. The Long Island Center for Business & Professional Women conferred its Achievers' Award in the Field of Law on Mrs. Schlissel and she was named a "Woman Achiever Against the Odds" by the Long Island Fund for Women and Girls.

Mrs. Schlissel has written and lectured extensively before bar associations, employment groups and professional organizations. She has given numerous media interviews and provided commentary relating to Federal civil practice, employment law issues, workplace discrimination, and sexual harassment.

Prior to joining Meyer Suozzi, Mrs. Schlissel was a law clerk at the New York State Court of Appeals and, thereafter, a litigation associate in the New York City office of Skadden, Arps, Slate, Meagher & Flom, LLP.

RICHARD J. EISENBERG, ESQ.

Richard Eisenberg is a long-time member of the Inn of Court and of its Executive Committee. He also serves as the faculty liaison between the Inn and Touro Law School.

Richard is Of Counsel to the Meyer Suozzi firm based in Garden City, NY. He concentrates his practice on corporate transactions and commercial real estate matters. He also has extensive trial and appellate experience, including state and federal matters throughout downstate New York.

His appellate work has included appearances before the Appellate Division, Second Department, the New York State Court of Appeals, the United States Court of Appeals for the Second Circuit and the United States Supreme Court.

Richard has been affiliated with Touro Law School for more than a decade. Since 2013, he has served as the Chair of the Advisory Board of Touro's Institute for Land Use and Sustainable Development. Since 2019, he has been a member of the law school's Adjunct Faculty and has taught courses in transactional law as well as environmental law.

At various times in his career, Richard has served as:

An Assistant District Attorney in New York City;

The president of his local school board;

A trustee of a major Long Island based performing arts non-profit;

General Counsel of a major Long Island based consumer products company;

The principal administrator of a large private foundation.

Mr. Eisenberg received his undergraduate degree from the University of Rochester and his law degree from Boston University.

GALE BERG, ESQ.

Gale Berg is a distinguished practitioner with a wealth of experience in pro bono legal services. Ms. Berg received her Bachelor of Science degree from American University in 1973 and graduated from Vermont Law School with a Juris Doctor degree in 1977. She has been honored for her outstanding commitment to public service and pro bono efforts in support of the disadvantaged on Long Island by the Nassau County Women's Bar Association and the National Association of Bar Executives. Ms. Berg is an active member of the Theodore Roosevelt American Inn of Court.

AMELIA CLEGG, ESQ.

Amelia Clegg currently works at Blank Rome LLP as an associate in their General Litigation group. She has a wide-ranging practice which includes Title IX claims, mass torts cases and commercial litigation but she is increasingly focusing her practice on white collar criminal defense litigation and investigations. Amelia is also committed to pro bono work and last year, she was recognized as a "Blank Rome Pro Bono Hero" for her dedication to her firm's pro bono program.

Amelia is the first and only lawyer in her family. She studied Classics at St Hilda's College, University of Oxford, before completing her English legal training at City Law School. During her legal training, Amelia was awarded Exhibitions towards her legal training by Honorable Society of the Inner Temple. Amelia was called to the Bar of England and Wales in 2017 at the Honorable Society of the Inner Temple. She completed her pupillage at 23 Essex Street, London before accepting tenancy there. As a criminal barrister, Amelia prosecuted and defended in criminal cases in bench and jury courts, acting as sole/first chair for both the across a broad range of criminal offenses. Before coming to the United States, Amelia also completed a lengthy secondment with Baker & Partners, a litigation boutique in Jersey, Channel Islands, where she gained experience in offshore litigation. During her secondment, Amelia gained experience in judicial review applications, cross-border litigation, and anti-money laundering law.

Amelia came to the United States to complete her L.L.M at the University of Pennsylvania Law School as a Thouron Fellow. During her L.L.M., Amelia served as an associate editor of Penn Law's Journal of International Law and was a student member of the New York City Bar International Law Committee. She was a member of the Penn Law Acapellants and a judge for the annual Quaker Mock Trial Competition. Amelia was admitted as a New York attorney in 2021, having passed the New York Bar in October 2020.

In addition to being a member of the Honorable Society of the Inner Temple, Amelia is a member of the New York American Inn of Court and is co-chairing a program for her Inn later this year. Amelia serves on the Editorial Board of the American Inn of Court's publication, *The Bencher,* and has previously contributed to *The Bencher* as an author. She also serves on the American Inns of Court's National Advocacy Training Program Alumni Advisory Council.

Amelia is the 2022 winner of the prestigious American Inns of Court Warren E. Burger Prize for Writing, a competition designed to promote scholarship in the area of professionalism, ethics, civility, and excellence. The award recognized her essay, *All Lawyers Are Equal, But Some Are More Equal Than Others: Incivility Towards Female Attorneys from within the Legal Profession*. Her winning essay calls attention to the legal system's sexism against women attorneys. Drawing on empirical data, case law, and anecdotal evidence, the paper argues that male attorneys and both male and female judges exhibit strong animosity toward women. Her essay argues that media depictions of female lawyers, whether in the news or Hollywood, create the

“fertile soil in which sexism continues to thrive and grow”, and notes that the consequences of this include sexual harassment, a significant pay gap, and an exodus of women attorneys from the profession. In Amelia’s own words, “sexism against female attorneys should be viewed as professional misconduct and a breach of professional ethics.”

Outside her legal interests, Amelia is a keen musician and currently sings with the Riverside Choral Society, with whom she recently performed at Carnegie Hall. She also enjoys playing judo at Kokushi Budo Institute and going to the opera and the theater – recent highlights include Tom Stoppard’s *Leopoldstadt* and Suzie Miller’s *Prima Facie*, the last of which combined Amelia’s love of the law and the arts.

Jonathan Schaffer-Goddard, ESQ.

Jonathan Schaffer-Goddard is dual-qualified English barrister and New York attorney. He is an experienced trial lawyer with a particular experience in international litigation and arbitration involving high-value infrastructure, shipping, insurance, technology and luxury assets disputes. Jonathan has conducted over 150 trials and hearings as first or second chair and has significant experience dealing with large quantities of expert evidence and complex factual disputes. Jonathan practices from 4 Pump Court Chambers in London and Holwell Shuster & Goldberg in New York.

A Princess Royal and Major Scholar of the Inner Temple, Jonathan completed his LLM at New York University School of Law, graduating with the law school's prize for international litigation and arbitration. He served as a graduate editor of the *Journal of International Law and Politics*, the Vis Moot chair of the NYU International Arbitration Association and as a research assistant to Professor Linda Silberman.

Jonathan is regularly involved in teaching advocacy and mooting to law students. He judges domestic and international mooting competitions and is a member of the Advisory Committee for the English Speaking Union Moot. As a student in England he won several national mooting competitions, and represented the United Kingdom at the Commonwealth Mooting Competition in Australia.
Jonathan is a member of the International Committee of the Inner Temple, and is committed to deepening ties between the US and English legal systems.

Jonathan is admitted to practice in New York as well as England and Wales.

Marbury v. Madison

5 U.S. 137 (1803)
Decided Jan 1, 1803

FEBRUARY, 1803.

AT the last term, viz. December term, 1801, William Marbury, Dennis Ramsay, Robert Townsend Hooe, and William Harper, by their counsel, Charles Lee, esq. late attorney general if
138 the United States, *138 severally moved the court for a rule to James Madison, secretary of state of the United States, to show cause why a mandamus should not issue commanding him to cause to be delivered to them respectively their several commissions as justices of the peace in the district of Columbia. This motion was supported by affidavits of the following facts; that Mr. Adams, the late president of the United States, nominated the applicants to the senate for their advice and consent to be appointed justices of the peace of the district of Columbia; that the senate advised and consented to the appointments; that commissions in due form are signed by the said president appointing them justices, c. and that the seal of the United States was in due form affixed to the said commissions, by the secretary of state; that the applicants have requested Mr. Madison to deliver them their said commissions, who has not complied with that request; and that their said commissions are withheld from them; that the applicants have made application to Mr. Madison as secretary of state of the United States at his office, for information whether the commissions were signed and sealed aforesaid; that explicit and satisfactory information has not been given in answer to that inquiry, either by the secretary of the state or any officer in the department of state; that application has been made to the secretary of the Senate for a certificate of the nomination of the applicants, and of the advice, and content of the senate, who has delcined giving such a certificate; whereupon a rule was laid to show cause on the 4th day of this term. This rule having been duly served,

Mr. Lee, in support of the rule, observed that it was important to know on what ground a justice of peace in the district of Columbia holds his office, and what proceedings are necessary to constitute an appointment to an office not held at the will of the president. However notorious the facts are, upon the suggestion of which the rule has been laid, yet the applicants have been much embarrassed in obtaining evidence of them. Reasonable Information has been denied at the office of the department of state. Although a respectful memorial has been made to the senate praying them to suffer their secretary to give them extracts from their executive journals respecting
139 *139 the nomination of the applicants to the senate, and of their advice and consent to the appointments, yet their request has been denied, and their petition rejected. They have therefore been compelled to summon witnesses to attend in court, whose voluntary affidavits they could not obtain. Mr. Lee here read the affidavit of Dennis Ramsay, and the printed journals of the senate of 31st January, 1803, respecting the refusal of the senate to suffer their secretary to give the information requested. He then called Jacob Wagner and Daniel Brent, who had been summoned to attend the court, and who had, as it is understood, declined giving a voluntary affidavit. They objected to being sworn, alleging

that they were clerks in the department of state, and not bound to disclose any facts relating to the business or transactions in the office.

Mr. Lee observed, that to show the propriety of examining these witnesses, he would make a few remarks on the nature of the office of secretary of state. His duties are of two kinds, and he exercises his functions in two distinct capacities; as a public ministerial officer of the United States, and as agent of the president. In the first, his duty is to the United States or its citizens; in the other, his duty is to the president; in the one, he is an independent and an accountable officer; in the other, he is dependent upon the president, is his agent, and accountable to him alone. In the former capacity he is compellable by *mandamus* to do his duty; in the latter he is not. This distinction is clearly pointed out by the two acts of congress upon this subject. The first was passed 27th July, 1789, vol. 1. p. 359. entitled "An act for establishing an executive department, to be denominated the department of foreign affairs." The first section ascertains the duties of the secretary so far as he is considered as a mere executive agent. It is in these words, "Be it enacted,c. that there shall be an executive department, to be denominated the department of foreign affairs, and that there shall be a principal officer therein, to be called the secretary of the department of foreign affairs, who shall perform and execute such duties as shall from time to time be enjoined on, of intrusted to him by the President of the United States, agreeable to the constitution, relative to correspondences,
140 commissions, *140 or instructions to or with public ministers or consuls from the United States; or to negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers, or other foreigners, or to such other matters respecting foreign affairs as the President of the United States shall assign to the said department; and furthermore, that the said principal officer shall conduct the business of the said department in such manner as the President of the United States shall from time to time order or instruct."

The second section provides for the appointment of a chief clerk; the third section prescribes the oath to be taken which is simply, "well and faithfully to execute the trust committed to him;" and the fourth and last section gives him the custody of the books and papers of the department of foreign affairs under the old congress. Respecting the powers given, and the duties imposed, by this act, no *mandamus* will lie. The secretary is responsible only to the president. The other act of congress respecting this department was passed at the same session on the 15th September, 1789, vol. 1. p. 41. c. 14. and is entitled "An act to provide for the safe keeping of the acts, records, and seal of the United States, and for other purposes." The first section changes the name of the department and of the secretary, calling the one the department and the other the secretary of state. The second section assigns new duties to the secretary, in the performance of which it is evident, from their nature, he cannot be lawfully controlled by the president, and for the non-performance of which he is not more responsible to the president than to any other citizen of the United States. It provides that he shall receive from the president all bills, orders, resolutions and votes, of the senate and house of representatives, which shall have been approved and signed by him; and shall cause them to be published, and printed copies to be delivered to the senators and representatives, and to the executives of the several states; and makes it his duty carefully to preserve the originals; and to cause them to be recorded in books to be provided for that purpose. The third section provides a seal of the United States. The fourth makes it his duty to keep the said seal, and to make out and record, and to affix the seal of the United States to all civil
141 commissions, after they *141 shall have been signed by the president. The fifth section provides for a seal of office, and that all copies of records

and papers in his office, authenticated under that seal, shall be as good evidence as the originals. The sixth section establishes fees for copies, c. The seventh and last section gives him the custody of the papers of the office of the secretary of the old congress. Most of the duties assigned by this act are of a public nature, and the secretary is bound to perform them, without the control of any person. The president has no right to prevent him from receiving the bills, orders, resolutions and votes of the legislature, or from publishing and distributing them, or from preserving or recording them. While the secretary remains in office, the president cannot take from his custody the seal of the United States, nor prevent him from recording and affixing the seal to civil commissions of such officers as hold not their offices at the will of the president, after he has signed them and delivered them to the secretary for that purpose. By other laws he is to make out and record in his office patents for useful discoveries, and patents of lands granted under the authority of the United States. In the performance of all these duties he is a public ministerial officer of the United States. And the duties being enjoined upon him by law, he is, in executing them, uncontrollable by the president; and if he neglects or refuses to perform them, he may be compelled by *mandamus*, in the same manner as other persons holding offices under the authority of the United States. The president is no party to this case. The secretary is called upon to perform a duty over which the president has no control, and in regard to which he has no dispensing power, and for the neglect of which he is in no manner responsible. The secretary alone is the person to whom they are intrusted, and he alone is answerable for their due performance. The secretary of state, therefore, being in the same situation, as to these duties, as every other ministerial officer of the United States, and equally liable to be compelled to perform them, is also bound by the same rules of evidence. These duties are not of a confidential nature, but are of a public kind, and his clerks can have no exclusive privileges. There are undoubtedly facts, which may come to their knowledge by means of their connection with the secretary of state, respecting
142 which *142 they cannot be bound to answer. Such are the facts concerning foreign correspondences, and confidential communications between the head of the department and the president. This, however, can be no objection to their being sworn, but may be a ground of objection to any particular question. Suppose I claim title to land under a patent from the United States. I demand a copy of it from the secretary of state. He refuses. Surely he may be compelled by *mandamus* to give it. But in order to obtain a *mandamus*, I must show that the patent is recorded in his office. My case would be hard indeed if I could not call upon the clerks in the office to give evidence of that fact. Again, suppose a private act of congress had passed for my benefit. It becomes necessary for me to have the use of that act in a court of law. I apply for a copy. I am refused. Shall I not be permitted, on a motion for a *mandamus*, to call upon the clerks in the office to prove that such an act is among the rolls of the office, or that it is duly recorded? Surely it cannot be contended that although the laws are to be recorded, yet no access is to be had to the records, and no benefit to result therefrom.

The court ordered the witnesses to be sworn and their answers taken in writing, but informed them that when the questions were asked they might state their objections to answering each particular question, if they had any.

Mr. Wagner being examined upon interrogatories, testified, that at this distance of time he could not recollect whether he had seen any commission in the office, constituting the applicants, or either of them, justices of the peace. That Mr. Marbury and Mr. Ramsay called on the secretary of state respecting their commissions. That the secretary referred them to him; he took them into another room and mentioned to them, that two of the commissions had been signed, but the other had not. That he did not know that fact of his own knowledge, but by the information of others. Mr. Wagner declined answering the question "who

gave him that information;" and the court decided that he was not bound to answer it, because it was not pertinent to this cause. He further testified that some of the commissions of the justices, but he believed not all, were recorded. He did not know whether the commissions of the applicants were
143 *143 recorded, as he had not had recourse to the book for more than twelve months past.

Mr. Daniel Brent testified, that he did not remember certainly the names of any of the persons in the commissions of justices of the peace signed by Mr. Adams; but he believed, and was almost certain, that Mr. Marbury's and Col. Hooe's commissions were made out, and that Mr. Ramsay's was not; that he made out the list of names by which the clerk who filled up the commissions was guided; he believed that the name of Mr. Ramsay was pretermitted by mistake, but to the best of his knowledge it contained the names of the other two; he believed none of the commissions for justices of the peace, signed by Mr. Adams, were recorded. After the commissions for justices of the peace were made out, he carried them to Mr. Adams for his signature. After being signed, he carried them back to the secretary's office, where the seal of the United States was affixed to them. That commissions are not usually delivered out of the office before they are recorded; but sometimes they are, and a note of them only is taken, and they are recorded afterwards. He believed none of those commissions of justices were ever sent out, or delivered to the persons for whom they were intended; he did not know what became of them, nor did he know that they are now in the office of the secretary of state.

Mr. Lincoln, attorney-general, having been summoned, and now called, objected to answering. He requested that the questions might be put in writing, and that he might afterwards have time to determine whether he would answer. On the one hand he respected the jurisdiction of this court, and on the other he felt himself bound to maintain the rights of the executive. He was acting as secretary of state at the time when this transaction happened. He was of opinion, and his opinion was supported by that of others whom he highly respected, that he was not bound, and ought not to answer, as to any facts which came officially to his knowledge while acting as secretary of state.

The questions being written, were then read and handed to him. He repeated the ideas he had before suggested, and said his objections were of
144 two kinds. *144

1st. He did not think himself bound to disclose his *144 official transactions while acting as secretary of state; and,

2d. He ought not to be compelled to answer any thing which might tend to criminate himself.

Mr. Lee, in reply, repeated the substance of the observations he had before made in answer to the objections of Mr. Wagner and Mr. Brent. He stated that the duties of a secretary of state were two-fold. In discharging one part of those duties he acted as a public ministerial officer of the United States, totally independent of the president, and that as to any facts which came officially to his knowledge, while acting in this capacity, he was as much bound to answer as a marshal, a collector, or any other ministerial officer. But that in the discharge of the other part of his duties, he did not act as a public ministerial officer, but in the capacity of an agent of the president, bound to obey his orders, and accountable to him for his conduct. And that as to any facts which came officially to his knowledge in the discharge of this part of his duties, he was not bound to answer. He agreed that Mr. Lincoln was not bound to disclose any thing which might tend to criminate himself.

Mr. Lincoln thought it was going a great way to say that every secretary of state should at all times be liable to be called upon to appear as a witness in a court of justice, and testify to facts which came to his knowledge officially. He felt himself delicately situated between his duty to this court,

and the duty he conceived he owed to an executive department; and hoped the court would give him time to consider of the subject.

The court said that if Mr. Lincoln wished time to consider what answers he should make, they would give him time; but they had no doubt he ought to answer. There was nothing confidential required to be disclosed. If there had been he was not obliged to answer it; and if he thought that any thing was communicated to him in confidence he was not bound to disclose it; nor was he obliged to state any thing which would criminate himself; but that the fact whether such commissions had been in the office or not, could not be a confidential
145 fact; it *145 is a fact which all the world have a right to know. If he thought any of the questions improper, he might state his objections.

Mr. Lincoln then prayed time till the next day to consider of his answers under this opinion of the court.

The court granted it, and postponed further consideration of the cause till the next day.

At the opening of the court on the next morning, Mr. Lincoln said he had no objection to answering the questions proposed, excepting the last, which he did not think himself obliged to answer fully. The question was, what had been done with the commissions. He had no hesitation in saying that he did not know that they ever came to the possession of Mr. Madison, nor did he know that they were in the office when Mr. Madison took possession of it. He prayed the opinion of the court whether he was obliged to disclose what had been done with the commissions.

The court were of opinion that he was not bound to say what had become of them; if they never came to the possession of Mr. Madison, it was immaterial to the present cause what had been done with them by others.

To the other questions he answered that he had seen commissions of justices of the peace of the district of Columbia, signed by Mr. Adams, and sealed with the seal of the United States. He did not recollect whether any of them constituted Mr. Marbury, Col. Hooe, or Col. Ramsay, justices of the peace; there were, when he went into the office, several commissions for justices of peace of the district made out; but he was furnished with a list of names to be put into a general commission, which was done, and was considered as superseding the particular commissions; and the individuals whose names were contained in this general commission were informed of their being thus appointed. He did not know that any one of the commissions was ever sent to the person for whom it was made out, and did not believe that
146 any one had been sent. *146

Mr. Lee then read the affidavit of James Marshall, who had been also summoned as a witness. It stated that on the 4th of March, 1801, having been informed by some person from Alexandria that there was reason to apprehend riotous proceedings in that town on that night, he was induced to return immediately home, and to call at the office of the secretary of state, for the commissions of the justices of the peace; that as many as 12, as he believed, commissions of justices for that county were delivered to him, for which he gave a receipt, which he left in the office. That finding he could not conveniently carry the whole, he returned several of them, and struck a pen through the names of those, in the receipt, which he returned. Among the commissions so returned, according to the best of his knowledge and belief, was one for Col. Hooe, and one for William Harper.

Mr. Lee then observed, that having proved the existence of the commissions, he should confine such further remarks as he had to make in support of the rule to three questions:

1st. Whether the supreme court can award the writ of *mandamus* in any case?

2d. Whether it will lie to a secretary of state in any case whatever?

3d. Whether, in the present case, the court may award a *mandamus* to James Madison, secretary of state?

The argument upon the first question is derived not only from the principles and practice of that country from whence we derive many of the principles of our political institutions, but from the constitution and laws of the United States.

This is the *supreme* court, and by reason of its supremacy must have the superintendance of the inferior tribunals and officers, whether judicial or ministerial. In this respect there is no difference between a judicial and a ministerial officer. From this principle alone the court of king's bench in England derives the power of issuing the writs of
147 *mandamus* and prohibition. 3 Inst. 70, 71. *147

Shall it be said that the court of king's bench has this power in consequence of its being the supreme court of judicature, and shall we deny it to this court which the constitution makes the *supreme* court? It is a beneficial, and a necessary power; and it can never be applied where there is another *adequate, specific, legal remedy.*

The second section of the third article of the constitution gives this court appellate jurisdiction in all cases in law and equity arising under the constitution and laws of the United States, (except the cases in which it has original jurisdiction,) with such exceptions, and under such regulations, as congress shall make. The term "appellate jurisdiction" is to be taken in its largest sense, and implies in its nature the right of superintending the inferior tribunals.

Proceedings in nature of appeals are of various kinds, according to the subject matter. 3 Bl. Com. 402. It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress. 3 Bl. Com. 109. There are some injuries which can only be redressed by a writ of *mandamus*, and others by a writ of prohibition. There must, then, be a jurisdiction somewhere competent to issue that kind of process. Where are we to look for it but in that court which the constitution and laws have made supreme, and to which they have given appellate jurisdiction? Blackstone, vol. 3. p. 110. says, that a writ of *mandamus* is "a command issuing in the king's name from the court of king's bench, and directed to any *person*, corporation or inferior court, requiring them to do some particular thing therein specified, *which appertains to their office and duty*, and which the court has previously determined, or at least supposes, to be consonant to right and justice. It is a writ of a most extensively remedial nature, and issues in all cases where the party has a right to have any thing done, *and has no other specific means of compelling its performance.*"

In the Federalist, vol. 2. p. 239. it is said, that the word "appellate" is not to be taken in its technical sense, as used in reference to appeals in the course of the *civil* law, but in its broadest sense, in which it denotes nothing more than the power of one
148 tribunal to review the proceedings *148 of another, either as to law or fact, or both. The writ of *mandamus* is in the nature of an appeal as to fact as well as law. It is competent for congress to prescribe the forms of process by which the supreme court shall exercise its appellate jurisdiction, and they may well declare a *mandamus* to be one. But the power does not depend upon implication alone. It has been recognised by legislative provision as well as in judicial decisions in this court.

Congress, by a law passed at the very first session after the adoption of the constitution, vol. 1. p. 58. s. 13. have expressly given the supreme court the power of issuing writs of *mandamus*. The words are, "the supreme court shall also have appellate jurisdiction from the circuit courts, and courts of the several states, in the cases hereinafter specifically provided for; and shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction; and writs of *mandamus*, in

cases warranted by the principles and usages of law, to any courts appointed, or *persons holding office*, under the authority of the United States."

Congress is not restrained from conferring original jurisdiction in other cases than those mentioned in the constitution. 2 Dal. Rep. 298.

This court has entertained jurisdiction on a *mandamus* in one case, and on a prohibition in another. In the case of The United States *v.* Judge Lawrence, 3 Dal. Rep. 42. a *mandamus* was moved for by the attorney-general at the instance of the French minister, to compel Judge Lawrence to issue a warrant against Captain Barre, commander of the French ship of war Le Perdrix, grounded on an article of the consular convention with France. In this case the power of the court to issue writs of *mandamus* was taken for granted in the arguments of counsel on both sides, and seems to have been so considered by the court. The *mandamus* was refused, because the case in which it was required was not a proper one to support the motion. In the case of The United States *v.* Judge Peters, a writ of prohibition was granted. 3 Dal. Rep. 121. 129. This was the celebrated case of the
149 French *149 corvette the Cassius, which afterwards became a subject of diplomatic controversy between the two nations. On the 5th Feb. 1794, a motion was made to the supreme court, in behalf of one John Chandler, a citizen of Connecticut, for a *mandamus* to the *secretary at war*, commanding him to place Chandler on the invalid pension list. After argument, the court refused the *mandamus*, because the two acts of congress respecting invalids did not support the case on which the applicant grounded his motion. The case of The United States *v.* Hopkins, at February term, 1794, was a motion for a *mandamus* to Hopkins, loan officer for the district of Virginia, to command him to admit a person to subscribe to the United States' loan. Upon argument, the *mandamus* was refused because the applicant had not sufficiently established his title. In none of these cases, nor in any other, was the power of this court to issue a *mandamus* ever denied. Hence it appears there has been a legislative construction of the constitution upon this point, and a judicial practice under it, for the whole time since the formation of the government.

2. The second point is, can a *mandamus* go to a secretary of state in any case? It certainly cannot in *all* cases; nor to the president in *any* case. It may not be proper to mention this position; but I am compelled to do it. An idea has gone forth, that a *mandamus* to a secretary of state is equivalent to a *mandamus* to the President of the United States. I declare it to be my opinion, grounded on a comprehensive view of the subject, that the president is not amenable to any court of judicature for the exercise of his high functions, but is responsible only in the mode pointed out in the constitution. The secretary of state acts, as before observed, in two capacities. As the agent of the president, he is not liable to a *mandamus;* but as a recorder of the laws of the United States, as keeper of the great seal, as recorder of deeds of land, of letters patent, and of commissions,c. he is a ministerial officer of the people of the United States. As such he has duties assigned him by law, in the execution of which he is independent of all control but that of the laws. It is true he is a high officer, but he is not above law. It is not consistent with the policy of our political institutions, or the manners of the citizens of the United States, that any ministerial officer, having public duties to
150 perform, *150 should be above the compulsion of law in the exercise of those duties. As a ministerial officer he is compellable to do his duty, and if he refuses, is liable to indictment. A prosecution of this kind might be the means of punishing the officer, but a specific civil remedy to the injured party can only be obtained by a writ of *mandamus*. If a *mandamus* can be awarded by this court in any case, it may issue to a secretary of state; for the act of congress expressly gives the power to award it, "in cases warranted by the principles and usages of law, *to any persons holding offices under the authority of the United States*."

Many cases may be supposed, in which a secretary of state ought to be compelled to perform his duty specifically. By the 5th and 6th sections of the act of congress, vol. 1. p. 43. copies under seal of the office of the department of state are made evidence in courts of law, and fees are given for making them out. The intention of the law must have been, that every person needing a copy should be entitled to it. Suppose the secretary refuses to give a copy, ought he not to be compelled? Suppose I am entitled to a patent for lands purchased of the United States; it is made out and signed by the president, who gives a warrant to the secretary to affix the great seal to the patent; he refuses to do it; shall I not have a *mandamus* to compel him? Suppose the seal is affixed, but the secretary refuses to record it; shall he not be compelled? Suppose it recorded, and he refuses to deliver it; shall I have no remedy?

In this respect there is no difference between a patent for lands, and the commission of a judicial officer. The duty of the secretary is precisely the same.

Judge PATERSON inquired of Mr. Lee whether he understood it to be the duty of the secretary to deliver a commission, unless ordered so to do by the president.

Mr. Lee replied, that after the president has signed a commission for an office not held at his will, and it comes to the secretary to be sealed, the president has done with it, and nothing remains, but that the secretary perform those ministerial acts which the law imposes upon him. It immediately becomes
151 his duty to seal, record, and deliver *151 it on demand. In such a case the appointment becomes complete by the signing and sealing; and the secretary does wrong if he withholds the commission.

3d. The third point is, whether, in the present case, a writ of *mandamus* ought to be awarded to James Madison, secretary of state.

The justices of the peace in the district of Columbia are judicial officers, and hold their office for five years. The office is established by the act of congress passed the 27th of February, 1801, entitled "An act concerning the district of Columbia," c. 86. s. 11. and 14. p. 271. 273. They are authorized to hold courts, and have cognisance of personal demands of the value of 20 dollars. The act of May 3d 1802, c. 52. s. 4. considers them as judicial officers, and provides the mode in which execution shall issue upon their judgments. They hold their offices independent of the will of the president. The appointment of such an officer is complete when the president has nominated him to the senate, and the senate have advised and consented, and the president has signed the commission, and delivered it to the secretary to be sealed. The president has then done with it; it becomes irrevocable. An appointment of a judge once completed, is made for ever. He holds under the constitution. The requisites to be performed by the secretary are ministerial, ascertained by law, and he has no discretion, but must perform them; there is no dispensing power. In contemplation of law they are as if done.

These justices exercise part of the judicial power of the United States. They ought, therefore, to be independent. Mr Lee begged leave again to refer to the Federalist, vol. 2. Nos. 78. and 79. as containing a correct view of this subject. They contained observations and ideas which he wished might be generally read and understood. They contained the principles upon which this branch of our constitution was constructed. It is important to the citizens of this district that the justices should be independent; almost all the authority immediately exercised over them is that of the justices. They wish to know whether the justices of this district are to hold their commissions at the
152 will of a secretary of state. *152 This cause may seem trivial at first view, but it is important in principle. It is for this reason that this court is now troubled with it. The emoluments, or the dignity of the office, are no objects with the applicants. They

conceive themselves to be duly appointed justices of the peace, and they believe it to be their duty to maintain the rights of their office, and not to suffer them to be violated by the hand of power. The citizens of this district have their fears excited by every stretch of power by a person so high in office as the secretary of state.

It only remains now to consider whether a *mandamus*, to compel the delivery of a commission by a public ministerial officer, is one of "the cases warranted by the principles and usages of law."

It is the general principle of law that a *mandamus* lies, if there be no other *adequate, specific, legal* remedy. 3 *Burr.* 1267. *King* v. *Barker et al.* This seems to be the result of a view of all the cases on the subject.

The case of Rex v. Borough of Midhurst, 1 *Wils.* 283. was a *mandamus* to compel the presentment of certain conveyances to purchasers of burgage tenements, whereby they would be entitled to vote for members of parliament. In the case of Rex *v.* Dr. Hay, 1 *W. Bl. Rep.* 640. a *mandamus* issued to admit one to administer an estate.

A *mandamus* gives no right, but only puts the party in a way to try his right. *Sid.* 286.

It lies to compel a ministerial act which concerns the public; 1 *Wils.* 283. 1 *Bl. Rep.* 640.; although there be a more tedious remedy. *Str.* 1082. 4 *Burr.* 2188. 2 *Burr.* 1045. So if there be a legal right, and a remedy in equity. 3 *Term Rep.* 652. A *mandamus* lies to obtain admission into a trading company. Rex *v.* Turkey Company, 2 *Burr.* 1000. *Carth.* 448. 5 *Mod.* 402. So it lies to put the corporate seal to an instrument. 4 *Term Rep.* 699. To commissioners of the excise to grant a permit. 2 *Term Rep.* 381. To admit to an office. 3 *Term Rep. 575.* To deliver papers which concern the public. 2 *Sid.* 31. A *mandamus* will sometimes lie
153 in a *153 doubtful case, 1 *Lev.* 113. to be further considered on the return. 2 *Lev.* 14. 1 *Sid.* 169.

It lies to be admitted a member of a church. 3 Burr. 1265. 1043.

The process is as ancient as the time of Edw. II. 1 Lev. 23.

The first writ of *mandamus* is not peremptory, it only commands the officer to do the thing, or show cause why he should not do it. If the cause returned be sufficient, there is an end of the proceeding; if not, a peremptory *mandamus* is then awarded.

It is said to be a writ of discretion. But the discretion of a court always means a sound, legal discretion, not an arbitrary will. If the applicant makes out a proper case, the court are bound to grant it. They can refuse justice to no man.

On a subsequent day, and before the court had given an opinion, Mr. Lee read the affidavit of Hazen Kimball, who had been a clerk in the office of the secretary of state, and had been to a distant part of the United States, but whose return was not known to the applicant till after the argument of the case.

It stated that on the third of March, 1801, he was a clerk in the department of state. That there were in the office, on that day, commissions made out and signed by the president, appointing William Marbury a justice of peace for the county of Washington; and Robert T. Hooe a justice of the peace for the county of Alexandria, in the district of Columbia.

Afterwards, on the 24th February, the following opinion of the court was delivered by the *Chief Justice.*

Opinion of the Court.

At the last term on the affidavits then read and filed with the clerk, a rule was granted in this case, requiring the secretary of state to show cause why
154 a *mandamus* *154 should not issue, directing him to deliver to William Marbury his commission as a justice of the peace for the county of Washington, in the district of Columbia.

No cause has been shown, and the present motion is for a *mandamus*. The peculiar delicacy of this case, the novelty of some of its circumstances, and the real difficulty attending the points which occur in it, require a complete exposition of the principles on which the opinion to be given by the court is founded.

These principles have been, on the side of the applicant, very ably argued at the bar. In rendering the opinion of the court, there will be some departure in form, though not in substance, from the points stated in that argument.

In the order in which the court has viewed this subject, the following questions have been considered and decided.

1st. Has the applicant a right to the commission he demands?

2dly. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

3dly. If they do afford him a remedy, is it a *mandamus* issuing from this court?

The first object of inquiry is,

1st. Has the applicant a right to the commission he demands?

His right originates in an act of congress passed in February, 1801, concerning the district of Columbia.

After dividing the district into two counties, the 11th section of this law enacts, "that there shall be appointed in and for each of the said counties, such number of discreet persons to be justices of the peace as the president of the United States shall, from time to time, think expedient, to
155 continue in office for five years. *155

It appears, from the affidavits, that in compliance with this law, a commission for William Marbury, as a justice of peace for the county of Washington, was signed by John Adams, then President of the United States; after which the seal of the United States was affixed to it; but the commission has never reached the person for whom it was made out.

In order to determine whether he is entitled to this commission, it becomes necessary to inquire whether he has been appointed to the office. For if he has been appointed, the law continues him in office for five years, and he is entitled to the possession of those evidences of office, which, being completed, became his property.

The 2d section of the 2d article of the constitution declares, that "the president shall nominate, and, by and with the advice and consent of the senate, shall appoint, ambassadors, other public ministers and consuls, and all other officers of the United States, whose appointments are not otherwise provided for."

The 3d section declares, that "he shall commission all the officers of the United States."

An act of congress directs the secretary of state to keep the seal of the United States, "to make out and record, and affix the said seal to all civil commissions to officers of the United States, to be appointed by the president, by and with the consent of the senate, or by the president alone; provided, that the said seal shall not be affixed to any commission before the same shall have been signed by the President of the United States."

These are the clauses of the constitution and laws of the United States, which affect this part of the case. They seem to contemplate three distinct operations:

1st. The nomination. This is the sole act of the president, and is completely voluntary.

2d. The appointment. This is also the act of the president, and is also a voluntary act, though it can only be performed by and with the advice and
156 consent of the senate. *156

3d. The commission. To grant a commission to a person appointed, might, perhaps, be deemed a duty enjoined by the constitution. "He shall," says

that instrument, "commission all the officers of the United States."

The acts of appointing to office, and commissioning the person appointed, can scarcely be considered as one and the same; since the power to perform them is given in two separate and distinct sections of the constitution. The distinction between the appointment and the commission will be rendered more apparent by adverting to that provision in the second section of the second article of the constitution, which authorizes congress "to vest, by law, the appointment of such inferior officers, as they think proper, in the president alone, in the courts of law, or in the heads of departments;" thus contemplating cases where the law may direct the president to commission an officer appointed by the courts, or by the heads of departments. In such a case, to issue a commission would be apparently a duty distinct from the appointment, the performance of which, perhaps, could not legally be refused.

Although that clause of the constitution which requires the president to commission all the officers of the United States, may never have been applied to officers appointed otherwise than by himself, yet it would be difficult to deny the legislative power to apply it to such cases. Of consequence, the constitutional distinction between the appointment to an office and the commission of an officer who has been appointed, remains the same as if in practice the president had commissioned officers appointed by an authority other than his own.

It follows, too, from the existence of this distinction, that if an appointment was to be evidenced by any public act, other than the commission, the performance of such public act would create the officer; and if he was not removable at the will of the president, would either give him a right to his commission, or enable him to perform the duties without it.

These observations are premised solely for the purpose of rendering more intelligible those which apply more directly to the particular case under
157 consideration. *157

This is an appointment made by the president, by and *157 with the advice and consent of the senate, and is evidenced by no act but the commission itself. In such a case, therefore, the commission and the appointment seem inseparable; it being almost impossible to show an appointment otherwise than by proving the existence of a commission; still the commission is not necessarily the appointment, though conclusive evidence of it.

But at what stage does it amount to this conclusive evidence?

The answer to this question seems an obvious one. The appointment being the sole act of the president, must be completely evidenced, when it is shown that he has done every thing to be performed by him.

Should the commission, instead of being evidence of an appointment, even be considered as constituting the appointment itself; still it would be made when the last act to be done by the president was performed, or, at furthest, when the commission was complete.

The last act to be done by the president is the signature of the commission. He has then acted on the advice and consent of the senate to his own nomination. The time for deliberation has then passed. He has decided. His judgment, on the advice and consent of the senate concurring with his nomination, has been made, and the officer is appointed. This appointment is evidenced by an open, unequivocal act; and being the last act required from the person making it, necessarily excludes the idea of its being, so far as respects the appointment, an inchoate and incomplete transaction.

Some point of time must be taken when the power of the executive over an officer, not removable at his will, must cease. That point of time must be when the constitutional power of appointment has been exercised. And this power has been exercised when the last act, required from the person possessing the power, has been performed. This last act is the signature of the commission. This idea seems to have prevailed with the legislature, when the act passed converting the department
158 *158 of foreign affairs into the department of state. By that act it is enacted, that the secretary of state shall keep the seal of the United States, "and shall make out and record, and shall affix the said seal to all civil commissions to officers of the United States, to be appointed by the president;" "Provided, that the said seal shall not be affixed to any commission before the same shall have been signed by the President of the United States; nor to any other instrument or act, without the special warrant of the president therefor."

The signature is a warrant for affixing the great seal to the commission; and the great seal is only to be affixed to an instrument which is complete. It attests, by an act supposed to be of public notoriety, the verity of the presidential signature.

It is never to be affixed till the commission is signed, because the signature, which gives force and effect to the commission, is conclusive evidence that the appointment is made.

The commission being signed, the subsequent duty of the secretary of state is prescribed by law, and not to be guided by the will of the president. He is to affix the seal of the United States to the commission, and is to record it.

This is not a proceeding which may be varied, if the judgment of the executive shall suggest one more eligible; but is a precise course accurately marked out by law, and is to be strictly pursued. It is the duty of the secretary of state to conform to the law, and in this he is an officer of the United States, bound to obey the laws. He acts, in this respect, as has been very properly stated at the bar, under the authority of law, and not by the instructions of the president. It is a ministerial act which the law enjoins on a particular officer for a particular purpose.

If it should be supposed, that the solemnity of affixing the seal is necessary not only to the validity of the commission, but even to the completion of an appointment, still when the seal
159 is affixed the appointment is made, and *159 the commission is valid. No other solemnity is required by law; no other act is to be performed on the part of government. All that the executive can do to invest the person with his office is done; and unless the appointment be then made, the executive cannot make one without the co-operation of others.

After searching anxiously for the principles on which a contrary opinion may be supported, none have been found which appear of sufficient force to maintain the opposite doctrine.

Such as the imagination of the court could suggest, have been very deliberately examined, and after allowing them all the weight which it appears possible to give them, they do not shake the opinion which has been formed.

In considering this question, it has been conjectured that the commission may have been assimilated to a deed, to the validity of which delivery is essential.

This idea is founded on the supposition that the commission is not merely *evidence* of an appointment, but is itself the actual appointment; a supposition by no means unquestionable. But for the purpose of examining this objection fairly, let it be conceded, that the principle claimed for its support is established.

The appointment being, under the constitution, to be made by the president *personally*, the delivery of the deed of appointment, if necessary to its completion, must be made by the president also. It is not necessary that the delivery should be made personally to the grantee of the office: it never is

so made. The law would seem to contemplate that it should be made to the secretary of state, since it directs the secretary to affix the seal to the commission *after* it shall have been signed by the president. If, then, the act of livery be necessary to give validity to the commission, it has been delivered when executed and given to the secretary for the purpose of being sealed, recorded, and transmitted to the party.

But in all cases of letters patent, certain solemnities are required by law, which solemnities
160 are the evidences *160 of the validity of the instrument. A formal delivery to the person is not among them. In cases of commissions, the sign manual of the president, and the seal of the United States, are those solemnities. This objection, therefore, does not touch the case.

It has also occurred as possible, and barely possible, that the transmission of the commission, and the acceptance thereof, might be deemed necessary to complete the right of the plaintiff.

The transmission of the commission is a practice directed by convenience, but not by law. It cannot, therefore, be necessary to constitute the appointment which must precede it, and which is the mere act of the president. If the executive required that every person appointed to an office should himself take means to procure his commission, the appointment would not be the less valid on that account. The appointment is the sole act of the president; the transmission of the commission is the sole act of the officer to whom that duty is assigned, and may be accelerated or retarded by circumstances which can have no influence on the appointment. A commission is transmitted to a person already appointed; not to a person to be appointed or not, as the letter enclosing the commission should happen to get into the post-office and reach him in safety, or to miscarry.

It may have some tendency to elucidate this point, to inquire whether the possession of the original commission be indispensably necessary to authorize a person, appointed to any office, to perform the duties of that office. If it was necessary, then a loss of the commission would lose the office. Not only negligence, but accident or fraud, fire or theft, might deprive an individual of his office. In such a case, I presume it could not be doubted but that a copy from the record of the office of the secretary of state would be, to every intent and purpose, equal to the original. The act of congress has expressly made it so. To give that copy validity, it would not be necessary to prove that the original had been transmitted and afterwards lost. The copy would be complete evidence that the original had existed, and that the appointment had been made, but not that the original had been transmitted. If indeed it should
161 appear that *161 the original had been mislaid in the office of state, that circumstance would not affect the operation of the copy. When all the requisites have been performed which authorize a recording officer to record any instrument whatever, and the order for that purpose has been given, the instrument is, in law, considered as recorded, although the manual labour of inserting it in a book kept for that purpose may not have been performed.

In the case of commissions, the law orders the secretary of state to record them. When, therefore, they are signed and sealed, the order for their being recorded is given; and whether inserted in the book or not, they are in law recorded.

A copy of this record is declared equal to the original, and the fees to be paid by a person requiring a copy are ascertained by law. Can a keeper of a public record erase therefrom a commission which has been recorded? Or can he refuse a copy thereof to a person demanding it on the terms prescribed by law?

Such a copy would, equally with the original, authorize the justice of peace to proceed in the performance of his duty, because it would, equally with the original, attest his appointment.

If the transmission of a commission be not considered as necessary to give validity to an appointment, still less is its acceptance. The appointment is the sole act of the president; the acceptance is the sole act of the officer, and is, in plain common sense, posterior to the appointment. As he may resign, so may he refuse to accept: but neither the one nor the other is capable of rendering the appointment a non-entity.

That this is the understanding of the government, is apparent from the whole tenor of its conduct.

A commission bears date, and the salary of the officer commences, from his appointment; not from the transmission or acceptance of his commission. When a person appointed to any office refuses to accept that office, the successor is
162 nominated in the place of the person who *162 has declined to accept, and not in the place of the person who had been previously in office, and had created the original vacancy.

It is, therefore, decidedly the opinion of the court, that when a commission has been signed by the president, the appointment is made; and that the commission is complete when the seal of the United States has been affixed to it by the secretary of state.

Where an officer is removable at the will of the executive, the circumstance which completes his appointment is of no concern; because the act is at any time revocable; and the commission may be arrested, if still in the office. But when the officer is not removable at the will of the executive, the appointment is not revocable, and cannot be annulled. It has conferred legal rights which cannot be resumed.

The discretion of the executive is to be exercised until the appointment has been made. But having once made the appointment, his power over the office is terminated in all cases, where by law the officer is not removable by him. The right to the office is *then* in the person appointed, and he has the absolute, unconditional power of accepting or rejecting it.

Mr. Marbury, then, since his commission was signed by the president, and sealed by the secretary of state, was appointed; and as the law creating the office, gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable, but vested in the officer legal rights, which are protected by the laws of his country.

To withhold his commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right.

This brings us to the second inquiry; which is,

2dly. If he has a right, and that right has been violated, do the laws of his country afford him a
163 remedy? *163

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.

In the 3d vol. of his Commentaries, p. 23. Blackstone states two cases in which a remedy is afforded by mere operation of law.

In all other cases," he says, "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, when ever that right is invaded."

And afterwards, p. 109. of the same vol. he says, "I am next to consider such injuries as are cognisable by the courts of the common law. And herein I shall for the present only remark, that all possible injuries whatsoever, that did not fall within the exclusive cognisance of either the ecclesiastical, military, or maritime tribunals, are, for that very reason, within the cognisance of the

common law courts of justice; for it is a settled and invariable principle in the laws of England that every right, when withheld, must have a remedy, and every injury its proper redress."

The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

If this obloquy is to be cast on the jurisprudence of our country, it must arise from the peculiar character of the case.

It behoves us, then, to inquire whether there be in its composition any ingredient which shall exempt it from legal investigation, or exclude the injured party from legal redress. In pursuing this inquiry the first question which presents itself is, whether
164 this can be arranged *164 with that class of cases which come under the description of *damnum absque injuria;* a loss without an injury.

This description of cases never has been considered, and it is believed never can be considered, as comprehending offices of trust, of honour, or of profit. The office of justice of peace in the district of Columbia is such an office; it is therefore worthy of the attention and guardianship of the laws. It has received that attention and guardianship. It has been created by special act of congress, and has been secured, so far as the laws can give security, to the person appointed to fill it, for five years. It is not, then, on account of the worthlessness of the thing pursued, that the injured party can be alleged to be without remedy.

Is it in the nature of the transaction? Is the act of delivering or withholding a commission to be considered as a mere political act, belonging to the executive department alone, for the performance of which entire confidence is place by our constitution in the supreme executive; and for any misconduct respecting which, the injured individual has no remedy?

That there may be such cases is not to be questioned; but that every act of duty, to be performed in any of the great departments of government, constitutes such a case, is not to be admitted.

By the act concerning invalids, passed in June, 1794, vol. 3. p. 112. the secretary at war is ordered to place on the pension list all persons whose names are contained in a report previously made by him to congress. If he should refuse to do so, would the wounded veteran be without remedy? Is it to be contended that where the law in precise terms, directs the performance of an act, in which an individual is interested, the law is incapable of securing obedience to its mandate? Is it on account of the character of the person against whom the complaint is made? Is it to be contended that the heads of departments are not amenable to the laws of their country?

Whatever the practice on particular occasions may be, the theory of this principle will certainly never
165 be maintained. *165 No act of the legislature confers so extraordinary a privilege, nor can it derive countenance from the doctrines of the common law. After stating that personal injury from the king to a subject is presumed to be impossible, Blackstone, vol. 3. p. 255. says, "but injuries to the rights of property can scarcely be committed by the crown without the intervention of its officers; for whom the law, in matters of right, entertains no respect or delicacy; but furnishes various methods of detecting the errors and misconduct of those agents, by whom the king has been deceived and induced to do a temporary injustice."

By the act passed in 1796, authorizing the sale of the lands above the mouth of Kentucky river, (vol. 3.p. 299.) the purchaser, on paying his purchase-money, becomes completely entitled to the property purchased; and on producing to the secretary of state the receipt of the treasurer upon a certificate required by the law, the President of the United States is authorized to grant him a

patent. It is further enacted that all patents shall be countersigned by the secretary of state, and recorded in the office. If the secretary of state should choose to withhold this patent; or, the patent being lost, should refuse a copy of it; can it be imagined that the law furnishes to the injured person no remedy?

It is not believed that any person whatever would attempt to maintain such a proposition.

It follows, then, that the question, whether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend on the nature of that act.

If some acts be examinable, and others not, there must be some rule of law to guide the court in the exercise of its jurisdiction.

In some instances there may be difficulty in applying the rule to particular cases; but there cannot, it is believed, be much difficulty in laying down the rule.

By the constitution of the United States, the president is invested with certain important
166 political powers, in the *166 exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders.

In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being intrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the president. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.

But when the legislature proceeds to impose on that officer other duties: when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.

The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the president, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.

If this be the rule, let us inquire how it applies to
167 the case under the consideration of the court. *167

The power of nominating to the senate, and the power of appointing the person nominated, are political powers, to be exercised by the president according to his own discretion. When he has made an appointment, he has exercised his whole power, and his discretion has been completely applied to the case. If, by law, the officer be removable at the will of the president, then a new appointment may be immediately made, and the rights of the officer are terminated. But as a fact which has existed cannot be made never to have existed, the appointment cannot be annihilated; and, consequently, if the officer is by law not removable at the will of the president, the rights he has acquired are protected by the law, and are not resumable by the president. They cannot be

extinguished by executive authority, and he has the privilege of asserting them in like manner as if they had been derived from any other source.

The question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority. If, for example, Mr. Marbury had taken the oaths of a magistrate, and proceeded to act as one; in consequence of which a suit had been instituted against him, in which his defence had depended on his being a magistrate, the validity of his appointment must have been determined by judicial authority.

So, if he conceives that, by virtue of his appointment, he has a legal right either to the commission which has been made out for him, or to a copy of that commission, it is equally a question examinable in a court, and the decision of the court upon it must depend on the opinion entertained of his appointment.

That question has been discussed, and the opinion is, that the latest point of time which can be taken as that at which the appointment was complete, and evidenced, was when, after the signature of the president, the seal of the United States was affixed to the commission.

It is, then, the opinion of the court,

1st. That by signing the commission of Mr. Marbury, the President of the United States
168 appointed him a justice *168 of peace for the county of Washington, in the district of Columbia; and that the seal of the United States, affixed thereto by the secretary of state, is conclusive testimony of the verity of the signature, and of the completion of the appointment; and that the appointment conferred on him a legal right to the office for the space of five years.

2dly. That, having this legal title to the office, he has a consequent right to the commission; a refusal to deliver which is a plain violation of that right, for which the laws of his country afford him a remedy.

It remains to be inquired whether,

3dly. He is entitled to the remedy for which he applies. This depends on,

1st. The nature of the writ applied for; and,

2dly. The power of this court.

1st. The nature of the writ.

Blackstone, in the 3d volume of his Commentaries, page 110. defines a *mandamus* to be "a command issuing in the king's name from the court of king's bench, and directed to any person, corporation, or inferior court of judicature within the king's dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court of king's bench has previously determined, or at least supposes, to be consonant to right and justice."

Lord Mansfield, in 3 Burrow, 1266. in the case of *The King* v. *Baker et al.*, states, with much precision and explicitness the cases in which this writ may be used.

"Whenever," says that very able judge, "there is a right to execute an office, perform a service, or exercise a franchise, (more especially if it be in a matter of public concern, or attended with profit,) and a person is kept out of possession, or
169 dispossessed of such right, and *169 has no other specific legal remedy, this court ought to assist by *mandamus*, upon reasons of justice, as the writ expresses, and upon reasons of public policy, to preserve peace, order and good government." In the same case he says, "this writ ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one."

In addition to the authorities now particularly cited, many others were relied on at the bar, which show how far the practice has conformed to the general doctrines that have been just quoted.

This writ, if awarded, would be directed to an officer of government, and its mandate to him would be, to use the words of Blackstone, "to do a particular thing therein specified, which appertains to his office and duty, and which the court has previously determined, or at least supposes, to be consonant to right and justice." Or, in the words of Lord Mansfield, the applicant, in this case, has a right to execute an office of public concern, and is kept out of possession of that right.

These circumstances certainly concur in this case.

Still, to render the *mandamus* a proper remedy, the officer to whom it is to be directed, must be one to whom, on legal principles, such writ may be directed; and the person applying for it must be without any other specific and legal remedy.

1st. With respect to the officer to whom it would be directed. The intimate political relation subsisting between the President of the United States and the heads of departments, necessarily renders any legal investigation of the acts of one of those high officers peculiarly irksome, as well as delicate; and excites some hesitation with respect to the propriety of entering into such investigation. Impressions are often received without much reflection or examination, and it is not wonderful that in such a case as this the assertion, by an individual, of his legal claims in a court of justice, to which claims it is the duty of that court to attend, should at first view be
170 considered *170 by some, as an attempt to intrude into the cabinet, and to inter-meddle with the prerogatives of the executive.

It is scarcely necessary for the court to disclaim all pretensions to such a jurisdiction. An extravagance, so absurd and excessive, could not have been entertained for a moment. The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.

But, if this be not such a question; if, so far from being an intrusion into the secrets of the cabinet, it respects a paper which, according to law, is upon record, and to a copy of which the law gives a right, on the payment of ten cents; if it be no intermeddling with a subject over which the executive can be considered as having exercised any control; what is there in the exalted station of the officer, which shall bar a citizen from asserting, in a court of justice, his legal rights, or shall forbid a court to listen to the claim, or to issue a *mandamus*, directing the performance of a duty, not depending on executive discretion, but on particular acts of congress, and the general principles of law?

If one of the heads of departments commits any illegal act, under colour of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law. How, then, can his office exempt him from this particular mode of deciding on the legality of his conduct, if the case be such a case as would, were any other individual the party complained of, authorize the process?

It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a *mandamus* is to be determined. Where the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the
171 mere organ of executive will; it is *171 again repeated, that any application to a court to control, in any respect, his conduct would be rejected without hesitation.

But where he is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the president, and the

performance of which the president cannot lawfully forbid, and therefore is never presumed to have forbidden; as for example, to record a commission, or a patent for land, which has received all the legal solemnities; or to give a copy of such record; in such cases, it is not perceived on what ground the courts of the country are further excused from the duty of giving judgment that right be done to an injured individual, than if the same services were to be performed by a person not the head of a department.

This opinion seems not now, for the first time, to be taken up in this country.

It must be well recollected that in 1792, an act passed, directing the secretary at war to place on the pension list such disabled officers and soldiers as should be reported to him, by the circuit courts, which act, so far as the duty was imposed on the courts, was deemed unconstitutional; but some of the judges thinking that the law might be executed by them in the character of commissioners, proceeded to act, and to report in that character.

This law being deemed unconstitutional at the circuits, was repealed, and a different system was established; but the question whether those persons who had been reported by the judges, as commissioners, were entitled, in consequence of that report, to be placed on the pension list, was a legal question, properly determinable in the courts, although the act of placing such persons on the list was to be performed by the head of a department.

That this question might be properly settled, congress passed an act in February, 1793, making it the duty of the secretary of war, in conjunction with the attorney-general, to take such measures as might be necessary to obtain an adjudication of the
172 supreme court of the United *172 States on the validity of any such rights, claimed under the act aforesaid.

After the passage of this act, a *mandamus* was moved for, to be directed to the secretary at war, commanding him to place on the pension list, a person stating himself to be on the report of the judges.

There is, therefore, much reason to believe, that this mode of trying the legal right of the complainant was deemed by the head of a department, and by the highest law officer of the United States, the most proper which could be selected for the purpose.

When the subject was brought before the court, the decision was, not that a *mandamus* would not lie to the head of a department directing him to perform an act, enjoined by law, in the performance of which an individual had a vested interest; but that a *mandamus* ought not to issue in that case; the decision necessarily to be made if the report of the commissioners did not confer on the applicant a legal right.

The judgment, in that case, is understood to have decided the merits of all claims of that description; and the persons, on the report of the commissioners, found it necessary to pursue the mode prescribed by the law subsequent to that which had been deemed unconstitutional, in order to place themselves on the pension list.

The doctrine, therefore, now advanced, is by no means a novel one.

It is true that the *mandamus*, now moved for, is not for the performance of an act expressly enjoined by statute.

It is to deliver a commission; on which subject the acts of congress are silent. This difference is not considered as affecting the case. It has already been stated that the applicant has, to that commission, a vested legal right, of which the executive cannot deprive him. He has been appointed to an office, from which he is not removable at the will of the executive; and being
173 so *173 appointed, he has a right to the commission which the secretary has received from the president for his use. The act of congress does not indeed order the secretary of state to send it to

him, but it is placed in his hands for the person entitled to it; and cannot be more lawfully withheld by him than by any other person.

It was at first doubted whether the action of *detinue* was not a specific legal remedy for the commission which has been withheld from Mr. Marbury; in which case a *mandamus* would be improper. But this doubt has yielded to the consideration that the judgment in *detinue* is for the thing itself, *or* its value. The value of a public office not to be sold is incapable of being ascertained; and the applicant has a right to the office itself, or to nothing. He will obtain the office by obtaining the commission, or a copy of it from the record.

This, then, is a plain case for a *mandamus*, either to deliver the commission, or a copy of it from the record; and it only remains to be inquired,

Whether it can issue from this court.

The act to establish the judicial courts of the United States authorizes the supreme court "to issue writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States."

The secretary of state, being a person holding an office under the authority of the United States, is precisely within the letter of the description; and if this court is not authorized to issue a writ of *mandamus* to such an officer, it must be because the law is unconstitutional, and therefore absolutely incapable of conferring the authority, and assigning the duties which its words purport to confer and assign.

The constitution vests the whole judicial power of the United States in one supreme court, and such inferior courts as congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and, consequently, in some form,

174 may be exercised over the present *174 case; because the right claimed is given by a law of the United States.

In the distribution of this power it is declared that "the supreme court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the supreme court shall have appellate jurisdiction."

It has been insisted, at the bar, that as the original grant of jurisdiction, to the supreme and inferior courts, is general, and the clause, assigning original jurisdiction to the supreme court, contains no negative or restrictive words, the power remains to the legislature, to assign original jurisdiction to that court in other cases than those specified in the article which has been recited; provided those cases belong to the judicial power of the United States.

If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction. If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance.

Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them, or they have no operation at all.

It cannot be presumed that any clause in the constitution is intended to be without effect; and, therefore, such a construction is inadmissible,

175 unless the words require it. *175

If the solicitude of the convention, respecting our peace with foreign powers, induced a provision that the supreme court should take original jurisdiction in cases which might be supposed to affect them; yet the clause would have proceeded no further than to provide for such cases, if no further restriction on the powers of congress had been intended. That they should have appellate jurisdiction in all other cases, with such exceptions as congress might make, is no restriction; unless the words be deemed exclusive of original jurisdiction.

When an instrument organizing fundamentally a judicial system, divides it into one supreme, and so many inferior courts as the legislature may ordain and establish; then enumerates its powers, and proceeds so far to distribute them, as to define the jurisdiction of the supreme court by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction; the plain import of the words seems to be, that in one class of cases its jurisdiction is original, and not appellate; in the other it is appellate, and not original. If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to their obvious meaning.

To enable this court, then, to issue a *mandamus*, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction.

It has been stated at the bar that the appellate jurisdiction may be exercised in a variety of forms, and that if it be the will of the legislature that a *mandamus* should be used for that purpose, that will must be obeyed. This is true, yet the jurisdiction must be appellate, not original.

It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, therefore, a *mandamus* may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper,
176 and, therefore, seems not to belong to *176 appellate, but to original jurisdiction. Neither is it necessary in such a case as this, to enable the court to exercise its appellate jurisdiction.

The authority, therefore, given to the supreme court, by the act establishing the judicial courts of the United States, to issue writs of *mandamus* to public officers, appears not to be warranted by the constitution; and it becomes necessary to inquire whether a jurisdiction so conferred can be exercised.

The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognise certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is

written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts
177 prohibited *177 and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternative there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

This theory is essentially attached to a written constitution, and, is consequently, to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must
178 decide on the operation of each. *178

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.

Those, then, who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions, a written constitution, would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favour of its rejection.

The judicial power of the United States is extended to all cases arising under the
179 constitution. *179

Could it be the intention of those who gave this power, to say that in using it the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases, then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or to obey?

There are many other parts of the constitution which serve to illustrate this subject.

It is declared that "no tax or duty shall be laid on articles exported from any state." Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? ought the judges to close their eyes on the constitution, and only see the law.

The constitution declares "that no bill of attainder or *ex post facto* law shall be passed."

If, however, such a bill should be passed, and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavours to preserve?

"No person," says the constitution, "shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

Here the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare *one* witness, or a confession *out* of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these, and many other selections which might be made, it is apparent, that the framers of
180 the constitution *180 contemplated that instrument as a rule for the government of *courts*, as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as , according to the best of my abilities and understanding, agreeably to *the constitution* and laws of the United States."

Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? if it is closed upon him, and cannot be inspected by him?

If such be the real state of things, this is worse than solemn mockery. To prescribe, or, to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the *supreme* law of the land, the *constitution* itself is first mentioned; and

not the laws of the United States generally, but those only which shall be made in *pursuance* of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that *courts*, as well as other departments, are bound by that instrument.

181 The rule must be discharged. *181

Justice Joseph Story on Common Law and Constitutional Origins of the United States Constitution

[EDITOR'S NOTE: JUSTICE JOSEPH STORY ON COMMON LAW AND CONSTITUTIONAL ORIGINS OF THE UNITED STATES CONSTITUTION, including his Dedication and Preface to his *Commentaries* (1833). The following is excerpted from: Joseph Story, LL. D., Dane Professor of Law in Harvard University, *Commentaries on the Constitution of the United States; with a Preliminary Review of the Constitutional History of the Colonies and States, before the Adoption of the Constitution. Abridged by the Author, for the Use of Colleges and High Schools* (Boston: Hilliard, Gray, and Company/Cambridge: Brown, Shattuck, and Co., 1833), pp. iii-viii, 62-75, 105-109, 581, 606, 608.

United States Supreme Court Justice Joseph Story (1779-1845) was a famous jurist, and his *Commentaries* was a very influential treatise on United States constitutional law. Story, first a Jeffersonian Republican and then (following his appointment to the Supreme Court of the United States by President James Madison), a Federalist, was one of the United States' most influential Supreme Court justices. His tenure on the Supreme Court spanned three decades, from 1811 to 1845. At the beginning of the twentieth century, Story was elected to the Hall of

Fame. His views on the Constitution of the United States are still widely respected.

Justice Joseph Story's first wife, Mary Lynde Fitch Oliver (1781-1805), whom he married on December 9, 1804, was a descendant of Governor Jonathan Belcher's sister Elizabeth Belcher Oliver (1678-1736).

TO THE

HONORABLE JOHN MARSHALL, LL. D.,

CHIEF JUSTICE OF THE UNITED STATES OF AMERICA.

SIR,

I ask the favour of dedicating this work to you. I know not, to whom it could with so much propriety be dedicated, as to one, whose youth was engaged in the arduous enterprises of the Revolution; whose manhood assisted in framing and supporting the national Constitution; and whose maturer years have been devoted to the task of unfolding its powers, and illustrating its principles. When, indeed, I look back upon your judicial labours during a period of thirty-two years, it is difficult to suppress astonishment at their extent and variety, and at the exact learning, the profound reasoning, and the solid principles, which they every where display. Other Judges have attained an elevated reputation by similar labours in a single department of jurisprudence. But in one department, (it need scarcely be said, that I allude to that of constitutional law,) the common consent of your countrymen has admitted you to stand without a

rival. Posterity will assuredly confirm by its deliberate award, what the present age has approved, as an act of undisputed justice. Your expositions of constitutional law enjoy a rare and extraordinary authority. They constitute a monument of fame far beyond the ordinary memorials of political and military glory. They are destined to enlighten, instruct, and convince future generations; and can scarcely perish but with the memory of the constitution itself. They are the victories of a mind accustomed to grapple with difficulties, capable of unfolding the most comprehensive truths with masculine simplicity, and severe logic, and prompt to dissipate the illusions of ingenious doubt, and subtle argument, and impassioned eloquence. They remind us of some mighty river of our own country, which, gathering in its course the contributions of many tributary streams, pours at last its own current into the ocean, deep, clear, and irresistible.

But I confess, that I dwell with even more pleasure upon the entirety of a life adorned by consistent principles, and filled up in the discharge of virtuous duty; where there is nothing to regret, and nothing to conceal; no friendships broken; no confidence betrayed; no timid surrenders to popular clamour; no eager reaches for popular favour. Who does not listen with conscious pride to the truth, that the disciple, the friend, the biographer of Washington, still lives, the uncompromising advocate of his principles?

I am but too sensible, that to some minds the time may not seem yet to have arrived, when language, like this, however true, should meet the eyes of the public. May the period be yet far

distant, when praise shall speak out with that fulness of utterance, which belongs to the sanctity of the grave.

But I know not, that in the course of providence the privilege will be allowed me hereafter, to declare, in any suitable form, my deep sense of the obligations, which the jurisprudence of my country owes to your labours, of which I have been for twenty-one years a witness, and in some humble measure a companion. And if any apology should be required for my present freedom, may I not say, that at your age all reserve may well be spared, since all your labours must soon belong exclusively to history?

Allow me to add, that I have a desire (will it be deemed presumptuous?) to record upon these pages the memory of a friendship, which has for so many years been to me a source of inexpressible satisfaction; and which, I indulge the hope, may continue to accompany and cheer me to the close of life.

I am with the highest respect,

affectionately your servant,

JOSEPH STORY.

Cambridge, January, 1833.

PREFACE

TO THE ORIGINAL WORK.

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I now offer to the public another portion of the labours devolved on me in the execution of the duties of the Dane Professorship of Law in Harvard University. The importance of the subject will hardly be doubted by any persons, who have been accustomed to deep reflection upon the nature and value of the Constitution of the United States. I can only regret, that it has not fallen into abler hands, with more leisure to prepare, and more various knowledge to bring to such a task.

Imperfect, however, as these Commentaries may seem to those, who are accustomed to demand a perfect finish in all elementary works, they have been attended with a degree of uninviting labour, and dry research, of which it is scarcely possible for the general reader to form any adequate estimate. Many of the materials lay loose and scattered; and were to be gathered up among pamphlets and discussions of a temporary character; among obscure private and public documents; and from collections, which required an exhausting diligence to master their contents, or to select from unimportant masses, a few facts, or a solitary argument. Indeed, it required no small labour, even after these sources were explored, to bring together the irregular fragments, and to form them into groups, in which they might illustrate and support each other.

From two great sources, however, I have drawn by far the greatest part of my most valuable materials. These are, The Federalist, an incomparable commentary of three of the greatest statesmen of their age; and the extraordinary Judgments of Mr. Chief Justice Marshall upon constitutional law. The former have discussed the structure and organization of the national

government, in all its departments, with admirable fulness and force. The latter has expounded the application and limits of its powers and functions with unrivalled profoundness and felicity. The Federalist could do little more, than state the objects and general bearing of these powers and functions. The masterly reasoning of the Chief Justice has followed them out to their ultimate results and boundaries, with a precision and clearness, approaching, as near as may be, to mathematical demonstration. The Federalist, being written to meet the most prevalent popular objections at the time of the adoption of the Constitution, has not attempted to pursue any very exact order in its reasoning; but has taken up subjects in such a manner, as was best adapted at the time to overcome prejudices, and win favour. Topics, therefore, having a natural connexion, are sometimes separated; and illustrations appropriate to several important points, are sometimes presented in an incidental discussion. I have transferred into my own pages all, which seemed to be of permanent importance in that great work; and have thereby endeavoured to make its merits more generally known.

The reader must not expect to find in these pages any novel views, and novel constructions of the Constitution. I have not the ambition to be the author of any new plan of interpreting the theory of the Constitution, or of enlarging or narrowing its powers by ingenious subtleties and learned doubts. My object will be sufficiently attained, if I shall have succeeded in bringing before the reader the true view of its powers maintained by its founders and friends, and confirmed and illustrated by the actual practice of the government. The expositions to be found in the work are less to be regarded, as my own opinions, than as those

of the great minds, which framed the Constitution, or which have been from time to time called upon to administer it. Upon subjects of government it has always appeared to me, that metaphysical refinements are out of place. A constitution of government is addressed to the common sense of the people; and never was designed for trials of logical skill, or visionary speculation.

The reader will sometimes find the same train of reasoning brought before him in different parts of these Commentaries. It was indispensable to do so, unless the discussion was left imperfect, or the reader was referred back to other pages, to gather up and combine disjointed portions of reasoning. In cases, which have undergone judicial investigation, or which concern the judicial department, I have felt myself restricted to more narrow discussions, than in the rest of the work; and have sometimes contented myself with a mere transcript from the judgments of the court. It may readily be understood, that this course has been adopted from a solicitude, not to go incidentally beyond the line pointed out by the authorities.

In dismissing the work, I cannot but solicit the indulgence of the public for its omissions and deficiencies. With more copious materials it might have been made more exact, as well as more satisfactory. With more leisure and more learning it might have been wrought up more in the spirit of political philosophy. Such as it is, it may not be wholly useless, as a means of stimulating abler minds to a more thorough review of the whole subject; and of impressing upon Americans a reverential attachment to the Constitution, as in the highest sense the palladium of American liberty.

January, 1833.

ADVERTISEMENT TO THE ABRIDGMENT.

The present work is an abridgment, made by the author, of his original work, for the use of Colleges and High-schools. It presents in a compressed form the leading doctrines of that work, so far as they are necessary to a just understanding of the actual provisions of the constitution. Many illustrations and vindications of these provisions are necessarily omitted. But sufficient are retained to enable every student to comprehend and apply the great principles of constitutional law, which were maintained by the founders of the constitution, and which have been since promulgated by those, who have, from time to time, administered it, or expounded its powers. I indulge the hope, that even in this reduced form the reasoning in favour of every clause of the constitution will appear satisfactory and conclusive; and that the youth of my country will learn to venerate and admire it as the only solid foundation, on which to rest our national union, prosperity, and glory.

April, 1833.

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CHAPTER XVI.

GENERAL REVIEW OF THE COLONIES.

§ 72. We have now finished our brief survey of the origin and political history of the colonies; and here we may pause for a short time for the purpose of some general reflections upon the subject.

§ 73. Plantations or colonies in distant countries are either, such as are acquired by occupying and peopling desert and uncultivated regions by emigrations from the mother country; or such as, being already cultivated and organized, are acquired by conquest or cession under treaties. There is, however, a difference between these two species of colonies in respect to the laws, by which they are governed, at least according to the jurisprudence of the common law. If an uninhabited country is discovered and planted by British subjects, the English laws are said to be immediately in force there; for the law is the birthright of every subject. So that wherever they go, they carry their laws with them; and the new found country is governed by them.

§ 74. This proposition, however, though laid down in such general terms by very high authority, requires many limitations, and is to be understood with many restrictions. Such colonists do not carry with them the whole body of the English laws, as they then exist; for many of them must, from the nature of the case, be wholly inapplicable to their situation, and inconsistent with their comfort and prosperity. There is, therefore, this necessary limitation implied, that they carry with them all the laws applicable to their situation, and not repugnant to the local and political circumstances, in which they are placed.

§ 75. Even as thus stated, the proposition is full of vagueness and perplexity; for it must still remain a question of intrinsic difficulty to say, what laws are, or are not applicable to

their situation; and whether they are bound by the present state of things, or are at liberty to apply them in future by adoption, as the growth or interests of the colony may dictate. The English rules of inheritance, and of protection from personal injuries, the rights secured by Magna Charta, and the remedial course in the administration of justice, are examples as clear perhaps as any, which can be stated, as presumptively adopted, or applicable. And yet in the infancy of a colony some of these very rights, and privileges, and remedies, and rules, may be in fact inapplicable, or inconvenient, and impolitic. It is not perhaps easy to settle, what parts of the English laws are, or are not in force in any such colony, until either by usage, or judicial determination, they have been recognized as of absolute force.

§ 76. In respect to conquered and ceded countries, which have already laws of their own, a different rule prevails. In such cases the crown has a right to abrogate the former laws, and institute new ones. But until such new laws are promulgated, the old laws and customs of the country remain in full force, unless so far as they are contrary to our religion, or enact any thing, that is *malum in se*; for in all such cases the laws of the conquering or acquiring country shall prevail. This qualification of the rule arises from the presumption, that the crown could never intend to sanction laws contrary to religion or sound morals. But although the king has thus the power to change the laws of ceded and conquered countries, the power is not unlimited. His legislation is subordinate to the authority of parliament. He cannot make any new change contrary to fundamental principles; he cannot exempt an inhabitant from that particular dominion, as for instance from the laws of trade,

or from the power of parliament; and he cannot give him privileges exclusive of other subjects.

§ 77. Mr. Justice Blackstone, in his Commentaries, insists, that the American colonies are principally to be deemed conquered, or ceded countries. His language is, "Our American Plantations are principally of this latter sort, [i.e. ceded or conquered countries,] being obtained in the last century either by right of conquest and driving out the natives, (with what natural justice I shall not at present inquire,) or by treaties. And, therefore, the common law of England, as such, has no allowance or authority there; they being no part of the mother country, but distinct, though dependent dominions."

§ 78. The doctrine of Mr. Justice Blackstone, may well admit of serious doubt upon general principles. But it is manifestly erroneous, so far as it is applied to the colonies and plantations composing our Union. In the charters, under which all these colonies were settled, with a single exception, there is, an express declaration, that all subjects and their children inhabiting therein shall be deemed natural-born subjects, and shall enjoy all the privileges and immunities thereof; and that the laws of England, so far as they are applicable, shall be in force there; and no laws shall be made, which are repugnant to, but as near as may be conveniently, shall conform to the laws of England. Now this declaration, even if the crown previously possessed a right to establish what laws it pleased over the territory, as a conquest from the natives, being a fundamental rule of the original settlement of the colonies, and before the emigrations thither, was conclusive, and could not afterwards be abrogated by the crown. It was an irrevocable annexation of the

colonies to the mother country, as dependencies governed by the same laws, and entitled to the same rights.

§ 79. And so has been the uniform doctrine in America ever since the settlement of the colonies. The universal principle (and the practice has conformed to it) has been, that the common law is our birthright and inheritance, and that our ancestors brought hither with them upon their emigration all of it, which was applicable to their situation. The whole structure of our present jurisprudence stands upon the original foundations of the common law.

§ 80. We thus see in a very clear light the mode, in which the common law was first introduced into the colonies; as well as the true reason of the exceptions to it to be found in our colonial usages and laws. It was not introduced, as of original and universal obligation in its utmost latitude; but the limitations contained in the bosom of the common law itself, and indeed constituting a part of the law of nations, were affirmatively settled and recognized in the respective charters of settlement. Thus limited and defined, it has become the guardian of our political and civil rights; it has protected our infant liberties; it has watched over our maturer growth; it has expanded with our wants; it has nurtured that spirit of independence, which checked the first approaches of arbitrary power; it has enabled us to triumph in the midst of difficulties and dangers threatening our political existence; and by the goodness of God, we are now enjoying, under its bold and manly principles, the blessings of a free, independent, and united government.

CHAPTER XVII.

GENERAL REVIEW OF THE COLONIES.

§ 81. In respect to their interior polity, the colonies have been very properly divided by Mr. Justice Blackstone into three sorts; viz. Provincial, Proprietary, and Charter Governments. *First*, Provincial Establishments. The constitutions of these depended on the respective commissions issued by the crown to the governors, and the instructions, which usually accompanied those commissions. These commissions were usually in one form, appointing a governor as the king's representative or deputy, who was to be governed by the royal instructions, and styling him Captain General and Governor-in-Chief over the Province, and Chancellor, Vice-Admiral, and Ordinary of the same. The crown also appointed a council, who, besides their legislative authority, were to assist the governor in the discharge of his official duties; and power was given him to suspend them from office, and, in case of vacancies, to appoint others, until the pleasure of the crown should be known. The commissions also contained authority to convene a general assembly of representatives of the freeholders and planters; and under this authority provincial assemblies, composed of the governor, the council, and the representatives, were constituted; (the council being a separate branch or upper house, and the governor having a negative upon all their proceedings, and also the right of proroguing and dissolving them;) which assemblies had the power of making local laws and ordinances, not repugnant to the laws of England, but as near as may be agreeable thereto, subject to the ratification and disapproval of the crown. The governors also had power, with advice of

council, to establish courts, and to appoint judges and other magistrates, and officers for the province; to pardon offences, and to remit fines and forfeitures; to collate to churches and benefices; to levy military forces for defence; and to execute martial law in time of invasion, war, and rebellion. Appeals lay to the king in council from the decisions of the highest courts of judicature of the province, as indeed they did from all others of the colonies. Under this form of government the provinces of New-Hampshire, New-York, New-Jersey, Virginia, the Carolinas, and Georgia, were governed (as we have seen) for a long period, and some of them from an early period after their settlement.

§ 82. *Secondly*, Proprietary Governments. These (as we have seen) were granted out by the crown to individuals, in the nature of feudatory principalities, with all the inferior royalties, and subordinate powers of legislation, which formerly belonged to the owners of counties palatine. Yet still there were these express conditions, that the ends, for which the grant was made, should be substantially pursued; and that nothing should be done or attempted, which might derogate from the sovereignty of the mother country. In the proprietary government the governors were appointed by the proprietaries, and legislative assemblies were assembled under their authority; and indeed all the usual prerogatives were exercised, which in provincial governments belonged to the crown. Three only existed at the period of the American Revolution; viz. the proprietary governments of Maryland, Pennsylvania, and Delaware. The former had this peculiarity in its charter, that its laws were not subject to the supervision and control of the crown; whereas in both the latter

such a supervision and control were expressly or impliedly provided for.

§ 83. *Thirdly*, Charter Governments. Mr. Justice Blackstone describes them, (1 Comm. 108,) as "in the nature of civil corporations with the power of making by-laws for their own internal regulation, not contrary to the laws of England; and with such rights and authorities as are especially given them in their several charters of incorporation. They have a governor named by the king, (or, in some proprietary colonies, by the proprietor,) who is his representative or deputy. They have courts of justice of their own, from whose decisions an appeal lies to the king and council here in England. Their general assemblies, which are their house of commons, together with their council of state, being their upper house, with the concurrence of the king, or his representative the governor, make laws suited to their own emergencies." This is by no means a just or accurate description of the charter governments. They could not be justly considered, as mere civil corporations of the realm, empowered to pass by-laws; but rather as great political establishments or colonies, possessing the general powers of government, and rights of sovereignty, dependent, indeed, and subject to the realm of England; but still possessing within their own territorial limits the general powers of legislation and taxation. The only charter governments existing at the period of the American Revolution were those of Massachusetts, Rhode-Island, and Connecticut. The first charter of Massachusetts might be open to the objection, that it provided only for a civil corporation within the realm, and did not justify the assumption of the extensive executive, legislative, and judicial powers, which were afterwards exercised upon the

removal of that charter to America. And a similar objection might be urged against the charter of the Plymouth colony. But the charter of William and Mary, in 1691, was obviously upon a broader foundation, and was in the strictest sense a charter for general political government, a constitution for a state, with sovereign powers and prerogatives, and not for a mere municipality. By this last charter the organization of the different departments of the government was, in some respects, similar to that in the provincial governments; the governor was appointed by the crown; the council annually chosen by the General Assembly; and the House of Representatives by the people. But in Connecticut and Rhode-Island the charter governments were organized altogether upon popular and democratical principles; the governor, council, and assembly being annually chosen by the freemen of the colony, and all other officers appointed by their authority. By the statutes of 7 & 8 William 3, (ch. 22, § 6,) it was indeed required, that all governors appointed in charter and proprietary governments should be approved of by the crown, before entering upon the duties of their office; but this statute was, if at all, ill observed, and seems to have produced no essential change in the colonial policy.

§ 84. The circumstances, in which the colonies were generally agreed, notwithstanding the diversities of their organization into provincial, proprietary, and charter governments, were the following.

§ 85. (1.) They enjoyed the rights and privileges of British born subjects; and the benefit of the common laws of England; and all their laws were required to be not repugnant unto, but, as

near as might be, agreeable to the laws and statutes of England. This, as we have seen, was a limitation upon the legislative power contained in an express clause of all the charters; and could not be transcended without a clear breach of their fundamental conditions. A very liberal exposition of this clause seems, however, always to have prevailed, and to have been acquiesced in, if not adopted by the crown. Practically speaking, it seems to have been left to the judicial tribunals in the colonies to ascertain, what part of the common law was applicable to the situation of the colonies; and of course, from a difference of interpretation, the common law, as actually administered, was not in any two of the colonies exactly the same. The general foundation of the local jurisprudence was confessedly composed of the same materials; but in the actual superstructure they were variously combined, and modified, so as to present neither a general symmetry of design, nor an unity of execution.

§ 86. In regard to the legislative power, there was a still greater latitude allowed; for notwithstanding the cautious reference in the charters to the laws of England, the assemblies actually exercised the authority to abrogate every part of the common law, except that, which united the colonies to the parent state by the general ties of allegiance and dependency; and every part of the statute law, except those acts of Parliament, which expressly prescribed rules for the colonies, and necessarily bound them, as integral parts of the empire, in a general system, formed for all, and for the interest of all. To guard this superintending authority with more effect, it was enacted by Parliament in 7 & 8 William 3, (ch. 22,) "that all laws, by-laws, usages, and customs, which should be in practice

in any of the plantations, repugnant to any law made, or to be made in this kingdom relative to the said plantations, shall be utterly void and of none effect."

§ 87. It was under the consciousness of the full possession of the rights, liberties, and immunities of British subjects, that the colonists in almost all the early legislation of their respective assemblies insisted upon a declaratory act, acknowledging and confirming them. And for the most part they thus succeed in obtaining a real and effective magna charta of their liberties. The trial by jury in all cases, civil and criminal, was as firmly, and as universally established in the colonies, as in the mother country.

§ 88. (2.) In all the colonies local legislatures were established, one branch of which consisted of representatives of the people freely chosen, to represent and defend their interests, and possessing a negative upon all laws. We have seen, that in the original structure of the charters of the early colonies, no provision was made for such a legislative body. But accustomed as the colonists had been to possess the rights and privileges of Englishmen, and valuing as they did, above all others, the right of representation in Parliament, as the only real security for their political and civil liberties, it was easy to foresee, that they would not long endure the exercise of any arbitrary power; and that they would insist upon some share in framing the laws, by which they were to be governed. We find accordingly, that at an early period [1619] a house of burgesses was forced upon the then proprietors of Virginia. In Massachusetts, Connecticut, New-Hampshire, and Rhode-Island, the same course was pursued. And Mr. Hutchinson has

correctly observed, that all the colonies before the reign of Charles the Second, (Maryland alone excepted, whose charter contained an express provision on the subject,) settled a model of government for themselves, in which the people had a voice, and representation in framing the laws, and in assenting to burthens to be imposed upon themselves. After the restoration, there was no instance of a colony without a representation of the people, nor any attempt to deprive the colonies of this privilege, except during the brief and arbitrary reign of King James the Second.

§ 89. (5.) All the colonies considered themselves, not as parcel of the realm of Great Britain, but as dependencies of the British crown, and owing allegiance thereto, the king being their supreme and sovereign lord. In virtue of its general superintendency the crown constantly claimed, and exercised the right of entertaining appeals from the courts of the last resort in the colonies; and these appeals were heard and finally adjudged by the king in council. This right of appeal was secured by express reservation in most of the colonial charters. It was expressly provided for by an early provincial law in New-Hampshire, when the matter in difference exceeded the true value or sum of £300 sterling. So, a like colonial law of Rhode-Island was enacted by its local legislature in 1719. It was treated by the crown, as an inherent right of the subject, independent of any such reservation. And so in divers cases it was held by the courts of England. The reasons given for the opinion, that writs of error [and appeals] lie to all the dominions belonging to England upon the ultimate judgments given there, are, (1.) That, otherwise, the law appointed, or permitted to such inferior dominion might be considerably changed without the

assent of the superior dominion; (2.) Judgments might be given to the disadvantage or lessening of the superiority, or to make the superiority of the king only, and not of the crown of England; and (3.) That the practice has been accordingly.

§ 90. (6.) Though the colonies had a common origin, and owed a common allegiance, and the inhabitants of each were British subjects, they had no direct political connexion with each other. Each was independent of all the others; each, in a limited sense, was sovereign within its own territory. There was neither alliance, nor confederacy between them. The assembly of one province could not make laws for another; nor confer privileges, which were to be enjoyed or exercised in another, farther than they could be in any independent foreign state. As colonies, they were also excluded from all connexion with foreign states. They were known only as dependencies; and they followed the fate of the parent country both in peace and war, without having assigned to them, in the intercourse or diplomacy of nations, any distinct or independent existence. They did not possess the power of forming any league or treaty among themselves, which should acquire an obligatory force without the assent of the parent state. And though their mutual wants and necessities often induced them to associate for common purposes of defence, these confederacies were of a casual and temporary nature, and were allowed as an indulgence, rather than as a right. They made several efforts to procure the establishment of some general superintending government over them all; but their own differences of opinion, as well as the jealousy of the crown, made these efforts abortive. These efforts, however, prepared their minds for the gradual reconciliation of their local interests, and for the gradual

developement of the principles, upon which a union ought to rest, rather than brought on an immediate sense of the necessity, or the blessings of such a general government.

§ 91. But although the colonies were independent of each other in respect to their domestic concerns, they were not wholly alien to each other. On the contrary, they were fellow subjects, and for many purposes one people. Every colonist had a right to inhabit, if he pleased, in any other colony; and, as a British subject, he was capable of inheriting lands by descent in every other colony. The commercial intercourse of the colonies, too, was regulated by the general laws of the British empire; and could not be restrained, or obstructed by colonial legislation. The remarks of Mr. Chief Justice Jay on this subject are equally just and striking. "All the people of this country were then subjects of the king of Great Britain, and owed allegiance to him; and all the civil authority then existing, or exercised here, flowed from the head of the British empire. They were, in a strict sense, *fellow* subjects, and in a variety of respects *one people*. When the Revolution commenced, the patriots did not assert, that only the same affinity and social connexion subsisted between the people of the colonies, which subsisted between the people of Gaul, Britain, and Spain, while Roman provinces, to wit, only that affinity and social connexion, which result from the mere circumstance of being governed by the same prince." Different ideas prevailed, and gave occasion to the Congress of 1774 and 1775.

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BOOK III.

THE CONSTITUTION OF THE UNITED STATES.

CHAPTER I.

ORIGIN AND ADOPTION OF THE CONSTITUTION.

§ 131. In this state of things, commissioners were appointed by the legislatures of Virginia and Maryland early in 1785, to form a compact relative to the navigation of the rivers Potomac and Pocomoke, and the Chesapeake Bay. The commissioners having met in March, in that year, felt the want of more enlarged powers, and particularly of powers to provide for a local naval force, and a tariff of duties upon imports. Upon receiving their recommendation, the legislature of Virginia passed a resolution for laying the subject of a tariff before all the states composing the Union. Soon afterwards, in January, 1786, the legislature adopted another resolution, appointing commissioners, "who were to meet such, as might be appointed by the other states in the Union, at a time and place to be agreed on, to take into consideration the trade of the United States; to examine the relative situation and trade of the states; to consider how far a uniform system in their commercial relations may be necessary to their common interest, and their permanent harmony; and to report to the several states such an act, relative to this great object, as, when unanimously ratified by them, will enable the United States in congress assembled to provide for the same."

§ 132. These resolutions were communicated to the states, and a convention of commissioners from five states only, viz. New-York, New-Jersey, Pennsylvania, Delaware, and Virginia, met at Annapolis, in September, 1786. After discussing the subject, they deemed more ample powers necessary, and as well from this consideration, as because a small number only of the states was represented, they agreed to come to no decision, but to frame a report to be laid before the several states, as well as before congress. In this report they recommended the appointment of commissioners from all the states, "to meet at Philadelphia, on the second Monday of May, then next, to take into consideration the situation of the United States; to devise such further provisions, as shall appear to them necessary, to render the constitution of the federal government adequate to the exigencies of the Union; and to report such an act for that purpose to the United States in congress assembled, as when agreed to by them, and afterwards confirmed by the legislature of every state, will effectually provide for the same."

§ 133. On receiving this report, the legislature of Virginia passed an act for the appointment of delegates to meet such, as might be appointed by other states, at Philadelphia. The report was also received in congress. But no step was taken, until the legislature of New-York instructed its delegation in congress to move a resolution, recommending to the several states to appoint deputies to meet in convention for the purpose of revising and proposing amendments to the federal constitution. On the 21st of February, 1787, a resolution was accordingly moved and carried in congress, recommending a convention to meet in Philadelphia, on the second Monday of May ensuing, "for the purpose of revising the articles of confederation, and reporting

to congress, and the several legislatures, such alterations and provisions therein, as shall, when agreed to in congress, and confirmed by the states, render the federal constitution adequate to the exigencies of government, and the preservation of the Union." The alarming insurrection then existing in Massachusetts, without doubt, had no small share in producing this result. The report of congress, on that subject, at once demonstrates their fears, and their political weakness.

§ 134. At the time and place appointed, the representatives of twelve states assembled. Rhode-Island alone declined to appoint any on this momentous occasion. After very protracted deliberations, the convention finally adopted the plan of the present constitution, on the 17th of September, 1787; and by a contemporaneous resolution, directed it to be "laid before the United States in congress assembled," and declared their opinion, "that it should afterwards be submitted to a convention of delegates chosen in each state by the *people* thereof, under a recommendation of its legislature, for their *assent* and *ratification*;" and that each convention, assenting to and ratifying the same, should give notice thereof to congress. The convention by a further resolution declared their opinion, that as soon as nine states had ratified the constitution, congress should fix a day, on which electors should be appointed by the states, which should have ratified the same, and a day, on which the electors should assemble and vote for the president, and the time and place of commencing proceedings under the constitution; and that after such publication, the electors should be appointed, and the senators and representatives elected. The same resolution contained further

recommendations for the purpose of carrying the constitution into effect.

§ 135. Congress, having received the report of the convention, on the 28th of September, 1787, unanimously resolved, "that the said report, with the resolutions and letter accompanying the same, be transmitted to the several legislatures in order to be submitted to a *convention of delegates chosen in each state by the people thereof*, in conformity to the resolves of the convention, made and provided in that case."

§ 136. Conventions in the various states, which had been represented in the general convention, were accordingly called by their respective legislatures; and the constitution having been ratified by eleven out of the twelve states, congress, on the 13th day of September, 1788, passed a resolution appointing the first Wednesday in January following, for the choice of electors of president; the first Wednesday of February following, for the assembling of the electors to vote for a president; and the first Wednesday of March following, at the then seat of congress [New-York] the time and place for commencing proceedings under the constitution. Electors were accordingly appointed in the several states, who met and gave their votes for a president; and the other elections for senators and representatives having been duly made, on Wednesday, the 4th of March, 1789, congress assembled under the new constitution, and commenced proceedings under it. A quorum of both houses, however, did not assemble until the 6th of April, when the votes for president being counted, it was found that George Washington was unanimously elected president, and John Adams was elected vice-president. On the 30th of April, president Washington was

sworn into office, and the government then went into full operation in all its departments.

§ 137. North-Carolina had not, as yet, ratified the constitution. The first convention called in that state, in August, 1788, refused to ratify it without some previous amendments, and a declaration of rights. In a second convention, however, called in November, 1789, this state adopted the constitution. The state of Rhode-Island had declined to call a convention; but finally, by a convention held in May, 1790, its assent was obtained; and thus all the thirteen original states became parties to the new government.

§ 138. Thus was achieved another, and still more glorious triumph in the cause of national liberty, than even that, which separated us from the mother country. By it we fondly trust, that our republican institutions will grow up, and be nurtured into more mature strength and vigour; our independence be secured against foreign usurpation and aggression; our domestic blessings be widely diffused, and generally felt; and our union, as a people, be perpetuated, as our own truest glory and support, and as a proud example of a wise and beneficent government, entitled to the respect, if not to the admiration of mankind.

[* * * * *]

CHAPTER XXXVIII.

JUDICIARY--ORGANIZATION AND POWERS.

§ 817. The order of the subject next conducts us to the consideration of the third article of the constitution, which embraces the organization and powers of the judicial department.

[* * * * *]

§ 850. The second section of the third article contains an exposition of the jurisdiction appertaining to the judicial power of the national government. The first clause is as follows: "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 ambassadors, 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."

§ 851. And first, the judicial power extends to all cases in law and equity, arising under the constitution, the laws, and the treaties of the United States. And by cases in this clause we are to understand criminal, as well as civil cases.

[* * * * *]

§ 855. It is observable, that the language is, that "the judicial power shall extend to all cases *in law* and *equity*," arising under the constitution, laws, and treaties of the United States. What is

to be understood by "cases in law and equity," in this clause? Plainly, cases at the common law, as contradistinguished from cases in equity, according to the known distinction in the jurisprudence of England, which our ancestors brought with them upon their emigration, and with which all the American states were familiarly acquainted. Here, then, at least, the constitution of the United States appeals to, and adopts, the common law to the extent of making it a rule in the pursuit of remedial justice in the courts of the Union. If the remedy must be in law, or in equity, according to the course of proceedings at the common law, in cases arising under the constitution, laws, and treaties, of the United States, it would seem irresistibly to follow, that the principles of decision, by which these remedies must be administered, must be derived from the same source. Hitherto, such has been the uniform interpretation and mode of administering justice in the courts of the United States in this class of civil cases.

For further reading:

Justice Joseph Story on Church and State and the Bill of Rights

Samuel West, [On Natural Law] (1776)

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official version of quoted or reproduced decisions/documents, see the original source.

William Blackstone

William Blackstone as illustrated in his *Commentaries on the Laws of England*.

Sir **William Blackstone** (July 10, 1723 – February 14, 1780) was an English jurist and professor who produced the historical and analytic treatise on the Common law called *Commentaries on the Laws of England*, first published in four volumes during the years 1765–1769. This first attempt to reduce the English Common law to a single unified system was an extraordinary success, and Blackstone received a knighthood in honor of his great work. The concepts and theories in the *Commentaries* went on to play a major role in the foundation of the Declaration of Independence, and the United States Constitution. The *Commentaries* still remain an important source of classical views of the Common law and its principles, and have served as the basis of university legal education in both England and the United States since their publication. Blackstone did not analyze the law, or promote reform; he saw the law as designed to impose rules of conduct by the ruler, representing the ultimate authority of nature, or God. Thus, his purpose was to accurately describe the laws as they existed, and in this he succeeded, allowing others who had a need to reform the law to build on his work. Indeed, though, if the law were cosmic principles given to humankind by God, we would need no reform, only understanding, as Blackstone envisioned.

Contents

Life

William Blackstone was born in Cheapside, London in July 1723, the son of a prosperous silk merchant. He became orphaned at an early age and was placed in the care of his uncle. He began his education at Charterhouse School, and at the age of fifteen was sent to continue his studies at Pembroke College, Oxford. In 1744 he was elected a fellow of All Souls' College, Oxford.

Upon completing his studies in 1746, Blackstone was called to the Bar at the Middle Temple. As a reward for his services he was appointed steward of its manors in May 1749. In addition, this opportunity was an effort to advance the interests of the college. Unsuccessful in law, he returned to Oxford in 1753 to deliver a course of lectures on English law. He became the first occupant of the newly founded Vinerian professorship of law in 1758.

Blackstone married Sarah Clitherow in 1761, and together they had nine children. Later that year he was elected a Member of Parliament and was appointed king's counsel. Blackstone retired from his professorship and headship in 1766. In 1770, Blackstone was knighted. He was made a judge of the Court of Common Pleas in 1770, where he administered the law efficiently, but his record was no more distinguished than his time spent at the Bar.

William Blackstone spent the last twenty years of his life with his family in Castle Priory House, which he built at Wallingford. On February 14, 1780, Blackstone died at the age of 57 and was buried at St. Peter's Church in the town. The Castle Priory House still stands, now as a hotel. His fine statue by Bacon in the Library of All Souls seems to dominate that magnificent room, to the enrichment of whose shelves he largely

contributed. If it is true that in his later life he became both irritable and heavy, it is certain that, during the eighteen years spent in his beloved college, he was the most genial and delightful of companions.[1]

Work

Blackstone lived and worked in the eighteenth century, contemporary with such as Adam Smith, David Hume, and Benjamin Franklin. The law was rooted in everyday life but removed by lawyers and courts from most people's lives. Blackstone's task, and in this he was successful, was to open the law to many for whom it had been closed.[2]

Commentaries on the Laws of England

Blackstone's lectures were designed as an introduction to the whole of the Common law, and they proved an immediate success with his students. It was the first time that English law had been made easily readable and comprehensible to the lay mind. Shortly thereafter, the lectures were published as *Commentaries on the Laws of England*. The series was comprised of four volumes, each representing a different theme, in order to present the whole of British law in a logical and comprehensive way. The publication was a great success, and said to have brought Blackstone £14,000, which was a very considerable sum of money at the time.

The first volume, published in 1765, was entitled "Rights of Persons"; the majority of the book based on the "Absolute Rights of Individuals." It also covered topics such as inheritance of the throne, duties of magistrates, allegiance to one's nation, marriage, and guardianship. The second volume entitled "Rights of Things" encompassed the rights that people have over property. "Private Wrongs" (known today as "torts") was the discussion basis for the third book. The fourth and final volume was published in 1769 and covered "Public Wrongs," meaning crimes and punishments, including offenses against God and religion.

The *Commentaries on the Laws of England* were treated like an authority and dominated the legal system for more than a century. In addition, the *Commentaries* had extreme influential power over legal education in both England and America.
The *Commentaries* were published all around the world, beginning in the U.S. in 1771. This first printing of 1,400 books sold out and soon after a second edition followed. They were translated into French, German, and Russian. Blackstone also published treatises on the Magna Carta and the Charter of the Forests.

Blackstone and Property Jurisprudence

Blackstone's characterization of property rights as "sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe," has often been quoted in judicial opinions and secondary legal literature as the dominant Western concept of property. In spite of the frequency with which this conception is quoted, however, it is now discredited or understood as a mere formalism, since in reality property rights are encumbered by numerous factors, including the will of the state.

Legacy

His work earned him belated success as a lawyer, politician, judge, and scholar. Blackstone, however, more than paid for his success; he and his book were the targets of some of the "most vitriolic attacks ever mounted upon a man or his ideas."[2]

The *Commentaries on the Laws of England* were written shortly before the United States Constitution. The terms and phrases used by the framers often derived from Blackstone's works. The book is regarded not only as a legal classic, but also as a literary masterpiece.

Blackstone's work was more often synthetic than original, but his writing was organized, clear, and dignified, which brings his great work within the category of general literature. He also had a turn for neat and polished verse, of which he gave proof in *The Lawyer's Farewell to his Muse*.[2]

United States courts frequently quote Blackstone's *Commentaries on the Laws of England* as the definitive pre-Revolutionary War source of Common law; in particular, the United States Supreme Court has often quoted from Blackstone's work whenever they engaged in historical discussion, for example, when discussing the intent of the framers of the Constitution.

United States and other Common law courts mention with strong approval "Blackstone's Formulation" (also known as Blackstone's ratio or the Blackstone ratio), popularly stated as "Better that ten guilty persons escape than that one innocent suffer." Named after Blackstone, the principle expressed in the formulation is much older, being closely tied to the presumption of innocence in criminal trials.[3]

Blackstone and his work have appeared in literature and popular culture. Blackstone received mention in Herman Melville's *Moby-Dick*. A bust of Blackstone is a typical ornament of a lawyer's office in popular fiction.

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Notes

1. ↑ Sir William Blackstone Retrieved February 12, 2008.
2. ↑ Jump up to: 2.0 2.1 2.2 Greg Bailey, Blackstone In America: Lectures by an English Lawyer, The Bettman Archive. Retrieved February 12, 2008.
3. ↑ Alexander Volokh, 1997, n Guilty Men *University of Pennsylvania Law Review*, 146-173. Retrieved February 12, 2008.

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- Royal Berkshire History: Sir William Blackstone
- Sir William Blackstone's *Commentaries on the Laws of England*, from the Avalon Project at Yale Law School

Credits

NATIONAL ARCHIVES

Declaration of Independence: A Transcription

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Note: The following text is a transcription of the Stone Engraving of the parchment Declaration of Independence (the document on display in the Rotunda at the National Archives Museum.) The spelling and punctuation reflects the original.

In Congress, July 4, 1776

The unanimous Declaration of the thirteen united States of America, When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.--That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, --That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.--Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of

Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.

He has refused his Assent to Laws, the most wholesome and necessary for the public good.

He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

He has refused to pass other Laws for the accommodation of large districts of people, unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only.

He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public Records, for the sole purpose of fatiguing them into compliance with his measures.

He has dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people.

He has refused for a long time, after such dissolutions, to cause others to be elected; whereby the Legislative powers, incapable of Annihilation, have returned to the People at large for their exercise; the State remaining in the mean time exposed to all the dangers of invasion from without, and convulsions within.

He has endeavoured to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new Appropriations of Lands.

He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary powers.

He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.

He has erected a multitude of New Offices, and sent hither swarms of Officers to harrass our people, and eat out their substance.

He has kept among us, in times of peace, Standing Armies without the Consent of our legislatures.

He has affected to render the Military independent of and superior to the Civil power.

He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation:

For Quartering large bodies of armed troops among us:

For protecting them, by a mock Trial, from punishment for any Murders which they should commit on the Inhabitants of these States:

For cutting off our Trade with all parts of the world:

For imposing Taxes on us without our Consent:

For depriving us in many cases, of the benefits of Trial by Jury:

For transporting us beyond Seas to be tried for pretended offences

For abolishing the free System of English Laws in a neighbouring Province, establishing therein an Arbitrary government, and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies:

For taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Governments:

For suspending our own Legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever.

He has abdicated Government here, by declaring us out of his Protection and waging War against us.

He has plundered our seas, ravaged our Coasts, burnt our towns, and destroyed the lives of our people.

He is at this time transporting large Armies of foreign Mercenaries to compleat the works of death, desolation and tyranny, already begun with circumstances of Cruelty & perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the Head of a civilized nation.

He has constrained our fellow Citizens taken Captive on the high Seas to bear Arms against their Country, to become the executioners of their friends and Brethren, or to fall themselves by their Hands.

He has excited domestic insurrections amongst us, and has endeavoured to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions.

In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people.

Nor have We been wanting in attentions to our Brittish brethren. We have warned them from time to time of attempts by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our

common kindred to disavow these usurpations, which, would inevitably interrupt our connections and correspondence. They too have been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the necessity, which denounces our Separation, and hold them, as we hold the rest of mankind, Enemies in War, in Peace Friends.

We, therefore, the Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do. And for the support of this Declaration, with a firm reliance on the protection of divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.

Georgia

Button Gwinnett

Lyman Hall

George Walton

North Carolina

William Hooper

Joseph Hewes

John Penn

South Carolina

Edward Rutledge

Thomas Heyward, Jr.

Thomas Lynch, Jr.

Arthur Middleton

Massachusetts

John Hancock

Maryland

Samuel Chase

William Paca

Thomas Stone

Charles Carroll of Carrollton

Virginia

George Wythe

Richard Henry Lee

Thomas Jefferson

Benjamin Harrison

Thomas Nelson, Jr.

Francis Lightfoot Lee

Carter Braxton

Pennsylvania

Robert Morris

Benjamin Rush

Benjamin Franklin

John Morton

George Clymer

James Smith

George Taylor

James Wilson

George Ross

Delaware

Caesar Rodney

George Read

Thomas McKean

New York

William Floyd

Philip Livingston

Francis Lewis

Lewis Morris

New Jersey

Richard Stockton

John Witherspoon

Francis Hopkinson

John Hart

Abraham Clark

New Hampshire

Josiah Bartlett

William Whipple

Massachusetts

Samuel Adams

John Adams

Robert Treat Paine

Elbridge Gerry

Rhode Island

Stephen Hopkins

William Ellery

Connecticut

Roger Sherman

Samuel Huntington

William Williams

Oliver Wolcott

New Hampshire

Matthew Thornton

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NATIONAL ARCHIVES

The Constitution of the United States: A Transcription

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Note: The following text is a transcription of the Constitution as it was inscribed by Jacob Shallus on parchment (the document on display in the Rotunda at the National Archives Museum.) *The spelling and punctuation reflect the original.*

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Article. I.

Section. 1.

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section. 2.

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section. 3.

The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section. 4.

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section. 5.

Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section. 6.

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any

Office under the United States, shall be a Member of either House during his Continuance in Office.

Section. 7.

All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section. 8.

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section. 9.

The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section. 10.

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Article. II.

Section. 1.

The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section. 2.

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section. 3.

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section. 4.

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Article. III.

Section. 1.

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 Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section. 2.

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 Ambassadors, 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.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be 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, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section. 3.

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

Article. IV.

Section. 1.

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section. 2.

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section. 3.

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section. 4.

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

Article. V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the

Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Article. VI.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Article. VII.

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

The Word, "the," being interlined between the seventh and eighth Lines of the first Page, The Word "Thirty" being partly written on an Erazure in the fifteenth Line of the first Page, The Words "is tried" being interlined between the thirty second and thirty third Lines of the first Page and the Word "the" being interlined between the forty third and forty fourth Lines of the second Page.

Attest William Jackson Secretary

done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independance of the United States of America the Twelfth In witness whereof We have hereunto subscribed our Names,

G°. Washington
Presidt and deputy from Virginia

Delaware

Geo: Read
Gunning Bedford jun
John Dickinson
Richard Bassett
Jaco: Broom

Maryland

James McHenry
Dan of St Thos. Jenifer
Danl. Carroll

Virginia

John Blair
James Madison Jr.

North Carolina

Wm. Blount
Richd. Dobbs Spaight
Hu Williamson

South Carolina

J. Rutledge
Charles Cotesworth Pinckney
Charles Pinckney
Pierce Butler

Georgia

William Few
Abr Baldwin

New Hampshire

John Langdon
Nicholas Gilman

Massachusetts

Nathaniel Gorham
Rufus King

Connecticut

Wm. Saml. Johnson
Roger Sherman

New York

Alexander Hamilton

New Jersey

Wil: Livingston
David Brearley
Wm. Paterson
Jona: Dayton

Pennsylvania

B Franklin
Thomas Mifflin
Robt. Morris
Geo. Clymer
Thos. FitzSimons
Jared Ingersoll
James Wilson
Gouv Morris

For biographies of the non-signing delegates to the Constitutional Convention, see the Founding Fathers page.

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Fordham Law Review

Volume 83 *Volume 83*
Issue 5 *Volume 83, Issue 5*

Article 3

2015

Foreword: Diversity in the Legal Profession: A Comparative Perspective

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COLLOQUIUM

FOREWORD: DIVERSITY IN THE LEGAL PROFESSION: A COMPARATIVE PERSPECTIVE

*Deborah L. Rhode**

In principle, the legal profession in the United States and United Kingdom is deeply committed to diversity and inclusion. In practice, it lags behind. This colloquium explores what stands in the way. Leading scholars from both countries look at the gap between aspirations and achievement, and suggest some concrete strategies for change.

The facts are frustratingly familiar. Women and lawyers of color remain underrepresented at the top and overrepresented at the bottom of the legal profession.[1] A cottage industry of research attempts to explain such inequalities.[2] Primary explanations include:

- Organizational cultures that do not support diversity;[3]
- Unconscious and concealed biases;[4]

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* Ernest W. McFarland Professor of Law and Director of the Center on the Legal Profession, Stanford University. This Foreword provides an overview of the colloquium entitled *The Challenge of Equity and Inclusion in the Legal Profession: An International and Comparative Perspective* held at Fordham University School of Law.

1. For the United Kingdom, see, for example, Julie Ashdown, *Shaping Diversity and Inclusion Policy with Research*, 83 FORDHAM L. REV. 2249, 2252 (2015); Hilary Sommerlad, *The "Social Magic" of Merit: Diversity, Equity, and Inclusion in the English and Welsh Legal Profession*, 83 FORDHAM L. REV. 2325, 2330–32 (2015). For the United States, see, for example, Russell G. Pearce, Eli Wald & Swethaa Ballakrishnen, *Difference Blindness Vs. Bias Awareness: Why Law Firms with the Best of Intentions Have Failed to Create Diverse Partnerships*, 83 FORDHAM L. REV. 2407, 2410 (2015); Deborah L. Rhode & Lucy Buford Ricca, *Diversity in the Legal Profession: Perspectives from Managing Partners and General Counsel*, 83 FORDHAM L. REV. 2483, 2483–84 (2015).

2. For examples, see sources cited in ABA, DIVERSITY IN THE LEGAL PROFESSION: THE NEXT STEPS (2010); ABA COMM'N ON WOMEN & THE LEGAL PROFESSION, VISIBLE INVISIBILITY (2012); DEBORAH L. RHODE, THE TROUBLE WITH LAWYERS (forthcoming 2015); Deborah L. Rhode, *From Platitudes to Priorities: Diversity and Gender Equity in Law Firms*, 24 GEO. J. LEGAL ETHICS 1041 (2011); Eli Wald, *A Primer on Diversity, Discrimination and Equality in the Legal Profession or Who Is Responsible for Pursuing Diversity and Why*, 24 GEO. J. LEGAL ETHICS 1079 (2011); David Wilkins & Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CALIF. L. REV. 493 (1996).

3. *See, e.g.*, Ashdown, *supra* note 1; Pearce, Wald & Ballakrishnen, *supra* note 1.

- Extended hours and resistance to flexible work schedules;[5] and
- Lack of access to mentors, sponsors, choice assignments, and business networks.[6]

The contributions to this colloquium offer further insights into these patterns of exclusion and the responses that might address them.

THE U.K. PERSPECTIVE

The colloquium begins with an essay by Julie Ashdown, head of Corporate Responsibility, Equality and Diversity, for the Law Society of England and Wales.[7] Ashdown reviews the research commissioned by the Society over the last twenty years and the initiatives that have resulted from that research. Her essay explores the effect of those initiatives and the challenges that remain. The research suggests that increasing numbers of women and minorities are studying law and doing well at it but then struggling to get training contracts and work as a solicitor.[8] Those who succeed and enter private practice "face significant challenges in reaching partner level."[9] One promising response has been the Diversity and Inclusion Charter, established by the Law Society in 2009. Its purpose is to promote diversity by helping signatories measure their procedures against a set of best practice standards and by providing opportunities to share advice with colleagues across the profession. To date over 450 practices have signed the Charter, representing more than a third of solicitors in private practice.[10] To make further progress, the Society sees its role as including lobbying with law firms on specific issues, such as flexible work or equal pay; signposting good practices; measuring advances; profiling role models; and providing practical support on relevant issues such as blind recruitment.[11] Through such efforts, the Society hopes to partner with solicitors in promoting a more inclusive profession.

Savita Kumra looks at diversity management strategies of large U.K. law firms, including the Law Society's Diversity and Inclusion Charter, and concludes that such efforts have not achieved their stated goals.[12] These strategies, such as public commitments to the issue, diversity committees,

4. *See, e.g.*, Rhode, *supra* note 2, at 1050–53; Kevin Woodson, *Race and Rapport: Homophily and Racial Disadvantage in Large Law Firms*, 83 FORDHAM L. REV. 2557, 2560 (2015); Devon W. Carbado, Patrick Rock & Valerie Purdie-Vaughns, Concealed Biases (2015) (unpublished manuscript) (on file with author).

5. *See, e.g.*, Ashdown, *supra* note 1; Savita Kumra, *Busy Doing Nothing: An Exploration of the Disconnect Between Gender Equity Issues Faced by Large Law firms in the United Kingdom and the Diversity Management Initiatives Devised to Address Them*, 83 FORDHAM L. REV. 2277, 2282 (2015); Rhode, *supra* note 2, at 1056–58.

6. *See, e.g.*, Ashdown, *supra* note 1; Kumra, *supra* note 5, at 2281–82; Pearce, Wald & Ballakrishnen, *supra* note 1, at 2423; Rhode, *supra* note 2, at 1053–56; Wilkins & Gulati, *supra* note 2.

7. Ashdown, *supra* note 1.

8. *Id.* at 2260–61.

9. *Id.* at 2261.

10. *Id.* at 2266.

11. *Id.* at 2264–71.

12. Kumra, *supra* note 5.

formal mentoring programs, flexible or reduced schedule options, and participation in high profile diversity events, have given the appearance of addressing the challenge of inclusion. But they have brought little actual progress. Thus firms are "busy doing nothing."[13] It is, for example, not enough for firms to establish formal work/life policies if women know that taking advantage of them will negatively affect career prospects.[14] To make significant progress, Kumra argues that more firms have to want to change in significant ways and to invest the effort in devising more effective strategies.[15]

Steven Vaughan is similarly critical of efforts to achieve diversity in U.K. law firms. Vaughan explores the justifications for and impact of the 2011 rule of the English Legal Services Board requiring the collection and publication of data on workforce diversity.[16] He maintains that the rule was unnecessary, that it was "set up to fail," that it has been poorly operationalized, and that its symbolic impact has been mixed.[17] More specifically, Vaughan argues that there is little evidence from the fields of corporate social responsibility and corporate governance to suggest that reporting rules have significant impact, and there is little reason to believe that clients will hold firms accountable for their diversity performance.[18] He also faults the Legal Services Board for drafting requirements lacking in "statistical sophistication" and for failing to do anything significant with the data that they have gathered.[19] As a consequence, there has been little significant change in the behavior of law firms traceable to the rule.[20]

Hillary Sommerlad challenges conventional definitions of merit within the English legal profession.[21] She argues that "conceptualizations of merit and professionalism are rooted in the contemporary system of social stratification."[22] Merit performs its "social magic" in legitimating professional hierarchies by presenting itself as a disinterested objective standard. Thus conceived, merit places responsibility for exclusion from upper level positions on those excluded—their presumed lack of capabilities and commitment.[23] As a consequence, merit serves to "deflect criticism of the slow progress toward diversity."[24] Sommerlad's thesis calls

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13. *Id.* at 2278.
14. *Id.* at 2286.
15. *Id.* at 2293–99. For examples, see Rhode, *supra* note 2, at 1072–77; Rhode & Ricca, *supra* note 1, at 2501–06.
16. *See* Steven Vaughan, *Going Public: Diversity Disclosures by Large U.K. Law Firms*, 83 FORDHAM L. REV. 2301 (2015).
17. *Id.* at 2301–02, 2308–21.
18. *Id.* at 2315–17.
19. *Id.* at 2302.
20. *Id.* at 2317–21.
21. Sommerlad, *supra* note 1.
22. *Id.* at 2327.
23. *Id.* at 2333.
24. *Id.* at 2325. For a similar argument, see Deborah L. Rhode, *Myths of Meritocracy*, 65 FORDHAM L. REV. 585 (1996).

into question the efficacy of blind recruitment strategies advocated by, among others, the Law Society.[25]

Lisa Webley looks at how broader changes in the regulation of the English legal profession relate to diversity.[26] As she notes, "New types of legal businesses are emerging, and law graduates—who previously had not found a place within the regulated admitted legal profession—appear to be entering new facets of the legal marketplace."[27] However, as noted by other contributions to this colloquium, the upper echelons of the profession remain stratified by class, race, ethnicity, and gender. The bar's main professional bodies have been "more inclined to encourage measures that aim to raise the aspirations of [underrepresented groups] to attend elite law schools rather than to challenge the prevailing view that elite schooling necessarily indicates lawyer excellence."[28] However, the Legal Services Board has a mandate to encourage a diverse legal profession, and it has indicated that if professional bodies do not achieve progress in promoting diversity, it may intervene.

Jonathan Ashong-Lamptey's essay explores how black lawyers use developmental relationships to enhance their careers in the face of disadvantage.[29] In the essay black lawyers are identified as biculturals: individuals who have both experienced and internalized more than one culture. Ashong-Lamptey acknowledges that the bicultural experiences of these individuals are heterogeneous and suggests that these differences may influence their developmental networks.

Borrowing from the acculturation literature, bicultural identity integration (BII) is used to measure the degree to which the black lawyers saw their racial identity and workplace identity as being either compatible and integrated or oppositional and difficult to reconcile. This framework is important because it integrates research on diversity and developmental networks to illumine how minority lawyers navigate processes designed to advance their careers.

Richard Collier's essay examines the practices of men concerning work/life balance and well-being in large transnational London law firms.[30] As he notes, fatherhood is rarely researched in this context; the dominant assumption is that it does not pose the same adverse career effects as motherhood.[31] Collier does not question this assumption, but he does note

25. *Cf.* Ashdown, *supra* note 1; *see also* Pearce, Wald & Ballakrishnen, *supra* note 1, at 2438–55 (questioning the conventional conceptions of merit in the context of the U.S. legal profession and advocating for an integration-and-learning approach that urges bias awareness).

26. Lisa Webley, *Legal Professional De(re)regulation, Equality, and Inclusion, and the Contested Space of Professionalism Within the Legal Market in England and Wales*, 83 FORDHAM L. REV. 2349 (2015).

27. *Id.*

28. *Id.* at 2364.

29. Jonathan Ashong-Lamptey, *Bicultural Experience in the Legal Profession: A Developmental Network Approach*, 83 FORDHAM L. REV. 2369 (2015).

30. Richard Collier, *Naming Men* As Men *in Corporate Legal Practice: Gender and the Idea of "Virtually 24/7 Commitment" in Law*, 83 FORDHAM L. REV. 2387 (2015).

31. *Id.* at 2390.

the tension for men who wish to assume caretaking roles that do not readily mesh with the demands of life as relatively highly paid elite London lawyers. Collier invites us to rethink the way that images of "good fathers" and "good lawyers" affect the formation of professional identity.[32] Complex changes are taking place in men's lives that reflect significant demographic, cultural, economic, and political shifts.[33] These changes need to inform our understanding of what constitutes work/life balance and well-being in the contemporary legal profession.

THE U.S. PERSPECTIVE

Turning the focus to the United States, Russell Pearce, Eli Wald, and Swethaa Ballakrishnen argue that, although color and difference blindness served an invaluable purpose in the first generation of antidiscrimination efforts, the current evidence of homophily and implicit bias demands a new bias awareness approach. They build on organizational behavioral literature to argue that significant progress toward diversity in large law firms requires abandoning the difference blindness approach. They note that white men continue to dominate the equity partnerships of elite law firms in the United States, at rates significantly out of proportion to their numbers in society as a whole and to their numbers in the entry classes of associates. Pearce, Wald, and Ballakrishnen argue that elite law firms must abandon the predominant difference blindness approach because, echoing Sommerlad's argument, it is based on a flawed presumption of merit that is tied to a historical conception of an ideal worker who is white, heterosexual, and male. They implore firms to adopt instead an integration and learning approach that places the burden of bias awareness and learning on all actors and suggest ways to incorporate a relational framework to promote equality and inclusion.[34]

Stacy Hawkins's contribution examines the difficulties legal employers face in implementing certain diversity programs that may be vulnerable to litigation under Title VII.[35] Hawkins surveys cases involving diversity decided by U.S. federal courts in the ten years since the U.S. Supreme Court's landmark affirmative action ruling in *Grutter v. Bollinger*.[36] She finds that affirmative action programs involving a conscious consideration of gender, race, or ethnicity in order to achieve some identified numerical representation of women and minorities are least likely to withstand legal challenge.[37] By contrast, plans involving expanded outreach in recruiting efforts, or affinity groups for women and minorities, are much more likely

32. *Id.* at 2395.
33. *Id.* at 2402.
34. Pearce, Wald & Ballakrishnen, *supra* note 1.
35. Stacy Hawkins, *How Diversity Can Redeem the* McDonnell Douglas *Standard: Mounting an Effective Title VII Defense of the Commitment to Diversity in the Legal Profession*, 83 FORDHAM L. REV. 2457 (2015).
36. *Grutter v. Bollinger*, 539 U.S. 306 (2003), upheld an affirmative action plan by the University of Michigan Law School that was narrowly tailored to achieve a compelling interest in promoting a diverse student body.
37. Hawkins, *supra* note 35, at 2474 & n.76.

to satisfy legal standards.[38] Ironically, the relatively high burden of proof that diverse employees must meet to establish discrimination works to the advantage of those employees when their employers defend against reverse discrimination claims.[39]

My essay with Lucy Ricca explores diversity through the perspective of leaders of the U.S. legal profession.[40] The analysis draws on interviews with managing partners of the 100 largest firms and general counsel of Fortune 100 corporations. By definition, those who agreed to participate in the survey tended to have a high commitment to diversity. Their experience illumines the most difficult challenges and the most effective responses. With respect to minorities, the greatest obstacle was the limited pool for diversity and the fierce competition for talented lawyers. With respect to women, the principle problems were a "culture that focuses heavily on hours as a metric of contribution," and "getting everybody to buy into the issue. Not all men see that there is a need to address women's issues. They see women partners and don't see inhibitions."[41] Some firms identified broader attitudinal problems. They specified implicit bias, "diversity fatigue," and the difficulty of having an "honest conversation" on the issue.[42] To address these issues, the essay proposes a number of initiatives designed to increase accountability, address unintended biases, and improve work/family policies.[43]

Eli Wald proposes a "capital" framework for understanding the bargain between large law firms and their lawyers.[44] From this perspective, firms exchange economic capital (salary and equity interest), social capital (mentoring), and cultural capital (training) for the lawyers' labor as well as their social, cultural, and identity capital.[45] Firms rely on their lawyers' capital to make hiring, promotion, and retention decisions, and derive value from the lawyers' capital, for example, by trading on the identity of women and minority lawyers in marketing themselves to clients and potential recruits as diverse.[46]

This labor-capital exchange, however, is often implicit and uninformed and therefore unjust. To make the bargain a fair one, Wald argues that firms must practice *capital transparency* by acknowledging the role that capital, and in particular, identity capital, plays in their hiring, promotion, and retention practices.[47] Next, because firms rely on, and benefit from, capital exchanges, they must invest in *capital infrastructure*, extending all of their lawyers an equal opportunity to cultivate the very capital—social,

38. *Id.* at 2474–75.
39. *Id.* at 2482.
40. Rhode & Ricca, *supra* note 1.
41. *Id.* at 2493.
42. *Id.*
43. *Id.* at 2501–06.
44. Eli Wald, *BigLaw Identity Capital: Pink and Blue, Black and White*, 83 FORDHAM L. REV. 2509 (2015).
45. *Id.* at 2529–36; *see also* Pearce, Wald & Ballakrishnen, *supra* note 1.
46. *Wald, supra* note 44, at 2536.
47. *Id.* at 2540.

cultural, and identity—necessary for achieving success and equality within their top ranks.

Kevin Woodson's analysis of the plight of black attorneys draws on sociological research to underscore the role of cultural homophily—the tendency of people to develop rapport and relationships with others on the basis of shared interests and experiences.[48] Given the social and cultural distance between black and white individuals in American society, Woodson argues that homophily deprives black attorneys working in predominantly white firms of equal access to relational capital. This social dynamic produces racial inequality in these firms, independently of and in addition to the harms caused by racial bias.[49] Drawing on interviews of lawyers in large corporate firms, Woodson traces the way that cultural distance impedes associates' ability to develop relational capital with their colleagues. Woodson argues that "even modest advantages in access to premium assignments can cumulatively result in attorneys ending up on very different career paths."[50] Mentoring and staffing practices also open the way for homophily to affect access to the kind of work and relationships that aid professional development. Awareness of these phenomena should lead firms to establish mentoring programs and monitor assignments to level the playing field for minority associates.[51]

DIVERSITY AND INCLUSION: BEYOND THE U.K. AND U.S. CONTEXT

Michele Goodwin and Alison Whelan's essay broadens the focus of the colloquium to Latin America, and the relationship between women's representation in political office and reproductive health. By exploring Chile and Uruguay as case studies, the essay makes clear that representation alone does not necessarily liberalize women's rights to the extent anticipated by the public. Nor does it acknowledge the responsibility of male legislators to their constituents who seek reproductive justice. "The rule of law provides a technical basis to challenge discrimination," Goodwin and Whelan conclude, "but without enforcement, representation, and participation in the political process, advancements in women's equality may be marginal at best."[52]

CONCLUSION

Taken together, these essays identify a wide gap between aspirations and achievements concerning diversity in the legal profession. Women and minorities still face substantial obstacles in attaining positions of greatest power, status, and economic reward. Yet the fact that these problems are being so thoroughly explored is testament to our partial progress. This

48. Woodson, *supra* note 4.
49. *Id.* at 2570.
50. *Id.* at 2567.
51. *Id.* at 2572–73.
52. Michele Goodwin & Allison M. Whelan, *Reproduction and the Rule of Law in Latin America*, 83 FORDHAM L. REV. 2577, 2602 (2015).

colloquium reminds us of all that stands in the way and helps chart a path to a more inclusive future.

Amdt7.1.1 Historical Background of Jury Trials in Civil Cases

Seventh Amendment:

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

The Seventh Amendment guarantees a jury trial in civil cases at law in federal court.[1] The Amendment traces its roots to English common law; some historians trace the origin of the English jury as far back as Ancient Greece.[2] Sir William Blackstone, in his influential treatise on English common law, called the right "the glory of the English law" and necessary for "[t]he impartial administration of justice," which, if "entirely entrusted to the magistracy, a select body of men," would be subject "frequently [to] an involuntary bias towards those of their own rank and dignity." [3]

From England, the colonists brought the right to a jury trial across the Atlantic. The civil jury played an important role during the colonial era.[4] The colonies stoutly resisted the King of England's efforts to diminish this right, and the Declaration of Independence identified the denial of "the benefits of trial by jury" as one of the grievances that led to the American Revolution.[5] Despite this right's prominence in Colonial America, however, a right to a civil jury trial was not included in the original draft of the Constitution.[6]

Records of the Philadelphia Convention show that the delegates twice raised the issue of whether the Constitution should include a right to a jury trial. On September 12, 1787, toward the end of the Convention, Hugh Williamson of North Carolina "observed to the House that no provision was yet made for juries in Civil cases and suggested the necessity of it." [7] Some delegates expressed support for such a provision but observed that the diversity of state courts' practices in civil trials made it impossible to draft a suitable provision.[8] This latter concern appears to have served as the basis for defeating a motion, brought by another delegate on September 15, 1787, to insert a clause in Article III, § 2, to guarantee that "a trial by jury shall be preserved as usual in civil cases." [9]

After the Convention, many opponents of the Constitution's ratification cited the omission of a right to a jury trial with such "urgency and zeal" that they almost prevented the states from ratifying the Constitution.[10] Some opponents of the

Constitution claimed that the absence of a provision requiring civil jury trials in a Constitution that mandated jury trials in criminal cases[11] implied that the use of a jury was abolished in civil cases.[12] In the Federalist Papers, Alexander Hamilton refuted this assertion, expressing the view that the Constitution's silence on civil jury trials merely meant "that the institution [would] remain precisely in the same situation in which it is placed by the State constitutions." [13]

In ratifying the Constitution, several states urged Congress to provide a right to a jury in civil cases as one of the amendments.[14] The right was included in the list of amendments James Madison proposed to the First Congress, which adopted the right as one of the Bill of Rights.[15] It does not appear that the proposed amendment's text or meaning was debated during its passage.[16] The Seventh Amendment became effective as part of the Bill of Rights in 1791.

Footnotes

1

U.S. Const. amend. VII. The Supreme Court has not held that the Seventh Amendment's guarantee of the right to a civil trial by jury applies to the states through the Fourteenth Amendment. *See* Curtis v. Leother, 415 U.S. 189, 192 n.6 (1974); Minneapolis & St. Louis R. Co. v. Bombolis, 241 U.S. 211 (1916). Most state constitutions, however, include this right. *See* William J. Rich, 2 Modern Constitutional L. § 22:13 (3rd ed.).

2

See Richard S. Arnold, Trial by Jury: the Constitutional Right to a Jury of Twelve in Civil Trials, 22 Hofstra L. Rev. 1, 5–7 (1993).

3

Blackstone, Commentaries on the Laws of England 379 (1765–1769).

4

See Arnold, *supra* 2, at 13–14.

5

See id. at 14.

6

See id.

7

2 Records of the Federal Convention of 1787, at 587 (Max Farrand ed., 1937).

8

Id.

9

Id. at 628.

10

3 Joseph Story, Commentaries on the Constitution of the United States § 1757 (1833). Justice Story observed: "[I]t is a most important and valuable amendment; and places upon the high ground of constitutional right the inestimable privilege of a trial by jury in civil cases, a privilege scarcely inferior to that in criminal cases, which is conceded by all to be essential to political and civil liberty." *Id.* § 1762.

11

U.S. Const. art. III, § 2.

12

The Federalist No. 83 (Alexander Hamilton).

13

See id.

14

Jonathan Elliott, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 326 (1836) (New Hampshire); 2 *id.* at 399–414 (New York); 3 *id.* at 658 (Virginia).

15

1 Annals of Cong. 436 (1789). "In suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate." *Id.*

16

The *Annals of Congress* note that on August 18, 1787, the House "considered and adopted" the committee version: "In suits at common law, the right of trial by jury shall be preserved." 1 Annals of Cong. 760 (1789). On September 7, the *Senate Journal* states that this provision was adopted after insertion of "where the consideration exceeds twenty dollars." 2 Bernard Schwartz, The Bill of Rights: A Documentary History 1150 (1971).

Defamation and Privacy Law in England & Wales

Contributors: Claire Gill (Partner) and Mathilde Groppo (Senior Associate), Carter-Ruck

Defamation

The law of defamation protects harm to reputation caused by the publication of false defamatory statements. Defamation is the collective name for two separate torts: libel and slander. The distinction turns on the permanence of the defendant's statement, but broadly speaking libel covers written publications (even if quickly removed) whereas slander is for more transient statements, such as spoken words.

The law of defamation in England and Wales is now principally governed by the Defamation Act 2013 and related statutes, and supplemented by the common law.

I. Preliminary Issues

Standing

Any living person can sue in defamation. A business (whether incorporated or not) can also sue in defamation, albeit with a need to meet specific further conditions in order to be able to do so (see below).

Governmental bodies, trade unions and charities are excluded from suing in their own capacities, but individuals connected to such groups can sue if the defamation extends to them.

Who can be sued?

Any person or entity involved in the publication or dissemination of the defamatory statement can be sued, most obviously the author, editor or publisher. A person or entity sued who is not the author, editor or publisher may have a statutory defence under s.1 Defamation Act 1996 (previously the common law defence of innocent dissemination) where they can show they took reasonable care in relation to the publication and did not know and had no reason to believe that

what they did caused or contributed to the defamatory statement. Particular rules apply to the operators of websites under s.5 Defamation Act 2013.

Limitation

The claimant has one year from the date of publication to issue proceedings in defamation. Where a person subsequently publishes a statement which is substantially the same as the original publication, the limitation period runs from the date of the first publication.

Nature of the tort

Libel and slander are strict liability torts. The claimant does not need to prove intention or negligence on the defendant's part, provided the below elements are established and the defendant does not raise a successful defence. In some instances, however, the defendant's state of mind may be relevant to defeating some defences.

II. Elements of the action: what the claimant must prove

A. Publication of a statement to a third party

This can be to the public at large, or to a more limited number of publishees.

B. The statement identifies the claimant

The statement does not need to name the claimant; it only needs to be understood to refer to the claimant.

C. The statement is defamatory and causes serious reputational harm

There are a number of applicable tests at common law as to what is defamatory, but generally speaking a statement will be defamatory at common law if it is capable of lowering the reputation of the claimant in the eyes of society generally.

Section 1 Defamation Act 2013 imposes a requirement to meet a "serious harm" test, where a "statement is not defamatory unless publication has caused or is likely to cause serious harm to the reputation of the claimant".

What constitutes evidence of serious harm has been the subject of several court decisions, culminating in the Supreme Court decision in *Lachaux v Independent Print Ltd* [2019] UKSC 27, which found that "serious harm" refers to the consequences of the publication and depends on a combination of the inherent tendency of the words and their actual impact on those to whom they were communicated.

The effect of s.1(2) Defamation Act 2013 is to make it harder for a company to sue for libel; "harm to the reputation of a body that trades for profit" is not "serious harm" unless it has caused

or is likely to cause the body serious financial loss". Serious financial loss is a high threshold and there are a very limited number of cases in which such loss was found to have been established.

There are also other, specific conditions which apply to whether a slander will be actionable.

Meaning

At the heart of any defamation claim is the meaning of the words complained of; the more grave the defamatory statement, the harder it will usually be to defend. It is common in litigated cases for there to be a dispute between the parties about what the words of which complaint is made mean, whether they are defamatory and whether they are statements of fact or expressions of opinion. These issues are commonly determined at an early stage by the court, at a Trial of Preliminary Issues.

III. Defences

The main defences are set out below. The list is not exhaustive.

A. Truth (Defamation Act 2013, s.2)

A claim in defamation will fail where the defendant can demonstrate that the imputation conveyed by the statement is substantially true. The burden of proof is on the defendant to prove the veracity of his or her statements, and the standard of proof is the balance of probabilities.

B. Honest opinion (Defamation Act 2013, s.3)

Where the defendant published a statement of opinion (as opposed to a statement of fact), a defamation claim will fail if the defendant can show (1) that the statement indicated, in general or specific terms, the basis of the opinion, and (2) that the opinion could have been held by an honest person on the basis of facts which existed at the time the statement was published or on the basis of anything asserted to be a fact in a privileged statement published before the statement complained of. The defence is defeated if the claimant can show that the defendant did not hold the opinion.

C. Publication on a matter of public interest (Defamation Act 2013, s.4)

This defence applies where the statement was on a matter of public interest, and the defendant reasonably believed that publishing the statement was in the public interest. The defendant's conduct at the pre-publication stage is relevant to the question of the reasonableness of the defendant's belief that publishing the statement was in the public interest, and the defendant will need to demonstrate the reasonableness of their belief by means of contemporaneous notes or records. The court must grant the defendant a certain amount of latitude for editorial judgement at the time of publication.

This defence replaces the old common law defence known as the Reynolds defence. Under the Reynolds defence, protection was given to "responsible journalism" reporting on matters of

public interest. The court, in assessing whether the journalism was responsible, applied illustrative factors identified by Lord Nicholls in Reynolds v Times Newspapers Ltd [2001] 2 AC 127 including whether the claimant had been given a fair opportunity to respond to the allegations. In assessing whether the belief of the defendant in the public interest is reasonable under s. 4, consideration must be given to all the circumstances of the case. Whilst the statute does not refer to the Reynolds factors, they are recognized as relevant to assess whether a defendant's belief that publication was in the public interest was reasonable.

D. Absolute privilege

If a statement is protected by absolute privilege there is a complete defence to a claim for libel, regardless of whether the statement is false or whether it was made maliciously. This defence protects the legislature, the executive and the judiciary in the exercise of their public functions. It applies for example to:

- parliamentary debates and proceedings
- court proceedings
- fair and accurate contemporaneous reports of court proceedings (s.14 Defamation Act 1996)
- certain international documents
- complaints to the police

E. Qualified privilege

At common law, qualified privilege protects a statement made by the defendant (D) to another party (X), in one of two circumstances:
(1) D has a duty to communicate the information in the statement to X, and X has a corresponding interest to receive the information; or
(2) D and X have a common interest in the information being communicated.

There are a number of instances where qualified privilege applies by operation of statute under s.15 Defamation Act 1996 and Schedule 1 thereto. This Act splits the statements protected between those having qualified privilege without explanation or contradiction (for example a fair and accurate report of proceedings in public of a legislature anywhere in the world) and statements that are privileged subject to explanation or contradiction, that is to say that there is no defence if the claimant shows that the defendant was requested to publish a reasonable statement by way of contradiction but refused or neglected to do so. An example would be a fair and accurate report of proceedings at any public meeting in the UK of a local authority.

The defence is defeated if it is shown to be made with malice, that is that the defendant made the statement with a dominant improper motive: evidence that the defendant did not believe the statement to be true or was indifferent as to its truth or falsity will be evidence of malice.

F. Offer of Amends

The Offer of Amends regime (under Defamation Act 1996, ss.2-4) allows the defendant to accept liability and settle a defamation claim early on in the proceedings. Due to having accepted liability, the defendant then benefits from more favourable rules; the amount of compensation payable to the claimant will be subject to a discount, to reflect the mitigating factors of the case including the fact of the Offer itself, and other relevant elements including the early publication of a correction.

The defendant's offer must include:
(1) a suitable correction and sufficient apology;
(2) publication of the correction/apology in a manner that is reasonable and practicable;
(3) the payment of such compensation and costs, as are agreed or determined by the court.

The Offer must be made before or at the time the Defence is served.

IV. Remedies

A. Damages

A successful claimant in defamation is awarded damages by the court. General damages will compensate the claimant for damage to reputation, vindicate their name and take account of the distress and humiliation caused. A number of factors can be considered by the court in determining the damages award, including the gravity of the allegations and the extent of the publication. Aggravated damages may be awarded if the defendant's conduct has increased the hurt suffered by the claimant. Sections 34-36 Crime and Courts Act 2013 restrict the circumstances in which the court can award exemplary damages against the press where the publisher is a member of an approved regulator. "Special damages" can be awarded for actual monetary loss; such awards are rare as it is normally difficult to establish causation.

There is a notional ceiling for damages awards, which cannot exceed the maximum level of damages awarded for pain and suffering and loss of amenity in personal injury cases; currently of the order of *£350,000 (Lachaux v Independent Print Ltd & Anor [2021] EWHC 1797),* although in practice awards tend to be much lower.

B. Apologies

The publication of an apology is not a type of relief that can be awarded by the court, although it is commonly included in a package of remedies agreed between parties by way of settlement. However, the court can order the defendant to publish the outcome of the case under s.12 Defamation Act 2013.

In cases that settle before trial, there is a possibility to read a Statement in Open Court (unilateral or joint), which sets out the background to the proceedings, announces the fact of the settlement and can sometimes include an apology/retraction by the defendant. This is another way of vindicating a claimant's reputation.

C. Injunctions

It is extremely difficult to obtain an interim injunction from the court which prohibits a threatened/imminent publication of a defamatory statement – the claimant must demonstrate that the defendant would not be able successfully to raise any defences at trial. Where, for example, the case requires examination of witness evidence, the case will need to go to trial, and an interim injunction restraining publication cannot be granted.

It is usual for the claimant to seek a final injunction in their general defamation claim, i.e. for the court to restrain the defendant from repeating the same or similar allegations, but a final injunction cannot be granted until trial.

Privacy

An individual's right to his or her privacy is protected by the tort of 'misuse of private information' (MPI). MPI found its roots in the equitable wrong of 'breach of confidentiality', and crystallised as a standalone, distinct tort in the early 21st century. This was in part linked to the enactment of the Human Rights Act 1998, which incorporated into domestic law the European Convention of Human Rights, whose Article 8 protects the right to respect for private and family life. There is a limitation period of 6 years running from the date of publication.

I. Elements of the action

There is a two-stage test:

1. Whether the claimant has a reasonable expectation of privacy

To pass the first stage, the claimant must identify the existence of a 'reasonable expectation of privacy' (REP) in the relevant information. The court will consider such factors as including the nature of the activity that is the subject matter of the information and the place where it occurred. Typically matters relating to a person's sex life, medical history, family and home life will be matters over which a claimant will have a REP. The context in which the information is revealed (e.g. whether a photograph was taken in public or in private) is also a factor to be taken into account when determining whether an REP arises. The information does not need to be in the form of written text; an REP can also arise in relation to photographs, videos and other materials.

Where an individual shares private information with other people, without apparent concern for limiting its publication to select parties, it can be difficult for the individual to establish the existence of an REP in such information. It can also be more difficult to establish the existence of an REP where the relevant information is already in the public domain, although that is not an absolute bar.

High-profile individuals and public figures are also entitled to privacy, but the approach taken to establish the existence of an REP in relation to them may be different from that of ordinary individuals.

It does not matter whether the information is true or false.

2. Is the REP outweighed by the countervailing right to freedom of expression: the balancing test

The second stage consists in balancing competing Convention rights and the justification for interfering with each right by way of a parallel analysis, applying the test of proportionality to each. This is referred to as a 'parallel' test because neither right (Article 8 or the competing Article 10 right to freedom of expression) takes precedence.

In *PJS v News Group Newspapers* [2016] AC 1081, [20], Lord Mance summarised the relevant principles as follows:

"(i) neither article has preference over the other, (ii) where their values are in conflict, what is necessary is an intense focus on the comparative importance of the rights being claimed in the individual case, (iii) the justifications for interfering with or restricting each right must be taken into account and (iv) the proportionality test must be applied: see eg In re S (A Child) (Identification: Restrictions on Publication) [2005] 1 AC 593 , para 17 . . . and Mosley v News Group Newspapers Ltd [2008] EWHC 687 (QB) at [28] per Eady J, describing this as a 'very well established' methodology. The exercise of balancing article 8 and article 10 rights has been described as 'analogous to the exercise of a discretion': AAA v Associated Newspapers Ltd [2013] EWCA Civ 554 at [8]."

The balancing exercise is therefore a fact-sensitive analysis, which involves consideration of the extent to which revealing the information is in the public interest.

II. Remedies

A. Injunction

The primary remedy sought is an injunction, which is a prohibitive form of order intended to restrain the defendant from publishing the information (whether prior to, or following publication). The form of order can be tailored to the circumstances of the case. An injunction can therefore also require the defendant to take other steps, such as deleting or delivering up any infringing materials.

An injunction can be sought either prior to publication, or after publication. If the injunction is sought prior to publication, it involves obtaining an 'interim' injunction, which is put in place pending a full hearing. In order to obtain the injunction, the claimant must demonstrate that he or she is more likely than not to succeed at trial.

Once an interim injunction is granted, the normal litigation process occurs. The parties may reach terms of settlement (which typically involve the giving of undertakings by the defendant). If no settlement is reached, the parties will follow the litigation process and ultimately return to court for a trial at which the judge will determine whether to grant a final injunction.

B. Damages

Damages play a small role in pre-emptory privacy actions, where the granting of an injunction is the primary remedy sought.

Damages are more important in cases brought after the private information has been published. In that case, a claimant may seek the payment of damages to compensate the violation of his or her right to privacy. Where the defendant was on notice of the claimant's legal rights, it may be possible to also obtain aggravated damages. Damages are typically lower than in libel cases, but can range in the tens of thousands of pounds.

C. Anonymity

Privacy proceedings are typically anonymized, which means that one or more of the parties are identified only by an acronym and are not identified by the general public pursuant to an anonymity order. If the privacy claim ultimately fails, the court may discharge any previously applicable anonymity orders. The identities of the parties protected by the anonymity order would then enter the public domain.

Data Protection

The legal framework protecting data subjects in England and Wales consists chiefly of the UK General Data Protection Regulation (GDPR) and the Data Protection Act 2018 (DPA). Data protection is concerned with the fair and proper use of information about people. Although it shares a partial basis in the ECHR, Article 8 with the tort of misuse of private information, the two areas are distinct.

The UK GDPR sets out various obligations on parties who process and/or control data. The obligations on some parties (such as law enforcement authorities or the intelligence services) are tailored for the particular circumstances. Data must be processed in accordance with the UK GDPR which includes seven overarching principles, such as the accuracy principle.

The UK GDPR also contains various data protection rights for individuals. These include a data subject's right to have his or her personal data erased, commonly known as the 'Right to be Forgotten'. This is not an absolute right, and only applies in certain circumstances. Those rights are not absolute, and can be limited where an exemption applies, such as the journalistic exemption. Data subjects can contact parties processing their data to notify them of violations of their rights, and request compliance with data protection law.

It is possible for data subjects to obtain compensation (including damages for distress) where their data protection rights have been violated. The Information Commissioner's Office (ICO) can also fine data processers and controllers for breaches of data protection law.

Contributors: Claire Gill (partner) and Mathilde Groppo (senior associate)

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https://www.npr.org/sections/parallels/2015/03/21/394273902/on-libel-and-the-law-u-s-and-u-k-go-separate-ways

This Sunday, HBO is airing the documentary *Going Clear,* about the Church of Scientology, to strong reviews. The nonfiction book on which the film is based was short-listed for the National Book Award.
Yet there have been serious challenges to releasing the film and the book in the U.K. That's because Britain does not have the same free speech protections as the United States.
As with many other works of investigative journalism, publishing *Going Clear* in the U.K. could expose the authors to a much more serious risk of lawsuits than they face in the U.S.
Given how closely the U.S. and Britain align on many topics, the degree to which they differ on the issue of free speech is striking.

Rachel Ehrenfeld never set out to become the face of this issue.

"I just set out to write the truth, to expose those who funded terrorism," she says.

Related NPR Story

MEDIA

In Britain, Calls To Regulate A Freewheeling Press

Ehrenfeld runs a think tank in New York called the American Center for Democracy. In 2003, she wrote a book called *Funding Evil: How Terrorism is Financed, and How to Stop It.* The book accused a wealthy Saudi businessman of funding al-Qaida. The businessman, Khalid bin Mahfouz, sued Ehrenfeld in a British court.

"I did not live in England, I do not live in England, the book was not published there, so why not come and sue me in the United States?" she asks.

The reason is simple.

"English laws are much more favorable for someone looking to protect their reputation," says Jenny Afia, a lawyer in London who often represents people making libel and privacy claims.

Ehrenfeld's case was an example of "libel tourism," where someone brings a libel claim in a country where he is most likely to win. Often, that country is Great Britain. "Crooks and brigands from around the world come here to launder their reputations, where they couldn't get exculpation in either their home country or indeed in the United States of America," says Mark Stephens, a London lawyer who often represents media companies in these cases.

In American courts, the burden of proof rests with the person who brings a claim of libel. In British courts, the author or journalist has the burden of proof, and typically loses.

"So you've got the rich and powerful shutting down and chilling speech which is critical of them," says Stephens.

Afia disagrees with that characterization. Journalists "are writing about the wealthy and the powerful, so those are the people who are going to be the victim to more false claims, and they're the people whose families will have their privacy invaded," she says.

U.S. Fights Back With 'Rachel's Law'

When author Rachel Ehrenfeld was sued in England, she didn't show up, and the court issued a default judgment against her, "that I would destroy the book, in addition to the fine" of about $250,000.

Typically, a U.S. court would enforce that ruling. But in this case, something extraordinary happened.

The New York Legislature took up Ehrenfeld's cause and passed a bill called the Libel Terrorism Protection Act. Many referred to it as "Rachel's Law."

Then, the U.S. Congress acted on it. Rep. Steve Cohen, D-Tenn., spoke on the House floor about the bill, known at the federal level as the "Speech Act."

"While we generally share a proud common law legal tradition with the United Kingdom," Cohen said, "it is also true that the United Kingdom has laws that disfavor speech critical of public officials, contrary to our own constitutional tradition."

The bill passed the House and the Senate unanimously, and President Obama signed it into law in 2010. It prevents U.S. courts from enforcing British libel rulings.
"We were quite shocked," says Afia, "because it was sort of raised as a national threat to U.S. constitutional issues, which as an ally was quite shocking to hear."

She thinks British laws strike the appropriate balance between privacy and freedom of speech.

So while Congress has provided a shield to American writers in the U.S., the threat of lawsuits today remains real for many others.

"We help media outlets from places like Zambia or Nigeria, exiled media that have fled their own countries because of repressive regimes and circumstances," says Peter Noorlander of the Media Legal Defense Initiative, a global nonprofit organization based in London. "They come to the U.K. and other places in Europe, and then they get pursued here for libel cases."

Revamped Rules Still Onerous For Defendant
In 2013, the U.K. responded to this outcry by changing the laws, eliminating some of the worst potential for abuses.

Under the new rules, libel tourism is less common. It is no longer as easy for people with little U.K. presence to bring these lawsuits in British courts. The law now says someone making a libel claim must demonstrate that a defamatory statement will cause "serious harm."

But these changes are not enough to persuade many to plunge back into these waters.

Cambridge University Press last year said it would not release a book about Russian President Vladimir Putin in the U.K. for fear of lawsuits.
"Even if the Press was ultimately successful in defending such a lawsuit, the disruption and expense would be more than we could afford," the publisher wrote in a letter to the author, Karen Dawisha.
And although the Church of Scientology is easy to spot in London, the book and documentary about the church, *Going Clear,* are far less so.

COUNSEL

Published on *Counsel* (https://www.counselmagazine.co.uk)

Is the UK criminal justice system failing women?

Date: 08 March 2023

Taking inspiration from Mary Seacole, every lawyer or future lawyer should work with 'compassion, skills and bravery' while representing accused women or prosecuting cases involving crimes against women. Like the Crimea in which she nursed, criminal law is a battlefield. It is still, at the senior level, largely populated by middle-aged men going to war when they don't have a war to go to, in a system that is not fit for purpose for women.

Scotland is making progressive attempts to reform women's prisons, recently introducing a presumption against sentences of less than three months for women offenders – the sort of sentence which causes women to lose their jobs, homes, and children. In Northern Ireland a 2021 report recommended strategic and operational reform and a gender responsive approach to criminal justice.

The UK Violence Against Women and Girls (VAWG) strategy published in 2021 requires a women centred and gender responsive approach – an anathema to politicians who recently voted against proposed changes to the Sentencing Act to make it a statutory duty to consider the best interests of a child in sentencing a primary carer. It is shocking that children are still sent to prison with their mothers and pregnant women are still incarcerated – the solution is not a mother and baby unit on the inside but parental support on the outside.

The VAWG strategy proposes strengthening tools available to frontline professionals – including putting in place a range of statutory guidance, training and online resources. What this really means is that there is a concession that the current system is policed and populated with professionals who simply do not understand women's issues. Education and training is, of course, important but it doesn't help on systemic failure in a system that is very reluctant to change. The VAWG strategy calls for evidence on victims and survivors. It does nothing to reduce the difficulties women face as accused persons at every stage of the criminal justice system and fails to take the gender responsive approach as thought out by Northern Ireland. It remains a document peppered with 'tough on crime' rhetoric rather than taking a trauma informed approach.

It is not enough

I have done my best to contribute to the development of law and greater understanding of the research on the need for greater change but I have formed the opinion that without reform the UK criminal justice system is failing women. How? Here are some examples…

Women and sex

Early in my career I was briefed to prosecute a case involving two sex workers. One had been raped by the defendant and he had beaten the other woman with an iron. He was living off their earnings and was so dangerous that they were brave enough to go to the police together. It was the beginning of many cases of this type that I dealt with at every level of seriousness until I took silk – the last one being a woman who was not a sex worker but was raped to death on a blind date. I currently represent Christine Keeler in a posthumous petition for mercy to pardon her conviction for perjury. She honestly denied she was a sex worker and denied the presence of a witness to an attack upon her which was said to be a material lie when it was totally irrelevant, given her attacker admitted he assaulted her. She is the poster woman for tropes where women suffer because of the behaviour of men and the justice system denies her credibility. I recently contributed to the de-criminalisation of sex work in Victoria, Australia. England and Wales is not so progressive. Why are sex workers criminalised at all and why is there not a legalised system that is safe for sex workers? It is because the system functions in a world that remains grim and discriminatory for women. Pardoning Keeler would be a start.

Women as witnesses (prosecution or defence)

I have helped to develop toolkits, pioneered by The Advocate's Gateway, including the use of an intermediary for vulnerable clients and witnesses. One 13-year-old girl with learning difficulties gave evidence for five days about rape by her stepfather. She needed the time to tell her story. The development of special measures means the system has adapted, but it remains difficult to persuade women to complain because ultimately the process is traumatic. This can be tackled by being more trauma informed. The current training for advocates does not recognise the need for rapport and is flawed. There is also a lot to do on courtroom design and changes to the adversarial nature of cases involving women as defendants and defence witnesses, who often must avoid confrontation in their daily lives.

Women as professionals

There are still far too few women in criminal law. In my last ten joint enterprise murder trials, I was the only woman silk in nine and the only woman in seven. There were no women judges. It is a very male working environment. I have been told off for the glasses I wear, colour of my lipstick and, ironically, for calling out misogyny. I have done it all with children and support from my family. I have stuck up

for myself every time but it is exhausting and no wonder women leave for a better work-life balance elsewhere.

Women as accused persons

What of women I have defended? The tropes against women are visible, particularly in murder of children and abusers, terrorism and in harsh sentencing for minor offences. Recent research shows that women have been unfairly convicted under 'joint enterprise' laws. The Equal Treatment Bench Book is not enough. A gender responsive system is a long way off if it doesn't include legal as well as policy changes to recognise reduced or absent criminal responsibility.

Women's health and criminal law

For many years I have contributed to research which helped change the law on female genital mutilation (FGM) but when the first FGM trial that led to a conviction took place, the trial included evidence on witchcraft. It was not an approach that helped educate people on this public health issue without risking discrimination. In Australia my work has contributed to the change in the law on reproductive rights – still sorely needed in the UK where criminal laws around abortion urgently need abolition.

Women who are trafficked

In my PhD on 'criminal justice as a strategic game for trafficked women', I found that the dominant strategy is silence as trafficked victims who commit crime are fearful of their traffickers *and* the state. I dedicated my PhD to Mary Jane Veloso on death row who was compelled to traffic drugs from the Philippines to Indonesia. We raised her trafficked status, and she was reprieved 30 minutes before she was due to be shot. She remains on death row. Her traffickers have been convicted of trafficking others. Why was she ever prosecuted and, once her trafficked status was known, why not released? It is largely because of the global approach to drug trafficking – macho 'wars' that spare no thought for exploited women. How many UK women are wrongly in prisons overseas as drug mules? What of those women in the UK? In England and Wales, I recently appeared in the Court of Appeal to represent a trafficked woman who was sent to prison for obtaining a job with false papers rather than remain required to provide sexual services. Her conviction was quashed but only after she had served her sentence. In cases of compulsion, duress, and diminished responsibility, the system waits for women to be harmed before providing exoneration or reduced punishment.

Women who are stateless

I represented JUSTICE in the intervention in the Shamima Begum appeals. We gave the UK Supreme Court all the law on subjecthood – known as 'belonging' in Australia. This goes beyond citizenship and provides responsibilities to subjects, including the protection of the rule of law, to be brought home and protected or prosecuted, taking into account any grooming or trafficking. The court asked questions in the hearing that demonstrated they understood these constitutional protections, but failed to decide on that law, instead staying the proceedings and giving deference to the Executive for policy decisions. The fear for women realised – when you need the protection of the courts, they can fail.

Women in prison

I spent several years on a project on women in prison for LexisNexis and continue to campaign for a changed approach. The vulnerability of women in prison is well known and yet women are still sent to

prison. Research proves it is pointless sending most mothers to prison when a community order would do – especially for financial offences and including for cases where they harm their children. Recently in Australia I defended a woman in crisis who was surprisingly prosecuted for briefly putting her child's face in the bath water. He wasn't harmed and the Sentencing Act there sensibly allowed for a 'non conviction' outcome. A small piece of progress that can have maximum effect when combined with a community programme. That said, it is time not to prosecute most cases at all, to close prisons and accept that alternatives to incarceration work where deterrence does not.

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So, what can we conclude? Women die at the hands of abusers. Women react to abuse, sometimes with violence. The system has not changed much, and the research is not being prioritised. When women commit serious crime, the sentences are astronomical and every criminal trial risks a stereotype.

Taking a case-by-case approach may give some successes and some failures but change is far too slow. Systemic reform requires acceptance of the research and education that an alternative system has legitimacy – this includes systems that prioritise health and welfare responses and not retribution. A system that does not rely on professional women who manage to stay the distance.

My mother would say 'success comes not by wishing but by hard work bravely done'. It is a mantra I pass to you in the hope that police, prosecutors, politicians, the media and the lawyers and judges will be brave enough to work for the change that women need in criminal justice – until then the UK criminal justice system will continue to fail women in a spectacularly public way.

NAO on improving outcomes for women in the CJS
In January 2022 a National Audit Office report, Improving outcomes for women in the criminal justice system, noted the longstanding concerns that the criminal justice system (CJS) is not responsive to the specific needs of women. It found:

- Women are a minority in the CJS and account for just 4% of the prison population as at September 2021.
- The average cost of a women's prison place in 2019-20 was £52,000.

The National Audit Office report also recognised there is a need:

- to reduce the number of women entering the CJS by intervening earlier with support in the community;
- to have fewer women in custody (especially serving short sentences) and a greater proportion of women managed in the community; and
- to create better conditions for women in custody.

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This article is based on Felicity's Professorial Lecture at Salford University's Mary Seacole Building on 9 November 2022

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Why criminal law is a battlefield for women – inspired by Mary Seacole, Dr Felicity Gerry KC calls up lawyers, judges, politicians, the police and media to work bravely for the change that women need in criminal justice

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